EXHIBIT I

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DWELLING PLACE NETWORK, a New Jersey not-for-profit corporation; HOUSE OF PRAISE CHURCH, a New Jersey not-for-profit corporation; CORNERSTONE COMMUNITY CHURCH, a New Jersey not-for-profit corporation; NEW LIFE CHURCH, a New Jersey not-for-profit corporation; BOBBY BLEDSOE; STEVE BURTON; RALPH GRAVES; and RICHARD MYERS, Plaintiffs, v. PHILIP D. MURPHY, in his official capacity as Governor of the State of New Jersey; GURBIR S. GREWAL, in his official capacity as Attorney General of the State of New Jersey; and PATRICK J. CALLAHAN, in his official capacity as Superintendent of the New Jersey Division of State Police and as State Director of Emergency Management, Defendants.	Hon. Robert B. Kugler, U.S.D.J. CIVIL ACTION NO. 1:20-CV-6281-RBK-AMD **CIVIL ACTION** **(ELECTRONICALLY FILED)**

BRIEF IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

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PRELIMINARY STATEMENT

COVID-19, the novel coronavirus spreading throughout the world, is a highly contagious, deadly disease without a vaccine or cure. It has claimed the lives of over 110,000 Americans, including over 12,000 New Jerseyans. And it has required New Jersey to take unprecedented measures to protect the health of its residents, measures the State would not have countenanced absent such life-or-death consequences.

One of those measures is the State's temporary limits on group gatherings. As public health experts have explained, COVID-19 spreads primarily though person-to-person contact, which means that the State can only prevent further spread of the virus by limiting such contact. Large gatherings, in particular, present a public health risk; multiple studies and reports have documented significant clusters of COVID-19 cases and deaths tied to single communal events, sometimes even tied to one or two asymptomatic attendees. As a result—and in line with the recommendations of public health experts—the State established limits on gatherings during the ongoing emergency that were tailored to the harms that each presents.

On June 9, however, the State significantly adjusted its gatherings restrictions, especially for gatherings that take place outdoors. As the State explained, in light of the decrease in the rate of reported new cases of COVID-19 in New Jersey, in the number of individuals being admitted to hospitals for COVID-19, and in the rate of reproduction for COVID-19 infections in New Jersey, the State could implement a

range of significant steps to lift restrictions that were designed to limit such person-to-person contact. That included amending the limits on the number of individuals who can participate in a gathering. Such limits could be especially relaxed outdoors, the State continued, because of the expert findings that outdoor environments present substantially reduced risks of COVID-19 transmission. The State thus set forth that, among other things, there would no longer be a limit on the number of people who could gather together outdoors for a religious service.

The only limit that remains in place relating to in-person worship services—and thus the only limit subject to this request for preliminary relief—is the limit for indoor gatherings. Given the heightened risk of large communal activities that take place indoors, the State established that the cap on gatherings must be 50 persons or 25 percent of the room's capacity, whichever is lower. That limit, which applies to any gathering regardless of its purpose, is constitutional. Most importantly, the Free Exercise Clause does not stand in the way of rules that apply to equivalent religious and secular conduct. Such rules of neutral applicability, the Supreme Court has held repeatedly, are perfectly valid even if they burden religious conduct. New Jersey's law applies evenhandedly to communal gatherings, whether religious or secular in nature—to the worship service and the concert, to the Bible study group and the book club. And were any doubt to remain, the special authority States have to respond to emergencies—including when their actions implicate constitutional

rights—requires this Court to uphold these temporary restrictions. These two reasons, independently and together, are why the vast majority of district courts and courts of appeals have rejected challenges to similar state laws, and why a majority of the Supreme Court has already allowed analogous limits to stand.

Even beyond the merits, there is no basis for preliminary relief here. As noted above, the State's ongoing implementation of its careful reopening plan has in large part addressed the harm that Plaintiffs were alleging. Indeed, the State is permitting individuals to congregate for religious services in *any* number if they are outdoors—including in an open-air tent to protect against the elements. The only harm on which Plaintiffs now rely is their inability to gather for services indoors in groups of 51 or more. But forcing New Jersey—one of the epicenters of the COVID-19 pandemic—to allow such large indoor gatherings sooner than the health data supports would be devastating to its efforts to slow the spread of COVID-19. Bluntly, few preliminary injunctions present risks this stark. Given the consequences of Plaintiffs' requested relief, and the shortcomings of their claims, this Court should deny the application for a preliminary injunction. While the State is cognizant of the burdens its residents are experiencing during this emergency—which is why the State continues engaging in an ongoing process of amending requirements—these rules have been making a difference, and the State must be allowed to continue controlling its response.

COUNTERSTATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

A. COVID-19's Spread and Devastating Impact on New Jersey.

Coronavirus disease 2019 ("COVID-19") is a contagious, and at times fatal, respiratory disease caused by the "severe acute respiratory syndrome coronavirus 2" virus, or "SARS-CoV-2." Its discovery at the end of 2019 in China, and its eventual spread to the United States, are well-documented. *See* Exs. A-C. Symptoms of the COVID-19 illness include fever, cough, and shortness of breath, which may appear in as few as two or as long as 14 days after exposure. *See* Ex. D.

As state and federal officials have recognized, COVID-19 represents a public health emergency unprecedented in modern times. On January 31, 2020, the United States Secretary of Health and Human Services declared a public health emergency in light of COVID-19. On March 13, 2020 and on March 18, 2020, President Trump also declared a national emergency pursuant to a variety of federal laws, including Sections 201 and 301 of the National Emergencies Act, 50 U.S.C. § 1601, *et seq.*, and Sections 401 and 501 of the Stafford Act on March 13, 42 U.S.C. § 5121-5207. These declarations all remain in effect today. *See* Exs. E-F.

As officials have highlighted, COVID-19 is especially pernicious given the ease with which it spreads. The Centers for Disease Control and Prevention ("CDC") has stated that "[t]he virus that causes COVID-19 is thought to spread mainly from

[1] Combined for the court's convenience.

person to person, mainly through respiratory droplets produced when an infected person coughs or sneezes. These droplets can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs." Ex. D. And it can spread even though the COVID-19 carrier may be entirely asymptomatic or have only mild, cold-like symptoms. *See* Exs. G-H. In certain states—including in New Jersey, one of the global epicenters of the disease—"COVID-19 seems to be spreading easily and sustainably in the community ('community spread') in many affected geographic areas. Community spread means people have been infected with the virus in an area, including some who are not sure how or where they became infected." Ex. D.

