LEGAL MEMORANDUM

FR: **Pacific Justice Institute**
TO: **Business Owners**
DT: **January 28, 2021**
RE: **Challenging Shutdowns of Businesses in Response to COVID-19**

INTRODUCTION

This resource outlines the history of how various courts handled challenges to shutdowns of businesses in response to COVID-19. While courts were originally unreceptive to those challenges, we will look at where there appear to be some cracks in the armor, starting in the area of religious liberty and moving toward more favorable decisions for businesses.

This resource identifies approaches that have been successful in previous challenges to shutdowns of businesses and recommends the incorporation of various approaches in a case strategy going forward. In addition to public health orders, businesses should be sensitive to directives of agencies from which they are granted licenses (e.g., food services, salons, etc.). **Pacific Justice Institute encourages business owners to provide this resource to their attorney to see if litigation is a viable option for the business in question.**

EARLY CASES

Jacobson v. Commonwealth of Massachusetts

Early decisions on lawsuits from shutdowns were influenced heavily by a United States Supreme Court decision from 115 years ago—*Jacobson v. Commonwealth of Mass*.[1] This case involved a challenge to Massachusetts' compulsory vaccination law, enacted in the context of a growing smallpox epidemic. In this 1905 decision, the Supreme Court held that government actions taken in the context of a public health crisis are subject to a more deferential review:

> In every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.

In a very early COVID-19 decision, *In re Abbott*,[2] the U.S. Court of Appeals for the Fifth Circuit[3] held that *Jacobson*'s deferential standard applies to government actions taken to combat the

[1] 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905).
[2] 954 F.3d 772, 777, 2020 U.S. App. LEXIS 10893, decided April 7, 2020.
[3] The U.S. Court of Appeals for the Fifth Circuit has jurisdiction over the federal district courts in Mississippi, Louisiana, and Texas.

COVID-19 pandemic. Importantly, the court explained that, without question, "individual rights secured by the Constitution do not disappear during a public health crisis, but the [Supreme] Court [has] plainly stated that rights could be reasonably restricted during those times."

The court stated succinctly:

> The bottom line is this: when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some "real or substantial relation" to the public health crisis and are **not "beyond all question, a plain, palpable invasion" of rights** secured by the fundamental law.

Courts that hold fast to the *Jacobson* decision seem to dismiss challenges to business shutdowns rather quickly, finding that the Supreme Court has set the bar very low for the government. For example, in the May 20, 2020 decision of *Antietam Battlefield KOA v. Hogan*,[4] the U.S. District Court for the District of Maryland confirmed:

> To overturn the Governor's orders, those who disagree with them must show that they have "no real or substantial relation" to protecting public health, or that they are "beyond all question, a plain, palpable invasion of rights secured by the fundamental law."

In a July 14, 2020 decision, *Xponential Fitness v. Arizona*,[5] the U.S. District Court for the District of Arizona stated:

> The Court further recognizes the economic and emotional hardships Governor Ducey's executive orders related to COVID-19 can impose on people and businesses. The Court is not unsympathetic to Plaintiffs' plight, but, as explained below, in our constitutional republic, the decisions of whether, when, and how to exercise emergency powers amidst a global pandemic belong not to the unelected members of the federal judicial branch, but to the elected officials of the executive branch.

On October 27, 2020, *AJE Enter. LLC v. Justice*,[6] U.S. District Court for the Northern District of West Virginia stated:

> [T]he vast majority of courts have looked to *Jacobson* in their analysis of various pandemic responses. In *Illinois Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020), the Seventh Circuit, in a case challenging orders limiting the size of public gatherings, stated that "[t]he district court appropriately looked to Jacobson for guidance, and so do we."
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> Albeit not a binding precedent, no less an authority than the Chief Justice of the United States has thrown his support behind the continued vitality of *Jacobson*'s

[4] 2020 U.S. Dist. LEXIS 88883, decided May 20, 2020.
[5] 2020 U.S. Dist. LEXIS 123379, decided July 14, 2020.
[6] 2020 U.S. Dist. LEXIS 222186, decided Oct. 27, 2020.

> deferential framework in the midst of this unfolding public health crisis. *S. Bay United Pentecostal Church v. Newsom*, — U.S. —, 140 S. Ct. 1613, 1614, 207 L. Ed. 2d 154 (2020) (mem.) (Roberts, C.J., concurring) (Opining that politically accountable officials are deserving of especially broad latitude in areas of medical and scientific uncertainty).
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> The Supreme Court has long recognized that a state can avoid this close constitutional scrutiny of alleged violations of substantive due process during a public health crisis.

