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**BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION AND LIMITED
GOVERNMENT OF THE COMMITTEE ON THE JUDICIARY**

Good afternoon, Chairman Roy, Ranking Member Scanlon, and members of the committee.

Thank you for inviting me to testify before you today on a topic that I believe to be the most significant civil liberties crisis of my lifetime: the use of the so-called COVID “emergency” to eviscerate Americans’ most cherished constitutionally protected freedoms.

During the Covid-19 pandemic, we witnessed the radical dismantling of the guardrails that the Framers of our Constitution specifically designed to reign in imperious government actors. Under the guise of an emergency, government officials issued unlimited executive fiats to control every aspect of our lives: they closed our schools, locked down our houses of worship, destroyed our small businesses, criminalized our free speech, banned travel, kept us from our loved ones at their most desperate hours—even shut down our beaches! The government wrested unchecked and unprecedented control from the American people, and the vast majority of elected officials—from both parties—assumed their heretofore unimaginable powers with no qualms about history, precedent, or the consequences.

Thankfully, due to a wave of legal challenges against these restrictions, the Supreme Court eventually issued several rulings that, piece-by-piece, returned some measure of protection to our threatened constitutional rights, while others remain exposed and eroded. COVID demonstrated just how vulnerable those rights are without affirmative protection from judicially unchecked government overreach. At any given time, a state or federal government could declare an emergency—or fabricate some other unfounded excuse—and suspend our fundamental rights once again.

It is imperative that Congress intervene and make sure that COVID legal history cannot and will not repeat itself.

An Emergency Based on Debunked “Science”

At the outset, it is important to highlight that much of the “science” on which COVID-19 restrictions were based has since been debunked. So-called experts—and the government officials beholden to them—literally lied to the American people. “15 days to stop the spread” turned into weeks, months, and nearly years of government mandates that did little to substantially stop the spread of COVID.

We were lied to about the origins of COVID, the dangers it posed to our health, how it spreads, and what actions could prevent individuals from transmitting or catching the virus. Americans who dared challenge this deceptive government narrative were vilified, censored, and denounced for spreading “misinformation.”

Of course, it is unelected government officials, aided by so-called experts and boosted by media and technology figures, who determined what is misinformation and what is truth.

The result was excessive, illogical, and inconsistent restrictions that violated our constitutional rights and failed to significantly protect the public health. When the government can invoke an emergency on such faulty grounds and use that emergency to trample freedom, we know the next instance of executive overreach cannot be far away.

Making Religious Americans Second-Class Citizens

The sheer scope of individual rights that the government violated during the COVID pandemic is almost incomprehensible and demonstrates just how far the government was willing to go to exert complete control over our lives. These actions were not targeted, not based on sufficiently credible science, and as such, the government made no attempt to limit its overbearing restrictions in any meaningful way.

One of the most egregious violations of our First Amendment freedoms was the treatment of religious Americans as second-class citizens. From the very beginning of the pandemic, governors across the country discriminately labeled houses of worship, and by extension the First Amendment, as “non-essential,” while leaving secular counterparts open for business. Marijuana, liquor, and big-box retailers were deemed essential, but God was not.

The houses of worship and religious leaders I represented implemented social distancing and health protocols often more aggressive than what the government prescribed for “essential” businesses it allowed to remain open, yet the governors banned Americans from gathering in person to worship. These restrictions forced Americans to make an untenable choice—obey God or government, but not both.

For millions of Americans, in-person gatherings are a central tenant of their faith. Worship services, prayer, acts of service—all require individuals to be together in person. But government bureaucrats decided that those central faith practices were within the jurisdiction of government to regulate, as though the First Amendment only applies selectively by gubernatorial fiat. In California, they even regulated in-home Bible studies by prohibiting more than three family units from gathering in private residences to pray and study together.

Yet, somehow an unlimited number of family units were permitted to gather outside the home in certain secular gatherings. COVID restrictions unleashed blatant discrimination against religious individuals versus their secular counterparts. Many governors issued mandates that included tailored exemptions, but few of those exemptions applied to religious activities.

