APR.
2021

ARPA CANADA'S LEGAL ARGUMENTS

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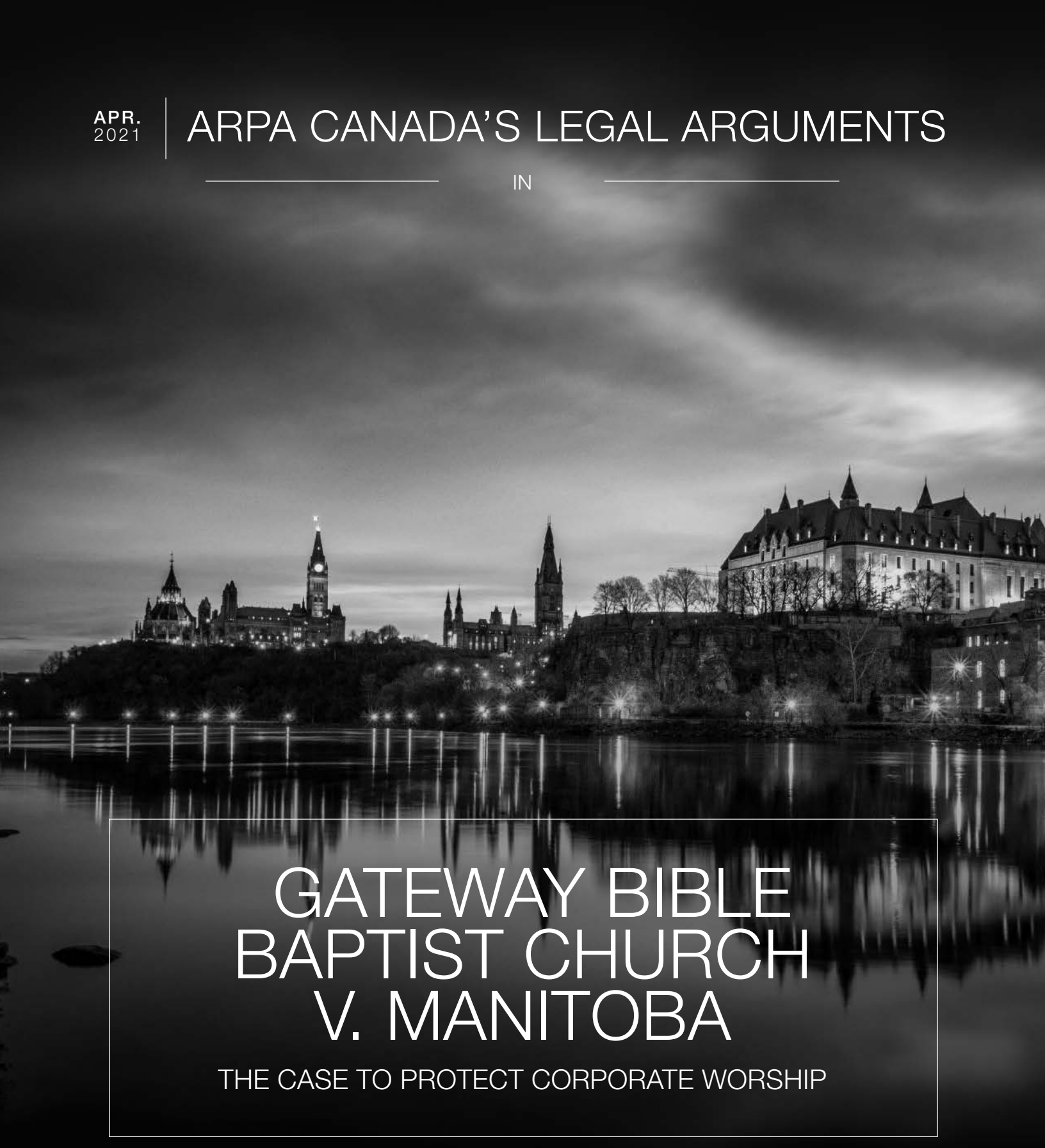

GATEWAY BIBLE BAPTIST CHURCH V. MANITOBA

THE CASE TO PROTECT CORPORATE WORSHIP

ARPACANADA.ca

Association for Reformed Political Action
ARPA CANADA

File No. CI 20-01-29284

MANITOBA COURT OF QUEEN'S BENCH
Winnipeg Centre

APPLICATION UNDER: *The Constitutional Questions Act*, C.C.S.M., c. 180

AND UNDER: The Court of Queen's Bench Rules, M.R. 553/88

IN THE MATTER OF: *The Public Health Act*, C.C.S.M. c. P210

BETWEEN:

GATEWAY BIBLE BAPTIST CHURCH, PEMBINA VALLEY BAPTIST CHURCH, REDEEMING GRACE BIBLE CHURCH, THOMAS REMPEL, GRACE COVENANT CHURCH, SLAVIC BAPTIST CHURCH, CHRISTIAN CHURCH OF MORDEN, BIBLE BAPTIST CHURCH, TOBIAS TISSEN, ROSS MACKAY

Applicants,

And:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF MANITOBA, DR. BRENT ROUSSIN in his capacity as CHIEF PUBLIC HEALTH OFFICER OF MANITOBA, and DR. JAZZ ATWAL in his capacity as ACTING DEPUTY CHIEF OFFICER OF HEALTH OF MANITOBA

Respondents,

And:

THE ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA

Intervenor.

