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APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2732

CHARLES CLARK, III; SOLID ROCK BAPTIST CHURCH, New Jersey not-for-profit corporation; BIBLE BAPTIST CHURCH OF CLEMENTON, New Jersey not-for-profit corporation; CHARLES CLARK, JR.; PASTOR ANDREW REESE,
Appellants

v.

GOVERNOR OF THE STATE OF NEW JERSEY; ATTORNEY GENERAL OF THE STATE OF NEW JERSEY; PATRICK J. CALLAHAN, Superintendent of State Police and State Director of Emergency Management in his official capacities; JILL S. MAYER; THOMAS J. WEAVER; CHIEF CHARLES GROVER; RICK MILLER; MILLARD WILKINSON; RICHARD A. DE MICHELE; CHERYL R. HENDLER COHEN

On Appeal from the United States District Court
for the District of New Jersey
(District Court No. 1:20-cv-06805)
District Judge: Honorable Renee M. Bumb

Argued August 23, 2022

(Filed: November 28, 2022)

Before: Greenaway, Jr., Matey,
and Rendell, *Circuit Judges*.

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OPINION OF THE COURT

RENDELL, *Circuit Judge*.

Once again, we have been asked to decide whether a challenge to long defunct COVID-19 pandemic restrictions presents a justiciable controversy.[1] Because the in-person gathering limits complained of here were rescinded over two years ago and it is absolutely clear their return could not reasonably be expected to recur, we hold that the case is moot.

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[1] *See Cnty. of Butler v. Governor of Pennsylvania*, 8 F.4th 226 (3d Cir. 2021).

I. BACKGROUND

A.

In March 2020, New Jersey Governor Philip Murphy took a series of measures to respond to the spread of COVID-19.[2] In Executive Order ("EO") 103, he declared a state of emergency pursuant to the Civilian Defense and Disaster Control Act, N.J. Stat. Ann. § A:9-33, et seq., as well as a public health emergency pursuant to the Emergency Health Powers Act, N.J. Stat. Ann. § 26:13, N.J. Stat. Ann. These declarations empowered the Governor to issue follow-up orders addressing the pandemic, an authority he went on to use.

On March 21, Governor Murphy issued EO 107, which, *inter alia*, prohibited in-person gatherings and ordered New Jersey residents to "remain home or at their place of residence," except for certain approved purposes, such as an "educational, political, or religious reason." *See Solid Rock Baptist Church v. Murphy*, 480 F. Supp. 3d 585, 589 (D.N.J. Aug. 20, 2020) (citing N.J. Exec. Order 107 ¶ 2 (Mar. 21, 2020)) ("*Solid Rock I*"). EO 107 excepted certain categories of businesses deemed "essential," including grocery and liquor stores, which could continue to welcome any number of persons (consistent with social distancing guidelines). *Id.* at 588–89. Violations of EO 107's proscriptions

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[2] Governor Murphy is the lead Defendant-Appellee named in this appeal, as he promulgated the relevant executive orders. Eight other state and local officials responsible for interpreting and enforcing the Governor's orders are also named. In this opinion, we refer to these individuals and the Governor collectively as "Appellees" or "the State."

were enforceable by criminal prosecution for "disorderly conduct," N.J. Stat. Ann. § App. A:9-49. Further, the order granted Defendant-Appellee Colonel Patrick Callahan, Superintendent of the State Police, "discretion to make clarifications and issue [related] orders[.]" N.J. Exec. Order 107 ¶ 6 (Mar. 21, 2020). He exercised that power the same day EO 107 was signed, declaring in Administrative Order No. 2020-4 that gatherings of ten or fewer persons were presumptively permitted.[3] Neither EO 107 nor AO 2020-4 contained an exception for religious worship gatherings or other First Amendment-protected activity.

B.

Plaintiff-Appellants are two New Jersey-based, Christian congregations, Solid Rock Baptist Church and Bible Baptist Church of Clementon, and their respective pastors, Andrew Reese and (as co-pastors) Charles Clark III and Charles Clark, Jr. Appellants believe that the Holy Bible requires them to gather for in-person worship services. Although both congregations switched to online services in the wake of the Governor's gathering restrictions, by late May 2020 they had resolved to defy those rules and return to in-person worship. After informing state authorities of their intention to do so, the two churches held services with more than ten persons in attendance. Local police, executive officials, and prosecutors—several of whom

[3] Colonel Callahan's clarifying order would, itself, be adopted in Governor Murphy's Executive Order 142, on May 13, 2020.

are named Defendant-Appellees[4]—then participated in issuing and pursuing criminal complaints against the Pastors for their violations of EO 107 and AO 2020-4.

Aggrieved by these actions, Appellants filed a complaint in the United States District Court for the District of New Jersey on June 3, 2020, naming Governor Murphy, New Jersey Attorney General Gurbir Grewal, Superintendent Callahan, and a slew of local officials as defendants. In the complaint, Appellants "challenge[d] Executive Order No. 107 . . . as further clarified by Administrative Order No. 2020-4," App. 36, asserting that the orders discriminated against religion by effectively closing churches while permitting secular activities deemed "essential" to operate unimpeded, App. 37. Appellants sought relief in the form of "a preliminary and permanent injunction enjoining Defendants or their designees or agents from enforcing the challenged Orders under any 'social distancing' requirements different from those governing 'essential' businesses or services," "a declaratory judgment and preliminary and permanent injunction that the challenged Orders are unconstitutional, on their face and

[4] These include: Jill S. Mayer, Camden County Prosecutor for Clementon Borough; Thomas J. Weaver, Mayor of Clementon Borough; Charles Grover, Chief of Clementon Borough Police Department; Rick Miller, Mayor of Berlin Borough; Millard Wilkinson, Chief of Berlin Borough Police Department; Richard A. De Michele, Prosecutor for Berlin Borough; Cheryl R. Hendler Cohen, Prosecutor for Clementon Borough.

as applied," and an award of costs, including attorneys' fees. App. 54. They did not seek damages.

C.

Less than a week after the complaint was filed, on June 9, 2020, Governor Murphy rescinded EO 107 in relevant part. In EO 152, the Governor raised indoor gathering limits to fifty persons or twenty-five percent room capacity (whichever was less); the order also permitted outdoor religious gatherings *without any gathering limits*, in recognition of the "particular[] importan[ce]" of "religious services" to the functioning of society. *See* N.J. Exec. Order 152 at 4, ¶ 2(f) (June 9, 2020) (further excepting outdoor political gatherings, such as "protests"). The same day, EO 153 rescinded EO 107's general stay-at-home requirement. N.J. Exec. Order 153 ¶ 11 (June 9, 2020).

EOs 152 and 153 presaged a trend; in the months that followed, Governor Murphy progressively relaxed the restrictions applicable to religious worship services. On June 22, 2020, EO 156 further loosened the restrictions applicable to Appellants, raising the maximum number of persons allowed at an indoor gathering to 100. N.J. Exec. Order 156 ¶ 1 (June 22, 2020).[5] On September 1, EO 183 permitted religious

[5] Although not every executive order discussed herein was entered into the record below, we may take judicial notice of their content. *See*, *e.g.*, *Union Cnty. Jail Inmates v. Di Buono*, 713 F.2d 984, 988 n.4 (3d Cir. 1983) (taking judicial notice of state executive orders).

gatherings of up to 150 persons. N.J. Exec. Order 183 ¶ 4 (Sept. 1, 2020) (retaining a twenty-five-person limit for generic secular gatherings). When COVID-19 case rates trended sharply upward in November, gathering limits were tightened for many contexts, but worship services were excepted and retained the limits set forth in EO 183. *See* N.J. Exec. Order 196 at 3, ¶ 1 (stating that "religious services" are "constitutionally protected").

On February 3, 2021, EO 219 increased the general gathering limit to 150 persons or thirty-five percent capacity and, on February 22, EO 225 set a new gathering limit for indoor religious services of fifty percent room capacity, *with no numerical limit*. *See* N.J. Exec. Order 219 ¶ 3 (Feb. 3, 2021); N.J. Exec. Order 225 at 3–4, ¶ 1 (Feb. 22, 2021) ("[A]t certain times, restrictions on [religious worship] gatherings should be less aggressive than restrictions on other gatherings[.]"); *see also* N.J. Exec. Order 230 at 5 (Mar. 11, 2021) ("[R]estrictions on [religious worship] gatherings should be less aggressive than restrictions on other gatherings[.]").

Ultimately, on May 12, 2021, Governor Murphy issued EO 239, which eliminated the remaining fifty percent capacity gathering restriction applicable to religious worship. *See* N.J. Exec. Order 239 ¶ 6 (May 12, 2021) (conditioning worship service attendance on the need for social distancing only). In EO 239, the Governor explained that this policy adjustment was driven by, among other things: (1) the "critical knowledge" that had been gained regarding COVID mitigation

strategies; (2) "expanded access to testing, personal protective equipment, and other materials"; (3) reduced infection and hospitalization rates; and (4) the substantial progress in vaccination rollout. *See id.* at 4. On May 24, 2021, EO 242 lifted all remaining numerical gathering limits for non-religious contexts and rescinded the general social distancing guideline for religious services. N.J. Exec. Order 242 ¶¶ 4–6 (May 24, 2021). On June 4, 2021, EO 244 ended the public health emergency in the state. N.J. Exec. Order 244 ¶ 1 (June 4, 2021).

D.

Governor Murphy's gradual loosening of restrictions impacted Appellants' parallel action in the District Court. On August 8, 2020, the District Court denied Appellants' motion for a preliminary injunction—which had demanded permission to worship in groups larger than ten persons—holding that the very relief requested had been, "in effect, granted through the enactment of Executive Order 156 [permitting 100 persons or twenty-five percent capacity at all indoor gatherings]." *Solid Rock I*, 480 F. Supp. 3d at 588. The District Court reasoned that EO 156 thus mooted the claim for relief and denied without prejudice the remaining claims, which are not relevant to this appeal. *Id.* at 601.

One month later, Appellants filed an amended complaint. *Solid Rock II*, 555 F. Supp. 3d at 57. Again, they presented a narrow claim "challeng[ing] Executive

Order ("EO") No. 107" as "further clarified by Administrative Order ("AO") No. 2020-4." *Id.* at 56. The amended complaint focused exclusively on the ten-person gathering limit created by those Orders and demanded that said "challenged Orders" be declared unconstitutional. *Id.* at 61. On August 16, 2021, the District Court dismissed the amended complaint, holding that Appellants' claims were all moot. *Id.* at 62. The District Court observed that "the contested EO 107 was rescinded by several of Governor Murphy's additional orders" and there had been no limit on outdoor worship services since June 9, 2020; thus, "there can be no dispute that the alleged unlawful conduct—EO 107—has been terminated by Defendants." *Id.* at 61. Nor did the District Court find it sufficiently plausible that such restrictions might return: "Plaintiffs present no evidence to suggest that the State will again enact measures restricting religious worship but worry about the possibility of the State's future response." *Id.* (citing *Cnty. of Butler v. Governor of Pennsylvania*, 8 F.4th 226, 233 (3d Cir. 2021) (Jordan, J., concurring)).[6] Finally, the District Court held that, insofar as Appellants' claims invited the District Court to interfere in the ongoing prosecution of the Pastors, it would abstain under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). *Solid Rock II*, 555 F. Supp. 3d at 57.

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[6] The District Court also reasoned that intervening Supreme Court precedent, *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) and *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), ensured that the State would not repeat the alleged harms. We discuss the relevance of those cases in detail below.

Appellants timely appealed.

E.

The COVID-19 pandemic and the State's response thereto have continued to evolve since this appeal was filed. On December 15, 2021, the criminal cases against the Appellant Pastors were voluntarily dismissed.[7] Over the fall and winter of 2021-22, the Delta and Omicron variants led to a spike in the reported cases of COVID, prompting Governor Murphy to declare a new public health emergency in EO 280, issued on January 11, 2022. N.J. Exec. Order 280 at 8 (Jan. 11, 2022). Although more COVID orders followed in the subsequent months, Governor Murphy refrained from reimposing any gathering restrictions. On March 4, he lifted the public health emergency once again in EO 292. N.J. Exec. Order 292 ¶ 1 (Mar. 4, 2022). When case reports trended upward in May, no health emergency was

[7] As explained above, the prosecutions of the Pastors were initiated in May 2020. At Oral Argument, the Panel was informed that, for some uncertain period between initiation and dismissal, the prosecutions were stayed at the request of the parties. The record in the District Court reveals that the action against Pastor Reese had been stayed by August 2020, at which time a request to stay the parallel prosecution of the Clarks was pending in state court. ECF Dkt. 20-cv-6805, Doc. No. 30. Both matters had been stayed by April 2021, "in anticipation of [the District Court's ruling]." Doc. No. 74.

declared, nor were any gathering restrictions implemented.[8]

II. JURISDICTION AND STANDARD OF REVIEW

The District Court had subject matter jurisdiction under 28 U.S.C. § 1331. We have appellate jurisdiction under 28 U.S.C. § 1291, regardless of whether the case is moot. *See Hartnett v. Pennsylvania State Educ. Ass'n*, 963 F.3d 301, 305 (3d Cir. 2020). We review the District Court's legal conclusions de novo and its factual findings for clear error. *Id.*

III. THE DISTRICT COURT CORRECTLY HELD THIS CASE IS MOOT

Before us, Appellants contend that this case is not moot. We disagree. The District Court correctly found that the Governor's partial rescission of the orders challenged in the amended complaint ended any live controversy. Insofar as the prosecutions animated a continuing dispute, their voluntary dismissal leaves no escape from mootness. Moreover, it is absolutely clear there is not a reasonable likelihood that the restriction orders will be reimposed, so the voluntary cessation doctrine does not save this case.

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[8] *See New Jersey COVID-19 Dashboard*, NEW JERSEY DEPARTMENT OF HEALTH, https://www.nj.gov/health/cd/topics/covid2019_dashboard.shtml (last visited September 6, 2022); *Valentine v. Collier*, 960 F.3d 707, 708 (5th Cir. 2020) (taking judicial notice of state COVID statistics).

A.

