IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DWELLING PLACE NETWORK, et al., ***Plaintiffs*,** **v.** **PHILIP D. MURPHY, in his official capacity as Governor of the State of New Jersey, et al.,** ***Defendants.***	**Case No.: 1:20-cv-06281-RBK-AMD**

BRIEF OF *AMICUS CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE IN SUPPORT OF DEFENDANTS AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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Antietam Battlefield KOA v. Hogan,
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Berean Baptist Church v. Cooper,
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Binford v. Sununu,
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Calvary Chapel of Bangor v. Mills,
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Cantwell v. Connecticut,
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Cassell v. Snyders,
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Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
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City Council v. Taxpayers for Vincent,
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City of Dallas v. Stanglin,
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Clark v. Cmty. for Creative Non-Violence,
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Compagnie Francaise de Navigation a Vapeur v. La. Bd. of Health,
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Corp. of the Presiding Bishop v. Amos,
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Cross Culture Christian Ctr. v. Newsom,
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Crowl v. Inslee,
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Cutter v. Wilkinson,
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Davis v. Berke,
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Elim Romanian Pentecostal Church v. Pritzker,
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Elkhorn Baptist Church v. Brown,
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Epperson v. Arkansas,
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First Baptist Church v. Kelly,
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First Pentecostal Church v. City of Holly Springs,
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First Pentecostal Church v. City of Holly Springs,
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Frisby v. Schultz,
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Garcia v. San Antonio Metro. Transit Auth.,
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Giboney v. Empire Storage & Ice Co.,
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Globe Newspaper Co. v. Superior Court,
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Hannibal & St. Joseph R.R. Co. v. Husen,
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Hawse v. Page,
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Hotze v. Hidalgo,
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Hughes v. Northam,
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TABLE OF AUTHORITIES—continued

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Jacobson v. Massachusetts,
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Johnson v. Robison,
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King v. Governor of New Jersey,
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Legacy Church, Inc. v. Kunkel,
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Lighthouse Fellowship Church v. Northam,
__ F. Supp. 3d __, No. 2:20-cv-2040,
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Lighthouse Inst. For Evangelism, Inc. v. City of Long Branch,
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Locke v. Davey,
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McCormick v. Stalder,
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Nat'l Inst. of Family & Life Advocates v. Becerra,
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Nikolao v. Lyon,
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On Fire Christian Ctr., Inc. v. Fischer,
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Our Lady of Sorrows Church v. Mohammad,
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Prince v. Massachusetts,
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Reynolds v. United States,
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Roberts v. Neace,
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Roberts v. U.S. Jaycees,
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Rumsfeld v. Forum for Academic & Institutional Rights, Inc.,
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Sherbert v. Verner,
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S. Bay United Pentecostal Church v. Newsom,
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S. Bay United Pentecostal Church v. Newsom,
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2020 WL 2813056 (May 29, 2020) 7, 10, 15, 18

Spell v. Edwards,
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2020 WL 2509078 (M.D. La. May 15, 2020) 17

Tabernacle Baptist Church v. Beshear,
__ F. Supp. 3d __, No. 3:20-cv-33,
2020 WL 2305307 (E.D. Ky. May 8, 2020) 18

Texas Monthly, Inc. v. Bullock,
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Thomas v. Collins,
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Tolle v. Northam,
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Turner Broad. Sys. v. F.C.C.,
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Ungar v. N.Y.C. Hous. Auth.,
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Ward v. Rock Against Racism,
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Williams-Yulee v. Fla. Bar,
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Wisconsin v. Yoder,
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Constitutions, Statutes, and Orders

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. XIV 20

42 U.S.C. § 2000bb(b) 12

Executive Order No. 102 (Feb. 3, 2020),
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Executive Order No. 103 (Mar. 9, 2020),
https://bit.ly/2M1zMLX 3

Executive Order No. 104 (Mar. 16, 2020),
https://bit.ly/2LYfp2g 4

Executive Order No. 107 (Mar. 21, 2020),
https://bit.ly/3bWUS8I ..... *passim*

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Executive Order No. 142 (May 13, 2020), https://bit.ly/36nL3zy ..... *passim*

Executive Order No. 143 (May 14, 2020), https://bit.ly/2AV5xnJ 11

Executive Order No. 148 (May 22, 2020), https://bit.ly/2XAy6ye 5, 6, 7, 11

Standing Order 20-02 (Mar. 16, 2020), https://bit.ly/2X4paST 4

Standing Order 2020-12 (May 22, 2020), https://bit.ly/2ZFf4tx 2, 5

Other Authorities

Attorney General William P. Barr Issues Statement on Religious Practice and Social Distancing, U.S. Dep't of Justice (Apr. 14, 2020), https://bit.ly/2RIYzHO 7, 8

Lateshia Beachum, *Two churches reclose after faith leaders and congregants get coronavirus*, WASH. POST (May 19, 2020), https://wapo.st/2WQgW0x 14

Coronavirus in the U.S.: Latest Map and Case Count, N.Y. TIMES (updated June 2, 2020), https://nyti.ms/2X27lE6 ..... 1, 5

COVID-19 Dashboard, CTR. FOR SYS. SCI. & ENGINEERING AT JOHNS HOPKINS UNIV. (last visited June 2, 2020), https://bit.ly/2xR2V99 1

Chris Epp, *'I would do anything for a do-over': Calgary church hopes others learn from their tragic COVID-19 experience*, CTV NEWS (updated May 11, 2020), https://bit.ly/3dLUv2l 14, 15

Hilda Flores, *One-third of COVID-19 cases in Sac County tied to church gatherings, officials say*, KCRA (Apr. 1, 2020), https://bit.ly/2XlCpPu 23

John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TULANE L. REV. 565 (2010) 19

Rong-Gong Lin II, et al., *Social distancing may have helped California slow the virus and avoid New York's fate*, L.A. TIMES (Mar. 31, 2020), https://lat.ms/2VSbYih 2

TABLE OF AUTHORITIES—continued

Page(s)

CHRISTI A. GRIMM, U.S. DEP'T OF HEALTH & HUMAN SERVS., HOSPITAL EXPERIENCES RESPONDING TO THE COVID-19 PANDEMIC (Apr. 2020), https://bit.ly/2VTEMIm 14

Bailey Loosemore & Mandy McLaren, *Kentucky county 'hit really, really hard' by church revival that spread deadly COVID-19*, LOUISVILLE COURIER JOURNAL (updated Apr. 2, 2020), https://bit.ly/2XkKCnd 24

