No. 20A95

IN THE

Supreme Court of the United States

KEVIN ROBINSON, *et al.*,

Applicants,

v.

PHIL MURPHY, GOVERNOR OF NEW JERSEY, *et al.*,

Respondents.

TO THE HONORABLE SAMUEL ALITO, ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT AND CIRCUIT JUSTICE FOR THE THIRD CIRCUIT

REPLY IN SUPPORT OF EMERGENCY APPLICATION TO JUSTICE ALITO FOR AN INJUNCTION PENDING APPELLATE REVIEW

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TO THE HONORABLE SAMUEL ALITO, ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE THIRD CIRCUIT:

In light of this Court's decision last week in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 2020 WL 6948354 (U.S. Nov. 25, 2020), it is now unquestionable that there is a "significant possibility" this Court would grant certiorari and reverse the district court's refusal to grant a preliminary injunction in this case. New Jersey's capacity limitations on religious gatherings "treat[] less harshly" a host of comparable secular businesses despite the availability of "less restrictive rules" to stop the spread of COVID-19. *Id.* at *2. Thus an injunction pending appeal is now all the more appropriate.

Alternatively, Applicants agree with the New Jersey defendants ("the government") that given the full Court's subsequent decision in *Harvest Rock Church v. Newsom*, No. 20A94 (U.S. Dec. 3, 2020) to vacate and remand, the full Court should also vacate and remand in this case. The district court's decision below obviously pre-dated this Court's much-needed clarification in *Brooklyn Diocese* of the required Free Exercise analysis. Thus it is no surprise the district court's mode of analysis erred at nearly every step: *e.g.*, relying on Chief Justice Roberts's "nonbinding and expired concurrence," *Brooklyn Diocese,* 2020 WL 6948354 (Gorsuch, J., concurring), in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) and this Court's 1905 decision in *Jacobson v. Massachusetts*, 197 U.S. 11; deeming it constitutionally sufficient that Applicants' worship services are comparable to *some* secular activities subject to similar or worse treatment; and

ignoring or disagreeing with their comparability to factories, stores, mass transit and the like, a position since debunked by *Brooklyn Diocese*.

Given that Fr. Robinson can say high Mass for only 20 congregants, and that Rabbi Knopfler can host synagogue worship for only nine other Jewish men—while hundreds of people can shop in nearby stores or work in nearby factories—the district court should have applied strict scrutiny. This Court should give the district court an opportunity to do so now. Alternatively, an injunction pending appeal remains an appropriate disposition given Applicants' commitment, like that of the applicants in *Brooklyn Diocese*, to enforcing social distancing and hygiene requirements and their willingness to limit occupancy to 50% capacity and, if necessary, require masks. (Application at 4, 20, 37.)

Because New Jersey's COVID restrictions "effectively bar[] many from attending religious services," they "strike at the very heart of the First Amendment's guarantee of religious liberty." *Id.* at *3. Under the clarified standard provided in *Brooklyn Diocese*, the district court, or this Court in the first instance, now has "a duty to conduct a serious examination of the need for such a drastic measure." *Id.*

ARGUMENT

I. FAILING AN INJUNCTION PENDING APPEAL, APPLICANTS AGREE THIS COURT SHOULD VACATE AND REMAND IN LIGHT OF *BROOKLYN DIOCESE* AND *HARVEST ROCK*.

The government argues this Court should grant Applicants' petition for certiorari before judgment, vacate the district court's denial of a preliminary injunction, and remand for further consideration in light of *Brooklyn Diocese*. (Opp.

at 17-19.) Failing an injunction pending appeal, Applicants agree. This Court's decision last week in *Brooklyn Diocese* nullifies the exact mode of analysis the district court mistakenly employed below. And the "GVR" yesterday in *Harvest Rock* will require reconsideration of, *inter alia*, California's disparately applied "Tier 2" limitation of religious worship to the lesser of 25% of capacity or 100 people—essentially the same limitation at issue in this appeal. Vacating and remanding follows accordingly here.[1]

In *Brooklyn Diocese*, this Court clarified the standard for evaluating restrictions on religious worship during a pandemic. This Court held that New York's 10- and 25-person caps imposed on houses of worship, but not on numerous secular activities, likely violated the Free Exercise Clause. *Brooklyn Diocese*, 2020 WL 6948354, at *2. New York's restrictions triggered strict scrutiny in part because, as compared to houses of worship, they "treated less harshly" a slate of favored secular activities like "factories," "schools," shopping in "large store[s]," "plants manufacturing chemicals and microelectronics," and "all transportation facilities." *Id*. That houses of worship were treated better than movie theaters, concert halls, and the like was irrelevant. *Id*. at *8 (Kavanaugh, J., concurring). And the Court did not once cite *Jacobson* or *South Bay* in deference to the government's discriminatory classifications. *Id*. at *1-4; *see also id.* at *5 (Gorsuch, J., concurring) ("Rather than apply a nonbinding and expired concurrence from *South Bay*, courts must resume applying the Free Exercise Clause.") Instead, the Court said that

[1] As the government acknowledges (Opp. Br. at 19, n.17), Applicants requested that this Court grant certiorari before judgment in this case, (Application at 35-36).

"even in a pandemic, the Constitution cannot be put away and forgotten." *Id.* at *3. All this was a significant clarification and, where needed, a correction of a sizeable body of COVID-19 Free Exercise jurisprudence developed over the last nine months in courts across the country.

The analysis in *Brooklyn Diocese* nullifies the district court's analysis at every turn. In particular, the district court refused to enjoin New Jersey's 25% restriction on Applicants' religious services for all of the following wrong reasons in light of *Brooklyn Diocese*:

(1) It "accord[ed] deference to the State['s]" disparate treatment of religion under *Jacobson* and the nonbinding *South Bay* concurrence (App. 1, Opn. at 14).

(2) It found the restriction generally applicable because religious gatherings are treated better than their "closest comparators" such as "[m]ovie theaters," "concert halls" and secular indoor "gatherings" (*id.*, Opn. at 15, 22); *see also id.*, Opn. at 14 (citing and quoting *Harvest Rock Church, Inc. v. Newsom*, No. 20-6414, 2020 WL 5265564, at *3 (C.D. Cal. Sept. 2, 2020), *vacated and remanded* by *Harvest Rock Church v. Newsom*, No. 20A94 (U.S. Dec. 3, 2020)).

(3) It found any comparison to "homeless shelters, casinos, mass transit, liquor stores, and pet stores" to be "unpersuasive" (*id.*, Opn. at 21) contrary to this Court's analysis in *Brooklyn Diocese*. *See* 2020 WL 6948354, at *2; *see also id.* at *4 (Gorsuch, J., concurring) ("In [the Governor's] judgment laundry and liquor, travel and tools, are all 'essential' while traditional religious exercises are not. *That* is exactly the kind of discrimination the First Amendment forbids." (Emphasis in

original.); *see also id.* at *7 (Kavanaugh, J., concurring) (noting that "discrimination against religion" exists where "a grocery store, pet store, or big-box store down the street does not face the same restriction").

(4) Finally, contrary to *Brooklyn Diocese*, the district court entirely ignored preferential treatment for factories and meatpacking plants (*id.*; *see, e.g.*, Dist. Ct. Dkt. No. 57 at 24 of 30 (plaintiffs raising exemptions for factories and manufacturers as examples of substantial underinclusivity)) and erroneously distinguished more favored treatment for schools (*id.*, Opn. at 20-21), a functionally exact comparator to worshippers sitting in pews as recognized in *Brooklyn Diocese*. *See* 2020 WL 6948354, at *2 (noting the "troubling results" of allowing hundreds to shop at large stores and authorizing factories and schools to operate without affording similar treatment to houses of worship).

Quite clearly, the district court's Free Exercise analysis was fatally flawed under the clarified standard in *Brooklyn Diocese*. Failing an injunction, this Court should therefore vacate and remand for that reason alone. *Cf. Box v. Planned Parenthood of Indiana & Kentucky* (No. 18-1019) (ultrasound viewing requirement), *vacated and remanded in light of June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020) (effectively clarifying the standard for determining an undue burden in the abortion-law context); *see also Box v. Planned Parenthood of Indiana & Kentucky* (No. 19-816) (parental involvement law), *vacated and remanded in light of June Medical*, 140 S. Ct. 2103.

Additionally, a decision vacating and remanding here is consistent with a similar disposition yesterday in *Harvest Rock*. There, Harvest Rock Church challenged not only California's "Tier 1" *ban* on religious gatherings in houses of worship, but also its "Tier 2" limit of 25% of capacity or 100 people, whichever is less, and its "Tier 3" limit of 50% of capacity or 200 people, whichever is less. (App. 2, Br. at 4, 21.) The district court there refused to enjoin any of those restrictions even though functionally comparable secular businesses and activities were exempt. *Harvest Rock*, 2020 WL 5265564, at *3.

The "GVR" in *Harvest Rock* will require reconsideration of even Tier 2's limit of 25% of capacity or 100 persons, whichever is less. *See Harvest Rock Church*, No. 20A94 (U.S. Dec. 3, 2020). California's Tier 2 limit is essentially the same as New Jersey's 25% of capacity limit challenged here. Consistent with *Harvest Rock*, this Court should therefore vacate and remand for reconsideration in light of *Brooklyn Diocese*.

II. UNDER *BROOKLYN DIOCESE*, YOUR HONOR OR THIS COURT SHOULD ENJOIN PENDING APPEAL NEW JERSEY'S CAPACITY LIMITATIONS ON RELIGIOUS GATHERINGS.[2]

The government's contention that *Brooklyn Diocese* and this Court's other Free Exercise cases do not apply to New Jersey's COVID-19 regulations is misguided. The government ignores the core principle in *Brooklyn Diocese*, no less applicable here, that disparate treatment of religious gatherings relative to *any* comparable and more favored secular activities triggers strict scrutiny. *Brooklyn*

[2] Applicants note that the opening brief in their appeal to the Third Circuit is due this upcoming Monday, December 7.

Diocese, 2020 WL 6948354, at *2. The government contends, quite falsely, that under its COVID-19 restrictions houses of worship are subject to "the same limits that govern *every* indoor business venue where members of the public remain for extended periods," only to cite *some* secular comparators like movie theaters and concert halls while ignoring all the secular businesses and activities *not* subject to the same limits. (Opp. at 9). The government caricatures socially distanced sitting in a pew for one hour a week as "intermingling *en masse*" (and thus akin to a birthday bash) while ignoring exemptions for (or futilely attempting to distinguish) *actual* "intermingling *en masse*"—every day of the week, for hours each day—in factories, warehouses, schools, mass transit, supermarkets, Costco, Walmart, and the like. (Opp. 32.) An injunction pending appeal is thus appropriate under *Brooklyn Diocese*.

