No. 20-639

IN THE

Supreme Court of the United States

CALVARY CHAPEL DAYTON VALLEY,
Petitioner,

v.

STEVE SISOLAK, in his official capacity as Governor of Nevada, *et al.*,
Respondents.

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

BRIEF OF RELIGIOUS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ALEXIS MILLER BUESE
SIDLEY AUSTIN LLP
1999 Avenue of the Stars
Los Angeles, CA 90067
(310) 595-9500

MORGAN A. PINO
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-5300

GORDON D. TODD*
DINO L. LAVERGHETTA
LUCAS W.E. CROSLOW
CHRISTOPHER S. ROSS
ROBIN W. CLEARY
MACKENZI J.S. EHRETT
CODY L. REAVES
BROOKE E. BOYD
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
gtodd@sidley.com

Counsel for Amici Curiae

* Counsel of Record

December 10, 2020

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

INTERESTS OF *AMICI CURIAE*[1]

The Minnesota Catholic Conference, the Minnesota North District of the Lutheran Church–Missouri Synod, the Minnesota South District of the Lutheran Church–Missouri Synod, the Roman Catholic Diocese of Madison, Samuel A. Fryer Yavneh Academy, Montebello Christian School, and Saint Joseph Academy (collectively, "*amici*") are churches or religious schools who have been injured by COVID-19-related restrictions that singled out and treated religious worship and religious association disparately from similarly situated secular activities. Each *amicus* had to engage counsel and sue or threaten to sue its state or local government to vindicate its constitutional right to free exercise of religion. Each was successful in rolling back the disparate treatment it faced, to a point, but each remains subject to the specter of renewed disfavor as public officials cast about for gatherings and activities they perceive as "low value" or having minimal economic impact that may be curtailed or banned in the name of "slowing the spread" of the novel coronavirus.

Amici understand the real and irreparable constitutional and religious injuries that Petitioner is experiencing and will continue to experience if this Court does not step in to protect Petitioner's most cherished freedoms. *Amici* submit this brief to illustrate for the

---

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person aside from *amici curiae* and their counsel made any monetary contribution towards the preparation and submission of this brief. Pursuant to Rule 37.2(a), counsel for *amici curiae* timely contacted counsel for all parties and obtained their written consent to the filing of this brief.

Court the pervasive, systematic, and nationwide extent of antireligious government actions being taken in the name of public health and in misguided reliance upon this Court's decision in *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905).[2]

SUMMARY OF ARGUMENT

The restrictions on religious exercise imposed by Respondents and governments throughout the country could never survive the exacting constitutional scrutiny prescribed by this Court over the past century for laws trenching on core civil liberties. Under that precedent, laws subjecting religion to disparate treatment must be invalidated unless the state can show that the restrictions are narrowly tailored to fit a compelling interest. Clearly, combatting a pandemic is a compelling interest, but authorities cannot claim that their actions are narrowly tailored to that interest when they restrict religious activity but allow congruent secular activities to persist.

Recognizing that their actions cannot survive normal constitutional standards, Respondents and other state and local authorities have argued that those standards do not apply in a pandemic. For that proposition, they cite to this Court's 1905 opinion in *Jacobson* v. *Massachusetts*, contending in essence that there are two constitutions: one for times of peace and one for times of pandemic. That approach finds no support in the precedent of this Court—including *Jacobson*—and would endanger the very concept of fundamental and well-ordered liberties.

---

[2] This brief builds on the brief submitted by many of the same *amici* in *Agudath Israel of America* v. *Cuomo*, No. 20A90 (U.S. docketed Nov. 16, 2020). This brief has been updated to reflect new case law, with substantial changes in Sections I and II.D.

Like Petitioner, *amici*—churches or religious schools in Minnesota, Wisconsin, and California—have experienced firsthand the effects of state and local governments' sweeping use of their emergency powers. Asserting plenary discretion under *Jacobson*, authorities have allowed thousands of people to shop at malls, but have limited Mass, Temple, and Services to a handful of congregants. Authorities have shuttered Jewish, Catholic, and Christian schools, but have allowed tens of thousands of camps and childcare facilities to operate at full capacity. They have prohibited people from gathering for prayer while encouraging people to gather in protest. The examples abound. Across the country, governments have devised frameworks whereby Americans can join together in rooms for secular activities, but those very same people—sometimes in those very same rooms—are prohibited from gathering in worship.

