

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
MERCER COUNTY, NEW JERSEY
DOCKET NO. MER-L-001007-19
A.D. # _____

GEORGE E. NORCROSS,)
et al.,)
)
Plaintiffs,)
)
v.)
)
PHILIP DUNTON MURPHY,)
et al.,)
)
Defendants.)

TRANSCRIPT

OF

ORAL ARGUMENT

Place: Mercer County Criminal
Courthouse
400 South Warren Street
Trenton, NJ 08608

Date: June 17, 2019

BEFORE:

THE HONORABLE MARY C. JACOBSON, A.J.S.C.

TRANSCRIPT ORDERED BY:

RAHAT BABAR, ESQ. (Special Counsel, Office of the
Governor)

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 Force, Ronald Chen, Walden Macht & Haran, and
 Quinones Law Firm

1 THE COURT: Norcross versus Governor Phil
 2 Murphy, *et al.*, docket number MER-L-1007-19.

3 If I could have the appearances of counsel
 4 for the record, please, starting with plaintiffs.

5 MR. TAMBUSI: Good afternoon, Your Honor,
 6 William M. Tambussi, Brown & Connery for the plaintiff,
 7 George Norcross, Connor Strong & Buckelew, NFI, L.P.
 8 and then Michaels Organization.

9 MR. MARINO: Good afternoon, Your Honor,
 10 Kevin Marino, Marino Tortorella & Boyle for Plaintiff,
 11 Parker McCay.

12 MR. CRITCHLEY: Good afternoon, Your Honor,
 13 Michael Critchley for George Norcross, Connor Strong &
 14 Buckelew, NFI and Michaels Organization.

15 MR. CRITCHLEY:

16 MR. STERN: Good afternoon, Your Honor, Herb
 17 Stern for Cooper Hospital.

18 MR. FERGUSON: Good afternoon, Your Honor,
 19 Robert Ferguson also for Cooper University Healthcare.

20 MR. BOYLE: Good afternoon, Your Honor, John
 21 Boyle for Plaintiff, Parker McCay.

22 MR. TORTORELLO: And John Tortorello, Your
 23 Honor, also for Parker McCay.

24 THE COURT: Okay. And for defendants.

25 MR. WELLS: Good afternoon, Your Honor. My

1 name is Ted Wells from the law firm of Paul Weiss. I'm
2 counsel for all of the Defendants, Governor Murphy in
3 his official capacity, the Task Force, Ronald Chen, the
4 Governor's Designees, Walden Macht & Haran, Jim Walden,
5 and Quinoes.

6 MR. MOSKOWITZ: Ben Moskowitz of Paul Weiss
7 for all defendants.

8 MR. CLEARY: Good afternoon, Your Honor,
9 Yahonees Cleary, also from Paul Weiss, for the same
10 defendants.

11 MS. BENEDON: Good afternoon, Alison Benedon
12 from Paul Weiss, also for all of the defendants.

13 MR. BABAR: Good afternoon, Your Honor, Rahat
14 Babar, special counsel litigation, counsel for Governor
15 of New Jersey, on behalf of three of the defendants,
16 Governor Phillip Murphy, the Task Force, and
17 (Indiscernible).

18 UNIDENTIFIED SPEAKER: Your Honor, before we
19 get started, we wanted to raise the issue of the
20 outstanding pro hac vice applications.

21 THE COURT: I hadn't signed the orders yet,
22 but I didn't know if there was any objection.

23 MR. TAMBUSI: No, Your Honor. Your chambers
24 called and we voiced no objection.

25 THE COURT: Okay. Somehow, the message

1 didn't get to me, but I'll sign them all and make them
2 nunc pro tunc to whatever it 145. Okay.

3 Anyone else back there entering the
4 appearance?

5 DANIEL FRIEL: Daniel Friel, Paul Weiss, for
6 same defendants.

7 MS. WITTE: Jamie Witte from Paul Weiss,
8 relevant defendants.

9 THE COURT: Okay. Anyway, before the court
10 today, is the order to show cause filed by the
11 plaintiffs seeking temporary restraints to prevent the
12 Task Force, convened by the Governor, to review the
13 activities of the Economic Development Authority from
14 continuing to conduct public hearings or publishing any
15 report based on its work to date until this court can
16 hear, review, and decide the issues raised in the
17 complaint filed by plaintiffs.

18 So, we're going to start with the argument on
19 behalf of plaintiffs and I'll also allow you rebuttal
20 time after hearing the arguments of the defendants.
21 So, whoever is going to start us off.

22 MR. TAMBUSI: Your Honor, Mr. Marino will be
23 starting the argument for the defendants followed by
24 Mr. Critchley and Judge Stern.

25 THE COURT: Okay.

1 MR. TAMBUSSI: To the extent that the court
2 has any additional questions regarding the factual
3 component, I will provide those answers.

4 THE COURT: Okay. The other thing is you're
5 more than welcome to use the podium, but I also don't
6 mind if you want to remain at counsel table, depending
7 upon your access to your materials.

8 MR. MARINO: I appreciate that, Your Honor.
9 I'm more comfortable at the podium if that's all right.

10 THE COURT: Yeah, that's fine.

11 MR. MARINO: Good afternoon, Your Honor, and
12 may I please the court, the plaintiffs in this case
13 clearly have met all four prongs of the Crowe vs.
14 DeGioia standard for the issuance of preliminary
15 injunctive relief and the temporary restraining order
16 we have requested that Your Honor enter.

17 With respect to the first prong of that test,
18 the irreparable harm prong, Your Honor I believe has
19 made clear and it has been made clear by the Supreme
20 Court of New Jersey as well that reputational harm, in
21 and of itself, is sufficient to give rise to
22 irreparable harm. A threat to one's reputation and
23 good name is in many ways the paradigmatic type of
24 irreparable harm.

25 I'm put in mind once hearing about a penance

1 that was issued for someone who asked his confessor
2 what he could do after taking someone's good name in vain
3 and he said, you should go to the tallest building in
4 town with a pillow stuffed with all the feathers that a
5 pillow will contain and cut it open and shake out those
6 feathers and then go and collect them that.

7 That's because taking one's name, putting
8 one's reputation at risk is, by definition, irreparable
9 harm. It isn't the only type of irreparable harm we
10 have in this case.

11 Your Honor, will, I'm sure, will recall your
12 own decision on this decision in the Burgos matter in
13 which you indicated that reputational harm can suffice
14 to be irreparable. And I believe the Supreme Court
15 said so as well in the Doe vs. Poritz case as Your
16 Honor will remember, Megan's Law case.

17 In Poritz, the court said instructively,
18 where a person's good name or reputation are at stake
19 because of what the government is doing to that person,
20 we conclude, sufficient constitutional interest are at
21 stake. Not very much different from what Your Honor
22 would say in the Burgos decision when you made it
23 clear, similarly, that you're dealing with something of
24 a very significant magnitude not only when you deal
25 with a harm to reputation, but something else that's

1 present in this case which is a constitutional
2 violation.

3 Ipsa facto, a constitutional violation, is a
4 significant, significant matter. And, of course, we
5 have alleged violations of the constitution in this
6 case, the New Jersey Constitution. We believe, Your
7 Honor, that this case raises very significant issues --
8 separation of powers.

9 I don't think there's very much question when
10 you look at the enabling statute of the Economic
11 Development Authority, when you look at the statutes
12 that Governor Murphy has invoked to justify his conduct
13 with respect to the Task Force. I don't think there's
14 any question that we are dealing with a constitutional
15 issue.

16 And, in addition, Your Honor, the
17 constitutional issue presented in this case is a First
18 Amendment issue because, of course, the invitation that
19 was extended to the "entities of concern" that were
20 identified by the Task Force leadership the very day
21 before the second Task Force proceeding went forward on
22 May 2nd, these entities of concern including, of
23 course, all of the plaintiffs whose name were mentioned
24 repeatedly.

25 Those are individuals who were given an

1 opportunity in a very truncated way to submit a written
2 statement, nothing on the order of what the enabling
3 statute that the Governor invoked 52:15-7 would
4 provide. So, that, the First Amendment violation and
5 also the due process violations we'll talk about when
6 we turn to the reasonable probability of success prong
7 of Crowe vs. DeGioia.

8 Those, as well, Your Honor, make it very
9 clear that there is a constitutional violation afoot
10 here, a significant constitutional violation whenever
11 you are denying the opportunity to confront one's
12 accusers, whenever you are truncating their ability to
13 make a full and fair presentation in their own defense
14 you are, of course, violating their constitutional
15 rights.

16 The third type of irreparable harm that is
17 present in this case, and I think undeniably so, is
18 that if you think about how this matter if you think
19 about how this matter arose. In the first instance, we
20 were told on May 1st there's going to be a hearing
21 tomorrow. Your entities of concern there could be
22 adverse statements made regarding you at this hearing.
23 That was the heads up we received late in the afternoon
24 before that hearing took place in a public forum at
25 Rutgers Law School.

1 And what transpired next, Your Honor, I thin,
2 is very, very significant. We find ourselves in a
3 position where, at that point, we're wondering, okay,
4 what to do about this. We're now learning that a Task
5 Force that purports to be operating pursuant to a
6 statute, and we speak in a moment about that statute;
7 52:15-7 is somehow going to be not only invoking our
8 names, but repeatedly invoking our names, the names of
9 the entity plaintiffs, law firm that I represent and
10 the others represented by my colleagues at the
11 plaintiff's table.

12 And so, you know, at that precise moment, we
13 thought, well there isn't much to do here except to
14 object to this and so, we objected to it. That
15 objection was turned aside. And, therefore, in fact,
16 the way it was turned aside was Mr. Walden, counsel for
17 the Task Force, was famously quoted as saying, "Bring
18 it on." And that's not a phrase that I've heard much
19 since, you know, athletic days, but bring it on means
20 bring it on, so we brought it on.

21 We filed a law suit. I will tell Your Honor,
22 we were mistaken about one thing. We thought that once
23 we filed that lawsuit and the issue was joined on the
24 subject of whether this Task Force even had authority
25 to exist.

1 And I want to make it clear that's what we're
2 talking about in the first instance, that's what count
3 one is about. One we filed the lawsuit that went to
4 the very heart of what this Task Force was undertaking
5 to do, we did not, for a moment, think it would roll
6 forward.

7 It had no hearing scheduled at that time. It
8 had conducted two hearings. The second hearing was
9 tremendously detrimental to us. The second hearing was
10 very clearly -- had very clearly cast us in a very
11 negative public light.

12 We've cited in our briefs all of the media
13 attention. I'm sure it has not escaped Your Honor's
14 notice that all of the plaintiffs were reviled based on
15 what was heard and what was done at that May 2nd, "Task
16 Force Hearing."

17 So, at this moment, we thought, we'll have a
18 fight in front of Judge Jacobson. It will be a fair
19 one. We know what we will get in Judge Jacobson's
20 courtroom. We know we will get a fair consideration of
21 the issues. However long that takes, it will take.
22 And, at the end, the matter will be resolved.

23 Not so, because we no sooner had filed our
24 complaint then all of a sudden, there was going to be
25 another hearing and it was going to happen as quickly

1 as humanly possible. Scheduled on June 3rd to proceed
2 on June 11th. Barely time to breathe, much less find a
3 way to get issue joined before this court which,
4 respectfully, is most entitled to hear this matter and
5 whose conclusions about this case are essential.

6 Until Your Honor interprets the law, it
7 doesn't exist. And so, you know, it puts me in mind of
8 what brings us here in the first place, Your Honor, a
9 separation of powers fight. But we have everyone
10 seeming to get into everyone else's lane. So what
11 happens?

12 They move forward and say we're going to have
13 this hearing. It's going to be in public. It's been
14 announced. It's going to happen on June 11th.

15 Well, we immediately reacted to that. We
16 thought bringing it on by filing the lawsuit would
17 suffice to join issue before this court and that we
18 would have an orderly and fair resolution of the very
19 significant issues presented.

20 As it turned out, we would have to take
21 another step to make that happen. And so, we took that
22 step. We filed emergently before Your Honor on June
23 6th. Your Honor was gracious enough to hear us that
24 afternoon in a telephone conference.

25 I think what transpired during that telephone

1 conference is very instructive, Your Honor, because as
2 we told you we think we're right on the merits. We had
3 talked about the irreparable harm scenarios that I've
4 just briefly discussed here this afternoon. And we
5 said we think the balance of equities clearly favors
6 us. There doesn't seem to be any emergent need for
7 this Task Force to come forward and announce findings,
8 and we don't think there's any emergent need for this
9 Task Force to inform the Legislature and inform the
10 Governor of what has transpired. We did not see the
11 urgency.

12 But on that call, counsel for the Governor
13 and the other defendants made it abundantly clear that
14 in their view this is a most emergent matter. And the
15 reasons given as to why it was a most emergent matter
16 were laid out in detail. The Governor is waiting. The
17 Legislature is waiting. The Grow New Jersey and the
18 ERG Programs, tax incentive programs, at issues in this
19 case, are going to sunset on July 1st.

20 And heaven forbid that the Legislature
21 doesn't hear from the Task Force before that happens
22 one could envision the disarray into which the entire
23 state would be thrown. As it turned out, that wasn't
24 so.

25 Because, as Your Honor will recall, at the

1 end of our telephone conference when Judge Stern, the
2 senior statesman, finally got an opportunity to speak,
3 he said I want to do some due diligence into this. And
4 he, in fact, did some due diligence and we've shared
5 that due diligence with Your Honor.

6 He wrote a letter. He wrote a letter to
7 Senate President Sweeney. He wrote a letter to
8 Assembly Speaker Coughlin. And made it clear some of
9 the things that had been represented by counsel on that
10 call, and those things as Your Honor, I believe, will
11 recall, and I'll direct your attention to them, of
12 course, this Mr. Stone's letter is attached to Mr.
13 Tambussi's certification as Exhibit Number 12.

14 Mr. Wells said in response to Your Honor's
15 question as to why the report had to be issued so
16 promptly.

17 "The importance of getting the report out is
18 that the two tax incentive programs involved
19 expire on July 1 of 2019 or they don't go
20 beyond that date. And that the legislature
21 is going to have to act if they want to
22 extend them. And that the Legislative
23 calendar, as Your Honor knows, is very tight
24 now at this time of year."

25 And Your Honor asked if this would be the

1 last report, said certainly had a very cataclysmic
2 sound to it. A sound like that would be the denouement
3 of this exercise. And Mr. Wells said, no, the Task
4 Force is going to continue and may, in fact, issue
5 additional reports, but that is the report, the one
6 that they were to announce on June 11th, that is being
7 issued and was contemplated to be issued in time for
8 both the Governor and the Legislature to consider the
9 Task Force's first report findings in order to assist
10 the Legislature and the Government in deciding what to
11 do before the two programs expire on July 1st.

12 Your Honor questioned again fairly, "I'm
13 trying to figure out how critical it is to do this."
14 Mr. Wells replied, the public interest is that the
15 program will expire and that based on the Legislative
16 calendar, the hope would be that, at least, there would
17 be a possibility that both the Governor and the
18 Legislature would be able to come together and make a
19 decision, not only whether to extend the program but in
20 what format.

21 Well, thereafter, Mr. Stern, of course,
22 quoted those statements to Messrs. Sweeney and Coughlin
23 and asked them if they could just give some,
24 illuminate, give some illumination to this question of
25 whether the Legislature, in fact, required the Task

1 Force's preliminary report to determine whether to
2 extend the tax incentive programs.

3 We provided to Your Honor the response is
4 fairly immediate and forthcoming. Mr. Sweeney
5 responded by letter June 11th indicating that both in
6 the Senate and the Assembly, there are bills that had
7 been introduced and would be considered and that they
8 would extend both tax incentive programs and Mr.
9 Sweeney expected that to move through the Senate on
10 June 11th also. Mr. Cimino, the executive director,
11 responded on Mr. Coughlin's behalf, said the General
12 Assembly's consideration of these programs is ongoing
13 and the body will continue to examine the programs in
14 its general course of business and expects to take
15 action in the near future.

16 They're not waiting, as it turns out, with
17 great anticipation for the interim report of this Task
18 Force. And I think it's very important for our
19 consideration today. As you'll see as we move into the
20 second prong here, you'll see that there are very
21 significant issues.

22 And I know Your Honor has already reviewed
23 these materials and is aware of the significant issues.
24 But this is not a minor issue. It's a very significant
25 issue. Significant to the public. Significant to the

1 parties. And I would expect, of course, significant to
2 all three arms of Government.

3 So what we basically want here, of course, is
4 Your Honor to have the opportunity to consider this.
5 And, of course, you know, the last kind of irreparable
6 harm when you first realize that no great urgency, but
7 the last type of irreparable harm is you denied this
8 opportunity to litigate the case. And that's
9 irreparable on its face.

10 It's as irreparable as a continuing
11 constitutional violation. It's as irreparable as the
12 sort of harm to one's good name and reputation that can
13 never be recaptured. It's significant when you have an
14 issue of this magnitude and you say we would like the
15 court of competent jurisdiction to resolve it.

16 It should not be short-circuited. Now, that
17 sometimes happen if there is a true emergency. And I
18 think as this exchange of correspondence and the fact
19 as we indicated in our briefs to Your Honor that the
20 Legislature has indicated that there will be two
21 committees.

22 The Assembly is going to have a committee to
23 examine this tax incentive issue, what it thinks about
24 the manner in which the EDA has administered the
25 incentive programs, and whether they should continue

1 and in what format and so forth. All of that will be
2 the subject of a properly convened Legislative hearing
3 in both the Senate and a similar committee has been
4 appointed in the Assembly.

5 So, the idea that but for allowing the Task
6 Force to immediately announce its findings, although
7 they are in the middle, not at the end of the road.
8 The idea that somehow an emergency that ought to derail
9 this court from extending to us our right to have Your
10 Honor decide these issues, I think is, frankly, a non-
11 starter. It doesn't make a great deal of sense.

12 But I would like beyond the irreparable harm
13 prong, I'd like to turn our reasonable probable of
14 success.

15 I don't think it could be clearer that we
16 have a reasonable probability of success in this case.
17 And I'll tell you as Your Honor knows, Executive Order
18 Number 52 signed by Governor Murphy, very shortly after
19 he took office actually on the 24th day of January, one
20 of the very first things that had to be done was to
21 issue Executive Order 52.

22 Executive Order 52 begins in a precatory
23 language by saying the taxpayers deserve a thorough
24 explanation of how and why the tax incentive programs
25 operated with minimal oversight. This is in light of

1 the auditor's report. And a public accounting will
2 help lawmakers inform their deliberations and so forth
3 as to whether the program should be renewed and in what
4 way and there should be an in-depth examination of the
5 deficiencies.

6 And in that Executive order, Governor Murphy
7 said at paragraph four, The Task Force is authorized to
8 call upon any department, office, division or agency of
9 this state to supply it with data and other
10 information, so forth. And in paragraph five, it's
11 going to seek voluntary cooperation. If individuals
12 refuse to cooperate, it may refer the matter to the
13 State Comptroller which may exercise subpoena
14 authority. And it concludes -- actually the paragraph
15 six says it's going to be purely advisory in nature.

16 THE COURT: I just want to correct you.
17 Fifty-two was not immediately after the inauguration of
18 Governor Murphy. That was Executive Order 3 that
19 directed the Comptroller to do the study that found
20 many many irregularities with the EDA.

21 MR. MARINO: Yes.

22 THE COURT: That came in, in January. And
23 then 52 came within a couple of weeks where the
24 Governor created the Task Force in response to the
25 Comptroller. And one of the key pieces was to make

1 recommendations regarding Legislation. That's why it's
2 been important because that is the, you know, that
3 really was one of the, what Governor Murphy wanted them
4 to look at.

5 What kind of proposals are you going to make
6 for us to, you know, to continue with tax incentives
7 but do it in a way that's more, you know, more
8 responsible and more in the interest of the state. So
9 you got the dates mixed up a little. So the
10 Comptroller report was really important.

11 MR. MARINO: Yes, and I don't disagree with
12 that. Obviously, that's right as a matter of fact.
13 And the significance that Your Honor attaches to it, I
14 also acknowledge.

15 It's certainly significant that the
16 Comptroller was asked to take a look at these programs.
17 The Comptroller took a look at the programs. Then, you
18 have this Executive Order. But what happens and what
19 brings us together today, I would suggest to Your
20 Honor, and what is of great significance is the
21 delegation of authorities to this Task Force that
22 occurs on March 22nd of 2019.

23 And I know Your Honor is familiar with this,
24 and I will, of course, highlight it for you, once
25 again, because I think it is the most significant

1 thing.

2 If you look at the statute that is invoked.
3 The statute, as I've said, is NJSA Section 52:15-7.
4 So, if you take a look at that statute, it's quite
5 clear what it permits and what it does not permit.

6 So, the statute says, and I know Your Honor
7 has been over it, but I draw your attention to it
8 because I think it's of critical importance that you
9 consider it at this moment.

10 The Governor is authorized at any time --
11 UNIDENTIFIED SPEAKER: I want to give the
12 Judge a copy of the statute.

13 MR. MARINO: I think Your Honor has it in
14 front of you. If you don't, I can hand it up.

15 THE COURT: I have it, but I can't -- I have
16 so many papers up here I'm always trying to find where
17 I put something.

18 MR. MARINO: May I approach, Your Honor?

19 THE COURT: Yeah, you can give it to me.
20 Thanks. Thank you.

21 MR. MARINO: So, the statute says the
22 Governor is authorized at any time, either in person or
23 by one or more persons appointed by him, for the
24 purpose to examine and investigate the management by
25 any state officer of the affairs of any department,

1 board, bureau or commission of the state and to examine
2 and investigate the management and affairs of any
3 department, board, bureau or commission of the state.

4 That is quite clear. That's a very clear
5 legislative mandate that the examination and
6 investigation that could be undertaken pursuant to this
7 legislative statement is an investigation of state
8 officer and of the affairs of a department, board,
9 bureau or commission of the state.

10 THE COURT: Now, this was adopted in 1941.

11 MR. MARINO: That's correct.

12 THE COURT: Which was before the 47
13 Constitution. And so that has bearing on what the
14 legislative intent is because it wasn't until after the
15 47 Constitution that the language "in, but not of"
16 became, you know, a term of art following the Parsons
17 case.

18 MR. MARINO: Yes.

19 THE COURT: So, you're dealing with statutory
20 interpretation of a statute adopted before the, you
21 know, before the, you know need to use the "in, but not
22 of" language because the Constitution of 47 said it has
23 to be the state departments are limited to twenty.

24 MR. MARINO: Yes, that's correct. And this
25 issue was taken up, as Your Honor is aware, by the

1 Appellate Division first and then subsequently by the
2 Supreme Court in the COAH case which we have cited and
3 explained In re Plan for Abolition of Council on
4 Affordable Housing which is a decision authored by
5 Judge Carchman for the court.

6 And in that decision, the Judge addressed
7 precisely the question that Your Honor has put your
8 finger on. Yes, the statute, this statute, 52:15-7 was
9 patterned on the Moreland Act. It was passed in 1941.
10 And very shortly after it was passed, very shortly
11 after it was passed, it was made clear that what was
12 not warranted there was sort of a star chamber type
13 proceeding where you wouldn't have the ability to
14 question witnesses, cross-examination and so forth.

15 But what happened in the COAH case is
16 critically important. As the court said, the "in, but
17 not of" language reflects the fact that under the New
18 Jersey Constitution, all agencies are constitutionally
19 required to be housed in one of the twenty executive
20 departments. I believe that's what Your Honor referred
21 to a moment ago.

22 That's where "in, but not of" is borne.
23 Because the Constitution having stated that we are
24 going to organize this in a way that there will never
25 be more than twenty principal departments of state

1 government, that being the case, there was a need to
 2 draw distinctions between quasi-governmental entities
 3 or authorities, independent entities that,
 4 nevertheless, in order to comply with this
 5 constitutional mandate had to be located within a
 6 department of state government.

7 So, in Judge Carchman's opinion, states the
 8 "in, but not of" language reflects the fact that all
 9 agencies are constitutionally required that he has in
 10 one of the twenty executive departments, as well as the
 11 drafter's recognition that some agencies required a
 12 quasi-independent status, beyond the reach of the
 13 otherwise strong executive, the Governor.

14 And the court went onto say, for example, at
 15 the time of the 1947 Constitutional Convention, the
 16 committee on the executive Militia and civil officers
 17 considered how to organize a quasi-independent entity
 18 such as the public utilities commission. It was
 19 recommended that such entities be under the Governor's
 20 supervision but not under the Governor's supervision
 21 and control.

22 That's an issue that Justice Rabner would
 23 take up and revisit later when this case came before
 24 the Supreme Court and was affirmed.

25 The court went on, after citing Parsons which

1 Your Honor had referred to in which the court found
 2 that the 1949, just after the Constitution was adopted,
 3 that the Turnpike Authority is "in, but not of" the
 4 State Highway Department. And that fact does not make
 5 it any less, any of the less an independent entity,
 6 right.

7 So, again, this is Judge Carchman,

8 "This in, but not of, language is the most
 9 common means of identifying those agencies
 10 that the Legislature intended to be
 11 independent and outside the scope of
 12 executive control," --

13 including the executive's reorganization
 14 power which was at issue in that case --

15 "while also abiding by the Constitutional
 16 mandate allocating every agency independent
 17 or otherwise to an established department in
 18 the executive branch."