The government's arguments demonstrate a surprising ignorance about the nature of Applicants' worship services and arrogance about its ability to justify religious burdens by means of shoot-from-the-hip distinctions between types of religious activities (e.g., long indoor confession lines OK but indoor worship not OK (Opp. 26-27)) and between religious and secular conduct (e.g., worship v. shopping at large stores). The Free Exercise Clause is not delimited by such *post hoc* contrivances.[3]

[3] The government also claims there is effectively *no limit* on Applicants' religious exercise since they can supposedly just move to a larger indoor space, stagger religious services across the day, use multiple rooms at the same time, move outdoors in the dead of winter, "or do some combination" of all these. (Opp. 22.) The government is simply question begging the "substantial burden" issue not at issue

The government argues *Brooklyn Diocese* doesn't apply here because the 25% of capacity restriction is much more forgiving than the 10- and 25-person limits enjoined in New York. (Opp. 20-22.) But in *Brooklyn Diocese* it was the "disparate treatment" between religious and secular activities that triggered strict scrutiny, not merely the numerical cap as such. *See* 2020 WL 6948354, at *2 (noting the "troubling results" of imposing more severe restrictions on houses of worship than on factories, schools, manufacturing plants, large stores, transit, and more); *see also id.* at *4 (Gorsuch, J., concurring) ("At a minimum, [the First] Amendment prohibits government officials from treating religious services worse than comparable secular activities, unless they are pursuing a compelling interest and using the least restrictive means."); *see also id.* at *7 (Kavanaugh, J., concurring) (noting that "heightened scrutiny" is required where "a grocery store, pet store, or big-box store down the street *does not face the same restriction*" as a house of worship (emphasis added)). The Court did not focus on the "far more severe" nature of New York's restrictions until its strict scrutiny analysis. *Id.*

Moreover, as in *Brooklyn Diocese*, Rabbi Knopfler's "synagogue . . . may not admit more than 10 persons," while numerous secular businesses "may admit as many people as they wish," or at least up to 50% capacity, *id.*, *regardless of the square footage of the business*. And "[w]hile attendance at [Fr. Knopfler's] house[] of

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in this appeal and entirely ignoring the massive burdens these alternatives would impose on Applicants' religious exercise. (*See,* Application at 14-15). The argument does nothing to show, as the government claims, that "New Jersey has accommodated religious conduct to a greater degree than analogous secular conduct." (Opp. 22.)

worship is limited to 25 persons," (Application at 3 (noting Fr. Knopfler's church seats approximately 100)), "even non-essential businesses may decide for themselves how many persons to admit," *id.*, *regardless of their total square footage*. (*See* Opp. 23 (admitting the "essential" designation applies only to retail businesses)); *see also* EO 107 ¶ 11[4] (stating non-retail businesses "should make best efforts" to reduce staff while acknowledging many jobs require physical presence of employees and imposing no upper limit on workplace occupancy).) Thus, the severe limits at issue in *Brooklyn Diocese* are nearly identical to those effectively at issue here.

The government also argues its 25% capacity limitation applies to *all* analogous secular activities. (Opp. 23.) Not so, as this Court made clear in *Brooklyn Diocese*, which found houses of worship comparable to factories, schools, shopping at large stores, mass transit, camps, and more. *Brooklyn Diocese*, 2020 WL 6948354, at *2. None of these state-privileged secular venues is subject to the 25% capacity (or 10-person) limit on "gatherings" here.

The government is thus flat wrong in claiming that equal or more strict limits apply to "prevent crowding at *any* venue where the public congregates for extended periods." (Opp. 24 (emphasis in original).) Just as in *Brooklyn Diocese*, here "[p]eople may gather inside for extended periods in bus stations and airports, in laundromats and banks, in hardware stores and liquor shops," and "[t]he only explanation for treating religious places differently seems to be a judgment that what happens there just isn't as 'essential' as what happens in secular spaces."

[4] EO 107, ¶ 11, https://nj.gov/infobank/eo/056murphy/pdf/EO-107.pdf.

Brooklyn Diocese, 2020 WL 6948354, at *4 (Gorsuch, J., concurring); *cf.* EO 107 ¶ 11 (authorizing the continuation of in-person work at favored non-retail businesses without capacity limits to perform "essential operations"). That the 25% capacity limit applies to *some* secular analogs, as the government emphasizes (Opp. 24) is, again, not sufficient to avoid violating the Free Exercise Clause. *Id.* at *8 (Kavanaugh, J., concurring). That is the great clarification *Brooklyn Diocese* has provided for the instruction of all lower courts.

But the government argues things are somehow different in New Jersey because its limits on "gatherings"—an undefined term capriciously applied to disfavored activities, including worship—operate even in the premises of exempted businesses like retail stores and art galleries when they host "gatherings" rather than the usual crowds of customers or patrons. (Opp. 25.) But under *Brooklyn Diocese*, retail stores and other secular businesses are comparable *per se* (*see supra*), not only when they are hosting discrete "gatherings." Thus, the government cannot pat itself on the back for treating attendance at religious services better than a "wine tasting" session in a liquor store while ignoring the fact it treats religion worse than the liquor store and retail shopping themselves.[5] Facile distinctions of this sort cannot hide New Jersey's unequal treatment of religious worship.

[5] The government claims that shopping at retail and grocery stores is less risky than a religious service, (Opp. at 25), but multiple studies show that grocery stores are actually viral vectors. *See, e.g.*, Luke Andrews, "Supermarkets are the most common 'exposure setting' for COVID," Daily Mail (Nov. 20, 2020), https://www.dailymail.co.uk/news/article-8966755/Official-data-shows-supermarkets-common-exposure-setting-Covid-19.html; Mary Kekatos, "Are grocery store workers COVID-19 super spreaders?," Daily Mail (Oct. 29, 2020),

The government insists that its real interest is in restricting "individuals together in close contact for extended periods." (Opp. 9). "The problem, however, is that the very features [the government] identified as especially dangerous in religious worship appear to have been ignored by the State in its decision to allow numerous other activities to occur, even though they *self evidently exhibit the same features*." *Harvest Rock Church, Inc. v. Newsom*, 977 F.3d 728, 734 (9th Cir. 2020) (O'Scannlain, J., dissenting) (emphasis added). The government simply refuses to apply its supposedly neutral principle to self-evidently comparable secular analogs, and yet it expresses surprise that Applicants are not happy that 75% of their houses of worship are shut down for their primary purpose (i.e., religious worship). (Opp. 26.) This kind of obvious underinclusion is "substantial, not inconsequential," and thus triggers strict scrutiny. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993).

That the government has strayed far afield of the First Amendment's strictures on state action and is now simply "making stuff up" is confirmed by its argument that filling a chapel *to capacity* is perfectly fine if the purpose is to stand in line for confession or to pick up a prayer book—but not fine for worship as such. (Opp. 26-27.) The government clearly misunderstands the nature of worship during the Catholic Mass and Jewish synagogue prayers, which primarily involve sitting in pews facing the same direction and keeping mostly to one's self for approximately an hour. It is hardly the alleged "intermingling *en masse*" (Opp. 32) akin to a

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https://www.dailymail.co.uk/health/article-8894901/Doctors-warn-high-rate-symptom-COVID-19-infections-grocery-store-workers.html.

"birthday" bash at a restaurant which is apparently covered by the government's arbitrary application of the term "gathering." (Opp. 11.) The government's evident ignorance about Applicants' religious services, resulting in disparate treatment relative to the numerous secular analogs discussed above, is yet another reason its discriminatory scheme must undergo strict scrutiny. *See Brooklyn Diocese*, 2020 WL 6948354, at *8 (Kavanaugh, J., concurring) ("[O]nce a State creates a favored class of businesses . . . the State must justify why houses of worship are excluded from that favored class.").

The government's attempts to distinguish Applicants' other comparators are futile. The government continues to insist that "outdoor environments" generally are a lower risk of COVID spread while obstinately ignoring its own evidence that outdoor *crowds* present a real danger of viral spread. (Application at 27-28.) The government's attempt to distinguish schools is similarly unpersuasive in light of *Brooklyn Diocese*'s adoption of the same view as other lower courts (*see* Application at 24) that houses of worship are no more dangerous than children and staff packed into schools (id. at 24-26). And as to factories, the government admits they "can be vectors for the virus" only to claim, in conclusory fashion without any supporting evidence, that they do not contain the same "features" that supposedly render Applicants' religious services more dangerous. (Opp. 32.) But this completely ignores the voluminous evidence showing the dangers of factories and meatpacking plants that frequently involve shoulder-to-shoulder activity in large numbers over 8-hour shifts. (Application at 26, n.46.) This activity is self-evidently far more

dangerous than sitting in a pew facing the same direction more than six feet apart (laterally) and in every other row for one hour or less one day a week. *See Harvest Rock*, 977 F.3d 728, 736 (O'Scannlain, J., dissenting). The government's attempts to argue otherwise are thus baseless.

Given that the 25% capacity limitation is not neutral and generally applicable under *Brooklyn Diocese*, it must survive strict scrutiny, which it cannot. Here Rabbi Knopfler is effectively subject to the same 10-person limit at issue in the Brooklyn Red Zone, and Fr. Knopfler is effectively subject to the same 25-person limit at issue in the Brooklyn Orange Zone (*see supra*)—limits this Court found were not narrowly tailored in *Brooklyn Diocese*. 2020 WL 6948354, at *2. Moreover, here "there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services." *Id*. The government itself supplies those means by allowing retail businesses up to 50% capacity and numerous non-retail businesses up to 100% capacity, *no matter how small the square footage* of these businesses. (*See supra*); *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 730-31 (2014) (government "accommodation" for religious non-profits was a lesser restrictive means than mandate on closely held religious for-profits). Both options are obviously "less restrictive" than the 25% limit currently imposed on Applicants' religious services. And the government presents no evidence that increasing Appellants' occupancy limit to, for example, 50% capacity in the same manner as comparable retail stores would materially impact the government's ability to contain the virus. In light of this Court's recognition in *Brooklyn Diocese*

that houses of worship are comparable to factories, large stores, and the like, New Jersey's discriminatory 25% limit on religious gatherings fails strict scrutiny.

III. THE MASK MANDATE IS RIDDLED WITH EXEMPTIONS THAT TRIGGER STRICT SCRUTINY.

Just as the government's response bemoans supposed "crowding" of worship spaces while ignoring "crowding" in all the secular premises its COVID-19 regulations permit to operate at 100% or 50% capacity—*no matter how small the secular space*—so too does the government see a problem with believers who seek merely to worship God without their faces covered, for perhaps an hour a week, but no problem with innumerable *temporally unlimited* secular exemptions from mask-wearing that undoubtedly contribute far more substantially to viral transmission.

The government asserts that "this emergency application does not point to any indoor venue where persons are exempt from this mandate." (Opp. at 5.) On the contrary, this Application (at 10-11) points to all of the following *indoor* exemptions from mask-wearing:

- when masks "inhibit the individual's health";
- when masks are "impracticable" to wear, "such as"—but *not only*—when eating, drinking, or smoking;
- when masks are not feasible for organizers or supervisors of "gatherings" (provided they maintain social distancing);
- when office staff are inside in office buildings or other non-public spaces—unless in "prolonged proximity to others" (i.e., less than six feet away).

The government places *no temporal limitation* on going maskless for reasons of health, eating or drinking (which can go on for hours at a time), impracticability,

feasibility, or occupancy of office spaces. Yet, when it comes to religion, strict temporal limitations are imposed: one may remove the state-mandated face covering only "momentarily" to "place or receive an item in [the] mouth . . . if done for religious purposes" or (when outdoors) only "briefly… for religious reasons."[6]

The secular exemption for eating and drinking demonstrates just how heedless the government really is when it comes to obvious secular vectors for maskless viral transmission. Under Executive Order 183, restaurants are permitted 25% capacity—*without a numeral cap, and no matter how small the restaurant*—and diners are permitted to go maskless when "their food or drinks arrive…" Only "after individuals have finished consuming their food or drinks"—no matter how long that takes—must they "put their face coverings back on."[7] Moreover, the "guidance" document for indoor dining provides as follows: "Limit seating to a maximum of eight (8) customers per table (unless they are from a family from the same household) and arrange seating to achieve a minimum distance of six feet (6 ft) between parties…"[8]

Thus, under New Jersey's mask mandate, parties of eight (or family parties of unlimited size) can eat, drink and be merry *sans* masks while *facing each other across narrow or round tables*, *without social distancing*, all the while expelling particles of virus at each other—for hours on end, if the owner permits. Yet

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[6] EO 183, ¶ 5, https://nj.gov/infobank/eo/056murphy/pdf/EO-183.pdf; EO 152, ¶¶ 1(c), 5, https://nj.gov/infobank/eo/056murphy/pdf/EO-152.pdf.

[7] EO 183, ¶ 1, (a), (b).

[8] *See* "What are the reopening rules for bars and restaurants? What precautions or policies must they take?", available at https://tinyurl.com/y4bloaoq (last updated November 26, 2020).

worshippers cannot sit in pews—facing in the same direction and separated by six feet from each other—for even one hour, once a week, without the mandated face covering. They can partake of Holy Communion or "the Kiddush cup" only "momentarily" without the state-imposed mask, but diners can tuck into multi-course dinners and imbibe wine for as long as they please while maskless. In what world is this disparate treatment of religion versus dining constitutionally permissible?

