

EXHIBIT DD

CNN AMC Theatres postpones reopening again as summer blockbusters are delayed



By [Frank Pallotta](#), CNN Business
Updated 10:15 AM ET, Thu July 23, 2020

New York (CNN Business) — With summer blockbusters pushing back their release dates because of coronavirus, AMC Theatres is delaying its opening once again.

The world's biggest movie-theater chain is postponing the reopening of its US theaters to "mid-to-late August," the company said Thursday. AMC ([AMC](#)) was set to have a phased reopening on July 15 with the hopes of being fully operational by July 24. That date was then pushed back to July 30 late last month.

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"This new timing reflects currently expected release dates for much anticipated blockbusters like Warner Bros.' "Tenet" and Disney's "Mulan," as well as release dates for several other new movies," the company said in a release.

Warner Bros. announced earlier this week that it would take "Tenet" -- Christopher Nolan's new twisty thriller originally set to premiere August 12 -- off the release calendar for now. The studio said it would share a new 2020 release date "imminently" for the film.

That makes Disney's "Mulan" the next big film on the calendar. "Mulan," the live-action reboot of the 1998 animated classic is set to hit theaters on August 21 -- and if the release date stays put, AMC would have a banner title to showcase in hopes of bringing audiences back to the movies.



Related Article: AMC Theatres reverses course and will require customers to wear masks

That may prove difficult, however, since coronavirus cases are spiking across the country, including in [Los Angeles, the movie capital of the world](#).

The theater chain announced last month it's implementing new safety and health measures to help keep moviegoers safe and curb the spread of coronavirus.

The new health and sanitation program, titled "AMC Safe & Clean," will include measures such as requiring all guests to wear masks, initially capping movie showtimes at a lower capacity and upgrading ventilation systems in theaters.

In its release AMC noted that "approximately one-third of all AMC cinemas in Europe and the Middle East are already open and are operating normally."

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AMC Theatres Will Start Reopening In August Following 'Tenet' Pause

By Anthony D'Alessandro

July 23, 2020 5:38am

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AMC Theatres

Just because Warner Bros. took Christopher Nolan's *Tenet* temporarily off the release schedule doesn't mean that the No. 1 theater chain isn't going to reopen. AMC announced this morning that it planning to reopen its multiplexes beginning mid-to-late August instead of the previously announced date of July 30.

The chain didn't go into details in its announcement this morning about which 450 U.S. theaters would be reopening and where. The chain was originally planning a phased weekend-by-weekend reopening approach. The release specified that a third of all AMC cinemas in Europe and the Middle East are already open and operating normally.

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Warner Bros. announced on Monday that it won't be rolling *Tenet* out in a typical everywhere global day-and-date fashion. The Nolan thriller will likely go first overseas in such markets as Asia and certain European markets where COVID-19 has quelled, and be released stateside in those states where it's safe to reopen movie theaters (New York, New Jersey, Maryland, North Carolina and South Carolina are among those states that have not been given the proper approval to reopen).

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AMC Theatres Shifts Reopening Date To July 30 After 'Tenet' & 'Mulan' Delay

“The new timing reflects currently expected release dates for much anticipated blockbusters like Warner Bros.’ *Tenet* and Disney’s *Mulan* as well as release dates for several other new movies coming to AMC’s big screens,” read a statement from the Leawood, KS-based circuit.

To date, Disney hasn’t announced that *Mulan* would be shifting from its current Aug. 21 release date, and there’s speculation by a number of those in exhibition (and here by AMC) as well as rival studios that the movie won’t necessarily move, rather follow a course where it opens where it can around the country and the world.

AMC is implementing several safety COVID-19 protocols upon its reopening, such as the electro-static cleaning of seats and partnering with Clorox, details of which [can be found here](#). When those guidelines were announced back on June 18, CEO Adam Aron told a rival trade outlet that he didn’t want to enforce the wearing of masks at AMC theaters in those areas of the U.S. which had eased such restrictions, because he didn’t want to make a political issue of it. There was an immediate social media backlash to his remarks, and Aron promptly changed course, creating a full circuit wide safety protocol that all AMC guests are now required to wear face masks.



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EXHIBIT FF

Regal Cinemas Puts Reopening Plans on Hold, New Date Expected Soon

Following in the footsteps of Cinemark, Regal Cinemas has delayed its planned reopening at least into August.

By RYAN SCOTT — July 22, 2020 in MOVIE NEWS

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Another day, another major blow to the movie theater business. Regal Cinemas, the second-largest theater chain in the U.S., has postponed its planned reopening indefinitely. The company had previously set its reopening date for July 31. However, the chain's website was recently updated, which confirms that they have decided to delay those plans indefinitely. The message on the website's homepage reads as follows.

"Announcement of New Reopening Date Coming Soon."

It has also been confirmed that this message is not referring to previous delays. Originally, Regal had hoped to open on July 10. However, with studios continuously shifting their release calendar, theater chains have had to shuffle their plans as well. Once Christopher Nolan's *Tenet* and Disney's live-action *Mulan* remake were postponed until August, Regal announced the shift to July 31. Unfortunately, Warner Bros. recently revealed that *Tenet* isn't going to arrive as planned and has yet to be given a new release date in the U.S. as such, Regal has postponed its opening plans once again. The third-largest chain, Cinemark just made a similar move.

It is expected that AMC will do the same. The nation's largest chain has been on the verge of bankruptcy for months. Theaters originally closed in the U.S. back in mid-March. Even before the closure, AMC was saddled with tremendous debt, said to be in the \$5 billion range. The company recently managed to rework some of its debt to stay afloat for a little while longer. But without being able to safely reopen, it is unclear how long AMC, Regal or Cinemark will be able to hold on without

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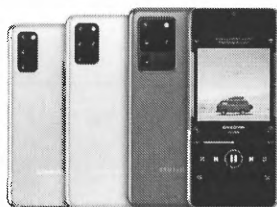
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MOVIE NEWS

The problem right now is there is an odd game of chicken going on. Studios like Warner Bros. and Disney can't risk releasing blockbusters such as *Tenet* or *Mulan* without a certain level of return at the box office. They both have budgets said to be in the \$200 million range. At the same time, chains like Regal need new movies to get people in seats. While the plan is to show older classics and recent hits to drum up some business in the beginning, that likely isn't a sustainable model for these big chains. Drive-ins have had a lot of success during the shutdown, but that is still on a relatively smaller scale.

Once theaters do reopen, it will be with strict safety measures in place. All of the major chains will be requiring customers and employees to wear masks, following online backlash to initial policies that did not require them. Auditorium capacity will also be reduced, which means fewer tickets can be sold for each screening. Additional cleaning and sanitizing will take place as well. We'll be sure to keep you posted as any further updates are provided. For more information regarding the chain's specific reopening policies, you can head on over to [RegalMovies.com](https://www.RegalMovies.com).



Ryan Scott

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EXHIBIT GG

Cinemark Halts Plans to Reopen Theaters This Friday

The movie theater chain had plans to open up again this week with older titles in order to prepare for new movies coming out in the following weeks.

By KEVIN BURWICK — July 22, 2020 in MOVIE NEWS

1.1k
SHARES

Cinemark will not be reopening its doors this Friday. The theater chain had originally planned to reopen its doors this weekend with evergreen classics, hoping to get people acclimated to their new safety protocols. But that is not happening. No new reopening date has been announced. As of this writing, cases are still soaring in many cities across the United States as residents prepare to be on lockdown again. It appears that Christopher Nolan's *Tenet* vacating its August 12th release date was one of the main reasons for Cinemark to rethink their reopening strategy. You can read a statement from Cinemark below.

"The company continues to evaluate availability of new studio content, status of the virus and local government regulations as it plans for the phased reopening of its U.S. theatres. All locations will reopen with greatly enhanced cleanliness, sanitizing and safety measures at every step of the moviegoing experience."

As for when *Tenet* will be released, the studio is still trying to figure that out. But it will more than likely open in European theaters first. "We will share a new 2020 release date imminently for *Tenet*, Christopher Nolan's wholly original and mind-blowing feature," said Warner Bros. chairman Toby Emmerich in a statement

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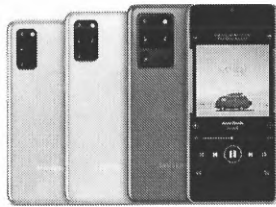
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keeping their release dates. Fithian believes that all of the summer movies should keep their release dates for the small amount of theaters that are still open.

John Fithian is certainly not happy to see major studios packing up their summer blockbusters and thinks that it would be wise for distributors to make some money, as opposed to none at all. "Most businesses would take 85% of that instead of zero, which will be what happens if they wait for all of the markets to open up," he said. It's unclear where he came up with the 85% number since 85% of theaters are not even open.



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BY SAMSUNG

Since Cinemark has changed its reopening plans, AMC and Regal will more than likely follow. With that in mind, the National Association of Theatre Owners has launched a new campaign to try and receive federal aid to keep things afloat in the meantime. #SaveYourCinema is the name of the plan and it's currently live and it is urging people to reach out to representatives and senators to help theaters of all sizes during this uncertain time.

For now, AMC and Regal are still planning on opening their doors next week. It is uncertain if they'll be able to do so since everything changes so fast, but looking at things now, it seems unlikely. Hopefully the government will step in to try and help these theater chains that are in danger of closing their doors forever as cases continue to surge in major cities. Cleveland.com was the first to report on Cinemark delaying their reopening again.



Kevin Burwick

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

**DWELLING PLACE NETWORK, ET
AL,**

CIVIL ACTION NUMBER:

20-6281

Plaintiffs,

TEMPORARY RESTRAINING ORDER

v.

PHILIP D. MURPHY, ET AL,

Defendants.

Mitchell H. Cohen Building & U.S. Courthouse
4th & Cooper Streets
Camden, New Jersey 08101
June 15, 2020

B E F O R E:

**THE HONORABLE ROBERT B. KUGLER,
UNITED STATES DISTRICT JUDGE**

A P P E A R A N C E S:

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Proceedings recorded by mechanical stenography; transcript
produced by computer-aided transcription.

1 (The following took place by way of Zoom.)

2 (Open Court)

3 THE COURT: Good morning, everybody. Can you hear
4 me?

00:17 5 MR. COLEMAN: Yes, your Honor.

6 MR. FEIGENBAUM: Yes.

7 THE COURT: Are we waiting for any other lawyers?

8 MR. VANNELLA: Not on our side.

9 MR. FEIGENBAUM: Not for the State either.

00:17 10 THE COURT: I'm waiting for my Deputy Clerk. I see
11 Carl's here, our court reporter. He's raring to go.

12 (Brief pause.)

13 THE COURT: All right. Okay. Well, everybody want
14 to get started? Are we ready to go?

00:18 15 MR. COLEMAN: Yes.

16 MR. VANNELLA: Yes, your Honor.

17 THE COURT: All right. Let's start with appearances
18 of counsel. We'll start with the plaintiffs, please.

00:18 19 MR. COLEMAN: For the plaintiffs, Ronald Coleman,
20 Mandelbaum Salsburg in Roseland.

21 THE COURT: For the defendants.

22 MR. VANNELLA: Good morning, your Honor. Daniel
23 Vannella from the New Jersey Office of the Attorney General on
24 behalf of the defendants.

00:18 25 MR. FEIGENBAUM: And Jeremy Feigenbaum, also from the

1 Office of the Attorney General, on behalf of the defendants.

2 THE COURT: All right. Let me start with some
3 preliminary instructions in this matter.

4 We're going to handle this the same as we would in the
5 courtroom. So please speak clearly and distinctly and slowly.
6 The technology, the Zoom technology is okay but it's not great
7 we've found in the experience of this. It's wonderful to have
8 social conversations, but it's a little difficult when we're
9 trying to establish a record. Obviously, we can't talk over
10 each other. I'm going to call upon each side and give you an
11 opportunity to have some questions, and then you'll have an
12 opportunity to speak.

13 Mr. Nami is on board, and he is not shy about stopping
14 people if he can't hear you or understand you, and I encourage
15 him to do that, so you may hear him interrupt and that's fine.
16 We'll just have to stop and figure out what we need.

17 Before we get into the merits of this, I want to thank
18 both sides. The briefing was terrific.

19 MR. COLEMAN: Thank you.

20 THE COURT: You really laid out the issues and the
21 facts and it was well-written. And this is a very interesting
22 case. I'm going to refer collectively to the defendants as
23 the State, and we'll probably refer collectively at times to
24 the plaintiffs as the churches.

25 All right. I want to start with the State, because

1 some things have been happening, particularly since the
2 plaintiffs brought this application. We're now operating I
3 think under Executive Order 152 with a 25 percent indoor but
4 not more than 50 people unlimited outdoor, et cetera, et
5 cetera. Face coverings. Things of that nature. And we'll
6 talk some more about that. But are there any current plans to
7 further revise these regulations under the executive order as
8 they apply to religious services?

9 MR. FEIGENBAUM: Thank you, your Honor.

10 The Governor has not stated any specific date or any
11 specific number where we anticipate a change. But what he had
12 said and what's been true for the gathering limits all along
13 is that the idea here is we will announce a new number, like
14 we just did in Executive Order 152, we will evaluate the data,
15 we will see how that affects our reopening, whether it looks
16 like other states or if our decline continues, and then we'll
17 keep evaluating.

18 So, I can't give a specific date or a specific number
19 for indoor gatherings for religious organizations, but I can
20 say, and all that I'm authorized to represent for the State,
21 that the reopening plan is continuing and will review
22 continued data of the gatherings limit.

