IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-2936

County of Butler; County of Fayette; County of Greene; County of Washington; Nancy Gifford; Mike Gifford, husband and wife doing business as Double Image Styling Salon; Prima Capelli Inc., a Pennsylvania Corporation; Mike Kelly; Marci Mustello; Daryl Metcalfe; Tim Bonner; Steven Schoeffel; Paul F. Crawford, trading and doing business as Marigold Farm; Cathy Hoskins, trading and doing business as Classy Cuts Hair Salon; RW McDonald & Sons Inc.; Starlight Drive in LLC, a Pennsylvania Corporation; Skyview Drive in LLC, a Pennsylvania Limited Liability Company,
Plaintiffs-Appellees,

- v. -

Governor of Pennsylvania; Secretary Pennsylvania Department of Health,
Defendants-Appellants.

On Appeal from the United States District Court for the Western District of Pennsylvania, No. 2:20-cv-00677-WSS (Hon. William S. Stickman IV, U.S.D.J.)

BRIEF OF AMICUS CURIAE NEW JERSEY BUSINESS & INDUSTRY ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLEES

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STATEMENT OF IDENTIFICATION

Founded in 1910, Amicus Curiae New Jersey Business & Industry Association ("NJBIA") is the nation's largest single state-wide organization of employers, with more than 10,000 member companies reflecting all industries and representing every region of New Jersey. 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 this 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.[1]

SUMMARY OF ARGUMENT

115 years ago, the United States Supreme Court held that judicial review of an exercise of a state's police power is permissible only when the state action "has

[1] The parties to the present appeal have graciously consented to the NJBIA's filing of this brief. No party's counsel other than the undersigned counsel for the NJBIA authored this brief in whole or in part. No party, party's counsel, or person contributed money to fund the preparation of this brief.

no real or substantial relation" to the promotion of the public health or general welfare; or (2) "is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905). This appeal 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* governs Appellees' constitutional claims in this action.

The NJBIA respectfully submits that this Court should answer that question in the negative. The Court should not adopt the one-size-fits-all test premised on *Jacobson*. That test does not account for over a century of nuances developed by the United States Supreme Court and the Third Circuit in order to ensure that the rights enshrined in the United States Constitution are adequately protected. Equally problematic, the unduly deferential *Jacobson* test essentially grants state governments unfettered discretion to interfere with the daily lives of every citizen. While that concern is not particularly acute at the outset of a public health crisis or in response to a discrete emergency, the authority to impose draconian restrictions and make arbitrary classifications in contravention of individual liberties must wane as the putative emergency stretches into months and as concrete science emerges.

Jacobson can be and should be reconciled with our modern doctrinal frameworks. Accordingly, this Court should instead look to well-settled standards for the First and Fourteenth Amendment claims at issue, subject to the core holding

of *Jacobson.* States have a strong interest in combating the spread of COVID-19 and protecting the health of their citizens; critically, however, state restrictions will pass constitutional muster only if the means imposed are adequately tailored under the applicable tier of scrutiny.

ARGUMENT

I. THE UNITED STATES SUPREME COURT'S MODERN CONSTITUTIONAL JURISPRUDENCE CAN BE RECONCILED WITH *JACOBSON*

A. The Court Did Not Announce a Pandemic-Specific Test in *Jacobson*

The *Jacobson* Court considered whether compulsory vaccination for smallpox pursuant to a state statute and local ordinance was "inconsistent with the liberty which the Constitution of the United States secures to every person against deprivation by the state." *Id.* at 24. The defendant-petitioner, who was assessed a criminal penalty for refusing to submit to vaccination, asserted that "a compulsory vaccination law is unreasonable, arbitrary, and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best[.]" *Id.* at 26.

The Court first acknowledged that the police power reserved for the States includes "the authority of a state to enact quarantine laws," and "such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." *Id.* at 25; *see also id.* at 27 (noting that "a community

has the right to protect itself against an epidemic of disease which threatens the safety of its members"). With respect to the means employed to promote the public health and general welfare, the Court noted that "[t]he mode or manner in which those results are to be accomplished is within the discretion of the state, *subject, of course*, . . . only to the condition that no rule prescribed by a state . . . shall contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument." *Id.* (emphasis added).

