

TESTIMONY OF

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BEFORE THE

House Select Subcommittee on the Coronavirus Pandemic

HEARING ON

“Churches vs. Casinos: The Constitution is not Suspended in Times of Crisis”

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I. INTRODUCTION

Chairman Wenstrup, Ranking Member Ruiz, and distinguished members of the Subcommittee: Thank you for inviting me to appear before you to testify about religious freedom during the COVID-19 pandemic. My name is Micah Schwartzman. I am the Hardy Cross Dillard Professor of Law and Director of the Karsh Center for Law & Democracy at the University of Virginia School of Law. For the past 15 years, I have taught courses and written extensively about constitutional law and the First Amendment,¹ and I recently chaired the Association of American Law Schools Section on Law & Religion.

Although I am here today as a legal expert on matters of religious freedom, I also want to say a few words about my own religious background. I come from a rabbinic family. My grandfather, Sylvan Schwartzman, was a rabbi who taught Jewish education at the Hebrew Union College, a seminary in Cincinnati, Ohio. My father, Rabbi Joel Schwartzman, was a military chaplain, who served for more than 20 years in the United States Air Force, retiring as a full colonel. My sister, Ilana, is a rabbi who leads a congregation in northern New Jersey. For my part, I am currently the president of the

¹ See, e.g., *Religious Freedom and Abortion*, 108 IOWA L. REV. 101 (2023) (with Richard Schragger); *Re-Upping Appeasement: Religious Freedom and Judicial Politics in the 2019 Term*, 2019-2020 ACS SUP. CT. REV. 115 (2020) (with Nelson Tebbe); *Establishment Clause Appeasement*, 2019 SUP CT. REV. 271 (2020) (with Nelson Tebbe); *Religious Antiliberalism and the First Amendment*, 103 MINN. L. REV. 1341 (2020) (with Richard Schragger); *Official Intentions and Political Legitimacy: The Case of the Travel Ban*, in NOMOS LXI: POLITICAL LEGITIMACY 201 (Jack Knight & Melissa Schwartzberg eds., 2019); *Establishment Clause Inversion and the Bladensburg Cross Case*, 2018-19 ACS SUP. CT. REV. 21 (Steven D. Schwinn ed., 2019) (with Richard Schragger); *The Etiquette of Animus*, 131 HARV. L. REV. 133 (2018) (with Leslie Kendrick); *The Costs of Conscience*, 106 KY. L.J. 811 (2018) (with Richard Schragger & Nelson Tebbe); *When Do Religious Accommodations Burden Others?*, in THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY (Susanna Mancini & Michel Rosenfeld eds., Cambridge University Press, 2018) (with Nelson Tebbe & Richard Schragger); *How Much May Religious Accommodations Burden Others?*, in LAW, RELIGION, AND HEALTH IN THE UNITED STATES 215 (Holly Fernandez Lynch, et al. eds., Cambridge University Press, 2017) (with Nelson Tebbe & Richard Schragger); THE RISE OF CORPORATE RELIGIOUS LIBERTY (Schwartzman et al. eds., Oxford University Press, 2016); *Religion as a Legal Proxy*, 51 SAN DIEGO L. REV. 1085 (2014); *Against Religious Institutionalism*, 99 VA. L. REV. 917 (2013) (with Richard Schragger); *What If Religion Is Not Special?* 79 U. CHI. L. REV. 1351 (2012); *Conscience, Speech, and Money*, 97 VA. L. REV. 317 (2011).