N.J. coronavirus deaths rise to 11,770 with 161,545 total cases. Another 708 new positive test[s] confirmed., NJ.COM (June 2, 2020), https://bit.ly/2XXWryx 1

Philip Oltermann, et al., *The cluster effect: how social gatherings were rocket fuel for coronavirus*, GUARDIAN (Apr. 9, 2020), https://bit.ly/369Sb2B 10

Richard Read, *A choir decided to go ahead with rehearsal; Now dozens of members have COVID-19 and two are dead*, L.A. TIMES (Mar. 29, 2020), https://lat.ms/2yiLbU6 24

Joe Severino, *COVID-19 tore through a black Baptist church community in WV; Nobody said a word about it*, CHARLESTON GAZETTE-MAIL (May 2, 2020), https://bit.ly/2WxQyae 24

The State of Our State's Coronavirus Fight, SEATTLE TIMES (Apr. 12, 2020), https://bit.ly/2KtMqTq 2

INTEREST OF *AMICUS CURIAE*

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that is committed to preserving the constitutional principles of religious freedom and the separation of religion and government. Americans United has long fought to uphold the guarantees of the First Amendment's Religion Clauses that government must not favor, disfavor, or punish based on religion or belief, and therefore that religious accommodations must not license maltreatment of, or otherwise detrimentally affect, third parties.

INTRODUCTION AND SUMMARY OF ARGUMENT

New Jersey, along with most of the world, continues to face a historically devastating pandemic. The United States has more than 1.8 million confirmed cases of COVID-19 and more than 100,000 deaths—the most worldwide. *See COVID-19 Dashboard*, CTR. FOR SYS. SCI. & ENGINEERING AT JOHNS HOPKINS UNIV. (last visited June 2, 2020), https://bit.ly/2xR2V99. New Jersey currently has the second-highest number of reported cases and deaths in the country. *See Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (updated June 2, 2020), https://nyti.ms/2X27lE6. And the number of cases and the death toll in New Jersey are still climbing. *See N.J. coronavirus deaths rise to 11,770 with 161,545 total cases. Another 708 new positive test[s] confirmed.*, NJ.COM (June 2, 2020), https://bit.ly/2XXWryx.

Though much about the virus remains unknown, what we do know—that the virus spreads through asymptomatic carriers, and that there is currently no known vaccine or effective treatment—demands decisive action from leaders at all levels of government. As part of New Jersey's emergency statewide public-health response, Governor Phil Murphy has temporarily prohibited in-person gatherings that would put large numbers of people in close proximity, restricted the operations of many businesses that are permitted to remain open, and ordered residents to stay at home. *See* Executive Order No. 107 (Mar. 21, 2020), https://bit.ly/3bWUS8I;

Executive Order No. 142 (May 13, 2020), https://bit.ly/36nL3zy. These temporary restrictions reduce contacts between people and with contaminated surfaces, slow the spread of the virus, and save lives. Indeed, reports from other regions suggest that orders of this type have been successful in limiting transmission of COVID-19. *See, e.g.*, *The State of Our State's Coronavirus Fight*, SEATTLE TIMES (Apr. 12, 2020), https://bit.ly/2KtMqTq; Rong-Gong Lin II, et al., *Social distancing may have helped California slow the virus and avoid New York's fate*, L.A. TIMES (Mar. 31, 2020), https://lat.ms/2VSbYih.

While the Governor's orders do temporarily limit the size of religious gatherings, Plaintiffs' religious-exercise rights have not been violated. The Supreme Court has explained that neutral, generally applicable laws reflecting no discriminatory intent toward religion do not violate the Free Exercise Clause of the First Amendment. The restrictions here comply with this principle: The virus is just as likely to spread at religious events as at nonreligious ones, so the orders apply to all in-person gatherings equally, regardless of motivation. Indeed, the Governor's orders have affected all areas of New Jersey society. In fact, in conjunction with the Governor's orders, this Court has issued its own orders delaying criminal and civil jury trials through August 31, 2020. *See* Standing Order 2020-12 (May 22, 2020), https://bit.ly/2ZFf4tx.

The challenged orders are thus subject to rational-basis review. But even if heightened scrutiny were called for—which is not the case—the orders still should be upheld because they are narrowly tailored to advance New Jersey's compelling interest in protecting its residents from a deadly disease. As the Supreme Court has held, personal liberty is subject to reasonable, temporary restrictions to secure the health of the state during a public-health emergency.

Nor have Plaintiffs' rights under the Free Speech or Assembly Clauses of the First Amendment been violated. The challenged orders regulate conduct rather than speech. And to the extent the orders burden inherently expressive conduct, they trigger only intermediate scrutiny, a

standard that is easily satisfied here because the orders are content neutral, advance an important governmental interest unrelated to the suppression of speech, and do not burden substantially more speech than necessary to advance that interest.

What is more, the Establishment Clause of the First Amendment forbids granting the religious exemption that Plaintiffs seek. For if government imposes harms on third parties when it exempts religious exercise from the requirements of the law, it impermissibly favors the benefited religion and its adherents over the rights, interests, and beliefs of nonbeneficiaries. Holding that in-person religious gatherings must be exempted from the prohibition on gatherings would do just that: A single contagious person at a religious service may infect scores of fellow congregants, who may then expose family, friends, and strangers, including countless people who did not attend the service.

For reasons similar to those set forth here, the overwhelming majority of decisions considering religion-based challenges to COVID-19-related public-health measures—including orders of the Supreme Court and the First, Third, Fourth, Seventh, Eighth, and Ninth Circuits denying injunctions pending appeal—have rejected them. Plaintiffs' motion for a preliminary injunction should likewise be denied.

STATEMENT OF RELEVANT FACTS

On February 3, 2020, more than a month before New Jersey reported its first confirmed cases of COVID-19, Governor Murphy established a Coronavirus Task Force chaired by the New Jersey Department of Community Health to "coordinat[e] all State efforts to appropriately prepare for and respond to the public health hazard posed by the virus." *See* Executive Order No. 102 (Feb. 3, 2020), https://bit.ly/2AaLfWS. By March 9, there were 500 reported cases and 22 confirmed deaths in the United States, with 11 "presumed positive" cases and 24 more under investigation in New Jersey. *See* Executive Order No. 103 (Mar. 9, 2020), https://bit.ly/2M1zMLX. On March 16,

with 178 confirmed cases in the State, Governor Murphy issued Executive Order No. 104, which, pursuant to CDC guidelines: (1) limited social gatherings to 50 people; (2) closed public and private preschools and elementary and secondary schools, and restricted in-person instruction at institutions of higher learning; and (3) closed to the public numerous nonreligious institutions and businesses, including restaurants, gyms, casinos, and entertainment venues and centers. *See* Executive Order No. 104 (Mar. 16, 2020), https://bit.ly/2LYfp2g.

