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

NATIONAL ASSOCIATION OF THEATRE 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,

- against -

PHILIP D. MURPHY, in his official capacity as Governor of New Jersey; and JUDITH PERSICHILLI, in her official capacity as Acting Commissioner of Health,

Defendants.

Case No. 3:20-cv-08298-BRM-TJB

ECF Case

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Most of Defendants' Opposition is devoted to browbeating propositions Plaintiffs never questioned and attacking claims Plaintiffs never made, while avoiding the serious constitutional issues of equal protection and free speech raised by this motion. To be clear: Plaintiffs never disputed that a State has authority to impose emergency public health measures (which is why Plaintiffs never considered filing suit when the initial, neutral business closure orders were issued in March). And Plaintiffs are not claiming that they should be treated more favorably than other indoor gatherings that the State has allowed to open. But the very cases on which Defendants rely most make it abundantly clear that Defendants' emergency powers must be exercised in a constitutional manner. Equal protection under the law and the right to free speech do not vanish during a public health emergency. Now that Defendants have deemed it safe for similarly-situated gathering places to reopen with appropriate health safeguards in place, equal protection dictates that they must allow Plaintiffs to reopen under the same conditions. This case is not about special treatment, this case is about equal treatment.

Defendants' lengthy brief and hundreds of pages of exhibits printed off the Internet do not address the actual issues in this case. Defendants offered four justifications in the Executive Orders for the admittedly different treatment of churches versus movie theatres: (1) An allegedly large number of people "congregat[e] together concurrently for an unusually prolonged period of time." **This is exactly what the State has said is true of churches (**at the same time it was reopening them), and only serves to *prove* Plaintiffs' equal protection claim. (2) There are supposedly an "especially high number of available outdoor" options for watching movies. **There is one drive-in theatre in the entire State**. (3) There are purportedly "virtual options" for the public to *watch* movies. **This is double-talk**. It ignores the Plaintiffs' rights as First Amendment *speakers* and disregards the constitutional rule that the government cannot suppress the speech of some because *other speech* may be available in some *other forum*. Which

brings us to the State's final justification: (4) "[C]ertain gatherings – including religious services and political activity – are particularly important to the functioning of the State and of society." **This favoring of one speaker over another is nakedly unconstitutional**.

Defendants cite four cases over and over again, *Jacobson v. Mass.*, *Arcara v. Cloud Books*, *S. Bay United Pentecostal Church v. Newsom*, and *CH Royal Oak v. Whitmer*. The actual holdings of these cases bear little resemblance to their description in Defendants' brief. *Jacobson* holds that a State's broad public health powers *cannot* be exercised in "an arbitrary, unreasonable manner" or where they threaten constitutional rights. *Arcara* merely holds that prostitution activity conducted inside a bookstore can be enjoined (so long as the sale of books is unaffected) because prostitution is *not* an expressive activity. And *S. Bay Pentecostal* and *CH Royal Oak* involved *content-neutral* orders that closed all similar businesses; they did not close some venues and allow others based on the speaker's content or identity.

The Opposition provides no evidence supporting the State's discriminatory treatment because there is none. The discriminatory treatment is explained *only* by Defendants' admitted belief they can favor the speakers they prefer. The Opposition is a signed confession of constitutional violations.

II. THE GOVERNOR'S DISCRIMINATORY REOPENING PLAN IS UNCONSTITUTIONAL UNDER *JACOBSON*

The heart of the Opposition is that this Court must defer without question to all COVID-19 related orders because of *Jacobson v. Mass.*, 197 U.S. 11 (1905). It is replete with "self-congratulatory rhetoric about how careful and thoughtful and measured and balanced" the Governor's approach has been in evaluating health risks, but "[s]tripped of verbiage," the State's rationale, "like a Persian cat with its fur shaved, is alarmingly pale and thin." *Schurz Comm's, Inc. v. FCC*, 982 F.2d 1043, 1050 (7th Cir. 1992) (Posner, J.). The Governor offers no health data to support the discriminatory treatment of movie theatres—but worse—attempts to deflect

attention from his own contradictory statements and submissions *filed in this Court* just last month. Defendants mischaracterize Plaintiffs' arguments as claiming that "*Jacobson* does not apply here," Opp. 20, but nothing could be further from the truth. As Plaintiffs made clear, the orders challenged here are unconstitutional *under Jacobson*, because the government cannot exercise this vast discretionary power in arbitrary ways that violate constitutional rights. PI Mot. 16-18.