The jurisdiction of the federal courts is limited to "Cases" and "Controversies". U.S. Const. art. III, § 2, cl. 1. "Thus, [we] can entertain actions only if they present live disputes, ones in which both sides have a personal stake." *Hartnett v. Pennsylvania State Educ. Ass'n*, 963 F.3d 301, 305 (3d Cir. 2020) (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 492–93 (2009)). The doctrine of mootness ensures that this condition remains "throughout the life of the lawsuit." *See Freedom from Religion Found. Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 476 (3d Cir. 2016) (quoting *Cook v. Colgate Univ.*, 992 F.2d 17, 19 (2d Cir. 1993)); *see also Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) ("No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute 'is no longer embedded in any actual controversy about the plaintiffs' particular legal rights.' " (quoting *Alvarez v. Smith*, 558 U.S. 87, 93 (2009))).

If it is impossible for us to grant "any effectual relief whatever to the prevailing party," then the case is moot. *See*, *e.g.*, *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 161 (2016) (quoting *Knox v. Serv. Emps.*, 567 U.S. 298 (2012)); *see also N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1526 (2020) (holding that case became moot when statutory amendments provided the relief sought); *Trump v. Hawaii*, 138 S. Ct. 377 (2017) (Mem.) (holding that challenge to expired provision of an executive order was moot). Yet, one "recurring situation" in which we are reluctant to dismiss

a case as nonjusticiable—despite the absence of ongoing conduct to enjoin—occurs where the defendant claims the matter has become moot owing to his voluntary cessation of the challenged action. *Hartnett*, 963 F.3d at 306–07; *see City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) ("Such abandonment is an important factor bearing on the question whether a court should exercise its power to enjoin the defendant from renewing the practice, but that is a matter relating to the exercise rather than the existence of judicial power."). In such cases, the defendant asserting mootness bears a particularly "heavy burden": it must be "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *See*, *e.g.*, *Fields v. Speaker of the Pa. House of Representatives*, 936 F.3d 142, 161 (3d Cir. 2019) (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007)).[9]

Here, Appellees contend that Governor Murphy's rescission of the relevant portions of EO 107 (which AO 2020-4 purported to apply) has rendered this case moot. Indeed, Appellees point out, indoor religious worship services in New Jersey have not been subject to *any* capacity restrictions for well over a year; so, "[t]here is simply no prospective relief left for this Court to grant." Appellees' Br. at 13. Appellants reply that the case appears moot only because of the Governor's

[9] Further, "[w]hen a plaintiff seeks declaratory relief, a defendant arguing mootness must show that there is no reasonable likelihood that a declaratory judgment would affect the parties' future conduct." *Hartnett*, 963 F.3d at 306 (citations omitted).

unilateral rescission of his COVID orders, meaning that the voluntary cessation doctrine imposes its "heavy burden" on any claim of mootness. In turn, Appellees seek to meet that burden by pointing to several factors, including the radically changed public health situation and the lack of renewed gathering restrictions during the Delta and Omicron waves.

Appellants also contend that the District Court incorrectly saddled them with the burden of showing a likelihood of recurrence. *See Solid Rock II*, 555 F. Supp. 3d at 61 ("Plaintiffs present no evidence to suggest that the State will again enact measures restricting religious worship but worry about the possibility of the State's future response."). We agree the District Court should have been clearer that the State, as "the party claiming mootness," bore the burden of demonstrating that it was absolutely clear there was no reasonable likelihood of recurrence. *See Hartnett*, 963 F.3d at 307 (citation omitted). As noted above, that burden is especially heavy where the claim of mootness is based on voluntary cessation of the challenged conduct. *Id.* at 307 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). However, this error does not impact our analysis as we review whether this case is moot de novo. *See Hamilton v. Bromley*, 862 F.3d 329, 333 (3d Cir. 2017).

For the reasons discussed below, we conclude that the controversy over Governor Murphy's orders ended with their rescission and Appellees have carried their burden of showing that it is absolutely clear that recurrence is not reasonably likely.

1.

This case is facially moot. The relevant portions of EO 107 and AO 2020-4 were rescinded by Governor Murphy over two years ago; thus, there is no "effectual relief whatsoever" that this Court may grant in relation to those orders. *See Campbell-Ewald Co*, 577 U.S. at 161. In the amended complaint, Appellants chose to put their challenge narrowly and identify those orders alone as the objects of their ire—despite knowing that New Jersey's COVID regime had already begun to relax. The choice to confine the scope of litigation meant the Governor's first steps towards reopening rendered Appellants' amended complaint moot-on-arrival.

More broadly, the Governor's orders ceased to disfavor religion (even in relation to so-called "essential" businesses) no later than February 22, 2021, when EO 225 ended that suspect imbalance. *Compare* N.J. Exec. Order 225 ¶ 1 (Feb. 22, 2021) (raising indoor religious worship capacity limit to fifty percent) *with* N.J. Exec. Order 122 ¶1(a) (Apr. 8, 2020) (setting maximum "essential retail business" occupancy at fifty percent). Even if we were to be charitable and read the amended complaint as raising a challenge to *any* COVID-based gathering restriction on religious worship, then Appellants *still* received the very relief sought in May 2021, when the last gathering restrictions ended. *See* N.J. Exec. Order 239 ¶ 6 (May 12, 2021) (limiting religious service attendance based only on the need for social distancing); N.J. Exec. Order 242 ¶ 10 (May 24, 2021) (rescinding EO 239's social distancing condition); *Brach v. Newsom*, 38 F.4th 6, 11 (9th Cir. 2022) (challenge to

executive COVID orders was moot after rescission of all such orders, where action had sought injunctive and declaratory relief); *Eden, LLC v. Justice*, 36 F.4th 166, 169 (4th Cir. 2022) (same). It thus appears that this Court cannot grant any effectual relief to Appellants, so their claims are no longer justiciable.[10]

2.

Nonetheless, Appellants insist the case remains justiciable under the voluntary cessation doctrine, correctly observing that "even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not *necessarily* moot the case." *Tandon*, 141 S. Ct. at 1297 (emphasis added). They argue that the State has failed to meet its burden of showing that it is absolutely clear a return to restrictions on religious worship is not reasonably likely, so we ought to opine on the legality of the defunct orders.

Before facing that proposition head-on, we pause to clarify the scope of our inquiry. For Appellants to prevail, we need not conclude it is likely that the *exact*

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[10] Appellants argue that their claim for attorneys' fees has not been vindicated, thus keeping the case alive. Not so. *See*, *e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("An 'interest in attorney's fees is . . . insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim.'" (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990))); *Ivy Club v. Edwards*, 943 F.2d 270, 276 (3d Cir. 1991) ("[A]n interest in attorneys' fees does not save a matter from mootness.").

same restrictions contained in EO 107 (and AO 20202-4) will return. At the same time, it is not as though the chance of *any* future COVID-related restrictions on Appellants' religious exercise will do. Rather, the hypothesized restriction must be "'similar' enough to the [original restriction] to present substantially the same legal controversy as the one presented" here. *See*, *e.g.*, *Resurrection Sch. v. Hertel*, 35 F.4th 524, 528 (6th Cir. 2022) (citing *Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 662 n.3 (1993)).

Appellants' amended complaint attacked an indoor gathering limit of ten persons and observed that certain secular activities were subject to more generous rules. Logically, then, a reasonable likelihood that Governor Murphy will, say, impose a *ninety percent* capacity limit on all indoor gatherings, or create a restriction that treats churches *more* favorably than grocery stores, would not suffice. We would not be contemplating the resurrection of the current controversy, but the creation of a new one, even if some legal issues recurred. Thus, Appellees' burden amounts to convincing us that it is absolutely clear that it is not reasonably likely they will re-impose severe in-person gathering restrictions applicable to religious worship services, nor differential burdens favoring secular over religious gatherings. Several considerations persuade us this burden is met.[11]

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[11] The dissent appears to require some definitive statement or assurance from the Governor that, even if the same pandemic

First, as we have noted, mootness concerns itself with whether the same legal controversy will recur. The controversy here has two aspects to it: (1) whether the same precise situation—the pandemic such as it presented itself in 2020 and 2021—will occur again; and (2) whether the Governor will respond to that situation by imposing restrictions similar enough to those he imposed in 2020 and 2021, such that it presents "substantially the same legal controversy as the one presented" here. *Resurrection Sch.*, 35 F.4th at 528. It is absolutely clear that neither of those aspects are reasonably likely to recur. Regarding the likelihood that the same pandemic conditions we faced in 2020-21 will repeat themselves, it is hard to imagine that we could once again face anything quite like what confronted us then. Moreover, the public health outlook has changed dramatically since the dark days of March 2020, when the ten-person gathering limit was implemented. Our knowledge of the virus and its vectors of transmission, the rollout of vaccines, and the availability of therapeutic responses to infection have totally changed the nature of the disease itself, our

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conditions reoccurred, he would not impose restrictions on religious gatherings. First, why would we require a government official to engage in that kind of speculation based on hypothetical facts? The dissent does not say. Second, and more importantly, Appellees' task is not to offer us *absolute certainty* that the restrictions will not happen again; instead, they must show it is "absolutely clear that the allegedly wrongful behavior *could not reasonably be expected to recur*." *Fields*, 936 F.3d at 161 (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007)) (emphasis added). Appellees have done precisely that.

understanding of it, and our response to it. The accumulation of those changed circumstances thus make the return of the same pandemic and the same restrictions unlikely. *See*, *e.g.*, *Cnty. of Butler*, 8 F.4th at 230[12]; *id.* at 233 (Jordan, J., concurring); *Lighthouse Fellowship Church v. Northam*, 20 F.4th 157, 164 (4th Cir. 2021); *see also Brach*, 38 F.4th at 15 (same medical factors suggest that school closures will not return). Governor Murphy relied on these facts when he eliminated the remaining gathering restrictions in May

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[12] In *County of Butler v. Governor of Pennsylvania*, 8 F.4th at 226, we held that a challenge to various Pennsylvania COVID restriction orders was moot, *id.* at 232. That conclusion was based on changed circumstances (1) on "the health front" and (2) "on the legal front." *Id.* at 230. Regarding the latter, we explained that "[a]n amendment to the Pennsylvania Constitution and a concurrent resolution of the Commonwealth's General Assembly now restricts the Governor's authority to enter the" sort of orders challenged in the case. *Id.* Here, Appellants and the dissent contend vigorously that *Butler* can be distinguished from the present action, as New Jersey's Governor still has the legal authority to issue COVID restrictions. We disagree. Although the change in the law was a factor in *Butler*, because we noted that the Pennsylvania Health Secretary *retained* the authority to issue comparable COVID orders and yet still held the case was moot, the change was undoubtedly not a *necessary* condition for our holding. *Id.* at 231 ("Plaintiffs have not carried [their] burden [under the capable-of-repetition doctrine]. Plaintiffs have pointed only to the fact that the Secretary of Health still claims the power to issue orders of the sort before us now."). Our decision in *Butler* thus provides strong precedential support for mootness here. True, as the dissent notes, we were proceeding under the capable-of-repetition doctrine of mootness, but the health factors we identified as supporting mootness in *Butler* are still present here and point in the same direction, yet the dissent offers no reason why the voluntary cessation doctrine requires us to disregard those same health factors when evaluating mootness in this case.

2021. *See*, *e.g.*, N.J. Exec. Order 239 at 1–7. As we have no reason to doubt the sincerity of that justification, *see Cnty. of Butler*, 8 F.4th at 230–31 (describing the presumption of good faith accorded government officials), the Governor's motivation further supports mootness: we are generally less skeptical of voluntary cessation claims where the change in behavior was unrelated to the relevant litigation, *see id.* (holding voluntary cessation burden did not save the case because the challenged orders were not terminated "as a response to the litigation"); *Hartnett*, 963 F.3d at 306–07 ("[T]he defendant's reason for changing its behavior is often probative of whether it is likely to change its behavior again. . . . [I]f the defendant ceases because of a new statute or a ruling in a completely different case, its argument for mootness is much stronger.") (citations omitted). Thus, New Jersey's acknowledged medical progress militates against a reasonable likelihood of a recurrence of the same pandemic and similar future gathering restrictions.[13]

Second, Appellees can point to a track record since May 2021 of declining to reimpose gathering

[13] The dissent urges that this case should be controlled by *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). But that case is easily distinguishable. There, the event that would trigger recurrence of the challenged policy—i.e., the resolution of the litigation in the government's favor—could very easily happen, and the government was unwilling to say it would not impose the policy again if it did. *See* 142 S. Ct. at 2607. Here, the triggering event of a similar pandemic is not likely to recur. And to be clear, the discussion of mootness in *West Virginia* consists of two paragraphs—another reason why the discussion there cannot bear the weight the dissent places on it.

restrictions, even during periods when COVID case rates increased precipitously. The fact that such restrictions did not return during the Delta and Omicron waves—nor during the less extreme increase of May 2022—indicates that gathering restrictions are reasonably unlikely to return as a COVID mitigation measure. *See*, *e.g.*, *Eden, LLC*, 36 F.4th at 171 ("If there were any reasonable chance that the [West Virginia] Governor might reimpose the safety measures at issue . . . then those waves of increased infection should have been the occasion for doing so. But they were not, and like other courts, we see that as a powerful signal that whatever course the COVID-19 pandemic takes, a return to restrictions like those challenged here is highly unlikely.") (citation and quotation marks omitted); *see also Brach*, 38 F.4th at 14 (state's continuation of in-person school instruction during variant wave supported mootness); *Hertel*, 35 F.4th at 530–31 (Moore, J., concurring) (state's decision to forgo school mask mandate during variant waves supported mootness). Appellants have even demonstrated a unique reluctance to tighten restrictions on *religious* exercise. During the winter of 2020-21, when most gathering contexts were subjected to decreased occupancy limits, religious worship was excepted. *See* N.J. Exec. Order 196 ¶ 1. This made sense given the Governor's expressed respect for

religious freedom in his executive orders, starting with EO 152 in early June 2020.[14] [15]

Third, in the years since EO 107 was promulgated, there has been significant, intervening Supreme Court precedent. In *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. at 63, and *Tandon v. Newsom*, 141 S. Ct. at 1294, the Court emphasized that "government regulations are not neutral and generally applicable,

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[14] Granted, the early executive orders did burden religious worship gatherings, a fact we address further below. But the point remains: if New Jersey officials were remotely likely to reimpose some form of gathering restriction, then they would have done so when case rates exploded because of the more transmissible Delta and Omicron variants, but they did not.

