UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NATIONAL ASSOCIATION OF THREATE OWNERS; NATIONAL ASSOCIATION OF THEATRE OWNERS OF NEW JERSEY; AMERICAN MULTI-CINEMA, INC.; CINEMARK USA, INC.; REGAL CINEMAS, INC.; BJK ENTERTAINMENT INC.; BOW TIE CINEMAS, LLC; and COMMUNITY THEATERS LLC, Plaintiffs, v. PHILIP D. MURPHY, in his official capacity as Governor of New Jersey; and JUDITH PERSICHILLI, in her official capacity as Commissioner of Health of New Jersey, Defendants.	Hon. Brian R. Martinotti, U.S.D.J. CIVIL ACTION NO. 3:20-CV-8298-BRM-TJB **CIVIL ACTION** **(ELECTRONICALLY FILED)**

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

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PRELIMINARY STATEMENT

COVID-19, the novel coronavirus spreading throughout the world, is a highly contagious, deadly disease without a vaccine or cure. It has claimed the lives of over 142,000 Americans, including over 13,000 New Jerseyans. And it has required New Jersey to take unprecedented measures to protect the health of its residents, measures the State would not have countenanced absent such life-or-death consequences.

Because this virus spreads through contact between two or more individuals, including asymptomatic individuals who are unaware that they have the disease, the State's response focused on limiting person-to-person contact. For over four months, the linchpin of those efforts was the State's Executive Orders requiring the closure of locations where members of the public are likely to interact, such as retail stores, recreational businesses, and even playgrounds, and that therefore represent vectors for the spread of this virus. The decisions the State made throughout this emergency were hard ones, and the State has long recognized the costs borne by those businesses required to close their premises to the public. But these Executive Orders have made a difference, allowing New Jersey to flatten the curve of COVID-19 hospitalizations and deaths and to reduce the number of cases statewide, and ultimately allowing the State to reopen a number of locations once closed to the public.

The State found, however, that the reopening process had to be methodical, to avoid the surge in COVID-19 cases currently happening across the United States—

a surge that is overwhelming hospitals and leading to even more tragic deaths. Under New Jersey's Road Back Plan, announced in May, the Governor announced just such a gradual process, permitting brick-and-mortar businesses to reopen in stages based on the relative risks and benefits. The State first authorized outdoor activities, given the experts' observations that risks of transmission are far lower outdoors. The State next focused on retail establishments, where any interactions between consumers are fleeting and thus any risks of transmission are reduced. And finally, after continuing to evaluate the health data, the State turned to indoor entertainment establishments, recognizing that they pose the highest risk of COVID-19 spread because they feature significant and extended person-to-person contact. Given the progress that State had made in fighting COVID-19, New Jersey did allow multiple indoor recreational and entertainment businesses to open—subject to especially low capacity limits—but the State kept closed premises deemed to be highest risk. The State concluded that these high-risk recreational premises included indoor gyms; indoor restaurants and bars; and (as relevant to this lawsuit) indoor performance-based entertainment centers like movie theatres, performing arts centers, and concert venues.

New Jersey acted well within its authority when it kept theatres closed at this stage of the gradual reopening. The Constitution, after all, authorizes state officials to make tough calls regarding how to keep residents safe during this unprecedented health crisis, including to keep certain businesses closed based on the public health

data. Indeed, as the Chief Justice aptly put the point, the "Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States," and when a State's "'officials undertake[] to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.'" *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) (quoting *Marshall v. United States*, 414 U.S. 417 (1974)). New Jersey has acted well within that reservoir of discretion here. Indeed, movie theatres require customers to be seated in a confined indoor room for an extended period of time, risking COVID-19 spread from those prolonged interactions. And those risks are magnified whenever patrons remove their mask, which they do to consume the concessions Plaintiffs wish to sell, and which would also be hard to observe and to prevent in a dark theatre. Those health risks are especially unnecessary because there are many other ways for residents to watch movies, none of which present the same threat. It thus comes as no surprise that other states, confronting a surge in COVID-19 cases, have begun to order movie theatres closed once more.

Plaintiffs, a group of movie theatres, try to turn this case into something it is not—a restriction on movies and a restriction on free speech. The crux of Plaintiffs' case is that movies are a form of free speech, and that the State's closure of movie theatres contravenes the First Amendment and must be reviewed under a heightened form of Equal Protection scrutiny. But the State's Executive Orders are not intended

to, and do not, concern speech. Instead, New Jersey is trying to limit heightened risks of COVID-19 spread from person-to-person contact. That is dispositive, because the Supreme Court has held that laws affecting bookstores or theatres for health reasons, rather than because of the content of their movies and books, are entirely permissible. It follows that the only question is whether New Jersey acted rationally in keeping such indoor performance-based venues temporarily closed even as it allowed other locations to be open, a deferential standard that New Jersey easily clears. Although Plaintiffs highlight that churches, libraries, and malls are open to the public, each are distinct from movie theatres in meaningful and relevant ways.

Even beyond the merits, there is no basis for preliminary relief here, because an order forcing New Jersey to reopen indoor movie theatres across the state sooner than the public health data supports would undermine its ongoing efforts to contain the spread of COVID-19. Bluntly, few preliminary injunction motions present risks this stark. Given the dramatic consequences of Plaintiffs' requested relief, and the general shortcomings of their legal claims, this Court should deny the request for a preliminary injunction. While the State recognizes the burdens that its residents and its companies are experiencing—which is why the State continues to engage in an ongoing process of reviewing its emergency orders—its rules have been making a difference, and it must be allowed to continue controlling its response.

COUNTERSTATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

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

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

As state and federal officials have recognized, COVID-19 represents a public health emergency unprecedented in modern times. On January 31, 2020, the United States Secretary of Health and Human Services declared a public health emergency in light of COVID-19. On March 13, 2020 and on March 18, 2020, President Trump also declared a national emergency pursuant to a variety of federal laws, including Sections 201 and 301 of the National Emergencies Act, 50 U.S.C. § 1601-1651, and Sections 401 and 501 of the Stafford Act on March 13, 42 U.S.C. § 5121-5207. These declarations all remain in effect today. *See* Exs. E-F.

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

[1] Combined for the Court's convenience.

mainly from person to person, mainly through respiratory droplets produced when an infected person coughs or sneezes. These droplets can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs." Ex. D. And it can spread even though the COVID-19 carrier may be entirely asymptomatic or have only mild, cold-like symptoms. *See* Exs. G-H. In certain states—including in New Jersey—COVID-19 has spread "easily and sustainably in the community … in many affected geographic areas. Community spread means people have been infected with the virus in an area, including some who are not sure how or where they became infected." Ex. D. There remains no vaccine or cure for COVID-19.

As of the filing of this brief, worldwide 15,566,087 confirmed COVID-19 cases have been reported, and at least 634,594 lives have been lost. *See* Ex. I. The United States remains at the center of the pandemic, with more confirmed cases (3,952,273) and deaths (142,755) than in any other nation. *See* Ex. J. The virus's impact in New Jersey was, from the onset, especially acute. On March 25, 2020, the Federal Government declared New Jersey a "major disaster area." Ex. F. As of the filing of this brief, there have been 177,887 confirmed cases and 13,810 deaths in New Jersey alone. *See* Ex. K. Medical experts have estimated that, in the worst case scenario, millions of Americans would have died had state governments done nothing to prevent the spread of COVID-19. *See* Ex. L.