19 It goes onto say,

20 "Examples include," --

21 and it lists several and at the bottom of the

22 page --

23 "the New Jersey Economic Development
 24 Authority, NJSA 34:1-4A establishing the New
 25 Jersey Economic Development Authority in,

1 but not of the Department of the Treasury."
2 And the court went onto say,
3 "For the purpose of complying with the
4 provisions of Article V, Section 4,
5 paragraph one, of the New Jersey
6 Constitution, the Civil Service Commission
7 is allocated within the Department of Labor
8 and Workforce Development but withstanding
9 this allocation, the Commission shall be
10 independent of any supervision or control by
11 the department or by any officer or employee
12 thereof."

13 That's the way Judge Carchman saw it for the
14 court when Governor Christie had attempted under the
15 Reorganization Act to abolish the Council on Affordable
16 Housing. It was rejected and it was rejected on this
17 exact basis, that an "in, but not of" agency is not a
18 department of state government. It is not a state
19 entity.

20 At the end of the opinion, the court said,
21 "The debates of the Constitutional Convention
22 inform us that the issue of executive
23 control of independent agencies was
24 addressed by use of the simple but
25 meaningful phrase in, but not of. While the

1 framers of our Constitution intended to
2 create a strong executive in the office of
3 Governor, perhaps, the strongest in the
4 United States, they also recognize the need
5 to insulate functions and agencies from
6 executive control."

7 That's what we're dealing with today. This
8 is an "in, but not of" entity without any question. So
9 as we allege in count one of our complaint, the idea
10 that it, the EDA, could be the subject of a
11 Gubernatorial investigation under 52:15-7 simply is not
12 right. It's not right ab initio.

13 That's before you get into what the Task
14 Force is actually doing which is to examine private
15 entities and individuals which is not its providence
16 either. And before you get to the subject of how they
17 are going about it, which is what is with a rather
18 extreme denial of the typical due process rights that
19 even attend those who are properly investigated under
20 52:15-7.

21 What struck me, Your Honor, and I'll ask you,
22 if you will, to just look along with me at this. If
23 you have the March 22nd, 2019 delegation letter which
24 is Exhibit E to our complaint.

25 I found it to be useful, Your Honor, in

1 examining this issue to compare the wording of the
 2 enabling statute -- not the enabling statute, but to
 3 compare the wording of 52:15-7 which is the animating
 4 statute for this Task Force investigation. And just
 5 take a look at the language of the statute and then
 6 take a look at how that language is conveyed in
 7 Governor Murphy's March 22nd letter.

8 So, if you look at paragraph one of the
 9 statute, it says the Governor is authorized at any time
 10 either in person or by one or more persons appointed by
 11 him for the purpose to examine and investigate the
 12 management by any state officer of the affairs of any
 13 department, board, bureau or commission of the state.

14 So, let's stop there and take a look at
 15 Governor Murphy's delegation letter. He says,

16 "As Governor, I am authorized to personally
 17 investigate or to appoint one or more
 18 persons to investigate the management and
 19 affairs of instrumentalities of the state,
 20 such as the EDA."

21 Well, that's inaccurate. As a matter of
 22 fact, that is not what the statute says. That is not
 23 what the Legislature enabled him to do or empowered him
 24 to do. And the idea that you could somehow gloss over
 25 a legislative mandate that speaks in very carefully

1 chosen language to a department, a board, a bureau or a
 2 commission, none of which is considered quasi-
 3 governmental, none of which is considered independent,
 4 none of which is "in, but not of." All of which are
 5 right in the heart of the state government. And for
 6 that reason subject to the control, as well as the
 7 supervision of the chief executive.

8 THE COURT: One thing that was puzzling to me
 9 is why you omitted from the brief the Governor's power
 10 to veto the minutes?

11 MR. MARINO: I'm sorry, Your Honor. I don't
 12 think, I didn't think the Governor's power to veto the
 13 minutes was determinative.

14 THE COURT: I think it's in the EDA statute,
 15 though. I mean isn't that indicative of certain
 16 control that the Governor has beyond -- I mean he's got
 17 the appointment authority, but he also can veto the
 18 minutes. I mean that's true a lot of the "in, but not
 19 of" agencies.

20 MR. MARINO: Yes, that's exactly right. We
 21 know --

22 THE COURT: So, he can't investigate and "in,
 23 but not of" agency over which he has the power to veto
 24 the minutes?

25 MR. MARINO: Yes, I take it from the manner

1 in which Your Honor puts the question that you think
2 those things all make sense together?

3 THE COURT: There's a certain absurdity in
4 it.

5 MR. MARINO: Well, I'll tell you why I
6 respectfully disagree that it's not even -- not only do
7 I not think it's absurd, I think if you take a step
8 back and consider what the Legislature was trying to
9 accomplish in respect of this independent entities such
10 as the EDA.

11 THE COURT: But this is before -- you know,
12 the statute came before 1941. You know, I don't --
13 there wasn't he need, as far as I can tell, because you
14 didn't have the twenty state departments. I mean in
15 the 47 Constitution, they were faced with all these
16 different boards and commissions and they wanted to,
17 you know, centralize things as opposed to having them
18 decentralize.

19 So, the language seems to be such to be
20 inclusive and expansive over the Governor's powers.

21 MR. MARINO: You know, Your Honor, when the
22 Legislature of New Jersey wants to be inclusive and
23 expansive, it has exhibited on many occasions the
24 ability to do precisely that.

25 THE COURT: Yeah, but we're talking about

1 1941. I mean some of what you're saying makes sense in
2 the, you know, after the twenty departments were
3 established, but I'm not sure in terms of -- you know,
4 we have to decide what the Legislature was up to in
5 1941.

6 MR. MARINO: Well, I agree with that, Your
7 Honor, but I think we also have to take heed of what
8 the Supreme Court was up to in 2013 when it decided the
9 COAH case and affirmed the Appellate's Division's
10 ruling.

11 I think this is not something of minor
12 consideration. I don't think the power to veto the
13 minutes is tantamount to the power to conduct this type
14 of investigation. I just don't see how those two
15 things are married to one another.

16 And I think it proves too much to advert to
17 the fact that the statute was passed many years ago and
18 significantly before, the seven years before the
19 Constitution was adopted.

20 And the reason is the need to have a
21 separation of powers, that is a true separation, right,
22 that doesn't just meld these different branches.
23 Certainly persisted well beyond the 1947 Constitution
24 and persist to this day. And the Supreme Court found
25 it sufficiently significant in the COAH decision to

1 call it out in just those terms and to speak about.

2 THE COURT: But we're talking about -- COAH
3 talked about the Reorganization Act and the Governor's
4 wanting to essentially, you know, end COAH, remove COAH
5 as an entity. And the court found that you didn't have
6 the power to do that.

7 But, here, we're talking about investigating
8 an instrumentality of the state. I think maybe the
9 language of the EDA, you know, enabling legislation.
10 And so, we're talking about investigate an entity that
11 is important to the operation of state government and
12 state policy and so forth.

13 And so, it just is somewhat counterintuitive
14 to think that the Governor didn't have investigatory
15 powers to look into problems that were identified by
16 the state auditor in 2015 and the state comptroller,
17 because, frankly, the Legislature didn't do it until
18 recently.

19 And so, the Governor, in his, you know, he
20 encouraged the Legislature to do it in some of his
21 budget addresses, but they didn't. So, he came in and
22 conveyed a Task Force and then he utilized a couple of
23 months later, he utilized the statute 52:15-7.

24 MR. MARINO: Well, the problem with that,
25 Your Honor, and it is a significant problem, is these

1 words of this statute like the words of every statute
2 must be interpreted to glean the legislative intent as
3 they would have been interpreted at the time that the
4 language was adopted. That's a settled principle of
5 statutory construction. It doesn't change over time.

6 The defendants direct Your Honor's attention
7 to the online dictionary and say well these --
8 actually, the EDA could be any of these things. It
9 could be a department. It could be a board. It could
10 be a bureau or it could be a commission. But we know
11 that it isn't any of those things.

12 So, the question becomes can you read this
13 language, right, can you read the language department
14 or bureau or commission to say more than that, to
15 actually say this was designed not to be a check and
16 balance on the Governor at all.

17 This was just designed to give him free rein
18 to investigate as he saw fit. And if you look at what
19 this investigatory power is that is in 52:15-7, it's
20 actually quite expansive. Right.

21 It speaks to examining and investigating the
22 management of the department, board, bureau or
23 commission and the management and affairs of any
24 department, board, bureau or commission, right. That's
25 in the first place.

1 As we'll see, that's not the use it's being
2 put to here. But before we move off the point, and I
3 understand exactly what Your Honor is saying, but, of
4 course, the court is aware that the Legislature could
5 at any time have determined that this statute NJSA
6 52:15-7 did not give sufficient power to the Governor
7 to allow him to actually, in addition to supervise,
8 instrumentalities. In addition to supervising quasi-
9 governmental agencies and independent entities that are
10 "in, but not of."

11 They actually could have passed a statute
12 that allowed him to control them, but they didn't do
13 that. And it seems that what Your Honor is saying is
14 well, the statute was in existence for many years
15 before the New Jersey Constitution, at least it was
16 passed seven years before. It's been in existence for
17 a long time since. It says what it says, but, you
18 know, that was then and this is now.

19 And I don't think that's right, Your Honor.
20 I believe that the Legislature makes the laws as Your
21 Honor knows and they certainly -- this is not the first
22 opportunity, not the first time this issue has arisen
23 over the scope and magnitude of a grant, an enabling
24 statute that says you are an independent agency or, as
25 the enabling statute puts it, "in, but not of."

1 I think it's important, Your Honor, to take a
2 look at that statute, that enabling statute for the
3 EDA. This is not a state agency by anyone's likes.
4 The defendant's brief says, widely says anybody that
5 gets compensated by the state is, of course, subject to
6 gubernatorial control.

7 Well, the EDA is a completely self-supporting
8 organization. In it's 2017 annual report --

9 THE COURT: Do you know one thing is you're
10 making a lot of the same arguments that are in the
11 brief which I have read.

12 MR. MARINO: Well, I don't want to --

13 THE COURT: So, I would try to move it along.

14 MR. MARINO: Tell me what is of interest to
15 Your Honor about it?

16 THE COURT: Well, I mean I've asked you
17 questions about the legislative history, the timing and
18 so forth. I mean if you want to point out some other
19 things about the EDA, I have the statute here. But you
20 don't need to repeat everything that's in the brief.

21 MR. MARINO: Understood, Your Honor.

22 I think if you take a look at what's been
23 done in this with respect to this Task Force in
24 addition to undertaking which is what we allege in
25 count one, the undertaking an investigation that I

1 believe it's not empowered to undertake. If you move
2 forward that what's going on here in this case is an
3 investigation of individuals and entities. They're not
4 involved in the management or affairs of the EDA.
5 They're outsiders, right.

6 And when you talk about investigating these
7 individuals as this does, I think that, in and of
8 itself, even if it were the case, that you would read
9 the statute as Your Honor is reading it or suggesting
10 it could be read, right. Even if you read the statute
11 to suggest these are sort of state agencies, even
12 though that's not what they're called, you still would
13 not see in this statute the ability to investigate
14 individuals.

15 And when you get to our count three of our
16 complaint, of course, that goes to the fact that we've
17 been denied cross-examination rights and so forth that
18 would, even under this statute, it makes it quite clear
19 that you are entitled to that. Right, the statute
20 itself makes it clear, and Your Honor has it front of
21 you, that we're entitled to cross examine and to round
22 out the field division and so forth.

23 If you look most instructively, Your Honor,
24 and perhaps as I can be most helpful to the court on
25 this subject, if you look at what's really happened in

1 this Task Force, I would suggest to Your Honor that it
2 bears absolutely no resemblance to a public hearing
3 designed to get to the bottom of what's really going
4 on. It is more like a grand jury proceeding where the
5 Task Force has met with witnesses and prepared their
6 testimony with them, and then it's presenting it by
7 simply leading the witnesses through all that it has to
8 say.

9 First, it speaks about federal crimes being
10 at issue here and, perhaps, there were crimes
11 committed. And when you really get into the details,
12 you have this kind of question.

13 Now, is it fair to say that prior to coming
14 here today, I asked you to review five applications?

15 Yes.

16 I asked you to review the project files.

17 Yes.

18 I'm only going to ask you about four of the
19 applications and, of course, they're about the
20 plaintiffs.

21 And this sort of leading examination isn't it
22 a fact that these are material misrepresentations?
23 Isn't it a fact that this is the sort of thing that you
24 want to know?

25 It took on a cast that wasn't even remotely

1 the sort of public hearing that I think one would
2 envision for an entity that actually was permitted to
3 be examined by the Governor. And so, that sort, you
4 know, our take on this, Your Honor, and I don't want to
5 belabor the record, but you have individuals here, and
6 I just -- I respectfully think this is an issue and
7 maybe it's an easier issue for Your Honor than it is
8 appreciate it to be for us, but to me, I think this is
9 an issue that would benefit by very careful
10 consideration by Your Honor as to exactly what was
11 going on in this statutory construct and exactly what
12 has transpired here, the nature of the EDA.

13 The enabling statute makes it clear you've
14 got public members appointed at the recommendation of
15 the Senate President and the Assembly Speaker and so
16 forth. There seems to be an effort to do something
17 more than simply have an arm of the Governor conduct
18 the kind of investigation that you would expect to find
19 with respect to something that is actually a state
20 entity.

21 So, for those reasons, Your Honor, I haven't
22 gotten to the balance of equities. I don't know what
23 the rush is. It doesn't appear that there is any rush.
24 And so, if we are right, and Your Honor will be the one
25 that will determine in the first instance where we are

1 right. But if we are right and this Task Force has
2 gone off without proper legislative authority and is
3 trending on ground on which it does not belong, if
4 we're right about that why wouldn't we be entitled to
5 not have them announce their findings in the middle of
6 the story before Your Honor gets to say in detail why
7 that's so to carefully consider the issue.

8 On the other hand, it doesn't seem that
9 there's any harm going to ensue because both houses are
10 considering the issue and their own committees and
11 because there's legislation pending with respect to
12 these continued programs.

13 THE COURT: We don't know what the report is
14 going to say, you know. I mean so there's certain --
15 there's a certain amount of speculation. So, I mean
16 when you look at irreparable harm, you know, that's one
17 of the things they're cautioning the court to look is
18 how speculative is the harm.

19 What happened on May 2nd happened. That's in
20 the record. It's clear. But whether or not the
21 preliminary report that the Task Force is anxious to
22 release prior to the expiration of the New Jersey Grow
23 and the Economic Redevelopment and Growth Act, the ERG,
24 a piece of the 2013 legislation we don't know.

25 So, I mean in that sense, it's speculative.

1 They could go on and the report could have nothing
2 about the individual defendants. We just don't know.

3 MR. MARINO: Well, Your Honor, we certainly
4 haven't read it, right, so we don't know. That's
5 exactly correct. We haven't read it, but --

6 THE COURT: And your clients opted to file
7 litigation rather than to put in their own statements
8 the budding what was said at May 2nd because you felt
9 it was inadequate and part of, you know, not sufficient
10 due process, but you had the opportunity. And I think
11 they said we would add it to the report.

12 So, I don't know what it's going to say, but
13 I just want to note that we don't know what's going to
14 be in there.

15 MR. MARINO: Just two things in response to
16 that, Your Honor.

17 First of all, the opportunity that was
18 extended to us was not in any way, shape or form the
19 opportunity prescribed by 52:15-7. Not at all.

20 THE COURT: That's correct.

21 MR. MARINO: But that's what the delegation
22 was about, right? Now, we're hearing --

23 THE COURT: Well, it's what seven means, what
24 it covers. And there's a dispute between the parties
25 as to whether seven was meant to give third-parties the

1 right to cross-examination or whether it was meant to
2 give the state entity cross-examination. If you read
3 through the transcript, they did afford the EDA the
4 right to cross-examination.

5 And your position is that its, you know,
6 seven does not extend to third-parties that an
7 investigation encompasses because they were, you know,
8 the third parties here sought tax incentives from EDA.
9 So, the Task Force position is it's a legitimate topic
10 of interest to look at companies that have filed
11 applications in terms of looking at any red flags that
12 some of those applications should have raised to the
13 underwriters.

14 MR. MARINO: Yes, certainly that's right,
15 Your Honor. But, again, to the statutory language and
16 this is the statute that the Governor invoked. This is
17 the Godhead of this delegation.

18 I don't think we can have -- I know we've
19 heard about well there's constitutional mandate and so
20 forth and so on. We're looking at the statute by which
21 the Legislature said what could be done.

22 And I want to draw your attention to four
23 words or six words, or individual under investigation
24 or scrutiny. The suggestion that only these EDA folks
25 would be able to cross-examine is simply directly at

1 odds with this statutory language whom whenever any
2 person shall be examined by the Governor or by his
3 representative and so forth that officers, department,
4 board representative or representatives, commission, I
5 beg your pardon, or individual under investigation or
6 scrutiny may cross-examine any such person on any phase
7 of the matter.

8 That's not the same as saying put in a
9 written statement and if we think it's relevant we'll
10 add it to the record. So, you can't have, I don't
11 think, I just don't think it's quite cricket. And I
12 just have very little more to say.

13 I don't think it's quite cricket to say what
14 enables us to conduct this investigation is a
15 legislative mandate contained in a particular statute
16 being 52:15-7. Forget about the fact that the language
17 doesn't speak to "in, but not of." That's what enables
18 us. But then say but when we get down to the part
19 about cross-examination let's talk, instead, about the
20 Investigative Procedures Act. Pay not attention to
21 that language either.

22 That's just not right as a matter of law.
23 And so, when we look at this we say, okay. We don't
24 think we're a proper subject. We don't think you're
25 examining the affairs or the management of even the

1 EDA, which we don't think is a state agency. But be
2 that as it may, if you're going to do that let us
3 cross-examine. Let us tell the whole story so we don't
4 have Jim Walden saying, isn't it a fact that these are
5 material misrepresentations.

6 That's not an investigative body. That's an
7 accusatory body. That's a Grand Jury proceeding but
8 being done in the public square. And it's absolutely
9 problematic.

10 And I ask Your Honor, I know because you've
11 indicated that you have concern over the statutory
12 language and the timing and so forth. And you're quite
13 correct and, of course, you're correct that the first
14 thing that happened was the comptroller said well
15 there's an issue. And that's why the Executive Order,
16 I jumped the gun and started talking about my Executive
17 Order.

18 THE COURT: First thing I know of was the
19 auditor.

20 MR. MARINO: Yeah and you're right. And
21 that's the first crack out of the box.

22 THE COURT: That's seventeen, 2017.

23 MR. MARINO: Sure. And they could have done
24 more. The comptroller does have the ability to
25 investigate even "in, but not of" entities. But the

1 Governor doesn't. He just doesn't have it. And to
2 ignore COAH, to ignore those pronouncements, to ignore
3 what the Supreme Court said. And I know we said it in
4 our brief. I don't mean to beat a dead horse. But to
5 ignore that, I have to say is to make, is a significant
6 misstep. And I just want Your Honor to be able to
7 carefully consider it and, frankly, the balancing the
8 equities being what it is, I don't know what the rush
9 would be.

10 Now when we talk about the public interest,
11 is there a greater public interest? Does the public
12 have a greater interest in hearing what the Task Force
13 has to say, particularly when you go through and see
14 what a, if you'll pardon the expression, dog and pony
15 show this was, right, where it was Mr. Walden leading
16 witnesses through pre-scripted statements, basically
17 for the benefit of the public.

18 Is the public interest in having the benefit
19 of that proceeding, is that greater than the public
20 interest in having Your Honor decide this issue on fair
21 reflection. And ask them well if you're enabling
22 statute was 52:15-7, why aren't you quoting 52:15-7 in
23 the delegation letter? And if you are relying on
24 52:15-7, why aren't you letting them cross-examine?

25 Because we do have lawyers on our side of the

1 table who have some capacity in that regard, Your
2 Honor. We like the opportunity. I would have loved
3 the opportunity as Parker McCay was being dragged
4 through the mud and these other plaintiffs were being
5 dragged through the mud, I would have loved to have the
6 opportunity to cross-examine so a full picture would be
7 provided to the public for which this was being done.

8 And so, really, today we are not here for
9 Your Honor to decide fully and finally what the infer
10 is. You've given us, I think, preliminary views as to
11 some of the thorny issues of statutory construction
12 that it entails. But I don't think that we're at the
13 end of the road.

14 And I would like to have Your Honor carefully
15 consider this at length and allow whatever
16 determination you wish to make. It's not the case that
17 how this case gets decided and how this Task Force acts
18 in the next two weeks is going to impact what happens
19 in the short term with respect to these programs.

20 Thank you very much, Your Honor.

21 THE COURT: Okay. Thank you.

22 MR. CRITCHLEY: Good afternoon, Your Honor.

23 THE COURT: Good afternoon.

24 MR. CRITCHLEY: As usual, you know the facts.
25 I just to before I begin my comments just

1 address a couple of things the court addressed to Mr.
2 Marino.

3 And you talked about counterintuitive nature
4 of the Governor not having the inherent authority to
5 investigate a state agency. And, to some extent, it is
6 counterintuitive. But I would point out that the
7 Governor, as has been stated from the United States
8 Supreme Court when it talked about the chief executive
9 of the United States in Youngstown Steel & Tube Company
10 vs. Sawyer and that opinion has been followed by our
11 Supreme Court in Worthington vs. Fauver and discussed
12 extensively in the CWA vs. Christie.

13 The Governor doesn't have aggregate powers to
14 engage in inherent activity. The powers that the
15 Governor has to flow from one of three sources. It has
16 to flow, for example, if it's an emergency order, has
17 to flow from an emergency in New Jersey. We have the
18 Disaster Act or it has to flow from a constitutional
19 mandate which we say doesn't exist here, and I will
20 explain that or a legislative act.

21 And our position is that the Executive Order
22 52 and the creation of the Task Force really has no
23 right to exist. The Governor, as much as we say, well
24 the Governor has inherent authority to supervise and
25 investigate anything the Governor wants. Judge, that's

1 a myth. That has no basis in law. It has no basis in
2 statute. It has no basis in the Constitution.

3 It may sound logical, but it has to have some
4 basis in law to support that proposition. And I will
5 discuss the evolution of Gubernatorial power going back
6 to 1776, the first state constitution.

7 But when the court talked about a couple of
8 things, the court talked about well the Governor has
9 the authority to veto the minutes of the EDA. Why
10 didn't you mention that?

11 Well, one of the things we would point out
12 that Chief Justice Rabner in his opinion in COAH talked
13 about that very topic. And he said, "Enabling statute
14 can set limits to an agency's independent." And he
15 goes on further and says, "Many statutes also give the
16 chief executive the power to veto minutes of
17 independent agencies." And then he cites about four
18 different agencies.

19 But independent agencies are, nevertheless,
20 insulated from the full supervision and control of the
21 executive branch, see Barron Supra. The chief
22 executive power over them extends only as far as the
23 enabling statute permits. So we're saying from what
24 authority springs this ability for the Governor to
25 engage in this type of activity, even though it may

1 sound counterintuitive.

2 Now much of the arguments made by defense in
3 this case I think a foundational them is that just as
4 the court pointed out that the Governor has supervisory
5 authority over state instrumentalities. And when you
6 look at what is the authority upon which that could be
7 made it springs from the Constitution, Article V,
8 Section 4, paragraph 2 -- The Governor shall have
9 supervision over the instrumentalities of governing.

10 But then we look at how did that clause get
11 there. Was that clause meant to be an expansion of the
12 Governor's power or was it counterintuitive utilizing
13 the word supervision? Was it counterintuitive in a
14 sense that it meant to constrict and restrain the
15 Governor's powers?

16 And I would submit that when we look at the
17 judicial opinions that utilization of the word
18 supervision was not a word of expansion but much rather
19 a word of extraction in terms of limitation. And why
20 do I say that?

21 We say that because as Mr. Marino had pointed
22 out, we talk about, you know, how do we get to this
23 point where we're challenging the Governor's ability to
24 conduct an investigation. We start with the various
25 Constitutions. There's been three Constitutions in the

1 state -- 1776, 1844, and 1947. And also, we had the
2 draft Constitution of 1944 which is kind of relevant.

3 But when we look at how the Governor's power
4 evolved, we know in 1776, the Constitution was such
5 that it would have limited the Governor's power because
6 their concern is not to create a Governor who had power
7 to the King of England. The power left in the hands of
8 the Legislature.

9 In 1844, sixty-eight years later, the only
10 change they made is they said, okay, the Governor can
11 be elected by the people. Other than that, the powers
12 were diluted.

13 Now, we come to the 1940s, '44 and '47, we
14 had a situation where they're saying we have to
15 streamline Government because as the court said, you
16 have to reach the times. And when we look at what's
17 going on in 1944, Judge, that's when we had the
18 Constitutional Draft Convention which many of the
19 analogues that are founded in '47, originally found
20 their place.

21 And one of the chief drafters of the 44
22 Convention to the Constitution was Arthur Vanderbilt
23 who later became the Chief Justice and author of the
24 Parsons opinion.

25 So when we look at what Judge Vanderbilt said

1 in Parsons, and remember when he's speaking. He's
2 speaking not only as a Chief Justice, but he's speaking
3 as one of the original developers of the Constitution.
4 He was advisor to Governor Driscoll.

5 He took the "in, but not of" and basically
6 what he said was is although we're going to give the
7 Governor stronger powers because the Constitution in
8 1947 was obviously intended to create stronger powers
9 in the Governor's office, as well as to deal with the
10 hodgepodge in the judiciary.

