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ARPA CANADA'S LEGAL ARGUMENTS

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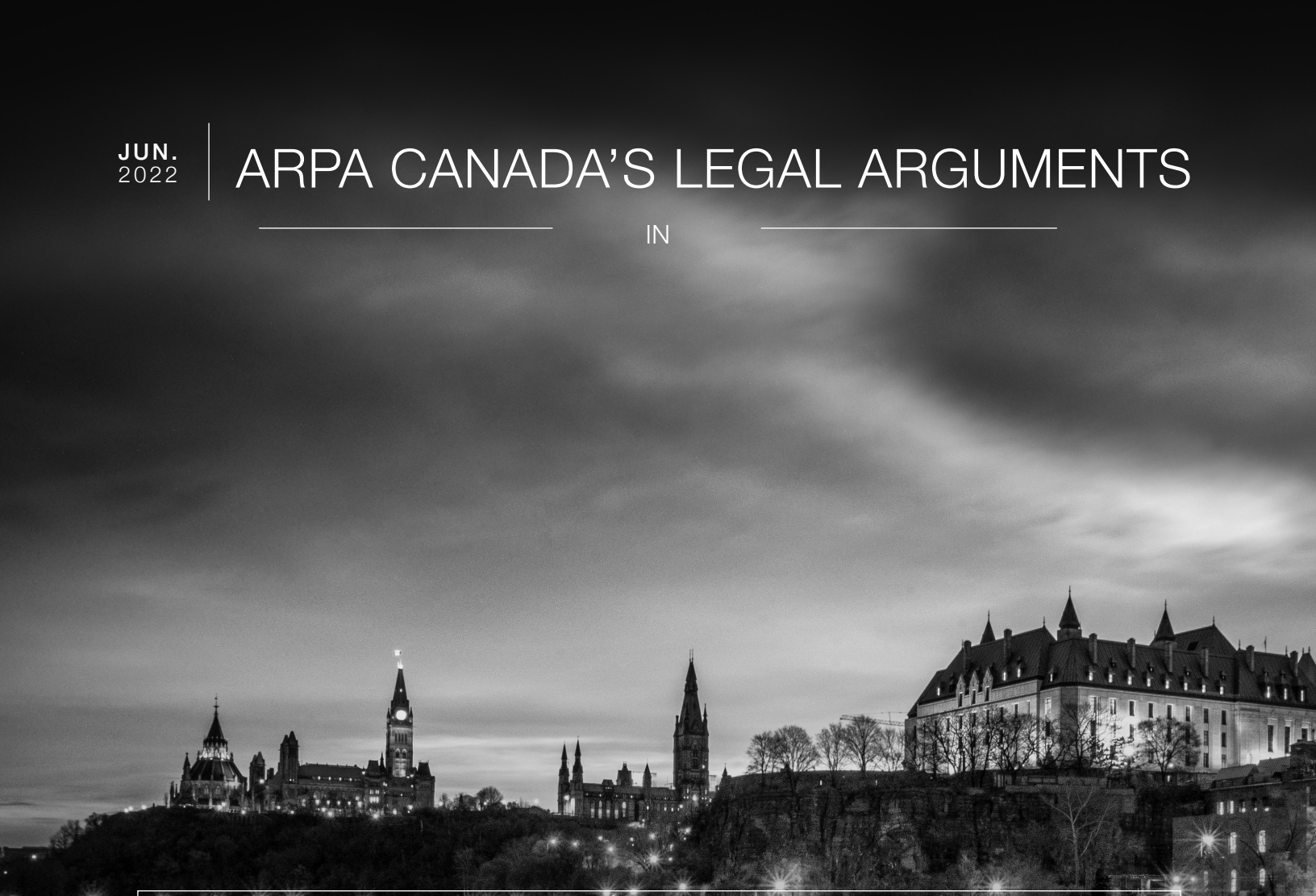

