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, CINEMARK USA, INC., REGAL CINEMAS, INC., BJK ENTERTAINMENT, INC., BOW TIE CINEMAS, INC., COMMUNITY THEATERS, LLC,	**CIVIL ACTION NUMBER: 3:20-cv-08298-BRM-TJB**
Plaintiffs,	**PRELIMINARY INJUNCTION HEARING**
v.	
PHILIP D. MURPHY, JUDITH PERSICHILLI,	
Defendants.	

Held via Zoom video conference
August 5, 2020
Commencing at 1:00 p.m.

B E F O R E: **THE HONORABLE BRIAN R. MARTINOTTI, UNITED STATES DISTRICT JUDGE**

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

DAVIS WRIGHT TREMAINE, LLP
BY: ROBERT CORN-REVERE, ESQUIRE
MARTIN FINEMAN, ESQUIRE
JANET GRUMER, ESQUIRE
GEOFFREY BROUNELL, ESQUIRE
JAKE FREED, ESQUIRE
1919 Pennsylvania Avenue NW
Washington, D.C. 2006
For the Plaintiffs

Megan McKay-Soule, Official Court Reporter
megansoule430@gmail.com
(215) 779-6437

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

A P P E A R A N C E S CONT'D:

OFFICE OF THE ATTORNEY GENERAL
BY: DAVID VANNELLA, ESQUIRE
JEREMY FEIGENBAUM, ESQUIRE
R.J. HUGHES JUSTICE COMPLEX
25 Market Street
Trenton, NJ 08625
For the Defendants

(PROCEEDINGS held via video conference before The Honorable BRIAN R. MARTINOTTI, United States District Judge, on August 5, 2020, at 1:00 p.m.)

THE COURT: We are on the record. Before we get started, those of you who are joining us from the press, and actually everyone, please remember the order that you signed, the agreement that you signed. This cannot be broadcast. It cannot be recorded and it cannot be transmitted in any way. Who's from the press?

MR. MADDAUS: I'm here from Variety, Your Honor, Gene Maddaus.

THE COURT: You understand the requirements, sir?

MR. MADDAUS: I do.

THE COURT: You intend to be bound by them?

MR. MADDAUS: I do. Thank you.

THE COURT: Anyone else here from the press?

MS. dEL VALLE: My name is Lauren del Valle. I am with CNN, and I understand.

THE COURT: And you will comply?

MS. dEL VALLE: Yes.

THE COURT: Thank you. Anyone else from the press?

THE DEPUTY COURT CLERK: One more, Judge. Rather, two more.

THE COURT: Okay.

THE DEPUTY COURT CLERK: Eric Gardener is present or

he's connecting. Can you hear us, Mr. Gardener?

MR. GARDENER: Yes.

THE COURT: Did you hear the requirements regarding not rebroadcasting or recording it in any way?

MR. GARDENER: Yes. I accept.

THE COURT: Okay. Thank you. That includes screenshots, please. Anyone else from the press?

THE DEPUTY COURT CLERK: Should be just one more. Jeanine O'Sullivan.

MS. O'SULLIVAN: Hello, can you hear me?

THE COURT: We can.

MS. O'SULLIVAN: Hello. I am here. Yes, I read the briefing on the requirements and rules.

THE COURT: Okay. Great. That being said, counsel, your appearances for the record. First, we'll start with plaintiff's counsel, please.

MR. CORN-REVERE: This is Robert Corn-Revere for the plaintiffs from Davis Wright Tremaine.

MR. FINEMAN: Good afternoon, Your Honor. It's Martin Fineman also with Davis Wright Tremaine. If I might ask a quick question. Mr. Corn-Revere is going to present our case. Would you prefer that the other of us blank our screens or do you have a preference about that?

THE COURT: No, not blank your screens. I would ask that you mute your microphones, though.

MR. FINEMAN: Thank you, Your Honor.

MS. GRUMER: Good afternoon, Your Honor. Janet Grumer for the plaintiffs from Davis Wright Tremaine.

MR. BROUNELL: Geoffrey Brounell for the plaintiffs also from Davis Wright Tremaine.

THE COURT: Anyone else?

MR. FREED: Jake Freed for the plaintiffs from Davis Wright Tremaine.

THE COURT: Defense?

MR. FEIGENBAUM: Jeremy Feigenbaum for the defendants.

MR. VANNELLA: Daniel Vannella for the defendants, Your Honor.

THE COURT: Before we start, I would like to thank and commend all counsel for a spectacular job in their briefing, in their presentations to the Court. I understand and completely acknowledge that we are in unprecedented times, both with the COVID and at least on the east coast with a hurricane that got thrown at us yesterday. I know you've been working diligently all hours of the night, and I appreciate that. Well done on your written submissions. I am sure that your oral presentation will be equally as spectacular.

Just to let you know, I will not be making a decision today. I think this is too far important an issue to render a decision from the bench. That being said, you're going to

have some time between today and the time that the decision comes out. I am ordering -- not requesting -- ordering you to contact Judge Bongiovanni to continue the dialogue to resolve this matter. And when you do speak with the judge and she does set something up for a conference, I am requiring that someone with settlement authority be readily available. Not that there is a lag time of days to get back to the judge, but readily available, I'll say, if not on the call, five or ten minutes away by telephone. I don't think it's unreasonable. It's not like we're bringing everyone into court. Is that understood, counsel? From plaintiff's counsel?

MR. CORN-REVERE: Yes, Your Honor.

THE COURT: Defense counsel?

MR. FEIGENBAUM: Yes, Your Honor.

THE COURT: Much appreciated. That being said, I've read the papers. I understand the arguments. I did set out a schedule regarding some time that you can have to argue. That being said, I will hear from the plaintiff. But before I hear from plaintiff, does counsel agree that the Government has a compelling state interest to stop the spread of a pandemic? Yes or no?

MR. CORN-REVERE: Yes.

THE COURT: Okay. I'll hear you.

MR. CORN-REVERE: Thank you, Your Honor. Thank you, Your Honor, for your flexibility in this process, for your

encouragement toward settlement, and for your willingness to deal with this on an expedited basis.

This is fundamentally a case about equal treatment under the law, and in that regard it's frankly a bit of a mystery that the state of New Jersey has chosen to discriminate between religious and nonreligious speech since so many of their arguments seem to be drawn from the world of film and literature.

For example, the defense of the executive orders under *Jacobson v. Massachusetts* seems to come from the Wizard of Oz. Pay no attention to the man behind the curtain. Likewise, the defense against the equal protection claim appears to be drawn from George Orwell's Animal Farm.

THE COURT: Are we going to have movie references throughout? Because I'm looking forward to it. I may give you five more minutes if you continue to string it through.

MR. CORN-REVERE: I'll try to work in something from My Cousin Vinny, if I can.

THE COURT: Thank you.

MR. CORN-REVERE: The fact --

THE COURT: I know one line you would want to use right now regarding this executive order, and I think it --

MR. CORN-REVERE: I think we both know the same line, Your Honor.

THE COURT: Okay.

MR. CORN-REVERE: And, you know, in regards to the State's essential claim that some animals are more equal than others and based their executive orders on that, the State is wrong and the differential executive orders must be enjoined.

THE COURT: Counsel, could you speak up a little bit? I'm having a little difficult time hearing you and I want --

MR. CORN-REVERE: I can move up closer to the monitor.

THE COURT: Thank you.

MR. CORN-REVERE: No, it's true. There have been many cases that have challenged emergency orders under this COVID-19 situation, but there's one thing that sets this case completely apart from all the others. In no other case has the Government filed arguments and exhibits showing that the health claims on which they are claiming deference are essentially false. Here, the State has done so not just once but repeatedly, both in Dwelling Place Network v. Murphy and in Solid Rock Baptist Church v. Murphy.

In both of those cases, they have essentially undermined the very basis on which they are coming into this court and asking for you to defer to the State.

Now, as we said in our reply, we're not trying to avoid the rule of *Jacobson v. Massachusetts*, which applies to these kinds of emergency situations. But rather, we're seeking to apply it. The plaintiffs agree, as Your Honor's opening

question suggested, that the governor has extraordinary powers in times of an emergency. That's why there was no challenge brought initially under Executive Orders 104 or 107. But under *Jacobson*, courts do not defer to executive mandates in two circumstances. One, where the power is exercised, as the Court said, in such an arbitrary, unreasonable manner where it might go so far beyond what was reasonably required to compel courts to intervene. Or in the second circumstance, the power is exercised in an arbitrary or a way where the constitutes a culpable invasion of constitutional rights.

THE COURT: So under what lens do we look at this? Through strict scrutiny?

MR. CORN-REVERE: Yes, we do. That's the second of the *Jacobson* tests where you're talking about a palpable invasion of constitutional rights.

THE COURT: You've conceded the State has a compelling interest here.

MR. CORN-REVERE: Yes.

THE COURT: So what is their requirement thereafter?

MR. CORN-REVERE: Thereafter they have to meet that interest using the least restrictive means. And here where you have a discriminatory set of mandates through these executive orders, it is not the least restrictive means.

The State's argument for deference, however, fails at the threshold because even though we might agree that there is

a compelling interest in general for what the State has done, there is no compelling interest for the discrimination that it is applying to various speakers and various actors within the state of New Jersey. All you have to do is compare the filings in this case with what the State filed in both Dwelling Place and Solid Rock. For example, their opposition brief, pages 10 to 11 and 36, they make a number of claims about health risks for theaters and implied comparative health risks to other venues that have been opened, but those are completely undermined by the arguments that they made in those other two cases. You can look in vain in this record through the arguments or the exhibits or anywhere and you will find no evidence that the State has suggested that compares the health risks of the venues it has opened, including religious venues and theaters. What you have is Exhibit J where they cite a three-page article from CNBC news. You don't have expert testimony. You don't have any reference to any scholarly work or anything else. But when you compare it to what was filed in Dwelling Place Network, you see something very different. You see 13 different exhibits being filed talking about the unique health risks of religious venues. They were exhibits filed in both of those cases in June and in July, very recently.