The Court then stressed the deference to be accorded to the factual findings underlying an exercise of the police power. *See id.* at 27-30. In response to myriad arguments concerning the utility of vaccines, the Court stated that

> [w]e must assume that, when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them. It was not compelled to commit a matter involving the public health and safety to the final decision of a court or jury. It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease.

Id. at 30. The Court noted that the regulation at issue was adopted against the backdrop of an increasing prevalence of smallpox in the community. *See id.* at 27-28. In light of that fact, the Court concluded that there was no room for second-guessing whether the regulation "was not necessary in order to protect the public health and secure the public safety." *Id.* at 28. The Court opined that it "would usurp

the functions of another branch of government if it adjudged, as a matter of law, that the mode adopted . . . to protect the people at large was arbitrary, and not justified by the necessities of the case." *Id.* at 28.

Critically, the Court included that final qualifier–"the necessities of the case"–in recognition of the proposition that

> an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons.

Id. The Court thus fashioned a test for "review[ing] legislative action in respect of a matter affecting the general welfare." *Id.* at 30. The 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.

Turning to the petitioner's claim, the Court rejected the assertion that the Due Process Clause grants citizens an inviolable "liberty" right. *See id.* at 26-27. The Court explained that the social contract underlying government function dictates that liberty "is not [an] unrestricted license to act according to one's own will," but is rather "only freedom from restraint under conditions essential to the equal

enjoyment of the same right by others." *Id.* at 26-27. Applying its test, the Court concluded that

> [w]hatever may be thought of the expediency of this statute, it cannot be affirmed to be, beyond question, in palpable conflict with the Constitution. Nor, in view of the methods employed to stamp out the disease of smallpox, can anyone confidently assert that the means prescribed by the state to that end has no real or substantial relation to the protection of the public health and the public safety.

Id. at 31.

As Justice Alito correctly noted when analyzing *Jacobson*,

> "[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 ("Calvary Chapel"), 140 S. Ct. 2603, 2608 (2020) (Alito, J., dissenting); *see also Roman Catholic Diocese of Brooklyn v. Cuomo ("Diocese")*, 592 U.S. --, 2020 WL 6948354, at *5 (U.S. Nov. 25, 2020) (Gorsuch, J., concurring) ("*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."). The NJBIA

agrees. *Jacobson* did not announce a test to be applied in *all* cases challenging state action taken in response to a pandemic. Rather, the Court clarified the scope of review for a facial challenge to an exercise of the police power, acknowledging the deference to be afforded to states when selecting the means to promote the general welfare—particularly in light of the public health issue at hand. The Court narrowly held that there is no fundamental "liberty" right that supersedes the state's need for compulsory vaccination in the face of a public health crisis.

B. Modern Constitutional Jurisprudence Involves the Application of Tiered Scrutiny

In the century since *Jacobson* was issued, the Court has greatly refined the analytical frameworks underlying certain constitutional claims. *See, e.g.*, *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174 (1980) (clarifying the standard of review for an equal protection claim under the Fifth Amendment in light of the fact that the "Court in earlier cases has not been altogether consistent in its pronouncements in this area"); *Diocese*, 2020 WL 6948354, at *5 (Gorsuch, J., concurring) (noting that "[a]lthough *Jacobson* pre-dated the modern tiers of scrutiny, this Court essentially applied rational basis review"); *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015) (holding that "*Jacobson* does not specifically control [the plaintiffs'] free exercise claim" because "*Jacobson* did not address the free exercise of religion because, at the time it was decided, the Free Exercise Clause of the First Amendment had not yet been held to bind the states"); Katie R. Eyer, *The Canon of Rational*

Basis Review, 93 NOTRE DAME L. REV. 1317, 1332 n.73 (2018) (noting that "the modern system of tiered scrutiny . . . emerged fully only in the aftermath of *Brown v. Board of Education*").

