No. 20-569

In the

Supreme Court of the United States

ELIM ROMANIAN PENTECOSTAL CHURCH, ET AL.,
Petitioners,

v.

J.B. PRITZKER,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Claremont Institute's Center for
Constitutional Jurisprudence
c/o Dale E. Fowler School of Law
Chapman University
One University Drive
Orange, CA 92866
(877) 855-3330
caso@chapman.edu

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Statutes

INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the individual right of Free Exercise of Religion. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719 (2018); *Arlene's Flowers v. Washington*, 138 S.Ct. 2671 (2018); and *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

SUMMARY OF ARGUMENT

An emergency, especially one not involving an attack by foreign actors on United States soil, is not grounds for suspending the Constitution. Courts have sufficient tools to decide whether emergency orders interfere with constitutionally protected liberties without resort to blind deference. This is especially important where the orders do not result from the normal democratic procedures but are instead issued by an official claiming to act as both legislator and executive.

While it might make sense to grant some breathing space for an initial response to what appears to be an emergency, that deference cannot continue indefi-

---

[1] All parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

nitely. As time goes by, the officials claiming emergency authority to suspend constitutional rights must be required to present evidence – subjected to normal judicial procedures allowing for contrary evidence – that the emergency exists and that the chosen means of response are necessary to achieve a compelling interest.

Finally, the government may not justify the orders on the basis of what the government believes is appropriate religious practice. The Establishment Clause forbids government interference with religious practice.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Review to Decide that a Claimed Emergency Does Not Suspend the Constitution

In his dissenting opinion in *Korematsu*, Justice Jackson noted that an unconstitutional emergency order is likely to last only as long as the purported emergency. A judicial opinion that rationalizes such an order, however, creates a principle that "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of urgent need." *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting). In the wake of the current global pandemic our jurisprudence is now littered with loaded weapons. It is time for this Court to act and bring to a halt any notion that a claimed emergency – especially one not related to an attack by a foreign power – does not nullify the Constitution. "Blind judicial deference" has no place in the analysis of constitutional claims. *City of Richmond v. J. A.*

Croson Co., 188 U.S. 469, 501 (1989); *see O'Lone v. Estate of Shabazz*, 482 U.S. 342, 357-58 (1987) (Brennan, J., dissenting).

The order under review clearly targets religious worship. Religious services are specifically listed in the order and are limited in ways that other gatherings are not. This disparate treatment demonstrates a burden on the rights of Free Exercise of Religion. *Roman Catholic Diocese of Brooklyn v. Cuomo*, -- S.Ct. --, 2020 WL 6948354 at *2 (2020) (order granting applications for stay). "Because the challenged restrictions are not "neutral" and of "general applicability," they must satisfy "strict scrutiny," and this means that they must be "narrowly tailored" to serve a "compelling" state interest." *Id.*

The Free Exercise of Religion protected by the First Amendment reflects a recognition that citizens owe a higher duty to the Creator that preexists duties owed to secular society. James Madison articulated the principal religious argument for the right to accommodation of religion in his famous attack on Patrick Henry's general assessment bill, *Memorial and Remonstrance*.

Madison defined religion in that text in the constitutional sense as "the duty we owe to our Creator." J. Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), ¶ 11 reprinted in 5 The Founders Constitution 83 (Phillip Kurland and Ralph Lerner, eds.) (Univ. of Chicago Press 1987). Because beliefs cannot be compelled, he wrote, the "[r]elgion… of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it, as these may dictate." *Id.* According to Madison, the free exercise of religion is, by its nature,

an inalienable right because a person's beliefs "cannot follow the dictates of other men" and because religion involves a "duty towards the Creator." *Id.* He went on to implicitly express the doctrine of inalienable rights contained in the Declaration of Independence, explaining, "This duty [towards the Creator] is precedent both in order of time and in degree of obligation, to the claims of Civil Society" and, therefore, "in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance." *Id.*

The right to Free Exercise of Religion, Madison reasoned, precedes civil society and is superior even to legitimate government. Importantly, taking issue with *Smith* in *City of Boerne v. Flores*, Justice O'Connor pointed out that "Madison did not say that duties to the Creator are precedent only to those laws specifically directed at religion, nor did he strive simply to prevent deliberate acts of persecution or discrimination. The idea that civil obligations are subordinate to religious duty is consonant with the notion that government must accommodate, where possible, those religious practices that conflict with civil law." *City of Boerne v. Flores*, 521 U.S. 507, 561 (1997) (O'Connor, J., dissenting). The Founders appealed to "the Laws of Nature and Nature's God" to justify signing the Declaration of Independence. Decl. of Independence, ¶ 1, 1 Stat. 1. Free Exercise claims likewise entail duties to a higher authority. Because the Founders operated on the belief that God was real, the consequence of refusing to exempt Free Exercise claimants from even facially benign laws would have been to unjustly require people of faith to "sin and incur divine wrath." William Penn, *The Great Case for Liberty of Conscience* (1670) in WILLIAM PENN, THE POLITICAL

WRITINGS OF WILLIAM PENN, introduction and annotations by Andrew R. Murphy (Indianapolis: Liberty Fund, 2002).