The number of cases nationwide and within the State grew apace. By the time Governor Murphy issued Executive Order No. 107, on March 21, there were more than 15,000 confirmed cases and 200 deaths in the United States and 890 reported cases, with at least 11 deaths, in New Jersey. *See* EO-107, *supra*. EO-107 followed CDC recommendations that individuals practice "social distancing"—"remaining out of congregate settings, avoiding mass gatherings, and maintaining distance (approximately 6 feet or 2 meters) from others when possible"—to prevent community spread of COVID-19, which happens "most frequently through person to person contact when individuals are within six feet or less of one another." *Id.* The order therefore cancelled "gatherings of individuals, such as parties, celebrations, or other social events," except where otherwise authorized. *Id.* ¶ 5. The order did not single out houses of worship for disfavored treatment.

Indeed, COVID-19 has had a dramatic impact on the operations and activities of government, businesses, and other entities, including those of this Court. Chief Judge Wolfson has adopted several standing orders to assist in mitigating the devastating effects of this virus. On March 16, Chief Judge Wolfson announced visitor restrictions and postponed criminal and civil jury trials scheduled to begin before April 30. *See* Standing Order 20-02 (Mar. 16, 2020), https://bit.ly/2X4paST. On May 22, the Court extended to August 31 the postponement of jury trials, the deadline for the government to file an indictment or information in criminal cases, and

the "excluded time" for criminal defendants under the Speedy Trial Act. *See* Standing Order 2020-12, *supra*. In short, this public-health emergency has temporarily burdened the basic legal rights of criminal and civil litigants.

As described above, New Jersey now has more than 160,000 reported cases of COVID-19 and more than 11,000 deaths. *See Coronavirus in the U.S.*, *supra*. But hospitalizations have decreased and the numbers of reported cases and deaths, while still growing, are on a downward trend. Hence, on May 13, Governor Murphy ordered that indoor gatherings of up to ten people be permitted. *See* EO-142 ¶ 8. And most recently, recognizing that "outdoor environments present reduced risks of transmission as compared to indoor environments," Governor Murphy loosened restrictions on outdoor gatherings, permitting in-person gatherings of up to twenty-five people, as long as they observe social-distancing requirements. *See* Executive Order No. 148 (May 22, 2020), https://bit.ly/2XAy6ye.

ARGUMENT

I. THE ORDERS DO NOT VIOLATE THE FREE EXERCISE CLAUSE.

A. Rational-Basis Review Applies To The Challenged Orders.

The freedom to worship in accordance with one's spiritual needs is a right of the highest order; and it is natural that, in difficult and scary times like these, people will seek the comfort and support that their faith communities provide. But the legal guarantees of religious freedom have never provided absolute license to engage in conduct consistent with one's religious beliefs. *E.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940). Plaintiffs nevertheless argue that the Free Exercise Clause entitles them to an exemption from the temporary, emergency public-health measures enacted by the Governor to combat a pandemic. That claim is wrong as a matter of law: Government may temporarily restrict individual rights to protect "against an epidemic of disease which threatens the safety of its [citizens]." *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905).

"The right to practice religion freely does not include liberty to expose the community . . . to a communicable disease." *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944).

The Supreme Court's Free Exercise jurisprudence makes clear that while government cannot forbid a religious practice *because* it is religious, religion-based disagreement with the law does not excuse noncompliance. "To permit this would be to make the professed doctrines of religious belief superior to the law of the land," which would "in effect . . . permit every citizen to become a law unto himself." *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879)). The Supreme Court has therefore held that laws that burden religious conduct are constitutionally permissible—and need satisfy only rational-basis review—when they are neutral toward religion and apply generally. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *Smith*, 494 U.S. at 879.

The neutrality requirement means that a law must not "infringe upon or restrict practices *because of* their religious motivation." *Lukumi*, 508 U.S. at 533 (emphasis added). The Free Exercise Clause thus bars discrimination against religion both facially and through "religious gerrymanders" that target specific religious conduct. *Id.* at 534. General applicability is the closely related concept (*id*. at 531) that government, "in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief" (*id.* at 543). The touchstone for both inquiries is whether the government has discriminated against religious conduct. *Id.* at 533–34, 542–43.

New Jersey's orders evince no hostility toward religion. They ban all gatherings that would bring more than ten people together indoors or more than twenty-five people together outdoors, whether for religious or secular activities. EO-107 ¶ 5; EO-142 ¶ 8; EO-148 ¶ 1. The Governor's orders thus bar gathering for "parties, celebrations, or other social events." EO-107 ¶ 5. They close all "recreational and entertainment businesses" where large numbers of people gather, including

gyms and fitness centers, movie theaters, performing-arts centers, nightclubs, indoor shopping malls, salons, libraries, and public and private social clubs. *Id.* ¶¶ 8, 9. And in defining different categories of businesses, the orders draw no distinctions based on religious views or motivations: Hospitals, food banks, and media organizations, for example, may remain open regardless of whether they have a religious affiliation. *Id.* ¶¶ 17–19; *cf. Ungar v. N.Y.C. Hous. Auth.*, 363 F. App'x 53, 56 (2d Cir. 2010) (holding that limited categorical exceptions to public-housing policy did not negate general applicability because exceptions were equally available to religious and nonreligious applicants).

And the orders *do* permit some religious gatherings to take place: up to ten people may congregate indoors (EO-142 ¶ 8), up to twenty-five people may congregate outdoors (EO-148 ¶ 1), and congregations may gather for drive-in religious services in which worshippers remain in their vehicles (EO-142 ¶¶ 4–7). The orders likewise explicitly permit residents to "leave[ ] the home for a[ ] . . . religious . . . reason. EO-107 ¶ 2. Hence, the orders treat religious gatherings the same as or more favorably than equivalent secular activity.

In similar circumstances, in *South Bay United Pentecostal Church v. Newsom*, __ S. Ct. __, No. 19A1044, 2020 WL 2813056 (May 29, 2020), the Supreme Court refused to issue an emergency injunction against a California public-health order. Concurring in the denial of the application for injunctive relief, Chief Justice Roberts explained, "Although California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment." *Id.* at *1. "Similar or more severe restrictions," emphasized the Chief Justice, "apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time." *Id.*; *accord Attorney General William P. Barr Issues Statement on Religious Practice and Social Distancing*, U.S. Dep't of

Justice (Apr. 14, 2020), https://bit.ly/2RIYzHO (urging that religious gatherings be treated like gatherings at movie theaters, restaurants, and concert halls).