APPLICATION BRIEF OF THE INTERVENOR

THE ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA

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Respondents

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I. Overview

1. The orders under constitutional review in this proceeding are unprecedented. Never before has any branch of government in Manitoba imposed such far-reaching prohibitions and limitations on in-person worship services. The impugned orders not only infringe individual churches, pastors, and congregants' fundamental freedoms, they also raise important questions regarding the fundamental structure of our "free and democratic society" as described and protected by the *Charter* as the "supreme law" of Canada.[1]

2. Once this constitutional groundwork has been laid, we will argue that:
    a. *Charter* jurisprudence emphasizes vitality and independence of non-state institutions and associations in a free society; the civil government is not the only important institution with responsibilities during a time of crisis.
    b. Gathering for religious worship fulfils purposes core to 2(a), (b), and (c), by manifesting religious individual's and community's identity, by expressing beliefs through worship and by expressing spiritual encouragement to spiritual family, and by giving effect to the nature of the church as the gathered "body of believers".
    c. Though sometimes neglected, it is crucial to consider the impact of impugned orders on each of these fundamental freedoms and to weigh the intersectional or "compound violations" of multiple section 2 fundamental freedoms.
    d. The infringements cannot be minimally impairing if the court finds that the impugned orders ban or significantly infringe on activity that receives explicit and direct constitutional protection while imposing less onerous restrictions on non-constitutionally protected activity of similar Covid-19 transmission risk.
    e. To demonstrably justify the orders, it is not sufficient for government to simply point to *some* evidence that banning or significantly constraining religious assemblies will

[1] *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s.52.

reduce Covid-19 transmission. Rather, it must *demonstrate* that the reduced transmission from such a ban is significant enough (compared to the baseline transmission rate in non-constitutionally protected activities permitted to continue) to weigh more heavily than the severe infringements of constitutional rights.

II. A Free and Democratic Society is Institutionally Pluralist

3. The novel nature of Covid-19 and the government's response have left little of life untouched over the past year. Religious individuals for whom assembled worship is an essential aspect of their religious practice have had their freedom of religion, freedom of religious expression, and freedom of peaceful assembly sharply curtailed. This impact is not something that can be reimbursed for or counteracted by any government program.[2] It is something that goes to the core of who they are as religious individuals and communities.

4. Although extraordinary times can call for extraordinary measures, such times do not alter the constitutional nature of our province. The civil government does not become ultimate with the declaration of a state of emergency but continues to share constitutional space with the other institutions, including religious institutions, which are integral to the lives of many Manitobans and may become all the more important to them (and, indeed, to a healthily functioning democracy) during times of emergency. It is not only the civil government that has a responsibility to "alleviate the burdens of the pandemic including public health restrictions" by "implementing a wide array of mental health, addictions, and other supports."[3] Religious organizations must help here too; indeed, this is part of *being* a church.

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[2] "The Government of Manitoba is aware that the COVID-19 pandemic has been exceptionally difficult and challenging for many people, both financially and in terms of mental health, among other impacts. The Governments of Manitoba and Canada have made many support programs available to alleviate economic hardship as well as the strain on mental health, including those that may result from the public health restrictions." Szilbeszter Jozsef Komlodi Affidavit at para 3. See also Respondents' Brief at paras 186 and 207.

[3] Respondents' Brief, para 186.

A. The *Charter's* Preamble Supports Limited Government and Institutional Pluralism

5. Early modern thinkers such as Hobbes and Rousseau "tried in different ways to subordinate religious claims to the sovereignty of politics."[4] William Galston describes this tradition as an effort to return to the "civic totalism" of ancient Greece and Rome, in which "intermediate associations existed only as revocable 'concessions' of power from the sovereign political authority."[5] Civic totalism has not triumphed in Canadian legal history, thanks in large part to the judiciary. Liberal democracy and constitutionalism qualify and limit state power. A free and democratic society is pluralist, not statist.

6. While Christian understandings of the proper relationship between civil and spiritual authority differ, a basic emphasis of Reformed Christian thought offers guidance. This foundational emphasis is that all authority belongs to God, who delegates limited authority to the different institutions in society, including the state. The state's authority is thus inherently limited by its original grant: authority is neither unlimited nor self-defined, and the state cannot arrogate to itself additional authority based on what a concerned citizenry might acquiesce to.

7. These limits on the state are affirmed in the preamble to the *Canadian Charter of Rights and Freedoms* (*"Charter"*) which invokes "the supremacy of God and the rule of law" as principles upon which Canada is founded. The former principle signifies that the state is neither the sole nor the highest authority, nor the ultimate source of rights and freedoms.[6] The latter principle means that all state actors must have intelligible sources for, and limits on, their authority.[7]

8. The preamble to the *Charter* signals "a kind of secular humility, a recognition that there are

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[4] William Galston, "Religion and the Limits of Liberal Democracy" in Douglas Farrow, ed, *Recognizing Religion in a Secular Society* (Quebec City: McGill-Queen's University Press, 2004) 12, at 44 (Intervenors' BOA, **TAB 27**).
[5] *Ibid*.
[6] Bruce Ryder, "State Neutrality and Freedom of Conscience and Religion" (2005), 29 SCLR (2d) (Intervenors' BOA, **TAB 37**); Iain T Benson, "The Limits of Law and the Liberty of Religion Associations" in Iain T Benson and Barry W Bussey, eds, *Religion, Liberty and the Jurisdictional Limits of Law* (Toronto: LexisNexis Canada Inc, 2017), at xxiii, n 5 (Intervenors' BOA, **TAB 22**).
[7] *Reference re Secession of Quebec*, [1998] 2 SCR 217, at para 71 (Intervenors' BOA, **TAB 18**); *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at para 60 (Intervenors' BOA, **TAB 4**).

other truths, other sources of competing worldviews, of normative and authoritative communities that are profound sources of meaning in people's lives that ought to be nurtured as a counter-balance to state authority."[8]

B. Section 1 Justification as an Expression of Institutional Pluralism

9. Civil government is not the only social institution with a constitutional right to exist, function, or have responsibility for public welfare. Therefore, section 1 only permits limits on fundamental freedoms that can be demonstrably justified "in a free and democratic society," meaning an institutionally pluralist society.[9]

10. In *Oakes,* Dickson C.J. identified the "principles essential to a free and democratic society" as "accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society."[10] A "free and democratic society" is therefore robustly pluralistic.

