

**IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF NEW JERSEY  
(Newark Division)**

<b>REV. KEVIN ROBINSON</b>	)	
	)	
	)	
Plaintiff,	)	<b>Case No.</b>
	)	
<b>v.</b>	)	
	)	
<b>PHIL MURPHY</b> , Governor of the	)	
State of New Jersey, in his	)	
official capacity,	)	
	)	
Defendant.	)	

**COMPLAINT FOR CIVIL RIGHTS VIOLATIONS,  
INJUNCTIVE RELIEF AND DECLARATORY JUDGMENT**

Plaintiff, by and through counsel, complains as follows:

**INTRODUCTION**

1. This civil rights action, brought pursuant to 42 U.S.C. § 1983, challenges Executive Order 107 (2020), effective March 21, 2020 (“Order 107”), issued by defendant Governor Phil Murphy as a response to the COVID-19 epidemic pursuant to his purported “emergency powers” under the New Jersey Civil Defense and Disaster Control Act (“DCA”).

2. On the pretext of limiting the impact of COVID-19, Order 107 unconstitutionally bans all social, political and religious gatherings of any number, under any circumstances, while allowing numerous commercial gatherings on the premises of businesses deemed “essential,” including supermarkets, pet stores, liquor stores, laundromats and dry cleaners, medical marijuana dispensaries, convenience stores; the front offices, back offices and warehouses of “essential” businesses, and the offices, studios and on-the-scene teams of the “essential” media.

3. Order 107 thus declares all religious gatherings “non-essential.”

4. Under threat of criminal penalties, Order 107 has forced the closure of every Catholic church or chapel in the State of New Jersey to public worship, including the church of which Plaintiff is the pastor.

5. Based solely on Order 107, Plaintiff has been threatened by local law enforcement with arrest and criminal prosecution if he dares to offer a Mass or conduct any other public gathering in his church, which remains closed due to this threat.

6. Plaintiff seeks a declaratory judgment that Order 107, both on its face and as applied to him, violates the First and Fourteenth Amendments to the United States Constitution, and both interim and permanent injunctive relief barring its enforcement as to him and others similarly situated.

### **PARTIES**

7. Plaintiff Father Kevin Robinson is a Catholic priest, ordained in 1991, who engages in priestly ministry in this District.

8. Defendant Phil Murphy is Governor of the State of New Jersey and is sued in his official capacity. At all times pertinent to this action Defendant and his subordinates have acted under color of State law.

### **JURISDICTION AND VENUE**

9. This action raises federal questions under the First and Fourteenth Amendments of the United States Constitution and under federal law, 28 U.S.C. §§ 2201 and 2202 (Declaratory Judgments), as well as 42 U.S.C. §§ 1983, 1988, and 1920.

10. This Court has jurisdiction over these federal claims under 28 U.S.C. §§ 1331 and 1343.

11. This Court has authority to grant the requested injunctive relief under 28 U.S.C. § 1343(3), the requested declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202, and Plaintiff's prayer for costs, including reasonable attorneys' fees, under 42 U.S.C. § 1988 and 28 U.S.C. § 1920.

12. Venue is proper in the District of New Jersey pursuant to 28 U.S.C. § 1391, as a substantial part of the events giving rise to the claims herein arose in this District.

### **FACTUAL ALLEGATIONS**

13. Plaintiff is a duly ordained Catholic priest who offers Mass and provides the other sacraments of the Catholic Church to his congregation in a church building with appurtenant facilities in Essex County, New Jersey.

14. On March 21, 2020, Defendant issued Order 107 for the stated purpose of "reducing the rate of community spread of COVID-19." (Order 107 at 1)

15. Order 107 invokes Defendant's "emergency powers," citing the New Jersey Civilian Defense and Disaster Control Act (DCA) to justify its provisions. (Order 107 at 4)

16. Order 107 supersedes the "operative provisions" of prior Executive Order 104 (2020) ("Order 104"), issued March 16, 2020, but retains its "factual findings." (Order 107, ¶ 1).

17. Order 104 permitted "gatherings of persons in the State of New Jersey" under the following terms:

All gatherings of persons in the State of New Jersey shall be limited to 50 persons or fewer, excluding 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.