A. Defendants' Health Claims are Arbitrary, Irrational, and Openly Discriminatory

The Opposition is chock full of generalized assertions that the government purportedly relied on experts and health data, Opp. 2, 4, 7, 8, 9, 10, 11, 12, 13, 14, 22, 23, 24, 25, 29, 30, 36, 38, 40, 41, 44, 45, but there is no indication of what this refers to. The State offers no expert declaration, and fails to even name one public health official to support its many assertions—not even from the State's own Department of Health. Counsel's declaration merely reprints hundreds of pages apparently drawn from online searches, most of which is recycled from a previous case in which the State advanced a conflicting position it neglects to mention here. Vannella Dec. Exhs. A - L.[1] Strangely, the State's declaration does not even assert that the Governor consulted any of these printouts, or was even aware of them.

By contrast, Plaintiffs have submitted the Expert Declaration of David F. Goldsmith, MSPH and Ph.D., a renowned epidemiologist on the faculty of George Washington University, who has advised the CDC, EPA, and OSHA, among others. Declaration of David F. Goldsmith, ¶¶ 2, 4. Dr. Goldsmith's expert opinion is that (1) movie theatres constitute a lower risk for transmission of COVID-19 than places of worship; (2) Defendants have not demonstrated that

[1] *Compare Dwelling Place Network v. Murphy*, No. 20-6281 (D.N.J.), Declaration of Daniel M. Vannella, Exhibits I-S, Z, AA (Brounell Dec. Exhs. J-W), in which the State describes church services essentially as Petri dishes for COVID-19 transmission because of such activities as speaking, singing and the laying on of hands. Who is the Court to believe? Mr. Vannella's Google searches now, or his Google searches last month?

theaters represent a greater or even equal risk for transmission of COVID-19 than places of worship or shopping malls; (3) Plaintiffs have presented a comprehensive set of guidelines that will be effective in preventing the transmission of COVID-19 to both moviegoers as well as theater employees and managers; and (4) when movie theatre audience members consume food or drink in an auditorium during a movie, there is less risk of transmission than in traditional indoor dining situations. *Id*. at ¶¶ 25-27.

None of the material Defendants now cite even addresses the issue of treating movie theatres differently from religious or political gatherings – the dispositive question raised by this motion – and the government goes out of its way to *misdirect* the Court's attention from its recent filings on this precise issue. The State prevailed in this Court last month in *Dwelling Place* making the same *Jacobson* arguments as here (repeating some pages of its Opposition verbatim), yet fails to even *cite* that case. It is not listed in the Opposition's Table of Authorities, and the State makes only oblique references to *Dwelling Place* (but never by name) as being a case that broadly supports "deference" under *Jacobson*. Opp. 20, 25 (referring generally to Judge Kugler's findings). Defendants submitted the TRO hearing transcript from *Dwelling Place* as Exh. HH here, yet never mention that they advocated equality of treatment for indoor gatherings in that case,[2] or that Judge Kugler's ruling was predicated on the earlier orders that impose "equal burdens on religious and non-religious activities." Vannella Dec. Exh. HH at 68, 71.

It is notable (but again, unmentioned by the State) that the plaintiffs in *Dwelling Place* sought *preferential* treatment, demanding that the State lift *all* restrictions on religious

[2] Mr. Feigenbaum, speaking for the State, defended the Executive Orders as being facially neutral, and described Chief Justice Roberts' concurring opinion in *S. Bay Pentecostal Church* as being explained by equality of treatment. Vannella Dec. Exh. HH at 35-36. He also defended the State's closure actions based on their then-neutrality. *Id*. at 45 ("the enforcement of the rules demonstrate that they're being applied on an even-handed basis to religious conduct and to secular conduct alike").

gatherings, including for such activities as communion, hands-on healing, and baptisms. Vannella Dec. Exh. HH at 6, 16-17.[3] Defendants opposed the TRO by claiming church services are uniquely *dangerous*. Brounell Dec. Exh. I at 5-7 ("communal gatherings, particularly ones involving speaking and/or singing, have been associated with spread of infectious diseases"). The State submitted the same exhibits as with this Opposition, but with a notable difference: Defendants' exhibits in *Dwelling Place* included *thirteen* articles talking about the unique *dangers* of church gatherings, generally focusing on those activities common in religious gatherings but *absent* in movie theatres (speaking, singing, kneeling, etc.). Brounell Dec. Exhs. K-W.

The contrast is striking. In this case, the State's claim that movie theatres are riskier is captured in a single unsupported statement that "the dark environment of theatres makes enforcement of a mask mandate more difficult than at a religious worship service," and "it takes less time for an individual to briefly remove her mask to accept communion … than it does for that person to remove her mask to eat popcorn or consume other concessions that Plaintiffs intend to sell." Opp. at 36. Despite the fact that movie theatres are operating in more than forty states and in many countries around the world, Defendants' online research failed to locate a single article linking the risk of COVID-19 transmission to theatres. And the State's suggestion (again without support) that theatres are riskier because of concessions, is not at issue here. Plaintiffs only seek equal treatment, and do not ask the Court to order the sale of concessions before the State reopens indoor dining generally.[4]

Notwithstanding the State's sworn declaration and contrary arguments in *Dwelling Place*,

[3] Judge Kugler framed the question presented as "whether the First Amendment gives your clients the right to completely open up without any restrictions whatsoever." Vannella Dec. Exh. HH at 17.