For legal commentary in media outlets and online sources, see, e.g., *Is the Religious Liberty Tent Big Enough to Include the Religious Commitments of Jews*, SLATE (June 22, 2022) (with Dahlia Lithwick); *Religious Privilege in Fulton and Beyond*, SCOTUSBLOG (Nov. 2, 2020) (with Nelson Tebbe & Richard Schragger); *Barrett Favors Religious Expression Over Other Speech. The Constitution Doesn't*, WASH. POST (Oct. 13, 2020) (with Nelson Tebbe); *The Separation of Church and State is Breaking Down Under Trump*, THE ATLANTIC (June 29, 2020) (with Nelson Tebbe & Richard Schragger); *The Quiet Demise of the Separation of Church and State*, N.Y. TIMES (June 8, 2020) (with Nelson Tebbe & Richard Schragger); *Churches have been hypocritical during the pandemic*, WASH. POST (May 13, 2020) (with Nelson Tebbe & Richard Schragger); *The Bladensburg Peace Cross sends the message that some citizens are less valued than others*, WASH. POST (Feb. 26, 2019) (with Nelson Tebbe & Richard Schragger); *Does Trump's New Travel Ban Violate the Establishment Clause?* JUST SECURITY (March 7, 2017) (with Nelson Tebbe & Richard Schragger); *The Costs of Conscience and the Trump Contraception Rules*, TAKE CARE (March 6, 2018) (with Nelson Tebbe & Richard Schragger).

board of my synagogue, Congregation Beth Israel, in Charlottesville, Virginia. I am also the father of three children, who were 10, 7, and 5 years old when the pandemic swept across our country.

I mention my religious and family background because I know how difficult the pandemic was for communities of faith. The burdens we experienced were unprecedented. I was part of my congregation's senior leadership in the spring of 2020, when we made the agonizing decision to close our temple's building, which meant shutting down our preschool and kindergarten, with more than 100 children, including one of my own.² We made that decision for a simple reason, which was to save lives. My father has reminded me of the Talmudic saying, that "one who saves a human life is as though they have saved an entire world."³ In the Jewish tradition, the principle of *pikuach nefesh*—the saving of a life—overrides all other commandments.

When the novel coronavirus overwhelmed hospital systems in Europe, and when it threatened to do the same in our country, faith communities of all denominations, including my own, made painful choices to comply with stay-at-home orders, capacity limits, social distancing rules, and mask requirements. We did it to save lives. That was in accordance with the rule of law and with our religious obligations.

II. RELIGIOUS FREEDOM DURING THE PANDEMIC

Turning now to the legal issues, in my view, the public health regulations that burdened religious groups during the pandemic were justified under the First Amendment and related federal and state statutes protecting religious liberty. There are three reasons why:

First, state officials generally acted in good faith and without discriminatory intent. They had to move quickly, in the face of great uncertainty, and often under catastrophic conditions. It is easy to forget how dire things were three years ago. When the Supreme Court decided its first COVID-related free exercise case, on May 29, 2020, Chief Justice Roberts noted, "there is no known cure, no effective treatment, and no vaccine."⁴ On the day the Chief Justice made that statement, nearly 1100 Americans died of COVID, which had already claimed 100,000 lives.⁵ And that was only the beginning of the pandemic, which is now responsible for more than 1.1 million deaths in the United States.

² The CBI Preschool & Kindergarten initially reopened online. Thanks to the inspiration and leadership of our educational director and her staff, it then became an award-winning Forest School. See *The Covenant Foundation Announces Recipients of 2022 Covenant Awards*, <https://covenantfn.org/news/the-covenant-foundation-announces-recipients-of-2022-covenant-award/>.

³ Talmud (Sanhedrin 37a).

⁴ *South Bay v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief).

⁵ Coronavirus Resource Center, JOHNS HOPKINS UNIVERSITY & MEDICINE, <https://coronavirus.jhu.edu/region/united-states> (last updated Mar. 10, 2023).

Tragically, faith communities were particularly susceptible to spreading COVID. Gathering indoors in large groups, talking and singing together for many hours, and sharing meals—all of these important activities created serious risks, especially for the elderly. At the outset of the pandemic, houses of worship were the sources of COVID clusters in more than a dozen states.⁶ And there are too many heart-breaking stories to recount of clergy who lost their lives to the pandemic.⁷ When considering the proper