Indeed, New Jersey belatedly recognized its unwarranted interference in the act of divine worship when it vaguely augmented its crabbed religious exemption from the mask mandate in Executive Order 192, which states that these measures do not apply "to religious institutions to the extent the application of the health and safety protocols would prohibit the free exercise of religion."[9]

Applicants' Complaint details, without challenge by the State, the many ways in which the mask mandate interferes with their free exercise of religion. *See* Dist. Ct. Dkt. 101 at ¶¶ 128-131 (Father Robinson) and ¶¶ 171-172, 195-206 (Rabbi Knopfler). By what right does the State prescribe the particular elements of worship that may be maskless and those which may not during the hour or so that Catholic or Jewish congregants gather to worship God?

While applicants stress that their challenge to the mask mandate is a separable element of this application, they maintain here precisely what one court has already rightly recognized: that the State "does not have the power to decide

[9] EO 192 (Oct. 28, 2020) at ¶¶ 1, 3, https://nj.gov/infobank/eo/056murphy/pdf/EO-192.pdf.

what tasks are a necessary part of an individual's religious worship. And while religious exercise is subject to truly neutral and generally applicable regulations, once the State begins creating exceptions [from mask-wearing] for secular activities as it deems necessary, then it is obligated to treat religious activities no less favorably, absent a compelling reason." *Denver Bible Church v. Azar*, No. 120CV02362DDDNRN, 2020 WL 6128994, at *11 (D. Colo. Oct. 15, 2020) (enjoining enforcement of mask mandate during worship services); *motion for stay pending appeal granted* (No. 20-1377, 10th Cir. Oct. 22, 2020).

IV. THE EQUITABLE FACTORS WEIGH HEAVILY IN FAVOR OF APPLICANTS.

Just as in *Brooklyn Diocese*, New Jersey's discriminatory restrictions prevent from worshipping "the great majority of those who wish to attend Mass on Sunday" at Fr. Robinson's St. Anthony's church (*see* Application at 14), and it "bar[s]" anyone from worshipping at Rabbi Knopfler's synagogue beyond the 10-person minyan (id. at 15), including women and children. *Brooklyn Diocese*, 2020 WL 6948354, at *3. These are clear violations of Applicants' religious duties to serve their congregations via in-person worship. "There can be no question," therefore, "that the challenged restrictions . . . cause irreparable harm." *Id*.

As to the balance of harms and public interest, contrary to the government's averments, "the State has not shown that public health would be imperiled if less restrictive measures were imposed." *Id*. Applicants enforce social distancing and hygiene requirements and are willing to operate at 50% capacity. (Application at 4, 20, 36.) And they are willing to enforce mask-wearing if this Court finds New

Jersey's mandate to be consistent with the First Amendment. (Id. at 37.) Here, unlike in New York, there has been no opportunity to follow self-imposed gathering limits beyond the 25% capacity limitation, and thus absence of such evidence is no basis to distinguish this case from *Brooklyn Diocese*.

It is also worth noting the government burdened the record below with unconfirmed anecdotes attributing seemingly countless COVID deaths to religious gatherings, even though it actually came up with only 20 deaths as a result of religious gatherings out of a total of 250,000—as shown in the following chart keyed to their voluminous but wholly non-probative exhibits:

EXHIBIT J (ECF 25-3):	3 deaths	March 2020
EXHIBIT M (ECF 25-3):	1 death	March 20, 2020
EXHIBIT N (ECF 25-3):	2 deaths	late April 2020
EXHIBIT P (ECF 25-3):	2 deaths	March-April 2020
EXHIBIT Q (ECF 25-3):	2 deaths	March 2020
EXHIBIT R (ECF 25-3):	3 deaths	March 2020
EXHIBIT Z (ECF 25-4):	2 deaths	April 2020 and May 13, 2020
EXHIBIT RRR, (ECF 91-2)	2 deaths	between late June 2020 and August 29, 2020
EXHIBIT TTT (ECF. 91-2):	1 death	September 2020
EXHIBIT FF (ECF 71-3):	4 deaths	June 23, 2020 and between late May and July 10, 2020

Indeed, the government has come up with precisely *zero deaths tied to any religious gatherings in New Jersey*. The government thus cannot show that

permitting Applicants to operate within the stipulated limits, on equal footing with other secular analogs, will harm the public interest.

Aside from the rebuttals of the government's averments already presented, two averments in its balancing of harms argument require correction.

First, it is not true that "one of the applicants repeatedly has been charged with violating New Jersey's laws." (Opp. at 40.) In truth, Rabbi Knopfler was charged once with conducting an "illegal" outdoor religious gathering, for which he was dragged off to jail in handcuffs like a violent felon. But that patently unconstitutional charge did not survive Governor Murphy's participation in "illegal" mass outdoor gatherings in protest over the death of George Floyd. The Governor covered his own hypocrisy by simply eliminating all outdoor gathering limitations for political or religious reasons in Executive Order 152. This was followed by Murphy's directive, via Attorney General Grewal, that all pending charges for "illegal" outdoor religious gatherings be dismissed, including the one against Rabbi Knopfler. (*See* Dist. Ct. Dkt. 101 at ¶¶ 161-166.)

Second, and no less misleading, is the government's caricature of Applicants' factually supported plea for a rational and balanced approach to the pandemic, using the government's own data to show that "focused protection"[10] of the vulnerable, not destructive lockdowns and other unprecedented mandates imposed on millions of healthy people, is the rational approach to coping with COVID-19.

The government's use of cropped quotations from Applicants' pleadings does not do justice to their contentions. (*See*, Dist. Ct. Dkt. 101 at ¶¶ 16-26 and 85-101.)

[10] *The Great Barrington Declaration* (October 4, 2020). Available at https://gbdeclaration.org/ .

After nine months of draconian restrictions on religious freedom, Applicants' position on "the science" is that of *The Great Barrington Declaration*, whose authors and signatories include renowned physicians, immunologists, infectious disease experts and epidemiologists from Harvard, Yale, Stanford, Tufts, Oxford, the University of London and other world-renowned institutions:

> Fortunately, our understanding of the virus is growing. We know that vulnerability to death from COVID-19 is more than a thousand-fold higher in the old and infirm than the young. Indeed, for children, COVID-19 is less dangerous than many other harms, including influenza.
>
> As immunity builds in the population, the risk of infection to all – including the vulnerable – falls. *We know that all populations will eventually reach herd immunity* – i.e. the point at which the rate of new infections is stable – and that this can be assisted by (but is not dependent upon) a vaccine. Our goal should therefore be to minimize mortality and social harm until we reach herd immunity.
>
> The most compassionate approach that balances the risks and benefits of reaching herd immunity, *is to allow those who are at minimal risk of death to live their lives normally to build up immunity to the virus through natural infection, while better protecting those who are at highest risk*. We call this Focused Protection. (Emphasis added.)[11]

In any case, the constitutional conclusion remains the same: that New Jersey's COVID-19 restrictions "treat[] religious exercises worse than comparable secular activities" without "using the least restrictive means available." *Brooklyn Diocese*, 2020 WL 6948354, at *4 (Gorsuch, J., concurring).

That is the case here as much as it was in *Brooklyn Diocese.*

[11] *See* Note 10, *supra.*

CONCLUSION

For the foregoing reasons, this Court should vacate the district court's decision below and remand for further consideration in light of *Brooklyn Diocese*, or, in the alternative, your Honor or this Court should enjoin New Jersey's discriminatory restrictions on Applicants' religious gatherings during the pendency of their appeal before the Third Circuit.

Respectfully submitted,

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APPENDIX 1

****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 2

No. 20A_____

IN THE SUPREME COURT OF THE UNITED STATES

HARVEST ROCK CHURCH, INC.; HARVEST INTERNATIONAL MINISTRY, INC., itself and on behalf of its member Churches in California,

Applicants,

v.

GAVIN NEWSOM,
in his official capacity as Governor of the State of California,

Respondent.

To the Honorable Elena Kagan,
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the Ninth Circuit

Emergency Application for Writ of Injunction
Relief Requested before November 29, 2020

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QUESTIONS PRESENTED

(1) Whether the Free Exercise Clause of the First Amendment prohibits the government from discriminating against houses of worship by restricting the size of religious gatherings while exempting or giving other preferential treatment to comparable nonreligious gatherings occurring inside the same houses of worship or to other comparable nonreligious gatherings occurring externally.

(2) Whether this Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), issued decades before the First Amendment was incorporated against the States and 60 years before strict scrutiny became the governing standard in First Amendment cases, dictates a separate standard for determining First Amendment liberties in times of declared crisis.

(3) Whether the Establishment Clause of the First Amendment and this Court's holding in *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947) that "[n]either a state nor the Federal Government . . . can force or influence a person to go to or remain away from church against his will" is violated when a State prohibits or forbids upon criminal penalty houses of worship from assembling regardless of the size of the house of worship or the religious doctrine or practice.

PARTIES

Applicants are Harvest Rock Church, Inc. and Harvest International Ministry, Inc., itself and on behalf of its 162 member Churches in California. Respondent is Hon. Gavin Newsom, in his official capacity as Governor of the State of California.

RULE 29 DISCLOSURE STATEMENT

Applicants Harvest Rock Church, Inc. and Harvest International Ministry, Inc. hereby state that they are both nonprofit corporations incorporated under the laws of the State of California, do not issue stock, and have no parent corporations, and that no publicly held corporations 10% or more of their respective stock.

DIRECTLY RELATED PROCEEDINGS

HARVEST ROCK CHURCH, INC. and HARVEST INTERNATIONAL MINISTRY, INC., itself and on behalf of its member Churches in California v. GAVIN NEWSOM, in his official capacity as the Governor of the State of California, Case No. 20-55907, currently pending preliminary injunction appeal (9th Cir. 2020).

HARVEST ROCK CHURCH, INC. and HARVEST INTERNATIONAL MINISTRY, INC., itself and on behalf of its member Churches in California v. GAVIN NEWSOM, in his official capacity as the Governor of the State of California, Case No. 20-55907, Motion for Injunction Pending Appeal by 2-1 decision with Judge O'Scannlain dissenting (9th Cir. October 1, 2020), reproduced in Appendix as Exhibit A.

HARVEST ROCK CHURCH, INC. and HARVEST INTERNATIONAL MINISTRY, INC., itself and on behalf of its member Churches in California v. GAVIN NEWSOM, in his official capacity as the Governor of the State of California, Case No. 20-55907, Petition for Rehearing En Banc of denial of motion for injunction pending appeal currently pending (9th Cir. 2020).

HARVEST ROCK CHURCH, INC. and HARVEST INTERNATIONAL MINISTRY, INC., itself and on behalf of its member Churches in California v. GAVIN NEWSOM, in his official capacity as the Governor of the State of California, Case No. 2:20-cv-06414-JCB-KK, Order denying Plaintiffs Motion for Injunction Pending Appeal (C.D. Cal. September 16, 2020), reproduced in Appendix as Exhibit B

HARVEST ROCK CHURCH, INC. and HARVEST INTERNATIONAL MINISTRY, INC., itself and on behalf of its member Churches in California v. GAVIN NEWSOM, in his official capacity as the Governor of the State of California, Case No. 2:20-cv-06414-JCB-KK, Order denying Plaintiffs Motion for Preliminary Injunction (C.D. Cal. September 2, 2020), reproduced in Appendix as Exhibit C.

HARVEST ROCK CHURCH, INC. and HARVEST INTERNATIONAL MINISTRY, INC., itself and on behalf of its member Churches in California v. GAVIN NEWSOM, in his official capacity as the Governor of the State of California, Case No. 2:20-cv-06414-JCB-KK, Order denying Plaintiffs Motion for Temporary Restraining Order (C.D. Cal. July 20, 2020), reproduced in Appendix as Exhibit D.

