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SPECIAL EDITION ON
COVID-19 AND RELIGIOUS LIBERTY

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We believe that religious liberty is a God-given right.

We believe that legislation and other governmental acts which unite church and state are contrary to the best interest of both institutions and are potentially prejudicial to human rights, and hold that religious liberty is best exercised where separation is maintained between church and state.

We believe that government is divinely ordained to support and protect citizens in their enjoyment of natural rights, and to rule in civil affairs; and that in so doing, government warrants respectful obedience and willing support.

We believe in the natural and inalienable right of freedom of conscience—to have or not have a religion; to adopt the religion or belief of one's choice; to change religious belief according to conscience; to manifest one's religion individually or in community with others in worship, observance, practice, promulgation, and teaching—subject only to respect for the equivalent rights of others.

We believe that religious liberty also includes the freedom to establish and operate appropriate charitable or educational institutions, to solicit or receive voluntary financial contributions, to observe days of rest and celebrate holidays in accordance with the precepts of one's religion, and to maintain communication with fellow believers at national and international levels.

We believe that religious liberty and the elimination of intolerance and discrimination based on religion or belief are essential to promote understanding, peace, and friendship among peoples. We believe that citizens should use lawful and honorable means to prevent the reduction of religious liberty.

We believe that the spirit of true religious liberty is epitomized in the Golden Rule: *Do unto others as you would have others do unto you.*

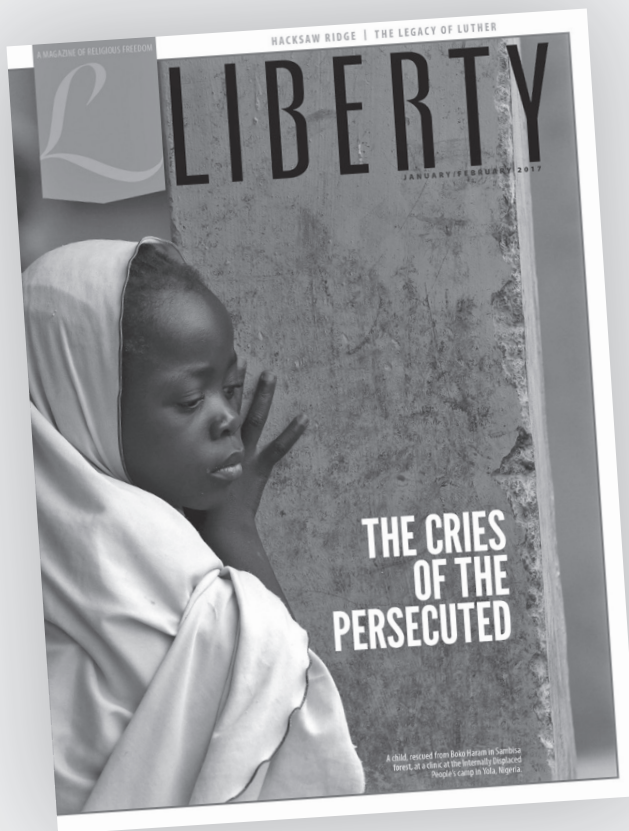
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The purposes of the International Religious Liberty Association are universal and nonsectarian. They include:

1. Dissemination of the principles of religious liberty throughout the world;
2. Defense and safeguarding of the civil right for all people to worship, to adopt a religion or belief of their choice, to manifest their religious convictions in observance, promulgation, and teaching, subject only to the respect for the equivalent rights of others;
3. Support for religious organizations to operate freely in every country through the establishment of charitable or educational institutions;
4. Organization of local, national, and regional chapters, in addition to holding seminars, symposiums, conferences and congresses around the world.

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The mission of the International Religious Liberty Association is to defend, protect and promote religious liberty for all people everywhere.



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INTRODUCTION FROM THE IRLA SECRETARY GENERAL

GANOUNE DIOP

For the past almost two years, multiple multifaceted crises have severely tested our resolve to be human and humane and to show unconditional solidarity with our sisters and brothers in humanity.

Health crisis required an unprecedented mobilization to provide medical care. Hospitals everywhere have been on a nonstop schedule because of the Covid crisis.

Meanwhile the climate crisis, caused by global warming in the age of Anthropocene, negatively affected the world ecosystems ushering an intensifying of heat waves, droughts on the one hand and flooding and landslides on the other.

These disasters exacerbated food insecurity and water shortages, triggering another crisis all too tragic and frequent: migrations and displacements.

Meanwhile, the perennial challenge of violence, gender-based violence, child labor, human trafficking and contemporary slavery continued unabated.

Human rights abuse worldwide has trampled the dignity of human beings who have been instrumentalized, and at worst treated as disposables.

A group of scholars from various institutions at the initiative of the International Religious Liberty Institute held a conference to address the intersection of COVID-19 with religious freedom.

IRLA Journal *Fides et Libertas* leadership is honored to extend a hospitality hand to publish articles from that significant event held in December 2020. It addressed one of the crises our world is facing. The endeavor is meaningful for being at the intersections of COVID-19 and freedom of religion or belief.

While not endorsing the content of each article, IRLA leadership is honored to offer them as part of the conversations to lead our world to a better place for human dignity, human rights and human flourishing.

In gratitude to all who have submitted their reflections, findings, and contributions to make the world a better place for millions of people.

Ganoune Diop, PhD
IRLA General Secretary

FIDES ET LIBERTAS



COVID-19 AND RELIGIOUS LIBERTY



INTRODUCTION TO SPECIAL EDITION OF FIDES ET LIBERTAS ON COVID-19 AND RELIGIOUS LIBERTY

THE COVID-19 PANDEMIC & RELIGIOUS FREEDOM

ALEXIS ARTAUD DE LA FERRIERE¹
& NICHOLAS PATRICK MILLER²

1. THE PANDEMIC AND RELIGIOUS FREEDOM IN EUROPE AND AMERICA

In response to the COVID-19 pandemic, governmental authorities across the globe have implemented unprecedented restrictions on public gatherings and collective social activities. These restrictions include the cancelation of major sporting events such as the 2020 Tokyo Olympics, the suspension of most international commercial travel, the postponement of political elections such as the second round of municipal polling in France, and the enforced closure of many businesses such as restaurants and concert halls. In many jurisdictions, these restrictions have also been applied to religious spaces and to communal religious practices. Whilst all state curtailments of rights and liberties merit critical scrutiny as to their legality and their legitimacy, restrictions imposed upon religious freedoms raise (at least) three specific concerns.

First, collective religious practices have been shown to play a uniquely powerful role in individuals' sense of self due to the compelling affective experiences and a moral authority associated with religious group membership (Luhtanen & Crocker, 1992; Wellman & Tokuno, 2004; Ysseldyk et al. 2010). Second, and relatedly, in cases where individuals consider access to religious spaces and participation in communal religious practices to constitute a moral obligation, such limitations can constitute a violation of their moral autonomy (REF). Finally, secular modernity is premised upon a fragile equilibrium between the power which the state exercises over the public sphere and the spaces of liberty accorded to religious expression and belief (REF); excessive restrictions by the state on religion risk disrupting that balance.

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2. Nicholas P. Miller, PhD, is Professor of Church History at the Seventh-day Adventist Theological Seminary at Andrews University, Berrien Springs, Michigan, and Director of the International Religious Liberty Institute.



Given the sensitive nature of religious practices and beliefs, numerous actors and organizations have contested the application of social distancing and restriction measures on religious spaces and practices. In the United States lawsuits have been filed against state and municipal governments in Kansas, Florida, Mississippi, Kentucky, Virginia, California and Texas.³ In Europe as well, the issue has led to confrontations between religious communities and governmental authorities, as in Greece⁴ and France⁵. However, because of the rapidly evolving nature of the COVID-19 crisis, and because of variances within legislative national frameworks, the full extent and nature of the current restrictions on in western countries is hard to assess.

In December of 2020, the International Religious Liberty Institute of Andrews University, located in southwest Michigan, teamed up with the University of Portsmouth and the Brigham Young University Center for Law and Religion Studies and sponsored a conference entitled “The COVID-19 Pandemic & Religious Freedom: Reports from North America and Europe.” It consisted of scholars from the United States, Canada, and several European countries, who gave papers on developments regarding COVID-19 restrictions and religious freedom in their respective geographical areas.

Fourteen papers were presented and commented on by a group consisting of somewhere between 30 and 40 scholars and lawyers from North America and Europe. The presentations and discussions were recorded, and can be found here: <https://www.covid-religiousliberty.org/events>. The presentation papers from the event are also made available at that site, but now for the first time these papers, revised in light of conference comments and editorial suggestions, are available in the present printed volume. Below we will spend a few moments commenting on the overall trajectory and message of the papers, one set from Europe, the other from America.

2. THE VIEW FROM EUROPE

During the first wave of the COVID-19 crisis in 2020, all EU states and the UK introduced some form of social distancing and/or confine-

3. <https://www.npr.org/sections/coronavirus-live-updates/2020/04/17/837698597/opposing-forced-church-closures-becomes-new-religious-freedom-cause>

4. <https://www.la-croix.com/Religion/Orthodoxie/Coronavirus-Grece-tensions-entre-lEglise-orthodoxe-gouvernement-2020-03-30-1201086859> ; <https://www.romfea.gr/diafora/36127-prosfugi-4-dikigoron-kata-ton-metron-pou-elifthisan-gia-tis-ekklisies>

5. <https://www.leparisien.fr/paris-75/a-paris-une-messe-pascale-clandestine-celebree-en-plein-confinement-12-04-2020-8298480.php>; <https://www.lefigaro.fr/vox/societe/l-appel-de-cent-trente-pretres-au-president-le-11-mai-laissez-nous-servir-20200424>



ment measures. However, European states did not respond to the situation in a uniform manner. Whilst they all referred to World Health Organization (WHO) recommendations⁶, and coordinated either multilaterally (for example through the European Council in the case of EU member states⁷) or bilaterally (for example, between the UK and France on border arrangements⁸), individual states established their public policy approaches autonomously.

Thus, Europe saw a wide spectrum of policy approaches in terms of the stringency of measures introduced to stem the propagation of the virus. On one end of the spectrum, Sweden adopted a relatively relaxed approach throughout the spring of 2020, maintaining many public liberties and favoring a “herd immunity” strategy⁹. In contrast, France¹⁰ and Spain¹¹, amongst other countries, quickly introduced a state of emergency, restricting a range of public liberties. At the opposite end of the spectrum, Estonia¹² and Romania¹³ went so far as to evoke Article 15 of the European Convention on Human Rights (ECHR), thereby derogating from certain obligations under the Convention.

Despite such latitude for national sovereignty in matters of health policy, COVID-19 containment policies adopted by EU states and the UK did converge on measures restricting religious liberty. The two most common measures in this regard were limitations imposed on collective religious practices and limitations imposed on access to places of worship; the details of which are examined in more detail, with reference to specific states, in the following articles. Whilst such measures (applied with varying levels of stringency) appear to have been the norm in Europe, Bulgaria and Hungary stood out as notable exceptions. In Bulgaria, although health authorities recommended the suspension of public religious celebrations, these recommendations were neither enforced by the government, nor voluntarily adopted by the Bulgarian Orthodox Church.¹⁴ Hungary is especially notable in this respect, having adopted measures to explicitly guarantee that restrictions on movement not hinder religious activities.¹⁵

6. <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance>

7. <https://www.consilium.europa.eu/media/43076/26-vc-euco-statement-en.pdf>

8. <https://www.gov.uk/government/news/joint-statement-between-the-uk-and-france-10-may-2020>

9. [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)31035-7/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)31035-7/fulltext)

10. <https://www.legifrance.gouv.fr/eli/loi/2020/5/11/PRMX2010645L/jo/texte>

11. <https://www.boe.es/eli/es/rd/2020/03/14/463/con>

12. <https://rm.coe.int/09000016809cfa87>

13. <https://rm.coe.int/09000016809cee30>

14. <https://orthodoxtimes.com/open-churches-in-bulgaria-the-services-are-also-broadcast-on-the-internet-and-radio/>

15. <http://abouthungary.hu/news-in-brief/coronavirus-update-restrictions-on-movement-now-in-force/>



Another major issue, discussed in the following articles, has been the impact of indirect curtailments on religious liberty: measures which have not specifically targeted religious groups or buildings, but which have, de facto, limited people's ability to gather in religious assemblies and engage in practices central to their religious beliefs. Thus, in Spain, Italy, and France, although religious organizations were, de jure, permitted to remain open and organize celebrations open to the public, in practice the police and local authorities limited these practices. Indeed, during the period of confinement in Spain, numerous incidents were reported of religious ceremonies being disrupted by the police throughout the country, despite their having respected the mandated minimal social distancing.¹⁶ In response to these interventions, the Spanish government faced complaints by numerous parties, including the Spanish Association for Christian Lawyers¹⁷ and the Spanish Observatory for Religious Freedom.¹⁸ Similar cases have been observed in Italy and France.

Since the first wave of the pandemic, several courts in European countries (in Germany, France, Belgium, England, and Scotland) have pushed back against the most stringent restrictions on religious liberty, for either procedural or substantive reasons. This is part of a larger trend that Mark Hill has described as a “steady stream of cases from around the world, now developing into something of a torrent, where the constitutionality of emergency provisions has been challenged”.¹⁹ Whilst the articles presented here offer a snapshot of the situation as it stood at the beginning of 2021, there is no doubt that the pandemic remains a present reality at the time of publication – and that its effects will be long-lasting in terms of how public authorities in Europe balance the protection of health with the preservation of fundamental liberties.

3. THE VIEW FROM NORTH AMERICA

The right to freedom of religion in the United States is protected primarily by the First Amendment to the federal constitution. The relevant text states that “Congress shall make no law respecting an establishment of

16. José Luis Bazán, “Religious Freedom in Spain during coronavirus pandemic: On the Abuses Committed by Spanish Public Authorities in the Implementation of Emergency Legislation Against COVID-19 that Undermine Religious Freedom”, Working Document. May 2020.

17. <https://abogadoscristianos.es/abogados-cristianos-se-querella-contra-el-ministro-marlaska-por-las-interrupciones-de-ceremonias-religiosas-realizadas-por-la-policia-durante-el-estado-de-alarma/>

18. <http://libertadreligiosa.es/2020/04/13/el-observatorio-para-la-libertad-religiosa-pide-explicaciones-al-ministro-del-interior-ante-la-suspension-de-misas-mientras-se-celebraban/>

19. Hill, M. Coronavirus and the Curtailment of Religious Liberty. *Laws*. 2020, 9, 27. <https://doi.org/10.3390/laws9040027>.



religion or prohibiting the free exercise thereof.” The first part is known as the establishment clause, and is generally understood as preventing governments, either federal or state, from supporting, promoting, or funding religion, or interfering in religious institutions. The second, known as the free exercise clause, is understood as protecting religious belief and behavior, of individuals and organizations alike.

Each state also has its own constitution, which typically contains its own version of these clauses. These state constitutions were largely ignored until the early 1990s, when the United States Supreme Court significantly cut-back on free exercise protections, protecting religious conduct only against laws that intentionally targeted religion. Since that time, state constitutions have received greater attention, as well as state laws passed to protect religious freedom, known as religious freedom restoration acts (RFRAs).²⁰ In responding to quarantine restrictions, then, people of faith need to consider a range of legal responses, from the federal and state constitutions, to state RFA laws.

A number of papers discuss the constitutional challenges that have taken place against COVID restrictions, with some presenters arguing that the restrictions are legally justified, and others arguing that in a number of places there has been governmental overreach. Much of the discussion revolved around the question of how “essential” in-person religious gatherings are to both religious practice, as well as to the functions of civil society.

Discussion were also had about questions of equality of treatment between secular and religious activities. There did appear to be a general agreement that such equality of treatment was constitutionally called for, but disagreement about what secular activities were truly comparable to religious worship. Are gatherings in churches similar or different from gathering in casinos and bars, or shopping centers and stores, or airports and bus stations?

Several papers looked at the question of how best to balance public health and religious freedom. Should the equal treatment of religion with similar secular activities be the sole test? Or should there be a category of religious worship behavior that received “strict scrutiny” protection irrespective of whether secular counterparts existed? Also, the importance of trying to weigh and balance these matters ahead of legal challenges was emphasized. In other words, it is important that the legislative process re-

20. Miller, Nicholas, Sheers, Nathan, “Religious Free Exercise Under State Constitutions,” 34 *Journal of Church and State* 303 (1992).



ceive input from religious groups before the restrictions are implemented.

Some interesting observations were made regarding the pandemic, political affiliations and religion. The Democratic Party has been known, for the last couple of decades especially, to have somewhat lower sensitivity to members or views of traditional faith communities. This is in part due to strong stands taken by Democratic candidates and platforms in the areas of life and abortion, gender and sexuality, or religious freedom in comparison to LGBT+ concerns.²¹ Conversely, since the days of Ronald Reagan, Republicans have made inroads into the mainstream, evangelical Christian community. This trend has only been exacerbated in the last decade or two.²²

These two political affiliations are often connected with either pro-vaccine positions (Democrats) or vaccine hesitancy and opposition. (Republicans). This is not of course universally true, President Trump and his wife were vaccinated secretly before they left office, and it is reported that all fifty governors, both Democrat and Republican are vaccinated. But the ex-President was soundly booed at a Republican rally recently when he promoted the vaccine, and outbreaks of the COVID Delta variant are most intense, and vaccine rates most generally low, in red counties and states.

4. CONCLUDING THOUGHTS

At the time of writing, with the onslaught of the Delta variant, the progression of the virus continues to evolve at speed across Europe and the US, and state responses to the pandemic remain dynamic. What was thought to be an emerging from the woods at the beginning of the summer of 2021 for many western countries, has turned back into the masking, distancing, and quarantining slog of a year ago. Therefore, the discussion provided here serves as a point of departure which must be updated as the crisis develops in order to capture increases and decreases in restrictiveness.

It may be that states with currently have very high levels of restric-

21. David E. Campbell, Geoffrey C. Layman, *The Politics of Secularism in the United States: Class, Status and Power*. Political Power, 08 November 2017. <https://doi.org/10.1002/9781118900772.etrds0423>

22. Legee DC, Kellstedt LA, editors (1993) *Rediscovering the religious factor in American politics*. New York: M.E. Sharpe, Inc.; Green JC (2007) *The faith factor: How religion influences American elections*. Westport, Connecticut: Praeger; Green JC, Kellstedt LA, Smidt CE, Guth JL (2007) *How the faithful voted: Religious communities and the presidential vote*. In Campbell DE, editor. *A matter of faith; Religion in the 2004 presidential election*. Washington, D.C.: Brookings Institution Press. 15–36; Bradberry LA (2016) *The Effect of Religion on Candidate Preference in the 2008 and 2012 Republican Presidential Primaries*. *PLoS ONE* 11(4): e0152037. <https://doi.org/10.1371/journal.pone.0152037>.



tiveness will soon reinstate religious liberties as the public health threat dissipates. It may also be that other states will increase and/or maintain current levels of restrictiveness indefinitely, thereby normalizing the state of exception; this latter scenario appears to be playing out in Hungary, where the parliament has passed a law allowing the Prime Minister to rule by decree without a set time limit.

In addition to such monitoring which needs to take place over the coming months, we also need to look deeper into the national contexts in which such restrictions are implemented. Part of this work requires an in-depth analysis of the “eco-system” of emergency COVID-19 legislation. Whilst states may impose relatively few direct restrictions on religious liberties, they may have other restrictions which impact on collective religious practice.

For example, whilst France has not explicitly ordered the closure of places of worship, the severe restrictions it places on residents’ movements may prohibit observant religious persons in France from exercising their right to visit places of worship. There may also exist arbitrary variances in implantation within countries where some regions or minority groups are subject to greater restrictions than others. Finally, religious freedoms are not unique in being severely restricted in these extraordinary times. As western states continue to suspend basic liberties in the name of public health, scholarly vigilance and civic engagement will be crucial for safeguarding the rule of law.



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COVID-19 AND RESTRICTIONS ON RELIGIOUS WORSHIP: FROM NONDISCRIMINATION TO CHURCH AUTONOMY

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ABSTRACT: During the coronavirus pandemic, religious groups challenging government restrictions on in-person worship services in the United States have typically argued that these restrictions discriminate against religion in violation of the Free Exercise Clause of the First Amendment. Demands for equal treatment have intuitive appeal, and they also fit with the Supreme Court's current religion clause jurisprudence. However, there are drawbacks to approaches that focus on equal treatment. It can be difficult to identify the appropriate secular benchmarks for determining whether discrimination has taken place, and what religious congregations have really wanted is not necessarily equal treatment but maximization of their ability to gather together safely in person. Indeed, although the Supreme Court has granted injunctive relief on a number of occasions after finding that the government's rules impermissibly favor secular activities over religious practice, the Court's real concern has been the impingement on religious worship. Many of the examples of discrimination given by those in the majority have seemed strained, and the justices have appeared most interested in subjecting restrictions on worship to the heightened scrutiny that follows from a finding of discrimination. The Court's shift in focus from discriminatory treatment to close scrutiny of worship restrictions is the right one, but those in the majority have neither acknowledged this shift nor signaled a new framework or approach that would explain or guide it. This essay argues that the appropriate framework for analyzing restrictions on religious worship is the doctrine of church autonomy that has been emerging in the Court's recent religion clause jurisprudence. Viewing conflicts over COVID-19 restrictions through this lens can better clarify what is at stake when clashes occur as well as better inform the scope and limits of institutional freedom in this context.

KEYWORDS: COVID-19, religious discrimination, equal treatment, church autonomy, free exercise, religious worship, worship restrictions,

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First Amendment, Free Exercise Clause, religious exemptions

When the dangers of COVID-19 first became apparent to the American public in March 2020, few churches resisted state and local lockdown orders that prohibited or severely limited in-person worship services. The potential for congregational gatherings to rapidly spread the virus was widely understood, and most religious believers probably anticipated a relatively short disruption.

However, litigation began to increase as states implemented reopening plans and religious groups challenged rules that they viewed as impermissibly favoring nonreligious forms of gathering over religious worship. For example, in a case that reached the Supreme Court on an application for emergency injunctive relief in July 2020, a rural Nevada church argued that the state violated the Free Exercise Clause when its reopening plan capped indoor worship services at 50 people but allowed casinos, bars, restaurants, bowling alleys and gyms to open at 50 percent of building capacity regardless of the total number of people assembled.² The Court in *Calvary Chapel Dayton Valley v. Sisolak* denied the church's application for relief over strong dissents joined by four of the Court's conservative justices, and the case and others like it continued in the lower courts.³

As the summer—and the pandemic—wore on, many Americans grew increasingly frustrated with the substantial restrictions that remained on religious gatherings in many jurisdictions and with reopening rules that they believed prioritized commercial and recreational activities over religious practice. Not surprisingly, pushback against COVID-19 restrictions continued to grow.

In the fall and winter, with COVID-19 infections spiking, many American jurisdictions tightened restrictions on secular and religious gatherings, and some religious groups challenged new rules placing severe restrictions on in-person worship.⁴ In late November 2020, the Supreme Court granted applications for emergency injunctive relief brought by a Catholic diocese and several Orthodox Jewish entities challenging tight

2. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020).

3. In December 2020, following the Supreme Court's decision in *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam), the Ninth Circuit granted the church's request for a preliminary injunction. *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228 (9th Cir. 2020).

4. For example, in December 2020, the Catholic Archdiocese of Washington challenged a new 50-person limit on in-person worship services in the District of Columbia. Shortly thereafter, the Mayor agreed to relax this rule and issued a new order limiting in-person religious services to 25 percent of occupancy capacity or 250 persons, whichever is fewer, and ensuring parity with a variety of other activities including gyms, recreational facilities, restaurants, and essential and nonessential retail businesses. Mayor's Order 2020-126 (Dec. 16, 2020). This article discusses litigation challenging tightened rules in New York.



caps on in-person worship in COVID-19 hotspots in New York.⁵ According to the Court in *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, the 10- and 25-person limits on houses of worship in areas designated as red and orange zones under New York’s Cluster Action Initiative favored secular activities over religious practice and failed to satisfy the strict scrutiny required of discriminatory action under the Free Exercise Clause.⁶ The distinctions drawn in New York’s rules were less clearly discriminatory than those in Nevada’s reopening plan. Certainly, the replacement of Justice Ginsburg with Justice Barrett in October 2020 tipped the balance on the Court in favor of the dissenters in *Calvary Chapel*. However, there were also signs that those who joined the majority may have been less interested in the threshold showing of discriminatory treatment than in applying heightened scrutiny to significant restrictions on religious worship. The examples of discrimination given by those in the majority seemed strained, and the justices appeared to be more concerned about the absence of a tight fit between the state’s purposes and its religious restrictions.

The Court’s move in *Diocese of Brooklyn* away from a focus on discrimination toward close scrutiny of worship restrictions is the right one, but the majority neither acknowledged this shift nor signaled a new framework or approach that would explain or guide it. I argue below that the appropriate framework for analyzing restrictions on religious worship is the doctrine of church autonomy that has been emerging in the Court’s recent religion clause jurisprudence. Viewing conflicts over COVID-19 restrictions through this lens can better clarify what is at stake when clashes occur as well as better inform the scope and limits of institutional freedom in this context.

Recognizing communal worship as an aspect of church autonomy will also require government and religious leaders to work with one another to achieve shared interests in religious freedom and the preservation of human life. Partnerships between religious groups and government officials can, in turn, build trust and increase the investment of religious believers in safety measures that benefit us all.

5. *Diocese of Brooklyn*, 141 S. Ct. 63.

6. *Id.* at 66-67. The restrictions in New York’s Cluster Action Initiative were implemented by N.Y. Exec. Order No. 202.68 (Oct. 6, 2020).



1. COVID-19 RESTRICTIONS AND RELIGIOUS DISCRIMINATION

Throughout the pandemic, the chief claim of religious litigants has been that the COVID-19 restrictions they challenge impermissibly discriminate against religious worship in favor of secular activities. Demands for equal treatment have intuitive appeal, and they also fit with the Supreme Court's current religion clause jurisprudence. Prior to its decision in *Employment Division v. Smith* in 1990⁷, the Court construed the Free Exercise Clause to afford relief where laws substantially burden religious practice and do not pass strict scrutiny.⁸ Strict scrutiny requires the government to demonstrate that the application of its rule to the believer is the least restrictive means of achieving a compelling state interest.⁹ In *Smith*, the Free Exercise Clause became largely a protection against religious discrimination. With a few exceptions, heightened scrutiny only applies where religious plaintiffs can show that laws burdening religious practice are not neutral or not generally applicable.¹⁰

The Court clarified the meaning of neutrality and general applicability in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.¹¹ Laws are not neutral if they target religious practice.¹² They are not generally applicable if the government pursues its interests only against religious conduct or leaves unregulated substantial secular conduct that undermines the state's interests to the same or greater degree.¹³ Religious plaintiffs typically argue that COVID-19 restrictions fail both of these standards. Rules that specify limitations on in-person worship that are stricter than restrictions on comparable secular activities target religion, and they are not generally applicable.¹⁴

There are a number of drawbacks to approaches that focus on equal treatment. One is the difficulty of identifying the appropriate benchmarks for determining whether COVID-19 restrictions discriminate against religion. Religious plaintiffs, government officials and judges frequently dis-

7. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

8. *Sherbert v. Verner*, 374 U.S. 398, 406-07 (1963); see also *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

9. *Sherbert*, 374 U.S. at 406-07; see also *Yoder*, 406 U.S. at 215.

10. *Smith*, 494 U.S. at 878-84; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

11. *Lukumi*, 508 U.S. at 533-46.

12. *Id.* at 533-40.

13. *Id.* at 542-43. In April 2021 in a case involving a challenge to COVID-19 restrictions on in-home religious gatherings, the Court indicated that laws are not generally applicable "whenever they treat any comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

14. See, for example, the Diocese of Brooklyn's Emergency Application for Writ of Injunction at 19, *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, 141 S. Ct. 63 (2020).



agree about these benchmarks. For example, in *Diocese of Brooklyn*, Justices Sotomayor and Kagan argued that New York’s Cluster Action Initiative treated religious worship better than comparable secular activities because stricter rules applied to secular gatherings like lectures, concerts and movies.¹⁵ These justices agreed with the state that the relevant comparisons to religious worship were gatherings where large numbers of people arrive simultaneously, congregate for extended periods of time, and leave together.¹⁶ The justices in the majority pointed instead to activities identified by the state as essential and not capped, such as shopping in grocery and hardware stores, using laundromats, congregating in transportation facilities, and working in plants manufacturing chemicals and microelectronics.¹⁷ (Preexisting rules governed these and other activities, including a 50 percent occupancy limit on essential retail businesses.¹⁸) The same disagreement reappeared in February 2021 when the Court enjoined California’s prohibition on indoor worship services in the state’s hardest hit regions.¹⁹

Certainly, worship services would be riskier than an activity like grocery shopping if worship is held without masks, social distancing and limitations on singing. However, most religious congregations, including the applicants in *Diocese of Brooklyn*, comply with state and local safety rules, and many, like the diocese, have developed far more rigorous safety plans. The applicants in *Diocese of Brooklyn* also did not object to New York’s preexisting rules limiting worship services to 33 percent of church or synagogue occupancy capacity,²⁰ and the diocese had been using a

15. *Diocese of Brooklyn*, 141 S. Ct. at 80–81 (Sotomayor, J., dissenting). New York prohibited nonessential secular gatherings altogether in red zones and limited them to 10 people in orange zones. N.Y. Exec. Order No. 202.68 (Oct. 6, 2020).

16. See Opposition to Application for Writ of Injunction at 37, *Diocese of Brooklyn*, 141 S. Ct. 63.

17. *Diocese of Brooklyn*, 141 S. Ct. at 66–67 (per curiam); id. at 69 (Gorsuch, J., concurring); id. at 73 (Kavanaugh, J., concurring).

18. N.Y. Dep’t Of Health, Interim Guidance For Essential & Phase Ii Retail Business Activities During The Covid-19 Public Health Emergency (Jul. 1, 2020), <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/RetailMasterGuidance.pdf>.