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

New Jersey law provides the Governor with sweeping authorities to respond to crises just like this one. Under the Disaster Control Act ("DCA"), N.J. Stat. Ann. App. § A:9-33 to -63, and the Emergency Health Powers Act ("EHPA"), N.J. Stat. Ann. § 26:13-1 to -31, the Governor has the authority to declare a public health emergency and a state of emergency, and he is delegated extensive powers to protect the State's residents from an unfolding or ongoing crisis. Governor Phil Murphy—in consultation with the State's Commissioner of Health Judith Persichilli—declared that a public health emergency and a state of emergency exist on March 9, 2020, *see* N.J. Exec. Order 103, and he subsequently adopted a series of measures to limit the spread of COVID-19 in New Jersey and thus to save lives.

Guided by the recommendations of public health officials and scientists, the Governor's measures focused primarily on limiting person-to-person contact—the only tool, in the absence of a vaccine, to mitigate the spread of COVID-19. First, on March 16, Governor Murphy ordered the closure to the public of all recreational facilities, amusement centers, shopping malls, bars and restaurants (except for take-out and delivery services), and gyms and fitness centers. *See* N.J. Exec. Order 104 ("EO 104"). Three days later, the Office of Emergency Management ("NJOEM")—which the Governor expressly authorized to issue further limits in response to this

emergency—added barbershops, hair salons, nail salons, spas, and tattoo parlors to the list of closed services. *See* NJOEM Admin. Order 2020-02.

In light of developing information on COVID-19, and as the crisis continued to worsen, on March 21, 2020, Governor Murphy issued Executive Order 107, which superseded EO 104 in full and established at least two relevant requirements. First, the Order required "[a]ll New Jersey residents shall remain home or at their place of residence," unless they were leaving their home for any of nine enumerated reasons. *See* N.J. Exec. Order 107 ("EO 107") ¶ 2 (permitting individuals to, *inter alia*, leave "for an educational, religious, or political reason"). Second, EO 107 mandated that a variety of businesses close their premises to members of the public. The Order said that "[t]he brick-and-mortar premises" of "retail businesses must close to the public as long as this Order remains in effect," but that certain "essential" retail stores—including pharmacies, grocery stores, and medical supply stores—could stay open. *Id.* ¶ 6. The Order also required the closure of all "recreational and entertainment businesses" to the public, *id.* ¶ 9, and it mandated that restaurants and bars be limited to take-out and delivery, *see id.* ¶ 8. The recreational and entertainment businesses that had to close their premises to the public included theatres and cinemas.[2]

[2] To be clear, and contrary to Plaintiffs' repeated statements in their brief, the State never ordered houses of worship to close.

Because these restrictions helped limit the community spread of COVID-19 in New Jersey and reduce statewide rates of infection and hospitalizations, in May the Governor announced "New Jersey's Road Back Plan"—a gradual Plan designed to reopen the State while preventing deaths and cases of the virus from surging. Ex. M. The Governor has taken multiple steps to achieve that goal, each time focusing on the level of risk presented, and the benefits to the public of reopening.

First, the Governor has taken a number of steps to reopen all outdoor premises, including (among other actions) opening state parks, allowing curbside pickup at all retail establishments, authorizing recreational and entertainment business to open up their outdoor premises to the public, and allowing restaurants and bars to serve their patrons in outdoor spaces. *See, e.g.*, N.J. Exec. Orders 133 (Apr. 29, 2020), 142 (May 13, 2020), 150 (June 3, 2020), and 153 (June 9, 2020). As the State explained, these decisions reflect the "repeated observations from public health experts, including but not limited to the CDC, that outdoor environments present reduced risks of COVID-19 transmission as compared to indoor environments." N.J. Exec. Order 148, pp. 3-4. Indeed, there is significant evidence that outdoor environments are far safer when it comes to the spread of COVID-19. *See* Ex. N (CDC Guidance noting that "[i]ndoor spaces are more risky than outdoor spaces where it might be harder to keep people apart and there's less ventilation" and recommending individuals "[c]hoose outdoor activities and places"); Ex. O (concluding "[t]he virus is harder to transmit outdoors

because the droplets that spread it are more easily disturbed or dispersed outside in the elements than in a closed, confined, indoor setting"); Ex. P.

The Governor next turned to indoor premises that presented reduced risks of COVID-19 spread. Effective on June 15, the State authorized "the brick-and-mortar premises of non-essential retail businesses that were closed to the public" to reopen, subject to strict capacity and sanitization limits. N.J. Exec. Order 150 ¶ 8. The State explained why it was authorizing indoor retail, but not recreation, to reopen at that time: "indoor recreation typically involves individuals congregating together in one location for a prolonged period of time, while in indoor retail settings, individuals [do not] remain in close proximity for extended periods." EO 153 p.4 & ¶¶ 8, 11. Indeed, as significant evidence showed, the fleeting interactions that take place in a retail setting present lower risks of COVID-19 spread. *Compare* Ex. Q (analyzing IMDB information to conclude movies average 100-120 minutes, not including pre-movie seating time), *with* Ex. R (average pharmacy visit less than 20 minutes and average grocery trip 41 minutes). Still, to promote public health, the State ordered all customers to wear masks at all times. *See* N.J. Exec. Order 122 ¶ 1(k).

After permitting retail to reopen, the Governor focused on indoor activities that did not have a good alternative outdoors, and thus where the costs to the general public of the closures were especially significant. On June 13, the Governor issued Executive Order 154 ("EO 154"), which permitted personal care service facilities

(*e.g.*, cosmetology shops, barber shops, beauty salons, spas, and tanning salons) to reopen as of June 22, subject to strict standards issued by the Department of Health and the Division of Consumer Affairs. *See* EO 154 at ¶ 1. This Order again provided a number of independently sufficient reasons to explain why personal care service facilities could reopen their premises to the public even while indoor recreation and entertainment businesses, dining establishments, and gyms and fitness centers could not: "unlike other indoor activities, personal care services 1) typically do not have an outdoor alternative, 2) can be conducted with limited and controlled interactions, as opposed to in an uncontrolled environment, and 3) can be conducted with both staff and clients wearing masks at nearly all times." *Id.* at 4.

Finally, the Governor turned to indoor premises where the risk of sustained person-to-person interaction is especially high—*i.e.*, recreational and entertainment businesses, and restaurants and bars. Given the progress that New Jersey had made in reducing COVID-19's spread, the Governor determined that "most recreational and entertainment businesses can now allow the public into their indoor spaces for activity," N.J. Exec. Order 157 ("EO 157") at p.3, and he allowed them to do so (at an especially reduced capacity and with a requirement that patrons wear masks at all times) effective on July 2, *id.* ¶ 7. But, as the Governor made clear, certain premises still had to be closed to the general public, including indoor gyms and fitness centers; restaurants and bars; and "performance-based locations such as movie theaters,

performing arts centers, and other concert venues." *Id.* at p.4.[3] The Governor also explained why performance-based locations had to stay closed, reflecting the same public health principles on which he had consistently relied: (1) such "businesses necessitate a large number of individuals congregating together concurrently in one indoor location for an unusually prolonged period of time, even more so than in other recreational and entertainment businesses where individuals do not inherently spend as prolonged an amount of time together in one single room"; and (2) "there are an especially high number of available outdoor and virtual options for members to the public to view and listen to movies and other performances, whether live or otherwise, that reduce the risk of indoor person-to-person contact." *Id.* at p.5.