They were -- how can I put this? Omitted in their presentations in this case where they're claiming that

religious venues are okay to open whereas theaters are not. You can compare it to the arguments that they make in this brief as compared to the ones in Dwelling Place, particularly at pages 5 to 7 of the opposition of the TRO in Dwelling Place Networks where the State describes at length why churches are particularly risky because of behaviors such as Baptist laying on of hands, singing, fellowshipping, and speaking. All of those things are unique to that setting which the State has opened, which are not true in the case of movie theaters. As a matter of fact, in movie theaters such activity is prohibited.

But here's what the State had to say at page 5 of its TRO brief in Dwelling Place Network. Quote, "Church gatherings present a special risk of COVID-19 transmission because of the sustained person-to-person interactions they facilitate. This comes as no surprise. For decades, communal gatherings, particularly ones involving speaking and/or singing, have been associated with the spread of infectious diseases." It adds cites. It goes on to say, "Singing and speaking result in increased emission of aerosols containing the virus."

That's the State's position toward churches when they are defendants and the church is suing them. But then when they see differential treatment in a case like this, they ignore those exhibits were ever filed and then talk about,

without support, the risk of transmission in theaters. Again, for which there is no evidence.

The record in this case, as opposed to what they have filed elsewhere, shows a very different story. For one thing, we filed the expert report of -- the declaration of Dr. David Goldsmith who is an epidemiologist at George Washington University who reached the following four conclusions. First, movie theaters provide a lower risk for transmission of COVID-19 than places of worship. Second, defendants have not demonstrated that theaters present a greater risk or even equal risk of transmission of COVID-19 than places of worship or shopping malls. Third, plaintiffs 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 fourth --

THE COURT: Do we even need to get to his report? I did read the report, and he is highly qualified in this area, has testified before courts and referenced much of the scholarly articles that have been written. He also parroted what your client proposes as guidelines to allow the theaters to open safely. But do we even need him if we are just going on a strict scrutiny analysis? Does he even come into play for an intermediate or a rational basis analysis?

MR. CORN-REVERE: No. We don't need him for you to be able to make that decision because ultimately the arbitrary

nature of what the State has been arguing is enough for that. We wanted to provide at least some expert testimony in this case since the State has provided none. And for nothing else, Your Honor, to give you some comfort that a decision in favor of the correct constitutional principles is not going to provide a risk on a comparative basis with those venues that are allowed to open and are preferred in New Jersey executive orders. And, secondly, in terms of the protocols that have been adopted, that they are effective. As a result, that's simply consistent with what's been provided in the record.

THE COURT: You're saying that this clearly doesn't satisfy a strict scrutiny analysis, but if I were to find it does when I get to the other scrutiny that could be applied if I do find it satisfies strict scrutiny, this report is there to show that there's no rational basis for it in the law.

MR. CORN-REVERE: I think the State's own showing suggests there's no rational basis for the discrimination between movie theaters and religious venues since the State is the one that talks about religious venues being uniquely dangerous and more dangerous than other venues like theaters. That would satisfy even rational basis scrutiny given what they have filed but not brought to your attention in this case.

Secondly, there's nothing in the executive orders that even suggests that there's any basis for this other than a

generalized interest, which we concede is a compelling interest in stopping COVID-19 overall. What lacks a compelling interest is the difference in treatment between those venues that are permitted to open and those that are not, and in particular religious venues since that has been the focus the State has litigated.

THE COURT: As I understood your application when filed, and I may have misunderstood it, you were seeking, were you not, to have the movie theaters opened up with the protocols that you set forth in your application. But you were also going to have the concession stands opened up?

MR. CORN-REVERE: That's not part of our claim in this case where it's seeking equal treatment. And so that when the State gets around to re-opening indoor dining and so on, then concessions would be opened as well. But we think that there would be a basis for opening concessions now. But in terms of the specific elements of our legal claim, the equal treatment, since indoor dining is closed, that's not something that is contained in the order that we submitted to Your Honor at the outset.

THE COURT: So let me ask you one more question. Would you be willing to abide by the requirements regarding the amount of individuals allowed in a theater that are in place now churches and/or for indoor venues?

MR. CORN-REVERE: Yes. That's been the basis for our

argument all along. We're seeking equal treatment rather than try some sort of preferential treatment. By the way, Your Honor, that's something that distinguishes this case from Dwelling Place Network where the churches in that case were arguing for the removal for any restrictions whatsoever, as Mr. Feigenbaum argued in that case, saying that what is required here is equality of treatment and not the preferential treatment that the plaintiff was seeking in Dwelling Place Network.

THE COURT: Let me hear from the defendants as to your different position now regarding religious activities as it relates to this application for indoor movie theaters.

MR. FEIGENBAUM: Thank you for the opportunity, Your Honor. So I think it's important to note that in the prior litigation -- and let me know if you have any trouble hearing. Obviously, the phone connection is not ideal. The different context that we were facing in Dwelling Place and in this case I think are really important for understanding the context in which this Court finds itself. In Dwelling Place, the argument made by houses of worship were that they needed to be treated like retail establishments or other recreational establishments where people come and go and have limited interactions with one another. And we said in that context that a church is more dangerous than those institutions because a church has sustained person-to-person contact. We

don't disagree with that. There are risks involved with attendance at worship services, and that's why we took the position we took at Dwelling Place.

THE COURT: What happened since then to move the ball forward for churches but not for a movie theater willing to comply with all the other requirements that are in place for church and probably even beyond?

MR. FEIGENBAUM: So there are three answers to that, Your Honor. One is about the sort of legal interest we're trying to accommodate. One is about the health risks involved, and one is about the adequacy of alternatives. So I'd like to address each three, if you don't mind, because I think it's not just the health risk answer. It's a broader answer than that.

THE COURT: Okay.

MR. FEIGENBAUM: The first part of the answer is that as case law made clear, we talked about this in Arcara and Real Alternatives and the like. The cases have an interest in the accommodating religious conduct, but it's separate from this free speech clause. And that flows directly from the free exercise clause, which is why states and the federal government all the time have religious accommodations under general and neutral statutes when they don't accommodate other activities, even ones that might be to implicate the same interest. So we obviously talked about inmate prayer versus

inmate movie theaters. You could say the same thing about the military where individuals are given an opportunity as a soldier to pray for an hour with their chaplain but are not allowed to spend an hour watching movies when they otherwise need to go to the mess hall. That's another example of where the state or the federal government has a clear interest in accommodating religion that is distinct from any other neutral interest like military order and the like.

The same would be true under Title 7 where you have accommodations and you have protections for individuals based on religion but not based on other analogous secular activities such that someone could not be fired from their job for missing a meeting because they had to go pray for Yom Kippur but could be fired from their job because they missed a day to go to a movie marathon with their son.

It also explains why there's different tax treatment rules for churches as opposed to movie theaters and why you can have a zoning rule that nevertheless in a residential neighborhood accommodates churches beyond the height restriction, but you don't also have to accommodate a movie theater beyond the height restriction in the same neighborhood.

The point is that the state and federal government have an independent and longstanding interest articulated I think most clearly in Real Alternatives and in Cutter that lay out

the State's interest in accommodating religious practice. What we said in Dwelling Place is that the free exercise clause does not compel the State to accommodate religious practice. That we are allowed to treat religious activity exactly the same as their secular counterpart, and now we've been allowed to do so since the 1990 decision *Employment Division v. Smith*. But what courts have also consistently said is that while we're not required to do so, the free exercise clause gives us the right to do so. That this is the so-called play in the joint doctrine. That the State has a legitimate interest in the language of real alternative. A legitimate interest in protecting religious activity and in protecting free exercise in light of the constitution and this country's historical interest in non-interference with religion so that leadership can set its own rules for its members and engage in its own conduct. That's the balance we've tried to walk.

In the Seventh Circuit case that we've identified for this Court, the panel, which contains both liberal and conservative jurists alike -- this is not a particularly ideological point -- said we have an opinion called Elim 2 in which we said that the state of Illinois does not have to treat churches any better than any similarly situated entity. But they said because the free exercise clause must be doing work independent of the free speech clause, the fact that the

State does not have to treat churches any better than a secular entity does not mean they're precluded from doing so. And instead, case laws time and again under Title 7 and tax treatment and zoning and the military and in the inmates context and in the context of a contraceptive mandate in Real Alternatives make clear over and over that the State's interest in accommodating religious activity is an important interest that the State is free to accommodate. That's just one of the three reasons that the State has, of course, for being able to treat them differently.

I'd also like to identify the reasons that have left to do with the protection to religions entities under the free exercise clause and under Real Alternatives and Cutter and instead have to do with some of the on-the-ground risks and on-the-ground alternatives that exist.

So when it comes to the risks, there are a couple of things that we identified in the brief and more generally that are of particular concern. The first is that by its very business model, movie theaters are, of course, dark. Not pitch black. I understand, but we've all been in a movie theater and the light reflected from a movie is certainly darker than in most contexts.

THE COURT: Aren't you getting into people taking their masks off?

MR. FEIGENBAUM: That's correct. But it's very, very

clear that in the area of economic and business regulation, the State is free to engage in that sort of educated guessing as to how individuals will behave. And, frankly, for what we've seen as a matter of law enforcement, plenty of people are unwilling to keep their masks on when they don't have to.

THE COURT: They argued that they would have somebody there, an usher or someone, requiring people to keep their masks on and perhaps taking it to the next level and having them leave if they didn't comply.

MR. FEIGENBAUM: So I think the State has justifiable concerns with outsourcing some of its enforcement needs to the needs of the business. So it would have economic incentive not to report the problems to us because it would lead to us re-shutting them down. I think the State has every right to continue to have concerns about opening, to a mass degree, places where individuals gather repeatedly whether they're wearing masks or not. Masks are a really important part of the public health equation, but they're not the only important part of the public health equation. And we all know that people have gone to movie theaters and they've snuck snacks in or they haven't listened to what the usher told them. And these are public health risks that take on a whole new balance when you're dealing with an epidemic like the kind that we're dealing.

