No. 20-A90

IN THE

Supreme Court of the United States

AGUDATH ISRAEL OF AMERICA, AGUDATH ISRAEL OF KEW GARDEN HILLS, AGUDATH ISRAEL OF MADISON, RABBI YISROEL REISMAN, AND STEVEN SAPHIRSTEIN,

Applicants,

v.

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

Respondent.

On Emergency Application for Writ of Injunction to the Honorable Sonia Sotomayor, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Second Circuit

MOTION BY THE ROMAN CATHOLIC ARCHDIOCESE OF SAINT PAUL AND MINNEAPOLIS, THE ROMAN CATHOLIC DIOCESE OF MADISON, SAMUEL A. FRYER YAVNEH ACADEMY, MONTEBELLO CHRISTIAN SCHOOL, AND SAINT JOSEPH ACADEMY FOR LEAVE TO (1) FILE THE ATTACHED *AMICUS CURIAE* BRIEF IN SUPPORT OF APPLICANTS, AND (2) TO DO SO WITHOUT TEN DAYS' ADVANCE NOTICE TO THE PARTIES

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Proposed *amici curiae* the Roman Catholic Archdiocese of Saint Paul and Minneapolis, the Roman Catholic Diocese of Madison, Samuel A. Fryer Yavneh Academy, Montebello Christian School, and Saint Joseph Academy (collectively "*amici*") respectfully move the Court for leave to file an *amicus curiae* brief in support of Applicants' Emergency Application for Writ of Injunction and to do so without 10 days' advance notice to the parties.

Given the expedited briefing schedule set by the Court, it was not feasible to give 10 days' notice as ordinarily required by Rule 37.2(a). Applicants have consented to the filing of this brief without such notice. Respondent has taken no position on the filing of this brief.

Proposed *amici* are nonprofit organizations that have no parent corporations and that are not owned, in whole or in part, by any publicly held corporation.[1]

Interest of the *Amici Curiae* and Summary of Brief

Amici are churches and religious schools whose religious liberties and practices have been treated unequally by COVID-19-related restrictions. During the past year, each *amicus* had to sue or threaten to sue its state or local government to vindicate its constitutional right to the free exercise of religion, and each remains subject to the risk of renewed discrimination.

Amici understand the real and irreparable constitutional and religious injuries that Applicants are experiencing and will continue to experience if this Court does

[1] No counsel for a party authored this motion or the proposed *amicus* brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution to fund the motion's or brief's preparation or submission.

not step in to enforce Applicants' most cherished freedoms. *Amici* submit this brief to illustrate for the 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).

In Minnesota, the Archdiocese of Saint Paul and Minneapolis was forced to limit its religious gatherings to ten persons or fewer while thousands were allowed to congregate in malls, restaurants, and bars. Religious worship was singled out by Minnesota leaders for particular disparate treatment without any basis in law or science. In Wisconsin, the Diocese of Madison was not allowed to welcome more than 50 individuals at any Mass, while trampoline parks and bowling alleys were specifically given permission to operate beyond that cap, under rules adopted at the behest of opponents of organized religion. In California, Yavneh Hebrew Academy, Montebello Christian School, and Saint Joseph Academy were all prohibited from conducting in-person religious education, while tens of thousands of secular tutoring and enrichment centers, education and athletic camps, and childcare facilities were permitted to resume in-person gathering and instruction under the state's discriminatory regulations.

During these periods of religious deprivation, proposed *amici* were unconstitutionally denied their most cherished rights and left unable to perform their core religious obligations. Houses of worship, religious schools, and religious organizations around the country should not have to fight for their rights piecemeal every time a local official decides to privilege secular activities during the COVID-19 pandemic or

any other emergency. Where the public health need is so dire that draconian measures are called for, such measures must be "applicable equally to all in like condition." *Jacobson*, 197 U.S. at 30–31. Where burdens are not levied alike, they may not be imposed so as to burden core rights and disfavor the free exercise of religion. In this breach, Courts must be particularly vigilant to protect fundamental rights.

For the foregoing reasons, proposed *amici* respectfully request that the Court grant this motion for leave to file the attached proposed *amicus* brief and accept it in the format and at the time submitted.