This Petition presents an opportunity for the Court to reaffirm that constitutional standards of review and fundamental rights are not weakened during a pandemic. *Amici* recognize and appreciate that the Court has recently taken a step in this direction by acknowledging that "effectively barring many from attending religious services[] strike[s] at the very heart of the First Amendment's guarantee of religious liberty" and thus government restrictions having that effect are due "serious examination." *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, No. 20A87, 2020 WL 6948354, at *3 (U.S. Nov. 25, 2020) (per curiam). However, even after *Diocese of Brooklyn*, confusion in the lower courts regarding *Jacobson* persists. See, *e.g.*, *Kentucky ex rel. Danville Christian Acad., Inc.* v. *Beshear*, No. 20-6341, 2020 WL 7017858, at *3 (6th Cir. Nov. 29, 2020) (suggesting that *Jacobson* alters the strict scrutiny analy-

sis of laws held to not be of general applicability). Accordingly, the Court should use this Petition as an opportunity to make clear in a merits opinion what was implicit in *Diocese of Brooklyn*: *Jacobson* does not supplant or, in any way, alter the strict scrutiny analysis applied to laws infringing religious liberties during a pandemic.

This Court should therefore grant certiorari before judgment to correct the error of the lower courts in applying *Jacobson*.

ARGUMENT

From the earliest days of the pandemic, public officials were quick to analogize COVID-19 with wartime, and on that basis began issuing vigorous restrictions never before seen outside of wartime. Now it may well be that in times of war or pandemic some restriction of civil liberties is justifiable. But as Cicero observed of wartime more than two millennia ago, "*silent enim leges inter arma*"—in time of war, the law falls silent. Marcus Tullius Cicero, *Pro Milone* (52 BC). Mindful of that sad history, restrictions on core civil liberties should be met with a jaundiced judicial eye. And where mandates justified by the need to "flatten the curve" begin instead to flatten rights to travel, assemble, and worship, courts must step forward to ensure that the cure is not worse than the disease, and that our constitutional norms prevail.

Like Petitioner's, *amici*'s sincere belief in the fundamental importance of public, in-person worship is beyond dispute. *Amici* churches believe that "[o]n Sundays and other holy days of obligation the faithful are bound to participate in the Mass," and "[t]hose who deliberately fail in this obligation commit a grave sin." *Catechism of the Catholic Church* §§ 2180–81. *Amici* schools, as this Court recently recognized, hold that

"educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the[ir] mission." *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020) (summarizing the key beliefs of Catholics, Protestants, Jews, Muslims, Mormons, and Seventh-Day Adventists in this regard). Moreover, *amici* schools believe this religious mandate can only be fulfilled in person.[3]

Respondents have failed to respect the core tenet of Petitioner's religious belief that Christianity must be practiced publicly and communally. Instead, Respondents have targeted Petitioner for special disfavor in Nevada's COVID-19 restrictions. Sadly, Respondents are not alone: *amici*'s state and local governments similarly discriminated against religious practice under the guise of COVID-19 mitigation, and claimed that *Jacobson* gave them the authority to do so. This Court should grant the petition and make clear that *Jacobson* does no such thing, and that the rights of religious Americans are not contingent on the government's assessment of their importance.

I. *JACOBSON* V. *MASSACHUSETTS* DOES NOT AUTHORIZE VIOLATIONS OF THE BILL OF RIGHTS OR ALTER THE FEDERAL COURTS' DUTY TO SCRUTINIZE GOVERNMENT ACTIONS THAT BURDEN RELIGIOUS FREEDOM.

"Government is not free to disregard the First Amendment in times of crisis." *Diocese of Brooklyn*,

---

[3] The district court docket in the *Yavneh* matter contains extensive declarations, expert opinions, and other materials regarding the centrality of religion to *amici* schools' curricula and the fact that religious schools do not pose a greater health risk than similarly situated activities.

2020 WL 6948354, at *4 (Gorsuch, J., concurring). This Court has never held otherwise, and it should make clear for lower courts and public officials alike that it does not do so now. "It is during our most challenging and uncertain moments" that threats to liberty are at their greatest, and the judiciary's role as guardian of those rights is more, not less, important. *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 532 (2004) (plurality opinion); see also *Maryville Baptist Church, Inc.* v. *Beshear*, 957 F.3d 610, 615 (6th Cir. 2020) (per curiam) ("While the law may take periodic naps during a pandemic, we will not let it sleep through one.").