[4] Notably, there currently are no restrictions on serving food or communal dining at indoor religious events in New Jersey, and many churches are doing so. Brounell Dec. ¶¶ 8-10, E-H.

Governor Murphy simultaneously announced he was *relaxing* the limits on both indoor and outdoor gatherings involving religious groups. EO 152, Fithian Dec. Exh. E. The Governor has never attempted to justify this discriminatory approach by pointing to *any* health data, and—for obvious reasons—has not acknowledged to the Court the contradictory material his lawyers submitted to Judge Kugler while demanding "deference." Instead, the explanation for the disparate treatment of movie theatres is admitted on the face of his Executive Orders: "certain gatherings—including religious services and political activity—are particularly important to the functioning of the State and of society." *Id.* at 4. Defendants' counsel underscored this point in its *Dwelling Place* briefing, observing that "after EO 152, … relative to the prior stay-at-home order, the business closure orders, and the limits on outdoor gatherings, religious conduct is *favored* compared to secular activity." Brounell Dec. Exh. I at 18 (emphasis in the original). *Jacobson* may require courts to defer to the executive on many things, but the State's desire to have it both ways is not among them.

B. Discriminatory Treatment is Unconstitutional Under *Jacobson*

Nothing in *Jacobson* or any other case suggests the type of discriminatory treatment imposed by New Jersey here merits any deference, and Defendants studiously avoid citing cases that address the issue head on. They repeatedly cite Chief Justice Roberts' concurring opinion in *S. Bay Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), but that case was neither a precedential ruling of the Court, nor did it address the issue presented here. *Ramsek v. Beshear*, 2020 WL 3446249 *4-5 (E.D. Ky. 2020) ("while informative, Justice Roberts' concurring opinion does not create precedent which controls in this case"). In *S. Bay Pentecostal Church*, a California congregation unsuccessfully sought to enjoin an executive order that imposed 25 percent occupancy limits on indoor church services, but as the Chief Justice pointed out, "similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances." 140 S. Ct. at 1613 (Roberts,

C.J., concurring).[5] As Plaintiffs pointed out in their opening brief, courts have upheld COVID-19 closure orders that are facially neutral, while striking down those that discriminate. PI Mot. 17 & n. 13.

Courts that have ruled on the question of such discriminatory COVID-19 restrictions have held that disparate treatment falls outside the deference accorded under *Jacobson*. In particular, the Sixth Circuit in *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020) and *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020) granted relief pending appeal and enjoined a governor from enforcing orders prohibiting in-person services so long as appellant, its ministers, and its congregants adhere to the public health requirements mandated for secular businesses.[6] As the court explained, "[a] law is not neutral and generally applicable unless there is 'neutrality between religion and non-religion,' and in this case, the Church and its congregants just want to be treated equally." *Roberts*, 958 F.3d at 414-15. Thus, even under *Jacobson*, "restrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom." *Id*. at 414.

Defendants fail to mention these cases (or any other decision that addresses the question of discriminatory treatment in COVID-19 orders) even though they cited other Sixth Circuit cases to support their argument for deference under *Jacobson*.[7] They also cite *In re Abbott*, 954

[5] Defendants try to make something of the fact that movie theatres in California were not treated as well as churches, suggesting that the same rule could apply here. Opp. 21. But the question of discriminatory treatment of theatres was neither presented to, nor decided by, the Court. The Chief Justice's message to the plaintiff churches in the context of that case was, what's *your* beef?

[6] District courts in Kentucky likewise required equal treatment for indoor gatherings for religious and secular purposes and granted injunctive relief. *Maryville Baptist Church, Inc. v. Beshear*, 2020 WL 2393359 *3 (W.D. Ky. 2020); *Tabernacle Baptist Church of Nicholasville v. Beshear*, 2020 WL 2305307 (E.D. Ky. 2020).