In a November 17, 2020 decision, *Grasmere Fit, Inc. v. de Blasio*,[7] the Supreme Court of New York, Richmond County stated:

> *Jacobson* remains the law to this day more than 115 years after it was decided . . . Under the facts presented, the Mayor's latitude to act must be "especially broad" and not second-guessed by the judiciary "which lacks the background, competence, and expertise to assess public health" (*South Bay United Pentecostal Church v. Newsom*). It is not the role of the courts to second-guess the Mayor's executive decision or take "a piecemeal approach and scrutinize individual aspects of a rule designed to protect public health or otherwise create an exception for particular individuals impacted by it."

As recently as December 23, 2020, U.S. District Court for the Middle District of Pennsylvania stated in *M. Rae, Inc. v. Wolf*,[8] "**The bottom line for our purposes is that *Jacobson* is controlling precedent until the Supreme Court or Third Circuit Court of Appeals tell us otherwise.** At its core, *Jacobson* teaches that some 'restraint' on individual liberties must be tolerated in the interest of protecting the public health."

FIRST CHINK IN THE ARMOR OF *JACOBSON*

Now we will focus on decisions that looked beyond *Jacobson*. But even at the time of this writing, if a judge is inclined to follow the dictates of *Jacobson*, a business will have difficulty prevailing in a lawsuit against the government for shutting down their business.

Cty. of Butler v. Wolf[9]

This case challenged not only the orders of the governor of Pennsylvania closing businesses, but also congregate gathering limits and stay-at-home orders. The U.S. District Court for the Western District of Pennsylvania found all of the orders to be unconstitutional, stating:

> Although the Jacobson Court unquestionably afforded a substantial level of deference to the discretion of state and local officials in matters of public health,

[7] 2020 N.Y. Misc. LEXIS 10981, decided Nov. 17, 2020.
[8] 2020 U.S. Dist. LEXIS 241961, decided Dec. 23, 2020.
[9] 2020 U.S. Dist. LEXIS 167544, decided Sept. 14, 2020.

it did not hold that deference is limitless. Rather—it closed its opinion with a caveat to the contrary:

> Before closing this opinion we deem it appropriate, in order to prevent misapprehension [of] our views, to observe—perhaps to repeat a thought already sufficiently expressed, namely—that **the police power of a state, whether exercised directly by the legislature, or by a local body acting under its authority, may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression.**

Jacobson was decided over a century ago. Since that time, there has been substantial development of federal constitutional law in the area of civil liberties. As a general matter, this development has seen a jurisprudential shift whereby federal courts have given greater deference to considerations of individual liberties, as weighed against the exercise of state police powers.

The U.S. District Court for the Western District of Pennsylvania also cited a quote from *Bayley's Campground, Inc. v. Mills*,[10] where a federal district court examined whether the governor of Maine's emergency order requiring visitors from out of state to self-quarantine, was constitutional. The Maine District Court stated:

> [T]he permissive Jacobson rule floats about in the air as a rubber stamp for all but the most absurd and egregious restrictions on constitutional liberties, free from the inconvenience of meaningful judicial review. This may help explain why the Supreme Court established the traditional tiers of scrutiny in the course of the 100 years since Jacobson was decided.

The court in *Cty. of Butler v. Wolf* concluded:

> But even in an emergency, the authority of government is not unfettered. The liberties protected by the Constitution are not fair-weather freedoms—in place when times are good but able to be cast aside in times of trouble. There is no question that this Country has faced, and will face, emergencies of every sort. But the solution to a national crisis can never be permitted to supersede the commitment to individual liberty that stands as the foundation of the American experiment. The Constitution cannot accept the concept of a "new normal" where the basic liberties of the people can be subordinated to open-ended emergency mitigation measures. Rather, the Constitution sets certain lines that may not be crossed, even in an emergency. Actions taken by Defendants crossed those lines. It is the duty of the Court to declare those actions unconstitutional.

Many felt that this decision would open the door for challenges to the shutdowns of businesses, but that was not to be. Just three weeks after the decision, on October 1, 2020, the

[10] 463 F. Supp. 3d 22 (D. Me. May 29, 2020).

U.S. Court of Appeals for the Third Circuit[11] granted a motion for stay of the District Court's order pending appeal. That stay is still in place as of this writing.