While the state undoubtedly has authority to take drastic actions to address crises, those actions must be evaluated against well-established constitutional standards. *Diocese of Brooklyn*, 2020 WL 6948354, at *3 ("[E]ven in a pandemic, the Constitution cannot be put away and forgotten."). In recent months, however, Respondents and governments throughout the country have cited *Jacobson* for the proposition that, during a pandemic, traditional standards of review should be put aside entirely in favor of near-plenary deference to the state. *Jacobson* has morphed into a warrant for unprecedented and unacceptable invasions of religious freedom. Respondents relied on *Jacobson* below to justify their restriction on Petitioner's free exercise of the Christian faith. State Defendants' Opposition to Emergency Motion for an Injunction Pending Appeal at 11–16, *Calvary Chapel Dayton Valley* v. *Sisolak*, No. 20-16169 (9th Cir. June 29, 2020), ECF No. 17; Frank Hunewill's Response to Appellant's Emergency Motion for Injunction Pending Appeal at 1, *Calvary Chapel Dayton Valley* v. *Sisolak*, No. 20-16169 (9th Cir. June 29, 2020), ECF No. 14. So did Minnesota and California in justifying their severe and discriminatory restrictions on public worship and religious education.

See State Defendants' Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order at 16–21, *Northland Baptist Church of St. Paul* v. *Walz*, No. 0:20-cv-1100 (WMW) (D. Minn. May 22, 2020), ECF No. 32 [hereinafter *Northland Baptist* State Defs.' Opp'n]; Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction, *Samuel A. Fryer Yavneh Acad.* v. *Newsom*, No. 2:20-cv-7408 (JAK) (C.D. Cal. Sept. 11, 2020), ECF No. 53 [hereinafter *Samuel A. Fryer Yavneh Acad.* Opp'n]. More examples abound. See *infra* Section II.D.

Neither *Jacobson* nor anything else in this Court's jurisprudence supports such contentions. As Justice Gorsuch recently explained in *Diocese of Brooklyn*—taking the precise view that *amici* advanced in that case and seek to advance today—"*Jacobson* didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so." *Diocese of Brooklyn*, 2020 WL 6948354, at *5 (Gorsuch, J., concurring). Indeed, *Jacobson* "involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction" than those at issue here. *Id.* However, there will be no clarity on this point in the lower courts until a majority of this Court directly and clearly holds that *Jacobson* does not alter the constitutional analysis of COVID-19 restrictions burdening the free exercise of religion.

In the context of the religious injuries suffered by Petitioner, *amici*, and countless faithful around the country, giving effect to the Constitution requires evaluating pandemic-related government actions using the tiered-scrutiny framework that the Court developed subsequent to its decision in *Jacobson*. That framework requires that restrictions on religious worship that are not generally applicable must be invalidated unless they are "justified by a compelling interest

and … narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993). This standard allows and accounts for the state's heightened interests during a pandemic, but prevents the state from imposing burdens in a manner that disfavors the free exercise of religion.

Respondents' restrictions and other COVID-19 measures around the country are not narrowly tailored to the state's compelling interest in mitigating the pandemic. Many COVID-19 restrictions discriminate against religion on their face. See Petition 10–14; *Lukumi*, 508 U.S. at 533 ("a law targeting religious beliefs as such is never permissible"). Others, like the restrictions California imposed on *amici* schools, have been unequally enforced. See *Masterpiece Cakeshop, Ltd.* v. *Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1732 (2018) ("disparate consideration" of religious and nonreligious conduct evidenced hostility toward religion). And nearly all are riddled with exceptions for favored interests and industries: in Nevada, casinos are treated far more favorably than houses of worship; in California, the entertainment industry is exempted from many of the state's restrictions; and in Minnesota and Wisconsin, *amici* churches had to threaten litigation just to be treated on par with commercial interests such as restaurants, bars, and retail stores. See *Emp't Div., Dep't of Human Res.* v. *Smith*, 494 U.S. 872, 884 (1990) ("[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."). Thus, applying the ordinary standard of review required by this Court's modern religious liberties cases would result in the invalidation of Respondents' orders. *Jacobson* does not allow or require a different result.

In cases involving nonreligious issues, the lower courts have readily applied modern analyses and rejected states' arguments that *Jacobson* justified restrictions on constitutional rights. For example, both the Sixth and Eleventh Circuits struck down COVID-related abortion restrictions, holding that *Jacobson* does not alter modern constitutional standards. See *Adams & Boyle, P.C.* v. *Slatery*, 956 F.3d 913, 926 (6th Cir. 2020), *petition for cert. docketed*, No. 20-482 (U.S. Oct. 14, 2020); *Robinson* v. *Attorney Gen.*, 957 F.3d 1171, 1182 (11th Cir. 2020). The Sixth Circuit rejected "the notion that COVID-19 has somehow demoted *Roe* and *Casey* to second-class rights, enforceable against only the most extreme and outlandish violations. Such a notion is incompatible not only with *Jacobson*, but also with American constitutional law writ large." *Adams & Boyle, P.C.*, 956 F.3d at 927.[4] As Justice Gorsuch recognized in his *Diocese of Brooklyn* concurrence, the same reasoning applies to the First Amendment, which *expressly* protects religious free exercise.