⁶ See, e.g., Addie Haney, *Bartow County Cluster of Coronavirus Cases Linked to Church*, 11 ALIVE (Mar. 20, 2020), <https://www.11alive.com/article/news/health/coronavirus/bartow-county-cases-of-coronavirus-link-back-to-church/85-4bb64f9e-5b3e-4640-b03e-3bf72a5acc5e>; Craig Parrish, Brandon Stone, & Richard Walker, *Washington State Choir Suffers Devastating Losses to COVID-19*, POST REGISTER (Mar. 31, 2020), https://www.postregister.com/coronavirus/washington-state-choir-suffers-devastating-losses-to-covid-19/article_688594b9-3c5f-5697-a4c7-b1fa9c70a9a9.html; Stephanie Becker, *At Least 70 People Infected with Coronavirus Linked to a Single Church in California*, Health Officials Say, CNN (Apr. 4, 2020) <https://www.cnn.com/2020/04/03/us/sacramento-county-church-covid-19-outbreak/index.html>; Jonathan Shorman, *Kansas Has 3 Church-Related COVID-19 Clusters, State Says Amid Scramble for Supplies*, WICHITA EAGLE (Apr. 6, 2020), <https://www.kansas.com/news/coronavirus/article241810656.html#adnr=900000>; *A Funeral. A Birthday Party. A Church Service. How a COVID-19 Cluster In Chicago Spread and Killed Three People*, CBS NEWS CHICAGO (Apr. 9, 2020), <https://chicago.cbslocal.com/2020/04/09/a-funeral-a-birthday-party-a-church-service-how-a-covid-19-cluster-in-chicago-spread/>; *Recent COVID-19 Cases Include Church Cluster on Maui*, MAUI NOW (Apr. 12, 2020), <https://mauinow.com/2020/04/11/recent-covid-19-cases-include-church-cluster-on-maui/>; Victor Tangermann, *A Pastor Refused to Close Church Due to COVID. Then It Killed Him*, FUTURISM (Apr. 14, 2020), <https://futurism.com/pastor-refused-close-church-covid-killed-him>; Kimberly King, *No Cluster of COVID-19 Cases in Rutherford County, Health Officials Say*, ABC 13 NEWS (Apr. 16, 2020), <https://wlos.com/news/local/no-cluster-of-covid-19-cases-in-rutherford-county-health-officials-say>; WBRZ Staff, *Defiant Central Pastor's Attorney Hospitalized with COVID-19, Church Member Dies From Virus*, WBRZ (Apr. 16, 2020), <https://www.wbrz.com/news/defiant-central-pastor-s-attorney-hospitalized-with-covid-19-church-member-dies-from-virus/>; Peter Smith, *Church Rebounds From Cluster of COVID Cases*, PITT. POST-GAZ. (Apr. 20, 2020), <https://www.post-gazette.com/news/faith-religion/2020/04/20/Eastminster-Presbyterian-Church-rebounds-cluster-COVID-19-coronavirus-pandemic/stories/202004200104>.

⁷ See, e.g., Michelle Boorstein, *Prominent Virginia Pastor Who Said 'God is Larger Than this Dreaded Virus' Dies of COVID-19*, PHILA. INQUIRER (Apr. 13, 2020), <https://www.inquirer.com/health/coronavirus/coronavirus-virginia-pastor-dies-20200413.html>; Neil Vigdor, *Pastor Who Defied Social Distancing Dies After Contracting Covid-19, Church Says*, N.Y. TIMES (Apr. 14, 2020), <https://www.nytimes.com/2020/04/14/us/bishop-gerald-glenn-coronavirus.html>; Minyvonne Burke, *4 Family Members of Virginia Bishop Who Died of Coronavirus Now Battling it Themselves*, NBC NEWS (Apr. 18, 2020), <https://www.nbcnews.com/news/us-news/4-family-members-virginia-bishop-who-died-coronavirus-now-battling-n1187076>; Michelle Boorstein, *Covid-19 Has Killed Multiple Bishops and Pastors Within the Nation's Largest Black Pentecostal Denomination*, WASH. POST (Apr. 19, 2020), <https://www.washingtonpost.com/religion/2020/04/19/church-of-god-in-christ-pentecostal-coronavirus-kills-bishops/>; Emily McFarlan Miller, *COVID-19 Death of 'Well-Loved' Texas Pastor Shows Coronavirus Spread to Rural Areas*, RELIGION NEWS SERVICE (Aug. 5, 2020), <https://religionnews.com/2020/08/05/death-of-well-loved-texas-pastor-highlights-corona-virus-spread-to-rural-areas/>; Rong-Gong Lin II, *Pastor Dies of COVID-19 Weeks After Fontana Megachurch Reopened for Indoor Services*, L.A. TIMES (Dec. 3, 2020), <https://www.latimes.com/california/story/2020-12-03/megachurch-pastor-dies-of-covid-19-after-church-reopens-indoor-services>; Stoney Sharp, *Marion Co. Pastor Dies After Battling COVID-19 for Six Weeks*, ABC 3340 NEWS (Dec. 20, 2020), <https://abc3340.com/news/local/marion-co-pastor-dies-after-battling-covid-19-for-six-weeks>; Emily Michot, *Deaths of Two Beloved Pastors from COVID-19 Serves as a Wake Up Call to Many in South Florida's Haitian American Community*, MIAMI HERALD (May 20, 2021), <https://www.miamiherald.com/news/coronavirus/article245423715.html>; Luis Andres Henao & Jessie Wardarski, *COVID-19 Takes Toll on Catholic Clergy in Hard-Hit Countries*, AP NEWS (July 15, 2021), <https://apnews.com/article/europe-health>