That the orders here allow some businesses and operations to continue does not negate general applicability. In this Circuit, a law fails the requirement of general applicability only if it establishes a "regime of individualized, discretionary exemptions" or "burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated." *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004). Hence, in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 364–67 (3d Cir. 1999), the court of appeals held that a city's policy of prohibiting police officers from wearing beards for religious reasons but allowing them for medical reasons was not neutral and generally applicable because the permitted secular exemption undermined the policy's purpose of ensuring uniformity among officers' appearances as much as the disallowed religious exemption would. And in *Blackhawk*, Pennsylvania's refusal to waive a wildlife permit for the plaintiff, who kept bears for religious reasons, while waiving the fee for zoos and circuses, was held to not be generally applicable because the exemptions for zoos and circuses equally undermined the state's interests in bringing in money and discouraging the keeping of wild animals. 381 F.3d at 211.

Importantly, "[a] regulation does not automatically cease being neutral and generally applicable . . . simply because it allows certain secular behaviors but not certain religious behaviors." *Lighthouse Inst. For Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 265 (3d Cir. 2007). The "relevant question" is whether the government "pursued its aims evenhandedly, generally allowing the kinds of uses that would further the [law's] goals and prohibiting the uses that would interfere with them." *Id.* at 275–76. "Heightened scrutiny [is] warranted only when a

principled distinction [cannot] be made between the prohibited religious behavior and its secular comparator in terms of their effects on the regulatory objectives." *Id.* at 266. So in *Lighthouse*, a zoning ordinance disallowing houses of worship but allowing certain categories of secular assemblies in a given zone was generally applicable because the permitted secular uses were "likely to further [the city's] aims" of revitalizing the area, "not harm them." *Id.* at 276; *see also King v. Governor of New Jersey*, 767 F.3d 216, 242 (3d Cir. 2014) (law prohibiting counselors from engaging in "sexual orientation change efforts" was generally applicable, notwithstanding supposed exemptions allowing counseling regarding gender transition and counseling that "facilitates exploration and development of same-sex attractions," because those permitted subjects were not "equally harmful to minors" and therefore were not comparable to the prohibited subject matter), *abrogated on other grounds by Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

That the Governor's orders permit essential retail businesses—such as those providing grocery, pharmacy, medical, and other similar services (EO-107 ¶ 6)—to remain open to the public does not negate general applicability. The orders restrict religious and analogous nonreligious gatherings equally. EO-107 ¶ 5; EO-142 ¶¶ 4–8. Nothing in the orders permits groups of more than ten people to congregate in essential retail businesses. *See* EO-107 ¶¶ 5–7; EO-142 ¶ 8. And in all events, allowing essential retail entities to operate does not "undermine[] the purposes of the law to at least the same degree as the covered conduct that is religiously motivated." *See Blackhawk*, 381 F.3d at 209. The Governor made a "principled distinction" (*Lighthouse*, 510 F.3d at 266) between the public-health risks of walking through a retail store and those associated with sitting in a room with scores of people for an extended period. Research demonstrates that "events where people spen[d] a length of time in each others' close company," such as parties, funerals, and religious gatherings, pose a notably higher risk of spreading the virus than fleeting interactions.

See Philip Oltermann, et al., *The cluster effect: how social gatherings were rocket fuel for coronavirus*, GUARDIAN (Apr. 9, 2020), https://bit.ly/369Sb2B.

Thus, in *South Bay*, the Supreme Court did not accept the argument that retail stores are a proper comparator to religious services. The Chief Justice's opinion explained that the order challenged there "exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods." __ S. Ct. __, 2020 WL 2813056, at *1. As the Chief Justice recognized, unlike religious gatherings, at which members of a faith community join together for an extended period, shopping for necessary services and supplies involves at most only limited, transitory interactions between customers and vendors. The decision not to prohibit less dangerous yet indispensable activities did not negate the Order's neutrality.

What is more, the permitted retail activities here do not "harm" but instead "further [the] aims" of New Jersey to safeguard public health (*Lighthouse*, 510 F.3d at 276) by ensuring that people can obtain items essential to health and survival. If in combating the virus the Governor were to close grocery stores, pharmacies, gas stations, banks, medical suppliers, laundromats, and similar services, the health crisis would be exacerbated. Medical professionals' ability to treat COVID-19 patients would be impaired without supplies and reliable transportation, and the entire medical system would suffer greater strain from additional illness and injury caused by the public's inability to eat, treat existing illnesses, and maintain sanitary living conditions.

Nor is the general applicability of the orders undermined by permitting nonessential retail and other workplaces to carry out limited operations. *See* EO-142 ¶ 9. The orders continue to bar the public from entering nonessential retail businesses, which may open only for curbside pickup. *See id.* Again, fleeting transactions do not carry the same risk of transmission of COVID-19 as do sustained, in-person, indoor gatherings. And while other types of non-retail businesses may remain

open as necessary for their employees to perform their essential job functions, members of the public are not permitted to patronize those businesses. *See* EO-107 ¶¶ 2, 6; EO-142 ¶ 2. Moreover, like employees of other such entities, clergy and their staff may go to their houses of worship to carry out permitted functions. *See* EO-107 ¶¶ 2(5), (7). They, like any other enterprise, just cannot hold in-person, indoor gatherings of more than ten people. EO-142 ¶¶ 4–8.

Finally, the Governor's recent decision to open beaches and similar outdoor spaces to the public, subject to strict social-distancing requirements (Executive Order No. 143 (May 14, 2020), https://bit.ly/2AV5xnJ), does not change things. Outdoor gatherings of more than twenty-five people are prohibited—whether for religious worship or recreation. *Id.* ¶ 3(g); EO-148 ¶ 1. And, in all events, Plaintiffs are seeking an exemption that would entitle them to hold *indoor* religious gatherings.

Simply put, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)). Plaintiffs' religious beliefs do not afford a constitutional excuse for noncompliance.

B. The Orders Would Satisfy Even A Compelling-Interest Test.

Even if the prohibition on in-person gatherings were subject to heightened scrutiny, which it isn't, Plaintiffs' free-exercise claim would still fail. More than a century of constitutional jurisprudence demonstrates that neutral restrictions on religious exercise tailored to containing contagious diseases withstand a compelling-interest test.