19. *Compare S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 717–19 (2021) (statement of Gorsuch, J.) (arguing that California discriminates against religious worship when it places more stringent restrictions on indoor services than on many businesses, such as grocery and retail operations, shopping malls, and transportation facilities), with id. at 720–21 (Kagan, J., dissenting) (arguing that the relevant comparisons to worship services are other activities where large groups of people gather closely together for extended periods of time, such as political assemblies, lectures, movies and concerts).

20. In Phase 4 of New York Forward, the state’s reopening plan, religious services were limited to “no more than 33% of the maximum occupancy for a particular area as set by the certification of occupancy for services occurring indoor or no more than 50 people for services occurring outdoor.” If separate buildings were available, each could be used at 33% of occupancy capacity if there were separate entrances and exits and attendees did not interact. N.Y. Dep’t of Health, Interim Guidance for Religious & Funeral Services During the



more restrictive limit of 25 percent of building capacity in its churches. It is not clear how to evaluate the relative safety of church services and grocery shopping when congregants are masked, distanced, and meeting at 33 percent of building capacity and many more people may be shopping in a space of similar size on a busy day. In its amicus brief in *Diocese of Brooklyn*, the American Medical Association argued that worship services are always especially risky activities even with safety measures and, indeed, pose a risk comparable to indoor dining.²¹ However, it was undisputed that there had been no outbreaks at the applicants' churches and synagogues,²² and the church outbreaks cited by the American Medical Association were either early in the pandemic or not clearly traceable to congregations adhering to mask requirements, social distancing and sanitation rules.²³ How the increased community spread of COVID-19 over the fall and winter months may have affected the relative safety of different activities is a further complicating factor as is the emergence of more contagious variants of the virus.

Covid-19 Public Health Emergency 2 (June 26, 2020).

21. Motion for Leave to File Brief as Amici Curiae and Brief of the American Medical Association and the Medical Society of the State of New York as Amici Curiae in Support of Respondent at 3, 6-7, 9, *Diocese of Brooklyn*, 141 S. Ct. 63.

22. *Diocese of Brooklyn*, 141 S. Ct. at 66 (per curiam).

23. Brief of the American Medical Association, *supra* note 20, at 7 n.15. Limited data exists from contract tracing regarding the relative risks of worship services and other activities that the AMA identified as high risk, and existing contact tracing data does not disaggregate spread associated with congregations following rigorous safety rules from those that do not. However, the data that does exist suggests that religious services are not, at least in aggregate, among the most common vehicles of COVID-19 spread. For example, in early December 2020, Washington, D.C. released data from August 1, 2020 to November 26, 2020 showing that only 1.8 percent of COVID-19 outbreaks were associated with places of worship while the percentages for colleges and universities (27.5%), K-12 school buildings (17.4%), childcare/daycare (13.8%), restaurants and bars (13.8%), food retail buildings (8.3%), and office buildings (7.3%) were far higher. COVID-19 Outbreak Data Guide, D.C. GOV'T (Dec. 6, 2020), https://coronavirus.dc.gov/sites/default/files/dc/sites/coronavirus/page_content/attachments/Outbreak%20Data%20Guide%20FINAL%202012-6-20.pdf. Later in December, the governor of New York released statewide contact tracing data from September to November showing that religious activities were the exposure source for only .69 percent of COVID-19 cases, a slightly higher percentage than retail businesses (.61%), a substantially lower percentage than restaurants and bars (1.43%), transit (.96%) and manufacturing (.84%), and dwarfed by household/social gatherings (73.84%). Nick Reisman, What New York's Contact Tracing Data Show, SPECTRUM NEWS, Dec. 11, 2020, <https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2020/12/11/what-new-york-s-contact-tracing-data-show>.

See also Hallie Miller, Maryland Releases More Contact Tracing Data Showing 'High-Risk' Locations for Coronavirus, BALTIMORE SUN, Sept. 24, 2020, <https://www.baltimoresun.com/coronavirus/bs-md-high-risk-locations-coronavirus-20200923-tiky7nifzb4vgbyji2vvqgoqq-story.html> (summarizing data indicating that fewer COVID-19 patients reported visiting worship services than working outside the home, shopping indoors, dining indoors, dining outside, or going to a gym); Selena Simmons-Duffin, Fourteen States Make Contact Tracing Data Public: Here's What They're Learning," NPR, Aug. 14, 2020, <https://www.npr.org/sections/health-shots/2020/08/14/902271822/13-states-make-contact-tracing-data-public-heres-what-they-re-learning> (summarizing data from Louisiana showing that the number of COVID-19 cases from outbreaks at religious services was lower than the number of cases stemming from retail settings, restaurants, bars, offices, child daycare, colleges and universities, food processing, industrial settings and casinos).



The fact that most COVID-19 limitations on religious worship are part of a complex series of proscriptions and prescriptions also complicates the identification of appropriate benchmarks for evaluating claims of religious discrimination. For example, in the directive at issue in *Calvary Chapel*, Nevada’s governor had detailed a series of rules that applied a range of restrictions to many different kinds of activities that can transmit COVID-19.²⁴ Varying occupancy limits were just part of these rules. Commercial businesses that Nevada permitted to operate at 50 percent of building capacity had to comply with additional restrictions that did not apply to churches, and some of these were carefully tailored to the nature of the enterprise. Nevada’s casinos, in particular, had to develop and abide by plans that included a variety of safety measures subject to government oversight.²⁵ In contexts like these, the standard for equal treatment is not clear.²⁶

Moreover, religious congregations are usually not actually asking for equal treatment. While those in the majority in *Diocese of Brooklyn* identified comparable secular activities to be essential businesses, like grocery shopping, pet stores and transportation, the applications to the Court did not demand the same occupancy rules that New York applies in these contexts. The applicants did not object to preexisting rules limiting worship services to 33 percent of occupancy capacity, and their application for relief only contested the 10- and 25-person caps in red and orange zones. The Supreme Court’s injunction was limited to those restrictions. Similarly, the church in *Calvary Chapel* did not really want to be governed by the same rules as Nevada’s casinos. It demanded the right to hold in-person worship services with the same occupancy limits as casinos, but it also developed its own safety plan that was in many ways more protective than rules that applied to commercial entities.

What most religious congregations want is to maximize their ability to gather together safely in person. As states reopened and time passed over the summer and early fall, religious believers grew increasingly concerned that their institutions were being left behind even as our improving understanding of how the virus spreads made safer forms of larger gatherings possible. As COVID-19 cases spiked in the fall and winter, some religious believers, like the applicants in *Diocese of Brooklyn*, ob-

24. Nev. Declaration of Emergency: Directive 021 (May 28, 2020).

25. Nev. Gaming Control Bd. Gaming Comm’n, Health And Safety Policies For Resumption Of Gaming Operations—Nonrestricted Licenses (May 27, 2020).

26. When the Ninth Circuit granted *Calvary Chapel*’s request for a preliminary injunction after the Supreme Court’s decision in *Diocese of Brooklyn*, it concluded that Nevada’s rules were discriminatory based solely on the variations in the state’s capacity limits. *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1233 (9th Cir. 2020).



jected to blunt rules that they viewed as unnecessarily restrictive even as many of the activities of daily life continued. Religious congregations are making important fairness claims; they want their religious needs to be treated with at least as much urgency as commercial and recreational interests, and they view them as essential as food, transportation and health care. However, religious congregations do not necessarily envision the same rules as those for nonreligious entities. They are not, in fact, asking for equal treatment, but they are asking for the type of heightened scrutiny that applies when courts find religious discrimination.

Indeed, those in the majority in Diocese of Brooklyn also seemed less focused on equal treatment than on remedying the loose fit between New York's objectives and its religious restrictions. While those in the majority argued that New York's rules discriminated against religion, most of their comparisons to essential activities that were uncapped in the Cluster Action Initiative seem strained. With safety rules, worship services might be comparable to garages, grocery stores, acupuncture facilities, and laundromats as I have discussed above, but those in the majority did not go into this detail or respond to obvious objections to their comparability. It is certainly far less clear that New York's rules discriminated against religion than Nevada's more lenient treatment of casinos, restaurants and gyms.

The real concern of those in the majority in Diocese of Brooklyn became the religious restrictions themselves. What mattered most to them about New York's rules was that the state had placed severe restrictions on worship that were not narrowly tailored.²⁷ The Court was right, but it did not acknowledge its shift or signal the principle or doctrine that could explain it.

2. COVID-19 RESTRICTIONS AND CHURCH AUTONOMY

Instead of focusing on discrimination, a better starting point is to focus on what is at stake in conflicts over COVID-19 restrictions on religious worship. Government restrictions on in-person worship services interfere with one of the most fundamental aspects of religious practice.²⁸ Differ-

27. Indeed, three weeks later, in his dissent from the Court's decision to deny emergency relief in *Danville Christian Academy, Inc. v. Beshear*, 141 S. Ct. 527 (2020), Justice Gorsuch, joined by Justice Alito, suggested that the guarantee of free exercise in this context is not limited to a prohibition against religious discrimination but also includes affirmative protections. *Id.* at 529 (Gorsuch, J., dissenting from the denial of application to vacate stay) (stating that "[i]t is far from clear ... why the First Amendment's right to free exercise should be treated less favorably than other rights, or ought to depend on the presence of another right before strict scrutiny applies"). *Danville Christian Academy* involved a challenge by a Christian school to a state order closing all public and private K-12 schools for in-person instruction from mid-November 2020 through the winter holiday break.

28. In another sign that the Court was moving away from a focus on discrimination to the burden of worship



ent religious groups have described the significance of worship services in different ways. In his efforts in September 2020 to loosen city rules limiting outdoor worship to 50 persons and barring indoor services altogether, San Francisco Archbishop Salvatore Joseph Cordileone emphasized the sacramental nature of the Catholic Church.²⁹ San Francisco’s limits deprived many Catholics of the Eucharist at a difficult time. In a challenge that same month to Washington, D.C.’s 100-person limit on indoor and outdoor worship gatherings, Capitol Hill Baptist Church described weekly gatherings of its covenanted members as essential to what it means to be a church.³⁰ The Orthodox Jewish applicants in *Diocese of Brooklyn* described synagogues as “a necessary and critical component of Jewish life”³¹ and joining together in prayer as “an emotional connection to God and community.”³² For most of America’s faiths, regular in-person worship services are indispensable; indeed, they are the lifeblood of the religious community.

In recent case law the Supreme Court has begun to articulate a doctrine of “church autonomy” with protections for religious institutions that do not depend on the existence of religious discrimination, and this doctrine should extend to disputes over worship services. The antecedents for this doctrine lie in a series of cases spanning over a century and limiting government involvement in intra-church disputes over property and related matters of church leadership.³³ In 2012 the Court drew on these precedents to recognize a ministerial exception from employment discrimination laws.³⁴ Eight years later in *Our Lady of Guadalupe School v. Morrissey-Berru*, the Court grounded this exception in a “general principle of church autonomy”³⁵ that affords religious institutions freedom over faith and doctrine and interrelated matters of church government “essential to

restrictions themselves, the Court in *Diocese of Brooklyn* described COVID-19 restrictions as “striking at the very heart of the First Amendment’s guarantee of religious liberty.” *Diocese of Brooklyn*, 141 S. Ct. at 68 (per curiam).

29. Archbishop Salvatore Joseph Cordileone, *Americans’ Right to Worship is Being Denied by Governments: I Won’t Be Silent Anymore*, WASH. POST, Sept. 16, 2020, <https://www.washingtonpost.com/opinions/2020/09/16/archbishop-salvatore-cordileone-right-to-worship/>.

30. Plaintiff’s Original Complaint at 6–7, *Capitol Hill Baptist Church v. Bowser*, 496 F. Supp. 3d 284 (D.D.C. 2020).

31. Complaint for Declaratory and Injunctive Relief at 11, *Agudath Israel of Am. v. Cuomo*, No. 1:20-cv-4834 (E.D.N.Y. Oct. 9, 2020) (hearing and bench ruling denying motion for temporary restraining order).

32. *Id.* at 13.

33. *Jones v. Wolf*, 443 U.S. 595 (1979); *Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevic*, 426 U.S. 696 (1976); *Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg*, 396 U.S. 367 (1970); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440 (1969); *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1960); *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94 (1952); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929); *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131 (1872); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872).

34. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).

35. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2061 (2020).



the institution's central mission.”³⁶ The question in *Guadalupe* was whether the ministerial exception extended to teachers of religion in faith-based schools even if they do not have the status of clergy and are also responsible for secular subjects. The Court's answer was yes. Religious education “lie[s] at the very core of the mission of a private religious school,”³⁷ and it is also of vital importance to the larger religious communities of which these schools are a part.³⁸ Closely-related matters of internal government and decision making, such as the selection and supervision of religion teachers, must be free from government interference.³⁹

The Court in *Guadalupe* spoke of a “sphere” of autonomy protected from state intrusion by both the Free Exercise and Establishment Clauses.⁴⁰ The Court has only begun to fill in the contours of this freedom, and its holdings exempting religious institutions from neutral laws of general applicability are limited to the ministerial exception. The limited reach of the Court's holdings has, perhaps, made litigants hesitant to draw on the concept of church autonomy in cases challenging COVID-19 restrictions. However, religious worship is clearly a matter at the core of a church's religious mission, and decisions about congregational worship belong within the scope of church autonomy. While church autonomy does not afford “a general immunity from secular laws,”⁴¹ its scope is “broad,” the Court has said.⁴² The selection of ministerial employees is a “component,”⁴³ but not exhaustive.

Of course, church autonomy cannot be a principle without limits, and conflicts over COVID-19 restrictions test the limits of this freedom. While few matters are more important to religious groups than worship, crowded services without safety precautions would risk the lives of those inside and outside the congregation. These are exceptional circumstances where the state clearly has a compelling interest in protecting public health. Whatever other limits on the principle of church autonomy there may be, governments must be able to act to protect the community where church activities endanger the lives of those outside the congregation.

However, this interest in protecting human life does not give gov-

36. *Id.* at 2060; *see also id.* at 2061.

37. *Id.* at 2064.

38. *Id.* at 2064–66.

39. *Id.* at 2055.

40. *Id.* at 2060.

41. *Id.* at 2060.

42. *Id.* at 2061.

43. *Id.* at 2060.



ernments unbounded power. Public health protections must be drawn to minimize intrusion upon religious worship, and in the context of COVID-19, this means that government officials must carefully tailor their rules to maximize the ability of congregations to meet safely in person. Numerical and other limits on church attendance must be justified with precision and scientific support, and when it is possible to increase attendance by adding precautions like mask-wearing, social distancing and sanitation protocols, government regulations must reflect this. General references to the riskiness of large gatherings where people arrive, congregate and leave together are not sufficient. Restrictions must take into account the effects of mask-wearing, social distancing and other precautions on the safety of religious worship. They must also take into account the experiences of religious congregations that have followed rigorous safety protocols. The congregations in *Diocese of Brooklyn* had followed New York's preexisting rules and experienced no outbreaks even as COVID-19 infections spiked and the virus spread in congregations that failed to follow the state's rules.⁴⁴

Careful tailoring also means that officials must continuously evaluate and update their rules in light of new information about the virus and how it spreads. At the outset of the pandemic, relatively little was known about how COVID-19 spreads, and the availability of testing was limited. Now we know that masks, distancing, and limitations on singing and loud talking can dramatically decrease virus transmission. In his dispute with San Francisco's mayor in the summer of 2020, Archbishop Cordileone observed that there was no evidence linking any Catholic masses that followed mask-wearing, social distancing and sanitation guidelines with COVID-19 outbreaks.⁴⁵ There have been many stories in the media pointing to examples of church services as sources of outbreaks, but most of these examples are from early in the pandemic or from situations where safety protocols were not universally followed.⁴⁶ Careful tailoring also requires consideration of the experiences of other jurisdictions with less restrictive rules for worship as well as the effects of more lenient treat-

44. Liam Stack & Joseph Goldstein, *How a Virus Surge Among Orthodox Jews Became a Crisis for New York*, N.Y. Times, Oct. 8, 2020, <https://www.nytimes.com/2020/10/08/nyregion/orthodox-jews-queens-brooklyn-closures.html>.

45. Cordileone, *supra* note 28 (citing Thomas W. McGovern et al., *Evidence-Based Guidelines to Celebrate Mass Safely are Working*, Realclear Science (August 19, 2020), https://www.realclearscience.com/articles/2020/08/19/evidence-based_guidelines_to_celebrate_mass_safely_are_working.html).

46. See, e.g., Kate Conger et al., *Churches Were Eager to Reopen: Now They are Confronting Coronavirus Cases*, N.Y. Times, Jul. 8, 2020, <https://www.nytimes.com/2020/07/08/us/coronavirus-churches-outbreaks.html>.



ment of commercial and recreational activities upon public safety.

Additionally, where a jurisdiction adopts less restrictive rules for secular activities that are clearly just as, if not more, risky than in-person worship such as indoor dining and fitness centers, this disparate treatment is evidence that regulations of worship have not been narrowly tailored. Disparate treatment itself is not definitive. Some jurisdictions may allow dangerous forms of secular activities to continue for economic reasons or because of political pressure. One suspects that this may have been the case when Nevada opened its casinos at 50 percent of building capacity without ensuring adequate enforcement of effective safety rules and COVID-19 cases spiked soon thereafter over the summer of 2020.⁴⁷

Few religious congregations want to sacrifice human life in order to engage in dangerous forms of in-person worship. For example, Nevada's Calvary Chapel wanted to meet at 50 percent of building capacity like casinos, but it also proposed its own rigorous and detailed safety plan covering everything from arrivals and departures, parking, sanitation, social distancing, food consumption, and restroom use.⁴⁸ The principle of church autonomy allows governments to intervene where religious worship endangers human life, but it also requires governments to do all they can to minimize this interference. There was more that Nevada could have done to facilitate safe worship, and Calvary Chapel's plan illustrated some possibilities.

As spikes in COVID-19 infections in the fall and winter made clear, in an evolving public health crisis, governments must have the flexibility to respond to rapidly changing circumstances and the room to take proactive steps if conditions worsen. Governments should also be permitted to err on the side of safety particularly at the outset of a crisis, in deteriorating circumstances, or where our understanding is limited. In his concurrence in an early decision denying a church's application for emergency injunctive relief from California's COVID-19 restrictions, Chief Justice Roberts rightly observed that the political branches of government bear the primary responsibility for responding to a public health crisis and

47. See CDC COVID Data Tracker, Centers For Disease Control and Prevention, <https://covid.cdc.gov/covid-data-tracker/> (last visited Sept. 10, 2021), for information about the growth in cases in Nevada and across the country. Soon after Nevada's casinos reopened in early June, photographs circulated of tightly packed crowds of maskless casino-goers. See Sergei Klebnikov, *In Photos: Customers Crowd into Casinos After Las Vegas Reopens*, *Forbes*, June 5, 2020, <https://www.forbes.com/sites/sergeiklebnikov/2020/06/05/photos-las-vegas-casinos-reopening/?sh=42c3878c3ea2>; Mary Forgiione & Jay Jones, *Nevada Issues New Face Mask Order: Las Vegas Visitors Must Now Cover Up*, *L.A. Times*, June 24, 2020, <https://www.latimes.com/travel/story/2020-06-24/nevada-face-mask-order-las-vegas-must-wear-masks>.

48. Emergency Application for an Injunction Pending Appellate Review at 4-5, *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020).



that substantial judicial deference is appropriate where governments act “in areas fraught with medical and scientific uncertainties.”⁴⁹ The scope of scientific uncertainty has contracted significantly since Chief Justice Roberts wrote this in May 2020 in *South Bay United Pentecostal Church v. Newsom*, but we are continuously learning about how the virus spreads and where dangers lie.

However, the level of caution that governments exercise with respect to religious worship must match their stances in the context of activities they view as essential. For religious believers, worship practices nourish life just as food does, and the protections of the religion clauses in our Constitution reflect the value that religion has for believers. The same rules need not apply to churches and retail stores, but governments must make the same efforts to maximize the ability of religious believers to worship together in person as they do to keep other essential functions open. New York’s Cluster Action Initiative placed no new limits on customers at essential retail stores while effectively shuttering in-person worship even where congregations following existing restrictions had not experienced outbreaks. This approach does not reflect the urgency of minimizing burdens on religious worship even if retrenchment is justified.

Narrow tailoring of restrictions on protected activities is a requirement of heightened scrutiny in many contexts where governments impinge on fundamental rights, but the principle of church autonomy demands more. This principle reflects the view that church and state are, at least in matters essential to religious mission, separate spheres with distinctive purposes and unique governing structures. Religious worship, in particular, is quintessentially a matter for religious institutions and their members and leaders. Of course, church and state coexist in the same environments, and they often interact. Some forms of interaction are familiar and ongoing; for example, religious organizations cooperate with the government to help the poor, elderly and neglected, and these social ministries have continued during the pandemic. Now worship itself has become an area where both religious and compelling government interests are at stake.

49. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974)). Chief Justice Roberts repeated his position when the litigation in this case came before the Court again in February 2021. *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 716–17 (2021) (Roberts, C.J., concurring in the partial grant of application for injunctive relief). See also *id.* at 722–23 (Kagan, J., dissenting) (drawing on Chief Justice Roberts’s statements in May); *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, 141 S. Ct. 63, 73–74 (2020) (Kavanaugh, J., concurring) (approving Chief Justice Roberts’s position advocating “substantial deference” to state and local jurisdictions during the pandemic).



However, when church and state interact, the independence of each must be recognized and respected. In the context of COVID-19, this means that religious leaders and government officials both have a role to play in developing the restrictions that apply to worship. At a minimum, government officials must communicate with religious leaders and give them an opportunity to provide input as decisions are made and rules are reevaluated and adjusted. When disputes arise, governments must show that this input has been received and considered carefully and in good faith. Religious congregations must also be given an opportunity to submit plans that may deviate from general rules but safely adapt congregational worship to the distinctive religious needs of their communities. These plans should be evaluated in a timely matter, and rejections must be explained and justified.⁵⁰ Spikes in COVID-19 infections and the emergence of new variants may call for new communication and new plans, but governments must respect the role and responsibilities of religious leaders in their own communities.

Indeed, government officials and religious leaders must treat each other as partners in addressing the risks of COVID-19. Governments and religious communities share the same interests in today's crisis. Both are committed to the values of religious freedom and the preservation of human life. However well-meaning, unilateral action by government officials disregards the independent institutional structures of faith communities and, with them, the expertise that religious leadership brings about the needs and experiences of their congregations. The result has been anger and resistance at a time when cooperation is essential.⁵¹

Religious believers have also been guilty of their own unilateralism. Feeling threatened by government involvement in core religious practice, believers have too often envisioned the government as a dangerous Goliath.⁵² In a democracy, government is one of the ways that citizens,

50. COVID-19 restrictions frequently provide for the submission and evaluation of plans by covered entities such as businesses and schools. Conflicts have arisen across the country where religious groups have submitted carefully tailored plans for safe worship and government officials have failed to evaluate these plans or have rejected them without specific justifications. *See, e.g.,* Cordileone, *supra* note 28 (writing in mid-September 2020 that while the Archdiocese of San Francisco “submitted [its] safety plans to the city in May along with other faith communities, and while indoor retailers had their plans approved and went into operation, we are still waiting to hear back”); Plaintiff’s Original Complaint, *supra* note 29, at 15-16 (stating that request for waiver from Washington, D.C.’s restrictions on large gatherings to permit church to worship outside with masks and distancing went unanswered for three months and was then denied without specific justifications).

51. New York’s Cluster Action Initiative sparked protests in ultra-Orthodox communities in the state’s hotspots. Liam Stack, *Backlash Grows in Orthodox Jewish Areas Over Virus Crackdown* by Cuomo, N.Y. Times, Oct. 7, 2020, <https://www.nytimes.com/2020/10/07/nyregion/orthodox-jews-nyc-coronavirus.html>.

52. *See, for example,* the statement of the First Liberty Institute, counsel for a number of organizations challenging COVID-19 restrictions, describing “shocking and outrageous attacks” on houses of worship during the pandemic and an “all-out assault on our constitution and faith community.” First Liberty Institute, *COVID-19 Victories and*



including religious citizens, act together for the common good, and in today's conflicts, believers and nonbelievers alike share common goals. Too often this is forgotten.

Partnerships founded on dialogue and engagement are needed and have many benefits. Where scientific and medical data is shared in an environment that is open to input from religious communities, the collection and dissemination of accurate data about the risks of COVID-19 and effective precautions are enhanced. Where government officials are more aware of the needs and experiences of America's diverse religious communities, trust is built and more sensitive responses to the risks inherent in in-person worship can be fashioned. The result will be government regulations and church policies that are more effective at achieving shared goals.

Indeed, where religious leaders are fully informed about the risks associated with COVID-19 and the effects of virus spread on the health, socio-emotional well-being, and economic security of those inside and outside the congregation, they may well prefer precautions that exceed regulatory requirements. This was the case with the Diocese of Brooklyn's COVID-19 commission, which regularly consulted with medical professionals and was chaired by the former Commissioner of New York City's Office of Emergency Management.⁵³ Indeed, many religious congregations across the country made decisions to worship remotely out of concern for members and the larger community.⁵⁴ Fully informed religious leaders can also play an important role in conveying information about the risks of COVID-19, necessary precautions, and the benefits of vaccination to those in their communities. Many religious communities already play this role.⁵⁵

Effective partnerships that build trust also reduce the likelihood that

Breaking Cases: History in the Making, First Liberty, <https://firstliberty.org/covidvictories/> (last visited Sept. 10, 2021).

53. Emergency Application for Writ of Injunction, *supra* note 13, at 8–9. The chair, Joseph Esposito, was also former Chief of Department of the New York City Police Department. *Id.*

54. See Wenei Philimon, *Online Prayers, Social Distancing in the Pews: Christian Leaders Debate How to Do Church Amid Pandemic*, U.S.A. Today, Aug. 15, 2020, <https://www.usatoday.com/story/news/nation/2020/08/15/church-restrictions-amid-covid-19-faith-leaders-find-ways-operate/5539943002/>.

55. See, e.g., The COVID-19 Vaccines: A Conversation with Dr. Francis Collins, Ethics & Religious Liberty Comm'n (Dec. 3, 2020), <https://www.facebook.com/erlcsbc/videos/242359160567399/> (webinar discussion between the Director of the National Institutes of Health and the President of the Ethics & Religious Liberty Commission of the Southern Baptist Convention discussing the importance of masks and other safety protections and the reliability and benefits of COVID-19 vaccines); Letter from Most Reverend Salvatore J. Cordileone, Archbishop of San Francisco to Priests of the Archdiocese on Reopening for public Masses, part 6, Archdiocese of San Francisco 3 (July 30, 2020), https://ec-prod-site-cache.s3.amazonaws.com/static/sfarchdiocese.org/documents/2020/7/Memo32to32Priests32re32Reopening32Public32Masses_Part326_073020.pdf (directing priests to remind parishioners “to follow the safety practices necessary to curb the spread of the virus,” in particular “to observe the ‘three W’s’”).



religious congregations will violate safety rules or insist on risky behaviors. As the pandemic drags on, more congregations are taking these risks, and some are challenging basic safety precautions like masks and social distancing.⁵⁶ New York's governor tied rising infection rates in many of the state's hotspots to the failure on the part of many in the ultra-Orthodox Jewish community to follow existing rules, and he launched his Cluster Action Initiative against the backdrop of his frustration.⁵⁷ However, heavy-handed responses that do not involve affected communities only deepen suspicions and make resistance more likely.

Establishing partnerships that build trust will not always be easy especially in our increasingly polarized environment. It will often require persistence, patience, and a willingness to listen and be flexible. However, if religious adherents believe that their governments recognize the urgency of their concerns and will work with them to mitigate the effects of the virus on their faith lives, all of our communities will be safer. Indeed, cooperative relationships between governments and faith communities in the context of COVID-19 may lay the groundwork for de-escalating divisive conflicts over other issues of religious liberty in the years ahead.

56. David Crary, *More U.S. Churches Sue to Challenge COVID-19 Restrictions*, AP News, Aug. 13, 2020, <https://apnews.com/article/virus-outbreak-mn-state-wire-religion-ca-state-wire-lawsuits-7d2933ca919f33aa8c-4c845e1d3febd>.

57. Stack & Goldstein, *supra* note 43.



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RESPONDING TO PANDEMICS: PEER-TO-PEER LEARNING WITH THE #FAITH4RIGHTS TOOLKIT

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ABSTRACT: The decades-long mutual avoidance between the faith-based and human rights movements has led to limited reciprocal literacy. Improving both the religious literacy of human rights actors and the human rights literacy of faith actors requires research, training and action-oriented dialogue among peers. This should be based on knowledge and respect, which requires time, trust and sound methodology. This is also the rationale and philosophy of the #Faith4Rights toolkit, which stresses that “faith and rights should be mutually reinforcing spheres.” The toolkit was drafted and refined over two years by faith-based and civil society actors, United Nations special rapporteurs and members of human rights treaty bodies at workshops that were convened by the Office of the High Commissioner for Human Rights on the campus of Collonges-sous-Salève. In view of the specific human rights challenges posed by the new coronavirus disease (COVID-19), the #Faith4Rights toolkit includes various peer-to-peer learning exercises in its modules as well as a practical case study on responding to pandemics. This article provides a brief overview of COVID-related exercises suggested in the toolkit concerning women, girls, and gender equality (module 5); minority rights (module 6); ethical and spiritual leverage (module 16); as well as research, documentation, and exchange (module 17). Faith actors can play an important transformative role, especially in the COVID-19 context, and their collaboration with other civil society actors is key for addressing the pandemic-related challenges and for “building back better.” High Commissioner Michelle Bachelet has stressed the importance of stimulating

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exchanges between different actors to “inspire interdisciplinary research on questions related to faith and rights” and of supporting a “long overdue cross-disciplinary reflection on the deep, and mutually enriching, connections between religions and human rights.”

KEYWORDS: Faith-based actors, Human rights mechanisms, Peer-to-peer learning, #Faith4Rights toolkit, New coronavirus disease, COVID-19, Gender equality, Minority Rights, Hate speech, Interdisciplinary research

LEVERAGING FAITH FOR RIGHTS DURING THE PANDEMIC

The new coronavirus disease (COVID-19) poses specific challenges for persons belonging to religious or belief minorities. Many of them have difficulties in accessing adequate health care or face stigma, discrimination and hate speech. COVID-19 also has a gendered impact with exacerbated problems for women and girls. Faith actors can play an important transformative role, especially in the COVID-19 context, and their collaboration with other civil society actors is key for addressing the pandemic-related challenges and for “building back better.”