GATEWAY BIBLE BAPTIST CHURCH V. MANITOBA

THE CASE TO PROTECT CORPORATE WORSHIP IN MANITOBA

COURT OF APPEAL

ARPA CANADA

IN THE COURT OF APPEAL

BETWEEN:

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

(Applicants) Appellants

-and-

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF MANITOBA, and 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 MANITOBA

(Respondents) Respondents

FACTUM OF THE INTERVENER THE ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA

June 3, 2022

The Association for Reformed Political Action (ARPA) Canada
André Schutten
Tabitha Ewert

Counsel for the Intervenor

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I. Overview

1. Over two years have past since governments across Canada implemented what have been described as the most intrusive regulations ever seen in Canadian law. Canadians grappled with what this meant for how to work, how to care for family members and friends, and how to navigate religious obligations and government regulations. The Manitoba government acted in the name of public health. Canada's constitution, however, requires more. Restrictions on the fundamental freedoms of Manitobans can only be upheld if they are demonstrably justified in a free and democratic society. Such a society jealously guards institutional pluralism.

2. Institutional pluralism is an organizing principle under the *Charter*. This principle is reflected in the preamble and sections 1 and 2, which together safeguard the role, vitality, and independence of non-state institutions and associations in our free society. Their rights represent a structural limit on the powers of government and reflect the fact that there are other valid sources of authority and meaning in citizens' lives. Government shares "constitutional space" with these other institutions which, like government, also have responsibilities, duties, and a constitutionally protected public role during a time of crisis.

3. An emergency order that unjustifiably violates institutional pluralism undermines society's shared objective of responding well to that very emergency. It engenders an adversarial relationship between government and affected religious

groups, treating the latter as mere transmission risks to be managed. By contrast, respecting religious communities' constitutional status and rights, and treating them as partners to cooperate with for the common good, preserves their goodwill and support in the common goal of fighting Covid-19. A mutually respectful relationship between government and civil society is essential to a free and democratic society.

4. Gathering for religious worship fulfils purposes core to 2(a), 2(b), and 2(c), by giving effect to the nature of the church as the gathered "body of believers". It is crucial to consider the impact of impugned regulations on each of these fundamental freedoms *and* to weigh the "compound violations" of multiple section 2 freedoms. Furthermore, to demonstrably justify the regulations, the government must *demonstrate* that the reduced transmission from such a ban is significant enough to weigh more heavily than the severe and compound infringements of constitutional rights and the unprecedented impositions on the free institutions of society.

II. The Charter's Preamble Signals Support for Institutional Pluralism

5. Philosophers such as Hobbes and Rousseau "tried in different ways to subordinate religious claims to the sovereignty of politics."[1] 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

[1] William A. Galston, "Religion and the Limits of Liberal Democracy" in Douglas Farrow, ed, *Recognizing Religion in a Secular Society* (Quebec City: MGill-Queen's University Press, 2004) 41 at 44 (IBOA Tab 26).

'concessions' of power from the sovereign political authority."[2] 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. As such, governments should pursue a policy of "maximum feasible accommodation."[3] Such accommodation does not require a government to abdicate its responsibility to act in the public interest. Instead, maximum feasible accommodation seeks to accommodate the various institutions that contribute to society, subject only to the core duties of the state.

6. "The preamble [to the *Charter*], including its reference to God, articulates the 'political theory' on which the *Charter's* protections are based."[4] It sees state authority as structurally limited vis-à-vis individuals and non-government institutions, whose rights against government are subsequently spelled out.

7. Professor ten Napel describes this political theory as one which creates space

> for the institutions of civil society to properly perform [their] constitutional role … in the more general separation of powers and checks and balances in the constitutional system, by creating a kind of federalism 'all the way down,' which allows for sovereignty to be shared by the state and civil society associations.[5]

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[2] Galston, *supra*, at 44 (IBOA Tab 26).
[3] William A. Galston, *Liberal Pluralism* (Cambridge: Cambridge University Press, 2002), at 20 (IBOA Tab 25).
[4] *Mouvement laïque québécois v Saguenay (City)*, [2015] 2 S.C.R. 3 at para. 147, 2015 SCC 16 (IBOA Tab 9).
[5] Hans-Martien ten Napel, *Constitutionalism, Democracy, and Religious Freedom: To Be Fully Human* (London: Routledge, 2017), at pp. 77-78 (IBOA Tab 33). Napel calls it "social pluralist constitutionalism".