11. Religious individuals and institutions are constitutionally protected actors in the public sphere who are afforded equal treatment and benefit under the law through disciplined state neutrality towards religious vs. non-religious modes of life.[11] The state's burden to demonstrably justify a limit on freedom of religious assembly in this case is very high because it is fundamentally incompatible with being a free and democratic society to sacrifice completely or to severely constrain religious communities' freedom to assemble, thus deeply injuring their vitality.

III. Institutional Pluralism Reflected in our Current Law

12. The foregoing basic principles of institutional pluralism continue to be reflected in our law

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[8] Ryder, *supra* note 6, at para 17 (Intervenors' BOA, **TAB 37**).
[9] This applies even in the case of a judicial review where the *Doré* framework is followed. See *Bracken v. Fort Erie (Town)*, 2017 ONCA 668, at para 63 (Intervenors' BOA, **TAB 3**).
[10] *R. v. Oakes*, [1986] 1 SCR 103 at p 136 (Intervenors' BOA, **TAB 15**) [emphasis added]. See also Dickson, C.J. in *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at p 336 (Intervenors' BOA, **TAB 14**), where he described a "free society" as "one which can accommodate a wide variety of beliefs ... and codes of conducts."
[11] *Mouvement laïque québécois v Saguenay (City)*, [2015] SCJ No 16, at para 137 (Intervenors' BOA, **TAB 11**).

today. Religious bodies may not exercise coercive power, yet they do have, as Chief Justice Hinkson aptly put it, "a sphere of independent spiritual authority, at the core of which is the authority to determine their own membership, doctrines, and religious practices, including manner of worship."[12] The Supreme Court has affirmed these points unequivocally in *Amselem* and in *Wall*.[13] The authority to determine the manner of worship must include the question of whether in-person attendance is a religious obligation and whether virtual or drive-in alternatives are adequate substitutes.[14]

13. The Supreme Court of Canada acknowledges institutional pluralism when, for example, it writes, "a constitution may seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority."[15] The vitality of non-state actors and communities is essential for societal health; it is a characteristic of a free and democratic society.

14. Addressing the constitutional principle of protection for minority rights, the Supreme Court writes of "the delineation of spheres of jurisdiction… and the [limited] role of our political institutions."[16] In the Reformed Christian tradition, as in Canada's legal tradition, the delineation of spheres of jurisdiction is not just between levels of civil government, but also between the state and other spheres of society, including the church. These spheres of jurisdiction should not be seen as mutually exclusive territorial boundaries, but rather as overlapping *aspects* of life lived together.

15. In the case at bar, as in all of life, there is overlap. The civil government's responsibility and

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[12] *Beaudoin v British Columbia*, 2021 BCSC 512 at para 199 (Intervenors' BOA, **TAB 2**).
[13] *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at para 50 (Intervenors' BOA, **TAB 21**); *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 at para 24 (Intervenors' BOA, **TAB 6**).
[14] M.H. Ogilvie, *Religious Institutions and the Law in Canada*, 4th ed. (Toronto: Irwin Law, 2017), at 95 (Intervenors' BOA, **TAB 34**), writes that Christian assertions of the "independence of spiritual authority … have enjoyed tacit acceptance in practice" in law.
[15] *Reference re Secession of Québec*, *supra* note 7, at para 74 (Intervenors' BOA, **TAB 18**) [emphasis added].
[16] *Ibid*, at para 52.

authority with respect to religious gatherings is legitimately engaged with respect to matters of public safety (e.g., overseeing fire safety, building safety, sanitation requirements, zoning, and on this occasion, Covid-19 transmission risk). However, this state authority co-exists with the church's own constitutionally protected responsibility and authority over assembled worship as a requirement and manifestation of religious faith. Government must pursue public safety objectives in a manner that respects the core religious responsibility and authority of the church.[17] The civil government shutting down the core function of another sphere of society, the church (which word is derived from the Greek *ecclesia*, which literally means "the assembled"[18]), would be justified only in the most extreme of cases.

16. Civil government and religious institutions fulfil different, but equally crucial, roles in a free and democratic society. With prolonged bans or severe restrictions on peaceful assemblies for religious worship, the implicit message from the government to religious bodies is that churches' core functions are not worth any risk. The courts must remind the executive or legislative branches of government of their obligation to consider not only their statutory objective, but also their constitutional duties and limits in pursuing those objectives, manifested here as respect for the role of other spheres and a willingness to accommodate as much as possible.

17. Churches' ability to fulfil their responsibilities and religious duties may be legitimately inconvenienced by laws or regulations of general application, subject to the state's duty under the *Charter* to accommodate religious freedom under s. 2(a) and avoid adverse effect discrimination under s. 15. By the same token, government's ability to fulfill its responsibilities

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[17] See Alvin Esau, "Living by Different Law: Legal Pluralism, Freedom of Religion, and Illiberal Religious Groups," in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008), at 111 (Intervenors' BOA, **TAB 24**), where he writes, "When we affirm legal pluralism, we do not automatically think in *hierarchical* ways about the outside law of the state as superior and sovereign to the inside law of the church; rather, we think in more *horizontal* ways." [emphasis in original].