Before its decision in *Smith* in 1990, the Supreme Court interpreted the Free Exercise Clause to require application of the compelling-interest test whenever religious exercise was substantially burdened by governmental action. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 407

(1963); *see also* 42 U.S.C. § 2000bb(b) (stating that purpose of federal Religious Freedom Restoration Act was "to restore the compelling interest test as set forth in" *Sherbert* and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). But even the Court's pre-*Smith* free-exercise decisions repeatedly acknowledged that there is no right to religious exemptions from laws, like the orders here, that shield the public from serious disease.

1. The orders serve a compelling governmental interest.

Government has a compelling interest in protecting the health and safety of the public in general and in preventing the spread of communicable diseases in particular. *See Sherbert*, 374 U.S. at 402–03; *accord Yoder*, 406 U.S. at 230 & n.20. "[P]owers on the subject of health and quarantine [have been] exercised by the states from the beginning." *Compagnie Francaise de Navigation a Vapeur v. La. Bd. of Health*, 186 U.S. 380, 396–97 (1902). On that basis, the Supreme Court more than a century ago upheld a mandatory-vaccination law aimed at stopping the spread of smallpox. *See Jacobson*, 197 U.S. at 25 (citing "the authority of a state to enact quarantine laws and 'health laws of every description'"). The Court straightforwardly rejected the idea that the Constitution bars compulsory measures to protect health, citing the "fundamental principle" that personal liberty is subject to restraint "in order to secure the . . . health . . . of the state." *Id.* at 26 (quoting *Hannibal & St. Joseph R.R. Co. v. Husen*, 95 U.S. 465, 471 (1877)). Because "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members," individual rights are subject to reasonable restrictions—especially during a public-health emergency like the one that we now face. *See Jacobson*, 197 U.S. at 27; *cf. United States v. Pitt*, 144 F.2d 169, 171 (3d Cir. 1944) ("This does not mean that the Constitution was suspended for the duration of the emergency, but that the conditions which faced the United States at the time the [law] was passed must play a cogent part in determining any question related to its constitutionality.").

The Supreme Court has repeatedly reaffirmed that public-health regulations that burden religious exercise withstand a compelling-interest inquiry. *See Sherbert*, 374 U.S. at 402–03 (citing mandatory vaccinations in *Jacobson* as example of burden on religion that satisfies compelling-interest test); *Yoder*, 406 U.S. at 230; *see also Prince*, 321 U.S. at 166–67. And lower federal courts have consistently recognized that the government has a compelling interest in preventing the spread of communicable disease. *See, e.g.*, *McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1997) ("[T]he prison's interest in preventing the spread of tuberculosis, a highly contagious and deadly disease, is compelling."); *Whitlow v. California*, 203 F. Supp. 3d 1079, 1089–90 (S.D. Cal. 2016) (collecting cases); *see also Nikolao v. Lyon*, 875 F.3d 310, 316 (6th Cir. 2017) (noting, in case involving statutory exemptions from vaccination law, that "[c]onstitutionally, [plaintiff] has no right to an exemption").

There can be no doubt that New Jersey has a compelling interest in stanching the spread of COVID-19. And that interest calls for limiting all large gatherings, including religious ones, so as not to undermine governmental efforts to reduce transmission.

2. The orders are narrowly tailored.

A compelling-interest test, if it applied, would also consider whether the challenged orders are narrowly tailored to the governmental interest at stake. *E.g.*, *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 607 (1982). Narrow tailoring does not, however, demand "perfect tailoring." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 454 (2015). Even "[a] complete ban can be narrowly tailored . . . if each activity within the proscription's scope is . . . appropriately targeted." *Frisby v. Schultz*, 487 U.S. 474, 487 (1988); *accord, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628–29 (1984) (ban on all gender discrimination narrowly tailored to combating evil of gender discrimination). Accordingly, the Supreme Court (*see Sherbert*, 374 U.S. at 403 (citing *Jacobson*, 197 U.S. at 26–27)) and many other federal and state courts (*see, e.g.*, *Whitlow*, 203 F. Supp. 3d

at 1089–90 (collecting cases)) have concluded that blanket prohibitions on refusing immunizations satisfy a compelling-interest test.

Governor Murphy's orders operate in the same way. No vaccine for COVID-19 yet exists, and hospitals nationwide have experienced "severe shortages of testing supplies and extended waits for test results." *See* CHRISTI A. GRIMM, U.S. DEP'T OF HEALTH & HUMAN SERVS., HOSPITAL EXPERIENCES RESPONDING TO THE COVID-19 PANDEMIC 3 (Apr. 2020), https://bit.ly/2VTEMIm. Without the capacity to test comprehensively for the virus, New Jersey cannot tailor its restrictions solely to those residents who have been diagnosed as having the virus. So temporarily restricting the size of in-person gatherings and enforcing social distancing and hygiene in permitted activities is the only way for the State to achieve its compelling interest in safeguarding the lives and health of its residents. The orders are no broader than necessary to ensure that the targeted activities—sustained physical gatherings of large numbers of people that create a significant risk of transmission of the virus—are curtailed.

To suggest that the orders are not narrowly tailored because in-person mass gatherings could be carried out with social-distancing measures in place ignores the obvious: Barring large gatherings entirely is more likely to reduce transmission of COVID-19 than is permitting large gatherings with attempts at social distancing. Under the compelling-interest test, a law is narrowly tailored if "proposed alternatives will not be as effective" in achieving the state's goal. *See Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004). That is the case here. For example, churches in Texas and Georgia that had reopened recently had to close again after church leaders and members contracted the virus at church despite social-distancing measures. Lateshia Beachum, *Two churches reclose after faith leaders and congregants get coronavirus*, WASH. POST (May 19, 2020), https://wapo.st/2WQgW0x. Similarly, a church service in Canada that complied with social-distancing guidelines nonetheless led to an outbreak that infected half of those present. Chris Epp,

'I would do anything for a do-over': Calgary church hopes others learn from their tragic COVID-19 experience, CTV NEWS (updated May 11, 2020), https://bit.ly/3dLUv2l.

Moreover, the Chief Justice's opinion in *South Bay* explained that "[t]he 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." __ S. Ct. __, 2020 WL 2813056, at *1. The Chief Justice added, "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.'" *Id.* (quoting *Jacobson*, 197 U.S. at 38 (alteration in original)). "When those officials 'undertake[ ] to act in areas fraught with medical and scientific uncertainties,'" continued the Chief Justice, "their latitude 'must be especially broad.'" *Id.* (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974) (alteration in original)). "Where 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," concluded the Chief Justice. *Id.* (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545 (1985)). Accordingly, this Court should not second-guess Governor Murphy's decisions here.