18. Order 107 eliminates the allowance of gatherings of “50 persons or fewer,” and declares that “All New Jersey residents shall remain home or at their place of residence” with the following nine exceptions (in pertinent part):

- obtaining goods or services from essential retail businesses...;
- obtaining takeout food or beverages...;
- seeking medical attention, essential social services, or assistance from law enforcement or emergency services;
- visiting family or other individuals with whom the resident has a close personal relationship...;
- reporting to, or performing, their job;
- walking, running, operating a wheelchair, or engaging in outdoor activities with immediate family members, caretakers, household members, or romantic partners while following best social distancing practices with other individuals, *including staying six feet apart*;
- leaving the home for an educational, *religious*, or political reason;
- leaving because of a reasonable fear for his or her health or safety; or
- leaving at the direction of law enforcement or other government agency.

Order 107 at ¶ 2 (emphasis added)

19. Order 107 now provides that “Gatherings of individuals, such as parties, celebrations, or other social events, are cancelled, unless otherwise authorized by any part of this Order.” (Order 107, ¶ 5)

20. The “gatherings of individuals” now forbidden by Defendant, in any number, include religious services, as Defendant’s official FAQ website specifically states:

**Are churches and other houses of worship still offering services?:**

Executive Order No. 107... *prohibits all gatherings* of individuals, such as parties, celebrations, or other social events, unless otherwise authorized by the Order. Residents should consult with their local houses of worship *to see what alternatives are being offered in place of in-person services.* (emphasis added)<sup>1/</sup>

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<sup>1/</sup>[See,https://covid19.nj.gov/faqs/nj-information/general-public/are-churches-and-other-houses-of-worship-still-offering-services](https://covid19.nj.gov/faqs/nj-information/general-public/are-churches-and-other-houses-of-worship-still-offering-services)

21. On account of Order 107, all Catholic churches in New Jersey have been shuttered and Masses and other functions therein prohibited.

22. Order 107 further prohibits religious gatherings anywhere in the State of New Jersey, whether or not they take place in a church or chapel, indoors or outdoors.

23. Plaintiff has complied with the Order by not offering Mass for the faithful or presiding over any other religious gathering anywhere in New Jersey.

24. Order 107 provides that violators of the Order, and those who aid or abet them, are subject to arrest and criminal prosecution for “disorderly conduct” under N.J.S.A. App. A: 9-49 and 50, the criminal penalty provisions of the DCA.

25. While Order 107 permits leaving home for a “religious... reason” (Order, ¶ 5), leaving home to travel to a now-forbidden religious gathering is clearly forbidden under criminal penalty, as is driving someone to such a gathering, which would constitute aiding and abetting a violation of the Order.

26. On March 20, 2020, the day before Order 107 went into effect, a local police officer arrived at Plaintiff’s church and demanded that the Mass that was about to begin be cancelled and that the congregation disperse, even though Order 107 was not effective until the following day.

27. The officer was verbally aggressive, repeatedly stating that the Mass could not proceed because of the Governor’s order, thus making it clear that Plaintiff was subject to arrest while the members of his congregation were cowering in the basement in fear.

28. Only when the officer was informed by the local Police Chief via cell phone that Order 107 was not effective until the following day was his implicit threat of arrest withdrawn.

29. On Thursday, March 26, however, Plaintiff was advised by the same Police Chief via text message that “we do have charges for mass gatherings, ie [sic] parties, etc.... Hoping this turns around soon it’s crazy.”

30. In obedience to Order 107, Plaintiff has since complied with Order 107 by not offering Mass for the faithful or presiding over any other religious gathering anywhere in New Jersey.

31. While forbidding all religious gatherings under any circumstances, Order 107 permits numerous commercial gatherings at the premises of businesses deemed “essential” by Defendant, as follows:

- a. Grocery stores, farmer’s markets and farms that sell directly to customers, and other food stores, including retailers that offer a varied assortment of foods comparable to what exists at a grocery store;
- b. Pharmacies and alternative treatment centers that dispense medicinal marijuana;
- c. Medical supply stores;
- d. Retail functions of gas stations;
- e. Convenience stores;
- f. Ancillary stores within healthcare facilities;
- g. Hardware and home improvement stores;
- h. Retail functions of banks and other financial institutions;
- i. Retail functions of laundromats and dry-cleaning services;
- j. Stores that principally sell supplies for children under five years old;
- k. Pet stores;
- l. Liquor stores;

- m. Car dealerships, but only to provide auto maintenance and repair services, and auto mechanics;
- n. Retail functions of printing and office supply shops; and
- o. Retail functions of mail and delivery stores.