Gatherings present a special risk of COVID-19 transmission because of the sustained person-to-person interactions they facilitate. This comes as no surprise: for decades, communal gatherings, particularly ones involving speaking and/or singing, have been associated with spread of infectious diseases. *See, e.g.*, B.T. Mangura, et al., "Mycobacterium Tuberculoisis Miniepidemic in a Church Gospel Choir," *Chest*, 113(1):234–37 (Jan. 1998); Robert G. Loudon & Rena Marie Roberts, "Singing and the Dissemination of Tuberculosis," *Am. Review of Respiratory Disease,* 98(2) (1968). Singing and speaking result in increased emission of aerosols containing the virus, a concern magnified when the gatherings occur indoors and last for sustained periods of time, which strongly increases the risk of an attendee's exposure.

Multiple studies issued in recent months confirm the risk of gatherings when it comes to COVID-19, especially when those gatherings take place indoors. One study, issued on May 15, 2020, explained that "[f]ollowing a 2.5-hour choir practice attended by 61 persons, including a symptomatic index patient, 32 confirmed and 20 probable secondary COVID-19 cases occurred (attack rate = 53.3% to 86.7%); three patients were hospitalized and two died." Ex. I at 607. It follows, the authors wrote, that "SARS-CoV-2 might be highly transmissible in certain settings, including group singing events. This underscores the importance of physical distancing, including maintaining at least 6 feet between persons, *avoiding group gatherings* and crowded places, and wearing cloth face coverings in public settings." *Id.* at 609 (emphasis added). Another study, issued four days later, found that communal church events held over the course of one week—including a Bible study in which no singing occurred and "most attendees sat apart from one another," and a three-day group event in which "[m]ost children and some adults participated in singing"—resulted in 35 confirmed COVID-19 cases and 3 deaths, among just 92 attendees. Ex. J at 632. Notably, the CDC traced the infections to 2 asymptomatic attendees. *Id.* Contact tracing confirmed that the various individuals infected at the church caused another 26 cases and one death in the community. *Id.* at 2-3. Nor do these studies stand alone: a report from Chicago "describe[d] [a] cluster of 16 cases of confirmed or probable

COVID-19, including three deaths, likely resulting from transmission of SARS-CoV-2 at two family gatherings (a funeral and a birthday party)." Ex. K at 446.

Beyond these studies, examples of the threat presented by indoor gatherings abound. In South Korea, as of March 25, 2020, at least 5,080 confirmed cases of COVID-19 could be traced back to just a single individual who attended a religious service at the Shincheonji Church of Jesus in Daegu. Ex. L. After a March 15, 2020 church service in Illinois, more than half of the 80 people in attendance became ill with COVID-19 symptoms, ten tested positive for COVID-19, and one person died. Ex. M. In Canada, a service with only 41 participants (capacity for 200 people) who maintained social distancing and hygiene practices resulted in 24 infections and 2 deaths. Ex. N. At least 45 infections and 2 deaths were also traced to a single choir rehearsal in a Seattle-area church, despite participants similarly having attempted to observe social distancing guidance. Ex. O. Three clusters of COVID-19 cases in Kansas were linked to church gatherings. Ex. P. In Kentucky, a church revival has been linked to at least 28 COVID-19 cases and 2 deaths. Ex. Q. 71 COVID-19 cases in California were linked to gatherings at one Sacramento church. Ex. R. And at a Mothers' Day church service held in defiance of California's stay-at-home order, a single asymptomatic person exposed 180 attendees to COVID-19. Ex. S. Countless other examples exist. *See, e.g.*, Exs. Z-AA.

As of the filing of this brief, worldwide 7,432,275 confirmed COVID-19 cases have been reported, and at least 418,051 lives have been lost. *See* Ex. T. The United States is at the center of the pandemic, with more confirmed cases (1,994,283) and deaths (112,967) than in any other nation. *See* Ex. U. And the impact of the virus in New Jersey has been especially acute. The impact was so immediately profound that, on March 25, 2020, the Federal Government declared New Jersey a "major disaster area." Ex. F. As of the filing of this brief, there have been 165,816 confirmed cases (which reflects 8.3% of all cases nationwide and 2.2% of all cases worldwide) and 12,443 deaths (11.0% nationwide and 3.0% worldwide) in New Jersey alone. *See* Ex. V Medical experts have estimated that, in the worst case scenario, millions of Americans would die if governments had done nothing to prevent the spread of COVID-19. *See* Ex. W. There is still no vaccine or cure for COVID-19.

B. New Jersey's Actions to Combat COVID-19 in New Jersey.

On March 9, 2020, Governor Murphy declared that a public health emergency and a state of emergency existed throughout the State. *See* N.J. Exec. Order 103. He then took a series of decisive actions to respond to the threat presented by COVID-19, guided by recommendations of public health officials and epidemiologists. And he incrementally tightened and loosened the restrictions as the public health crisis continued to unfold and as additional data became available.

On March 16, 2020, Governor Murphy ordered the closure of all public and private schools, recreational facilities, gyms and fitness centers, amusement centers, shopping malls, and bars and restaurants (except for take-out and delivery services), and he prohibited gatherings of 50 or more people. *See* N.J. Exec. Order 104 ("EO 104"). Three days later, the Office of Emergency Management ("NJOEM")—which the Governor authorized to issue additional limits in response to this emergency—added barbershops, hair salons, nail salons, spas, and tattoo parlors to the list of closed services. *See* NJOEM Admin. Order 2020-02.

Guided by developing information on COVID-19, and as the crisis continued to worsen across the State, on March 21, 2020, Governor Murphy issued Executive Order 107, which superseded EO 104 in full, and established at least three relevant requirements. First, the Order required that "[a]ll New Jersey residents shall remain home or at their place of residence," unless they were leaving their home for any one of nine enumerated reasons. *See* N.J. Exec. Order 107 ("EO 107") ¶2. Although that list of authorized reasons was short, it included "leaving the home for an educational, religious, or political reason." *Id.* Second, EO 107 mandated a variety of business closures. The Order stated "[t]he brick-and-mortar premises" of "retail businesses must close to the public as long as this Order remains in effect," but "essential" retail stores—including pharmacies, grocery stores, medical supply stores, convenience stores, hardware and home improvement stores, child supply stores, pet stores, and

liquor stores[2]—could remain open. *Id.* ¶6. The Order also required the closure of all "recreational and entertainment businesses," *id.* ¶9, and it mandated that restaurants and bars be limited to providing take-out and delivery, *see id.* ¶8. But the Order did not require the closure of any houses of worship.