The #Faith4Rights toolkit, which was launched and piloted online in 2020, is particularly suited for online interaction among faith communities and minority groups because digital engagement is far more inclusive than traditional in-person consultative patterns. The #Faith4Rights toolkit includes various COVID-related peer-to-peer learning exercises in its modules as well as a practical case study.³ This innovative methodology not only raises awareness of discrimination against minorities, women and girls, but it also offers a toolbox for identifying practical remedies through exchanges of practices that promote socio-cultural change in a sustainable manner.

The #Faith4Rights toolkit was drafted and refined over two years by faith-based and civil society actors, UN special rapporteurs and members of human rights treaty bodies at workshops that were convened by the Office of the High Commissioner for Human Rights (OHCHR) on the campus of Collonges-sous-Salève.⁴ The participants stressed in the Collonges Declaration that the toolkit “is a prototype suggested for faith actors, academic institutions and training experts, to be further enriched and adapted to the various inter-faith engagement contexts.”⁵

3. <https://www.ohchr.org/Documents/Press/faith4rights-toolkit.pdf>

4. See <https://news.eud.adventist.org/en/all-news/news/go/2019-12-23/faith-for-right/>

5. #Faith4Rights toolkit, <https://www.ohchr.org/Documents/Press/faith4rights-toolkit.pdf>, p. 4.



The toolkit offers peer-to-peer learning modules to explore the relationship between religions, beliefs and human rights by stimulating an interdisciplinary discussion in relation to the 18 commitments on “Faith for Rights”.⁶ This methodology serves a triple purpose: (1) engaging to ensure ownership, (2) thinking critically to face new challenges, and (3) reinforcing the mutual enhancement between faith and rights. The toolkit is a living document, which is open for adaptation by facilitators in order to tailor the modules to the specific context of the participants and it has already been enriched through a dozen updates during its first year of piloting in 2020.

This approach has also allowed for swift reactions to the advent of COVID-19 by including in the #Faith4Rights toolkit concrete ideas for peer-to-peer learning exercises on responding to pandemics. It includes a case study composed on the basis of real situations of negative stereotyping of religious minorities and instances of COVID-related hate speech. Such learning through sharing of experiences is also amplified by inspiring examples of artistic expressions that have been regularly added to the toolkit.

This paper will provide a brief overview of COVID-related exercises suggested in the toolkit concerning women, girls, and gender equality (module 5); minority rights (module 6); ethical and spiritual leverage (module 16); research, documentation, and exchange (module 17); and a hypothetical case for debate in reference to an epidemic (annex G). These modules aim to stimulate exchanges between different actors to “inspire interdisciplinary research on questions related to faith and rights”⁷ and to support a “long overdue cross-disciplinary reflection on the deep, and mutually enriching, connections between religions and human rights.”⁸

The optimal benefit from the #Faith4Rights toolkit and its regularly updated 18 modules depends on the quality of moderation/facilitation of its peer-to-peer learning exercises. The task of a facilitator of such peer-to-peer learning events may be quite daunting because he or she needs to bring the participants together and stimulate true learning from each other. This cannot be achieved in a top-down manner but rather requires carefully listening to each other, on an equal footing, and trying to learn from all participants’ experiences.

Raising the right questions in a sensible manner and at the right

6. Beirut Declaration and its 18 commitments on “Faith for Rights”, <https://www.ohchr.org/Documents/Press/Faith4Rights.pdf>

7. <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24531&LangID=E>

8. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21451&LangID=E>



moment in the flow of the dialogue is a prerequisite for finding answers. The idea is precisely to frame and guide a free but informed debate, which may also be heated at times. What the #Faith4Rights toolkit tries to achieve is precisely to empower the facilitator and all participants to constructively handle any controversial issues rather than avoiding them. These include gender equality, sexual and reproductive health and rights, as well as violence and political manipulation in the name of religion. It is obvious that facilitators of debates on these complex issues, particularly in tension zones among different faith communities, require skills and preparation, for which the #Faith4Rights toolkit offers ideas and support.

WOMEN, GIRLS, AND GENDER EQUALITY

Module 5 of the toolkit mirrors commitment V of the “Faith for Rights” framework, which pledges to ensure non-discrimination and gender equality by revisiting those religious understandings and interpretations that appear to perpetuate gender inequality and harmful stereotypes or even condone gender-based violence. With regard to the various negative effects of COVID-19 on gender equality, the toolkit provides the facilitator of a peer-to-peer exchange with several questions: What are the most challenging consequences of the COVID-19 crises in the participants’ areas of work? How do they particularly affect girls and women? What are the areas of action where faith leaders believe they have the greatest chance to make a difference in facing these challenges? What promising practices can they share in this respect? What elements of the #Faith4Rights toolkit could be of practical utility in their work? What support or preparation would they feel necessary for them to use this tool in an optimal manner?

Already in April 2020, the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) published a *Call for joint action in the times of the COVID-19 pandemic*, referring to its “peer-to-peer learning webinars, in collaboration with Religions for Peace and other partners to explore how various faith communities can scale up collaboration around the diverse challenges posed by COVID-19 with a human rights-based approach with respect to women and girls. These webinars will use the #Faith4Rights toolkit as a resource.”⁹ Held within the CEDAW Knowledge Hub Initiative, the webinars on confronting COVID-19 from

9. https://www.ohchr.org/Documents/HRBodies/CEDAW/Statements/CEDAW_statement_COVID-19_final.doc



the prism of faith, gender and human rights¹⁰ as well as on keeping the faith in times of hate¹¹ are available online as sources of inspiration for facilitators and participants. One of the learning objectives of module 5 is that participants reflect on the gendered impact of the coronavirus pandemic and explore how they can collaborate with all relevant civil society actors to address diverse challenges, especially for women and girls.

MINORITY RIGHTS

Commitment VI on “Faith for Rights” pledges to stand up for the rights of all persons belonging to minorities and to defend their freedom of religion or belief as well as their right to participate equally and effectively in cultural, religious, social, economic, and public life, as recognized by international human rights law, as a minimum standard of solidarity among all believers.

Already in March 2020, the Special Rapporteur on minority issues, Fernand de Varennes, flagged that “the coronavirus outbreak endangers the health of all of us, with no distinction as to language, religion or ethnicity. But some are more vulnerable than others.”¹² And the Special Rapporteur on freedom of religion or belief, Ahmed Shaheed, expressed extreme concerns “that certain religious leaders and politicians continue to exploit the challenging times during this pandemic to spread hatred against Jews and other minorities”.¹³ He also called all religious leaders and faith actors to combat incitement to hatred, noting that “Resolution 16/18, United Nations Strategy and Plan of Action on Hate Speech, Rabat Plan of Action, #Faith4Rights toolkit, Fez Plan of action and UNESCO’s program to prevent violent extremism through education are some useful tools for such engagement and education”.¹⁴

With regard to responding to pandemics, the #Faith4Rights toolkit suggests that the facilitator might ask the participants how religious leaders could promote the dissemination of accurate, evidence-based health and scientific information on COVID-19. How could they draw on language from within their faith traditions to promote positive messages that strengthen the protection of universal human rights and affirm the dignity of all people, the need to protect and care of the vulnerable, and inspire hope and resilience in

10. https://www.facebook.com/watch/live/?v=635014984024247&ref=watch_permalink

11. https://www.facebook.com/watch/live/?v=598898111012437&ref=watch_permalink

12. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25757&LangID=E>

13. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25800&LangID=E>

14. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25814&LangID=E>



those affected by COVID-19 and related hate speech?

Furthermore, the #Faith4Rights toolkit facilitates access to related UN standards and guidance on new challenges, particularly in their faith-related dimensions. For example, the UN Human Rights Committee stressed in April 2020 that States cannot “tolerate, even in situations of emergency, the advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence, and they must take steps to ensure that public discourse in connection with the COVID-19 pandemic does not constitute advocacy and incitement against specific marginalized or vulnerable groups, including minorities and foreigner nationals.”¹⁵

In addition, the UN Network on Racial Discrimination and the Protection of Minorities noted that “religious leaders have a crucial role to play in speaking out firmly and promptly against intolerance, discriminatory stereotyping and instances of hate speech. Their actions or inactions can have lasting impacts on overall efforts at ensuring that the pandemic does not deepen inequalities and discrimination.”¹⁶ The #Faith4Rights toolkit is also referenced in the checklist,¹⁷ which the UN Network designed in December 2020 to strengthen work in countries to combat racial discrimination and advance minority rights, including in developing COVID-19 response and recovery plans.

ETHICAL AND SPIRITUAL LEVERAGE

Commitment XVI on “Faith for Rights” pledges to leverage the spiritual and moral weight of religions and beliefs with the aim of strengthening the protection of universal human rights and developing preventative strategies adapted to the local contexts and benefitting from the potential support of relevant United Nations entities. This commitment was taken up by Religions for Peace in its *Statement on Coronavirus Crisis*, published in March 2020: “Our core responsibility as faith actors is to translate ethical values into concrete actions. A compelling way to do this is to promote human rights, fraternity and solidarity through the ‘Faith for Rights’ framework. Beyond religious institutions and faith leaders, such a joint approach to face the current health crisis – and its severe economic and social implications – is also an individual responsibility. The ‘Faith

15. <https://undocs.org/CCPR/C/128/2>

16. https://www.ohchr.org/Documents/Issues/Minorities/UN_Network_Racial_Discrimination_Minorities_COVID.pdf

17. <https://www.ohchr.org/Documents/Issues/Minorities/AnnotatedChecklist.docx>



for Rights’ framework and its 18 commitments reach out to individual theistic, non-theistic, atheistic or other believers in all regions of the world to enhance cohesive, peaceful and respectful societies on the basis of a common action-oriented platform. To fulfil this responsibility of believers, in this broad definition of religion or belief, we encourage faith actors to use the online #Faith4Rights toolkit.”¹⁸

Linked to this statement by Religions for Peace, the toolkit suggests several questions that facilitators may ask participants in peer-to-peer learning events, for example how to conceive a project that alleviates any negative consequences in their local context? What are these consequences and where are the entry points in the 18 commitments on “Faith for Rights” to these issues? What is the specific role that faith actors can play in this respect in order to complement rather than duplicate the contributions of other actors? Which practices in the religious sphere could either prevent diseases or increase the risk of their propagation? What are the lessons learned that may lead to preventive action by the participants who could integrate this in their own work?

The toolkit also points the facilitator to the World Health Organization’s interim guidance of April 2020 on practical considerations and recommendations for religious leaders and faith-based communities in the context of COVID-19.¹⁹ In May 2020, the High Commissioner for Human Rights addressed religious representatives and Faith-Based Organizations, saying that, “We need your far-sighted leadership; your sense of principle; and your voices of authority and concern to combat these hateful divisions. The struggle for equality and justice is at the heart of the human rights agenda, and at the heart of the UN’s work.”²⁰

As a concrete follow-up to the Global Pledge for Action, OHCHR – together with the UN Alliance of Civilizations (UNAOC) and the Office of the Special Advisor on Prevention of Genocide (OSAPG) – have also organized a series of monthly webinars on topics where the role of faith actors is particularly influential, such as gender equality, hate speech, religious sites, minorities, atrocity crimes and interfaith dialogue.²¹ Aligning the efforts of these three UN entities in partnership with faith-based actors on a specific peer-to-peer learning program is a major shift from the

18. <https://rfp.org/statement-by-religions-for-peace-on-coronavirus-crisis/>

19. <https://www.who.int/publications-detail-redirect/practical-considerations-and-recommendations-for-religious-leaders-and-faith-based-communities-in-the-context-of-covid-19>

20. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25909&LangID=E>

21. <https://www.ohchr.org/Documents/Issues/Religion/GlobalPledgeActionConcept.pdf>



traditional top-down approaches to a genuine recognition of what faith actors have to offer and what the United Nations can learn from their action and wisdom.

Shifting from the classical top-down approach to a peer-to-peer learning mode does not negate the importance of guidance from high-level religious authorities. Both tracks indeed complement each other. Leadership is always of the essence. The document on Human Fraternity for world peace and living together, signed by Pope Francis and the Grand Imam of Al-Azhar in February 2019, is a case in point. The two spiritual dignitaries “resolutely declare that religions must never incite war, hateful attitudes, hostility and extremism, nor must they incite violence or the shedding of blood.”²² The Catholic Church and Al-Azhar also “pledge to make known the principles contained in this Declaration at all regional and international levels, while requesting that these principles be translated into policies, decisions, legislative texts, courses of study and materials to be circulated.”

Commenting on it from a human rights perspective, a statement on behalf of OHCHR indicated that the document on Human Fraternity resonates in many ways with the “Faith for Rights” framework on the role and responsibilities of religious actors. Inter- and intra-religious engagement can be a healing tool of reconciliation and peacebuilding in people’s hearts and minds. Such engagement should lead to sustainable change on the ground. Human rights tools provide useful peer-to-peer learning opportunities that faith actors can seize and enrich.²³

RESEARCH, DOCUMENTATION AND EXCHANGE

Module 17 of the #Faith4Rights toolkit refers to a panel discussion on multi-stakeholder action to address COVID-19, during which High Commissioner Michelle Bachelet stressed the importance of exchanging experiences and creating sustainable partnerships. She underlined this point with a captivating example of interfaith collaboration: “Let me give you a recent example of such interfaith support: A Lutheran church in Berlin has hosted Muslim worshippers who were unable to take part in Friday prayers at their mosque because of social distancing rules. So the Imam led prayers in German and Arabic, stressing that the pandemic has brought people together. The church’s pastor was moved by the Muslim

22. http://www.vatican.va/content/francesco/en/travels/2019/outside/documents/papa-francesco_20190204_documento-fratellanza-umana.html

23. <https://www.youtube.com/watch?v=3lSQ5KVDqz0&t=5m7s>



call to prayer in the church and she said that ‘we have the same concerns, and we want to learn from you. And it is beautiful to feel that way about each other.’ I would like to emphasize the powerful image of a male imam and a female pastor praying together and acting in solidarity.”²⁴

In search of such inspiring grass-roots experiences, OHCHR has been conducting peer-to-peer learning events, including civil servants in Nigeria (with the Oslo Coalition on Freedom of Religion or Belief), faith-based and humanitarian actors in Denmark, South Asia and globally with Religions for Peace, with academic institutions (Oxford University, Vrije Universiteit Amsterdam and University of Pretoria) and the Special Rapporteur on freedom of religion or belief and students from more than 50 countries (with UNICRI and OSAPG). In all these webinars, the #Faith4Rights toolkit has been used, notably its exercises related to COVID-19. One key take-away of these webinars has been the need to improve both the religious literacy of human rights actors and the human rights literacy of faith actors.

It has been particularly useful to discuss a hypothetical case study²⁵, which is based on real-life elements, exemplifying the role and responsibilities of the State and religious leaders during an epidemic. In this scenario, followers of A-Religion, which is a religious minority community in the fictitious State of Itneconni, face discrimination through the Prime Minister’s emergency order to curb the spread of the infectious virus called ANOROC-20 as well as hate speech broadcasted via public television from the religious leader of B-Religion which constitutes the vast majority of Itneconni’s religious demography.

While the scenario was designed as a hypothetical case study, one participant during a peer-to-peer learning event asked why the #Faith4Rights toolkit had invented some funny names for the states and religions in this scenario, whereas a similar case had actually happened in the participant’s district. This real-life feedback illustrates the importance of peer-to-peer learning between civil servants, faith-based actors, and human rights mechanisms in order to prevent any overreach of extraordinary measures as well as to safeguard human rights and civic space for everyone.

This may also fulfil the long-term transformative commitment XVII on “Faith for Rights” which aims at the “exchange of practices, mutual

24. <https://www.youtube.com/watch?v=dLYpCBxj2Gg&t=74m42s>

25. #Faith4Rights toolkit, <https://www.ohchr.org/Documents/Press/faith4rights-toolkit.pdf>, scenario G, p. 96.



capacity enhancement and regular activities of skills updating for religious and spiritual preachers, teachers and instructors, notably in areas of communication, religious or belief minorities, inter-community mediation, conflict resolution, early detection of communal tensions and remedial techniques. In this vein, we shall explore means of developing sustained partnerships with specialized academic institutions so as to promote interdisciplinary research on specific questions related to faith and rights and to benefit from their outcomes that could feed into the programs and tools of our coalition on Faith for Rights.”

Ultimately, both movements inherited a limited reciprocal literacy from the decades-long mutual avoidance between religion and human rights. The only alternative to destructive confrontation or immobility is better understanding of both “faith” and “rights” through research, training and action-oriented dialogue among peers. This should be based on knowledge and respect, which requires time, trust and sound methodology. This is also the rationale and philosophy of the #Faith4Rights toolkit, which stresses that “faith and rights should be mutually reinforcing spheres.” This overarching aim resonates well with a famous quote by Max Planck, whose discovery of energy quanta won him the Nobel Prize in Physics: “If you change the way you look at things, things you look at change.”²⁶

26. See Joachim P. Sturmberg, “If You Change the Way You Look at Things, Things You Look at Change. Max Planck’s Challenge for Health, Health Care, and the Healthcare System”, in: J. Sturmberg (ed) *Embracing Complexity in Health* (Springer, Cham, 2019). https://doi.org/10.1007/978-3-030-10940-0_1



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REFLECTING ON THE MEASURE OF OUR HUMANITY: REVISITING THE IMPERATIVE OF HUMAN SOLIDARITY

GANOUNE DIOP¹

ABSTRACT: This article addresses the intersections of the COVID-19 pandemic and the imperative of human solidarity based on a shared humanity. It expands on the justification of human solidarity, our understanding of what it means to be human foundationally, and it allows creative envisioning of the imperative of human solidarity. It provides a deeper framework of the issue of justice. Justice not only in vaccines distributions but also in the right to be treated as full human beings. As such, justice becomes inseparable from equality and equity, dignity and freedom. All human beings are seen as possessing infinite value. No hierarchicalism and ontological stratification of society between superiors and inferiors.

KEYWORDS: COVID-19, human solidarity, dignity, freedom, sacred identity

INTRODUCTION

The following reflection focuses on what we can call the first human right: the right to be human, to be related to as a full human being and be treated as such. This right is intrinsically connected to the imperative of human solidarity. This is especially true in times of pandemics, crises, global threats, natural disasters, societal upheavals and various challenges.

Regarding the concept of human solidarity, it has been stated that “The discipline of politics has been guilty of overlooking this ‘subjective’ element of community life, but recent works by Stjernø and Brunkhorst reflect a growing awareness of the theoretical significance of the concept.”² It has received a major emphasis at the United Nations as a key to

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2. Lawrence Wilde, “The concept of solidarity: emerging from the theoretical shadows?” First published February 1, 2007, research article. *The British Journal of Politics and International Affairs*. <https://doi.org/10.1111/j.1467-856x.2007.00275.x>.



meeting the challenges of life's predicaments during a time of pandemic.³

Addressing leaders of the world's richest countries at the G20 summit, the UN Secretary-General Antonio Guterres, referring to the COVID pandemic, said the following: "We need solidarity and cooperation. And we need concrete action now - especially for the most vulnerable."⁴

In reference to the distribution of the COVID-19 vaccines, the UN Secretary General said the following:

"The recent breakthroughs on COVID-19 vaccines offer a ray of hope. But that ray of hope needs to reach everyone. That means ensuring that vaccines are treated as a global public good - a people's vaccine accessible, everywhere. This is not a 'do-good' exercise. It is the only way to stop the pandemic dead in its tracks. Solidarity is indeed survival."

In the following, we will be exploring the moral foundation for human solidarity. But first, clarifications are in order.

1. THE NATURE AND SCOPE AND HUMAN SOLIDARITY

At the outset, it may be useful to specify what solidarity is not and expand subsequently on its true nature.

Solidarity is not condescendence from a superior to an inferior. It is not charity in the sense of giving of one's surplus. It is not aid wealthy nations share with developing countries that have been victims of resources plunder for centuries. An infamous example has been the partition of Africa at the Berlin Conference in 1884. Instability in the Congo region has been the price to pay for being rich in mineral resources but poor in the scale of human flourishing, indecent standard of living, food insecurity, political instability, and economic chronic imbalances.

Solidarity is not just compassion in the sense of being moved because of other peoples' predicament. Compassion is indeed part of what it means to be human. It is needed. But being human means more. Human solidarity means more as well.

ROOTS OF HUMAN SOLIDARITY: CONSCIENCE AS UNIQUE CHARACTERISTIC OF BEING HUMAN

3. The General Assembly, on 22 December 2005, by resolution [60/209](#) identified solidarity as one of the fundamental and universal values that should underlie relations between peoples in the twenty-first century, and in that regard decided to proclaim 20 December of each year International Human Solidarity Day. The sustainable development agenda is said to be built on global cooperation and solidarity. See (International Human solidarity Day. [un.org](#)).

4. António Guterres. "UN chief to press G20 for greater solidarity and support during pandemic" (G20 virtual summit, New York, 20 November 2020). <https://news.un.org/en/story/2020/11/1078192>.



Human solidarity has deep roots. It is motivated by a shared identity, a shared humanity and actuality a shared destiny. It is characterized by an embrace of the shared mystery of being human. This shared humanity goes beyond mere biological features, intellectual potential, emotional make up or the same socialized patrimony, lineage or heritage. It is part of a deep mysterious belonging to the realm of the spiritual, an irreducible spiritual dimension which escapes definitions and confinements.

Humans are unique by virtue of not just our rationality and our capability to feel and express emotions but by virtue of our spiritual dimension. Our deep roots transcend the observable. Our thoughts can't be seen. Moreover, our rationality explores the external world to make sense of what we see. There is something happening at that inner level of evaluation, of processing what we observe in the phenomenal world. Our conscience, our center for ethical valuation operates in the inner chambers of our being, where no one has access. But this is where are formed how we relate to all others. Every decision made is supposed to be born from that secret space that functions like an inner sanctum, a sacred space.

Precisely, our solidarity as human beings and with human beings is grounded and nurtured by the inner conviction that human beings are sacred, unquantifiable by materialistic means.

To state my core thesis, our shared sacred identity is the foundation of our human solidarity. The importance of freedom of conscience lies at this intersection.

Freedom of conscience functions like a sign, a constant reminder of the full humanity of every human person. It is critical to uphold, to promote and to protect this freedom especially in times of vulnerability, fragility, and widespread infections from viruses and pathogens.

With the above clarification, we can now postulate that the main reflection we would like to submit to your consideration is that the fundamental issue which undergirds the main challenges during a time of pandemic is the measure of our humanity.

The existential question of the meaning of our humanity is made more difficult to answer in light of the reality of social tensions due to discriminations based on racism, tribalism, ethnocentrism, casteism, classism, colorism, gender discrimination and any form or expression of supremacist ideologies.

It would be an unfortunate omission not to address the problem of disenfranchisement of minority populations in America, in Europe and



elsewhere. History has witnessed a chronic deficit in solidarity with people groups whose lands were annexed, whose resources plundered, whose infrastructures fragilized or destroyed all together.

As the results of centuries of subjugations and exploitations, and multiple violations of rights, the indigenous people of the Americas and black people and people of color (BIPOC) in general are more vulnerable. They have less access to health care. In the current health crisis, they are disproportionally affected by the virus. These populations present the highest rate of fatalities from COVID-19.⁵

How to think about religious freedom in such contexts? First, the issue of the right to safe living should be addressed. Solidarity in wishing people and putting in place healthy environments is a must. The effects of environmental racism in the form of the dumping of toxic waste are devastating to populations of poor regions of the world. But there is more in our own backyard.

“Existing preconditions some of which as in the case of populations of Southwestern United States are due to exposure to uranium mining and radiation causing health issues like bone cancer, kidney damage and lung cancer give people little freedom and protection from COVID-19 and other debilitating and deadly diseases. . . .

Many low-income persons are daily exposed to the virus for being frontline workers and care takers. , , ,

The viruses then spread more in contexts where disenfranchisements abound, in contexts where racist policies, discriminations, victimization of citizens have been perpetrated for generations. Prison populations and infections of black people tell a story of systemic racial profiling and discriminations to such an extent that experts talk about a new Jim Crow law.”⁶

Unquestionably, systemic, structural, and institutional racism stemming from the colonial era and its institutions has put at a disadvantage the populations that do not have the means, the health, the medical structures and tools to efficiently fight against physical fragility and vulnerability to

5. See Mental Health America, Mhanational.org, “The COVID-19 pandemic has disproportionately impacted communities of color in America. Racial and ethnic disparities in health care are known factors contributing to the higher morbidity and mortality among people of color, as compared to white Americans. These disparities have a dual impact – not only are they resulting in differences in the actual care and treatment that COVID-19 patients receive, but they also put people in BIPOC communities at higher risk of contracting COVID-19 in the first place.”

6. Siena Fouse, “An Ongoing Battle: Fighting the Impacts of Uranium Mining in Southwestern Indigenous Communities” *Eli.org*, Wednesday, June 24, 2020.



pathogens and deadly agents. What exacerbates the current situation for minority populations is the racialization of the one human family which makes it nearly impossible to establish social justice.

People are suffering and dying from a virus particularly vicious against people with preexisting conditions created by social inequality and inequity, environmental pollution, lack of adequate sanitation due to poverty.

TOWARDS SUSTAINABLE SOLUTIONS

Our overarching thesis is the belief that the first human right is the right to be human, that is to have one's full humanity recognized, respected and protected. This full humanity of every person should not be diminished in any way because of skin color, gender or functional social status. Such dispositions and practices based on prejudices are deeply detrimental to human solidarity.

One of the key distinctive characteristics of our humanity is not just consciousness but conscience, freedom of conscience and the necessity of freewill without which self-determination would always remain aspirational but never operational.

Therefore, advocating and working for a more just world is a good place to start. The respect of every person's conscience being paramount in this endeavor. But beyond respect which can be just a disengaged way of not being involved in finding ways to help others find their way to healing and wholeness. Solidarity demands more. A benevolent attitude towards all others is a sure path to genuine solidarity with the whole human family.⁷

The responsibility to solidarity with the whole human family, is expressed in the consensus of the UDHR. It is a solidarity not based on charity in the sense of helping the poor but on a constant conscientiousness of what everyone shares with the poor, the dignity of the human person regardless of social circumstances. The focus on rights may have somewhat overshadowed or eclipsed the sine qua none of human responsibility toward every other human being.

As poignantly stated, "The Categorical Imperative operates primarily to tell you what you mustn't do to other people, not what you should do for them." Therefore, the need to revisit and restore the core in what makes us human, the responsibility of solidarity with the whole human family."

7. Hilde Lindermann, "Standard Moral Theories from a Feminist Perspective," in *Ethical Theory: A Concise Anthology*, edited by Heimir Geirsson & Margaret R. Holmgren (Ontario, Canada: Broadview Press, 2018), 387.



What is at stake and one of the most pressing questions is the understanding and adoption of what it means to be human.

Archbishop Rowan William insightfully expressed this problematic as follows:

“If there is one great challenge for our day, it is the pervasive sense that we are in danger of losing our sense of the human.”⁸

What does it mean to be a human being? This is a complex question.

Restrictive definitions limit the responses to this fundamental question to the issue of belonging to a particular group, whether tribal, ethnic, cultural, philosophical or religious.

The trajectory of identifying, valuing, classifying, and separating, leads to cementing the segmentation of humans into stratifications into superiors and inferiors, thus, stripping part of the human family of their deeper human identity and dignity. Importance based on socioeconomic categorizations has become the norm around the globe, in nearly every society. But human beings cannot be wholly defined through the lenses of the economy.

The dehumanization of others takes the trajectory of exclusion from a construct, in fact, an arbitrary, nonuniversal norm one chooses to believe and to elevate to the status of reference of how to view and to measure others. From this premise, humans are theoretically and practically subjected to valuing, segmenting and dividing into racial categories, castes and classes, economic status and materialistic worth.

As a problematic consequence, the loss of the sense of the human has led to the legitimization of violence. It is the root cause of the various violations of human dignity, human rights and human sacredness. In this latter sense, it is sacrilegious to trample any human being’s dignity. Toxic relations are perpetrated from the loss of the sense of sacredness and of the infinite worth of every person.

In spite of the violations and transgressions of people’s integrity, consensuses have been achieved at international levels and ratified through declarations, statements, covenants and conventions. Racializing human beings reducing identity to perceived features transgress peoples’ deeper identity and weaken the needed dimension of solidarity, which is essential to peaceful coexistence.

The UNESCO statement of 1950 was a landmark statement to debunk the foundations of racist theories. It states at the outset that “Scien-

8. Rowan Williams, *Being Human: Bodies, Minds, Persons* (Grand Rapids, MI: William B. Eerdmans Publishing Company, 2018), 25.



tists have reached general agreement in recognizing that mankind is one: that all men belong to the same species, Homo sapiens.”

The United Nations Declaration on the Elimination of All Forms of Racial Discrimination ratified on 20th of November 1963:

“Solemnly affirms the necessity of speedily eliminating racial discrimination throughout the world in all its forms and manifestations and of securing understanding of and respect for the dignity of the human person,

Convinced that any doctrine of superiority based on Racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere,”

Reaffirming that discrimination between human beings on the grounds of race, color or ethnic origin is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State,

Convinced that the existence of racial barriers is repugnant to the ideals of any human society.”

That is the current verdict of the world. But here there is a gap between the ideal and the real. Practically, the measure of our humanity is tested by how we view and relate to other human beings. The current reckoning against racism challenges ancient practices based on violence against other human beings. It attempts to restore the sense and practice of human solidarity. The pandemic of COVID-19 may be an opportunity to recreate the sacred bond of human solidarity.

CRITICAL QUESTIONS

The questions which compel us to think more carefully about the true embrace of one humanity are the following:

- Are there justifications for hierarchical segmenting, valuing of human beings?
- Are stratifications and divisions of humanity between superiors and inferiors legitimate?
- What about the construct of racial superiority or inferiority which nurtures most racist and supremacist ideologies? These segmenting and valuing are accompanied with contempt and disdain of human beings deemed inferior.



The root cause of much senseless suffering, dehumanizing practices of discriminating against human beings is the legitimization of violence and the demeaning and trampling of human dignity. This toxic legitimization of violence has a tendency to creep into instrumentalization of religions for conquest, colonization, empire-building and annexations of peoples' lands and resources.

