No. 20-639

In the

Supreme Court of the United States

CALVARY CHAPEL DAYTON VALLEY,
Petitioner,

v.

STEVE SISOLAK, GOVERNOR OF NEVADA, ET AL.,
Respondents.

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

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

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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

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.

Too many lower courts, state and federal, have relied on the century-old decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) for the proposition that

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[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.

executive officers are entitled to suspend the constitution in response to a claimed emergency. But a claimed emergency, especially one not involving an attack by foreign actors on United States soil, is not grounds for suspending the Constitution. The lower courts have stretched the reasoning of *Jacobson* well-beyond its breaking point. This Court should grant review to put an end to this idea that *Jacobson* allows executive officials to ignore 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 indefinitely. 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. Review by this Court is urgently required.

REASONS FOR GRANTING THE WRIT

I. The Court should also grant review to clarify lower court confusion and clearly hold that *Jacobson* does not apply to free exercise challenges of COVID-19 restrictions.

Long obscure, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), upheld against a Due Process Clause challenge the state's power to fine anyone who refused a mandatory smallpox vaccination. Since 1905, courts have sporadically cited *Jacobson*, mostly in challenges to vaccination laws, but the case was otherwise generally ignored. Decided the same term as *Lochner v. New York*, 198 U.S. 45 (1905), *Jacobson* is a relic of a jurisprudence the Supreme Court has long since abandoned.

But this all changed in early 2020.[2] Governors across the country dusted off *Jacobson* and brought it back to life to support their lockdown measures, including the Respondent here. Unfortunately, these states and many courts have grossly misread *Jacobson*, mistakenly grafting the case onto modern constitutional precedent. Yet *Jacobson* provides no authority for limiting religious liberty in a pandemic. *Jacobson* is a due process case from the *Lochner* era where the petitioner failed to identify an actual constitutional right the state had infringed. It was pronounced long before the Bill of Rights were incorporated

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[2] According to a December 1, 2020 Westlaw search, courts cited *Jacobson v. Massachusetts,* 197 U.S. 11 (1905) an average of 6 times per year in its first 115 years of existence. The following year—this year—courts have cited the case 194 times, a 3224% increase.

against the states or the Court had developed its modern tiers of scrutiny. *Jacobson* thus has no relevance, even during a pandemic, to religious liberty claims under the Free Exercise Clause. Further, *Jacobson* declares that even when exercising police powers in an emergency, states still are limited by constitutional rights.

A. Situating *Jacobson* in its historical context.

1. The case itself.

Jacobson involved a state law authorizing municipalities to make vaccinations mandatory for anyone over the age of twenty-one if "necessary for the public health or safety." 197 U.S. at 12. While the vaccinations were free, refusal triggered a $5 fine—half a week's wages for the average earner in 1905.[3] Henning Jacobson was subsequently convicted of refusing to be vaccinated against smallpox, and he challenged this conviction. *Id*. at 13.

This Court upheld his conviction. In so doing, the *Jacobson* Court rejected three federal constitutional challenges to the state law—none of which involved the Free Exercise Clause. The Court easily batted down Jacobson's challenges under the Constitution's

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[3] See Census of Manufactures: 1905, available at https://babel.hathitrust.org/cgi/pt?id=nnc1.cu56779232&view=1up&seq=14. Half a week's wages would be almost $500 today. See Bureau of Labor Statistics, *Usual Weekly Earnings of Wage and Salary Workers Third Quarter 2020*, U.S. Department of Labor (Oct. 16, 2020), https://www.bls.gov/news.release/pdf/wkyeng.pdf (reporting that the "[m]edian weekly earnings of the nation's 109.7 million full-time wage and salary workers were $994 in the third quarter of 2020").

preamble and the Equal Protection Clause. *Id.* at 13-14, 22, 30. And the Court dispatched with Jacobson's due process argument that "a compulsory vaccination law is unreasonable, arbitrary, and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best." *Id.* at 26. The Court declared that "the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." *Id.* The Court did admit that state power could be "exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons." *Id.* at 28. But the Court found that the state law was not arbitrary, rather, it was "justified by the necessities of the case." *Id.*

In recalling what *Jacobson* did decide, it is valuable to note what it did not. Importantly, *Jacobson* did not conclude that the state's vaccination law overcame Mr. Jacobson's religious liberty claims. That's because there were no such claims before the Court. *See Capitol Hill Baptist Church v. Bowser,* No. 20-CV-02710 (TNM), 2020 WL 5995126, at *7 (D.D.C. Oct. 9, 2020) ("The unique array of claims before the *Jacobson* Court . . . included none under the First Amendment."). While it's true that there is a solitary passing reference to religion, this was not a statement on the Free Exercise Clause, but an abstract reference to liberty in the context of a military draft. *Jacobson*, 197 U.S. at 29. And it makes perfect sense that *Jacobson*

did not raise a federal Free Exercise Clause claim before the U.S. Supreme Court—the clause would not be incorporated against the states for another three and a half decades in *Cantwell v. Connecticut*, 310 U.S. 296 (1940). *See Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015) ("*Jacobson* did not address the free exercise of religion because, at the time it was decided, the Free Exercise Clause of the First Amendment had not yet been held to bind the states.").