8. This is consistent with a principle in Reformed Christian thought: all authority belongs to God who delegates ***limited*** authority to different institutions in society. 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 whatever a concerned citizenry might acquiesce to.

9. The preambular reference to "the supremacy of God" signifies, at the very least, that the state is not God. It is neither the sole nor the highest authority, nor the ultimate source of rights and freedoms.[6] The preambular reference to "the rule of law" means that not only must all state actors have intelligible sources for their authority, but there must also be structural limits to their authority.[7]

10. The *Charter's* preamble signals "a kind of secular humility, a recognition that there are 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]

III. Institutional Pluralism Reflected in our Current Law

11. Canada's court have consistently recognized the role and authority of other

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[6] Bruce Ryder, "State Neutrality and Freedom of Conscience and Religion" (2005) 29 S.C.L.R. 10 (IBOA Tab 29). [Ryder, *State Neutrality*].
[7] John Sikkema, "The First Division of Power: State Authority and the Preamble to the Charter" (2022) 105 S.C.L.R. (2d) 67-93 (IBOA Tab 32); Ian T. Benson, "The Limits of Law and the Liberty of Religious Associations" in Ian T. Benson and Barry W. Busey, eds, *Religion, Liberty and the Jurisdictional Limits of Law* (Toronto: LexisNexis Canada Inc., 2017), at xxiii, n 5 (IBOA Tab 21); and *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 71, 16 D.L.R. (4th) 385 (IBOA Tab 15) [*Secession Reference*].
[8] Ryder, *State Neutrality*, *supra* note 6 at para. 17 (IBOA Tab 29).

institutions. For example, religious bodies have, as British Columbia 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."[9] The Supreme Court has affirmed these points unequivocally in *Amselem* and in *Wall*.[10]

12. The Supreme Court of Canada acknowledges institutional pluralism when 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."[11] The vitality of non-state actors and communities is essential for societal health and is a defining characteristic of a free and democratic society.[12]

13. As with the delineated spheres of a federal state,[13] the spheres of jurisdiction between church and state should not be seen as mutually exclusive territorial boundaries, but rather as overlapping *aspects* of life lived together. The civil government's responsibility and authority with respect to religious gatherings is legitimately engaged with respect to matters of public safety (e.g., fire safety,

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[9] *Beaudoin v. British Columbia*, 2021 BCSC 512 at para. 199 (IBOA Tab 1) [*Beaudoin*]; *Ontario v. Trinity Bible Chapel et al*, 2022 ONSC 1344, at para. 106 (IBOA Tab 11) [*Trinity Bible Chapel*].
[10] *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 at para. 50, 2004 SCC 47 (IBOA Tab 20); and *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, [2018] 1 S.C.R. at para. 24, 2018 SCC 26 (IBOA Tab 5).
[11] *Secession Reference*, *supra* note 7 at para. 74 (emphasis added) (IBOA Tab 15).
[12] *Trinity Bible Chapel*, *supra* note 9 at para. 84 (IBOA Tab 11).
[13] *Secession Reference*, *supra* note 7 at para. 52 (IBOA Tab 15).

building safety, sanitation requirements, and on this occasion, Covid-19 transmission risk). However, this state authority does not automatically supersede other authority. It co-exists with the church's constitutionally protected responsibility and authority over assembled worship.[14] Government must pursue public safety objectives in a manner that respects the core religious authority of the church. The state's effective prohibition of the core function of another sphere of society would be justified only in extreme situations, and on a case-by-case basis. In other words, it is legitimate to enact restrictions, even heavy and burdensome ones, on another independent sphere of society where demonstrably justified. It is another thing altogether to prohibit that sphere from doing its core function at all.