23 THE COURT: But there's no specific plans, like last
24 time I was informed by the State that you thought changes were
25 coming. We're not in that position now; is that correct?

1 MR. FEIGENBAUM: That's correct, your Honor.

2 THE COURT: Okay. I want to get some update from the
3 plaintiffs on what the churches are doing. Because when I
4 reviewed the certifications once again, a lot of things that
00:22 5 they were asking for, it seemed to me they were able, going to
6 be able to do this past weekend. So let's find out how this
7 all turned out. The weather was beautiful here in New Jersey
8 on Sunday.

9 MR. COLEMAN: Yes, it was.

00:22 10 THE COURT: Well, we'll just start with Dwelling
11 Place Network, Bobby Bledsoe.

12 MR. COLEMAN: Well, your Honor, actually that's the
13 best one to ask about, because Dwelling Place Network has a
14 1,000 seat sanctuary. With rather conservative social
00:22 15 distancing, it could accommodate 200 to 250 people if not for
16 the limits that are in place now.

17 So, the answer to the question what they're doing now
18 is that all of my clients are complying with the State's
19 regulations, meaning that they're either having outdoor
00:23 20 services or capped numbers of services, meaning, therefore,
21 that they're having -- they're accommodating fewer people than
22 they otherwise would, or they're accommodating them outdoors
23 under strict social distancing rules. That's my
24 understanding.

00:23 25 THE COURT: Well, for Pastor Bledsoe at Dwelling

1 Place Network in Newark, he says in his certification,
2 Paragraph 4, that he has a capacity of 180 worshippers --

3 MR. COLEMAN: Oh, I'm sorry, I'm referring to the
4 wrong one then. So --

00:23

5 THE COURT: Regularly about 140 would come on
6 Sundays.

7 MR. COLEMAN: Right. The one --

8 THE COURT: He says they, you know, it includes
9 communion, hands-on healing, baptisms.

00:24

10 What was -- do you know what Pastor Bledsoe was able to
11 do this past Sunday in regards to religious services?

12 MR. COLEMAN: No, your Honor, we -- considering that
13 we did not expect that there would be any opportunity for
14 supplementing the record. I can represent, though, that

00:24

15 having been in contact with my clients in the time since we
16 last spoke, that what they've been -- again, what they've been
17 doing has been either, has been in compliance with the
18 Governor's orders, that I have every reason to believe that

00:24

19 they're taking full advantage of it, except to the extent that
20 they're capped on an absolute basis in terms of -- Dwelling
21 Place actually, your Honor, to be clear, is not in Newark.

22 THE COURT: It's in Vineland.

23 MR. COLEMAN: Right. Right. So, their plans to --
24 the Dwelling Place sanctuary holds, would have room for,

00:25

25 normally for 140, and I have every reason to believe that they

1 are, instead of having 50 percent capacity they're having, you
2 know, whatever is -- whether they chose to go outside and have
3 a larger service or chose to go inside and use the smaller cap
4 number, your Honor, I'm not aware.

00:25 5 THE COURT: Well, it kind of makes a difference as to
6 what it is you're asking me to do.

7 Well, let's go on to the next one, which is Pastor
8 Ralph Graves in the House of Cornerstone Community Church. He
9 says, and this is a bigger place.

00:25 10 MR. COLEMAN: Right.

11 THE COURT: But he's suggesting in Paragraph 5 that
12 they could go to a third service. But if you look at the
13 numbers in Paragraph 4, they could go to four services inside
14 on Sundays or whatever day it is that they celebrate, I'm
00:26 15 assuming it's Sunday.

16 MR. COLEMAN: Yes, your Honor.

17 THE COURT: And meet the numerical limits easily.

18 MR. COLEMAN: Yes. My understanding is that they're
19 doing so. I have every reason to believe that they're taking
00:26 20 full advantage of the relaxation of the rules that have taken
21 place since we last appeared.

22 THE COURT: He also says in Paragraph 7 that they'd
23 be willing to hold outdoor services.

24 MR. COLEMAN: Yes. They were.

00:26 25 THE COURT: So, they're able to comply then with

1 these guidelines, correct?

2 MR. COLEMAN: Well, your Honor, they are. That
3 doesn't necessarily -- in other words, when this application
4 was made, they -- which was obviously on May 26th, they
00:26 5 were -- all my clients were prepared to comply with the
6 guidelines that existed, A, at the time. And B, they were
7 seeking at least a level of relaxation, almost, that was
8 available, that was available then. We're not necessarily
9 saying that there are -- that under the present circumstance
00:27 10 that they would accept those limitations now, because it's two
11 weeks later and a lot of things have changed.

12 THE COURT: Well, I understand that, but I'm just
13 going by what they proposed in the papers.

14 MR. COLEMAN: Yes. Understood.

00:27 15 THE COURT: And it seems to me that under the new
16 guidelines that they are able to comply with the new
17 guidelines. So if it's something else they want, and think
18 that the First Amendment Free Exercise Clause entitles them
19 to, it's not before me at this time. It's difficult for me to
00:27 20 make a decision on that.

21 MR. COLEMAN: Well, your Honor, with all due respect,
22 we would suggest that the fact that our clients were prepared
23 in the end of -- in late May to be handcuffed to a certain
24 extent, at least to open up a window of greater opportunity to
00:28 25 serve their congregations than is the case now, doesn't

00:28

1 necessarily mean that -- and, you know, if we certainly, if
2 the Court had wanted us to -- you know, we didn't want to be
3 presumptuous, and given that there was no, there was no
4 opportunity for a reply, notwithstanding the calendar, we
5 thought it would not be appropriate to supplement the record
6 with additional information.

00:28

7 We do think that our clients' arguments regarding the
8 restrictions are still valid, including the fact that they --
9 that we have to come into a Federal Court in order to have the
10 discussion about how many people can attend church services as
11 opposed to how many people can attend Home Depot. Our
12 *prima facie* argument, your Honor, is that those distinctions
13 are discriminatory toward religion and that the record of
14 the -- presented by the State does not satisfy the criteria
15 for making that distinction.

00:29

16 So, yes, it's true that what our clients planned in
17 late May and were hoping to achieve in late May, at least
18 those with the smaller sanctuaries, is now possible to do.
19 And it's a good thing that we had great weather this weekend,
20 not so good for my lawn, we appreciated the rain more, but we
21 don't know, the Governor has stated in response to your
22 Honor's question that we don't know when the next relaxation
23 of the rules will be. And we don't know what effect that
24 might otherwise have on our clients' circumstances.

00:29

00:29

25 So, having made -- the Court's point is obviously

00:30

1 understood, but we do wish to make it clear that we don't
2 think that there's any reason that the May 26th state of
3 affairs where we were requesting much more minimal relief than
4 I think it would be appropriate under the circumstances and on
5 the record now, should necessarily govern.

00:30

6 THE COURT: But the difficulty that the Court is in
7 is that I have before me these applications, essentially
8 applications from the pastor saying, we can survive with A, B
9 and C, and now the State has provided A, B and C, so I'm not
10 sure what it is that's before the Court that I can order at
11 this point.

12 MR. COLEMAN: Well, we can consider the certification
13 of Pastor Myers then.

14 THE COURT: Right.

00:30

15 MR. COLEMAN: Which is the New Life Church in
16 Millville. And he's the one that I had in mind when I spoke
17 in the beginning who has a sanctuary that can seat a thousand
18 people. Normal Sunday church attendance is 225 to 300 people.
19 And that right now is beyond the absolute cap for, for indoor
20 gatherings.

00:31

21 THE COURT: Well, he'd have to have six services on
22 Sunday to do it indoors. But he also hints about outdoors,
23 because at the time the outdoor cap was 25, at the time that
24 he wrote this. But now there is no cap. I'd be interested to
25 know if he's able to conduct his services outdoors, because as

00:31

1 the State points out, he can put up a tent, he can put up
2 roofs, he can put up tarps and everything else outdoors to
3 protect parishioners and church employees and the pastor from
4 the sun and the elements.

00:31 5 MR. COLEMAN: Your Honor, there's a lot of things you
6 could do, but what we've seen over the last week is that the
7 State doesn't actually consider them necessary to do except
8 with respect to those activities that it wishes to, to -- to
9 restrict. So, for example, if there is a public march that
00:32 10 the Governor wants to attend, there is no outdoor limit.
11 There's no social distancing, there are no tents. And when
12 the Governor is asked to explain the distinction, his
13 explanation is that, well, this is a big moment, this is one
14 of the big -- this is of historic importance.

00:32 15 And, your Honor, we would submit that the First
16 Amendment has been of historic importance for a couple hundred
17 years. The fact that one kind of activity is subject to no
18 restrictions -- we saw the Governor marching literally
19 shoulder to shoulder, not going into a grocery store and
00:32 20 quickly buying food. Rather, participating in a demonstration
21 with essentially no restrictions other than wearing a mask.
22 It was outdoors, but the fact is the record on outdoors versus
23 indoors is inconclusive.

00:33 24 And, your Honor, I mean, what the State submitted here
25 was a couple of studies from 1998 and 1968 concerning

00:33

1 tuberculosis. Interestingly, despite the fact that
2 tuberculosis and COVID are not the same disease, most of these
3 studies involve church choirs. Yet, we see that church choirs
4 are allowed to meet, even though tuberculosis is still
5 something that exists. We see that churches are allowed to,
6 to, to have regular services in their facilities that they
7 spent a great deal of trouble and, and, and gold building; in
8 other words, money. Going to the trouble of building these.

00:34

9 The suggestion that they should -- that it's good
10 enough for them to go outside because our, what has become
11 essentially a one-man government has decided that that's
12 sufficient, your Honor, we think at this stage is entirely
13 appropriate to say that that is before the Court. That there
14 is no distinction based on the State's -- on the conduct of at

00:34

15 least one of the defendants that is the defendant who's
16 calling all the shots here. There's no longer a rational
17 basis for distinguishing between the number of people at a
18 service, there's no real record evidence -- in other words,
19 yes, the State has incrementally added an additional level of

00:34

20 permit for religious services so that a smaller congregation
21 is able to fit within the present regulation, but what we
22 don't see is any limit to those regulations, any rationale or
23 any criteria by which this state returns to democracy -- we've
24 had a state of emergency now for three months. What the State
25 has failed to demonstrate is that there's any reason our

00:35

1 legislature and the Health Department and the rule-making
2 procedures that have managed disease and health and public
3 interest and the First Amendment in this state for 250 years
4 are not adequate to the task.

00:35 5 This is a, this is a facial challenge, your Honor, not
6 only an as-applied challenge. The fact that of the four
7 pastors of the small congregations, of the relatively small
8 congregations that submitted certifications two, three weeks
9 ago, are now able to fit inside the permission given by the
00:36 10 State to meet in their churches or outside their churches. Do
11 we have to come back every week to Federal Court and find out
12 when the permission is going to be granted for them to be
13 indoors? We're beyond the point where emergency regulations
14 can be justified, especially given the First Amendment --
00:36 15 we're not here to say we have a better way of governing. But
16 we do have a better way of governing, it's by democracy.

17 Why the legislature has been silent here, well, that
18 question is not in front of your Honor. But the idea that the
19 Governor may indefinitely continue an incremental regulatory
00:36 20 process deciding whether people can attend churches indoors or
21 outdoors, the cases are very clear that government may not
22 *prima facie* say, we've decided that your First Amendment
23 rights are sufficiently met with respect to worship in a
24 smaller space or in an outdoor space. All things being equal,
00:37 25 congregations are entitled to pray where they want to and in

1 the manner they want to.

2 We believe that to the extent that the State has
3 demonstrated that it is entitled to interfere with that
4 decision, that time passed in March and the Governor's conduct
00:37 5 over the last week has demonstrated nothing more than that at
6 this point the regulations have nothing to do with public
7 safety. When asked about why he was attending a public
8 demonstration in which he marched for a considerably -- we
9 didn't take a stopwatch to it, your Honor, but it was longer
00:37 10 than it takes to go into a grocery store and buy milk and
11 orange juice. And the Governor's response was, well -- as you
12 can see from some of these photos, sometimes it's hard, I
13 think folks should get tested. If they've been in a big
14 gathering like that in real proximity to others, I think
00:38 15 getting tested is a smart move.

16 Your Honor, we ask the Court to require that the State
17 apply the same standard to people who wish to exercise their
18 First Amendment rights the way Governor Murphy exercised his
19 First Amendment rights, which is to -- if they want to go as
00:38 20 Americans to a large gathering, they take care, they make an
21 adult decision, they get tested, maybe they get tested
22 beforehand. But to make a blanket rule that stores, that
23 beaches, that demonstrations may be open and unlimited but
24 houses of worship, which like demonstrations are entitled to a
00:39 25 presumption of non-interference, that those should be limited

1 and that the State -- unlike the last time we appeared, and
2 where the State at least was promising that additional relief
3 would be available here, the State's not even doing that.

4 So, your Honor, we submit that the as-applied challenge
00:39 5 there is indeed still before the Court, and that the State's
6 conduct and in particular the conduct of the defendant,
7 Governor Murphy, demonstrates that at this point the, the
8 restrictions in place are pretextual. What the pretext is
9 for, I don't frankly know. But the idea that if a politician
00:39 10 or an elected official believes that an issue is sufficiently
11 important that social distancing rules do not need to be
12 applied and that testing is good enough, that's the standard
13 that should be applied to religious worship as well.

14 THE COURT: Well, you raise some very interesting
00:40 15 policy issues. The Governor's going to have to answer to
16 those through the electoral process. I mean, I think the
17 Chief Justice would respond that if you don't like the
18 policies, the next election throw the bums out and put in a
19 new group of bums. That's the way it's supposed to work.