What is more, *Jacobson* did not hold that constitutional rights get less protection during an emergency. The Court did recognize that "the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." 197 U.S. at 25. And the "mode or manner in which [public health and safety are to be safeguarded] . . . is within the discretion of the state." *Id*. But then the Court noted an important caveat: that discretion is "subject . . . to the condition that no rule prescribed by a state, nor any regulation adopted by a local governmental agency acting under the sanction of state legislation, shall contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument." *Id*. Thus, a health or safety regulation during an emergency, "even if based on the acknowledged police powers of a state, must *always* yield in case of conflict with the exercise by the general government of any power it possesses under the Constitution, or with any right which that instrument gives or secures." *Id*. (emphasis added). Under *Jacobson*, authority to swing the fist of state police power ends where the nose of constitutional rights begins.

2. Courts should read *Jacobson* as it was understood in 1905—not through a modern lens.

Given *Jacobson*'s birth in the *Lochner* era, it would be a mistake to view *Jacobson* through the lens of the Court's modern rights jurisprudence. Courts should be very wary of looking to *Jacobson* to decide current religious liberty claims when it (1) was decided before the Supreme Court developed its modern constitutional rights jurisprudence; (2) led to some of the Court's most repudiated cases[4]; (3) was decided by the *Lochner* Court under a completely different conception of due process that has since been rejected by the Court[5]; (4) never addressed a free exercise claim; (5) was decided decades before the Free Exercise Clause was incorporated against the states and the modern free exercise doctrine was developed; and (6) where the petitioner failed to identify a legitimate constitutional right. *See generally* Josh Blackman, *What*

[4] One of the Supreme Court's most infamous and since repudiated cases—*Buck* v. *Bell*, wherein the Court upheld the state's authority to forcibly sterilize people the state deemed "imbeciles"—directly relied on *Jacobson*: "The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson v. Massachusetts*, 197 U. S. 11, 25 S. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765. Three generations of imbeciles are enough." 274 U.S. 200, 207 (1927).

[5] While *Jacobson* used the term "reasonable," it was not preforming rational basis analysis. See Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 Harv. L. Rev. F. 179, 191 (2020) ("In other words, in a decision that predated even *Lochner* (by just under two months), the Supreme Court's reference to what was 'reasonable' was far more robust than what we tend to think of today as 'minimum rationality' rational basis review.").

Rights are "Essential"? The 1st, 2nd, and 14th Amendments in the Time of Pandemic, Social Science Research Network (Oct. 9, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3707739. Clearly, "[t]here are reasons to think that *Jacobson* is not an appropriate lodestar" in a religious liberty case involving COVID-19 regulations. *Capitol Hill Baptist Church*, 2020 WL 5995126, at *7.

True, this Court cited *Jacobson* in a later religious liberty case. In *Prince v. Massachusetts*, the Court opined that a parent "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds." 321 U.S. 158, 166 (1944) (citing *Jacobson*, 197 U.S. 11). Yet *Jacobson* cannot be read to support that proposition since it never addressed parental or religious rights. Also, this statement is dicta because *Prince* didn't involve compulsory vaccinations. Finally, *Prince* was decided nearly twenty years before the Court launched modern free exercise jurisprudence with its tiers of scrutiny in *Sherbert v. Verner*, 374 U.S. 398 (1963), making *Prince*'s relevance to current free exercise claims minimal at most.