BREAKTHROUGH IN RELIGIOUS LIBERTY CASES

The breakthrough in religious liberty cases has its genesis in a dissenting opinion in the Supreme Court's decision on *Calvary Chapel Dayton Valley v. Sisolak*.[12] Justice Alito wrote in his dissenting opinion:

> For months now, States and their subdivisions have responded to the pandemic by imposing unprecedented restrictions on personal liberty, including the free exercise of religion. This initial response was understandable. In times of crisis, public officials must respond quickly and decisively to evolving and uncertain situations. At the dawn of an emergency—and the opening days of the COVID-19 outbreak plainly qualify—public officials may not be able to craft precisely tailored rules. Time, information, and expertise may be in short supply, and those responsible for enforcement may lack the resources needed to administer rules that draw fine distinctions. Thus, at the outset of an emergency, it may be appropriate for courts to tolerate very blunt rules. In general, that is what has happened thus far during the COVID-19 pandemic**. But a public health emergency does not give Governors and other public officials carte blanche to disregard the Constitution for as long as the medical problem persists**. As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights.

After Justice Barrett was confirmed to the Supreme Court, the decision of *Roman Catholic Diocese v. Cuomo*[13] was decided on November 25, 2020, in favor of houses of worship, and the New York limitation of 10 persons for a church service was found unconstitutional. In his concurring opinion, Justice Gorsuch wrote, "**Government is not free to disregard the First Amendment in times of crisis** . . . Yet recently, during the COVID pandemic, certain States seem to have ignored these long-settled principles."

In regards to *Jacobson*, Justice Gorsuch further wrote:

> Although Jacobson pre-dated the modern tiers of scrutiny, this Court essentially applied rational basis review to Henning Jacobson's challenge to a state law that, in light of an ongoing smallpox pandemic, required individuals to take a vaccine, pay a $5 fine, or establish that they qualified for an exemption. Rational basis

[11] The U.S. Court of Appeals for the Third Circuit has jurisdiction over the federal district courts in Delaware, New Jersey, and Pennsylvania.
[12] 2020 U.S. LEXIS 3584, 2020 WL 4251360 (July 24, 2020).
[13] 208 L. Ed. 2d 206, 2020 U.S. LEXIS 5708, 28 Fla. L. Weekly Fed. S 590, __ S.Ct. __, 2020 WL 6948354 (Nov. 25, 2020).

> review is the test this Court normally applies to Fourteenth Amendment challenges, so long as they do not involve suspect classifications based on race or some other ground, or a claim of fundamental right. Put differently, Jacobson didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so. Instead, Jacobson applied what would become the traditional legal test associated with the right at issue—exactly what the Court does today . . . . Nothing in Jacobson purported to address, let alone approve, such serious and long-lasting intrusions into settled constitutional rights. In fact, Jacobson explained that the challenged law survived only because it did not "contravene the Constitution of the United States" or "infringe any right granted or secured by that instrument." . . . Why have some mistaken this Court's modest decision in Jacobson for a towering authority that overshadows the Constitution during a pandemic? In the end, I can only surmise that much of the answer lies in a particular judicial impulse to stay out of the way in times of crisis. But if that impulse may be understandable or even admirable in other circumstances, **we may not shelter in place when the Constitution is under attack. Things never go well when we do.**

Justice Gorsuch also addressed the important issue of mootness. New York, as in many other States such as California, have color-coded areas of the State based on ever-changing statistics of infection rates and hospital capacity. By the time the Supreme Court decided this case, the location in question had changed to another color and thus the restricted rule was removed. The State argued that the case should be dropped as it is now moot because the restriction no longer exists. However, Justice Gorsuch asserted that **the case must be decided now rather than send the plaintiffs away**, because the color code can switch back at any time, causing the plaintiffs' case to begin all over again.

The court ruled that restrictions on houses of worship should not be addressed by *Jacobson* but rather be considered under the strict scrutiny test. The strict scrutiny test places a greater burden on the government to show that they (1) have a **compelling interest** in their actions and (2) are proceeding in the **least restrictive way** to accomplish the task. Houses of worship have the protection of the strict scrutiny standard because of their status in the First Amendment to the Constitution—the right to religious freedom.

Of course, **businesses do not have that First Amendment status and therefore fall under the lower standard of the rational basis test**. The government must still show (1) a rational relationship between its actions and a legitimate governmental interest it is trying to address and (2) that its actions are not arbitrary and capricious.

RECENT SUCCESSFUL LAWSUITS AGAINST GOVERNMENT SHUTDOWNS OF BUSINESSES

We will now look at three recent court decisions in which courts ruled in favor of small businesses objecting to shutdown orders. Unfortunately, all are lower court decisions.