00:40 20 MR. COLEMAN: Well, your Honor --

21 THE COURT: You raised the issue of the silence of
22 the legislature in New Jersey, and you're right. I've seen
23 some statements from Senator Sweeney about that, but that
24 speaks volumes too, that's our most democratic branch in New
00:40 25 Jersey, the legislature, and they've seen fit not to do

1 anything at all about restraining the Governor's ability that
2 they gave him, you know, years and years and years ago.

3 But anyway, I want to get back to the last church,
4 which is the House of Praise Church. It seems to me with the
5 small numbers involved in that church that they can easily
6 have now held whatever services they want.

7 MR. COLEMAN: Agreed, your Honor.

8 THE COURT: In their church. So they really don't
9 have anything to complain about anymore.

10 But anyway, so what you're telling me now is that you
11 want me to, what, strike down in its entirety any limitation
12 on religious services at these churches and others?

13 MR. COLEMAN: Well, your Honor, we believe the Court
14 has the power to do that. That the record in front of it is
15 sufficient to do that. We -- and, yes, we do ask that the
16 Court do that. We believe, again, that the Governor's conduct
17 and comments starting with the Bill of Rights is above my pay
18 grade, and ending with his explanation as to his conduct last
19 week in which he said this may be one of the most profound
20 moments in the history of our country, this is the moment that
21 I think is bigger than any of us right now.

22 Your Honor, we think that the Constitution and the
23 First Amendment is bigger than any of us right now. And that
24 notwithstanding the fact that a political majority in the
25 legislature may see fit not to embarrass a governor of the

1 same party and is comfortable acquiescing in the surrender of
2 its power, it hasn't -- neither the legislature nor the
3 Governor has the power to override the First Amendment. And
4 we're not here on a challenge to the legislative process, but
00:42 5 we are here on a challenge under the First Amendment.

6 So, yes, that is what we're asking for. We think that
7 short of that, there are many forms of relief, including at
8 the very least removing an absolute cap that has, that is
9 unrelated to capacity. We think, your Honor, that there's --
00:43 10 the State has not made any argument whatsoever to justify
11 that. But we also think, again, in light of the
12 demonstrations, you know, it's clear that there's no real, no
13 real sense among the defendants that it's necessary for people
14 to be prohibited from gathering in the way that they see fit
00:43 15 as adults the way we do all the time.

16 THE COURT: Well, there are many, many people that
17 I'm sure that share your clients' frustrations and their fears
18 that this is diminishing the value of the First Amendment to
19 the Constitution, which we have been enforcing for over
00:43 20 200 years. Really, the question before me, the question is
21 whether or not the First Amendment gives your clients the
22 right to completely open up without any restrictions
23 whatsoever.

24 MR. COLEMAN: So we submit at this point, your Honor,
00:44 25 that at this point, meaning under the facts before the Court

1 now, that it does.

2 THE COURT: The State raises an interesting point I'd
3 like you to address, and that is that these executive orders
4 began back in March. And you have the ability, your clients
5 have the ability under State law to challenge those executive
6 orders, and had the ability to challenge those executive
7 orders in the Appellate Division as soon as they were entered.
8 But your clients chose not to do that, they chose this route.
9 And it's caused, you know, three months of delay in getting to
10 this point of having a judge independent of the State
11 judiciary, which seems to be something of interest in
12 plaintiffs in these cases, and pass on whether or not these
13 executive orders are legal. Why didn't your clients challenge
14 the executive order earlier on? Why did they wait till now?

15 MR. COLEMAN: Because earlier on, your Honor, there
16 was a consensus, your Honor, on a number of things. One of
17 them was that there was, that the large extent of uncertainty
18 regarding the facts was sufficient for everyone affected,
19 which was everyone in the state, not to act, that it would be
20 better to be cautious and that there was every reason in the
21 world to assume -- which, by the way, we still do, that the
22 State of New Jersey and its agencies have the welfare and
23 health of its citizens first and foremost in its
24 considerations.

25 What happened, however, was that as time went on and

1 facts changed on the ground with respect to first the
2 rationale for the restrictions, which the original rationale,
3 as your Honor knows, was to avoid overwhelming health care,
4 not to prevent anyone from getting sick for the rest of time,
00:46 5 or even to prevent anyone from getting COVID, but rather to
6 avoid overwhelming what were, seemed to be potentially limited
7 health care facilities in the event of a very extreme spike.
8 That rationale went by the board. But the policy of
9 quarantining did not go by the board.

00:46 10 And as the months went on and my clients, and I had
11 this discussion with them, saw that they were increasingly
12 unable to serve their parishes, that what they had anticipated
13 would be a four to six-week period, perhaps, during which they
14 would be limited from providing the services that they do
00:47 15 which include not only worship services but a wide range of
16 human services, social services, then they realized that it
17 was -- what they thought would be a reasonable response from
18 the State to change in circumstances which with respect to
19 the, again, the rationale for the quarantine and for the
00:47 20 lockdown, and to the very considerable reduction in infection
21 rates as well as different and changing understandings of how
22 the sickness is spread and whom it affects, what cohorts make
23 up the vast majority of the infected. As these facts became
24 clear, our clients came to understand that the State's -- the
00:48 25 State was not exhibiting what should have been the appropriate

1 level of flexibility to react to the new information and allow
2 their First Amendment activities to continue. By then, the
3 opportunity to go to this legislative, you know -- through
4 the, you know, the long way had really been foreclosed, you
5 know.

6 So, by mid-May when it was clear that there was no
7 longer a health care crisis in terms of admissions and it was
8 clear that over 80 percent of the deaths in New Jersey took
9 place among those 65 or over, of whom a great number were
10 nursing home residents, as these facts became clear and it
11 became more and more apparent that meeting in congregate
12 worship was not nearly the risk that it was thought to be in
13 March or April when these orders were first made, the
14 combination of the State's lack of flexibility in reacting to
15 the changing circumstances, as well as the sort of political
16 doubling down -- I mean there are many, many comments during
17 the course of this adventure that we've been on over the last
18 three or four months, during which the State has made it very,
19 very clear that its intention here is to assert authority and
20 to maintain the authority and not at any time to admit of a
21 limitation on its authority. And that's the sort of thing
22 that gets people running to Federal Courts to seek the First
23 Amendment protection, because this is not an administrative
24 dispute at this point. This is, in our clients' view, you
25 know, and again, they come from a religious tradition in which

1 they consider limitations on their worship to be something
2 imposed by, historically by sovereigns that are antithetical
3 to their beliefs and their worship.

00:50 4 So, whether or not they would have trusted the
5 administrative procedure that they could have utilized to
6 challenge these orders when they first came out, sitting here
7 now -- I appreciate the Court allowing us to sit while we have
8 our oral argument, sitting here now in mid-June and still
9 debating with a judge, whether it would be in the Appellate
00:50 10 Division or here, about whether or not church services could
11 be held under a tent, in a church, that's the systemic problem
12 and that's the nature -- that's why the First Amendment is
13 implicated here.

00:51 14 THE COURT: Well, look, I don't think there's any
15 question or any disagreement that our leaders in science and
16 politics across the board made an enormous number of mistakes
17 during the course of this pandemic. You know, things that we
18 were told turned out not to be true, things change, wear a
19 mask, don't wear a mask, wear a mask. And all this stuff
00:51 20 changed, though, during the course of these few months as the
21 scientists and doctors scramble to figure out what this thing
22 is all about. But isn't that the reason why the Court should
23 exercise extreme caution? I mean we are not, these judges
24 have no expertise in science.

00:51 25 MR. COLEMAN: Well, your Honor --

1 THE COURT: Scientists can't even get it right, why
2 do you expect us to get the policies right?

3 MR. COLEMAN: We're not asking the Court to set
4 policy, your Honor, we're asking the Court rather to defer to
00:52 5 the First Amendment. And there's the point at which policy
6 making -- we recognize that all the Con -- every right in the
7 Constitution is subject, and particularly the First Amendment
8 is subject to the time, place and manner restrictions. We
9 understand that. Courts are called upon to draw lines every
00:52 10 day. And what my clients submitted, your Honor, is that we've
11 crossed that line. If we hadn't crossed it on May 26th when
12 these papers were filed, we've certainly crossed it by now.
13 The State has in no way demonstrated that it is -- let me
14 withdraw that.

00:52 15 Again, when we say let's defer to the State, if we
16 refer to the regular operation of the State through its normal
17 administrative and legislative and municipal functions, health
18 is typically -- you know, issues with respect to gatherings
19 and public health are usually managed at the municipal level.
00:53 20 When Asbury Park decided to depart from the guidance or the
21 detente that was issued by the State last week, the Governor
22 made it very clear that that would not be tolerated. Well,
23 that's -- okay, that order's not in front of the Court right
24 now. But we submit, your Honor, that that line has been
00:53 25 crossed. And the fact that the Governor is in a position now

1 of presumptive validity -- we understand that a government
2 action is entitled to a presumption of validity. What we have
3 tried to get across to the Court, especially in our
4 supplementary submission merely of facts last week, was that
00:53 5 that presumption is no longer valid. And, your Honor, again,
6 there's a great deal of reason to be skeptical of using
7 out-of-court statements by political figures as a window into
8 judging the validity of their official work. We've seen it
9 happen at the national level, and it has not necessarily been
00:54 10 a fruitful approach to the truth seeking function of the
11 courts.

12 Having said that, when we're talking about the
13 presumption of validity in which conduct of the State is
14 clothed, it is appropriate to look at how those making the
00:54 15 decision treat the conduct that's being regulated themselves.
16 So, yes, it's true that judges don't know any better than
17 governors, and perhaps governors are even entitled to a
18 presumption that they know better than judges. But we're
19 entitled to ask the Court to look at how government conducts
00:55 20 itself, not only how a government goes about folding
21 wherefores into executive orders.

22 THE COURT: But it's not a question of who knows
23 better. As the Chief Justice reminds us, and he's been very
24 consistent about this throughout his career, governors are
00:55 25 answerable to the people, judges are not. Federal judges are

1 not answerable to the people. That's the big difference as to
2 who's going to make these kinds of decisions.

3 I mean, there's no evidence in this case that -- I mean
4 we're talking about what's motivating the Governor, we're
5 talking about why he makes these distinctions, some of which I
6 think many people would say, would agree with you that don't
7 seem to be very rational. But there is no evidence that any
8 of these decisions come to any kind of anti-religious bias.

9 You know, people traveling to and from religious services were
10 exempted from the first order. They were one of the nine
11 exemptions. He's always permitted drive-through services.

12 They've never closed the houses of worship, though they closed
13 a lot of retail stores around the state. Now the trend seems
14 to be opening more and more you can have unlimited outdoor
15 services. You can have increased limits at indoor services.

16 The regulations now permit where you're supposed to be wearing
17 face masks, you can remove your face mask for religious
18 purposes, I assume that's communion and maybe baptisms. But
19 that's getting, the trend clearly is more and more favorable
20 to religions, and there's no evidence whatsoever, is there, of
21 any anti-religious bias. Regardless of what's motivating the
22 Governor, anti-religious bias is not one of those factors,
23 correct?

24 MR. COLEMAN: We have no -- well, your Honor, I would
25 submit this. The Governor made a very strong statement in

00:57 1 attending a demonstration that the First Amendment at that
2 juncture should trump concerns over spread of disease. He did
3 not make the same statement with respect to his promulgation
4 of regulations concerning First Amendment exercise of free
5 religion.

00:58 6 That, now, as your Honor knows from many years on the
7 bench, is extremely unusual in a Section 1983 case to find a
8 smoking gun, to find that e-mail, or going back to earlier
9 days in our career, that memo or that overheard conversation
10 where someone says, let's screw the churches, let's get these
11 people and prevent them from worshipping God because Satan is
12 our master. I don't expect ever to find, if I were to do this
13 case and dig through millions of e-mails, I don't expect to
14 find anything like that.

00:58 15 I'm sitting here with highly sophisticated
16 professionals from the Law Department and the Attorney
17 General's Office, that's not how they operate, I know that.
18 What this Court is entitled to do is to say, what is the State
19 doing? Is there animus? There's no proof of animus. Is
00:58 20 there disparate treatment? There is disparate treatment.
21 Because no one was arrested at the Trenton War Memorial. No
22 one was arrested in connection with a failure to observe
23 social distancing requirements at the BLM demonstrations.
24 That means that the State has one attitude towards a certain
00:59 25 kind of First Amendment exercise and another attitude towards

1 another kind of First Amendment exercise.

2 And, your Honor, we're not talking about animus, we're
3 talking about a Constitutional requirement that First
4 Amendment rights are actually supposed to be privilege. We
00:59 5 should not be here asking why can't I have as many people in
6 my thousand seat sanctuary as a Home Depot is allowed to have.
7 We should be -- the premise should be that the sanctuary comes
8 first, then the Home Depot.

9 And the State -- and Justice Roberts, your Honor, fell
00:59 10 prey to this as well in his very short decision in an entirely
11 different procedural posture, in which he said, well, people
12 spend a long time in church, people don't spend that long in a
13 grocery store. There's no record evidence of that whatsoever.
14 I've gone shopping since COVID began, no one told me how long
01:00 15 I can stay in ShopRite in Nutley. No one's following me
16 around in Home Depot to see you how long I stay in there. And
17 there were -- everyone here knows that there were nice blue
18 tape arrows on the floor in March and April when you went into
19 the supermarket. They're gone now. There's -- and that's
01:00 20 great, that's great because it's not necessary.