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To the Honorable Elena Kagan
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the Ninth Circuit

Pursuant to Sup. Ct. Rules 20, 22 and 23 and 28 U.S.C. §1651, Applicants Harvest Rock Church, Inc. and Harvest International Ministry, Inc. (collectively "Churches"), herby move for an emergency writ of injunction **before Sunday, November 29, 2020** against Governor Newsom's Emergency Proclamation and subsequently issued stay-at-home orders, including the currently operative "Blueprint for a Safer Economy" (the "Blueprint"), which establishes a statewide framework of four Tiers with sector-specific restrictions in each tier and imposes an unconstitutionally discriminatory regime that relegates Churches' fundamental right to religious exercise to constitutional orphan status.

As a result of the Governor's COVID-19 restrictions on religious worship, ***Harvest Rock Church has received letters from the Planning and Community Development Department, Code Enforcement Division, for the City of Pasadena and from the Pasadena Office of the City Attorney/City Prosecutor, Criminal Division, threatening up to 1 year in prison, daily criminal charges and $1,000 fines against the pastors, church, governing board, staff, and parishioners, which includes a threat to close the church***. Emergency relief is needed now to prevent criminalizing constitutionally protected religious exercise.

For **over nine months**, the Governor has continued to discriminate against Churches' religious worship services while permitting myriad nonreligious entities to continue to gather without numerical restrictions *inside the same house of worship*

and in other external comparable congregate assemblies; publicly encouraging and supporting mass protestors, rioters, and looters to gather without numerical restriction in blatant disregard for his own Orders; and has purported to prohibit religious worship services – **even in the private homes of Californians** – despite the fundamental protections enshrined in the First Amendment.

Despite his nine-month reign of executive edicts subjugating Californians to restrictions unknown to constitutional law, the Governor continues to impose draconian and unconscionable prohibitions on the daily life of all Californians that even the Governor disregards at his own whim.

Bill Melugin & Shelly Insheiwat, *Fox 11 obtains exclusive photos of Gov. Newsom at French restaurant allegedly not following COVID-19 protocols*, FOX11 (Nov. 17, 2020), *available at* https://www.foxla.com/news/fox-11-obtains-exclusive-photos-of-gov-newsom-at-french-restaurant-allegedly-not-following-covid-19-protocols.

For the Governor, COVID-19 restrictions are apparently optional and penalty free. But for Churches or anyone worshipping in their own home with someone who does not live there, COVID-19 restrictions are mandatory and enforced via criminal penalties. If Churches host a *religious* gathering (of even 2 people) in their own church, the Orders impose criminal sanction. "**When laws do not apply to those who make them, people are not being governed, they are being ruled**."[1] "[F]reedom for me, but not for thee, has no place under our Constitution." *Spell v. Edwards*, 962 F.3d 175, 183 (5th Cir. 2020) (Ho, J., concurring).

As a brief sample of the restrictions currently imposed on Churches' religious exercise, the Blueprint issued by the Governor:[2]

(1) **Tier 1**, *prohibits gathering for any indoor worship services in over 41 counties* (including many where Churches are located and 94% of the population) and, where indoor worship is not prohibited, prohibits gathering for indoor worship with 101 or more individuals, or over 25% capacity (whichever is lower);

(2) **Tiers 1-4**, *prohibits singing or chanting during religious worship* in counties where indoor worship remains permissible;

(3) **Tiers 1-4**, *prohibits gatherings inside private homes* for small-group Bible studies and worship services; and

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[1] *Mainer v. Pritzker*, Case No. 2020-CH-10 at 77 (Ill. Cir. Ct. 4th Judicial Cir. 2020), *available at* https://courts.illinois.gov/appellatecourt/highprofile/2020/5200163-Supporting-Record3.pdf (emphasis added).

[2] A simplified chart outlining the restrictions and exemptions provided for in the Blueprint is attached hereto as Addendum 1

(4) **Tiers 1-4**, imposes *internal* discriminatory treatment permitting nonreligious gatherings in the Churches to feed, shelter, and provide social services and "necessities of life" such as nonreligious counseling to an unlimited number of individuals while prohibiting or severely restricting (depending on the Tier) religious gatherings and worship *in the same church building*.

(5) **Tier 2**, *restricts religious worship to 25% capacity or 100 people, whichever is less*; but permits laundromats, warehouses, and meat packing plants with no restriction, allows "essential retail" to operate at 50% with no numerical cap, museums to operate at 25% capacity with no numerical cap; gyms and fitness centers to operate at 10% capacity with no numerical cap; and malls, destination centers and swap meets at 50% capacity with no numerical cap.

(6) **Tier 3**, *restricts religious worship to 50% capacity or 200 people, whichever is less*; but permits laundromats, warehouses, meat packing plants and essential retail to operate with no restriction, museums to operate at 50% capacity with no numerical cap; gyms and fitness centers to operate at 25% capacity with no numerical cap; and family entertainment centers and cardrooms at 25% capacity with no numerical cap.

The Governor prohibits or restricts "gatherings" in Churches or private homes, but he publicly encourages thousands of protesters singing and chanting.

JURISDICTION

Applicants have a pending interlocutory appeal in the United States Court of Appeals for the Ninth Circuit, from the order of the Central District of California

denying Applicants' motion for preliminary injunction. This Court has jurisdiction under 28 U.S.C. §1651.

STATEMENT OF THE CASE AND FACTUAL BACKGROUND

A. Applicant Churches and Religious Ministries.

Applicant Churches comprise Appellant Harvest Rock Church, Inc., a Christian church with multiple campuses in California, including in Pasenda, Los Angeles, Irvine, Corona, Orange, and Riverside Counties, and Applicant Harvest International Ministries, Inc., an association of Churches in Pasadena, with 162 member churches throughout California. (Verified Complaint, "V. Compl.." ¶¶ 40, 41, 48, 54 (attached hereto in the Appendix as Exhibit E.) Churches have and exercise the sincere religious belief that its fundamental purpose is to worship God as an assembled body of believers, where the church ministers the Gospel of Jesus Christ to its congregants, and its congregants receive biblical instruction and minister to the needs of one another and the community. (V. Compl. ¶¶ 48, 49, 51, 54, 55, 57.)

Each of the Churches also has and exercises the sincere religious belief that it must order its worship and community support according to the commands and standards in the Bible. (V. Compl. ¶¶ 50, 58.) Churches believe they must assemble for worship, in-person, as a critical requirement of both obedience to the Bible and fulfillment of the church's fundamental purpose, and to do so even more in times of peril and crisis. (V. Compl. ¶¶ 48–50, 54, 57, 58, 65.)[3] Worship includes singing praise

[3] Citing, e.g., *Hebrews* 10:25 ("[24] And let us consider how to stir up one another to love and good works, [25] not neglecting to meet together, as is the habit of some, but encouraging one another, and all the more as you see the Day drawing near." (ESV)).

to God. (V. Compl. ¶¶ 59–64.)[4] Churches also meet in small home groups to worship, study the Bible, fellowship, and minister to each other's needs. (V. Compl. ¶¶ 52, 53, 56.) The Churches cannot obey the Bible's command to gather and worship via the Internet. (V. Compl. ¶¶ 48, 54.)

Each of the Churches has and exercises the sincere religious belief that the Bible commands them to provide food, clothing, shelter, and counsel to the needy and afflicted. (V. Compl. ¶¶51, 55.) Harvest Rock Church operates a ministry at its churches called the Hope Center, staffed by church leaders and volunteers, which provides support for those with financial, familial, emotional, and spiritual needs in its communities. (V. Compl. ¶ 51.) Many of Harvest International's churches likewise provide food, financial and other support, and biblical and social-service-type counseling in their church buildings. (V. Compl. ¶ 55.)

B. COVID-19 Restrictions and Exemptions under the Orders.

1. Evolution of the Restrictions and Exemptions from the Emergency Proclamation to the Blueprint.

For nearly nine months, Governor Newsom and his designee, the California State Public Health Officer, have issued and amended a series of orders and directives in response to COVID-19 (the "Orders"), extensively restricting when, where, and how Californians may exercise their constitutionally protected liberties, including gathering for religious worship according to conscience, while exempting myriad businesses and nonreligious activities from comparable gathering

[4] Citing, e.g., *Hebrews* 2:12 ("I will declare thy name unto my brethren, in the midst of the church will I sing praise unto thee." (KJV)); *Psalm* 59:16 ("I will sing aloud of your steadfast love in the morning. For you have been to me a fortress and a refuge in the day of my distress." (ESV)).

restrictions. (V. Compl. ¶¶ 66–103; Joint Statement for Injunction Pending Appeal (reproduced in the Appendix as Exhibit F), at 2–8.)

The Governor's COVID-19 scheme of restrictions and exemptions began with his Emergency Proclamation, issued March 4, 2020, proclaiming a "State of Emergency" in California due to COVID-19, which has no expiration by its own terms. (V. Compl. Ex. A.) Proceeding from the Emergency Proclamation, the Governor's Orders most relevant to this Application are as follows:

- The March 12 Executive Order N-25-20 states that all residents of California "are to heed any orders and guidance of state and local public health officials, including but not limited to the imposition of social distancing measures." (V. Compl. Ex. B.)

- The March 19 Stay-at-Home Order, issued by the State Public Health Officer at the Governor's direction, **orders** "all individuals living in the State of California to **stay home** or at their residence," but **exempts** travel for 16 expansive "federal critical infrastructure sectors" with **130 subsectors**, including (a) businesses providing food and groceries (such as Ralphs and Trader Joe's grocery stores, and Walmart and Costco 'big box' stores), (b) food manufacturing and warehousing, (c) organizations providing "**food, shelter, and social services, and other necessities of life** for economically disadvantaged or otherwise needy individuals," (d) businesses providing construction materials and equipment (such as Home Depot and Lowe's warehouse stores), (e) e-commerce distribution facilities (such as Amazon.com facilities), (f) bank and financial processing and service centers (such as

Wells Fargo and Chase centers), and (g) "radio, television, and media service" organizations (of any size), and numerous other exempted businesses and operations (of any size); but **does not exempt travel to attend religious worship**. (V. Compl. Ex. C (emphasis added); V. Compl. Ex. D, V. Compl. Ex. E.) The March 19 Stay-at-Home Order does not impose any numerical or other limitations on people participating in the exempted activities, apart from advising that "they should at all times practice social distancing." (V. Compl. Ex. C.)

- The March 19 Executive Order N-33-20 incorporates and puts the full power of the Governor's office behind the Stay-at-Home Order, directs the Governor's Office of Emergency Services "to take necessary steps to ensure compliance" with the order, and gives notice to the public that the order is enforceable pursuant to California Government Code § 8665, which provides that violating the Governor's orders is a misdemeanor criminal offense punishable by up to a $1,000 fine, six months in jail, or both. (V. Compl. Ex. E.)

- The April 28 Essential Workforce Guidance, prepared by the State Public Health Officer pursuant to Executive Order N-33-20, **exempts** from the Stay-at-Home Order an expanded 13 sectors and **173 subsectors** of businesses and operations in so-called "Essential Critical Infrastructure," similar to the "federal critical infrastructure sectors" adopted in the Stay-at-Home Order, including (a) businesses providing food and groceries (such as Ralphs and Trader Joe's grocery stores, and Walmart and Costco 'big box' stores), (b) food manufacturing and warehousing, (c) organizations providing "**food, shelter, and social services, and**

other necessities of life for economically disadvantaged or otherwise needy individuals," (d) businesses providing construction materials and equipment (such as Home Depot and Lowe's warehouse stores), (e) e-commerce distribution facilities (such as Amazon.com facilities), (f) bank and financial processing and service centers, and (g) "radio, television, and media service" organizations (of any size), and new categories not covered in the Stay-at-Home Order, such as (h) "laundromats, laundry services, and dry cleaners," (i) law and accounting firms, real estate offices, and other professional services (of any size), (j) businesses that produce, store, transport and distribute cannabis, and (k) workers supporting California's entertainment industry, studios, and other related entertainment establishments, and numerous other exempted businesses and operations (of any size); and **exempts for the first time** "Clergy for essential support and faith-based services," but **imposes** a unique qualifier on religious worship not applicable to other "Essential" services, limiting exempt "faith-based services" to those "that are **provided through streaming or other technologies** that support physical distancing and state public health guidelines." (V. Compl. Ex. G.)