In times of pandemic, the fracture of human society is exacerbated by the trampling of human dignity, the disregard of the sacredness of people's conscience, the violations of other peoples' full humanity, and subsequent multiform discriminations based on their alleged sub-humanity and second-class citizenship of part of the human family. There must be a better humanity. It could be that the pandemic can be an opportunity to reset the buttons and place human solidarity at the center of human interactions by virtue of a shared humanity.

Human solidarity is grounded on the mystery of every human being. Human beings are more than biological beings. We are even more than rational beings with remarkable intellectual faculties and capabilities. There is something about human beings that transcends our analytical skills and tools. Beyond our intellect and emotions there is an elusive aspect of humans that people variously designate as spirit, soul, human consciousness, spiritual awareness.

Matter is not all there is. The spiritual dimension inherent in every human person makes us connected to transcendence and endowed with dignity and nobility which calls for a solidarity upon which depends our very survival. The virus makes no difference. Even though one has to be vigilant about what story or stories the distributions of vaccines will tell. Human beings are interconnected. Therefore, the need to affirm and promote solidarity. This solidarity extends beyond humanitarian assistance. It includes respect, kindness, gentleness, patience, faithfulness, self-control for the sake of solidarity. These, in fact, according to the Apostle Paul, are part of the fruit of the Spirit (Galatians 5:22)

Human cultural distinctions can be highlighted as a richness and welcomed as a blessed diversity of the human family. Though often sidelined and stifled, the values of brotherhood and sisterhood and equality present in all world religions and world philosophies can be rediscovered and protected.

Recovering the sense of the human is critical to the healing of the wounds of human existence many of which were created by the various



historical transgenerational traumas from slaveries, the gulags, the genocides and the debilitating and deadly diseases that ravage indiscriminately people of all walks of life, especially people with preconditions disadvantaged by slavery, segregation, and systemic racism.

The era of crimes against humanity must cease. Impunity for the those who destroy life replaced by accountability, education, resocialization and reintegration into more human and humane not only of *modus operandi* (method of operation) but also of *Modus Vivendi* (a way of life).

Integrating a sense of solidarity with all the human family is the only way forward to recovering a sense of the human-based on human dignity, and a shared human identity and destiny. Consequently, wearing mask, social distancing, purposefully being mindful of other people's safety and wellbeing, become part of human solidarity. So is the sharing of intellectual property, vaccines surplus and logistical support for developing countries to reach autonomy, and self-determination for the good of people of the planet. After all, in an interconnected world, insecurity anywhere is a threat to insecurity everywhere.



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COVID-19, LAW AND RELIGION IN BELGIUM

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ABSTRACT: The Belgian regime of recognized religions has presented very few advantages during the COVID-19 crisis, apart from maintaining the salaries of priests. On the contrary, we have observed a number of challenges during this time, including, a lack of empathy by public authorities, including in their public speeches; a high level of conformity by religious authorities working together in an interreligious way; and a high degree of uncertainty as to future actions before the courts by conservative Christians.

KEYWORDS: COVID-19, Religious freedom, public authorities, Belgium

INTRODUCTION

Belgium is a small European country, but it has been one of the most affected by the COVID-19 crisis. By December 2020, there were more than seventeen thousand deaths for eleven million inhabitants, which would be equivalent in the USA to five hundred thousand deaths. Belgium is divided into two linguistic regions, one French-speaking and the other Dutch-speaking, with the Brussels-Capital as a region with special status. The proportion of COVID-19-related mortality between these regions confirms the long-standing disparities between them, since there have been approximately twice as many deaths among French-speakers as among Dutch-speakers.

The Belgium Church-State regime is a system of recognized religions, i.e., state-subsidized religion, with wages for ministers. Religious instruction is provided for one hour per week within the public-school curricula. Within this system, six religions are recognized by the State: Roman Catholicism, Judaism, Anglicanism, Evangelical Protestantism, Islam, and Orthodox Christianity. In addition to these, a seventh recognized philosophy (organized secularism) was added in 1993. This is an originality of Belgium by comparison with neighboring France. Whilst in France, laicity is a constitutional characteristic of the Republic, in Belgium, laicity is one of its recognized religions.

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Returning to the management of COVID-19, three characteristics are worth noting and will constitute the content of our short discussion. First, we can observe that health measures restricting religious freedom are supported by the religious leaders, who have made efforts to provide theological legitimization for the temporary prohibition of collective celebrations. They insist on the role of individual prayer and support for neighbors, the poor and those in suffering, as an essential means of pleasing God.

The second characteristic is the inter-religious dimension of the positions taken by the religious leaders: they have worked together on common reactions, common protocols and common negotiations with public authorities, at least when they are called upon. Further, one Catholic bishop was heard to say that the Catholic Church would not demand the resumption of collective celebrations in churches until mosques could be allowed to do so as well.

The third observation is the apparent religious illiteracy of the public authorities not only with regards to their own Belgian legislation on worship, but also with regards to Belgian religious realities and their diversity. How can this be explained? By the principle of neutrality, through religious ignorance, or by a contempt for religions? It remains uncertain, but we lean towards the second hypothesis: that of religious illiteracy on behalf of the public authorities.

RELIGIOUS LEADERS AND THEIR COMMON POSITION OF LEGITIMIZATION

During the first progressive deconfinement in mid-May 2020, religious groups had to wait a month before being allowed to organize collective celebrations. During this month, the leaders of the recognized religions negotiated health protocols with the government. Limitations on the number of people in places of worship gradually eased from 40 to 200 in August. In early October, as the health situation worsened, the limitation on the number of worshippers returned to 40, and finally collective celebrations were completely banned from the end of October. This ban was just extended at the end of November until mid-January. Christmas Mass was banned in the churches and festive meals in families were limited to only one guest per house.

During the first and second confinement, all collective religious celebrations were prohibited, with only three exceptions: weddings,



with 5 people permitted to attend; funerals, with 15; and live-streamed religious services, with 10 people permitted on-site. In the first confinement, public compliance with restrictions was high, despite very harsh measures. These included prohibition on all car and pedestrian traffic on public thoroughfares, parks, the countryside, or the woods, farther than an hour away by foot. During the deconfinement in May, social activities were not all re-authorized at the same time. This resulted in a broad social protest with a strong feeling of discrimination between different professions. Several lawsuits were filed by different organizations, although not by the churches. The Catholic bishops and other religious leaders adopted together a religious discourse of support for the government's measures, legitimizing them theologically in the name of defending the weak and the sick, with a sense of responsibility in the face of a crisis that was so deadly in Belgium.

Following media coverage of the efforts of conservative Catholics to repeal restrictions in France, similar groups of laity in Belgium followed suit in May 2020, taking their case to the Belgian courts on their own initiative, without the support of the bishops. But, unlike in France, the Belgian Council of State rejected their request. The argument of the Belgian Council of State is noteworthy. Part of their ruling rested on the lack of expertise regarding the health risks specific to religious gatherings; but more surprisingly, the Council of State recalled that the Catholic faithful have to defer to the position of their bishops and that these bishops were the first to ban religious celebrations on their own initiative. Moreover, it was noted, these bishops, with the other religious leaders were in the process of negotiating with the government the protocols for reopening churches and places of worship.

In response to one of the petitioners who invoked the urgent need for the baptism of their newborn child, the State Council invoked a similar line of argument, noting that the bishops themselves had taken the initiative to ban all the baptism ceremonies and to postpone them *sine die*. This is a classic form of case law concerning religious autonomy in Belgium in which the State Council continues to employ the formula "spiritual sovereignty" to defer to the religious authority of recognized denominations. But here this classical argument was reinforced by the fact that bishops were precisely negotiating this issue with the government.

Thus, in Belgium, the limitation of freedom of religion has been severe over the past year, including the banning of collective celebrations.



On November 27, the Belgian government decided to partially reopen non-essential shops to facilitate the purchase of Christmas gifts, but did not suspend the ban on religious ceremonies including Christmas Day. Most troubling for a part of the population was the speech delivered by the Prime Minister of Belgium on this occasion in which he pronounced the word “Christmas” more than a hundred times without ever evoking the religious dimensions of this holiday nor evoking the harshness represented by the ban on religious ceremonies.

On November 30th 2020, the French Council of State condemned the limitation of collective celebrations to a maximum of 30 worshippers, considering this to be discriminatory compared to the less severe limitations imposed on various kinds of businesses. This case before the French Council of State included conservative Catholics as well as the bishops of France. One may wonder whether this case will have an effect again in Belgium.²

The situation in Belgium is therefore under tension between a new French case in favor of religious freedom and a Belgian government which banned religious worship without any empathy in its public pronouncements. This is surely the indication of a very high secularization of the Belgian society, but that is not enough to explain the lack of empathy of the government towards religions even if they are minorities. A further explanation could perhaps be found in the fact that this Christmas issue is attached to a long dominant Catholic Church, and that it would have been discriminatory to manage this holiday differently from others.

In any case, after the November 30th ruling by the Council of State in Paris, with support by the French bishops, and after this unempathetic speech by the Belgian Prime Minister, the Belgian bishops took a stand in a press release on December first. In this release, they expressed their disappointment, but also their willingness to resume negotiations with the government, their support for the health measures taken by the public authorities, and finally the importance of joining the national efforts in the field of public health. They did not opt to take legal action. However, we do not know what will happen with isolated followers who are opposed

2. This text was composed and submitted prior to the 8th of December 2020, when the Council of State ruled in favor of a petition lodged by a Jewish group on the grounds that the restrictions were disproportionate in light of the religious obligations of certain Jewish denominations. Following this, on the 22th of December 2020, the Council of State rejected an application to further ease restrictions, lodged by members of the Catholic clergy; the Council arguing that its decision of 8th December was motivated by the specific discrimination against the Jewish community.



not only to the government limitations on the freedom of worship, but are also opposed to their own religious leaders, whom they consider as too soft and cowardly in the face of State restrictions.

RELIGIOUS ILLITERACY AMONGST BELGIAN PUBLIC AUTHORITIES

Of course, the impact of the COVID-19 pandemic has not been limited to recognized religions: a virus is deaf and blind to legal distinctions. And the government knows this very well. By consequence, the first lockdown orders, from mid-March to mid-May, stipulated that churches and places of worship may remain open, but that any collective celebration is totally prohibited *for all religions*, recognized or not.

This highlights the poor quality of the legislation rolled out during this period and, notably, the poor translation between the French and Dutch versions of the term “religious celebration:” it was not clear whether restrictions concerning kinds of collective activities or formal ritual celebrations. This is a recurrent difficulty in a country that has several national languages. A second issue was the initial absence of any reference to the collective activities of organized secularism, i.e., philosophical organizations recognized by law in 1993 and 2020 as analogous to a religion. This error was later corrected by the government, but the damage was done.

Indeed, this oversight bore witness to tensions within the Belgian regime in which recognized secularism now wishes to be freed from this analogy with religions in order to ideologically seize the public authorities themselves. Strategically, I see this option as prejudicial against religions: religions would be the crucible of irrationality and uncontrolled emotion, while philosophies would be the place of rationality. It is important here to insist on how the government repeatedly evoked the Christmas holiday without mentioning its religious dimension.

Finally, an observation that would be comical if it did not reveal racial ignorance and even animus, concerns the penal prohibition in Belgium of covering one’s face under the law of 2011. No health exception was foreseen by this norm of the penal code intended to prohibit the wearing of the Islamic niqab. During the health crisis, it took several weeks before a government order clarified such an exception and stated that the mask could only be worn for health (not religious) reasons.



CONCLUSION

In our discussion, we have explored three characteristics of the Belgian experience during COVID-19: the lack of empathy demonstrated by public authorities towards religions, the legitimizing efforts on the part of religious leaders to support the government's sanitary restrictions, and the close collaboration observed between recognized religions. In the background to the pandemic, we can see the ambiguity of the status of organized secularism, the absence of reflection regarding unrecognized minority religions, the religious illiteracy of public authorities, and finally, the tensions created by movements of conservative religious groups. Olivier Roy has noted that in France a part of Catholics appear to have become religious consumers, characterized by their claim to access religious services rather, than by an expression of spirituality. The situation seems quite different in Belgium, where the position of the bishops is less consumerist, and the recalcitrant faithful are less numerous. But perhaps this is also a sign of a deeper secularization of Belgian society.



LAW, RELIGION, AND CORONAVIRUS BETWEEN THE UNITED STATES AND THE EUROPEAN UNION

ALEJANDRO GONZÁLEZ-VARAS¹

ABSTRACT: This paper aims to explain the legal measures enacted by the European Union and the European countries about the necessity of containing COVID-19 spread. A comparison is made with the situation in the United States. Special attention is focused on the effects of these measures on the fundamental right of religious freedom. It is also analyzed the response of religious denominations to the closure of places of worship and to their reopening.

KEYWORDS: COVID-19, Religious freedom, European Union and Member States, United States, Religious denominations

1. INTRODUCTION

Coronavirus arrived on the European continent more suddenly than in many other places in the world. The epidemic reached a peak in most EU countries in April or early May 2020. At this time, European governments implemented measures to reduce contact between people, such as restrictions of mobility or even home confinement. Concomitantly, member states had to coordinate with each other and with the European Union to mitigate the spread of the virus across the continent, to support national health systems, and to counter the socio-economic impact of the pandemic at both national and EU levels. As a result, the number of confirmed cases of COVID-related mortality decreased in the summer. Consequently, the intensity of legal measures and fundamental rights limitations was lightened. However, infections began to increase again at the beginning of autumn. The situation in the middle of October 2020 was similar to that during the preceding spring. So, many countries again set more stringent control measures to reduce contact between people. Some of these directly affect fundamental rights.

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2. THE EUROPEAN REACTION TO COVID-19

2.1. NATIONAL LEGAL MEASURES AGAINST CORONAVIRUS

Across EU countries, the situation has been rather uncoordinated and even somewhat chaotic. Every country has ruled legal and health measures in different ways, and public authorities have changed rules at a rapid pace. There has been a proliferation of rules enacted in every country regarding COVID. More than half of the EU's Member States have proclaimed states of emergency. In some cases, such states of emergency have lasted much longer than would be expected for the most exceptional situations. In other cases, legal experts have pointed out that in a number of cases the sources of law have been used incorrectly. Important health measures that touch on fundamental rights are, in many instances, being enacted by rules that are simply not suitable for this task².

All EU Member States introduced border/travel restrictions and have prohibited public gatherings (included, in some instances, religious ones) for the first COVID wave in spring. Most EU States also imposed home confinements, at least for some weeks. Despite alleviations of restrictions since the first wave, restrictions have continued into 2021, limiting the number of people who can go to public places such as cinemas, restaurants, universities, and worship places.

2.2. EU ATTEMPTS TO DELIVER GUIDELINES AND COORDINATE STATES MEMBERS

Even though it was thought that the way back to normality would be very long, it was also clear that the extraordinary confinement measures in spring 2020 could not last indefinitely. The members of the European Council decided to coordinate to limit the spread of the virus at a meeting on March 26, 2020³. Following this meeting, the President of the Commission and the President of the European Council⁴ signed a *Joint European Roadmap towards lifting COVID-19 containment measures*, stating that

2. M. Assis Raimundo, P. Pulido Adragão, A. Costa Le o, T. Ramalho, "COVID-19 e liberdade religiosa em Portugal", *Revista General de Derecho Canónico y Eclesiástico del Estado*, 54 (2020), p. 7 and ff. From a wider perspective, L. Cotino Hueso, "Los derechos fundamentales en tiempos del coronavirus. Régimen general y garantías y especial atención a las restricciones de excepcionalidad ordinaria", *El Cronista*, 86-87 (2020), pp. 88-101. S. De La Sierra, "Lectura de urgencia de las reacciones frente al COVID-19 desde una óptica jurídica internacional y comparada", *El Cronista*, 86-87, pp. 32-41.

3. <https://www.consilium.europa.eu/media/43076/26-vc-euco-statement-en.pdf>

4. Joint European Roadmap towards lifting COVID-19 containment measures, 15 April 2020, in https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/european-roadmap-lifting-coronavirus-containment-measures_en



constant dialogue with social partners will be key. This dialogue should include representatives of religious denominations, as laid out in article 17 of the Treaty on the Functioning of the European Union⁵ and further guidelines⁶ on its interpretation. The Roadmap states (§ 7) that, in the process of relaxing the confinement, “gatherings of people should be progressively permitted.” However, it does not explicitly address religious celebrations.

The European Union has developed further tools in order to monitor the legal health of the EU Members States as they address the spread of COVID-19. One of these tools has been the Council of the European Union’s recommendation⁷ aimed at ensuring the coordination and timely communication at the EU level of measures taken by Member States that restrict free movement. Following this, the Commission has also published a report on the rule of law in the EU,⁸ analyzing the risk posed by some States’ legal measures against the pandemic. The European Commission⁹ has announced the need to build a European Health Union, putting forward a set of proposals to strengthen the EU’s health security framework, and to reinforce the crisis preparedness and response role of key EU agencies. Such moves signal a recognition that, in order to step up the fight against the COVID-19 pandemic and future health emergencies, more coordination at the EU level is needed.

Unlike the EU context, the Council of Europe texts have made specific references to religious freedom, such as in the document, *Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis*.¹⁰

3. COVID AND RELIGIOUS FREEDOM

With this backdrop, we are able to discuss more specifically the situation of religious freedom. From the outset, it should be noted that the vast majority of countries have not established the obligation to close places of worship, nor they have prohibited the celebration of religious acts – this was the case even in spring 2020. However, this is not to say that there were no restrictions due either to limitations imposed on the general mo-

5. Published in the *Official Journal of the European Union* C83, on 30 March 2010.

6. https://ec.europa.eu/info/sites/info/files/guidelines-implementation-art-17_en.pdf

7. Council of the European Union, Recommendation 2020/1475, 13 October 2020, on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, in *Official Journal of the European Union* L337, 14 October 2020.

8. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0580&from=ES>

9. https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2042

10. <https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40>



bility of people, or to the fact that religious worship has been restricted to caps on the maximum number of attendants.

In the case of Spain, the government successively invoked two stages of states of alarm.¹¹ In the first stage, places of worship were permitted to remain open on condition that they adopted organizational measures to avoid crowding.¹² But, this permission was balanced against a mandatory home confinement prohibiting people from leaving their homes except to access “essential services” specified in the Royal Decree 463/2020. Public worship was not on that list of essential services, an omission seen in several other European countries as well.

Therefore, whilst there was not a direct prohibition to exercise religious freedom either alone or in community in Spain, it is possible to speak about an indirect curtailment.¹³ The Decree that established the second state of alarm (926/2020) has offered a better treatment to religious freedom. In fact, its article 8 says that people are allowed to visit places of worship to carry out their religious activities up to a maximum number indicated by public authorities, reflecting the guidance for secular gatherings.

The Italian context was similar to that of Spain. People were entitled to enter a place of worship if they were allowed to leave their home to access an essential service; but they were not allowed to leave their homes with the express purpose of going to a place of worship.¹⁴ These restrictions held until the end of April 2020, drawing criticism from the Italian Bishops Conference (CEI).¹⁵ Finally, the Holy See had to mediate between the two parties.¹⁶ As a result of this mediation, the CEI and the Italian Government reached an agreement to allow collective worship within safe sanitary conditions. Following this agreement with the Catholic Bishops, the Government concluded further agreements with the other religious denominations¹⁷.

In the case of Portugal, the situation also began with a general ban on

11. Established by Royal Decree Royal Decree 463/2020, on 14th March, and Royal Decree 926/2020, 25th October.

12. Art. 11 Royal Decree 463/2020.

13. M.B. Rodrigo Lara, “La libertad religiosa en España durante la pandemia de COVID-19”, *Revista General de Derecho Canónico y Eclesiástico del Estado*, 54 (2020), pp. 12-16.

14. P. Consorti, “Emergenza e libertà religiosa in Italia davanti alla paura della COVID-19”, *Revista General de Derecho Canónico y Eclesiástico del Estado*, 54 (2020), pp. p. 9.

15. See the Prime Minister’s Decree on 26th April, and the Bishops Conference’s response on the same date in <https://www.chiesacattolica.it/dpcm-la-posizione-della-cei/>

16. A. Madera, “Some preliminary remarks in the impact of COVID-19 on the exercise of religious freedom in the United States and Italy”, *Stato, Chiese e pluralismo confessionale*, 16 (2020), pp. 80-83.

17. See Art. 1.11 Decree (Decreto-legge) 16th May, n. 33.



collective worship. The President's Decree 14-A/2020¹⁸ noted that it contents could not infringe the fundamental right of religious freedom (art. 5). Indeed, articles 41 and 19.6 of the Portuguese Constitution prohibit its suspension. However, art. 4.f of the Decree allowed public authorities to restrict the collective dimensions of religious practice. Some authors have opined that the Decree appears to treat the public display of the religion as something different from religious freedom itself¹⁹. In any case, as restrictions were gradually eased, public gatherings (included religious worship) were permitted subject to caps on the number of participants. From May 30, 2020, generalized public worship was authorized. Even in the second coronavirus wave, the possibility of celebrating collective worship depended on the same rules as other types of gatherings.

4. THE RESPONSE OF RELIGIOUS DENOMINATIONS TO THE CLOSURE OF PLACES OF WORSHIP AND TO THEIR REOPENING

In both the EU and the USA, most religious denominations have adapted to government guidelines, suspending their public worship activities and opting to broadcast them.²⁰ They have adapted their rites to pandemic. The Holy See went so far as to set up a COVID-19 Commission.²¹ Religious denominations can be said to have deployed a cooperative attitude with civil authorities. For some European religious groups such as the European Evangelical Alliance (EEA) and the Conference of European Churches (CEC), the civil measures that have halted large gatherings –including worship services– do not especially target the churches. Thus, they have not considered these to constitute a direct infringement of religious freedom. On the contrary, restrictions have been accepted by these bodies as necessary for the common good and for public health.

This has not prevented other religious bodies from voicing their complaints about the limits imposed on religious freedom. The two Presidencies of the Commission of the Bishops Conferences of the European Union (COMECE) and of the Council of the Bishops' Conferences of Europe (CCEE)²² have criticized the strong limitations imposed on the

18. Republic President's Decree (Decreto do Presidente da República) 14-A/2020, 18 March 2020.

19. M. Assis Raimundo, P. Pulido Adragão, A. Costa Le o, T. Ramalho, "COVID-19 e liberdade religiosa...", cit. p. 9.

20. B. Scharffs, "Coronavirus and religious freedom...", cit., pp. 2-3, and 23-28.

21. <http://www.humandevlopment.va/es/vatican-covid-19.html>

22. <http://www.comece.eu/comece-ccee-presidencies-lets-work-all-together-for-a-recovery-that-leaves-no-one-behind>



freedom of religion, citing the closure of places of worship, and calling for the re-establishment of normal State–Church relations based on dialogue and respect for fundamental rights. COMECE reiterates that religion is not a merely private issue; arguing that it also has a public and collective dimension that cannot be marginalized. Moreover, these bodies have expressed regret that the EU Roadmap lacked any explicit mention of religious services. There have been other religious bodies, from the Evangelical world, that have also adopted this critical position, such as the Portuguese Council of Christian Churches²³ and the ensemble of the Christian Churches in Austria.²⁴

Within the Catholic world, Cardinal Sarah, then prefect of the Congregation for Divine Worship, signed a letter on 12th September in which he asserted that Bishops should “ensure that the participation of the faithful in the celebration of the Eucharist is not reduced by public authorities to a ‘gathering’, and is not considered comparable or even subordinate to forms of recreational activities.”²⁵

In short, the religious confessions have cooperated with the civil authorities, but they have also defended their interests. The last example can be found in France. The Government having decided in November to limit access to places of worship to thirty people, prompting religious groups to denounce this measure as reducing religious beliefs to an accessory social activity.²⁶ The French Bishops’ Conference, amongst others, successfully petitioned the *Conseil d’État* to cancel the government’s decree.²⁷

On the other hand, Jewish communities have faced other worries, including a rise in instances of hate speech, racism, stereotyping of minorities, and misinformation.²⁸ They have been alarmed by the spreading of scapegoating, blaming Jews for the propagation of the virus. For their part, Muslim communities have issued guidance and advice for their adherents, encouraging Muslims to comply with government rules.²⁹ In some coun-

23. https://www.ceceurope.org/wp-content/uploads/2020/07/Webinar-Two_Challenges-for-Human-Rights-in-times-of-Covid-19%C2%AD_Bishop-Jorge-Pina-Cabral.pdf

24. https://www.ceceurope.org/wp-content/uploads/2020/07/Webinar-Four_Challenges-for-Human-Rights-Dr-Peter-Kromer.pdf

25. <https://www.osservatoreromano.va/en/news/2020-09/let-us-return-to-the-eucharist-with-joy.html>

26. https://www.vaticannews.va/it/chiesa/news/2020-11/francia-messe-vescovi-coronavirus-limite-fedeli.html?utm_source=newsletter&utm_medium=email&utm_campaign=NewsletterVN-IT

27. https://www.vaticannews.va/it/chiesa/news/2020-11/francia-ricorso-chiesa-cattolica-limite-presenze.html?utm_source=newsletter&utm_medium=email&utm_campaign=NewsletterVN-IT

28. European Jewish Congress, <https://eurojewcong.org/?s=covid>.

29. Comisión Islámica de España, in <http://comisionislamicadeespana.org/recomendaciones-generales-ante-el-nuevo-coronavirus>, or from the Muslim Council of Britain, in <https://mcb.org.uk/resources/coronavirus/>



tries, such as the UK,³⁰ Muslims have also faced blame for coronavirus outbreaks. Indeed, the European Union Agency for Fundamental Rights has confirmed an increase in attacks on minorities because of these reasons,³¹ a situation also observed in the USA where religious gatherings of different denominations were often characterized in the press and by politicians as a particularly dangerous.³²

5. CONCLUDING REMARKS

It is possible to assert that religious denominations in Europe have generally behaved in accordance with civil authority guidelines. It is also true that there have been some protests related to the curtailment of the religious freedom. Nevertheless, these situations have usually not reached the courts in European countries. It is also interesting to underline that there have not yet been any cases which have reached the CJEU or the ECtHR in relation to religious freedom and COVID.³³ Regarding the Strasbourg court (ECtHR), there have been cases pertaining to related issues (such as family life in the decision *D.C. v. Italy*, 19th May, or about difficulties for extradition of people based on health reasons in the decision *Hafeez v. U.K.*, 24th March), but not regarding religious freedom.

30. <https://edition.cnn.com/2020/08/06/europe/muslims-coronavirus-england-islamophobia-gbr-intl/index.html>

31. European Union Agency for Fundamental Rights, *Coronavirus pandemic in the EU. Fundamental rights implications*. Bulletin 4 (June 2020), pp. 11, 33–35.

32. B. Scharffs, “Coronavirus and religious freedom: a preliminary view from the United States”, in *Revista General de Derecho Canónico y Eclesiástico del Estado*, 54(2020), p. 13.

33. In contrast to Europe, the banning of religious gatherings has raised more litigation in U.S. courts, including the Supreme Court, such as *Calvary Chapel Dayton Valley v. Sisolak* (on 24th July) or *South Bay United Pentecostal Church v. Newsom* (on 29th May). On these decisions, see: B. Scharffs, “Coronavirus and religious freedom...”, cit., pp. 18 and 24. A. Licastro, “Normativa anti Covid...”, cit., pp. 44 and ff.



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THE CORONAVIRUS, THE COMPELLING STATE INTEREST IN HEALTH, AND RELIGIOUS AUTONOMY¹

W. COLE DURHAM, JR.²

Experience with COVID-19 has refocused attention on the relationship between the state's interest in protecting public health and the protection of freedom of religion even during a clear health emergency. Does the state have unfettered discretion to shut down religious services? Can the state regulate clergy conduct in ways that preclude the administration of last rites? Can the state specify whether and how religious rituals are performed? Can the state dictate funeral practices? Is the state free to determine how "essential" religious practices are?

On the other hand, can a religious community wear out its welcome by making religious liberty claims where this contributes to a social perception that the group is making a selfish claim without caring about implications for others? To what extent does a religious group, simply because it has religious needs, have the right to put others in the community at risk? We clearly understand situations where we believe that conscientious objection deserves to be respected even though risks—even risks of life—are imposed on others. Conscientious objection to conscription is the obvious case, though even there, expectations of alternate service are generally understood. How strong should the presumption in favor of freedom of conscience be? What if the religious community is in fact rendering all kinds of service, but this is not generally known? Bad news travels faster than good news about sacrifices religious communities make. News about all that religious groups are doing to help minimize spread, find alternative ways of meeting, providing service to the sick and vulnerable, and so forth, are all much better in promoting appreciation of religious concerns than mere assertion of religious freedom claims. But of course, how each religious community responds is itself an internal matter.

These are simply a few of countless issues that have arisen over the past several months. The challenge presented by such examples is com-

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plicated by the fact that different religious communities have very different religious practices, generating distinctive religious needs, and posing distinctive health risks. Also, for a variety of internal religious reasons, different religious communities may have differing abilities to adapt their religious practices to publicly imposed mandates.

One answer to these and many other religious liberty claims arising in the pandemic context is simply to hold, with the Supreme Court in *Employment Division v. Smith*³, that so long as a health policy is neutral and general, it prevails. Caroline Mala Corbin has given a fairly thorough analysis of how this approach comes out.⁴ In the absence of blatant discriminatory targeting, applying this approach will almost inevitably sustain implementation of the state's policy. But that, from the standpoint of most believers at any rate, tilts the balance too far in the direction of the state.

At this point, fortunately from my perspective, a majority of jurisdictions—either by statute or by judicial decision interpreting state constitutional law—have rejected that approach and insisted on a second alternative: an insistence that some form of heightened scrutiny is required to justify imposing a substantial burden on free exercise of religion.⁵ It has been striking that only a handful of state jurisdictions have followed the *Smith* precedent. And as we await the decision in *Fulton v. City of Philadelphia*,⁶ there is some possibility that the current Supreme Court may overturn *Smith*—at least if Justice Barrett is somewhat less of a strict follower of the Scalia line than some might expect.