To state the obvious,

> when the Supreme Court elaborates a new standard for analyzing a constitutional claim, we use that most recent formulation, rather than the framework from a decision for a different constitutional claim, made by a different claimant, in a different state, facing a different public health emergency in a different century.

Bayley's Campground Inc. v. Mills, 463 F. Supp. 3d 22, 31 (D. Me. 2020) (applying analytical framework applicable to the "right to travel" in recognition of the fact that "the Supreme Court refined its approach for the review of state action that burdens constitutional rights"); *accord Denver Bible Church v. Azar*, -- F. Supp. 3d --, 2020 WL 6128994, at *7-8 (D. Colo. Oct. 15, 2020) ("[W]hile an emergency might provide justification to curtail certain civil rights, that justification must fit within the framework courts use to evaluate constitutional claims in non-emergent times."); *Savage v. Mills*, -- F. Supp. 3d --, 2020 WL 4572314, at *5 (D. Me. Aug. 7, 2020) (calling into doubt whether "*Jacobson* will be the Rosetta Stone for evaluating the merits of a challenge to any COVID-19-related government regulation"); Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 HARV. L. REV. F. 179, 193 (2020) (stating that "the Supreme Court has *never* said that *Jacobson* applies—to the

exclusion of subsequently articulated doctrinal standards—to all constitutional rights").

Courts within this Circuit have analyzed COVID-19-related challenges using modern frameworks. *See, e.g.*, *Cnty. of Butler v. Wolf*, -- F. Supp. 3d --, 2020 WL 5510690 at *10 (W.D. Pa. Sept. 14, 2020) (holding that "ordinary constitutional scrutiny is necessary to maintain the independent judiciary's role as a guarantor of constitutional liberties—even in an emergency"); *Nat'l Ass'n of Theatre Owners v. Murphy*, No. 20-8928, 2020 WL 5627145, at *12 (D.N.J. Aug. 18, 2020) (applying rational basis review to equal protection challenge). The same is true outside of this Circuit. *See League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App'x 125, 127–28 (6th Cir. 2020) (applying rational basis review and acknowledging that "[a]ll agree that the police power retained by the states empowers state officials to address pandemics such as COVID-19 largely without interference from the courts"); *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 925-26 (6th Cir. 2020) (holding that plaintiffs established a likelihood of success on the merits on challenge to temporary ban on abortions "even if *Jacobson*'s more state-friendly standard of review is the test we should be applying here—rather than the usual *Roe/Casey* standard," and noting "the challenge of reconciling century-old precedent with the Supreme Court's more recent constitutional jurisprudence"); *Hernandez v. Grisham*, -- F. Supp. 3d. --, 2020 WL 6063799, at *55 (D.N.M. Oct.

14, 2020) (applying rational basis review); *Denver Bible Church*, 2020 WL 6128994, at *7-8 ("[M]ost state and local public-health orders that don't implicate fundamental rights will be analyzed under what is now known as the rational basis test.").[2]

Indeed, Defendants-Appellants acknowledge that the tier-based levels of scrutiny apply in this case. They submit that they "have never argued that *Jacobson* gives them unbridled authority, that 'ordinary' constitutional review should not apply, or that other constitutional doctrines are displaced." Defs.' Br. at 26. They likewise assert that "[t]he error in the District Court's analysis was not that it . . .