14. Churches' ability to fulfil their religious duties and societal responsibilities may be legitimately inconvenienced by laws or regulations of general application. By the same token, government's ability to fulfill its responsibilities may be inconvenienced by its duty to accommodate and respect religious institutions and practices under ss. 2 and 15 of the *Charter* (as in *Multani*[15] or *Loyola*[16]). This is the nature of a free and democratic society. The courts must hold the executive and legislative branches of government accountable to their constitutional duties and limits, manifested here as respect for the role of other institutions of society.

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[14] 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 p. 111 (IBOA Tab 23).
[15] *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6 (ABOA Tab 44).
[16] *Loyola High School v. Quebec (Attorney General)*, [2015] 1 S.C.R. 613, 2015 SCC 12 (IBOA Tab 7) [*Loyola*].

15. In this mutually respectful relationship:

> 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.[17]

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

16. The manner and practice of worship is at the core of religious freedom.[18] The authority to determine the manner of worship falls to the religious institution and must include the question of whether physical, in-person attendance is a religious obligation. For many people, their religious convictions require assembling for *communal* worship, being *physically present with their spiritual brothers and sisters*, and receiving the sacraments – which involves *physically* eating *the same* bread and drinking *the same* wine from the *same* table. This cannot be achieved by livestream. Government must account for the constitutionally recognized importance and priority of religious practices in the life of religious citizens. For Christians, the church is not a building or a legal entity, but the *ecclesia*, the gathered people.[19]

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[17] David Schneiderman, "Associational Rights, Religion, and the Charter" in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008), at p.72 (IBOA Tab 31) [Associational Rights].
[18] *Beaudoin*, *supra* note 9 at para. 199 (IBOA Tab 1).
[19] Affidavit of Riley Toews, sworn January 5, 2021 at para 13 [AB Vol. 2 Tab 2E, p. AB235].

17. The state may enact restrictions on religious gatherings, provided the restrictions are demonstrably justified in a free and democratic society. Manitoba enacted a total ban on worship. For thirteen weeks no religious gatherings were permitted whatsoever.[20] Such extreme restrictions can be justified only if the government can demonstrate that all alternative courses of action could not *substantially* reduce the risk of viral transmission.

B. Institutional Pluralism Should be Addressed in the Final Stage of Oakes

18. Where engaged, the constitutional theme of institutional pluralism should be addressed explicitly in the final stage of the *Oakes* test. Chief Justice Dickson describes the purpose of this final stage as follows:

> Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of … the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance … it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve.[21]

19. This final stage of the Oakes test is set within a broader vision, the "second contextual element of interpretation of s. 1 … provided by the words 'free and democratic society'."

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few…respect for cultural and group identity, and faith in social….

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[20] *Gateway Bible Baptist Church et al. v. Manitoba et al.*, 2021 MBQB 219 at paras. 75-83 (IBOA Tab 4) [*Gateway Bible*].
[21] *R. v. Oakes*, [1986] 1 S.C.R. 103 at para. 71, 53 O.R. (2d) 71 (emphasis added) (IBOA Tab 14) [*Oakes*].

> institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.[22]

20. This is a vision of institutional pluralism – a vision of society where both government and courts demonstrate an abiding respect for other legitimate institutions of society. Dickson C.J.'s phrase "faith in social institutions which enhance the participation of individuals and groups in society" is particularly noteworthy. Faith in social institutions requires that civil government respect, trust, protect, and cooperate with other institutions, dialoguing with, rather than dictating to, them. This is all the more important during a public crisis.[23]

21. The argument accepted by the Application Judge that a total ban of religious assemblies was necessary because "it was not possible to monitor hundreds of private places of worship… to ensure that the precautions identified would always have been followed, properly or at all" is very disheartening.[24] This finding betrays an inherent suspicion of all religious houses of worship, a total lack of "faith in social institutions" to have the capacity to monitor *for themselves* the safety protocols. It assumes religious institutions are incompetent and not to be trusted.