Respectfully submitted,

/s/ Gordon D. Todd

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INTERESTS OF *AMICI CURIAE*[1]

The Roman Catholic Archdiocese of Saint Paul and Minneapolis, the Roman Catholic Diocese of Madison, Samuel A. Fryer Yavneh Academy, Montebello Christian School, and Saint Joseph Academy (collectively, "*amici*") are churches and 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 discrimination it faced, to a point, but each remains subject to the specter of renewed discrimination 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 Applicants are experiencing and will continue to experience if this Court does not step in to protect Applicants' most cherished freedoms. *Amici* submit this brief to illustrate for the 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).

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

SUMMARY OF ARGUMENT

The COVID-19 pandemic has stressed religion as it has all of our institutions. In the early, darkest days of the pandemic, most houses of worship and religious schools closed their doors to help slow the spread of this novel virus. This was as it should have been. Love for one's neighbors, known and unknown, requires sacrifice. Religious institutions have not asked to be insulated from the burdens associated with curbing the pandemic; to the contrary, faith groups have been on the front lines fighting the virus and leading efforts of mercy and mitigation. However, in the eight months since this pandemic began, governments have shown a consistent propensity to impose greater burdens on religious conduct than similarly situated secular activities. These authorities have not shown—and could not show—that religious activities pose a greater risk than their secular counterparts. Rather, they have simply judged that religious worship, education, and other gatherings have less societal or economic value than similar secular activities that have been allowed to resume with lighter restrictions.

There is no doubt that the discrimination against religion imposed by Respondent and governments throughout the country could not survive the exacting constitutional scrutiny mandated by the Court's last century of precedent. Under that precedent, laws infringing the free exercise of religion 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 similar secular activities to continue.

Recognizing that their actions cannot survive normal constitutional standards, Respondent 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.

While such an approach might be convenient for governments seeking to take swift, expansive, and unilateral executive action, it finds no support in the precedent of this Court—including *Jacobson*—and would endanger the very concept of fundamental and well-ordered liberties. Giving the executive deference to infringe liberties upon the executive's own declaration of an emergency would transform rights into mere suggestions.

Like Applicants, *amici*—churches and schools in Minnesota, Wisconsin, and California—have experienced firsthand the effects of state and local governments' sweeping use of their emergency powers. Under the diaphanous cloak of *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 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.

A year ago, it would have been unimaginable that such blatant discrimination against the free exercise of religion could take place in America. The First Amendment was so important—and the Court's protections of religious liberties so stringent—that not even one such regulation would be allowed to survive. But, due to a misplaced interpretation of *Jacobson*, these regulations have become commonplace. This Court's intercession is desperately needed—not to rewrite COVID-19 mitigation plans or second-guess executive officials—but to articulate clearly and unambiguously the constitutional guardrails and rules of the road that must guide governments' efforts.

Specifically, this Application presents an opportunity for the Court to reaffirm that constitutional standards of review and fundamental rights are not weakened during a pandemic. The Court's well-established standards of review erected to protect fundamental liberties already account for the exigencies we presently face. Indeed, if a pandemic or other emergency is so dire as to justify restricting otherwise protected constitutionally protected activity, and the government can make that showing, then the response can and should survive strict scrutiny. And at the same time, applying rather than displacing heightened scrutiny will ensure that such responses are not disfavoring protected classes and fundamental rights without an appropriate fact-based justification. Conversely, the near-total deference demanded by Respondent and other authorities under *Jacobson*—jettisoning judicial skepticism

and careful scrutiny of such burdens—is a mode of legal analysis long-since discarded by this Court and would be a recipe for judicially endorsed tyranny.

This Court should therefore grant the application and enter the writ of injunction or, in the alternative, grant certiorari before judgment to correct the error of the lower courts in applying *Jacobson*.

ARGUMENT

As New York Governor Andrew Cuomo has stated repeatedly of the COVID-19 pandemic, "[t]his is war time." *US coronavirus: Fema Official Says Masks and Gloves Are on the Way to Hospitals – as It Happened*, Guardian (Apr 5, 2020, 11:22 AM), https://www.theguardian.com/world/live/2020/apr/05/coronavirus-us-deaths-trump-latest-news-updates?page=with:block-5e8a02c58f080bdb9f5349f3#liveblog-navigation. As Cicero observed of war time more than two millennia ago, "*silent enim leges inter arma*." Marcus Tullius Cicero, *Pro Milone* (52 BC). The American experiment, however, must strive to be better. Our Constitution, our Bill of Rights, protects liberties fundamental to a free people against majorities, against passion, and against exigency. We have not always lived up to this goal. *See, e.g., Korematsu v. United States*, 323 U.S. 214 (1944), *overruled by Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. Const. amend. XIV. And, while in the earliest stages deference might be due to elected executive branch officials, with the passage of time, constitutional norms and rights must reassert and reaffirm themselves. *See, e.g.*, *Trump v.*

Hawaii, 138 S. Ct. 2392, 2423 (2018); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). This case is such a case.