Even without a judicial reversal of *Smith*, the general pattern was set by the Religious Freedom Restoration Act, which sought to restore the strict scrutiny approach of pre-*Smith* case law, according to which substantial burdens could be imposed on exercise of religion only if doing so “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling interest.”⁷ State RFRA provisions generally echo this language.⁸ Of course, since the

3. 494 U.S. 872 (1990).

4. Caroline Mala Corbin, “Religious Liberty in a Pandemic,” <https://www.youtube.com/watch?v=62hL0UdqluI>.

5. See William W. Bassett, W. Cole Durham, Jr., Robert T. Smith, and Mark Goldfeder, *Religious Organizations and the Law* § 3.27 (Thomson Reuters, 2020).

6. *Fulton v. City of Philadelphia*, cert. granted, 140 S.Ct. 1104 (2020).

7. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, codified at 42 U.S.C.A. §§ 2000bb et seq., §2000bb-1(b).

8. Provisions parallel to those in the federal RFRA can be found either in the laws of the 21 states that have adopted state RFRA provisions or in the jurisprudence of the highest courts of 11 additional states that have adopted heightened scrutiny as a matter of state constitutional law. See 1 William W. Bassett, et al., *Religious Organizations and the Law* §§ 3.12, 3.26-27 (2d ed. rev. 2020).



public health concerns raised in the COVID-19 situation are clearly compelling, the main residual question is whether the health-backed state mandates are narrowly tailored. This is a closer question, but may often be resolved in favor of the state.

Part of the larger point I am making though is that there are considerations in the current crisis in which judicial mechanisms for addressing the issues in question break down. Even though health is an obvious and long-recognized basis for overriding religious freedom,⁹ the reasoning is not easy, and should not be automatic. It is analogous in some ways to the dilemma encountered in mandatory disclosure of child abuse: it is difficult to imagine something more compelling than protecting children, yet we are troubled by compelling priests to violate the seal of the confessional.¹⁰

While strict scrutiny analysis makes it less likely that public officials will simply ride roughshod over the relevant religious claims, there are problems with this approach. It remains at core a matter of balancing. With this in mind, it is worth remembering that it is not obvious that public health concerns are always so compelling that they will automatically outweigh religious freedom concerns. The assumption that public health issues will clearly override countervailing religious concerns overlooks the fact that as public health worries intensify, the significance of religion in people's lives also intensifies. It is no accident that in international law, religious freedom is one of the rights that is non-derogable even in times of emergency.¹¹ Indeed, it is often precisely in times of emergency that religion is most essential.

This reality unravels some of the abstract assumptions (i.e., the assumption that health concerns always outweigh religious concerns) on which a mechanical strict scrutiny analysis is predicated. One of the difficulties with compelling state interest analysis is that it sometimes assumes that just because an interest (such as health) is compelling, it automatically overrides the religious liberty interest on the other side. The fact that an interest is compelling does not automatically mean it is *sufficiently* compelling. Abstract assumptions may be unraveled by concrete realities.

Even leaving aside the problem of parallel intensification of interests being balanced, strict scrutiny remains far too blunt an instrument

9. See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

10. See generally Bassett, Durham, Smith and Goldfeder, *supra* note 3, Chapter 20 (addressing disclosure obligations of clergy).

11. See International Covenant on Civil and Political Rights, Art. 4(2) (listing freedom of religion among the human rights that are non-derogable even in time of declared public emergency). This does not mean that religious freedom is without limits during emergencies, but the limitation clause of Article 18(3) cannot be ignored at such times.



to resolve (in sensitive and sensible ways) the array of religious liberty claims that have been highlighted by the Coronavirus crisis. On the one hand, compelling state interest analysis may assume too easily that public health interests are so compelling that they automatically outweigh any countervailing concerns. On the other hand, while examining less restrictive alternatives obviously helps, this aspect of the strict scrutiny test spawns fears among some of an unadministrable Pandora's Box of infinitely varied possibilities that legitimizes too many alternatives and/or allows each religion to become a law unto itself. The worry is that the religious claimant can endlessly dream up less restrictive with the result that consideration of the possible alternatives becomes too costly from the standpoint of the state official considering the alternatives, or questions surface about whether proliferation of alternatives undercuts fundamental equality norms. Something like this is what Winifred Fallers Sullivan has taken as the proof of the impossibility of religious freedom.¹² In short, the coronavirus poses not only a first-order crisis for public health (that is, the health crisis of the pandemic itself) but also a second-order challenge for the analytic tools we use to address the religious freedom issues arising from the first-order crisis.

An initial response to this problem is to shift from the strict scrutiny formulae embodied in RFRA to a more direct analysis of equality norms that the strict scrutiny formulae were first invented to protect. The equality approach is developed in considerable detail in the opinions of Justices Alito and Kavanaugh dissenting from denial of an application for injunctive relief in *Calvary Chapel Dayton Valley v. Sisolak*¹³ and more recently in the opinions of Justices Kavanaugh and Gorsuch concurring in the judgment in *Roman Catholic Diocese of Brooklyn v. Cuomo*.¹⁴

Essentially, the Justices argued that a careful application of equalitarian analysis, arising under various constitutional norms, compels the conclusion that religious communities should not be treated less favorably than other types of organizations that pose similar or worse COVID-19 infection risks. These approaches have the advantage that they deploy attractive equalitarian norms and provide concrete reference points that can facilitate neutral judicial analysis. However, as the outcome in *Calvary Chapel*

12. See generally Winifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton and Oxford: Princeton University Press, 2005).

13. 140 S.Ct. 2603 (2020). See also Douglas Laycock and Steven T. Collis, 'Generally Applicable Law and the Free Exercise of Religion,' 95 *Nebraska Law Review* 1 (2016).

14. 141 S.Ct. 63 (2020).



indicates, the refined equalitarian analysis can be outweighed by concern for the state's health interest. Moreover, the concrete comparison points leave room for some arbitrariness in how they are selected.

When assessing whether religious communities are treated fairly by restrictions motivated by reducing the spread of COVID-19, should religious worship facilities be compared with grocery stores, with theaters, with schools, with casinos? And what is the characteristic for assessing comparability: is it the likelihood that virus will be spread? Is it a more general assessment of how "essential" the respective activities are? How does one compare various strategies for limiting spread that religious communities and state officials advance? How does one account for the fact that different things may seem essential to different people? In a larger sense, the exclusive focus on equalitarian comparisons risks reducing religious *liberty* to a mere *equality* norm. While equality is a vital issue not to be overlooked, religious *freedom* is about more than *equality* alone.

Without disparaging the force and relevance of the equality analysis that is emerging, I believe it is vital to take into account the autonomy of religious communities as well. There are of course limits to the collective religious freedom rights of religious communities just as there are limits to the conscientious rights of individuals. To cite the most obvious examples, religious communities do not have the right to limit the voluntary exit of their members from their communities. Analysis of this issue becomes complex as one takes into account more subtle pressures that religious communities might use to discourage exit. Also, there are limits on the extent to which religious communities can impose the costs associated with their beliefs on third parties. In general, religious autonomy rights are not so strong that they justify or excuse a religious community in threatening the lives of others. But contrary to what my colleague Fred Gedicks has argued, it is not enough to simply assess whether some third-party effects—some externalities—flow to others. Creative minds can almost always identify third party effects. But reasonable rules allow higher levels of reciprocity (e.g., alternative service) to buttress conscientious claims. Both of these limitations raise complex baseline and boundary issues that need to be analyzed in much greater depth.¹⁵

But what authorities wrestling with COVID-19 have too often left

15. Stephanie H. Barclay, 'First Amendment "Harms"', 95 *Indiana L.J.* 331 (2020); Mark Storslee, 'Religious Accommodation, the Establishment Clause, and Third-Party Harm', 86 *U. Chi. L. Rev.* 871 (2019); Frederick Mark Gedicks and Rebecca Van Tassell, 'Of Burdens and Baselines: *Hobby Lobby's* Puzzling Footnote 37,' in Chad Flanders, Micah Schwartzman, and Zoë Robinson, *The Rise of Corporate Religious Liberty* (Oxford University Press 2016).



out of the account is the importance of deferring, within broad limits, to decisions and judgments made within religious communities. This includes, but is more than, recognizing reasonable alternatives that the groups propose to regulations. It does not necessarily require that public officials agree with the religious community's beliefs and viewpoints. But it does require respecting the rights of the community to have its own views and distinctive beliefs, which can be acted on (or rejected) by its members. It requires good faith dialogue and a genuine commitment to finding a way to allow the community to live out its beliefs, even if there are no obvious comparators. It requires state officials to give considerable deference to what the community regards as an "essential" service and a recognition that the state does not have unlimited authority to define or assess the balance of harms. It requires assuring that religious communities are not unfairly stereotyped or treated with disrespect. There may well be cases in which, in the end, the religious community's preference must give way to deeper community needs, but it is vital that the community have the sense that its concerns have been heard and respected, that there has been a good faith effort to accommodate, and neither the community nor state officials can identify a way to respect the community's autonomy.

Deference in the forms I have mentioned here lies at the core of notions of deference to religious processes that are at the core of religious autonomy doctrine. This doctrine was left unscathed by the *Smith* decision, which specifically noted (though only in terse references)¹⁶ that the *Smith* decision was not intended to overrule long-standing religious autonomy doctrine. If there was any doubt about this, it was clearly resolved by *Hosanna-Tabor Evangelical Lutheran Church*,¹⁷ which clearly held that the religious autonomy doctrine is anchored in both the Free Exercise and the Establishment Clause of the United States Constitution.

This is significant among other things because while free exercise jurisprudence generally turns on balancing, establishment clause analysis has a more jurisdictional character, in effect requiring courts to keep secular and religious domains distinct (e.g., by avoiding excessive entanglement). It is true that several of the most significant religious autonomy cases have concentrated on personnel issues. That is true of the recent cases (e.g., *Hosanna-Tabor*,¹⁸ decided in 2012, and the *Our Lady of Gua-*

16. *Employment Division v. Smith*, 494 U.S. 872 (1990).

17. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012).

18. *Id.*



*dalupe School v. Morrissy-Berru*¹⁹ decided in the summer of 2020). But the doctrine is much deeper, extending back at least to Magna Carta and beyond,²⁰ and involves not only matters of religious personnel and also religious property, and more fundamentally, deep questions about the proper degree of control that state institutions may impose or interject in internal decision procedures of religious communities.

As Perry Dane has pointed out, religious autonomy claims raise not the “retail” claims of individual religious believers but the “wholesale” claims of all religious communities.²¹ These communities cannot really function authentically if they are not free to define their own doctrines, their own ecclesiastical structures, their ministries, their prioritization of use of resources, and so on. That religious autonomy notions extend beyond the “ministerial exception” cases recently before the court was implicit in the Court’s earlier decision in *Corporation of Presiding Bishop v. Amos*²², and these issues are likely to rise again if Congress attempts to limit Title VII exemptions for religious institutions.

The scope of the religious autonomy right and the scope of deference it requires state officials to give religious communities’ decision-making processes will no doubt be given greater clarity in the years ahead. What is required is not unlimited deference, but it is *respectful* deference. It does not ignore equality and less restrictive alternatives, but it affirms, in addition, that one of the costs or burdens our society is committed to assuming: the obligation not only to treat people and their religious communities equally, but with respect for their dignity and freedom. There will also be a need for finding what the German’s call “practical concordance”²³—how those with conflicting interests can find ways to live together, respecting each other’s core values. The importance of this dimension of what COVID-19 has taught us should not be forgotten.

19. 140 S.Ct. 2049 (2020).

20. See, e.g., W. Cole Durham, Jr., ‘Religious autonomy at the crossroads,’ in W. Cole Durham, Jr., Javier Martínez-Torrón, and Donlu Thayer, eds., *Law, Religion, and Freedom: Conceptualizing a Common Right* (London and New York: Routledge, Taylor and Francis Group, 2021) 257, 258; Tore Lindholm, ‘Magna Carta and Religious Freedom,’ in Daniel Barstow Magraw, Andrea Martinez, and Roy E. Brownell, eds., *Magna Carta and the Rule of Law* (American Bar Association, 2015).

21. Perry Dane, ‘The Varieties of Religious Autonomy,’ in Gerhard Robbers, *Church Autonomy: A Comparative Survey* (Peter Lang, 2001), 120-121.

22. 483 U.S. 327 (1987).

23. Heiner Bielefeldt and Michael Wiener, *Religious Freedom under Scrutiny 99* (Philadelphia: University of Pennsylvania Press, 2020); Gertrude Lübke-Wolff, ‘Das Prinzip der praktischen Konkordanz,’ in *Festschrift für Christian Kirchberg zum 70. Geburtstag* (2017), 143, 144; Stijn Smet, ‘Freedom of Expression and the Right to Reputation: Human Rights in Conflict,’ 26 *American University Int’l L. Rev.* 183, 185-89 (2011); Thilo Marauhn & Nadine Ruppel, ‘Balancing Conflicting Human Rights: Konrad Hesse’s Notion of “Praktische Konkordanz” and the German Federal Constitutional Rights,’ in Eva Brems, ed., *Conflicts Between Fundamental Rights* (2008).



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COVID-19, STATE GUIDANCE DOCUMENTS ON RELIGIOUS SERVICES, AND THE POTENTIAL OF PRE-INFRINGEMENT ENGAGEMENT WITH RELIGIOUS COMMUNITIES

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Does the coronavirus pandemic justify the government telling churches how to run their worship services? That's a question I asked during the North American reopening phase of summer 2020, on which I found some very concerning aspects to the policy precedents being implemented. I re-frame that in some different ways today, thinking of some of the subsequent shutdowns and re-openings and also, more generally, of the possible import into religious freedom contexts of norms from some other areas of law.

Notably, I want to discuss ideas related to consultation with affected communities in advance of the implementation of policies that harm those communities. There is significant legal doctrine on this norm in the context of Indigenous communities.² While I do not necessarily argue for making that norm justiciable in the context of religious communities, I nonetheless suggest that it is a norm that should provide guidance to state actors in the church/state interface in situations like those that arose with COVID-19.

Obviously, as fall and winter of 2020-21 came on, questions of emergency shutdowns became relevant once again, and the various waves and phases of COVID-19 generated distinctive issues. Important religious freedom law bears on various matters that arose, with one very constructive decision relatively earlier in the process being the late November 2020 United States Supreme Court decision in *Roman Catholic Diocese of Brooklyn v. Cuomo* identifying constitutional problems with New York State's restrictions on attendance at worship service.³ Good decisions have been ready to apply core principles of religious freedom sensibly even amid a pandemic. But the issues raised by COVID-19 have also highlighted issues giving rise to needs for recognition of additional principles and norms.

1. Dwight Newman, PhD, is Professor of Law and Canada Research Chair in Indigenous Rights in Constitutional and International Law at the University of Saskatchewan. He presented on these previously at the "Law, Religion, and Coronavirus in the United States: A Six-Month Assessment" forum on October 2, 2020, and reuse some material from that paper with permission in the present publication while extending from it with some new content.

2. See some of my past work, cited at note 14, below.

3. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. (2020) was released November 25, 2020.



While the analysis in this paper mainly discusses examples from the summer 2020 reopening phase, it may also bear on subsequent measures. What was different about the summer 2020 reopening, the fall 2020 second wave, and subsequent developments compared to the first wave in March 2020, though, is that there has been time to plan and potentially to dialogue on aspects of the policies adopted. While nobody would deny that COVID-19 presents an ongoing “emergency” in certain senses, different phases of a longer-term emergency can differ in terms of the amount of time available to prepare for them, and that has implications for appropriate state engagement with religious actors.

Some state governments in the United States and provincial and territorial governments in Canada seem to have thought during the summer 2020 reopening phase of the pandemic that they could simply decide how to regulate worship services. In my view, this set a concerning precedent of relatively detailed governmental regulation of religion. Other governments, facing the same coronavirus pandemic, managed to engage with religious institutions more respectfully, furthering health goals during that phase of the emergency without imposing detailed requirements on religious services.

To set the context, I will discuss some striking examples of how coronavirus guidance documents on religious services have differed in ways that show differing levels of respect for principles of state non-interference in religion. While the pandemic situation can obviously justify some steps that would not normally be taken, the different approaches illustrate that governments have had genuine choices about whether to interfere more or to interfere less with religion. The choices they are making have implications in relation to the precedent for future interference.

The documents under discussion, issued by essentially every state government, come under different names that are not applied consistently. Some are “guidelines”, and some are “guidance” documents. But some of the slightly-more gently named “guidance” documents contain significant mandatory restrictions. For example, California’s July 2020 guidance document included this significant restriction with mandatory language: “Places of worship must therefore discontinue indoor singing and chanting activities”.⁴

Slightly different regulations on singing during worship services appeared in two other states. The state of Washington’s phase 1/2/3 guidelines

4. California Department of Public Health, “COVID-19 Industry Guidance: Places of Worship and Providers of Religious Services and Cultural Ceremonies” (July 29, 2020), <<https://files.covid19.ca.gov/pdf/guidance-places-of-worship.pdf>> (copy on file with author).



banned choirs, but specifically permitted masked congregational singing.⁵ The written guidelines of New York State in the initial reopening phase and on through to now required a ban on singing unless a twelve-foot distance could be maintained between individuals.⁶ But most states seemed to suppose that the coronavirus could be controlled during the reopening phase without specific regulation of worship music, which raises some questions about the handful of states that did regulate this aspect of worship.

Some jurisdictions imposed requirements on those offering religious services to record contact information for those attending. For example, the District of Columbia's June 2020 guidance document required that contact details be kept for thirty days and provided a specific mandate that "[f]aith community leadership is responsible for ensuring there is a process in place to account for the names of every person who has been on the premises".⁷ Needless to say, a willingness to register attendance at a place of worship might vary between those more definitively in the flock and those who might have more casually visited without wishing to identify themselves. Some could also worry about the precedent for more concerning governmental uses of religious service registration lists.

A number of states offered guidance on not sharing microphones. Some entered into more concerning regulation of liturgical or sacramental objects, even if naming these objects indirectly. Virginia's Phase One guidance document provided that "[a]ny items used to distribute food or beverages must be disposable and used only once and discarded."⁸ Some Canadian provinces were ready to be more explicit. For example, Alberta's May 2020 document set out a number of rules specifically for food or drink during "a faith-based ritual (e.g. communion)."⁹

5. State of Washington, "Phase 1, Phase 2, and Phase 3 Religious and Faith-Based Organization COVID-19 Requirements" (October 21, 2020 update), <<https://www.governor.wa.gov/sites/default/files/COVID19%20Phase%201%20to%203%20Religious%20and%20Faith%20Based%20OrganizationGuidance.pdf>> (copy on file with author).

6. New York State Department of Health, "Interim Guidance for Religious & Funeral Services During the COVID-19 Public Health Emergency" (April 6, 2021 version), <<https://www.governor.ny.gov/sites/default/files/atoms/files/ReligiousandFuneralServicesMasterGuidance.pdf>> (copy on file with author).

7. Government of the District of Columbia, DC Health, "Phase Two Guidance: Coronavirus 2019 (COVID-19) Guidance for Places of Worship" (June 16, 2020), <https://www.nationalshrine.org/wp-content/uploads/COVID-19_DC_Health_Guidance_for_Places_of_Worship__2020.06.17_ForPOSTING.pdf> (copy on file with author).

8. Virginia, "Safer at Home: Phase One, Religious Services" (2020), <<https://www.governor.virginia.gov/media/governorviriniagov/governor-of-virginia/pdf/Virginia-Forward-Phase-One-Religious-Services-Guidelines.pdf>> (copy on file with author).

9. Alberta, "COVID-19 Information: Guidance for Places of Worship" (May 23, 2020), <<https://open.alberta.ca/dataset/2be831dd-d83e-42da-b634-6bc6d5232d1a/resource/dc6e8a2e-978b-4121-acc7-8889fcfc160e/download/covid-19-relaunch-guidance-places-of-worship-2020-05.pdf>> (copy on file with author).



Appropriate guidelines on communion are no doubt entirely sensible from a health standpoint—and are probably so even apart from a pandemic. But it is a highly delicate matter for the state to impose mandatory rules on liturgical and sacramental objects. Again, it puts the state in a position that generates a worrying precedent for how the government can regulate even the most intimate parts of religious services.

Some states, when facing the reopening phase of the coronavirus, engaged very differently with religious entities. Tennessee’s guidance for houses of worship opened with an affirmation of the value of communities of faith and their First Amendment rights, and it went on to explain that the document itself was “an aggregation of suggested protocols from various faith communities across Tennessee” that was offered as a “courtesy for your convenience.”¹⁰ Other documents were clear that they encouraged or recommended practices rather than mandating them—here, one could mention examples like the Wyoming guidelines¹¹ or the Indiana guidelines (which also contained a reminder of the “right of Hoosiers to worship and freely exercise their religion”).¹² Oklahoma’s guidance document for places of worship made specific room for the “discretion” and “best judgment” of religious leaders.¹³

The respect shown in such documents for the freedom of the church—or, more broadly, the sphere of jurisdiction of religious entities separate from the state—is in stark contrast to the regulation of specifically scorned acts (like “singing and chanting activities”), the imposition of state-mandated registries of attendees at worship sites, and mandatory regulations imposed on liturgical and sacramental objects. Federalism thus seemingly revealed some sharply differing governmental attitudes toward religion and toward the church-state interaction.

Differences in attitude were apparent from the outset of the pandemic, as some governments treated religion as offering an “essential service” and others were ready to shut it down. Approaches in that time period present some different issues in so far as they concerned an urgent response in the context of a great deal of uncertainty in March 2020. But differenc-

10. Tennessee, Governor’s Office of Faith-Based and Community Initiatives, “Guidance for Gathering Together in Houses of Worship” (October 2020), <<https://www.tn.gov/content/dam/tn/governorsoffice-documents/House%20of%20Worship%20Guidance%20FBCI.pdf>> (copy on file with author).

11. Wyoming, “COVID-19: Guidance for Faith Organizations and Funeral Homes from the Wyoming Department of Health” (August 1, 2020), <<https://health.wyo.gov/wp-content/uploads/2020/08/WDH-COVID-19-Guidance-for-Faith-Organizations-and-Funeral-Homes-8.1.2020.pdf>> (copy on file with author).

12. Indiana, “Revised Guidance for Places of Worship” (2020), <https://www.backontrack.in.gov/files/BackOn-Track-IN_PlacesOfWorship.pdf> (copy on file with author).

13. Oklahoma, “Guidance for Oklahoma’s Open Up and Recover Safely Plan: Places of Worship” (May 1, 2020).



es in attitude that persisted during the fall 2020 reopening phase, second wave, and subsequent phases, when there was more clarity and more time for dialogue, raise some major questions. Some governments sought to minimize their impacts on religion and others either did not worry about their impact or even maximized it.

In another human rights context, that concerning Indigenous rights, there has been the development of significant bodies of norms and laws on the concept of pre-infringement consultation with Indigenous communities. Canada, especially, has seen the development of a very substantial body of case law on what is called the duty to consult doctrine.¹⁴ The idea of this doctrine is to minimize negative effects on Indigenous communities' rights by requiring governments to proactively consult with them when contemplating government decisions that carry the possibility of an adverse impact on Indigenous rights.

Just what is required in terms of consultation is calibrated under the Canadian law on this doctrine in respect of factors allowing an analysis of the potential degree of adverse impact on rights, although the application of this analysis has not always been straightforward or free of controversy.¹⁵ But what is always sought is what is called “meaningful consultation”, which involves the government genuinely providing information on what is being contemplated, listening to responses concerning potential impacts of the potential government decision, and then showing evidence of having considered what it has heard in its decision-making process about the government decision and potential variants of it.¹⁶

A key aim underlying this doctrine, as I suggested, is to minimize negative impacts on rights—and it could thus be considered aligned with legal doctrines that call for minimal impairment of rights as part of the test for justified infringements on rights. But it also serves purposes of trying to further reconciliation between Indigenous and non-Indigenous communities in the context of a complex colonial history.

The Canadian body of law I have referenced on the duty to consult has become complex and technical, and I do not in any way suggest

14. I have written extensively on this doctrine in works that have been regularly cited by Canadian courts. See generally Dwight G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich, 2009); Dwight G. Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Vancouver: UBC Press, 2014); Dwight Newman, “The Section 35 Duty to Consult,” in Peter Oliver, Patrick Macklem, and Nathalie des Rosiers, eds., *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017).

15. For the original statement of the key tests, see *Haida Nation v. British Columbia* (Minister of Forests), 2004 SCC 73, [2004] 3 SCR 511.

16. See e.g. *Adam v. Canada*, 2014 FC 1185 at para. 70, adopting definition of meaningful consultation from Newman, *Revisiting the Duty to Consult*, p. 103.



importing it directly. It is also important to acknowledge that the issues between the state and religious communities are obviously very different than issues as between the state and Indigenous communities.¹⁷ That said, various misunderstandings between the church and state are increasingly probable as the world shifts not just to a post-Constantinian order or to the separation of church and state, but to a reality with significant secularization, especially pronounced amongst certain layers of governmental bureaucracy. An idea like pre-infringement consultation has the potential to help lessen unnecessary negative impacts on religious liberty and to promote better relationships overall. Adapted away from a justiciable doctrine for present purposes into a norm of governmental practice, pre-infringement engagement with religious communities would seem highly appropriate.

What some states did in their policies during the summer 2020 reopening phase showed this sort of respectful engagement. There are arguments grounded in larger bodies of norms that lend support to what they did. Their approach avoided unnecessary infringements of religious liberty and unnecessary interference with religious communities in so far as they engaged with religious communities on what would work well for all and be respectful of religious freedom. Such an approach also fosters good relationships overall.

This latter point is important in respect of a key objection that could be levelled at parts of my argument. Namely, some would object that states needed to take the steps that they did because some religious congregations did unreasonable things and ended up generating super spreader events. I cannot deny some aspects of this point with respect to some very specific incidents. But the fact that some super spreader events occurred in the context of some risky decisions made at some churches should not be license to prohibit all religious worship for other churches. In some contexts, governmental authorities saw super spreader events at worship services held in basements and then prohibited even drive-in worship services where everyone would remain in closed vehicles. There is room for more expectation of rationality, not to mention even-handedness relative to other sectors, in government decision-making.

Beyond this response, though, I want to suggest that an approach drawing on norms of pre-infringement engagement can actually assist in

17. For some analogies between the distance of both Indigenous and religious worldviews from liberal secular norms, though, see generally R.E. Lowe-Walker, *Intercultural Deliberation and the Politics of Minority Rights* (Vancouver: UBC Press, 2018).



minimizing problems. First of all, religious leaders drawn into dialogue and receiving fair information about health matters in an environment of respect for religious freedom are more likely to cooperate in developing approaches and making decisions that are responsive to this information than those simply subject to state orders that appear to show disrespect for religion.

Second, in so far as the Canadian jurisprudence on the duty to consult doctrine can inform a concept of pre-infringement engagement, it may also have pertinent norms for this point. One of the expectations within the duty to consult doctrine is that there is to be good faith engagement from both sides, and if an Indigenous community does not engage in good faith, it may lose the opportunity to be consulted and the state may no longer face a duty in that context.¹⁸

A norm of pre-infringement engagement could legitimately come with expectations of good faith involvement in the engagement by religious communities. If some chose not to engage in good faith, they might be then subject to legal restrictions without the same respect for their perspectives. But simply restricting religious entities without beginning with respect for them is not an appropriate starting point. A broader body of jurisprudence can be informative to approaches that can achieve greater respect for religious freedom and religious communities while also achieving greater societal cohesion.

It is too easy to say that the pandemic justifies every government act taken in response to it. The very fact that there are varying governmental approaches in the context of religious organizations and religious services shows that this is an arena in which choices are possible. Governments that interfered more in religious services chose to interfere more in religion. That is a concerning development. Even while guidance documents from the reopening phase had sensible ideas that could protect health, the readiness of some governments to make more of those mandatory without engaging with religious communities—even while striking at particular liturgical and sacramental acts or core elements of religious liberty—raises serious questions.

The appropriate response of religious entities is challenging. In some ways, it would not be good for these entities, or for religion generally, to be perceived as fighting against sound health guidance. At the same time,

18. See e.g. *Xats'ull First Nation and Director (Environmental Management Act) and Gibraltar Mines Ltd.*, Decision No. 200-EMA-006(a) (British Columbia Environmental Management Agency) at paras. 343, 358-60.



it is not good for these entities, or for religion generally, to permit without objection the accumulation of precedents for governmental intrusion into core elements of worship services.

My contribution may not reveal easy answers on the path forward, but I hope that it exposes some details of some further dilemmas arising in the context of law, religion, and coronavirus and presents a perspective on a norm that could be advocated and developed by various actors. Churches—and other religious entities—do not and should not want the state regulating aspects of their religious services. But the coronavirus pandemic has provided an opportunity for a development of precedents for such interference that is arguably all the more dangerous for its very subtlety, even while alternative approaches would exist that could lessen the harms.



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QUARANTINES, RELIGIOUS GROUPS, AND SOME QUESTIONS ABOUT EQUALITY

CHRISTOPHER C. LUND¹

ABSTRACT: COVID-19 quarantine orders imposed on religious organizations raise hard questions. Religious organizations deserve to be treated equally with other organizations. But equality is not self-implementing. What is the right secular analogue to a religious service? What if there are several good secular analogues, all treated in different ways? Quarantine orders classify organizations by type. But does it make sense to put all religious gatherings of all denominations in the same category, as if religious differences do not exist? And how can one classify religious organizations without, at least implicitly, deciding on their value and the value of religion itself?

KEYWORDS: Religion, religious organizations, free exercise of religion, equality, general applicability, neutrality, First Amendment

When the government imposes quarantine orders for public safety, shutting some places down and leaving other places open, how should it treat religious organizations and religious services? A natural answer is that they should be treated *equally*, and that makes sense. Equality is a solid principle, with wide-ranging appeal and deep roots in history and in law.

But, at the same time, equality is not self-executing. The deeper one goes into these quarantine orders, the more that becomes apparent. We can try to treat religion equally, but it becomes harder in practice than it is in theory. Equality means that religious groups should be treated the same way as other similarly situated groups, but this becomes difficult when there are a bunch of possible comparators treated in different ways. Courts, even the United States Supreme Court, have had to be tough decisions about which comparisons count.