21 The fact that we can say, well, the State has been so
22 gracious so far, look how far they've come, they've given us
23 permission now to have as big of an outdoor -- your Honor,
24 certainly if I walked in here in February and said, your
01:00 25 Honor, the State has just enacted a regulation, pursuant to

01:01

1 which only -- religious services may only take place outdoors,
2 and the good news is that the weather is going to be great, I
3 think we would all agree that that would be a problem. It's
4 not enough -- the State cannot say that outdoor worship is
5 sufficient. What the State can say is we've got a general
6 rule concerning conduct, concerning capacity. I mean, one
7 thing I have not heard because we haven't really heard from
8 the State yet, but one thing that I still do not see in their
9 papers is the justification.

01:01

10 Your Honor, again, if we're going to quote Justice
11 Roberts, who gets into the weeds of -- I mean, essentially
12 Justice Roberts in his opinion says -- he weighs the factors,
13 he weighs the factors and says, well, people stay in church
14 longer. The State in its papers talks about church choir

01:01

15 practice and spikes or vectors that have arisen as a result of
16 religious worship, not necessarily religious worship involving
17 social distancing and masks. So, we are getting into the
18 weeds. And when we get into the weeds, it's entirely
19 appropriate to compare what is enacted for, for shopping,

01:02

20 what's happening at the shore, what's happening at the War
21 Memorial, and say, without assigning animus it is still a
22 problem for the State to fail to assign Constitutional
23 significance to plaintiffs' rights.

01:02

24 That's why we're here, your Honor, not because the
25 Governor is trying to wipe out religious worship in this state

01:02 1 but because he has made a decision which is Constitutionally
2 inappropriate, which is that marching for political causes is
3 a sufficient basis for relaxation of strict control,
4 worshipping indoors is not. That's Constitutionally suspect.
5 I don't need the smoking gun, I need only to look at the
6 factual record.

01:03 7 THE COURT: Well, the Chief Justice did get into the
8 weeds. We have to deal with that, that he did. And can it be
9 argued with? Well, you know, I've been in Home Depot and
10 Lowes, people aren't just going in and grabbing something off
11 the shelf and leaving, I mean they're sitting down with the
12 kitchen people, they're sitting down with the flooring people
13 for hours at a time planning a design. I get that. But
14 that's what the Chief Justice said.

01:03 15 MR. COLEMAN: That's what the Chief Justice --

16 THE COURT: The State's response, I'm going to hear
17 from them next, is look, it's not really relevant because all
18 we need is a rational basis. We don't have to have been a
19 hundred percent correct when we made the decision, we just
20 need to have had a rational basis when we made that decision.
21 That's what they're going to say, I'm pretty sure.

01:03 22 MR. COLEMAN: Your Honor, that basis may have been
23 rational, it may have been rational two weeks ago, it's not
24 rational now. The conduct of the Governor at these
25 demonstrations speaks volumes about the -- and Chief Justice

01:04

1 Roberts did not have that in front of him. He did not have
2 the pictures that we're all seeing coming out of the major
3 cities of people in massive demonstrations, shoulder to
4 shoulder, gathering together, COVID went out the window.
5 That's not the fault of the State of New Jersey, but what the
6 State of New Jersey does do in New Jersey tells us what, what
7 the State itself considers to be rational. And what the State
8 considers to be rational is that adults who are healthy, who
9 are young, or who are old, make their decisions for
10 themselves.

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11 We, we -- and again, your Honor, also in terms of the
12 rational basis, I also want to point out there's a gigantic
13 problem here with the idea that this incremental release of,
14 of authority which at no time has the State ever suggested
15 that it would not, that it would have any reluctance
16 whatsoever to turn right back around and reimpose all these
17 restrictions. There's nothing stopping it from doing so. You
18 know, and again, we're asking the Court to draw a line, we
19 believe that that line has been crossed. That after the
20 demonstrations and after the openings of the beaches, and
21 after the openings of retail, there's no longer a -- what is
22 the rational -- again, the rational basis that is positive.
23 Merely calling something a rational basis doesn't make it
24 rational.

01:05

01:05

25 And we submit that we don't know what Justice Roberts

01:06 1 had in front of him in the California case that's now back
2 before the Ninth Circuit. We do know that in this case, the
3 State's rationalization for what it represents to be a
4 rational basis for its decision about outdoor worship on
5 June 15th, on June 15, 2020, is no longer rational. We have
6 references again to 1998 tuberculosis studies involving church
7 choirs. It's 2020, it's not tuberculosis, it's not a choir.
8 Talking about worship requires a very big difference.

01:06 9 THE COURT: Well, the thing, Mr. Coleman, many of
10 your clients want is to have singing.

11 MR. COLEMAN: Yes.

12 THE COURT: In church and all that.

01:06 13 MR. COLEMAN: As a former choir member, I can tell
14 the Court there's a very big difference between sitting in the
15 catacombs of a church and practicing, you know, your mouth is
16 open the entire time and you're sitting next to -- you know,
17 all the tenors are sitting together, and over there the big
18 tough bases are sitting together. That is very different from
19 coming into church, sitting six feet away from another church
01:07 20 member. And, yes, there'll be singing, but there'll be masks.
21 It's a different experience, it's not the same.

01:07 22 I certainly understand the Court's reluctance to
23 micromanage and to second guess. It's entirely consistent
24 with what Chief Justice Roberts and his mentor have always
25 taught with respect to judicial restraint, it's appropriate.

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1 We're here now precisely because we were not here in March.
2 If we would have come in March, if we would have come in
3 April, we could not make these arguments. But what the facts
4 on the ground now tell us is that what may have once been a
5 rational basis is no longer rational. And that this Court at
6 the very least, and yes, we do believe the Court has the
7 ability to say that this entire regulatory scheme or this
8 quasi-regulatory scheme has outlived any Constitutional
9 justification on, on vagueness grounds, which was not in front
10 of the Chief Justice given the complete discretion vested in
11 the State Police. And on, on First Amendment grounds, both
12 free speech and free exercise, but at the very least,
13 certainly the cap on indoor services, doesn't seem to be any
14 rational basis for that at all.

15 THE COURT: Mr. Coleman, I admire your passion, but
16 I'm going to give you a chance to catch your breath.

17 MR. COLEMAN: Thank you.

18 THE COURT: I'm going to talk to the State for a
19 little while.

20 MR. COLEMAN: I'm glad to say I went through my
21 Corona experience a couple of months ago, so I've got the
22 breath for it. Thank you.

23 THE COURT: Have you ever run for political office?

24 MR. COLEMAN: No, thank you. I assume that your
25 Honor means the question in the nicest possible way.

1 THE COURT: Really I'm trying to encourage you. I
2 admire your passion for this issue. It's great.

3 MR. COLEMAN: Thank you.

4 THE COURT: We need people like you.

01:09 5 MR. COLEMAN: I am here. I am here.

6 THE COURT: Well, you may have the wrong audience for
7 your passion.

8 All right. Before we turn to a discussion of exactly
9 what the Chief Justice meant in that concurring opinion, I
01:09 10 want to ask the State whether or not they want to make any
11 comments, because we talked a lot about facts and policies and
12 things of that nature. Do you want to talk about any of that
13 before we get any discussion on the legal parameters of the
14 First Amendment litigation?

01:09 15 MR. FEIGENBAUM: Sure. And thank you for the
16 opportunity to do so, your Honor.

17 I think it would be helpful just to begin with why the
18 State continues to believe that the emergency is ongoing and
19 why it's important to have the kind of gradual reopening plan
01:09 20 that the State has had to date which has significantly lifted
21 many of the restrictions on gatherings, especially as it
22 relates to religious services, and demonstrates I think that
23 the State is quite solicitous of religious services, and
24 certainly harbors no animus or efforts to I think undermine
01:10 25 religious services. But instead, is doing its level best

1 right now in the face of uncertain and developing science to
2 figure out how to limit the spread of COVID-19 while at the
3 same time expanding our testing and contact tracing program so
4 that we can lift the restrictions even further.

01:10 5 I think an important point of, to borrow your Honor's
6 phrase, I'll call them the churches as well for the purpose of
7 this discussion. I think an important point raised by the
8 churches is their view that what might have been rational a
9 couple of months ago is no longer rational today. But I think
01:10 10 one of the core tenets of the Chief Justice's opinion,
11 understanding we'll get into that framework in a minute, is
12 that it has to be the state and their elected leaders who
13 ultimately make the call about when the facts on the ground
14 really support a significant number of changes in the face of
01:11 15 the sort of developing body of science. It is true that there
16 aren't control group experiments about COVID-19 and no
17 long-term observational studies because we've all been living
18 with COVID-19 for just a couple of months now.

01:11 19 So, what the State is doing through the process of
20 gradual reopening rather than simply lifting all restrictions
21 at once is essentially changing the rules step by step, as
22 your Honor noted, allowing drive-in services, then allowing
23 outdoor services of up to 25, now allowing indoor services of
24 50 and unlimited religious services outdoors. And it's going
01:11 25 to assess based on the changes in the rate of hospitalization,

1 the rate of infection from one COVID patient to another, the
2 ability of our contact tracing programs to handle the spread
3 of COVID-19 that we see on the ground.

01:11 4 Once we take all of those factors into account, we'll
5 be able to continue marching forward, hopefully, with
6 additional reopenings. That's not true just in the gathering
7 context, which is obviously the provision that affects
8 religious services, but that's true when we talk about indoor
9 dining, like the reference Mr. Coleman made to Asbury Park, or
01:12 10 when we talk about indoor recreation like we're talking about
11 with gyms. The idea that each time the State is going to
12 assess what the data shows based on the changes the State has
13 made and then to continue moving forward accordingly.

01:12 14 And I think that's why New Jersey has seen tremendous
15 progress over the past couple of months at the exact same time
16 as we're starting to see spikes based on more quick reopenings
17 without the gradual steps taken here, elsewhere in this
18 country. So, I think it's fair to say that unfortunately the
19 emergency is not over, and we have certainly not banished
01:12 20 COVID-19 from the state or from the country, and so it
21 requires continuing to seriously relax the restrictions that
22 we've had, but to do so thoughtfully and while building data
23 in the progress. It's why as much as I wish I was standing at
24 a podium in your Honor's courtroom right now, we're still
01:13 25 engaging in a sort of Zoom conversation. Because every branch

1 of government, Federal and State, is gradually taking steps to
2 try to expand its operations as much as possible.

3 I think there were just a few points that I wanted to
4 respond to, and to the degree that your Honor thinks we're
01:13 5 bleeding into the discussion of *South Bay*, and to the degree
6 your Honor would like to stop with any questions about that
7 decision and its contours, obviously more than happy to do so.

8 THE COURT: We're going to get to that, obviously.

9 MR. FEIGENBAUM: So I think that there are three
01:13 10 general points that will relate to the disposition of this
11 case. The first is essentially the validity of these rules
12 generally. The second, which is I think a focus of
13 plaintiffs' argument this morning, is the validity of the
14 rules in light of the Governor's decision to march in one
01:13 15 particular protest. And I think the third are some of the
16 equitable arguments that I will touch on very briefly, because
17 I think your Honor has already walked through why under
18 Executive Order 152 there's such a significant change in the
19 degree of irreparable harm and in the equities to the degree
01:14 20 that they would support preliminary relief at this stage.

21 So, briefly on the face of the orders themselves and
22 their validity, obviously, and as the Chief Justice himself
23 explained, the plain text of the order covers gatherings
24 regardless of purpose. The regardless of purpose language is
01:14 25 in fact used directly in some of the executive orders. And

1 that is very much the State's regime. To the church and the
2 choir, to the Bible study and the book club, the idea of equal
3 treatment which was the focus of the Chief Justice's opinion.

4 Now, Mr. Coleman has raised a couple of contexts that
5 he says suggest that this whole regime is actually irrational.

6 That no reasonable state essentially could think that their
7 rule is properly protecting the residents in a sensible way
8 from COVID-19. And he used three examples. One was the

9 analogy to retail, whether it was Home Depot or grocery

10 stores. The second was the contrast between treatment
11 outdoors and treatment indoors. And the third was his point

12 that capacity limit based on percentage would appear to be
13 enough, and you wouldn't need some sort of fixed numerical

14 capacity placed on top of that, that including that sort of

15 number would be irrational.

16 I'll take them briefly in turn, and then once I discuss
17 that, I'll turn to Mr. Coleman's point about the purported
18 selective enforcement and the Governor's decision to
19 participate in an outdoor protest.

20 So, with respect to the Home Depot and grocery store
21 analogy, as I think your Honor has already noted, that was
22 asked and answered directly in *South Bay*. A majority of the
23 Supreme Court allowed California's restrictions to stand, and
24 the Chief Justice explained why, including the direct contrast

25 to contact like shopping and retail, whether Home Depot or a

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1 grocery store. I think the point for why it might be rational
2 for states to conclude that that contact could be different is
3 not that every single individual interaction in a grocery
4 store is shorter than every single interaction in a house of
5 worship. It is, of course, possible that someone would come
6 into a house of worship for five minutes, come to a service
7 and quickly leave. You could imagine someone's child coming
8 in, deciding they actually want to go to the basement instead
9 and find the games that the church has, and leave quickly.

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10 And, of course, it's possible that someone in Home Depot could
11 be there for an hour or two at a time trying to learn about
12 the latest products relative to their home.