B. *Jacobson* and the COVID-19 Pandemic.

1. During the pandemic, courts have usually misread *Jacobson*.

Unfortunately, most federal courts have not viewed *Jacobson* with the jaundiced eye history requires, misreading or overreading it. *See, e.g., In re Abbott*, 954 F.3d 772, 786 (5th Cir. 2020) ("*Jacobson* instructs that all constitutional rights may be reasonably restricted to combat a public health emergency."); *Lighthouse Fellowship Church v. Northam*, No. 2:20CV204, 2020 WL 2110416, at *4 (E.D. Va. May 1,

2020) (declaring that *Jacobson* limits the First Amendment); *Cassell v. Snyders*, No. 20 C 50153, 2020 WL 2112374, at *6 (N.D. Ill. May 3, 2020) ("During an epidemic, the *Jacobson* court explained, the traditional tiers of constitutional scrutiny do not apply."). These errors led one court to sardonically observe that "the permissive *Jacobson* rule floats about in the air as a rubber stamp for all but the most absurd and egregious restrictions on constitutional liberties, free from the inconvenience of meaningful judicial review." *Bayley's Campground, Inc. v. Mills*, 2020 WL 2791797, *8 (D. Me. May 29, 2020). *See also id.* ("This may help explain why the Supreme Court established the traditional tiers of scrutiny in the course of the 100 years since *Jacobson* was decided.").

Some courts, including the District Court in this case, have even pointed to Chief Justice Roberts' concurrence in *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) to justify their misreading. *See, e.g., 4 Aces Enterprises, LLC v. Edwards*, No. CV 20-2150, 2020 WL 4747660, at *9 (E.D. La. Aug. 17, 2020) (relying on Roberts' concurrence in *South Bay* to conclude that "[t]raditional doctrine does not control during a pandemic; *Jacobson* does"). But this view of *Jacobson* is a legal fiction. Just not the helpful kind.

In reality, Chief Justice Roberts cited *Jacobson* to observe that "[o]ur Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" *Id.* (quoting *Jacobson v.*, 197 U.S. at 38). That is as uncontroversial as it is true. *See Roman Catholic Diocese of Brooklyn, New York v. Cuomo,* 592

U.S. __, No. 20A87, slip op. at 2-3 (Roberts, C.J., dissenting). By constitutional design, the police power—the power to legislate on issues of health, safety, and morals—was left with the states and the people (the Constitution only providing the federal government with limited, enumerated powers). *See also S. Bay United Pentecostal Church v. Newsom,* 959 F.3d 938, 942 (9th Cir. 2020) (Collins, J., dissenting) ("*Jacobson* merely rejected what we would now call a 'substantive due process' challenge to a compulsory vaccination requirement, holding that such a mandate 'was within the State's police power.'") (quoting *Phillips,* 775 F.3d at 542).

2. Some jurists have accurately stated *Jacobson*'s modern role.

A few clear-eyed federal jurists have seen *Jacobson* for what it is—and what it is not. When this case was previously before the Court and the Court denied the application with an unsigned, *per curiam* opinion, Justices Thomas, Alito, Gorusch, and Kavanaugh dissented. *Calvary Chapel Dayton Valley v. Sisolak*, No. 19A1070, 2020 WL 4251360 (U.S. July 24, 2020). Justice Alito observed that "it is a mistake to take language in *Jacobson* as the last word on what the Constitution allows public officials to do during the COVID–19 pandemic." Pet. App. 29a (Alito, J., dissenting). Rather, the "[l]anguage in *Jacobson* must be read in context, and it is important to keep in mind that *Jacobson* primarily involved a substantive due process challenge to a local ordinance requiring residents to be vaccinated for small pox." *Id*. Thus, "[i]t is a considerable stretch to read the decision as establishing the test to be applied when statewide measures of indefinite duration are challenged under

the First Amendment or other provisions not at issue in that case." *Id*. at 29a-30a. Similarly, in his dissent, Justice Kavanaugh cited *Jacobson* merely for the principle that "courts should be extremely deferential to the States when considering a *substantive due process* claim by a secular business that it is being treated worse than another business." *Id*. at 43a (Kavanaugh, J., dissenting) (emphasis added).

And in *Diocese of Brooklyn*, Justice Gorsuch likewise viewed *Jacobson* as inapt for analysis of a free exercise challenge to COVID-19 restrictions. *See* slip op. at 3-6 (Gorsuch, J., concurring). He noted that *Jacobson* "involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction." *Id*. at 3. As to the mode of analysis, he observed that "*Jacobson* didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so." *Id*. at 4. Regarding the claimed substantive due process right in *Jacobson*, Justice Gorsuch noted that "[e]ven if judges may impose emergency restrictions on rights that some of them have found hiding in the Constitution's penumbras, it does follow that the same fate should befall the textually explicit right to religious exercise." *Id*. Finally, Justice Gorsuch distinguished the "avoidable and relatively modest" restriction at issue in *Jacobson* from a "ban [on] all traditional forms of worship . . . whenever the Governor decrees and for as long as he chooses." *Id*. at 4-5. And Justice Gorsuch concluded that "[n]othing in *Jacobson* purported to address, let alone approve, such serious and long-lasting intrusions into settled constitutional rights." *Id*. at 5.