For this short piece, I seek merely to establish two propositions, which are relatively uncontroversial, but which also illuminate some of the difficulties inherent in these decisions. The first proposition is that quarantine schemes require judgments about the value of religious exercise. These judgments are probably not susceptible to objective calculation. Such judgments end up being somewhat uncomfortable in a system like ours,

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where the government tries to avoid direct questions about religion's worth or value.

The second proposition is that, by insisting that all gatherings of all religious organizations be treated the same way, quarantine schemes become blind to some genuine religious differences. We decide how much to restrict religious organizations in general by imagining what typically happens in a religious service, but our imagined typical religious service ends up looking a lot like a Sunday morning Christian worship service.

Much of the debate, and the litigation, over quarantine schemes has been over issues of who should decide. There are questions of judicial and legislative competence, questions about how power should be allocated during emergencies, and even much more mundane questions (like the standard of review for a party seeking an injunction pending appeal). But forget those questions. Underneath all of them are more fundamental questions about equality that are unavoidable, profound, and difficult. This piece does not answer those questions. It tries simply to see them clearly—to see them for what they are.

States have worked against the COVID-19 pandemic in a variety of ways, including quarantine orders. Starting in early 2020, but continuing up to the present moment, states have issued shut-down orders requiring businesses and other organizations (including religious organizations) to close temporarily. These shut-down orders work by categorizing organizations by type. Some organizations have to close; others can stay open. Organizations that can stay open may have to follow certain rules—like spacing requirements, mask mandates, and fractional capacity limits. Oftentimes things proceed in stages. This kind of organization can open now; this other kind can open next week; this other kind can open next month.

When deciding what things should open and when, one would naturally take into account the value of the thing in question. Essential businesses never had to close—this might include things like grocery stores, hospitals, lawyers' offices, and liquor stores. States have different definitions of “essential businesses,” of course, but the common task was to identify what businesses were *essential*—what businesses were too important to close.

But this isn't just about essential businesses. These kinds of value judgments enter into every part of a state's classification scheme. In its multi-stage reopening plan, California put restaurants in stage 2 and bars in stage



3—meaning that restaurants could re-open before bars.² Now, this could be purely about the relative risk of COVID-19 transmission. But that’s not entirely clear, especially given that social distancing and masks were required in both places. More likely, there’s also a value judgment here. California believes—and it may have good reason for believing—that open restaurants are simply more important to society than open bars.

Value judgments here are inescapable. Grocery stores are essential businesses because people need to be able to buy food and a lot of people don’t have the money for grocery delivery. Childcare get placed in the first category of businesses that could reopen because we know parents will have trouble working without childcare for their kids.

There is a simple truth here. Determinations about when different things should re-open do not merely involve questions of fact (what’s the amount of risk?), but also involve questions of value (is this worth the amount of risk?). The more something is worth, the more risk we are willing to accept. But this creates real problems when it comes to figuring out where religious organizations should fit into the organizational taxonomy. Again, take California’s multi-stage reopening plan. Essential businesses (including grocery stores, fast food places, and liquor stores) were in stage 1 and never had to close. Other organizations were classified as stage 2 (which really consisted of two separate stages, 2a and 2b), stage 3, and stage 4. Where do religious organizations most naturally fit? Should religious organizations be treated like concerts (stage 4), movie theaters (stage 3), restaurants (stage 2b), or grocery stores (stage 1)? We must listen to the scientists, who will tell us about the comparative transmission risk of all those things. But that is not enough. Cost/benefit analysis means somebody also needs to tell us about the comparative value of those things. How important is religious exercise, as compared to a concert, or a movie, or a meal out, or a trip to the grocery store?

This is a pickle. In deciding in what category to put religious organizations, governments must make judgments about the worth of religious exercise. But those are exactly the kind of judgments we usually want the government to avoid. In our system, people get to decide the worth of religion for themselves. They might think religion is good or bad; they

2. California’s rules came before the United States Supreme Court in *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020). But more factual detail about California’s reopening plan is available from the dissenting opinion in the Ninth Circuit. See *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 940 (9th Cir. 2020) (Collins, J., dissenting) (noting that “Stage 2 entities [included] schools (in an adapted form), childcare, dine-in restaurants, outdoor museums, destination retail, including shopping malls and swap meets,” while “Stage 3 [included] bars, movie theaters, hair salons, and “more personal & hospitality services”).



might think it valuable, invaluable, or worthless. But each of us gets to decide about religion for ourselves—we decide, with those we love and trust, what to believe, whether to believe, and how to practice. But the pandemic changes this. We now affect each other more than we did before. Your decision to go to a bar, to a restaurant, or to a church affects my life differently than it did before. This prompts us into now making collective (that is, governmental) decisions about the worth of things—including the worth of religion.

To be clear, this problem cannot be avoided. It is inherent in quarantine schemes that classify organizations by type. And to be sure, I do not think any other kind of quarantine scheme could really work. If governments could not classify organizations by type, they would only be able to use generally applicable rules like “indoor masks,” “always six feet apart,” “buildings at 50% capacity.” But that simply would not work. It would not work because it would make it impossible for the government to distinguish even among *nonreligious* organizations based on their value. California would be unable to favor restaurants over bars. It would be unable to give any priority to grocery stores, hospitals, or childcare places. Sensible quarantine schemes must classify organizations by type. But that brings us back into the thicket.

This cuts a bunch of different ways all at once. Religious exercise should be given a high priority. But how high? And high by what measure?

An example here clarifies the point. One of the cases the Supreme Court considered this summer was *Calvary Chapel Dayton Valley v. Sisolak*, which involved Nevada’s quarantine scheme. Nevada had reopened casinos. Religious organizations—churches, synagogues, mosques, and so on—could have a maximum of 50 people. But casinos could have up to 50% of their maximum capacity—given their size, that meant thousands of people effectively. And casinos are like religious organizations in a way that relates to risk transmission. Like churches, and unlike (say) grocery stores, people tend to stay at casinos for periods of time.

A number of Supreme Court Justices thought this unconstitutional. They said that devalued religious exercise. “[T]here is no world,” Justice Gorsuch said, “in which the Constitution permits Nevada to favor Caesar’s Palace over Calvary Chapel.”³ Justice Gorsuch’s analysis is sound. If casinos

3. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2609 (2020) (Gorsuch, J., dissenting from denial of application for injunctive relief).



and churches are similar in terms of risk transmission, then the decision to let casinos open while forcing churches to remain closed is indeed a value judgment that casinos are more important than churches.

At the same time, though, consider this. Nevada apparently gets more than 30% of its General Fund revenue—more than a billion and a half dollars a year—from casinos and their related hotels.⁴ Nevada needs the casinos to be open—it needs that money to fix the roads, and keep the schools open, and for various social programs.

The argument that churches should open because casinos are open and pose the same kinds of health risks only works, as a logical matter, if the benefits of churches and casinos are roughly equal. But are they? Casinos are worth a billion dollars to Nevada. What do we say about churches in this respect? Are they worth more than that? Less? How much? How can we know? But that is the question at the bottom of all of this—how much are churches worth? It's a question that we do not want the government to address explicitly, but it's implicitly laying behind all of these decisions.

My first point was that quarantine schemes require the government to make decisions about how much religious exercise is worth. Let me turn, in my final paragraphs, to my second point—that quarantine schemes flatten religious differences in uncomfortable ways.

Quarantine schemes all adopt the basic principle of denominational neutrality—the principle of treating all religious affiliations and denominations the same. In every quarantine scheme, churches, mosques, and synagogues have all gone into the same category, to be governed by the same rules and restrictions. This is the right approach. After all, equality between religious denominations is a bedrock principle. But this approach also ends up collapsing real differences between faiths.

For example, in deciding how to handle religious organizations, many courts and legislatures have seized on the fact that singing involves a high degree of transmission risk, which naturally suggests caution about letting religious groups meet. But, of course, not all faiths sing during worship services—some faiths don't even have what many would consider to be worship services. We've been figuring what restrictions to impose on religious services based on some conception of what "usually" happens in religious services. But such conceptions will naturally be heavily shaped by the practice of the dominant majority faiths. To put it bluntly, quarantine

4. Nevada Resort Association, How Gaming Benefits Nevada, available at <https://www.nevadaresorts.org/benefits/taxes.php>.



orders act as if all religious gatherings resemble prototypical Sunday morning Christian worship services.

This is not terribly surprising. It is probably not even avoidable. Every society will have its own understandings about what religious worship looks like, and those understandings will naturally enter into law at various points. But it is a concern, or at least a curiosity, to see genuine religious differences been flattened in this way, and to see all religious organizations governed by rules that were designed largely for Protestant worship services.



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HOW ESSENTIAL IS RELIGION? MEANINGS AND PERCEPTIONS OF RELIGION DURING THE COVID-19 PANDEMIC IN EUROPE

JEAN-FRANÇOIS MAYER¹

ABSTRACT: In Europe as elsewhere, the COVID-19 pandemic has had an impact on all areas of life. In the religious field, it has underlined larger issues related to the status of religion and to religious freedom. While religious groups have widely adjusted to restrictions, even when it affected key religious practices, they often wondered how the significance of religious life was rated by secular authorities when the time came for gradually lifting restrictions and deciding which services were essential. Since the path of negotiations was mostly followed by main religious organizations, several legal actions for demanding the resumption of public worship or the permission for larger groups of faithful to gather were initiated by smaller groups or individuals. The issues at stake were related to the proportionality of restrictions on public worship, also in comparison of the way in which secular facilities were dealt with. The pandemic has once again made clear how religious freedom and freedom of worship are indivisible. What may also have worried religious groups is how health considerations sometimes seemed to lead states to attempt regulating the way into which worship itself is conducted.

KEYWORDS: COVID-19, pandemic, Europe, freedom of worship, Christians, Muslims, religious practices, state and religion

On May 6, 2020 the Commission of the Bishops' Conferences of the European Union (COMECE) expressed concern that the roadmap of plans to deal with the COVID-19 pandemic published by the European Union Commission lacked any explicit mention of religious services. In the words of its General Secretary: "The aggressive approach of certain secularist actors against the role of religion in the public square may have contributed to its marginalization in the context of the current crisis."² Measures enforced by governments all around the world to fight the pandemic were not meant to target religious freedom, but religious activities

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2. Commission of the Bishops' Conferences of the European Union, "Freedom of Religion at Stake in the Context of Fighting against Covid-19," May 6, 2020, <http://www.comece.eu/freedom-of-religion-at-stake-in-the-context-of-fighting-against-covid-19>.



have nonetheless been affected, like all other areas of life. This situation reveals larger issues related to the status of religion in contemporary societies and to religious freedom.

Apart from a few references to events in other parts of the world, in this paper I have restricted myself to the most easily comparable issues, and therefore focus primarily on Europe, considering the abundance of material that is available for such a study at a time when the crisis is still ongoing. Limitations of space restricted the extent of a wider focus in the present paper, but it will prove fruitful to go beyond Europe, since we have a unique opportunity to analyze the impact (in various fields) of a crisis that has simultaneously affected regions across the entire world.³

As far as the pandemic's effect on religious activities were concerned, disruptions became apparent during the early days of the crisis in most affected areas, especially in terms of providing religious assistance to dying people and the consequences of the pandemic for funerals (which would be a topic in itself). Religious freedom became an issue of public debate when European governments started to plan the gradual lifting of containment measures in the spring of 2020. What would be the pace and extent of the resumption of public worship in comparison with the reopening of secular activities?

In late April 2020, as I attempted to provide an overview of the ways in which Christian churches in Western countries had dealt with the pandemic,⁴ I observed how religious groups in Europe had widely adjusted to secular restrictions designed to prevent the spread of the virus, at a time when uncertainty ruled most aspects of life. Nobody knew for sure how the lifting of restrictions would evolve and what it might involve.

In late February and early March some voices had claimed that cancelling public worship should be out of question, but in a very short time more or less everybody complied with government-imposed restrictions, in that could hardly have been imagined a month earlier. In a matter of weeks, health issues became paramount in the religious field, as in others.

The fact that some religious gatherings in various countries had played a role as super-spreaders of the virus had contributed to making

3. See for instance the following analysis across four different countries on three continents: Danielle N. Boaz, "Between 'Essential Services' and Culpable Homicide: State Responses to Religious Organizations and the Spread of the Novel Coronavirus in 2020," *Journal of Law, Religion and State* 8, issue 2–3 (December 2020): 129–51.

4. Jean-François Mayer, "Analyse: les Églises chrétiennes face au coronavirus—bilan intermédiaire et perspectives," *Religioscope* (April 26, 2020), <https://www.religion.info/2020/04/26/analyse-les-eglises-chretiennes-face-au-coronavirus-bilan-intermediaire-et-perspectives/>.



religious leaders aware of the risks involved in such gatherings and of a possible subsequent negative impact on the image of a religious institution or denomination. It is not surprising, therefore, that in French-speaking countries, following the much-publicized case of a super-spreader event unintentionally caused by a gathering of the Evangelical church *La Porte Ouverte* in Mulhouse (eastern France), a number of Evangelical congregations were quicker than mainline Churches to cancel public worship.

When speaking with members of religious groups' administrative staff, I tended to assume that they had the public image of their group in mind when they cancelled public gatherings of their believers. But what came first (quite understandably) in their own spontaneous reactions was the concern that they felt believers should cultivate for the preservation of human life. This should not be understood as mere rhetoric, but as reflecting a real concern that took priority over everything else. This also explains why many temporary sacrifices in terms of religious freedom were accepted at the time.

In many cases, despite the significant sacrifices this involved for believers during crucial periods of their respective religious calendars, religious groups seemed eager to act in an exemplary way and were very willing to make significant adjustments to their religious practices. For instance, as early as late February 2020, the Romanian Orthodox Church advised its faithful no longer to kiss icons. For a number of smaller religious groups, the pandemic also presented an opportunity to show that they could be seen as trusted and responsible partners in efforts to overcome the virus. For example, it was impressive to see the care with which a number of Muslim communities across Europe developed convincing plans to protect worshippers against infection.⁵

It was when some of the enforced restrictions were lifted in late spring/early summer 2020 that a number of believers started to ask if public religious life should be seen as less essential than other areas of human activities. The debate would become rapidly more heated during the second wave of infections—but this was not exclusive to the religious domain. With the imposition of long-lasting or repeated restrictions, unease has been growing. In England, in November 2020, 122 church leaders from various traditions launched a legal challenge to the ban on communal wor-

5. Interestingly, in Germany on April 29, 2020 it was a convincing protection plan submitted by a mosque that managed to convince the federal court in Karlsruhe to pave the way for the resumption of public worship.



ship, stating in no uncertain terms that worship had been “criminalized.”⁶

During the first wave of the virus, mainline religious groups had been reluctant to confront State authorities regarding measures that had been enforced to contain the pandemic. In several countries, specific subgroups rather than leading religious organizations had initiated legal action.⁷ Historical religious groups have mostly sought cooperation rather than confrontation in an effort to remain trusted partners of the State in a time of crisis. The fact that a number of legal actions were initiated by individuals or subgroups also indicates how such debates on religious freedom are not merely conducted between the State and religious groups, but how individuals also play an autonomous role. Burkhard J. Berkmann stresses the triangular relationship between church, State, and individual believers, as evidenced by pandemic-related discussions.⁸

This does not mean that mainline churches remained passive, and strong words to defend religious freedom had already appeared during the first wave. In mid-April it was unusual to hear the president of the Swiss Bishops Conference say that “the government [had] forgotten the churches” when planning the lifting of measures to contain the pandemic. But the usual route taken by mainline religious bodies was that of negotiation and discussions, if possible, since such bodies have a history of establishing communication channels to State authorities. What mattered for established religious bodies was that a dialogue with the State would take place and that their role in society would thus be acknowledged (while there was a degree of irritation when they were ignored).

Such a dialogue may be official, but informal. When I asked an official of a Roman Catholic diocese if local authorities had consulted the bishop

6. Harriet Sherwood, “Communal Worship ‘Criminalised’ under Lockdown, Church Leaders in England Say,” *The Guardian*, November 14, 2020, <https://www.theguardian.com/world/2020/nov/14/communal-worship-criminalised-under-lockdown-church-leaders-say>.

7. During the second wave, while these smaller groups remained active, established religious institutions felt that they should not leave the ground to them alone. For instance, in France on November 27, 2020 the Archbishop of Reims and president of the French Bishops Conference, Eric de Moulins-Beaufort, submitted a (successful) summary appeal on behalf of the Conference regarding the limit of 30 people allowed to attend religious services. A variety of other groups had also appealed the measure. The difference with smaller groups was that, besides submitting a summary appeal, the president of the French Bishops Conference was also able to obtain an appointment with the French prime minister.

8. Berkman rightly remarks that, “this does not mean, however, that the individual believer can use the state legal system to force the church to change its teachings or legal norms, or in the case at hand, to offer worship services. . . . The individual believer can demand only that the state remove the legal restrictions that prevent the church from holding public services. This alone, however, is of little use to individual believers if the church does not offer Sunday masses” (Burkhard J. Berkmann, “The Covid-19 Crisis and Religious Freedom: The Interaction between State and Church Norms in Germany, Especially in Bavaria,” *Journal of Law, Religion and State* 8, issue 2–3 (December 2020): 179–200).



about measures to contain the second wave of infections, he answered that there had been nothing official, but that informal exchanges had indeed taken place, since the bishop and the people in charge knew each other.

From the spring of 2020, European believers sometimes wondered how essential the collective practice of religion was considered to be, since the term “essential services” is primarily applied to secular, practical activities. Nevertheless, for any believer, religious beliefs and the practice of religion are essential. Faced with adverse circumstances (for example, being stranded on a desert island), believers would want to keep their faith alive despite their lack of access to fellow believers and public worship, but this is far from being seen as an ideal situation.

Another pandemic-related issue was that people who were not necessarily believers themselves—for instance, health officials—were responsible for determining what should be seen as essential. Moreover, believers sometimes wondered if measures affecting religious practices were proportionate responses to the threat that they were supposed to help resolve and questioned their impact in comparison with decisions affecting other areas of public life. Both political and theological views would influence perceptions of whether religious freedom was being infringed or not.

An assessment of how far collective religious practice is “essential” or not in comparison with other activities will necessarily differ from one person to another. Astutely, besides offering evidence that public worship can occur in secure environments, the faith community leaders who signed a collective letter to the British prime minister in early November 2020 expressing their concerns at restriction measures, attempted to present public worship not as essential in itself. Rather, they insisted on how public worship can support believers’ role in contributing to society’s well-being in terms of such vital matters as social action, social cohesion and mental health, all of which are signs of much-needed hope.⁹ This would seem to have been a productive approach to demonstrate the value of public worship in an increasingly secular environment.

But whatever other contributions religious bodies can make to society, the most crucial point is that the exercise of religion as a community is an essential component of religious freedom, which personal prayer cannot replace.¹⁰ Religious freedom and freedom of worship as a group are essentially

9. The (undated) document can be downloaded from the website of the Church of England: <https://www.churchofengland.org/sites/default/files/2020-11/Faith%20communities%20letter%20to%20Prime%20Minister%203%20November.pdf>.

10. See Cyrille Dounot, “Pas d’urgence pour la liberté de culte,” Lexbase, La lettre juridique no. 845 (Novem-



related and are in a very real sense indivisible. In light of this fact, the only issue that can be discussed is how far freedom of collective worship can temporarily be limited, adjusted or even suspended for health-related purposes.

The principle of the right to religious freedom itself should remain a fundamental freedom, and this is basically what both the Council of State in France on November 29, 2020, and the Supreme Court of the United States on November 25, 2020, have reaffirmed.¹¹ At the same time the proportionality of restrictions on public worship and the way in which comparable secular facilities are treated should be taken into consideration. The fact that religious services can be shared online through a variety of channels has been a blessing in some ways for attempts to keep in touch (although disembodied online services raise other questions beyond the topic of this paper), but they should not become a pretext for extending the closure of places of worship.¹²

In effect, however, the issues raised here go beyond the mere exercise of public worship. Health considerations are having an impact on the way worship is conducted. The issue of the use of the communion spoon in Eastern Orthodox churches is a striking instance, with a variety of reactions within churches, and possibly a lasting impact on a century-old practice.¹³

In an article published by *La Croix International*, Loup Besmond de Senneville remarks that, “what worries Rome is not so much the closure of churches for health reasons, but rather government interference in how worship services are organized.”¹⁴ There was an amazing example of this in Switzerland in spring 2020. When the Swiss federal health authorities published the rules (dated May 18) for allowing the resumption of public

ber 26, 2020), <https://www.lexbase.fr/revues-juridiques/61548948-le-point-sur-pas-d-urgence-pour-la-liberte-de-culte>.

11. As summarized in the header of the report in the *New York Times*: “The court signaled that if unconstrained religious observance and public safety are sometimes at odds, then religious freedom should win out” (Jesse McKinley and Liam Stack, “Cuomo Attacks Supreme Court, but Virus Ruling Is Warning to Governors,” *New York Times*, November 26, 2020, <https://www.nytimes.com/2020/11/26/nyregion/supreme-court-churches-religious-gatherings.html>).

12. Remote viewing of services is explicitly mentioned in the Supreme Court decision of November 25, 2020: “If only 10 people are admitted to each service, the great majority of those who wish to attend Mass on Sunday or services in a synagogue on Shabbat will be barred. And while those who are shut out may in some instances be able to watch services on television, such remote viewing is not the same as personal attendance. Catholics who watch a Mass at home cannot receive communion, and there are important religious traditions in the Orthodox Jewish faith that require personal attendance.”

13. See Alexei Krindatch, “Holy Communion during the Pandemic in American Orthodox Parishes,” *Orthodox Reality*, August 2002, <https://orthodoxreality.org/wp-content/uploads/2020/08/HolyCommunionDuringPandemicFinalReport1.pdf>.

14. Loup Besmond de Senneville, “Vatican Urges Balanced Approach to Anti-COVID Restrictions,” *La Croix International*, December 1, 2020, <https://international.la-croix.com/news/religion/vatican-urges-balanced-approach-to-anti-covid-restrictions/13423>.



worship, they recommended that communion should not be given. The Protestant Church complied, but the Roman Catholic Church intervened behind the scenes (without much noise), and a revised version of the rules without any mention of communion was later published. Besides the topic of communion, the new rules were significantly shorter than the original version. This could constitute a good guideline for any state agency that has to deal with issues pertaining to religious freedom: the best approach is to offer a general orientation without going into details that might infringe on what is essential to members of a particular religious group, even if an outsider might not be aware of such details.

Religious freedom needs to be put into context—and not only a legal context, but a cultural and political one as well. Otherwise, how would one explain that the same measure enforced in two neighboring countries would lead to strikingly different reactions? In several Swiss cantons attendance at worship was limited to 30 people in November 2020, whatever the size of the building. The faithful registered in advance (online or by phone) or were admitted without pre-registration if the list was not yet full, and were politely sent away if no place was available. Not a few people thought that the rule was too rigid, since it applied whatever the size of the place of worship, but it was respected by all denominations.

In neighboring France, the same measure was adopted (before it was overturned a few days later by the State Council). A number of Catholics (although not all of them) protested, stating that such a rule could not be enforced, or even openly broke it by allowing significantly more participants into a particular place of worship. While the rule was the same, therefore, it was not received in the same way in both countries.

Besides the challenges of finding a balance between religious freedom and health issues, resistance against pandemic-related measures by religious groups or religious figures—for instance, in countries such as France or the United States¹⁵—also represented the continuation of the “culture wars” between secular and religious positions. The pandemic does not erase pre-existing tensions, and may indeed bring them to the fore.

In an article on relations between states and religious bodies around the world during the COVID-19 crisis, Andreas Jacobs has remarked that the pandemic offered an opportunity to test these relations, with various outcomes. In Pakistan, for instance, it had allowed religious activist groups

15. A good US example (Grace Community Church in Los Angeles) is described in the last part of an article by Barry W. Bussey, “Contagion: Government Fear of Religion during the Covid-19 Crisis,” *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 54, October 2020.



to affirm their power, while in Greece, the State had mostly been able to assert its authority over the dominant Orthodox Church.¹⁶ This did not prevent the Greek Orthodox Church from reasserting itself by opening churches for the celebration of the Feast of Theophany on January 6 despite the government ban. It faced mild reactions. “We showed disobedience,” said Metropolitan Athenagoras, the spokesperson of the Holy Synod, “and the government showed tolerance.”¹⁷

Thus, the discussion on religious freedom needs to be considered within a wider perspective. On a variety of issues there is a concern that the current crisis could lead to a lasting erosion of some freedoms; this applies to religion too. In a speech in the House of Commons on November 4, 2020, the former British prime minister, Theresa May, was critical of the suspension of public worship, stating: “My concern is that the Government today is making it illegal to conduct an act of public worship, for the best of intentions, sets a precedent that could be misused for a government of the future for the worst of intentions.”¹⁸

We are not yet at the stage of “worst intentions.” But the COVID-19 crisis is one of those turning points where the nature of the relationship between States and religious groups, and the real-world expression of religious freedom, can have very practical implications for all concerned.

16. Andreas Jacobs, “Corona-Test für Religionspolitik: Das Verhältnis von Staaten und Religionsgemeinschaften zu Beginn der COVID-19 Pandemie,” in *Corona und Religionen: Religiöse Praxis in Zeiten der Pandemie*, ed. Jeannine Kunert (Berlin: Evangelische Zentralstelle für Weltanschauungsfragen, 2020), 35–49.

17. Kaki Bali, “Orthodox Church Undermines Greece’s COVID Pandemic Measures,” DW, January 16, 2021, <https://www.dw.com/en/orthodox-church-undermines-greeces-covid-pandemic-measures/a-56251674>.

18. Ed Thornton, “Theresa May Speaks out against Ban on Public Worship,” *Church Times*, November 5, 2020, <https://www.churchtimes.co.uk/articles/2020/6-november/news/uk/theresa-may-among-parliamentarians-to-speak-out-against-ban-on-public-worship>.



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THE CORONAVIRUS PANDEMIC AND RESTRICTIONS ON CHURCHES: EVALUATING THE CHRISTIAN LEGAL MOVEMENT'S ROLE IN POLARIZING RELIGIOUS FREEDOM

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ABSTRACT: The coronavirus pandemic affected virtually all aspects of American life, including how people worship. In the earliest days of the pandemic state and local governments enacted restrictions on public gatherings that affected churches and other houses of worship. In response, groups comprising the Christian legal movement filed numerous lawsuits, claiming these restrictions severely infringed on people's First Amendment rights to religious exercise. While some of these restrictions were poorly designed and unfairly singled out churches relative to other kinds of gatherings, others that were reasonable, neutral restrictions enacted in the legitimate pursuit of safeguarding public health were attacked just the same. In this article we argue that the Christian legal movement's opposition to these latter restrictions reflected the growing polarization of religious freedom in the United States. This advocacy, while occasionally providing victories for churches and other houses of worship, has the effect of turning religious freedom into yet another culture war issue. This is a problem for the future of religious freedom as a political and constitutional question, and has the potential to weaken religious freedom protections in the long run.

KEYWORDS: Polarization; Religious Freedom, Religious Liberty, First Amendment, Pandemic, COVID-19, Legal Advocacy, Christian Conservatism

During the earliest days of the 2020 coronavirus pandemic in the United States, the various levels of government enacted restrictions on large gatherings in an effort to slow the spread of the virus. Restaurants were closed, concerts and sporting events canceled, store capacities limited, and religious services halted. It was a sudden and seismic shift in the American way of life.

Religious Americans generally complied with orders pertaining to worship services, but many also expressed concerns about this regulation of religious life. Across several national surveys, white evangelicals were more likely

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than others to support churches defying government restrictions.³ Moreover, there were clear partisan gaps coinciding with support or opposition to these restrictions.⁴ And another study connected defiance to trust in Fox News.⁵ In general, the politics of COVID-19 restrictions on churches reflect the growing polarization of religious freedom,⁶ one that is poised to play a major role in future—and, in many ways, current—culture wars.⁷ As such, there are two, often simultaneous conversations going on, one legal and one political.

While most places of worship transitioned—some easily, some with greater difficulty—to online or distanced outdoor meetings to meet the requirements of local ordinances and recommendations,⁸ others fought back. Some argued that these orders violated their rights under the First Amendment. Some went so far as saying that these orders were evidence of persecution toward people of faith and ought to be opposed not just for legal reasons, but also for moral and theological ones. The details constituting these legal fights are different across venues, but the houses of worship at the center of these disputes tend to make a similar argument, that state orders regulating places of worship differently than other entities—or even regulating them at all—run afoul of the First Amendment.

This is an argument the Christian legal movement⁹ (CLM) is more

3. Paul Djupe, “Survey Numbers Chart Evangelical Defiance against the States,” Religion News Service, April 17, 2020, <https://religionnews.com/2020/04/17/survey-numbers-chart-evangelical-defiance-against-the-states/>.

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6. Andrew R. Lewis, *The Rights Turn in Conservative Christian Politics: How Abortion Transformed the Culture Wars* (New York, NY: Cambridge University Press, 2017), <https://doi.org/10.1017/9781108278171>.

7. Jeremiah Castle, “New Fronts in the Culture Wars? Religion, Partisanship, and Polarization on Religious Liberty and Transgender Rights in the United States,” *American Politics Research* 47, no. 3 (2019): 650–79.

8. Daniel A. Cox, Karlyn Bowman, and Jacqueline Clemence, “Fear, Frustration, and Faith: Americans Respond to the Coronavirus Outbreak,” AEI, April 2, 2020, <https://www.aei.org/research-products/report/fear-frustration-and-faith-americans-respond-to-the-coronavirus-outbreak/>.

9. The CLM advocates for issues important to (conservative) Christians, in the United States and around the world (see Daniel Bennett, *Defending Faith: The Politics of the Christian Conservative Legal Movement* (Lawrence, KS: University Press of Kansas, 2017)). Following other scholarship, we define the CLM as legal advocacy organizations that are distinctively Christian and exist to litigate primarily on behalf of Christians. These include groups like Alliance Defending Freedom, the Thomas More Law Center, First Liberty, and Liberty Counsel, among others (as Bennett explains in *Defending Faith*, Becket is not a member of this movement). The CLM is generally focused on issues aligned with conservative Christians, supporting a robust understanding of religious freedom, promoting traditional conceptions of sexuality, gender, and the family, and opposing legal abortion in the name of defending the sanctity of human life. This movement is composed of legal interest groups, yes, but also of law schools and legal training programs, all with the purpose of building a support structure for the movement as a whole (see Amanda Hollis-Brusky and Joshua C. Wilson, *Separate but Faithful: The Christian Right’s Radical Struggle to Transform Law & Legal Culture* (New York, NY: Oxford University Press, 2019)).



than happy to make in its lawsuits on behalf of churches and other houses of worship and in related amicus briefs. At the same time, some entities within the CLM often stoke the fears of culture wars over religious freedom when appealing to a broader, popular Christian audience, especially in their fundraising efforts. This two-pronged dialogue has in-group advantages, to be sure, but it may also hamper efforts to build useful (and necessary) coalitions and threaten the stability of religious liberty jurisprudence in the years to come.

