

April 2022

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Recommended Citation

John Inazu, *COVID-19, Churches, and Culture Wars*, 18 U. ST. THOMAS L.J. 307 (2022).
Available at: <https://ir.stthomas.edu/ustlj/vol18/iss2/4>

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ARTICLE

COVID-19, CHURCHES, AND CULTURE WARS

JOHN INAZU*

The First Amendment's Free Exercise Clause often requires courts and officials to balance competing interests of the highest order.¹ On the one hand, the Constitution recognizes the free exercise of religion as a fundamental right. On the other hand, the government sometimes has compelling reasons for limiting free exercise, especially in situations involving dangers to health and safety. The shutdown and social distancing orders arising out of the COVID-19 pandemic raised the stakes on both sides of this equation. They not only restricted free exercise but also curtailed what many people consider to be the core of that exercise: religious worship. But the orders did so in order to stop the spread of a deadly virus, a public health interest of the highest order. These already high constitutional stakes were further heightened by a rapidly changing pandemic, a heated presidential election, and Justice Amy Coney Barrett's Supreme Court appointment, all of which fueled the fire of the culture wars. This article explores the free exercise implications of the Court's resolution of challenges to the COVID-19 shutdown orders through these constitutional and cultural lenses.

* Sally D. Danforth Distinguished Professor of Law and Religion, Washington University in St. Louis. Portions of this Article draw from previous essays including *Close the Churches*, ATLANTIC (Mar. 18, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/close-churches/608236>; *Obeying God Rather than Men? What's Really a Religious Liberty Issue?*, CHRISTIANITY TODAY (July 31, 2020), <https://www.christianitytoday.com/edstetzer/2020/july/obeying-god-rather-than-men.html>; *SCOTUS Gets it Right on Religious Liberty*, CHRISTIANITY TODAY (Nov. 26, 2020), <https://www.christianitytoday.com/edstetzer/2020/november/scotus-gets-it-right-religious-liberty-church-is-essential.html>. Thanks to Chad Flanders for comments on an earlier version of this Article, and to Clare Carter, Seth Reid, and Alex Siemers for research assistance. Thanks also to Zachary Port, Brandon Mickelsen, Tyler Wessman-Conroy, and Mary Clare Mulcahy at the *University of St. Thomas Law Journal*.

1. See *Wis. v. Yoder*, 406 U.S. 205, 215 (1972) (“[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”).

I. BACKGROUND

During the COVID-19 pandemic, the Supreme Court responded to five significant requests for injunctive relief involving worship: *South Bay United Pentecostal Church v. Newsom*,² *Calvary Chapel Dayton Valley v. Sisolak*,³ *Roman Catholic Diocese of Brooklyn v. Cuomo*,⁴ *South Bay United Pentecostal Church v. Newsom II*,⁵ and *Tandon v. Newsom*.⁶

South Bay was decided in May 2020 in response to reopening plans outlined by California Governor Gavin Newsom and officials in San Diego County. The plans allowed retail stores, offices, restaurants, and schools to open but kept houses of worship closed.⁷ *South Bay United Pentecostal Church* argued that these orders were unconstitutional because they discriminated against religious organizations.⁸ After losing its request for injunctive relief at the district court and the Ninth Circuit, the church appealed to the Supreme Court. By that time, the San Diego County Health Department had issued an order allowing churches to hold services, as long as they: (1) limited attendance to 25 percent of their building capacity or a maximum of one hundred people (whichever was lower); and (2) practiced social distancing.⁹ *South Bay* argued it was still harmed by the new guidelines because its building seated 600, and its attendance was normally somewhere between 200 and 300.¹⁰ The Supreme Court denied the request. Chief Justice Roberts concurred, emphasizing relevant differences between those activities permitted to remain open on the one hand, and churches and other restricted activities on the other.¹¹ Justice Kavanaugh, joined by Justices Thomas and Gorsuch, disagreed and argued that the Court should have

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

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

4. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020).

5. *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021).

6. *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

7. *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (“[T]he Order exempts or treats more leniently . . . dissimilar activities, such as operating grocery stores, banks, and laundromats . . .”).

8. Emergency Application for Writ of Injunction Relief Requested by Sunday, May 24, 2020 at 1, *S. Bay United Pentecostal Church*, 140 S. Ct. (No. 19A1044).

9. See Opposition of State Respondents to Emergency Application for Writ of Injunction at 11, *S. Bay United Pentecostal Church*, 140 S. Ct. (No. 19A1044).

10. The state emphasized that the church had not asked for an order blocking the enforcement of the new guidance in the lower courts and argued that the church could add more services if it wanted to ensure that everyone could attend. *Id.* at 14–15.