Like Applicants', *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. For example, school Mass and frequent confession—Catholic observances that require the physical presence of a Catholic priest—are central parts of the religious curriculum of *amicus* Saint Joseph Academy. Decls. of Lucas Heintschel & Chris Ambuul in Support of Mtn. for Prelim. Inj., Doc. Nos. 29-4, 29-15, *Samuel A. Fryer Yavneh Academy v. Newsom*, No. 2:20-cv-7408 (N.D. Cal. Aug. 27, 2020).[2] Corporate prayer—which Jewish law conditions on the presence of a *minyan*, or quorum of adult men—is essential to religious education at

[2] 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. Indeed, plaintiffs there assembled a vast array of medical literature demonstrating that while students are a minimal risk for COVID-19 infection or transmission, they suffer substantial educational, psychological, sociological, and other developmental harm from being precluded from attending school.

amicus Yavneh Hebrew Academy. Decls. of Asher Peretz & Rabbi Shlomo Einhorn in Support of Mtn. for Prelim. Inj., Doc. Nos. 29-10, 29-20, *Samuel A. Fryer Yavneh Academy v. Newsom*, No. 2:20-cv-7408 (N.D. Cal. Aug. 27, 2020). These practices and many others are essential to *amici* schools' missions, and can only be performed in person.

Respondent has failed to respect the core tenet of Applicants' religious belief that Judaism must be practiced publicly and communally. Instead, Respondent has targeted Applicants for special disfavor in New York's COVID-19 restrictions. Sadly, Respondent is 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 application 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.

Constitutional rights and standards are not weakened during a pandemic. 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. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004) (plurality opinion); *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 exigent crises, those actions must be evaluated against well-established constitutional standards. In recent months, however, Respondent and governments throughout the country have cited *Jacobson* for the proposition that, during a pandemic, traditional standards of review should give way to near plenary deference to the state.[3] *Jacobson* has morphed into a warrant for unprecedented and unacceptable invasions of religious freedom. Respondent relied on *Jacobson* below to justify its targeted restriction on Applicants' free exercise of the Jewish faith. Memorandum of Law in Opposition to Plaintiffs' Application for Temporary Preliminary Injunctive Relief at 17, *Soos v. Cuomo*, No. 1:20-cv-651 (N.D.N.Y. June 22, 2020), ECF No. 18. So did Minnesota in justifying its severe and discriminatory restrictions on public worship. *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) (May 22, 2020), ECF No. 32. California invoked so-called "*Jacobson* deference" in an attempt to evade searching judicial scrutiny of its restrictions on religious schools, which did not apply to tens of thousands of day camps or child-care centers. Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction, *Samuel A. Fryer Yavneh Acad. v. Newsom*, No. 2:20-

[3] These invocations of *Jacobson* are often based on a misreading of the Chief Justice's nonprecedential concurrence in the denial of an application for injunctive relief in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020). *See Harvest Rock Church, Inc. v. Newsom*, 977 F.3d 728, 732 (9th Cir. 2020) (O'Scannlain, J., dissenting) (objecting to panel majority's reliance on the Chief Justice's *South Bay* opinion in rejecting a Free Exercise challenge).

cv-7408 (JAK) (Sept. 11, 2020), ECF No. 53. More examples abound. *See infra* Section II.D.

This interpretation and use of *Jacobson* is as chilling as it is wrong. *Jacobson* did not hold that constitutional liberties are weakened or given less protection during a pandemic. In fact, the plaintiff there failed to identify *any* constitutional right infringed by regulations requiring mandatory smallpox vaccinations. *Jacobson*, 197 U.S. at 30–31. Rather, he objected to being vaccinated because he "had no faith in vaccination as a means of preventing the spread of smallpox, or … thought that vaccination, without benefiting the public, put in peril the health of the person vaccinated." *Id.* at 36. The holding in *Jacobson* is simple and limited: the police power of the state includes the power to compel healthy adults to be vaccinated, so long as the law applies "equally to all in like condition" and does not infringe the Constitution. *Id.* at 30. The *Jacobson* court—perhaps anticipating the abuses we have seen during the COVID-19 pandemic—went out of its way to explicitly hold that if a state's pandemic-related action violates a fundamental right, "it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." *Id.* at 30–31.