[15] Appellants point out that Governor Murphy has continued to extend the state of emergency pursuant to the Disaster Control Act, despite ending the public health emergency declared under the Emergency Health Powers Act. *See* N.J. Exec. Order 292 at ¶¶ 1–2. The continuation of the emergency state means, in turn, that Governor Murphy still has the authority to issue COVID restrictions—a condition Appellants and the dissent tell us defeats the State's ability to meet its voluntary cessation burden. But the mere fact that Governor Murphy retains the power to reinstate the restrictions complained of does not mean we have a live controversy. *See*, *e.g.*, *Rendell v. Rumsfeld*, 484 F.3d 236, 242 (3d Cir. 2007) ("[S]tatutory changes that discontinue a challenged practice are usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the law suit is dismissed.") (internal citations and quotation marks omitted); *Bos. Bit Labs, Inc. v. Baker*, 11 F.4th 3, 10 (1st Cir. 2021) ("That the Governor has the power to issue executive orders cannot itself be enough to skirt mootness, because then no suit against the government would ever be moot. And we know some are.") (citations omitted). Nor does the existence of a state of emergency show that a return to gathering restrictions is reasonably likely. *See*, *e.g.*, *Eden, LLC*, 36 F.4th at 172 n.5.

and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise," *Tandon*, 141 S. Ct. at 1296. This rule provided state officials with crucial guidance in shaping any future COVID restrictions, instructing them that such regulations must be neutral and generally applicable in all but the narrowest of circumstances. We believe there is no reasonable likelihood that the State will tempt fate by reimposing restrictions disfavoring religion in the teeth of this caselaw. *See*, *e.g.*, *Hawse v. Page*, 7 F.4th 685, 693 (8th Cir. 2021) ("Even in the hypothetical event that the County were to reinstate gathering limits of fewer than ten persons, there is no reasonable expectation that the County would flout the Supreme Court's intervening pronouncements on equal treatment between religious exercise and comparable secular activity."); *Hertel*, 35 F.4th at 529.[16]

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[16] Appellants direct us to the Supreme Court's holding in *Diocese of Brooklyn* that rescission of COVID restrictions might not moot a case where the defendant "regularly changes" the regime applicable to the plaintiffs. 141 S. Ct. at 68. There, New York had implemented a geographic risk classification system that resulted in rapid changes—sometimes several in a single week—to the capacity caps applicable to houses of worship. *Id.* at 69 n.3. That situation kept the case alive because petitioners lived under "a constant threat" that they would again be subjected to a harsher classification. *Id.* at 67–68. The instant case is plainly distinguishable. As detailed above, Governor Murphy progressively loosened restrictions on religious worship services starting in June 2020. The regulations applicable to religious exercise have moved in only one direction in New Jersey: towards increased freedom. Appellants have not been subject to any numerical or capacity limits on their worship gatherings since May 2021, well

Appellants argue that Governor Murphy has shown a lack of respect for these precedents by failing to issue relaxed COVID guidance fast enough after they were announced. When pressed at oral argument, however, Appellants' counsel conceded that the State's regime already avoided strict scrutiny under the rule of these cases by the time they had both been decided. When *Tandon* came down in April 2021, religious worship gatherings were subject to the same fifty percent capacity limit applicable to essential businesses, and they had been since February 2021.

Further, although the prosecution of the Pastors continued for months after the Supreme Court had implicitly cast doubt on the validity of EO 107's proscriptions, we do not take this as persuasive evidence that the Governor and other high state officials are dismissive of precedent. As explained above, it appears the prosecutions had been stayed when *Diocese of Brooklyn* and *Tandon* were decided, and they would remain so for some time after. It is thus not as though the State was actively pressing for convictions in the face of ominous caselaw. And we are hesitant to read the actions of municipal prosecutors as reflecting directly on the views and intentions of New Jersey's

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over a year ago. There is thus no comparison to be made with the New York system of sudden, inconsistent, and ongoing changes that gave the *Diocese of Brooklyn* Court pause. *See Brach*, 38 F.4th at 14–15. For the same reasons, we do not believe that Appellees have the "track record of 'moving the goalposts' " that concerned the Court in *Tandon*. *See* 141 S. Ct. at 1297.

highest officials.[17] Although the Attorney General does exercise ultimate supervisory authority over local prosecutors (subject to the Governor's oversight), there is no unified chain-of-command, and he is not responsible for their day-to-day functioning. *See Yurick v. State*, 184 N.J. 70, 79, 875 A.2d 898 (2005) (citations omitted). The delay in dismissing the prosecutions thus reflects on the Governor and his cabinet only indirectly.

Finally, even assuming a reasonable likelihood of *some* COVID-based gathering restriction returning, it is implausible that a challenge to that restriction would constitute the *same legal controversy* as the one before us now. Given *Diocese of Brooklyn* and *Tandon*, the State is now on notice that religious exercise cannot be disfavored relative to comparable secular activity, even if the latter is deemed an "essential service" during emergency conditions. *See Hertel*, 35 F.4th at 529 ("The Supreme Court and other courts have since blocked any number of [COVID orders], thereby providing concrete examples of mandates and restrictions that violate the Free Exercise Clause."). We have no reason to doubt the sincerity of the State's assurance that it will adhere to these precedents in the future. *See Cnty. of Butler*, 8 F.4th at 230–31 (citation omitted). Consequently, any future restriction on

[17] Several local officials are named Appellees, but the scenario that Appellants fear is not that these individuals will sua sponte reinstitute the prosecutions. Rather, at this stage of the litigation, all mootness analysis centers on the Governor, asking if *state-wide restrictions* will return via executive orders. Local officials would presumably have no role in that critical decision.

religious worship would likely omit the key legal issue raised in Appellants' amended complaint: that "[Appellees'] Orders are not neutral laws of general applicability because they target constitutionally protected activity . . . all the while providing broad exemptions for many secular activities[.]" Amend. Compl. ¶ 4.

In any event, we need not hypothesize further about what a renewed COVID restriction regime in New Jersey might look like. The point is that the very possibility of such renewed restrictions is itself speculative, and an analysis of the legal status of such hypothesized rules doubly-so.

* * * * *

In sum, we are persuaded that this case is moot, as the District Court correctly found. Appellants offer nothing more than speculation to suggest that we have a live controversy here. They invite us to hypothesize about future scenarios in which (a) not only does the COVID-19 pandemic reach crisis levels comparable to early-2020, but (b) New Jersey's executive officials will choose to ignore everything—both legal and factual—we have learned since those early months and bluntly reintroduce legally-suspect gathering restrictions on

religious worship. This will not do, and we will therefore affirm.[18] [19]

MATEY, *Circuit Judge*, dissenting.

From the outbreaks of Athens, Byzantium, and London, to the ravages of smallpox, SARS, and "Swine Flu," plagues punctuate the pages of history. When such a potent enemy appears, it is natural to reach for every weapon, every tool, anything that might turn the tide. Anything that ends the emergency. But emergencies have long been "the pretext on which the safeguards of individual liberty have been eroded—and once they are suspended it is not difficult for anyone who has assumed such emergency powers to see to it that the emergency will persist." 3 F.A. Hayek, Law, Legislation and Liberty 124 (1979). Guarding against that threat is one reason the permanent guarantees of our natural rights were recognized in the Constitution. And examining whether those guarantees have been honored or breached is part of the "virtually unflagging

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[18] Because the prosecutions of the Pastors were voluntarily dismissed, we have no occasion to discuss *Younger* abstention. The dismissed prosecutions do not serve as the sort of "continuing injury" that might defeat mootness. *See Hartnett*, 963 F.3d at 308.

[19] This conclusion addresses Appellants' request for injunctive relief as well their request for a declaratory judgment. As it is absolutely clear there is no reasonable likelihood that EO 107 will be reinstated, there is likewise no reason to think the declaratory judgment requested would affect the parties' conduct. *See Hartnett*, 963 F.3d at 306.

obligation of the federal courts to exercise the jurisdiction given them." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

The majority concludes that Governor Murphy's choice to place significant limitations on religious gatherings is no longer a live controversy because those restrictions were relaxed and eventually withdrawn. But the Governor changed course unilaterally, not as the result of any legal force. Neither Governor Murphy nor New Jersey's Attorney General has ever hinted, let alone assured, that the Governor will not reimpose those same limits down the long COVID-19 road. And neither acknowledge any boundaries on the Governor's emergency powers in the decisions of the Supreme Court, or even in the Constitution. Caveats all insufficient to carry the "heavy" burden, *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022), to sidestep judicial review of these restrictions on religion. As the longstanding limits on mootness do not relax for COVID-19 controversies, I would remand the matter to the District Court and so respectfully dissent.

I.

Mootness means a once live dispute "is no longer embedded in any actual controversy about the plaintiffs' particular legal rights." *Alvarez v. Smith*, 558 U.S. 87, 93 (2009). But how a suit became moot matters. If a savvy defendant could simply say, "never mind," and stop the offending conduct long enough to win dismissal, the federal courts would have little work to do. As

a result, "[i]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). Instead, we ask whether the "allegedly wrongful behavior" has ended, or merely paused. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007). Understandably, any answer is no more than a prediction. So we look at the circumstances to see if the defendant "could reasonably be expected to engage in the challenged behavior again." *Hartnett v. Pa. State Educ. Ass'n*, 963 F.3d 301, 306 (3d Cir. 2020). Naturally, "the defendant's reason for changing its behavior is often probative." *Id.* Did the defendant merely "yield[ ] in the face of a court order" while still maintaining "that its conduct was lawful all along"? *Id.* Or did the defendant stand down "because of a new statute or a ruling in a completely different case"? *Id.* at 307. Either way, it must be "absolutely clear" that the same acts could not "reasonably be expected to recur." *West Virginia v. EPA*, 142 S. Ct. at 2607 (quoting *Parents Involved*, 551 U.S. at 719). A "heavy" burden that, as the majority explains, rests solely with the State. Maj. Op. at 12; *see also West Virginia v. EPA*, 142 S. Ct. at 2607.

A.

Governor Murphy has not carried this formidable burden. The Governor starts by saying he has already taken back the limits on worship. But the Supreme Court has answered that excuse, explaining that "even

if the government withdraws or modifies a COVID restriction in the course of litigation," it "does not necessarily moot the case." *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021). Governor Murphy then adds there are no *current* plans to reimpose the capacity limits. A carefully cabined answer more alarming than assuring. Next, he recalls the urgency of COVID-19, reminding us this "unprecedented pandemic" and "rapidly worsening crisis" required a wide "range of social mitigation measures" in March 2020. Response Br. 5–6. Severe circumstances that left no room to accommodate religious services—but not severe enough to close liquor stores and pet shops. **App. 85–86.** Finally, Governor Murphy points to his decision to unilaterally "decline[] to reimpose indoor or outdoor capacity limits on religious gatherings." Response Br. 8. From which we must infer that he and the New Jersey Attorney General consider the First Amendment subordinate to their emergency powers, powers they may or may not "decline" to exercise against religious worship. They will let us all know when the time arrives.

Respectfully, that is not how the voluntary cessation doctrine works, a point emphasized by the Supreme Court mere months ago in *West Virginia v. EPA*. There, the Court considered whether a proposed rule to regulate carbon dioxide fit within the authority provided by Congress. When faced with a challenge, the Government announced plans to change course and promised to promulgate a new regulation. A proposal, the Government claimed, that "mooted the prior dispute." 142 S. Ct. at 2607. Not so, said the

Court, because "the Government's mootness argument boils down to its representation that EPA has no intention of enforcing" the old plan. *Id.* That does not shoulder the "heavy burden" of showing "it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* (citation omitted). Indeed, the Government in that case "nowhere suggested that if the litigation were resolved in its favor it would not" reimpose the same challenged policy. *Id.* (cleaned up). Instead, it "vigorously defend[ed]" the legality of its proposal. *Id.*

More so here. Governor Murphy does not suggest he has no intention to reimpose limits on worship, only that he has no current plans on the table. Not once has the Governor stated he lacks the power to curtail religious freedoms for emergencies. Nor has the New Jersey Attorney General ever questioned the prosecution of Plaintiffs for violating the challenged Executive Order, a case that lingered until briefing began on this appeal.[1] Or acknowledged the Supreme Court's decisions in *Catholic Diocese* and *Tandon*, which confirm that emergencies do not permit state action to abandon the promise of freely exercised faith. "Trust me," is all Governor Murphy serves up.

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[1] Oral Argument at 22:50, *Clark v. Governor of N.J.*, ___ F.4th ___ (3d Cir. 2022) (No. 21-2732), https://www2.ca3.uscourts.gov/oralargument/audio/21-2732_Clarkv.GovernorStateNJ.mp3. The Governor now tries to distance himself from the county prosecutions. But a "county prosecutor's law enforcement function . . . remains at all times subject to the supervision and supersession of the State." *Yurick v. State*, 184 N.J. 70, 79 (2005) (cleaned up).

That, of course, is the one answer we have not accepted. Take our recent decision in *County of Butler v. Governor of Pennsylvania*, 8 F.4th 226 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 772 (2022), where we considered a challenge to Pennsylvania's COVID-19 orders closing businesses and limiting secular gatherings. A moot challenge, we explained, because the "Governor's orders are no longer in effect *and* . . . he has been stripped of his power to unilaterally act in connection with this pandemic." *Id.* at 230 (emphasis added). Or consider our analysis in *Hartnett*. There, teachers challenged a Pennsylvania statute allowing unions to collect fees from nonmembers. While the lawsuit progressed, the Supreme Court invalidated a similar statute, a change of law the parties agreed made Pennsylvania's law unenforceable. That, we held, satisfied the mootness exception. We explained that once the Supreme Court spoke, "the unions immediately stopped collecting agency fees." *Hartnett*, 963 F.3d at 307. And the unions "*conceded* that Pennsylvania's agency-fee arrangement violates the First Amendment and have *forsworn* collecting fees from nonmembers." *Id.* (emphasis added). The holdings in *Butler* and *Hartnett* both turn on external legal constraints on the defendant's prior conduct, where "the claims became moot for reasons outside the parties' control." *Butler*, 8 F.4th at 232. Whether that new law is decisional, statutory, or constitutional, it is strong evidence that informs our focus "on whether the defendant made that change unilaterally and so may 'return to [its] old ways' later on." *Hartnett*, 963 F.3d at 307 (quoting *City*

of Mesquite, 455 U.S. at 289 n.10) (alteration in original).

Nothing of the sort has occurred here: no concessions of illegality, no foresworn future restrictions, no divesting of power. Governor Murphy retains his statutory authority to act at his pleasure. The state's Constitution has not been altered, and no court, including ours, has stepped up to consider the rights reserved by the First Amendment. Respectfully, that has never been enough to evade the powers vested in the judiciary by Article III. And I see three problems that will likely follow our holding today.