11. Chief Justice Roberts concluded that the “comparable secular gatherings” were activities such as “lectures, concerts, movie showings, spectator sports, and theatrical performances,” since those were where “large groups of people gather in close proximity for extended periods of time.” *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613. Although the order exempted or treated more favorably some activities like grocery stores and banks, Chief Justice Roberts contended that these were “dissimilar activities” where “people neither congregate in large groups nor remain in close proximity for extended periods.” *Id.*

applied strict scrutiny because the order treated similarly situated activities more favorably than worship gatherings.¹²

In July 2020, the Court decided *Calvary Chapel* in response to Nevada Governor Steve Sisolak's order limiting "[c]ommunities of worship and faith-based organizations" to fifty people for in-person services.¹³ The order imposed less onerous restrictions on bowling alleys, restaurants, gyms, pools, and other businesses, allowing them to reopen at 50 percent capacity.¹⁴ And it subjected casinos to a 50 percent occupancy limit on each gaming area.¹⁵ *Calvary Chapel* argued that the order was unconstitutional because it discriminated against the free exercise of religion.¹⁶ The Supreme Court denied its request for relief.¹⁷

Diocese v. Cuomo came just before Thanksgiving, in response to New York Governor Andrew Cuomo's restrictions. Governor Cuomo created different zones based on infection rates and imposed heightened restrictions corresponding to those zones. The most restrictive zone, the red zone, limited in-person gatherings to the lesser of ten people or 25 percent of maximum capacity.¹⁸ The orange zone relaxed those restrictions to the lesser of

12. *Id.* at 1614 (Kavanaugh, J., dissenting from denial of application for injunctive relief).

13. *Calvary Chapel Dayton Valley v. Sisolak*, No. 20-cv-00303, 2020 WL 4260438, at *1 (D. Nev. June 11, 2020), *rev'd*, 982 F.3d 1228 (9th Cir. 2020); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020).

14. Nev. Declaration of Emergency Directive 021 - Phase Two Reopening Plan §§ 20, 25, 26, 28, 29 (May 28, 2020), [https://gov.nv.gov/News/Emergency_Orders/2020/2020-05-28_-_COVID-19_Declaration_of_Emergency_Directive_021__Phase_Two_Reopening_Plan_\(Attachments\)](https://gov.nv.gov/News/Emergency_Orders/2020/2020-05-28_-_COVID-19_Declaration_of_Emergency_Directive_021__Phase_Two_Reopening_Plan_(Attachments)) [hereinafter Nev. Declaration].

15. *Id.* § 20.

16. The district court denied a motion for a temporary restraining order or preliminary injunction, and the district court and the Ninth Circuit both denied an injunction pending appeal. *Calvary Chapel Dayton Valley*, 2020 WL 4260438, at *1 (denying temporary restraining order and emergency motion for preliminary injunction); *Calvary Chapel Dayton Valley v. Sisolak*, No. 20-cv-00303, 2020 WL 3404700, at *2 (D. Nev. June 19, 2020) (denying motion for an injunction); *Calvary Chapel Dayton Valley v. Sisolak*, No. 20-16169, 2020 WL 4274901, at *1 (9th Cir. July 2, 2020) (denying emergency motion for injunctive relief pending appeal).

17. Although movie theaters, museums, and trade schools were restricted to the lesser of fifty persons or 50 percent of the building's capacity, *see* Nev. Declaration §§ 20, 30, arcades and bowling alleys were only required to be at 50 percent capacity. *Id.* § 20. Seizing on Chief Justice Roberts's conclusion in *South Bay* that theaters were comparable to religious gatherings, Nevada argued that its order treated religious gatherings the same as non-religious gatherings because theaters were also restricted to a fifty-person limit. Respondents Steve Sisolak and Aaron D. Ford's Response to Emergency Application for an Injunction and Respondent Frank Hunewil's Limited Joinder Thereto at 15, *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020) (No. 19A1070). Nevada further argued that those activities it treated differently than religious gatherings, such as restaurants and casinos, were not comparable to religious gatherings. *Id.* at 17–18. As a decision without an opinion, the Court's reason for denying the application for injunctive relief remains unclear. However, given Chief Justice Roberts's rationale in *South Bay* that theaters are like religious gatherings and that grocery stores and banks are not like religious gatherings, *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) it is likely that the Court found Nevada also treated similar activities alike.