C. The Vast Majority Of Courts To Consider Similar Free-Exercise Challenges To COVID-19-Related Orders Have Rejected Them.

For reasons similar to those explained above, the great majority of decisions around the country, even before the Supreme Court's ruling in *South Bay*—including orders of the First, Third, Fourth, Seventh, Eighth, and Ninth Circuits—have denied injunctive relief in challenges like this one to in-person-gathering restrictions and stay-at-home orders.

For example, the Seventh Circuit recently explained in denying a motion for injunction pending appeal:

> [Illinois'] Executive Order 2020-32 responds to an extraordinary public health emergency. The Executive Order does not discriminate against religious activities, nor does it show hostility toward religion. It appears instead to impose neutral and

> generally applicable rules . . . . [Its] temporary numerical restrictions on public gatherings apply not only to worship services but also to the most comparable types of secular gatherings, such as concerts, lectures, theatrical performances, or choir practices, in which groups of people gather together for extended periods, especially where speech and singing feature prominently and raise risks of transmitting the COVID-19 virus. Worship services do not seem comparable to secular activities permitted under the Executive Order, such as shopping, in which people do not congregate or remain for extended periods.

Elim Romanian Pentecostal Church v. Pritzker, No. 20-1811, 2020 WL 2517093, at *1 (7th Cir. May 16, 2020) (per curiam) (Easterbrook, Kanne, & Hamilton, JJ.) (citation omitted), *injunction pending appeal denied after challenged order expired*, __ S. Ct. __, No. 19A1046, 2020 WL 2781671 (U.S. May 29, 2020). And as the Ninth Circuit put it in its opinion in *South Bay United Pentecostal Church v. Newsom*, "[W]here state action does not 'infringe upon or restrict practices because of their religious motivation' and does not 'in a selective manner impose burdens only on conduct motivated by religious belief,' it does not violate the First Amendment." __ F.3d __, No. 20-55533, 2020 WL 2687079, at *1 (9th Cir. May 22, 2020) (quoting *Lukumi*, 508 U.S. at 543). In another case in which the Ninth Circuit denied a motion for an injunction pending appeal, a California district court held that because challenged state and local "orders apply to both religious and secular gatherings, they do not discriminate, and are therefore facially neutral." *Gish v. Newsom*, No. 5:20-cv-755, 2020 WL 1979970, at *5–6 (C.D. Cal. Apr. 23, 2020), *motion for injunction pending appeal denied*, No. 20-55445, ECF No. 21 (9th Cir. May 7, 2020). In a case in which the Fourth Circuit denied a motion for injunction pending appeal, a Virginia district court held not only that the plaintiff was unlikely to succeed on the merits but also that the balance of equities favored the state because "it is no exaggeration to recognize that the stakes for residents . . . are life-or-death." *Tolle v. Northam*, No. 1:20-cv-363, 2020 WL 1955281, at *1–2 (E.D. Va. Apr. 8, 2020), *motion for injunction pending appeal denied*, No. 20-1419, ECF No. 14 (4th Cir.

Apr. 28, 2020), *petition for cert. docketed*, No. 19-1283 (U.S. May 12, 2020).[1] And the Third Circuit recently affirmed a district court's denial of a motion for injunctive relief from Delaware's order restricting indoor religious gatherings to thirty-percent capacity, though neither court expressed a view on the merits of the plaintiff's claims. *Bullock v. Carney*, __ F.3d __, No. 20-2096, 2020 WL 2819228 (3d Cir. May 30, 2020), *denying motion for injunction pending appeal of* __ F. Supp. 3d __, No. 1-20-cv-674, 2020 WL 2813316 (D. Del. May 29, 2020).

In only a few jurisdictions—principally the Sixth Circuit and courts within it—has any injunctive relief been granted in religion-based challenges to COVID-19 orders. *See Roberts v. Neace*, 958 F.3d 409, 412, 416 (6th Cir. 2020) (per curiam order on motion for injunction pending appeal); *Maryville Baptist Church v. Beshear*, 957 F.3d 610 (6th Cir. 2020) (same); *Berean Baptist*

[1] Many other federal and state courts have reached similar conclusions when evaluating challenges like this one. *See, e.g.*, *Antietam Battlefield KOA v. Hogan*, __ F. Supp. 3d __, No. 1:20-cv-1130, 2020 WL 2556496, at *7–10, 12–14 (D. Md. May 20, 2020), *appeal docketed*, No. 20-1579 (May 22, 2020); *Spell v. Edwards*, __ F. Supp. 3d __, No. 3:20-cv-282, 2020 WL 2509078, at *2–4 (M.D. La. May 15, 2020); *Calvary Chapel of Bangor v. Mills*, __ F. Supp. 3d __, No. 1:20-cv-156, 2020 WL 2310913, at *6–10 (D. Me. May 9, 2020), *motion for injunction pending appeal denied*, No. 20-1507 (1st Cir. June 2, 2020); *Cross Culture Christian Ctr. v. Newsom*, __ F. Supp. 3d __, No. 2:20-cv-832, 2020 WL 2121111, at *5–7 (E.D. Cal. May 5, 2020), *appeal dismissed*, No. 20-15977, ECF No. 14 (9th Cir. May 29, 2020); *Cassell v. Snyders*, __ F. Supp. 3d __, No. 3:20-cv-50153, 2020 WL 2112374, at *6–11 (N.D. Ill. May 3, 2020), *appeal docketed*, No. 20-1757 (7th Cir. May 6, 2020); *Lighthouse Fellowship Church v. Northam*, __ F. Supp. 3d __, No. 2:20-cv-2040, 2020 WL 2110416, at *4–8 (E.D. Va. May 1, 2020), *appeal docketed*, No. 20-1515 (4th Cir. May 4, 2020); *Legacy Church v. Kunkel*, __ F. Supp. 3d __, No. 1:20-cv-327-JB-SCY, 2020 WL 1905586, at *30–38 (D.N.M. Apr. 17, 2020); *Davis v. Berke*, No. 1:20-cv-98, 2020 WL 1970712, at *2–3 (E.D. Tenn. Apr. 17, 2020); *Nigen v. New York*, No. 1:20-cv-1576, 2020 WL 1950775, at *1–2 (E.D.N.Y. Mar. 29, 2020); *see also Our Lady of Sorrows Church v. Mohammad*, No. 3:20-cv-00674, ECF No. 14 (D. Conn. May 18, 2020); *Crowl v. Inslee*, No. 3:20-cv-5352, ECF No. 30 (W.D. Wash. May 8, 2020); *Abiding Place Ministries v. Wooten*, No. 3:20-cv-683, ECF No. 7 (S.D. Cal. Apr. 10, 2020); *Elkhorn Baptist Church v. Brown*, No. S067736 (Ore. May 23, 2020); *Hughes v. Northam*, No. CL 20-415 (Va. Cir. Ct. Russell Cty. Apr. 14, 2020); *Hotze v. Hidalgo*, No. 2020-22609 (Tex. Dist. Ct. Apr. 13, 2020); *Binford v. Sununu*, No. 217-2020-CV-00152 (N.H. Super. Ct. Mar. 25, 2020); *cf. Hawse v. Page*, No. 4:20-cv-588, 2020 WL 2322999, at *3 (E.D. Mo. May 11, 2020) (standing-based ruling), *motion for injunction pending appeal denied*, No. 20-1960 (8th Cir. May 19, 2020).

