**No. 20A95**

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 for Writ of Injunction to the Honorable Samuel Alito, Associate Justice of the United States Supreme Court and Circuit Justice for the Third Circuit**

## MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AND THE MEDICAL SOCIETY OF NEW JERSEY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

The American Medical Association (AMA) and the Medical Society of New Jersey (MSNJ) respectfully move for leave to file the accompanying brief as *amici curiae* in support of the Respondents. The Respondents have consented to the filing of this *amicus* brief. Counsel for the Applicants did not respond to requests for consent.

Since the COVID-19 pandemic began, this Court and others have grappled with the States' attempts to balance public health and civil liberties, including the free exercise of religion. For scientific questions, particularly questions about the relative risks of religious services and other activities, the courts have largely relied on assumptions and guesses. This is not an aspersion; knowledge about transmission of the novel coronavirus (SARS-CoV-2) has developed quickly, and much of it was not yet available when the courts issued their decisions.

The AMA and MSNJ believe that scientific research has progressed enough to identify factors that contribute to the risks of various activities, and to compare the risks of various activities to each other. As the largest organizations of physicians in the United States and the State of New Jersey, respectively, the AMA and MSNJ share a strong interest in assuring that decisions about public health are rooted in sound science. Their *amicus* brief will assist the court by explaining that science, and putting it in the context of the executive orders at issue in this case.

Respectfully submitted,

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## CORPORATE DISCLOSURE STATEMENT

The American Medical Association and the Medical Society of New Jersey have no parent corporation, and no publicly held company has a 10% or greater ownership interest in their stock.

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## BRIEF OF *AMICI CURIAE*

The American Medical Association (AMA) and the Medical Society of New Jersey (MSNJ) respectfully submit this brief as *amici curiae* in support of the Respondents.[1]

## INTEREST OF *AMICI CURIAE*

The AMA is the largest professional association of physicians, residents, and medical students in the United States. Through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all United States physicians, residents and medical students are represented in the AMA's policymaking process. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every state, including New Jersey, and in every medical specialty, including infectious diseases. The AMA believes that governmental mandates designed to halt the spread of SARS-CoV-2, the virus that causes COVID-19, should be based on sound science.

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[1] The Respondents have consented to the filing of this *amicus* brief. Counsel for the Applicants did not respond to requests for consent. Providing ten days' notice to the parties as required under Rule 37.2(a) was not possible because the request for a response to the Application was docketed five days before the response was due. No counsel for a party authored this brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. No person other than the *amici curiae*, their members, or their counsel, made such a monetary contribution.

Founded in 1766, MSNJ is the oldest professional society in the United States. The organization and its dues-paying members are dedicated to a healthy New Jersey, working to ensure the sanctity of the physician–patient relationship. In representing all medical disciplines, MSNJ advocates for the rights of patients and physicians alike, for the delivery of the highest quality medical care. MSNJ joins the AMA's belief that governmental mandates designed to halt the spread of COVID-19 should be based on sound science.

The AMA and MSNJ submit this brief on their own behalf and as representatives of the Litigation Center of the AMA and the State Medical Societies. The Litigation Center is a coalition of the AMA and the medical societies of each state and the District of Columbia. One of its purposes is to present the viewpoint of organized medicine to the courts in cases of importance to the practice of medicine or to public health.

## SUMMARY OF ARGUMENT

COVID-19, the greatest public health emergency in a century, has required governments to make difficult choices about how best to protect their citizens. To do so, these governments must weigh science on one hand, and the basic human needs and civil liberties of their citizens on the other. Among these civil liberties is the free exercise of religion, for which the AMA and MSNJ have the utmost respect.