[18] See Toews January 5, 2021 Affidavit, paras 9-13; Tissen January 5, 2021 Affidavit, para 6; Rempel January 7, 2021 Affidavit at paras 13-15; Lowe December 30, 2020 Affidavit at para 11.

may be legitimately 'inconvenienced' by its obligation to respect religious institutions and practices (as in *Multani*[19] or *Loyola*[20]). This is the nature of being a free and democratic society. In this mutually respectful relationship between state and non-state actors:

> state actors [must] be attentive to the capacity of the state to harm associational life. The state might cause harm when it acts… on behalf of a purportedly homogeneous "public interest." […] there can never be an all-encompassing "we" without an already present "them"; every consensus is, to some extent, based on antecedent acts of exclusion. It is not enough, then, to insist on mere neutrality regarding associational activities; we must be attentive to the possibility that state action will work to oppress group objects.[21]

A. The Manner and Practice of Worship is at the Core of the Church's Sphere

18. The manner and practice of worship is at the core of what it means to be religious.[22] For many religious people this means assembling together for worship. The state's interests may well impact these assemblies but must do so carefully, weighing the constitutional importance and priority of religious practices in the life of religious citizens. For Christians, the church is not a building, but rather the in-person assembly of worshippers.[23] Corporate worship and partaking in the sacraments are the manifestation of the church's doctrines and the essence of its members' practices. All of these are based on core doctrines of the church.

19. The state may enact restrictions on such gatherings in pursuit of legitimate civic aims, provided they are demonstrably justified in a free and democratic society. To enact a blanket ban, as Manitoba has,[24] is the most severe infringement possible at law, which could be justified only if all alternative courses of action could not substantially reduce the risk of viral transmission.

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[19] *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 (Intervenors' BOA, **TAB 12**).
[20] *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 (Intervenors' BOA, **TAB 9**).
[21] David Schneiderman, "Associational Rights, Religion, and the Charter" in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008), at 72 (Intervenors' BOA, **TAB 38**).
[22] *Beaudoin*, *supra* note 12 at para 199 (Intervenors' BOA, **TAB 2**).
[23] See footnote 18, *supra*. Specifically in Lowe December 30, 2020 Affidavit at paras 11-12: "The very word assembling…in the Greek texts necessitates the physical meeting of believers together…There is a separate word in the Greek text that speaks of a brick and mortar structure (Acts 18:29) called a church. A church, the body of believers, is comprised of a group of people."
[24] See Roussin Affidavit at para 149.

IV. The Fundamental Freedoms within a Free and Democratic Society

A. The Fundamental Freedoms Preserve Institutional Pluralism

20. As laid out above, Canada is founded upon principles that recognize the supremacy of God and the rule of law.[25] Professor Dwight Newman writes, "That there would be rights and freedoms based on this preambular phrase could be read as implying that rights and freedoms were rooted in both eternal truths and in inherent features of law."[26] We enjoy various fundamental freedoms and rights, and any limitations of those rights by government are legitimate only to the extent that they are demonstrably justified by evidence that the infringement is necessary to the achievement of an even more pressing public good.

21. The fundamental freedoms enacted in section 2 of the *Charter* protect "social space" for an institutionally pluralistic society against usurpation by an ever-expanding state, particularly in times of societal urgency where the political majority is at greater risk of overlooking how minorities disproportionately bear the unintended harms of the majority's well-intentioned actions. "The guarantees of freedom of conscience and religion, the freedoms of expression, assembly, and association, all speak to the aim of dispersing power to civic and religious associations while bringing groups together in the generation of public policy outcomes."[27] The Supreme Court acknowledged this, saying, "Undoubtedly, one of the key considerations motivating the enactment of the *Charter*, and the process of constitutional judicial review that it entails, is the protection of minorities…"[28]

22. Dickson C.J. writes that the uniting feature of the fundamental freedoms "is the notion of the centrality of individual conscience and the inappropriateness of governmental intervention to

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[25] *Canadian Charter of Rights and Freedoms*, Preamble, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[26] Dwight Newman, "Recovering Forgotten Freedoms", (2020) 98 SCLR (2d) 47 – 62, at para 22 (Intervenors' BOA, **TAB 33**).
[27] Schneiderman, *supra* note 21, at 73 (Intervenors' BOA, **TAB 38**).
[28] *Reference re Secession of Québec*, *supra* note 7, at para 81 (Intervenors' BOA, **TAB 18**).

compel or to constrain its manifestation."[29] Continuing on the theme, Dickson C.J. writes:

> the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system […] underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental". They are the *sine qua non* of the political tradition underlying the *Charter*."[30]

23. The Supreme Court has likewise held that these individual rights manifest in religious institutions, which also receive constitutional protection.[31] The fundamental freedoms in the *Charter* protect the manifestation of Canadians' beliefs, including the peaceful assemblies of citizens for religious purposes.