[7] For example, Defendants cite *Independent Fitness Facilities & Trainers v. Whitmer*, 2020 WL 3468281 (6th Cir. 2020), where the court reversed a preliminary injunction that would have allowed indoor gyms to reopen. However, the Sixth Circuit distinguished its decision to defer

F.3d 772 (5th Cir. 2020), a Fifth Circuit case upholding a temporary ban on elective surgery—including abortions—during the pandemic. But there was no issue of discriminatory treatment in that case. *Id.* at 792 ("Respondents point to no evidence that GA-09 applies any differently to abortions than to any other procedure. Nor do they cite any comparable procedures that are exempt from GA-09's requirements."); but *see Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 925-26 (6th Cir. 2020) (enjoining temporary ban on elective surgery under *Jacobson*'s civil liberties exception). Defendants' highly selective citation of case law ignores the clear pattern: COVID-19 limitations on First Amendment activities may only be tolerated when they are neutral, not when they discriminate.[8]

The one case Defendants cite involving a COVID-19 closure order and movie theatres is not to the contrary. Defendants rely exhaustively on *CH Royal Oak, LLC v. Whitmer*, 2020 WL 4033315 (W.D. Mich, July 16, 2020), which denied injunctive relief to a theatre owner who wanted to host a film festival honoring the Juneteenth holiday. The court's First Amendment analysis in *CH Royal Oak* is fatally flawed for reasons more fully described *infra* at pp.17-18, and it does not apply to the situation presented here – a statewide ban on all movie theatres. For purposes of *Jacobson* analysis, *CH Royal Oak* says nothing about the constitutionality of permitting like gatherings for some expressive purposes but not others – the issue at the heart of this case. *CH Royal Oak* involved no element of discrimination between different speakers, and the court stated that "nothing in the EO singles out expressive activity or has the effect of

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under *Jacobson* from cases like *Maryville Baptist Church*, which, it explained, "involve individual rights for which precedent requires courts to apply a heightened level of scrutiny to government actions." *Id.* at *1.

[8] Last week, the Supreme Court denied a motion for injunction pending appeal in *Calvary Chapel Dayton Valley v. Sisolak*, No. 19A1070 (U.S. July 24, 2020). Plaintiff there claimed that Nevada's COVID-19 emergency directives treated place of worship differently from comparable mass gatherings. However, the challenged orders imposed the same occupancy limits on secular venues (including movie theatres) and places of worship.

singling out expressive activity." *Id.* at *4.

III. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR EQUAL PROTECTION CLAIM

Defendants do not deny the content-based bias of New Jersey's reopening plan stated on the face of Governor Murphy's Executive Orders. Quite to the contrary, the Opposition embraces the astounding proposition that the government may favor certain speakers over others. Defendants' failure to appreciate basic constitutional principles is summed up in its throwaway line, offered without support, that "federal courts give greater protection to political speech and to religious activity than to other forms of speech." Opp. 40. And their open contempt for the choices made by New Jersey's citizens to decide for themselves what ideas they deem worthy is illustrated by its imperious claim "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." Opp. at 38.

The Supreme Court repeatedly has rejected as "startling and dangerous" the notion that First Amendment protections depend on "a 'simple balancing test' that weighs the value of a particular category of speech against its social costs." *Brown v. Entertainment Marketing Ass'n*, 564 U.S. 786, 792 (2011); *B.L. ex rel. Levy v. Mahanoy Area Sch. Dist.*, 964 F.3d 170, 182 (3d Cir. 2020) ("The First Amendment … abhors 'ad hoc balancing of relative social costs and benefits,'" quoting *United States v. Stevens*, 559 U.S. 460, 470 (2010)). This is because the First Amendment does not grade on a curve: "esthetic and moral judgments . . . are for the individual to make, not for the Government to decree." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (1999). And the First Amendment "mandates governmental neutrality between religion and religion, and between religion and nonreligion." *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). It is astonishing the State fails to acknowledge this.

A. Defendants Fundamentally Misunderstand Equal Protection

In the totalitarian society imagined in George Orwell's classic *Animal Farm*, "some animals are more equal than others," but fortunately that's not how the U.S. Constitution works. In Governor Murphy's New Jersey, the government may believe it can "accord greater protection to religious activity" than to other First Amendment rights, Opp. 37, but this is equally false. Such a claim does more than abridge equal protection – it creates serious tension with the Establishment Clause. When the government acts for the expressed purpose of "advancing religion," it violates the central Establishment Clause value of official religious neutrality. *McCreary County*, 545 U.S. at 860.

Defendants claim their ability to favor religion over secular speech (as an "accommodation" of religious practice) finds support in *Cutter v. Wilkinson*, 544 U.S. 709 (2005). Opp. 38. But *Cutter* did not address Equal Protection at all—it only examined whether a law requiring certain religious accommodations *in prison* violated the Establishment Clause. Citing *Cutter*, Defendants disparage Plaintiffs' arguments, claiming that "it follows logically from [Plaintiffs'] position that inmates must be provided time to watch movies as a group if any other inmates are permitted to engage in communal prayer." Opp. at 38. Even if the Court had been talking about equal protection (which it wasn't) *Cutter* only upheld the facial validity of a law that required the government to accommodate inmates' religious practices, but only so long as such accommodations do not devolve into "'an unlawful fostering of religion.'" *Cutter*, 544 U.S. at 713-14 (citation omitted).