At the same time, the Governor has also relaxed the limits on gatherings, *i.e.*, the limits imposed on the number of people who can gather together at a common time and for a common purpose. (In other words, gatherings rules limit the number of persons at an event no matter whether hosted by a business that was once closed, like a screening at an outdoor movie theatre, or on a premises that was never closed, like a service at a house of worship or a birthday party at an individual's home.) For

[3] To be precise, gyms and fitness centers were allowed to open to the public in truly limited fashion, namely to "offer individualized indoor instruction by appointment only where an instructor is offering training to an individual, and the individual's immediate family members, household members, caretakers, or romantic partners." *Id.* ¶ 10. And although EO 157 announced indoor restaurants and bars could reopen, the Governor instead indefinitely paused that reopening in Executive Order 158, in light of the spike in COVID-19 cases tied to such establishments in other states.

months, the Governor maintained a strict limit on the number of persons who could participate in a gathering, whatever its purpose, limiting groups to 10 persons. *See* EO 107 ¶ 5 (imposing limits on gatherings); *see* NJOEM Administrative Order 2020-04 (clarifying 10-person limit). But at the same time as the State was relaxing limits on business closures, the Governor was relaxing these separate gatherings limits too. The current limits on gatherings for indoor premises are 25 percent of the capacity of the room or 100 persons (whichever is lower), again with participants all wearing their masks, and the limit in outdoor spaces is 500 persons. *See* N.J. Exec. Order 152 ¶ 1; N.J. Exec. Order 161 ¶ 1. The Governor also recognized the rules for *outdoor* gatherings for services and political activity should be relaxed even further, such that no numerical cap applies, because they are "particularly important to the functioning of the State and of society." *See* EO 152 at p.4 & ¶ 2. But no exception was made to the gatherings rules indoors, given the health risks presented in the context.

C. Recent Spikes In COVID-19 And Progress In New Jersey

New Jersey's cautious reopening plan has proven fortuitous in recent weeks, as the State has avoided the COVID-19 spikes emerging throughout the Nation. *See, e.g.*, Ex. S; Ex. T (New Jersey among the 12 states with the lowest risk levels, with all remaining states either in an "active or imminent outbreak" or "at risk" of one). The past two weeks have been especially striking: "[i]n comparing the week of June 28-July 5 to the following week, July 5-12, just six states saw their number of new

coronavirus cases drop," and "in comparing July 5-12 to July 12-19, only nine states had a new caseload below that of the prior week." Ex. U. The *only* state that saw its cases drop in both weeks was New Jersey. *See id.* (including chart showing, in same time period, weekly increases as high as 163 percent in one state, and weekly increases of more than 50 percent in 12 other states).

In light of the surging COVID-19 cases and hospitalizations, other states are beginning to take more preventative measures, either hitting pause on any reopening efforts or issuing new closure orders altogether. *See, e.g.*, Ex. V. Recently, California ordered all counties in the state to close bars and the indoor operations of restaurants, museums, and movie theaters. *See* Ex. W; *see also* Ex. X (Governor Newsom noting that such closures were being ordered because "COVID-19 continues to spread at an alarming rate"). Other states, including New York, North Carolina, New Mexico, Arizona, Maryland, and South Carolina, have also halted the reopening of movie theatres and other closed businesses. *See, e.g.*, Ex. Y; Ex. Z (part of North Carolina's "Extension of Phase 2 Measures to Save Lives in the COVID-19 Pandemic"); Ex. AA (North Carolina keeping indoor movie theaters closed for further time "because the spread of COVID-19 can be significant there"); Exs. BB-DD.

D. Plaintiffs' Lawsuit

This lawsuit involves claims brought by a collection of movie theatre owners, the National Association of Theatre Owner, National Association of Theatre Owners

of New Jersey, American Multi-Cinema ("AMC"), Cinemark USA ("Cinemark"), Regal Cinemas ("Regal"), BJK Entertainment, Bow Tie Cinemas ("Bow Tie"), and Community Theaters. Plaintiffs AMC, Regal, Cinemark, and Bow Tie closed their theatres nationwide in mid-March, and at one point claimed an intent to reopen as many theatres as possible at the end of July—a plan at least three of them since have put on hold. Exs. DD-GG. Plaintiffs filed their Complaint on July 6, 2020, or about sixteen weeks after EO 104 went into effect. Dkt. 1. The six claims stated in the Complaint are as follows: violations of the Equal Protection Clause (First Claim for Relief); violations of freedom of speech and expression under the First Amendment (Second Claim); violations of the Due Process Clause (Third Claim); violations of the Takings Clause (Fourth Claim); and violations of the New Jersey Constitution (Fifth and Sixth Claims). Dkt. 1 at ¶¶ 46-80.

Seven days later, on July 13, 2020, Plaintiffs filed an order to show cause seeking temporary and preliminary restraints. Dkt. 19. This Court denied the demand for temporary restraints, noting that "Plaintiffs' moving papers demonstrate they had ample opportunities to file a request for a Temporary Restraining Order after the Governor's initial executive order, subsequent modifications thereto, and the filing of this complaint." Dkt. 22 ¶ 2. This Court added that as Plaintiffs filed this motion, "states that initially ordered the re-opening of indoor movie theaters have once again ordered their closure in response to rising COVID-19 infection numbers." *Id.*

STANDARD FOR PRELIMINARY INJUNCTION

"[T]he grant of injunctive relief," courts have explained, "is an extraordinary remedy which should be granted only in limited circumstances." *Truck Ctr., Inc. v. Gen'l Motors Corp.*, 847 F.2d 100, 102 (3d Cir. 1998); *see also, e.g., Adams v. Freedom Forge Corp.*, 204 F.3d 475, 487 (3d Cir. 2000) (the "dramatic and drastic power of injunctive force may be unleashed only against conditions generating a presently existing actual threat"). "Such stays are rarely granted" in the Third Circuit because "the bar is set particularly high." *Conestoga Wood Specialties Corp. v. Sec. of U.S. Dep't of Health & Human Servs.*, 13-144, 2013 WL 1277419, *1 (3d Cir. Feb. 8, 2013). To grant preliminary injunctive relief, the court must first determine whether these factors are met:

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

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

The moving party always has the burden of "meet[ing] the threshold for the first two 'most critical' factors." *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017). And even if the moving party satisfies those first two tests, a court must still "consider[] the remaining two factors"—the balance of the equities and public interest—"and determine[] in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief." *Kos Pharms*, 369 F.3d

at 708. Finally, "[a] party seeking a mandatory preliminary injunction that will alter the status quo bears a particularly heavy burden in demonstrating its necessity." *Lane v. New Jersey*, 725 F. App'x 185, 187 (3d Cir. 2018) (citation omitted).

ARGUMENT

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

I. PLAINTIFFS WILL NOT SUCCEED ON THE MERITS.

The Supreme Court has long established that during an emergency, the State's regulations are subject to especially deferential review. As a result, this Court should uphold New Jersey's closure of movie theatres, which promote the public's health, so long as there is no plain or palpable invasion of constitutional rights. Here, there is no such plain violation; to the contrary, New Jersey's approach easily withstands traditional First Amendment and Equal Protection scrutiny.

