

No. 21-698

IN THE
Supreme Court of the United States

COUNTY OF BUTLER, *et al.*,

Petitioners,

v.

GOVERNOR OF THE COMMONWEALTH
OF PENNSYLVANIA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

**BRIEF OF *AMICUS CURIAE* NEW JERSEY
BUSINESS & INDUSTRY ASSOCIATION
IN SUPPORT OF THE PETITION
FOR A WRIT OF CERTIORARI**

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Third Circuit erred in holding that Petitioners' constitutional challenge to the business closure orders imposed by the Executive Branch of the Commonwealth of Pennsylvania is moot.

TABLE OF CONTENTS

	<i>Page</i>
QUESTION PRESENTED	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iii
INTEREST OF THE <i>AMICUS CURAIE</i>	1
SUMMARY OF ARGUMENT.....	1
ARGUMENT.....	2
This Court Should Reverse the Third Circuit’s Decision on Mootness in Favor of a Resolution of the Important Constitutional Issues at Stake in this Appeal	2
CONCLUSION	7

TABLE OF CITED AUTHORITIES

	<i>Page</i>
Cases	
<i>Brach v. Newsom</i> , 6 F.4th 904 (9th Cir. 2021), <i>reh'g en banc</i> granted, -- 4th --, 2021 WL 5822544 (Dec. 8, 2021)	2, 7
<i>Calvary Chapel Dayton Valley v. Sisolak</i> , 140 S. Ct. 2603 (2020).	4
<i>Cnty. of Butler v. Wolf</i> , 486 F. Supp. 3d 883 (W.D. Pa. 2020)	4
<i>Elim Romanian Pentecostal Church v. Pritzker</i> , 962 F.3d 341 (7th Cir. 2020), <i>cert. denied</i> , 141 S. Ct. 1753 (2021)	2, 6
<i>Friends of the Earth, Inc. v.</i> <i>Laidlaw Environmental Services (TOC), Inc.</i> , 528 U.S. 167 (2000).	5, 6
<i>Jacobson v. Massachusetts</i> , 197 U.S. 11 (1905)	1, 3, 4
<i>Roman Catholic Diocese of Brooklyn v. Cuomo</i> , 141 S. Ct. 63 (2020).	2, 4, 5

INTEREST OF THE *AMICUS CURIAE*

Founded in 1910, Amicus Curiae New Jersey Business & Industry Association (“NJBIA”) is the nation’s largest single statewide organization of employers, with nearly 10,000 member companies reflecting all industries and representing every region of New Jersey.¹ Its membership ranges from most of the 100 largest businesses in New Jersey to thousands of small and medium-sized companies from every sector of the economy. Its mission is to provide information, service, and advocacy for its members to build a more prosperous New Jersey.

Since the onset of the COVID-19 pandemic, the NJBIA’s members have been subject to significant restrictions on the ordinary operation of their businesses. Because any test announced by the Court would govern the constitutionality of the Executive Orders imposed in New Jersey, the NJBIA has a strong interest in ensuring that the correct analytical framework is in place to safeguard the constitutional rights of its members.

SUMMARY OF ARGUMENT

Petitioners’ civil action raises an issue of substantial public importance that has emerged in response to state action seeking to stem the spread of COVID-19: whether the disjunctive test announced in *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905) governs Petitioners’ constitutional

1. No counsel for any party authored this brief, in whole or in part. No person or entity other than amicus contributed monetarily to its preparation or submission. On November 29, 2021, counsel of record for all parties received notice of the NJBIA’s intention to file this brief. Counsel of record consented to the NJBIA’s filing of this brief.

claims, as the Commonwealth of Pennsylvania argued below. Because the Third Circuit dismissed the appeal and vacated the judgment on mootness grounds, there has been no ruling on this important issue regarding the correct analytical framework.

The NJBIA respectfully submits that the Third Circuit erred in holding that intervening events mooted this case. The decision below conflicts with this Supreme Court's recent decision in *Roman Catholic Diocese of Brooklyn v. Cuomo* ("*Diocese*"), 141 S. Ct. 63 (2020). More significantly, there is disagreement among the circuits. The Third Circuit's decision conflicts with *Brach v. Newsom*, 6 F.4th 904 (9th Cir. 2021), *reh'g en banc granted*, -- 4th --, 2021 WL 5822544 (Dec. 8, 2021); and *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1753 (2021). Lastly, the unprecedented COVID-19 pandemic continues to challenge our state and local governments' ability to adopt appropriate responsive measures. Our state executive leaders' ability to reinstate old restrictions and craft new ones must be accord with concomitant judicial standards developed in response to the pandemic. This Court should grant the Petition for a Writ of Certiorari, hold that Petitioners' constitutional claims are not moot, and remand this matter for an adjudication on the merits.

ARGUMENT

This Court Should Reverse the Third Circuit's Decision on Mootness in Favor of a Resolution of the Important Constitutional Issues at Stake in this Appeal.

This appeal presented a question of significant importance to businesses residing within the Third

Circuit. The NJBIA respectfully submits that the Third Circuit's mootness decision should be reversed and this matter be remanded to allow the Third Circuit to address important constitutional issues that are likely to reoccur. For the reasons that follow, this case falls squarely within the "voluntary cessation" exception to the mootness doctrine.