Third, the Executive Order placed limits on gatherings. In line with the studies detailed above, the Order explained that the CDC called for individuals to "remain[] out of congregate settings" and to "avoid[] mass gatherings," and that the President had advised "avoid[ing] social gatherings in groups of more than 10 people." *Id.* p.3. As a result, EO 107 established that any "[g]atherings of individuals, such as parties, celebrations, or other social events, are cancelled." *Id.* ¶5. Although the Order did not place a specific numeric limitation on gatherings, EO 107 authorized "[t]he State Director of Emergency Management, who is the Superintendent of the State Police … to make clarifications and issue orders related to this provision." *Id.* The Director did so the same day EO 107 issued, clarifying in Administrative Order 2020-04 "that gatherings of 10 people or fewer are presumed to be in compliance with the terms and intentions of [EO 107], unless clear evidence exists to the contrary."

[2] Alcohol is one of the few legal substances for which withdrawal can lead to death or require hospitalization of the addicted, which would take resources and staff away from treating COVID-19 patients in the midst of a pandemic. *See* Ex. X.

The Governor has taken multiple subsequent steps to lift restrictions as part of "New Jersey's Road Back Plan," a Plan designed to reopen the State safely while preventing deaths and cases of the virus from surging. That includes the issuance of three Orders to loosen gatherings restrictions. On May 13, 2020, Governor Murphy issued Executive Order 142. This Order clarified the limits on in-person gatherings, explaining that while prior rules had "acknowledged there may be circumstances in which clear evidence showed an impermissible gathering was happening even if 10 persons or fewer were in attendance, law enforcement has not identified any such situations in practice" and was "enforcing violations of the prohibition on gatherings only where there have been more than 10 people in attendance." Executive Order 142 ("EO 142"), p.2. As a result, EO 142 established that "gatherings of 10 persons or fewer *are in compliance*" with New Jersey law, and only "gatherings of more than 10 persons" would be unlawful. *Id.* ¶8 (emphasis added). Second, EO 142 set forth that individuals could participate in drive-in and drive-through gatherings with any number that they wished—and regardless of the purpose of such gathering—so long as individuals remained in their cars. *Id.* ¶¶4-5.

The State returned to the issue on May 22, 2020 in Executive Order 148 ("EO 148"). The State identified "repeated observations from public health experts … that outdoor environments present reduced risks of COVID-19 transmission as compared to indoor environments," and concluded "it is appropriate to … adjust restrictions

relative to gatherings that happen outdoors, meaning that certain gatherings in open-air spaces outdoors can be allowed while still maintaining reasonable restrictions to help limit the spread and prevent future outbreaks of COVID-19 and protect the health, safety, and welfare of New Jersey residents." EO 148, pp.3-4. As a result, the State ordered that up to 25 persons could participate in outdoor gatherings. *Id.* ¶1.

Most recently, on June 9, 2020, the State significantly adjusted its restrictions on gatherings in Executive Order 152 ("EO 152"). This Order continued to draw a dichotomy between gatherings that took place outdoors and indoors, given the risks presented by each. EO 152 established that outdoor gatherings "must be limited to 100 persons or fewer." *Id.* ¶2(a). But, recognizing both that "certain gatherings—including religious services and political activity—are particularly important to the functioning of the State and of society," *id.* p.5, and that outdoor environments are safer than indoor environments, *id.*, the Order made clear that whenever "the outdoor gathering is a religious service or political activity, such as a protest, the gathering is not required to comply with" the 100-person limit. *Id.* ¶2(f). At the same time, the State significantly raised its limits on indoor gatherings, although to a lesser degree given the risks an indoor environment still presents. EO 152 established that indoor gatherings must be limited to no more than 50 persons at any time, but at no time shall the number of individuals be more than 25% of the capacity of the room in which it takes place. *Id.* ¶1(a). (The Order also makes clear that in a small room,

where 25% of capacity would be less than 10, the gathering may still include up to 10 individuals. *Id.*) That rule applies whatever the purpose of the gathering. *Id.*

The State explained the bases for these limits. The State began by noting that "as the spread of COVID-19 decreases in a state, the state can significantly adjust its limits on indoor and outdoor gatherings." *Id.* p.3. But, the State added, "the fact that the spread of COVID-19 has been limited by the State's emergency measures does not in any way suggest that gathering restrictions can be lifted altogether"—to the contrary, "absent social distancing measures, public health experts anticipate that the spread of COVID-19 would again significantly increase." *Id.* The State went on to explain that its "restrictions on gatherings continue to be tailored to the harms that each gathering presents, meaning that indoor in-person gatherings must comply with a more stringent limitation than outdoor in-person gatherings," *id.* p.5, and also that the limits on indoor gatherings are still "more stringent than the restrictions that are in place for retail, because in indoor retail settings individuals neither congregate in large groups nor remain in close proximity for extended periods, which are factors that have been linked to the increased risk of COVID-19 transmission," *id.* p.3.

The Order took effect immediately.

C. Plaintiffs' Lawsuit

On May 22, 2020—more than two months after EO 107 went into effect, but before the State most recently addressed its gatherings limits—Plaintiffs filed their

Complaint. Dkt. 1. The claims stated in the Complaint are as follows: violations of the First Amendment Establishment Clause (First and Second Claims for Relief); violations of the First Amendment Freedom of Assembly Clause (Third Claim for Relief); Due Process Clause violations based on infringement of Plaintiffs' rights to freedom of religion, assembly, speech, and travel (Fourth Claim for Relief); and violations of the Equal Protection Clause (Sixth Claim for Relief). Dkt. 1 at ¶¶ 89-138. On May 26, 2020, Plaintiffs moved ex parte for an order to show cause why a temporary restraining order and preliminary injunctive relief should not be granted. Dkt. 4, 4-1. Their brief also asserts additional violations not stated expressly in the Complaint, including free speech violations. *See* Dkt. 4-1 at 18-19, 20-24.

STANDARD FOR PRELIMINARY INJUNCTION

"[T]he grant of injunctive relief," courts have explained, "is an extraordinary remedy which should be granted only in limited circumstances." *Truck Ctr., Inc. v. Gen'l Motors Corp.*, 847 F.2d 100, 102 (3d Cir. 1998); *see also, e.g., Adams v. Freedom Forge Corp.*, 204 F.3d 475, 487 (3d Cir. 2000) (the "dramatic and drastic power of injunctive force may be unleashed only against conditions generating a presently existing actual threat"). "Such stays are rarely granted" in the Third Circuit because "the bar is set particularly high." *Conestoga Wood Specialties Corp. v. Sec. of U.S. Dep't of Health & Human Servs.*, 13-144, 2013 WL 1277419, *1 (3d Cir.

Feb. 8, 2013). To grant preliminary injunctive relief, the court must first determine whether these factors are met:

> (1) A likelihood of success on the merits; (2) that [the plaintiff] will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief.

Kos Pharms. Inc. v. Andrx Corp., 369 F.3d 700, 708 (3d Cir. 2004).