[2] Some courts have incorrectly held that *Jacobson*'s test applies to all constitutional rights. *See, e.g.*, *In re Rutledge*, 956 F.3d 1018, 1028 (8th Cir. 2020) (granting writ of mandamus directed at TRO enjoining health directive against abortion provider and holding that *Jacobson* dictates that "a court may review a constitutional challenge to a government's response to a public health crisis only if the state's response lacks a 'real or substantial relation' to the public health crisis or it is, 'beyond all question, a plain, palpable invasion' of the right to abortion"); *In re Abbott*, 954 F.3d 772, 784–87 (5th Cir. 2020) (holding that "the effect on abortion arising from a state's emergency response to a public health crisis must be analyzed under the standards in *Jacobson*," and that "*Jacobson* instructs that *all* constitutional rights may be reasonably restricted to combat a public health emergency"). Nothing in *Jacobson* supports the view that the declaration of an emergency displaces the different standards for the rights both enumerated and implicit in the United States Constitution. *See Calvary Chapel*, 140 S. Ct. at 2608 (Alito, J., dissenting).

applied 'ordinary constitutional scrutiny'"; they simply challenge the application of those doctrines.[3] *Id.* at 30-31.

* * *

The court below properly eschewed reliance on *Jacobson* as the final word on constitutional challenges during a public health crisis. *Jacobson* can and should be reconciled with modern constitutional tests. While the test has been superseded by right-specific frameworks, *Jacobson*'s core holding has not been radically disturbed: (1) a compulsory vaccination law promulgated in order to stymie a public health crisis does not violate a citizen's constitutionally protected interest in avoiding physical restraint, *see Kansas v. Hendricks*, 521 U.S. 346, 356-57 (1997) (citing *Jacobson*, 197 U.S. at 26); and (2) courts should defer to the factual findings underlying a reasonable exercise of the police power in the face of medical and scientific uncertainty, *see Gonzales v. Carhart*, 550 U.S. 124, 163 (2007) (citing *Jacobson*, 197 U.S. at 30-31).

As the Court subsequently noted, "the [*Jacobson*] Court balanced an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interest in preventing disease." *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 278 (1990). On how that balancing is to be conducted,

[3] The NJBIA takes no position on whether the Pennsylvania Executive Orders under review survive tier-based scrutiny. Its interest in this appeal is limited to ensuring that the correct analytical framework is applied.

Jacobson no longer has precedential value. The immense body of constitutional law that has emerged in the last century has supplanted the disjunctive test announced in *Jacobson*. *See Diocese*, 2020 WL 6948354, at *5 (Gorsuch, J., concurring) ("*Jacobson* didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so.").

II. APPLICATION OF THE TRADITIONAL ANALYTICAL FRAMEWORKS APPLICABLE TO THE RIGHTS AT ISSUE MUST ACCOUNT FOR BOTH *JACOBSON* AND THE ONGOING NATURE OF THE COVID-19 PANDEMIC

To resolve Plaintiffs' challenges to the orders under review, the Court must (1) identify the constitutional right at issue; (2) determine the applicable legal framework; and (3) apply the framework in a manner that gives appropriate deference to States' decision-making at the outset of a public health emergency. *See Diocese*, 2020 WL 6948354, at *2 (per curiam) (holding that "[b]ecause the challenged restrictions are not neutral and of general applicability, they must satisfy 'strict scrutiny'" (internal quotation marks omitted)); *Diocese*, 2020 WL 6948354, at *12 (Sotomayor, J., dissenting) ("*South Bay* and *Calvary Chapel* provided a clear and workable rule to state officials seeking to stem the spread of COVID-19: They may restrict attendance at houses of worship so long as comparable secular institutions face restrictions that are at least equally as strict.").

In accordance with *Jacobson*, states should be given reasonable leeway regarding the decisions of what constitutes a public health emergency *in the short*

term, and whether *temporary* restrictions should be imposed in order to achieve the goals of "flattening the curve" and protecting hospital capacity. That said, *Jacobson* is distinguishable from the present case in one crucial aspect that necessitates meaningful judicial review. The constitutional infringement at issue in that case involved a discrete invasion of one's liberty—compelled vaccination. The restrictions on civil liberties brought on by the COVID-19 pandemic are not so limited: the present crisis has an indeterminate end date that, until a cure is discovered, may require potentially indefinite limits on economic and social activities.