The AMA and MSNJ will not tell this court how to strike that balance, but they do believe that the science clearly shows that congregating indoors, as the Applicants ask this Court to allow, endangers public health. Remaining in close proximity indoors

for long durations, as well as singing and talking, make attendance at a religious service risky, even if congregants follow precautions. The risk profile of a religious service is similar to that of attending an indoor sporting event, going to a bar, or eating in a restaurant, all of which are subject to the same 25% capacity limit that applies to religious services. In sum, New Jersey's rules treat religious services no more strictly than similarly risky activities.

## ARGUMENT

### I. Several Factors Determine the Risk of Spreading SARS-CoV-2.

In the months since COVID-19 arrived, scientists and physicians have learned a great deal about how the disease spreads from person to person, and how to contain it. Everyone is now familiar with many preventive measures, such as wearing masks, social distancing, and frequent hand washing. Even with these precautions, some activities remain risky. Several factors affect their relative risks:

*Inconsistent use of masks.* Masks reduce the emission of respiratory droplets laden with SARS-CoV-2, and also help the wearer reduce inhalation of these droplets. According to the CDC, "The community benefit of masking for SARS-CoV-2 control is due to the combination of these effects; individual prevention benefit increases with increasing numbers of people using masks consistently and correctly."[2]

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[2] Centers for Disease Control and Prevention, *Scientific Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2* (Nov. 20, 2020), https://www.cdc.gov/coronavirus/2019-ncov/more/masking-science-sars-cov2.html.

*Enclosed spaces.* Clusters of COVID-19 infections are linked mostly to indoor settings.[3] Even if improved ventilation may in theory reduce transmission, there is currently no scientific consensus on ventilation standards for controlling the spread of SARS-CoV-2.[4]

*Large groups.* On average, larger groups will contain more people who are infected, and more people who can potentially become infected. Empirical research and predictive modeling both show that reducing time spent in large groups reduces COVID-19 outbreaks.[5] Excluding people who show symptoms of COVID-19 cannot solve the problem because a substantial proportion of transmission—perhaps a majority—involves presymptomatic or asymptomatic carriers.[6]

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[3] Quentin J. Leclerc et al., *What settings have been linked to SARS-CoV-2 transmission clusters?*, 5 Wellcome Open Research 83 (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7327724/; Hua Qian et al., *Indoor Transmission of SARS-CoV-2*, Indoor Air (forthcoming 2020), https://onlinelibrary.wiley.com/doi/10.1111/ina.12766.

[4] Kenichi Azuma, et al., *Environmental factors involved in SARS-CoV-2 transmission: effect and role of indoor environmental quality in the strategy for COVID-19 infection control*, 25 Environmental Health & Preventative Medicine 66 (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7607900/.

[5] Huaiyu Tian et al., *An investigation of transmission control measures during the first 50 days of the COVID-19 epidemic in China*, 368 Science 638 (2020), https://pubmed.ncbi.nlm.nih.gov/32234804/; Kenji Karako et al., *Analysis of COVID-19 infection spread in Japan based on stochastic transition model*, 14 Biosci Trends 134 (2020), https://www.jstage.jst.go.jp/article/bst/14/2/14_2020.01482/_pdf/-char/en.

[6] Luca Ferretti et al., *Quantifying SARS-CoV-2 transmission suggests epidemic control with digital contact tracing*, 368 Science 619 (2020), https://science.sciencemag.org/content/368/6491/eabb6936; Xi He et al., *Temporal dynamics in viral shedding and transmissibility of COVID-19*, 26 Nature Medicine

*Close proximity to others.* An infectious person sheds the virus through respiration in droplets that range in size. While the largest droplets do not travel far before falling to the ground or encountering a barrier, the smallest droplets can remain airborne and travel farther than six feet, the figure that many use as a rule of thumb for social distancing.[7] In the scientific community, there is no agreed-upon "safe" distance.[8] That said, standing near an infectious person is riskier than standing farther away.[9]

*Long duration of exposure and staying in one place*. The amount of virus to which a person is exposed can influence the chance of infection, as well as its severity. That amount depends on how long a person

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672 (2020), https://www.nature.com/articles/s41591-020-0869-5; Xi He et al., *Author Correction: Temporal dynamics in viral shedding and transmissibility of COVID-19*, 26 Nature Medicine 1491 (2020), https://www.nature.com/articles/s41591-020-1016-z.

