No. 20-A90

In The
Supreme Court of the United States

THE ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK,

Applicant,

v.

ANDREW M. CUOMO, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF NEW YORK,

Respondent.

To the Honorable Stephen Breyer,
Associate Justice of the United States Supreme Court
and Acting Circuit Justice for the Second Circuit

MOTION BY CENTER FOR CONSTITUTIONAL JURISPRUDENCE FOR LEAVE TO (1) FILE *AMICUS CURIAE* BRIEF, WITH ATTACHED BRIEF IN SUPPORT OF APPLICANT, AND (2) TO DO SO WITHOUT TEN DAYS' ADVANCE NOTICE TO THE PARTIES

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The Center for Constitutional Jurisprudence moves the Court for leave to file an amicus brief in support of Applicant's Emergency Application for Writ of Injunction, without the 10 days' advance notice to the parties of *amicus*'s intent to file as ordinarily required.

Considering the expedited briefing schedule set by the Court, it was not feasible to give 10 days' notice. Applicant has consented to the filing of the brief without such notice. Respondent has taken no position on the filing of the brief.

The Claremont 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. To that end, the Center has appeared in numerous cases before federal courts across the country as *amicus curiae* defending the right to the free exercise of religion. See, *e.g., Dignity Health* v. *Minton*, No. 19-1135; *Fulton* v. *City of Philadelphia,* No. 19-123; *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049 (2020). Given the egregious nature of the government's actions in this case, the Center has a strong interest in filing this *amicus* brief to defend the Applicant's religious liberty and assist the Court in its decision making.

The *amicus* brief includes relevant material not fully brought to the attention of the Court by the parties. See Sup. Ct. R. 37.1. The brief describes in depth the seminal case federal courts have relied on in restricting religious liberty during the COVID-19 pandemic: *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905). The brief further explains how many lower courts and governors have misread the case,

including here, resulting in the wrong analysis of federal free exercise claims in the face of government restrictions aimed at limiting the spread of the pandemic. The widespread infringement of religious liberty and the numerous lower court errors create exceptional circumstances that warrant the granting of the Center permission to be heard on Applicant's Emergency Application for Stay. Amicus therefore requests its motion be granted.

Respectfully submitted,

/s/ Anthony T. Caso

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INTERESTS OF AMICUS CURIAE[1]

The Claremont 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. To that end, the Center has appeared in numerous cases before this Court as *amicus curiae* defending the right to the free exercise of religion. See, *e.g., Dignity Health* v. *Minton*, No. 19-1135; *Fulton* v. *City of Philadelphia,* No. 19-123; *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049 (2020). Given the egregious nature of the government's actions in this case, the Center has a strong interest in filing this *amicus* brief to defend the Applicant's religious liberty and assist the Court in its decision making.

SUMMARY OF ARGUMENT

Long obscure, *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905), upheld the state's power to penalize a person who refused a mandatory smallpox vaccination and raised a Due Process Clause challenge. 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. Governors across the country dusted off

[1] *Amicus* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus*, its members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

Jacobson and brought it back to life to support their lockdown measures. 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. That's because it 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 powers in an emergency, states still are limited by constitutional rights.

ARGUMENT

I. Situating *Jacobson* In Its Historical Context.

A. 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.[2] Henning Jacobson was subsequently convicted of refusing to be vaccinated against smallpox, and he challenged this conviction. *Commonwealth* v. *Jacobson*, 183 Mass. 242 (Mass.

[2] 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").

1903).

The U.S. Supreme 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. First, the Court easily rejected Jacobson's contention that the state vaccination law violated rights that were secured "by the preamble to the Constitution of the United States, and tended to subvert and defeat the purposes of the Constitution as declared in its preamble." 197 U.S. at 13-14. The Court did so because, in its view, the Preamble "has never been regarded as the source of any substantive power conferred on the government of the United States, or on any of its departments." *Id*. at 22.