In the context of the religious injuries suffered by Respondent, *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 "undergo the most rigorous of scrutiny." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546

(1993). Such restrictions must be invalidated unless they are "justified by a compelling interest and … narrowly tailored to advance that interest." *Id.* at 533. 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.

There can be no doubt that Applicants, *amici*, and others who have been subject to COVID-19 restrictions have had their religious freedom infringed. Central to the practice of Orthodox Judaism is the communal celebration of the Sabbath in the synagogue, which Respondent's restrictions have made impossible. *See* Application 22. Similarly, central to the practice of Roman Catholicism is the fulfillment of the "Sunday obligation" to attend Mass in a parish church, which many state and local governments have made impossible by imposing strict limitations on religious gatherings.

There can also be no doubt that Respondent's 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, including Respondent's, discriminate against religion on their face. *See* Application 25–29; *Church of the Lukumi Babalu Aye*, 508 U.S. at 533 ("a law targeting religious beliefs as such is never permissible" and "the minimum requirement of neutrality is that a law not discriminate on its face"). 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, which is "inconsistent with what the Free Exercise Clause requires"). And nearly all are riddled with exceptions for favored interests and industries: in California, for instance, the entertainment industry is exempted from much of the state's restrictions; in Nevada, casinos are treated far more favorably than houses of worship; 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) ("where 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 Respondent's 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. filed*, No. 20-482 (U.S. Oct. 14, 2020); *Robinson v. Attorney Gen.*, 957 F.3d 1171, 1182 (11th Cir. 2020). The Sixth Circuit reasoned that "we will not countenance … 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. The same reasoning applies to the First Amendment, which *expressly* protects religious free exercise. "The Constitution sets certain lines that may not be crossed, even in an emergency" and if "[a]ctions taken by [governments] cross[] those lines," "[i]t is the duty of the Court to declare those actions unconstitutional." *Cty. of Butler v. Wolf*, No. 2:20-CV-677, 2020 WL 5510690, at *31 (W.D. Pa. Sept. 14, 2020). *See Soos v. Cuomo*, No. 1:20-cv-651 (GLS), 2020 WL 3488742, at *8 (N.D.N.Y. June 26, 2020), *appeal docketed*, No. 20-2418 (2d Cir. July 30, 2020); *First Baptist Church v. Kelly*, 455 F. Supp. 3d 1078, 1089 (D. Kan. 2020); *Tabernacle Baptist Church, Inc. of Nicholasville v. Beshear*, 459 F. Supp. 3d 847, 850 (E.D. Ky. 2020); *Capitol Hill Baptist Church v. Bowser*, No. 20-cv-2710 (TNM), 2020 WL 5995126, at *12 (D.D.C. Oct. 9, 2020).

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 rights, imposing greater restrictions on religious worship and education than similarly situated secu-

lar 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 application, this Court can clarify for both 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, but rather that pandemic mandates burdening fundamental rights, including free exercise, will be subject to the same judicial skepticism and incisive scrutiny this Court has long required of all 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://www.leg.mn.gov/archive/execorders/20-56.pdf. 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). Minnesota's "guidance" for houses of worship reinforced the ban on religious gatherings of 10 or more persons while giving no indication of when faith-based gatherings could resume. Minn. Dep't of Health, *Guidance for Faith-Based Communities Considering In-Person Services* (May 13, 2020). Yet the governor directed state agencies "to develop a phased plan to

achieve the limited and safe reopening of bars, restaurants, and other places of public accommodation beginning on June 1, 2020." Minn. Exec. Order No. 20-56 ¶ 7(b).