32. Order 107 places no limitation on the size of gatherings at the business premises deemed “essential,” but rather provides merely that “essential” businesses, “*wherever practicable*, provide pickup services outside or adjacent to their stores” and that they “shall abide by social distancing practices *to the extent practicable* while providing essential services,” including “*reasonable efforts* to keep customers six feet apart and frequent use of sanitizing products on common surfaces.” (Order 107 at ¶¶ 6-7)(emphasis added)

33. Order 107 places no limitation on the size of gatherings of employees in the office environments, backrooms or warehouses of businesses deemed “essential,” save for “best efforts to reduce staff on site to the minimal number necessary to insure that essential operations can continue,” with merely advisory examples of employees who, in Defendant’s judgment, “need to be physically present at their work site in order to perform their duties...” (Order, ¶ 11)

34. Order 107 also exempts the media from any restriction whatsoever: “Nothing in this Order shall be construed to limit, prohibit, or restrict *in any way* the operations of newspapers, television, radio, and other media services.” (Order 107, ¶ 19)(emphasis added)

35. Order 107 fails to mention, and thus leaves untouched, Order 104’s allowance of unlimited gatherings in “airports, bus and train stations...” (Order 104 at 1).

36. In completely forbidding all religious gatherings as “non-essential,” Order 107 denies religious gatherings the latitude afforded “essential” commercial gatherings: i.e. that social distancing practices be maintained “to the extent practicable,” that “reasonable efforts” be

made to keep people “six feet apart,” and that there be “frequent use of sanitizing products on common surfaces.”

37. In completely forbidding all religious gatherings as “non-essential,” Order 107 also denies religious gatherings the latitude accorded to the staffs of “essential businesses,” which are subject only to advisory suggestions but no limit on the size of those gathered on premises, and to the mass media, which are subject to no restrictions at all.

38. Religious gatherings in the pews of churches, which can easily accommodate social distancing, are comparatively small and discrete and manifestly pose far less of a risk of viral transmission than the favored commercial gatherings, which involve:

(a) innumerable close interpersonal exchanges of goods and services every day of the week;

(b) crowds and massive foot traffic as well as seated patrons in the favored retail businesses as well as in airports, train and bus stations;

(c) the touching of countless objects for sale and common surfaces, including keypads and touch screens, by potentially millions of people in the State of New Jersey;

(d) the close proximity of innumerable seated employees in the confined spaces of innumerable offices, backrooms and warehouses of essential businesses, and

(e) the totally unregulated physical presence of innumerable seated employees in offices and studios, and gatherings of employees at the scenes of news coverage, in the course of mass media operations.

39. Plaintiff is willing to observe the same limitations Order 107 imposes on permitted “essential” gatherings on the premises of “essential businesses”: i.e., “abide by social distancing practices to the extent practicable,” “reasonable efforts to keep [congregants] six feet



apart and frequent use of sanitizing products on common surfaces.” (Order 107 at ¶¶ 6-7)(emphasis added)

40. Plaintiff’s congregation at Mass typically numbers around 50, the same number that was permitted for any and all gatherings under superseded Order 104 and is also now permitted under Connecticut Governor Ned Lamont’s Executive Order No. 7N, which specifically exempts religious gatherings from its limitation of other gatherings to no more than five people: “except that religious, spiritual or worship gatherings *shall not be subject to such increased restrictions*, and shall instead remain subject to the prohibition on gatherings of 50 or more people, provided that they employ reasonable and appropriate distancing measures.”<sup>2/</sup>

41. Order 107 articulates no rationale whatsoever for treating religious gatherings as a greater threat to public health and safety than commercial gatherings that involve manifestly far greater risk of viral transmission among millions of potential customers or in the enclosed premises of the offices maintained by “essential” businesses and the media.

42. As the pleaded facts demonstrate, Order 107 irrationally, invidiously, and without any legitimate state purpose discriminates against religious gatherings in favor of secular commercial gatherings.