Defendants here fail to disclose that *Cutter* applies only to the unique context of "institutionalized [*i.e.*, incarcerated] persons who … are … dependent on the government's permission and accommodation for exercise of their religion." *Id.* at 721. The Supreme Court has explained that "incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."

Price v. Johnson, 334 U.S. 266, 285 (1948). "Perhaps the most obvious of the First Amendment rights that are necessarily curtailed by confinement are those associational rights that the First Amendment protects outside of prison walls." *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125-26 (1977). New Jersey's movie theatres are not prisons and Governor Murphy is not their warden. *Cutter* has no application here.

B. Movie Theatres and Indoor Religious Services Are Similarly Situated

Defendants cannot justify their disparate treatment of movie theatres versus places of worship and other expressive activities that they permit. Such discrimination, whether secular or religious, violates Plaintiffs' rights to equal protection, but this discussion focuses on religious discrimination because Defendants have made it a cornerstone of their position. Defendants agree that movie theatres and church services are similar in that both "involve individuals congregating in a single room," Opp. 36, but everything else Defendants (and their many exhibits) say about the two support the conclusion that religious gatherings are far *riskier* than movies with respect to limiting the spread of COVID-19. [11]

Unlike attendees at places of worship, movie theatre guests generally do not engage in conversation with those outside their immediate group, hold or shake hands, hug, sing, provide verbal responses, engage in responsive readings, sit, stand and kneel frequently, share prayer books, or engage in other forms of contact common in places of worship. There are no hands-on healing ceremonies. Speaking and singing is not allowed in movie theatres. Fithian Dec. ¶ 27. Defendants are correct that movie showings can sometimes last an hour and forty minutes or longer. Opp. 10, but religious services can—and often do—last even longer. Brounell Dec. ¶¶ 4-7, Exhs. A-D (surveying current religious service lengths in New Jersey). And New Jersey's

[11] Among the numerous exhibits the Defendants submitted printed off the Internet is a survey by the Texas Medical Association which actually states that houses of worship present a *greater* health risk than movie theatres. Vannella Dec. Exh. LL. *See also* Brounell Dec. Exhs. I at 5-7; K-W.

places of worship regularly offer breakfast clubs, barbecues, luncheons, and ice cream socials. *See id*. ¶¶ 8-10, Exhs. E-H (surveying current food consumption in New Jersey places of worship).

In fact, everything the State has filed about relative health risks suggests it would have a better equal protection argument if the Governor had opened the movie theatres and continued to limit indoor religious gatherings. The *only* supposedly unique risk from movie theatres is Defendants' wholly unsupported claim (that is nowhere mentioned in its Executive Orders) that "the dark environment of theatres makes enforcement of a mask mandate more difficult than at a religious worship service." Opp. 36.[12] Defendants, however, fail to advance any evidence for this assertion—because there is none. Not only is there sufficient light in movie theatres to enable enforcement of mask mandates, movie theatres will ensure patrons wear masks during movie showings. Piechota Supp. Dec. ¶¶ 4-6. Defendants do not explain what measures churches are required to take to enforce mask mandates, and offer no data showing that churches are, in fact, enforcing those mandates. Defendants also ignore that some religious traditions call for services in darkened environments. Brounell Dec. ¶ 11.

The Opposition also has a throwaway line about movie theatres being air-conditioned, as if most churches are not as well. Furthermore, the Opposition simply ignores that among the safety protocols Plaintiffs have proposed is that the facility HVAC system air exchanges will be calibrated to maximize replacement of indoor air with fresh air

Accordingly, the State offers no serious justification for treating movie theatres differently from churches or the other expressive gatherings that are open.

[12] Defendants also state that "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." Opp. at 36. But places of worship are serving up much more, and as noted above, Plaintiffs agree to serve no concessions until New Jersey reopens indoor dining.

C. The Discriminatory Reopening Plan Fails Under Any Level of Scrutiny

Because fundamental rights are at issue, the Executive Orders must satisfy strict scrutiny, which requires Defendants to demonstrate that their content-based "classification has been precisely tailored to serve a compelling governmental interest." PI Mot. 18-21 (quoting *Plyler v. Doe*, 457 U.S. 202, 217 (1982)). Rather than trying to meet this standard, Defendants incorrectly claim Plaintiffs "misstated the standard of review." Opp. 34. But Defendants do not even mention—let alone distinguish—the controlling cases, including *Plyler*, *Minneapolis Star & Trib. Co. v. Minn. Comm'r of Rev.*, 460 U.S. 575, 582 (1983); *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 99, 101 (1972); and *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951). PI Mot. 20.