[7] Chanjuan Sun & Zhiqiang Zhai, *The efficacy of social distance and ventilation effectiveness in preventing COVID-19 transmission*, 62 Sustainable Cities & Society 102390 (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7357531/pdf/main.pdf.

[8] Mahesh Jawaweera et al., *Transmission of COVID-19 virus by droplets and aerosols: A critical review on the unresolved dichotomy*, 188 Environmental Research 109819 (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7293495/#.

[9] Yuki Furuse et al., *Clusters of Coronavirus Disease in Communities, Japan, January–April 2020*, 26 Emerging Infectious Diseases 2176 (2020), https://wwwnc.cdc.gov/eid/article/26/9/20-2272_article; Charles Courtemanche et al., *Strong Social Distancing Measures In The United States Reduced The COVID-19 Growth Rate*, 39 Health Affairs (Millwood) 1237 (2020), https://pubmed.ncbi.nlm.nih.gov/32407171/.

spends breathing the virus in. Staying in one place for a longer time creates a higher risk of infection.[10]

*Loud talking and singing.* Loud speech can emit thousands of oral fluid droplets per second.[11] Many of these droplets can remain in the air for eight to fourteen minutes before evaporating.[12] Likewise, singing expels large amounts of oral fluid droplets—significantly more than normal talking produces.[13] One of the earliest and best-known superspreader events in the United States was a choir practice at which fifty-three of the sixty-one attendees became infected.[14]

## II. Attending a Religious Service Is Among the Riskiest Activities.

Religious services have every one of the risk factors listed above. Large groups of people enter an enclosed space, then sit or stand near each other for a

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[10] Maogui Hu et al., *The risk of COVID-19 transmission in train passengers: an epidemiological and modelling study*, Clinical Infectious Diseases ciaa1057, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7454391/pdf/ciaa1057.pdf.

[11] Valentyn Stadnytskyi et al., *The airborne lifetime of small speech droplets and their potential importance in SARS-CoV-2 transmission*, 117 Proceedings of the National Academy of Sciences 11875 (2020), https://www.pnas.org/content/117/22/11875.long.

[12] *Id.*

[13] Malin Alsved et al., *Exhaled respiratory particles during singing and talking*, 54 Aerosol Science & Technology 1245 (2020), https://www.tandfonline.com/doi/full/10.1080/02786826.2020.1812502.

[14] Lea Hamner et al., *High SARS-CoV-2 Attack Rate Following Exposure at a Choir Practice — Skagit County, Washington, March 2020*, 69 Morbidity & Mortality Weekly Report 606 (2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6919e6.htm.

significant amount of time, and typically talk and sing. Social distancing protocols and mask-wearing could mitigate these risk factors to some extent, but would not eliminate any of them. Since the COVID-19 pandemic began, several outbreaks have been tied to religious services in the United States and abroad.[15]

A religious service's profile of risk factors closely matches that of other activities that are understood to be relatively dangerous, including eating inside a restaurant, or attending an indoor concert or sporting event. Other activities, such as shopping at a pet store or working in an office, lack one or more of the risk factors associated with religious services.