43. On April 15, 2020, Defendant admitted on national television, respecting his issuance of Order 107, that “I wasn’t thinking of the Bill of Rights when we did this.”<sup>3/</sup>

44. On April 23, 2020, counsel for Plaintiff sent a demand letter to Defendant, with copies to the Acting Chief Counsel for the Governor and the Attorney General of New Jersey, advising that Order 107 is unconstitutional, seeking confirmation that Plaintiff was subject to

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<sup>2/</sup>See, <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7N.pdf?la=en>.

<sup>3/</sup> See, <https://www.foxnews.com/media/tucker-carlson-phil-murphy-bill-of-rights>.

arrest and/or prosecution for disobeying the Order by offering Mass, and further advising that if there were no response within five (5) days, Plaintiff would pursue this action. (*See* Demand Letter, Exhibit A to this Complaint.) There has been no response to the demand letter.

45. On April 27, 2020, after having already extended Order 107 for 30 days from April 7, Defendant announced a further extension of the Order indefinitely.<sup>4/</sup>

46. There is no sign that Defendant intends to relinquish his grip on the daily life of anyone present in the State of New Jersey, including Plaintiff, by any date certain.

47. Plaintiff seeks to offer Mass for his congregation on Sunday, May 3, 2020 and therefore seeks emergent relief from Order 107 via TRO.

### **COUNT I**

#### **Violation of the First and Fourteenth Amendments to the U.S. Constitution (Free Exercise of Religion) 42 U.S.C. § 1983**

48. Plaintiff re-alleges and incorporates by reference the allegations in paragraphs 1-47 above.

49. Plaintiff's sincerely held religious belief compels him to offer the Mass and other Sacraments of the Catholic Church to his congregants as well as to preside over other religious gatherings in his church and elsewhere as required by his religion.

50. The Free Exercise Clause of the First Amendment to the U.S. Constitution protects Plaintiff's religious activities.

51. Defendant's interpretation and application of Order 107 substantially burdens Plaintiff's free exercise of his religious practices and beliefs by forbidding him to offer Mass or

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<sup>4/</sup> *See*, "NJ stay-at-home order extended indefinitely as Murphy outlines path to reopening" @ <https://www.pix11.com/news/coronavirus/gov-murphy-to-unveil-plan-to-responsibly-reopen-new-jersey>

preside over any gathering, including funerals, in his church or elsewhere in the State of New Jersey.

52. Order 107 is not a neutral law of general applicability because it contains numerous exemptions for secular gatherings on the premises of “essential businesses,” where much larger and much more frequent gatherings affect the purported state interest of “reducing the rate of community spread of COVID-19” far more than the religious gatherings of a Catholic congregation.

53. Order 107 does not advance a compelling state interest as applied to Plaintiff, nor is it the least restrictive means of accomplishing the stated purpose of “reducing the rate of community spread of COVID-19.”

54. Defendant and the State of New Jersey have less restrictive means of achieving any legitimate interest served by Order 107, as alleged in ¶ 36.

55. Order 107 is thus underinclusive and overbroad, both on its face and as applied, because it exempts numerous secular gatherings from its prohibitions while failing to regulate the prohibited gatherings, including religious gatherings, by the least restrictive means possible.

56. Order 107, both facially and as applied to Plaintiff, violates the Free Exercise Clause of the First Amendment as made applicable to the States by the Fourteenth Amendment.

57. In the absence of declaratory and injunctive relief, Plaintiff will be irreparably harmed.

58. Plaintiff has no adequate remedy at law for the violation of his constitutional rights.

## COUNT II

**Violation of the First and Fourteenth Amendments to the U.S. Constitution  
(Violation of Freedom Speech, Assembly and Expressive Association)  
42 U.S.C. § 1983**

59. Plaintiff re-alleges and incorporates by reference the allegations in ¶¶ 1-55.

60. The First Amendment protects Plaintiff's right to peaceably assemble together with the members of his congregation.

61. Said religious assemblies are intertwined with speech and expressive association, meaning the right to associate with others of like mind for a protected purpose.

62. As alleged above, Defendant and the State of New Jersey have less restrictive means of regulating gatherings for the stated purpose of "reducing the rate of community spread of COVID-19."

63. Order 107, both facially and as applied to Plaintiff, violates his right to peaceably assemble, speak and expressively associate with others.