1. *Cal. Rest. Ass'n v. County of L.A. Dep't of Pub. Health*[14]

This case was decided in the California Superior Court, County of Los Angeles, on December 8, 2020. The facts were as follows:

On November 22, 2020, the LA County Department of Public Health announced that it was going to eliminate outdoor dining and drinking entirely at restaurants, bars, breweries, and wineries by issuing a Restaurant Closure Order. The Restaurant Closure Order took effect on November 25, 2020.

In justifying the position to close outdoor restaurants, the County Department of Public Health cited a 61% increase in hospitalization cases involving COVID-19 in the County. However, plaintiffs pointed out the Department's own data indicates that COVID-19 cases traced back to the County's restaurants and bars accounted for a mere 3.1% (70 of the total 2,257) confirmed cases county wide from over 204 outbreak locations—the vast majority of which were chain/fast-food type restaurants. They had no concrete data for outside dining at restaurants.

The court discussed the Department's ability to promulgate orders regarding public health, and specifically discussed the *Jacobson* case. However, the conclusion of the discussion on *Jacobson*, the court stated:

> The health officer's authority is **not unbridled**. Courts have the duty to evaluate an exercise of that authority to ensure actions taken have a "real and substantial relationship" to public health and safety. The health officer cannot act arbitrarily or oppress. In addition, the health officer cannot engage in a "plain, palpable invasion of rights" secured by the Constitution. Whether the regulation in question is a reasonable one, directed to accomplish the purpose that appears to have been in view, is a question for the court to determine.

The plaintiffs brought forward five expert witnesses who testified that the closing of outdoor restaurants was unnecessary and not based on science. They stressed the safety of outdoor dining versus that of indoor. They also discussed the psychological damage being done by keeping persons from socializing.

The Department brought forward four expert witnesses of their own. These experts emphasized the effectiveness of the initial lockdown in limiting infections of COVID-19, and the statistics relative to hospitalizations and the availability of ICU beds.

The court referred to Justice Gorsuch's concurring opinion in *Roman Catholic Diocese v. Cuomo,* stating that the *Jacobson* test is equivalent to rational basis review. The court stated:

[14] 2020 Cal. Super. LEXIS 4439 (Dec. 8, 2020).

While courts do not weigh evidence when applying this test, they must ensure that the agency has adequately considered all relevant factors and has demonstrated a rational connection between those factors and the choice made. "[A]ctions which are irrational, arbitrary or capricious do not bear a rational relationship to any end." (*County of Butler v. Wolf*).

Plainly, the County established that the surge is legitimately concerning, particularly hospitalizations, ICU load, and deaths. Increased hospitalizations due to COVID, including ICU admissions, risk overwhelming the County's hospital capacity. As a result, the County is entitled to act. **The principal question is: Does the action of closing outdoor restaurants have rational support in furthering the reduction of this risk?**

Assuming that Jacobson test applies to a pandemic nine months old, the County is correct that it is highly deferential to an agency's public health action. Even if Jacobson no longer applies, the Department still has great discretion. The court may not weigh the evidence or substitute its judgment for that of the Department. For this reason, the fact that Petitioners' experts have differing views than the County's experts about how to address the pandemic is not significant; the court's rational basis review is not a battle of the experts.

However, **the County clearly has failed to perform the required risk-benefit analysis**. By failing to weigh the benefits of an outdoor dining restriction against its costs, the County acted arbitrarily and its decision lacks a rational relationship to a legitimate end. The balance of harms works in Petitioners' favor until such time as the County concludes after proper risk-benefit analysis that restaurants must be closed to protect the healthcare system.

As part of the risks of closure, the County could be expected to consider the economic cost of closing 30,000 restaurants, the impact to restaurant owners and their employees, and the psychological and emotional cost to a public tired of the pandemic and seeking some form of enjoyment in their lives. This analysis must be articulated for Petitioners and the public to see.

The Los Angeles County Superior Court ruled in favor of the restaurant association, granting an injunction.

2. *Midway Venture LLC v. County of San Diego*[15]

This is known as the infamous strip club case, often cited as an example of out-of-control COVID-19 orders that allowed strip clubs to be open but required churches to be closed. However, in looking at this case, the establishment is also looked at in the context of being a restaurant.

[15] Superior Court of California, County of San Diego, Case No. 37-2020-00038194-CU-CR-CTL, decided December 16, 2020.

This case is different from the case in LA County because this situation involved indoor dining. Further, San Diego County's public health officer did not agree that closing restaurants and other businesses was necessary to combat the rise in COVID-19 cases.