balance between protecting religious freedom and saving lives, it is crucial to remember these tragic facts. State and local officials could not have responsibly ignored them.

Second, most COVID-related public health regulations were, and remain, neutral and generally applicable, which is the main constitutional standard for the Free Exercise Clause of the First Amendment.⁸ To be sure, public officials were far from perfect. But rules about capacity limits, social distancing, and masking were applied equally to religious groups and to their secular counterparts.⁹ In terms of risk levels, unfortunately churches were not like many retail businesses. It was much more dangerous to congregate with others and sing with them than it was to pick up groceries, drop off dry cleaning, or visit the bike shop. When officials did single out religion, it was often to provide special accommodations, for example, giving houses of worship *more* favorable treatment than secular venues like theaters, concert halls, sports arenas, and fitness centers, which created comparable risks.¹⁰

In a few highly controversial cases, the Supreme Court required religious exemptions from stringent social gatherings restrictions.¹¹ But the Court also rejected claims for exemptions from capacity limits and restrictions on certain high-risk activities like singing and chanting during indoor services.¹² Nor did the Court grant religious schools exemptions from orders that temporarily stopped in-person learning.¹³ With respect to vaccines, federal courts have rejected free exercise challenges to mandates for health care workers.¹⁴ And while the Supreme Court was asked to overrule those

religion-coronavirus-pandemic-7a1c85ae32750c4a255312360fbf6cf3; Sam Tabachnik, *Bob Enyart, Conservative Firebrand and Pastor, Dies of COVID-19*, DENVER POST (Sept. 13, 2021), <https://www.denverpost.com/2021/09/13/bob-enyart-dies-covid-19/>; Michelle Boorstein, *Marcus Lamb Died of Covid-19 After His Network Discouraged Vaccines. But Some Christian Leaders Don't Want to Talk About It*, WASH. POST (Dec. 3, 2021), <https://www.washingtonpost.com/religion/2021/12/03/marcus-lamb-daystar-vaccine-televangelist-graham/>; Nebil Husayn, *False prophets: When Preachers Defy COVID—And Then It Kills Them*, SALON (Dec. 15, 2021), <https://www.salon.com/2021/12/15/false-prophets-when-preachers-defy--just-before-it-them/>.

⁸ *Employment Division v. Smith*, 494 U.S. 872 (1990); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021).

⁹ See Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. 2397, 2399-2400 (2021) (describing California's regulation, which was framed and enforced evenhandedly as to churches).

¹⁰ See *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 80 (Sotomayor, J., dissenting).