- The May 25 Worship Guidance, pursuant to further executive and public health orders providing for the modification of stay-at-home restrictions, **authorizes the limited reopening** of places of worship for in-person religious worship at "25% of building capacity or a maximum of 100 attendees, whichever is lower," after "a county public health department's approval of religious services," but **imposes** a combination of significant restrictions on places of worship, including temperature

screenings upon entering a church, eye-protection and gloves for workers, face coverings for employees, volunteers, and attendees, posting signage throughout the facility to inform attendees of the face covering and glove requirements, discouraging use of shared items such as Scriptures and Hymnals, discontinuing use of offering plates, discouraging handshakes or hugging of any kind, discontinuing singing, group recitation, and similar practices, and others. (V. Compl. Exs. H, J.)

- The revised July 1 Worship Guidance expressly **prohibits singing and chanting** in worship, and reimposes the indoor worship limitation of 25% of building capacity or maximum of 100 people, whichever is lower. (V. Compl. Ex. K.)

- The revised July 6 Worship Guidance changed the singing and chanting prohibition to apply only indoors. (V. Compl. Ex. L.)

- On July 13 the Governor announced the reinstatement of previously relaxed stay-at-home restrictions for the 30 counties on the California Department of Public Health (CDPH) County Monitoring List, which restrictions **banned in-person worship services** in those counties. (V. Compl. ¶¶ 94, 95.)

- The ensuing July 13 Health Order closed indoor operations throughout the state for certain non- "Essential Critical" businesses, and additionally specified the **closure of places of worship** and certain other businesses in counties on the County Monitoring List. (V. Compl. Ex. M.)

- The July 29 Worship Guidance continued the ban on indoor worship singing, and the numerical restriction for indoor worship of 25% of building capacity or 100 people, whichever is fewer. (Joint Statement, Ex. C.) It notes:

> Precise **information about the number and rates of COVID-19 by industry or occupational groups, including among critical infrastructure workers, is not available at this time.** There have been **multiple outbreaks in a range of workplaces, indicating that workers are at risk** of acquiring or transmitting COVID-19 infection. Examples of **these workplaces include places of worship**, hospitals, long-term care facilities, prisons, **food production, warehouses, meat processing plants, and grocery stores**.

(Joint Statement Ex. C (emphasis added); V. Compl. ¶ 93).

- The August 28 Health Order authorizes the current scheme of COVID-19 restrictions in California, implemented on August 28 under the umbrella designation "**Blueprint for a Safer Economy**" (the "Blueprint"), which is a framework of risk tiers and sector-specific restrictions within each tier, applied and periodically adjusted, county-by-county, throughout the State.[5] (Joint Statement at 1–2, 4 and Ex. H.) Counties may move in both directions within the Blueprint tier framework—from a more restrictive tier to a less restrictive tier, and back to a more restrictive tier again. (Joint Statement at 1.)

2. Blueprint Restrictions and Exemptions.

a. Restrictions on Houses of Worship.

As applied to the "Places of Worship" sector, which includes Churches, the Blueprint identifies specific restrictions for each tier:

- **Tier 1-Widespread:** No in-person, indoor worship allowed; only outdoor worship permitted.

[5] The Blueprint tiers and corresponding sector restrictions as of September 21, 2020 are charted in the "Blueprint Sector Chart" (Joint Statement, Ex. A.) Each county's tier classification as of September 15, along with population and other metrics, is shown in the "Blueprint Data Chart" (Joint Statement Ex. B.)

- **Tier 2-Substantial:** Allowed to open indoors at maximum of 25% capacity or 100 people, whichever is less; outdoor worship permitted.

- **Tier 3-Moderate:** Allowed to open indoors at maximum of 50% capacity or 200 people, whichever is less; outdoor worship permitted.

- **Tier 4-Minimal:** Allowed to open indoors at maximum of 50% capacity; outdoor worship permitted.

(Joint Statement 1–2.)

The numerous counties classified as Tier 1–Widespread under the Blueprint includes Los Angeles, Orange, and Riverside Counties where Applicant Harvest Rock Church's Los Angeles, Pasadena, Irvine, and Corona campuses are located (Joint Statement at 4.) Orange and Riverside Counties were under Tier 2, but have since been placed in Tier 1 again. Appellant Harvest International Ministry, Inc. has 162 member churches located throughout California in various Blueprint tiers. (Joint Statement at 5.).

b. Exemptions for Other Sectors.

For sectors other than places of worship, the Blueprint modified some restrictions and exemptions as compared to prior Orders, but left others in place. (Joint Statement at 5.) For example:

- **Grocery stores** are in the "Retail" sector of the Blueprint, subject to the Industry Guidance and the July 29 Retail Guidance (Joint Statement at 5–6 and Ex. I.) The Blueprint permits grocery stores to operate at 50% capacity under Tier 1–Widespread and Tier 2–Substantial, and without numerical limits under Tier 3–Moderate and Tier 4–Minimal. (Joint Statement at 5–6.)

- **Essential retail** stores, such as Walmart and Costco, are also now classified in the "Retail" sector of the Blueprint, subject to the Industry Guidance and the July 29 Retail Guidance. (Joint Statement at 6.) The Blueprint permits essential retail stores to operate at 25% capacity under Tier 1, 50% capacity under Tier 2, and without numerical limits under Tier 3–Moderate and Tier 4–Minimal. (*Id*.)

- **Laundromats** are classified in the "Limited Services" sector of the Blueprint, subject to the Industry Guidance and July 29 Limited Services Guidance (Joint Statement at 6–7.) The Blueprint allows laundromats to operate without numerical limits. (*Id*.)

- **Warehouses** are classified in the "Logistics and warehousing facilities" sector of the Blueprint, subject to the Industry Guidance and July 29 Logistics and Warehousing Guidance (Joint Statement at 7.) The Blueprint allows warehouses to operate without numerical limits. (*Id*.)

- **Food packing and processing** are classified in the "Critical Infrastructure" sector of the Blueprint (Joint Statement Ex. A, at 1). The Blueprint allows food packing and processing operations without numerical limits.

- The provision of "**food, shelter, and social services, and other necessities of life** for economically disadvantaged or otherwise needy individuals" is classified in the "Critical Infrastructure" sector of the Blueprint (Joint Statement Ex. A at 1). The Blueprint allow such provision without numerical limits. Furthermore, every version to date of the Worship Guidances exempts such activities, as well as schooling, from worship restrictions in the same church. (V. Compl. Ex. J

(excluding from worship restrictions "food preparation and service, delivery of items to those in need, . . . school and educational activities, . . . counseling, . . .and other activities that places and organizations of worship may provide")

- Many **other sectors'** restrictions under the Blueprint are **less stringent** than those applicable to places of worship. For example:
    - Churches in Tier 2 may open for indoor worship at 25% capacity or 100 people, whichever is fewer. (Joint Statement at 1.) By comparison, laundromats, warehouses, and meat packing plants in Tier 2 (or any tier) may operate with **no percentage or numerical caps** (Joint Statement at 6–7; V. Compl. Ex. G); grocery and "essential" retail stores (*e.g.*, Walmart, Costco, and 'big box' stores) in Tier 2 may operate at 50% capacity, but with **no numerical cap** (Joint Statement at 5–6); museums in Tier 2 may operate at 25% capacity, but with **no numerical cap** (Joint Statement Ex. A at 2); gyms and fitness centers in Tier 2 may operate at 10% capacity, but with **no numerical cap** (Joint Statement at 3), and malls, destination centers, and swap meets may operate at 50% capacity but with no numerical cap. While Churches are caped at 100, Harvest Rock Church which seats 1250 people could have 125 or 625 if the limit was based on 10% or 50% rather than a numerical cap.
    - Churches in Tier 3 may open for indoor worship at 50% capacity or 200 people, whichever is fewer. (Joint Statement at 2.) By comparison, laundromats, warehouses, meat packing plants, grocery and "essential" retail

stores, malls, destination centers, and swap meets in Tier 3 may operate with **no percentage or numerical caps** (Joint Statement at 5–6; V. Compl. Ex. G); museums in Tier 3 may operate at 50% capacity, but with **no numerical cap** (Joint Statement Ex. A at 2); gyms and fitness centers in Tier 3 may operate at 25% capacity, but with **no numerical cap** (*Id.* at 3); and family entertainment centers and cardrooms in Tier 3 may operate at 25% capacity, but with **no numerical cap** (Joint Statement Ex. A at 5). While Churches are caped at 200, Harvest Rock Church which seats 1250 people could have 312 based on 25% and 625 at 50% rather than a numerical cap.

See also Addendum 1 Chart (outlining the restrictions on Houses of Worship that are not imposed on myriad other industry sectors with similar gathering risks).

C. The Governor's Public Support For Mass Protests.

From the end of May and into July, groups of thousands of people continually gathered throughout California cities for mass protests (including riots and looting) in violation of the Governor's Orders. (V. Compl. ¶¶ 104–118.) One example is depicted in the below photographs taken in Hollywood on Sunday, June 7:

(V. Compl. ¶ 112.)

Early in the protest period, on May 30, Governor Newsom released an official statement praising and encouraging the protesters in California to continue to gather in large numbers despite their flagrant violations of his own Orders. (V. Compl. ¶¶ 106–107.) Specifically, the Governor said, "we have seen **millions of people** lift up their voices in anger, rightfully outraged . . . . Every person who has raised their voice should be heard." (*Id.*) He continued, "I want to thank all those . . . who exercised their right to protest peacefully." (*Id.*)

On June 1, Governor Newsom held a news conference in which he expressed appreciation and gratitude for the thousands of protesters gathering in the streets in California in violation of his own orders. (V. Compl.¶ 104.) In that press conference, the Governor thanked the protesters, invoked God's blessing on them, and explicitly encouraged the protesters to continue to flout his orders: "Those that want to express themselves and have, **Thank You! God bless You. Keep doing it**." (*Id.*)

Governor Newsom has publicly stated that "people understand we have a Constitution, we have a right to free speech and we are all dealing with a moment in our Nation's history that is profound and pronounced." (V. Compl. ¶ 105.) In discussing the protesters' gathering by the thousands in the streets, Governor Newsom "expressed sympathy and showed support for the protesters," noting that he encouraged the protesters to engage in their constitutionally protected speech to advocate for their point because "people have lost patience" and need to protest. (V. Compl. ¶108.) Governor Newsom explicitly stated that he wants the mass protests to continue, despite his Orders, stating, "'your rage is real. **Express it so that we can hear it**.'" (V. Compl. ¶109.)

On June 5 the Governor called for new, more favorable treatment for mass protesters, stating, "'Protesters have the right not to be harassed . . . . Protesters have the right to protest peacefully. Protesters have the right to do so without being arrested . . . ." (V. Compl. ¶110.)

D. Enforcement Of The Orders Against Churches.

On August 11, 2020, the Pastor of Harvest Rock Church received a letter from the Planning and Community Development Department, Code Enforcement Division, for the City of Pasadena threatening criminal penalties, including fines and imprisonment, for being open for worship against the Governor's Orders and local health orders. (A copy of Pastor Che Ahn's Declaration with the letter is reproduced in the Appendix as Exhibit G.) On August 18, 2020, the Pasadena Office of the City Attorney/City Prosecutor, Criminal Division, threatened in a letter daily criminal

charges and $1,000 fines against the pastors, staff, and parishioners, including closure of the church. (A copy of Pastor Che Ahn's Declaration with the letter is reproduced in the Appendix as Exhibit H.)

REASONS FOR GRANTING THE APPLICATION

I. CHURCHES HAVE AN INDISPUTABLE RIGHT TO RELIEF BECAUSE THE ORDERS' DISCRIMINATORY TREATMENT OF RELIGIOUS WORSHIP SERVICES VIOLATES THE FREE EXERCISE CLAUSE.

A. The Orders Must Satisfy Strict Scrutiny Because They Substantially Burden Churches' Religious Exercise And Are Neither Neutral Nor Generally Applicable.