In *Midway Venture LLC v. County of San Diego*, two strip clubs opened for five weeks until receiving a cease and desist letter from the County Health Department. The clubs also served restaurant food and beverage. Plaintiffs provided the court with their detailed plans to prevent the spread of COVID-19 in their establishments. Plaintiffs also presented expert testimony that stated indoor dining is not responsible for the rise of COVID-19 cases. Plaintiffs presented evidence that there have been no cases tied to the clubs during the five weeks they were open. The court noted that this could be disputed by the county if untrue, because of contact tracing. But the county offered no objection to their assertion.

Defendants presented expert testimony from the State Health Department relative the rise of COVID-19 cases and the lack of available hospital space. But Dr. Wilma J. Wooten, San Diego County's Public Health Officer, was asked if having a dancer perform 15 feet away from restaurant tables, while the dancer was wearing a mask, presented a hazard to diners. She replied in the negative. With full knowledge of current data, Dr. Wooten purportedly had previously represented that "penalizing sectors like restaurants and gyms for the case increase is wrong." Dr. Wooten asserted that closure of indoor restaurants during wintertime will move people into homes and encourage high risk gatherings. Therefore, closing indoor capability actually contradicts California's "Blueprint for a Safer Economy."

Plaintiffs showed that they have exhausted their capital trying to comply with the County's "endless and bewildering" orders, have sustained significant, if not draconian, losses, and are fearful that their businesses may be closed permanently if the County's latest orders are not enjoined.

The court referenced *Roman Catholic Diocese of Brooklyn v. Cuomo* relative the mootness issue, agreeing that a change of status does not render the case moot.

The court noted that businesses with restaurant service, such as plaintiffs' establishments, serve the public interest. These business establishments provide sustenance to and enliven the spirits of the community, while providing employers and employees with means to put food on the table and secure shelter, clothing, medical care, education, and, of course, peace of mind for themselves and their families.

The court questioned whether there is a rational nexus between the percentage of ICU bed capacity throughout the Southern California Region and plaintiffs providing live adult entertainment (and any other businesses with restaurant service like plaintiffs' establishments) in San Diego County. The court found that San Diego County presented no evidence that businesses with restaurant service which implemented safety protocols, have impacted ICU bed capacity throughout the Southern California Region (much less in San Diego County).

The court then enjoined the government from enforcing the order to close restaurants and adult entertainment establishments.

NOTE: On January 22, 2021, A three-justice panel of the 4th District Court of Appeal, Division One, in San Diego ruled that the State and San Diego County were not provided a proper opportunity to make arguments regarding restaurant restrictions, as that was not the subject of the case filed by Cheetahs Gentleman's Club and Pacers Showgirls International. The ruling stated that the judge "violated due process by enjoining the state and county parties from enforcing restaurant restrictions, and that portion of the preliminary injunction must be reversed."

The panel wrote that the strip clubs may amend their claims to address restaurant restrictions, but because the original complaint concerned only live entertainment and not dining, the injunction should be overturned.

According to the appeals court, the injunction was also "unreasonably vague" as to which pandemic protocols public health officials would be permitted to enforce. The injunction permitted the restaurants and strip clubs to operate "subject to protocols that are no greater than essential to further defendants' response to control the spread of COVID." **It is worth noting that the complaint can be amended to include all restaurants, and the judge could provide more specificity on the requirements of pandemic protocols prior to opening restaurants if a similar ruling is made**.

3. *Matter of Lasertron Inc. v. Empire State Dev. Corp.*[16]

Lasertron operates a "laser-tag" facility in Amherst, New York, where patrons shoot infrared-emitting light guns to tag designated targets. A health department inspection reported that the company's safety measures were satisfactory, but as a result of the inspection the health department reclassified Lasertron and without explanation directed the company to cease operations. The reclassification from the prior categorization with "paintball" to a "place of public amusement" required Lasertron to shut down.

Lasertron showed that they took steps to limit patrons to less than 50 percent, required face masks, promoted significant social distancing, disinfected equipment and common areas with great frequency, and were compliant with State guidelines; thus, they should remain open. They presented well documented, strict COVID-19 protocols, including cleaning their equipment with hospital-grade virucide. Lasertron's lawsuit argued that the government's decision to shut down their company contradicted the State's own guidelines. As such, Lasertron asserted that the government's decision was arbitrary and capricious.

Plaintiffs stated that no cases of COVID-19 have been traced back to their business, and the government conceded during argument that that there had been no cases traced back to Lasertron. The government admitted that Lasertron passed inspection without any violations. And the government also conceded that they do not have an appeal process for a cease and desist letter.