B.

First, while the majority invokes the old mootness test, it applies something softer. The majority points out that it must be "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Parents Involved*, 551 U.S. at 719 (emphasis added). But the majority only recites this standard, rather than rigorously holding the Governor to his "formidable burden," *Hartnett*, 963 F.3d at 307, permitting him to dismiss, not defend, his decisions. Instead, the majority rests on its doubt "that the State will tempt fate by reimposing restrictions disfavoring religion." Maj. Op. at 21. That flips the holdings of *West Virginia v. EPA* and a host of prior decisions,[2] recasting the

[2] What the majority points to as a distinction between this case and *West Virginia v. EPA* is in fact a similarity. The majority notes that the Court there did not find the dispute moot in part

heavy burden of absolute certainty with the light weight of mere skepticism and setting a much lower hurdle for the Governor to clear.

Second, the majority repeats the error of the District Court and conflates two separate mootness exceptions that carry two distinct burdens. On the one hand, there are cases in which the plaintiff's alleged injury has disappeared through no action of the defendant. That will make the matter moot unless the plaintiff can show the duration of the challenged action is too short to be fully litigated and "there is a reasonable expectation that the same complaining party will be subjected to the same action again." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1540–41 (2018) (citation omitted). This is the "capable of repetition, yet evading review" exception. *Id.* at 1540 (citation omitted). And the burden of showing the issue is "capable of repetition" rests only with the plaintiff. Voluntary cessation, on the other hand, places that "heavy burden" on the defendant. *West Virginia v. EPA*, 142 S. Ct. at 2607.

The majority yokes the wrong party.[3] The opinion repeatedly looks to the facts in *Butler*. But that case involved the "capable of repetition" exception, not

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because "the government was unwilling to say it would not impose the policy again." Maj. Op. at n.13. I agree. And the Government here has been similarly coy.

[3] Indeed, the majority explicitly shifts the burden from the Governor to the challengers, concluding that "Appellants offer nothing more than speculation to suggest that we have a live controversy here." Maj. Op. at 24.

voluntary cessation. And the former "applies only in exceptional situations," where the burden rests with the plaintiff. *Butler*, 8 F.4th at 230–31 (citation omitted). That allocation makes all the difference. The plaintiffs, we explained, could not carry their burden because Pennsylvania changed the law to prevent the same measures from returning. *Id.* at 232. Nor did they offer anything to rebut the Commonwealth's representations "that the public health landscape has so fundamentally changed" that future policies would not resemble the past. *Id.* at 231. A point, we noted, "[p]laintiffs here have given us little reason to disbelieve." *Id.*

Here, of course, there is every reason. That is the purpose of the heavy burden against accepting voluntary cessation claims on no more than the moving party's say-so. Perhaps a presumption of governmental good-faith has some application in "capable of repetition" cases challenging state actions like *Butler*; the burden is already on the plaintiff who must offer facts showing "a reasonable expectation . . . [they] will be subject to the same action again." *Id.* at 231 (citation omitted). Extending that "presumption," if it truly exists,[4] to voluntary cessation would give governmental

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[4] *Butler* relies on *Marcavage v. National Park Service*, 666 F.3d 856, 861 (3d Cir. 2012) for the proposition that "[w]e generally presume that government officials act in good faith." *Butler*, 8 F.4th at 230. Language *Marcavage* borrowed from *Bridge v. United States Parole Commission*, 981 F.2d 97, 106 (3d Cir. 1992). But *Bridge* took that concept from the dissenting opinion in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), neglecting, it seems, to note that it is a dissenting view. Neither *Bridge*, a case about

actors the keys to get out of almost any lawsuit simply by citing their own good intentions. The result in *West Virginia v. EPA* confirms that is not correct.

Finally, Plaintiffs, like the almost nine million residents of New Jersey, still do not know whether the First Amendment protects their religious obligations and faith tenets, even though at the Founding, "the right to religious liberty . . . was universally said to be an unalienable right." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1900 (2021) (Alito, J., concurring) (citation omitted); *see also* Vincent Phillip Muñoz, Religious Liberty and the American Founding 229 (2022) ("[T]he Founders declared religious liberty to be an inalienable natural right."). A chilling prospect because Executive Order 107 treats religious exercise worse than comparable secular activity. Comparability "must be judged against the asserted government interest that justifies the regulation at issue," and is "concerned with the risks various activities pose, not the reasons why people gather." *Tandon*, 141 S. Ct. at 1296 (citation omitted). In *Tandon*, the Court found "at-home religious exercise" comparable to retail shopping. *Id.* at 1297. Here, Governor Murphy's "severe in-person gathering restrictions," Maj. Op. at 16, accommodated alcohol, protected pets, and honored home improvement, but found spaces for safe worship non-essential. That imposed "differential burdens favoring secular over

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parole eligibility calculations, nor *Ward*, a First Amendment challenge to noise permits, involves mootness. All making for a most shaky foundation, one we should not casually extend into questions about Article III.

religious gatherings," *id.*, demanding the Governor show a narrowly tailored restriction serving a compelling state interest. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020).

It is unclear why Governor Murphy urgently needs to shut down synagogues, churches, and mosques en masse while finding room to accommodate a laundry list of businesses. The majority implies answering that question can wait, rationalizing that it is "hard to imagine" a health emergency presenting the State an opportunity to reimpose the ban on religious worship. Maj. Op. at 17. But no lively imagination is needed to conjure up future competitions between public health and religious liberty given the volatility of respiratory viruses,[5] the increased probability of future pandemics,[6] and the routine declaration of "emergencies" by Governor Murphy.[7] I

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[5] *See*, *e.g.*, Jamie Crow, *Telltale Signs of a 'Tripledemic'*, Johns Hopkins Coronavirus Resource Center (Nov. 3, 2022), https://coronavirus.jhu.edu/from-our-experts/telltale-signs-of-a-tripledemic ("[W]e're starting to see an uptick in some [COVID] variants that are probably among the most immune-evasive variants that we've seen.").

[6] "Based on the increasing rate at which novel pathogens such as SARS-CoV-2 have broken loose in human populations in the past 50 years, . . . the probability of novel disease outbreaks will likely grow three-fold in the next few decades." Michael Penn, *Statistics Say Large Pandemics Are More Likely Than We Thought*, Duke Global Health Institute (Aug. 23, 2021), https://globalhealth.duke.edu/news/statistics-say-large-pandemics-are-more-likely-we-thought.

[7] Some eighteen since 2018. *See Executive Orders*, State of New Jersey, https://nj.gov/infobank/eo/056murphy/approved/eo_archive.shtml (last visited Nov. 22, 2022).

would take the opportunity to provide an answer now, giving the people of New Jersey, and its representatives, the guidance they are entitled to under the Constitution.

II.

COVID-19 did not change the standards for mooting a case or controversy arising under the laws of the United States. Governor Murphy elected to use an emergency power to eliminate public religious worship. He has not carried the formidable burden of showing, with absolute clarity, there is no reasonable probability he will not do so again. Respectfully, we should decide whether the Governor's actions satisfy the First Amendment before the next emergency arrives.

APPENDIX B

[Dkt. Nos. 50, 55, 57, 58, 59]

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

SOLID ROCK BAPTIST CHURCH; BIBLE BAPTIST CHURCH OF CLEMENTON; ANDREW REESE; CHARLES CLARK, JR.; and CHARLES CLARK III,

Plaintiffs,

v.

PHILIP D. MURPHY, Governor of the State of New Jersey; GURBIR S. GREWAL, Attorney General of the State of New Jersey; PATRICK J. CALLAHAN, Superintendent of State Police and State Director of Emergency Management; JILL S. MAYER, Camden County Prosecutor for Clementon Borough; THOMAS J. WEAVER, Mayor of Clementon Borough; Charles Grover, Chief of Clementon Borough Police Department; RICK MILLER, Mayor of Berlin Borough; MILLARD WILKSON, Chief of Berlin Borough Police Department; RICHARD A. DE

Civ. No. 20-6805
(RMB/MJS)

OPINION

(Filed Aug. 16, 2021)

MICHELE, Prosecutor for Berlin Borough; CHERYL R. HENDLER COHEN, Prosecutor for Clementon Borough,

Defendants.

RENÉE MARIE BUMB, UNITED STATES DISTRICT JUDGE:

Plaintiffs Solid Rock Baptist Church of West Berlin, New Jersey, and Bible Baptist Church of Clementon, New Jersey, along with their respective pastors, move for reconsideration of this Court's Order [Dkt. No. 32] denying their Emergency Motion for a Preliminary Injunction. [Dkt. No. 12]. Additionally, Defendants move to dismiss the Amended Complaint [Dkt. No. 33], arguing that the claims are moot and that the Court should abstain from addressing Plaintiffs' ongoing prosecution in state court. [Dkt. Nos. 55, 57, 58, 59]. As the legal principles for these pending motions are both identical and dispositive, the Court will address these matters in one opinion. For the reasons set forth below, Plaintiffs' Motion for Reconsideration will be **DENIED** and Defendants' Motions to Dismiss will be **GRANTED.**

I. Factual Background and Procedural History

a. Initial Complaint

Plaintiffs Solid Rock Baptist Church of West Berlin ("Solid Rock"), Bible Baptist Church of Clementon ("Bible Baptist"), Solid Rock Pastors, Charles Clark, Jr.

and Charles Clark III, and Bible Baptist Pastor, Andrew Reese, initiated this matter by filing a complaint on June 3, 2020 [Dkt. No. 1] in this Court. Their complaint was filed to challenge restrictions imposed by New Jersey Governor Philip D. Murphy in response to the worldwide COVID-19 pandemic, and named Governor Murphy, New Jersey Attorney General Gurbir S. Grewal, and New Jersey Superintendent of State Police and State Director of Emergency Management Colonel Patrick J. Callahan (collectively, the "State" or "Defendants") as Defendants.

Specifically, Plaintiffs challenged Executive Order ("EO") No. 107, issued by Governor Murphy on March 21, 2020. Governor Murphy's EO 107 was further clarified by Administrative Order ("AO") No. 2020-4, issued by Colonel Callahan on March 21, 2020, which Plaintiffs also challenge. These orders, issued and enacted at the very beginning of the COVID-19 pandemic, prohibited individuals from gathering indoors for religious worship with more than ten (10) people at a time, regardless of attempted social distancing or hygiene protocols by the individuals. Amended Complaint at ¶ 2. Plaintiffs allege that EO 107 "disparately and discriminatorily allows so-called "essential" commercial and other secular entities" to hold gatherings consisting of more than ten people without limitations or scrutiny. *Id.* Importantly, EO 107 has not been in effect since June 9, 2020, when the Order was superseded in its entirety by EO 152, which relaxed gatherings limits and allowed for outdoor religious services in unlimited numbers. Motion to Dismiss at page 1, 4.

Two weeks after filing the initial Complaint, Plaintiffs filed an Emergency Motion for Preliminary Injunction in this Court on June 17, 2020, seeking "preliminary and permanent injunctive relief to be able to safely assemble for religious worship in their God-given buildings." Motion for Preliminary Injunction at page 2. Defendants Murphy, Grewal, and Callahan filed opposition on July 6, 2020, and the Court held oral arguments via Zoom on July 28, 2020. [Dkt. No. 24]. Following oral arguments, the Court issued an Order and Opinion on August 20, 2020, denying Plaintiffs' Emergency Motion for Preliminary Injunction without prejudice. [Dkt. No. 31, 32]. In its ruling, the Court allowed Plaintiffs to "amend their complaint if so desired." Opinion at page 3. One month after this Court issued its Order and Opinion, Plaintiffs filed an Amended Complaint on September 21, 2020. [Dkt. No. 33].

b. <u>Amended Complaint and Motion for Reconsideration</u>

Plaintiffs' Amended Complaint added both defendants and claims to the litigation. In addition to the previously named Defendants Governor Murphy, Attorney General Grewal, and Colonel Callahan, Plaintiffs added Acting Camden County Prosecutor for Clementon Borough, Jill Mayer; Mayor of Clementon Borough, Thomas J. Weaver; Chief of Clementon Borough Police, Charles Grover; Mayor of Berlin Borough, Rick Miller; Chief of Berlin Borough Police, Millard Wilkson; Prosecutor for Berlin Borough, Richard A. De

Michele; and Clementon Borough Prosecutor, Cheryl R. Hendler Cohen as defendants. Plaintiffs further allege that Defendants' orders and actions violated their rights to equal protection under the United States Constitution and the New Jersey State Constitution, in addition to the alleged violations of free exercise, establishment of religion, right to assemble, and the New Jersey State Constitution as argued in the initial Complaint. Plaintiffs' Amended Complaint reiterates their claims against Defendants for both the initial enactment of the challenged Executive and Administrative Orders, as well as the enforcement and subsequent state prosecution of these orders by the collective Defendants against Plaintiffs Solid Rock and Bible Baptist churches and their respective pastors.