THE COURT: They can do that in church, too. I've

seen people at church having a snack. Right?

MR. FEIGENBAUM: So that's absolutely right, and that's why I think it's one piece of the three things that are going on. We also think that it's not unfair to speculate that individuals are more likely to listen to their faith leaders commanding them to keep their masks on in the middle of service than an usher at a movie theater. It's not unreasonable for the State to think that some of those mechanisms could be more effective in protecting the public health.

And then the third criteria that we think make movie theaters and other performance venues really quite different from any other context that we've identified is the availability of alternative. As we've noted repeatedly in our brief, and as I think is important to stress for this Court, this really is not a case about speech. The State can't say that often enough. This is not a case where we're targeting movies for showing obscene material. This is not a case where we're trying to prevent the publication of any movies or any other form of speech based on a message that we oppose or a political dispute where the governor has a different view.

Under the laws being challenged here, New Jersians can watch any movies, no matter how explicit and no matter how controversial. It can do so in their home. It can do so in their cars, and they can even do so outdoors at a movie

festival.

THE COURT: Can they do it at a church?

MR. FEIGENBAUM: What was that, Your Honor?

THE COURT: Can they watch one in church? Just for purposes of the record, when I use the word "church," I mean all houses of worship. I'm just not narrowing it on the church. Can they watch --

MR. FEIGENBAUM: Of course, Your Honor, and the State uses it in exactly the same way and the same way other First Amendment cases do.

So the way that the rules operate for churches is that obviously we've given them an exemption to have their religious services. The State does not want to police if a part of the religious service involves viewing a part of a movie. So the State doesn't want to get into what a worship service does or does not have. I understand that plaintiffs have highlighted some social events that they think a church is having. The record doesn't even reflect if they're indoors or outdoors. One of the events they pointed to was a barbecue, which quite likely was outdoors. I can't find any evidence from it from the record.

THE COURT: In the middle of a mass, if the priest wants to play a clip from the Ten Commandments, is that permitted?

MR. FEIGENBAUM: Yes. The State has no interest in

having the business of telling a priest how to run his service.

THE COURT: How about a clip from one?

MR. FEIGENBAUM: If it's a part of a religious service and he plans to bring a parable or just having a sort of social entertainment event having nothing to do with their faith.

THE COURT: How about if they're going to use the church after mass at 2 o'clock to show Cinderella for the children of the parish? Would that be something that's permissible?

MR. FEIGENBAUM: So I think we would have concerns if the church started basically turning itself into an entertainment center Willy-nilly. The point of the exemption for the church, and this is how it's worked --

THE COURT: How about if the church uses a movie theater for mass because they don't have a venue, is that permissible? Could they use a theater?

MR. FEIGENBAUM: No, Your Honor. That's a perfect example of why this is not about expressive conduct. The point is that what the State is trying to do is figure out the paradigmatic uses of various locations, whether it's malls or libraries or churches or movie theaters, and assessing the risk and the availability of alternative. The State is not required to say that every single use of a church would be

distinct from every single use of a movie theater. A mask could, of course, get placed in a movie theater, and it's conceivably possible that at some point some church will try to get creative and turn itself into some commercial enterprise to show movies. That would obviously raise concerns, and we would address that in the future. We don't have any evidence that that's been happening.

THE COURT: I'm going to interrupt you for one second.

Plaintiff's counsel, did you cite to an example of a church using a movie theater because they didn't have a venue?

MR. CORN-REVERE: Yes. This is included in our declarations from Cinemark where they have a church theater program for churches that don't otherwise have facilities. They will use theater facilities for their church services. And it raises an interesting question, Your Honor, of just exactly how these executive orders would apply because apparently they allow gatherings for religious purposes. They don't specify what buildings you have to use.

But the question here, and according to Mr. Feigenbaum, it appears that the State would have concerns and might want to step in and decide whether or not the use of a facility is appropriate based on who happens to be using it at the time.

THE COURT: Okay. Understand. Counsel, to that point.

MR. FEIGENBAUM: Your Honor, the State has no concerns about which ways movie theaters are used. They're closed. If there's a declaration by -- and I must have missed it -- that the movie theater is open to the public for whatever reason, that's a violation of the executive order. Movie theaters are not open to the public right now. We're actually not in the business of searching what is the purpose for which the movie theater is open and how good is the reason. Movie theaters by their structure and their nature and the way that they operate are closed to the state at this time and can't be opened to the public. Period. So I don't want there to be any misconception led by plaintiff's counsel about what we're saying movie theaters can or cannot be open for. They're closed for the public. And there's nothing unusual about this. The State throughout its emergency period has taken steps based on the paradigmatic and core uses of various business entities to keep them open or closed because of the core uses of those facilities and the enforcement problems that would follow.

For example, it is possible that a clothing store and a grocery store might end up selling at some point the exact same item, but the grocery store was, nevertheless, allowed to stay open and the clothing store was, nevertheless, required to be closed at various times during the pandemic to limit person-to-person contact and protect public health.

The point of those closures wasn't that the health risk at the grocery store was so different than the health risk of clothing. The point was that people had a need to be able to go access the groceries and get their fresh groceries is very different than the need immediately to go get clothes, even if a specific store might sell the same item as another specific store. The state has to be able to operate on that sort of categorical basis, which is why every state has been acting on a categorical basis when it comes to different industries, including as it comes to movie theaters. All the other states that have either kept closed movie theaters but re-opening on pause, or closed movie theaters once again have been doing so on the basis of the nature of movie theaters and are closing the theaters themselves. And that's --

THE COURT: Your defense is, you concede, that movie theaters are being treated differently than churches, i.e. the exercise of someone's religion in a building?

MR. FEIGENBAUM: Yes. Movie theaters are definitely being closed while churches are being open. I agree with that. I think my point is just that we have three reasons why. One of them is the ability of the state to protect the free exercise of religion, and that's the point of Real Alternatives and Cutter and the Seventh Circuit case on which we relied. The other is about the different health profiles and the concerns that individuals are going to take off their

masks. And the third -- and I think this is extremely important -- is also the different adequacy of alternatives. Our point is that with respect to the general population, individuals have the ability to access seeing a movie and that we're not telling them what movies they can or cannot see. Some distributors might choose not to release movies, but that's the economic choice of a third party. It is in no way, shape, and form in any way us, the state, saying this movie is allowed to be shown or that movie is allowed to be shown. That's very different.

THE COURT: Did the State ever close churches?

MR. FEIGENBAUM: The State did not ever close churches. There's two sets of requirements that we have all throughout the process. There's the entities that have been closed and then there's the gatherings rules that are placed on individuals when they're allowed to come together. So I think it is an important distinction. We said this explicitly in Dwelling Place. This is exactly what we told the court in Dwelling Place as well. Houses of worship have never been closed. We closed all manner of businesses where person-to-person contact was especially likely, whether it was non-essential retail, whether it was all recreation or whether it was casinos and movie theaters. We closed all sorts of businesses. We never closed houses of worship. What we did do is have a very strict gathering limit which was operating

wherever you were. So if I was in a home -- we obviously never closed homes. But if I was in a home, we still couldn't have more than ten people together for your birthday party or whatever sort of celebration you wanted to have. That was the same for houses of worship. We never closed them, but they were, nevertheless, subject to a strict gathering limit. As we have loosened the gathering limit, it has been easier for large worship services to be able to take place in those churches. Just as a matter of how the gatherings limit works versus what is opened or closed, we never closed churches.

THE COURT: I think perhaps some of the misconception came from the fact that some of the churches hierarchy closed churches.

MR. FEIGENBAUM: I think that's right, Your Honor. And I think one of the things that makes churches so interesting and one of the reasons states had a whole policy of noninterference with churches reflecting, you know, the longstanding history under the free exercise clause was also the different alternatives available for religious practice and the different alternatives available for individual movie watching. And it's not -- this is an important part of the state's re-opening. Every time the State decides to re-open something under COVID-19, it has to engage in a balancing act between the public health risk and the need to the general public of that service. So when we re-open personal care

services, it was the first time that we allowed that level of close person-to-person contact to take place in an indoor facility. But the truth was there really weren't other good outdoor or at home alternatives to a tattoo parlor or barber shop or any of the other places where you needed to have careful use of equipment indoors.

THE COURT: What data is the governor using to decide how to roll out these openings?

MR. FEIGENBAUM: So, again, it's the balancing question. So I think it's a wholistic picture, and I want to walk through what that looks like. When he decides to re-open any industry or any entity, he looks at both what are the identified health risks of that entity based on public reporting. Based on studies when they're available. Although, let's be honest, there are almost no studies available right now. That's the whole point of this unfolding epidemic. We have very little published data that makes clear with any sort of control experiment what will or won't be safe, which is one of the challenges with movie theaters. Very few movie theaters have been opened. Even in the vast majority of states where plaintiffs say they're allowed to be open right now. And, therefore, it's very hard to do the sort of observational study or control experiment that we'd like to have. So we consult with the Department of Health. The governor specifically consults with the Commissioner of

Health, and then they make a determination as to the predicted safety of any entity, whether it's a kind of retail store, a recreational establishment and the like. And then they balance that against the interest in re-opening, which includes the adequacy of alternative. And then for churches includes the interest in protecting free exercise of religion under that separate provision of the First Amendment. And the adequacy of alternatives analysis is particularly challenging for movie theaters including as compared to houses of worship. We identified this point in our brief.

But in the context of a movie theater, there is, frankly, a really clear alternative for members of the general public to experience the service that they provide, which is one of the reasons why in trying to protect the general public the State has made the call at this time that the health risks of grouping people together for extended periods of time to watch movies cannot be born at this time. Understanding that that imposes serious economic costs on the movie theaters just like any closure has --

THE COURT: Where is that data? Because they've presented an expert report that seems to be contra to that representation.