The moving party always has the burden of "meet[ing] the threshold for the first two 'most critical' factors." *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017). And even if the moving party satisfies those first two tests, a court must still "consider[] the remaining two factors"—the balance of the equities and public interest—"and determine[] in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief." *Kos Pharms*, 369 F.3d at 708. Finally, "[a] party seeking a mandatory preliminary injunction that will alter the status quo bears a particularly heavy burden in demonstrating its necessity." *Lane v. New Jersey*, 725 F. App'x 185, 187 (3d Cir. 2018) (citation omitted); *see also, e.g., Conestoga Wood*, 2013 WL 1277419, *1 (noting that "an injunction shall issue only if the plaintiff produces evidence sufficient to convince the district court that all four factors favor preliminary relief").

ARGUMENT

Plaintiffs' application for a preliminary injunction fails for two reasons: their lawsuit will ultimately not prevail on the merits, and the remaining equitable factors

militate against granting the requested relief.

I. PLAINTIFFS WILL NOT SUCCEED ON THE MERITS.

A. New Jersey's Limit On Gatherings Is Consistent With The Free Exercise Clause.

For thirty years, the rule governing the Free Exercise Clause has been clear: laws of general applicability that impose burdens on analogous religious and secular activities alike do not violate the First Amendment and are instead subject to rational basis review. The gatherings rules at issue reflect such laws of neutral applicability, and they easily withstand deferential rational basis review.

Begin with the principles governing the Free Exercise Clause. As the Supreme Court explained in *Employment Division v. Smith*, the First Amendment 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).'" 494 U.S. 872, 879 (1990). In *Smith*, the Court explained there was a difference between religious belief and conduct: while the First Amendment bars government regulation of belief, the "exercise of religion" involves conduct that could be regulated by a law not directed at the religious group. *See id.* at 877; *see also, e.g., Fulton v. City of Philadelphia*, 922 F.3d 140, 159 (2019) ("The premise of *Smith* is that, while religious belief is always protected, religiously motivated *conduct* enjoys no special protections or exemption from general, neutrally applied legal requirements.").

Cases from both the Supreme Court and the Third Circuit prove the point. In *Smith* itself, the Supreme Court held that the Free Exercise Clause permitted Oregon to prohibit use of peyote in the state, even though certain individuals used that drug in their religious practice. 494 U.S. at 878. And last year, the Third Circuit rejected a challenge to a city's "Fair Practices Ordinance" that prohibited sexual-orientation discrimination in public accommodations. *Fulton*, 922 F.3d 140. After Philadelphia canceled a contract with Catholic Social Services ("CSS"), a non-profit organization that provided foster care services but refused to work with same-sex couples, CSS filed suit. *Id.* at 147. The Third Circuit held that Philadelphia had not violated CSS's free-exercise rights because its nondiscrimination policy was a "neutral, generally applicable law." *Id.* Each time, the principle was simple: because the rule applied to religious and secular conduct evenhandedly, it could withstand legal challenge.

New Jersey's rules seeking to limit the spread of COVID-19 are neutral laws. New Jersey has imposed four kinds of rules to limit person-to-person contact—the only tool, in the absence of a vaccine, to mitigate the spread of COVID-19. First, in EO 107, the State previously required residents to remain at home, but gave a series of reasons that justified leaving one's home—a list that included any "educational, *religious*, or political reason." EO 107 ¶2 (emphasis added). Second, it required a series of retail and recreational businesses to close their brick-and-mortar facilities to the public, while allowing some retail stores to remain open as "essential." *Id.* at

¶¶6 & 8-9.[3] But the State never closed houses of worship. Third, after EO 152, while the State does impose limits on gatherings when they take place outdoors, there is a carve-out for religious services. *See* N.J. Exec. Order 152 at ¶2. Said another way, relative to the prior stay-at-home order, the business closure orders, and the limits on outdoor gatherings, religious conduct is *favored* compared to secular activity.

The only rule that incidentally burdens religious practice, and the only rule at issue in this litigation, is the limitation on gatherings that take place indoors. As EO 152 establishes, the number of individuals at the gathering is limited to no more than 50 persons, but at no time shall the number of individuals be more than 25% of the capacity of the room in which it takes place. This mandate applies regardless of the purpose of any such gathering. In other words, if any resident wants to participate in a Bible study group or a religious service in a Church, she could do so with 49 others; likewise, if that resident intends to participate in a book club indoors, or in a secular choir rehearsal, that same numerical limit would apply. That is dispositive: the rules for indoor gatherings have nothing to do with whether that gathering is religious or

[3] Although not challenged here, the stay-at-home order has since been lifted, and most recreational businesses have subsequently be allowed to reopen their *outdoor* areas to the public. *See* N.J. Exec. Order 153.

secular, and instead everything to do with the risk of COVID-19 transmission. This is a classic "neutral law of general applicability."[4]

It is thus no surprise that a majority of the Supreme Court has squarely rejected another challenge to an analogous gatherings limit. *South Bay United Pentecostal Church v. Newsom*, No. 19A1044, 2020 WL 2813056 (U.S. May 29, 2020), involved free exercise claims against California's "temporary numerical restrictions on public gatherings to address this extraordinary health emergency," which "limit attendance at places of worship to 25% of building capacity or a maximum of 100 attendees." *Id.* at *1 (Roberts, C.J., concurring). While the California plaintiffs tried "to enjoin enforcement of the Order," like Plaintiffs do here, the Court rebuffed that request. *Id.* The Chief Justice drafted a concurring opinion to explain the denial. As he put it, these state law "restrictions on places of worship … appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings,

[4] Of course, even a neutral law of general applicability can violate the constitution where it is motivated by religious animus. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Com'n*, 138 S. Ct. 1719, 1727 (2018) (setting aside a state order where the record showed that it was based upon "a clear and impermissible hostility toward the sincere religious beliefs"); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 541-42 (1993) (rejecting ordinance in light of statements at hearing hostile to a particular religious sect). The record in this case is devoid of any evidence of hostility by New Jersey officials to religious practice or belief because no such evidence exists. Instead, these New Jersey laws were motivated by the need to limit person-to-person contact to slow the spread of a deadly virus, regardless of whether that contact was religious or otherwise.

spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time." *Id.*

Notably, the vast majority of federal courts were already in accord before the Court's decision in *South Bay United Pentecostal Church*, and no federal courts have endorsed Plaintiffs' approach since. *See, e.g.*, *Elim Romanian Pentecostal Church v. Pritzker*, No. 20-1811, 2020 WL 2517093, *1 (7th Cir. May 16, 2020);[5] *Calvary Chapel v. Mills*, 20-156, 2020 WL 2310913, *6 (D. Me. May 9, 2020) (noting "the majority of courts" rejected Plaintiffs' argument before the Court's decision); *Cross Culture Christian Ctr. v. Newsom*, 20-832, 2020 WL 2121111, *5-7 (E.D. Cal. May 5, 2020); *Cassell v. Snyders*, 20-50153, 2020 WL 2112374, *7-11 (N.D. Ill. May 3, 2020); *Gish v. Newsom*, 20-755, 2020 WL 1979970, *5-6 (C.D. Cal. Apr. 23, 2020); *Lighthouse Fellowship v. Northam*, 20-204, 2020 WL 2110416, *4-8 (E.D. Va. May 1, 2020); *Legacy Church v. Kunkel*, 20-327, 2020 WL 1905586, *30-38 (D.N.M. Apr. 17, 2020); *Davis v. Berke*, 20-98, 2020 WL 1970712, *2 (E.D. Tenn. Apr. 17,

[5] In rejecting an analogous claim, Judge Easterbrook employed strikingly similar language as the Chief Justice: "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, as in *Employment Division v. Smith*, 494 U.S. 872 (1990). The Executive Order's 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." *Id.*

2020); *Abiding Place Ministries v. Wooten*, 20-683 (S.D. Cal. Apr. 10, 2020); *Nigen v. State of N.Y.*, 20-1576, 2020 WL 1950775 (E.D.N.Y. Mar. 29, 2020).

None of Plaintiffs' counterarguments prove otherwise, or suggest this Court can diverge from the Supreme Court's ruling. Plaintiffs' primary argument is that, notwithstanding the above, religious activity is actually *disfavored* as compared to secular activity. Plaintiffs base that objection heavily on the notion that more than 50 could be in "indoor retail facilities" at any one time. Dkt. 4-1 at 25. But contrary to how Plaintiffs frame this dispute, the question is not whether any secular activity faces fewer restrictions than religious ones, but rather whether "secular conduct 'that endangers the [State]'s interests in a similar or greater degree' receives favorable treatment." *Cassell*, 2020 WL 2112374, *9 (quoting *Lukumi*, 508 U.S. at 533, 543). That makes sense: the free exercise test asks whether "the decisionmaker selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon a particular group." *Id.* (citation omitted). Sussing out discrimination requires comparators that present "analogous" risks of COVID-19 transmission. *See Gish*, 2020 WL 1979970, *6.

As the Chief Justice already explained—building upon a body of federal court decisions—that proves fatal to Plaintiffs' claim. At bottom, the secular conduct that the various challengers to state gatherings limits have identified is dissimilar from the proposed religious activity in which they wish to engage. *See, e.g., S. Bay United*

Pentecostal Church, 2020 WL 2813056, *1 (Roberts, C.J., concurring) (rejecting the very argument Plaintiffs make because the "Order 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"); *Gish*, 2020 WL 1979970, *6 (noting "[a]n in-person religious gathering is not analogous to picking up groceries, food, or medicine, where people enter a building quickly, do not engage directly with others except at points of sale, and leave once the task is complete. Instead, it is more analogous to attending school or a concert—activities where people sit together in an enclosed space to share a communal experience.").[6]

As the Chief Justice noted, those dissimilarities are directly related to slowing the spread of COVID-19. *See, e.g.*, *Calvary Chapel*, 2020 WL 2310913, *8 (finding that "[g]atherings in houses of worship present a greater risk to the public health than shopping at a grocery store or other retail outlet," based on the transitory nature of a person's interactions while shopping); *Cassell*, 2020 WL 2112374, *9 (same); *Elim*, 2020 WL 2517093, *1 (same). These differences have been borne out by experience.

[6] The small number of decisions that struck down state gatherings limits prior to the ruling in *South Bay United Pentecostal Church*—on which Plaintiffs heavily rely—all relied on this erroneous comparison. *See, e.g., Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020); *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020). That comparison is incorrect for the reasons given above, and after the Supreme Court's decision, it is no longer tenable.

See Cassell, 2020 WL 2112374, *9 (describing the "many examples where religious services have accelerated the pathogen's spread" and adding that the "Plaintiffs have failed to identify a grocery store or liquor store that has acted as a vector for the virus"); *supra*, at pp. 4-7 & Exs. I-J, L-N, P-R (studies and reports describing risk of gatherings). It cannot be that 100 people must be allowed to stand in an indoor hall for hours at a time just because people are allowed to quickly buy groceries.[7]

Nor is there any basis for this Court to distinguish the Supreme Court's order in *South Bay United Pentecostal Church*. First, Plaintiffs argue that the "procedural postures in the two cases differ, and hence the burden facing the plaintiffs in that matter compared to the motion to stay now before the Court, are entirely different." ECF 16 at 7. But the Chief Justice's opinion did not rely on any specific procedural posture and instead found specifically that the "restrictions on places of worship … appear consistent with the Free Exercise Clause of the First Amendment." 2020 WL 2813056, *1 (Roberts, C.J., concurring). Nor was the procedural posture particularly different in any event; to obtain an injunction enjoining enforcement of an order that has already taken effect, a plaintiff in the Third Circuit needs to satisfy "a particularly

[7] A few final examples help clarify why the distinction between communal activity and retail has nothing to do with religion. If a church allowed individuals to pick up a religious text and bring it to their home, the pastor would *not* be in violation of the gatherings limit if 51 people happened to be in the building getting a Bible at once. On the other hand, no liquor store could have a special two-hour wine tasting event for its customers. Plaintiffs may disagree with the State's distinctions, but that line does not in any way discriminate against religious conduct.

heavy burden in demonstrating its necessity." *Lane*, 725 F. App'x at 187. Plaintiffs' second basis for distinguishing *South Bay United Pentecostal Church*—that "the two states' respective emergency regulations diverge significantly"—is also unavailing. ECF 16 at 7. Just as California "permits houses of worship to utilize their facilities at a 25% occupancy level," so too does New Jersey. *Id.* And while California caps an indoor gathering at 100 people, rather than New Jersey's limit of 50, that fact is immaterial. The state's precise numerical limit played no role in the Chief Justice's analysis, which focused on whether limits were neutral; New Jersey in fact allows an unimlimited number to participate in an outdoor service, including in an open-air tent; and New Jersey has had more COVID-19 diagnoses per capita than California. *South Bay United Pentecostal Church* controls the disposition of this case.[8]

Because the state laws at issue treat analogous religious and secular activities similarly, they are subject only to rational basis review, a standard they clear easily.