In each phase of its reopening plan, Minnesota discriminated against the free exercise of religion. *Minnesota's Stay Safe Plan*, Minn. COVID-19 Response, https://mn.gov/covid19/for-minnesotans/stay-safe-mn/stay-safe-plan.jsp (last updated Nov. 10, 2020). In "Phase I," places of worship and religious services were restricted to 10 or fewer people, indoors or outdoors, even though retail establishments were open at 50 percent capacity and both critical and non-critical businesses were open. *Id.* In "Phase II," nothing changed for places of worship—even outdoor and socially-distanced religious gatherings remained limited to 10 persons. *Id.* But restaurants and bars were permitted to serve up to 50 patrons outdoors, campgrounds and boat charters were allowed to operate, and salons and barbershops were open at 25 percent capacity. *Id.* Restaurant patrons were not required to wear masks, so long as they practiced social distancing. *Id.* Even in "Phase III" of Minnesota's reopening, places of worship were to be limited to indoor gatherings of 20 or fewer persons, while restaurants and bars were allowed to open indoor dining and other businesses were permitted to operate at increased capacity. *Id.*

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* Minn. Exec. Order No. 20-56

¶ 6(c). 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.*

The consequences of this discriminatory treatment should shock the conscience of every American: this May in Minnesota, twelve people could legally shop in a retail store, but if that same group crossed the street to pray at a neighborhood church, they violated the law. Tens of thousands were allowed in the Mall of America—up to 50 percent of its capacity—but to fill even one percent of the pews at the Cathedral of Saint Paul (capacity 3000) was a criminal offense.

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.

Patently unable to satisfy the strict scrutiny framework, Minnesota justified its conduct by citing *Jacobson* as the controlling authority. *See* Defs.' Mem. in Opp'n to Pls.' Mot. for T.R.O., *Northland Baptist Church of St. Paul v. Walz*, No. 20-cv-1100

(WMW) (ECF No. 32) (May 22, 2020) (*Jacobson* is "the seminal United States Supreme Court case that governs the constitutional analysis in this case," and "courts 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 *amicus* the Roman Catholic Archdiocese of Saint Paul and Minneapolis, Minnesota refused to work toward a solution that respected religious freedom. Minnesota only changed course after the Archdiocese 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://theminnesotasun.com/2020/05/26/twin-cities-mayors-dont-want-to-let-churches-reopen-archbishop-hits-back/. 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 1 (May 13, 2020) (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) ("Forward Dane Version 1"). However, three days after receiving a letter from the Freedom From Religion Foundation complaining that churches were being permitted to reopen,[4] PHMDC issued Emergency Order 3 and revised 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) ("Forward Dane Version 2"). Under Emergency Order 3, all businesses were permitted to resume routine operations at 25 percent capacity, but "Mass Gatherings," defined as "planned events … 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://publichealthmdc.com/documents/2020-05-22_Order_3.pdf.

Of all the entities and activities addressed in the Forward Dane plan, only houses of worship fared worse in Forward Dane Version 2. For example, in the original plan, "[i]ndoor places of arts and culture" such as movie theaters and museums

[4] May 19, 2020 letter from Annie Laurie Gaylor & Dan Barker, Co-Presidents, Freedom from Religion Foundation, to Janel Heinrich, Director, Public Health Madison & Dane County 1, https://bit.ly/3cCqd0V.

were allowed to open in Phase 1 at 25 percent capacity with "[m]inimum 6 feet spacing between groups." Forward Dane Version 1, at 6. In Version 2, that category was combined with "[i]ndoor playgrounds, funplexes, trampoline parks, [and] miniature golf" into a new grouping called "[p]laces of amusement and activity," which were permitted to reopen at 25 percent capacity—without the requirement of six-foot distancing between groups. Forward Dane Version 2, at 13.

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. PHMDC Emergency Order No. 3, § 2. 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, the Mayor of Madison said she "supported people protesting as long as they wanted, and wherever they

wanted."[5] 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.[6]

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. The state closed all schools and then issued a "framework for reopening" that indefinitely suspended "in-person learning" for nearly the entire state. Exec. Dep't, State of Cal.,

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[5] *After Peaceful Afternoon, Protests Escalating in Madison*, WAOW TV-9 (May 30, 2020), https://waow.com/2020/05/30/after-peaceful-afternoon-protests-escalating-in-madison/.

[6] While amici in Wisconsin and Minnesota were grateful to secure positive outcomes short of 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, mooting claims and legislating around protected rights by trial and error is too often a feature of religious liberties litigation.