Approximately three months after filing their Amended Complaint, and nearly eight months after this Court denied Plaintiffs' Emergency Motion for Preliminary Injunction, Plaintiffs filed a Motion for Reconsideration on December 18, 2020. [Dkt. No. 50]. In this motion, Plaintiffs requested that the Court reconsider its denial of Plaintiffs' Emergency Motion and cited a change in controlling case law in support of their argument. Citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. ___, 141 S.Ct. 63, 208 L.Ed.2d 206 (2020) and *Robinson v. Murphy*, 592 U.S. ___, 141 S.Ct. 972, 208 L.Ed.2d 503 (2020), Plaintiffs allege that these decisions from the Supreme Court of the United States dictate a ruling in their favor. Specifically, Plaintiffs allege that these cases illustrate instances where the Supreme Court granted injunctive

relief to religious institutions against restrictive government orders dictating COVID-19 occupancy protocols. Following the filing of Defendants' Motions to Dismiss, Plaintiffs responded in opposition on February 2 and February 16, 2021. [Dkt. Nos. 61, 62, 67, 68]. Defendants filed a reply brief on February 23, 2021, and Plaintiffs filed a letter on April 14, 2021, advising this Court that the Supreme Court recently issued an opinion in *Tandon v. Newsom*, 593 U.S. ___, 141 S.Ct. 1294, 209 L.Ed.2d 355 (2021). The Court requested supplemental briefing from the parties addressing whether the *Tandon* decision affects the present case, if at all. Defendants argued in their supplemental briefing that the instant matter is unaffected by the *Tandon* decision, as the California case involved state emergency orders that were currently still in effect, as opposed to New Jersey EO 107 that was rescinded more than a year ago. [Dkt. No. 76]. Plaintiffs argue otherwise, claiming that *Tandon* not only mandates a strict scrutiny analysis of government restrictions involving religious matters by lower courts, but also alleging that the matter is not moot as New Jersey "has repeatedly, without warning, restricted or expanded limits on gatherings." Supplemental Brief, ¶ 1.

c. <u>Solid Rock</u>

As discussed in this Court's August 20, 2020, Opinion, Plaintiff Solid Rock Baptist Church of West Berlin ("Solid Rock") has been operating since 1981 in Berlin, New Jersey, and its constituents gather regularly for in-person religious services. Amended

Complaint at ¶¶ 56-60. The church sanctuary can seat up to 1,000 people, and the church is co-pastored by Plaintiff Charles Clark, Jr. and his son, Plaintiff Charles Clark, III. *Id.* ¶¶ 58, 59, 63. In the Amended Complaint, Plaintiffs trumpet the "ecclesiastical importance" of church attendance, and their belief that "physical assembly in one place on the Lord's day, for mid-week services, revivals, and other special religious worship meetings is an essential part of their worship and that failure to assemble is a sin in violation of God's commands as they interpret the Holy Bible." *Id.* ¶¶ 60-61. Despite their strong belief in the necessity of in-person religious services, Solid Rock complied with Governor Murphy's orders from March 23, 2020, until May 24, 2020, and did not hold any indoor worship services, instead offering livestreamed services online. *Id.* ¶ 64.

Pastor Clark notified Governor Murphy by letter on May 15, 2020, that Solid Rock intended to resume indoor worship services on May 24, 2020, and that his constituents "will be safe, sanitized, and use social distancing." *Id.* ¶ 65-66. Pastor Clark also requested that the Governor declare churches to be "essential" businesses. *Id.* Three days later, on May 18, 2020, counsel for Solid Rock wrote to Governor Murphy's office to express their constitutional concerns regarding the restrictions imposed by EO 107 and to inform the Governor that the church intended to resume indoor services on May 24, 2020. *Id.* ¶ 66. Though the Governor's office did not respond to either letter, Plaintiffs allege that Camden County public safety officers

unlawfully installed cameras outside the church on May 23, 2020. *Id.* ¶ 68.

Solid Rock held two religious worship services indoors with more than ten people in the sanctuary on Sunday, May 24, 2020. Amend. Compl. ¶ 67. Although the church normally accommodates up to 1,000 people, Plaintiffs permitted no more than 250 people in the sanctuary to comply with social distancing requirements. *Id.* Attendees had their temperature checked with touchless thermometers and those constituents with a temperature above 100.4° were not permitted to enter the church. *Id.* Reservations were required to attend the services, and individuals and their families sat at least 6-feet apart and wore masks. *Id.*

The very next day, on May 25, 2020, Lt. Michael Scheer of the Berlin Borough Police Department issued criminal complaints to both Pastor Clark, Jr. and Pastor Clark, III, charging them with "opening Solid Rock Church [sic.] on 5/24/20 @ 10 am [and 5:30pm] facilitating a gathering over 10 people in violation of EO 107. *Id.* ¶ 69. Additionally, Plaintiffs allege that Defendant Jill S. Mayer, in her role as Acting Camden County Prosecutor, instructed Defendants Miller, Wilkinson, and de Michelle not to entertain plea negotiations with Pastors Clark, Jr., and Clark III regarding the prosecution of said complaints in Clementon Municipal Court. *Id.* ¶ 71. These charges are still pending, and Solid Rock, Pastor Clark, Jr., and Pastor Clark, III contend that Governor Murphy's Order prohibits "Solid Rock members to continue to assemble as

commanded by the Lord in His Word, the *Holy Bible*." *Id.* ¶ 72.

d. Bible Baptist

Since 1886, Plaintiff Bible Baptist has been in operation in Clementon, New Jersey, offering in-person religious services to its constituents on a regular basis multiple times per week. Amend. Compl. ¶¶ 38-39. Since 2014, the congregation is pastored by Plaintiff Andrew Reese and normally holds services for seventy (70) people at its weekly assemblies. ¶¶ 40, 44. Like fellow plaintiff Solid Rock, Bible Baptist strongly believes in the importance of in-person religious services, and their Amended Complaint states that "Christian fellowship is an essential part of their worship and that failure to assemble is a sin in violation of God's commands as they interpret the *Holy Bible*." *Id.* ¶ 41. Despite this belief, from March 23, 2020, until May 20, 2020, Bible Baptist offered livestreamed services online, instead of traditional indoor church services. *Id.* ¶ 45. On May 20, 2020, however, while EO No. 107 was still in effect, the church held its mid-week worship service in its building with more than ten people – all wearing masks – in the sanctuary. *Id.* ¶ 46. Following this service, Clementon Police Chief Charles Grover issued a criminal complaint to Pastor Reese, charging him with "opening Bible Baptist Church on May 20, 2020, and facilitating a gathering of more than 10 people on the premises of the Church in violation of Executive Order 107 in violation of APP. A:9-50." *Id.* ¶ 48.

Plaintiffs allege that they fully sanitized the sanctuary before holding two religious worship services with more than 10 people in the sanctuary on Sunday, May 24, 2020. *Id.* ¶ 49. Parishioners sanitized the sanctuary between the services and all individuals in attendance, other than families, sat at least 6-feet apart and wore a mask. *Id.* It was at these services that, Plaintiffs allege, Clementon police officers arrived at the church prior to each of the two services. *Id.* ¶ 50. Though the police officers did not disrupt either service, Chief Grover once again swore out a criminal complaint charging Pastor Reese with violating EO No. 107. *Id.* As similarly alleged by Solid Rock, Bible Baptist claims that Defendant Meyer instructed other prosecutors and law enforcement officials not to entertain plea negotiations with Pastor Reese or Bible Baptist regarding the prosecution of said complaints in Clementon Municipal Court. *Id.* ¶ 51. Pastor Reese and Bible Baptist advise that they will continue "to assemble as commanded by the Lord," and are concerned about the payment of fines and possible imprisonment regarding their continued state of worship. *Id.* ¶ 54.

II. Standard of Review

a. Motion for Reconsideration

In the District of New Jersey, Local Civil Rule 7.1(i) governs motions for reconsideration. *Bowers v. Nat'l. Collegiate Athletics Ass'n.*, 130 F.Supp.2d 610, 612 (D.N.J. 2001). Local Rule 7.1(i) creates a procedure by which a court may reconsider its decision "upon a

showing that dispositive factual matters or controlling decisions of law were overlooked by the court in reaching its prior decision." *Agostino v. Quest Diagnostics Inc.*, Civ. No. 04–4362, 2010 WL 5392688 at *5 (D.N.J. Dec. 22, 2010) (*citing Bryan v. Shah*, 351 F.Supp.2d 295, 297 (D.N.J. 2005); *Bowers*, 130 F.Supp.2d at 612). The "purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985) (internal citation omitted). Reconsideration is to be granted only sparingly. *United States v. Jones*, 158 F.R.D. 309, 314 (D.N.J. 1994). Such motions "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *NL Indus., Inc. v. Commercial Union Ins. Co.*, 935 F.Supp. 513, 515–16 (D.N.J. 1996) (internal citation omitted). Third Circuit jurisprudence dictates that a Rule 7.1(i) motion may be granted only if: (1) there has been an intervening change in the controlling law; (2) evidence not available when the Court issued the subject order has become available; or (3) it is necessary to correct a clear error of law or fact to prevent manifest injustice. *Max's Seafood Café v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999) (citing *North River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995)); *Agostino*, 2010 WL 5392688 at *5.

b. Mootness

A case traditionally becomes moot when a dispute no longer presents a live case or controversy, or the

parties lack a cognizable interest in the outcome of the matter. *See County of Morris v. Nationalist Movement*, 273 F.3d 527, 533 (3d Cir. 2001); *Prysock v. U.S. Parole Comm'n*, No. 08-5116 (JBS), 2010 WL 1838415 at *2, 2010 U.S. Dist. LEXIS 44286 at *6 (D.N.J. May 6, 2010). Important to note, a defendant's voluntarily cessation of the alleged wrongful behavior "does not moot a case or controversy unless 'subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. . . .'" *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (quoting *Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000).). "[T]he central question of all mootness problems is whether changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief." *Jersey Cent. Power & Light Co. v. N.J.*, 772 F.2d 35, 39 (3d Cir. 1985).

III. Discussion

a. Plaintiffs' claims are moot

Plaintiff's Amended Complaint argues that EO 107 and its enforcement prevents parishioners from attending constitutionally protected religious services and subjects Plaintiffs to ongoing penalties via the State's prosecution. Additionally, Plaintiffs raise a claim of selective enforcement, alleging that EO 107 subjected Plaintiffs to "unequal treatment relative to similarly situated non-religious groups and

individuals who also exercised First Amendment rights guaranteed under The United States Constitution." Amend. Compl. ¶¶ 98-99. Plaintiffs claim that Defendants' malfeasance is ongoing, and that their actions "have infringed upon and continue to infringe upon" Plaintiffs' constitutional rights. *Id.*

Defendants argue, in their multiple motions to dismiss, that Plaintiffs claims are moot, as "EO 152 expressly superseded that rule [EO 107] in favor of more relaxed gatherings limits." Motion at page 4. They also argue that EO 153, enacted on June 9, 2020, fully rescinded the general stay-at-home order issued by the State at the onset of the pandemic. *Id.* Defendants argue, as Plaintiffs' claims are allegedly moot, that the Court should deny Plaintiffs' Motion for Reconsideration, and dismiss the Amended Complaint. Furthermore, Defendants argue that the District Court should abstain from adjudicating Plaintiffs' claims regarding pending state prosecutions for their alleged violations of EO 107, as "[t]he request to have this court interfere with those proceedings must be denied, because black letter rules of abstention require the issues to be litigated in state court instead." *Id.* at page 18.

In opposition, Plaintiffs propose that their claims should go forward and not be dismissed as moot, as Defendants have allegedly failed to show that the State's purportedly wrongly action will not reoccur. [Dkt. No. 67 at page 7]. "Recent federal courts reviewing the fluid ebb and tide of COVID-19 executive orders across the nation have had no difficulty in deciding that, although the order may come and go, they may also come

again," Plaintiffs argue. *Id.* at page 9. Plaintiffs seek both declaratory and injunctive relief in their Amended Complaint, enjoining Defendants from enforcing the challenged Orders and declaring that the Orders are, on their face and as applied, unconstitutional. Amend. Compl. ¶ 103.

First, it is true that the contested EO 107 was rescinded by several of Governor Murphy's additional orders. *See* Motion to Dismiss, page 5. "[S]ince June 9 [2020] the State has continually declined to impose any new gatherings cap on outdoor religious services – allowing them to proceed in unlimited numbers." Thus, there can be no dispute that the alleged unlawful conduct – EO 107 – has been terminated by Defendants. *See Behar v. Murphy*, No. 20-5206, 2020 WL 6375707 (D.N.J. Oct. 30, 2020), citing *Black United Fund of N.J., Inc. v. Kean*, 763 F.2d 156, 160 (3d Cir. 1985) ("[t]he raison d'etre for the injunction no longer exists.")

Second, the Court is unconvinced by Plaintiffs' argument that the State's allegedly unlawful conduct could occur again. "This criterion has been interpreted to require more than speculation that a challenged activity will be resumed." *Thompson v. United States Dep't of Labor*, 813 F.2d 48, 51 (3d Cir. 1987) (citing *Preiser v. Newkirk*, 422 U.S. 395, 403 (1975)). In response to the ongoing COVID-19 pandemic, Governor Murphy has issued numerous executive orders addressing occupancy limits and restrictions. While these orders certainly have changed over the course of the pandemic, they reflect the shifting nature of the coronavirus and its effect on society, as opposed to having

been enacted in response to Plaintiffs' ongoing litigation. Plaintiffs present no evidence to suggest that the State will again enact measures restricting religious worship but worry about the possibility of the State's future response. Plaintiffs' concerns are worthy of consideration. As the Honorable Judge Kent A. Jordan recently noted in a similar case, "[t]he Plaintiffs insist that this case is not moot because the orders at issue are indeed capable of repetition yet evading review, but we have only their speculation that the same kind of heavily restrictive orders will be issued once more. Given the recent, wide-spread reporting that the Delta variant of the COVID-19 virus is causing increased concern among many public health authorities, the Plaintiffs' position ought not be rejected out of hand, and it has not been." *Butler County v. Governor of Pennsylvania*, No. 20-2936, at *1 (Jordan, J., concurring) (3rd Cir. 2021). This Court also appreciates Plaintiffs' position in the instant matter, but nevertheless finds that the harm Plaintiffs claim in not being able to serve their congregation has been ameliorated by the recission of EO 107. Moreover, given the precedent set by recent Supreme Court decisions on pandemic-related restrictions, the "law no longer provides [the State] a mechanism" to "repeat the alleged harm." *Rendell v. Rumsfeld*, 484 F.3d 236, 242 (3d Cir. 2007). Thus, if the State enacts new restrictions in response to COVID-19 that Plaintiffs believe are violative of their rights, Plaintiffs are not without recourse. New claims could always be filed, and the Court will hear those claims, if appropriate, in due course. Accordingly, the Court finds that Plaintiffs' claims are moot, and will

therefore deny the Motion for Reconsideration and grant the Motions to Dismiss.

b. The Court will abstain under *Younger*

Plaintiffs also argue that this Court need not abstain from hearing this case under *Younger* as the matter falls within one of the permitted exceptions as developed by the Supreme Court. Described in *W.K. by W.K. v. N.J. Div. of Developmental Disabilities*, exceptions to *Younger* abstention apply in circumstances where: (1) the "state proceeding is motivated by a desire to harass or is conducted in bad faith," *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611; (2) the "challenged provision is flagrantly and patently violative of express constitutional prohibitions," *Moore v. Sims*, 442 U.S. 415, 423, 60 L.Ed. 2d 994, 99 S. Ct. 2371 (1979); or (3) there is "an extraordinarily pressing need for immediate equitable relief." *Kugler v. Helfant*, 421 U.S. 117, 124-25, 44 L. Ed. 2d 15, 95 S. Ct. 1524 (1975). *W.K. by W.K.*, 974 F. Supp. 791, 796 (D.N.J. 1997). Any one of these exceptions, independently, are sufficient for a district court to evade abstention under *Younger. See Kugler v. Helfant*, 421 U.S. 117, 124, 95 S. Ct. 1524, 1530, 44 L. Ed. 2d 15 (1975) (explaining that the *Younger* Court 'left room for federal equitable intervention' when there is a showing of bad faith or harassment by state officials, when the state law is flagrantly violative of constitutional prohibitions, or where other 'extraordinary circumstances' exist and can be show.) Plaintiffs allege that the Governor's contested Orders flagrantly violated their constitutional rights under

the First and Fourteenth Amendments, and that the state prosecutor's refusal to entertain plea negotiations constitutes bad faith. [Dkt. No. 67 at page 15]. Although Plaintiffs' allegations are troubling – particularly that Plaintiffs, unlike others, were "targeted" by the setting up of cameras and the alleged prosecutor's directive not to entertain any plea discussions typically afforded to other defendants – the Court is nonetheless disinclined to involve itself in pending state court litigation. In this instance, it is clear that the ongoing state criminal prosecutions fall within the confines of *Younger* abstention and should be resolved in the jurisdiction in which they emanated – the state courts. The ongoing state proceedings (1) "are judicial in nature"; (2) "implicate important state interests"; and (3) "afford an adequate opportunity to raise federal claims." *Schall v. Joyce*, 885 F.2d 101, 106 (3d Cir. 1989) (citing, *e.g.*, *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982)). Troubling as the alleged facts are, the Court finds that Plaintiffs are able to raise their claims of selective enforcement and bad faith as presented in the Amended Complaint in the state court proceeding. Moreover, in light of the recent Supreme Court rulings, Plaintiffs may raise the unconstitutionality of EO 107, the order they have already been charged with violating, in the state court proceeding as well. For these reasons, the Court will abstain under *Younger*.