B. Freedom of Expression Includes the Right to be Spiritually Encouraged in Song

24. The guarantee of the fundamental freedom of expression, protected by section 2(b) of the *Charter*, has three rationales at its core: (1) an instrument of democratic government; (2) an instrument of truth; and (3) an instrument of personal fulfillment.[32] Music, congregational singing in particular, meets both the second and third rationales in that religious music communicates transcendent truths and acts as a means to express oneself, personally and communally, through a beautiful artform in a deeply fulfilling and enriching way that meets psychological, mental, emotional, and spiritual needs. As noted by Dr. Jay Bhattacharya, there is ample evidence in medical literature that religious communal singing produces particular psychological benefits, and "provides a sense of belonging and connectedness that is crucially important in the life of many believers, with measurable effects on mental health."[33]

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[29] *Big M Drug Mart*, *supra* note 10, at p 346 (Intervenors' BOA, **TAB 14**).
[30] *Ibid*, at p 346. Another unifying feature of the fundamental freedoms is the protection of the search for truth: Derek Ross, "Truth-Seeking and the Unity of the Charter's Fundamental Freedoms", (2020) 98 SCLR (2d) 63 – 107 (Intervenors' BOA, **TAB 36**).
[31] See *Loyola High School*, *supra* note 20, at para 60 (Intervenors' BOA, **TAB 9**) and *Mounted Police Assn. Of Ontario v. Canada (Attorney General)*, 2015 SCC 1, at para 64 (Intervenors' BOA, **TAB 10**).
[32] Peter W. Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2007) (loose-leaf updated 2019, release 1) vol 2 at 43-7 – 43-8 (Intervenors' BOA, **TAB 28**), adopted by the Supreme Court of Canada in *Irwin Toy Ltd., v. Quebec (Attorney General)*, [1989] 1 SCR 927 (SCC) at 976 (Intervenors' BOA, **TAB 8**).
[33] Bhattacharya Affidavit, Exhibit "C" at p 25, and footnotes 120 – 123.

25. The freedom of expression question here has particular theological implications for this intervenor and the constituency it represents: first, the participatory nature of communal singing and second, the beneficiaries of communal singing. In Reformed theology, the worship of God in corporate song is a right and privilege of all believers gathered together, not just for the trained few. It is also a joyous duty, since all members are called to worship God in song. But secondly, Scripture also teaches that singing in corporate worship is "vertical" *and* "horizontal", i.e. that by singing together, believers not only praise God (vertical) but also encourage one another (horizontal), inspiring and uplifting one another "with psalms, hymns, and spiritual songs".[34] This is all the more important and necessary during times of calamity. The guarantee of freedom of expression protects not just the right to sing, but to hear singing, to receive it and be uplifted by it. To prohibit religious corporate singing (either directly, or indirectly by prohibiting the gathering together for that purpose for extended periods of time during very difficult times) is a profound violation.

C. Freedom of Peaceful Assembly is Directly Engaged in the Case at Bar

26. The *Charter* guarantee of the fundamental freedom of peaceful assembly has received little attention in Canadian jurisprudence, often being subsumed by other fundamental freedoms.[35] In *The Law of the Canadian Constitution*, Régimbald and Newman summarize the fundamental freedom of peaceful assembly as follows:

> The dividing line concerning which right is at issue relates to what precisely is at issue: section 2(b) freedom of expression concerns the actual or attempted conveyance of meaning, section 2(c) freedom of assembly concerns the physical dimensions of assembling for protest or other constitutionally pertinent reasons, and section 2(d) freedom of association concerns the non-physical organizational dimensions of the association of individuals.[36]

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[34] See The Holy Bible (ESV), Ephesians 5:18-20, where the Apostle Paul encourages the church to "not get drunk with wine, for that is debauchery, but be filled with the Spirit, addressing one another in psalms and hymns and spiritual songs, singing and making melody to the Lord with your heart, giving thanks always and for everything to God the Father in the name of our Lord Jesus Christ, submitting to one another out of reverence for Christ."

[35] Peter Hogg notes that picketing has been protected under 2(b) Peter W. Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2007) vol 2 at 44-2 (Intervenors' BOA, **TAB 29**).

[36] Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2nd ed (Toronto: LexisNexis Canada, 2017) at p 645 (Intervenors' BOA, **TAB 35**) [emphasis added].

27. A gathering may have an expressive or religious element, but the protection of the gathering itself properly falls under section 2(c). Section 2(c) contains the internal limit that such an assembly must be peaceful.[37] In his judgment in *Roach*, Linden J.A. explains that "freedom of peaceful assembly is geared towards protecting the physical gathering together of people."[38] In this sense, saying "religious assemblies could continue by remote means"[39] is non-sensical.

28. While there are undoubtedly religious beliefs at issue in this case, ARPA Canada submits that the crux is not religious beliefs or associations *per se*, but the right to *peacefully assemble in person* in accordance with sincerely held religious beliefs, in order to carry out mandatory religious practices. We disagree with the Respondents' claim that the restrictions on corporate worship are only "arguably" violations of section 2(c) and are "better addressed directly under the freedom of religion."[40] There is overlap between the fundamental freedoms in this case, as religious freedom under section 2(a) has been interpreted to include the right "to manifest religious belief by worship and practice".[41] This overlap, however, should not obscure the fact that the *Charter* grants separate and meaningful protection to freedom of assembly. While the impugned orders may result in a less severe section 2*(a)* infringement for *some* persons whose religious beliefs (unlike those of the Applicants) permit virtual attendance or drive-in alternatives at services, the section 2*(c)* rights of *all* religious individuals who would otherwise have attended in-person services are infringed by the orders which prohibit or severely restrict peaceful religious assemblies. This case requires a distinct and robust examination of the fundamental freedom of peaceful assembly guaranteed by section 2(c).

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[37] Nnaemeka Ezeani, "Understanding Freedom of Peaceful Assembly in the Canadian Charter of Rights and Freedoms", (2020) 98 SCLR (2d) 351-376, at para 45 (Intervenors' BOA, **TAB 25**). Enzeani notes that "An assembly will not fail the peaceful test simply because the conduct of the individuals has the potential to annoy or offend third parties or hinder their activities. This position is appropriate because it is difficult for people to converge without some annoyance to third parties, especially where the assembly occurs in a public space."
[38] *Roach v. Canada (Minister of State for Multiculturalism and Citizenship*, [1994] 2 FC 406.at para 69 (FCA) (Intervenors' BOA, **TAB 20**), in dissent but not on this point.
[39] Respondents' Brief, para 73.
[40] Respondents' Brief, para 84.
[41] *Big M Drug Mart Ltd*, *supra* note 10, at p 336 (Intervenors' BOA, **TAB 14**).