MR. FEIGENBAUM: So I think there's a couple points I'd make to that. The first is that the expert report has a couple of, I think, shortcomings that are worth noting. The

first is that the expert report itself notes that there might be concessions being sold in that context and that people might or might not be taking off their masks. But nevertheless, grapples directly with the risk of removing masks in movie theaters. Understanding that's no longer the claim they're making. It's a really notable omission in an expert report about the risk indoors, but it doesn't talk in detail about the threat presented by indoor mask removal. So we think that that's extremely notable.

The second point is that the Johns Hopkins' report they submitted in their opening brief and the expert report they submit, the Goldsmith declaration on reply, do not have a one-to-one match for what they say about levels of risk in comparison and they definitely don't match the same hierarchy identified by the Texas Medical Association in Exhibit LL. They seem to suggest that libraries and malls are a similar danger to places like movie theaters and that is very much not the case when it is absolutely the case that the Texas Medical Association said the risks are greater.

My point is not to say that there's any one scientific answer here. My point is that there's significant scientific uncertainty based on the public health experts or the public health epidemiologists and infectious disease experts that are discussed in Exhibit JJ based on the Texas Medical Association information discussed in Exhibit LL and based on the

inconsistencies across the Johns Hopkins' report and based on the Goldsmith declaration.

The point of *Jacobson* is that in scientific uncertainty, where we very much exist right now, the State has to be able to make the call that having a room like a movie theater, which is unusual for the amount of time that people spend in the same space for that extended period of time in closed indoor quarters is too big a risk for the state to bear and that it doesn't have to re-open them. Heed come what may, and then figure out the data after that fact. That would be a really dangerous experiment for us to have to run.

THE COURT: So let's circle back to where I started with counsel. You obviously contend that the State has a compelling interest in stopping a pandemic. Fair question? Yes? Mr. Feigenbaum.

MR. FEIGENBAUM: I'm sorry. Yes. I absolutely agree with that.

THE COURT: What scrutiny does this Court need to undertake in looking at these executive orders?

MR. FEIGENBAUM: The State submits its rational basis, although I'm happy to walk through why we believe we'd prevail on either level of scrutiny or any level.

THE COURT: I would like that. Strict scrutiny.

MR. FEIGENBAUM: So the reason we prevail on strict scrutiny I think is best articulated in the Seventh Circuit

opinion we shared with this Court yesterday, State of Illinois Republican Party, in which they assumed without deciding that there was going to be a strict scrutiny applied. They said it might apply, but nevertheless protecting the rights under the free exercise clause was a compelling state interest which matches perfectly with what the Court has said in Real Alternatives and what was said in Cutter. That case has compelling interests in protecting religious worship.

I would also come back even if strict scrutiny to the difference between the alternative analysis. The point that we've made regarding movie theaters is that there is a readymade alternative to group movie watching for the general public. There is no similar alternative for religious worship for the reasons in Dwelling Place, which are exhibits that are part of the Dwelling Place record as well. We presented those to Your Honor. They were Exhibit QQ and Exhibit RR, and those were specific exhibits by faith leaders that said it would be in violation of their religious commandment if they did not gather in person together in groups. And that explains why they didn't have same adequacy of alternatives.

On the adequate alternatives measure, on the health measure, and on the protecting religious freedom measure, we very clearly have a compelling Government interest and we are acting in the least restrictive means possible by limiting movie theaters, which pose a special danger while nevertheless

distinguishing churches which have a very different historical pedigree under the constitution and in this country.

If you get to rational basis, I think it's obvious that it follows the rational basis that if we think we can prevail on strict scrutiny, we obviously think that we can prevail on rational basis, exactly as Judge Kugler found in dealing with the gyms.

The reason that we believe rational basis applies is that it is quite clear we are not targeting movie theaters because of the expressive nature of their conduct. No one thinks, and I don't believe plaintiffs to suggest, that we're going after movie theaters because we don't like something about their speech. We're going after movie theaters because we believe that they present a special risk as a matter of public health. And the point of our --

THE COURT: You're claiming it's content neutral?

MR. FEIGENBAUM: So we're saying that it is with the exception of -- first of all, we think it is generally when we do health and adequacy of alternative, that those things have nothing to do with the value of putting on speech. Things that have to do with the risk and what the adequate alternatives are to the general population. If this Court disagrees with those and only wants to rely on the distinction of the free exercise clause, then the way --

THE COURT: Hold on one second. Megan, did you get

that?

THE COURT REPORTER: Yes, Your Honor.

MR. FEIGENBAUM: I'm happy to repeat the point, Your Honor. We're all working through these challenges these days. So the point I was trying to make is that it depends on the metric you're looking at whether one is to say it's content based or not. When we say there's adequate alternatives to watch movies and what aren't adequate alternatives to in-person conduct for religion based on the various record, that is not privileging one kind of speech or another. When we say there are different kinds of risks, we are not privileging one kind of speech or another. The only time in which there's even an argument that we're doing this based on privilege in one kind of speech or another is when we're talking about respecting the free exercise clause. And the point of the Seventh Circuit opinion that we shared and the point of Real Alternative is that whatever the level of scrutiny, there is a clear interest and, therefore, we are acting with the appropriate tailoring requirement when we have an exemption for religious accommodation. Otherwise, it's not clear how you could exempt religious accommodations under Title 7. How you could justify past treatment for churches versus movie theaters. How you can have different zoning rules for churches versus movie theaters, and how members of the military could have group prayer sessions even they if

don't have group opportunities to watch movies.

If all of those were content-based speech restrictions where you needed the special compelling interest to have the religious one instead of the secular one, it's not clear how any of those would survive. And the point of real alternatives, which went through all of the examples I just provided to you, is that there is a historical respect for freedom of religion that gets treated differently and that does not mean that general and otherwise neutral and applicable rule falls for content-based discrimination.

THE COURT: So are there any protocols that the plaintiff could put in place that would satisfy the administration that a movie theater can open safely? For example, one person allowed in the movie theater by themselves. Is that something that's okay?

MR. FEIGENBAUM: So, Your Honor, we in the gym context did something. That was another high risk industry that we had particular concerns about, and we basically said individuals can make group appointments when it was just your family or your household or no other change. My understanding is that that would not work with the business model of movie theaters because if you're just right -- there's a reason to go to a gym to meet a personal trainer if you're just a family. They have equipment you don't have. There's an individual there who is giving you training. If you're just

one family or just one household going to a movie theater, then you could just be watching the same movie at home. And my understanding was that business model wasn't going to work for plaintiffs. I don't know that the State would have any particular concerns with a rule that said one person at a time in a whole movie theater or even one family or one household at a time in a movie theater.

THE COURT: So how about if they were to say we could satisfy social distancing and we can accommodate in our movie theater four groups of ten people because they will have X rows and seats between them and among them and they would never cross heads with the other person. As a matter of fact, we have four entrances and they can each go out their own door. Something like that?

MR. FEIGENBAUM: I think the State would potentially still have concerns. I would obviously have to talk to my client on that particular example. But I'll explain why I think the State would still have concerns because it has to do with the balancing of health and alternative. If we're looking at the general public and the risk that we have to bear for them, it is the case that the general public would potentially be seeing some movie that they could see at home. Again, whether or not they can is an economic choice of the third party actor. And the only difference of coming in the movie theater is to increase the risk of COVID-19 exposure.

So relative to the alternative, we're still accepting a COVID-19 risk that we shouldn't have to. And that wouldn't be based on any sort of equal protection theory because it wouldn't match what other entities are doing. So that would be based on some sort of freestanding theory that these restrictions on movie theaters are irrational. And that's where *Jacobson* I think most perfectly comes in, which is why plaintiffs aren't asking for something like that in this case because it's for the elected branches which have those expertise and democratic accountability to figure out, relative to the alternative, what are the health risks most important to bear? So I don't need to say that there's that particular example that I could or could not agree to unlike the one household that obviously appears to be the same from a health risk perspective. But I did just want to identify we would have to balance the alternative situation of those four families watching the same movie at their own home and then those four families coming together to watch it and whether that would be an increased risk that would be bad for the state to bear at this time.

THE COURT: So I'll turn to plaintiff's counsel now. And I guess you can start your argument, if you'd like.

MR. CORN-REVERE: You must've seen me chomping at the bit here. Let me start with the question that you asked Mr. Feigenbaum, and that is where's the data? I think you heard

him talk very quickly and talk a lot, but he never answered your question. And the answer is there is no data supporting the conclusion that he reached. And that is, we're concerned about the special risk as a matter of public health posed by movie theaters. There is nothing in anything that Mr. Feigenbaum said or in any of the papers that are filed and that's clear through the ones that he referred to.

For example, he refers to Exhibit LL, which is the Texas Medical Association chart. To begin with, that is not a scientific study. The Texas Medical Association simply went out to a bunch of people and said, ah, what do you think? So then they created a ranking based on that sort of general quote.

But the most notable thing about Exhibit LL is that it lists churches as being more risky than movie theaters. So, again, it's hardly evidence for what they're talking about. There is no data supporting what the kinds of closure and differential closures that the state of New Jersey is enforcing here.

He refers to Exhibit JJ, of course without naming what Exhibit JJ is. This is the article that I mentioned earlier when I was speaking. A news article from CNBC. Other than that, there is absolutely nothing other than the many articles that the Government has filed in other cases talking about the special risks of churches because of the specific kinds of

activities that take place in churches but not in movie theaters.

The other information that we have in the record, or actually part of it is to the dog that didn't bark. A literary reference, not a movie reference. Sorry. But it's one that, you know, what we don't have is any reports, any epidemiological studies of the 40-plus states where theaters have been opened. The state in its other cases have been able to go out and beat the bushes and find articles talking about COVID-19 transmission from churches. But despite the fact that movie theaters are operating elsewhere, they found nothing that they can put in the record to suggest that movie theaters are particularly risky.