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), this Court held certain laws prohibiting religious practices violated the First Amendment, concluding "that the laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom." 508 U.S. at 524. The same can be said of the Orders here, which establish a scheme of gathering restrictions and exemptions that permit Churches to assemble an unlimited number of people in their church to provide and receive food, clothing, shelter, and counsel—as nonreligious social services—but prohibit religious preaching, communion, or other worship in the same church with the same people. Moreover, the scheme of restrictions and exemptions permit working, shopping, and patronizing myriad businesses and nonreligious activities involving groups and crowds of people, with no numerical limits, while prohibiting religious worship services of any size. Furthermore, the Governor has publicly commended and

encouraged mass protest gatherings by the thousands in violation of his Orders, granting a *de facto* exemption for the mass protests. Thus, ***the Orders discriminate between religious and nonreligious activities among similar groups of people, and even in the same church with the same people.*** The disparate treatment religion and religious exercise could not be clearer**.**

1. The Orders Substantially Burden Churches' Religious Exercise.

Churches have and exercise sincere religious beliefs, rooted in Biblical commands (*e.g.*, *Hebrews* 10:25), that Christians are not to forsake assembling together, and that they are to do so even more in times of peril and crisis. (V. Compl. ¶¶ 48–54, 57–58, 65.) "[T]he Greek work translated church . . . literally means **assembly**." *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 912 (W.D. Ky. 2020) (emphasis added). And Churches also have and exercise sincere beliefs that obedience to Scripture requires them to sing as, and in, their worship of God. (V. Compl. ¶¶ 59–64.) Though the Governor might not view church worship services and singing as fundamental to Churches' religious exercise—or "Essential Critical" like 'big box' and warehouse store shopping, or more important than mass protest gatherings—"religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Rev. Bd. of Ind. Emp. Security Div.*, 450 U.S. 707, 714 (1981). The Orders prohibiting or restricting Churches' religious worship services inside their churches or private homes, and prohibiting singing even where limited worship is allowed, on pain of criminal sanctions, unquestionably and substantially burdens Churches' exercise of

religion according to their sincerely held beliefs. "The Governor's actions substantially burden the congregants' sincerely held religious practices—**and plainly so**. Religion motivates the worship services." *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 613 (6th Cir. 2020) (emphasis added). *See also Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020) (same).

2. The Orders Are Neither Neutral Nor Generally Applicable Because They *Internally Discriminate* Between Churches' *Impermissible* Religious Worship Services And *Permissible* Nonreligious Activities In The Same Building For The Same Number Of People.

A law is not neutral "if the object of the law is to infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. Courts first look to the text, but "facial neutrality is not determinative. The Free Exercise Clause . . . extends beyond facial discrimination [and] forbids subtle departures from neutrality." *Id.* at 533–34 (cleaned up). The First Amendment prohibits hostility that is "masked, as well as overt." *Id.* The Orders are not facially neutral, and they covertly or subtly depart from neutrality by treating Churches' religious services differently from its nonreligious services in the same building.

The March 19 Stay-at-Home Order adopted, and the April 28 Essential Workforce Order expanded further, dozens of categories and subcategories of businesses and activities wholly exempt from stay-at-home requirements, subject only to recommended social distancing. (V. Compl. Exs. C-E, G.) These activities include the provision of "food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise needy individuals," which maintain

their exemption in all tiers under the Blueprint. (V. Compl. Exs. D, G.) Churches may provide food, shelter, unemployment, family, or drug counseling, and any other social services for the "necessities of life" **in their church buildings, without any numerical restrictions.** But the Blueprint (and the prior Orders) prohibit or discriminate against gatherings for religious purposes to provide spiritual food, communion, or spiritual counseling for worship or study in the same building. The Blueprint bans ALL religious gatherings in Tier 1 and discriminates in Tiers 2-4.

In Tier 2 counties where Churches are permitted to have limited indoor worship of 25% capacity with no more than 100 people, they feed, shelter, or provide nonreligious social services or counseling for "necessities of life" for an unlimited number of people in the same building. (V. Compl. ¶¶ 84–92, 101; Joint Statement at 8-9.) Churches in Tier 1 where ALL religious gatherings are prohibited they are still exempt to feed, counsel, and provide social services and necessities of life. (V. Compl. ¶¶ 94–97)

The Orders *internally* discriminate between Churches' nonreligious and religious activities – allowing the former and banning the latter in the Blueprint Tier 1, and discriminate between nonreligious and religious activities in Tiers 2-4. The Orders are not neutral or generally applicable even when comparing *internal* activities of the Churches. "Indeed, even non-worship activities conducted by or within a place of worship are not subject to the attendance parameters" otherwise applicable to places of worship. *Harvest Rock Church, Inc. v. Newsom*, 977 F.3d 728, 734 (9th Cir. 2020) (O'Scannlain, J., dissenting).

3. The Orders Are Neither Neutral Nor Generally Applicable Because They *Externally* Discriminate Between Churches' Religious Exercise, Which Are Totally Prohibited In Most California Counties, And Similarly Situated Nonreligious Activities.

a. The Orders explicitly permit myriad nonreligious activities without restriction.

As shown above, while religious worship is either prohibited or severely restricted under the Blueprint tiers, grocery stores, 'big box' retail stores like Walmart and Costco, warehouse home stores like Lowes and Home Depot, laundromats, warehouses, food processing plants, schools, museums, family entertainment centers, malls, destination centers, swap meets, and cardrooms, – all of which include similar nonreligious congregate activities to the Churches without numerical restrictions, or with numerical restrictions that are less stringent than those applied to places of worship. The disparate treatment of religious as compared to similar nonreligious congregate gatherings unquestionably and substantially burden the Churches' exercise of religion and violates the First Amendment.

As the Sixth Circuit held, twice,

> **Do the four pages of exceptions in the orders, and the kinds of group activities allowed, remove them from the safe harbor for generally applicable laws? We think so.** As a rule of thumb, the more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law. **At some point, an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny.**

Roberts v. Neace, 958 F.3d 409, 413-14 (6th Cir. 2020) (emphasis added).

"Assuming all of the same precautions are taken, why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister? The Commonwealth has no good answers." *Id.* at 414. Thus, the court rejected the Governor's suggestion "that the explanation for these groups of people to be in the same area—intentional worship—creates greater risks of contagion than groups of people, say, in an office setting or an airport," *id.* at 416, and further explained,

> the reason a group of people go to one place has nothing to do with it. Risks of contagion turn on social interaction in close quarters; the virus does not care why they are there. So long as that is the case, **why do the orders permit people who practice social distancing and good hygiene in one place but not another for similar lengths of time? It's not as if law firm office meetings and gatherings at airport terminals always take less time than worship services.**

Id. (emphasis added). *See also Maryville Baptist Church, Inc v. Beshear*, 957 F.3d 610 (6th Cir. 2020) (issuing injunction pending appeal against Kentucky's prohibition on in-person and drive-in worship services). The same is true here.

Regarding Gov. Newsom's clear discrimination in the Blueprint, Judge O'Scannlain in his dissent, wrote that in many counties in California

> indoor worship services are completely prohibited [but] in these same counties, the State still allows people to go indoors to: spend a day shopping in the mall, have their hair styled, get a manicure or pedicure, attend college classes, produce a television show or movie, participate in professional sports, wash their clothes at a laundromat, and even work in a meatpacking plant.

Harvest Rock Church, 977 F.3d at 731 (O'Scannlain, J., dissenting). He continued,

> the restrictions prescribed for "places of worship" limit attendance at in-person worship services as follows: (1) at the most severe, in counties designated to be "Tier 1" risks for COVID-19 spread, *no* in-person

> worship services may be held; (2) in Tier 2 counties, worship services may be held with no more than 25% of a building's capacity or 100 persons in attendance, whichever is fewer; (3) in Tier 3 counties, worship services can be held with no more than 50% of a building's capacity or 200 persons in attendance, whichever is fewer; and, finally, (4) in Tier 4 counties, worship services can be held with no more than 50% of a building's capacity, with no additional cap on attendance.

Id. at 733.

But, "[c]ritically, these same parameters do not apply broadly to all activities that might appear to be conducted in a *manner* similar to religious services—for example educational events, meetings, and seminars." *Id.* at 733-34. "Instead, each of these (and many other potentially similar) activities is regulated entirely separate from, and often more leniently than, religious services." *Id.* at 734. Indeed, "not *all* such activities are so tightly restricted" as religious services, and "so many *other* comparable secular businesses have been treated more favorably." *Id.*

Judge O'Scannlain correctly pointed out that many of the exempted activities or the activities treated more favorably – such as museums, gyms, shopping malls, family entertainment centers, warehouses, salons, and others – "involve gatherings of people from different households for extended periods of time—in many cases, hours on end." *Id.* at 736. "Yet, despite sharing these supposedly critical features of church attendance, these activities are all more open and available to Californians." *Id.* Judge O'Scannlain's reading of the Blueprint scheme under the Governor's Orders is correct beyond question. *See* Addendum 1 (outlining the discriminatory treatment afforded to Churches' religious worship services in every tier as compared to similar nonreligious activities).

b. The Governor's public support and encouragement of mass protestors, rioters, and looters demonstrates the Orders are not generally applicable.

The Governor has not only refused to enforce his COVID-19 stay-at-home restrictions upon the tens of thousands of protesters, he has openly encouraged them to continue. (V. Compl. ¶¶ 104–118.) Courts are noticing that open encouragement of protesters while prohibiting far smaller and less risky religious gatherings demonstrates a lack neutrality and generally applicability.

The constitutional incongruity of the Governor's encouragement of protesters while restricting worshippers was highlighted by Judge Ho's concurrence in *Spell v. Edwards*, 962 F.3d 175 (5th Cir. 2020. Judge Ho first recounted,

> At the outset of the pandemic, public officials declared that the *only* way to prevent the spread of the virus was for everyone to stay home and away from each other. They ordered citizens to cease all public activities to the maximum possible extent—even the right to assemble to worship or to protest

Id. at 180-81 (Ho., J., concurring). "But circumstances have changed. In recent weeks, officials have not only tolerated protests—they have encouraged them . . . ." *Id.* at 181.

> For people of faith demoralized by coercive shutdown policies, that raises a question: If officials are now exempting protesters, how can they justify continuing to restrict worshippers? **The answer is that they can't.** Government does not have carte blanche, even in a pandemic, to pick and choose which First Amendment rights are "open" and which remain "closed."

Id. (emphasis added).

Judge Ho noted, "To survive First Amendment scrutiny, however, those orders must be applied consistently, not selectively. And it is hard to see how that rule is

met here [in light] of the recent protests." *Id.* at 182. He continued, "It is common knowledge, and easily proved, that protesters do not comply with social distancing requirements. But instead of enforcing the Governor's orders, officials are **encouraging the protests**—out of an admirable, if belated, respect for First Amendment rights." *Id.* (emphasis added). That is equally true here, where thousands of protesters have gathered, yet the Governor publicly and unequivocally supported their flagrant violations of his orders. (V. Compl. ¶¶ 104–111). "**If protests are exempt from social distancing requirements, then worship must be too.**" *Spell*, 962 F.3d at 182 (emphasis added).

Of particular relevance, Judge Ho cited a brief filed by the United States in another case against Governor Newsom in observing that "California's political leaders have expressed support for such peaceful protests and, from all appearances, have not required them to adhere to the now-operative 100-person limit . . . . **It could raise First Amendment concerns if California were to hold other protests to a different standard**." *Id.* (emphasis added). Much like here, "**public officials cannot devalue people of faith while elevating certain protesters**. **That would offend the First Amendment—not to mention the principle of equality for which the protests stand**." *Id.* at 183 (emphasis added).

As Judge Ho stated, " "Those officials took no action when protesters chose to ignore health experts and violate social distancing rules. **And that forbearance has consequences**." *Id.* (emphasis added).