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[22] *Oakes*, *supra* note 21 at para. 64 (emphasis added) (IBOA Tab 14).
[23] *Trinity Bible Chapel*, *supra* note 9 at para. 87 (IBOA Tab 11).
[24] *Gateway Bible*, *supra* note 20 at para. 305 (IBOA Tab 4).

22. The government must undertake the planning and effort necessary to preserve pluralism, even though such effort can make achieving government objectives more difficult. The Supreme Court warns, "there are occasions when the majority will be tempted to ignore fundamental rights in order to accomplish collective goals more easily or effectively. Constitutional entrenchment ensures that those rights will be given due regard and protection."[25]

23. A blanket ban on corporate worship disrespects religious institutions and contradicts the spirit and letter of the *Charter*. Thus, at the final stage of the *Oakes* analysis, any measurable benefits derived specifically from prohibitions of religious gatherings must be weighed against the fact that the orders in question trench so deeply on the core of other key social institutions.

IV. The Fundamental Freedoms within a Free and Democratic Society

A. The Fundamental Freedoms Preserve Institutional Pluralism

24. The *Charter's* fundamental freedoms structurally limit state authority and protect social space for an institutionally pluralistic society against usurpation by an ever-expanding state. This is particularly so in times of emergency where the political majority risks overlooking how minorities disproportionately bear the unintended harms of the majority's well-intentioned actions. The fundamental freedoms "all speak to the aim of dispersing power to civic and religious associations while bringing groups

[25] *Secession Reference*, *supra* note 7 at para. 74 (emphasis added) (IBOA Tab 15).

together in the generation of public policy outcomes."[26] The Supreme Court concurs: "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."[27]

25. Dickson C.J. held that the uniting feature of the fundamental freedoms is "the notion of the centrality of individual conscience" and concluded that governmental intervention compelling or constraining the conscience's manifestations is inappropriate.[28] The centrality of these fundamental freedoms

> both to the basic beliefs about human worth and dignity and to a free and democratic political system […] underlies their designation in the *[Charter]* as "fundamental". They are the *sine qua non* of the political tradition underlying the *Charter*.[29]

26. The Supreme Court has held that these individual rights manifest in religious institutions, which also receive constitutional consideration.[30] The fundamental freedoms in the *Charter* protect Canadians' beliefs as manifested in diverse institutions, including the peaceful assemblies of religious citizens.

B. Congregational Singing is Constitutionally Protected

27. At the core of 2(b) is the freedom of expression as an instrument of truth and as an instrument of personal fulfillment.[31] Music, particularly congregational

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[26] Schneiderman, *Associational Rights*, *supra* note 17 at p. 73 (IBOA Tab 31).
[27] *Secession Reference*, *supra* note 7 at para. 81 (IBOA Tab 15).
[28] *R. v. Big M Drug Mart Ltd*., [1985] 1 S.C.R. at para. 121, 18 D.L.R. (4th) 321 (IBOA Tab 14) [*Big M*].
[29] *Ibid*., at para. 122 (IBOA Tab 14).
[30] *Loyola*, *supra* note 16 at para. 60 (IBOA Tab 7).
[31] Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., vol. 2 (loose-leaf updated 2019, release 1) (Toronto: Thomson Reuters Canada, 2007), at p. 43-7-43-8 (IBOA Tab 27), adopted by the Supreme Court of Canada in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at p. 976, 58 D.L.R (4th) 577 (IBOA Tab 6).

singing, finds its protection here, as 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. Thus, as a matter of first principles, congregational singing implicates both ss 2(a) and 2(b) protection because it contains not only expressive content, but deeply religious content. Conduct protected by multiple fundamental freedoms should not be pigeonholed into one fundamental freedom or another other. The fact that singing psalms and hymns are particularly religious does not remove them from the scope of s. 2(b) protection.