[8] Just as there has been no effort to discriminate against religion in the text of the Orders, there has also been no effort to selectively enforce the rules against faith groups—the problem at issue in *Tenafly Eruv Association v. Borough of Tenafly*, 309 F.3d 144 (2002). In that case, although the ordinance prohibited the placement of "any sign or advertisement, or other matter upon," among other things, telephone poles, *id.* at 151, Tenafly's selective application of the ordinance to Orthodox Jewish symbols "devalued" the religious group's reasons for posting on telephone poles by "judging them to be of lesser import than nonreligious reasons." *Id.* at 152. But this record contains no evidence that state officials have in practice been allowing secular gatherings like concerts to take place in indoor spaces. *See, e.g.*, Ex. Y (describing enforcement actions relating to secular gatherings). And to the degree that certain secular outdoor gatherings, such as political protests, have been proceeding, so too can all outdoor religious services take place in any number.

That test is extraordinarily deferential: to be upheld, the law need only be "rationally related to a legitimate governmental purpose," and the challengers "have the burden to negate every conceivable basis which might support the rules." *Cross Culture*, 2020 WL 2121111, *7. Plaintiffs are "likely unable to make such a showing" given "the Governor's interest in limiting the spread of COVID-19, a highly contagious illness that spreads more easily through close contact." *Calvary Chapel*, 2020 WL 2310913, *9. Public health experts across the country—including at the CDC—have highlighted that gatherings contribute to the spread of COVID-19, and that limits on gatherings help to prevent further spread. All the more so in New Jersey, where the virus's impact has been particularly dire. No wonder, then, that the majority of the justices on the Supreme Court allowed these laws to stand.

B. New Jersey's Limit On Gatherings Is Consistent With The State's Authority To Respond To Emergencies.

Although the traditional First Amendment analysis is enough to dispose of the application for preliminary relief, there is a second reason to reject this request—the State's sweeping authority to respond to ongoing public health emergencies. Bluntly, "[t]he Constitution does not compel courts to turn a blind eye to the realities of the COVID-19 crisis." *Cassell*, 2020 WL 2112374, *6. Instead, during an emergency, courts grant state officials considerable deference regarding how to keep residents safe even in the face of competing constitutional interests.

For over a century, the Supreme Court "has distinctly recognized the authority

of a State to enact … quarantine laws and 'health laws of every description,'" derived from the States' "police power" to "protect the public health and the public safety." *Jacobson v. Massachusetts*, 197 U.S. 11, 24-25 (1905); *see also, e.g., Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health*, 186 U.S. 380, 387 (1902) (noting "the power of the States to enact and enforce quarantine laws for the safety and the protection of the health of their inhabitants ... is beyond question."). During a public health crisis, *Jacobson* explained, traditional tiers of constitutional scrutiny do not apply, and courts will "only" strike down a law when it "[1] has no real or substantial relation to those objects, or [2] is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." 197 U.S. at 31. Framed another way, courts may intervene only if emergency actions are so "arbitrary" that they "justify the interference of the courts to prevent wrong and oppression." *Id.* at 28, 38. The underlying logic is simple: "a community has the right to protect itself against an epidemic or disease," *id.* at 27, and "[t]he mode or manner in which those results are to be accomplished is within the discretion of the state," *id.* at 25.

Courts since *Jacobson* have reaffirmed the rule that, although an individual's constitutional rights do not disappear during a health crisis, they can be reasonably curtailed. *See, e.g., United States v. Caltex*, 344 U.S. 149, 154 (1952) (holding that the sovereign may take steps "in times of imminent peril" that would not otherwise be permissible); *United States v. Chalk*, 441 F.2d 1277, 1280 (4th Cir. 1971) (adding

that "[t]he invocation of emergency powers necessarily restricts activities that would normally be constitutionally protected"); *Hickox v. Christie*, 205 F. Supp. 3d 579, 584, 591–92 (D.N.J. 2016) (in the face of a challenge to a quarantine to limit spread of Ebola, relying on *Jacobson* to hold that state authorities have "broad discretion" in protecting the public health). As two courts of appeals recently explained,

> The bottom line is this: when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some "real or substantial relation" to the public health crisis and are not "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." Courts may ask whether the state's emergency measures lack basic exceptions for "extreme cases," and whether the measures are pretextual—that is, arbitrary or oppressive. At the same time, however, courts may not second-guess the wisdom or efficacy of the measures.

In re Abbott, 954 F.3d 772, 778 (5th Cir. 2020); *accord In re Rutledge*, 956 F.3d 1018, 1028 (8th Cir. 2020). The Supreme Court and lower courts have recognized that *Jacobson* applies to restrictions that burden religious conduct. *See, e.g., Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) (holding that "[t]he right to practice religion freely does not include liberty to expose the community ... to communicable disease"); *In re Abbott*, 954 F.3d at 778 (finding that constitutional rights could be reasonably restricted as public health and safety may demand, including "one's right to peaceably assemble [and] to publicly worship").

South Bay United Pentecostal Church is once against dispositive. In the Chief Justice's concurring opinion explaining why California could impose its gatherings

limits on houses of worship,[9] he highlighted that COVID-19 "has killed thousands of people in California and more than 100,000 nationwide," and he recognized that States' "temporary numerical restrictions on public gatherings" sought "to address this extraordinary health emergency." *S. Bay United Pentecostal Church*, 2020 WL 2813056, *1 (Roberts, C.J., concurring). It follows, the Chief Justice explained, that courts must affords States significant deference when adopting such measures:

> The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson*, [197 U.S. at 38]. When those officials "undertake[] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall v. United States*, 414 U.S. 417, 427 (1974). 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.

Id. In other words, the Chief Justice explained, *Jacobson* provided a second basis to uphold California's analogous gatherings rules.

New Jersey's limits on gatherings—like the limits across the country—easily withstand the review called for by *Jacobson*. First, the law has a "real or substantial

[9] As noted above, even before the Court's decision, the overwhelming majority of courts had upheld analogous state restrictions relying, in part, on *Jacobson*. *See, e.g.*, *Cassell*, 2020 WL 2112374, *7; *Calvary Chapel*, 2020 WL 2310913, *7; *Gish*, 2020 WL 1979970, *5; *Elim Romanian Pentecostal Church v. Pritzker*, 20-2782, 2020 WL 2468194, *3 (N.D. Ill. May 13, 2020); *Cross Culture*, 2020 WL 2121111, *5. After the Supreme Court's decision, no court has gone the other way.

relation" to its object of protecting public health. As the Chief Justice put it, "there is no known cure, no effective treatment, and no vaccine" for COVID-19, and most importantly, "people may be infected but asymptomatic, [meaning that] they may unwittingly infect others." *Id.*; *see also supra*, at pp. 3-4; Exs. C-D, G-H, T-V. Any limits on the number of individuals who can gather together for a communal service indoors obviously bears a substantial relation to public health. Second, there is no plain and palpable invasion of free exercise rights. Even as "physical contact with others is curtailed" at indoor services, "a wide swath of religious expression remains untouched by the Orders," *Gish*, 2020 WL 1979970, *5, including outdoor worship services and indoor services of up to 50. Further, as explained above, the gatherings limits are neutral rules that do not violate the traditional First Amendment test, so it certainly cannot be "beyond all question" that they represent a "plain" invasion of those rights. *See S. Bay United Pentecostal Church*, 2020 WL 2813056, *2 (Roberts, C.J., concurring) (concluding that "[t]he notion that it is 'indisputably clear' that the Government's limitations are unconstitutional seems quite improbable").