> The First Amendment does not allow our leaders to decide which rights to honor and which to ignore. In law, as in life, what's good for the goose is good for the gander. **In these troubled times, nothing should**

> **unify the American people more than the principle that freedom for me, but not for thee, has no place under our Constitution**.

Id. (emphasis added).

Similarly, as recounted in *Soos v. Cuomo*, No. 1:20-cv-651 (GLS/DJS), 2020 WL 3488742 (N.D.N.Y. June 26, 2020), the Governor of New York and the New York City Mayor openly encouraged protesters gathering in large numbers in New York, 2020 WL 3488742, *4–5, while continuing to prohibit in-person religious gatherings. *Id.* at *5-6. The court issued a preliminary injunction enjoining the enforcement of the "ever changing maximum number of people" for religious worship because the disparate treatment for protesters as compared to religious congregants in a worship service violated the First Amendment. *Id.*, at *8 ("[I]t is plain to this court that the broad limits of that executive latitude have been exceeded.").

"Mayor de Blasio's simultaneous pro-protest/anti-religious gatherings message . . . clearly undermines the legitimacy of the proffered reason for what seems to be a clear exemption, no matter the reason." *Id.* at *12. Indeed, "[t]hey could have also been silent. **But, by acting as they did, Governor Cuomo and Mayor de Blasio sent a clear message that mass protests are deserving of special treatment.**" *Id.* at *12 (emphasis added).

The same result should obtain here. The Orders discriminate between nonreligious and religious gatherings, and now sweep in Bible study and worship in private homes with anyone who does not live there. (V. Compl. ¶¶ 48–58, 73, 83–94.) The Orders dictate the manner in which Churches may worship by prohibiting singing and chanting where indoor worship is allowed, and by allowing provision and receipt of approved social services by unlimited numbers in the same church buildings

where religious worship services are either banned or several limited. (V. Compl. ¶¶ 71–73, 78, 98–103.) And the Governor has imposed these draconian restrictions on Churches while openly celebrating and encouraging mass gatherings for protests. (V. Compl. ¶¶ 104–111.) The Court should issue the injunction pending appeal.

B. Churches' Right To Relief Is Indisputably Clear Because The Orders Cannot Survive Strict Scrutiny.

1. The Governors' Disparate Treatment Of Comparable Nonreligious Activities Of Similar Nature Substantially Diminishes Any Assertion Of A Compelling Interest.

When "[a] speech-restrictive law with widespread impact" is at issue, "**the government must shoulder a correspondingly heavier burden and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights**." *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2472 (2018) (emphasis added). Here, because the Orders infringe upon Churches' free speech, assembly, and religious exercise rights, the government "must do more than simply posit the existence of the disease sought to be cured. **It must demonstrate that the recited harms are real, not merely conjectural**." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (emphasis added). This is so because "[d]eference to [the government] cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 841 (1978)

To be sure, preventing disease represents a "compelling interests of the highest order." *On Fire*, 453 F. Supp. 3d at 910. Churches do not doubt the desire to diminish

the spread of COVID-19. But where the Governor permits similar nonreligious congregate gatherings (even in the same church building) while banning religious gathering or otherwise discriminating such activities, and encourages preferred protest gatherings to violate his Orders, assertions of a compelling interest are substantially diminished. Put simply, the Orders "cannot be regarded as protecting an interest of the highest order . . . **when [they] leave[] appreciable damage to that supposedly vital interest unprohibited**." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (emphasis added); *see also Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2232 (2015) (same). Where the government creates a large system of exceptions, such as California's system of exempted businesses where people can gather without limit, the Supreme Court has recognized that such exceptions "can raise 'doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker.'" *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 448 (2015) (quoting *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786 (2011)). The Orders thus "have every appearance of a prohibition that society is prepared to impose upon [AWMI's religious gatherings] but not on itself." *The Florida Star v. B.J.F.*, 491 U.S. 524, 542 (1989) (Scalia, J., concurring). In fact, the Orders suggest that the Governor is prepared to accept the risk of gatherings at liquor, warehouse, supercenter, and so-called "non-essential" retail stores, **thousands of protestors in the streets of California**, and his own dinner party with friends, but cannot stomach Churches' assembly for a religious worship service, even with strict social distancing that is good enough for others. The Governor cannot permit broad swaths

of gatherings, carrying the same (if not greater) risk than that posed by Churches' gatherings, and still claim constitutional compliance.

2. The Orders Are Not The Least Restrictive Means.

Whatever interest the Governor claims, he cannot show the Orders are narrowly tailored to be the least restrictive means of protecting that interest. And it is the Governor's burden to make the showing because "the burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). "As the Government bears the burden of proof on the ultimate question of . . . constitutionality, **[Churches] must be deemed likely to prevail unless the Government has shown** that [their] proposed less restrictive alternatives are less effective than [the Orders]." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (emphasis added).

To meet this burden, the government must show it "**seriously** undertook to address the problem with less intrusive tools readily available to it," meaning that it "**considered different methods that other jurisdictions have found effective**." *McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014) (emphasis added). And the Governor cannot meet the burden by showing "simply that the chosen route is easier." *Id.* at 2540. Thus, the Governor "would have to show either that **substantially less-restrictive alternatives were tried and failed**, or that the **alternatives were closely examined and ruled out for good reason**." *Bruni v. City of Pittsburgh*, 824 F.3d 353, 370 (3d Cir. 2016) (emphasis added). "It is not enough to show that the Government's ends are compelling; the means must be

carefully tailored to achieve those ends." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). "There must be a fit between the . . . ends and the means chosen to accomplish those ends." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 572 (2011).

The Governor fails this test. The Governor prohibits and severely restricts religious gatherings while exempting myriad "Essential Critical" businesses and nonreligious activies involving similar congregate activates. (V. Compl. ¶¶ 68–97, 104–118.) The Governor's decision "has consequences," 962 F.3d at 183 (Ho, J., concurring), and the consequence here is that the Orders fail strict scrutiny.

Examples abound of less restrictive approaches that the Governor neither tried nor considered. (V. Compl. ¶¶ 126–139.)

> [O]ther Governors trusted the people of their states and exempted religious gatherings from any attendance limitations during this pandemic. The Governor has failed to cite any peer-reviewed study showing that religious interactions in those 15 states have accelerated the spread of COVID-19 in any manner distinguishable from nonreligious interactions. Likewise, common sense suggests that religious leaders and worshipers (whether inside or outside [the State]) have every incentive to behave safely and responsibly whether working indoors, shopping indoors, or worshiping indoors. **The Governor cannot treat religious worship as a world apart from nonreligious activities with no good, or more importantly, constitutional, explanation**.

Berean Baptist Church v. Cooper, 460 F. Supp. 3d 651, 662 (E.D.N.C. 2020) (emphasis added) (footnote omitted). Churches have demonstrated they can observe the distancing and hygiene guidance deemed sufficient for exempt businesses and nonreligious gatherings. (V. Compl. ¶¶ 119–125.) There is no justification for depriving Churches of the same consideration or benefit going forward.

The Governor cannot demonstrate that he deployed the least restrictive means because his Orders, and their application,

> are **"underinclusive"** ***and*** **"overbroad."** They're underinclusive because they don't prohibit a host of equally dangerous (or equally harmless) activities that the Commonwealth has permitted . . . . Those . . . activities include . . . walking into a liquor store where other customers are shopping. The Court does not mean to impugn the perfectly legal business of selling alcohol, nor the legal and widely enjoyed activity of drinking it. But if beer is "essential," **so is [church]**.

On Fire, 453 F. Supp. 3d at, at 911 (emphasis added) (footnote omitted). Because of the Governor's failure to tailor his gathering restrictions to closely fit the safety ends he espouses, and failure to try other, less restrictive alternatives that he cannot demonstrate are not working in other jurisdictions across the country, Churches "can likely show that the broad prohibition against in-person religious services . . . is not narrowly tailored to achieve the stated public health goals where the comparable secular gatherings are subjected to much less restrictive conditions." *First Baptist Church v. Kelly*,455 F. Supp. 3d 1078, 1090 (D. Kan. 2020).

II. CHURCHES' RIGHT TO RELIEF IS ALSO INDISPUTABLY CLEAR BECAUSE THE APPLICATION OF *JACOBSEN V. MASSACHUSETTS* TO FUNDAMENTAL RIGHTS UNDER THE FIRST AMENDMENT IS PLAINLY IN ERROR.

A. *Jacobsen* Did Not Involve The First Amendment, And Was Decided Decades Before The First Amendment Was Incorporated Against The States And Sixty Years Before Strict Scrutiny Would Be Established As The Standard.

This Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), is a significant contributing factor to the direct and substantial conflict among the circuit and district courts reviewing COVID-19 restrictions. A 115-year-old due process

opinion, with minimal progeny and substantial jurisprudential developments since its issuance, does not provide the standard in a contemporary First Amendment case. The majority of Churches' claims arise under the First Amendment. (V. Compl. ¶¶155-243.) *Jacobson*—importantly—did not involve such claims. Yet, the divided panel of the Ninth Circuit and the district court placed great emphasis on the *Jacobson* standard that was articulated long before the First Amendment even applied to the States and decades before this Court would introduce tiers of scrutiny. Indeed, it would not be until 1940 that this Court would first articulate the notion that "[t]he fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause). *See also Gitlow v. New York*, 268 U.S. 652, 666 (1925) (Free Speech Clause); *Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, 16 (1947) (Establishment Clause).

It would not be for another quarter century that "exacting judicial scrutiny" would even enter the First Amendment lexicon in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938), 50 years before the phrase "compelling interest" would enter First Amendment jurisprudence in Justice Frankfurter's concurrence in *Sweezy v. New Hampshire*, 354 U.S. 234, 65 (1957) (Frankfurter, J., concurring), and 60 years before strict scrutiny would be applied in its current form in *Sherbert v. Verner*, 374 U.S. 398 (1963). In recent years this Court has effectuated a monumental shift in how and when strict scrutiny is mandated in First Amendment cases. *See, e.g.*, *Blitch v. City of Slidell*, 260 F. Supp. 3d 656, 666 (E.D. La. 2017) ("*Reed v. Town*

of Gilbert[, 135 S. Ct. 2218 (2015)] then **worked a sea change in First Amendment law**." (emphasis added)); *see also Wollschlaeger v. Florida*, 848 F.3d 1293, 1332 (11th Cir. 2017) (Tjoflat, J., dissenting) (same).

Jacobson preceded these developments, did not involve the First Amendment, and could not foresee that First Amendment jurisprudence would require that restrictions on religious exercise survive "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 US. 507, 534 (1997). *Jacobson*, on the other hand, involved the extraordinarily deferential standard that state regulations during an emergency must be "beyond all question, a plain, palpable invasion of rights." 197 U.S. at 31. *Jacobsen* cannot be reconciled with First Amendment jurisprudence. The frequency of courts' citation to *Jacobson* in COVID-19 litigation around the country therefore raises a question of exceptional importance that this Court should clarify, lest the bedrock protections of the First Amendment be irretrievably discarded.

B. The Indefinite And Perpetually Reissued COVID-19 Restrictions Upon Religious Exercise Demonstrates That The Governor Has Turned Emergency Discretion Into An Impermissible Government By Executive Fiat, Which Is A Grave Threat To Constitutional Liberties.

The indefinite duration of the Governor's COVID-19 Orders also risks subjugating cherished constitutional rights to the dustbin of constitutional history by virtue of unchecked executive fiat. Such a regime is wholly foreign to the American experiment. Under the First Amendment, not to mention the entire regime established by the Constitution, a governor is not permitted to use exigent

circumstances to curtail the democratic process in perpetuity and usher in an undemocratic reign of governance by executive decree. "Although the *Jacobsen* Court unquestionably afforded a substantial level of deference to the discretion of state and local officials in matters of public health, it did not hold that discretion limitless." *County of Butler v. Wolf*, No. 2:20-cv-677, 2020 WL 55106990, *6 (W.D. Pa. Sept. 14, 2020). And, since the time *Jacobsen* was decided well over a century ago, "there has been substantial development of federal constitutional law in the area of civil liberties [and] this development has seen a jurisprudential shift whereby federal courts **have given greater deference to considerations of individual liberties**, as weighed against the exercise of state police powers." *Id.* (emphasis added).