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13 But the Chief Justice's point, and I think this is
14 certainly true especially during an emergency, is that states
15 are moving forward on a categorical basis where they're
16 assessing categorical risks relative to COVID-19 transmission.
17 And the Chief Justice, we believe, correctly assessed that
18 it's certainly rational for states to conclude that as a
19 categorical basis, interactions in grocery stores tend to be

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20 much more fleeting and quick lived, especially between two
21 given individuals, than it would be in a place designed to
22 bring together, wonderfully in the State's view, fellowship
23 and community and the like. So, I think that helps explain
24 why the Chief Justice reached the decision that he did, and

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25 why it's rational for New Jersey to have done exactly what

1 California decided to do.

2 The second distinction that Mr. Coleman focuses on and
3 asserts is irrational is the distinction between the treatment
4 of religious services when they happen indoors and when they
5 happen outdoors. Obviously, no one is suggesting that that
6 distinction in any way discriminates against religion.

7 Whether you're indoors or outdoors has nothing to do with
8 religious versus secular. And in fact, outdoor religious
9 activities are getting preferential treatment as compared to
10 analogous secular gatherings, which reflects the State's
11 efforts, something the Chief Justice contemplated they could
12 do in *South Bay*, to in fact prefer religious activity when
13 possible in a period of lower community spread and in a lower
14 risk activity like outdoors.

15 And if your Honor is looking for information to help
16 justify the outdoor/indoor distinction as a matter of rational
17 basis, the executive orders themselves lay out significant
18 reason to think that outdoor spaces are considerably safer
19 relative to COVID-19. And Exhibit BB, which is included at
20 Docket 32-4 is advice from the CDC relative to large
21 gatherings which specifically recommends that they take place
22 outdoors instead of indoors when possible.

23 And there's a good reason for that. Even leaving aside
24 that social distancing is often much more possible outdoors
25 than it is indoors, the fact that you have an open air system

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1 as opposed to a closed ventilation system also makes it harder
2 for COVID-19 to spread further than the six feet that we're
3 all focusing on, which is not talismanic and is not a
4 guarantee if you're six feet away in a closed ventilation
5 system that you will be protected from someone else. And
6 also, as studies are beginning to show, issues like sunlight
7 and heat and humidity and wind all have an impact on
8 destroying the virus carrying particles that are released when
9 someone coughs or sneezes or sings, or even talks loudly. So,
10 for all of those reasons, it's certainly rational for the
11 State to have a strong preference for outdoor activities over
12 indoor activities.

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13 And as your Honor is well aware from the colloquy with
14 plaintiffs' counsel, in that area where the risk is lower and
15 where we're able to prefer religious activity, the State no
16 longer imposes any numerical restriction on the ability of
17 churches to have religious services outdoors, in a park, in
18 their parking lot, what have you, given the lower risks found
19 there.

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20 So then the question becomes is it still rational to
21 have a 50 person limit on indoor spaces regardless of the
22 percentage capacity of the particular room. And as the Chief
23 Justice noted, rational basis is the right test because that's
24 true whether or not you're talking about an indoor concert or
25 an indoor worship service or indoor seminar or book club. And

1 the reason that we have that I think is both based on the
2 science and based on the law.

3 So, the science based argument is that in gradually
4 lifting our number in the way that we have, we're able to
01:20 5 collect the data and find out if a 50 person limit is still
6 necessary. And critically, it also allows us to put together
7 a functioning contact tracing program. So the idea behind
8 increasing testing and increasing contact tracing is that the
9 State will be able to identify all those who are diagnosed
01:20 10 with COVID-19, and then to identify all those with whom they
11 may have had interaction, including if they risked spreading
12 COVID-19 even while they were asymptomatic.

13 And the problem with allowing for such large events,
14 say you have a 50 percent capacity limit in a room that serves
01:20 15 a thousand, which is I think is one of the examples presented
16 here, is that you're not just talking about 500 people and
17 phone calls to those 500 people for the contact tracers, but
18 you're talking about phone calls to everyone that each of
19 those 500 people went and interacted with. Or I guess if you
01:21 20 say 50 percent of that, then you're at 250. At some point in
21 a burgeoning contact tracing program, the State needs the
22 ability to reach everyone to the best degree possible that may
23 have been exposed to COVID-19, because that is what's going to
24 allow us, just like other countries with more significant
01:21 25 contact tracing programs did a couple months ago, to fully

1 reopen as much as possible to what the Governor has called
2 phase four, which is the full reopening with certain
3 protections, you know, like masks or general social distancing
4 and the like, to the degree possible.

01:21 5 Allowing essentially congregate activity at high
6 numbers simply based on the capacity of a room would present
7 serious challenges for the contact tracing program. Something
8 that we can bear in an outdoor context because the risk of
9 COVID-19 spread is so much lower, but something that the State
01:22 10 could rationally conclude is just too risky to allow in indoor
11 closed ventilation systems.

12 So, I think that's everything until your Honor has
13 questions about *South Bay* or the general face of the EOs, that
14 I would say about how the EOs operate on their face. Which I
01:22 15 think would then turn to the question that Mr. Coleman has
16 raised about the ability of certain protests to take place
17 outdoors that have been happening in the state, and what that
18 means now going forward under Executive Order 152. And
19 obviously also responding to the fact that the Governor
01:22 20 himself participated in one.

21 So, right at the outset, I'd like to note that all of
22 Mr. Coleman's clients can prospectively, under Executive
23 Order 152, do everything that he's highlighting that the
24 protestors have been able to do. They were marching together
01:23 25 outdoors, they were engaging in large congregate activity, I

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1 don't disagree with that at all. But every single church that
2 wishes to hold a large outdoor service is now able to do so.
3 So, even to the degree that Mr. Coleman's arguments about the
4 single context of Black Lives Matter protests call into
5 question the broader orders themselves, and I'll give reasons
6 why I don't think that's right. I wanted to simply note at
7 the outset that it wouldn't give plaintiffs any right to the
8 relief they're seeking, which is not to do what the protestors
9 did because, again, under Executive Order 152 they are allowed
10 to do what the protestors did. They want to do something
11 else, something that no one has been allowed to do, which is
12 to hold large gatherings of more than 50 people indoors at a
13 time when we're still building our contact tracing programs,
14 and at a time when public safety is still at risk while we're
15 seeing COVID-19 spikes happening elsewhere in the country that
16 do have larger indoor gatherings than we do.

17 I also think it's important to rebut any idea that
18 there's been some sort of selective enforcement program here
19 that suggests that one group is engaging in speech that the
20 State welcomes and they don't have to worry about COVID rules,
21 and then religious folks are disfavored and there's
22 anti-religious animus here. So, the relevant case that we
23 cite in our brief on the selective enforcement point is the
24 *Tenafly* case. And I think that shows what it means to have
25 selective enforcement. The question becomes is your law that

1 appears facially neutral really just a pretense to be going
2 after religious conduct in even the conduct of a particular
3 religious sect.

01:24 4 So, in the *Tenaflly* case, there was a facially neutral
5 order that prevented posting items on telephone poles, but it
6 turns out everyone had been allowed to post items on telephone
7 poles; advertisements, holiday displays, house numbers, orange
8 ribbons, you name it. But when a group of Orthodox Jews
9 wanted to post items on telephone poles that was necessary for
01:25 10 them to build what's known as an Eruv, which is important for
11 religious practice on Shabbat, the sabbath, it was very clear
12 that Tenaflly said no to them specifically to block their
13 religious practice from taking place.

01:25 14 This case is at the opposite end of the spectrum.
15 There's no suggestion that religion alone has been focused on,
16 or even especially targeted by the gatherings requirement, and
17 instead there's only a suggestion that one set of protests,
18 the Black Lives Matter protests, had been able to proceed
19 despite the COVID rules. But that does not demonstrate the
01:25 20 kind of selective enforcement that we're talking about here,
21 because the reason was not to savoring (sic) of religion, and
22 instead the reason was that law enforcement officers in all
23 charging decisions need to balance public safety and public
24 health.

01:25 25 And in the specific context of protests that were about

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1 law enforcement and law enforcement's relationship with the
2 community, the spectacle of law enforcement officers charging
3 those protestors and issuing them summonses or tickets would
4 have been cause for serious public safety concerns of the kind
5 that we saw across the country that thankfully was by and
6 large avoided in New Jersey. Including I would say right here
7 in Camden, if we were in Camden at the moment, but including
8 in Camden where law enforcement officers obviously made the
9 choice that that kind of non-enforcement in that context of
10 those protests was going to be better for public safety. It
11 wasn't a suggestion that COVID-19 laws don't apply or that
12 religious conduct is less important than secular conduct, it
13 was a sensible call based on law enforcement prosecutorial
14 discretion.

15 And to really I think put a finer point on what was
16 going on there and how it had nothing to do with
17 anti-religious bias or religious animus from the Governor or
18 from law enforcement officers, I would point to Docket 32-4,
19 Exhibit Y, which is a collection of the charges that have been
20 issued under the executive orders that the Attorney General
21 was putting out daily and then weekly as the crisis was
22 unfolding. And if this Court -- I'll just name a list of
23 pages for the record and for you later, but essentially if
24 this Court looks at Pages 35, 36, 41, 44, 48, 55, 59, 78 and
25 82, this Court will find examples of enforcement action that

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1 were taken relative to gatherings that were entirely secular
2 in nature, including outdoor gatherings. So that might be an
3 engagement party or a birthday party, or it might have been a
4 large backyard party that took place with a concert in Rumson,
5 that was Page 44. Or an outdoor gambling event with 19
6 people, that was Page 55. Or 40 people outdoors together
7 drinking, that was Page 82.

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8 The point isn't whether or not a particular plaintiff
9 might agree with each of those actions, the point is that they
10 demonstrate quite clearly that what's going on in New Jersey
11 is not in any way anti-religious bias. And instead, the
12 enforcement of the rules demonstrate that they're being
13 applied on an even handed basis to religious conduct and to
14 secular conduct alike, and that it's certainly rational to
15 continue having a program like that.

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16 So then plaintiffs come back and say, we disagree with
17 that, we think there was selective enforcement, and we have to
18 be allowed to do something that takes place indoors instead.
19 But unfortunately, that argument would have no stopping point.

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20 If you're not asking to do the thing that was essentially the
21 basis of the asserted selective enforcement, then how far does
22 someone get to go. Right now it's that they don't want a
23 numerical cap, but the next set of plaintiffs, and the State
24 is already facing a lawsuit from plaintiffs situated like
25 this, might be that someone doesn't have to wear masks

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1 anymore. Or it might be that someone wants to open a gym or
2 it might be that a casino wants to reopen. None of those
3 which were at issue in what the protestors were doing, but if
4 selective enforcement remedies could go beyond that would
5 really I think open up a can of worms, and it's never been the
6 way that the law's been applied in the past.

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7 So, I want to touch briefly on why the Governor's
8 participation in a specific protest does not change this
9 analysis. And I think your Honor has already touched on this,
10 so I'll just flush it out slightly. Which is that whether or
11 not a public official complies with the law is actually
12 immaterial to the law's validity itself. There may well be
13 political or policy or legal consequences for the public
14 official, but there aren't consequences for the state's law.

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15 And there's a good reason for that, which is that the
16 political policy or legal consequences run to the Governor
17 himself. But finding a law invalid actually harms society,
18 the benefits of that law.

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19 And this is a perfect example. The public health risks
20 of large indoor gatherings are to the residents who would
21 later interact with those parishioners. Not even just the
22 ones who chose to participate in a church gathering, but the
23 ones who are later interacting with them, their neighbors,
24 their family, their friends. It's not to the Governor
25 directly. And that's why the consequence of the Governor

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1 participating in a march is exactly what your Honor suggested,
2 and is in no way what plaintiffs have pointed to.

3 And I think a few analogies might help put a finer
4 point on this. So if you imagine a governor is caught
01:30 5 speeding, which has happened in this state and happened in
6 other states in the past. There are consequences for the
7 governor, but there are no consequences to the speeding law in
8 the State of New Jersey or in any other state. And that's
9 true even when you're talking about a Constitutional analysis.

01:30 10 So, if a governor in a state that bans the possession of
11 assault weapons is caught with a machine gun, there will be
12 consequences for the governor of the political policy or legal
13 kind that we've been discussing, but there won't be
14 consequences for the validity of the firearms law under the
01:31 15 Second Amendment.

16 And this context is exactly the same. And I would also
17 again just note that to the degree that plaintiffs wish to
18 engage in conduct that the Governor did, they are free to do
19 so under Executive Order 152. They want to engage in
01:31 20 different conduct that is indoors and that the State has
21 always rationally concluded is significantly more dangerous,
22 including up until we're able to have a fully, more robust
23 contact tracing program.

24 And that really leads us to the equities, to the final
01:31 25 consideration so critical we think to the preliminary

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1 injunction stage, which is that we are in the middle of a
2 reopening plan, and I cannot sit here and give you, like I did
3 two weeks ago, an exact date and an exact number when the next
4 reopening will happen. But that's because last time when we
5 had our status conference, we knew that we were in the middle
6 of doing those changes based on what the data was showing us.
7 And, you know, we suggested they would be significant, and I
8 think as your Honor has noted, the changes really were
9 significant. Fifty is not just a far cry from ten, but
10 unlimited outdoors is certainly a far cry from 25 outdoors.

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11 What I'm telling you now is that the State is committed
12 to continuing with the reopening plan, but to do so in the
13 same kind of gradual way that the Chief Justice suggested in
14 *South Bay* is the kind of call that a state's elected leaders
15 are entitled to make, and that will allow us to avoid the
16 spikes we're starting to see elsewhere. To the degree that
17 the delay your Honor noted in this case comes from the fact
18 that plaintiffs waited a few months to file and did not go to
19 State Court, that just puts a finer point on it.