Epidemiologists and physicians generally agree that religious services are among the riskiest activities. The Illinois State Medical Society asked physicians and infectious disease specialists to rate thirty-seven activities by their COVID-19 exposure risk; in third place was "Attending a large indoor religious service, concert or other event (more than 50 people)," even if participants wore masks and adhered to social

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[15] Allison James et al., *High COVID-19 Attack Rate Among Attendees at Events at a Church — Arkansas, March 2020*, 69 Morbidity & Mortality Weekly Report 632 (2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6920e2.htm; Kate Conger, Jack Healy, & Lucy Tompkins, *Churches Were Eager to Reopen. Now They Are Confronting Coronavirus Cases.*, N.Y. Times, July 8, 2020 (updated July 10, 2020), https://www.nytimes.com/2020/07/08/us/coronavirus-churches-outbreaks.html; Sungchan Kim et al., *Evaluation of COVID-19 epidemic outbreak caused by temporal contact-increase in South Korea*, 96 International Journal of Infectious Diseases 454 (2020), https://europepmc.org/backend/ptpmcrender.fcgi?accid=PMC7224674&blobtype=pdf.

distancing.[16] (Without masks and social distancing, this activity ranked first.) The only two riskier activities were going to a bar and hugging or shaking hands. "Grocery or other indoor shopping" was in twenty-fifth place. In a similar survey conducted by the Texas Medical Association, "Attending a religious service with 500+ worshippers" tied for the highest risk score with attending a large music concert, going to a sports stadium, and going to a bar.[17] By contrast, "Working a week in an office building" was considered a moderate risk, comparable to swimming in a public pool. Grocery shopping was considered a "low-moderate" risk, comparable to playing golf. Finally, the New York Times asked 511 epidemiologists when they expect to resume twenty activities of daily life.[18] The plurality estimated that it would be a year or more before they would "Attend a church or other religious service," trailing only "Stop routinely wearing a face covering" and "Attend a sporting event, concert or play" for the longest anticipated wait until the activity could be resumed. The vast majority of the epidemiologists expected to work in a shared office in less than a year.

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[16] Illinois State Medical Society, *ISMS COVID-19 Risk Survey* (2020), https://www.isms.org/Resources/For_Physicians/COVID chart/.

[17] Texas Medical Association, *TMA Chart Shows COVID-19 Risks for Various Activities* (2020), https://www.texmed.org/Texas MedicineDetail.aspx?id=54216. Survey respondents assumed that participants in each activity would wear a mask when practical, stay at least 6 feet away from people who are not immediate family members, and wash their hands frequently.

[18] Margot Sanger-Katz, Claire Cain Miller, & Quoctrung Bui, *When 511 Epidemiologists Expect to Fly, Hug and Do 18 Other Everyday Activities Again*, N.Y. Times, June 8, 2020, https:// www.nytimes.com/interactive/2020/06/08/upshot/when-epidemio logists-will-do-everyday-things-coronavirus.html.

A recent epidemiological study matches the consensus among physicians and epidemiologists. The study used cell-phone location data from 98 million people and a model of coronavirus spread to project the number of cases of COVID-19 that could be avoided by not reopening various types of establishments.[19] "Religious Organizations" were clustered at the high end with establishments like fitness centers and limited-service restaurants.[20] The numbers of cases avoided by not reopening stores (including grocery stores, pet stores, hardware stores, and convenience stores) were much lower.

Although schools superficially share many of the same risk factors as religious services, their different demographics seem to reduce the risk of virus transmission. While children can contract COVID-19, they appear not to contract or spread the virus as readily, at least among younger children.[21] Studies in

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[19] Serina Chang et al., *Mobility Network Models of COVID-19 explain inequities and inform reopening*, Nature (forthcoming 2020), https://www.nature.com/articles/s41586-020-2923-3_reference.pdf.

[20] *Id.*, Extended Data Figure 5(d).

[21] Russell M. Viner, Oliver T. Mytton, and Chris Bonell, *Susceptibility to SARS-CoV-2 Infection Among Children and Adolescents Compared With Adults: A Systematic Review and Meta-analysis*, JAMA Pediatrics (Sept. 25, 2020; corrected Nov. 2, 2020), https://jamanetwork.com/journals/jamapediatrics/fullarticle/2771181; Walter S. Gilliam et al., *COVID-19 Transmission in US Child Care Programs*, Pediatrics (forthcoming 2020), https://pediatrics.aappublications.org/content/pediatrics/early/2020/10/16/peds.2020-031971.full.pdf ("Gilliam").