On top of that, we did submit the declaration from our declarant Bow Tie cinemas and the three states where they're operating during the COVID-19 and they've opened theaters. They've had zero reported cases of COVID-19.

So to the extent there's any data on this record, it supports plaintiff's position. By the way, speaking of the dog that didn't bark, there are no health experts from the state who have been willing to provide declarations suggesting that the state's position is supportable. That includes the codefendant in this case who's the Director of Public Health. So there is nothing that they have submitted on the record that supports the position they're taking.

Let me move quickly to the question about levels of scrutiny because that's something that I think is particularly -- well, a little troubling about the position that the state is taking. That is they're basing their argument on the -- one of the authorities they submitted last night. As a matter of fact, most of the legal argument that Mr. Feigenbaum is presenting is based upon this unauthorized surreply they tried to slip in last night, which I think we thoroughly responded to with our letter this morning.

But in particular, he tries to draw from the Seventh Circuit opinion, as he calls it, in Pritzker, an argument that strict scrutiny applies in cases like this. Three things about that. One is Pritzker is not a decision on the merits. Pritzker is a one-day denial of a motion for injunction pending appeal and it was denied. There is no decision on the merits. There is no application of strict scrutiny or any other kind of scrutiny. It's simply denying the injunction pending appeal.

In the second place, the decision in that case -- one second. The decision in that case, the only precedential Seventh Circuit opinion that exists, which Mr. Feigenbaum doesn't cite, is the decision in *Elim Romanian Pentecostal Church v. Pritzker*, which was also decided this year, decided before they created exemptions. And there the Court upheld executive order imposing the same occupancy limits on

religious and nonreligious gatherings. So the key there was neutrality. And there's no ruling in the case involving the one that they're relying on that they submitted as supplemental authority.

The third thing and the third part about that case is the executive order in that case was considered to be narrow, and we disagreed with the district court's conclusion there that is now on emergency appeal. It was considered to be narrow because there were only three exceptions that were made to the distinction between political speech and other speech. Political speech was still -- gatherings were still limited. Religious gatherings were allowed, but the Court concluded that it was narrow simply because the only exceptions were for emergency services, Government, and religious.

Now, we disagreed for a variety of reasons with the district court's conclusion, but it hardly stands as a precedential Seventh Circuit ruling. And the difference, even if you accepted that as something that's precedential applies here, it simply -- you can't translate the conclusion there to here because the exceptions in New Jersey are far broader and very different than they are in Illinois.

Just yesterday Governor Murphy extended his preferences to go beyond political and religious speech in Executive Order 173 to include gatherings for weddings, funerals, and memorial services. Mr. Feigenbaum was talking about how carefully

calibrated everything is to the specific health risks, but it seems that the exceptions in New Jersey are being listed for a speech that Governor Murphy considers to be either more important or more congenial. And those exceptions are allowed without regard to any kind of health data.

Now, that brings me to the three points that Mr. Feigenbaum raised in trying to distinguish those from the argument they were making in Dwelling Place Network and other cases. First of all, he says that there is a compelling state interest in differentiating between religious speech and nonreligious speech. To begin with, these sets of orders discriminate not just on religious and nonreligious speech. As I just pointed out with Executive Order 173, there are a variety of types of gatherings that are permitted in New Jersey of various different subjects that have no relationship to the health risks that are not applied to movie theaters. And as a consequence, it's content-based on its face.

Secondly, even if it did apply just to the difference between religion and nonreligious speech, Mr. Feigenbaum tries to extract from cases like Real Alternatives and from Cutter a rule that simply doesn't exist. You know, it has never been the case in the United States that the Government simply has a free authority to prefer religious speech over nonreligious speech. Yes, certain accommodations can be made. And, yes, the free exercise clause of the First Amendment has work to

do. But to assume that you can then favor religious speech or nonreligious speech ignores the existence of the establishment clause. There has always been a balance. And the requirement, as a consequence of that, has been neutrality between religion on and non-religion. And so while you can have certain kinds of regulations that don't burden religious exercise, you don't get to favor religious exercise over non-religion.

An example of that is a case that is cited in Real Alternatives but not discussed by the Government is *Center for Inquiry v. Marion County Circuit Court*. That's a case where the state regulations allowed chaplains and religious people to conduct marriages but not secular people who occupied the same position. And the Court essentially held that this was a violation of both First and Fourteenth Amendment saying that neutrality is essential to the validity of an accommodation. And interestingly for purposes of that, the Seventh Circuit cited Cutter v. Wilkinson. So it's always required that sort of balance and neutrality between religion and non-religion. You can accommodate but you cannot favor, and that's what the State is arguing here for.

Also, as I pointed out there, they're arguing far more than just favoritism of religion. The favoritism of whatever speech the governor decides he's going to permit this week.

When we're talking about -- well, the rule he suggests

derives from *Employment Division v. Smith* or the reactions to it. There have been various federal laws that have been adopted like RFRA, like the regulation at issue in Cutter that accommodations can be made. Once again, those laws were adopted to try and rebalance issues to try and restore the ability to protect religion. They were not intended to favor religion.

THE COURT: Let me hear counsel on that issue. Mr. Feigenbaum, you spent some time on that. Talk to me about what your adversary just stated.

MR. FEIGENBAUM: I'm not sure I understand the line being drawn between accommodating and favoring, and I think it sort of collapses in practice. So if Your Honor thinks about the example we used of, say, the military where you would be allowing someone, a cadet, to spend an hour each morning in group prayer, but you wouldn't be allowing that cadet to spend an hour each morning watching movies. They're accommodating their religion. But as applies to this case and based on the arguments plaintiffs are making in this case, you would actually be discriminating in favor of religious speech by the pastor for that person and against the speech of the movie distributor that the cadet would be watching. Any time that you package an accommodation for religion, you are necessarily favoring the religious conduct over the equivalent secular conduct. And that's the point that Real Alternatives is

absolutely making quite clearly. And I think it might be helpful just to read a couple of the key passages from that decision ever so briefly -- and you know I obviously speak quickly -- because I think that it shows very clearly what an accommodation actually is and how it operates relative to secular entities.

So in the case of Real Alternatives, after finding that the two entities were not similarly situated for reasons I can refer to later but don't directly respond to your question, the Court says that even if the entities are similarly situated, the challenge fails because of the historic principle of respect for the economy of religion. This provides for legitimate purpose for preferential treatment of religious organizations. Accommodations may be extended to houses of worship without applying to nonprofit entities to alleviate governmental interference with the ability of religious organizations to define and carry out their religious mission.

Then they drop a footnote to make clear specifically that were the rule otherwise, if you couldn't favor religion, then you couldn't have the accommodation. They say there would be pressure to appeal the thousands of religious accommodations that have been enacted at the federal, state, and local levels for fear that they would become vehicles to avoid compliance by anyone who dislikes the underlying law.

The same problem is here too with the argument that any time you prefer the practice of religion and accommodate that practice of religion as a result, you're discriminating on the basis of speech because as Arcara pointed out, every activity involves some element of speech. So it really doesn't function in that matter.

And Real Alternatives also cites *Church of LDS v. Amos*, a 1987 Supreme Court opinion which said -- again, I'm quoting -- whereas here Government acts with the proper purpose of listing a regulation that burdens the exercise of religion, we see no reason to require the exemption package with benefits to secular entities.

So if this Court recognizes that what New Jersey is doing is trying to limit those places where individuals are gathering together for extended periods of time, but then accommodated religion, even if that meant a preferential treatment for churches, then the point of Amos and the point of Cutter and the point of Real Alternatives is that that decision is perfectly permissible. It reflects interest under the free exercise clause and the law does not fail on that basis. So that's our point directly on the case law.

THE COURT: Counsel, do you agree with that?

MR. CORN-REVERE: Obviously not. I mean --

THE COURT: Okay.

MR. CORN-REVERE: -- if that were true, there would

be nothing left of the establishment clause. And that is if they're saying that any time religious practice is recognized as being protected then you can favor religion. Then there's simply no -- what they're doing is taking a specialized situation where you have the application of the Religious Freedom Restoration Act and saying that we can make an accommodation and now extending that to saying as a general proposition, we can provide for favoritism of religion because of its content rather than to do it because of the health risks. None of those other situations apply to this situation here where the State itself has identified the source of the problem that it's trying to solve as being most uniquely associated with the kinds of practices that happened at religion activities.

In terms of citing a case as further support for Cutter v. Williamson (sic) in Real Alternatives, that case is only mentioned in passing and not in support of the main issue. And it goes on to say, when it cites Cutter, even when in noninterference with church autonomy is not strictly required, the Government has discretion to grant certain religious accommodations subject to constitutional limitations, like the establishment clause. So as a consequence, again, neutrality is required. It doesn't mean that you have to allow inmates to see movies. But when the parties are similarly situated, as the Court explained in *Center for Inquiry v. Marion County*

Circuit Court, then you can't extend the accommodation to swallow the establishment clause.

THE COURT: Talk to me about the Whitmer case.

MR. CORN-REVERE: The Whitmer case is the Michigan case that denied a preliminary injunction to allow for Juneteenth celebration film festival. The Court upheld it, noting that it was content neutral and that it -- noted that if it had been content-based that it would be subject to strict scrutiny, but it wasn't. This is the court that also applied *Arcara v. Cloud Books*, we think, incorrectly. But it's the case that New Jersey has tried to rely on so much. And that's the case saying that there's no First Amendment problem if you close down a bookstore that has prostitution going on inside. This is the case that the Government is trying to extend into a general rule to say that as a consequence it can use a health justification and there's no problem with closing things down altogether.

But of course, as *United States v. Alvarez* teaches, you can't take a fragment of a statement from a case and then try and weave that into a general rule that restricts First Amendment rights.