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20 You know, there are a number of pending challenges to
21 the executive orders that are in State Court right now. And
22 it's certainly possible that as part of the broader reopening,
23 other challenges will be filed in those courts. But what
24 doesn't need to happen is for a Federal Court to come in and
25 issue a mandatory injunction at this stage that would

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1 essentially upend the status quo in the midst of a careful
2 reopening plan.

3 And with that, I will turn it over to any questions
4 your Honor may have.

01:33 5 THE COURT: I don't, but I want to focus now on the
6 *South Bay* case, and I'll ask Mr. Coleman some questions about
7 that. You know, before the *South Bay* case there were Circuit
8 courts on both sides of this issue of whether to impose
9 injunctions against these closure orders. And it came to the
01:33 10 Supreme Court in a rather uncommon way.

11 MR. COLEMAN: Yes, your Honor.

12 THE COURT: Well, it didn't come up as a direct
13 appeal, although there's litigation working its way up through
14 the courts. This is an application to a single Justice,
01:33 15 Kagan, who referred it to the Court, and then the Court by a
16 vote of five to four declined to enter an injunction. And the
17 Chief Justice then writes his concurrence. And historically
18 maybe he'll talk some day as to why he thought it necessary in
19 this case, but he did. And he talks about the standard for an
01:34 20 injunction when you're at the Supreme Court being the legal
21 rights are indisputably clear. And that's particularly where
22 the District and the Circuit courts have refused to grant the
23 injunction.

24 And you go back in history, in the last 35 years there
01:34 25 have been a handful of injunctions entered by the Supreme

1 Court, and it's not real clear what standards they're using,
2 but let's go with what the Chief Justice says is the standard
3 in the *South Bay* case. How is that standard really different
4 from the four factors you need to show in this Rule 65
5 application?

6 MR. COLEMAN: Well, your Honor, it appears to be
7 different because it is repeatedly characterized as being
8 different, including by the Supreme Court. It is
9 understandable just as a matter of the normal operation of our
10 court system that asking a reviewing court to review a
11 decision by a lower court requires a higher standard because
12 the lower court has had the full opportunity to consider the
13 factual record in front of it, to hear the full arguments of
14 counsel, and to schedule matters, and if it sees fit to make
15 evidentiary findings or to request an evidentiary hearing,
16 whatever the case may be, where the reviewing court is looking
17 at a record, an appellate record, and is asked to review a
18 decision based on an abuse of discretion, which is frequently
19 a very difficult burden to overcome.

20 Here there is no -- here we're asking the Court to, to
21 the extent that there's a discretion standard here which is --
22 preliminary injunction standards are rife with discretionary
23 opportunities for the court, that's not the case here. Every
24 time -- all the more so when you get to the Supreme Court.
25 When you have gone to a trial to District Court and a District

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1 Court has denied an injunction. And an injunction, as we
2 know, your Honor, and I think to some extent your question
3 alludes to this, the injunction is often described as
4 extraordinary relief. Unfortunately, we often find, and I've
5 represented a lot of defendants in intellectual property
6 cases, it's not as extraordinary as we would sometimes like it
7 to be. When judges see a certain fact pattern, a certain
8 combination of factors, it's not all that unusual for them to
9 issue preliminary injunctions.

01:37

10 Nonetheless, when a Court has passed on whether or not
11 to award that extraordinary relief, it is understandable as a
12 matter of jurisprudence that an appellate court will defer to
13 the trial court. All the more so when you get to the Supreme
14 Court level, because now there have been two courts that have
15 had the opportunity to review the matter. And it's asking a
16 great deal for -- to ask the Supreme Court to come in and say
17 it's obvious here, something patently unconstitutional has
18 taken place.

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19 Your Honor, our standard here is that we believe the
20 record shows that insufficient care has been taken to treat
21 Constitutionally protected conduct as it should be treated,
22 which is with a degree of deference. That has not been
23 evident in the record, that's our argument. We cited cases
24 showing courts that have entered such -- that have found such
25 violations in what we consider to be very similar

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1 circumstances with respect to states imposing safety
2 regulations on congregational worship. And in our view, this
3 Court has ample authority to do that. It is a very
4 different -- and I think, your Honor, I can say, you know, to
5 an experienced jurist, you know, we often talk about the
6 difference between the standards for a TRO and the standards
7 for a preliminary injunction. And we all have a paragraph
8 that we cut and paste into our briefs that the standards are
9 the same. And yet, we all know the standards are not the
10 same. When you walk into court and seek a TRO, you're asking
11 the judge to do something more than when you ask a judge for a
12 preliminary injunction under the normal circumstances of a
13 motion, response, a reply, a hearing. It's different.

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14 It's also different when you seek a preliminary
15 injunction in the trial court, make a showing, compared to
16 telling the Supreme Court of the United States not only did a
17 district judge appointed by the President of the United States
18 blow it, but at least a panel of Court of Appeals judges blew
19 it. Of course it's a different, it's a different endeavor
20 altogether.

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21 THE COURT: I'm not sure I agree with your analysis
22 that the Court of Appeals gives great deference in injunction
23 proceedings to a District Judge. I mean, not from personal
24 experience, I haven't been reversed on an injunction, but then
25 again I don't grant a whole lot of them. But, you know, my

1 recollection is that the Court of Appeals moves on them
2 immediately, the Court of Appeals, God bless them, doesn't
3 seem to be bound by the fact findings below in these cases.
4 And they have no reluctance to reverse them whatsoever.

01:40 5 MR. COLEMAN: Your Honor, it's possible I'm spending
6 too much time in the Second Circuit.

7 THE COURT: Maybe. But anyway --

8 MR. COLEMAN: Before your Honor -- I know you have
9 specific questions for me and I do want to have the
01:40 10 opportunity to respond to some of the things that the State
11 raised, but if your Honor has more questions for me, please.

12 THE COURT: Go ahead. We'll get to my questions,
13 trust me.

14 MR. COLEMAN: There are a couple of concerns that I
01:40 15 have, one is that Mr. Feigenbaum has said that right now
16 there's no -- he can't promise as he did two weeks ago that
17 here's the next goodie that's going to be given to the people
18 of the State of New Jersey from the Governor. But he did
19 allude a couple of times to something that we've never -- that
01:41 20 is a little bit troubling, which is that it would appear that
21 the State is holding back from authorizing outdoor gatherings.

22 And by the way, it's not true that our clients can do
23 what Governor Murphy did. Governor Murphy, as the selective
24 enforcement argument acknowledged, did not engage in social
01:41 25 distancing. The event at which he took place did not feature

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1 social distancing. That is a violation of the State's rules.
2 All residents and businesses must follow State and Federal
3 safeguarding guidelines, keep six feet between yourselves and
4 others, face cover is not a substitute for social distancing.
5 That didn't happen. And it wasn't only Governor Murphy who
6 was not charged with a crime, unsurprisingly, it was the
7 hundreds of thousands of people who attended that event.

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8 THE COURT: Well, Mr. Coleman, sometimes it is good
9 to be king.

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10 MR. COLEMAN: I imagine, I would think an Article 3
11 judge would know that as well as anyone in this conversation.

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12 But it does seem as if what I'm hearing between the
13 lines is that the State is contemplating not permitting
14 outdoor worship -- I'm sorry, indoor worship without a cap,
15 regardless of facility size, until it has put into place a
16 sophisticated contact tracing program that will permit the
17 State to track everyone who comes and goes. So, I'm getting
18 signals, not supposed to look at faces, but here we are on
19 Zoom and Mr. Feigenbaum's telling me that that is not the
20 case, so, fine, that's not an issue.

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21 Because certainly contact tracing is equally relevant
22 with respect to indoor and outdoor activities. There was no
23 contact tracing at the demonstrations, and as a practical
24 matter, once you get to the point where thousands of people
25 are participating in events outdoors or indoors, contact

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1 tracing is a little bit of a joke I think. I'm so good, I
2 think then we're really on the same page in terms of what
3 we're all talking about. And I would then, you know -- that
4 was a concern, I misunderstood it, and I'll entertain any
5 further questions the Court might have.

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6 THE COURT: Well, let's go back to *South Bay*. Since
7 that decision came down, there have been a number of courts
8 that have cited to a -- four in this religious gathering
9 context, the Oregon Supreme Court, the District of Nevada and
10 two District Courts in California. All have cited that
11 decision and that concurring opinion by Chief Justice Roberts
12 in denying similar applications to enjoin state governors'
13 orders as they relate to religious gatherings. But there have
14 been no cases whatsoever that have sought to distinguish it.
15 In fact, in a non-religious gatherings context, there have
16 been five or six decisions who have cited the concurring
17 opinion in support of denying applications for injunctions in
18 non-religious settings.

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19 Again, no court has sought to distinguish *South Bay* and
20 to say that it doesn't in any way require the denial of an
21 injunction. What do you say to that? Why should I ignore
22 *South Bay*? I mean, is there any doubt in your mind the
23 Supreme Court has five votes against granting an injunction?

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24 MR. COLEMAN: Yes, there is, your Honor. I believe
25 the facts matter a lot. And the facts that have become

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1 apparent since *South Bay* are compelling. I also think that
2 procedural posture matters a lot, and notwithstanding -- I
3 don't have the records of the cases and those that have cited
4 *South Bay* approvingly, but I do know that in the State of New
5 Jersey, where there is an order that prohibits indoor
6 gatherings for worship but does not prohibit what are
7 essentially indoor gatherings, for shopping --

01:46

8 THE COURT: Well, only some kinds of shopping. Most
9 retail stores still are closed to customers. They have the
10 curbside pickup and all that stuff.

11 MR. COLEMAN: Right. Any kind of shopping. I'll die
12 on that hill, your Honor.

01:46

13 I do not believe Justice Roberts intended to take the
14 position that as a matter of law, as a matter of
15 Constitutional law it can be said that when you have -- that
16 church services are *per se* more dangerous than retail
17 experiences, that they are of longer duration or that social
18 distancing in an indoor church service is irrelevant to those
19 considerations. What I see Justice Roberts as having said was
20 the findings of the courts below to that effect could not be
21 disturbed on the record on appeal.

01:46

22 We're arguing here that on this record, that such a
23 finding is not justified. Justice Roberts was looking at
24 whether such a finding could be shown to have been palpably
25 incorrect on the extraordinary basis of an appeal to the

01:47

01:47 1 Supreme Court. I would never expect any judge in this Court
2 to feel obligated to do, to follow a decision in another case,
3 in another procedural context, in another factual context,
4 merely because other courts in other contexts, perhaps similar
5 to ours but whose record is not in front of ours, merely
6 because they've done so.

01:48 7 It's not surprising that district judges like yourself
8 have read Justice Roberts as indicating a particular
9 inclination. We also know that judges change their minds,
10 justices also change their minds. And they also look at every
11 record based on the merits of that case's record. And again,
12 two weeks has turned out to be a very long time in the history
13 of COVID. So we think, your Honor, that -- certainly I don't
14 have to explain to the Court that it certainly is not bound by
01:48 15 the decision of the Supreme Court because it's not the same
16 issues and it's not the same posture. And certainly, the --
17 you know, the decisions in the other District Courts are
18 obviously influential but they're not dispositive. This Court
19 has the ability and, you know, to make a decision based on the
01:49 20 law as it's understood and as has been briefed by the parties.
21 I can't do better than that.

22 THE COURT: You're fine.

01:49 23 I think you said that the State has made the decision
24 that indoor religious gatherings are more dangerous than other
25 indoor gatherings. Is that true, I mean they still prohibit

1 attendance at movie theaters, sporting events --

2 MR. COLEMAN: That's right.

3 THE COURT: Things of that nature. So why do you say
4 that they've singled out religious services as being more
01:49 5 dangerous indoors than other things that are still prohibited
6 to be occurring indoors?

7 MR. COLEMAN: I certainly don't want to be
8 misconstrued. This state has not singled out houses of
9 worship, and there are other states that specifically name
01:49 10 houses of worship as being, as constituting nonessential -- or
11 worship as constituting nonessential activities. And that's
12 quite Constitutionally obnoxious. And I'm grateful I live in
13 a state that did not do that.

14 Having said that, the State is required to guard First
01:50 15 Amendment rights under the Fourteenth Amendment. The State is
16 required not merely to not offend the First Amendment, but to
17 protect First Amendment rights. So, the fact that movie
18 theaters are also closed is actually of great spiritual
19 significance I'm sure, and is positive. But having said that,
01:50 20 the First Amendment requires the State -- does not require the
21 State to justify closing movie theaters to the level at which
22 it requires the State to justify limiting the extent to which
23 houses of worship can be used. So that's why that -- that's
24 how that distinction should be framed.

01:50 25 And certainly there are other facilities, like large

01:51

1 stores, where no such limitations are in place at all. And I
2 have yet to hear a rationale for it, other than people go in
3 and shop quickly, which I just think that's the worst kind of
4 anecdotal -- I mean listen, as an Orthodox Jew, there's a
5 service that we say in the middle of the day called Mincha,
6 it's the afternoon service. It takes 13 minutes in a nice,
7 slow minyan.(sic). There are synagogues two blocks outside my
8 window here where hundreds of people can come in, show up for
9 Mincha, be in and out in less than 10 or 15 minutes, far
10 shorter than it takes me to go to the ShopRite in Nutley with
11 the list of groceries from Mrs. Coleman to pick up to prepare
12 for the next Shabbos which grows as I -- because of texting
13 and global husband positioning technology as the shopping trip
14 goes on.