II. *JACOBSON* IS NEVERTHELESS BEING USED TO JUSTIFY SEVERE INFRINGEMENTS ON RELIGIOUS FREEDOMS THROUGHOUT THE NATION.

Amici have directly experienced the consequences of assertions—often premised on a misreading of *Jacobson*—that governments have near-plenary authority to infringe the free exercise of religion during a pandemic. State and local governments in Minnesota, Wisconsin, and California ran roughshod over *amici*'s

---

[4] *Amici* take no position in this brief on whether *Robinson* and *Adams & Boyle* were correctly decided, or on the constitutional questions involved in those cases. The point is simply that the *express protections of the Constitution* should not be relegated to second-class status under *Jacobson*.

rights, imposing greater restrictions on religious worship and education than similarly situated secular conduct. Only by seeking legal recourse were *amici* able to achieve some semblance of equal treatment. This pattern has repeated itself in jurisdictions across the country.

By acting on this petition and addressing these issues in a merits opinion, the Court can clarify for governmental authorities and lower courts that the government will not be given *carte blanche* to violate religious freedoms in the name of combatting COVID-19, and that pandemic mandates burdening fundamental rights, including free exercise, are subject to the same judicial scrutiny this Court has long required of such laws.

A. Minnesota Relied On *Jacobson* To Justify Its Months-Long Prohibition Of Public Worship, While Permitting Shopping Malls And Restaurants To Operate.

When Minnesota began to relax its initial COVID-19 restrictions, the state allowed "[n]on-[c]ritical," "customer facing businesses"—such as the Mall of America and pet groomers—to reopen at 50 percent capacity. Minn. Exec. Order No. 20-56, ¶ 7(e)(ii) (May 13, 2020), https://bit.ly/39PifDS. But religious gatherings were subject to more onerous restrictions: Minnesota expressly prohibited "gatherings of more than 10 people" for a "faith-based … purpose—even if social distancing c[ould] be maintained." *Id.* ¶ 6(c).

This discriminatory treatment lacked any scientific, health, or other meaningful rationale. On its face, Minnesota Executive Order 20-56 allowed more than 10 persons to gather in cannabis dispensaries, liquor stores, bicycle shops, and a long list of other "critical and non-critical businesses." See *id.* Yet the Order

deemed public worship less important than "commercial activity," relegating it to an inferior category along with "social," "leisure," and "recreational" gatherings. *Id.* Order 20-56 targeted religious gatherings not because they present a heightened risk of COVID-19 transmission (there is no reliable evidence that they do) but because of their "faith-based … purpose." *Id.*

Minnesota offered no explanation for allowing the Mall of America to operate at 50 percent capacity with store employees, custodial staff, security, and guests for upwards of 8 hours a day, while demanding that houses of worship be banned from holding services with more than 10 persons for a short time on Saturday or Sunday. Nor could it. There is no basis to conclude that attending a church service, subject to the same social distancing requirements set out for commercial activities, presents any greater risk of transmission than shopping at a retail outlet.

Unable to satisfy the strict scrutiny framework, Minnesota justified its conduct by citing *Jacobson*. See *Northland Baptist* State Defs.' Opp'n, *supra*, at 16 ("[C]ourts give significant deference to the emergency measures instituted during an epidemic under the standard set forth by the Supreme Court in *Jacobson*."). Despite letters pleading for fair treatment from churches including members of Minnesota *amici*, Minnesota refused to work toward a solution that respected religious freedom. Minnesota only changed course after *amici* and other churches retained counsel and threatened litigation over the state's discriminatory and unconstitutional treatment of religion. Even when the governor announced his concession to let churches reopen, the mayors of Minneapolis and St. Paul responded by urging citizens not to return to church and indicating that they were considering their own ban on religious gatherings. Anthony Gockowski,

Twin Cities Mayors Don't Want to Let Churches Reopen, Archbishop Hits Back, Minn. Sun (May 26, 2020), https://bit.ly/33P2zwM. Only the tragic death of George Floyd and resulting public demonstrations—which those same public officials embraced—forestalled these further threatened restrictions on religious association.

B. In The Name Of Public Health And Under Pressure From Antireligion Activists, The City Of Madison And Dane County, Wisconsin Likewise Prohibited Public Worship For Months, While Permitting Retail Stores, Restaurants, And Office Buildings To Operate, And Approving Of Mass Protests.