11 They had seventeen independent judiciaries,
12 each running by its own fiefdom. So what he said is we
13 looked at the Constitution. When he wrote Parsons, it
14 was only two years removed from 1947. And he said,
15 there are certain agencies that are safe harbors.
16 There are certain agencies that are removed from the
17 power of the Governor. And I'm speaking not only as
18 the Chief Justice but I'm speaking as someone who's
19 close to the framers one and half years after the
20 Constitution is developed.

21 And he created and he said its manifestly
22 intent of the Legislature when they utilize the words
23 "in, but not of" was their intent to create a
24 separation of the power of the Governor from
25 investigating state agencies such as the Turnpike.

1 The Turnpike Authority was created in 1948, after the
2 Constitutional Convention. So, it was created
3 afterwards. So it's not at that time sensitive.

4 So after the Convention occurs, you have the
5 creation of the Turnpike Authority, the "in, but not
6 of" language and that's where Judge Chief Justice
7 Vanderbilt said, no. We are creating a safe harbor.

8 And as Mr. Marino pointed out when you follow
9 of the evolution of that thought process, you go from
10 1949, two years removed from the 47 Convention. You go
11 up to Judge Carchman. Judge Carchman, again, said even
12 though we have a strong executive in New Jersey and we
13 want to have a strong executive in New Jersey to meet
14 the modern needs of the modern times. He said the "in,
15 but not of" language is in there for two purposes.

16 One, to recognize the balancing factor that
17 instrumentalities have to be placed in one of the not
18 more than twenty departments. We only have fifteen
19 departments today, but they allowed for twenty because,
20 at the time, you had fifty or sixty. They restrict it
21 to twenty.

22 And then he said, in addition, and this is
23 Judge Carchman's opinion writing for unanimous panel
24 like four years ago. In addition, it was the framer's
25 concern that there are some agencies, and I think this

1 is the language, there are some agencies which we
2 require independent status. And he says to be free
3 from the reach of a strong executive - the Governor.
4 And he cites for that proposition the committee on
5 militia, Governor and civil officers.

6 So, basically what he's saying is it is
7 counterintuitive. But when we look at the intent of
8 the framers of the Constitution, there's a carve-out.
9 You can have broad supervisory powers, but based upon
10 Chief Justice Vanderbilt's opinion in Parson and based
11 upon Chief Justice -- based upon Judge Carchman's
12 opinion in COAH, that cannot be considered that you can
13 exercise control over agencies such as the EDA.

14 Now that was not just a throw-in because when
15 Chief Justice Rabner wrote the opinion in COAH or
16 basically he affirmed not only factually and legally,
17 but in substance, all of the provisions of Judge
18 Carchman in his thinking and in his analysis,
19 interestingly, interestingly he spends a great deal of
20 time on footnote number 2.

21 And in footnote number 2, the Chief Justice
22 at the time says, the framers were concerned over
23 giving the Governor control over quasi-independent
24 agencies and utilized the word controller, that would
25 be significant. They were concerned about giving

1 control over quasi-independent agencies. And then he
2 refers to the original draft of the 47 Constitution.
3 The original draft of the 47 Constitution had the words
4 as to Article IV, Article V, Section 4, paragraph two.
5 The original draft had the Governor shall have the
6 authority to supervise and control instrumentalities of
7 Government.

8 Interestingly, the 1994, the 1944 Draft
9 Convention had the same language. The Governor shall
10 have the authority to supervise and control. So what
11 did the framers say? The framers said, no. We are a
12 little concerned about utilization of the word control
13 because they interpreted, as Chief Justice expressed in
14 footnote number 2. The framers at the time said, we
15 are concerned that if we utilize the word control, it
16 will give the Governor the authority to order quasi-
17 agencies to act or not to act.

18 THE COURT: So, if the BPU existed, you know,
19 the Public Utilities Commission existed prior to 1941
20 this statute gives the Governor the authority over
21 every commission which would suggest over-independent
22 commissions, which, you know, certainly -- I mean, what
23 do you make of that?

24 MR. CRITCHLEY: The words commission is
25 utilized loosely, but I think Judge Carchman, when he

1 discussed why did they utilize -- I think he used the
2 word -- I think Judge Carchman, in his Appellate
3 Division opinion, said why did they utilize the word
4 instrumentality. And he said because you have all
5 these various agencies of government, everyone,
6 whatever you call, a commission, the racing commission,
7 the thoroughbred commission, everybody is named in the
8 commission, but they're not "in, but not of." They're
9 quasi independent agencies.

10 THE COURT: Yeah, but, I mean, if we're going
11 back to the legislative intent, if the BPU was an
12 independent entity that was of concern in Footnote 2
13 here and the language of the statute gave the Governor
14 authority to investigate commissions it would seem as
15 if that language could be interpreted to cover
16 independent commissions.

17 MR. CRITCHLEY: I don't think so, Judge,
18 because if you look at the history of BPU --

19 THE COURT: Because the BPU is not a
20 commission?

21 MR. CRITCHLEY: No, no. I think if you look
22 at the history of BPU, I think, they later change the
23 statute where it became of the Governor's office so
24 that it can be investigated, but at the time it was an
25 "in, but not of." It later became an of government

1 agency. And had it not changed the Governor still
2 would be in the same position; he would not be able to
3 investigate the BPU.

4 But when they changed the statute to make the
5 BPU in and of the Governor's office I think not only
6 does it not contrary to my position, I believe it
7 supports my position. And when you talk about the
8 Statute 52-15.7 we say, well, it happened so long ago,
9 1941. What about today?

10 A couple things I would point out.

11 Number one, its never been amended. It was
12 adopted in July. When I say amended, it had never been
13 amended since 1941 except for one purpose. And the
14 Governor's office recently utilized that very old
15 statute as a justification for initiating the Task
16 Force. He doesn't utilize -- in terms of the
17 delegation letter he didn't say I'm relying on Article
18 5, Section 4, Paragraph 2. He said I'm relying on 52-
19 15.7. So, that speaks. And when we talk about that
20 statute it was not a throw-away.

21 When you look at the constitutional
22 convention, Your Honor, when you talk about the section
23 dealing with the investigative power of the Governor
24 the committee actually makes reference to 52:7. It
25 says, "Fourteen states make no provisions by the

1 constitution or statute from the executive inquiry.
2 Approximately fifteen states, including New Jersey,
3 provide for an executive inquiry similar to that of the
4 Moreland Act." And they make reference to 15:15-7.

5 So, when they wrote the constitution 52:15-7
6 was a basis upon which they utilized to say, okay, does
7 the Governor have investigative power. They used that
8 as a platform. They used that as a platform. So, that
9 is why 52-7 is important. It's important because it
10 was utilized by the framers to give the Governor
11 investigative authority constitutionally because before
12 1941, YOUR Honor, the Governor had investigative
13 authority. He had no statutory authority to
14 investigate. He had no constitutional authority to
15 investigate. He could do nothing.

16 So, in '41 they said, okay, we will give you
17 the statutory right to investigate, but when they gave
18 the Governor the statutory right to investigate they
19 said, okay, we're giving it with conditions, and I will
20 explain the conditions. Then, just six years later
21 they said, okay, not only are we going to give you a
22 statutory right to investigate, we're giving you the
23 constitutional. We're embedding it in the constitution
24 with the comments, with the footnotes you have a right
25 to investigate, but, basically, utilize the framework

1 of 52-7 because that's what we cite as authority;
2 52:15-7.

3 Let me just discuss that, Your Honor, for a
4 moment. Let me just -- I think my colleagues also
5 talked about that constitutional right to investigate.
6 And when you look at the wording of the constitution,
7 New Jersey 47, which deals with the constitutional
8 right to investigate by the Governor, its Article 5,
9 Section 4, Paragraph 5. And interestingly,
10 interestingly the 1944 draft convention, which was
11 rejected by the voters in 1944, also contained a
12 constitutional right granting the Governor the power to
13 investigate.

14 And when you look at historical context and
15 say, okay, what were the framers thinking about in 1944
16 and what were they thinking about in 1947. And you go
17 back to the draft section of the Forty-Four Convention,
18 its Article 4, Section 1, Paragraph 14. It talks about
19 the Governor having authority to conduct an
20 investigation and interestingly in the Forty-Four draft
21 convention it gave the Governor the power to subpoena.
22 It also gave the person who's the subject of
23 investigation the power to subpoena.

24 Now, when we fast-forward three years later
25 and you discuss that same constitutional provision now

1 its Article 5, Section 4, Paragraph 5, the power to
 2 subpoena is removed. So, his investigative power under
 3 the constitution is very limited. What can he do under
 4 the constitution? Can he subpoena anybody? No.

5 Under Article 5, Section 4, Paragraph 5, it
 6 doesn't say you have the power to subpoena as the
 7 Forty-Four draft convention said. It says what he can
 8 do is the following; he can require someone to submit a
 9 written statement or statements under oath, under oath,
 10 that's all. So, you can't say this authority is based
 11 upon the constitutional authority to investigate
 12 because they're issuing subpoenas. And that is why
 13 they did not assert Article 5, Section 4, Paragraph 5
 14 as a basis because that does not give them the power to
 15 subpoena.

16 Also, interestingly, as we point out, it said
 17 under the constitutional power to investigate under the
 18 Forty-Seven Constitution it says it only applies to
 19 employees of the state. It only applies to employees
 20 who are receiving compensation. And when you look at
 21 the opinions that touched on those various provisions,
 22 particularly the opinion in CWA v. Christie, when they
 23 talk about that investigative power they talk it only
 24 applies to the executive branch. It doesn't apply to
 25 these quasi agencies.

1 THE COURT: What branch are they in?

2 MR. CRITCHLEY: Quasi in?

3 THE COURT: What branch is the EDA in? If its
 4 not legislative, if its not judicial, was there another
 5 branch?

6 MR. CRITCHLEY: Yes. They're called -- if
 7 you look at -- I have a boring life, I looked us the
 8 State Government. If you look at it the State
 9 Government has departments. Those are one of the
 10 twenty principal departments that they could create.
 11 There's fifteen and its Corrections --

12 THE COURT: Right. Right.

13 MR. CRITCHLEY: -- and then you have all the
 14 other, Racing Commission, EDA; they're all under the
 15 term agencies. So, they're not --

16 THE COURT: But branches, isn't it executive?

17 MR. CRITCHLEY: No. No.

18 THE COURT: Its more t hen three branches of
 19 Government?

20 MR. CRITCHLEY: This is what Judge Carchman
 21 said when that question was raised. Why did we put
 22 them -- why did we put them under Article, you know,
 23 Article 5, Section 4 where they have to be in one of
 24 the twenty principal departments. Why do we even put
 25 the Turnpike Authority in there? Does that mean its

1 part of the Governors Office?

2 Chief Justice VandeWalle answered that. He
3 said no, it has nothing to do with the Governors
4 Office. It's a recognition of the constitutional
5 requirement that all instrumentalities, all agencies,
6 not just the principal departments, all agencies be
7 placed in those twenty, but not because they're in and
8 of; its just they're in. They're among and with "in,
9 but not of." Chief Justice VandeWalle made that clear.
10 Judge Carchman placed great emphasis on that.

11 THE COURT: Is -- what's the -- what's the
12 persuasive weight of an Appellate Division decision
13 when the Supreme Court had the final say? I mean, I --

14 MR. CRITCHLEY: Which opinion, Judge?

15 THE COURT: Judge Carchman was the Appellate
16 Division decision, but the Supreme Court decision is
17 the operative decision. So, I mean, I can certainly
18 give persuasive weight to anything.

19 MR. CRITCHLEY: But, Judge, I say this; you
20 look at Judge Carchman's opinion, who is the unanimous
21 opinion, he wrote for the panel. You look at Judge
22 Carchman's opinion and then you look at Chief Justice
23 Rabner's opinion, In Re COAH, I'm not going to say, but
24 it mirrors. There is no distinction at all. Every
25 emphasis that is made by Judge Carchman in support of

1 the "in, but not of" concept, and explained it, is
2 adopted fully. There is not a shade bit of difference
3 between the two. Chief Justice Rabner and the majority
4 of the Court, five versus two, adopted completely.

5 I'm getting something, Judge. I guess this
6 is the Supreme Court opinion in COAH, again, where
7 Chief Justice Rabner wrote the phrase, "in, but not of"
8 the panel noted, was a common means of identifying
9 those agencies that the legislature intended to be
10 independent and outside the scope of the executive
11 control including the executives reorganization power
12 while also abiding by the constitutional mandate
13 allocating every agency independent or otherwise.
14 Independent or otherwise to an established department
15 in the executive branch. For support the panel cited
16 the enabling statutes of the various independent
17 agencies that are "in, but not of." Then, later he
18 cited EDA. That is exactly what Judge Carchman held.

19 So, there is no absolutely no distinction, no
20 distinction whatsoever between Judge Carchman's opinion
21 in the Appellate Division and Chief Justice Rabner's
22 affirmance of Justice Carchman's opinion.

23 Now, we talk about 52-15-7, Judge. And we're
24 saying, well, what is the relevance of a 1941 statute
25 to today. As I pointed out, it was utilized by the

1 framers in discussing the constitutional authority
2 allowing the Governor to investigate and it was cited
3 by the Governor as a basis for issuing his executive
4 order. So, it has very much relevance today.

5 And when you look at the historical context
6 and how that statute got drafted it was initially --
7 the sponsor was a Senator Hendrickson. I happen to
8 look up Senator Hendrickson. He was a man of
9 substance. He was a former ambassador to New Zealand.
10 he was a former United States Senator. He was a former
11 Treasurer of the State of New Jersey. He was a
12 candidate for Governor unsuccessfully against Charles
13 Edison. He was the President of the Senate. So, he
14 drafted, in 1941, this powerful individual, he drafted
15 this statute.

16 THE COURT: Well, it came from the Moreland
17 Act, right? The New York Act.

18 MR. CRITCHLEY: Part of it. Part of it was
19 based on it, yes, because at the time the power of the
20 executives were evolving. And they wanted to give the
21 Governor some statutory authority to investigate, but
22 with limited conditions, Judge. That's what's
23 important. And those limited conditions apply today,
24 almost eighty years later. It has not been changed.

25 And what he says, this man, he adopts the

1 statute and when he adopted the statute originally in
2 January of 1941 it did not have those, I'll call them,
3 "The Hendrickson right." The due process rights. It
4 just had, okay, the Governor can inquire as to
5 departments, boards, bureaus, commissions. That's all
6 it had.

7 Then he says, three months later, three
8 months later in a statement attached to the bill he
9 says, yes, we allowed this legislation to be passed,
10 but it was being conducted, it was being conducted like
11 a Star Chamber proceedings. Then he required these
12 rights to be incorporated. So, he mandated those
13 rights into the statute. And when he did it its not as
14 if he said, okay, those rights only apply to state
15 employees. It defies logic.

16 Talk about counter-intuitive. When they --
17 you don't have to guess. You have -- normally, you
18 know, the opinions tells us when the statute is clear
19 on its face, unambiguous, it gives ordinary meaning.
20 The only time you go into intrinsic evidence is if
21 there is some ambiguity, and you look for legislative
22 intent.

23 Here, I say the statute it clear on its face,
24 but let's go to the intrinsic evidence, let's go to the
25 legislative intent, let's look at just the statement to

1 the bill, why they amended it, because it was being
2 abused because at the time they were conducting the
3 investigation, the very first investigation, the people
4 who were being investigated were not given rights to
5 participate jointly. So, what he said is I am going to
6 create the statute and I'm going to amend it. And as
7 we talked about due process being a flexible concept,
8 he took away the flexibility. He mandated what has to
9 be done. And it was signed by the Governor. And he
10 said when you are under investigation, if you are an
11 individual -- because the statute as it was originally
12 drafted said department, board, bureau, commission.
13 Then, when he amends the statute he adds or individual
14 under scrutiny.

15 THE COURT: Well, it did say initially any
16 State Officer.

17 MR. CRITCHLEY: Yes.

18 THE COURT: So, that would be the individual
19 under scrutiny, wouldn't it?

20 MR. CRITCHLEY: Well, Judge, I just think to
21 say there's a difference between a state person
22 receiving due process rights and an individual under
23 scrutiny. I think that's a distinction that does not
24 rise to the level of protection of the law under the
25 constitution or even lack, my words, common sense

1 because if you are an individual under scrutiny it
2 docent take much to understand what that means. You
3 are an individual under scrutiny. And it says, the
4 individual under scrutiny says you shall have the right
5 to cross-examine. Okay. We have the right to cross-
6 examine.

7 And later on he says the individual has a
8 right, has a right to introduce evidence or otherwise.
9 Then, it doesn't leave it to doubt as to why that is in
10 there. He expresses the reason. The Governor signed
11 the legislation. Why can they introduce evidence? You
12 can introduce evidence and the words in the statute are
13 to explain, expand upon or clarify the matter under
14 review, under scrutiny. And it says, again, well, why
15 did they do that. The legislature tells you, the
16 legislature tells you right in the statute. It says to
17 the end, to the end that the full details, not just the
18 full details, can be developed and presented when; you
19 do it this day, you do it tomorrow. It says to be
20 developed and presented one and the same time.

21 So, when we talk about trial-like proceedings
22 that's what the legislature intended. That is what the
23 Government intended. And what we're saying is when
24 they conducted the proceedings the way they did here a
25 couple things occur.

1 Number one, we say they did not have the
2 right, they did not have the right to even conduct a
3 task force because they don't have the authority to
4 investigate independent agencies. Hypothetically, its
5 all leading. Are we going to disregard the statute?

6 They can only exercise delegated rights given
7 to them by the legislature if they follow the will of
8 the legislature. And there are sometimes -- of course,
9 the cases talk about, you know, it's not a water tight
10 compartment. You can't have the executive, the
11 judiciary and the legislature all in self-contained.
12 Sometimes, I think, they use the word osmosis. They
13 bang into one another. And there should be reasonable
14 accommodations.

15 So, in this situation the legislature engaged
16 in what, I consider, a reasonable accommodation, 1941
17 to the present. It gave them the authority to, you
18 know, conduct an investigation. But then what did they
19 do? The way they conducted themselves here they
20 violated the expressed will of the legislature. How
21 did they violate the express will of the legislature?

22 The express will of the legislature didn't
23 say, okay, whoever's being investigated under 52:15-7
24 after their name has been besmirched, after they have
25 been maligned, you can sometime later on write some

1 affidavit, maybe a month, two months from now, and
2 we'll consider it. That is not what the legislature
3 said. And that is not what the Governor, Governor
4 Edison, said when he signed the legislation. He said
5 if you're under investigation, under 52:15-7, its not
6 your discretion, you're not doing us any favors.

7 You are mandated to follow the law. And when
8 you don't follow the law, here we have the words of
9 separation of powers argument, you are violating the
10 express will of the legislature. You are usurping the
11 authority of the legislature. You are impairing the
12 essential integrity of the legislature. And when you
13 combine all those you have a separation of powers
14 argument. That is the concern here.

15 They conducted this proceeding in complete
16 derogation of their statutory responsibilities as if it
17 didn't even exist. And that is why we're saying,
18 Judge, we're screaming, we want to participate, but not
19 by signing an affidavit.

20 Now, you had an opportunity, I don't think
21 so, to look at these proceedings. They say we don't
22 get trial-like rights, but they got a trial-like
23 saying. They had a bench, they had -- Mr. Chen is up
24 there like a judge. Mr. Bolen (phonetic) is there.
25 Mr. Quinones is there. They're calling witnesses,

1 direct examination, direct examination, direct
2 examination. They're criticizing our clients up and
3 down. The next day Norcross is under investigation.
4 Everybody is under investigation.

5 That is not what the legislature intended.
6 The legislature intended, okay, if you're going to call
7 a witness we have the right to call a witness. If
8 you're going to choose evidence, we have a right to
9 choose evidence, to explain, to enlarge and to clarify
10 so that the matter is fully developed and presented at
11 one and the same time. They took that away from us and
12 they're saying, well, all Norcross wants to do is stop
13 the investigation. All we're looking to do is stop --
14 that's absurd. That is absurd.

15 I mean, what we're saying is what we don't
16 have a lack of in New Jersey are investigative
17 agencies. The Governor can't say, oh my God, if I
18 don't investigate nothing is going to happen. You have
19 the controller. You have --

20 THE COURT: You know what, Mr. Critchley,
21 I've let you go on and on. I don't know that there's
22 much else that's not in the brief. Is there any, you
23 know, other point you want to make?

24 MR. CRITCHLEY: Yes. One other thing.

25 THE COURT: Yeah.

1 MR. CRITCHLEY: When they sent that letter,
2 they sent a letter, I think its Exhibit F, Exhibit F,
3 they talk --

4 THE COURT: Hold on. Let me just see, there
5 weren't tabs. Okay. This is the letter from Mr.
6 Walden to Mr. Perino (phonetic), is that the one?

7 MR. CRITCHLEY: Is that February 22nd, 2019?

8 THE COURT: Yeah. I have it. Okay.

9 MR. CRITCHLEY: Okay. When you look at that
10 letter, I mean when they delegated the authority to
11 this task force they're limited with that they could
12 do.

13 Now, what they did during the course of --
14 I'll let you take a look at it.

15 THE COURT: You know, I have it right here.
16 Is there any point you want to make?

17 MR. CRITCHLEY: Yes. I want to talk to the
18 formation. Mr. Chen's formation of the accelerated re-
19 certification program. Now, what is that? Now, in
20 addition to conducting the investigation, now they're
21 creating programs aside from the fact as to whether
22 that program violates the Administrative Procedure Act.

23 THE COURT: Did you raise this in the brief?

24 MR. CRITCHLEY: We didn't, Judge.

25 THE COURT: Excuse me. You didn't. So, its

1 certainly not appropriate to argue now, is it, when
2 they don't have a chance to reply. I didn't have a
3 chance to review it.

4 MR. CRITCHLEY: Okay. Can I get just one
5 second.

6 THE COURT: Well, I mean you also didn't cite
7 in either of the plaintiffs' briefs any of the
8 constitutional provisions. I just checked you're, you
9 know, table of authorities. There were no
10 constitutional provisions cited --

11 MR. CRITCHLEY: We're relying on the
12 constitution, Judge.

13 THE COURT: -- in your opening brief or the
14 reply brief unless I misread the table of authorities.

15 MR. CRITCHLEY: Well, Judge --

16 THE COURT: Only your adversary has cited it.

17 MR. CRITCHLEY: Well --

18 THE COURT: But I'd like to go on anyway,
19 but, I mean, this is a new argument.

20 MR. CRITCHLEY: Okay. I'm going to finish
21 right now, Judge.

22 THE COURT: Yeah. Okay.

23 MR. CRITCHLEY: I'm know when I'm testing the
24 court's patience. I've been around long enough.

25 THE COURT: Well, I'm -- there's certain

1 fairness in terms of raising arguments at oral argument
2 that you're adversaries and the court, frankly, isn't
3 prepared for, but in any event --

4 MR. CRITCHLEY: Well, as we -- this thing was
5 happening very quickly, Judge, and I have a boring
6 life, and over the weekend that is what I was doing,
7 unfortunately. When I was watching --

8 THE COURT: Well, whatever, we don't need to
9 know what you were watching.

10 MR. CRITCHLEY: You just don't stop. You
11 keep reading, Judge, and as I'm reading these things
12 are occurring to me. All I am saying is the
13 accelerated program that is, basically, something that
14 should be promulgated pursuant to rules and regulations
15 of the Administrative PROCEDURE Act.

16 Number two --

17 THE COURT: I don't think that's part of your
18 complaint, though, is it?

19 MR. CRITCHLEY: I'm sorry.

20 THE COURT: I don't think its in your
21 complaint.

22 MR. CRITCHLEY: Its not. Its not.

23 THE COURT: Okay.

24 MR. CRITCHLEY: But I'm you just to consider
25 that.

1 The last thing is, you know, there's no
2 standards. How do you become a member of that? They
3 also refer to it as -- and we put -- they clarified as
4 an entity of concerns. What is -- I mean this is the
5 disparaging comments, almost welling in nature. They
6 create this task force, they create these programs,
7 they create these terms. I've been conducting
8 investigations a long time, criminal and civil. I know
9 what targeted it. I know what subject is. I know
10 witnesses. I never heard of an entity concern, but it
11 sounds bad.

12 Thank you, Judge.

13 THE COURT: Okay. Thanks.

14 Anyone else on behalf of Plaintiffs?

15 MR. STERN: May I just for a moment?

16 THE COURT: Yes. Okay.

17 MR. STERN: Thank You, YOUR HONOR. I promise
18 to be extremely brief because I'm sure you're anxious
19 to hear Mr. Wells. I know I'm anxious to hear Mr.
20 Wells. So, I know how much you must be.

21 I come only to remind us what we're here to
22 do today. I did not think we're here to finally
23 adjudicate through this court the ultimate answers to
24 the very good questions that you have raised to my
25 colleagues.

1 We're here, I thought, to determine whether
2 we have made a good enough case so that You should take
3 the time that is necessary to decide these very
4 difficult issues in a mature and scholarly way that I
5 know you will bring to this matter if you're given the
6 opportunity.

7 I sit here and I listen to this and it seems
8 to me that there are a basic question. You have a
9 statute before you, 52:15-7. And as you will construe
10 that statute you will impact the law of this state for
11 many, many years. Your decision will have enormous
12 precedential value. It will determine what a Governor
13 may do or not do in terms of agencies, which are "in,
14 but not of" the state. Others who stand, will stand
15 later and look to your decision to determine that.