Church v. Cooper, __ F. Supp. 3d __, No. 4:20-cv-81, 2020 WL 2514313 (E.D.N.C. May 16, 2020); *Tabernacle Baptist Church v. Beshear*, __ F. Supp. 3d __, No. 3:20-cv-33, 2020 WL 2305307 (E.D. Ky. May 8, 2020); *On Fire Christian Ctr. v. Fischer*, __ F. Supp. 3d __, No. 3:20-cv-264, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020); *First Baptist Church v. Kelly*, __ F. Supp. 3d __, No. 6:20-cv-1102, 2020 WL 1910021 (D. Kan. Apr. 18, 2020). But those cases were decided before the Supreme Court's decision in *South Bay* and are at odds with the Chief Justice's reasoning there. They incorrectly concluded that the compelling-interest test applied to the orders at issue based on categorical exemptions for nonreligious activities, such as office work or walking down a store aisle, that are quite different from religious gatherings and pose less danger of spreading the virus. *Compare, e.g.*, *Neace*, 958 F.3d at 414, *with South Bay*, __ S. Ct. __, 2020 WL 2813056, at *1 (Roberts, C.J., concurring in denial of application for injunctive relief). And in determining that the restrictions were not narrowly tailored, those decisions incorrectly second-guessed the public-health judgments of governmental officials and ignored the fact that social-distancing measures are less effective at preventing transmission than outright bans of large gatherings. *Compare, e.g.*, *Neace*, 958 F.3d at 414–15, *with South Bay*, __ S. Ct. __, 2020 WL 2813056, at *1 (Roberts, C.J., concurring in denial of application for injunctive relief). Meanwhile, a Fifth Circuit order granting a partial injunction pending appeal did not make clear whether it was based on constitutional grounds, state statutory grounds, or preemption by a state order of the challenged local order. *Compare First Pentecostal Church v. City of Holly Springs*, No. 20-60399, Doc. No. 515426773, at 2 (5th Cir. May 22, 2020) (per curiam order), *with id.*, Doc. No. 515418914, at 7–14 (May 16, 2020) (motion for injunction pending appeal).

II. THE ORDERS DO NOT VIOLATE THE FREE SPEECH OR ASSEMBLY CLAUSES.

Plaintiffs' claims that the orders violate their First Amendment rights of speech and assembly fare no better than their free-exercise claim. The First Amendment freedoms of speech

and assembly are "cognate rights" subject to the same protections. *Thomas v. Collins*, 323 U.S. 516, 530 (1945). Accordingly, the right to assemble has been subsumed under free-speech doctrine regarding expressive association. John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TULANE L. REV. 565, 609–11 (2010).

The First Amendment's protections for free expression do not prohibit government from regulating conduct in a way that incidentally burdens expressive activity. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006). Thus, it "has never been deemed an abridgement of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language." *Id.* (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). By temporarily limiting the size of in-person gatherings, the challenged orders plainly regulate conduct rather than speech. All mass gatherings—social, civic, recreational, religious, and otherwise—are subject to the same conduct-based limitation without regard to their purpose or the content of any expression that might be involved. *See* Part I.A, *supra*.

Only if the orders were interpreted to regulate "inherently expressive" conduct (*Rumsfeld*, 547 U.S. at 66) could they trigger intermediate scrutiny (*see Holder v. Humanitarian Law Project*, 561 U.S. 1, 26–27 (2010); *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). Gathering with more than ten people indoors is not, however, inherently expressive. *See City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (holding that there is no generalized First Amendment right to associate with others); *Roberts*, 468 U.S. at 618 (association is expressive if done "for the purpose of engaging in those activities protected by the First Amendment").

But even if the orders were construed as regulating inherently expressive conduct, they would nonetheless pass constitutional muster. Under the applicable intermediate-scrutiny test, burdens on expressive conduct are upheld if they (1) are content-neutral, (2) advance important

governmental interests unrelated to the suppression of speech, and (3) do not burden "substantially more speech than necessary" to further those interests. *Turner Broad. Sys. v. F.C.C.*, 520 U.S. 180, 189 (1997). All three requirements are satisfied here.

First, the justification for the restriction on the size of gatherings—to fight a deadly virus by reducing person-to-person transmission—"ha[s] nothing to do with content." *See Boos v. Barry*, 485 U.S. 312, 320 (1988). The ban applies to all mass gatherings regardless of their purpose; religious gatherings are covered not because they are religious (or because they include speech) but because they entail bringing together large numbers of people. *See* Part I.A, *supra*.

Second, there can be no question that combating a deadly outbreak of a global pandemic is an important interest unrelated to the suppression of expression. Indeed, the Supreme Court has held that much less important interests satisfy intermediate scrutiny. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 796–97 (1989) (ensuring that bandshell events are both loud enough and not too loud); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 296 (1984) (keeping public park clean and accessible); *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 806–07 (1984) (avoiding aesthetic visual clutter from signs and billboards).

Third, the orders do not burden substantially more expressive conduct than necessary to advance New Jersey's interest in slowing the spread of COVID-19. They restrict large in-person gatherings precisely because they are most conducive to spreading the virus. *See* Part I.B.2, *supra*.[2]

[2] Plaintiffs also assert a claim under the Equal Protection Clause of the Fourteenth Amendment. *See* Dkt. No. 4-1, at 28–29. But their equal-protection claim, based on the alleged burden on their religious exercise, fails for the same reasons their free-exercise claim fails. *See Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004) (applying rational-basis scrutiny and rejecting equal-protection claim following conclusion that governmental program in question did not violate Free Exercise Clause (citing *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974))).