01:51

15 So, this is entirely anecdotal, and I think, you
16 know -- I'm trying to be a little bit funny, but the fact is
17 it's really dangerous. Because -- and what galls me about it
18 is that the Chief Justice of the Supreme Court made, accepted
19 these casual, you know, assumptions about how long it takes to
20 do what in a what.

01:52

21 And in fact, I can understand in fact if the State were
22 to say -- and again I think it is fraught to get into how
23 should we, how should we go about crafting a better rule,
24 because that's not this Court's province. But if the State
25 were to say no indoor gatherings above a certain number

01:52

1 lasting longer than X, that would sound like a very rational
2 criterion that would capture this concept of shopping is fast,
3 praying is slow.

01:52 4 I think my clients have much longer services as a
5 general rule than the 15-minute Mincha that I'm referring to,
6 but I will say this, if I were to tell them after getting off
7 the phone or later on today that the Court ordered that
8 they're permitted to have, to use their sanctuaries which they
9 have put so much heart and so much effort to build, to bring
01:53 10 their congregation together so that they can pray for 25
11 minutes on a Sunday morning, I think that they would consider
12 that to be a fantastic outcome. And that would be a criterion
13 that I think would make a lot of sense.

01:53 14 But we don't have that criterion. What we have instead
15 is -- and what I'm trying to get at, your Honor, in terms of
16 the State's attitude is not so much a matter of selective
17 enforcement because that is a hill that no litigator really
18 hardly ever wants to die on, especially someone who does a lot
19 of intellectual property work.

01:53 20 As a general matter, though, what is the State's
21 attitude towards protecting the First Amendment rights. What
22 we find here is that it puts them in the category of movie
23 theaters, puts them in the category of beer halls. That's not
24 appropriate. It has to do better for the First Amendment.

01:54 25 And if looking at these neutral criteria that make beer halls

01:54

1 and movie theaters and churches the same, what we find is that
2 people spend a long of time in them, then that's the axis that
3 we should be focusing on, not the absolute number. Because by
4 the State's argument, if I were to hire -- I almost said
5 Giants Stadium -- MetLife Stadium, and space people every
6 100 feet, well, I guess that's a -- I don't know whether
7 that's an outdoor or indoor, but if we consider it indoor,
8 that would that would be a -- it's an irrational criterion.

01:55

9 If we were talking about egress and ingress requirements being
10 staggered, I can think, again, as an amateur, you know,
11 bureaucrat, I can think of lots of approaches here. But what
12 we're arguing is that bright-line rules, broad strokes made a
13 lot of sense in March, they made a lot of sense in April, they
14 started making a lot less sense in May. In June, on
15 June 15th, they don't make sense, they're not Constitutionally
16 supported. That's our argument.

01:55

17 THE COURT: Mr. Coleman, I hate to tell you this, but
18 the New York Giants are not recognized as a legitimate
19 football team down in this part of the state.

01:55

20 MR. COLEMAN: I grew up in Mercer County, your Honor,
21 I understand very well what, what the respective attitudes
22 are. They're not considered legitimate up here either.

23 THE COURT: Touché.

01:55

24 You said that the Chief Justice accepted the
25 distinctions in his opinion, but is that really what he did,

01:56

1 or is he really saying in his opinion that, yes, these are
2 distinctions, and they were distinctions that were rationally
3 made at the time by the respective states? Whether they're
4 right or wrong, whether history has proved them right or
5 wrong, isn't he making the point that they were rational at
6 the time made by the state, and since he's applying the
7 rational basis, that's all he needs to be concerned with?

01:56

8 MR. COLEMAN: To the extent that we can read him as
9 saying that, your Honor, and I think it's a reasonable
10 reading, I'm here to say that these regulations based on what
11 I said just about two minutes ago, these regulations at this
12 time, in this state, are not rational. They may have been --
13 again, the Chief Justice was looking at a record based upon a
14 snapshot of what California's regulations looked like by the
15 time they got to him, and which had already been changed,
16 which are still being litigated.

01:56

17 Now, New Jersey's regulations are not rational, and
18 their irrationality, and again I'm not making a selective
19 enforcement argument, but rather demonstrating that the
20 conduct of the Governor at the protests tells us what he
21 believes is rational. What he believes is rational is that
22 for First Amendment purposes people can dispense with the
23 strict requirements of social distancing, fend for themselves,
24 get tested, that's rational, we can trust the Governor when he
25 says that.

01:57

01:57

1 THE COURT: Mr. Feigenbaum, the State's response is
2 what, sir? Your opportunity.

3 MR. FEIGENBAUM: Thank you, your Honor.

4 Two main points on this. One about the standard and
5 one about the records.

6 So, regarding the standard, I think, your Honor, the
7 Chief Justice's opinion is really best read to reflect what he
8 thought was or wasn't consistent with the First Amendment.

9 And that's because whether you're on a PI or whether you're on
10 an abuse of discretion, appellate courts and certainly the
11 Supreme Court are always reviewing specifically what they
12 think of the law and the Constitutional question *de novo*. We
13 saw that, for example, in the travel ban case where the
14 Supreme Court itself was actually up on a PI in reaching that
15 decision.

16 And then not that long ago, a District Court said, no,
17 I have a different record in this case, wherein a different
18 procedural posture all come out differently. And just last
19 week the Fourth Circuit reversed that decision, saying that
20 essentially when the Supreme Court actually reaches the legal
21 issues, even on a different posture in an earlier stage of the
22 case, clearly their legal disposition is what controls.

23 In the Chief Justice's opinion, and it's certainly
24 unusual to see the Chief Justice write an opinion for only
25 himself at that early stage in the case, is very clearly

1 telegraphing his view of the law and an explanation for why
2 the majority of the Supreme Court allowed California's law to
3 stand. I would also note the procedural posture is not that
4 different. So the procedural posture at the Supreme Court was
5 certainly about granting relief that the lower courts had
6 denied, and that kind of mandatory relief the Chief Justice
7 highlighted raises the burden.

8 But the Third Circuit has also made clear that, this
9 would be the Acierno case that we cite in our brief at
10 Page 653, that you're talking about not preservation of the
11 status quo, but a mandatory injunction that would disrupt the
12 status quo, that you are once again looking for heightened
13 standards to be met because of the kind of burden that would
14 lie from an injunction from a Federal Court changing the facts
15 on the ground for a state during its reopening plan.

16 So, I think a combination of how the Chief Justice
17 explained his opinion and the fact that the procedural posture
18 really is not quite so different as plaintiffs' counsel
19 suggests, really show that *South Bay* resolves this case, which
20 is why, as your Honor has noted, every case after *South Bay*,
21 notwithstanding the split that existed before *South Bay*, has
22 come out the same way and has denied the kind of relief that's
23 being sought in this case.

24 Briefly on the record, I understand that the facts on
25 the ground in New Jersey today do not look exactly like the

02:00

1 facts on the ground in New Jersey, thank God, looked on
2 April 15th. And I think we're all very, very pleased about
3 that, and it's in large part because of the kinds of programs
4 that were put in place in the face of developing information
5 and uncertain science. Certainly things changed as time went
6 on, but it was those sorts of efforts, each time rational in
7 light of the facts on the ground, that helped bring New Jersey
8 to where it is today.

02:00

9 If you look at the facts in California, California's
10 situation has never been as bad as what New Jersey has had for
11 months. California has had 5,000 deaths in a population of
12 40 million. New Jersey has had 12,000 deaths in a population
13 of 9 million. So to the degree that the argument is that
14 community spread is lower in New Jersey now than it was a few
15 months ago, and that distinguishes the Chief Justice's

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16 opinion, it very much does not. Because the facts have always
17 been more striking in New Jersey than they were across the
18 state in California. And New Jersey has had to respond in
19 kind, although it did of course significantly relax the

02:01

20 restrictions as our outbreak and community spread started to
21 reduce. So, I think that that helps to explain why to the
22 degree that the different records are relevant, it certainly
23 doesn't help distinguish *South Bay* from this case, and in fact
24 suggests that New Jersey really does have to take some
25 stringent measures to protect its overall population.

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1 We're also allowing widespread in any number religious
2 worship to take place outdoors, as I've noted before in
3 covering the equities. And that too would help emphasize why,
4 just as *South Bay* suggested, we're actually doing a lot in
5 New Jersey to protect robust avenues of religious worship to
6 the greatest degree possible given the facts we have on the
7 ground right now, and that the Chief Justice's opinion is very
8 clear. Let the states do their level best in a rational way
9 to protect religious worship while treating equally to
10 everything else. Not treating it preferentially to the most
11 analogous conduct, but treating it equally, or if it can as a
12 policy matter, preferentially.

13 And that's what we've done indoors, where we've treated
14 it equally to the most analogous activities, as the Chief
15 Justice pointed to in *South Bay*, and treated it preferentially
16 outdoors in a lower risk activity at a time of lower community
17 spread. The State wants to accommodate worship how ever it
18 can, but it cannot do so for high risk activities at this
19 continued stage of community spread and at this continued
20 stage of testing and tracing.

21 THE COURT: Mr. Coleman, I'll give you the last word.
22 You are the plaintiff, you have the burden here.

23 MR. COLEMAN: Thank you. Thank you, your Honor.

24 Your Honor, I think Mr. Feigenbaum has been accurate
25 and fair. I do understand that the Chief Justice does have an

02:03

1 inclination in his work to defer to the state, to defer to
2 government action, and that is an important component of
3 judicial restraint. But I would just note that New Jersey has
4 a higher COVID death rate than California because -- largely
5 because of New Jersey's policy with respect to nursing homes.
6 And New Jersey's policy with respect to nursing homes has no
7 small relation to State mandated decisions regarding COVID in
8 nursing homes that were, turned out to be quite mistaken.

02:03

9 It is not unreasonable, and in fact the law counsels
10 that we defer to the government, especially in times of
11 emergency. But in many respects, government has made the
12 wrong choices. Where there is a Constitutional prerogative,
13 that deference has to be reconsidered. And we submit that the
14 facts here and the circumstances and the timing are such that
15 it is appropriate and not inconsistent at all with the Supreme
16 Court's ruling or those of any other court that this Court is
17 required to obey or to follow, to issue the injunction that
18 we've requested. Thank you.

02:04

02:04

19 THE COURT: Thank you. I'm going to put my findings
20 and decision on the record now, because I anticipate that
21 there may be an appeal and I don't want to delay it any
22 further by taking the time to write an opinion, because
23 writing an opinion is somewhat labor intensive, and isn't
24 going to change the outcome anyway.

02:04

25 The facts are really largely undisputed. We have the

02:05

1 certifications from the four pastors of the churches which set
2 forth that which is going on in their churches, and that which
3 they at the time thought they would require in order to
4 successfully hold religious services. There's no dispute
5 whatsoever that these are all sincerely held and long term
6 religious beliefs.

02:05

7 As to the State, we have the executive orders, they say
8 what they say. And we have the enforcement decisions by the
9 Superintendent of the State Police, that's all in the record
10 for everyone to see.

02:05

11 Under Rule 65, you both understand, both sides
12 understand the four factors that I need to go through. One,
13 the likelihood of success on the merits. Two, whether there's
14 a showing of irreparable harm. Three, review the balance of
15 the equities to make sure that the granting of an injunction
16 would not result in greater harm to the non-moving party. And
17 number four, the public interest favors the relief sought in
18 this case.

02:06

19 I do find that this executive order is currently under
20 challenge and the other executive orders are laws of general
21 applicability that impose equal burdens on religious and
22 non-religious activities. Thus, they are subject to rational
23 review basis. I think it's important to understand that the
24 latest iteration for indoor gatherings applies equally to
25 religious and non-religious services and gatherings in this

02:06

1 case.

2 There's also been no evidence whatsoever of any
3 anti-religious animus, I went through that at the beginning of
4 the oral argument. The State never shut down the houses of
02:06 5 worship. The State has always exempted people traveling to
6 and from religious services. In this case the State has never
7 had any limits on driving or drive-through services, unlike
8 some other states have.

9 We now have, the trend clearly is opening more and more
02:07 10 and permitting larger numbers to gather for religious
11 services. We have unlimited outdoor services. They can use
12 tents, tarps, things of that nature to protect the
13 parishioners from the weather and the elements. Specifically
14 permit the removing of face masks for religious reasons, which
02:07 15 again I assume to be for communion or baptism and things of
16 that nature.

17 So, when we turn now to rational basis of this, I think
18 it's an easy case for the State. I understand the plaintiffs'
19 dissatisfaction with some of the distinctions made and some of
02:08 20 the decisions made by the State. Some of them in retrospect
21 seem to make little sense, total demarcation of essential and
22 nonessential indicate some bureaucrat who was not feeling the
23 pain of everyone else because the bureaucrat's getting their
24 guaranteed salary and benefits. That strikes people the wrong
02:08 25 way, and I appreciate that. But it is rational. There was a

1 rational basis to make some of these distinctions.

2 Most retail stores remain closed. Essential stores,
3 you know, food, pharmacy, things of that nature, I think the
4 State has made a good case that these are rational decisions
02:08 5 that were made at the time. That they were made despite the
6 fact that they do impose burdens on an awful lot of people in
7 this state.

8 So, I think when we look at factor number one, the
9 likelihood of success on the merits, I think that favors the
02:09 10 defendant, the State. I don't think the plaintiffs, the
11 churches are going to win their argument that this is a
12 violation of their First Amendment rights.

13 As to irreparable harm, I think the fact that at least
14 three of these four plaintiffs can now operate precisely as
02:09 15 they had wished to operate before the change made by the State
16 on June 10th, and the fourth can probably operate much like it
17 wanted to before the change made, it makes it difficult for
18 them to show irreparable harm.