the United States and abroad have shown that outbreaks in schools are rare.[22]

In addition, any comparisons between religious institutions and workplaces like retail stores, factories, warehouses, and meatpacking plants must take into account the different way in which the capacities of those buildings are measured, and how activities in those buildings are regulated. It is the *amici*'s understanding that building codes allow churches and synagogues to accommodate more people in a given space than large workplaces, and that social distancing would likely be impossible at a religious service at 100% capacity. For example, the capacity of a pew is one person per eighteen inches, while a warehouse may require as much as 500 square feet per person.[23] Even at 25% of capacity, a religious service may be more tightly packed than some workplaces at 50% or even 100% of capacity. Moreover, there is no counterpart to the Occupational Safety and Health Administration to enforce safety requirements at a religious service. The CDC has issued guidance for meat and poultry processing facilities, warehouses, and factories to reduce the risk of virus transmission. A religious service at 100% capacity would be too densely populated to comply with this guidance.[24] It would be

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[22] Gilliam; Danilo Buonsenso et al., *SARS-CoV-2 infections in Italian schools: preliminary findings after one month of school opening during the second wave of the pandemic*, medRxiv (preprint 2020), https://www.medrxiv.org/content/10.1101/2020.10.10.20210328v1.

[23] International Building Code § 1004 (2018), https://codes.iccsafe.org/content/IBC2018/chapter-10-means-of-egress.

[24] *See, e.g.*, Centers for Disease Control and Prevention, *Meat and Poultry Processing Facilities: Key Strategies to Prevent COVID-19 Infection among Employees*, https://www.cdc.gov/

incorrect simply to assume that a religious institution limited to 25% capacity is necessarily subject to more stringent restrictions than a factory at 100% capacity.

## III. New Jersey's Rules Treat Religious Services at Least as Leniently as Comparably Risky Activities.

When comparing New Jersey's restrictions on various activities, it is important to classify those activities by the risk they pose. On the spectrum of risk, attending a religious service, even with precautions, is similar to eating in a restaurant or bar, working out at a gym, or attending an indoor concert or sporting event, all of which are subject to a capacity limit of 25%.[25] It is substantially different from activities such as attending school (where most of the attendees are children), getting a facial (where only two people are present), shopping at Costco (where building capacity is calculated differently, interactions between shoppers are fleeting, and no one is singing), playing contact sports (which take place outdoors), and mass celebrations (which also take place outdoors). And attending an indoor religious service where the use of masks is discretionary, as the Applicants request, is singularly dangerous; there is likely no activity permitted in New Jersey that would pose a greater risk to public health.

New Jersey's rules thus treat religious services at least as leniently as comparable activities, and as leniently as some non-comparable activities as well. For example, facials, acupuncture, and other one-on-one personal care activities would not be treated any

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coronavirus/2019-ncov/downloads/community/FS-MeatProcessing-EMPLOYERS.pdf.

[25] Casino gambling also is subject to a capacity limit of 25%.

more strictly if they were religious in nature because New Jersey's rules allow for at least ten people to attend a religious service, regardless of the building's capacity. Moreover, the different methods for calculating capacity of religious institutions and other businesses may mean that a secular business operating at 50% or even 100% capacity may be less densely packed than a religious institution at 25% capacity.

## CONCLUSION

The AMA and MSNJ sympathize with the Respondents, who must balance public health with civil liberties in a difficult and fast-changing pandemic, and with the Applicants, who sincerely believe in the importance of their mission. While the AMA and MSNJ recognize that this case cannot be decided by science alone, they believe that the Court's understanding of the science should be as accurate as possible. The science indicates that even with protective measures in place, attending a religious service is inherently risky, that its risk is comparable to that of secular activities subject to the same limitations, and that this risk cannot be eliminated. Moreover, granting discretion over mask use would allow religious services to become incomparably risky.

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