Several problems with the reliance on Arcara. First, it requires content neutrality. In *Arcara v. Cloud Books*, the Court went on to say this is a neutral rule, but if it were applied pre-textually and it could be applied content-based,

then it would have real problems. The difference here is the content discrimination is on the face of the order where Governor Murphy allows certain kinds of speech, political speech. Now, weddings and funerals, memorial services and churches, the kinds of speech that he likes, that kind of content discrimination is on the face of the order. So the problem that would have applied in Arcara, had there been pretext, is on the face of the order and requires strict scrutiny in this case.

The other problems with Arcara are that it wasn't tied to the fact it was a bookstore at all. It was just the fact that prostitution is taking on in the back of the bookstore and so it was closed down as a nuisance.

Had -- well, as the court made clear, the owner was free to open up the next day, the next door, selling the same books to the same customers. There was no restriction on the book seller at all whereas here, no movie theater operator in New Jersey is opened anywhere. Arcara has never been read to be a general rule that the Government is applying in this case.

THE COURT: Okay. Let me suggest this. For Megan's benefit, we're going to take a ten-minute break. It is 2:06, at least where I am. We'll resume a little after 2:15. Thank you.

(A short recess occurred.)

THE COURT: Let me ask the Government, should we follow the Whitmer case?

MR. FEIGENBAUM: Could you re-ask that question?

THE COURT: Should we follow the Whitmer case?

MR. FEIGENBAUM: Absolutely. So I do think that this Court should follow the Whitmer case, and there's a couple of reasons why I think it bears on the disposition on the case in front of you.

So there's two things I want to say about what the district court specifically did, and then two things about why the distinctions with that case don't really hold up. So the two things that it did are that it based a similar case in which according to the docket in that case and the Court's own opinion, NATO has similarly sent Michigan a safety re-opening plan and Michigan has similarly concluded that it wasn't ready to fully re-open across every region at that time. And they argue that Michigan has similarly not done enough to show the risk of movie theaters. Nevertheless, the court, recognizing the import of Arcara and recognizing the import of *Jacobson*, deferred to the governor and to the elected officials of the state to decide when re-opening was necessary.

The plaintiffs made the same limiting arguments about Arcara that the plaintiffs make in this particular case. They say those arguments about what Arcara means have never been accepted, but the Whitmer case directly accepted them and said

exactly that the point of Arcara was what its plain language. But when movie theaters get special solicitude and strict scrutiny when a law is targeting the expressive nature of their acts, that when you're regulating them as businesses and not targeting them because of their expressive conduct, then you don't have to satisfy strict scrutiny in a similar manner. That's exactly what the court held which is why it applied intermediate scrutiny instead of a strict scrutiny and upheld the state law.

Plaintiffs give in the briefing and oral argument this afternoon two reasons for distinguishing the CH Royal Oak case, and neither withstands closer scrutiny. In the briefing, plaintiff focuses on the idea that that was about one movie theater. But that's simply incorrect. It was one movie theater bringing that challenge, but there was no special closure order to that movie theater and that movie theater only. Instead, they sought an exception to a general rule about the closure of movie theaters for their Juneteenth celebration or a movie-showing event, and they were told they were not going to get an exception. So they challenged the general rule and the failure to give them an exception to that rule.

In fact, Michigan had a closure order at the time. Michigan, unlike New Jersey, was going region by region, but as well as to the region there, only two of the eight regions

in Michigan had opened movie theaters by that point and six of them were still closed. And this movie theater was in one of the closed regions. So, again, this was a general closure order of movie theaters among other targeted industries that the state had concluded presented an especially high risk, and the district court rejected a challenge to the closure of movie theaters.

The second error that they make is that that case did not involve content discrimination where this case evidently does involve content discrimination. The whole point of the legal theory in Arcara was that there was content discrimination between various protests like the Black Lives Matter protest and the black -- and the Juneteenth movie showing that the movie theater wanted to do. And the Court said there wasn't discrimination based on expressive conduct because it was a general closure of movie theaters. Not because there weren't similar claims of a lack of content neutrality.

THE COURT: Your argument is that this executive order is content neutral because it's not talking about what can be shown. It's saying basically nothing can be shown in this brick and mortar structure?

MR. FEIGENBAUM: Exactly. That was the point that was made in the Whitmer decision.

THE COURT: Let me hear plaintiff's counsel on that

point.

MR. CORN-REVERE: Yeah. That's the difference between the two of them. You have categories of speech, categories of gatherings that are permitted in New Jersey, and that simply wasn't the case where you have a blanket closure. And the court did not analyze it in terms of a content-based restriction. And, again, the distinction that it talks about in Arcara where you don't have some sort of pretextual closing, I would agree that the Juneteenth film festival wasn't the target of a contextual closer. But what you did have or didn't have there that you have here is a series of re-openings that allow different kinds of gatherings and different kinds of venues based on the content and based on the governor's estimation of how good those kinds of gatherings are for society, whether they are religious gatherings, memorial services, either religious or nonreligious, weddings, or funerals. And those decisions are made without regard to any kind of assessment of the differential health risks.

THE COURT: Now because this is, as you argue, content-based, what's the analysis that I have to undertake?

MR. CORN-REVERE: The analysis for a content-based restriction on speech is strict scrutiny. That it requires that the Government have to show that it is serving a compelling interest and do so using the least restrictive

means.

THE COURT: And for the Government, you maintain that this is content neutral and, therefore, intermediate scrutiny; is that correct?

MR. FEIGENBAUM: Two quick points on that, Your Honor, because I think they're incredibly relevant here. The first is that I think there's a misunderstanding about the law that took place in the Whitmer case. So if this Court were to look at the Michigan executive orders that were in place at the time, Executive Order 2020-115 and Executive Order 2020-110, that's for Michigan's orders for things like gathering and things like closure. And Michigan did exactly what New Jersey is doing here. Michigan actually had an exemption for religious services. They specifically have a sentence that says there will be no penalties for any violations of these orders if you are a religious service. So I don't understand the argument that Whitmer could be distinguished because it didn't have any sort of distinction between religious services and between action and movie theaters.

I think the important point to turn to is then what plaintiff is saying about the latest executive order and whether or not it showed content discrimination. The point that was going on in Whitmer and the point that we submitted to this court is that there are business closure orders and

then there are separately rules about when people can and cannot gather, which I'll turn to in just a moment. But on the closure orders, there is no entity that is open that is analogous to movie theaters aside from, at closest, what goes on in churches and houses of worship, which we addressed amply through Real Alternatives and other things. Through that and through our adequacy of alternatives analysis. But they don't point to anything else that's analogous in that way. So it's not as though we're trying to discriminate against movies. All performance venues are closed because that's where people congregate for unusually long periods of time and present a risk to the state because of the concern of person-to-person contact.

Now if this Court believed that there are concerns with whether distinctions are being drawn based on content, then what happens in the Seventh Circuit was that they sort of assumed, okay, there's a content distinction between religion and between the secular activities. But nevertheless, in reliance on the case plaintiff just cited from the Seventh Circuit said, yes, a state is free to treat religious and secular equally, but under the play in the joint doctrine, we are allowed to give them some accommodation or preferential treatment. And I think that's really important here because that is a doctrine that's been around forever in the history of the free exercise clause. The Court typically refers to it

as play in the joint, and the basic idea is this. You can treat religion exactly the same as everything else or you can accommodate religion, and those are permissible under the free exercise clause. It is possible for an accommodation to go so far that you reached the point of the establishment clause. But the point of *Cutter v. Wilkinson* was that the accommodation in that case, which again they were saying was the difference between options for political speech for inmates and religious group worship for inmates, did not cross that line. So if you don't cross the line over the establishment clause, then your religious accommodation is allowed to stand and it doesn't cause an equal protection problem or else you could never have religious accommodations at all. The whole idea of religious accommodation is that you are accommodating something religious more than the identical secular thing is being treated. Otherwise, it's not an accommodation.

I think the core response that we're hearing to that doctrine today is that, well, in other context you could have a reason for the accommodation that isn't about content because you have this sort of different general rule. But I think you should walk through the examples because I think it's very hard to explain those without the explanation being trying to protect religious conduct and noninterference with religion, an important part of this country's constitutional

history.

So in the context of inmates or the military, the general goal of limiting what they can do and when they can do it is to maintain order, and in this case obviously a cadet to maintain training. But there's an exception to their strict regimen if they have an hour in the morning for prayer but not an hour in the morning for watching movies. The reason for that is because you're accommodating religion. You have a general goal which is setting their strict schedule, but an accommodation for their religious worship.

THE COURT: Are you saying that this is content neutral but with an accommodation for religion?

MR. FEIGENBAUM: Yes. That's the way the general closure orders work. Whether its kept open or closed is based on a risk. It's not based on the content of any speech or message. That's an important part of the test.

THE COURT: Doesn't it get close to the establishment clause?

MR. FEIGENBAUM: That's correct. The reason it doesn't get close to the establishment clause and the reason plenty of state are doing it and why there's no actual establishment clause challenge in this case is because there's plenty of times when you can accommodate individual's ability to pray without taking one religion or another. We're not picking among any belief systems of any kind. We are not in

any way trying to pick one religion in New Jersey. But the point is we're accommodating people's ability to pray. Otherwise, it's not the New Jersey law against discrimination could have an accommodation for religious conduct or why Title 7 has an accommodation for religion. The point is that you accommodate religion to grant preferential to the religious conduct relative to the most analogous secular conduct, which is exactly what Real Alternatives says and which has not presented an establishment problem because of the play in the joint doctrine that we were talking about and that Justice Ginsberg talks about I think particularly eloquently in the Cutter case.

THE COURT: So, counsel, you look like you're ready to jump through the Zoom. I'll hear you.

MR. CORN-REVERE: Let me try and briefly deal with the religious accommodation issue, and then finally get to the other two points that Mr. Feigenbaum made about trying to distinguish their showings in Dwelling Place Network and Solid Rock Baptist Church.