28. This issue has theological implications for the intervener's constituency due to the participatory nature of communal singing. In Reformed theology, worshiping God in corporate song is a right of all believers, not just the trained few. Congregational singing is "vertical" *and* "horizontal." Therefore, believers not only praise God (vertical) but also encourage one another (horizontal), uplifting one another "with psalms, hymns, and spiritual songs".[32]

29. The application judge held that religious gatherings where congregants sing are equivalent to secular gatherings such as going out to watch a movie.[33] However, passively observing a show is, in its nature, different from participating in worship.

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[32] *Trinity Bible Chapel*, *supra* note 9 at para. 103 (IBOA Tab 11); and Affidavit of Riley Towes, sworn January 5, 2021 at paras. 16-18 [AB Vol. 2 TAB 2E, p. AB236].
[33] *Gateway Bible*, *supra* note 20 at para. 260 (IBOA Tab 4).

As was observed by the Ontario Superior Court, "religious services do not draw the same bright line between the stage and the audience. The observers perform and the performers observe in an interactive and symbiotic fashion."[34]

30. This is all the more important during times of calamity.[35] Freedom of expression protects not just the right to sing, but to hear singing and be comforted by it.[36] The state does not hold a monopoly on helping people cope with the stress of the pandemic.[37] Congregational singing cannot be replicated in isolation and to effectively prohibit it is a profound violation of both s. 2(a) and 2(b).

C. Freedom of Peaceful Assembly is Directly Engaged

31. Régimbald and Newman explain 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.[38]

32. A gathering may have an expressive or religious element, but the protection

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[34] *Trinity Bible Chapel*, *supra* note 9 at paras. 103-104 (IBOA Tab 11).
[35] Affidavit of Tobias Tissen, sworn January 5, 2021 at paras. 7-8 [AB Vol. 2 Tab 2F, p. AB 415-416].
[36] *Mounted Police Association. Of Ontario v. Canada (Attorney General)*, [2015] 1 S.C.R. 3 at para. 64, 2015 SCC 1 (IBOA Tab 8) [*Mounted Police*] where the court says, "Freedom of expression protects both listeners and speakers" citing *R. v. National Post*, [2010] 1 S.C.R. 477, at para. 28, 2010 SCC 16 (IBOA Tab 13).
[37] *Trinity Bible Chapel*, *supra* note 9 at para. 87 (IBOA Tab 11).
[38] Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2nd ed (Toronto: LexisNexis Canada, 2017) at p. 645 (emphasis added) (IBOA Tab 28) [*Law of the Constitution*].

of the peaceful gathering itself properly falls under section 2(c).[39] In *Roach*, Linden J.A. explains that "freedom of peaceful assembly is geared towards protecting the physical gathering together of people."[40] Thus, an argument that religious assemblies could continue by remote or virtual means is non-sensical.

33. The crux of this case is not religious beliefs or associations *per se*, but the right to *peacefully assemble in person* in accordance with sincerely held religious beliefs. There is overlap between the fundamental freedoms in this case, as religious freedom 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* specifically protects freedom of assembly. The section 2(c) rights of *all* religious individuals who would otherwise have attended in-person services are infringed by regulations that prohibit peaceful religious assemblies. This case therefore requires a robust examination of freedom of peaceful assembly.

34. Nnaemeka Ezeani suggests that where governments restrict gatherings to limit viral 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] Law professor John Inazu explains the importance of freedom of

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[39] Nnaemeka Ezeani, "Understanding Freedom of Peaceful Assembly in the Canadian Charter of Rights and Freedoms", (2020) 98 S.C.L.R. (2d) 351-376 at para. 45 (IBOA Tab 24) [Understanding Freedom].
[40] *Roach v. Canada (Minister of State for Multiculturalism and Citizenship)*, [1994] 2 FC 406 (FCA) at para. 69 (IBOA Tab 18).
[41] *Big M*, *supra* note 26 at para. 94 (IBOA Tab 12).
[42] *Understanding Freedom*, *supra* note 39 at para. 24 (IBOA Tab 24).

