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Via ECF

Hon. Brian R. Martinotti
United States District Court, District of New Jersey
Clarkson S. Fisher Building & U.S. Courthouse
402 East State Street
Trenton, NJ 08608

Re: *National Association of Theatre Owners, et al. v Philip D. Murphy, et al.*
Case No. 3:20-cv-08298-BRM-TJB

Dear Judge Martinotti:

Today, Defendants filed a letter enclosing Executive Order No. 173, which was issued by Defendants yesterday. (Dkt. No. 30.) Your Honor has kindly allowed Plaintiffs to file this brief response. (Dkt. No. 31.)

Defendants' counsel letter, in describing Executive Order No. 173, begins, "To the extent it may pertain to the issues presented in this matter . . ." This is an extreme understatement, for the reasons briefly stated below.

First, here is what Executive Order No. 173 does. It leaves in place the Executive Orders requiring indoor movie theatres to remain closed, while allowing indoor religious and political gatherings to occur. In fact, Executive Order No. 173 repeats and expands upon the State's explicit preference for "religious services or celebrations, political activities, wedding ceremonies, funerals, or memorial services" over other speech.

Next, Executive Order No. 173 once again openly states Defendants' unconstitutional preference for certain speech (religious and political) over other speech (artistic and cultural). Executive Order No. 173 states: "[A]s I noted when issuing Executive Order No. 152 (2020), certain gatherings, including religious services and political activity, are particularly important to the functioning of the State and society, and restrictions on these gatherings can be relaxed to a greater extent than restrictions on other gatherings." (emphasis added.) Executive Order No. 173 "reduc[es] the limits on indoor gatherings other than religious services or celebrations, political activities, wedding ceremonies, funerals, and memorial services from a maximum of 100 persons to a maximum of 25 persons." (emphasis added.) **The Constitution forbids this**

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sort of preference of one speaker or one message over another. *See, e.g., Police Dep't. of City of Chicago v. Mosley*, 408 U.S. 92 (1972).

Furthermore, Executive Order No. 173 demonstrates that these Executive Orders draw arbitrary, unreasonable, and unsupported distinctions unrelated to the possibility for transmitting the virus. Executive Order No. 173 provides, “certain events such as wedding ceremonies, funerals, and memorial services, whether religious in nature or not, which typically happen once in a lifetime, provide benefits to the well-being of the participants such that they can be treated differently from casual social gatherings ...” (emphasis added.) **These distinctions are entirely unrelated to the possibility of virus transmission and demonstrate that the State’s powers have been exercised in “an arbitrary, unreasonable manner.”** *Jacobson v. Mass.*, 197 U.S. 11, 25 (1905).

We look forward to discussing Executive Order No. 173 further at tomorrow’s hearing.

Respectfully submitted,

Davis Wright Tremaine LLP

/s/ Geoffrey S. Brounell

cc: All Counsel of Record (by ECF)