Madison, therefore, did not conceive "of a secular society in which religious expression is tolerated only when it does not conflict with a generally applicable law," *City of Boerne*, 521 U.S. at 564 (O'Connor, J., dissenting), but rather he likely conceived of a society in which citizens have the individual liberty under the Free Exercise Clause to live out their faith. Madison observed that a man's religion "cannot follow the dictates of other men." *Memorial and Remonstrance*, 5 THE FOUNDERS CONSTITUTION 83. Such trespasses on the actual Free Exercise of Religion by the majority are an illegitimate interference with that inalienable right and would effectively write the Free Exercise Clause out of the Constitution.

The First Amendment protects religious exercise, not just religious belief. Indeed, a review of the writings of the founders and ratifiers of the Constitution demonstrate that exercise of religion was meant to be an unqualified right. At the very least, this Court must test government limits on religious exercise under the strict scrutiny test.

This Court has "a duty to defend the Constitution, and even a public health emergency does not absolve us of that responsibility." *Calvary Chapel Dayton Valley v. Sisolak*, 140 S.Ct. 2603, 2604 (2020) (Alito, J., dissenting from denial of injunctive relief). The Court can uphold this duty by application of strict scrutiny to the challenged regulation. This test gives the Court all the tools that it needs to review the challenged order. If the Governor can prove that the restrictions at

issue are necessary to achieve a compelling state interest, and are narrowly tailored to accomplish that goal, then the restrictions will be upheld. As explained in Part II, *supra*, the type of proof necessary for showing a compelling interest will necessarily vary based on the need for intervention at the early stages of the claimed emergency as opposed to orders issued months after the claimed emergency was first declared. However, the narrow tailoring analysis will remain the same as an important check government power.

II. Review Should Be Granted to Decide that the Level of Deference Granted at the Beginning of a Claimed Emergency Diminishes with the Passage of Time

This Court has noted that "[s]temming the spread of COVID-19 is unquestionably a compelling interest." *Roman Catholic Diocese of Brooklyn*, at *2. But that is only the beginning of the inquiry under strict scrutiny. Strict scrutiny requires the government to prove that the challenged order furthers the compelling interest and is narrowly tailored. *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010).

In the early stages of the pandemic, there was an understandable willingness on the part of some to defer to orders issued by governors because there was so little known about the disease. *Roman Catholic Diocese of Brooklyn*, at *5 (Gorsuch, J., concurring). But that deference has an expiration date. Once the initial stages of the claimed emergency have passed, the Court must "resume applying the Free Exercise

Clause" and apply strict scrutiny to edicts that interfere with religious liberty. *Id*.

As noted, strict scrutiny requires proof, not speculation, that the restriction is necessary to achieve the claimed compelling interest. *See Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 543 (1980). This requires a "strong basis in evidence" that the restriction is necessary to achieve the government's interest. *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996). Necessity in this context requires the government to prove that the challenged edict "would substantially address, if not achieve, the avowed purpose." *Id*. at 915.

In Free Exercise cases, such as the instant action, the government has a particularly high bar to clear in order to justify its restrictions. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2392 (2020) (Alito, J., concurring). The Governor here must prove that he is protecting an interest "of the highest order." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547 (1993). But exempting other activities from the restrictions imposed on religious worship defeat the Governor's claims. "'[A] law cannot be regarded as protecting an interest "of the highest order" ... when it leaves appreciable damage to that supposedly vital interest unprohibited.'" *Id*.; *Little Sisters of the Poor*, 140 S.Ct. at 2392 (Alito, J., concurring).

The Free Exercise Clause does not require the Court to ignore the pandemic and it does not deprive the government of the tools it needs to address the pandemic. However, blind judicial deference to edicts issued by governors claiming emergency powers is not permitted. We are well-past the initial stages of the

pandemic. Sufficient time has elapsed for the governors claiming emergency powers to come forward with scientific evidence that their edicts are truly necessary to achieve a compelling government interest and they are narrowly tailored to achieve that interest.