A. The State Is Entitled To Deference In Its Emergency Response.

For over a century, the Supreme Court "has distinctly recognized the authority of a State to enact … quarantine laws and 'health laws of every description,'" derived from the States' "police power" to "protect the public health and the public safety." *Jacobson v. Massachusetts*, 197 U.S. 11, 24-25 (1905); *see also, e.g., Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health*, 186 U.S. 380, 387

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

Courts since *Jacobson* have reaffirmed the rule that, although an individual's constitutional rights do not disappear during a health crisis, they can be reasonably curtailed. *See, e.g.*, *United States v. Caltex*, 344 U.S. 149, 154 (1952) (holding that the sovereign may take steps "in times of imminent peril" that would not otherwise be permissible); *United States v. Chalk*, 441 F.2d 1277, 1280 (4th Cir. 1971) (adding that "[t]he invocation of emergency powers necessarily restricts activities that would normally be constitutionally protected"); *Hickox v. Christie*, 205 F. Supp. 3d 579, 584, 591-92 (D.N.J. 2016) (in addressing a quarantine to limit the spread of Ebola, finding states have "broad discretion" in protecting public health); *In re Abbott*, 954

F.3d 772, 778 (5th Cir. 2020) (holding that "when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights," and that while courts may ask whether the laws are unconstitutional "beyond all question" and whether they "are pretextual" and/or "arbitrary or oppressive," the courts "may not second-guess the wisdom or efficacy of the measures").

The Supreme Court, in *South Bay United Pentecostal Church*, has similarly made clear the importance of allowing states some flexibility as they respond to the spread of COVID-19. In a concurring opinion that explained why the Court was rejecting a First Amendment challenge by churches to the limits on their worship services, this Chief Justice explained that COVID-19 had "more than 100,000 [cases] nationwide," and that the restrictions at issue sought "to address this extraordinary health emergency." 140 S. Ct. at 1613 (Roberts, C.J., concurring). It follows, he explained, that federal courts must afford states significant deference when adopting emergency measures to limit the virus's spread:

> The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson*, [197 U.S. at 38]. When those officials "undertake[] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall v. United States*, 414 U.S. 417, 427 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people.

Id. Another judge of this Court, relying on the Chief Justice's concurrence, has made exactly the same point in rejecting a challenge to another one of New Jersey's orders. *See* Ex. HH at T71:20-23 (Judge Kugler noting that the need to defer to state elected officials is especially great "when the facts on the ground are constantly changing," just as they are in this unfolding public health crisis).[4]

Plaintiffs' claims that *Jacobson* does not apply here are unavailing. Court after court, and jurist after jurist, have recognized that COVID-19 is the very sort of crisis that calls for deference to the State as it makes the tough calls regarding what costs to bear, and what unprecedented actions to take, in order to save lives. *See League of Independent Fitness Facilities & Trainers v. Whitmer*, No. 20-1581, 2020 WL 3468281, *2 (6th Cir. June 24, 2020) (noting "the police power retained by the states empowers state officials to address pandemics such as COVID-19 largely without interference from the courts," and adding that "[t]his century-old historical principle has been reaffirmed just this year by a chorus of judicial voices"). Plaintiffs say only that these cases confronted "neutral" laws, evidently unlike New Jersey's rules, *see* Dkt. 19-2 at 16-17, but the Supreme Court recognized that these laws distinguished

[4] Even before the Chief Justice's opinion, courts had recognized the application of *Jacobson* to restrictions that burden First Amendment conduct. *See, e.g., Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) (holding that "[t]he right to practice religion freely does not include liberty to expose the community ... to communicable disease"); *In re Abbott*, 954 F.3d at 778 (finding that constitutional rights could be reasonably restricted as public health and safety may demand, including "one's right to peaceably assemble").

between different industries based on the activities that took place. *See S. Bay United Pentecostal Church*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (noting orders at issue allowed for greater opening of "grocery stores, banks, and laundromats" than for activities "where large groups of people gather in close proximity for extended periods of time"). Those cases even involved laws that allowed houses of worship to open while other indoor premises like theatres were still closed—the very feature Plaintiffs say make this law non-neutral. *See id.* (noting that compared to churches, "[s]imilar *or more severe* restrictions apply to … lectures, concerts, movie showings, spectator sports, and theatrical performances" (emphasis added)); *see also* Ex. UU (noting that movie theaters were not allowed to begin reopening in California until June 8, 2020, which was after the Court's decision in *South Bay*).

The limited number of cases on which Plaintiffs rely for the proposition that *Jacobson* does not apply are not to the contrary. First, although a single court in *Jew Ho v. Williamson*, 103 F. 10, 26 (C.C.D. Cal. 1900), invalidated San Francisco's quarantine of its Chinatown district, San Francisco lacked evidence that the bubonic plague was a continued threat there, whereas COVID-19 clearly remains a serious threat in New Jersey and across the United States, and the city was targeting residents of Chinese national origin, reflecting xenophobia rather than public health policy. *See Hickox*, 205 F. Supp. 3d at 592 & n.4 (distinguishing the quarantine order in *Jew Ho* for exhibiting "a lamentable tinge of xenophobia"). While New Jersey's orders

distinguish between businesses, the distinctions are justifiable and consistent with law, *see* Part I.D, *infra*, and do not reflect animus. Second, reliance on *First Baptist Church v. Kelly*, 20-1102, 2020 WL 1910021 (D. Kan. Apr. 18, 2020), is misplaced, because that decision predates the Supreme Court's rejection of a nearly-identical challenge in *South Bay United Pentecostal Church*, and no case has followed *First Baptist*'s reasoning since then. And finally, *Camelot Banquet Rooms, Inc. v. U.S. S.B.A.*, No. 20-601, 2020 WL 2088637 (E.D. Wis. May 1, 2020), is irrelevant to the question of the State's leeway in abating a public health crisis, because that decision concerned regulations prohibiting approval of payroll loans to plaintiff's nightclub, not measures actually designed to stop the spread of the virus. *See id.* at *2 (quoting 13 C.F.R. § 120.110(p)). This case, by contrast, directly relates to New Jersey's emergency response, the zenith of *Jacobson* deference.

B. The Closure Of Movie Theatres Promotes Public Health.

As explained above, the first question this Court must ask is whether the law has a "real or substantial relation" to its object of protecting public health. That is an easy question: the closure of movie theatres limits the spread of COVID-19.

As another federal court noted in rejecting a challenge to the closure of movie theatres, "[i]t takes only a moment of rational speculation to discover conceivable support for the continued closure of indoor movie theaters." *CH Royal Oak, LLC v. Whitmer*, No. 20-570, 2020 WL 4033315, *6 (W.D. Mich. July 16, 2020). There is

no question that COVID-19 spreads via person-to-person contact, and that "people may be infected but asymptomatic, [so that] they may unwittingly infect others." *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613 (Roberts, C.J., concurring). Nor can there be any question that the business model for theatres "necessitate[s] a large number of individuals congregating together concurrently in one indoor location for an unusually prolonged period of time," such that a single group of persons remains seated in the same closed-circulation, confined room for hours at a time. *See* EO 157 at p.4. Indeed, the average film length is approximately 90 minutes, and the average time for the most popular movies is 120 minutes, all of which excludes the time for previews, meaning individuals are sitting in the same confined common-air indoor environment for an unusually long period. *See* Ex. II (noting that "[o]f the ten films nominated for best picture in 2016, eight were over two hours long"). And sharing a closed-air, confined indoor room for that extended period is exactly the scenario in which COVID-19 most easily spreads. *See* Exs. N & P; *CH Royal Oak*, 2020 WL 4033315, *6 ("Movie theaters present large, sustained, indoor gatherings. This is the type of event the CDC cautions against holding.").