19 As to the balance of the equities, I think the State's
02:09 20 argument is a good argument. We're here, whether we're doing
21 it the right way or the wrong way, the State is trying to
22 reduce the number of infections, the number of
23 hospitalizations, the number of deaths that are coming from
24 this unprecedented pandemic. To permit these religious
02:10 25 services indoors to have a greater number of people attend

1 would implicate and make very difficult any contact tracing
2 that the State would like to do in order to continue to attack
3 this disease.

02:10 4 And again, they're making no distinction between indoor
5 and outdoor, I mean between indoor retail and indoor religious
6 services. You still can't go to the movies, you still can't
7 go to sporting events, you can't go to entertainment
8 complexes, you can't go to the malls, you can't go in most
9 retail stores. In all, I think for a rational reason.

02:10 10 Whether I agree with it or not, the State has shown a rational
11 basis for this. Is an injunction in the public interest?
12 Well, yeah, I think a vindication of someone's First Amendment
13 rights is clearly in the public interest in this matter.

02:11 14 I am very much influenced by the Chief Justice's
15 concurrence in the *South Bay* case. I've heard the argument,
16 and, Mr. Coleman, which has been a terrific argument, the
17 Chief Justice makes maybe some certain assumptions, but I
18 think he's talking about the rational basis that we have to
19 defer to when the facts on the ground are constantly changing.

02:11 20 We, the judges, have no special expertise in these
21 kinds of situations, and we're not answerable to the people
22 because we're Article III judges, so we must defer to what the
23 State is trying to do. And Mr. Coleman makes a point that
24 time has passed, things are changing and perhaps the Chief
02:12 25 Justice a month or two from now may have a different opinion.

1 These kinds of lockdowns continue despite the drop in the
2 rates of infections, rates of death and rates of
3 hospitalization. But at this point, I'm going to deny the
4 application for the preliminary injunction for the plaintiffs.

02:12

5 Anything further? You'll both do an order.

6 MR. COLEMAN: We're good. Thank you, Judge.

7 THE COURT: Thank you, everybody. That was terrific.
8 You're really on top of the game and --

9 MR. COLEMAN: Thank you.

02:12

10 THE COURT: -- it was really interesting. This is a
11 really interesting case. I'm a big backer of free exercise
12 clause and First Amendment, but I don't think the law at this
13 point would permit me to grant an injunction.

14 MR. COLEMAN: Thank you, Judge.

02:13

15 THE COURT: Thank you very much, everybody.

16 MR. FEIGENBAUM: Thank you, your Honor.

17 MR. VANNELLA: Thank you.

18 (The matter was then concluded.)
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1 I certify that the foregoing is a correct transcript from the
2 record of proceedings in the above-entitled matter.

3
4 /S/ Carl Nami, Official Court Reporter

5 Court Reporter/Transcriber

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7 June 26, 2020
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EXHIBIT II

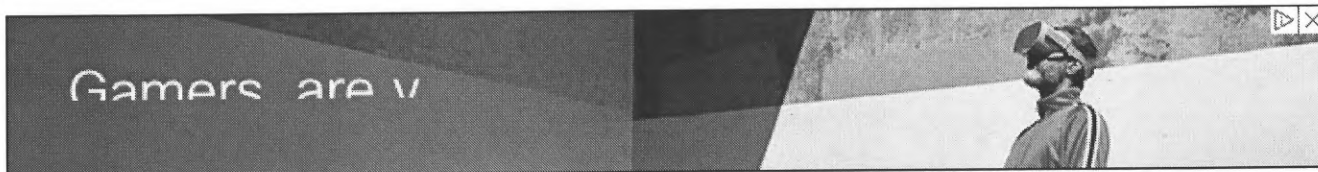


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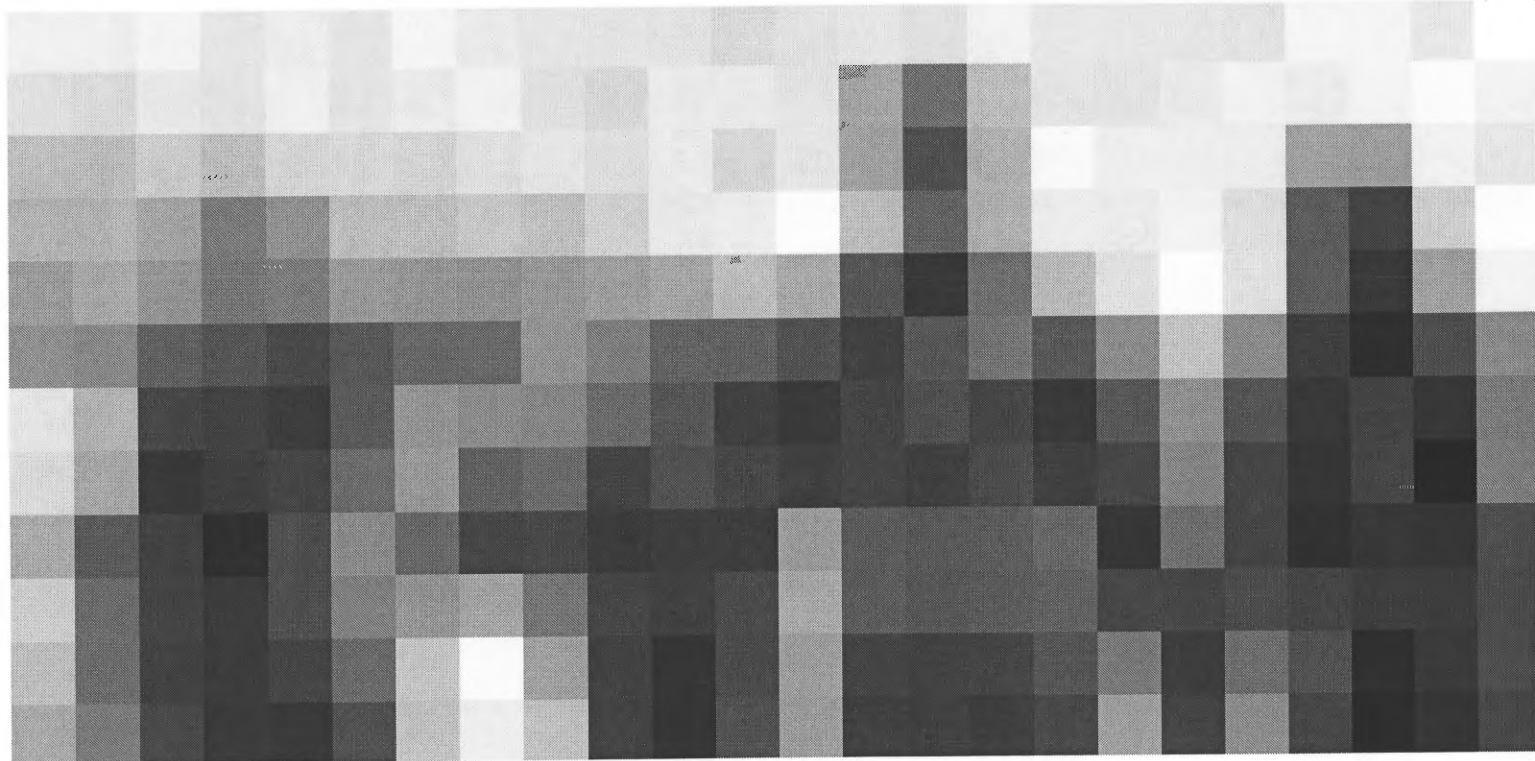


HOME > ENTERTAINMENT

Are movies getting longer? Here's the data



Sidney Fussell, Tech Insider Jun 14, 2016, 9:10 PM



Marvel

Are movies getting longer? The year's biggest blockbusters, "Batman v Superman," "X-Men: Apocalypse," were both over 145 minutes long, and several critics took issue with the 146 minute runtime in the otherwise excellently reviewed, "Captain America: Civil War."



Dr. Randal Olson, an expert on data visualization, posted original research to his site based on IMDB's film database. Surprisingly, he found that the data supports the opposite: overall movie length isn't actually growing.

Here's what he found:

Dr. Olson compiled the runtimes from the 25 most popular movies each year from 1931 to 2013. Take a look:

IMDB/Dr. Randal Olson

The data reveals two major shifts in movie length. First: from 1950 to 1965, average runtime for top films rapidly increased, gaining about 20 minutes on average. Dr. Olson hypothesizes that competition from television pressured movie studios to produce longer epics that would bring people to theaters. Classic epics like "Ten Commandments" (1956, 220 mins), and "Lawrence of Arabia" (1962, 216 mins) were released in this time period.



Olson points to the rise of home video. There's no definitive answer, but it's entirely possible that studios wanted to keep movies under two hours so they could easily fit on VHS tapes.

These two shifts are important because they help explain why we tend to *think* movies are getting longer.

"Between 1985-2000, feature films grew back to the same length as in the 1960s," Dr. Olson explains. "This may explain why it's usually Millennials (born 1980-2000) complaining that movies have gotten longer than they used to be: If you grew up watching movies in the 1980s, they *have* gotten longer for you! Meanwhile, Generation X-ers are shaking their head at Millennials wondering what the heck they're talking about (as usual)."

Movies aren't arbitrarily getting longer so much as they're returning to a status quo set in 1965.

Notable exceptions are films competing for Academy Awards. Speaking with The Daily Beast, Rolling Stone film critic Peter Travers said studios are afraid movies with runtimes under two hours won't

thinking. If it ain't long, it ain't winning," Travers said.

The chart below looks at *all* films in the IMDB database (excluding Bollywood) between 1906 and 2013.

IMDB/Dr. Randal Olson

Dr. Olson found that, as a whole, movies aren't anywhere near as long as the two-hour plus standard seen in best picture contenders. Of the ten films nominated for best picture in 2016, eight were over two



For reference, here's a look at the length of the ten best picture nominees for 2016:

"The Big Short" - 130 mins
"Bridge of Spies" - 142 mins
"Brooklyn" - 112 mins
"Mad Max: Fury Road" - 120 mins
"The Martian" - 144 mins
"The Revenant" - 156 mins
"Room" - 118 mins
"Spotlight" - 129 mins

Overall, it seems, big budget epics will keep you in the theater the longest, though your standard popcorn movies will probably be less of a drain on your time. And as long as studios equate runtime with critical acclaim, that isn't likely to change.

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EXHIBIT JJ

7/23/2020

It's too soon to go to a movie theater, infectious disease experts say

BREAKING Disney delays 'Mulan' indefinitely, Star Wars and Avatar movies



ENTERTAINMENT

'It's too soon to go to a movie theater,' infectious disease experts say

PUBLISHED THU, JUN 25 2020 • 11:51 AM EDT

Sarah Whitten
@SARAHWHIT10

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KEY POINTS

Major movie theater chains are looking to reopen in July.

Infectious disease experts think it's too soon for consumers to return to movie theaters.

Epidemiologists worry that lax mask policies and air-conditioning could lead to increased transmission of the coronavirus.



MARKETS



WATCHLIST



CNBC TV



MENU

BREAKING Disney delays 'Mulan' indefinitely, Star Wars and Avatar movie

Movie theater owners may be eager to reopen their screens to the public, but health experts aren't convinced that it's time to head back to cinemas.

Coronavirus cases in the U.S. have not slowed. In fact, the country reported more new Covid-19 cases on Wednesday than any single day before. Nearly half of these new cases are coming from Florida, Texas and California, where outbreaks appear to be expanding.

"What we are seeing now is that wave one is still going on," said Dr. Ravina Kullar, a Los Angeles-based infectious disease specialist, epidemiologist and spokeswoman for the Infectious Diseases Society of America. "There has not been a decline or a plateau and that is a concern. I don't see any change in a positive direction."

While movie theaters have established guidelines for social distancing and increased sanitation, only some locations are requiring patrons wear masks. Infectious disease specialists who spoke to CNBC underscored the importance of wearing face coverings as a preventative measure against the spread of coronavirus, especially in enclosed, air-conditioned locations.

The majority of theaters are looking to reopen in mid-July. But even studios seem to be



MARKETS



WATCHLIST



CNBC TV



MENU

BREAKING Disney delays 'Mulan' indefinitely, Star Wars and Avatar movie



"I would honestly say I'm not comfortable going to the movies right now," Dr. Carlos Del Rio, an Atlanta-based infectious diseases specialist said. "I want to see the numbers come down, want to see the cases go down. Right now, the only place I am comfortable going to the movies is my living room."

Both Kullar and Del Rio voiced concerns about the accountability of other customers at the cinema. For the most part, the other patrons in the theater will be strangers and there's no way to determine if they have been judicious about safety measures or if they have disregarded them. There's also no way that theaters can enforce the use of masks when the lights go down and the movie begins.

"Not wearing a mask is like Russian roulette," Kullar said.

Then there is the air-conditioning. In April, the Centers for Disease Control and Prevention published a research letter linking the spread of coronavirus to air conditioners.

The primary way that coronavirus is transmitted is through close contact from person to person and the exchange of infected droplets. The forced air could increase the risk for transmission.

While some production studios have introduced new air filtration systems in an attempt to slow the spread of the disease, no major movie theater has announced plans to invest in this technology.

"Right now it's too soon to go to a movie theater," Kullar said, noting that drive-in theaters are a much safer option for consumers.

Del Rio, too, recommended that consumers avoid closed spaces and large crowds.

"In the middle of a pandemic there are certain things you have to do and things you