29. In a recent Supreme Court Law Review article on freedom of assembly, Nnaemeka Ezeani suggests "governments might as a result of the outbreak of [a] virus place restrictions on the gathering of … groups to curtail the spread. Freedom of assembly may be valuable in at least providing a way we could scrutinize the restrictions placed by the government were they to become too stringent."[42] Ezeani quotes American law professor John Inazu on the importance of freedom of assembly as distinct from expression and association:

> Many group expressions are only intelligible against the lived practices that give them meaning. The ritual and liturgy of religious worship often embody deeper meaning than an outside observer would ascribe them. The political significance of a women's pageant in the 1920's would be lost without knowing why these women are gathered.[43]

30. Each of the examples mentioned by Inazu are manifestations of institutional pluralism protected by the *Charter*. Individuals may hold political beliefs, but they are worth little without the freedom to associate as an advocacy group and physically assemble in protest. Likewise, religious beliefs may be held by individuals, but they are worth little without the freedom to associate as a church and physically assemble together to manifest those beliefs.

D. The Court Should Consider "Compound Violations" of Fundamental Freedoms

31. Where more than one fundamental freedom is infringed, the court must give due weight and attention to each, as well as to the intersectional impact upon all of them collectively. In this case, the compound violation of sections 2(a), 2(b) and 2(c) (as well as of religious equality protected by section 15) requires attention. The court must analyse the compound violation with a view to the constitutional imperative of preserving institutional pluralism.

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[42] Ezeani, *supra* note 37, at para. 24 (Intervenors' BOA, **TAB 25**). At footnote 58, Ezeani goes into more analysis of how s. 2(c) would be implicated, explicitly in a Covid-19 context. See also Kristopher Kinsinger, "Restricting Freedom of Peaceful Assembly During Public Health Emergencies," *Constitutional Forum constitutionnel*, Vol. 30, No. 1, 2021, 19-28 (Intervenors' BOA, **TAB 31**).

[43] John D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly,* (New Haven, CT: Yale University Press, 2012) at pp 2-3 (Intervenors' BOA, **TAB 30**). Cited in Ezeani, *ibid*, at para 28.

32. Professor Dwight Newman opines,

> What could appear to be a trivial infringement of one freedom might actually be more appropriately recognized as a more substantial infringement in the context of an intersectionality of different freedoms […] The possibility of such intersectional freedom infringement is a further reason to carry out independent development of each of the freedoms recognized within the section 2 fundamental freedoms clause -- only in doing so can we fully identify the full depth of impacts on human freedom arising from certain state actions."[44]

33. Another recent Supreme Court Law Review article argues that an approach that decides a constitutional case by only analysing a single infringement, despite others alleged,

> unfairly puts the onus on claimants to pick their "best" *Charter* right or freedom and rely entirely on it. […] However, each and every *Charter* right or freedom raised should be given due attention because each one protects a distinct (though, at times, overlapping) good and each right or freedom has its own test. […] we cannot know whether the violations are justified unless the full analysis is completed.[45]

34. The Supreme Court acknowledges this in *Mounted Police*, ruling that freedom of association does not derive from freedom of religion but "stands as an *independent* right with *independent* content, essential to the development and maintenance of the vibrant civil society upon which our democracy rests".[46]

35. This Court should apply the practice of criminal law courts when remedying multiple *Charter* breaches. As two criminal law scholars explain, "It is well established that courts are not to consider breaches of *Charter* rights in a vacuum. Rather, they should take into account the

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[44] Dwight Newman, "Interpreting Freedom of Thought in the Canadian Charter of Rights and Freedoms", (2019), 91 SCLR (2d) 107 – 122, at para 34-35 (Intervenors' BOA, **TAB 32**). See also Professor Jamie Cameron, who writes, "Minimizing the severity of the violation [by addressing only one freedom] demonstrated a lack of insight into the scope and severity of the breach and how it engaged section 2's guarantees as an integral whole…[This] can diminish the significance and severity of compound violations." Jamie Cameron, "Big M's Forgotten Legacy of Freedom", (2020) 98 SCLR (2d) 15 – 45, at para 41-42 (Intervenors' BOA, **TAB 23**).

[45] André Schutten, "Recovering Community: Addressing Judicial Blindspots on Freedom of Association", (2020) 98 SCLR (2d) 399 – 430 at para 27 (Intervenors' BOA, **TAB 39**). In almost all cases cited by the Respondents at para 86 where courts have declined to rule on other alleged Charter breaches, it is because a violation under a different section was already found and was *not* saved under section 1. In such cases, it is entirely appropriate to find it unnecessary to rule on other alleged Charter violations.

[46] *Mounted Police*, *supra* note 31, at para 49 (Intervenors' BOA, **TAB 10**) [emphasis added].

cumulative effect of multiple *Charter* breaches".[47] Where there are multiple *Charter* breaches of legal rights (in particular, sections 8, 9, and 10), courts routinely weigh the seriousness of the *cumulative* effect of the violations.[48]

36. Courts have also given particular consideration to the multiple *Charter* violations in a context where a criminal investigation interacts with the media. In a lower Court decision, overturned on appeal but not on this point, Benotto J. articulated the underpinnings of the broad protections against search and seizure for the media, intersecting sections 2(b) and 8:

> It is because of the fundamental importance of a free press in a democratic society that special considerations arise in applications to search media premises or to seize material from journalists […] the damaging effect of the search on the freedom and functioning of the press is highly relevant to the assessment of the reasonableness of the search.[49]

37. This intervener submits that, in an analogous way, the damaging effect of the Orders on *religious* assemblies in particular (in contrast to assembling merely for entertainment, for example) is highly relevant to the assessment of the sufficiency of the justification of the Order.