Defendants assert that "rational basis review applies in 'areas of social and economic policy' that do not distinguish based upon suspect lines." *Id.* (quoting *L.A. v. Hoffman*, 144 F. Supp. 3d 649, 675 (D.N.J. 2015)). However, this misleadingly omits key language from *Hoffman*, which stated that rational basis review applies "in areas of social and economic policy" where "a statutory classification … neither proceeds along suspect lines *nor infringes fundamental constitutional rights*…." *Hoffman*, 144 F.Supp.3d at 675 (emphasis added). Nothing in the Opposition supports Defendants' assumption that rational basis review will suffice where the government draws lines based on the exercise of fundamental rights.

Even if Defendants were correct, however, and the discriminatory reopening plan can survive if supported by a mere rational basis, the government's own arguments and other submissions to this Court undermine its ability to meet even that permissive standard. At the same time the State's lawyers were assuring this Court that religious gatherings are particularly risky, the Governor opted to relax the restrictions on both indoor and outdoor religious gatherings. *See supra* pp.3-6. The Governor did so—while keeping movie theatres closed—even though the riskiest behaviors (singing, speaking, etc.) that occur at religious observances

are prohibited at movie theatres. Fithian Dec. ¶ 27. Defendants have offered published evidence suggesting that such religious observances are risky, but nothing to support their assertion that attending a movie poses the same or greater risks. Brounell Dec. Exhs. K - W. To the contrary, the only comparative information submitted concludes that church attendance poses *greater* dangers. *Id*. And the only explanation Defendants provide for the disparate treatment is their bias that religion is "particularly important."

Favoring one speaker over another does not merely fail as a rational basis for state action, it is not even a legitimate governmental purpose. *Sorrell v. IMS Health, Inc*., 564 U.S. 552, 578-79 (2011) ("The State may not burden the speech of others in order to tilt public debate in a preferred direction."). And even though such discrimination requires heightened scrutiny, the Supreme Court has held it is unnecessary to apply the stricter standard in order to find that content or speaker-based disparities are invalid. *Id*. at 571. The avowed discrimination against movie theatres in Governor Murphy's Executive Orders is not just unsupported by evidence, it is contradicted by Defendant's own submissions to Judge Kugler. Whichever standard of review applies, the restrictions on theatres fail.

IV. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR FIRST AMENDMENT CLAIM

Defendants' closure orders are equally infirm under the First Amendment. Defendants leap beyond the claim that under *Jacobson* the Governor may impose temporary emergency measures that have incidental effects on speech to the absurd proposition that an indefinite closure of all the State's movie theatres (that discriminates between speakers) "*does not implicate the First Amendment at all*." Opp. 27 (emphasis added). This is based on a fundamental misreading of *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 700 (1986), which upheld a temporary closure of an adult bookstore because *prostitution was occurring on the premises*. The central premise of Defendants' First Amendment argument depends on *Arcara*. Opp. 27,

28, 29, 30, 31, 32, 35, 40.

But everything about the State's interpretation of *Arcara* is wrong: it does not apply outside its specific context of an enforcement order against plainly illegal conduct that is entirely unrelated to expressive activity. *Arcara* has never been applied to uphold a mass closure order like the one at issue here, much less one that is content- and speaker-based. Defendants merely pluck from *Arcara* the line that the government can enforce a "public health regulation of general application," 478 U.S. at 706, and, divorcing that statement from its factual context, concludes that the Governor may impose a general ban on theatre exhibition. Opp. 28. Such misuse of precedent illustrates a perennial problem in First Amendment cases where the government points to "isolated statements in some earlier decisions" and tries to expand them into "a general rule" permitting speech restrictions. *United States v. Alvarez*, 587 U.S. 709, 718 (2012).

Arcara did not empower the government to close down bookstores generally because the Governor deemed them to be unhealthy—just one particular store that happened to sell books was temporarily closed under a nuisance law shutting places of prostitution. The result would have been the same if it was a hardware store or a café. The closure was imposed because of prostitution at that particular location, not because the store was a place where people assembled to read or purchase books. Accordingly, the Court stressed that the closure order concerned "absolutely no element of protected expression" and "had nothing to do with any expressive conduct at all." *Arcara*, 478 U.S. at 705 & n.2.

Most importantly, the order had no effect on the owner's ability to sell the same books in the same type of store (just without the prostitution). It emphasized that "respondents remain free to sell the same materials at another location." *Id.* at 705-06. Not so here. Although the government maintains people may still get access to certain movies (which, as discussed below, is no answer), Plaintiffs are not free to reopen their theatres as was the bookstore owner in

Arcara.