16 Your decision will determine whether a
17 Governor may convene such a body and, in essence,
18 investigate people who are not state agents. I know
19 that they will claim that that's not what they're
20 doing, but I will paraphrase Mr. Justice Frankfurter
21 and amend it. "Judges need not be blind as men, I'll
22 add, and women to what they know as men and women."

23 Your Honor has the record before you of what
24 has been going on here. I am confident that when you
25 have a mature opportunity to evaluate you will quickly

1 come to the conclusion that even if Section 52:15-7
2 authorized the investigation of an agency, which is
3 "in, but not of" the state, that is not what's going on
4 here. We look to the court to look through the mirage
5 to the facts of what is going on.

6 And, finally, the third thing that you will
7 have to decide, and we hope you will decide it maturely
8 with time to decide it, is if they're going to do that
9 to people, what rights do those people have? If
10 they're going to invoke 52:15-7 what rights do we have?
11 Can we call our own witnesses? Can we cross-examine?
12 Can we present our own evidence? These three questions
13 are squarely presented in counts one, two and three of
14 the complaint before you.

15 And I respectfully suggest to Your Honor
16 something that Mr. Marino said to you near the close of
17 his remarks, the real public interest here is not haste
18 or speed, but for this court to shed its guidance
19 correctly after having an opportunity to carefully
20 consider, weigh and answer some of the questions which
21 this court, itself, has raised. For today that is all
22 we ask. Please preserve the status quo and let us
23 answer questions which go to the very heart of the
24 balance of Government in this state.

25 Thank you for your patience.

1 THE COURT: Okay. Thank you.

2 All right. Well --

3 MR. WELLS: Your Honor, just one procedural
4 matter.

5 THE COURT: Yes.

6 UNIDENTIFIED ATTORNEY: You had asked us on
7 the telephone call whether we had served the nominal
8 defendant EDA, we did.

9 THE COURT: Okay. I haven't heard from them.

10 UNIDENTIFIED ATTORNEY: Okay.

11 THE COURT: Okay. All right. Counsel for
12 defendants?

13 MR. WELLS: Your Honor, I would like to begin
14 by handing up a couple of slides. I don't have a
15 computer and power point, but I want to refer to these
16 during my argument. May I approach?

17 THE COURT: Give them to my Sheriff's Officer
18 is fine.

19 MR. WELLS: I'm giving the copies right now
20 to my counsel.

21 THE COURT: Okay.

22 MR. WELLS: Your Honor, the management issues
23 that exist at the EDA were recognized originally by the
24 state auditor in 2017 during the governorship of Mr.
25 Christie. So, this is not an issue that arose for the

1 first time under the administration of Governor Murphy.
2

3 The state controller under Governor Murphy
4 then issued a report a year later, in 2018, in which
5 the state controller recognized, again, continued
6 issues concerning oversight at the EDA, and issues of
7 controls and whether or not those controls were
8 adequate to identify instances of possible fraud and
9 abuse.

10 As a result of what the 2017 state auditor
11 found, the 2018 state controller found, Governor
12 Christie, on January 24th, 2019, issued executive order
13 52. And I think that is where we should start in terms
14 of the facts. And Executive Order 52 makes absolutely
15 no reference to 52:15-7. Executive Order 52 provides,
16 on Page 2, right before the first numbered paragraph,

17 "Now, therefore, I, Philip D. Murphy,
18 Governor of the State of New Jersey, by
19 virtue of the authority vested in me by the
20 Constitution and by the statutes of the
21 state, do hereby order and direct,"
22 And in Paragraph 1 establishes the Task
23 Force.

24 Paragraph 2, says that the Task Force will
25 hold public hearings and shall ask individuals to

1 testify who can provide insight into the design,
2 implementation and oversight of these programs.

3 Paragraph 5, then, talks about voluntary
4 cooperation. And it says the Task Force shall seek to
5 obtain voluntary cooperation from any individuals or
6 entities who have access to information pertinent to
7 the Task Force mission.

8 The next sentence then deals with the issue
9 of compulsory process. The next sentence reads,

10 "If the Task Force encounters individuals or
11 entities who refuse to cooperate it may
12 refer the matter to the State Controller,
13 which may exercise its subpoena authority,
14 or to the EDA, which may exercise its
15 authority to compel information from
16 recipients pursuant to the terms of the
17 incentive program and grants."

18 Now, as written, Executive Order 52 clearly
19 did not authorize the Task Force to send out subpoena.
20 That power did not exist in the original order.

21 Now, we know from the record what happened
22 next was that after the Task Force was created on March
23 22nd, 2019 Governor Murphy wrote a letter to Professor
24 Chen, its Exhibit E to plaintiffs' complaint, and in
25 that letter Governor Murphy designates Professor Chen

1 to have the power to operate under 52:15-7 in which
2 gave the Task Force and Professor Chen the right to
3 issue compulsory process.

4 So, when Your Honor earlier, I think in
5 April, heard a motion concerning one of the subpoena
6 involved in this case Your HONOR, actually, was very
7 astute and recognized the distinction, on the record,
8 between the original Executive Order 52 and the letter
9 which gave the Task Force subpoena power. And its very
10 important as we go forward to understand that
11 distinction.

12 Now, what we know, if we turn to my slide
13 deck, Slide Number 1 is from plaintiffs' reply brief at
14 22. I think its very important because if you accept
15 what they wrote it shows what they are saying is at
16 issue in this case and what is not. And the plaintiffs
17 wrote, at Page 22, first, whether the Task Force was
18 lawfully created in January 2019 misstates the issue.
19 The conduct challenged in this action concerns
20 defendants misuse of NJSA 52:15-7, not the Task Force's
21 creation as a purely advisory entity with the power to
22 seek only voluntary cooperation.

23 The Task Force's status and that of its
24 chair, Professor Chen, was purportedly altered on March
25 22nd, 2019 when the Governor issued his delegation

1 letter appointing Professor Chen as his designee under
2 NJSA 52:15. It is the supposed bestow and exercise of
3 those powers which Professor Chen has wielded through
4 the Task Force that plaintiffs are challenging.
5 Importantly, the delegation letter is based solely on
6 NJSA 52:15-7, not on generic provisions of the New
7 Jersey Constitution.

8 Now, I submit that that is critical that they
9 have conceded in their reply brief that what is at
10 issue in this case is not whether the Task Force was
11 lawfully created under Executive Order 52 and not
12 whether the Task Force had the power to seek voluntary
13 cooperation. They have conceded that. There have been
14 statements, today, about the Task Force's right to
15 exist, but there is no question what -- their arguments
16 are all pinned on, putting aside the due process and
17 first amendment issues, their arguments all center
18 around whether 52:15-7 is applicable and can be used by
19 the Task Force.

20 I submit it is clear on this record that the
21 powers given to the Task Force to engage in compulsory
22 process were separate from the Executive Order 52 that
23 was set forth in January that said there will be an
24 investigation, they'll seek voluntary cooperation, and
25 there will be a public hearing, and there will be a

1 report that will be published to assist the Governor,
2 the legislature and the public.

3 Now, what we are talking about here, today,
4 are issues surrounding the compulsory process issues
5 under 52:15-7 and also, then, arguments about what the
6 procedural rights are because the plaintiffs, they go
7 into different directions. The baseline or initial
8 direction under Count 1 is that 52:15-7 doesn't apply
9 at all. They then say, but, if it does apply then we
10 want to come within the procedural safeguards in it.

11 But I want to start with Count 1 because in
12 this particular case at no time did the plaintiffs
13 respond to any compulsory process subpoena. They
14 didn't respond to any subpoena. Subpoena were issued.
15 It is not in dispute that the subpoena were withdrawn.
16 They never produced a document. They never came into
17 court and questioned the right of us to serve those
18 subpoena. They were withdrawn before this action was
19 ever filed.

20 So, I want to start with the proposition that
21 at no time did the Task Force get any documents, get
22 any evidence from these plaintiffs pursuant to 52:15-7.
23 It never happened.

24 THE COURT: Was there voluntary cooperation?

25 MR. WELLS: No. They didn't cooperate at

1 all. They just --

2 THE COURT: Because I thought in one of the -
3 - some of the testimony about Cooper, you know, Cooper
4 had, their application went back to 2014 earlier than
5 some of the others.

6 MR. WELLS: Right.

7 THE COURT: Certainly, there were documents
8 regarding Cooper. I thought they said we got documents
9 from Cooper in the context of the testimony, but, you
10 know, I'm not sure, but in any event --

11 MR. TAMBUSI: To my knowledge I don't think
12 they gave us anything. We got documents, but we got
13 them -- the documents that relate to this plaintiffs,
14 so there is no confusion, were obtained by voluntary
15 cooperation from my going to the EDA and talking to the
16 EDA or in the public record. We didn't --

17 THE COURT: So, it may just have been a use
18 of a word that they've --

19 MR. WELLS: Yeah. I'm not sure if I'm --

20 THE COURT: That's all right. It may be, but
21 they were just Cooper documents you looked at.

22 MR. WELLS: Yeah. But they didn't -- these
23 plaintiffs, to my knowledge, did not produce anything
24 of the record in terms of the parties is one of
25 acrimony where their letters and people are arguing

1 about the scope of 52:15-7, but no documents were
2 produced. And I think that's important in terms of
3 what is going on here today because all of their
4 arguments, aside from their due process first amendment
5 arguments, all of their arguments are grounded on the
6 contention that 52:15-7 is inapplicable to the EDA.
7 But with respect to them the reality is we got nothing
8 from them. Its moot or they have no standing to
9 complain about whether or not we served a 52:15-7
10 subpoena on some other person.

11 So, I think we have to start there and when
12 you talk about or think about what they're trying to
13 enjoin, they're trying to enjoin, at the moment, two
14 things. They're trying to enjoin the Task Force from
15 issuing its report, its initial report, which is not
16 predicated on any compulsory subpoena they ever
17 responded to because they were withdrawn. So, they're
18 trying to stop a report to the extent it discusses them
19 is based not on them compliant with the subpoena. And
20 that is the big thing they're trying to stop. They
21 don't the report to come out. They don't want the
22 report to be issued, but all of their arguments, this
23 entire lawsuit, the temporary restraints, are all
24 predicated on some notion that 52:15-7 is what the case
25 is all about. With respect to them it is of no moment.

1 It is of no moment.

2 Now, if you look at the next slide I list the
3 Task Force witnesses, people who have testified. There
4 were four witnesses who testified at the first hearing
5 on March 28th. There were six who testified on March -
6 - I'm sorry, on May 2nd. But I want to be clear, none
7 of those -- two of those witnesses did appear pursuant
8 to subpoena; Ms. Comma, who did not discuss -- Ms.
9 Golsen-Comma, who did not discuss the plaintiffs. And
10 a Kerrie-Ann Murray who also appeared pursuant to
11 subpoena, but she did not discuss the plaintiffs.

12 THE COURT: But there was a big switch,
13 though, from March 28th to May 2nd. There was a very
14 distinct decision at the March 28th hearing not to name
15 names.

16 MR. WELLS: Right.

17 THE COURT: I mean, even from Ms. Comma, she
18 was saying her company really provided
19 misrepresentations to the EDA --

20 MR. WELLS: Right.

21 THE COURT: -- but they didn't name the
22 company; although, they did give that company the
23 chance to submit an affidavit if they wanted to.

24 MR. WELLS: They did.

25 THE COURT: And they mentioned at the

1 beginning of the proceeding that they wanted to do that
2 for fairness since they were at the beginning of the
3 proceedings, but then something changed, you know,
4 before May 2nd.

5 MR. WELLS: Right.

6 THE COURT: And the day before these
7 plaintiffs here were notified that there could be
8 information adverse to them coming out the next day.

9 MR. WELLS: Right.

10 THE COURT: So, there was a switch there and,
11 you know, I was somewhat concerned about that.

12 MR. WELLS: Well, but part of the switch was,
13 to my understanding, some of the comments after the
14 first hearing was that the first hearing wasn't
15 "transparent" and that people should be more
16 transparent. And they reacted to that. And they did
17 give notice. They told -- this wasn't some situation
18 where they did not give notice, where they --

19 THE COURT: Well, it was less than twenty-
20 four hours.

21 MR. WELLS: The facts are that fact is
22 accurate. They said you can submit a statement and
23 then there's a letter where they said at the next
24 hearing you can come and testify. So, those
25 opportunities to be heard were extended.

1 THE COURT: But even Ms. Murray, at the
2 second hearing, she -- they didn't mention that company
3 either.

4 MR. WELLS: I'm sorry.

5 THE COURT: Ms. Murray, at the second hearing
6 -- I mean Ms. Comma, at the first hearing, they didn't
7 mention the company; although, clearly the Task Force
8 knew who the company was.

9 MR. WELLS: Right.

10 THE COURT: And then got -- offered them the
11 chance to rebut what she said because these are
12 whistle-blowers who were terminated from employment.

13 MR. WELLS: Correct.

14 THE COURT: And -- but, frankly, neither one
15 of them, neither Ms. Comma nor Murray, had anything to
16 do with Camden as far as I could tell because Ms. Comma
17 was talking about a move from Parsippany to Jersey City
18 and Murray was talking about something up North I
19 believe. It just was of interest to me that Murray --
20 they didn't allow Murray to name names, but then when
21 they were questioning Comma, they had them go over the
22 specific applications of the four plaintiffs by name.

23 So, I mean there was a distinct shift there.
24 You say it was for transparency. I don't know if
25 that's made clear in the transcripts, but I'll accept

1 your answer.

2 MR. WELLS: I will read you, I think it's a,
3 statement from Senator Sweeney if somebody will get it
4 for me. Do you have copies for them?

5 THE COURT: Its not in the record, I take it?
6 Its not in my record?

7 MR. WELLS: No, its not, Your HONOR.

8 THE COURT: Okay. And why should we hear it
9 now?

10 MR. WELLS: I was just trying to respond to
11 your question.

12 THE COURT: Okay. All right.

13 MR. WELLS: Fine. I was trying to respond to
14 you. I didn't --

15 THE COURT: You can answer, as long as you
16 have copies to everyone else.

17 MR. WELLS: Yeah.

18 THE COURT: I mean, I was looking through the
19 transcripts. I try to read them.

20 MR. WELLS: Sure. No, Your Honor. I was --
21 so, this was issued, let me get the date right, April
22 12th, 2019. And Senator Sweeney said -- well, it reads
23 -- do you have a copy for the court?

24 Senate President Steve Sweeney issued the
25 following statement in response to the announcement by

1 the Task Force on tax incentive programs that it has
2 made a criminal referral.

3 "The announcement by the Task Force of
4 alleged criminal activity regarding the
5 state's tax incentives is vague and
6 incomplete. Everyone agrees that the public
7 should scrutinize state spending which is
8 why the Task Force must say who is being
9 investigated, what law was broken and which
10 law enforcement agency was notified.
11 This Task Force was asked to follow the
12 facts and get to the truth. They should
13 follow their own mandate and allow the
14 public to see the truth. If any company
15 violated their agreements or defaulted on
16 their promises to the EDA they should be
17 identified. If anyone committed fraud, lied
18 or cheated they should be held accountable.
19 The integrity of the incentive programs is
20 critical for their effectiveness and so is
21 the public's trust in any investigations.
22 Everyone should be straight-forward and
23 forthcoming with any relevant information.
24 We want an accurate accounting of the
25 successes, weaknesses and failings of the

1 current programs so that the legislature can
2 make informed decisions about their renewal
3 and any needed reforms. We can't forget
4 that these programs are for the benefit of
5 job holders, job seekers and the state's
6 economy."

7 Now, with --

8 THE COURT: And, you know, I don't know if
9 this is so or not, but when you read the March 28th,
10 2019 Task Force hearing, Ms. Comma gave testimony that
11 there had been intentional misstatements of fact given
12 to the EDA.

13 MR. WELLS: Right.

14 THE COURT: So, if there was any suggestion -
15 - you know, I think there may have been a statement
16 before both hearings that there were serious issues and
17 misrepresentations could lead to impossible referral
18 for criminal prosecution.

19 MR. WELLS: Yes.

20 THE COURT: I mean that was put on the record
21 and I guess that's part of what Senator Sweeney was
22 responding to, but when you look at the March 28th the
23 one company that was identified, though not by name,
24 was not a Camden company, was not with a development in
25 Camden.

1 MR. WELLS: Right. Now, Your Honor, with
2 that background, the basic point I want to start with
3 is that you should look at this entire case through the
4 lens that their statutory argument about Section 52:15-
5 7 is really about additional authority that was given
6 to the Task Force so it could exercise compulsory
7 process and not have to go through the state
8 controller. But in their particular case those
9 subpoena were withdrawn and we never got any
10 information from them pursuant to compulsory process.

11 THE COURT: Right, but it was -- there also,
12 at least in Section 7 of the Statute, is the cross
13 examination. So, they're talking about, you know,
14 statutory process and due process.

15 MR. WELLS: And I'm going to address all
16 that, but I'm saying that's when they start to go in a
17 different direction. Remember, point one is 52:15-7
18 doesn't apply. That is their Count 1. Count 2 is,
19 Judge, if it does apply then I believe we have the
20 right to the procedural safeguards set forth in it.
21 And I will get to that, but in terms of Count 1 I don't
22 think they -- there is no standing, they haven't been
23 harmed, they didn't do anything as a result of the
24 compulsory process and they say, in their reply brief,
25 that they're not challenging the fact that Governor

1 Murphy had the right to form the Task Force, and that
2 the Task Force had the right to get information
3 voluntarily. They say that point blank.

4 Now, with that said let me go to the
5 statutory argument. Now, first, I want to go to Slide
6 3, in front of you, and that's just a repeat of NJSA
7 34(1)(b)(4) which is part of the enabling statute of
8 the EDA. But what that statute recognizes, as YOUR
9 HONOR already has observed today, is that the EDA is a
10 public body, corporate and politic, that the EDA is
11 hereby constituted as an instrumentality of the state
12 exercising public and essential government functions,
13 and, finally, that the EDA shall be deemed and held to
14 be an essential government function of the state.

15 So, there is no question that on the face of
16 the enabling statute it is an instrumentality of the
17 state. There is also no question that the opening
18 sentence says that it is "in, but not of" the
19 Department of Treasury.

20 Now, in terms of the Governor's authority
21 over the EDA, I set that forth in Slide 4, the next
22 page, the Governor has the ability to appoint members
23 to the EDA, to remove members for cause after a public
24 hearing and suspend them pending the completion of such
25 hearing. I mean think about it, how could you remove

1 somebody for cause if You couldn't investigate? Has
2 the power to appoint the chairperson of the EDA. Has
3 the power to veto any action taken by the EDA.

4 Now, there has been talk about -- we've used
5 the phrase "veto of minutes," but what the veto power
6 means is not you veto the minutes like somebody made a
7 mistake in writing down the minutes. That is not what
8 the shorthand term "veto the minutes" means. "Veto the
9 minutes" means the Governor has the power to veto. Its
10 almost like a line item veto, reject any action taken
11 by the EDA. I mean those are powerful powers of
12 supervision.

13 When my fellow counsel for plaintiffs talked
14 about issues of control and talked about Footnote 2 in
15 COAH, Footnote 2 supports us. Footnote 2 talks about
16 how the constitution took out the term control, but
17 supervision remains. And that lies and derives from
18 the constitution. So, its not about control. But the
19 powers of the Governor set forth in the EDA enabling
20 statute give the Governor great supervisory powers and
21 the ability we submit to investigate the EDA.

22 Now, I want to make clear. There's a lot of
23 talk about COAH. I don't think COAH has much to do
24 with this at all. They have tried to twist it to
25 support their position, but it is a radically different

1 case.

2 COAH is about whether or not under the
3 Reorganization Act, could a governor, in this case
4 Governor Christie, not control or supervise a quasi-
5 public entity, but whether he could abolish it. That
6 is a radically different exercise. And when you read
7 the COAH case, I submit you have to start with what the
8 case involved, again, the power to abolish.

9 The Court in COAH then engaged in a fairly
10 straightforward statutory analysis and said the use of
11 the word "of" in that case did not give Governor
12 Christie the power to abolish COAH. But as Your Honor
13 recognized while the plaintiffs were arguing, the
14 statute that you ultimately must interpret in this case
15 was passed in 1941 before there were any entities or
16 discussion of entities that were in or not of.

17 The whole analysis in COAH is impacted
18 because it's viewed through the prism of years of the
19 state legislature being on notice that the in but not
20 of language is special post-1947. And so when they
21 talk about the word "of" in COAH it was viewed through
22 that prism. That doesn't exist in this case.

23 In 1941, in but not of as Your Honor has
24 recognized, that concept did not exist. So it's
25 against that background that I suggest we have to start

1 with the statute 5215-7 and that's slide 5. And what
2 that statute says on its face that the Governor is
3 authorized at any time either in person or by one or
4 more persons appointed by him for the purpose to
5 examine and investigate the management by any state
6 officer of the affairs of any department, board, bureau
7 or commission of the state and to examine and
8 investigate the management and affairs of any
9 department, board, bureau or commission of the state.

10 Those words which I submit are controlling,
11 that the court under traditional principles of
12 construing statutes, you have to start with the words.
13 The words are broad, there is no suggestion that when
14 this was passed in 1941 there was any intent to some
15 way carve out quasi-independent or independent
16 agencies. Such agencies existed back then. But these
17 words are broad and on their face they cover the EDA.

18 Now the plaintiffs in their brief say oh, the
19 New Jersey legislature knows when it wants to carve out
20 an authority because sometimes they use the word
21 authority. So they quote a case from 1968, or they
22 quote a case from 1980, I mean 30, 40 years later.
23 That doesn't tell you anything.

24 Your Honor, I submit you have to look at what
25 the statute in 1941, what did that do. It has not been

1 amended, it has not been changed, and the fact that it
2 doesn't specifically use the word authority doesn't
3 tell you anything. And they can't bootstrap an
4 argument that doesn't exist by saying something
5 happened 30 years later. In fact, they don't use the
6 word authority, it doesn't tell you anything. These
7 words cover the EDA.

8 Now, if we go to slide 6, what slide 6 shows
9 is a comparison with respect to the COAH issue between
10 the language and the Executive Reorganization Act
11 versus the language in 5215-7. What the Supreme Court
12 addressed in the Executive Reorganization Act was a
13 statute where it said any division, board, commission,
14 agency, office, authority, or institution of the
15 executive branch created by law whether or not it
16 receives appropriations. But that is different it's
17 of, the word "of" is of the executive branch. In NJ
18 5215-7 it is much broader. It is of the state which is
19 a totally different concept.

20 So, again, I submit COAH does not control
21 this case, it is of no moment, they are misreading it
22 because they have nothing else to argue about. But the
23 cases are radically different. And 1515-7 should be
24 interpreted based on the words on the face of the
25 statute with full recognition that the word "of" is

1 used in 1515-7 could not have been intended as some
2 type of limiting principle since the principle they
3 refer to didn't come about until six years later.

4 THE COURT: The Reorganization Act was a 1969
5 statute?

6 MR. WELLS: It's either 69 or 70, I think.
7 It's much later, it's of recent vintage.

8 THE COURT: So it was post the 47
9 constitution.

10 MR. WELLS: Oh, not just post. If you read
11 what the opinion talks about, they talk about the
12 history of the in but not of, and they view the word
13 "of" through that prism to say well the New Jersey
14 legislature knew about this difference. So they put
15 great emphasis on the word "of" then the have a, then
16 the dissent takes them to task. But the important
17 point is that reasoning does not exist for the 1941
18 statute because the concept didn't even come about
19 until after the constitution was changed in '47. This
20 is a broad statute, there's no basis to interpret it
21 not to cover the EDA. It is brought on its face and I
22 would ask Your Honor again to look at the plain
23 language of the statute and recognize that COAH is not
24 an inhibition in any way, shape or form.

25 Now, with that said, I want to turn to where

1 they shift their argument. Because remember, initially
2 they say 5215-7 just doesn't apply. That's their
3 Count, Count One argument. They then switch and say
4 well if it does apply, we want the procedural
5 safeguards. So now you're going to move to a world
6 where we're going to assume for discussion purposes
7 that 5215-7 applies. Now we're going to ask assuming
8 it applies what are the procedural safeguards that the
9 plaintiffs are entitled to. And we submit that it is
10 crystal clear that the procedural safeguards in 5215-7
11 in terms of the rights of cross-examination apply
12 solely to the board or the board employees who are
13 being investigated. And those provisions do not apply
14 in any way, shape or form to private individuals, but
15 that instead the procedural rights of the private
16 individuals are in 15:13E.

17 Now let's look at slide 7. What I've done in
18 slide 7 is to quote what the original statute looked
19 like when it was passed in March of 1941, and then what
20 the provision looked like that added the rights of
21 cross-examination.

22 Now, in their brief, the plaintiffs, in their
23 reply brief, because this is the first time I've had a
24 chance to reply to this because I did not have an
25 opportunity. Now, in their brief they cite to the

1 third column but they don't print it out. Now when you
2 print out the legislative history which is the third
3 column of slide 7, you see that it makes clear that
4 those procedural safeguards that were added in July of
5 1941 to prevent the so called star chamber effect they
6 were added with respect to departments or boards or the
7 people who worked there, not private individuals.
8 Okay.