> Courts are generally willing to give **temporary** deference to **temporary** measures aimed at remedying a fleeting crisis. . . . **But, that deference cannot go on forever. . . . Faced with ongoing interventions of indeterminate length, "suspension" of normal constitutional levels of scrutiny may ultimately lead to the suspension of constitutional liberties themselves**.

Id. at *9 (emphasis added).

> While respecting the immediate role of the political branches to address emergent situations, the judiciary cannot be overly deferential to their decisions. **To do so risks subordinating the guarantees of the Constitution**, guarantees which are the patrimony of every citizen, to the immediate need for an expedient solution. This is especially the case where, as here, measures directly impacting citizens are taken outside the normal legislative or administrative process by Defendants alone. There is no question that our founders abhorred the concept of one-person rule. The decried government by fiat. **Absent a robust system of checks and balances, the guarantees of liberties set forth in the Constitution are just ink on parchment**. There is no question that a global pandemic poses serious challenges to governments and for all Americans **But the response to a pandemic (or any emergency) cannot be permitted to undermine our system of constitutional liberties**.

Id. at *10 (emphasis added).

"Using normal levels of constitutional scrutiny in emergency circumstances does not prevent governments from taking extraordinary actions to face extraordinary situations." *Id.* It just requires them to understand that the Constitution does not have a pause button in times of perceived crisis. Put simply, "**[t]he application of normal scrutiny will only require the government to respect the fact that the Constitution applies even in times of emergency**." *Id.* (emphasis added).

C. This Court's Precedent Makes Clear That Perceived Exigencies Of Any Kind Cannot Justify The Suspension Of Constitutional Liberties.

This Court's precedents, too, demand that perceived emergencies not be used as a pretext for the suppression of constitutional liberties. In *Ex Parte Milligan*, this Court made clear that exigencies do not permit the Constitution to be overridden by government officials. 71 U.S. 2, 119 (1866) ("By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rules or the clamor of an excited people."). Speaking of the Founders of the great American experiment, this Court noted that "[t]hose great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law." *Id.* at 120-21. Indeed,

> The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads to directly to anarchy or despotism.

Id. at 120-21 (emphasis added).

This Court made these unequivocal statements in the middle of the Civil War, where there was no doubt greater urgencies of fellow countrymen warring against and slaughtering each other than of the unseen urgency of a virus. Yet, this Court held its ground:

> [I]f society is disturbed by civil commotion—if the passions of men are aroused and the restraints of law weakened, if not disregarded—these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired he blessing of liberty, consecrated by the sacrifices of the Revolution.

Id. at 124. Churches pray for the exercise of that same "watchful care" now.

Though it is now "insisted that the safety of the country in time of [crisis] demands that this broad claim for [unending emergency deference] shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so." *Id.* at 126.

III. CHURCHES' HAVE AN INDISPUTABLE RIGHT TO RELIEF BECAUSE THE ORDERS PLAINLY VIOLATE THE ESTABLISHMENT CLAUSE.

In their Verified Complaint, Churches challenged the Orders as a violation the Establishment Clause. (V.Compl. ¶¶222-243.) The district court provided only

slapdash treatment of this claim, despite the unequivocal pronouncements from this Court's binding precedent. That decision is in conflict with this Court's Establishment Clause decisions. Most notably, in *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947), this Court unequivocally held that **"[t]he establishment of religion clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church . . . Neither can force nor influence a person to go to or remain away from church against his will**." *Id.* at 15 (emphasis added). Also, this Court's precedents make clear that "[a]n attack founded on disparate treatment of religious claims invokes what is perhaps the central purpose of the Establishment Clause—the purpose of ensuring government neutrality in matters of religion." *Gillette v. United States*, 401 U.S. 437, 449 (1971). Finally, in *Lynch v. Donnelly*, this Court held that the Establishment Clause "affirmatively mandates accommodation, not merely tolerance, of all religions, **and forbids hostility towards any**. 465 U.S. 668, 674 (1984) (emphasis added). The *Everson*, *Gillette*, and *Lynch* triumvirate dictate that the Orders' disparate treatment of religious worship as compared to nonreligious gatherings at myriad other locations or nonreligious gatherings in Churches' own buildings violates the Establishment Clause. Put simply, the Orders force Churches and congregants to remain away from Church against their will, an indisputable violation of the Establishment Clause.

IV. CHURCHES ARE SUFFERING IRREPARABLE HARM AND WILL CONTINUE TO SO SUFFER ABSENT INJUNCTIVE RELIEF.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373

(1976). Thus, demonstrating irreparable injury in this matter "**is not difficult**. Protecting religious freedom was a vital part of our nation's founding, and it remains crucial today." *On Fire*, 453 F. Supp. 3d at 913 (emphasis added). With each passing Sunday, Churches are suffering under the yoke of the Governor's unconstitutional Orders prohibiting Churches from freely exercising their sincerely held religious beliefs requiring assembling themselves together to worship God. Indeed, absent an injunction, Churches "face an impossible choice: skip [church] service[s] in violation of their sincere religious beliefs, or risk arrest . . . or some other enforcement action for practicing those sincere religious beliefs." *Id.* at 914. Conversely, an injunction enjoining enforcement of the Orders on Churches' responsibly conducted worship services will impose no harm on California. "[T]here can be no harm to [the government] when it is prevented from enforcing an unconstitutional statute . . . ." *Joelner v. Vill. of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004). And, "[i]njunctions protecting First Amendment freedoms are always in the public interest." *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 590 (7th Cir. 2012).

V. ALTERNATIVELY, THIS COURT SHOULD GRANT CERTIORARI PRIOR TO JUDGMENT.

Pursuant to 28 U.S.C. 2101(e), this Court is permitted to grant certiorari before judgment in the court of appeals. Such a pre-judgment grant of certiorari is warranted where, as here, "the public importance of the issues presented and the need for their prompt resolution" warrants this Court's intervention. *United States v. Nixon*, 41 U.S. 683, 687 (1974). Here, the issues presented in Churches' Application involve rights which this Court has characterized as "lying at the foundation of a free

government of free men." *Schneider v. New Jersey*, 308 U.S. 147, 151 (1939). More importantly, there is a substantial circuit split concerning the issue of whether discriminatory COVID-19 restrictions on religious worship services are permissible under First Amendment. *Compare Maryville Baptist Church, Inc. v. Beshear,* 957 F.3d 610 (6th Cir. 2020), *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020), and *First Pentecostal Church v. City of Holly Springs, Miss.*, 959 F.3d 669 (5th Cir. 2020) (all holding that COVID-19 restrictions placing discriminatory burdens on religious worship services compared to nonreligious gatherings are subject to and cannot survive strict scrutiny and granting injunctive relief), *with Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020), *Harvest Rock Church v. Newsom*, No. 20-55907, 2020 WL 5835219 (9th Cir. Oct. 1, 2020), and *South Bay United Pentecostal Church v. Newsom*, 959 F.3d 938 (9th Cir. 2020) (all holding that *Jacobsen* controls the analysis of COVID-19 restrictions on First Amendment activity and denying injunctive relief). The circuit split could not be more pronounced.

Moreover, this Court currently has before it a Petition for a Writ of Certiorari from a fully developed record below presenting nearly identical questions to those at issue here. *See Elim Romanian Pentecostal Church v. Pritzker*, Case No. 20-569 (U.S. 2020). This Court's intervention to resolve the overwhelming circuit split is necessary, and certiorari should be granted.

CONCLUSION

For the foregoing reasons, Churches respectfully request that this Court grant the Application and grant certiorari to resolve these important questions.

Dated this November 20, 2020.

Respectfully submitted,

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No. 20A_____

IN THE SUPREME COURT OF THE UNITED STATES

HARVEST ROCK CHURCH, INC.; HARVEST INTERNATIONAL MINISTRY, INC., itself and on behalf of its member Churches in California,

Applicants,

v.

GAVIN NEWSOM,
in his official capacity as Governor of the State of California,

Respondent.

To the Honorable Elena Kagan,
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the Ninth Circuit

ADDENDUM TO APPLICATION FOR EMERGENCY WRIT OF INJUNCTION

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TABLE OF BLUEPRINT TIERS AND SELECTED SECTOR RESTRICTIONS

TIER 1 Widespread	SECTOR/ACTIVITY	RESTRICTIONS
	Places of Worship: religious services in building	**No indoor gathering; outdoor only**
	Places of Worship: nonreligious social services in building	**No building capacity or numerical limitation**
	Food packing and processing (Critical Infrastructure)	No building capacity or numerical limitation
	Laundromats (Limited Services)	No building capacity or numerical limitation
	Warehouses (Logistics and Warehousing Facilities)	No building capacity or numerical limitation
	Grocery Stores (Retail)	50% capacity with no maximum
	Other Essential Retail ('big box' stores)	25% capacity with no maximum
	Shopping Centers (Malls, Destination Centers, Swap Meets)	25% capacity with no maximum
	Museums	Outdoor only
	Gyms and Fitness Centers	Outdoor only
	Family Entertainment Centers	Outdoor only
	Cardrooms, Satellite Wagering	Outdoor only

TIER 2	SECTOR/ACTIVITY	RESTRICTIONS
Substantial	**Places of Worship: religious services in building**	**25% capacity or 100 people, whichever is fewer**
	Places of Worship: nonreligious social services in building	**No building capacity or numerical limitation**
	Food packing and processing (Critical Infrastructure)	No building capacity or numerical limitation
	Laundromats (Limited Services)	No building capacity or numerical limitation
	Warehouses (Logistics and Warehousing Facilities)	No building capacity or numerical limitation
	Grocery Stores (Retail)	50% capacity with no maximum
	Other Essential Retail ('big box' stores)	50% capacity with no maximum
	Shopping Centers (Malls, Destination Centers, Swap Meets)	50% capacity with no maximum
	Museums	25% capacity with no maximum
	Gyms and Fitness Centers	10% capacity with no maximum
	Family Entertainment Centers	Outdoor only
	Cardrooms, Satellite Wagering	Outdoor only

TIER 3 Moderate	SECTOR/ACTIVITY	RESTRICTIONS
	Places of Worship: religious services in building	**50% capacity or 200 people, whichever is fewer**
	Places of Worship: nonreligious social services in building	**No building capacity or numerical limitation**
	Food packing and processing (Critical Infrastructure)	No building capacity or numerical limitation
	Laundromats (Limited Services)	No building capacity or numerical limitation
	Warehouses (Logistics and Warehousing Facilities)	No building capacity or numerical limitation
	Grocery Stores (Retail)	No building capacity or numerical limitation
	Other Essential Retail ('big box' stores)	No building capacity or numerical limitation
	Shopping Centers (Malls, Destination Centers, Swap Meets)	No building capacity or numerical limitation
	Museums	50% capacity with no maximum
	Gyms and Fitness Centers	25% capacity with no maximum
	Family Entertainment Centers	25% capacity with no maximum
	Cardrooms, Satellite Wagering	25% capacity with no maximum

TIER 4 Minimal	SECTOR/ACTIVITY	RESTRICTIONS
	Places of Worship: religious services in building	**50% capacity with no maximum**
	Places of Worship: nonreligious social services in building	**No building capacity or numerical limitation**
	Food packing and processing (Critical Infrastructure)	No building capacity or numerical limitation
	Laundromats (Limited Services)	No building capacity or numerical limitation
	Warehouses (Logistics and Warehousing Facilities)	No building capacity or numerical limitation
	Grocery Stores (Retail)	No building capacity or numerical limitation
	Other Essential Retail ('big box' stores)	No building capacity or numerical limitation
	Shopping Centers (Malls, Destination Centers, Swap Meets)	No building capacity or numerical limitation
	Museums	No building capacity or numerical limitation
	Gyms and Fitness Centers	50% capacity with no maximum
	Family Entertainment Centers	50% capacity with no maximum
	Cardrooms, Satellite Wagering	50% capacity with no maximum