Second, the Court quickly batted down Jacobson's argument that the state law "was opposed to the spirit of the Constitution," *id*. at 14, because, the Court observed, it did not need "to go beyond the plain, obvious meaning of the words in those provisions of the Constitution which, it is contended, must control our decision," *id*. at 22. Third, the Court rejected Jacobson's claim that the vaccination law violated the Fourteenth Amendment's Privileges or Immunities, Due Process, and Equal Protection Clauses. The Court did not even address the Privileges or Immunities Clause argument in light of its futility after the *Slaughter-House Cases*, 83 U.S. 36 (1873). Regarding the Equal Protection Clause argument, which focused on an exemption for children, the Court concluded that because all adults were treated the same, no constitutional violation existed as "there are obviously reasons why regulations may be appropriate for adults which could not be safely applied to persons of tender years." *Id*. at 30.

Finally, 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 claim. That's because there was no such claim before the Court. See *Calvary Chapel Dayton Valley* v. *Sisolak*, 140 S. Ct. 2603, 2608 (2020) (Alito, J., dissenting) (noting that there were no First Amendment challenges "at issue in [Jacobson]"). See also *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. ("The liberty secured by the 14th Amendment, this court has said, consists, in part, in the right of a person 'to live and work where he will' and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense.") (quoting *Allgeyer* v. *Louisiana*, 165 U. S. 578 (1897)). 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. The reason Mr. Jacobson lost was not because the Supreme Court gave less protection to his constitutional rights and more deference to state regulations during an emergency. He lost because he failed to identify an actual constitutional right in challenging the state law. If he had, the outcome likely would have been different.

B. Courts should read *Jacobson* as it was understood in 1905, and not through the lens of modernity.

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. Even worse, some courts have concluded *Jacobson* anachronistically modifies that modern jurisprudence. To avoid that fundamental error, five principles are useful. See generally Josh Blackman, *What 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.

First, *Jacobson* was decided when the Court viewed the Fourteenth Amendment's Due Process Clause as prohibiting "arbitrary" or "irrational" legislation. This is far different from the Court's modern rational basis test.[3] Second, the idea of incorporation against the states was not yet in the air in 1905—the controlling caselaw held that the Bill of Rights did not limit the states. See *United States* v. *Cruikshank*, 92 U.S. 542 (1876).

Third, the beginning of the tiers of scrutiny that guides modern constitutional rights analysis would not occur for another thirty-three years with *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). While the Court sometimes referred to "fundamental" rights, it was not referencing the types of modern rights that today invoke strict scrutiny under the Due Process Clause. Likewise, the Court had yet to come up with "suspect" classifications that would require strict scrutiny under the Equal Protection Clause. Instead, courts sought to discover whether a state had enacted "class legislation" for invalid "motives."[4]

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[3] 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.").

[4] See *Lochner* v. *New York*, 198 U.S. 45, 64 (1905) (implying that the New York Bakeshop Act was

Fourth, at the time *Jacobson* was decided, the Court had decided almost no cases under the Bill of Rights, and what few there were or that would come soon thereafter were out of step with the Court's modern expansive protections of constitutional rights. For example, the Court's first significant Free Speech cases would not occur until 1919.[5] But those cases rejected free speech claims against prosecutions for speech that criticized the federal government—a view the Court has subsequently roundly renounced. Finally, fifth, the Court had yet to develop its jurisprudence on "bodily autonomy." In fact, 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).

True, the Supreme Court cited *Jacobson* in a later religious liberty case. In *Prince* v. *Massachusetts*, 321 U.S. 158 (1944), the aunt who was the custodian of her nine-year-old niece was convicted of furnishing the girl with Jehovah's Witnesses' magazines and allowing her to sell them on the streets, in violation of child labor laws. *Id*. at 160. In her defense, the aunt raised due process and freedom of religion claims. *Id*. at 164. The Court rejected these claims. In so doing, in dicta, the Court opined that a parent "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds." *Id*. at 166 (citing *Jacobson*, 197 U.S. 11). Yet *Jacobson* cannot be read to support that proposition

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enacted for improper "other motives"); David E. Bernstein, *Revisiting* Yick Wo, 2008 Ill. L. Rev. 1393 (observing that the reason the Court found a laundry ordinance that targeted Chinese people as unconstitutional was not because of the targeting, but because the ordinance arbitrarily denied a single class of people a property right).