64. In the absence of declaratory and injunctive relief, Plaintiff will be irreparably harmed.

65. Plaintiff has no adequate remedy at law for the violation of his constitutional rights.

## COUNT III

**Violation of the Fourteenth Amendment  
(Equal Protection – Substantive Due Process)**

**42 U.S.C. § 1983**

66. Plaintiff re-alleges and incorporates by reference the allegations contained in ¶¶ 1-55 above.

67. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees equal protection of the laws, which requires that the State not treat the “suspect class” of religion differently from the class of similarly situated people or pass laws that burden First Amendment rights.

68. Order 107 treats the class of people who exercise freedom of religion by gathering with others for that purpose, including Plaintiff, differently from the similarly situated class of people who gather with others for the purpose of secular gatherings at retail stores, confined office spaces, back offices, warehouses, and the studios and other premises of media operations, even though both classes are subject to the risk of infection by or transmission of COVID-19.

69. Moreover, the class of those who gather for religious purposes in churches and chapels, mostly on Sundays, is plainly less subject to the risk of infection or transmission than those engaged in commercial transactions involving crowded offices, large crowds every day of the week, physical exchanges, and common surfaces that are touched by potentially millions of people, which makes the suspect classification of Order 107 even more irrational and invidious.

70. Order 107 cannot survive the strict scrutiny required of suspect classifications under the substantive due process component of the Equal Protection Clause as it is far from neutral and generally applicable and is not narrowly tailored to serve a compelling state interest.

71. Order 107, both facially and as applied, also violates Plaintiff’s fundamental rights to free exercise of religion, speech, assembly and expressive association as alleged above.

72. Even if Order 107 did not involve a suspect classification or violate fundamental rights, its total ban on religious gatherings while permitting numerous larger and riskier secular and commercial gatherings under modest limitations is not rationally related to a legitimate state interest and thus cannot survive even rational basis analysis under the Equal Protection Clause.

73. Alternatively, Order 107 cannot survive heightened scrutiny under the “hybrid-rights” theory the United States Supreme Court has recognized for purposes of Equal Protection analysis.

74. Order 107 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, including its substantive component.

75. In the absence of declaratory and injunctive relief, Plaintiff will be irreparably harmed.

76. Plaintiff has no adequate remedy at law for the violation of his constitutional rights.

#### **COUNT IV**

##### **Violation of the First and Fourteenth Amendment**

##### ***Ultra Vires* State Action Under the DCA**

##### **42 U.S.C. § 1983**

77. Plaintiff re-alleges and incorporates by reference the allegations contained in ¶¶ 1-73 above.

78. Defendant’s “lockdown” of the entire State of New Jersey under the purported authority of the DCA is an *ultra vires* attempt to regulate every aspect of the daily lives of 9 million residents of the State of New Jersey: dictating for what reasons they may leave home; which businesses they may operate or patronize; which activities they may engage in and with whom they may engage in them; and banning every gathering of citizens the Governor deems “non-essential,” including all religious gatherings.

79. The DCA confers no such authority on the Governor. Under New Jersey law, executive orders under the DCA must have a rational relationship to the legislative goal of protecting the public and must be closely tailored to the scope of the current emergency situation.

80. The ban on all religious gatherings in the State of New Jersey is *ultra vires* the DCA and should be declared void and unenforceable, as it constitutes state action in violation of all the constitutional rights Order 107 infringes, as pleaded above.

81. In the absence of declaratory and injunctive relief voiding and enjoining Defendant's *ultra vires* acts, Plaintiff will be irreparably harmed.

82. Plaintiff has no adequate remedy at law for the violation of his constitutional rights.

### **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff respectfully prays that this Court grant the following relief:

- A. A temporary restraining order restraining Defendant or his designates from enforcing Executive Order 107 (2020) to ban religious gatherings or to regulate them under any "social distancing requirements" different from those governing commercial gatherings under the Order; or, in the alternative, compelling Defendant to apply to all gatherings, including religious gatherings, the same 50-person limitation in Executive Order 104 (2020) with the "social distancing" protocol of Order 107;
- B. A preliminary and permanent Injunction so restraining Defendant;
- C. A declaratory judgment that Executive Order 107 (2020) is unconstitutional, both facially and as applied to Plaintiff;
- D. An award of costs of this litigation, including reasonable attorneys' fees, pursuant to 42 U.S.C. § 1988; and
- E. Such other and further relief as this Court deems just and proper.

Dated: April 30, 2020

Respectfully submitted,



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