In this article we examine the CLM's response to COVID-19-related regulations on places of worship in the United States. We argue that while these church-state conflicts are perfectly suited to draw Christian legal groups into battle, there is a good deal of diversity within the CLM in terms of groups' responses to regulations stemming from the pandemic. At the same time, we suggest that some of this movement's public arguments have the potential to exacerbate culture wars rhetoric over religious freedom, continuing to polarize this topic with damaging consequences not only for public health, but also for the prospect of robust protections for free exercise in the years to come.

There is a great deal of diversity within the CLM in terms of activity, funding, and professionalism. While Alliance Defending Freedom boasts an eight-figure budget, dozens of staff attorneys, and multiple victories before the U.S. Supreme Court, the Thomas More Law Center runs a much smaller ship and makes headlines for combating Islam in the public square.¹⁰ Though groups in the CLM tend to share a general set of goals, establishing a niche in that movement and actually enacting those goals exposes rifts among them.¹¹

Perhaps as a result of the desire to carve out a niche in an otherwise crowded community, several Christian legal groups have been active in

ty Press, 2020). While some groups (e.g., Alliance Defending Freedom) get the lion's share of attention and do the heaviest lifting in court, one must also pay attention to the CLM as a whole to understand how the rhetoric from this movement shapes ongoing culture wars controversies. For example, it was the relatively minor organization Liberty Counsel that drew national attention (and the attention of future Republican presidential candidates) for its defense of Kentucky clerk Kim Davis, who refused to issue marriage licenses following *Obergefell v. Hodges*. Liberty Counsel and groups like it may not have the pedigree or credibility of larger, more successful organizations, but they can shape the cultural narrative nonetheless. And given the competition for limited resources among like-minded interest groups, it is only natural for smaller, less influential organizations to sometimes make more hyperbolic and outlandish arguments in order to secure attention and support.

10. "Thomas More Uncovers Islamic Propaganda Forced on Teachers," Thomas More Law Center, August 22, 2019, <https://www.thomasmore.org/news/thomas-more-law-center-uncovers-taxpayer-funded-islamic-propaganda-forced-on-teachers-a-special-investigative-report/>.

11. Daniel Bennett, "The Rise of Christian Conservative Legal Organizations," Religion and Politics, June 10, 2015, <http://religionandpolitics.org/2015/06/10/the-rise-of-christian-conservative-legal-organizations/>.



litigation on behalf of churches challenging pandemic regulations. Liberty Counsel was involved in one of the country's first lawsuits on these questions, jumping to the defense of a Virginia pastor who faced penalties for continuing to hold in-person church gatherings in violation of state orders.¹² Alliance Defending Freedom represented two churches who sued Oregon's governor for maintaining restrictions on churches,¹³ and has since defended a church challenging Nevada's person limit on attendance.¹⁴ First Liberty Institute won a restraining order against a Kentucky policy limiting in-person services.¹⁵ And the Thomas More Society touted its efforts defending California pastor John MacArthur, whose church fought virtually all of California's restrictions against in-person gatherings.¹⁶

One of the earliest legal challenges to pandemic-related restrictions took place in Virginia, after the pastor of Lighthouse Fellowship was cited for holding an in-person service with 16 people, exceeding the 10-person limit set by the commonwealth.¹⁷ Liberty Counsel represented the church, focusing its arguments on the religious freedom rights of the church and the pastor. Core to the legal argument was that Virginia exempted "essential retail businesses" from the 10-person limitation, but did not do so for religious gatherings. Requiring church meetings to abide by the 10-person limitation resulted in "discriminatory restrictions on religious worship services."¹⁸

At the same time, Liberty Counsel's legal approach stoked anger over perceived government persecution of churches. Appearing before the Fourth Circuit Court of Appeals, Liberty Counsel argued that Virginia's governor "continu[ed] to place his thumb on houses of worship."¹⁹ Liberty Counsel also praised the Trump administration for the Department of

12. "Criminal Charges Against VA Pastor Dropped," Liberty Counsel, July 14, 2020, <https://lc.org/newsroom/details/071420-criminal-charges-against-va-pastor-dropped>.

13. "Oregon Governor Sued over COVID-19 Order That Allows Numerous Gatherings, Restricts Churches," Alliance Defending Freedom, May 26, 2020, <http://www.adfmedia.org/News/PRDetail/11001>.

14. "ADF to 9th Circuit: Strike down NV Governor's Rule Treating Churches Worse than Casinos," Alliance Defending Freedom, December 7, 2020, <http://www.adfmedia.org/News/PRDetail/11145>.

15. "Breaking: Judge Grants Restraining Order Against Kentucky Governor in Dispute Over In-Person Religious Gatherings," First Liberty, May 8, 2020, <https://firstliberty.org/media/breaking-judge-grants-restraining-order-against-kentucky-governor-in-dispute-over-in-person-religious-gatherings/>.

16. "Pastor John MacArthur Files Declaration Against LA County's Repeated Attacks to Shut Down Church," Thomas More Society, August 24, 2020, <https://www.thomasmoresociety.org/pastor-john-macarthur-files-declaration-against-la-countys-repeated-attacks-to-shut-down-church/>.

17. Justin Jouvenal, "DOJ Claims Virginia Governor Is Violating Religious Freedom with Pandemic Order," Washington Post, May 4, 2020, https://www.washingtonpost.com/local/legal-issues/doj-claims-virginia-governor-is-violating-religious-freedom-with-pandemic-order/2020/05/04/2c083b18-8e35-11ea-9e23-6914ee410a5f_story.html.

18. "VA Church Goes to Appeals Court," Liberty Counsel, June 29, 2020, <https://lc.org/newsroom/details/062920-va-church-goes-to-appeals-court-1>.

19. "VA Church Goes to Appeals Court."



Justice's involvement, as well as Vice President Pence's statements of support, elevating the administration's support for religious freedom in the face of discrimination, "It is reassuring," declared Mat Staver, the founder of Liberty Counsel, "to have an administration that supports religious freedom."²⁰

This pattern of coupling legal defense with culture war politics was present among other Christian legal groups. In the spring, First Liberty Institute defended churches in Kentucky opposing Governor Andy Beshear's restrictions. The lawsuit emphasized the churches' religious freedom and assembly rights under federal and state constitutions. Simultaneously, First Liberty used the events to elevate religious freedom threats, and used rhetoric that appeared designed to polarize conservatives against liberals.²¹ Debates over public health restrictions on churches were described as an "all-out war on faith,"²² and the group claimed to have exposed the "real agenda of our opponents: to keep our churches shut down indefinitely and attack religious freedom in America."²³ The American Center for Law and Justice, meanwhile, also emphasized the polarization of over religious freedom to promote its work, arguing that "extremists on the Left are using the Coronavirus as an excuse to attack Christians."²⁴

Such claims and rhetoric did not necessarily originate with the CLM, but they did find favor with Republican leadership. Though the CDC issued measured guidance for churches considering holding in-person services, President Trump emphasized political division, leveraging religious freedom rhetoric for political gain. On May 22, President Trump mirrored the arguments of Christian legal groups about churches being excluded from essential status, declaring that if governors did not allow churches to open immediately, he would "override the governors."²⁵ In August, Trump told the Catholic cable network EWTN that Democrats are using corona-

20. "VP Pence Supports VA Church Case," Liberty Counsel, May 7, 2020, <https://lc.org/newsroom/details/050720-vp-pence-supports-va-church-case>.

21. "FLI Sues Kentucky Governor on Behalf of Church," First Liberty, May 6, 2020, <https://firstliberty.org/covid-19-flisues-kentucky-governor-fb/>.

22. Jorge Gomez, "All Out War on Faith: Opponents Use COVID-19 Crisis to Launch Attacks on Religious Freedom," First Liberty, April 3, 2020, <https://firstliberty.org/news/covid-19-religious-liberty-attacks/>.

23. Jorge Gomez, "Opponents of Freedom Use COVID to Attack and Destroy the Religious Freedom Restoration Act," First Liberty, September 11, 2020, <https://firstliberty.org/news/opponents-use-covid-to-attack/>.

24. Jordan Sekulow, "The Radical Left Continues to Use the Coronavirus Crisis to Attack Faith and Conservative Values | American Center for Law and Justice," American Center for Law and Justice, April 2020, <https://aclj.org/radical-left/the-radical-left-continues-to-use-the-coronavirus-crisis-to-attack-faith-and-conservative-values>.

25. Anne Gearan et al., "Trump Tells States to Let Houses of Worship Open, Sparking Cultural and Political Fight over Pandemic Restrictions," Washington Post, May 22, 2020, https://www.washingtonpost.com/politics/trump-tells-states-to-let-houses-of-worship-open-sparking-cultural-and-political-fight-over-pandemic-restrictions/2020/05/22/1ab1c160-9c57-11ea-ad09-8da7ec214672_story.html.



virus to “put the churches out of business.”²⁶ And at the Republican National Convention, Donald Trump Jr. echoed this argument, citing recent protests over racial injustice: “People of faith are under attack. You’re not allowed to go to church, but mass chaos in the streets gets a pass.”²⁷

There are consequences to this rhetoric. One recent survey experiment asked participants whether they agreed with a generic, positive statement about religious freedom, varying the identity of the speaker as either President Trump or then-candidate Joe Biden.²⁸ Interestingly, when the statement was attributed to President Trump, support for the statement observably declined. If support for a constitutional protection like religious freedom is conditional on partisanship or support for individual candidates, this is concerning indeed.

The partisan polarization of religious freedom comes at a cost. For one thing, while the public was predictably divided over these issues, legal actions and rhetoric in some cases have obscured legitimate concerns where religious congregations were over-burdened. The rhetoric made divisions divisive. For example, earlier this summer a Nevada church challenged state restrictions limiting indoor church gatherings to 50 persons, while restricting much larger venues (such as casinos) to 50 percent capacity.²⁹ Though the Supreme Court denied injunctive relief, the Nevada church has a far better legal argument than, say, John MacArthur’s California megachurch, which refused to abide by virtually any pandemic regulation, including those related to gathering size, mask wearing, and social distancing.³⁰

Not surprisingly, this polarization of religious freedom threatened to diminish the stark reality of the pandemic, potentially leading people of faith to downplay just how serious the health crisis was at its apex. MacArthur himself repeatedly cast doubt on the seriousness of the situation, telling

26. Emily Czachor, “Trump Warns Catholic Voters Democrats Want Them ‘out of Business,’ Says He ‘Saved the Second Amendment,’” *Newsweek*, August 5, 2020, <https://www.newsweek.com/trump-warns-catholic-voters-democrats-want-them-out-business-says-he-saved-second-amendment-1523089>.

27. Jack Jenkins, “At Republican Convention, a Vision of Faith under Fire,” *Religion News Service*, August 29, 2020, <https://religionnews.com/2020/08/29/at-republican-convention-a-partisan-vision-of-faith-god-gop/>.

28. Andrew R. Lewis, “Donald Trump Hurts Public Support for Religious Freedom,” *Religion in Public*, November 2, 2020, <https://religioninpublic.blog/2020/11/02/donald-trump-hurts-public-support-for-religious-freedom/>.

29. Adam Liptak, “Supreme Court Rejects Nevada Church’s Challenge to Coronavirus Shutdown Restrictions,” *The New York Times*, July 24, 2020, <https://www.nytimes.com/2020/07/24/us/supreme-court-nevada-church-coronavirus.html>.

30. Yonat Shimron, “John MacArthur Claimed There Is ‘no Pandemic.’ He Was Politicizing Science, Experts Say,” *Religion News Service*, September 1, 2020, <https://religionnews.com/2020/09/01/john-macarthur-claimed-there-no-pandemic-he-was-politicizing-the-science/>.



congregants in an August sermon that the numbers of COVID deaths were inflated before concluding, “There is no pandemic.”³¹ Additionally, research highlighted a growing divide over the reasonableness of restrictions on churches during the pandemic, with partisanship and support for the prosperity gospel among the key drivers of this divide.³² The marriage of polarization over religious freedom and COVID-denialism threatened to unnecessarily exacerbate the crisis during the winter months, just ahead of the release of vaccines to the public.

These tensions only amplified as the pandemic raged on. Late in 2020, the Supreme Court weighed in on New York’s restrictions on in-person worship, enjoining the 10- and 25-person limits on attendance and finding that these restrictions are likely to be unconstitutional upon closer review.³³ “Even in a pandemic,” reads the Court’s per curiam opinion, “the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment’s guarantee of religious liberty.” And though the dissenting justices argued that the Court’s decision was both ignoring the government’s concern for public health and unnecessary given recent changes to the policy, Justice Gorsuch memorably wrote that the restrictions treat houses of worship different from their nonsectarian counterparts. “Who knew,” Gorsuch facetiously asked, “public health would so perfectly align with secular convenience?”

Notably, Washington University’s John Inazu agreed with the Court’s decision yet played down its widespread importance, referring to it as “fairly fact-specific injunctive relief” before adding, “It’s hard to generalize much from this decision, and I’m concerned that public messaging about it will fuel a broader culture wars narrative.”³⁴ But that’s precisely what happened. Following the decision, Alliance Defending Freedom declared, “The Constitution forbids government officials from treating religious Americans like second-class citizens,”³⁵ while First Liberty Institute

31. Mark Wingfield, “MacArthur Asserts ‘There Is No Pandemic,’” Baptist News Global, September 3, 2020, <https://baptistnews.com/article/macarthur-asserts-there-is-no-pandemic/>.

32. Paul Djupe and Ryan Burge, “Church Defiance to Covid-19 Restrictions Is Growing,” Religion in Public, November 17, 2020, <https://religioninpublic.blog/2020/11/17/church-defiance-to-covid-19-restrictions-is-growing/>.

33. Roman Catholic Diocese of Brooklyn v. Cuomo, 592 U.S. ____ (2020).

34. John Inazu, “SCOTUS Gets It Right on Religious Liberty: Church IS Essential,” Christianity Today, November 26, 2020, <https://www.christianitytoday.com/edstetzer/2020/november/scotus-gets-it-right-religious-liberty-church-is-essential.html>.

35. “US Supreme Court Halts NY Governor’s Rules That Treat Churches, Synagogues Worse than Businesses,” Alliance Defending Freedom, November 26, 2020, <http://www.adfmedia.org/News/PRDetail/11140>.



added, “Government officials may not abuse their emergency powers to discriminate against Americans of faith.”³⁶

On the other side, though, *New York Times* columnist Paul Krugman tweeted, “The first major decision of the Trump packed court – and naturally it will kill people,” while New York Governor Andrew Cuomo dismissed the Court’s ruling because of Trump’s Supreme Court’s appointments and the majority’s conservative ideology.³⁷ Rather than interpreting the decision as a limited defense of the First Amendment in the midst of an unprecedented health crisis, both sides of the divide sought to capitalize on the most extreme readings of the decision, and to use it as an example of why “the other side” must be defeated at all costs. As we have suggested in this article, this is a problem for the future of religious freedom in the United States.

When houses of worship and Christian legal groups challenge reasonable restrictions and link their efforts to partisan politics and cultural polarization, they hamper efforts to vouchsafe religious freedom on the whole and build support for the broader cause. Legitimate questions are not only dwarfed by the propensity by some churches and advocacy groups to rebuff any government regulation, but such actions inhibit broader political support for religious freedom. And limited political support will, in time, diminish legal protections. Moreover, even when courts invalidate problematic restrictions, advancing a culture war narrative connected to religious freedom only furthers this problematic divide.

The polarization of religious freedom did not begin with the arrival of COVID-19, but it certainly did not diminish during the pandemic, either. And while conservatives are not alone in their efforts to polarize issues related to religious freedom—consider the Equality Act, which explicitly prohibits individuals from appealing to the Religious Freedom Restoration Act when facing allegations of discrimination against LGBT people³⁸—organizations in the CLM have been much more active in religious freedom advocacy than their progressive counterparts. Ultimately, the CLM may win smaller battles and garner immediate political support

36. Paul Krugman, “The First Major Decision from the Trump-Packed Court — and, Naturally, It Will Kill People,” @paulkrugman (blog), November 26, 2020, <https://twitter.com/paulkrugman/status/1331974982704967681>.

37. Jesse McKinley and Liam Stack, “Cuomo Attacks Supreme Court, but Virus Ruling Is Warning to Governors,” *The New York Times*, November 26, 2020, <https://www.nytimes.com/2020/11/26/nyregion/supreme-court-churches-religious-gatherings.html>.

38. Danielle Kurtzleben, “House Passes The Equality Act: Here’s What It Would Do,” NPR, February 24, 2021, <https://www.npr.org/2021/02/24/969591569/house-to-vote-on-equality-act-heres-what-the-law-would-do>.



by fighting tooth and nail against even the most minute public health regulation, but this strategy does little to win the larger war for expanded religious freedom protections for all.



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RELIGIOUS LIBERTY IN A PANDEMIC: CONSTITUTIONAL CHALLENGES TO MASS GATHERING BANS

CAROLINE MALA CORBIN¹

ABSTRACT: The coronavirus pandemic led to an unprecedented shutdown of the United States. To stem the spread of the highly contagious pathogen, much of the country shut down for at least a month in April 2020, with the vast majority of governors ordering people to stay at home as much as possible.² When cases surged again in the United States, some states reinstated those orders. The emergency regulations usually included a ban on large gatherings, such as any in-person gathering of more than ten people. Although some states exempted worship services, others did not.³ Churches sued, arguing that these bans violated their Free Exercise Clause rights by treating worship services more strictly than analogous activities that were not banned, such as shopping at a supermarket or superstore—allowed as essential services. This essay examines these claims, concluding that the constitutionality of the bans turns on the science of how the pathogen spreads, and that the best available scientific evidence supports the mass gathering bans.

KEYWORDS: religious liberty, COVID-19, churches, bans,

I. JACOBSON OR SMITH?

Some courts faced with religious liberty challenges to COVID-19 mass gathering bans have eschewed traditional constitutional analysis, arguing that emergency circumstances call for more deferential review.⁴ In support, they cite the Supreme Court ruling in *Jacobson v. Massachusetts*, a 1905 Supreme Court case affirming mandatory vaccination during a smallpox epidemic.⁵

The Supreme Court was originally divided. Before Amy Coney Barrett was appointed as the newest Supreme Court Justice, the Supreme

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2. Jiachun Wu et al., *Stay-at-Home Orders Across the Country*, NBC News (Apr. 29, 2020), <https://www.nbc-news.com/health/health-news/here-are-stay-home-orders-across-country-n1168736>.

3. Jack Jenkins, *See Which States Have Religious Exemptions in Their Stay-at-Home Orders*, Religious News Service (Apr. 9, 2020), <https://religionnews.com/2020/04/09/see-which-states-have-religious-exemptions-in-their-stay-at-home-orders/>.

4. *See, e.g.*, *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020).

5. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905).



Court twice rejected challenges by churches to COVID-19 regulations.⁶ In a concurrence, Chief Justice Roberts explicitly cited *Jacobson* with approval.⁷ However, since then the newly configured Court struck down COVID-19 regulations more than once with no mention of *Jacobson* in the per curiam decisions.⁸ Indeed, in one, Justice Gorsuch devoted a significant part of his concurrence to attacking *Jacobson*.⁹

I am also wary of lowering constitutional scrutiny, even during a devastating pandemic. It makes it too tempting for the government to use the emergency as a pretext to limit rights; states have already successfully invoked the pandemic to curtail women’s constitutional right to abortion.¹⁰ Instead, the current doctrine articulated by *Employment Division v. Smith*, should control.¹¹ Under *Smith*, government regulations that are neutral and generally applicable do not violate the Free Exercise Clause, even if they do limit people’s ability to practice their religion.

II. NEUTRAL & GENERALLY APPLICABLE

An order is neutral if it does not target religion, and it is generally applicable if it applies broadly to the relevant population. While neutrality and general applicability are separate inquiries, the two issues are interrelated.

A. NEUTRALITY

The neutrality requirement is meant to capture discriminatory targeting of religion. According to the Supreme Court, the touchstone of neutrality is whether “the object of [the] law is to infringe upon or restrict practices *because of* their religious motivation.”¹²

At a minimum, a neutral law must be neutral on its face. A ban on all mass gatherings, whether religious or secular, is neutral on its face. However, neutrality is not limited to facial neutrality, and some courts infer hostility if religious conduct is treated differently from its secular counterparts.

If the true secular counterparts are other mass gatherings, then there is no discrimination: No hostility toward religion can be gleaned from ban-

6. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020).

7. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring).

8. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

9. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (Gorsuch, J., concurring).

10. *See, e.g., In re Abbott*, 954 F.3d 772, 784–85 (5th Cir. 2020) (upholding ban on nonemergency abortions under *Jacobson* standard).

11. *Employment Division v. Smith*, 494 U.S. 872 (1990).

12. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (italics added).



ning all gatherings of a certain size, whether they be in restaurants, bars, movie theatres, sports arenas, gyms, or houses of worship.

B. GENERALLY APPLICABLE

General applicability is another way to ferret out discriminatory treatment of religion. The idea is that “government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief.”¹³ That is, the government cannot accomplish its goals at the expense of religious organizations alone. When religious conduct must bear the cost, but not secular conduct that “endangers [the government’s] interests in a similar or greater degree,”¹⁴ a law is not generally applicable.

Although a law wouldn’t be generally applicable if it only limited large religious gatherings but not large secular ones, a ban on all mass gatherings does not have that problem.

Churches, however, argue that this is exactly what happened under the shutdown orders, which barred worship services while myriad other comparable activities, like shopping at grocery, garden, and box stores, were permitted. Nonetheless, these activities are distinguishable.

1. ESSENTIALNESS

The activities may or may not be distinguishable in terms of essentialness. Some courts have argued that the exempted activities were essential in the sense that people could not do without them. For example, a few courts have argued that the exempted activities like food shopping are essential to survival in a way that church is not: “All these stores facilitate the purchase of necessary items that help treat ill individuals who are staying at home, or that make a house habitable, or that feed people so they can stay alive.”¹⁵ This conclusion arguably embeds a contested value judgment about what is essential to human flourishing. To valorize physical needs over spiritual ones may not adequately express everyone’s priorities.

Other courts have argued that the exempted activities are essential in the sense that there are no alternatives available.¹⁶ We must eat, yet most

13. *Church of the Lukumi Babalu Aye*, 508 U.S. at 543.

14. *Church of the Lukumi Babalu Aye*, 508 U.S. at 543.

15. *Legacy Church, Inc. v. Kunkel*, 455 F. Supp. 3d 1100, 1160 (D.N.M. 2020).

16. *Antietam Battlefield KOA v. Hogan*, 461 F. Supp. 3d 214, 231 (D. Md. 2020), appeal dismissed, No. 20-1579, 2020 WL 6787532 (4th Cir. July 6, 2020) (“[U]nlike religious services, [these essential services] cannot operate remotely.”).



of us cannot grow our own food and therefore must purchase it from a supermarket. For those who must worship, alternatives to in-church services abound. People may pray to God on their own at home or together outside, online, or at drive-in services. To be sure, the experience is not exactly the same as in-person fellowship, but little in our lives today is exactly the same.

There are rebuttals and counter-rebuttals to both claims. Although people must buy food, why not have it delivered rather than purchase it in person? Of course, that assumes both the availability and affordability of delivery services, which simply may not be the state of affairs for all people and for all stores. At the same time, even if most religions do not mandate that worship take the form of large in-person gatherings, perhaps a few do.

2. HEALTH RISK

Ultimately whether these two activities can be distinguished on the basis of essentialness does not matter because they are distinguishable based on the health risks attached to them. That is, when it comes to the reason why the bans were imposed-- to limit the spread of the coronavirus-- these activities are not comparable. The risk of spreading the coronavirus is much higher at a worship service compared to shopping. Although the Supreme Court has held otherwise, it does not have science on its side.

Studies have established that people are contagious even before they exhibit symptoms,¹⁷ and that the coronavirus spreads mainly by person-to-person contact via droplets and aerosols.¹⁸ As a result, the risks of transmission appear greatest in crowded indoor spaces where people are interacting with each other for longer periods of time, especially where

17. Tina Hesman Saey, *Covid-19 May Be Most Contagious One or Two Days Before Symptoms Appear*, Science News (Apr. 15, 2020, 5:39 PM), <https://www.sciencenews.org/article/coronavirus-covid-19-infection-contagious-days-before-symptoms-appear> (noting that individuals are most likely to spread Covid-19 before they feel ill); Christie Aschwanden, *How 'Superspreading' Events Drive Most COVID-19 Spread*, Scientific America (June 23, 2020), <https://www.scientificamerican.com/article/how-superspreading-events-drive-most-covid-19-spread1> (reporting that roughly 40 percent of transmission occurs before the person shows symptoms according to CDC estimates).

18. Tanya Lewis, *How Coronavirus Spreads Through the Air: What We Know So Far*, SCIENTIFIC AMERICA (May 12, 2020), <https://www.scientificamerican.com/article/how-coronavirus-spreads-through-the-air-what-we-know-so-far1/>; Apoorva Mandavilli, *The Coronavirus Can Be Airborne Indoors*, W.H. O. Say, N.Y. TIMES (Oct. 5, 2020), <https://www.nytimes.com/2020/07/09/health/virus-aerosols-who.html>; Trisha Greehalgh et al., *Ten Scientific Reasons in Support of Airborne Transmission of SARS-CoV-2*, 297 THE LANCET 1603 (Apr. 15, 2021), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(21\)00869-2/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(21)00869-2/fulltext)



the ventilation is poor.¹⁹ The World Health Organization advises people to “Avoid the Three Cs: Confined and enclosed places, Crowded places, and Close-contact settings.”²⁰

Singing and speaking are also risk factors.²¹ One of the most notable early outbreaks in the United States was traced to a choir rehearsal at a church. Even though the singers took care to apply hand sanitizer and observe social distancing, 53 out of 61 contracted COVID-19.²² But even speaking loudly can significantly increase the risk of transmission.²³

In fact, religious services have been the vector for multiple coronavirus outbreaks.²⁴ One CDC Study found that after two positive but asymptomatic worshippers attended church events, at least 35 of 92 attendees fell ill, with three dying. Moreover, at least 26 more cases in the community could be traced to the outbreak, with one known death.²⁵

A sample from October 2020 demonstrates how often churches

19. CDC, *Scientific Brief: SARS-Cov-2 and Potential Airborne Transmission* (May 7, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html> (noting that transmission occurs after exposure to respiratory droplets or aerosols and risks increase due to enclosed spaces, inadequate ventilation, or prolonged exposure); Carolyn Barber, *Protecting Against COVID's Aerosol Threat*, *Scientific America* (Oct. 1, 2020), <https://www.scientificamerican.com/article/protecting-against-covids-aerosol-threat/>; Kai Kupferschmidt, *Why Do Some COVID-19 Patients Infect Many Others, Whereas Most Don't Spread the Virus at All?* *Science* (May 19, 2020), <https://www.sciencemag.org/news/2020/05/why-do-some-covid-19-patients-infect-many-others-whereas-most-don-t-spread-virus-all>; Martin Z. Bazant & John W.M. Bush, *A Guideline to Limit Indoor Airborne Transmission of COVID-19*, *Proceedings of the National Academic Of Sciences* (Apr. 27, 2021), <https://www.pnas.org/content/118/17/e2018995118>

20. WHO (@WHO), Twitter (July 16, 2020, 11:36 PM), <https://twitter.com/WHO/status/1283787493096202240?s=20>. Epidemiologists in Japan have long warned against the three Cs: closed spaces, crowded places, and close-contact settings where people are talking face-to-face. Office for the Novel Coronavirus Disease Control, Gov't Of Japan, *Avoid the 'Three Cs'!* (2020), <https://corona.go.jp/prevention/pdf/en.cluster2.pdf>.

21. Valentyn Stadnyskiy et al, *The Airborne Lifetime of Small Speech Droplets and their Potential Importance in SARS-CoV-2 Transmission*, 117 *Proceedings of the National Academy of Sciences* 11875 (June, 2, 2020), <https://www.pnas.org/content/117/22/11875> (“[T]here is a substantial probability that normal speaking causes airborne virus transmission in confined environments.”); Derek Thompson, *Mask Up and Shut Up*, *The Atlantic* (Aug. 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/08/wear-your-mask-and-stop-talking/615796/> (“[C]ompared with yelling, quiet talking reduces aerosols by a factor of five; being completely silent reduces them by a factor of about 50.”).

22. Lea Hamner et al., *High SARS-CoV-2 Attack Rate Following Exposure at a Choir Practice — Skagit County, Washington*, March 2020, 69 *Morbidity & Mortality Wkly. Rep.* 606, 607 (2020).

23. Hillary Brueck, *A 30-Minute Conversation May Be One of the Riskiest-COVID-19 Activities*, *Business Insider* (Nov. 3, 2020), <https://www.businessinsider.com/avoid-spreading-coronavirus-stop-talking-so-much-2020-9>; Knvul Sheikh, *Talking Can Generate Coronavirus Droplets That Linger Up to 14 Minutes*, *N.Y. Times* (June 2, 2020), <https://www.nytimes.com/2020/05/14/health/coronavirus-infections.html>.

24. See Caroline Mala Corbin, *Religious Liberty in a Pandemic*, 70 *Duke L. J. Online* 1, 22–23 nn.125–131 (providing examples).