Beyond simply misunderstanding *Arcara's* holding, Defendants also misapply it. They acknowledge the government cannot "single out bookstores or others engaged in First Amendment protected activities" as a pretext for censorship and assert that no such thing is happening here. Opp. 31-32. But, of course, this reasoning is relevant only if the closure order is content-neutral (as was the case in *Arcara*), but here it is not. A facially content-based closure order is unconstitutional for the same reason as a facially-neutral order that is employed as a pretext for censorship. The content-based orders are just easier to spot, as here: indoor gatherings are permitted in New Jersey for a host of expressive activities, including religious services, political rallies, libraries, degree-granting schools, etc., but not for film exhibition using the same health protocols. [15]

Defendants assert there is no evidence of "pretext" here, but there doesn't need to be to establish a First Amendment violation where the government decree is content-based. They cite *Minneapolis Star & Tribune Co.* in recognizing that discriminatory taxes on newspapers are unconstitutional, Opp. 32, but overlook the Court's admonition that "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment." 460 U.S. at 592. The Court observed that "even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment," while recognizing the difficulties posed by judicial inquiries into improper motives. Instead, the Court relied on the *fact* of discrimination and held that when the government burdens one speaker but not another, it "places a heavy burden on the State to justify its action." *Id.* at 592-93. The Court applied this rule to strike down a tax exemption that favored religious publications in *Ark. Writers' Project v. Ragland*,

[15] Under Defendants' over-expansive reading of *Arcara*, the Governor could order the closure of adult bookstores in New Jersey while allowing Christian bookstores to remain open, based on the public health justification that readers of faith are more "clean living," and less likely to spread disease.

481 U.S. 221 (1987)—the same type of favoritism at issue here. As in *Minneapolis Star*, no showing of "pretext" was required. *Ark. Writers' Project*, 481 U.S. at 228 ("discrimination can be established even where, as here, there is no evidence of an improper censorial motive").

Under the First Amendment, a regulation of speech that "'on its face' draws distinctions based on the message a speaker conveys" is subject to strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 156 (2015). This applies to any regulation that applies to speech "because of the topic discussed or the idea or message expressed," including "defining regulated speech by particular subject matter" or "by its function or purpose." *Id.* Thus, when the government "singles out specific subject matter for differential treatment," it must use the least restrictive means to serve a compelling interest. *Id.* at 169-70. This rule applies "regardless of" any "benign motive" that the government may assert, or "lack of animus toward the ideas contained in the regulated speech" *Id.* at 156.

Nor does it matter that the Governor does not dictate which movies might be shown. A government decree "banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation [and subject to strict scrutiny], even if it imposed no limits on the political viewpoints that could be expressed." *Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2346 (2020). Here, of course, Defendants have been quite forthcoming in acknowledging their overt preference for religious and political speech. And it is always the case that a law "favoring some speakers over others demands strict scrutiny when the [government's] speaker preference reflects a content preference.'" *Reed*, 576 U.S. at 170.

All of this undermines Defendants' reliance on *CH Royal Oak, LLC v. Whitmer*, 2020 WL 4033315, Opp. 33-34, because the closure orders there were entirely neutral. *Id.* at **4-5. Had that not been the case, the court there recognized that strict scrutiny would have applied. *Id.* at *2 ("government regulations that "suppress, disadvantage, or impose differential burdens upon speech because of its content" are "subject to strict scrutiny"). It also explained that it was

applying "a particularly simple *Jacobson* analysis," *id.* at *6, because there was no record (unlike this case) showing the state had opened venues for expressive purposes that it had shown were equally (or more) risky than the movie theatres. Additionally, *CH Royal Oak* involved only the denial of an injunction to hold a one-time film festival, and did not address the legality of an indefinite statewide ban on movie theatres, as does this case.

Finally, Defendants' assertion, both in the Executive Orders and the Opposition, that there are supposedly numerous alternative channels of communication (*e.g.*, outdoor cinema and streaming video), Opp. 33-34, is factually incorrect and legally deficient. Defendants cite *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622 (1994) to support this argument, Opp. 32, a case based on *intermediate scrutiny*, as the State admits. It has no application whatsoever in this case, where the discrimination between permitted venues is content-based (and proudly so). As the Supreme Court made clear just this Term, a statute that treats one speaker more favorably than others is content-based and subject to strict scrutiny. *Barr*, 140 S. Ct. at 2346-47 (distinguishing *Turner Broadcasting Sys.*).[16]