Since the onset of the COVID-19 pandemic, courts around the country have been grappling with the constitutionality of various state-imposed restrictions on businesses, worship, and many ordinary facets of everyday life. When presented with arguments in support of and in opposition to these restrictions, lower courts have been tasked with reconciling the modern tier-based levels of constitutional scrutiny with this Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905). The *Jacobson* Court held that it may set aside an exercise of the police power when the state action "has no real or substantial relation" to the promotion of the general welfare; *or* "is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Id.* at 31.

As Justice Alito correctly noted,

"[i]t 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. Language 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. It 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.”

Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2608 (2020) (Alito, J., dissenting). Justice Gorsuch has likewise stated that “*Jacobson* hardly supports cutting the Constitution loose during a pandemic. That decision involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction.” *Diocese*, 141 S. Ct. at 70 (Gorsuch, J., concurring).

The NJBIA agrees. *Jacobson* did not announce a test to be applied in *all* cases challenging state action taken in response to a pandemic. The district court correctly held in this case that “ordinary constitutional scrutiny is necessary to maintain the independent judiciary’s role as a guarantor of constitutional liberties—even in an emergency.” *Cnty. of Butler v. Wolf*, 486 F. Supp. 3d 883, 901 (W.D. Pa. 2020).

To date, this Court has not addressed the continuing viability of the *Jacobson* doctrine in a majority opinion. Lower courts thus continue to lack guidance on how to reconcile this Court’s precedents. Complicating these matters further is the ever-changing nature of COVID-19 restrictions given many state executive branch’s blank check writing authority to adopt, modify, rescind, and reinstitute emergency measures. Accordingly, Petitioners request this Court clarify the application of the mootness doctrine in the COVID-19 setting and reverse the decision below so that the parties can get an answer on the underlying constitutional questions presented.

The NJBIA respectfully submits that the Third Circuit erred dismissing this appeal as moot. The issues presented remain ripe for review given the Commonwealth of Pennsylvania’s authority to reimpose substantially similar restrictions *sua sponte* and at any time. Given the ever-evolving nature of COVID-19 pandemic and the broad discretion granted to the Executive Branch, COVID-19 restrictions fall squarely within the “voluntary cessation” doctrine. The reinstatement of capacity restrictions and closure orders expose the business community to irreparable harm while awaiting judicial resolution. The business community needs a definitive and immediate ruling on the issues presented in the underlying appeal.

Voluntary cessation of the contested conduct makes litigation moot only if it is “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000). A series of cases have applied this doctrine to hold that challenges to COVID-19 restrictions were not rendered moot by subsequent repeal or amendment.

In *Diocese*, this Court rejected a mootness argument in connection with New York’s “zone” system of capacity limits for religious services. New York had already reclassified the areas in question and expanded the capacity limits by the time the appeal reached the Supreme Court. *See Diocese*, 141 S. Ct. at 66-68. The Court concluded the matter was not moot, noting that the plaintiffs remained under a threat that the areas would be reclassified, and in the event that that happened, the plaintiffs would likely not be able to secure relief from the Court before experiencing irreparable harm. *See id.* at 68-69.

The Seventh Circuit correctly applied the foregoing principles in *Elim Romanian Pentecostal Church*. In that case, Illinois contended that the Governor’s rescission of an executive order limiting the size of public assemblies rendered the appeal moot. *See Elim Romanian Pentecostal Church*, 962 F.3d at 344. The Seventh Circuit disagreed. *See id.* at 344-45. The Court emphasized that the Executive Branch reserved the right to reinstate the challenged restrictions if the COVID-19 situation worsened as defined by certain criteria. *Id.* In the Seventh Circuit’s view, the voluntary cession exception applied because “[t]he list of criteria for moving back to Phase 2 (that is, replacing the current rules with older ones) shows that it is not ‘absolutely clear’ that the terms of Executive Order 2020-32 will never be restored.” *Id.* at 345 (quoting *Friends of the Earth, Inc.*, 528 U.S. at 189).

The Ninth Circuit’s panel decision in *Brach* also got it right. The Ninth Circuit emphasized that

a challenge to state restrictions is not moot when officials with a track record of moving the goalposts retain authority to reinstate those heightened restrictions at any time. So too, here, nearly the entire edifice of California’s oft-changing Covid-related restrictions is the product of Defendants’ own unilateral decrees, which have rested on a comparable retention of unbridled emergency authority to promulgate whatever detailed restrictions Defendants think will best serve the public health and the public interest at any given moment.

Brach, 6 F.4th at 919 (internal quotation marks and citation omitted).

The Ninth Circuit's rationale fully applies here. Accordingly, the Third Circuit erred in holding that the voluntary cessation doctrine is inapplicable to this case. Whether penned by the Governor or the Secretary of Health, the Commonwealth of Pennsylvania retains the authority to impose similar restrictions to those declared unconstitutional by the district court.

The business community within the Third Circuit is entitled to a ruling on the weighty issues presented in this appeal to ensure that future restrictions comport with modern notions of constitutional due process. Courts across the country have declined to sidestep these important issues. The NJBIA respectfully submits that the Third Circuit should address them too.

CONCLUSION

For the foregoing reasons, Amicus Curiae New Jersey Business & Industry Association respectfully requests this Court grant the Petition for a Writ of Certiorari, vacate the Third Circuit's decision, and remand this matter for an adjudication on the merits.

Respectfully submitted

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