The government relied heavily on *Jacobson*, arguing that the case shields the health department from judicial scrutiny and challenges from affected businesses. To that end, the government

[16] N.Y. Misc. Lexis 2, Supreme Court of New York, Erie County, decided January 4, 2021.

maintained that Lasertron cannot "second guess" the otherwise rational exercise of duty delegated to the health department during a health crisis, suggesting that rights and protections of due process do not exist when a health crisis presents itself.

The court noted that it must uphold the administrative exercise of discretion unless it has "no rational basis" or the action is "arbitrary and capricious." The court quoted *Matter of Pell v. Board of Ed. of Union Free School District*[17] in its final decision:

> The arbitrary and capricious test chiefly relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts.

The Supreme Court of New York, Erie County then stated:

> **While it is understood that recommendations of those in the public health field should be given considerable weight, this does not mean that carte blanche is generously given to governmental authorities without redress or review**. The Court finds the cavalier process adopted by the State when it reclassified Lasertron is nothing short of arbitrary and capricious.
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> When asked to explain the evaluation process undertaken to review the determination of the health inspector, the Court received an unavailing, perfunctory response. When respondent was asked to explain what was in the Inspector's report that prompted the Supervisor to seek guidance from the State, again, the Court received generalities and few specifics. In reviewing whether the closure was arbitrary or capricious, Lasertron has demonstrated that the Respondents' decisions were haphazard and devoid of logic.
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> **It is clear that the decision to force closure will most certainly result in discharging employees, loss of goodwill and have adverse business effects that the Respondents dismissed as irrelevant**. Even Dr. Blog's affidavit is replete with dismissive conclusions that, while perhaps of interest in academia, are of little comfort to businesses that are forced to see their source of income and support for their families, let alone that of their employees, vanish.
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> **Notwithstanding issues of public health, a higher standard must be expected of government officials who take these drastic steps**. Here, the record lacks any meaningful insight as to why the decision was made to second guess an Inspector who, based on a physical inspection of the premises, found compliance and made a determination that the results were satisfactory.
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> Respondent . . . relies heavily on Jacobson to justify its expansive and sweeping powers. However, Jacobson is hardly the super-precedent that it is purported to be. The 1905 case addresses a challenge to a state law that required residents to be vaccinated against smallpox or pay a $5 fine. The burden in Jacobson was

[17] 34 N.Y. 2d 222 (N.Y. Ct. App. 1974).

fairly modest - either get vaccinated or pay a fine. Here, the burden is unlimited, as the result is closure and the forfeiture of your business and livelihood.

Executive Orders forced the closure of this business, which left it without redress. **The Court must not shy away from performing their independent and constitutionally required role in reviewing the decisions of the State so as to ensure that government does not take its broad authority to a point of abuse**. Judicial deference has its limits. Here, considering the record shows full compliance by Lasertron with state imposed requirements—to the satisfaction of respondent—and no scientific evidence of any coronavirus transmission from its facility, the decision to seek clarification, when none was necessary, which resulted in an arbitrary reclassification with no account of the facts only goes to prove the Court's concern.

Lasertron has shown that the continued closure of its business will result in incalculable financial damages and loss of customers. For Respondents to suggest otherwise shows a disconnect with the perils small businesses face, especially when confronted with governmentally imposed restrictions, the likes of which have never been seen before.

Wholesale determinations such as the one made here by executive fiat at the expense of the rights of individuals and businesses, without a right of appeal, cannot be permitted to continue. As such, Petitioner is hereby granted a preliminary injunction.

RECOMMENDATIONS FOR CHALLENGING THE SHUTDOWN OF A PRIVATE BUSINESS

If a particular court does not want to make a controversial ruling, or if a particular judge feels that shutdowns of businesses are warranted, there is a clear path to avoid a serious challenge to the shutdown of a private business. The court merely needs to state they are following the 115-year-old Supreme Court decision in *Jacobson.* It is not a difficult stretch to find that the shutdowns are reasonably related to controlling the spread of COVID-19, and that the court should not question the science of data used by the government to arrive at its conclusion that a shutdown is necessary.

Therefore, you must be fully committed to moving your judge off of *Jacobson* before bringing your case forward. Be prepared to vigorously argue why *Jacobson* should not be used as a guidepost. Rather, the court must evaluate all of the evidence and decide whether the government edict is rationally related to a legitimate governmental interest, and more importantly, whether it is arbitrary and capricious. Stopping the spread of COVID-19 is clearly a governmental interest, but is the government's order based on clear logic and facts? Has the government carefully balanced benefits of the order against the harm it will cause?