38. The Supreme Court emphasizes the intersectional significance of religious assemblies, emphasizing the "socially embedded nature of religious belief"[50] and that freedom of religion protects not merely religious opinions but also a right "to establish communities of faith, the autonomous existence of which is indispensable for pluralism in a democratic society."[51]

39. The cumulative effect of the compound *Charter* infringements, particularly of section 2(a) and 2(c) of the *Charter* in this case, is a "double-barrelled infringement" of the Applicants'

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[47] James Fontana and David Keeshan, *The Law of Search and Seizure in Canada*, 11th ed. (2019), Ch 24, sec 5 (Intervenors' BOA, **TAB 26**).
[48] See, for example, *R. v. Simpson*, (1993), 79 CCC (3d) 482 (Ont CA) at 507 (Intervenors' BOA, **TAB 16**), where Doherty J.A. ruled evidence inadmissible due to "the double-barrelled infringement of the appellant's constitutional rights." And see *R. v. Young*, (1993), 79 CCC (3d) 559 (Ont CA) at 566 (Intervenors' BOA, **TAB 17**), where Carthy J.A., excluding evidence for infringements of ss. 8, 9, and 10(b), commented, "the number of violations combined to form a larger pattern of disregard for the appellant's Charter rights."
[49] *National Post v. Canada*, [2004] 178 O.J. (Sup. Ct.), at para 45 (Intervenors' BOA, **TAB 13**) [emphasis added].
[50] *Loyola*, *supra* note 20, at para 60 (Intervenors' BOA, **TAB 9**).
[51] *Mounted Police*, *supra* note 31, at para 64 (Intervenors' BOA, **TAB 10**).

constitutional freedoms and ought to be weighed as such. The prohibition or severe limitations, not on peaceful assemblies generally (some of which remain permitted under the impugned orders[52]), but on *religious* assemblies in particular, requires judicial attention and redress.

V. Minimal Impairment and Proportionality in a Free and Democratic Society

40. The impugned orders can only be upheld if they are minimally impairing and proportionate.[53] This intervener makes submissions only on specific and discrete aspects of the minimal impairment and proportionality analysis.

A. Minimal Impairment Requires Prioritizing Constitutionally Protected Activity

41. In the second step of the *Oakes* proportionality analysis, the emphasis is on the right being breached.[54] That is, "the government must show that the measures at issue impair the [*Charter*] right…as little as reasonably possible in order to achieve the legislative objective."[55]

42. It should be fatal to the government's demonstrable justification burden at the minimal impairment stage if the court concludes that the Covid-19 transmission risk of banned or severely restricted religious assemblies (if practiced with equivalent public health safeguards) are no greater than the Covid-19 transmission risk in equivalent non-religious gatherings (formal, spontaneous, or informal) which the impugned orders permit to continue.[56]

43. It appears that the government's pressing and substantial objective for the impugned orders was to reduce total Covid-19 transmission to a certain (unstated) target level. The goal was

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[52] See COVID-19 Prevention Order, November 21, 2020 at 10(1) (Respondents' BOA, **TAB 3**) which allows for universities and other educational institutions to provide in-person instruction to 50% capacity or 25 persons, whichever is less.
[53] *Loyola*, *supra* note 20, at paras 37-38 (Intervenors' BOA, **TAB 9**).
[54] *Oakes*, *supra* note 10 at p 139 (Intervenors' BOA, **TAB 15**).
[55] *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199 at para 160 (Intervenors' BOA, **TAB 19**).
[56] See COVID-19 Prevention Order, November 21, 2020 at 10(1) (Respondents' BOA, **TAB 3**) which allows for universities and other educational institutions to provide in-person instruction to 50% capacity or 25 persons, whichever is less; and COVID-19 Prevention Order, November 21, 2020 at 14 (Respondents' BOA, **TAB 3**) which permitted community centres to remain open with the provision that "Only activities that are permitted under these Orders may take place…The conduct of specific activities at a community centre is governed by the applicable provisions of these Orders."

clearly not to reduce Covid-19 transmission to eliminate it altogether, because if that were the objective, then the orders would ban *all* in-person contact, which they do not. The orders have in fact reduced by a certain percentage the number and scale of scenarios in which people physically come into contact with others. Where that reduction could be achieved through restrictions of non-constitutionally protected activity, it cannot, as a matter of basic logic, be minimally impairing for government to permit the non-constitutionally protected activity to continue while banning constitutionally protected activity. Demonstrable justification requires government to pursue its pressing and substantial objectives by restricting non-constitutionally protected activity *before* restricting constitutionally protected activity. Religious assemblies and practices have constitutional protection.[57] Other activities may be worthy of promotion or protection, but not at the expense of those activities afforded express *Charter* protection.

44. In the case at bar, the government chose at times to completely prohibit religious assemblies or else to severely limit or restrict them. In evaluating whether this restriction is minimally impairing, the question is whether government could achieve substantially the same end (i.e. equivalent reduction in the spread of Covid-19) in a manner that does not so drastically impair this right. The court should ask not only: (1) Do bans on religious assemblies reduce the risk of viral spread? and (2) Would anything less than a total ban substantially reduce the risk of viral spread? But also: (3) Are there other non-*Charter*-protected activities contributing to viral spread that could be further restricted before outright banning *Charter*-protected activities?