For example, in some states, there were exemptions for reporters so they could continue to do their jobs freely. There were exemptions for liquor stores, marijuana dispensaries, and even Hollywood sets. BLM protesters gathered in the thousands in major cities across America. But when it came to religion, the government ignored the First Amendment’s protections and didn’t allow exemptions.

The Center for American Liberty and Dhillon Law Group represented several faithful Americans in their fight to live according to their religious beliefs.

In *Gish v. Newsom* and in *South Bay United Pentecostal Church v. Newsom*, we represented pastors and congregants in California who did everything they could to keep their churches’ doors open during Gov. Gavin Newsom’s radical restrictions on religious gatherings. They employed social distancing and sanitation guidelines, but nothing was enough to satisfy the government’s insatiable desire to shut down the free exercise of religion.

When states finally began to roll back some of their restrictions, they continued to discriminate against religious Americans. In some states, secular businesses were allowed to open with various health precautions in place—but churches that

implemented the same restrictions were still forced to keep their doors closed. You could gather at a Costco, but not at a cathedral.

This discrimination against religious Americans did not end once restrictions finally lifted. The Center for American Liberty presently represents three individuals who were fired from the North Carolina Symphony when they requested religious exemptions to the Symphony's vaccine mandate. All three musicians submitted exemption requests that included guarantees that they would take on additional social distancing and masking requirements in order to avoid having to violate their religious beliefs by taking the vaccine. The Symphony denied the requests and fired all three musicians.

The Symphony eventually lifted its vaccine mandate, but refused to re-hire these religious musicians. As a result of the government's discrimination against their Constitutionally-protected religious beliefs, these talented artists lost their livelihood.

Such disparate treatment of religious Americans clearly violates the guarantees of the First Amendment.

Destroying Our Kids' Educational Future

Moreover, the government unconstitutionally shut down schools, permanently damaging the educational progression of a generation of America's children. This is especially true of those children with special needs, those learning English as a second language, and economically disadvantaged children.

By relegating education to online distance learning, the government violated federal due process, equal protection guarantees, and the right to an effective education for special-needs children—all, for a class of Americans who were always considered the least vulnerable to COVID.

In *Brach v. Newsom*, the Center for American Liberty and Dhillon Law Group represented a diverse group of parents as they sought to overturn these damaging shutdowns and restore basic education for their children. At a minimum, the Fourteenth Amendment guarantees parents a fundamental right to direct the upbringing and education of their children. The Ninth Circuit agreed that shutting down private schools uniquely denied parents their right to choose how to educate their children, before overturning *Brach* on mootness grounds.

Silencing the Right to Protest

When freedom-loving Americans objected to the violations of their rights, they discovered even their right to protest had been revoked.

In California, citizens decided they needed to speak out about the State's erasure of their Second Amendment rights during the pandemic. Our clients Ron Givens and Christine Bish planned a socially distanced protest on the grounds outside at the state Capitol in Sacramento, fully intending to comply with sanitation and social distancing guidelines. However, the California Highway Patrol denied these individuals' permit applications to use the State Capitol grounds for their demonstrations, in direct violation of their First and Fourteenth Amendment rights.

In times of crisis, the government often seeks to curtail fundamental freedoms, such as the right to assemble and petition the government. But it is precisely at those times that these rights become the most critical to the preservation of liberty.

The government used COVID-19 as an excuse to deny Americans their freedom, and then deny Americans the right to protest these violations. This is the very definition of tyranny.

The Loophole to a Critical Check on Executive Power

These unabashed violations of our civil liberties were made possible by the lack of due process and judicial scrutiny during the pandemic. When governors invoked "emergency" status, federal judges tossed all constitutional scrutiny aside, and the government had free reign to control virtually every aspect of our lives.

Under modern jurisprudence, when the government enacts a law or policy that violates a constitutionally protected right, courts apply varying levels of scrutiny—depending on the rights in question—to determine whether the government's action is constitutional.

Under the default rational basis test, the burden is on the petitioner, not the government, to show that the regulation or law in question is not rationally related to a legitimate state interest. Specific instances merit a heightened intermediate scrutiny, whereby the regulation or law in question must be substantially related to an important government interest.