IV. Conclusion

For the reasons set forth above, the Court finds that Plaintiffs' claims are moot. Accordingly, Plaintiffs' Motion for Reconsideration is DENIED and Defendants' Motions to Dismiss are GRANTED. The Court will abstain from addressing Plaintiffs' pending state court proceedings.

Date: 8/16/2021

/s/ Renée Marie Bumb
HON. RENÉE MARIE BUMB
UNITED STATES DISTRICT JUDGE

APPENDIX C

[Dkt. No. 12]

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

SOLID ROCK BAPTIST CHURCH; BIBLE BAPTIST CHURCH OF CLEMENTON; ANDREW REESE; CHARLES CLARK, JR.; and CHARLES CLARK III,

Plaintiffs,

v.

PHILIP D. MURPHY, Governor of the State of New Jersey; GURBIR S. GREWAL, Attorney General of the State of New Jersey; PATRICK J. CALLAHAN, Superintendent of State Police and State Director of Emergency Management,

Defendants.

Civ. No. 20-6805(RMB/JS)

OPINION

(Filed Aug. 20, 2020)

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RENÉE MARIE BUMB, UNITED STATES DISTRICT JUDGE:

The United States Pledge of Allegiance speaks of "one Nation under God, indivisible, with liberty and justice for all," 4 U.S.C. § 4. In the State of New Jersey, however, those who wish to pray to God in their houses of worship, must be divided. Faced with a global pandemic of biblical proportions, Governor Phil Murphy

has promulgated various emergency executive orders imposing attendance restrictions on large indoor gatherings, including religious services. As of the time of this Opinion, a place of worship is limited to 25-percent capacity, with attendance never to exceed 100 persons, regardless of sanctuary size, for indoor religious services.

Plaintiffs bring this suit against Defendants New Jersey Governor Philip D. Murphy, New Jersey Attorney General Gurbir S. Grewal, and the New Jersey Superintendent of State Police and State Director of Emergency Management, Colonel Patrick J. Callahan (collectively, the "State" or "Defendants"). This matter now comes before the Court upon Plaintiffs' Emergency Motion for a Preliminary Injunction ("PI Motion") [Dkt. No. 12]. Invoking the U.S. Constitution, the New Jersey Constitution, and their deep faith in a religious obligation to gather for worship,[1] Plaintiffs challenge the Governor's Executive Orders and seek an order allowing them to "continue [their] in-person, indoor church services with more than 10 people while practicing adequate social distancing and following all relevant safety guidelines." [PI Motion, at 18].

The Court finds that the portion of Plaintiffs' motion seeking permission to hold gatherings of more than 10 people has been, in effect, granted through the

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[1] Among other verses, Plaintiffs invoke Hebrews 10:25 ("Not forsaking the assembling of ourselves together, as the manner of some is but exhorting one another and so much the more as you see the day approaching."). See Plaintiffs' Complaint [Dkt. No. 1], at 9.

enactment of Executive Order No. 156. At this juncture, the remaining aspects of Plaintiffs' motion will be denied without prejudice. The Court will, however, allow Plaintiffs to amend their complaint if so desired.

I. FACTUAL BACKGROUND

A. *Executive Orders on Gatherings*

On March 9, 2020, Governor Murphy issued Executive Order No. 103 ("EO 103"), declaring a State of Emergency and Public Health Emergency based on the dangers posed by the spread of the Coronavirus Disease 2019 ("COVID-19").[2] In EO 103, Governor Murphy authorized Colonel Patrick Callahan to "take any such emergency measures as the State Director may determine necessary" to protect New Jersey citizens from exposure to COVID-19. Since March, the State of New Jersey has experienced over 185,000 confirmed cases of COVID-19, contributing to almost 16,000 deaths.[3]

As COVID-19 spread around throughout New Jersey, Governor Murphy promulgated new emergency orders in relation to COVID-19. On March 16, 2020, Governor Murphy issued Executive Order No. 104 ("EO 104"), which limited all gatherings to "50

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[2] Two days later, on March 11, 2020, the World Health Organization declared that COVID-19 was a "pandemic," which means that there is "worldwide spread of a new disease."

[3] Johns Hopkins University, Coronavirus Resource Center, available at https://coronavirus.jhu.edu/ (accessed on August 19, 2020).

persons or fewer," with exceptions for various categories of businesses deemed "essential."[4] This directive, however, excluded "normal operations at airports, bus and train stations, medical facilities, office environments, factories, assemblages for the purpose of industrial or manufacturing work, construction sites, mass transit, or the purchase of groceries or consumer goods." EO 104, ¶ 1.

On March 21, 2020, Governor Murphy issued Executive Order No. 107 ("EO 107"), which canceled all "gatherings of individuals" and ordered all New Jersey residents to "remain home or at their place of residence," unless for approved reasons, such as "leaving the home for an "educational, religious, or political reason." Under EO 107, essential retail businesses could remain open, but were required to "abide by social distancing practices to the extent practicable while providing essential services." EO 107 further instructed that essential businesses were required to make "all reasonable efforts to keep customers six feet apart and frequent use of sanitizing products on common surfaces." EO 107, ¶ 7.

The provision in EO 107 cancelling all "gatherings of individuals" also granted the State Director of Emergency Management "the discretion to make clarifications and issue orders related to this provision." Apparently in coordination with the Governor's order,

[4] EO 104 clarified that essential retail businesses excluded from the directive included: "grocery/food stores, pharmacies, medical supply stores, gas stations, healthcare facilities and ancillary stores within healthcare facilities." EO 104, ¶ 8.

later that same day, March 21, 2020, Colonel Callahan issued Administrative Order No. 2020-4 (AO 2020-4), which "clarified that gatherings of 10 persons or fewer are presumed to be in compliance with the terms and intentions of [EO 107], unless clear evidence exists to the contrary." Governor Murphy formalized Colonel Callahan's interpretation in Executive Order No. 142 ("EO 142"), issued on May 13, 2020, which stated that "gatherings of 10 persons or fewer are in compliance with the terms of [EO 107], while gatherings of more than 10 persons are in violation of that Executive Order."

The executive orders did not draw a distinction between indoor and outdoor gatherings until May 22, 2020, when Governor Murphy issued Executive Order No. 148 ("EO 148"). In that order, Governor Murphy instructed that indoor gatherings would continue to be limited to "10 persons or fewer," but allowed for outdoor gatherings with "no more than 25 people at the same time."

While EO 148 remained in effect, from late May through early June 2020, cities in New Jersey saw massive protests in the aftermath of George Floyd's death in Minneapolis, Minnesota. During this period of time, hundreds, and sometimes thousands, of protestors gathered in the streets on a daily basis to protest Mr. Floyd's death and show support for the broader "Black Lives Matter" movement. As noted by Plaintiffs during oral argument, attendees at the social justice protests packed the streets in close proximity to one another while loudly chanting, yelling, and singing.

Although some protestors wore masks, many did not. See Oral Argument Transcript, July 28, 2020 ("Tr.") [Dkt. No. 30], at 14:4-14. At times, these protests descended into chaos, violence, and destruction.

Although the protests stood in clear violation of EO 148, which limited outdoor gatherings to "no more than 25 people at the same time," Governor Murphy publicly expressed support for these protests. Id. Plaintiffs highlighted the extent to which the State prioritized protest activity, emphasizing that Governor Murphy even joined the protestors and marched with them in streets. See id., at 14:9-12 ("it doesn't take long perusing the news to see even the Governor shoulder to shoulder with individuals clearly not following social distancing guidelines."). In fact, at his daily COVID-19 briefing on June 1, 2020, Governor Murphy stated, "to anybody who goes out, you have the absolute right to go out and peacefully and rightfully protest." See Governor Phil Murphy, Transcript of June 1st, 2020 Coronavirus Briefing ("Murphy Briefing, 6/1").[5] To Plaintiffs, the Governor's partisan conduct demonstrated "viewpoint discrimination as well as just plain basic uneven treatment." Tr., at 15:1-2.

Undeniably, the Governor's stance stood in contrast to his previous public statements on different types of outdoor gatherings, such as weddings, parties, and "re-open" protests, for which participants had been issued widely publicized criminal citations. Governor

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[5] Available at: https://nj.gov/governor/news/news/562020/approved/20200601c.shtml (accessed on August 19, 2020).

Murphy explained that this difference in treatment came down to a matter of what he personally deemed more urgent and important:

> It's one thing to protest – I don't want to make light of this and I'll probably get lit up by everybody who owns a nail salon in the state. But it's one thing to protest what day nail salons are opening, and it's another to come out in peaceful protest, overwhelmingly, about somebody who was murdered right before our eyes, and is yet, if that weren't enough, yet another data point of the trail of data points that highlights systemic racism and the stain that slavery still leaves in our country today. I put those into different orbits.

Murphy Briefing, 6/1.

Eight days later, on June 9, 2020, Governor Murphy superseded EO 148 by issuing Executive Order No. 152 ("EO 152"), which stated that indoor gatherings would be allowed, but would be "limited to 25% of the capacity of the room in which it takes place, but regardless of the capacity of the room, such limit shall never be larger than 50 persons or smaller than 10 persons." EO 152 also allowed outdoor gatherings "limited to 100 persons or fewer." Most notably, EO 152 created an exemption: "[w]here the outdoor gathering is a religious service or political activity, such as a protest, the gathering is not required to comply with [the numerical capacity limits] of this Order." Governor Murphy explained that, "[g]iven the growing body of evidence showing the reduced risk of transmission outdoors, we

believe such a rule appropriately prioritizes individuals' rights to speak and worship freely." Governor Phil Murphy, June 9th, 2020 Coronavirus Briefing Transcript ("Murphy Briefing, 6/9").[6]

Although EO 152 prospectively cleared up the issue of unequal treatment for outdoor First Amendment gatherings, the State still faced a constitutional conundrum retrospectively, having previously issued criminal citations for some outdoor religious gatherings and "re-open" protests. Apparently recognizing that the state had preferred certain types of First Amendment activity over others, in a memorandum issued on June 17, 2020, New Jersey Attorney General Gurbir Grewal announced that he would direct prosecutors to dismiss charges against those cited for outdoor First Amendment activity prior to EO 152. In an advisory memorandum, the Attorney General stated as follows:

> Last week, Governor Murphy announced that, going forward, all outdoor political activity and outdoor worship services would be permitted, without any limitation on the number of individuals permitted to gather for such activities. As articulated in Executive Order No. 152 the Governor's decision was based both on the lower risks of COVID-19 transmission outdoors and on the societal importance of these activities. To ensure that all outdoor political activities and outdoor worship services

[6] Available at: https://nj.gov/governor/news/news/562020/approved/20200609b.shtml (accessed on August 19, 2020).

> receive uniform treatment, I am directing prosecutors to move to dismiss any Executive Order violations previously filed for such conduct, despite the initial probable cause determination or appropriateness of the violation at the time it was issued. Based on data maintained by the Division of Criminal Justice, there were five individuals who received summonses for organizing outdoor political protests and religious services in violation of Orders prior to the issuance of Executive Order No. 152; no individual protestors or worshipers have been cited to date.

New Jersey Attorney General Gurbir S. Grewal, Guidance Regarding Municipal Prosecutors' Discretion in Prosecuting COVID-19 Related Offenses, June 17, 2020 ("NJAG Mem."), at p. 4 (emphasis added).

As lamented by counsel for Plaintiffs, however, the Attorney General's memorandum only added salt to their religious wounds. The Attorney General's action directed the dismissal of charges against those cited for outdoor First Amendment activity prior to EO 152, but did not dismiss charges against those cited for indoor First Amendment activity, such as Plaintiffs, even if the citations were issued during the period of time when the Executive Orders did not distinguish between the risks associated with indoor and outdoor activity.