Defendants' blithe assertion that there are adequate alternative channels for exhibiting movies is obviously untrue. The fact that *some* movies can be watched at home does nothing to mitigate movie theatres' concerns, because ***Plaintiffs*** would still have no ability to show movies (as opposed to consumers watching them). There is only one drive-in theatre in New Jersey, and the ability to project a movie on the outside wall of a bar somewhere is hardly an adequate alternative. Likewise, the contention that watching *some* movie at home is a sufficient alternative misses the point entirely. The issue is not whether some movies are available on TV or through streaming services. The issue is whether the State may foreclose altogether the

[16] Defendants' reliance on *CH Royal Oak* for the availability of "adequate alternative channels of communication" is especially inapposite. Opp. 34. Whether or not that analysis applies in strict scrutiny cases, suggesting there are options for a one-time film festival is not comparable to finding alternatives for all theatres in the state.

exhibition of the films that Plaintiffs wish to show.[17]

V. INJUNCTIVE RELIEF SHOULD BE GRANTED

Having demonstrated likelihood of success on their equal protection and First Amendment claims, Plaintiffs' request for injunctive relief should be granted. The loss of First Amendment freedoms, even for a minimal period, unquestionably constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). PI Mot. 26-27. Defendants' claim that an indefinite ban on movie exhibitions is not irreparable injury is nonsense. Opp. at 41-42. Defendants' further assertion that money damages could be an adequate remedy ignores that the challenged orders have not just wreaked economic havoc on the film exhibition industry, but completely barred expressive activity throughout the State. In any event, Plaintiffs have not sought damages, and Defendants do not articulate what damages would be available in a case like this. The State's claim that there is no "causal connection" between the Governor's unconstitutional orders and Plaintiffs' injury is equally risible. When the government bans a book, the right to obtain injunctive relief is not contingent on the author proving someone will buy the book after the illegal government conduct is enjoined. *E.g.*, *Backpage.com LLC v. Dart*, 807 F.3d 229, 238-39 (7th Cir. 2015) (granting injunction on First Amendment grounds; rejecting argument that equitable relief would not guarantee resumption of business). The same is true here.

Defendants' claim that Plaintiffs' supposed "delay" in bringing suit undermines any finding of irreparable harm ignores that Plaintiffs' claims did not emerge until mid-June , when the Governor's unequal reopening plan became manifest.[18] Opp. at 43. Once that occurred,

[17] In addition, many directors will not release their films until those films can be shown in a theatre, due to the superior viewing experience. Brounell Dec. Exhs. X-CC.

[18] Defendants misleadingly suggest that they never closed places of worship. Opp. at 43 ("New Jersey has all along distinguished between movie theatres and houses of worship."). On March 21, 2020, the Governor issued Executive Order No. 107, closing all "non-essential" businesses, including places of worship. Fithian Dec. Exh. B. In fact, the Governor's closure of churches was challenged in *Dwelling Place*.

Plaintiffs filed suit within weeks. Fithian Dec. Exh. E, I. And in the meantime, Plaintiffs attempted to avoid litigation by actively negotiating with the Governor's office until the week of the July 4 holiday. *Id.* ¶ 31.

The public interest and balance of equities factors support injunctive relief, because "the public interest is always served in promoting First Amendment values." *TD Bank, NA v. Hill*, 928 F.2d 259, 285 (3d Cir. 2019); *Americans for Prosperity v. Grewal*, 2019 WL 4855853, **9, 19 (D.N.J. 2019) (Martinotti, J.) ("the enforcement of an unconstitutional law vindicates no public interest") (quoting *K.A. ex rel. Ayers v. Pocono Mtn. Sch. Dist.*, 710 F.3d 99, 114 (3d Cir. 2013)). Although Defendants claim that "the harm from upending the closures of indoor theatres . . . would be especially profound," Opp. at 44, the record here does not support this assertion. *Supra* pp.3-6. Where First and Fourteenth Amendment rights are being violated—as they are here—courts have repeatedly concluded that the public interest and balance of equities favors upholding the Constitution, even in the face of legitimate concerns about COVID-19. *Roberts*, 958 F.3d at 416 ("treatment of similarly situated entities in comparable ways serves public health interests at the same time it preserves bedrock free-exercise guarantees"); *see also Maryville Baptist Church*, 957 F.3d at 616 ("As for harm to others, an injunction appropriately permits religious services with the same risk-minimizing precautions as similar secular activities, and permits the Governor to enforce social-distancing rules in both settings").

Irreparable harm, balancing of the hardships, and the public interest all weigh heavily in favor of granting an injunction against Defendants' unconstitutional orders.

VI. CONCLUSION

For the reasons explained above and in Plaintiffs' opening memorandum, Plaintiffs respectfully ask the Court to issue a preliminary injunction requiring that Defendants treat movie theatres in the same manner as places of worship with regard to opening.

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Respectfully Submitted,

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