The following seven recommended procedures are gleaned from the few successful cases overturning shutdowns of private businesses, and include PJI's opinion of other suggested actions necessary to challenge the closure of your business:

1. Persuade the court that the *Jacobson* decision should not be the methodology for the court to review your case.

***Jacobson* concerned an act of the Massachusetts Legislature, not an edict from a government official**. In *Jacobson*, the Supreme Court assumed the Legislature was acting on the best available information after appropriate investigation. However, in this recent pandemic, some question the motivation of individual executive branch members promulgating the shutdown orders. Obviously there is a pandemic, and obviously the government needed to respond immediately. But over time, facts such as the tendency of "blue states" to have stricter lockdowns than "red states," and the fact that certain blue state officials are leaning toward removing the restrictions immediately after a new U.S. President is in place, at least raise the possibility that politics may be in play in some instances.

For example, Chicago opened its restaurants three days after the Presidential Inauguration. Additionally, Washington, D.C. and the State of New York suddenly expressed an openness to removing the restrictions after the Inauguration. On January 25, 2021, California Governor Gavin Newsom lifted stay-at-home orders across the State "in response to improving coronavirus conditions." However, many are openly questioning whether this decision is based on science, or in response to a growing movement to recall Governor Newsom. These questionable motives on the part of members of the executive branch of government cry out for judicial review.

> Executive Orders forced the closure of this business, which left it without redress. **The Court must not shy away from performing their independent and constitutionally required role in reviewing the decisions of the State so as to ensure that government does not take its broad authority to a point of abuse.** Judicial deference has its limits. *Matter of Lasertron Inc. v. Empire State Dev. Corp.*
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> Wholesale determinations such as the one made here by executive fiat at the expense of the rights of individuals and businesses, without a right of appeal, cannot be permitted to continue. *Cal. Rest. Ass'n v. County of L.A. Dep't of Pub. Health.*

The consequences in the *Jacobson* case were far less than those facing businesses today. In *Jacobson*, if you refused to get a smallpox vaccination, you were fined $5, which is equal to approximately $140 in today's economy. In addition, there were several situations that allowed you to be excused from the vaccinations. In today's cases of shutting down businesses, the consequences can be a bankruptcy of a business, the loss of the life savings of an entrepreneur, and the loss of the jobs of their employees (we will discuss the injury to your business below). On a macro scale, these shutdowns may have a devastating effect on the economy of the United States for many years to come. In addition, some experts point to a rise of depression,

suicide, drug overdoses, and alcoholism from lockdowns and shutdowns. Some experts claim banning of routine medical procedures such as cancer screenings will have a significant toll on many people going forward. Therefore, **the importance of judicial review of today's cases is far greater than a dispute under the law in play 115 years ago in *Jacobson***. Judicial review is critical to ensure dire consequences are not imposed in an arbitrary and capricious manner.

> The arbitrary and capricious test chiefly relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts. *Matter of Lasertron Inc. v. Empire State Dev. Corp.,* quoting *Matter of Pell v. Board of Ed., Union Free School District*.

Review and incorporate the writings of Justice Alito in his dissenting opinion in *Calvary Chapel Dayton Valley v. Sisolak,* particularly regarding the need for emergency action at the beginning of the pandemic when little was known about infection or mortality rates. He basically raises the question as to whether we are still in such an emergency that unquestioned drastic action is needed, or after 10 months should we be in a position to question authorities as to whether stricter lockdowns are the proper way to proceed.

Review and incorporate the writings of Justice Gorsuch in *Roman Catholic Diocese v. Cuomo*. Justice Gorsuch wrote the following:

> Nothing in *Jacobson* purported to address, let alone approve, such serious and long-lasting intrusions into settled constitutional rights. In fact, *Jacobson* explained that the challenged law survived only because it did not "contravene the Constitution of the United States" or "infringe any right granted or secured by that instrument. . . . **Why have some mistaken this Court's modest decision in *Jacobson* for a towering authority that overshadows the Constitution during a pandemic?** In the end, I can only surmise that much of the answer lies in a particular judicial impulse to stay out of the way in times of crisis. But if that impulse may be understandable or even admirable in other circumstances, **we may not shelter in place when the Constitution is under attack. Things never go well when we do.**

The decision to shut down businesses to control the spread of COVID-19 is not "settled science." There are respected scientists who believe business shutdowns do more harm than good. The court holds a duty to review the basis and decision-making process of a government official's shutdown orders, determine whether government measures are rationally related to the objective of stopping the spread of COVID-19, and determine if government measures are arbitrary and capricious.