Some lower federal judges and courts have also accurately read *Jacobson*, though they are in the minority—and not a single circuit has correctly read *Jacobson* in the Free Exercise context. For example, when *South Bay* was before the Ninth Circuit, California contended that *Jacobson* "extend[s] to the First Amendment and other constitutional provisions." *S. Bay*, 959 F.3d at 942 (Collins, J., dissenting). But Judge Collins correctly noted in dissent that "[n]othing in *Jacobson* supports the view that an emergency displaces normal constitutional standards." *Id.* Rather, under *Jacobson*, "an emergency may justify temporary constraints within those standards [of substantive due process]." *Id.* Thus, "*Jacobson*'s deferential standard of review is appropriate in that limited context [of substantive due process]." Further, "*Jacobson* says nothing about what standards would apply to a claim that an emergency measure violates some other, enumerated constitutional right; on the contrary, *Jacobson* explicitly states that other constitutional limitations may continue to constrain government conduct." *Id.* So, Judge Collins rightly concluded, the Plaintiffs' free exercise claim should be analyzed under "well-established" standards, not *Jacobson*. *See also County of Butler v. Wolf*, No. 2:20-CV-677, 2020 WL 5510690, *6 (W.D. Pa. Sept. 14, 2020) (observing that "when *Jacobson* was decided," the "century of development [that] has seen the creation of tiered levels of scrutiny for constitutional claims" "did not exist"; instead, the *Jacobson* Court applied "ordinary constitutional scrutiny . . . to maintain the independent judiciary's role as a guarantor of constitutional liberties—even in an emergency"); *Savage v. Mills*, No. 1:20-CV-00165-LEW,

2020 WL 4572314, at *5 (D. Me. Aug. 7, 2020) (rebuffing government arguments that *Jacobson* was "a de jure immunity talisman," or "the Rosetta Stone for evaluating the merits of a challenge to any COVID-19-related government regulation").

Likewise, in *Capital Hill Baptist Church*, "the District [of Columbia] urge[d] that *Jacobson* . . . relaxes the heavy burden that would normally fall on it." 2020 WL 5995126, at *7. While noting that courts "have recently invoked *Jacobson* when assessing whether governmental measures in response to the COVID-19 pandemic infringe on individual rights and liberties," the court strongly cautioned that "there are reasons to think that *Jacobson* is not an appropriate lodestar here." *Id*. The court then refused to follow *Jacobson* for a few reasons, including that "*Jacobson* addressed whether a state law mandating vaccination violated an individual's Fourteenth Amendment substantive due process" rights, not any claims "under the First Amendment." *Id*.

Similarly, in *Denver Bible Church v. Azar*, No. 1:20-cv-02362-DDD-NRN, 2020 WL 6128994 (Oct. 16, 2020), Colorado defended its COVID-19 regulations regarding churches by "argu[ing] that th[e] court's analysis begins and essentially ends with *Jacobson*." *Id*. at *7. But the court declared that it "cannot accept the position that the Constitution and the rights it protects are somehow less important, or that the judicial branch should be less vigilant in enforcing them, simply because the government is responding to a national emergency. The judiciary's role may, in fact, be all the more important in such circumstances." *Id*. So the court concluded that "while an emergency might provide justification to curtail certain civil rights, that

justification must fit within the framework courts use to evaluate constitutional claims in non-emergent times." *Id.*

This Court should grant review to clarify that *Jacobson* adds nothing to the analysis of a modern Free Exercise Clause claim.

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

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*, slip op. at 2-3 (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 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 III, *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.

III. 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*, slip op. at 4. 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*, slip op. at 10 (Gorsuch, J., concurring (slip op. at 3 of Gorsuch, J. concurrence)). But any leeway on the measure of proof required to support the state's compelling interest has an expiration date. Once the initial stages of the claimed emergency have passed, the Court must apply strict scrutiny to edicts that interfere with religious liberty. *Id.* That requires the Governor to prove the necessity of the restrictions.

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.

CONCLUSION

Jacobson is a due process case from the *Lochner* era where the petitioner failed to identify an actual constitutional right the state had infringed. It was pronounced long before the Bill of Rights were incorporated against the states or the Court had developed its modern tiers of scrutiny. *Jacobson* thus has no relevance, even during a pandemic, to religious liberty claims under the Free Exercise Clause. Further, *Jacobson* declares that even when exercising police pow-

ers in an emergency, states are still limited by constitutional rights. The Court should clarify this to provide much-needed guidance to the lower courts.

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.

December 2020 Respectfully submitted,

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