Plaintiffs obligatorily cite *Jacobson* but proceed to ignore its holding and its reasoning. They assert that they "do not ask the Court to second-guess the efforts of defendants," Dkt. 4-1, at 15, yet they contend that they only should have to "comply with CDC guidelines for social distancing," Dkt. 4-1 at 24, and that they should not have to abide by any indoor numeric limitations. Plaintiffs misstate the law and the

CDC guidelines. With respect to the former, as noted above, the Chief Justice noted the "Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States," and that if "those officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad." *S. Bay United Pentecostal Church*, 2020 WL 2813056, *1. Simply put, it is not for federal courts to decide which "social distancing" measures are sufficient to allow more than 50 individuals to gather together in an indoor space. And with respect to the guidelines, the CDC has said that large gatherings should be canceled, and that "the cutoff threshold is at the discretion of community leadership based on the current circumstances the community is facing." Ex. AB. The State's policy is thus in line with CDC recommendations, and certainly at least falls within the area of reasonable disagreement that courts cannot "second-guess[]." That is true even as the spread of COVID-19 lessens due to these restrictions; casting aside even these higher limits on indoor gatherings is "like throwing away your umbrella in a rainstorm because you are not getting wet." *Cassell*, 2020 WL 2112374, *7 (quoting *Shelby Cty. v. Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting)). To the contrary, *Jacobson* demands that the State be allowed to continue following its methodical reopening plan in line with the data and public health experts.

C. Plaintiffs' Remaining Claims Lack Merit.

None of Plaintiffs' other claims get them further. The Establishment Clause

claim falls short for two reasons. First, as a threshold matter, the cornerstone of the Establishment Clause claim appears to be that houses of worship were not designated as "essential." *See* Dkt. 4-1 at 19-20. But Plaintiffs misunderstand the Orders' use of that term. The designation of "essential" allowed the State to distinguish between the retail spaces that are allowed to remain open and those that must remain closed. No houses of worship were ever required to close. Second, the Establishment Clause claim appears to be Plaintiffs' second attempt to assert a Free Exercise claim, given their reliance in this section of their brief on *Jehovah's Witnesses Assembly Halls of New Jersey v. City of Jersey City*, 597 F. Supp. 972 (D.N.J. 1984) and on *Maryville Baptist Church*, 957 F.3d 610, which analyzed only free exercise claims. Plaintiffs offer no argument at all as to how these Orders fail the test for Establishment Clause claims in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), and other courts have rejected identical arguments. *See Calvary Chapel*, 2020 WL 231913, *9 (correctly noting that such orders have secular purpose of slowing spread of COVID-19 and primary effect of limiting secular and religious gatherings, and that there has been no showing of government entanglement with religion).

The remaining First Amendment and Equal Protection claims rely on the same misconception that New Jersey disfavors religious conduct over analogous secular activities, which has been rebutted above and in the Chief Justice's opinion in *South Bay United Pentecostal Church*. *See* Dkt. 20 ¶108-114, 122-130 (First Amendment

claims); *id.* ¶¶131-138 (Equal Protection Clause claims); *Calvary Chapel*, 2020 WL 2310913, *9 (noting that these derivative claims fail if the free exercise claim cannot prevail). The remaining First Amendment claims also fail for independent reasons on the merits. With respect to free speech, New Jersey's limits on indoor gatherings of more than 50 persons reflect "content-neutral" regulations tailored to advance the State's interest in slowing the spread of COVID-19, and they all leave open channels for the speech—including in unlimited gatherings outdoors and virtually. *See Givens v. Newsom*, No. 20-852, 2020 WL 2307224, *5-7 (E.D. Cal. May 8, 2020) (rejecting free speech claim). The freedom of assembly and association claims fail for similar reasons. *See, e.g.*, *id.* (noting that "[t]he State's order seeks to suppress the virus, not expressive association" and that it "does not prohibit substantially more expressive association than is necessary to advance this [health] objective"); *Legacy Church*, 2020 WL 1905586, *38-41 (D.N.M. Apr. 17, 2020) (same).

The vagueness claim also falls short. As a threshold matter, Plaintiffs have not even alleged they personally were injured by the allegedly "overly broad language." *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1135 n.14 (3d Cir. 1992). "An individual has standing to challenge a provision on vagueness grounds only if it is vague *as applied to that person*." *Rode v. Dellarciprete*, 845 F.2d 1195, 1200 (3d Cir. 1988) (emphasis added). In any event, on the merits, these Orders are "sufficiently explicit to inform" or give fair warning to anyone about which conduct violates the limits—

in the context of Plaintiffs' proposed activities, only for religious services of more than 50 persons or more than 25 percent of the room's capacity. Still more, Plaintiffs are simply wrong to argue the State has "unfettered discretion" and provides a "lack of any procedures for challenging their discretionary determinations." Dkt. 4-1 at 26. The Orders themselves, under long-settled New Jersey law, can be challenged at any time in the Appellate Division of the State's courts. *See Worthington v. Fauver*, 440 A.2d 1128 (N.J. 1982); *In re Veto*, 58 A.3d 735 (N.J. Sup. Ct. App. Div. 2012); N.J. Ct. R. 2:2-3(a)(2). Plaintiffs simply have not availed themselves of that option. Finally, any remaining "due process" claims must fail because the First Amendment claims fail. *See Betts v. New Castle Youth Dev. Ctr.*, 621 F.3d 249 (3d Cir. 2010) (adopting rule that "if a constitutional claim is covered by a specific constitutional provision, ... the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process").[10]

II. THE REMAINING FACTORS MILITATE AGAINST GRANTING PRELIMINARY INJUNCTIVE RELIEF.

Even if this Court concludes that Plaintiffs have a sufficiently high likelihood of success—which, in the Third Circuit, is a gateway factor to granting preliminary relief—the remaining factors strongly cut in favor of maintaining the status quo and

[10] Plaintiffs also appear to argue that the restrictions on indoor gatherings affect their right to travel. *See* Compl. ¶124. But they offer no basis to think this is so. For one, the Orders have always permitted travel from one's home for a religious reason. For another, the stay-at-home order has been rescinded. *See* N.J. Exec. Order 153.

denying such relief. While Plaintiffs are somewhat impacted by the gatherings rules, the State has taken critical steps to address any harms.[11] By contrast, the State would be significantly impacted by an injunction that disrupts its measured and temporary steps to curb the spread of COVID-19, and its equally measured steps to lift social distancing rules in ways that protect public health.