A number of other features make movie theatres especially risky vectors for spread of COVID-19. For one, as experts have noted, "[f]or 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." Ex. JJ. Still

more, the heavy use of air conditioning in theatres presents another problem, as the "forced air could increase the risk for transmission." *Id.*; *see also* Ex. KK (scientific report discussing COVID spread and air conditioning). And crucially, although mask wearing remains essential to limiting COVID-19's spread, "especially in enclosed, air-conditioned locations," there is simply "no way that theaters can enforce the use of masks when the lights go down and the movie begins." Ex. JJ; *see also id.* (noting "[e]pidemiologists worry that lax mask policies and air-conditioning could lead to increased transmission of the coronavirus"). Those risks are further magnified when movie theatres offer concessions, which Plaintiffs plan to do, *see* Dkt. 21-2 (noting protocols for concession sales), which require the movie theatres' patrons to remove masks for extended periods of time while eating and drinking. Movie theatres seem to believe that they, alone, should be able to allow patrons to remove their masks to enjoy food and beverage indoors, notwithstanding the State's and the experts' well-founded recommendations and requirements regarding masks.

It should thus come as no surprise that many experts and states have concluded that theatres cannot be open while COVID-19 presents such a weighty threat. Indeed, as a journalist recently noted after canvassing epidemiologists, "[i]nfectious disease experts think it's too soon for consumers to return to movie theaters." Ex. JJ; *see also id.* (quoting infectious disease specialists stating "I'm not comfortable going to the movies right now," and "[r]ight now it's too soon to go to a movie theater," and

advising people to watch movies at drive-in theatres or in their homes). The Texas Medical Association, to take one example, published a chart this month detailing the relative risks of various indoor activities, categorizing "going to a movie theatre" as one of the highest risk activities in which residents could engage. *See* Ex. LL. And that is why certain states that had reopened a broader array of indoor premises more quickly than New Jersey, and are confronting spikes in COVID-19 hospitalizations, are pausing reopening of theatres or shutting them once again. *See* Exs. V-DD.

Plaintiffs respond that they have identified other evidence suggesting movie theatres will not be too risky in light of their "proposed protocols," which they deem to be "more health-protective" than those required for other businesses permitted to stay open or reopen. *See* Dkt. 21-2 at 10. That response suffers from two fatal flaws. First, to the degree there is disagreement among the experts or some open questions in the data, the point of *Jacobson* and *South Bay United Pentacostal Church* is that the State's elected officials, rather than Plaintiffs or a federal court, must sift through the evidence to decide what social distancing measures are sufficient to permit movie theatres (like any business) to reopen. *See, e.g.*, Ex. HH at T71:20-23 (Judge Kugler finding that "judges, have no special expertise in these kinds of situations, and we're not answerable to the people because we're Article III judges, so we must defer to what the State is trying to do"). And there is enough evidence, described above, to justify the expert recommendations to keep theatres closed.

Second, Plaintiffs' own evidence does not sufficiently support their cause. For one, Plaintiffs' evidence is non-responsive to some of the problems identified above, especially the challenges enforcing mask compliance in a dark theatre, as well as the problem of patrons removing masks to consume concessions. For another, Plaintiffs' material includes evidence that undermines their case. The Johns Hopkins report on which they rely begins with the caveats that "[t]here is no one-size-fits-all approach to reopening," and that "State-level decision makers will need to make choices based on the individual situations experienced in their states, risk levels, and resource assessments"—exactly what New Jersey says should happen here. Dkt. 21-3, Ex. O at 3. That same report also notes it is relying on qualitative assessments rather than validated data, because the latter does not exist, *id.* at 11, which only confirms the presence of scientific uncertainty that, federal courts have repeatedly held, demands deference to the State. And strikingly, the report actually notes that movie theatres involve greater contacts between patrons than other premises the State still requires to remain closed to the public, like restaurants and gyms. *Id.* at 12.

At bottom, New Jersey's decision to keep theatres closed for now is justified by sufficient expertise and evidence, and it should not be disturbed.

C. The Closure Of Indoor Movie Theatres To Limit The Spread Of COVID-19 Does Not Violate The First Amendment.

Notwithstanding the link between these Orders and public health, Plaintiffs claim the temporary closure of indoor theatres reflects an impermissible restriction

on their speech rights and thus violates the First Amendment. Plaintiffs are mistaken: the closure of movie theatres to advance the public health goal of limiting the spread of COVID-19 does not implicate the First Amendment at all. And even if it did, the closure order would easily withstand First Amendment review.

First, although the State readily agrees that movies are protected speech, and that their presentation, whether or not in movie theatres, falls within the contours of the First Amendment, *see, e.g.*, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952), Plaintiffs' claim that the First Amendment addresses *any* act affecting the premises at which movies are offered is a bridge too far. Indeed, although Plaintiffs fail to mention it, the Supreme Court's decision in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), rejected precisely that way of thinking. That case concerned a New York law that said any building in which "prostitution, lewdness, and assignation" is permitted to occur was a nuisance and would be subject to closure for one year. *Id.* at 698-99. Based on that law, the State closed the premises of a bookstore for one year, not because of the sexually-explicit books the store sold, but because its owner permitted "instances of solicitation of prostitution." *Id.* The store made a claim like the one plaintiffs press here, that the "closure of the premises would impermissibly interfere with their First Amendment right to sell books on the premises." *Id.* at 700. But the Court rejected this argument. As the Court explained, the First Amendment was not implicated at all because the "legislation providing the closure sanction was

directed at unlawful conduct having nothing to do with books or other expressive activity." *Id.* at 707. Because the First Amendment is implicated only when it is the "conduct with a significant expressive element *that drew the legal remedy in the first place*," *id.* at 706 (emphasis added), it was not implicated by this law.

The Court explained why this was the only sensible result. As it put the point, the store's argument that such non-speech regulation still triggered heightened First Amendment scrutiny whenever it was imposed upon a book store or a movie theatre "proves too much, since every civil and criminal remedy imposes some conceivable burden on First Amendment protected remedies." *Id.* at 706; *see also id.* (noting that courts "have not traditionally subjected every criminal and civil sanction imposed through legal process to 'least restrictive means' scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction"). And in language directly relevant to this action, the Court thus explicitly held that the "First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which [stores] happen to sell books." *Id.*

Third Circuit precedent is in accord, repeatedly noting that First Amendment scrutiny is not required for any government action to address a concern unrelated to regulating speech, even when that action has a consequence of limiting expression. *See, e.g.*, *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 438

(3d Cir. 2000) (finding courts have "required a close relationship between the state action and the effected expressive activity to find a constitutional violation"); *Associated Film Distribution Corp. v. Thornburgh*, 800 F.2d 369, 374 (3d Cir. 1986) (noting need for plaintiffs to show "the inference of a goal to suppress expression"). And other circuits have reached the same result. *See, e.g.*, *Int'l Franchise Ass'n v. City of Seattle*, 803 F.3d 389 (9th Cir. 2015) (First Amendment not implicated by an ordinance providing that certain franchises operating under a marketing plan—a type of speech—are required to pay minimum wage); *Wright v. St. Petersburg*, 833 F.3d 1291 (11th Cir. 2016) (noting First Amendment not implicated by ordinance banning a minister from a park for one year for a trespass violation).

This case fits perfectly within that framework. Whatever may be said about the merits of the State's approach—and as explained above, this law is in fact needed to promote public health—there can be little doubt that the "expressive element" of movie theatres is *not* what drew the legal closure order in the first place. There is no evidence in the record that movie theatres or performance venues are being targeted in the Orders based on the movies they show. Instead, both the Orders and the record evidence make clear that the State is targeting the spread of a dangerous disease, and it is doing so by limiting person-to-person contact, especially the extended person-to-person contact occurring in confined indoor spaces that happens at performance venues. That is precisely the kind of law *Arcara* allows.