[5] See *Schenck* v. *United States*, 249 U.S. 47 (1919); *Debs* v. *United States*, 249 U.S. 211 (1919); and *Abrams* v. *United States*, 250 U.S. 616 (1919).

since it never addressed parental or religious rights. Also, this statement is dicta because *Prince* did not involve compulsory vaccinations. Finally, *Prince* was decided nearly twenty years before the Court ushered in its modern free exercise jurisprudence with its tiers of scrutiny in *Sherbert* v. *Verner*, 374 U.S. 398 (1963). This makes *Prince*'s relevance and usefulness to current free exercise claims minimal at best.

In sum, courts should be very wary of looking to a precedent for deciding a current religious liberty claim when that precedent (1) was handed down in a time before the Supreme Court developed its modern constitutional rights jurisprudence; (2) led to some of the Court's most repudiated cases; (3) was decided by the *Lochner* Court under a completely different conception of due process that has since been rejected by the Court; (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 *Capitol Hill Baptist Church*, 2020 WL 5995126, at *7 (observing "there are reasons to think that *Jacobson* is not an appropriate lodestar" in a religious liberty case involving COVID-19 regulations).

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

Unfortunately, some federal courts have not viewed *Jacobson* with the jaundiced eye history requires, often uncritically following a previous court's misreading of the case or plucking quotations from *Jacobson* without considering their context. As one federal district court observed earlier this year, "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.")

A. During the pandemic, courts have often misread *Jacobson*, erroneously grafting it onto modern Supreme Court jurisprudence.

Most federal courts grappling with COVID-19 restrictions have misunderstood *Jacobson*, misreading or overreading it to stand for propositions of law it simply cannot support. The District Court here was no exception. In denying Applicant's motion for a temporary restraining order and preliminary injunction, the court observed that "the government is afforded wide latitude in managing the spread of deadly diseases under [*Jacobson*]." Applicant's Exhibit C at 5. So the court concluded that "in light of *Jacobson* and the Supreme Court's recent decision in *South Bay*, it cannot be said that the Plaintiff has established a likelihood of success on the merits." *Id*. at 5.

Other examples include the Fifth Circuit, which stated that "*Jacobson* instructs that *all* constitutional rights may be reasonably restricted to combat a public health emergency." *In re Abbott*, 954 F.3d 772, 786 (5th Cir. 2020) (emphasis added). That statement is as breathtaking as it is wrong. Is there any case in the Supreme Court's pantheon that allows for all constitutional rights to be restricted? None that *amicus* is aware of. Certainly not *Jacobson*, which never stated or even hinted at such a holding. In fact, *Jacobson* stated just the opposite—any state regulation must fall before a constitutional right. 197 U.S. at 25.

And while *In re Abbott* dealt with abortion rights, the Fifth Circuit went out of its way in dicta to opine that a *Jacobson* "analysis would apply, for example, to an

emergency restriction on gathering in large groups for public worship during an epidemic." *Id*. at 777 n.1. This makes little sense for the reasons noted above. That *Jacobson* might have some relevance to abortion rights juxtaposed against public health concerns could be true given the right to an abortion stems from the Due Process Clause, the same clause invoked and rejected in *Jacobson*. But to extend that precedent to all constitutional rights is not only more than *Jacobson* can bear, it is contradicted by the Court's statements in *Jacobson*. 197 U.S. at 25. Likewise, seeming to forget that *Jacobson* did not deal with the First Amendment, was decided decades before the Free Exercise Clause was incorporated against the states, and cautioned that the state's police power could not infringe constitutional rights, the U.S. District Court for the Eastern District of Virginia wrote that the *Jacobson* limited the First Amendment. See *Lighthouse Fellowship Church* v. *Northam*, No. 2:20CV204, 2020 WL 2110416, at *4 (E.D. Va. May 1, 2020).