On June 22, 2020, after Plaintiffs had filed the instant Motion, Governor Murphy issued Executive Order No. 156 ("EO 156"), which stated that "the number

of individuals at indoor gatherings shall be limited to 25% of the capacity of the room in which it takes place, but regardless of the capacity of the room, such limit shall never be larger than 100 persons or smaller than 10 persons." EO 156 also allowed outdoor gatherings of "250 persons or fewer," but stated that "an outdoor gathering that is a religious service or political activity, such as a protest, is not required to comply with the numerical limit on persons." As of the time of this Opinion, EO 156 remains in effect as to indoor religious services.[7]

B. *Bible Baptist Church of Clementon*

Plaintiff Bible Baptist Church ("Bible Baptist") has been operating since 1886 in Clementon, New Jersey, where its constituents regularly gather for in-person religious services multiple times per week. See Compl., ¶¶ 30-31. Bible Baptist is a small congregation, normally having 70 people at its weekly leadership assembly (seating capacity is 75). Reese Cert. [Dkt. No. 12-3], at 4, ¶ 19. As alleged in the Complaint, Bible Baptist's pastor, Plaintiff Andrew Reese, along with the church's congregants, "believe that a physical assembly in one place on the Lord's day, for mid-week services, revivals, other special religious worship meetings, and for Christian fellowship is an essential part of their worship and that failure to assemble is a sin in

[7] Governor Murphy has issued various subsequent Executive Orders on the subject of indoor and outdoor gatherings, but the relevant restrictions remain unchanged as they pertain to places of worship.

violation of God's commands as they interpret the *Holy Bible.*" Compl., ¶ 33. In fact, Bible Baptist places such an emphasis on in-person attendance at services, that membership is automatically terminated if a member goes six months without attending at least one regular worship service. Id., ¶¶ 34-35. Despite this belief, from March 23, 2020 until May 20, 2020, Bible Baptist did not hold indoor church services, but instead, livestreamed services online. Id., ¶ 37.

On May 20, 2020, while EO 107's ban on non-essential gatherings of more than 10 people was still in effect, Bible Baptist held its mid-week worship service with more than 10 people in the sanctuary. Compl., ¶ 38. Although Bible Baptist's sanctuary has a seating capacity of 75 people, in preparation for the service, the church lowered the maximum capacity to 38 people to allow for social distancing. Id., ¶ 43. The sanctuary was also fully sanitized. Id., ¶ 39. During the service, all attendees wore a mask and all individuals, other than families, sat at least 6-feet apart. Id., ¶ 38. The following day, on May 21, 2020, Clementon Police Chief Charles Grover issued a criminal complaint to Pastor Reese, charging him with "opening Bible Baptist Church on May 20, 2020 and facilitating a gathering of more than 10 people on the premises of the Church in violation of Executive Order 107 in violation of APP. A:9-50." Id., ¶ 40.

After fully sanitizing all surfaces in the sanctuary, Bible Baptist held two religious worship services indoors with more than 10 people in the sanctuary on Sunday, May 24, 2020. Compl., ¶ 41. The sanctuary

was sanitized between the services and all individuals in attendance, other than families, sat at least 6-feet apart and wore a mask. Id. On that day, Clementon police officers arrived at the church before each of the two services. Although the police officers did not disrupt either service, following the services, Chief Grover once again swore out a criminal complaint charging Pastor Reese with violating EO 107. Id., ¶ 42. Pastor Reese has received "multiple tickets." Reese Cert., at 2, ¶ 4.

As confirmed at oral argument, the criminal charges against Pastor Reese are still pending, but have been stayed pending the outcome of this matter. See Tr., at 6:4-11. Bible Baptist and Pastor Reese contend that their First Amendment rights to freely assemble and exercise their religion by holding indoor worship services remain impeded by the threat of prosecution and imprisonment under the currently applicable Executive Orders. See, e.g., Reese Cert., at 5, ¶ 20. ("Despite the threat of criminal prosecution, my and our faith compel me and Bible Baptist members to continue to assemble as commanded by the Lord in His Word, the *Holy Bible*"). Relevantly, although EO 107 has been superseded, the type of services held by Bible Baptist remain prohibited under EO 156.

C. *Solid Rock Baptist Church of West Berlin*

Plaintiff Solid Rock Baptist Church of West Berlin ("Solid Rock") has been operating since 1981 in Berlin, New Jersey, where its constituents regularly gather for in-person religious services multiple times per week.

Compl., ¶¶ 47-48. Solid Rock is co-pastored by Plaintiff Charles Clark, Jr. and his son, Plaintiff Charles Clark, III. Id., ¶¶ 49-50. The Solid Rock sanctuary is able to seat up to 1000 people. Clark Cert. [Dkt. No. 12-4], at 4, ¶ 10.

As alleged in the Complaint, Solid Rock and its pastors believe that "physical assembly in one place on the Lord's day, for mid-week services, revivals, and other special religious worship meetings is an essential part of their worship and that failure to assemble is a sin in violation of God's commands as they interpret the Holy Bible." Compl., ¶ 51. Similar to Bible Baptist, Solid Rock holds in-person attendance at services to such a high degree of importance that membership is subject to automatic termination if an individual does not attend at least one service in a four-month period. Id., ¶¶ 52-53. Indeed, Solid Rock has terminated the membership of several individuals for nonattendance. Clark Cert., at 4, ¶ 9. Nonetheless, to comply with the Governor's orders, from March 23, 2020 until May 24, 2020, Solid Rock did not hold any indoor worship services, but instead, like Bible Baptist, livestreamed services online. Compl., ¶ 55.

On May 15, 2020, Pastor Clark notified Governor Murphy, by letter, that Solid Rock intended to resume indoor worship services on May 24, 2020. Id., ¶ 56. In the letter, Pastor Clark stated "[w]e will be safe, sanitized, and use social distancing," but also requested that the Governor declare churches to be "essential" businesses. Id. On May 18, 2020, counsel for Solid Rock wrote to Governor Murphy's office to express their

constitutional concerns regarding the restrictions imposed by EO 107 and to inform the Governor that Solid Rock intended to open for indoor services on May 24, 2020. Id., ¶ 57. Solid Rock's counsel requested confirmation from the Governor that churches could resume indoor services, but the Governor's office did not respond to either letter. Id., ¶ 58. Instead, on May 23, 2020, Camden County public safety officers allegedly installed cameras outside Solid Rock. Id., ¶ 59.

On Sunday, May 24, 2020, Solid Rock held two religious worship services indoors with more than 10 people in the sanctuary. Compl., ¶ 58. Solid Rock, which is a large congregation that has a sanctuary that can normally hold 1000 people, permitted no more than 250 people in the sanctuary to comply with social distancing requirements. Id. Every attendee had their temperature checked with a touchless thermometer and those with a temperature of 100.4° and above were not permitted to enter the building. Id. Every individual attending, other than families, sat at least 6-feet apart and wore a mask. Members were also required to make reservations to attend the Sunday services so that the church could enforce its social distancing protocols. Id.

Police officers did not disrupt either service, but on Monday, May 25, 2020, Lt. Michael Scheer of the Berlin Borough Police Department issued criminal complaints to both Pastor Clark, Jr. and Pastor Clark, III, charging them with "opening Solid Rock Church [sic.] on 5/24/20 @ 10 am [and 5:30pm] facilitating a gathering over 10 people in violation of EO 107. In violation

of APP. A:9-50." Compl., ¶ 60-61. Each has received five tickets for violating the Executive Orders.

As confirmed at oral argument, the charges against Pastor Clark, Jr. and Pastor Clark, III are still pending. See Tr., at 6:4-11. Solid Rock, Pastor Clark, Jr., and Pastor Clark, III contend that their First Amendment rights to freely assemble and exercise their religion by holding indoor worship services remain impeded by the threat of prosecution and imprisonment under the Executive Orders. See, e.g., Clark Cert., at 6, ¶ 19 ("Despite the threat of criminal prosecution, my and our faith require me and Solid Rock members to continue to assemble as commanded by the Lord in His Word, the *Holy Bible*"). Relevantly, although EO 107 has been superseded, the type of services held by Solid Rock remain prohibited under EO 156.

II. STANDARD OF REVIEW

When evaluating a plaintiff's motion for a preliminary injunction, the district court considers four factors: "(1) a likelihood of success on the merits; (2) that [they] 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). "If a plaintiff meets the first two requirements, the District Court determines in its sound discretion whether all four factors, taken together, balance in

favor of granting the relief sought." Fulton v. City of Philadelphia, 922 F.3d 140, 152 (3d Cir. 2019), cert. granted sub nom. Fulton v. City of Philadelphia, Pennsylvania, 140 S. Ct. 1104 (2020). However, "[p]reliminary injunctive relief is an extraordinary remedy and should be granted only in limited circumstances." Lane v. New Jersey, 725 F. App'x 185, 187 (3d Cir. 2018) (quoting Kos Pharms., Inc., 369 F.3d at 708).

III. DISCUSSION

The Free Exercise Clause of the First Amendment, which applies to state actions pursuant to the Fourteenth Amendment, Cantwell v. Connecticut, 310 U.S. 296, 303 (1940), provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." When religiously motivated conduct comes into conflict with a law or government action, the analysis of a free exercise claim depends on the nature of the challenged law or government action. Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144, 165 (3d Cir.2002). If the government action is neither "neutral" (discriminates against religiously motivated conduct) nor "generally applicable" (enforced against conduct that is only regulated when performed for religious purposes), strict scrutiny applies, and the government action violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling government interest. Id. However, if a government action is "neutral" and "generally applicable," and burdens religious conduct only incidentally, the action is permissible if it is

rationally related to a legitimate government objective. Id.

In this matter, Plaintiffs allege that Governor Murphy's Executive Orders, on their face and as applied, unconstitutionally infringe upon their First Amendment rights to freely assemble and exercise their religious beliefs by suppressing their ability to gather for in-person indoor worship services. In turn, the State argues that the Executive Orders are consistent with the Free Exercise Clause because they impose burdens on analogous religious and secular activities alike.

A. Neutrality and General Applicability

As Plaintiffs correctly state, a government action is not considered neutral and generally applicable if it specifically targets or burdens religiously motivated conduct but exempts substantial comparable conduct that is not religiously motivated. See Tenafly, 309 F.3d at 165-166 (citing Church of the Lukumi Babalu Aye., Inc. v. Hialeah, 508 U.S. 520, 537 (1993)). At oral argument, Plaintiffs primarily argued that the Governor's capacity restrictions on indoor gatherings are not neutral or generally applicable because they impermissibly favor secular indoor retail establishments and public places, such as airports and train stations, which are not subject to the same limitations of 25-percent

capacity and 100-person maximum attendance. Tr., at 12:5-13:16.[8]

In response, the State countered at oral argument that the types of indoor retail establishments and public places that are exempted from the Executive Orders (most specifically, the 100 capacity) are substantively different in nature than places of worship. See Tr., at 52:25-53:3 (contending that "individual gatherings, much more than stores or airports or offices or anything else, have been linked to serious outbreaks of COVID-19 even from just one or two asymptomatic attendees"). The State acknowledged that some exempted places experience high foot traffic, but explained that the more transitory and superficial nature of interactions in these places poses a lower risk of transmission

[8] It is important to note that at oral argument the parties focused much of their attention on the 100-person capacity restriction set forth by Executive Order 156, which was decreed after the filing of the within Motion. This is relevant because at the time of the filing for the requested injunctive relief Plaintiffs sought an order allowing it to continue indoor church services with more than ten people. That request has been mooted by Executive Order 156 (as well as Executive Order 152 issued days before the instant Complaint) and Defendants would have no basis to oppose relief from the 10-person limitation, and as such, that relief has been effectively granted, at least in part. What the parties do quarrel about is exactly how many people in excess of 10 may attend an indoor service, specifically, the legality of the 100-person numerical cap. Although an amendment of the pleading would have been procedurally proper and prudent, the Court need not delve into such procedural analysis because even if the Complaint were amended to challenge the 100-capacity limitation, as Plaintiffs did at oral argument, the challenge would not succeed for the reasons set forth herein.

than the type of interactions that occur at religious services, where attendees sing, chant, and sit near each other for an extended period of time.[9] The State further pressed that the nature of interactions at indoor religious services are more akin to those that occur at large indoor gathering places, such as concert venues, movie theaters, and dining establishments, which have all been forced to remain closed under Governor Murphy's Executive Orders.

Plaintiffs do not dispute that places of worship are treated more favorably than indoor recreational facilities, like movie theaters, but dispute that those types of business are more appropriate comparisons than regular retail businesses, airports, or train stations. Plaintiffs, however, do not point to any scientific or anecdotal evidence to support their posited comparators.

In May of this year, the Supreme Court considered whether to enjoin an emergency order from California, which was nearly identical to Executive Order No. 156. That order limits religious gatherings to "25% of building capacity or a maximum of 100 attendees," but allows "essential" retail establishments to remain open without the same restrictions. See South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613

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[9] At oral argument, the State argued that "[i]f you have 50 people in an airport, whether or not they're waiting for the same or different flights, they are extremely unlikely to be [ ] interacting with each other . . . the risk of us interacting and therefore having the kind of sustained person-to-person interaction that risks COVID-19 spread goes up considerably" at large communal gatherings.

(2020). Chief Justice Roberts concurred in the Supreme Court's decision to deny injunctive relief, noting:

> Similar or more severe restrictions 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. And 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.

Id.

Moreover, just last month, the Supreme Court weighed the constitutionality of Nevada's even harsher restrictions, which limit attendance at religious services to "no more than 50 persons," regardless of a venue's size or social distancing measures implemented, while allowing casinos and other entertainment facilities to open at 50-percent of their maximum capacity, with no numerical limit on attendance. Calvary Chapel Dayton Valley v. Sisolak, et al., 591 U.S. ___ (2020) (slip op., at 1). The Supreme Court allowed the restrictions to stand. Under Nevada's restrictions, a casino with a thousand-person capacity could theoretically allow as many as 500 people on the casino floor at the same time, but a church with the same, or greater, capacity would still be capped at 50 attendees for a worship service. Although Nevada's restrictions

placed on religious services are undisputedly more severe than those imposed on casinos, the Supreme Court, nonetheless, denied the church injunctive relief.

In those cases, the Supreme Court deemed both California and Nevada's capacity restrictions to be neutral and generally applicable. Because there is no meaningful distinction between the orders in both cases and the Executive Orders here, this Court is constitutionally duty-bound to find similarly as to New Jersey's Executive Orders.

B. Rational Basis Review

Having concluded that Governor Murphy's restrictions on large indoor gatherings are neutral and generally applicable on their face, the Court now turns to whether they are rationally related to a legitimate government objective. In this case, Bible Baptist (which has a 75-person capacity) desires to hold services at 50-percent capacity with 38 people in attendance, but is precluded by the State's 25-percent capacity limitation. Meanwhile, Solid Rock (which has an 1000-person capacity) desires to hold services at 25-percent capacity with 250 people in attendance, but is precluded by the State's 100-person cap on attendance. As such, the Court must assess whether the State has a rational basis for both the 25-percent and 100-person limitations.