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]

D. Courts Should Address Compound Charter Violations

35. 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."[44] Thus, the exploration of compound violations is a useful exercise in order to "fully identify the full depth of impacts on human freedom arising from certain state actions." Courts have recognized that where a right protects multiple interests, the court should consider them all because "a law that has deleterious effects on multiple protected interests will weigh differently in the balance than a law that impacts only one."[45]

36. It is often at the intersection of fundamental freedoms that institutional pluralism finds its protection. As Professor Jamie Cameron has noted, if courts minimize the severity of a section 2 violation by addressing only one freedom, they risk missing "the

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[43] *Understanding Freedom*, *supra* note 39 at para. 28 (emphasis added) (IBOA Tab 24).
[44] Dwight Newman, "Interpreting Freedom of Thought in the Canadian Charter of Rights and Freedoms", (2019), 91 S.C.L.R. (2d) 107 – 122, at paras. 34-35 (IBOA Tab 30).
[45] *British Columbia Civil Liberties Association v. Canada (Attorney General)*, [2018] B.C.J. No. 53 at para. 262, 2018 BCSC 62 (IBOA Tab 2).

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."[46]

37. Benotto J. noted this principle by evaluating the intersecting impact on s. 2(b) and s. 8 with respect to police searches of media entities in *National Post v. Canada* (overturned on appeal, but not on this point):

> 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[47]

The intersection of these two constitutional protections made the Charter violation that much more egregious. In an analogous way, the damaging effect of the regulations in question on *religious* assemblies (in contrast to assembling merely for entertainment, for example) is highly relevant to the assessment of the sufficiency of the justification of the regulation.

38. Courts recognize that when a sequence of action trenches on multiple Charter rights, the actions protected by those rights attract greater constitutional gravity. In *Saskatchewan v. Durocher*, Mr. Durocher set up a tipi on government property to protest the high suicide rate among Indigenous youth. He conducted a ceremonial

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[46] Jamie Cameron, "Big M's Forgotten Legacy of Freedom", (2020) 98 S.C.L.R. (2d) 15 – 45, at paras. 41-42 (emphasis added) (IBOA Tab 22).
[47] *National Post v. Canada*, [2004] 178 O.J. at para. 45, 69 O.R. (3d) 427 (ONSC) (emphasis added) (IBOA Tab 10).

fast inside the tipi to further his protest. Saskatchewan issued a Notice of Trespass to Mr. Durocher. The court considered the political *and* religious nature of his fast and ruled that the Notice of Trespass breached ss. 2(a) and (b).[48]

39. The Supreme Court has also noted the connection between section 2(b) and section 3 of the *Charter* in *Figueroa v. Canada (Attorney General)*, invalidating a provision of the *Canada Elections Act* that prescribed that a minimum of 50 candidates were necessary to maintain registered party status.[49]

40. The appropriate place to weigh the cumulative effect of compound *Charter* infringements is in the fourth stage of the *Oakes* analysis: weighing deleterious versus salutary effects. As Dickson C.J. explains, "Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of … the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society."[50] If the deleterious effects of a measure on a free institution of society is too severe, the measure will not be justified.

41. The cumulative effect of compound *Charter* violations is not an arithmetic exercise, but a qualitative one. The point is not that the impugned regulations created a series of infringements which snowball into an even larger infringement. Rather, it

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[48] *Saskatchewan v. Durocher* (2020), 453 D.L.R. (4th) 650, 2020 SKQB 224 at paras. 2-5, 26-38; 46 (IBOA Tab 19); *Right to Life Association of Toronto v. Canada (Employment, Workforce, and Labour)*, 2021 FC 1125 at paras. 142-156 (IBOA Tab 16).
[49] *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912, at paras. 26-29, 2003 SCC 37 (IBOA Tab 3).
[50] *Oakes*, *supra* note 21 at para. 71 (emphasis added) (IBOA Tab 14).

is that the government impinged upon all the appellants' fundamental freedoms in a way that engages the core of these freedoms and strikes at the heart of institutional pluralism. It is through this lens that this Court should view the impugned regulations.