After Wisconsin's statewide COVID-19 restrictions were held by the Wisconsin Supreme Court to have been unlawfully promulgated, Public Health Madison & Dane County ("PHMDC") implemented local restrictions and a phased reopening plan that initially treated religious entities the same as other "essential businesses and operations," limiting occupancy to 25 percent. PHMDC, Emergency Order No. 1 (May 13, 2020), https://publichealthmdc.com/documents/2020-05_Adopting_Safer_at_Home.pdf (requiring religious entities to follow Section 2(b) of Wisconsin Department of Health Services Emergency Order #28); PHMDC, *Forward Dane: Phased Reopening Plan for Dane County During the COVID-19 Pandemic* 13 (May 18, 2020). However, three days after receiving a letter from the Freedom From Religion Foundation complaining that churches were being permitted to reopen,[5] PHMDC issued Emergency Order 3 and revised

---

[5] Letter from Annie Laurie Gaylor & Dan Barker, Co-Presidents, Freedom From Religion Found., to Janel Heinrich, Dir.,

its "Forward Dane" reopening plan to cap all religious gatherings at 50 persons. PHMDC, *Forward Dane Version 2: Phased Reopening Plan for Dane County During the COVID-19 Pandemic* 13 (May 22, 2020). Under Emergency Order 3, all businesses were permitted to resume routine operations at 25 percent capacity, but "Mass Gatherings," defined as "planned event[s] … such as a concert, festival, meetings, training, conference, religious service, or sporting event," were capped at 50 persons. PHMDC, Emergency Order No. 3, § 2 (May 22, 2020), https://bit.ly/2VNvk8H.

PHMDC made clear in a May 29, 2020 "COVID-19 Information Update" that the "Mass Gathering" restrictions did not apply to a business's "everyday operations"—only to atypical gatherings. See *id.*; PHMDC, *COVID-19 Information Update*, Forward Lookout (May 29, 2020), https://www.forwardlookout.com/2020/06/round-up-may-29-june-3/32489. Only religious organizations were prohibited from resuming their everyday operations—religious services—at 25 percent capacity, because Emergency Order 3 defined *all* religious services as "Mass Gatherings."

Dane County officials went so far as to call diocesan officials and pastors at several diocesan parishes, threatening to "monitor" Masses and issue citations if a religious gathering exceeded the 50-person limit. These admonishments came even as thousands of Madisonians packed the streets for public protests with inconsistent masking and no semblance of social distancing. According to media reports, there were few citations or arrests at these protests. On the contrary,

---

Pub. Health Madison & Dane Cty. 1 (May 19, 2020), https://bit.ly/3cCqd0V.

the Mayor of Madison said she "supported people protesting as long as they wanted, and wherever they wanted."[6] Madison and Dane County clearly favored some First Amendment activities over others.

Thus, in Madison, much like in Minnesota, thousands of people could shop together at malls, hundreds could work in office buildings with social distancing, and dozens of children could bounce around at indoor trampoline parks. And as long as local officials supported their cause, protestors could violate the "Mass Gathering" ban with impunity. But because all religious services were deemed "Mass Gatherings," no more than 50 of the 1,225 seats in the Diocese of Madison's Saint Maria Goretti Church could be filled by law-abiding citizens.

The Diocese of Madison protested PHMDC's religious discrimination without success until the Diocese retained counsel and threatened litigation. Only then did PHMDC issue a new order that treated religious and nonreligious activities equally.[7]

C. California Relied On *Jacobson* To Justify Its Months-Long Prohibition Of In-Person Religious Education, While Permitting Camps And Daycares To Operate In School Buildings.

In response to COVID-19, California enacted restrictions that burdened religious schools while leaving other, functionally identical groups unburdened.

---

[6] *After Peaceful Afternoon, Protests Escalating in Madison*, WAOW TV-9 (May 30, 2020), https://bit.ly/36XecDT.

[7] While *amici* in Wisconsin and Minnesota were grateful to secure positive outcomes without litigation, these resolutions underscore a further concern: that state and local governments may bend or break the law, only to pull back when threatened with litigation. This sort of gamesmanship is too often a feature of religious liberties litigation.