9 The first and the third column it's statement
10 of company initial draft of amendment, July 14, 1941.
11 And it reads, "at the very first hearing held under the
12 provisions of this act, the investigator show clearly
13 that it was his purpose to conduct star chamber
14 proceedings. It is fundamental in a democratic
15 government that any department or board under
16 investigation should have the right to explain or
17 clarify any matters developed before an investigator.
18 This act seeks to accomplish that person."

19 But focus again on that sentence that "any
20 department or board under investigation." It doesn't
21 say anything about a private citizen. That amendment
22 relates to the internal people, the board or the
23 department or their employees. Then if you look at the
24 next column, at the next piece of legislative history,
25 it says description of bill in legislative index,

1 Section 448 by Mr. Hendrickson who Mr. Critchley told
2 us about. And reads, "provides that investigations of
3 state departments by governors, such department shall
4 have cross-examination right of person's questioned."

5 So those amendments clearly go to the
6 department or the board or their people. They have
7 nothing to do with private third parties.

8 Now, the legislature is sensitive as it
9 should be to the fact that in a hearing people who are
10 not part of the department or part of the board may
11 have their names mentioned and even defamatory comments
12 or negative comments may be made. So what did the New
13 Jersey legislature do? It enacted a different section
14 under title 52. And that different section which
15 applies to private individuals is on slide 8. And
16 that's NJSA 52:13E.

17 Now :13E says first in 1A. Agency means any
18 of the following while engaged in an investigation or
19 inquiry, the governor or any person or persons
20 appointed by him acting pursuant to PL1941, see 16
21 section 1, colon, I mean paren see. 5215-7. So right
22 there in the statute is telling any reader and Your
23 Honor that the protections of 52:13E link right back to
24 a 5215-7 hearing. That's what that reference means.
25 This is not a general floating in the air section about

1 private individuals whose names are mentioned in
2 hearings. This specifically is tied to 5215-7.

3 And then it goes on to say in paragraph 6,
4 "any person whose name is mentioned or is specifically
5 identified and who believes that testimony or other
6 evidence given at a public hearing or comment made by
7 any member of the agency or its counsel at such a
8 hearing tends to defame him or otherwise adversely
9 affect his reputation shall have the right either to
10 appear personally before the agency and testify in his
11 own behalf as to matters relevant to the testimony or
12 other evidence complained of, or in the alternative, at
13 the option of the agency. That's the task force, to
14 file a statement of facts under oath relating solely to
15 matters relevant to the testimony or other evidence
16 complained of which statement shall be incorporated in
17 the record of the investigatory proceeding."

18 So this is the provision that grants
19 procedural protections to private individuals and the
20 task force, Your Honor, honored this provision, it
21 offered them the opportunity to submit a written
22 statement, and even though it was not required by the
23 statute, they also said at the next hearing you could
24 testify.

25 THE COURT: I know one of the things they

1 bring up about testifying at a future hearing is a
2 limitation of five minutes as if they were, you know,
3 public comment the way you might do as a board of ed
4 meeting or something like that.

5 MR. WELLS: Your Honor, that is all totally
6 theoretical, totally speculative. The hearing that
7 they are trying to enjoin is not a hearing that's
8 supposed to have any "witnesses." The hearing that the
9 order right now enjoins, at least as I understand it,
10 is the hearing that was supposed to take place on June
11 11, there were supposed to be two things at that
12 hearing. One, issuance of the findings which as I said
13 are not based on any compulsory process that we
14 received or the task force received from the
15 plaintiffs. And so that report should be permitted to
16 be issued I submit. And two, they were going to let
17 the public comment. So they weren't producing any
18 witnesses. So whether or not there's some moment in
19 the future where they would want to testify and what
20 would actually happen at that particular hearing,
21 that's not before Your Honor, that's totally
22 speculative. Nobody, nobody knows.

23 THE COURT: But is there a sense -- I can't
24 recall sometimes I confuse case law that I read and the
25 briefs. Was there any argument that some of their harm

1 is self created because they did not accept the offer
2 of the commission to set the record straight?

3 MR. WELLS: Yes.

4 THE COURT: And I mean going back, they
5 didn't, you withdrew the subpoenas but they could have
6 voluntarily cooperated. But then subpoenas were
7 issued, the subpoenas were withdrawn when they
8 objected. They had the opportunity to provide a
9 statement but they deemed it more appropriate to file
10 litigation.

11 MR. WELLS: That's correct.

12 THE COURT: And then there was, there was
13 this offer of, I mean you know of public comment there
14 was some reference to five minutes each, but in any
15 event.

16 MR. WELLS: Yes, but --

17 THE COURT: Did you make that argument that
18 it was self-created on their part to some extent?

19 MR. WELLS: We made argument that they had
20 the opportunity to come and testify and they refused
21 it. We made the argument that they had the opportunity
22 first to submit the written statement. And they did
23 not do that. And we made the opportunity that they
24 could testify but nobody ever scheduled.

25 THE COURT: Does that factor, I mean we

1 haven't gotten to the test yet. But does that factor
2 into the irreparable harm?

3 MR. WELLS: Yes. And even in an irreparable
4 harm in this case, if you read their opening brief,
5 they start out by saying, they've been harmed. That's
6 how they start. They really say the toothpaste is out
7 of the tube, we've been damaged, and they acknowledge
8 that most of the damage is in the newspaper articles.
9 But that's their argument, you know, this is not some
10 case that we've seen where you can't let this fact out
11 because once it's out it'll be in the public domain and
12 you never can recover. Their opening brief is replete
13 with references we have already been harmed. So we now
14 in the context of trying to assess irreparable harm
15 going forward, it has to be viewed on the record where
16 they've acknowledge that it's in the public domain
17 already that these entities have been the subject of
18 being part of the task force. That's happened.

19 But in terms of going forward, I think
20 irreparable harm, I think you're talking about some
21 speculative delta that should not be given much weight
22 at all because it's out there already.

23 Now, as I said, 13E does not give them
24 anything other than the rights that the New Jersey
25 legislature thought were proper. In terms of the

1 constitution, just to save time, we've been here a long
2 time, slides 9, 10 and 11 cite the relevant
3 constitutional sections. But I submit that, Your
4 Honor, when you are interpreting section 5215-7, it
5 should be interpreted in a way that it does not run up
6 against provisions in a New Jersey constitution that we
7 submit clearly give the Governor the powers, the power
8 to supervise. It gives the Governor the power to
9 investigate all officers and employees in New Jersey.
10 It gives the Governor the power to make sure the laws
11 are being faithfully executed, that the principle of
12 constitutional avoidance is of critical importance in
13 this case because the new Jersey constitution perhaps
14 more than any other constitution in the country gives
15 the New Jersey Governor extraordinary supervisory
16 powers.

17 The word control was taken out of the 1947
18 amendment, but the word supervision was not. That's
19 why that footnote, the footnote in COAH talks about the
20 constitutional powers. And I think the fact that the
21 EDA is self-funded I think that is personally of little
22 moment in looking at the constitutional provisions
23 because I don't think the legislature could engage in
24 any type of gymnastics to prevent the Governor from
25 investigating state employees just by saying, well,

1 you're going to take your fees out of the Government
2 monies that we're able to extract because we're a
3 government entity any more than the turnpike authority
4 can say well, we're going to collect the tolls so the
5 Governor doesn't have anything to do with the turnpike
6 authority.

7 But everything should be interpreted in terms
8 of the statutory analysis from the backdrop of an
9 extraordinarily powerful and strong set of
10 constitutional provisions that are expressed in terms
11 of the issue of investigation making sure that state
12 employees re carrying out their job. The New Jersey
13 Governor some say is the most powerful governor in the
14 country because of the constitutional provisions and
15 the ability to appoint. Your Honor, that really
16 concludes my argument on the statutory points.

17 Look, in terms of the irreparable harm,
18 first, I don't think there's any issue of probability
19 of success. And they keep saying to Your Honor, well
20 we want you to have a chance to think about this case.
21 Well, I want you to have this chance to do it too. But
22 at the end of the day this is not a rocket science
23 statutory issue. The 5215-7, if its words are given
24 their fair meaning, the statute covers the EDA. If you
25 read COAH, I submit COAH doesn't control. So you've

1 got to read the COAH opinion, you've got to look at the
2 statute. But I want you to take as much time as you
3 want, but I don't think, you know, they act like
4 there's some 10,000 page record or something.

5 This report needs to be issued. There's no
6 dispute, no dispute that the EDA tax programs are
7 important, are important to the state in terms of
8 economic growth. There's no dispute that they expire
9 on July 1. There's no dispute that there have been
10 serious control problems that have not controlled
11 adequately issues of potential fraud and abuse. The
12 report needs to be issued not just to educate the
13 legislature and the Governor and the public.

14 If the legislature were to extend the program
15 tomorrow, the report would still be relevant. The
16 extension as I understand is being discussed is for 7
17 months, but it's still relevant and important. And the
18 EDA management who is running the program day to day
19 giving out a tax incentive valued at the hundreds of
20 millions of dollars even in a short period of time, he
21 needs to know what the task force has found.
22 Furthermore, the public has every right to know what
23 has happened in the past in terms of what the task
24 force has found. They're trying to suppress important
25 fundamental information from the public under the guise

1 now of the possibility that their clients may be
2 mentioned.

3 THE COURT: Well, then their concern too, I
4 mean when you look at irreparable harm, if there's a
5 violation of a statute, we've gone over the statute, if
6 there's a violation of the constitution and they're
7 saying separate and apart from the statute, you know,
8 section 7 of the statute they have a constitutional
9 right to more process than they were afforded by you.
10 And then if I allow the proceedings to go forward,
11 there will be continuing violation of their right to
12 because they're not being given trial type process.

13 MR. WELLS: Right. Right, Your Honor. But
14 step one, there is whether or not there has been a
15 constitutional violation. That's the lynchpin, then
16 the irreparable harm arguably follows from that. But
17 the lynchpin point one is has there been a
18 constitutional violation. So what does the record show
19 in terms of these plaintiffs? What the record shows is
20 they were given the opportunity to submit a written
21 statement. They did not. They were given the
22 opportunity to testify at a later hearing. They filed
23 a lawsuit as Your Honor said. Nothing has happened. I
24 mean people were talking, this is voluntary
25 information. I mean that's why it's really important

1 to think about what they're trying to suppress.

2 Because if they're right, then any citizen
3 cannot only hold up a task force hearing, they can hold
4 up a legislative hearing because these principles that
5 they are talking about in terms of due process and the
6 first amendment, they apply just as much to the
7 legislature as they apply to the executive branch.
8 They are talking about a radical change in how
9 Government operates. At any time anybody may be
10 negatively referred to, they can stop a hearing by
11 going into court and saying my reputation is going to
12 be hurt, and I want full cross-examination rights. I
13 mean you'd have complete chaos and everything would
14 come, you know, would just stop. The system could no
15 tolerate it.

16 This is a radical unprecedented ruling that
17 they are asking you to make, radical and unprecedented.
18 The Governor has every right to hold a hearing. This
19 is voluntary information that they got from the EDA,
20 not by virtue of 5415-7. There's no basis to withhold
21 the report. There's no basis to stop anything because
22 there's nothing before Your Honor in terms of well let
23 me look at it in the context, I think maybe you should
24 have given them another 20 minutes or you should have
25 given them another two hours. Whatever. That's not in

1 the record.

2 THE COURT: In terms of the balancing of the
3 interest, you know, when somebody raises reputational
4 interest in New Jersey, the case law is more favorable
5 to individuals. You don't need much other than damage
6 to reputation. And if they're concerned about
7 continuing damage from any report that might come out
8 based on the May 2nd hearing, isn't that something to
9 consider with irreparable harm?

10 MR. WELLS: I don't think so at all, Your
11 Honor. Because well the touchstone, touchstone is not
12 the worry, the touchstone is the constitutional
13 violation. That's the gating issue. If you don't get
14 through that gate, you don't get to talk about your
15 reputation because that's what I mean why it would be
16 unprecedented. Because if all you had to say is the
17 task force is going to put a witness on the stand who
18 may say something negative about me or there's going to
19 be a hearing in the senate next week and somebody is
20 going to say something about me. And therefore I have
21 the right to get Michael Critchley, one of the great
22 cross-examiners in the history of this state, to come
23 in and spend two or three days cross-examining people.
24 I don't believe the system could tolerate it, I don't
25 believe the constitution requires it. It would be as I

1 said a radical and unprecedented change in how
2 Government operates.

3 We are talking about issues of the public
4 purse. Hundreds of millions of dollars going back to
5 2017 under Governor Christie when this was identified.
6 So this is, nobody can say this is something that
7 Governor Murphy of, you know, of, you know, invented.
8 In fact he would be derelict if he didn't form the task
9 force. We are talking about hundreds of millions of
10 dollars, and they're trying to keep the truth from
11 coming out.

12 In terms of the balancing of equities, the
13 public's right to know and the notion that a task force
14 that has gotten information from the EDA and public
15 sources, voluntary sources, can't report on it, that's
16 not grounded in anything in the constitution. And I
17 recognize it under New Jersey law that reputational
18 harm is something that the courts have insisted to.
19 But again, it's always been based on some serious
20 showing that there's a violation before we get there.
21 And that has not happened in this case.

22 This report should be issued, it should be
23 issued as soon as Your Honor is able to decide what you
24 feel is the right answer. We will accept that. But I
25 would ask Your Honor to proceed as quickly as your

1 schedule permits. Thank you.

2 THE COURT: Okay, thank you. Any rebuttal
3 from plaintiff's counsel?

4 MR. MARINO: Your Honor, the notion that what
5 we have received in the context of that task force
6 proceeding bears any resemblance to due process is
7 completely fanciful. I want you to please travel with
8 me the road that we have taken in this courtroom today
9 and how it veers off the road that was taken before we
10 got here today.

11 Now, 52:15-7 has become in Mr. Wells's words,
12 moot, irrelevant, meaningless because why? Because
13 they issued a subpoena and then they withdrew the
14 subpoena. And that's why he tells you it's irrelevant.
15 Well, indeed, 52:15-7 is as much the point today when
16 we are examining all the harm that this task force
17 proceeding has engendered as it was at the very
18 inception on March 22nd, 2019. No one is speaking on
19 behalf of Governor Murphy or the task force was saying
20 pay no attention to 15:15-7. Quite the contrary. As
21 governor I am authorized to personally investigate or
22 to appoint one or more persons to investigate the
23 management and affairs of instrumentalities of the
24 state such as the EDA, see NJSA52:15-7. And in the
25 last paragraph of that delegation letter of March 22nd,

1 2019, I am hereby appointing you pursuant to 52:15-7.

2 It's outrageous to hear that it doesn't
3 matter at all that that's the Governor's letter
4 delegating power pursuant to a branch of the
5 legislature. And it doesn't matter, it's moot because
6 they withdrew a subpoena. Not so. It is the absolute
7 power that is transferred from the Governor of the
8 State of New Jersey to Mr. Chen's task force, and put
9 it into the hands of Mr. Walden to conduct what could
10 only be fairly characterized as a star chamber
11 proceeding.

12 And yes, I have the letter in front of me. I
13 know Mr. Wells is not aware of it, but it's very clear
14 that what we were offered was "as a further
15 accommodation, we will permit each witness to make
16 introductory remarks of no more than five minutes."
17 No, we did not avail ourselves. And if that's self-
18 inflicted harm, I would inflict the harm on myself
19 every single day. If you told me that I was accused
20 and I was going to have to stand trial in the United
21 States of America and my cross-examination rights would
22 be completely removed from me, the 6th amendment to the
23 contrary notwithstanding, and I would have no ability
24 to do anything but for five minutes go up and say what
25 I had to say and then after the fact I could submit

1 something in writing, that would be reversed as a
2 violation of due process and as a violation of the
3 confrontation clause about like that. It's outrageous.

4 But now 5215-7 isn't the point. And we hear
5 that COAH isn't the point. We hear that COAH is
6 limited to its facts, an interpretation of the
7 Reorganization Act. That on its face is completely
8 false. Your Honor asked about the power that you
9 should afford or the persuasive force that you should
10 give to an appellate, intermediate appellate division
11 decision. If you read those two decisions, you will
12 see that Justice Rabner's majority opinion for the
13 Supreme Court of New Jersey quotes many times in haec
14 verba from Judge Carchman, mentions him by name,
15 mentions his analysis in detail. So, no, COAH is not
16 just a reorganization act. It's something far more
17 significant, the COAH case, it's far more significant.
18 It's about the separation of powers and that's what the
19 court says.

20 So what are we hearing? We have a self-
21 inflicted gunshot wound here because we would not take
22 the crumbs that they put on the table for us and go and
23 give a five minute statement. If you read the
24 transcript of what transpired, it's nothing short of
25 extraordinary. Mr. Walden says at length, he talks

1 about the whistle blower allegations of this fellow, I
2 mispronounced his name, I think its Subsoos (phonetic),
3 and Your Honor I think is aware of the case. This is a
4 whistle blower who lost his case. He lost on summary
5 judgment on his discrimination claim and he lost in a
6 no cause of action. And they say yes, but the jury
7 found that he reasonably believed he'd been wronged.
8 That's question one. Okay? Yes, he reasonably
9 believed it. And question two, does he have a cause of
10 action? No. Here's the reality. They spent probably
11 45 minutes having someone recount for the public the
12 allegations that this man made. This is not anything
13 remotely approaching a fair proceeding.

14 And I have to draw Your Honor's attention.
15 You said to me and I know you said it again to Mr.
16 Critchley and it's obviously important to the Court to
17 focus on these dates. So I think Your Honor may be
18 overlooking one aspect of this. You focus on 1940 and
19 1941 and say well that's these words were used in 1940
20 and '41 and that was before this notion of in but not
21 of came into existence with the constitutional
22 convention that Mr. Critchley went through at some
23 length.

24 But in 1974, that's when the EDA was formed,
25 not in 1941 or 2 or 3. It was formed after the

1 legislature was well aware of the import as elucidated
2 in detail by first Judge Carchman and then by the
3 Supreme Court of those terms, simple but meaningful.
4 Right? But they were aware of it. If they wanted to
5 extend these rights of investigation to the Governor,
6 why on this planet would they not have made the EDA a
7 government agency? Why did they make it in but not of?
8 Look at the enabling statute. Why did they do it?
9 They did it for a reason because it was supposed to be
10 not within the control, just the supervision.

11 Now, in response to something Mr. Critchley
12 said, I think Your Honor asked about, asked Your Honor
13 about an individual's rights. And just going back
14 again to 52:15-7. At 52:15-7 the officer is not the
15 individual under scrutiny. If you look at the wording,
16 it says, "whenever any person shall be examined by the
17 Governor or by his duly authorized representative or
18 representatives under the powers contained in this act
19 at a public hearing, the officer, department, board,
20 bureau, commission or individual under investigation or
21 scrutiny. The officer is not the individual under
22 investigation, our clients are the individuals under
23 investigation. And the notion that this is fair game
24 because this is a very powerful Governor, yes the New
25 Jersey constitution gave tremendous powers to the

1 Governor, but they were not unlimited. They were not
2 unlimited.

3 And so if you just take a moment and think
4 about some of what you've heard, it's extraordinary.
5 It's a bait and switch at this point. I will give you
6 power under this statute, but if you try to invoke
7 rights, the statute also gives to you, then I will say
8 no, no, no, those aren't for you, those are for someone
9 else. Who are they for? We are the ones who are at
10 issue here.

11 And this idea that the harm has already
12 occurred, no it has not. Yes, what they've done was
13 improper. Although over and over they said we're not
14 making any findings here. We're just investigating.
15 You know, that's what we're doing. And Your Honor
16 pointed it out. At the first hearing, it was no
17 mention of names. But at the beginning of the second
18 hearing they said you know what, we've decided because
19 people want to know and the public is entitled to know,
20 we're going to give you some names. And by the way,
21 we've gathered a lot of the information. Basically
22 assuring the assembled masses that what they were
23 saying was factual. And without giving us the
24 opportunity to get up and say wait a minute, let's have
25 a cross-examination.

1 So either you want to have a 52:15-7
2 proceeding and if Your Honor were to decide, although I
3 think for the reasons set forth in Count One I think
4 that's not right. If Your Honor were to decide you
5 know what, I think that they really are a department or
6 what have you, and therefore I really think that this
7 investigatory power applies. How could you get us into
8 the proceeding with the investigatory power intact but
9 then somehow along the way even though we're the ones
10 whose rights are being violated, somehow we don't get
11 to say boo about it. And all in the name of what?
12 What's going to happen? We want the opportunity. And
13 no, we didn't inflict the wound. We want the
14 opportunity. We don't want five minutes, we don't want
15 a statement that's in writing.

16 When you get up and say about one of my
17 clients, he did this and Mr. Walden says and isn't it a
18 fact that Mr. Sheehan did this, and isn't it a fact
19 that this company did that, and aren't these material
20 misrepresentations? When he does that, he better be
21 ready for cross, real cross-examination. Not five
22 minutes of fame, not a written statement after the
23 fact. And so I don't even understand, it makes
24 absolutely no sense to me to say -- and in the
25 constitution, let's be clear. Mr. Wells invoked the

1 constitutional provisions. The constitutional
2 provision that they invoked in their brief says
3 basically if you're paid by the state you get to be
4 investigated by the Governor. That's what the
5 provision says. And that's right. Only we're not paid
6 by the state, we're completely self-supportive. That's
7 what our 2017 annual report says. The legislature
8 could have done a lot here, Your Honor. They could
9 have done a great deal. And when the Supreme Court
10 considered the COAH case, they could have said COAH is
11 limited to its facts. They could have said this is sui
12 generis because it's just about reorganization.

13 But I'll ask Your Honor this. If the
14 Governor can do this, if he can investigate this in
15 this way, he has the power that no one has. There's no
16 way the legislature can do this and not afford you the
17 opportunity to proceed. There's no way any court would
18 do it. It doesn't work that way. The executive is a
19 co-equal branch. The branches work together. Your
20 Honor is right, the EDA is in but not of the executive
21 department, and specifically the Department of the
22 Treasury.

23 But I think to look at this and say even
24 though in our enabling statute, there isn't a whisper
25 of us being subject to the control as opposed to the

1 supervision of the executive to say it doesn't matter,
2 I'm going to let this proceed the pace in the public
3 interest I think would be a significant miscarriage.

4 Thank you for your patience, Your Honor.

5 THE COURT: Thank you.

6 MR. CRITCHLEY: Just briefly, Judge. And I
7 promise I'm going to cite to something in the record.

8 Judge, Mr. Wells referred to the hearing you
9 had some time ago regarding enforcement of a subpoena.
10 And I read the transcript of that hearing. And one
11 case you cited in there was In Re Application of
12 Attorney General. And I think it's appropriate because
13 you referred to before "our opportunity to participate
14 in May 1." We received a notice the evening of May 1
15 about adverse information that's going to occur the
16 next day. We had 18 hours to potentially respond. In
17 Re Application of Attorney General which the court
18 cites that with a subpoena or the court said then Judge
19 Byrne, later Governor Byrne, said it violates someone's
20 due process rights. You have to give them an
21 opportunity to respond, to be heard. To give us 18
22 hours, that shows you basically that they were running
23 roughshod over us. And to say well we gave them that
24 opportunity is really a violation of our rights.

25 And they also talk about, Your Honor, that

1 the statute, 5215-7 just applies to departments,
2 boards, bureaus and commissions. Yet, they also say,
3 although it just applies to them, what we could carve
4 out. It also applies to third parties. We could
5 subpoena individual third parties. But then they say
6 okay, we have rights that just apply to departments,
7 boards, bureaus, and commissions, but we could subpoena
8 third parties.

9 But those third parties don't have the same
10 rights as anybody else. It just doesn't make any
11 sense. If you are the subject of a subpoena, and
12 you're subject to a subpoena pursuant to that statute,
13 the rights apply to you. And the reason we know that
14 is because the courts have said, and again, when you
15 have a statute, two statutes, a general statute, and a
16 specific statute covering the same subject matter, the
17 specific statute governs. And here we have 5215-7,
18 very specific. And then Mr. Wells talks about 52:13-6
19 saying okay we have rights there. You have a general
20 statute, the code of fair procedure, 5213-6, and you
21 have a specific statute covering 52-7, the rights are,
22 that statute prevails, Judge. That's basic statutory
23 law.

24 Thank you very much.

25 THE COURT: Okay. Thank you.

1 MR. STERN: Your Honor, Count One says they
2 have no right to convene such a body at all. The
3 Governor knew that which is why he wrote his letter of
4 March 22nd. In his letter of March 22nd, he points out
5 that we're in but not of and then he proceeds to
6 enlarge the authority of the task force by reaching for
7 our famous 52:15-7. Now, it simply can't be linked.
8 Under the Governor's expression, Mr. Marino read one
9 where the Governor says he's appointing Mr. Chen
10 pursuant to provision. But there's an earlier
11 reference in the letter. It says, "I'm authorized to
12 personally to investigate such as the EDA" which he's
13 not. And then he reaches for 52:15-7. So it's not us
14 that are in a conundrum, it is rather the other side.

15 Their legitimacy as told depends upon whether
16 or not you can use this particular statute to in fact
17 investigate an organization like the EDA, assuming of
18 course that's what they're really investigating. But
19 let's take them at their word. That's the first issue
20 before the Court. That's Count One.

21 The second issue before the Court is well if
22 you're going to invoke that statute, if you've got the
23 right to do it, if a Judge like Your Honor says, yeah,
24 you can do that, you can get around the whole scheme by
25 reaching for that, then you can convene the kind of

1 tribunal that they have convened in this instance.