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

42. The impugned regulations can only be upheld if they are minimally impairing and proportionate.[51] The intervener makes submissions only on specific and discrete aspects of the minimal impairment and the final balancing stages of the *Oakes* test.

A. Total Prohibitions are Outside the "Range of Reasonable Alternatives"

43. The government must demonstrate that significantly greater risk reduction – over and above the reduction from less restrictive measures – can be achieved by a total ban of constitutionally protected activity. Furthermore, a total ban cannot be considered part of the "range of reasonable alternatives". A total ban must be treated differently than partial restrictions. Justice McLachlin, as she then was, writes:

> It will be more difficult to justify a complete ban on a [fundamental freedom] than a partial ban [citations omitted]. The distinction between a total ban … and a partial ban … is relevant to the margin of appreciation which may be allowed the government under the minimal impairment step of the analysis. … A full prohibition will only be constitutionally acceptable under the minimal impairment stage of the analysis where the government can show that *only* a full prohibition will enable it to achieve its objective.[52]

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[51] *Loyola*, *supra* note 16 at paras. 37-38 (IBOA Tab 7).
[52] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at para. 163, 111 D.L.R. (4th) 385 (emphasis) (IBOA Tab 17).

44. 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?

B. The Complete Denial of Assembly is not Proportionate

45. The deleterious impact of the impugned regulations includes the denial of the freedom of the Appellants, of Reformed Christians, and others whose religious beliefs compel assembling in-person for worship and/or sacraments. For these individuals, the regulations do not merely change their *mode* of religious worship; rather, the regulations ban their religious worship. This strikes at the heart of *Charter* protections in sections 2(a), 2(b), and 2(c) and is of the greatest severity.

46. In addition to the sum of fundamental freedom infringements on individual worshippers and churches, the impugned regulations undermine institutional pluralism and weaken "the vibrant civil society on which our democracy rests."[53] On the micro level, the regulations deprived Manitobans of their religious institutions at a time they needed them most. On a macro level, the regulations sidelined mediating institutions that are crucial in maintaining a healthy civil society and a constitutionally limited government.

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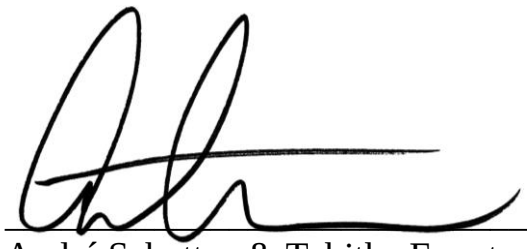
[53] *Mounted Police*, *supra* note 36 at para. 49 (IBOA Tab 8).

47. The Manitoba government does not possess sole responsibility for protecting or promoting health. In a free and democratic society, social institutions and communities also have a legitimate and important role to play in enhancing various aspects of health. The church, for example, is better equipped than the state to address the spiritual, mental, emotional, and social health of Canadians, especially the churches' own members. The outright bans and severe restrictions on religious assemblies harmed the mental, emotional, relational, and spiritual health of many Manitobans. Churches have, for two millennia, worked to address and alleviate 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 3rd day of June, 2022.



André Schutten & Tabitha Ewert
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3. *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C. R. 912.
4. *Gateway Bible Baptist Church et al. v. Manitoba et al.*, 2021 MBQB 219.
5. *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, [2018] 1 S.C.R. 750.
6. *Irwin Toy Ltd., v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.
7. *Loyola High School v. Quebec (Attorney General)*, [2015] 1 S.C.R. 613.
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10. *National Post v. Canada*, 69 O.R. (3d) 427.
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15. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.
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