III. This Court Should Grant Review to Decide that Neither State Officials nor Courts Have the Power to Decide Whether a Particular Religious Practice Is Necessary

Underlying the order at issue in this case is the Governor's claim that he can decide which religious practices are or are not necessary. It seems that the Governor believes that he can limit attendance because not everybody needs to attend a worship service in order to practice their religion. Similarly, the court below ruled that the Governor was free to treat grocery stores and soup kitchens more favorably than houses of worship because "[f]eeding the body requires teams of people to work together in physical spaces, but churches can feed the spirit in other ways." *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 347 (7th Cir. 2020). The Establishment Clause, however, denies any authority to states or federal courts to dictate how a church can "feed the spirit."

Beyond its federalism component, the Establishment Clause protects an individual liberty of religion. *Zelman v. Simmons-Harris*, 536 U.S. 639, 679 (2002) (Thomas, J., concurring); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 52 (2004) (Thomas, J., concurring). It protects the individual's right to engage in religious worship without coercion. And it protects against government interference with the internal op-

eration of religions entities. It helps here to understand what the founding generation meant by the term "establishment of religion."

In colonial America, state establishments of religion were ubiquitous. While the Puritans ruled New England to advance their vision of a Christian commonwealth, the Church of England held the allegiances of colonies like Virginia and Georgia. Michael McConnell, *The Origins and Historical Understanding Of Free Exercise Of Religion*, 103 Harv. L. Rev. 1409, 1422-23 (1990) [hereinafter McConnell, *Origins of Free Exercise*]. New York and New Jersey welcomed those that did not fit into the Puritan or Anglican tradition. *Id.* Pennsylvania and Delaware were founded as safe havens for Quakers, while Maryland was founded as a refuge for English Catholics who suffered persecution in Britain. *Id.* Most notably, Roger Williams founded Rhode Island as a colony for Protestant dissenters after the General Court banished him from Massachusetts. *Id.* Thus, when Congress proposed an amendment banning the federal government from making any law "respecting the establishment of religion" it had something very specific in mind.

The key term is "establishment." The Congress that proposed the First Amendment and the states that ratified it had significant experience with the concept of religious establishments. Some establishments involved governmental coercion that compelled a *form* of religious observance. Thus, some states sought to control the doctrines and structure of the church. South Carolina did this through its 1778 Constitution requiring a church to ascribe to five articles of faith before being incorporated as a state

church. S.C. Const. of 1778 art. XXXVIII, reprinted in 2 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States 1626 (Ben Perley Poore ed., The Lawbook Exch. Ltd. 2d ed. 2001) (1878). Other states, like Virginia, sought to control the personnel of the church and vested the power of appointing ministers of the Anglican Church in local governing bodies known as vestries. Rhys Isaac, *Religion and Authority: Problems of the Anglican Establishment in Virginia in the Era of the Great Awakening and the Parsons' Cause*, 30 Wm. & Mary Q. 3 (1973).

The other type of government coercion at play in religious establishments involved coercion of the individual in his or her religious practice. Massachusetts, for instance, prosecuted Baptists who refused to baptize their children or attend Congregationalist services. Michael McConnell, *Establishment & Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev 2105, 2145 (2003)[hereinafter McConnell, *Establishment & Disestablishment*]. Georgia supported the state church through a liquor tax. *Id.* at 2154. Other states limited political participation to members of the state church. *Id.* at 2178.

The order in this case dictates how many people may attend a religious service, regardless of the size of the building in which the service is held. The state claims the power to decide whether it is necessary for an individual to be able to attend communal prayer, a praise and worship service, a Shabbat service, a khutbah, or the Holy Sacrifice of the Mass. The Court below agrees because in its view, there are other ways to feed the spirit. Yet the decision of how to feed the soul

is one that the Constitution reserves to the church, synagogue, mosque, or other religious entity. Government simply has no role in determining what is a sufficient exercise of religious worship. *See Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 199-200 (2012) (Alito, J., concurring); *see e.g., Frazee v. Illinois Dep't of Employment Sec.,* 489 U.S. 829, 833 (1989), *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 716 (1981), and *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. at 725.

Review should be granted to decide that even in a claimed emergency government has no role in deciding what types of worship are "sufficient." *See Employment Division v. Smith*, 494 U.S. 872, 887 (1990) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.")

CONCLUSION

Searching judicial review is especially important at this time because the orders at issue in this case, and similar orders in other states, are not imposed by the normal democratic process. Instead, governors, mayors, and local health officials have claimed emergency power to suspend constitutional liberties of speech, assembly, and, in this case, free exercise of religion. This Court should grant review to decide that such autocratic exercises of authority are not beyond the review of the judiciary.

November 2020 Respectfully submitted,

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
The Claremont Institute's Center for Constitutional Jurisprudence
c/o Chapman University Fowler School of Law
One University Drive
Orange, CA 92866
(877) 855-3330
caso@chapman.edu

Counsel for Amicus Curiae