2 Now, 52:15-7, according to slide 5, provided
3 kindly by Mr. Wells, speaks about an individual under
4 investigation or scrutiny. Can it fairly be said, can
5 we look at ourselves in the mirror and say that our
6 clients in this room are not under investigation or
7 scrutiny by this body? I don't believe this Court will
8 say that. And if we are under investigation or
9 scrutiny, then are we not as individuals, it says
10 individual under investigation or scrutiny. Are we not
11 entitled to the procedural safeguards embodied in the
12 statute itself which this Governor has reached for in
13 an effort to bridge the gap which prevented him from
14 investigating to begin with?

15 I do not now speak of a constitution. We do
16 not have to reach that level unless Your Honor first
17 answers the questions which I respectfully posed to
18 you. But if we reach for the constitution, what's
19 going on is shameful. It's not right. It doesn't pass
20 the smell test.

21 Now I heard Mr. Wells of whom I have the
22 highest admiration say well, it really doesn't matter
23 to this side of the room, you see because they did it
24 to us already. It's all out there. Where's the
25 irreparable harm? They've been smeared, tarnished,

1 tattered, whatever's been done has been done. So
2 what's the problem if we just finish the job? I don't
3 think I have to respond to that. But I do remember in
4 the midst of time, a long time ago, maybe 30, 40 years
5 ago, when an amazing courageous young lawyer defended a
6 man I think his name was Sciavone (phonetic). Do I
7 have it right?

8 UNIDENTIFIED SPEAKER: Yes.

9 MR. STERN: He defended him in a court in New
10 York. And it was a long trial, months, months and
11 months. And he won an acquittal. And this young
12 lawyer turned to his client Sciavone and said
13 congratulations. And Sciavone said thanks, but where
14 will I get my reputation back. I don't believe that
15 lawyer would say it didn't matter if they do it again
16 because they already did it to you once.

17 MR. TAMBUSI: Excuse me. Judge, could I
18 correct something, the facts on the record? I haven't
19 spoken a lot.

20 THE COURT: Okay. Mr. Tambussi, go ahead.

21 MR. TAMBUSI: Very quick, Judge. You made
22 an inquiry of Mr. Wells with regard to whether or not
23 Connor Strong, Michaels, NFI and Coopers responded to
24 any subpoenas. Subpoenas were issued on April 17th to
25 Connor Strong, NFI and Michaels Organization. There

1 are 12 days given for a response to that subpoena. The
2 subpoena to Cooper was issued on April 22nd. On April
3 29th, Connor strong, Michaels Organization and NFI
4 responded to Mr. Walden and specifically requests that
5 he provide the legal basis for the issuance of the
6 subpoenas. Cooper's subpoena was not yet due yet.

7 On May 1st, Mr. Walden advised counsel for
8 Cooper, NFI, Connor Strong and the Michaels
9 Organization that he would withdraw the subpoenas to
10 obviate the need to address the lawfulness of the
11 subpoenas and that he would send more narrow document
12 requests in their stead. To date, none of the
13 plaintiffs have received any further requests from Mr.
14 Walden. This was confirmed to Mr. Walden in writing
15 and we never received a response, Your Honor. Thank
16 you.

17 THE COURT: The one thing I was referring is,
18 and I even found it in the transcript. It must have
19 been, just had to do with documents of Cooper that were
20 from Cooper to the EDA and not provided by Cooper
21 voluntarily. So I think that's what it must be.

22 MR. TAMBUSI: That's correct, Your Honor.
23 And Mr. Walden did raise this issue of the accelerated
24 program in his letter requesting the documents. But he
25 never sent the request, the more narrow request that he

1 had promised in order to get Cooper's documents. To
2 date, we're still waiting. Thank you.

3 THE COURT: Okay.

4 MR. WELLS: First, there was a lot of
5 discussion about the opportunity to give a five minute
6 introductory statement. The introductory statement was
7 totally distinct from the opportunity to testify. The
8 five minute introductory statement is similar to what
9 you might see at a congressional hearing where the
10 person is permitted first to talk for five minutes
11 uninterrupted and then is permitted to testify. So if
12 you look at the letter of May 9, 2019, there is
13 absolutely no time limit put on the testimony.

14 THE COURT: Where is the May letter?

15 MR. WELLS: It's Exhibit K to the complaint.

16 THE COURT: Okay.

17 MR. WELLS: Okay. So let's get to Exhibit K,
18 it's May 9, 2019. And --

19 THE COURT: Let me -- I'd like to get it.

20 MR. WELLS: Sure, no, no.

21 THE COURT: I have one of May 6th. Let me
22 just see. Exhibit K, this is J.

23 MR. WELLS: I think I read it --

24 THE COURT: No, it's not tabbed. When it
25 came off ecourts it wasn't tabbed. K, okay, I have it

1 here.

2 MR. WELLS: Okay. Okay. So let's take the
3 mystery away and let's just read the letter.

4 "Dear All" -- this is from Mr. Walden to the
5 plaintiffs -- "I write as special counsel to the New
6 Jersey task force on the economic development
7 authority's tax incentives in response to your letter
8 of May 6th, 2019. Six points bear mentioning. First
9 if you wish to have a dialogue with us, have a
10 dialogue. Please do not write a letter and then
11 immediately leak it to the press. I am surprised that
12 such an August group would rely on this kind of stunt.
13 It is beneath you, especially since although we were
14 not obligated to, we advised you in advance that our
15 hearing might include potentially adverse information
16 about your clients. I did not receive a single
17 response to my offer to read a statement from any of
18 your clients into the record. Second, we provided
19 subpoenas for the production of documents in advance of
20 the hearing so that if there was another side to the
21 facts, we had the opportunity to present those facts.
22 Your clients produced nothing by the deadline.
23 Instead, at the 11th hour you requested that your
24 clients have the opportunity to cooperate voluntarily.
25 As an accommodation, Professor Chen withdrew the

1 subpoena to permit such cooperation. Your letter of
2 May 6th is hardly cooperation. At bottom you have
3 produced not a single document before or after the
4 hearing supporting any conclusions or assertions that
5 your clients out of state locations were bonafide,
6 suitable and available. We await word from you on when
7 you will voluntarily produce the documents we requested
8 assuming it is still your client's intention to do so.
9 Third, you have raised the specter of litigation over
10 the task force's authority. Feel free to file a
11 challenge to executive order number 52. We are
12 certainly prepared to defend it. Fourth, you also
13 include the following language in your letter 'we
14 dispute that the task force's participants are cloaked
15 with any immunity from liability from your defamatory
16 conduct.' You are members of the bar, as such you
17 cannot make bad faith threats to attempt to dissuade us
18 from our work. You should carefully review the
19 transcript of the proceeding during which we carefully
20 explained that the public should draw no conclusions
21 about the company's intents, and further that the
22 questions reflected our concerns about EDA, EDA's
23 oversight of these applications. Whether or not we
24 enjoy immunity which I will not address here, you have
25 no basis for a suit. Fifth, you request the

1 opportunity to be heard at the next proceeding.
2 Professor Chen will accommodate that request by
3 permitting fact witnesses from each of your client's
4 companies to testify at the next hearing which would
5 not have otherwise focused on these projects. Please
6 confirm by May 23, 2019 whether the following
7 individuals will voluntarily provide sworn testimony."
8 And then they list various people. And then
9 the letter on page 3 goes on to say, "please review the
10 applicable statutes in article 52 as counsel's role in
11 this hearing will be strictly limited. However, as a
12 further accommodation" -- again, this is not testimony
13 -- "as a further accommodation, we will permit each
14 witness to make introductory remarks of no more than
15 five minutes. Once you confirm these witnesses will
16 voluntarily appear to provide testimony we will confirm
17 available dates for the proceeding."
18 So this five minute business is a
19 mischaracterization. It was five minutes of
20 introductory remarks and then they would be permitted
21 to testify.
22 Now, Your Honor asked why did they start to
23 identify some companies. I just checked the transcript
24 at page 7 at the second day of the hearing where
25 Professor Chen says that they provide more information

1 because some of the comments, I read now page 7, line
2 16. "Some of the comments including members of the
3 legislature said that the public had the right to know
4 more information about what we are finding as we
5 investigate." So that's what prompted a more fulsome
6 disclosure. And I read to you Mr. Sweeney's statement
7 which is from a member of the legislature. So they
8 explained on the record what they were doing. It was
9 just, I think we all agreed that no documents were
10 submitted at any time.

11 I just want to end -- oh no, they made one
12 other argument on rebuttal. They said for the first
13 time that the word individuals in 5215-7 in terms of
14 the procedural rights means that that includes private
15 parties submit based on what I argued before, it
16 absolutely does not. It just includes individuals who
17 are employed by the state, members of the state and
18 dose not involve any private rights of action. And the
19 very, when Mr. Critchley said that there was a general
20 statute of 15-7 and then the 13E statute was specific,
21 or maybe he said it the other way around. But the
22 bottom line is that 13E specifically cross-references
23 the 15-7. There is no dispute that they are linked.
24 It is in the statute. That's why I printed it.

25 Last point. In terms of the due process, I'd

1 like to refer Your Honor to a case Pelullo v. State of
2 New Jersey, it's the SCI case. And it's 294 NJ Super.
3 336 (1996). But there's discussion of the problems
4 with applying the due process clause to investigative
5 hearings. And what the case law says is that an
6 adjudicatory hearing is radically different and
7 requires much more in terms of procedural due process.
8 But when there are public investigative hearings that
9 the due process clause has to be applied differently.
10 And in fact if you did not apply it differently, it
11 says what I said earlier, that the whole system would
12 break down. And if you look at page 566 of that
13 opinion that I just cited, I just want to read from it.
14 It is "when government action does not partake of an
15 adjudication. As for example when a general fact
16 finding investigation is being conducted, it is not
17 necessary that the full panoply of judicial procedures
18 be used. Therefore, as a generalization, it can be
19 said that due process embodies the differing rules of
20 fair play which through the years have become
21 associated with different types of proceedings whether
22 the constitution requires that a particular right
23 obtained in a specific proceeding depends upon a
24 complexity of factors. The nature of the alleged right
25 involved, the nature of the proceedings, and the

1 possible burden of proceedings are all considerations
2 which must be taken into account." Then the court goes
3 on to state, "the investigative process could be
4 completely disrupted if investigative hearings were
5 transformed into trial like proceedings. And that
6 persons who might be indirectly affected by an
7 investigation were given an absolute right to cross-
8 examine every witness called to testify. Fact finding
9 agencies without any power to adjudicate would be
10 diverted from their legitimate duties and would be
11 plagued by the injection of collateral issues that
12 would make the investigation interminable. Even a
13 person not called as a witness could demand the right
14 to appear at the hearing. This is what they're asking
15 for. Even a person not called as a witness could
16 determine the right to appear at the hearing, cross-
17 examine any witness whose testimony or sworn affidavit
18 allegedly defamed or incriminated him and call an
19 unlimited number of witnesses of his own selection.
20 This type of proceeding would make a shambles of the
21 investigation and stifle the agency and its gathering
22 of facts." That's from the appellate division of New
23 Jersey.

24 Last point, Your Honor.

25 THE COURT: Actually it's not.

1 MR. WELLS: It's not?

2 THE COURT: No. It's a quote, it's a direct
3 quote from the United States Supreme Court.

4 MR. WELLS: Oh no. Oh no, the opinion.

5 THE COURT: What you just read was from the,
6 was from the appellate division quoting I believe --

7 MR. WELLS: I understand that.

8 THE COURT: Oh okay. I'm sorry.

9 MR. WELLS: No, no. I was saying that the
10 opinion. But you're right, it's from the U.S. Supreme
11 Court.

12 THE COURT: Right. It's a direct quote.

13 MR. WELLS: Yes. But the opinion is an
14 appellate division opinion. That's the only point I
15 was trying to make.

16 The last point, I also refer in terms of
17 first amendment case, GJJM Enterprises v. City of
18 Atlantic City, it's a District Court case 293 F.Supp
19 3.d 509. It talks about the first amendment issues.
20 Because these first amendment issues and the due
21 process issues tend at times to overlap. But the
22 opinion reads -- I got to get the page.

23 THE COURT: Is it cited in your brief?

24 MR. WELLS: I believe --

25 UNIDENTIFIED SPEAKER: It's cited in the

1 plaintiff's brief.

2 MR. WELLS: It's in plaintiff's brief.

3 THE COURT: Okay. The main brief or the
4 reply brief? I just want to get the, I didn't get the
5 cite, so I was just going to check the brief.

6 MR. WELLS: Okay. But it's plaintiff's
7 brief, 293 F.Supp 3d 509, (2017). I'm just having
8 trouble finding the page. But it reads "the loss of
9 first amendment freedoms for even minimal periods of
10 time unquestionably constitutes irreparable injury.
11 For that irreparable injury to support granting a
12 preliminary injunction, plaintiffs must show a chilling
13 effect on free expression." And the point that that
14 sentence makes in terms of first amendment analysis is
15 the court has to ask are the plaintiffs in some way
16 being chilled from getting their story into the public
17 domain. And they are not. They've written op eds,
18 they have been very active. And the task force has no
19 ability or intent to chill them. They have every
20 opportunity to put their side of the story out and they
21 can do that in forms other than the task force. In
22 fact if you read some of the stuff they said, they seem
23 to say they're going to cooperate with the senate
24 investigative committee.

25 But in terms of doing the analysis they are

1 not being chilled. Nobody is putting them in a spot
2 where they can't tell their side of the story. But
3 again, the core point, Your Honor, this is not an
4 adjudicatory hearing, and the very procedural rights
5 that they are asking Your Honor to give them are the
6 very rights that the U.S. Supreme Court as Your Honor
7 just recognized stated a minute ago said would destroy
8 investigative hearings. And they are not to be treated
9 like they are at adjudicatory hearings. Thank you.

10 MR. CRITCHLEY: Judge, (indiscernible) one
11 distinction, one comment from Pelullo that Mr. Wells
12 did not read, and I read this from the opinion. "In
13 the present case, SCI did not in publishing its reports
14 make an accusation or hand out an adjudication that the
15 plaintiffs were guilty of any crime." Well that's not
16 what we have here. We have here we have a
17 (indiscernible) reports. They have also indicated
18 they've made criminal referrals of activity of
19 wrongdoing. They labeled us entities of concern. So
20 Pelullo is misplaced. Here we are directly involved in
21 a situation where the statute clearly indicates we have
22 a right to cross-examine, we have a right to direct.
23 And if we had that letter that Mr. Wells just read, May
24 9th, that's like giving us snowballs in the winter. If
25 they would have just said, okay, we're going to allow

1 you to participate the way the statute says you can, we
2 produce evidence, you produce evidence, examination, we
3 would not have a due process argument. We are not
4 making this up. If they don't like the law, change the
5 statute. But the law exists, you have to apply it.
6 Plain and simple. And sometimes, sometimes, Judge,
7 believe it or not, due process rights, sometimes pose a
8 burden on the Government.

9 THE COURT: Thank you. It is the Court's
10 intention to give you a decision today. I'm going to
11 take a break of anywhere from 15 to 30 minutes to
12 collect my thoughts. I tend to give lengthy decisions,
13 so it will be, we'll be here a while longer. I assume
14 Jeffrey you can stay. And but I understand that many
15 of you may have other things you need to get to. There
16 will be a recording made, there will be the opportunity
17 tomorrow to get a CD of whatever I say.

18 I'm only saying this to tell you that while
19 I'm taking the break, if anyone has to leave I do not
20 take it personally. You have, you have lives and
21 things that you may have anticipated doing today. So I
22 just leave you at that. The camera people have to go.
23 And so I'll be back in 15 or 20 minutes. But it's
24 important to me to get you a decision today. So, thank
25 you.

1 (Recess 4:50 p.m. to 5:19 p.m.)

2 THE COURT: Okay. This will be the Court's
3 decision on the application for temporary restraints
4 brought by plaintiffs. And first, I want to thank all
5 of you who have remained and for your patience
6 throughout the afternoon and for your continuing
7 patience as I provide you with a decision. I have the
8 different materials I'm going to be using here, and I
9 just beg your indulgence because there was a somewhat
10 short period of time to pull all of this together. But
11 as usual, the attorneys helped by the excellent briefs
12 I received and also the assistance of my law clerk and
13 the rest of the staff, including the staff who are
14 willing to stay tonight.

15 So, the plaintiffs in this action are four
16 companies: Conner Strong & Buckelew, NFI, The Michaels
17 Organization, and Cooper University Medical Health
18 Care; an individual, George Norcross, who is the
19 executive chairman of Conner Strong, and also, he is
20 the chair of Cooper's Board of Trustees. And one of
21 the defendants is a law firm, Parker McCay, who advised
22 some of the -- some of these parties and was involved
23 in the drafting of the Economic Opportunity Act of
24 2013, which created the New Jersey Grow and the ERG --
25 Economic Redevelopment and Growth Act, which are the

1 two current tax incentive programs that are the focus
2 of -- of the Task Force's investigation.

3 All of the parties were mentioned in the
4 course of a Task Force hearing on May 2, 2019, and the
5 -- as part of an investigation into the practices of
6 the Economic Development Authority in which the Task
7 Force was asked to examine the activities of the EDA
8 over the past few years, and bring any concerns to
9 light, and also to suggest changes to the enabling
10 legislation, that Economic Opportunity Act of 2013,
11 which is scheduled to expire on June 30, 2019, which is
12 less than two weeks from today.

13 The Task Force was created by Governor Murphy
14 pursuant to Executive Order Number 52 and subsequent --
15 that was, I think, January 19th of 2019, and then he
16 subsequently empowered the chair of the Task Force,
17 Rutgers law professor Ronald Chen with gubernatorial
18 investigatory powers including subpoena power under
19 N.J.S.A. 52:15-7, which has been a real focus of so
20 much of the argument here this afternoon.

21 The four companies named as plaintiffs had
22 all made applications for tax incentive grants and so
23 forth to EDA. And so, among the issues in the
24 applications they filed were concerns or intent to
25 relocate offices and employees of these four, to

1 Camden, a distressed city in New Jersey that was
2 identified for special treatment in that statute, in
3 order to encourage economic development there. And the
4 record shows that there was significant economic
5 development in Camden.

6 In addition to the governor, named as
7 defendants are Mr. Chen, the head of the Task Force,
8 and the attorneys employed to assist in the
9 investigation. EDA has been named as a nominal
10 defendant. I have had no appearance filed on behalf of
11 EDA, and they have not participated today.

12 As I mentioned, plaintiffs seek to obtain
13 temporary injunctive relief in order to stop the Task
14 Force's ongoing investigation, including the release of
15 a preliminary report that the Task Force had indicated
16 it was intending to release on June 11th pending the
17 Court's consideration of the claims set forth in their
18 complaint. And those claims, at least the ones before
19 me today, challenge the validity of the Task Force and
20 are -- and claiming constitutional and statutory
21 violations of their rights. And it's all against the
22 backdrop of the test the Court has to apply for whether
23 or not an injunction can issue.

24 There was a considerable background that was
25 -- that was provided to me that underlines the present

1 controversy, so I am going to take some period of time
2 to go over my reading of the -- of the record that was
3 provided to me.

4 Tax incentives are something that has -- that
5 have certainly been a matter of public interest around
6 the country in the last couple of years, I think
7 perhaps most vividly by the efforts of Amazon to pick
8 an alternate headquarters. We know what happened in
9 New York. They picked Long Island City, and then there
10 was so much opposition to the tax incentives that were
11 going to be provided, that Amazon said, don't need
12 this, and walked away.

13 But in New Jersey, we've had our own concerns
14 about tax incentives as a result of the 2013 statute.
15 And it's not just individuals or groups in New Jersey
16 that have raised questions about the tax incentives.
17 The record shows ongoing interest of the Pew Charitable
18 Trust, which has done a nationwide examination of
19 various tax incentive programs throughout the country,
20 and one -- a representative from the Pew Trust was
21 called as a witness in this case.

22 So, in terms of the -- what led up to the
23 Task Force, the first primary thing was that January
24 2017, during the Christie administration the State
25 auditor issued a report that identified some problems

1 with EDA in regard to verifying information in
2 applications and the monitoring of grant recipients.
3 And the -- they did speak about Grow New Jersey grants
4 and that there were -- the auditor was concerned that
5 there were inadequate verification procedures used by
6 EDA in regard to what companies were grant-eligible and
7 whether the jobs that were intended to be retained in
8 New Jersey actually were retained. And a lot of that
9 examination, even though it talked about Grow New
10 Jersey, a lot of it went back to a prior program under
11 the Business Retention and Relocation Assistance Grant
12 Program. But it was -- it's ultimately -- it morphed
13 into, under 2013, the New Jersey Grow and the ERG
14 programs.

15 One of the things of interest to me in light
16 of what went on here is that the auditor identified
17 projects in the city of Camden as having inadequate
18 documentation. This was back in 2016. And they
19 specifically recommended that the tax credit funding
20 methodology for Camden needed to be -- needed to be
21 examined because it might not be in the best interest
22 of the State. And there was a mention in the report of
23 something that has come up in the testimony before the
24 Task Force, and I don't know that it was in the
25 comptroller's report, but certainly it's come up in the

1 Task Force. And that -- I know in the Task Force,
2 there -- there was testimony regarding EDA -- even EDA
3 staff being of two minds as to whether projects in
4 Camden needed to show that jobs were leaving the state
5 in order to be eligible. And some -- some staff said
6 that you didn't have to show that in Camden. Some said
7 you did have to show that you were going to leave the
8 state, but were going to go to Camden instead, but the
9 -- whether you had to show it or not, what I take from
10 the record is that if you could show it, that these
11 jobs were going to move -- in the case of these four
12 plaintiffs, move to Philadelphia instead of to Camden,
13 then you could qualify for higher -- a higher grant or
14 higher incentive -- higher tax incentive. And so, all
15 four of the plaintiffs here, as will come out -- it
16 came out in the testimony, did make representations to
17 EDA in regard to considering Philadelphia as an
18 alternative. And ultimately, then, I believe they all
19 did locate in Camden -- located those jobs in Camden.

20 EDA had a response to the auditor's report,
21 and you see this theme throughout all of the record
22 here by EDA and others that these tax incentive
23 programs, including Grow New Jersey are complex and
24 they're nuanced. The whole aim is to -- is to support
25 job creation and retention in New Jersey. And the --

1 there was a statement even in the EDA response to the
2 auditor that if there's any certification that was
3 submitted to EDA that was false, it could lead to the
4 revocation of tax credits or maybe even criminal civil
5 penalties. So, this was -- this was what the auditor
6 said, and it's shone a light on what -- on what EDA had
7 done back in -- you know, at the time of the Christie
8 administration.

9 Now, we're dealing with a statute from 2013,
10 and one of the things that's in the record is that New
11 Jersey was one of the states that was the slowest to
12 recover after the recession. And so, there was a lot
13 of interest, and then the legislature adopted the
14 statute in 2013 as part of the -- part of its design to
15 help the -- help the State recover from the recession.
16 And the record shows that tax incentives and tax
17 incentive programs are viewed by everybody as being
18 important and the -- and the investigation is really to
19 see how best should you -- how best should you craft,
20 and then how best should you administer, what kind of
21 checks and balances do you need from the agency that's
22 overseeing these -- these important programs where the
23 amount of money that is being cited is in -- is in the
24 billions of dollars.

25 So, after the -- after the auditor -- report

1 of the state auditor, Murphy administration comes in
2 and then it was Executive Order 3 in which they
3 directed the comptroller to do a performance review, a
4 careful performance review of the EDA activities in
5 regard to tax incentives. And Executive Order 3, I
6 believe, was January 19th of 2018 and it -- it then led
7 to -- the comptroller took a little bit longer than
8 what the governor had intended, and the report of the -
9 - the report of the comptroller came in on January 9th
10 of 2019. At least, that's what on the front of the
11 report that I have.

12 But in the interim, Governor Murphy, in his
13 budget address on March 13th of 2018, noted that he had
14 directed the comptroller to do a comprehensive
15 performance -- performance audit of New Jersey's tax
16 incentive programs. And at least the information that
17 he had -- and I'm just stating what was in the -- what
18 was in the budget address without saying how accurate
19 it is -- in New Jersey, it appeared to him from some
20 data he had that per job, it was about \$160,000 in tax
21 incentives for one job; where Massachusetts, it was
22 \$22,000 per job. And so, he asked the legislature to
23 work on a new program in light of the expiration of the
24 2013 statute and New Jersey Grow and ERG in 2019.

25 And so, the next thing then, is the

1 comptroller report comes out, and it's a lengthy
2 report. And it really doesn't name -- it really
3 doesn't name names. It's really focused on the EDA
4 procedures themselves. It gives some background about
5 the -- you know, about the agency, but it really
6 presents quite a troubling picture of lack of oversight
7 at the agency that was, you know, was directed to get
8 involved with very large amounts of tax credits. And
9 the -- they didn't do statistically or scientifically a
10 statistical sampling. They just took 48 projects and
11 looked at the number of jobs, and at the -- what was
12 the benefit to the state. And they -- they went over
13 the Grow New Jersey program and the ERG program, and
14 they, you know, really drilled down with the
15 cooperation of EDA, and the -- they found numerous
16 significant deficiencies in EDA's management and
17 oversight of the incentive programs. I'm reading from
18 the summary of audit results at page 9.