There is still more evidence that the closure of indoor movie theatres to limit the spread of COVID-19 is consistent with the First Amendment—the alternatives available. In *Arcara* itself, the Court held that the one-year closure of the bookstore was "mitigated by the fact that respondents remain free to sell the same materials at another location," which provided additional evidence that the State was targeting the harms at the premises of the bookstore and not anything about the content of the books themselves. *See* 478 U.S. at 705-06.[5] So too here. Although the State ordered the closure of any indoor movie theatres to limit the spread of COVID-19, it has not ordered any limits on any particular movie, or class of movie, all of which could be shown at drive-in movie theatres and other outdoor movie screenings, on streaming services, or via rented DVD. In other words, the State is addressing the risk to public health of indoor movie theatres, not the movies themselves.

Plaintiffs' response is passing strange. According to Plaintiffs, it matters not that "the public can watch Movie A online (or at New Jersey's sole drive-in theatre)" because that is no excuse to "forbid the exhibition of Movies B, C, D, and E." Dkt. 19-2 at 23. The State agrees, of course, but it has nothing to do with this case. Rather,

[5] This language undermines Plaintiffs' claims that "[t]he State lacks any authority to close off a normal venue for expression based on the assertion there are other ways to communicate" and that "[a]ny such suggestion" by the State would be "frivolous." *See* Dkt. 21-2 at 23. To the contrary, the fact that the State is allowing movies to be watched in a wide range of contexts with reduced COVID-19 risks confirms that the State is focused on the spread of COVID-19, rather than on the regulation of movies, and thus that the First Amendment is not implicated under *Arcara*.

the State's point is that the public could watch Movie A *and* Movies B, C, D, and E online, outdoors, at a drive-in theatre, or by renting a video, whatever the expressive content contained. And if what Plaintiffs mean is that they are unable, or unwilling, to profit from showings of Movies B-E other than inside their indoor movie theatres, or that movie distributors do not wish to release Movies B-E until theatres are open, that does not change the analysis, because the State is not restricting the exhibition of those movies and it instead reflects economic choices of third parties. *See Young v. Am. Mini Theatres*, 427 U.S. 50, 77-78 (1976) (Powell, J., concurring) (noting that "the inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of [the law] upon freedom of expression").[6]

Of course, as *Arcara* also recognized, the State cannot "single out bookstores or others engaged in First Amendment protected activities" for imposition of neutral rules as a backdoor to shutting down expressive conduct it opposes. 478 U.S. at 705. After all, as the Court explained, it would not do for the State to be able to close any premises "as a pretext for suppression of First Amendment protected expression."

[6] *Arcara* also directly responded to Plaintiffs' claims that such closures are a "blanket prior restraint." *See* 478 U.S. at 705 n.2. As the Court explained, New York's "order would impose no restraint at all on the dissemination of particular materials, since respondents are free to carry on their bookselling business at another location, even if such locations are difficult to find." *Id.* Further, the Court went on, the Order was "not be imposed on the basis of an advance determination that the distribution of particular materials is prohibited—indeed, the imposition of the closure order has nothing to do with any expressive conduct at all." *Id.* That is all true here as well.

Id. at 707 n.4. (That helped to explain why the Court had, a mere three years earlier, invalidated a special use tax, "without parallel in the State's tax scheme," "on the cost of paper and ink products consumed in the production of a publication," which inappropriately "single[d] out the press." *Minneapolis Star & Tribune Co. v. Minn. Commissioner of Revenue*, 460 U.S. 575, 577, 582 (1983).) But these orders reflect a general effort to reduce the spread of COVID-19 by limiting the locations at which significant person-to-person interaction happens, and then to reopen premises based on the risks presented. As it stands right now, the State's closures include a range of high-risk indoor locations, including gyms and fitness centers, restaurants and bars, and concert halls and performing arts centers, in addition to movie theatres. *See CH Royal Oak*, 2020 WL 4033315, *5 (noting, in evaluating similar order, that "nothing in the EO singles out expressive activity or has the effect of singling out expressive activity"). In short, this public health rule never targets the expressive elements of theatres, but instead imposes burdens on theatres and other industries in line with the risks they present. Plaintiffs cannot conjure up a First Amendment claim by "merely linking the words [COVID-19] and [movies]." *Arcara*, 478 U.S. at 705.

Even if this Court believes that it must engage in a First Amendment analysis, EO 157 passes muster. Because this Order is "unrelated to the content of speech," it is "subject to an intermediate level of scrutiny," *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994), meaning that the law must be "narrowly tailored

to serve a significant governmental interest" and must "leave open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). This Court must thus uphold the Order "if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997).[7]

There can be no serious doubt that preventing COVID-19's spread is not only a significant governmental interest, but a compelling one. *See CH Royal Oak*, 2020 WL 4033315, *5 (making this point in rejecting another challenge to the closure of movie theatres). And by keeping only indoor movie theatres closed, which present the heightened risks described above, the State avoided burdening substantially more expression than necessary. *See id.* (noting that "the government interest of protecting the public from the coronavirus would be achieved less effectively if large groups were permitted to gather for sustained periods in movie theatres"); *cf. also Givens v. Newsom*, 20-852, 2020 WL 2307224, *6 (E.D. Cal. May 8, 2020) (adding that this tailoring requirement "in the context of a public health crisis is necessarily wider

[7] A law is content neutral even if it "singles out a certain medium," so long as "the differential treatment is 'justified by some special characteristic' of the particular medium being regulated." *Turner Broad. Sys.*, 512 U.S. at 660-61 (citation omitted). The closure of indoor movie theatres obviously fits that bill; Plaintiffs do not dispute that indoor venues present a higher risk of COVID-19 than their outdoor, drive-in, and/or virtual counterparts.

than usual"). Moreover, by closing only indoor theatres, New Jersey "leaves open ample alternative methods of communication" for the expressive ideas contained in movies. *CH Royal Oak*, 2020 WL 4033315, *6. That is why the only district court to consider an analogous challenge to the closure of movie theatres upheld the law against a First Amendment attack, and why this Court should do the same.

D. The Closure Of Indoor Movie Theatres To Limit The Spread Of COVID-19 Does Not Violate The Equal Protection Clause.

Perhaps because Plaintiffs have no freestanding right to reopen in light of the public health risks, Plaintiffs' preliminary injunction application focuses primarily on their Equal Protection Claim (Dkt. 1, First Claim for Relief), arguing that because the State allowed other premises to reopen, this Court must allow indoor theatres to reopen as well. In particular, Plaintiffs claim that indoor theatres cannot be made to close so long as "churches, libraries, and shopping centers are allowed to open." Dkt. 19-2 at 22. But Plaintiffs are wrong on the law and on the facts.

As a threshold matter, Plaintiffs misstate the standard of review that applies. As has long been established, rational basis review applies in "areas of social and economic policy" that do not distinguish based upon suspect lines. *L.A. v. Hoffman*, 144 F. Supp. 3d 649, 675 (D.N.J. 2015); *see also Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 426 (2010) (regulation of business operations does not "impinge on fundamental rights"); Ex. MM at T34:13-35:7 (Judge Kugler explaining that rational basis applies to equal protection claim by gym closed by New Jersey's emergency

orders). Plaintiffs think that the rule is different for regulations that govern movie theatres on the basis that theatres are "'included within the free speech and free press guaranty of the First and Fourteenth Amendments.'" Dkt. 21-2 at 19 (quoting *Joseph Burstyn*, 343 U.S. at 502). But as explained, the Supreme Court rejected that way of thinking in *Arcara*, and it is no stronger when repackaged as a basis for strict scrutiny under the Equal Protection Clause. *See* Part I.C, *supra*. For good reason: Plaintiffs' position, if true, would mean that any statute that impacts movie theatres differently than another business would be subject to strict scrutiny review, no matter that a law has nothing to do with movies themselves. Instead, when it comes to a State's health law, rather than a speech restriction, movie theatres are treated like other businesses and their equal protection claims trigger only rational basis review.