The state closed all schools and indefinitely suspended "in-person learning" for nearly the entire state. Exec. Dep't, State of Cal., *Proclamation of a State of Emergency* (Mar. 4, 2020), https://bit.ly/31ZDbTj; Exec. Order No. N-33-20 (Mar. 19, 2020), https://bit.ly/3arL6fM. After the filing of multiple lawsuits in federal and state court, including by some of *amici*, the state issued "cohort guidance" that allowed daycares, camps, and other supervised care environments to operate at 100 percent capacity, so long as children were placed in small cohorts. See Cal. Dep't of Pub. Health, *Guidance Related to Cohorts* (updated Sept. 4, 2020), https://bit.ly/2VVssX3. However, schools were allowed to open only at 25 percent capacity and only to provide a subset of services. See Cal. Dep't of Pub. Health, *Providing Targeted, Specialized Support and Services at School* (updated Sept. 4, 2020), https://bit.ly/2ZRotNQ.

Amici schools believe that their religious missions can be fulfilled only through some in-person instruction and communal participation in prayers, sacraments, and other religious observances. Yet at the same time California refused to accommodate *amici*'s religious needs, it went to great lengths to accommodate nonreligious interests. While California required most schools to remain closed, it allowed tens of thousands of day camps and childcare facilities to continue providing services—including in the very school buildings closed to in-person education. In other words, children could gather in a room to play, but that very same group in that very same room was prohibited from receiving religious instruction. Children could gather in person at distance-learning hubs, karate dojos, bowling alleys, movie theaters, and arcades, but they could not come together for religious education. See Sonja

Sharp, *A Loophole Is Allowing Thousands of California Students to Use Pandemic-Shuttered Classrooms*, L.A. Times (Aug. 22, 2020), https://lat.ms/2Qmfu25; Katy Murphy, *Shadow Schools? Class Is in Session—at the YMCA and Roller Rink*, Politico (Aug. 7, 2020), https://politi.co/2QiLnIJ.

When *amici* schools sued, the state invoked "the deference afforded under *Jacobson*" in defense of its discriminatory restrictions. *Samuel A. Fryer Yavneh Acad.* Opp'n, *supra*, at 7. Fortunately, California ultimately relented and agreed to a stipulated order allowing religious schools in California to open at 100 percent capacity, as long as the schools follow the cohort guidance applicable to comparable nonreligious activities.[8] Stipulated Order of Dismissal, *Samuel A. Fryer Yavneh Acad.* v. *Newsom*, No. 2:20-cv-7408 (JAK) (C.D. Cal. Oct. 28, 2020), ECF No. 63.

D. The Constitutional And Religious Injuries Endured By *Amici* Have Been Replicated Across The Nation By States Relying On *Jacobson* And The Need To Protect Public Health.

Amici are only a few of the untold thousands of houses of worship, schools, and religious organizations that have endured heavy-handed prohibitions of the free exercise of their religion in the name of "flattening the curve." Other examples from around the country

---

[8] Though California agreed to respect *amici*'s religious freedom, Los Angeles County (among other jurisdictions) is once again subjecting religious schools to greater burdens than comparable nonreligious activities such as daycares and camps. See Cty. of Los Angeles Dep't of Pub. Health, Order of the Health Officer, *Revised Temporary Targeted Safer at Home Health Officer Order for Control of COVID-19: Tier 1 Substantial Surge Updated Response* (Rev. Order Dec. 6, 2020), https://bit.ly/3qv3sEe.

demonstrate that states', and even courts', disrespect and disregard for the free exercise of religion is a truly national problem.

Kansas, for instance, after initially exempting religious services from its mass-gathering restriction, banned religious gatherings of more than 10 persons only five days before Easter, yet continued to allow more than 10 persons in retail stores, restaurants, public transportation facilities, and offices. *First Baptist Church* v. *Kelly*, 455 F. Supp. 3d 1078, 1089 (D. Kan. 2020). The district court, however, found that *Jacobson* did not "provide the best framework" because the order at issue was not neutral or generally applicable, *id.* at 1087, and observed that "even in such extreme cases as a public health crisis, the police power of the state is not without limits, and is subject to appropriate judicial scrutiny," *id.* at 1086.

Kentucky officials went a step further by imposing—and threatening to enforce—prohibitions on *drive-through* church services, while allowing drive-through liquor stores and restaurants to operate freely. *Maryville Baptist Church*, 957 F.3d at 613; *On Fire Christian Ctr., Inc.* v. *Fischer*, 453 F. Supp. 3d 901, 910 (W.D. Ky. 2020). Kentucky slated nearly every type of activity—from car washing to dog grooming—to resume before worship services. *Maryville Baptist Church*, 957 F.3d at 613. The governor argued that his orders responding to COVID-19 were "entitled to the deferential standard of review set forth in *Jacobson*." Brief of Governor Andy Beshear at 8, *Maryville Baptist Church*, 957 F.3d 610 (No. 20-5427), 2020 WL 4551930. The Mayor of Louisville also cited to *Jacobson*, saying that "even the most basic human 'rights'" must fall before the state's prerogative to protect the public from danger. Defendants' Motion to Dissolve

Temporary Restraining Order and Response in Opposition to Plaintiff's Motion for Preliminary Injunction at 11, *On Fire Christian Ctr., Inc.* v. *Fischer*, No. 3:20-cv-00264-JRW (W.D. Ky. Apr. 13, 2020), ECF No. 10. Both the district court and the Sixth Circuit rejected these arguments. *Maryville Baptist Church*, 957 F.3d at 613; *On Fire Christian Ctr.*, 453 F. Supp. 3d at 910.