Or consider the U.S. District Court for the Northern District of Illinois. In one case, the court determined that "[e]ven if this case falls outside *Jacobson*'s emergency crisis standard, Plaintiffs have failed to show a likelihood of success under traditional First Amendment analysis." *Illinois Republican Party* v. *Pritzker*, No. 20 C 3489, 2020 WL 3604106, at *4 (N.D. Ill. July 2, 2020), *aff'd on other grounds*, No. 20-2175, 2020 WL 5246656 (7th Cir. Sept. 3, 2020). But *Jacobson* did not create a separate standard for constitutional analysis of the First Amendment—or any constitutional right—during an emergency crisis; *Jacobson* merely found that the state law did not violate equal protection and was not arbitrary, the *Lochner*-era due process standard that

the Court has long since abandoned.

Similarly, in another case the same court declared that "[d]uring an epidemic, the *Jacobson* court explained, the traditional tiers of constitutional scrutiny do not apply." *Cassell v. Snyders*, No. 20 C 50153, 2020 WL 2112374, at *6 (N.D. Ill. May 3, 2020). But *Jacobson* says no such thing. As already observed, this statement by the court is factually impossible: *Jacobson* was decided over three decades *before* the Court began to even hint at tiers of scrutiny in *Carolene Products*, tiers that would take further time to refine into their modern version. See *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"). The *Jacobson* Court did not possess a time machine.

Most significantly, Chief Justice Roberts, in a five-paragraph concurrence no other member of the Court joined, recently cited to *Jacobson* in *S. Bay United Pentecostal Church* v. *Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring). The case involved a church's challenge to California COVID-19 laws that limited "attendance at places of worship to 25% of building capacity or a maximum of 100 attendees." *Id.* The church applied for injunctive relief from the Supreme Court, which the Court denied in a 5-4 vote with the Chief Justice voting with the majority. *Id*.

Avoiding the wildly overbroad readings of *Jacobson* entertained by some lower courts, Chief Justice Roberts cited *Jacobson* in observing 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*, 197 U.S. at 38). That is as uncontroversial as it is true. 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) ("As the Second Circuit has recognized, *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).

The Chief Justice said nothing about *Jacobson*'s authority to limit the First Amendment. Yet that has not stopped lower courts from subsequently reading Chief Justice Roberts' concurrence for something it never stated. See also Applicant's Exhibit C at 4-5 (the district court here also relied on Chief Justice Roberts' concurrence to understand *Jacobson* and deny relief). For instance, one federal district court, relying on the Chief Justice's concurrence, declared that "[t]raditional doctrine does not control during a pandemic; *Jacobson* does." *4 Aces Enterprises, LLC* v. *Edwards*, No. CV 20-2150, 2020 WL 4747660, at *9 (E.D. La. Aug. 17, 2020). See also *First Baptist Church v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021, at *4 (D. Kan. Apr. 18, 2020) (admitting that *Jacobson* "did not deal with a question of religious liberty," but concluding that *Jacobson*, and not *Employment Division v. Smith*,

controlled challenges to government burdens to the free exercise of religion during the current pandemic). But that doctrine can be no more found in the Chief Justice's concurrence than it can be found in *Jacobson* itself.

In short, a *Jacobson* exception to traditional doctrine is a legal fiction. Just not the useful kind.

As noted by Judge Park in his dissent from the Second Circuit's denial of Applicant's motion for an injunction pending appeal, Governor Cuomo has made the same analytical error, relying on *Jacobson* to push the restrictions at issue here. See Applicant's Exhibit A at 7 ("[T]he Governor overstates the import of *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), which upheld a mandatory vaccination law against a substantive due process challenge. *Jacobson* was decided before the First Amendment was incorporated against the states, and it did not address the free exercise of religion.") (internal quotation marks omitted).