Under rational basis review, state laws are "presumed to be valid and will be sustained if the classification drawn … is rationally related to a legitimate state interest." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Under this test, the challengers to a "classification have the burden 'to negat[e] every conceivable basis which might support it,'" *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (citation omitted), and the State could respond even with "rational speculation," in addition to evidence or empirical data. *Cabrera v. AG United States*, 921 F.3d 401 (3d Cir. 2019) (citation omitted). Further, the "classification does not fail rational basis review because it is not made with mathematical nicety or because

in practice it results in some inequality," and may instead be under-inclusive and/or over-inclusive. *Heller v. Doe*, 509 U.S. 312, 321 (1993).

New Jersey's classifications easily clear that bar. Plaintiffs' leadoff argument, that movie theatres must be open when houses of worship are open, suffers from two fatal flaws: the two are not analogous in key ways, and in any event, the Constitution allows the State to protect individuals' religious exercise. With respect to the former, the health risks associated with indoor religious worship and indoor theatres are not the same. Although both involve individuals congregating in a single room, the dark environment of theatres makes enforcement of a mask mandate more difficult than at a religious worship service. Moreover, it takes less time for an individual to briefly remove her mask to accept communion (or sip wine, or engage in any other religious practice) than it does for that person to remove her mask to eat popcorn or consume other concessions that Plaintiffs intend to sell.

Far more importantly, the benefits of reopening movie theatres and houses of worship differ as well. Plaintiffs do not seriously dispute that movies can be watched safely at home and at a drive-in theatre, which is an important consideration for the State in deciding which indoor premises must be open. *See* Exs. NN-PP. Plaintiffs nevertheless argue that this is not a "logical" way to distinguish between churches and theatres, because (they say) these alternatives are equally available for houses of worship. That would come as quite a surprise, however, to those who believe their

faith commands them to worship in person with their coreligionists. *See Employment Division v. Smith*, 494 U.S. 872, 877 (1990) (recognizing religious exercise "often involves" the "performance of physical acts" such as "assembling with others for a worship service"). One only has to compare the lawsuits filed against New Jersey's emergency orders by churches, *see, e.g.*, Exs. QQ & RR, with the record here, to see this is so: the former proffered multiple declarations regarding the commandments of in-person communal worship, while Plaintiffs do not (and cannot) certify that the expressive elements of movies could only be experienced inside of a theatre. (To the contrary, some of the plaintiffs themselves offer streaming services. *See* Exs. V & SS.) In light of the distinct risks and benefits of reopening, the State had ample basis to distinguish between houses of worship and theatres.

Even if this Court disagrees with the State's well-supported determination that houses of worship and movie theatres are dissimilarly situated, it still cannot grant Plaintiffs the relief that they seek for another reason: the State is allowed to accord greater protection to religious activity. In upholding a statute that protected religious liberty rights of inmates and institutionalized persons, but did not speak to their other rights, the Supreme Court found that "[r]eligious accommodations … need not come packaged with benefits to secular entities." *Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005) (citation omitted); *see also id.* (concluding that "[t]here is no requirement that legislative protections for fundamental rights march in lockstep," and in the process

rejecting the idea that states cannot "giv[e] greater protection to religious rights than to other constitutionally protected rights"). Were it otherwise, the Court added, "all manner of religious accommodations would fall," and a state would have to provide inmates with "publicists and political consultants" anytime they allowed inmates to meet with chaplains. *Id.* at 724-25. Plaintiffs' claim that movies and worship cannot be distinguished runs afoul of that same rule; it follows logically from their position that inmates must be provided time to watch movies as a group if any other inmates are permitted to engage in communal prayer. Simply put, as a matter of black-letter First Amendment law, the State does not have to allow a couple a night out to watch Tenet simply because it is also protecting their right to freely worship.[8]

Plaintiffs' assertions that all performance-based venues must be open because libraries and shopping malls are open fare no better. Both comparators fail for the same reason—they are not remotely similar with respect to the risks of COVID-19. Recall some of the critical features that make movie theatres (like other performance venues) particularly dangerous: the unusually long period of time that a large group of individuals spend together in a single indoor room, and the fact that it is far harder to ensure patrons' compliance with an indoor mask mandate when the lights go down

[8] While Plaintiffs rely on the Chief Justice's opinion in *South Bay United Pentecostal Church* for the proposition that prayer services and movie showings are comparable, they ignore his recognition (expressed without concern) that "similar *or more severe* restrictions" were being placed on the latter than were being imposed on the former. *See* 140 S. Ct. at 1613 (Roberts, C.J., concurring) (emphasis added).

(especially, but not only, if the theatre offers concessions). Libraries and shopping malls do not present either of those risks. As a general matter, when someone enters a library or a mall, their goal is to find an item, whether a book or a pair of shoes, rent or buy the item, and leave. Indeed, the State's Executive Orders even require all malls to remove or block "[a]ll areas with communal seating" and any "communal play area," NJOEM Admin. Order 2020-16 ¶¶ 7, 9, to ensure they really are being used exclusively as retail spaces. Malls must close even their vending machines, to ensure constant mask usage indoors. *Id.* ¶ 9.

That difference is dispositive: as the Chief Justice has explained, the State can sensibly distinguish between those premises at which "large groups of people gather in close proximity for extended periods of time," like movie theatres and any other performance-based venues, and those premises "in which people neither congregate in large groups nor remain in close proximity for extended periods," like malls and libraries, given the risks of sustained person-to-person interaction and, consequently, of COVID-19's spread. *See S. Bay United Pentecostal Church*, 140 S. Ct. at 1613 (Roberts, C.J., concurring). Nor does it matter that a particular individual may spend more time at a mall or library than at the movie theatres; the State is free to assess risks on a categorical basis, even though there may be some over-inclusive or under-inclusive applications. (Indeed, even if one person spends a considerable amount of time at a mall, they are likely going from store to store, and will not be seated in the

same room, with the same large group of people, for a sustained period of time.) The paradigmatic uses of libraries and malls, on the one hand, and theatres, on the other, show just how much more the latter risks adding to the spread of COVID-19.

Notably, nothing in this analysis turns on "the government's stated preference for other speakers," which Plaintiffs brazenly claim is the basis for the Governor's decisions. Dkt. 21-2 at 24. None of the Executive Orders distinguish between indoor movie theatres and houses of worship on this basis, and there is "no suggestion on the record before us that the closure of [movie theatres] was sought ... as a pretext for the suppression of First Amendment protected material." *Arcara*, 478 U.S. at 707 n.4. Instead, the *only* time the Orders detail the importance of political and religious activity, and the only time that they draw a distinction on that basis, is in the context of outdoor gatherings, to ensure political protests or worship services are not subject to the same numerical limits as, say, a birthday party or recreational gathering. There is nothing wrong with that decision (indeed, the federal courts give greater protection to political speech and to religious activity than to other forms of speech), but in any event, it has nothing to do with the closure of indoor theatres. [9]

[9] Plaintiffs also briefly note that movie theatres are closed even as tattoo parlors and massage parlors are open. But the contrasts between these personal care services and movie theatres are even more obvious. With respect to risks, such services "can be conducted with limited and controlled interactions, as opposed to in an uncontrolled environment," and "with both staff and clients wearing masks at nearly all times." EO 154 at p.4. Theatres, by contrast, involve members of the public sitting together in a confined room for a long time, in an environment where mask-wearing is hard

The State had good reasons to keep movie theatres closed even as it allowed other locations to reopen, and on rational basis review, especially combined with the deference owed during an emergency, it must be allowed to make that choice.[10]

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

Even beyond the fact that Plaintiffs' claims will not prevail on the merits—in the Third Circuit, a gateway factor to granting any preliminary relief—Plaintiffs also cannot demonstrate that the remaining factors cut in their favor.