Finally, when a regulation or law infringes on a fundamental right or discriminates against a protected class of people, the burden shifts. Under strict scrutiny, the burden is on the government, not the petitioner, to prove constitutionality. Strict

scrutiny requires that the government demonstrate that it has a compelling government interest in violating said right, and that it narrowly tailored the law to achieve that interest. This burden-shifting analysis may sound arcane, but it is often dispositive. It is very difficult for a petition to convince a court that the government shouldn't prevail under a rational basis review, as its degree of scrutiny is very low. Likewise, it is extremely difficult for the government to prevail when facing strict scrutiny, as there is almost always a less restrictive means of achieving the government's compelling interest.

During COVID, the states violated American's fundamental rights indiscriminately. From religious freedom to freedom of speech, government officials aggressively trampled on these most basic liberties—and many federal judges threw all three standards of scrutiny aside in the name of an “emergency,” ruling instead that the government was entitled to deference because it uttered the magic word “emergency,” an incantation that trumped decades of tiered legal scrutiny jurisprudence.

Judge after judge uttered similar, chillingly dismissive rulings in our cases challenging government overreach. This complete disregard for such a critical check on the executive branch was the result of an outdated Supreme Court ruling from over a century ago.

The 1905 case *Jacobson v. Massachusetts* involved a vaccine mandate. A Massachusetts law allowed cities to require residents to be vaccinated for smallpox. Cambridge resident and pastor Henning Jacobson refused to comply with the requirement and was fined by the city. Jacobson sued, arguing that the vaccine mandate violated his Fourteenth Amendment right to liberty.

The Supreme Court ruled in favor of Massachusetts, claiming that police powers are “wholly” within the discretion of the state so long as they are not exercised in an “arbitrary and oppressive manner.” Because local health departments had determined that mandatory vaccines were needed, the requirement could not be deemed unreasonable, nor arbitrarily imposed.

In effect, the *Jacobson* decision handed unlimited power to the government to declare what was needed to protect public health and safety and then implement restrictions to achieve this self-determined goal.

But federal courts applied *Jacobson* to COVID-19 lockdown challenges in error. The Court decided *Jacobson* decades before the First Amendment's Establishment and

Free Exercise Clauses were held to apply to the States by incorporation. And since the Court's adoption of its modern analytical framework, the Court has never set it aside during an emergency.

Yet applying *Jacobson*, there was no room for judges to make their own determinations; the executive fiat was to be endorsed, and our fundamental rights abridged.

Such a significant and dangerous loophole in the American system, that judges refused to correct, must now be closed by legislation.

Congress Must Limit the *Jacobson* Loophole

Jacobson remains a threat to constitutionally-protected liberty during future emergency situations, as many courts will undoubtedly still apply it. *Jacobson* is the very reason that four years after the start of the pandemic, we are still having this conversation about the civil liberties violations during the COVID-19 era. The guardrails remain vulnerable to deterioration and complete removal as long as *Jacobson* remains intact due to Congressional inaction.

Congress must step up and ensure this may never happen again.

I urge Congress to enact legislation that limits the federal government's ability to use the *Jacobson* decision to curtail our constitutional freedoms ever again. No emergency—especially one defined by the government—should warrant the erosion of our freedoms and a complete disregard for the judicial scrutiny the courts use to preserve them. We must maintain the rule of law regardless of the circumstances. Without it, as we learned during the pandemic, our freedoms are at the whim of power-hungry politicians guided by pseudo experts who are eager to be free of the barriers set in place by the Framers of our Constitution.

President Ronald Reagan's words serve as a stirring reminder in the wake of the COVID lockdowns:

Freedom is never more than one generation away from extinction. We didn't pass it to our children in the bloodstream. It must be fought for, protected, and handed on for them to do the same, or one day we will spend our sunset years telling our children and our children's children what it was once like in the United States where men were free.

COVID nearly sent our fundamental freedoms into extinction. Without brave patriots standing up against this government tyranny, the “emergency” would never have ended. The violation of our rights would persist.

Without taking aggressive legislative action to ensure this cannot happen again, that freedom will never be passed to the next generation. We must fight to preserve it.

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