45. There may be legitimate economic or other reasons for government to decide not to ban certain academic, community, economic, or commercial activities. But the fact that these activities are permitted, but worship services of the same size are not, demonstrates that the relevant freedoms are not minimally impaired. The *Charter* precludes restricting enumerated rights as the government's 'first choice.'

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[57] *Big M Drug Mart*, *supra* note 10, at para 94 (Intervenors' BOA, **TAB 14**).

B. The Complete Denial of Assembly for Some Mitigation of Risk is not Proportionate

46. The deleterious impact of the impugned orders which, from time to time actually or effectively banned corporate worship,[58] includes the complete denial of the freedom of the Applicants, of Reformed Christians, and others whose religious beliefs compel assembling in-person for worship and/or sacraments.[59] For these individuals, the impact of the orders in issue is not merely to change the *mode* in which they conduct their religious practices (i.e., online instead of in person), but in fact makes it impossible for them to perform their mandatory religious practices.

47. The beliefs of many Christians, including Reformed Christians, are that corporate, assembled worship is a requirement for the church of Christ. Corporate worship requires in-person presence that cannot be achieved through virtual means. A virtual livestream can be observed or watched by a congregant, but Reformed theology holds that a congregant is not to be merely an observer of corporate worship, but an active participant, most obviously through joining together in singing, prayer, and receiving the sacrament of the Lord's Supper (also called "communion"). All of these are to be done corporately – that is, together as an assembled body. This strikes at the heart of *Charter* protections in sections 2(a) and 2(c) and is of the greatest severity.

48. In addition to the sum of fundamental freedom infringements on individual worshippers and churches, the impugned orders do serious "macro harm" to institutional pluralism and "the vibrant civil society on which our democracy rests."[60] An entire category of constitutionally-protected societal actors are banned from assembly, thus deeply injuring their vitality and leading to significant downstream harms. On the micro level, this deprives Manitobans of their religious institutions during a period of greater, not lesser, need for comfort and guidance. On a macro level, it sidelines mediating institutions that are crucial in maintaining a healthy civil

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[58] See Roussin Affidavit, complete ban from November 20, 2020 to January 22, 2021 at para 149 and restricted to 10 persons from January 22, 2021 to February 12, 2021.
[59] See Toews January 5, 2021 Affidavit, paras 9-13; Tissen January 5, 2021 Affidavit, para 6; Rempel January 7, 2021 Affidavit at paras 13-15; Lowe December 30, 2020 Affidavit at para 11.
[60] *Mounted Police*, *supra* note 31, at para 49 (Intervenors' BOA, **TAB 10**).

society and a constitutionally limited government. The risk of a slide towards statism is greatest during times of emergency; it is precisely during those times that it is most crucial to uphold constitutional guarantees of institutional pluralism. Manitoba is rendered deeply less free and democratic by the challenged portion of the impugned orders, and unnecessarily so.

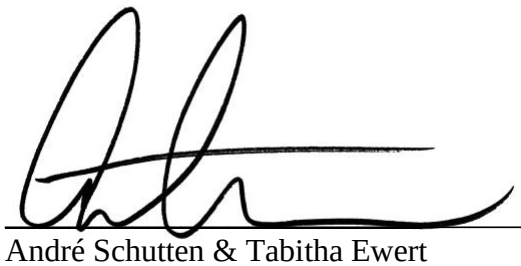
49. The mere fact that there has been *some* Covid-19 transmission in "religious settings"[61] does not demonstrably justify a blanket ban on corporate worship, if the ban is disproportionate to the degree of transmission as compared to baseline community transmission occurring generally in the population and tolerated by government in other settings. Where the line should be drawn is something for the parties to argue. This intervener's point is that government should not receive a "pass" on the proportionality requirements of the *Oakes* test as applied to the ban (November 20, 2020 to January 22, 2021) on religious gatherings simply because it might decrease the risk of Covid-19 transmission by some percentage.[62] While such evidence might be sufficient to satisfy the government's burden to establish a rational connection, it is not sufficient to satisfy the government's proportionality burden under section 1, which is a matter of weighing the deleterious and beneficial impacts of the impugned orders.

50. Although civil government has legitimate and important responsibilities with respect to protecting citizens' health from various threats, government does not exercise sole responsibility for protecting or promoting health. Dickson C.J.C., identified that "principles essential to a free and democratic society" include "faith in social … institutions which enhance the participation of individuals and groups in society."[63] In a free and democratic society, even during a pandemic, private institutions and individuals also have a legitimate and important role to play in enhancing various aspects of health. The church, for example, is much better

[61] It should be noted that of the 10 instances listed in the Loeppky Affidavit at para 14, only 2 were from a worship service.
[62] Roussin Affidavit at para 149. There is a difference between reducing a risk of COVID-19 transmission and reducing COVID-19 transmission.
[63] *Oakes*, *supra* note 10 at p 136 (Intervenors' BOA, **TAB 15**) [emphasis added].

equipped than the state to address the spiritual, mental, emotional, and social health of Canadians, particularly of that of their membership. The outright bans and severe restrictions on religious assemblies for corporate worship and sacraments has downstream effects, negatively impacting the mental, emotional, relational, and spiritual health of many Manitobans, as the Respondents concede.[64] Churches have, for two millennia, worked to address and alleviate these public health challenges through counselling, poverty alleviation, shelters, substance abuse groups and more. These institutions must be free to also prevent such deleterious effects upstream through maintaining their core communal, and constitutionally protected, religious practices.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 14th day of April, 2021.



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[64] See Respondents' Brief, para 186, admitting the need for government support to alleviate the burdens of public health restrictions.