First, with respect to the establishment clause and accommodations for religion. First of all, this isn't a case about religion. This is a case about differential treatment of different speakers. Religion happens to be an example that came up. It is only one of many exclusions and examples that Governor Murphy has made. As I mentioned just yesterday, he

excludes similar gatherings for political purposes, weddings, funerals, and memorial services. And as much as Mr. Feigenbaum wants to say it's been very carefully calibrated, there is no evidence of that whatsoever.

Secondly, in terms of the play at the joints and the notion of accommodating religion, we're talking about first having to decide whether or not, for purposes of the Government interest involved, are the parties similarly situated? In the case of Real Alternatives, the Court decided no, they weren't similarly situated. We don't have to accommodate Real Alternatives for the contraceptive mandate because it isn't really a religion. What you have is a one sentence mission statement for a company that wants to get an exemption. So they are not similarly situated and we don't have to treat them the same way for the purpose of this Government interest.

Here, we're talking about whether or not movie theaters and churches are similarly situated for the purpose of evaluating whether or not people being in groups present a greater or lesser risk of spreading infection. That's the Government interest involved. And here, Mr. Feigenbaum himself says that the closest comparison is movie theaters and churches. Although everything that they have filed in every other case suggests that movie theaters are riskier than churches. So purposes for whether or not they are similarly

situated and for purposes of equal protection analysis, you have to determine whether or not the Government is arguing against its own Government interest or not.

The relevant equal protection standards are set forth in the cases that we cited in our opening brief including *Police Department of Chicago v. Mosley*. *Niemotka v. Maryland*. A case that I can never pronounce, but one that involved excluding Jehovah's witnesses as opposed to other religions from having permits to meet in a public park.

Now, if the governor had decided that Jehovah's witnesses were somehow riskier, that they had some kind of practice that transmitted disease, apparently the state's argument here is that the governor would be able to keep Jehovah's witnesses from meeting in the park but not other religions because he has made, in his judgment, as a health matter neutral as opposed to religions that you would be able to discriminate between the different speakers, but that's not the way equal protection works. Where you have a particularly articulated Government interest, and in this case not having people gather in groups, where they have no rational basis for treating one group as opposed to the other, then that fails under any level of scrutiny under both equal protection and First Amendment.

Now, in terms of the other reasons that Mr. Feigenbaum gives for trying to distinguish this case from the others in

which they have submitted exhibits to this court talking about the special dangers of religious congregations. They talk about it's based on risks because of the business model in theaters and that theaters are dark and it's hard to enforce.

Let me go back to the business model a second because it ignores what this case is really about. As I told Your Honor earlier, we are advocating for equal treatment. We will resume concessions when the state reopens indoor dining. Much of our arguments are based on saying that this business model of theaters is based on having concessions. And in the long run it is. Just like all of the business models in the United States are based on normal operations and not these emergency conditions. But what we're arguing for as a matter of law in this case is equal treatment, and concessions are not a reason not to allow theaters to have equal treatment with churches. In this case, actually just allowing them to reopen with food service to resume later would give them somewhat less than equal treatment than the churches because as we've shown in the record, they frequently and very commonly have meals served at churches. In fact, in one of the declarations that the Government submitted, they had Reverend Bledsoe at the Dwelling Place in his declaration Dwelling Place Networks Church talking about how they served 420 meals a week. So the basis for treating them differently simply isn't supported by the record.

In terms of the actual justifications, when we hear about things about theaters being dark, that doesn't distinguish them from churches that many of whom, according to the survey that we submitted to the record, have darkened environments. We have also submitted declarations saying that both there's enough light to enforce the rules. The theaters will enforce the rules and that they will obey. And Mr. Feigenbaum's response to that is, well, we all know certain things happen at theaters. I'm sorry. But that's really just not enough to support a statewide ban on re-opening movie theaters when, again, the issue that he's really concerned about that people might take off their masks and eat popcorn, isn't part of the legal argument that we're considering here.

Finally, and this seems to be the main thing that he wants to talk about in terms of why it's no harm no foul for movie theaters to remain closed. Mr. Feigenbaum talked about the availability of alternatives for watching movies. First, this is completely unresponsive to the claim in front of the court. To say that someone might be able to see a movie online does nothing for the actual plaintiffs in this case, the exhibitors of cinema product. As a matter of fact, if you think about the bundle of rights that goes into a typical First Amendment case, it really is not just one thing. It's a series of things. Think of book publishing, for example. It's really at least five steps. You have the person who

writes the book, the person who publishes the book, the person who sells the book to the bookstore, the person who buys and reads the book, and perhaps you have a fifth step where you have people reading, discussing or teaching from the book. Those are all distinct First Amendment activities, all of which are protected by the First Amendment and would be -- those rights would be violated if the Government interfered with any one of those steps.

With movie making it's perhaps even more steps because it's more of a collaborative process than having someone sit over a table and write a book. And so any one of those points, if you interrupt what's being done, you have a First Amendment violation and that's what we have here. Regardless of whether or not streaming is available. Regardless of whether or not people want to be able to project the wall -- a movie on an outdoor wall, you don't solve the First Amendment problem when you still prohibit the theaters to exhibit the movies. So there's no adequate alternative source, alternative venue for showing films if you have closed the theaters, even if people can get access to some films.

To say that one speaker might be able to connect with viewers through streaming video certainly doesn't solve the problem for other speakers that, either for reasons of their choice or that they can't, do not make those connections. So, for example, you wouldn't be able to tell a rabbi that he

doesn't have to worry about the synagog being closed so long as the Baptist preacher is able to stream his sermons to his congregants. You've got to be able to solve the problem across the board. Otherwise, you still have that problem.

And that doesn't even bring us to the final issue and that is having the presence of adequate alternative avenues of communication isn't an issue when you're dealing with strict scrutiny. That is the test that applies when you're dealing with intermediate scrutiny, and the Government suggests that we should look at *Turner Broadcasting v. The FCC* as model for that. But that case only applied to an intermediate scrutiny standard and was specifically distinguished by the Supreme Court. This term in the Bar case said that where you have a content-based restriction that you apply strict scrutiny and that Turner simply doesn't apply to that situation.

THE COURT: The linchpin of this decision is really whether or not this is content-based or neutral?

MR. CORN-REVERE: I think it is an important part of it. Certainly the fact that we've argued from the beginning that the discrimination between speakers, the unequal treatment has been the critical factor. And here there's no question that there is a distinction.

Let me also draw a distinction between how Mr. Feigenbaum characterizes how something is content-based and we are. He says that it's not content-based if you're not

censoring a movie because you don't like that movie or you're trying to suppress a particular movie. That doesn't cover the waterfront. These cases were addressed in our reply brief including *Reed v. Town of Gilbert*, *Minneapolis Star v. Minnesota Commissioner of Revenue* and *Arkansas Writer's Project*. What they said is you don't look into the motive where you have a facially content-based distinction. And part of the reason is that it's too difficult for courts to look behind particular motivations behind different decision makers.

Maybe it is that Governor Murphy simply prefers weddings and funerals and church services to movies. Who knows what his motivation is. But the law doesn't require the courts to try and get into that question of motivation when you have a facially content-based distinction.

THE COURT: So if the conclusion is this is facially content-based, then we go down the strict scrutiny route, correct?

MR. CORN-REVERE: You get there one of two ways. You get there because it's content-based or because it's speaker-based. And you can either go down the strict scrutiny route through equal protection or through the First Amendment. Either way you get there.

THE COURT: Okay. And if the conclusion is it is not content-based, then it's intermediate scrutiny, correct?

MR. CORN-REVERE: Again, if it is speaker-based, and here it clearly is, then you don't get to intermediate scrutiny. They very proudly say that it's speaker-based.

THE COURT: Let me ask defense counsel same question.

MR. FEIGENBAUM: Sure. So obviously if you find that there's a content-based set of restrictions, then we recognize heightened scrutiny will apply. If it does not touch on a fundamental right and is not content-based, then we submit like other economics and general business regulations, like a movie theater, a gym or restaurant, then rational basis would apply. We don't think that question disposes of the case for the reasons I gave you that we think we can survive any level of scrutiny. But we agree with how Your Honor's thinking about that content-based, if that's how you think we're drawing the distinction. And after I'd like another opportunity to say why I don't agree that that framing is correct, of course. But if you agree that it's content-based, then, yes, the heightened scrutiny and strict scrutiny can apply and we can survive it. And if it's not, it's general business and rational basis applies.

THE COURT: I'll give you one minute on why it's not content-based.

MR. FEIGENBAUM: What was that, Your Honor?

THE COURT: One minute, even though you've peppered the record pretty good with it this afternoon.

MR. FEIGENBAUM: That's fair. So really quickly, the reason it's not content-based is because the way plaintiffs are defining it is based -- purely based on risk. But all throughout the re-opening we've always been balancing health risk with need to the general public and alternatives to the general public. That explains why we distinguish between clothing stores and grocery stores. If you took plaintiff's argument to its conclusion, we couldn't do that sort of distinguishing because they both presented the same health risk and that was the end of the story. We submit that that's not the right way to think about it and the mere fact that movie theaters, the service they provide, the business involves speaking, doesn't change that analysis either. We've always been balancing what the alternatives are to the general population.

The reason we also think it's fine to turn to the general population specifically is because they're making a claim about equal treatment. And so the point is if you're trying to figure out if we're discriminating based on speech or if we have a different interest, if the general public which we're focussing on is really differently affected in that context, then that shows we're not trying to pick winners and losers among speakers and instead demonstrate that we have a real good faith effort to treat one institution differently from another institution of the kind that Real Alternatives

suggests is perfectly permissible.