As objective science emerges and the infringements on civil liberties nonetheless linger, the Judiciary must carefully consider whether the most stringent means employed to combat the pandemic remain narrowly tailored or rationally related to the stated goal of promoting public health. *See Diocese*, 2020 WL 6948354, at *2 (per curiam) (holding that capacity limits on houses of worship were not narrowly tailored to the State's interest in stemming the spread of COVID-19 because "there [is] no evidence that the [houses of worships] have contributed to the spread of COVID-19" and "there are many less restrictive rules that could be adopted to minimize the risk to those attending religious services"). What is constitutionally permissible with respect to the imposition, modification, and removal of

governmental restrictions cannot be static over time. Courts are equipped to make those fact-specific, albeit difficult, decisions.

> [A]s "emergency" restrictions extend beyond the short-term into weeks and now months, courts may become more stringent in their review. . . . [T]his admonition comes into play in the "tailoring" prong of current constitutional doctrine. Where fundamental rights are implicated, this requires assessing whether the government's action is the least restrictive means available. In the earliest days of a pandemic or other true emergency, what may be the least restrictive or invasive means of furthering a state's compelling interest in public health will be particularly uncertain, and thus judicial intervention should be rare. But as time passes, scientific uncertainty may decrease, and officials' ability to tailor their restrictions more carefully will increase.

Denver Bible Church, 2020 WL 6128994, at *8. As another court has noted,

> [w]oven into *Jacobson* is the recognition that at the time the plaintiff refused the vaccination, smallpox was "prevalent and increasing" in the area and posed an acute risk to public health. 197 U.S. at 28. And we know the feeling: Much of this city and country have faced similar public health risks recently or are facing them currently. In such circumstances, judicial scrutiny may recede to its lowest ebb, leaving room for an energetic response by the political branches to the many uncertainties accompanying the onset of a public health crisis. But when a crisis stops being temporary, and as days and weeks turn to months and years, the slack in the leash eventually runs out. "While the law may take periodic naps during a pandemic, we will not let it sleep through one." *Roberts v. Neace*, 958 F.3d 409, 414–15 (6th Cir. 2020).

Capitol Hill Baptist Church v. Bowser, -- F. Supp. 3d --, 2020 WL 5995126, at *7 (D.D.C. Oct. 9, 2020).

At some point, perhaps months into the pandemic, it may be the case that the relationship between "flattening the curve" and an executive order closing certain business establishments or prohibiting certain commercial activities has become "so attenuated as to render the distinction arbitrary or irrational." *United States v. Walker*, 473 F.3d 71, 77 (3d Cir. 2007) (quoting *Fitzgerald v. Racing Ass'n of Central Iowa*, 539 U.S. 103, 107 (2003)). Even in the face of an emergency that has imposed immense challenges on our governments to make the best decisions for their constituents, courts must remain vigilant against potential overreach insofar as those political bodies impose measures that are no longer supported by the exigency of the situation or that are wholly disproportional and arbitrary in nature.

CONCLUSION

For the foregoing reasons, this Court should adhere to the traditional analytical frameworks that govern the constitutional claims before the Court and decline to adopt the test announced in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

Respectfully Submitted,

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COMBINED CERTIFICATIONS

I certify that I am admitted to practice before this Court pursuant to Third Circuit Local Appellate Rule 46.1(e).

I certify that this brief complies with the type-volume limitation excluding the parts of the brief pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3998 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(f). This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Times New Roman font.

Pursuant to Third Circuit Local Appellate Rule 31.1(c), I certify that the text of this electronic brief is identical to the text of the paper copies and that I have scanned the PDF version of this brief using McAfee VirusScan Enterprise version 8.8 and no virus was found.

Date: December 29, 2020

s/ David R. Kott
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CERTIFICATE OF SERVICE

I certify that on December 29, 2020, I caused the foregoing brief to be electronically filed through the ECF system of the United States Court of Appeals for the Third Circuit, which caused counsel of record to be served by ECF.

I further certify that I have mailed the foregoing document by First-Class Mail, postage prepaid to the following non-CM/ECF participant:

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