25. Allison James et al., *High COVID-19 Attack Rate Among Attendees at Events at a Church—Arkansas*, March 2020, 69 *Morbidity & Mortality Wkly. Rep.* 632, 634 tbl. 1 (2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6920e2-H.pdf>.



served as the locus of super-spreader events.²⁶ More than 200 cases have been linked to church services at the Crossroads Community Church on October 18 in Massachusetts.²⁷ Over 213 positive cases, and 12 deaths, were traced to a North Carolina church's convocations in October.²⁸ In Maine, an October fellowship service at a church resulted in at least 62 cases of COVID-19.²⁹ A worship service on October 11 at Liberty Church in Michigan was the source of at least 74 infections.³⁰

No such severe clusters have been traced to people shopping at stores.³¹ The nature of the excursion differs from worship services, and these differences present a lower risk profile.

First, the typical time spent inside is much shorter. When people shop, they generally enter and leave the store as fast as they can. Worship services are extended affairs. A usual Sunday Catholic Mass takes at least an hour, and other services can be even longer: one plaintiff church's service lasted an hour and forty-five minutes.³²

In his dissent to an earlier Supreme Court decision to uphold California's restrictions, Justice Kavanaugh complained, "Why can someone safely walk down a grocery store aisle but not a pew?"³³ The answer is that that they can but do not: people sit in pews, not walk down them.

Second, people in stores generally try to minimize their interactions as much as possible; a feat made easier by the ability to constantly move around. In addition, the shopping can be done with little or no conversation.

In contrast, the point of in-person religious services is to commune with one's fellow worshippers. Even when social distancing, congregants

26. At this is just a sampling. See, e.g., Nakia McNabb, *At least 18 West Virginia Covid-19 Outbreaks Linked to Church Services, Governor Says*, CNN.COM (Oct. 19, 2020) (describing active Covid-19 outbreaks), <https://www.cnn.com/2020/10/19/us/west-virginia-covid-churches-trnd/index.html>.

27. Kaitlin McKinley Becker, *More Than 200 COVID-19 Cases Linked to Fitchburg Church*, NBC Boston (Nov. 7, 2020), <https://www.nbcboston.com/news/local/more-than-200-covid-19-cases-linked-to-fitchburg-church/2225433/>.

28. AP, *Three More Dead from COVID-19 Outbreak Linked to North Carolina Church*, ABC NEWS (Nov. 22, 2020), <https://wlos.com/news/local/3-more-dead-from-covid-19-outbreak-linked-to-north-carolina-church>.

29. Lauren Abbate, *Maine CDC Closes COVID-19 Outbreak Investigation Into Brooks Church*, Bangor Daily News (Nov. 20, 2020), <https://bangordailynews.com/2020/11/20/news/midcoast/maine-cdc-closes-covid-19-outbreak-investigation-into-brooks-church/>.

30. Krystle Holleman, *One Death Reported after COVID-19 Outbreak at Grand Ledge Church*, WILX10 (Nov. 11, 2020), <https://www.wilx.com/2020/11/11/one-death-reported-after-covid-19-outbreak-at-grand-ledge-church/>.

31. *Cf. Cassell v. Snyders*, 458 F. Supp. 981, 997 (N.D. Ill. 2020) ("There are many examples where religious services have accelerated the pathogen's spread ... In comparison, Plaintiffs have failed to identify a grocery store or liquor store that has acted as a vector for the virus.").

32. *Elim Romanian Pentecostal Church v. Pritzker*, No. 20 C 2782, 2020 WL 2468194, at *4 (N.D. Ill. May 13, 2020).

33. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1615 (2020) (Kavanaugh, J., dissenting).



are still in an open room, perhaps with questionable ventilation, filled with people all around them. Moreover, the fellow worshippers surrounding them are speaking and even singing for an extended period of time. Not surprisingly, the Johns Hopkins Bloomberg School of Public Health rated the contact intensity of shopping as low and the contact intensity of places of worship as high.³⁴

In sum, the current science suggests that crowded indoor spots where people talk, sing, and socialize for an extended period of time are high risk. While that generally does not describe people at their local shop, it does describe religious services. The bottom line, then, is that mass gatherings and shopping are not analogous in terms of risk. Accordingly, mass gathering bans should satisfy the neutral and generally applicable requirements of *Smith*.

A final note: this analysis assumes a ban that covers all large indoor gatherings, including gatherings inside restaurants, bars and other indoor places where people interact for a prolonged period of time. To exempt restaurants – or casinos – but not houses of worship weakens the state’s defense. Although it should not necessarily defeat it, the Supreme Court recent COVID-19 rulings suggest otherwise.

To allow all mass gatherings except religious worship inexorably leads to the conclusion that the point of the law was to burden religious exercise. It is harder to insist on that conclusion when not only religious gatherings are banned, but a long list of secular gatherings are as well, even if a few secular counterparts are permitted. However, the Supreme Court has held that they will find religious discrimination if there is a single comparable secular activity that has fewer restrictions, even if there are dozens of comparable secular activities that have more restrictions.³⁵ Consequently, the strongest mass gathering bans are comprehensive. If they are, then there is no reason to exclude houses of worship. Unfortunately, this conclusion depends on a Supreme Court getting the comparisons right, and not comparing “apples to watermelons.”³⁶

34. John Hopkins Bloomberg School of Public Health, Public Health Principles for a Phased Re-Opening During Covid-19: Guidance For Governors, 12, 16 (Apr. 17, 2020), https://www.centerforhealthsecurity.org/our-work/pubs_archive/pubs-pdfs/2020/200417-reopening-guidance-governors.pdf. The Guide also rated worship services as “high” in number of contacts, compared to “medium” for retail. *Id.*

35. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (“[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise. It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue.”).

36. *Cf. Tandon v. Newsom*, 141 S. Ct. 1294, 1298 (2021) (Sotomayor, J., dissenting) (“[T]he law does not require that the State equally treat apples and watermelons.”).



CONCLUSION

Bans on all mass gatherings, including religious ones, should be perfectly constitutional in the midst of a pandemic. The Supreme Court once noted that “The right to practice religion freely does not include liberty to expose the community . . . to communicable disease.”³⁷ Whether that sentiment still holds true is now an open question. Our constitutional rights are precious, but none of them should be absolute--especially if exercising them endangers others.

37. *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944).



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CONFLICTS BETWEEN PUBLIC HEALTH MEASURES AND RELIGIOUS FREEDOM IN A PERIOD OF PANDEMIC

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ABSTRACT: In the United States of America, government responses to the COVID-19 pandemic have brought into focus conflicts between public health activities and religious liberty. State and local governments utilized familiar and long-established public health measures to combat this pandemic, including surveillance, testing, reporting, contact tracing, sanitation, closure, isolation, quarantine, and social distancing.² Closure orders have had significant effects on religious believers and their places of worship. In addition to disrupting regular worship assemblies, public health orders also disrupted other important religious services, including baptisms and Eucharistic celebrations, weddings and funerals, last rites and pastoral counseling, religious education and charitable works. Many jurisdictions enforced public health measures even-handedly against religious and secular institutions, and some state and municipal governments displayed attentive sensitivity to the unique concerns of faith communities. In some instances, however, governments adopted overly restrictive measures or enforced measures unequally against religious institutions. Litigation was instituted in many jurisdictions, with litigants bringing claims under federal and state law.³ Courts, including the United States Supreme Court, have issued rulings in many cases. This paper examines conflicts between public health orders and religious liberty that arose in the United States during the COVID-19 pandemic, and it argues that the strict-scrutiny standard, rather than the rational-basis standard or a com-

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2. See Lawrence O. Gostin & Lindsay F. Wiley, *Public Health Law: Power, Duty, Restraint* 391-433 (3d. ed. 2016).

3. In addition to challenges claiming violations of religious liberty, challenges were also brought on other constitutional and statutory grounds. For instance, challenges were brought based upon separation of powers grounds. In Wisconsin, the state supreme court determined that the Secretary-designee of the state Department of Health Services exceed her lawful authority in making a generally applicable rule without following the statutorily mandated procedure. *Wisconsin Legislature v. Palm*, 942 N.W.2d 900 (Wis. 2020). In Michigan, the state supreme court determined that the governor lacked lawful authority to make emergency declarations after a date set by the legislature. *In re Certified Questions from the United States District Court*, ___ N.W.2d ___ (Mich. 2020). In Pennsylvania, the state supreme court determined that the governor had authority to issue an executive order, which was a proper exercise of police power and did not violate the doctrine of separation of powers. *Friends of Danny DeVito v. Wolf*, 227 A.3d 872 (Pa. 2020).



parable standard, is the appropriate standard to protect religious liberty from infringement by government orders in the current public health crisis. It explores these conflicts by considering several of the judicial rulings. However, before turning to these cases, this paper considers several constitutional background issues and the public health enterprise.

KEYWORDS: public health, measures, religious freedom, COVID-19 pandemic

CONSTITUTIONAL BACKGROUND

Conflicts between public health measures and religious freedom are not new in America. Indeed, the design reflected in state constitutions assumes that such conflicts will arise. While state constitutions recognize that governments must secure the rights and liberties of the people, including religious freedom, they also declare that governments exist for the peace, safety, and wellbeing of the people. State governments thus possess the police power, which is the authority to provide for common goods like public health, safety, order, and morals. Consequently, government efforts to promote the public's health will generate conflicts with the rights and liberties of the people.

Conflict between a public health measure and personal liberty was evident over a century ago in the Supreme Court's decision in *Jacobson v. Massachusetts*. In that case, the Court considered Mr. Jacobson's challenge to a Massachusetts law that authorized municipalities to mandate smallpox vaccination. When the city of Cambridge acted under this statutory authority and required adults be vaccinated, Jacobson refused and was fined. He asserted a substantive due process claim, arguing that Massachusetts law violated liberty secured by the Constitution. The Court disagreed, determining that the local ordinance was a reasonable exercise of police power and that Jacobson's liberty was subjected to reasonable restraint for the common good.⁴

THE PUBLIC HEALTH ENTERPRISE

Government in the United States grew in size and scope over the ensuing century following the Jacobson decision, and government now reaches into nearly every facet of life and society. This is evident in the proliferation of federal, state, and local administrative agencies that distribute benefits and regulate private activity, including activity affecting the public's health. During much of the twentieth century, the mission of public health was

⁴. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).



focused upon the control and prevention of disease and injury, and public health initiatives led to many significant achievements, including effective vaccinations, safer foods and vehicles, fluoridated drinking water, cleaner air and water, and safer workplaces. Conflicts between public health activities and religious liberty were limited and suitable for accommodation. For instance, many jurisdictions granted religious and philosophical exemptions to mandatory vaccinations to accommodate conscience concerns.

Over the last few decades, however, public health advocates have sought to expand the scope of the public health mission. The “new public health” movement points to various social, economic, and environmental factors, and it urges that the reach of public health includes addressing these social “determinants” of health by, among other things, combatting poverty, expanding educational and economic opportunities, ameliorating racial and gender inequalities, and confronting crime, violence, and social disorder. These advocates resist the core ideals of classical liberalism (e.g., individualism, freedom, self-discipline, personal responsibility, and limited government) and emphasize instead collective interests, social accountability, and government intervention. And even as they pit the public’s health against the individual and her rights, including religious liberty, they contend that science and the public good support the expanded reach of public health and their more robust undertaking.⁵

The proponents of the new public health thus seek to advance an agenda that goes beyond the traditional public health mission and measures, and they urge courts to apply deferential standards (like the reasonableness standard applied by the Court in *Jacobson*) rather than stricter standards applied when suspect classifications and fundamental rights are involved.⁶ Furthermore, as became evident in its defense of various public health initiatives over the last decade and a half, the new public health movement advocates weakened versions of the rights of individuals and corporate bodies whether the freedom of speech, the right to bear arms, or the freedom of religion.⁷ Accordingly, the freedom of religious believers and institutions is at best a minor concern for the new public health.⁸

5. For a thoughtful examination of the “new public health” movement, see Lindsay F. Wiley, *Rethinking the New Public Health*, 69 Wash. & Lee L. Rev. 207 (2012).

6. See, e.g., Michael R. Ulrich, *A Public Health Law Path for Second Amendment Jurisprudence*, 71 Hastings L.J. 1053, 1070-84 (2020).

7. See, e.g., Elizabeth Sepper, *Introduction*, 50 WASH. U.J.L. & POL’Y 1, 1-3 (2016) and the articles published in Volume 50 of the journal (symposium entitled “Toward a Healthy First Amendment”).

8. See, e.g., B. Jessie Hill, *The First Amendment and the Politics of Reproductive Health Care*, 50 WASH. U.J.L. & POL’Y 103, 116-17 (2016).



CONFLICTS WITH RELIGIOUS LIBERTY

The cause of the current health crisis is the spread of an infectious disease. Consequently, this pandemic fits well within the traditional scope of the public health enterprise. Government in the United States thus rightly responded to the pandemic with long-established public health measures, but these measures nonetheless precipitated wide-scale conflicts with religious freedom and other rights. Indoor religious services (and even outdoor services in some jurisdictions) were prohibited. When permitted to meet indoors, occupancy was limited, masks and social distancing were required, singing was banned, and in some locales, government agents were present to monitor. Even though government-mandated closures and government-imposed conditions on reopening restrained the free exercise of religion, religious believers and institutions exhibited considerable deference and respect, and they largely complied with government orders and guidance.

However, these conflicts between public health measures and religious freedom spawned litigation in those jurisdictions in the United States that adopted overly restrictive measures or enforced measures unequally against religious institutions. Claims based on religious freedom were raised under both the First Amendment to the United States Constitution and the federal Religious Freedom Restoration Act (RFRA). The First Amendment bars federal, state, and local governments from prohibiting the free exercise of religion. Because the Supreme Court's decision in *Employment Division v. Smith* permits government to apply neutral laws of general applicability that burden the free exercise of religion,⁹ First Amendment challenges to coronavirus-related measures have focused on unequal treatment and the targeting of religion based upon regulations that allowed some businesses to operate and some public gatherings to occur while churches were restricted from doing the same.¹⁰

Several cases reached the United States Supreme Court, and the first three of these will be considered here. Each involved state government restrictions on worship during the pandemic. In two of the three cases, the Court denied church applications to enjoin harsh restrictions on worship. In the third case, the Court granted injunctions in favor of a Catholic diocese and an Orthodox Jewish synagogue. As the cases reached the Court over a period of several months, the Court gradually awakened from a

9. *Employment Division v. Smith*, 494 U.S. 872 (1990).

10. The church autonomy doctrine under the First Amendment and equal protection under the Fourteenth Amendment should also provide viable avenues for pressing constitutional claims, but they are not explored here.



posture of wooden deference to state public health officials to a more enlightened awareness that the interests of religiously scrupulous people and religious institutions can co-exist with health and safety measures.

In none of these cases did the Court resolve the latent tension in its Free Exercise jurisprudence between the deferential neutrality standard of *Employment Division v. Smith*¹¹ and the strict-scrutiny standard of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.¹² Under *Lukumi*, when government discriminates against or targets religion and thus violates the minimum requirement of neutrality, it must satisfy strict scrutiny. In such a case, the regulation must be “narrowly tailored” using the least restrictive means to serve a “compelling” government interest, which is an interest of the highest order.¹³

In the first case to reach the Court, *South Bay United Pentecostal Church v. Newsom*, the Court denied an application for injunctive relief against California’s restrictions on public gatherings that limited attendance at places of worship.¹⁴ In his concurring opinion, Chief Justice Roberts argued that California’s occupancy cap did not appear to offend free exercise, for it treated places of worship comparably to similar secular gatherings where people congregate in close quarters for extended periods and differently from dissimilar activities where people do not congregate in large groups or remain in close proximity for extended periods.¹⁵ He further argued that courts should grant broad deference to executive officials who must nimbly respond to changing conditions and changing scientific revelations in their attempt to protect the public’s health. For Roberts, the bottom line was that changing facts (i.e., changing infection and death rates) plus changing science (i.e., changing information regarding viral spread and virulence) equals the widest berth in favor of executive officials, especially when injunction relief is sought at a preliminary stage of litigation.¹⁶

In his dissenting opinion, Justice Kavanaugh showed the importance of identifying the proper comparator for determining the applicable standard and evaluating the government’s treatment. In Kavanaugh’s view, California imposed an occupancy cap on places of worship that it did not impose on comparable secular businesses. This discrimination against places of worship led him to analyze California’s regulation under the

11. See *supra* note 9 and accompanying text.

12. *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993).

13. *Id.* at 546.

14. *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (mem.).

15. *Id.* at 1613.

16. *Id.* at 1613-14.



strict-scrutiny standard of *Lukumi* instead of the neutrality standard of *Smith*.¹⁷ Kavanaugh did not deny that California has a compelling interest in protecting the public from COVID-19, but he argued that the state must provide compelling justification for subjecting houses of worship to a tight occupancy limit but not subjecting comparable secular businesses such as supermarkets, restaurants, factories, and offices to any occupancy limit. California, he concluded, failed to provide compelling justification for its discrimination against religion.¹⁸

In *Calvary Chapel Dayton Valley v. Sisolak*, the Court denied a church's application for injunctive relief against Nevada's less favorable treatment of religious services than secular services at casinos, bowling alleys, and other favored establishments.¹⁹ Justice Alito (joined by Thomas and Kavanaugh) dissented from the Court's denial of injunctive relief, concluding that the church was likely to succeed on its free exercise and free speech claims.²⁰ In Alito's view, the state's differential treatment of religious services warranted strict-scrutiny analysis under *Lukumi*,²¹ and its favoring of secular expression over religious expression was anathema to the First Amendment.²² In addition to determining that Nevada's regulation could not withstand strict-scrutiny analysis, Alito explained that the *Jacobson* decision should not be read to establish the test for constitutional provisions not at issue in that case.²³ In a separate dissenting opinion, Justice Gorsuch observed that the First Amendment prohibits discriminatory treatment that restricts religious organizations to fifty worshippers but that does not place a similar cap on entertainment venues.²⁴

In his separate dissenting opinion, Kavanaugh found that Nevada treated religious organizations equally with some secular organizations but worse than other secular organizations.²⁵ He argued that "the government must articulate a sufficient justification for treating some secular organizations or individuals more favorably than religious organizations or individuals."²⁶ He was not persuaded by Nevada's proffered reasons for different treatment. First, the state did not demonstrate that public health

17. *Id.* at 1614.

18. *Id.* at 1615.

19. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020) (mem.).

20. *Id.* at 2605.

21. *Id.* at 2605-07.

22. *Id.* at 2607-08.

23. *Id.* at 2608.

24. *Id.* at 2609.

25. *Id.* at 2611-12.

26. *Id.* at 2613.



justifies a looser limit at casinos and gyms but a stricter limit at places of worship, especially considering that people at casinos and gyms will congregate in large groups and remain in close proximity for extended²⁷ periods. Second, the state's claim of economic justification was unacceptable because it may not favor businesses because they generate economic benefits but discriminate against religious organizations because they do not generate the same benefits.²⁸ He observed that among the red lines that government may not cross even in a crisis are racial discrimination, religious discrimination, and content-based suppression of speech.²⁹

The dissents in *Calvary Chapel* are noteworthy for two additional reasons. First, they highlight the hypocrisy of government authorities narrowly restricting religious services conducted under mask and distancing protocols, while allowing non-religious services under conditions posing greater risks. Second, they underscore the time element. The exigency that existed at the onset of the pandemic had passed, and the four months that had transpired gave the state ample time to craft policy and calibrate restrictions to accommodate constitutional rights.

In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Court granted injunctive relief against New York's occupancy limits on attendance at religious services.³⁰ The religious organizations claimed that the severe restrictions violated the First Amendment by targeting the Orthodox Jewish community and treating houses of worship more harshly than comparable secular businesses (like acupuncturists, liquor stores, and bicycle repair shops) that were deemed essential and subjected to no capacity restrictions. The Court determined that the restrictions were not neutral and generally applicable and thus that the strict-scrutiny standard of *Lukumi* applied.³¹ In addition to concluding that the restrictions were not narrowly tailored,³² the Court observed that, "even in a pandemic, the Constitution cannot be put away and forgotten."³³ Thus, the Court showed greater concern about disparate treatment of religious organizations by executive officials in the *Diocese of Brooklyn* case than it had in the two previous cases.³⁴

In his concurring opinion, Justice Gorsuch criticized the Roberts

27. *Id.* at 2613-14.

28. *Id.* at 2614.

29. *Id.* at 2614-15.

30. *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam).

31. *Id.* at 67.

32. *Id.* at 67.

33. *Id.* at 68.

34. Justice Amy Coney Barrett's appointment to the Court undoubtedly contributed to an outcome in this case that differed from *South Bay and Calvary Chapel*.



concurrence in *South Bay* for relying on the Court's earlier decision in *Jacobson* and for suggesting slack enforcement of constitutional liberties during a pandemic.³⁵ Gorsuch observed that the rational-basis mode of analysis in *Jacobson* is the test normally applied under the Fourteenth Amendment when no suspect classification or fundamental right is involved. Accordingly, he thought, *Jacobson* teaches that courts do not "depart from normal legal rules during a pandemic," and thus the Court should apply the "normal" test in this First Amendment case, which is strict scrutiny under *Lukumi* because of the government's discriminatory treatment of religious exercise.³⁶ Additionally, Gorsuch noted that entirely different rights were at issue in *Jacobson* and *Diocese of Brooklyn*. *Jacobson* involved an implied substantive due process right to "bodily integrity," but the *Diocese of Brooklyn* case involved a textually explicit right to practice religion.³⁷ Gorsuch also found the restrictions in *Jacobson* and *Diocese of Brooklyn* to differ in nature. In *Jacobson*, the vaccination law allowed individuals to "opt-out" by paying a fine or claiming an exemption and thereby avoid the intrusion upon "bodily integrity." Given the opt-out and exemption provisions, Gorsuch thought, Massachusetts's turn-of-the-century law may have been capable of surviving strict-scrutiny analysis. However, in *Diocese of Brooklyn*, New York afforded houses of worship no comparable exemption scheme. In a "red" or "orange" zone, New York permitted no traditional forms of worship when the Governor so ordered and for as long as he ordered.³⁸

In his separate concurring opinion, Kavanaugh highlighted the severely restrictive and discriminatory nature of New York's regulations.³⁹ In his view, New York had neither justified excluding houses of worship from treatment extended to secular businesses it favored nor tailored its restrictions.⁴⁰

In his dissenting opinion, Chief Justice Roberts expressed concern that New York's numerical limits seemed unduly restrictive and raised serious constitutional questions, but he thought the requested relief was not needed because New York had adjusted its restrictions.⁴¹ Justice Breyer issued a separate dissenting opinion that Justices Sotomayor and Kagan joined,⁴² and

35. *Id.* at 69.

36. *Id.* at 70.

37. *Id.* at 70-71.

38. *Id.* at 70.

39. *Id.* at 72-73.

40. *Id.* at 73.

41. *Id.* at 75-76.

42. *Id.* at 76-78.



Sotomayor issued a separate dissenting opinion that Kagan joined.⁴³ They believed that the extraordinary remedy of an immediate injunction was not needed at that time because the applicants were not then subject to the fixed-capacity limits, and they contended that government officials should have broad discretion to address the public’s health needs.⁴⁴ Sotomayor and Kagan also thought that *South Bay and Calvary Chapel* provided a workable rule allowing restrictions on attendance at religious services “so long as comparable secular institutions face restrictions that are at least equally as strict.”⁴⁵

In *Capitol Hill Baptist Church v. Bowser*, a lower federal court considered a church’s challenge to restrictions imposed by Mayor Muriel Bowser and the District of Columbia.⁴⁶ The church claimed that the District’s restrictions violated the federal RFRA, which requires governmental actions that substantially burden religious exercise to satisfy the strict-scrutiny standard. In *Bowser*, the federal court determined that the District’s order prohibiting the church from holding outdoor worship services (even with appropriate mask and distancing precautions) failed under the strict-scrutiny standard,⁴⁷ and it granted the church injunctive relief.⁴⁸

In reaching this conclusion, the court observed that the District substantially burdened the church’s religious exercise by prohibiting the church from meeting together as a congregation as its faith requires.⁴⁹ The court found that the District failed to demonstrate a compelling interest in banning the church from gathering for religious worship outdoors with appropriate safeguards,⁵⁰ and it found that less restrictive but equally effective alternatives were available.⁵¹ In its reasoning, the court concluded that the less demanding standard of *Jacobson* was not the appropriate standard.⁵² The court also observed that the District significantly undercut its position when Mayor Bowser encouraged mass gatherings for purposes of peaceful protests⁵³ and when the District allowed dining establishments

43. *Id.* at 78–81.

44. *Id.* at 78–79.

45. *Id.* at 79.

46. *Capitol Hill Baptist Church v. Bowser*, 496 F.Supp.3d 284 (D.D.C. 2020).

47. *Id.* at 289 (citing Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb et seq.). The federal RFRA applies to the federal government, the District of Columbia, and federal territories, but not the states.

48. *Id.* at 303.

49. *Id.* at 301–302.

50. *Id.* at 303.

51. *Id.*

52. *Id.*

53. *Id.* at 298. In defending her favoring of mass protests over religious worship, Mayor Bowser asserted that “First Amendment protests and large gatherings are not the same” because, “in the United States of America, people can protest.” Michelle Boorstein, *Prominent Evangelical Church Is the First to Sue D.C. over COVID-19 Worship Limits*, Washington Post (Sept. 22, 2020).



to serve meals outdoors with no restrictions.⁵⁴

Litigation and demand letters also presented claims under state RFRA and other state laws against public health orders restricting religious services. In a number of jurisdictions, state and local officials adjusted restrictions in response to litigation or demand letters from legal counsel.⁵⁵ In Kentucky, Maryville Baptist Church challenged two orders of Governor Andy Beshear under the state RFRA and the First Amendment.⁵⁶ The Sixth Circuit enjoined the enforcement of these orders against the church.⁵⁷ The court found that the church was likely to succeed on its state RFRA claim that the governor's orders substantially burdened sincerely held religious practices (i.e., conducting drive-in worship gatherings) and that the orders were not the least restrictive means of achieving the government's compelling interest.⁵⁸ The court also determined that the church was likely to succeed on its First Amendment claim because the orders failed strict-scrutiny analysis by prohibiting religious activity while creating exceptions for comparable secular activities.⁵⁹

Some of the current conflicts between public health measures and religious liberty should resolve as effective vaccines and therapeutics become available. However, additional conflicts will emerge as public health authorities consider mandating COVID-19 and flu vaccinations for health care workers and first responders, as well as vulnerable populations, school children, and even the general population.⁶⁰ These conflicts will pit governments and the communities they represent against individuals who object to mandated vaccinations on religious and other grounds.

54. *Bowser*, 496 F.Supp.3d at 299-300. After the Roman Catholic Archdiocese of Washington, D.C. filed a separate lawsuit against the District in December of 2020, Mayor Bowser modified her order, increasing the capacity for in-person worship to 25% of the building capacity or 250 total persons, whichever is smaller. See District of Columbia, Mayor's Order 2020-126 (Dec. 16, 2020) <https://coronavirus.dc.gov/sites/default/files/dc/sites/coronavirus/page_content/attachments/Mayor%27s%20Order%202020-126%20%2011-16-2020.pdf>. See also Karl A. Racine, Statement on Settlement with Catholic Archdiocese of Washington (Dec. 22, 2020) <<https://oag.dc.gov/release/statement-ag-racine-settlement-catholic>> (stating that the Archdiocese would comply with the District's December 16, 2020 order).

55. See, e.g., Letter from The Becket Fund for Religious Liberty to Governor Tim Walz and Attorney General Keith Ellison May 20, 2020 <<https://s3.amazonaws.com/becketnewsite/Becket-Letter-to-Governor-Walz.pdf>>; Letter from Sidley Austin LLP et al. to County Executive Joseph T. Parisi et al. (June 3, 2020) <<https://s3.amazonaws.com/becketnewsite/Diocese-of-Madison-Letter-to-County-City-and-PHMDc-with-Attachment.pdf>>.

56. *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 611 (6th Cir. 2020) (per curiam).

57. *Id.* at 616.

58. *Id.* at 612-13.

59. *Id.* at 614-15.

60. See Stephanie Desmon, *Could COVID-19 Vaccines Become Mandatory in the U.S.?* (Nov. 20, 2020) <<https://hub.jhu.edu/2020/11/20/could-coronavirus-vaccines-become-mandatory/>>. Employers are also considering mandating the COVID-19 vaccine. See Andrea Hsu, *As COVID-19 Vaccine Nears, Employers Consider Making It Mandatory* (Nov. 25, 2020) <<https://www.npr.org/2020/11/25/937240137/as-covid-19-vaccine-nears-employers-consider-making-it-mandatory>>.



Additionally, if public health advocates and authorities find opportunity in the present public health crisis to advance the broader agenda of the new public health, additional conflicts will arise. However, at least as far as religious freedom is concerned, the strict-scrutiny standard should impel officials to more carefully calibrate restrictions and grant exemptions that strike the appropriate balance.

CONCLUSION

The coronavirus pandemic required governmental response, and executive officials and public health authorities throughout the United States have taken decisive and urgent action to protect their communities. However, governmental intervention, even in the interest of achieving public goods, is a double-edged sword, and its impact on the religious liberty of individuals and institutions should not be minimized. As *The Williamsburg Charter*, adopted in commemoration of the 200th anniversary of Virginia's call for the federal Bill of Rights, explains: "Less dramatic but also lethal to freedom and the chief menace to religious liberty today is the expanding power of government control over personal behavior and the institutions of society, when the government acts not so much in deliberate hostility to, but in reckless disregard of, communal belief and personal conscience."⁶¹

During the coronavirus pandemic, Americans have witnessed both deliberate hostility to and reckless disregard of communal belief and personal conscience by government. But they have also witnessed examples of governmental sensitivity to and respect for faith communities and religious believers. Those Americans who are most concerned with religious liberty must remain attentive to government interventions, even when such interventions are in the name of public health, for the encroachment of public health activities on religious liberty may be too readily justified, too easily implemented, and too long endured. Given the persistent threat government interventions pose to religious liberty, the strict-scrutiny standard, as recognized in First Amendment jurisprudence and approved in the federal and state RFRAS and other state laws, helps to ensure that government strikes the right balance, and it does so by encouraging government officials to consult faith leaders and narrowly tailor any measure intended to protect public health so as not to unduly burden religious freedom.

61. *The Williamsburg Charter* (1988), reprinted in 8 *J.L. & Religion* 5, 9 (1990).



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For further information about the *Fides et Libertas* book review policies and procedures, or to submit your name as a reviewer, or an idea for a book to be reviewed, contact:

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