Although the State does not dispute that Plaintiffs are impacted by the inability to gather in religious worship in large groups—which is why the State would never impose such rules outside of an emergency—a number of factors undermine the case for irreparable harm. For one, the Governor has significantly amended the rules that govern religious services since the time Plaintiffs filed their lawsuit. Most strikingly, this means that services could take place in *unlimited numbers* so long as they occur outdoors, where the open-air environment helps to reduce the risks of COVID-19 transmission. (And if Plaintiffs' concern is that outdoor services cannot occur in poor weather conditions, EO 152 allows the gathering to take place in an open-air tent.)

[11] Moreover, the fact that Plaintiffs would be upending the status quo so many weeks after the gatherings rules went into effect undermines the strength of the irreparable harm prong. It is black letter law that "delay in filing" for such relief "undermines" such claims. *Doris Behr 2012 Irrevocable Trust v. Johnson & Johnson*, No. 19-8828, 2019 WL 1519026, *4 (D.N.J. 2019); *see also, e.g., Pharmacia Corp. v. Alcon Labs.*, 201 F. Supp. 2d 335, 382 (D.N.J. 2002) (a delay can "knock[] the bottom out of any claim of immediate and irreparable harm," and is a "dispositive basis" for rejecting a preliminary injunction). That is so because delays increase the risk that relief will "fundamentally alter[] the status quo." *Acierno v. New Castle County*, 40 F.3d 645, 647 (3d Cir. 1994). Although EO 107 went into effect on March 21, 2020, Plaintiffs did not file suit until May 22, 2020, Dkt. 1, more than two months later.

The only current limits are those governing indoor worship services—and even in that context, a house of worship can have 50 individuals come together for a service, assuming the room is large enough. Said another way, the *only* harm is the inability to conduct a service indoors of more than 50 people or more than 25 percent of a room's capacity, given the still-significant risk of COVID-19 transmission at large indoor events. New Jersey is thus allowing "robust avenues for praise, prayer and fellowship," and each of its "allowances go a long way towards mitigating the harms Plaintiffs identify." *Cassell*, 2020 WL 2112374, *2, 15.[12]

On the other side of the ledger, the State would face considerable harm from the grant of an injunction in this case—indicating that both the balance of equities and the public interest militate against preliminary relief. As a general matter, a State

[12] Plaintiffs' certifications prove the point. Plaintiffs each certify that they engage in religious worship that must take place in-person, but none of them certify that their religious practice must take place indoors, rather than outdoors. Moreover, many of the Plaintiffs could comply with the gatherings limit now. Plaintiff House of Praise certifies that it now "has 65 members, of whom 45 typically attend Sunday morning services"—within the indoor gatherings limit. *See* Dkt. 5 ¶5. Plaintiff Dwelling Place has "140 regular Sunday-morning service worshippers," and it already spread them out "over three morning services"—once again within the indoor gatherings limit. *See* Dkt. 4-3 ¶4. While Plaintiff House of Cornerstone Community Church conducts services that "attract approximately 185 worshippers," Dkt. 4-4 ¶4, and Plaintiff New Life Church planned to reduce capacity "to between 156 and 180 worshippers [and] five people" on stage, Dkt. 4-2 ¶7, they can do so either by holding four indoor services (Plaintiff Cornerstone already intended to "spread our Sunday services out over three sessions," Dkt. 4-4 ¶4), or by conducting them outdoors, or by engaging in some combination of the two. By allowing individuals to engage in group worship of any number outdoors, and to allow any gatherings in groups of up to 50 indoors, the State has significantly mitigated the alleged harms.

suffers irreparable harm anytime it is enjoined by the court from enforcing one of its policies. *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers). But the harm here would be especially profound. Indeed, "preventing enforcement" of these gatherings limits "would pose serious risks to public health." *Cassell*, 2020 WL 2112374, *15; *see also, e.g.*, *Tolle v. Northam*, 20-363, 2020 WL 1955281, *1 (E.D. Va. Apr. 8, 2020) ("Although the Court recognizes plaintiff's constitutional concerns, those concerns do not outweigh the severe harm defendants would suffer if they could not enforce the Executive Order. Moreover, it is no exaggeration to recognize that the stakes for residents of the [State] are life-or-death.").

Much as the parties all wish it were otherwise, "the sad reality is that places where people congregate, like churches, often act as vectors for the disease." *Cassell*, 2020 WL 2112374, *15. And the heightened risk of contracting COVID-19 would extend not just to those people who accept that risk and choose to commune in large numbers, but also to anyone who they later interact with, and then for those who *they* contact, and the next people, and the next. *See id.* (agreeing that such an injunction "would not only risk the lives" of Plaintiffs' congregants but also "increase the risk of infections among their families, friends, co-workers, neighbors, and surrounding communities"). The record is replete with evidence that indoor gatherings, religious or otherwise, contribute to the quick and extensive spread of the virus. *See* Exs. I-J, L-N, P-R. The public interest thus demands that New Jersey be allowed to maintain

rules to limit such gatherings consistent with the public health data. And it demands that this Court not order the State to allow indoor gatherings of more than 50 persons to occur before the State can conclude they are consistent with public health. *See S. Bay United Pentecostal Church*, 2020 WL 2813056, *2 (Roberts, C.J., concurring) (rejecting the idea that a court should provide "emergency relief in an interlocutory posture, while local officials are actively shaping their response to changing facts on the ground"); *Bullock v. Carney*, No. 20-2096, 2020 WL 2819228, *1 (3d Cir. May 30, 2020) (affirming district court's denial of request by pastor for temporary relief from Delaware's rules on the basis that the equitable factors were not satisfied).

In short, "[t]aking into account COVID-19's virulence and lethality, together with the State's efforts to protect avenues for religious activity," this Court should hold that "equitable considerations, including the promotion of the public interest, weigh heavily against the entry of" a preliminary injunction allowing for more than 50 people to participate in Plaintiffs' gatherings. *Cassell*, 2020 WL 2112374, *15. Combined with the fact that their claims will not prevail on the merits, and especially in light of the Chief Justice's opinion, preliminary relief is improper.

CONCLUSION

Plaintiffs' Motion for Preliminary Injunctive Relief should be denied. New Jersey must instead be allowed to continue evaluating its restrictions in a considered and neutral way, as *Jacobson* and the Free Exercise Clause authorize it to do.

Respectfully submitted,

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