19 "Key internal controls were lacking or non-
20 existent for the monitoring and oversight of recipient
21 performance. EDA was, thus, prevented from determining
22 whether the incentive jobs were actually created or
23 retained or from ensuring that the awardees had
24 satisfied the incentive program requirements for these
25 jobs. And, in addition, the agency lacks adequate

1 policies, procedures, and controls to provide accurate
2 and reliable program results."

3 And then they -- you know, they went through
4 their findings including that according to their
5 review, close to 3,000 jobs had not been substantiated
6 as having been created or retained. And then they went
7 through 21 recommendations to enhance EDA's monitoring
8 and its administration of the -- of the incentive
9 programs. And as I said, they really -- really drilled
10 down. Some of the things they highlighted was -- you
11 know, were -- they looked at certain projects that got
12 incentive rewards under a transit hub program. They
13 looked at the economic benefit analysis and how that
14 was analyzed by the EDA underwriters. And they went
15 over the application process and were -- came to the
16 conclusion that certain incentive awards were
17 improperly awarded, overstated and overpaid.

18 But they didn't identify any particular
19 applicant or any particular awardee who got -- got an
20 award under the program, but they also noted that EDA
21 has not consistently collected sufficient information
22 from recipients regarding the employees who filled the
23 -- filled the jobs, and again, failed to implement
24 appropriate controls to properly verify the recipient
25 reported tax data used in determining the actual award,

1 and failed to take action when recipients failed to
2 meet the terms of their award agreements. And a couple
3 -- it was only one Grow New Jersey recipient, but a
4 couple from the earlier program failed to meet the
5 employment levels as required by their award letters.
6 And they did note that EDA has not taken any action to
7 recapture any part of the tax incentives that may have
8 been improperly -- improperly awarded. And the --
9 again, they had all the -- all these recommendations
10 that -- some of which I've gone through.

11 EDA had a response to the -- to the
12 comptroller report and were committed to making
13 changes, although they defended a number of the things
14 that had been cited in the report. And in the appendix
15 to the report, the -- was a -- they -- the comptroller
16 included a report to the governor's office prepared by
17 Rutgers University to -- in analyzing Grow New Jersey
18 and ERG tax incentive programs. And the -- you know,
19 the concern that there was -- so many projects have
20 been approved.

21 There was a very substantial offset to the
22 corporation business tax and premium tax, so that New
23 Jersey would be receiving much less tax income going
24 forward as a result of the large number of recent
25 awards. And they were critical of the long lead time

1 associated with the Grow New Jersey and ERG projects,
2 and the South Jersey project funding was concentrated
3 in Camden and other projects were in the north, more
4 populous counties of the state. And some incentives
5 may be more generous than intended by the statute. And
6 Rutgers then recommended the -- you know, that there be
7 a closer look at the program and looked at the cost
8 benefit -- Rutgers looked at the cost benefit analysis.

9 And there was also reference to the work of
10 the Pew Charitable Trust, an independent non-profit
11 organization, that had issued a report in May 2017,
12 which assessed how states were -- were formulating and
13 applying tax incentive programs. And New Jersey was
14 noted in the Pew Charitable Trust analysis as trailing
15 other states, because it lacked a plan for the regular
16 evaluation of tax incentives. I think this was coming
17 out of the Rutgers report, though, and not out of a
18 separate report from the Pew -- from the Pew Charitable
19 Trust. But then there was a list of other states that
20 Rutgers was suggesting should be -- should be -- their
21 processes should be looked at by New Jersey.

22 So, then we come to Governor Murphy getting
23 the report from the comptroller, and then very quickly
24 thereafter, within about ten days I think it was,
25 issuing Executive Order Number 52. I think it was

1 January 19th of 2019. And so, in the executive order -
2 - oh, this is January 24th of 2019 -- he goes through
3 the -- his concern about the state comptroller's
4 performance audit revealing grossly inadequate
5 compliance and enforcement efforts that failed to
6 ensure that the tax incentive programs were operated to
7 the benefit of New Jersey's economy and were lacking
8 the key internal controls. He mentioned the 3,000 jobs
9 that couldn't be substantiated and highlighted a number
10 of the things that I've already quoted from the
11 comptroller's report. And he noted that the programs,
12 Grow New Jersey and the Economic Redevelopment and
13 Growth programs, the EDR -- ERG, excuse me -- were
14 scheduled to expire on July 1st and wanted this Task
15 Force to examine the program -- programs and to help
16 inform lawmakers about whether and in what form the
17 programs should be renewed and the types of controls
18 that are needed both in law and in practice.

19 And then he established the Task Force to
20 conduct an in-depth examination of the deficiencies in
21 the design, implementation and oversight of Grow NJ and
22 ERG, including the problems identified in the state
23 comptroller's audit, and to make recommendations
24 regarding future oversight and future -- future
25 legislation. And the Task Force was not given subpoena

1 power. They were referred to the comptroller for
2 subpoena power, and they were directed to seek to
3 obtain voluntary cooperation.

4 And then as was raised in the colloquy and in
5 the papers here, subsequently in a letter to Ronald
6 Chen in March, the governor provided, at least his view
7 -- March 22, 2019, the governor then said:

8 "As Governor, I'm authorized to personally
9 investigate or appoint one or more persons to
10 investigate the management and affairs of
11 instrumentalities of the state, such as EDA."

12 Citing N.J.S.A. 52:15-7 and gave his subpoena
13 power under that statute to -- to Mr. Chen.

14 And then the next thing was that on March
15 28th, there was the first hearing -- the first public
16 hearing, and there were, you know, introductory
17 statements sort of posing the problem, and one of the -
18 - one of the first things that was noted is that the
19 legislation itself did not have enough controls to
20 ensure effective monitoring of the programs by EDA.
21 The statement -- beginning statement went over the
22 state auditor report, and then over the -- mention of
23 the comptroller report. And they -- Mr. Chen noted
24 that the Task Force had sent letters to every company
25 that took tax credits to preserve documents, also to

1 consultants and lawyers that were involved with the EDA
2 applications, and they now had started to review
3 specific cases.

4 And you know, they noted that they were going
5 to be hearing from experts making recommendations as to
6 what tax-incentive legislation should look like to
7 better serve the citizens of New -- of New Jersey.
8 They said there was one company that had actually
9 admitted it wasn't in compliance and had -- was
10 planning to repay tax credits of over a million
11 dollars.

12 And there was a statement made that if any
13 company had included misleading information in its
14 application or any compliance documents, that they --
15 the state might seek repayment, or there may be
16 referral to criminal authorities. And, frankly, that
17 was -- that was mentioned, as I said earlier, in the
18 auditor's report as well.

19 At the first hearing, they did not name
20 names. There was testimony of Ms. Golsen-Comma.
21 (phonetic) She is a whistleblower. She has a lawsuit
22 against her employer. The employer was not named. And
23 she made allegations that the company she worked for
24 had knowingly submitted false information to EDA in
25 order to get the tax incentives. It was noted that --

1 on the record that the Task Force had extended to that
2 company the chance to submit a written statement giving
3 their perspective, but that the company had not
4 submitted anything.

5 The second witness was Philip Degnan, the
6 comptroller, and he was -- you know, he was questioned
7 about the report of the comptroller and how it was
8 critical of the EDA reliance on recipient reported data
9 without adequate need for verification. And it was
10 raised with him that there were certain inconsistencies
11 in program administration and lack of compliance. But,
12 you know, the -- Philip Degman did admit that they were
13 enormously complicated programs, and that the
14 comptroller had to review a tremendous amount of data.

15 The next witness was from the Pew Charitable
16 Trust, a man named Mr. Goodman. They had studied tax
17 incentive programs throughout the country and he was
18 advocating for caps. That the New Jersey -- NJ Grow
19 and the ERG did not have caps. And he was concerned
20 about -- about the need for caps.

21 And that came up a few times, also by the
22 next witness. I don't know if his name is Whiten or
23 Whiten, W-H-I-T-E-N. He was involved with a group
24 called New Jersey Police Perspective, and he also
25 raised the need for caps. The number -- amount of tax

1 incentives that had -- New Jersey had issued had gone
2 up and up and up in a short period of time under the
3 2013 -- 2013 statute. He cited some statistic with a
4 cost per job of approximately \$78,000 with Camden's
5 cost per job. I'm just saying he cited this. Whether
6 it's true or not, I don't know. But he cited -- and
7 it's part of the record in the case -- that per job, it
8 was over \$270,000 for every job that was retained or
9 added in Camden. And he supported tax incentives but
10 says it's important to do it in a way that is -- is
11 more careful, and, again, with caps and, you know, he
12 claimed that the amount of spending on tax incentives
13 since 2009 had gone up tenfold each year. And he
14 admitted there were benefits from these programs, but
15 concerned about their form, and that it was not -- the
16 current form was not -- you know, really was not
17 serving the citizens of New Jersey well.

18 He identified Camden as an extra-special
19 bonus category as a very distressed city. It was a
20 target area for the 2013 statute as were a few other
21 municipalities. The ones that comes to mind were
22 Paterson and Passaic, Trenton, and I think later
23 Atlantic City was added. And he advocated giving the
24 statute more teeth, and also that -- you know, that the
25 program was to -- was to show a 10 percent profit for

1 the state, and that Camden had gotten favorable
2 treatment in terms of just breaking even. There was
3 this net benefit of 100 percent for Camden and for the
4 rest -- for projects in the rest of the state, it was
5 110 percent.

6 And that was pretty much it after the May
7 28th hearing. And then we heard in the colloquy about
8 the subpoenas that were served on the -- at least on
9 the companies here, who are plaintiffs and how they --
10 they were withdrawn. And for whatever the reasons --
11 we heard two versions of it -- no material was
12 voluntarily provided by the -- by the four companies
13 who were plaintiffs to the -- to the Task Force.

14 So, then on May 1st of 2019, the Task Force
15 notifies the plaintiffs here that there may be adverse
16 information that is going to come out about them on the
17 May 2, 2019 hearing. And they would be given a chance
18 to put a statement in for the public record. And it
19 was less than 24 hours' notice. And the companies were
20 identified at the beginning of the May 2nd hearing as
21 entities of concern where there were potential
22 irregularities that would require more investigation.
23 And Mr. Chen did note that they were going to provide
24 names at this hearing for the public record, but that
25 they had notified the individual companies or whatever

1 in advance, and they could submit sworn statements to
2 be added to the -- to the record. He emphasized that
3 the Task Force was conducting a hearing and not a
4 trial.

5 And there was discussion about the two
6 different attitudes toward applications from Camden,
7 whether you had to show you were -- the jobs were at
8 risk of leaving New Jersey or just whether the jobs
9 were going to be coming into Camden being -- being
10 enough. And he -- it was identified, the concern about
11 the lack of clarity and consistency with EDA policies,
12 particularly in regard to Camden. And the -- there was
13 a mention by one of the attorneys for the Task Force
14 that there could be potential criminal exposure for any
15 company that was found to have lied to EDA and -- but
16 the Task Force itself does not have any criminal
17 authority. Any referral would have to be made to an
18 entity, state or federal, that had criminal authority.

19 The Task Force made the representation they
20 weren't drawing any conclusions in regard to breaking
21 the law, that their focus was the level of diligence
22 applied to applications, particularly about jobs moving
23 out of New Jersey and they were going to focus on what
24 EDA did or didn't do to vet the companies'
25 representations.

1 Then they went over that lawsuit that was
2 filed by that Mr. Succses (phonetic) who was a
3 whistleblower, and that was here in Mercer County. It
4 was eventually a no-cause on the whistleblower piece of
5 it. Summary judgment was granted on the discrimination
6 piece of it. And there was some testimony as to why
7 that lawsuit wasn't brought to the attention of the
8 comptroller. I don't see that it's so relevant to the
9 proceedings today, but that was -- that was one of the
10 topics that came up, and the testimony of Mr. Succses
11 was -- at the trial was summarized by one of the -- one
12 of the attorneys for the Task Force.

13 They also heard from another whistleblower,
14 who had filed a lawsuit against her company and claimed
15 that there had been misrepresentations to EDA. That
16 employer had disputed her claims, and so, they decided
17 not to identify that employer. And one of the -- one
18 of the claims this whistleblower made was that there
19 were employees that were hired and then were quickly
20 fired, and that went against the aim of the -- you
21 know, of the EDA to create jobs and retain jobs.

22 The next testimony was from John Boyd, who is
23 a business location expert. And, you know, he told
24 what a corporation would typically do when you're
25 considering relocating to another property. And this

1 was the backdrop for the testimony that came out about
2 the four plaintiff companies here. Mr. Boyd talked
3 about the due diligence that the companies would go
4 through, and how they'd look for office space. It
5 would be preferred to have it on contiguous floors, and
6 that there would be quite a bit of documentation, site
7 visits, and things of that nature, if the company was
8 seriously considering moving to another site.

9 And the Task Force then moved on to the two
10 witnesses that are really at the crux of the complaints
11 of plaintiff, and that is David Lawyer (phonetic) and
12 Tim Lezura, (phonetic) who were both long-term
13 employees of the -- of the EDA. David Lawyer was an
14 underwriter, and he did note that there was no formal
15 training process for EDA underwriters between 2013 and
16 2017 as to what the statutory requirements were for the
17 projects, but that in his view, everybody that applied
18 for a New Jersey Grow grant had to show that the jobs
19 were at risk of moving out of New Jersey, even if you
20 were going to move into Camden, and that was the -- you
21 know, that was his view.

22 And then we hear later from Mr. Lezura that
23 there were another point of view that you didn't have
24 to show that if you were going to be taking jobs into -
25 - into Camden. So, it was at that point that Mr.

1 Lawyer was shown applications from Conner Strong, The
2 Michaels Organization, NFI, and Cooper Health, where
3 each one said they were considering a move to
4 Philadelphia and had been represented by the same
5 consultant.

6 And there were various things brought out of
7 statements regarding -- you know, statements from the
8 press regarding some of the companies showing that they
9 were suggesting that they had intended to move to
10 Camden all along, and they -- there was a, you know,
11 careful review or close review of letters of intent
12 that each of the four corporations had provided in
13 terms of their intending to move to Philadelphia if
14 they did not get the tax incentives.

15 And there were issues about the timing of the
16 -- of the proposals, you know, that they had lined up
17 for, you know, alternate sites, and whether those
18 proposals had expired before the applications were
19 submitted. And as the -- Mr. Walden took Mr. Lawyer
20 through the various files, Mr. Lawyer said, well, what
21 you're pointing out to me are things that EDA did not
22 vet carefully, and there is doubt now cast about
23 whether these alternate sites were available. And it
24 raised some certain inconsistencies from different
25 filings that were made over the course of the months

1 when EDA was looking -- was looking at the -- looking
2 at the -- at the applications.

3 And the -- there was a -- there was a
4 statement that there may be reasons to explain all
5 this. We don't have all the records, but Mr. Lawyer
6 said the underwriters should have done -- you know,
7 should have done more vetting and should have asked --
8 should have asked more -- more questions and they went
9 through some details on each of the four applications.
10 And the emphasis was -- certainly to some extent was on
11 what the underwriters did or didn't do and the --
12 whether the documents raised questions regarding the
13 bona fides of the alternate locations.

14 We then had Mr. Lezura, who testified in a
15 somewhat similar vein, although he noted how Camden --
16 because of its intense poverty -- that there had been a
17 special focus on trying to help Camden even as far back
18 as the McGreevey administration. And the -- he
19 confirmed that 11 billion had been improved in tax
20 incentives, and that he was -- he was supporting a lot
21 of what EDA had -- had done.

22 And then he was taken through the 2013
23 legislation, and he had been involved for EDA in
24 reviewing drafts of the legislation. And there were
25 certain parts of the legislation that had been -- had

1 been changed at the -- you know, towards the final days
2 before it was adopted. I think they said, initially,
3 it had been a 43-page statute. Then it came to -- or
4 bill. It then went up to about 80 pages. But even
5 though the -- Mr. Walden may have been leading Mr.
6 Lezura, Mr. Lezura, you know, at times, he refused to
7 say that changes were put in, you know, for the reasons
8 that Mr. Walden was insinuating. So, I mean, the --
9 Mr. Lezura, you know, tried to be as -- you know, tried
10 to refresh his recollection. Certain provisions he
11 remembered. A lot of provisions in the statute he
12 didn't remember -- he didn't remember at -- he didn't
13 remember at all.

14 And the -- you know, he supported the aim to
15 get people to invest in Camden, given the -- given the
16 extreme poverty that was -- that was there. And the --
17 he said any role that Parker McCay had in drafting the
18 bill didn't influence how he would apply -- apply the
19 statute, and he's the one who said that for Camden
20 projects, you didn't actually have to show that you
21 were going to move to an out of state location, and he
22 admitted that there were two different interpretations.

23 The final witness was someone named Brandon
24 McCoy (phonetic). And he noted that it's not unusual
25 for legislators to seek expert advice from attorneys or

1 experts in a field when they are drafting bills, but
2 that it -- it should have -- have had -- I think he
3 said there should be more -- there should be more
4 monitoring.

5 So, that was the -- that was the testimony
6 that came out and the four companies and Mr. Norcross
7 were named. And then quickly thereafter on May 21st of
8 2019, the complaint was filed by the -- by the
9 plaintiffs as an action for declaratory relief to
10 invalidate the Task Force for lack of gubernatorial
11 authority, and for where we had much of the argument on
12 the merits here -- here today. And then if -- if the
13 Court did not accept that argument, the complaint went
14 on to say that the -- the plaintiffs were denied the
15 statutory right -- their statutory rights under -- what
16 is it, 52:15-7, and -- so, let's see.

17 Count 1 is a declaratory judgment that all
18 executive actions taken to create and empower the Task
19 Force pursuant to 52:15-7 are invalid, and the Task
20 Force is unlawful. And count 2 is for a declaratory
21 judgment that 52:15-7 doesn't authorize an
22 investigation of individuals who are not involved in
23 state government. And 3, that 52:15-7 does not
24 authorize an investigation that denies the plaintiffs
25 the right to cross-examine witnesses and introduce

1 witnesses and/or otherwise -- and they cited First
2 Amendment and due process guarantees.

3 And so, when the -- when the Task Force set
4 another hearing for June 11th and noted that they would
5 be -- they would be releasing a preliminary report,
6 that's when the application came in for -- for a
7 temporary restraining order. And I should note that
8 after the May 2nd hearing, the -- there were -- was
9 extensive publicity on the testimony regarding these
10 four -- these four companies, and Mr. Norcross and
11 Parker McCay and the plaintiffs provided many citations
12 from the New York Times, from Politico, from NJTV News,
13 from ProPublica, from the Philadelphia Enquirer, from
14 WNYC. There were many, many -- many articles, and I
15 printed some of them and reviewed them and there was --
16 there certainly was negative -- negative coverage in
17 regard to -- regard to the testimony that had come out
18 at the May 2nd hearing.

19 And in the course of the record provided to
20 the Court, it's now -- the legislature and the senate
21 have determined that they're going to do their own
22 hearings, and there was some news coverage that the
23 attorney general may be looking at a grand jury
24 investigation as well.

25 But what we're about today is the application

1 to stop the Task Force from -- from issuing a report
2 and from holding more meetings and from continuing its
3 work while this -- while this action is pending. And
4 so, a temporary restraint, a lot of the case law also
5 deals with injunctions, and to issue a restraint is
6 really one of the strongest weapons at the command of a
7 Court of Equity. It's been noted to that effect in
8 Continental Insurance v. Honeywell Insurance, 406 N.J.
9 Super. 156 at page 186, an Appellate Division case from
10 2009. So, the courts are told to grant it sparingly
11 with great care, to apply discretion, and to take into
12 account the well-known, four-part test that is
13 established in Crowe v. De Gioia, 90 N.J. 126, and has
14 been, you know -- other cases include Waste Management
15 of New Jersey v. Union County Utilities Authority, 399
16 N.J. Super. 508.

17 And in terms of the -- in terms of the actual
18 -- actual test, the -- you have to find that:

19 "The moving parties have demonstrated a
20 reasonable probability of success on the merits, a
21 balancing of the equities and hardships favors
22 injunctive relief, the movant has no adequate remedy of
23 law, and the irreparable injury to be suffered in the
24 absence of injunctive relief is substantial and
25 imminent, and that the public interest will not be

1 harmed." I'm just reading from the Waste Management
2 case at page 520.

3 And the -- one of the tough things for
4 plaintiffs is that each of the factors must be clearly
5 and convincingly demonstrated. And the -- it's -- the
6 Court also went out of its way in the Waste Management
7 case to note that a court may withhold relief despite a
8 substantial showing of irreparable injury in the public
9 interest, and that the public interest is typically
10 given more weight than private -- than private
11 interests. And that's something that is guiding the
12 Court's -- Court's analysis here.

13 In terms of irreparable harm -- and we had
14 Mr. Marino go through four different categories of
15 irreparable harm, the Court has been concerned
16 throughout this review of these papers about the
17 fairness element of all this. I mean, that's not one
18 of the four categories, but, you know, is this process
19 fair? I mean, that's the essence of -- that's the
20 essence of due process. And when you're looking at
21 injunctive relief of harm to reputation, it's something
22 -- reputation is -- is something that is protected in
23 New Jersey, as I mentioned in the colloquy, even --
24 even more than under -- you know, under federal, you
25 know, federal law through, you know, Doe v. Poritz, 142

1 N.J. 1. So that constitutional issues arise when
2 reputations are at stake.

3 But when, you know, -- you can have the
4 concern of reputation, but it doesn't always translate
5 to -- into, you know, into due process rights in terms
6 of being -- giving the person whose reputation is at
7 stake, entitlement to, you know, to trial-type
8 protections and a adjudicatory hearing. And the court
9 has to balance their interests and the -- and the
10 interests of the -- and the interests of the public.

11 So plaintiffs have certainly raised
12 continuing concern about their reputation and damage to
13 reputation is -- is something that can be viewed as
14 irreparable. And when you look at whether the issues
15 present a legally-settled right, we have declaratory
16 judgment brought by the plaintiffs in the underlying
17 complaint saying that the statutes of New Jersey and
18 the constitution of New Jersey and the Federal
19 Constitution in terms of all the constitutional rights
20 to due process, we want a declaratory judgment that
21 those -- all those rights apply here and require that
22 the -- the Task Force be shut down permanently, and
23 then at this stage, they're saying, Judge, we can -- we
24 can show a likelihood of success on the merits, and we
25 can also show that the balance of hardships is in our

1 favor and not in favor of the Task Force.

2 Certainly, they're -- you know, that whole
3 settled legal right is something that -- that I think
4 is often given courts a little bit of a problem in, you
5 know, is there a valid cause of action here? Yes,
6 there's a valid cause of action here under the
7 Declaratory Judgment Act to declare the rights and
8 interests of the -- of the plaintiff. So they meet
9 that aspect of the test.

10 The two pieces that are tough for the
11 plaintiff to meet here -- and all of them have to be
12 proven -- are the likelihood of success of the merits
13 and the public interest and the balance of the public
14 interest in the context of what is -- the Task Force
15 was directed to do, and the plaintiffs' individual
16 interests in their -- in their reputations.

17 And one of the -- one of the problems for a
18 court in applying its discretion here is we're at the
19 beginning of the case, and so -- but plaintiffs have
20 sought a preliminary injunction that requires the Court
21 to look at a likelihood of success on the merits at
22 this early stage. So my reaction -- you know, my view
23 of the merits is a view of the merits at this early
24 stage, but I can't say that there's a likelihood of
25 success on the merits that's been shown by plaintiffs.

1 I find that the -- the two affordable housing
2 case decisions, both by Judge Carchman and also by the
3 Supreme Court, dealt with a very different statute than
4 what's before the Court here. And in the attempt to
5 bring this case under those, you know, those statutes,
6 I just find unconvincing at this point. Can you
7 convince me in the future? Maybe you can, but I have
8 to look now at your likelihood of success on the merits
9 that the governor does not have the authority to have a
10 task force to investigate an "in, but not of" entity,
11 like the EDA that has made awards of billions of
12 dollars, and where that have been a state audit report
13 and a comptroller report that have raised significant
14 irregularities that -- that go to the interests of the
15 -- of the State of New Jersey.

16 And the argument about supervision versus
17 control, you can make these arguments, but what the --
18 what Judge Carchman and the -- and the Supreme Court
19 were doing was looking at the Executive Reorganization
20 Act where the governor wanted to abolish an independent
21 agency, abolish it, get rid of it. And they drilled
22 down on what the statutes -- on what the statutes were,
23 both the COAH-enabling legislation and on the
24 Reorganization Act. And they did get into a discussion
25 of "in, but not of" agencies -- "in, but" -- yeah, "in,

1 but not of" entities and what they would -- you know,
2 whether or not the governor could abolish it. And in
3 the context of abolishing an agency, both the Appellate
4 Division and the Supreme Court said it wasn't something
5 that the governor could do, because it was -- they were
6 "in, but not of" gave a certain independent status.

7 To me, at this point early on, the -- that
8 analysis really doesn't transfer easily or convincingly
9 to N.J.S.A. 52:15-7. We're not talking about
10 abolishing an agency. We're talking about looking at -
11 - looking into serious problems that independent
12 entities, the auditor and the comptroller have
13 confirmed and asking this Task Force to look further
14 and then to propose legislation to prevent -- you know,
15 misuse of these tax incentives in the future.