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* (Sept. 4, 2020), https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/small-groups-child-youth.aspx. 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. *See supra* 6-7. Yet at the same time California refused to accommodate *amici*'s religious needs, it went to great lengths to accommodate non-religious 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 inculcation. *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; Cal. Dep't of Pub. Health, *COVID-19 Industry Guidance: Family Entertainment Centers* (Oct. 20, 2020), https://bit.ly/3ljEp4o; Cal. Dep't of Pub. Health, *COVID-19 Interim Guidance: Youth Sports* (Aug. 3, 2020), https://bit.ly/2Eh1mVu.

When *amici* schools sued, the state invoked "the deference afforded under *Jacobson*" in defense of its discriminatory restrictions. Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction at 7, *Samuel A. Fryer Yavneh Acad. v. Newsom*, No. 2:20-cv-7408 (JAK) (Sept. 11, 2020), ECF No. 53. Fortunately, California relented and agreed to a stipulated order allowing religious schools in the California to open at 100 percent capacity, as long as the schools follow the cohort guidance applicable to comparable nonreligious activities. Stipulated Order of Dismissal, *Samuel A. Fryer Yavneh Acad. v. Newsom*, No. 2:20-cv-7408 (JAK) (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 demonstrate that the states' 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, issued a new order five days before Easter banning religious gatherings of more than 10 persons. Yet the government 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 at 1089. The district court determined that the governor had singled out churches as "the only essential function whose core purpose . . . had been basically eliminated," making it clear that "religious activity was targeted for stricter treatment due to the nature of the activity involved, rather than because such gatherings pose unique health risks." *Id.*

Kentucky's governor and the mayor of Louisville 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). Ironically, while drive-through worship was criminalized, indoor, in-person office meetings were allowed, "even though the open-air services would seem to present a lower health risk." *Maryville Baptist Church*, 957 F.3d at 613. In fact, Kentucky slated nearly every type of activity—from car washing to dog grooming—to resume before worship services. *Id.*

Nevada's governor allowed thousands of people to congregate in casinos, while simultaneously limiting attendance at religious services to 50 regardless of the size

of the facility. *See Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2604 (2020) (Alito, J., dissenting). This overt discrimination led one member of this Court to conclude that in Nevada, "it is better to be in entertainment than religion." *Id.* at 2609 (Gorsuch, J., dissenting).

The mayor of the District of Columbia refused to issue a permit for a church to meet *outdoors* and socially distanced, while publicly and simultaneously "'welcom[ing]' hundreds, if not thousands" of protesters to the city. *Capitol Hill Baptist Church*, 2020 WL 5995126, at *8. The district court observed that "[n]o matter how the protests were organized and planned, the District's (and in particular, Mayor Bowser'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.*

Colorado designated houses of worship as "critical," but functionally "treat[ed] them differently from other 'critical' businesses and activities, even those that pose a comparable risk of COVID-19 transmission." *Denver Bible Church v. Azar*, 2020 WL 6128994, at *9 (D. Colo. Oct. 15, 2020). The state 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. *Id.* at 10. 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." *Id.* at *13.

Finally, Respondent has discriminated against religious organizations in New York for months. Until June, houses of worship were the *only* indoor facilities in the state that were subject to a 25 percent capacity limitation; other "nonessential businesses" enjoyed a 50 percent cap despite not being "justifiably different than houses of worship." *Soos*, 2020 WL 3488742, at *11. Similarly, New York's restrictions on *outdoor* gatherings expressly exempted graduation ceremonies, and implicitly contained a "de facto exemption" for public protests, *id.*, but made no allowance for outdoor religious activities. Respondent's blatant preference for nonreligious behavior has also affected the enforcement of New York's COVID-19 restrictions, leading to outrageous spectacles such as a group of eight Jews, spaced twenty feet from one another, being threatened with arrest for praying together in an "illegal gathering." *Id.* at *6.

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 rightly 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 written in a different context:

> **William Roper**: So, now you give the Devil the benefit of law!
>
> **Sir Thomas More**: Yes! What would you do? Cut a great road through the law to get after the Devil?
>
> **William Roper**: Yes, I'd cut down every law in England to do that!
>
> **Sir Thomas More**: Oh? 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).[7]

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 the application and enter the writ of injunction or, in the alternative, grant certiorari before judgment to correct the error of the lower courts in applying *Jacobson*.

[7] Viewable at https://www.youtube.com/watch?v=d9rjGTOA2NA (Columbia Pictures 1966).

Respectfully submitted,

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