The mayor of the District of Columbia relied on *Jacobson* to defend her refusal to issue a permit for a church to meet *outdoors* and socially distanced, while simultaneously "'welcom[ing]' hundreds if not thousands" of protesters to the city. *Capitol Hill Baptist Church* v. *Bowser*, No. 20-cv-02710 (TNM), 2020 WL 5995126, at *8 (D.D.C. Oct. 9, 2020) (alteration in original). The district court observed that "[n]o matter how the protests were organized and planned, the District's … support for at least some mass gatherings undermines its contention that it has a compelling interest in capping the number of attendees at the Church's outdoor services." *Id.* The court found that *Jacobson* was "not an appropriate lodestar." *Id.* at *7.

Colorado designated houses of worship "critical," but required houses of worship to operate at a lower capacity than "critical" *nonreligious* concerns such as packing plants and warehouses, groceries, liquor stores, gun shops, and marijuana dispensaries. *Denver Bible Church* v. *Azar*, No. 1:20-cv-02362-DDD-NRN, 2020 WL 6128994, at *10 (D. Colo. Oct. 15, 2020), *appeals docketed*, Nos. 20-1377 & 20-1391 (10th Cir. filed Oct. 16, 2020 & Oct. 26, 2020). The defendants repeatedly relied on "the *Jacobson* standard" to defend their discriminatory line-drawing. State Defendants' Response to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction at 2, 13–14, *Denver Bible Church* v. *Azar*, No. 1:20-cv-02362-DDD-NRN (Aug. 27, 2020), ECF No. 41. The district court concluded

that "[h]aving decided that the risk of allowing various activities to be exempt from the strictest Safer at Home rules is justified on the basis that those activities are critical and necessary, the State cannot decide for Plaintiffs what is critical and necessary to their religious exercise." *Denver Bible Church*, 2020 WL 6128994, at *13.

It is troubling that these public officials—among others—have used *Jacobson* as a license to trample religious liberties in the name of public health. But what is even more concerning is that some courts have endorsed this view. For example, in considering Illinois's restrictions, the Seventh Circuit "d[id] not deny that [people participating in exempted nonreligious activities] may be at much the same risk as people who gather for large, in-person religious worship," but nevertheless upheld (citing *Jacobson*) restrictions that subjected religious services to a 10-person cap while exempting "essential" services including warehouses, big-box retail, and office space. *Elim Romanian Pentecostal Church* v. *Pritzker*, 962 F.3d 341, 346–47 (7th Cir. 2020), *petition for cert. docketed*, No. 20-569 (U.S. Oct. 30, 2020). The court endorsed Illinois' determination that churches were not "essential," because essential functions "must" be carried out in-person, whereas religious obligations could be suitably carried out over the Internet, in much the same way that "concerts can be replaced by recorded music." *Id.* This Court has since clarified that neither public officials nor judges have the authority to tell worshippers what a suitable replacement for their worship may be. See *Diocese of Brooklyn*, 2020 WL 6948354.

Virginia issued a criminal citation and summons to a pastor after his church conducted a 16-person worship service in a building that holds nearly 300 people. Plaintiff-Appellant's Opening Brief at 6–7, *Lighthouse*

Fellowship Church v. *Northam*, No. 20-1515 (4th Cir. June 29, 2020), 2020 WL 3576923. Police officers threatened to issue a criminal citation to every person in attendance if the governor's 10-person cap was violated on Easter. *Id.* at 7. During this same time, beer, wine, and liquor stores as well as laundromats, retailers, garden stores, law firms, and other professional services were all exempt from numerical limits. The district court, relying on *Jacobson*, agreed with the governor that the exempted businesses were "essential" while religious worship was not. For example, the court found that liquor stores were essential because of the potentially harmful effect that deprivation of alcohol could have on alcoholics, and concluded that a numerical cap on such services could cause "[m]any people [to] go without essential goods and services despite being in dire need of them." *Lighthouse Fellowship Church* v. *Northam*, 458 F. Supp. 3d 418, 431 (E.D. Va. 2020), *appeal dismissed*, No. 20-1515, 2020 WL 6074341 (4th Cir. Oct. 13, 2020). This concern did not extend, apparently, to those yearning for spiritual fulfillment or who perceived a dire need to save their souls.