¹¹ *Id.* Even strong proponents of religious exemptions have criticized the Court's decisions in these cases. See, e.g., Douglas Laycock, *Do Cuomo's New Covid Rules Discriminate Against Religion?* N.Y. TIMES (Oct. 9, 2020), <https://www.nytimes.com/2020/10/09/opinion/cuomo-synagogue-lockdown.html> ("Covid-19 kills some and permanently injures others; the threat to human life is real and immediate. Those who flout the rules endanger everyone around them, and this is sufficient reason for regulating even a worship service.").

¹² See *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) (mem.).

¹³ See *Danville Christian Academy, Inc. v. Beshear*, 141 S. Ct. 527 (2020) (mem.).

¹⁴ See *Does 1-3 v. Mills*, 142 S. Ct. 17 (2021) (mem.); *Dr. A v. Hochul*, 142 S. Ct. 552 (2021) (mem.); but see *Doster v. Kendall*, 54 F.4th 398 (2002).

decisions, it refused to do so.¹⁵ The Court also refused to grant vaccine exemptions for members of the Armed Services.¹⁶

Third, and finally, even when public health regulations place distinctive burdens on religious practices, those burdens can still be justified under the First Amendment. Like all fundamental rights, religious freedom has limits, especially when exemptions impose serious harms on other people.¹⁷ As Justice Robert Jackson once said, the Bill of Rights is not a suicide pact.¹⁸ Under current law, particularly when the government has a compelling interest, such as preventing the spread of a deadly pandemic, it can impose restrictions on even the most cherished and important of our individual liberties, as long as it does so evenhandedly.¹⁹

III. CONCLUSION

The Supreme Court has made clear that the government may not discriminate against religion,²⁰ but the fact that some laws burden religious practices is not, by itself, sufficient to show that those laws are discriminatory. When public officials treat religious organizations and individuals like their secular counterparts—when churches, religious schools, and medical professionals are subject to the same rules as others—there is no discrimination and no violation of religious freedom under the First Amendment.

Thank you again for the opportunity to appear before this subcommittee, and I look forward to your questions.

¹⁵ See *Dr. A v. Hochul*, 142 S. Ct. 2569 (2022) (cert. denied); *Mills*, 142 S. Ct. 17 (denying injunctive relief).

¹⁶ See *Austin v. U.S. Navy Seals 1-26*, 142 S. Ct. 1301 (2022) (mem.) (granting stay of preliminary injunction).

¹⁷ See *Cutter v. Wilkinson*, 544 U.S. 709 (2005); Schwartzman, Tebbe & Schragger, *Costs of Conscience*, *supra* note 1; Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343 (2014).

¹⁸ See *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

¹⁹ See *Mills*, 142 S. Ct. 17; *Hochul*, 142 S. Ct. 552.

²⁰ See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719 (2018); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

BIOGRAPHY

Micah Schwartzman is the Hardy Cross Dillard Professor of Law, the Roy L. and Rosamond Woodruff Morgan Professor of Law, and the Director of the Karsh Center for Law and Democracy at the University of Virginia School of Law. A scholar who focuses on law and religion, jurisprudence, political philosophy and constitutional law, Schwartzman joined the UVA Law faculty in 2007.

Schwartzman received his B.A. from the University of Virginia and his doctorate in politics from the University of Oxford, where he studied as a Rhodes Scholar. During law school, he served as articles development editor of the Virginia Law Review. Schwartzman then clerked for the U.S. Court of Appeals for the Fourth Circuit and was a postdoctoral research fellow at Columbia University's Society of Fellows in the Humanities. He has been a visiting law professor at Columbia University and UCLA.

Schwartzman's work has appeared in the *Harvard Law Review*, *University of Chicago Law Review*, *Michigan Law Review*, *Virginia Law Review*, and *Supreme Court Review*, among others. He has published legal commentary in *The New York Times*, *Washington Post*, *The Atlantic*, *Slate*, *The New Republic*, and *Vox*. He co-edited *The Rise of Corporate Religious Liberty* (Oxford University Press) and is currently editing a volume on *Discrimination By/Against Religion* (Oxford University Press).

A member of the American Law Institute, Schwartzman has chaired the AALS Section on Law and Religion and serves on the Board of Academic Advisors for the American Constitution Society.