A number of considerations undermine Plaintiffs' claims of irreparable harm. Leaving aside Plaintiffs' efforts to cover it with a First Amendment veneer, *but see* Part I.C, *supra*; *CH Royal Oak*, 2020 WL 4033315, *7, the remedy in this case would be aimed at their business losses. *See, e.g.*, Dkt. 1 at ¶¶ 29, 43, Prayer for Relief (5). Because the purpose of preliminary relief is to protect a plaintiff from harm that cannot be addressed by a legal remedy at the conclusion of a case, economic losses,

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to ensure. And with respect to benefits, there are no at-home or outdoor equivalents to indoor parlors, especially given the equipment involved, but there are easy ways to watch movies beyond an indoor theatre. Finally, to the degree that Plaintiffs rely on any contrasts between movie theatres and outdoor activities or retail spaces, those distinctions are easily justified by the reduced risks of transmission outdoors, and by the fleeting person-to-person interactions that happen in retail contexts.

[10] Plaintiffs assert a number of other causes of action in their Complaint, including violations of state constitutional law and violations of the Due Process Clause. While the State is prepared to move to dismiss each one of these claims, the State does not address them here, because Plaintiffs did not press any of these arguments in their motion for a preliminary injunction.

even when "significant" and "sympathetic," do not justify preliminary relief anytime those costs are "exclusively financial and largely hypothetical." *Benner v. Wolf*, 20-775, 2020 WL 2564920,*8 (M.D. Pa. May 21, 2020) (rejecting claims by businesses challenging another state's closure orders and seeking preliminary relief).

Although the State does not doubt the considerable economic pain the movie theatre industry is suffering, it is speculative to tie that only to New Jersey's closure orders, rather than to low consumer confidence and the lack of new releases. Indeed, notwithstanding Plaintiffs' claims that most states allowed movie theatres to reopen, "less than 17% of the 5,440 movie theater locations in the U.S. are open," and in the ten states with the most movie theatres (of which New Jersey is not one), 2,507—nearly half of theatres nationwide—are closed. *See* Ex. V. Plaintiffs themselves say that "78% of consumers would require safety assurances from the health department before feeling comfortable to visit a movie theatre," Dkt. 21-2 at 15, something that cannot be achieved by any court order. Nor does it appear that distributors will be releasing blockbusters in August: release of the two most hotly anticipated movies, Warner Bros.' *Tenet* and Disney's *Mulan*, each has now been postponed indefinitely, and others pushed back up to a year. Exs. TT, VV.[11]

[11] Moreover, to the degree Plaintiffs claim these delays are informed by the opening and closing of theatres, New Jersey's role is again speculative, because New Jersey reflects one of many markets, and other states (including California) have recently decided to re-close their theatres or pause their re-opening. *See* Exs. V-DD.

Moreover, as this Court already recognized, the delay in Plaintiffs' request for relief further undermines their claims of irreparable harm. It is black letter law that delay can "knock[] the bottom out of any claim of immediate and irreparable harm," and is a "dispositive basis" for rejecting a preliminary injunction. *Pharmacia Corp. v. Alcon Labs.*, 201 F. Supp. 2d 335, 382 (D.N.J. 2002); *see also Doris Behr 2012 Irrevocable Trust v. Johnson & Johnson*, 19-8828, 2019 WL 1519026, *4 (D.N.J. 2019) (noting "delay in filing" for relief "undermines" claims for irreparable harm). That is not because any plaintiffs are being blamed or punished for their delay, but because the point of a preliminary injunction is typically to preserve the state of affairs while the parties litigate, and such delays increase the risk that relief would "fundamentally alter[] the status quo." *Acierno v. New Castle County*, 40 F.3d 645, 647 (3d Cir. 1994). Plaintiffs waited to file a complaint for sixteen weeks—or 112 days—after New Jersey issued its Order closing theatres. And they waited another week before filing for preliminary relief. *See* Dkt. 22 at 2 (explaining that Plaintiffs "had ample opportunities to file a request for a [TRO] after the Governor's initial executive order, subsequent modifications thereto, and the filing of this complaint"). And they waited even though New Jersey has all along distinguished between movie theatres and houses of worship. As a result, the closure of movie theatres to protect public health is, of course, the status quo at this point in time.

On the other side of the ledger, the State would face considerable harm from the grant of an injunction—indicating that both the balance of equities and the public interest militate against relief. As a general matter, a state suffers irreparable harm anytime it is enjoined from enforcing one of its policies. *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers). But the harm from upending the closures of indoor theatres and performance venues would be especially profound in the State. *See, e.g.*, *Benner*, 2020 WL 2564920, *9 ("[W]hile we acknowledge that Petitioners have important financial equities at play in this case, they have failed to adduce evidence to prove that their losses outweigh the grave harms that could result to all [State residents] from a widespread COVID-19 outbreak."); *Tolle v. Northam*, 20-363, 2020 WL 1955281, *1 (E.D. Va. Apr. 8, 2020) ("[I]t is no exaggeration to recognize that the stakes for residents of the [State] are life-or-death.").

The State has repeatedly found that indoor movie theatres present particularly high risks of COVID-19 transmission, and the record evidence cited above confirms that conclusion. *See* Exs. N-S, JJ-LL, V-DD. From prolonged indoor congregation of strangers to the inability to stop patrons from removing their masks, "it's too soon for consumers to return to movie theaters" in New Jersey. Ex. JJ. And that risk of contracting COVID-19 would extend not just to those who accept that risk and go to the movies, but also to anyone who they later interact with, and then those who *they* contact, and the next people, and the next. *See Tolle*, 2020 WL 1955281, *1 (noting

that an injunction would risk not only "the lives" of Plaintiffs' customers but also "infections among their families, friends, co-workers, neighbors, and surrounding communities"). That is a risk New Jersey cannot yet bear, especially as other states are reclosing or halting reopening of theatres. *See* Exs. V-DD; Dkt. 22 at 2.

The truth is, New Jersey's orders have helped keep residents safe throughout this unprecedented crisis. This remains the case even as the disease's spread in New Jersey has slowed, and to cast aside the restrictions in place would be "like throwing away your umbrella in a rainstorm because you are not getting wet." *Cassell v. Snyders*, 20-50153, 2020 WL 2112374, *7 (N.D. Ill. May 3, 2020) (quoting *Shelby Cty. v. Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting)). The increasing COVID-19 rates in other states sadly offer ample proof of that. Rather than upend the State's gradual reopening, this Court should instead allow it to continue carefully evaluating its COVID-19 orders as the Constitution authorizes it to do.

CONCLUSION

This Court should deny Plaintiffs' Motion for Preliminary Injunctive Relief.

Respectfully submitted,

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