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

Fortunately, some jurists have seen *Jacobson* for what it is—and what it is not. 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). Writing in dissent, Judge Collins strongly disagreed. He correctly pointed out 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]. It might have been relevant here if Plaintiffs were asserting a comparable substantive due process claim, but they are not." *Id.* Instead, Plaintiffs were asserting a free exercise claim. Judge Collins further accurately observed that "*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*.

More significantly, at least four members of this Court read *Jacobson* similarly to Judge Collins in *Calvary Chapel*, which came two months after *South Bay*. *Calvary Chapel* involved a Nevada COVID-19 regulation that limited houses of worship to fifty people, regardless of how many people such houses could hold. 140 S. Ct. at 2604 (Alito, J., dissenting). Yet the same regulation allowed commercial establishments (i.e., casinos, gyms, bars, and restaurants) to operate at up to 50% of their capacity. *Id.* After losing in the lower courts, the church sought injunctive relief from the Supreme Court. The Court denied the application with an unsigned, per curiam opinion, but Justices Thomas, Alito, Gorusch, and Kavanaugh dissented; they would have granted the injunction. *Id.* at 2603. Justices Alito, Gorsuch, and Kavanaugh penned dissents.[6]

In his dissent, Justice Alito observed that "it is a mistake to take language in

[6] Justice Gorsuch's dissent, only a paragraph in length, did not discuss *Jacobson*. See *Calvary Chapel Dayton Valley* v. *Sisolak*, 140 S. Ct. 2603, 2609 (Gorsuch, J., dissenting).

Jacobson as the last word on what the Constitution allows public officials to do during the COVID–19 pandemic." *Id.* at 2608 (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.* 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 2614 (Kavanaugh, J., dissenting) (emphasis added).

A few other federal courts have accurately read *Jacobson* as well. For instance, the U.S. District Court for the Western District of Pennsylvania observed 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." *Butler,* 2020 WL 5510690, at *6. 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." *Id.* In similar fashion, the U.S. District Court for the District of Maine rebuffed 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." *Savage* v. *Mills*, No. 1:20-CV-00165-

LEW, 2020 WL 4572314, at *5 (D. Me. Aug. 7, 2020). Rather, *Jacobson* was about "a different public health crisis in a different time, threatening different types of injuries to the Plaintiffs." *Id*. If courts were to follow *Jacobson*, it would mean they would "routinely dismiss cases at the pleading stage based on the immediate evaluation of the merits of governmental action in derogation of constitutional rights." *Id*. This same court in another case characterized *Jacobson* as merely "a case rejecting a 'substantive due process' challenge to a compulsory vaccination requirement." *Bayley's Campground*, 2020 WL 2791797, at *7. What is more, *Jacobson* does not usurp traditional modern doctrine because "the Supreme Court established the traditional tiers of scrutiny in the course of the 100 years since *Jacobson* was decided." *Id*. at *8.

Just last month two more federal district courts avoided the temptation of misreading or overreading *Jacobson*. In *Capital Hill Baptist Church*, a case involving a religious liberty challenge to D.C.'s COVID-19 restrictions, "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 some 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 noted a few reasons why it chose not to follow *Jacobson*, 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.*

Likewise, the U.S. District Court for the District of Colorado swatted away an attempt by the state of Colorado to justify, based on *Jacobson*, its infringement of churches' free exercise rights via COVID-19 restrictions. See *Denver Bible Church* v. *Azar*, No. 1:20-cv-02362-DDD-NRN, 2020 WL 6128994 (Oct. 16, 2020). In the case, Colorado "argue[d] 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.* Furthermore, the court pointed out that "*Jacobson* itself says that 'no rule prescribed by a state, nor any regulation adopted by a local governmental agency acting under the sanction of state legislation' to safeguard public health and safety may 'contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument.'" *Id.* (quoting *Jacobson*, 197 U.S. at 25). "In other words," the court concluded, "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. Jacobson* thus adds nothing to the analysis of a modern Free Exercise Clause claim.

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 powers in an emergency, states are still limited by constitutional rights.

The Emergency Application for Writ of Injunction should be granted.

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Respectfully submitted,

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