16 And to me, it's very telling that the statute
17 52:15-7 was adopted in 1941. It was well before the
18 Constitution of 1947 that directed that all -- that
19 there be only 20 -- no more than 20 principle
20 departments to get all these various boards,
21 commissions and so forth under some centralized
22 management. And as I mentioned in the colloquy, to me,
23 it was somewhat persuasive that the board of -- you
24 know, the Public Utility Commission that was mentioned,
25 I believe, in -- maybe in that footnote -- in that

1 footnote 2 that we were talking so much about -- well,
2 maybe not there, but it was -- it was mentioned --
3 yeah. It was mentioned in footnote 2. It was a
4 commission. And so, in 1941 the legislature authorized
5 the governor to look into a quasi-independent agency,
6 the board of -- which would include the Public Utility
7 Board, as part of department, board, bureau or
8 commission of the state.

9 And so, it's -- I was -- you know, I'm not
10 convinced at this point. You know, as I said, all I
11 have to do is look at likelihood of success on the
12 merits, but when I looked at the -- at the legislation
13 and the case law, it wasn't -- it wasn't persuasive to
14 me at this point. I mean, we're talking about the
15 governor, you know, exercising supervisory
16 responsibility to some extent under the Constitution,
17 because he didn't rely on 52:15-7 in creating the Task
18 Force, but he did to give it the, you know, the
19 additional powers, the subpoena powers and to enforce
20 the attendance of witnesses, et cetera.

21 So, you know, on count 1, the Court, I said,
22 wasn't convinced. So, I can't -- can't grant a
23 temporary injunction when I have concerns about the --
24 the likelihood that plaintiffs can prevail.

25 There's also the -- you know, the -- there

1 was one point, I think, that Mr. Wells made that, you
2 know, that the governor is given the authority to
3 terminate any employee, which would extend to EDA
4 employees, and how can you terminate without an
5 investigation? I thought that was fairly telling. And
6 also, under the EDA statutory -- its own statute, the
7 governor has those -- you know, has the appointment
8 authority, some of which is connected with the approval
9 by the, you know, various legislative -- houses of the
10 legislature, but he also has the power to veto the
11 minutes. It was awfully telling to me that even in the
12 -- I mentioned this in the colloquy, but that
13 plaintiff's brief, both of the briefs, didn't even
14 mention the governor's power to veto activity of the
15 EDA. And to me, the fact that the governor can veto
16 actions of them, but could not, in his supervisory
17 power, have a task force to look into how they're --
18 how they're administering these critically-important
19 programs for the State of New Jersey, it really -- you
20 know, it really seemed like an incongruous argument.

21 And the fact that there was so much attention
22 paid to that argument here, made me think that some of
23 the other arguments that I thought might be more
24 persuasive for the plaintiffs were almost completely
25 ignored. The fairness -- I mean, we heard some of --

1 some about that, but there was -- you know, there was
2 really no -- no discussion by plaintiffs of a lot of
3 the case law that was cited in regard to -- you know,
4 in regard to commissions and investigatory commissions
5 versus accusatory commissions. That were -- that case
6 law was important to me in trying to look at the
7 fairness and what the rights of these individuals are
8 versus a State Task Force charged with looking into
9 irregularities that independent entities had identified
10 as being of very significant state interest.

11 Before I forget, there's also the issue
12 regarding the rights that plaintiffs are -- you know,
13 plaintiffs are afforded under the statute itself,
14 they're count 2, and the legislative history that was
15 provided by Mr. Wells, I think is really helpful on
16 that point. The statute itself gives the governor
17 authority to investigate state officers and state
18 departments, boards, bureau or commissions. And so,
19 when they're looking at, you know, when they're doing
20 these investigations at a public hearing, the officer,
21 department, board, bureau, commission or individual
22 under investigation may then have the right of cross-
23 examination. And the legislative history cited by, you
24 know, by Mr. Wells, noted that that when there was a
25 fairly quick amendment to the statute to add the cross-

1 examination right, it was that the little legislative
2 statement that we have, it's fundamental in a
3 democratic government that any department or board
4 under investigation should have the right to explain or
5 clarify any matter developed before an investigator,
6 and that -- the -- even description of the bill in the
7 legislative index says it provides that investigations
8 of state departments by governor, such departments
9 shall have cross-examine rights of the persons
10 questioned.

11 And so in terms likelihood of success on the
12 merits, the record at this point causes me to find that
13 plaintiffs' argument based on the statute, 52:15-7 is
14 giving -- giving them the rights of cross-examination
15 is also -- I'm not -- I'm not even -- it's not that I
16 have to be persuaded by it. I mean, when you look at
17 the Waste Management decision, I don't have to be
18 persuaded by it, but if I'm going to enter an
19 injunction stopping a task force from releasing its
20 recommendations prior to the legislature considering
21 changing or -- or extending these programs, I would
22 look for certain claims that would be stronger than
23 what the plaintiffs have put before me here.

24 So -- and then also, we have the N.J.S.A.
25 52:13e-6 where there was concern about third parties,

1 about any person who's mentioned, and there's specific
2 reference over to N.J.S.A. 52:15-7, and if there's any
3 -- if any person who is mentioned who believes
4 testimony or other evidence given at a public hearing
5 or comment made by any member of the agency and it was
6 two members of the EDA that were -- that gave testimony
7 or statements made by the council, tend to defame him
8 or otherwise adversely affect his reputation shall have
9 the right either to appear personally before the agency
10 and testify on his own behalf as to matters relevant to
11 the testimony or other evidence complained of, or, in
12 the alternative, at the option of the agency to file a
13 statement of facts under oath relating solely to
14 matters relevant to the testimony or other evidence
15 complained of, which statements shall be incorporated
16 in the record of the investigatory proceeding.

17 The agency, at first, offered only the
18 opportunity to provide a statement of facts that they
19 would include in the report. They gave it at the very
20 first hearing to the company identified by the
21 whistleblower, Ms. Comma. That was extended to that --
22 to that company, and at least in the record of this
23 case, there was no -- no statement submitted on behalf
24 of that company.

25 For the defendant -- the plaintiffs here,

1 excuse me, the plaintiffs, who had objected to -- to
2 the existence of the Task Force, objected to the lack
3 of ability to cross-examine, they were extended the
4 right to file a statement of facts, but then in the
5 letter that Mr. Wells read into the record, it was
6 clarified that at the next hearing, they would invite
7 any of the -- any of those four companies to provide
8 witnesses to -- you know, to add to the public -- you
9 know, add to the public record.

10 And so with all that -- all of what the
11 statutes provided, again, the Court was not convinced
12 that the plaintiffs had made a sufficient case to
13 warrant a finding of likelihood of success on the
14 merits.

15 And I have to say that there was very little
16 discussion here of cases that were -- that were
17 important to the Court in trying to get a handle on
18 this whole sense of fairness. What's fair to these --
19 you know, fair to these -- to these plaintiffs? And,
20 you know, the fact that they got notice less than 24
21 hours before there was going to be negative information
22 about them, that's something that was of concern to me.
23 And then -- you know, to hear Mr. Chen, well, say we've
24 been criticized that we haven't been transparent
25 enough, we have to name names. And then today, seeing

1 Senator Sweeney seemed to be encouraging, name names.
2 You know this -- we want to know what's going on here.
3 It's important for the legislature to understand what
4 the Task Force is looking at.

5 And you know, it's clear from the legislative
6 history that New Jersey statute was patterned on the
7 Moreland Act, which is a New York statute and there
8 were a couple of cases, Weil v. New York State
9 Commission to Investigate Harness Racing, 205 Misc.
10 614; 128 N.Y.S. -- I think it may be supplement section
11 -- 2d 874 from 1954. And there was a series of
12 Moreland cases that gave the governor the right to
13 inquire into activities of state agencies and in this,
14 you know, in these -- the two cases that I looked at,
15 subpoena power was really one of the big -- was one of
16 the big issues. And the -- in this Harness Racing
17 case, there were third parties that were called to
18 provide information through these subpoenas to the
19 commission looking at harness racing in the State of
20 New York and the court said that those private third
21 parties had a legitimate connection to the government
22 action under scrutiny.

23 And to me, the -- you know, the -- any
24 company that applied to tax incentives, they have a
25 legitimate connection to the Task Force activity. And

1 the -- as I said, in terms of this Weil case, the
2 objection was to -- to the subpoenas and, you know, the
3 court found that if the commission is going to uncover
4 information concerning harness racing in the state, we
5 have to have the information from these people who
6 participate in the industry, and that petitioners enjoy
7 privileges granted under their licenses and their
8 personal connection with harness racing is a legitimate
9 subject of inquiry.

10 All of these -- the four companies who are
11 plaintiffs, they had -- they applied for grants. They
12 made certifications and submitted them to the EDA. It
13 was the EDA that provided the files to the Task Force.
14 They didn't rely upon the four companies, because the
15 subpoenas were withdrawn and the -- you know, the court
16 in this Weil case noted that the -- if the subpoenas
17 weren't honored, the investigation might well be
18 stymied upon its threshold.

19 And then there was a quote from Chief Judge
20 Cardozo from Matter of Edge Ho Holding Company, 256
21 N.Y. 374, that -- noting that if subpoenas are to be
22 quashed upon speculation upon forecasts of the
23 testimony and its probable importance, their activity,
24 the investigation would be paralyzed. And so in any
25 event, the court upheld in that Weil case the subpoena.

1 In another case under the Moreland Act, New
2 York Republican State Committee v. New York State
3 Commission on Government Integrity, 138 Misc. 2d 790;
4 525 N.Y.S. 2d 527 from 1988, a more recent decision.
5 The other one, I think, was 1954. There was a Moreland
6 Commission investigation with -- where subpoenas were
7 issued to third parties, and they were political
8 parties. And the aim of the commission was to
9 investigate instances of corruption in the
10 administration of government, and particularly, in
11 regard to certain election laws. And so, these were
12 subpoenas that were to the political parties looking
13 into the efficacy of the existing laws to promote
14 confidence in government and further the public
15 interest.

16 And there was -- there was concern and the
17 commission raised concern about misconduct of how
18 certain funds were handled by both political parties.
19 They subpoenaed both the Democrats and the Republicans.
20 The Republicans objected, as saying the commission
21 overstepped its legal authority, because they had
22 issued subpoenas to entities that were not department,
23 board, bureau or commission of the state, and that the
24 subpoena power should be limited to state entities and
25 not extend to third parties. And the Moreland Act was

1 then quoted, and it is -- it is similar to the New
2 Jersey statute including the right to subpoena and
3 require the attendance of witnesses.

4 And they -- they just noted that when you're
5 doing an investigation, under the Moreland Commission
6 statute, it's common to subpoena testimony or documents
7 from non-state entities or individuals whose activities
8 are regulated or directly relate to the laws or state
9 entities under scrutiny. They cite the Weil case and
10 then another one, Schiffman v. Bleakley, 46 N.Y.S. 2d
11 353, which looked into workers compensation laws, and a
12 physician was subpoenaed.

13 And the court noted that despite the
14 protestations of the Republican party there, the
15 relationship of that testimony to the mismanagement
16 alleged with the Board of Elections was that the focus
17 of the inquiry was on the Board of Elections, and the
18 efficacy of the laws in existence to promote the -- a
19 confidence in government and to ensure that the State
20 Board of Elections was doing what they -- what they
21 were supposed to do. And the Court said that the
22 petitioner's insistence that they are the focus of the
23 investigation is a misunderstanding as to the purposes
24 of the commission, and they said it was part of the
25 fact finding of the commission, and that the, you know,

1 it was -- it went on to talk about other inquiries that
2 have been done by the Commission on Government
3 Integrity, and how their fact finding bodies -- and
4 even though the commission may describe possible
5 misconduct, you know, by the time you get to the end of
6 the investigation, it would not necessarily be -- that
7 misconduct would be substantiated.

8 And there was a claim that the entities that
9 got the subpoenas, that they were issued in bad faith
10 as a means to harass the Republican party, and their
11 subpoenas were issued to both Democrats and
12 Republicans, and it's -- you know, a lot of the kinds
13 of claims that we hear from plaintiffs are reflected in
14 some of these cases looking at the -- looking at the
15 fairness of investigatory proceedings.

16 There was a First Amendment argument there
17 about chilling effect on free association and rights to
18 privacy, and the court -- the court rejected it,
19 because of the commission showing that there was a
20 legitimate state interest in the -- you know, in the
21 inquiry. And the court there didn't see how requiring
22 the -- the political parties there to disclose their
23 finances would have a chilling effect on any person's
24 First Amendment rights, and the -- so they rejected a
25 First Amendment claim there.

1 The Court also -- in terms of the due process
2 claims that have been raised by the plaintiffs, the
3 Pelullo v. State Commission on Investigation case at
4 249 N.J. Super. 336, an Appellate Division case from
5 1996, and there were several, you know, on the State
6 Commission of Investigation in New Jersey. Another
7 one, In Re: Vitabile, V-O-V-I-T-A-B-I-L-E [sic] 188
8 N.J. Super. 61 and the -- I think the oldest case of
9 the group, In Re: Zicarelli, 55 N.J. 249 from 1970.

10 In the Zicarelli case, the appellants refused
11 to answer questions before the State Commission of
12 Investigation even when they got a grant of immunity,
13 and they contended that the statute denied them due
14 process of law and denied them their rights under the
15 Bill of Rights, and the court said that's -- you know,
16 the State Commission on Investigation is not an
17 accusatory body, and that its purpose is to conduct
18 public hearings to ascertain facts. And the State
19 Commission on Investigation was looking into whether
20 there was probable cause to believe a criminal
21 violation had occurred, and the -- under the State
22 Commission of Investigation, the fact finding was to be
23 made public and could include conclusions as to
24 specific individuals.

25 And, nonetheless, the Court went on and noted

1 -- cited Hannah v. Larche, which was cited in the
2 Pelullo case also that Mr. Wells was reading at 363
3 U.S. 420 from 1960. And despite having an
4 investigatory body like the SCI that could make
5 findings public with conclusions as to specific
6 individuals, the court concluded -- and this was the
7 Supreme Court of New Jersey -- the SCI is in no sense
8 an accusatory body with -- an accusatory body. The
9 purpose is to find facts which may be used as the basis
10 for legislative and executive action that arises from a
11 review of the statute itself.

12 And it noted how the SCI was to make
13 recommendations to the governor and legislature with
14 respect to changes or additions to existing provisions
15 of law. And they found that the right to hold public
16 hearings was not an infraction of any constitutional
17 right of the individuals who were the subject to -- to
18 scrutiny in the course of the SCI public hearings. The
19 court said, we have a typical commission created to
20 discover and to publicize the state of affairs in a
21 criminal area to the end that helpful legislation may
22 be proposed and received needed public support. And
23 that the commission might aid law enforcement in
24 gathering evidence of a crime and transmitting it to
25 the appropriate agency does -- you know, does not turn

1 it into an accusatory -- an accusatory body. And the
2 aim was to aid the executive branch to obtain
3 information that, in fact, could be provided to
4 accusatory bodies, and the Supreme Court rejected the
5 due process -- the due process claims that had been
6 raised by the plaintiffs there.

7 You know, and when the plaintiffs or the
8 appellants, in the Zicarelli case claimed that their
9 individual rights, their constitutional rights were
10 denied, the Court said that the answer is that the role
11 of the SCI is not accusatory, and that the rights that
12 were accorded to those individuals are appropriate and
13 adequate in light of the agency's mission and powers.

14 They noted the governor is a party to the
15 legislative process. He has to give the state of the
16 state each year and can recommend to the legislature
17 measures for approval or disapproval, and they -- you
18 know, they turned back -- the court turned back a
19 separation of powers argument there.

20 And Pelullo, 294 N.J. Super. 336, the
21 Appellate Division case, the -- you know, the court
22 noted again that the SCI was not an accusatory body,
23 and that their aim was to make investigations and then
24 submit recommendations to the governor and the
25 legislature as to changes in the law. And there, the

1 plaintiff was given notice and the right to submit a
2 sworn affidavit. And that is similar to what was
3 accorded plaintiffs here, although they were also --
4 have also been accorded the right to provide witnesses
5 and testify, not just the -- not just the five minutes.

6 But many of the decisions rely upon -- you
7 know, frankly, before I leave Pelullo, the -- there
8 were the -- there were -- the SCI released a report
9 about organized crime in bars, which referenced the
10 plaintiff regarding a threat that the plaintiff was
11 alleged to have made against an individual, and there
12 were a lot of details here about a number of
13 individuals and actions that they took that could lead
14 -- potentially lead to criminal prosecution and again,
15 claims of violation of federal and state constitutional
16 rights, allegation that the plaintiff's reputation was
17 harmed when the SCI published its report about this
18 threat, and he also urged that he was entitled to
19 confront and cross-examine the person who had given the
20 information under the -- under subpoena. And, you
21 know, the court went on to say that due process is not
22 a fixed process -- I'm sorry -- a fixed concept, but a
23 flexible one. It depends upon the particular
24 circumstances, and they found that the SCI did not
25 require trial-type rights to be afforded to individuals

1 who were the subject of fact finding to the end that
2 helpful legislation may be proposed and received needed
3 public support.

4 They made the point that there wasn't an
5 adjudication that plaintiff was guilty of any crime,
6 and they don't have any -- that the SCI doesn't have
7 the right to do -- to pursue a criminal indictment,
8 neither does the -- neither does this Task Force. And
9 the court found that we don't perceive that the SCI
10 puts aside its investigative role in favor of an
11 accusatory one when it reports on plaintiff's
12 activities in this manner in its report.

13 The question was, was defendant given due
14 process in the investigative report. He was given an
15 opportunity to respond by sworn affidavit, which would
16 be included in the report. Plaintiff argues that he
17 was entitled to the full panoply of rights for one who
18 has been criminally accused, and the court said no.
19 The sufficiency of the process is appropriate for a
20 non-accusatory investigative body, and that they went
21 through a balancing of the governmental interests
22 against the private interests and found that
23 information that's readily available to the public that
24 the -- the individual identified by the SCI can't
25 expect it to remain private, and it's generally not

1 within the ambit of constitutional protection.

2 So these were EDA documents, documents
3 submitted by plaintiffs to the EDA that were the
4 subject of examination of two EDA officials as to
5 whether red flags on the -- that appeared to be in the
6 documents would be -- you know, should have given rise
7 to more intense vetting and the -- the court noted that
8 -- acknowledged the Doe v. Poritz case, but said we're
9 convinced the nature of the information disclosed, when
10 balanced against the strong state interest in
11 disclosure to inform the government and public as to
12 organized criminal activity, entitles plaintiff only to
13 reasonable protection against false and reckless
14 information by means of procedural safeguards without
15 interfering with the investigatory process.

16 And they rely on Hannah v. Larche, 363 U.S.
17 420, and then they gave that extensive quote from
18 Hannah about how due process is an elusive concept, and
19 its content varies according to specific factual
20 context. And when governmental action does partake of
21 an adjudication, such as when a general fact finding
22 investigation is being conducted, it is not necessary
23 that the full panoply of judicial procedures be used.

24 And the court went on to say, I think this
25 may be the section Mr. Wells quoted:

1 "The investigative process could be
2 completely disrupted if investigative hearings were
3 transformed into trial-like proceedings, and if persons
4 who might be indirectly affected by an investigation
5 were given an absolute right to cross-examine every
6 witness called to testify, that it would divert fact
7 finding agencies from their legitimate duties and would
8 inject collateral issues that would make the
9 investigation interminable.

10 "Even a person not called as a witness could
11 demand the right to appear and cross-examine any
12 witness whose testimony or sworn affidavit allegedly
13 defamed or -- defamed or incriminated him, and they
14 could call an unlimited number of witnesses of their
15 own selection. It would make a shambles of the
16 investigation and stifle the agency in its gathering of
17 facts."

18 And then they went on and found that the
19 safeguards afforded to plaintiff were -- were
20 sufficient.

21 And the Hannah v. Larche case, you know, 363
22 U.S. 420, there it was the Commission on Civil Rights
23 was investigating allegations made by individuals who
24 were unnamed about how they had been discriminated
25 against in terms of their deprivation of their right to

1 vote, and the court found that the Civil Rights
2 Commission investigation was, you know, was not an
3 accusatory commission. It was -- it was an
4 investigatory decision, and that there were different
5 rules of fair play as -- you know, as I just noted.
6 And that the rights claimed by plaintiffs, as the
7 rights claimed by plaintiffs here, are generally only
8 afforded in adjudicatory proceedings. And this is not
9 -- I mean, whether Mr. Chen sat at a bench, it's not an
10 adjudicatory proceeding, and he doesn't have the power
11 to do a criminal indictment. And it's an -- it's not
12 an accusatory -- not an accusatory body. As in the
13 Hannah v. Larche case, the only purpose is to find
14 facts to use as the basis for -- to make
15 recommendations as to how the EDA should be reformed
16 and how the legislation should be -- you know, should
17 be changed.

18 I don't think I need to go into the Hannah
19 rationale since it was really extensively --
20 extensively quoted in -- in Pelullo, but again, it's
21 this -- the Supreme Court of the United States says
22 this commission does not adjudicate, it does not hold
23 trials, it does not determine anyone's civil or
24 criminal liability. It does not issue orders. It
25 doesn't indict, punish or impose any legal sanctions.

1 Its purpose is to find facts which may subsequently be
2 used as the basis for legislative or executive, you
3 know, -- or executive action.

4 And so, you know, after looking at all those
5 cases, I can see why they weren't cited today by
6 plaintiffs' argument, but they were extremely
7 persuasive to me when I was looking at the -- you know,
8 whether or not this was fair and whether I should stop
9 something that was -- that was unfair. You know, I
10 understand. I looked at the newspaper articles. As a
11 result of the commission hearings, there's been a lot
12 of negative publicity. The Task Force is not the
13 media. What the media does is they have their -- you
14 know, their right to what they want to emphasize, but
15 as an investigatory body, the -- and not an accusatory
16 body, the plaintiffs' view the body as an accusatory
17 body. The actual testimony was a small part of the
18 total testimony taken by the commission. It was done
19 in the context of dealing with the underwriter and the
20 -- and one of the executives from EDA as to with the
21 underwriter, what should -- shouldn't the agency have
22 looked at this more carefully. And the underwriter
23 said, yeah, I think you're right. They should have
24 looked at some of these inconsistencies. And then with
25 Lezura, they were looking at the statute and how it was

1 changed at the last minute and concerns about
2 provisions that were put in, and frankly, we have the -
3 - you know, we have a Task Force that has to make
4 recommendations as to what should be included and what
5 should not be included.

6 The main -- the last piece, though, is that
7 when the Court balanced the interests of the private
8 parties, I think the case law that I've cited shows
9 that the public interest weighs out over -- over the
10 private interest when you are dealing with an
11 investigatory body established in the public interest.
12 And we have an entity that is -- we have Task Force
13 that's on the cusp of providing a preliminary report
14 based upon their fact finding, based upon these two
15 hearings.

16 And whether or not the legislature does
17 anything with it, I've looked at the statutes that were
18 included in the appendix provided by the parties.
19 Their proposals may be the ones that are in there,
20 maybe others, to give some extension to these two
21 programs, NJ Grow and ERG, but frankly, the public
22 interest is that this Task Force be allowed to report
23 before there is a -- before there's a vote in the
24 legislature. It may not affect the legislators one way
25 or the other. I don't know. I can't predict that, but

1 I think the public has a right to know what the -- what
2 the Task Force has found so they can contact their
3 legislators if they want.

4 I mean, I do these OPRA cases all the time.
5 Open Public Records, Open Public Meetings Act and New
6 Jersey is committed to public participation. Here's a
7 Task Force that was initiated after two independent
8 findings of significant problems with the EDA and a
9 Task Force that was asked to make recommendations as to
10 legislation. And to stop the Task Force at this point
11 when they -- as I said, they have a preliminary report,
12 balancing the public interest, it weighs -- it weighs
13 against the temporary restraint sought by plaintiffs.

14 And if I didn't mention it earlier, I'll
15 mention it again. I think I did mention it. That in
16 that Waste Management case on public -- you know, on
17 the -- how you weigh the public interest, the Court
18 noted that even where there is irreparable harm, the
19 public interest can trump private interests, and the
20 public interest behind this Task Force and its being
21 continued to do -- being able to continue to do its
22 work, to me, at this early stage of the proceedings, is
23 -- goes -- the balance goes in favor of continuing the
24 Task Force, letting its report go out to the public and
25 the legislature or the governor doing whatever --

1 whatever they determine is appropriate under the
2 circumstances. So for all those reasons, the Court
3 will deny the application for temporary restraints.

4 And we'll endeavor to get an order up on
5 eCourts within the next hour or so, so that the
6 plaintiffs' appellate rights can be pursued as earlier
7 as later tonight.

8 Anyway, thank you for your patience. I
9 warned you it would be long, but I do believe the
10 issues were serious enough to warrant the extensive --
11 the extensive oral opinion of the Court.

12 Thank you very much. Good night.

13 UNIDENTIFIED MALE ATTORNEY: Your Honor, --

14 THE COURT: Is there something else?

15 UNIDENTIFIED MALE SPEAKER: Could we -- I
16 want -- I want to understand what I'm permitted to do.
17 I don't want --

18 THE COURT: There's no stay.

19 UNIDENTIFIED MALE ATTORNEY: Okay.

20 THE COURT: There's no restraint against the
21 issuance of a report or the conducting of further
22 hearings.

23 UNIDENTIFIED MALE ATTORNEY: Thank you.

24 (Proceedings concluded.)

25 * * * * *

C E R T I F I C A T I O N

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