The very last thing that I will say is to say that this speech is being suppressed and that the vantage point has to be indoor movie theaters is essentially a tautology. The business model involves speaking within indoor movie theaters, but that's not a requirement that the State has ever imposed on them and I'm not suggesting the economic costs to them aren't very significant. They can be and that still doesn't mean that it's content discrimination or a prohibition on them speaking in any other forum outdoors, in cars, streaming into people's homes as they choose to do so. Again, economic harms can be real without it determining the First Amendment analysis.

The last point is that plaintiff's counsel has referred to EO-173 a number of times which talks about weddings and memorial services and things like that. And I've stressed to this Court before and would stress again, the comparator has to be in the closure orders. What is actually open to the public for all intents and purposes to host those sorts of gatherings. Phones are. Obviously, churches are, as we've talked about. But the question is what space is open to the public that provides the comparator? There's no comparator to what a movie does and what a one-time wedding does. I don't read anything in the briefs to suggest that those are a similar comparator. Movie theaters want to be open to a

totally different scale and degree than to a hundred people who know each other who want to get together for a wedding.

So even if the gathering's rule makes sure that a funeral can happen, even if a house party can happen with the same number of people, which is distinction based on conduct, not based on speech or based on communicative message. Even if, as we are, allowing the funeral to proceed with more people than a general house party, that says nothing about whether or not a movie theater can be open. This court could strike down every distinction we have across different kinds of gatherings, and it still wouldn't re-open movie theaters which are subject to a total closure order. And, therefore, the comparators have to be to things that are open to the general public. A different set of requirements and a two track set of rules that basically every state has adopted during COVID.

So I just wanted to make that quick response to the wedding and funeral point since I hadn't addressed it before.

THE COURT: Okay. Counsel, would you like five minutes to address the Court on any subject that you would like? And I promise I will not interrupt you with questions.

MR. CORN-REVERE: Feel free to interrupt because I like getting questions.

Let me address that last point, Mr. Feigenbaum. And in fact, the thrust of the entire argument is that this

supposedly is not content-based because it is based on risk. But we know it is not based on risk. We know from what the state has filed in repeated cases that they know that the risks are higher for having religious gatherings than for other gatherings. They, nonetheless, allow them. We can talk about the accommodation later. But, again, like gatherings, either -- as Mr. Feigenbaum acknowledges, for like gatherings you have people in a theater environment or a church environment. They are treating them differently even though the risks are even if you grant them the same, they are treating them differently.

The distinction between the two is not the health risk that he doesn't suggest there's any data to suggest there is. The difference is because the state prefers one type of gathering over another.

Now, in terms of the new categories that were opened in EO-173 yesterday, we mentioned the fact that they are -- house parties are apparently prohibited. But weddings, funerals, memorial services are whether or not -- religious or not. We're not saying that those are like movies. What we're saying is that here's another example of where the governor is making distinctions based on content and not based on health risk because if you have people in a house for a house party or a rave, you're going to have the same kind of health risks as if you have them for a solemn memorial service or a funeral

or a wedding. It's just that the governor has decided those other kinds of gatherings are, in his estimation, more important.

So once you remove the differential health risks, then all that is left is content. All you have left is the State saying we're going to prefer some kind of gatherings over others. And once you do that and you move it to its constituent parts, the essential element of being a decision made by the State based not on risks but based on the fact that it has things that are more social utility to one kind of speech or another, then you come to strict scrutiny and you come to the kinds of constitutional analysis that the state simply can't meet. They have no data to show that there's any -- this would be true under any level of scrutiny. No data to suggest that one is more risky than the other. And everything that they have submitted to the Court suggests that the gatherings that they are permitting are more risky than allowing movie theaters. And this cannot be considered to be the restricted means of serving the state's interest when they are simply doing this in the face of the health risks that not just they've admitted, but they have urged this Court to accept.

That being said, standard principles of equal protection say that this has to be subject to strict scrutiny and that they don't meet that test. Under the First Amendment

they try and use *Arcara v. Cloud Books* but never come to grips with the notion that Arcara applied to not a general closure order but the closure of one store, one time, allowing the same book seller to open up, sell the same books to the same people the next day from a different location. It was really just a nuisance order targeting the practice of prostitution and nothing else. And you can't extract from that a general principle that allows the Government to close all movie theaters in the state indefinitely.

The State tries to suggest that -- tries to rehabilitate the Michigan case, the CH case. But, again, that case was not decided on the basis of looking at content differences. It was simply deciding that you can get -- you could not get an injunction to run your one film festival. Whether or not there were religious exemptions in the overall fabric of the State's executive orders was not part of that decision. It wasn't considered. And as a consequence, the court simply didn't have the same facts and the same legal question presented there that you have here.

But here, where you have an admitted facial content-based distinction that is based on zero health differences, then there is no way the Government can satisfy strict scrutiny or, given what it's filed, any level of scrutiny.

THE COURT: Counsel, thank you. Government.

MR. FEIGENBAUM: Thank you, Your Honor. A couple of quick points in response to that. The first is that we've given literally dozens of examples that haven't been rebutted to this Court of instances in which religion has been accommodated without it turning into a content-based discrimination regime. So we really don't think that that regime -- that that argument really can hold water. Like the military example, the tax treatment example of different tax treatments for movie theaters and for churches. The different zoning rules that apply to each. The rules under Title 7. The rules under the New Jersey law against discrimination. A whole lot of laws rise or fall, including, as one court noted, 2,600 state and federal tax laws with different significance for religious entities if what we're saying to Your Honor this afternoon ends up carrying weight. And we don't think that this court should call into question that full range of laws.

Plaintiff has also now I think properly acknowledged that they aren't saying they're similarly situated to the individual gathering of EO-173. They're just saying that's other evidence of content-based distinctions in other rules like around gatherings and things like that. I have two responses to that. The first is that it shows their only comparator they're still relying on is churches, which I think is particularly significant for the reasons we talked about in terms of what's actually open to the public that they think

they're similar to. And second, I also think that what their argument is it's pretty telling that if you have to limit person-to-person contact, you are not allowed to say a funeral -- so we haven't closed house parties. We just limited the number of people at a house party as compared to a funeral. Again, it's not before this Court. But they're making clear the logic of the argument is if you're allowing 50 people to meet for a funeral to bury a loved one right now, even the dangers given a person-to-person contact, you must also allow 50 person house party to be taking place. EO-173 gives all sorts of reasons why that isn't true having nothing to do with content. But I think just on the face of this plaintiff's argument is pretty eye opening and should be pretty surprising I think to this Court.

The only other points that I think are particularly important for us to make really turn on a number of the facts that are present here because I've heard that again and again. It's about the risks of what movie theaters present here.

There is a lot of evidence presented by the risks of having movie theaters open to the public, and it's the general evidence that we provided of having businesses open to the public at this time where there are sustained person-to-person contact. So that's Exhibit M and P and other exhibits in the record and other findings in the executive orders. What they're saying there isn't evidence of -- just to be clear on

this -- is enough evidence specifically distinguishing between churches and between movie theaters. They're not actually saying that we don't have evidence to show sustained person-to-person contact is dangerous or particularly risky. The Seventh Circuit opinion that we talked about is really helpful in talking about the equities here in saying that a federal court order re-opening movie theaters at the time would present distinct risks because there are almost no other contexts in which individuals are in a similarly confined indoor space for extended periods of time like happened by the very nature of watching a movie in that indoor space. Especially when there are such obvious alternatives available to the general public.

So in figuring out the risks that society has to bear during COVID-19, that is important information to take into account. It's not that there's a lack of information about the risks. The argument they have is just that there there's a lack of information about the risks between houses of worship and between movie theaters. And I'd like to note that that's simply not even correct. We have highlighted that as a paradigmatic matter movie theaters are darker than your sort of categorical or average religious service, understanding that there are cases where there are religious services that nevertheless happen in the dark, but New Jersey hasn't wanted to say which kinds of services are okay and which kinds are

service isn't okay. But so comparing categorically, there are distinct differences there, and I don't think it's unreasonable at all to say that there's differences in the likelihood of enforceability of a mask mandate when you're surrounded by your parishioners versus when you're surrounded by strangers. These are all questions that we've raised about the distinct risks. And that's especially true when balanced against the alternative, which we have always said at every step of the re-opening is a part of what we're looking at. And it's absolutely something that we're allowed to be looking at. We are allowed to look at risks relative to available alternatives. It explains why grocery stores were open when clothing stores were closed. It explains why we opened personal care services when there were no alternatives. And it also explains why performance venues have been closed as a particularly dangerous area where there's sustained person-to-person contact and where there's a readymade alternative for the general public. This is not about trying to suppress the speech of movies and it's not about trying to suppress the speech of movie theaters. They have a great business model, and in times when we're not trying to limit person-to-person contact we have no issue with people coming together in a confined space to watch a movie together. But right now, given the public health risk, we have had to set up orders that have individuals no longer coming into movie

theaters where they will be exposed to the unnecessary risks and further spread of COVID-19. That should not be happening at this time, exactly at a moment when other states are dealing with COVID-19 spikes. And if that's because their own re-opening's or closed movie theaters, even as those states, too, have continued to allow religious services to take place. What we're doing is perfectly normal as a part of the normal arsenal of states as they respond to the crisis -- the really unprecedented crisis presented by COVID-19.

THE COURT: Counsel, thank you very much. You did not disappoint, as I predicted in the beginning. We will get a decision out as soon as humanly possible.

In the meantime, a reminder about Judge Bongiovanni. And more importantly, when you speak to Her Honor, please make sure there is someone with immediate settlement authority that can be reached. Not that there needs to be an extended period of time to discuss what occurs before her chambers.

Megan, thank you very much. Dana, thank you very much. A reminder to those members of the press of the restrictions per the agreement that you've entered into with the Court. That being said, be well, be safe, and I'm here if you need me. Thank you very much. Be well.

(Court concludes at 2:54 p.m.)

FEDERAL OFFICIAL COURT REPORTER'S CERTIFICATE.

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

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/S/ Megan McKay-Soule, RMR, CRR **August 6, 2020**

Court Reporter Date