Governor Murphy's stated objective in enacting restrictions on large indoor gatherings was to reduce the risk of COVID-19 transmission. At oral argument, the State explained that New Jersey "is especially

concerned about communal events and group activities . . . that bring people together . . . because that just risks much more person-to-person interaction in a sustained way." Tr., at 54:22-25. The State also justified loosening the restrictions on outdoor gatherings based on growing evidence that there is a much lower risk of transmission outdoors.

The State further argued that both the 25-percent capacity and 100-person numerical limitations are necessary because, otherwise, it would be too administratively difficult for the State's contact tracers to identify and speak to all relevant individuals in the event of an outbreak. Id., 52:17-54:9. In explaining the justification for the 100-person numerical cap in the context of contact tracing, the State elaborated:

> So once you identify that a sport is likely to be an outbreak, what you need to do in that case is have a robust contact tracing program to be able to identify not just the people they interact with, but everyone that they've interacted with outside of that gathering then the people they've interacted with and so on and so forth. . . . So when you go up beyond this certain numerical limit, it's not just that our contact tracers have to talk to the additional 30 people in the room or 40 people in the room to hit your capacity limit, they need to talk to everyone else that's in that room that they went and talked to after. So, let's say you have a hundred people but the capacity led to 250, the contact tracers don't have to just talk to 150 more people, they have to talk to 150 more

> people and everybody each of those people talked to. So it's orders of magnitude more than you would have at a gathering capped at a hundred.

Tr., at 53:3-21.

At oral argument the Court questioned the State about how it could rationalize the 100-person cap on attendance for indoor gatherings in places of worship while, under Executive Order No. 157 ("EO 157"), issued on June 26, 2020, allowing casinos, and other similar indoor recreational centers, to open at 25-percent capacity without a 100-person cap on attendance. See EO 157, ¶ 7(a).[10] The State argued that "[t]here is a lower risk in some of the casinos because, yes, there may be more people in the overall hall but when you are at your slot machine you are not actually particularly trying to interact with others and have the sort of sustained person-to-person contact with large groups of people like you would at communal events." Tr., at 55:1-7. The State further explained that casinos remained subject to the 100-person cap on attendance for special events or gatherings, such as poker or slot tournaments, where players were more likely to interact with one another.

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[10] The Court observes that the 25-percent capacity limitation in EO 157 also allows these secular indoor businesses to exclude employees when calculating compliance, but inexplicably, clergy and other pastoral employees are not excluded from being counted towards the 25-percent or 100-person capacity limitations on indoor gatherings.

To be clear, the Court recognizes that reducing the transmission of COVID-19 is a legitimate government objective. But, like Plaintiffs, the Court is skeptical of the reasoning for the precise limitations imposed. For example, the Court is puzzled as to why it would be any more administratively difficult to perform contact tracing for 250 people who have made reservations to attend worship services and sit in the same place throughout the service, as done by the worshippers at Solid Rock, than it would be to contact trace for a similar number of people who can move freely from table-to-table or slot machine-to-slot machine throughout a casino, and then visit a neighboring casino.[11] As discussed more fully infra, as Plaintiffs passionately and persuasively argue, at a minimum, the State's failure

[11] As Plaintiffs question, it is also unclear how the State arrived at the seemingly arbitrary 25-percent and 100-person figures. Relatedly, the State has continually allowed places of worship to hold services with 10 or fewer individuals, regardless of capacity or ability to social distance. As discussed at oral argument, it may be coincidental, but it is interesting to note that the "10 person minimum" exemption exactly aligns with requirement under traditional Jewish law necessitating a quorum, or "minyan," of 10 adult males for a prayer service to take place. This does seem to suggest, as Plaintiffs argue, that the State may have strategically gerrymandered exemptions, not for health and safety purposes, but rather to inoculate the State against legal challenges, such as one from Jewish groups who, absent the 10-person exemption, could have claimed that the Executive Orders prohibited prayer services. The State's defense of the "10-person" exemption was not persuasive. If the exemption was truly intended to distinguish between "things that were gatherings versus simply two families having to be together at any given time," Tr., at 23:13-15, the State could have, for example, limited the "10-person" exemption to individuals gathered at private residences.

to undertake a more thoughtfully tailored approach to indoor religious activity, while pursuing nuanced and creative approaches to accommodate casinos, retail stores, transportation hubs, and schools, tends to suggest that accommodating religious activity was simply not a priority for the State.

Despite this Court's concerns, Supreme Court precedent counsels that States should be given broad deference when enacting regulations to protect public health and safety. Indeed, Chief Justice Roberts expressed this sentiment when concurring in the decision to deny injunctive relief in relation to nearly identical restrictions in South Bay:

> 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 v. Massachusetts, 197 U.S. 11, 38 (1905). 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. See Garcia v. San

> Antonio Metropolitan Transit Authority, 469 U.S. 528, 545 (1985).

South Bay, 140 S. Ct. at 1613-14.

Counsel for Plaintiffs made an impassioned entreaty for relief from the 25-percent and/or 100-person capacity limitation. For sure, such limitations are hard to swallow for those who turn to prayer and fellowship, especially in times of great hardship and suffering such as these. Moreover, Plaintiffs, who view worship services as "essential" to their emotional and physical health and well-being, take little solace in the fact that religious services are treated no worse than indoor secular gathering places like movie theaters, performing arts centers, and concert venues.

At oral argument, the State argued that "New Jersey is absolutely doing everything that it can in the face of these unprecedented challenges to accommodate worship in the state." Tr., at 21:10-12. Plaintiffs have made a convincing case otherwise. Given the sacred status of Free Exercise rights under the First Amendment, the State could have developed more narrowly tailored precautions to mitigate risk of transmission while allowing Plaintiffs to gather for prayer services in accord with their religious beliefs.

Plaintiffs have persuasively argued that the steps that they took, such as limiting attendance, setting up a reservation system, taking temperature of attendees, implementing social distancing, requiring mask usage, and sanitizing the sanctuary before and after services, are precisely the type of precautions that could have

been considered and implemented by the State if it chose to prioritize indoor worship services to the same extent that it prioritized outdoor non-religious protests. Instead, the State painted with broad strokes and implemented a "one church-size fits all" policy that makes no effort to distinguish between the capacity and needs of small congregations (like Bible Baptist) and large congregations (like Solid Rock). The difference in how the restrictions impact the two Plaintiffs, with varied overall congregation sizes and capacities, illustrates this point.[12]

Although Plaintiffs have made a compelling case that the Executive Orders were crafted with religious indifference, the Court may not invalidate the executive orders on those grounds alone. In the end, Plaintiffs have been unable to demonstrate that the restrictions on indoor gatherings were crafted with religious animus, have been applied unequally, or lack a rational relationship to a legitimate government objective. Additionally, at least on this record, Plaintiffs have not offered any evidence to refute the State's proffered justifications, such as the lessened risk of transmission at indoor spaces where contact is merely "transitory" or that the 100-person cap is necessary for the administrative feasibility of performing contact

[12] For example, assuming that the churches routinely fill to capacity, Bible Baptist could accommodate all worshippers at 25% capacity if it held four services in a single day. This is a burden upon the church, undoubtedly, but one that could potentially be managed. In contrast, given the 100-person capacity limitation, Solid Rock would be forced to hold a staggering ten services per day to accommodate all worshippers.

tracing. In light of these factors, and recent Supreme Court precedent, the Court must find that Plaintiffs have not met their burden of demonstrating that the restrictions on indoor religious gatherings have been applied discriminatorily or lack a rational relationship to a legitimate government interest.

Plaintiffs argue that this case is distinguishable from South Bay, Calvary Chapel, and another case recently considered in the District of New Jersey, Dwelling Place Network, et al. v. Murphy, et al., Civ. No. 20-6281 (RBK), and that the Court should not consider those decisions as precedential. Specifically, Plaintiffs argue that this case is different because of their belief regarding the necessity of in-person religious worship "is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living." Tr., at 7:1-23 (quoting Wisconsin v. Yoder, 406 U.S. 205, 216 (1972)). In attempting to draw this distinction, Plaintiffs suggest that they are faced with a more substantial burden than plaintiffs in those cases. Plaintiffs' position is understandable, as they undoubtedly felt that their sincerely held religious beliefs were under siege by government action, but as a factual matter, so, too, did the plaintiffs in the aforementioned cases.[13]

[13] The religious worshippers in all of the cases cited by Plaintiffs did, in fact, claim that the in-person religious services were biblically required. Furthermore, although Plaintiffs contend that adhering to their sincerely held religious beliefs would subject them to the threat of persecution and imprisonment, that is no longer the case. In light of EO 156, though less than ideal, it is theoretically possible, albeit burdensome, that Plaintiffs could

Regardless, this aspect is not relevant for purposes of the Court's analysis. In Tenafly, the Third Circuit explained that "[n]either the Supreme Court nor our Court has intimated that only compulsory religious practices fall within the ambit of the Free Exercise Clause." 309 F.3d at 171. Rather, burdens on conduct motivated by "beliefs which are both sincerely held and religious in nature" may implicate the Free Exercise Clause "without regard to whether [the conduct] is mandatory." Id. Therefore, the Court does not distinguish between cases involving "optional" and "mandatory" religious practices.

C. Selective Enforcement

At oral argument, Plaintiffs appeared to press a claim of unlawful selective enforcement, pointing out that they were issued criminal citations for gathering in violation of EO 107, but the social protestors, who also clearly violated the order, were not cited. Plaintiffs also highlighted that Governor Murphy praised social justice protestors who gathered in contravention of EO 107, while expressing no such support for religious worshippers. Plaintiffs argued that this amounts to "viewpoint discrimination as well as just plain basic uneven treatment." Tr., at 15:1-2. To these arguments, the Court makes the following observations. First, Plaintiffs appear to conflate selective enforcement with the

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accommodate all those who wish to congregate in person, without violating the Executive Orders, by holding a series of smaller worship services on the same date.

State's insensitivity towards religious practices. Second, Plaintiffs have not asserted a selective enforcement cause of action in their Complaint.

As articulated by the Third Circuit, "in order to establish municipal liability for selective enforcement of a facially viewpoint- and content-neutral regulation, a plaintiff whose evidence consists solely of the incidents of enforcement themselves must establish a pattern of enforcement activity evincing a governmental policy or custom of intentional discrimination on the basis of viewpoint or content." Brown v. City of Pittsburgh, 586 F.3d 263, 294 (3d Cir. 2009).

To be clear, Plaintiffs have not alleged that the restrictions on indoor gatherings have been selectively enforced against religious groups or that they were selectively targeted for surveillance and enforcement.[14] To this point, at oral argument, Plaintiffs were unable to pinpoint any secular indoor gathering that received more favorable treatment from law enforcement than religious services. This differs from New Jersey's restrictions on outdoor gatherings, which, prior to EO 152, were selectively enforced against non-preferred types of First Amendment activity. For example, while religious groups and "re-open" protestors received criminal citations for exceeding attendance limits and

[14] Rather, Plaintiffs, to a certain extent, induced law enforcement action by alerting the State and/or local police in advance that they intended to violate the restrictions on large gatherings. Plaintiffs also admitted that they received warnings from law enforcement to cease and desist before criminal citations were issued. Tr., at 9:22-25.

failing to abide by social distancing requirements set forth in the Executive Orders, the "social justice" protestors received no such citations.

The State justifies its prosecutorial decision not to issue citations to social justice protestors on the basis of the indoor/outdoor distinction and as a "public safety judgment" to avoid "serious civil unrest and serious conflict." Tr., at 42-15-43:17. Plaintiffs find little comfort in this sentiment, arguing that it demonstrates a clearly discriminatory viewpoint preference for certain types of First Amendment Activity when enforcing the Executive Orders.

Plaintiffs explained that the exemption for outdoor First Amendment activities was created after the social justice protests began and did little to help them. Indeed, Plaintiffs aptly note that outdoor religious services remained subject to attendance limitations at the time they held the services for which they received criminal citations. Therefore, Plaintiffs, and other religious groups, were not necessarily aware that they could have retrospectively received favorable treatment if they had chosen to move their services outdoors. Meanwhile, they are still facing criminal prosecution for their religious activity, while those who engaged in non-religious First Amendment activity, which was equally prohibited at the time, were given free passes and after-the-fact dispensation.

Additionally, Plaintiffs suggest that EO 152's rollback of attendance limitations for outdoor First Amendment gatherings was really more geared towards

providing cover to allow social justice protests, rather than to make an accommodation for religious worship. On this point, counsel for Plaintiffs said that neither church viewed outdoor services as a viable alternative for their congregations, given the logistical challenges and costs associated with moving services outdoors. Tr., at 10:9-14 (noting that Plaintiffs "view it as a large potential burden given the inconsistencies of weather, mosquitoes, getting everyone corralled, the expense of tents, the expense of training their people to be able to structure everything outdoors as opposed to the practice that they are currently performing").

Finally, Plaintiffs insinuate that the State declined to accommodate religious worship and, instead, selectively enforced the Executive Orders against religious groups because they would quietly accept their fate and, in effect, "turn the other cheek." Plaintiffs in this case, however, had no desire to forego their sincerely held religious beliefs.

In short, the Court notes that Plaintiffs' argument for selective enforcement may, indeed, have merit. However, because Plaintiffs have not alleged such claim in their Complaint, the Court need not address it here. The Court, however, will permit Plaintiffs to file an amended complaint within 30 days if they wish to pursue such a claim.[15]

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[15] This Court notes that it is unclear whether it has jurisdiction over such a claim while the related criminal action remains pending in state court. As such, any amended complaint must adequately set forth the basis for jurisdiction.

IV. CONCLUSION

Urgently wishing not to "forsak[e] the assembling of [themselves] together," Plaintiffs are rightfully disillusioned that the State has not prioritized indoor religious activity to the same degree as outdoor social justice protests. The State's apathy to sincerely held religious beliefs, alone, however, does not establish unequal treatment as it pertains to indoor gatherings. Because the Court concludes that Plaintiffs have failed to establish that the Executive Orders, as they pertain to large indoor gatherings, are not facially neutral and generally applicable, the Court finds that Plaintiffs have not established a likelihood of success on the merits.

Accordingly, Plaintiffs' Emergency Motion for a Preliminary Injunction shall be **DENIED WITHOUT PREJUDICE**. However, as previously noted, the Court will allow Plaintiffs to file an amended complaint if they wish to pursue a claim for selective enforcement, unless the State reexamines its pursuit of charges against Plaintiffs.

DATED: August 20, 2020

s/ Renée Marie Bumb
HON. RENÉE MARIE BUMB
UNITED STATES DISTRICT JUDGE