2. If there are obvious cases where similarly positioned businesses are treated in a disparate manner, point them out. If a person can go to Walmart and buy clothing, but cannot go to your smaller men's clothing store and buy the same clothing, this is obviously unequal treatment. The same is true if you can sit down and have a meal in a restaurant at the airport,

but cannot eat at a restaurant near the airport. What is the scientific or rational basis that shows it is more dangerous to patronize the small business or the out-of-airport restaurant? If such evidence does not exist, **the decision to close your business while allowing others to perform the same function is a decision that is arbitrary and capricious.**

3. Present your own experts to make your point, and have them challenge the assertions of the government experts. Recently experts such as Dr. Monica Gandhi, an infectious disease expert at the University of California San Francisco; Jeff Barke, M.D., a primary care physician based in Orange County, California; Jayanta Bhattacharya, M.D., Professor of Medicine and infectious disease specialist at Stanford University; and Dr. Wilma J. Wooten, San Diego County's Public Health Officer, all opined that closing restaurants did not help prevent the spread of COVID-19. Some experts argue that closures actually make the spread of COVID-19 worse by forcing families to congregate in private homes where strict protocols and social distancing are less likely. There are undoubtedly many other experts with opinions favorable to your position. Do not let the assertions of government experts hang out unchallenged. If your experts do not agree, bring their detailed disagreement to the attention of the court.

4. If you have an excellent track record in preventing the spread of COVID-19, bring it to the court's attention. If there have been no infections among your employees and patrons, make that assertion and point out the fact that the government knows this is true because they do contact tracing. In addition, lay out a written plan for your COVID-19 protocols, emphasizing that they meet or exceed all CDC recommendations. Emphasize the fact that you care deeply about the safety of your staff and patrons, and that you operate your business in a manner that reflects that concern.

5. Layout the damage being done to your business, your family, and your employees and their families. Take the time to do this in detail, and make it personal. The issue here is not the $5 fine as in *Jacobson*; the consequences here are **catastrophic**. Additionally, if the government did not include the possible economic effects in their analysis of their order prior to implementation, argue that the order was implemented without proper analysis of the negative effects of the order.

> [T]he County clearly has failed to perform the required risk-benefit analysis. By failing to weigh the benefits of an outdoor dining restriction against its costs, the County acted arbitrarily and its decision lacks a rational relationship to a legitimate end. The balance of harms works in Petitioners' favor until such time as the County concludes after proper risk-benefit analysis that restaurants must be closed to protect the healthcare system. *Cal. Rest. Ass'n v. County of L.A. Dep't of Pub. Health.*

6. Assert Justice Gorsuch's argument in *Roman Catholic Diocese v. Cuomo* regarding the issue of mootness. If an order is relaxed while your case works its way through the courts, argue that it can be reinstated at any time with a stroke of the pen.

7. Modify your business function to fit under a different tier or category allowed to re-open. For example, a roller-skating rink that has been shut down might re-open its facility to be used for a purpose allowed under state or county guidelines. The guidelines may allow for the roller-skating facility to be used as a worship center, and even allow roller skating to continue, but only permit suggested donations for such usage or for food consumed. Perhaps the roller-skating facility could be open for "appointments only" with customized instruction for the "best aerobic workout." The former usage might count as a church; the later as a fitness center. Note that such usage changes would only be helpful if churches or fitness centers are allowed to re-open under the law or, arguably for the church, under the First Amendment.

CONCLUSION

While we hope that the pendulum swings away from the draconian shutdowns being implemented by edicts of government officials, no one really knows where the pandemic goes from here. Mutations in the virus are inevitable, and the contagiousness, virulence, and mortality rates of those new strains are unknown, as are the effectiveness of a vaccine on those new strains. **Regardless of what occurs in the future, we must be prepared to challenge government edicts that appear to be overbearing**. The following is from the U.S. District Court in Western Pennsylvania in the case of *County of Butler v. Wolf*:

> But even in an emergency, the authority of government is not unfettered. **The liberties protected by the Constitution are not fair-weather freedoms**—in place when times are good but able to be cast aside in times of trouble. There is no question that this Country has faced, and will face, emergencies of every sort. But the solution to a national crisis can never be permitted to supersede the commitment to individual liberty that stands as the foundation of the American experiment. **The Constitution cannot accept the concept of a "new normal" where the basic liberties of the people can be subordinated to open-ended emergency mitigation measures. Rather, the Constitution sets certain lines that may not be crossed, even in an emergency.**

And lastly, again Justice Gorsuch opined in *Roman Catholic Diocese v. Cuomo*, "**We may not shelter in place when the Constitution is under attack. Things never go well when we do."**

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