NO. 20-_____

In the Supreme Court of the United States

REVEREND KEVIN ROBINSON AND
RABBI YISRAEL A. KNOPFLER,

Applicants,

v.

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

Respondents.

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

EMERGENCY APPLICATION TO JUSTICE ALITO FOR AN INJUNCTION PENDING APPELLATE REVIEW

CHRISTOPHER A. FERRARA
THOMAS MORE SOCIETY
420 ROUTE 46 EAST – SUITE 7
FAIRFIELD, NJ 07004-6092
(973) 244-9895
CFERRARA@THOMASMORESOCIETY.ORG

MICHAEL G. MCHALE
THOMAS MORE SOCIETY
10506 BURT CIRCLE, SUITE 110
OMAHA, NE 68114
(402) 501-8586
MMCHALE@THOMASMORESOCIETY.ORG

STEPHEN M. CRAMPTON
COUNSEL OF RECORD
THOMAS BREJCHA
PETER BREEN
THOMAS MORE SOCIETY
309 W. WASHINGTON ST., SUITE 1250
CHICAGO, IL, 60606
(312) 782-1680
SCRAMPTON@THOMASMORESOCIETY.ORG

NOVEMBER 20, 2020 *COUNSEL FOR APPLICANTS*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

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

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

LIST OF PARTIES

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

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

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OPINIONS BELOW

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

JURISDICTION

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

EMERGENCY APPLICATION TO JUSTICE ALITO FOR AN INJUNCTION PENDING APPELLATE REVIEW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STATEMENT OF THE CASE

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

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

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

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

[4] *Id.* at ¶ 12.

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

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

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

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5 *Id.* at ¶¶ 6, 9, and 10.

6 *Id.*

7 *Id.*

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

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

10 *Id.*

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

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

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

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

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[11] *Id.* at ¶ 25.

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

[13] *Id.* at ¶¶ 2(a)-(e).

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

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

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

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

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14 *Id.* at ¶ 1(a).

15 *Id.*

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

17 *Id.*

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

100% of capacity, no numerical cap:

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

50% of capacity, no numerical cap:

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

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

19 EO 107, *supra* n. 3 at ¶ 11.

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

21 EO 107, *supra* n. 3 at ¶ 19.

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

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

24 EO 107, *supra* n. 3 at ¶ 11.

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

25% of capacity, no numerical cap:

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

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

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

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

B. The Exemption-Ridden Mask Mandate.

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

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

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

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[26] EO 157, *supra* n. 23 at ¶ 11.

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

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

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

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

Indoor private commercial spaces: Masks are not required when:

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

Outdoor public spaces: Masks are not required when:

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

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

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

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

[31] EO 163, *supra* n. 29 at ¶ 3.

[32] *Id.* at ¶¶ 1-3.

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

[34] *Id.* at ¶ 2.

[35] *Id.* at ¶ 3.

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

C. Father Robinson and Rabbi Knopfler.

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

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

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

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

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

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

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

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

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

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

D. Lower Court Proceedings.

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Schools.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Outdoor Crowds.

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

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

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

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

D. Other Comparators.

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

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

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

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

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

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

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

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

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

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

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

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

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

III. THE GOVERNMENT'S ORDERS FAIL STRICT SCRUTINY.

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

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

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

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

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

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

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

V. *JACOBSON* DOES NOT CHANGE THE ANALYSIS.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

Respectfully submitted,

/s/ Stephen Crampton
STEPHEN M. CRAMPTON
COUNSEL OF RECORD
THOMAS BREJCHA
PETER BREEN
THOMAS MORE SOCIETY
309 W. WASHINGTON ST., SUITE 1250
CHICAGO, IL, 60606
(312) 782-1680
SCRAMPTON@THOMASMORESOCIETY.ORG

CHRISTOPHER A. FERRARA
THOMAS MORE SOCIETY
420 ROUTE 46 EAST – SUITE 7
FAIRFIELD, NJ 07004-6092
(973) 244-9895
CFERRARA@THOMASMORESOCIETY.ORG

MICHAEL G. MCHALE
THOMAS MORE SOCIETY
10506 BURT CIRCLE, SUITE 110
OMAHA, NE 68114
(402) 501-8586
MMCHALE@THOMASMORESOCIETY.ORG

COUNSEL FOR APPLICANTS

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