In Maine, the governor limited "faith-based" gatherings to 10 people while allowing essential businesses including marijuana dispensaries and liquor stores to operate without a cap, and even non-essential businesses such as malls, theaters, casinos, gyms, and personal care facilities to perform non-public-facing functions without a cap, so long as social distancing could be maintained. *Calvary Chapel of Bangor* v. *Mills*, 459 F. Supp. 3d 273, 278–80 (D. Me. 2020). The court found that, because of *Jacobson*, traditional tiers of scrutiny did not apply during a pandemic. *Id.* at 284. Moreover, the court maintained that drive-through services or online services should be enough to satisfy churchgoers, *id.* at 283–85, and that religious organizations are

particularly dangerous because their purpose is "to congregate and converse," *id.* at 286. This comment alone starkly betrays the court's fundamental misunderstanding of the purpose of religious worship.

As this Court is well aware, New York spent months discriminating against religious organizations. The governor argued that "the Supreme Court's decisions in *Jacobson* and *South Bay* [were] dispositive." This Court disagreed. *Diocese of Brooklyn*, 2020 WL 6948354, at *5–6 (Gorsuch, J., concurring).

Finally, as noted above, even after this Court's decision in *Diocese of Brooklyn*, the Sixth Circuit suggested that *Jacobson* may alter courts' constitutional analyses. The Sixth Circuit stayed a preliminary injunction that prevented the enforcement of a COVID-19 order against religious schools (but not against nonreligious activities including preschools, colleges, offices, and entertainment venues), concluding that the challenged restrictions were "generally applicable." *Kentucky* v. *Beshear*, 2020 WL 7017858, at *3. This troubling conclusion is currently before this Court for review. *Danville Christian Acad., Inc.* v. *Beshear*, No. 20A96 (U.S. docketed Dec. 1, 2020). But, equally troubling is that, having found that the order was "generally applicable," the court stated that it had "no need to rely upon either *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Mem.) (Roberts, C.J., concurring), or *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)." *Kentucky* v. *Beshear*, 2020 WL 7017858, at *3. The clear implication is that the Sixth Circuit believes that, if it had held the order to *not* be generally applicable, *Jacobson* and *South Bay* would somehow alter its strict scrutiny analysis of the order.

These cases—and others throughout the country—demonstrate that the Court must make clear what was

implicit in *Diocese of Brooklyn*: *Jacobson* is not a license to ignore the Free Exercise Clause, or any other constitutional right.

CONCLUSION

Only a year ago, the thought of state governments cracking down on public worship was unthinkable. It has sadly now become commonplace. But this Court should not allow it to become *acceptable*. To be clear, *amici* appreciate the challenges state and local elected and public health officials face in combating this pandemic. At the same time, the simple truth remains that when a situation is so bad as to justify such extreme restrictions, then such restrictions should apply equally to all similarly situated assemblies as a matter of sound policy and logic. The fact that the decision has been made, repeatedly, to apply restrictions unevenly, undercuts these officials' justifications. The law does not allow this disparity.

It falls to this Court to underscore that *Jacobson* does not displace constitutional norms and to ensure that state and local governments cannot chop down cherished protections and fundamental rights in pursuit of COVID-19. As a fictionalized Sir Thomas More observed:

> And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down, and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake!

Robert Bolt, *A Man for All Seasons* 66 (1st Vintage international ed. 1990) (1960).[9]

Beyond the benefits that constitutional protection confers on religious observants, the entire nation benefits from the preservation of the rule of law when the words of our nation's founding document are given full force. The Court should grant certiorari before judgment to correct the error of the lower courts in applying *Jacobson*.

Respectfully submitted,

ALEXIS MILLER BUESE
SIDLEY AUSTIN LLP
1999 Avenue of the Stars
Los Angeles, CA 90067
(310) 595-9500

MORGAN A. PINO
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-5300

GORDON D. TODD*
DINO L. LAVERGHETTA
LUCAS W.E. CROSLOW
CHRISTOPHER S. ROSS
ROBIN W. CLEARY
MACKENZI J.S. EHRETT
CODY L. REAVES
BROOKE E. BOYD
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
gtodd@sidley.com

Counsel for Amici Curiae

* Counsel of Record

December 10, 2020

[9] Viewable at https://bit.ly/37FQz1H (Columbia Pictures 1966).