III. THE ORDERS DO NOT VIOLATE THE ESTABLISHMENT CLAUSE, BUT GRANTING A RELIGIOUS EXEMPTION WOULD.

The Establishment Clause of the First Amendment "mandates governmental neutrality between religion and religion, and between religion and nonreligion." *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). Because the Governor's orders treat religious gatherings similarly to analogous nonreligious gatherings, Plaintiffs are wrong in arguing that the orders violate the Establishment Clause. Rather, *granting* Plaintiffs the religious exemption that they seek would violate the Establishment Clause. For the neutrality requirement of the First Amendment's Religion Clauses forbids the government not just to target religion for worse treatment (*see* Part I.A, *supra*) but also to grant religious exemptions that would detrimentally affect nonbeneficiaries (*see Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 (1985)).

The rights to believe, or not, and to practice one's faith, or not, are sacrosanct. But they do not extend to imposing the costs and burdens of one's beliefs on others. For when government purports to accommodate the religious exercise of some by shifting costs or burdens to others, it prefers the religion of the benefited over the rights, beliefs, and interests of nonbeneficiaries, in violation of the Establishment Clause. Exempting Plaintiffs from the Governor's orders would contravene this settled constitutional rule.

In *Estate of Thornton*, for example, the U.S. Supreme Court invalidated a law requiring employers to accommodate Sabbatarians in all instances, because "the statute t[ook] no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." 472 U.S. at 709–10. The Court held that "unyielding weighting in favor of Sabbath observers over all other interests" has "a primary effect that impermissibly advances a particular religious practice," violating the Establishment Clause. *Id.* at 710. Similarly, in *Texas Monthly, Inc. v. Bullock*, the Court invalidated a sales-tax exemption for religious periodicals because,

among other defects, it unconstitutionally "burden[ed] nonbeneficiaries" by making them pay "to offset the benefit bestowed on subscribers to religious publications." 489 U.S. 1, 18 n.8 (1989) (plurality opinion).

The Supreme Court's pre-*Smith* Free Exercise Clause jurisprudence is consistent, demonstrating that religious exemptions that harm others cannot be required even under a compelling-interest test. In *United States v. Lee*, the Court rejected an Amish employer's request for an exemption from paying social-security taxes because the exemption would have "operate[d] to impose the employer's religious faith on the employees." 455 U.S. at 261. In *Braunfeld v. Brown*, the Court declined to grant an exemption from Sunday-closing laws because it would have provided Jewish businesses with "an economic advantage over their competitors who must remain closed on that day." 366 U.S. 599, 608–09 (1961). And in *Prince*, the Court denied a request for an exemption from child-labor laws to allow a minor to distribute religious literature because of the danger that it would have posed to the child's welfare. 321 U.S. at 170. That is because "[r]eal liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own [liberty] . . . regardless of the injury that may be done to others." *Jacobson*, 197 U.S. at 26.

In short, a religious accommodation "must be measured so that it does not override other significant interests" (*Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005)) and must not "impose substantial burdens on nonbeneficiaries" (*Texas Monthly*, 489 U.S. at 18 n.8 (plurality opinion)). When nonbeneficiaries would be unduly harmed, religious exemptions are forbidden. *Cutter*, 544 U.S. at 720; *Estate of Thornton*, 472 U.S. at 709–10.

In only one narrow set of circumstances (in two cases) has the Supreme Court ever upheld religious exemptions that materially burdened third parties—namely, when core Establishment and Free Exercise Clause protections for the ecclesiastical authority of religious institutions

required the exemption. In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 194–95 (2012), the Court held that the Americans with Disabilities Act could not be enforced in a way that would interfere with a church's selection of its ministers. And in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 339–40 (1987), the Court upheld, under Title VII's statutory religious exemption, a church's firing of an employee who was not in religious good standing. These exemptions did not amount to impermissible religious favoritism, and therefore were permissible under the Establishment Clause, because both Religion Clauses limit governmental intrusion into the internal organizational structure of churches.

This case does not implicate that special protection for ecclesiastical authority because it does not present questions regarding "religious organizations[']autonomy in matters of internal governance." *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring). Rather, it presents a far different question: whether there is a constitutional right to put countless people outside the church at greater risk of exposure to deadly disease.

Granting an exemption here would elevate Plaintiffs' religious preferences over the health of the entire community. By holding large religious gatherings, Plaintiffs would not only put their members in danger but also increase the risk of contagion for everyone with whom they come into contact, including children, the elderly, and others at the highest risk of severe illness.

If New Jersey is forced to exempt large, in-person, indoor religious gatherings, everyone will be in greater danger of contracting the virus. Religious gatherings are just as likely as any other gathering to spread COVID-19, and the examples have sadly piled up across the country. Officials in Sacramento County, California, for example, traced roughly a third of the county's first several hundred cases back to church gatherings. Hilda Flores, *One-third of COVID-19 cases in Sac County tied to church gatherings, officials say*, KCRA (Apr. 1, 2020, 2:55 PM), https://bit.ly/2XlCpPu. After a church-choir practice in Washington State—at which members

attempted to observe hygiene guidance—45 out of 60 attendees fell ill, and two tragically died. Richard Read, *A choir decided to go ahead with rehearsal; Now dozens of members have COVID-19 and two are dead*, L.A. TIMES (Mar. 29, 2020), https://lat.ms/2yiLbU6. A single church event in Louisville was "linked to at least 28 cases . . . and two deaths." Bailey Loosemore & Mandy McLaren, *Kentucky county 'hit really, really hard' by church revival that spread deadly COVID-19*, LOUISVILLE COURIER JOURNAL (updated Apr. 2, 2020), https://bit.ly/2XkKCnd. And a church service in West Virginia led to a cluster of infections that devastated a small community. Joe Severino, *COVID-19 tore through a black Baptist church community in WV; Nobody said a word about it*, CHARLESTON GAZETTE-MAIL, https://bit.ly/2SFVYyX. *See also supra* pp. 14–15 (describing additional COVID-19 outbreaks stemming from religious services).

As these examples demonstrate, a single unwitting carrier at a worship service could cause a ripple effect throughout the entire community: That one carrier might pass the virus to his neighbors in the pews, who might then return home and pass it to their family members, including people at high risk of severe illness. If those infected family members then go to the doctor's office, or to the grocery store for milk, they may potentially expose others, who may then do the same to their families—and so on. And the more people who get sick, the more strain is placed on the hospital system, and the greater the chance that people die due to lack of healthcare resources.

The Establishment Clause forbids the government to grant religious exemptions for conduct that threatens so much harm to so many.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a preliminary injunction should be denied.

Respectfully submitted,

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