18. *Governor Cuomo Announces New Cluster Action Initiative*, New York State (Oct. 6, 2020), <https://www.governor.ny.gov/news/governor-cuomo-announces-new-cluster-action-initiative> [hereinafter NY Order].

twenty-five people or 33 percent of maximum capacity.¹⁹ While houses of worship were capped at ten persons in red zones, “essential” businesses—including “acupuncture facilities, camp grounds, garages, . . . plants manufacturing chemicals and microelectronics”—could admit as many people as they wished.²⁰ The Roman Catholic Diocese of Brooklyn and Agudath Israel of America challenged red and orange zone designations affecting religious gatherings.²¹ The Supreme Court granted the request for emergency relief after concluding that the plaintiffs were likely to succeed on the merits of their free exercise claim alleging discriminatory treatment of religious organizations.²²

In February 2021, the Supreme Court relied on *Diocese v. Cuomo* to grant partial injunctive relief to churches objecting to California’s COVID-

19. *Id.* The governor also designated yellow zones, where in-person gatherings are limited to 50 percent capacity. *Id.*

20. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020) (per curiam).

21. Emergency Application for Writ of Injunction at i, 23, *Roman Cath. Diocese*, 141 S. Ct. 63 (No. 20A87).

22. *Roman Cath. Diocese*, 141 S. Ct. at 63. The petitioners attested—without contradiction from the state—that they had “complied with all public health guidance, ha[d] implemented additional precautionary measures, and ha[d] operated at 25% or 33% capacity for months without a single outbreak.” *Id.* at 66. But the petitioners claimed that Governor Cuomo had targeted religious gatherings for harsher treatment than “comparable secular facilities.” *Id.* Although noting that the remarks were not outcome-determinative, the Court cited the dissent in the appellate court for evidence that the “challenged rules can be viewed as targeting the ‘ultra-Orthodox [Jewish] community.’” *Id.* (quoting *Agudath Isr. of Am. v. Cuomo*, 980 F.3d 222, 229 (2d Cir. 2020) (Park, J., dissenting)) (alteration in lower court opinion). One of the petitioner’s alleged that the zones subject to restriction evidence the “Governor’s targeting of Orthodox Jewish communities.” Emergency Application for Writ of Injunction Relief Requested by 3:00 PM on Friday, Nov. 20, 2020 at 5–11, *Agudath Isr. of Am. v. Cuomo*, 141 S. Ct. 889 (2020) (No. 20A90) [hereinafter *Agudath Israel Petition*]. See generally *Audio & Rush Transcript: Governor Cuomo is a Guest on CNN Newsroom with Poppy Harlow and Jim Sciutto*, New York State, (Oct. 9, 2020), <https://www.governor.ny.gov/news/audio-rush-transcript-governor-cuomo-guest-cnn-newsroom-poppy-harlow-and-jim-sciutto> (transcribing Governor Cuomo’s explanation of the zones targeted). In an interview, Governor Cuomo acknowledged that they were targeting “a couple of unique clusters, frankly, which are more religious organizations,” because those clusters had higher rates of infection. *Id.* In issuing the order, Governor Cuomo acknowledged that this order is “right on the line of government intrusion on religion.” Nicole Hong & Liam Stack, *Cuomo’s Restrictions on Synagogues in Virus Hot Spots Can Go Forward*, N.Y. TIMES, <https://www.nytimes.com/2020/10/09/nyregion/cuomo-synagogues.html> (Nov. 16, 2020). Some Orthodox Jews in the Boroughs Park neighborhood protested following the new order, “light[ing] masks on fire and attack[ing] at least three people, including two local men accused of disloyalty to the Hasidic community.” *Id.* In May, long before the contested order, as churches reopened, the Diocese did not initially offer public Mass and waited a week after it was legally authorized before reopening in-person weekday services. Emergency Application for Writ of Injunction at 9, *Roman Cath. Diocese*, 141 S. Ct. 63 (No. 20A87). The synagogues suing in *Agudath Israel* attest that they adopted “rigorous health protocols,” including the splitting of traditional services to accommodate social distancing and requiring masks during the “entirety of their religious services.” *Agudath Israel Petition*, *supra*, at 5. Given the efforts these religious organizations attested to making to comply with COVID-19 restrictions and the explicit targeting of Orthodox Jewish neighborhoods for restrictions, the case raised the concern of state animus toward religion, such as existed in *Masterpiece Cakeshop Ltd. v. Colo. Civ. Rts. Comm’n*, 138 S. Ct. 1719 (2018). See *Agudath Israel Petition*, *supra*, at 19–25 (not labeling the question “animus” but discussing *Masterpiece* extensively).

19 restrictions in *South Bay II*.²³ While allowing percentage capacity limitations and a prohibition on singing and chanting during indoor services, the Court enjoined California from enforcing a total prohibition on indoor worship services.²⁴

In April 2021, the Court yet again enjoined California's COVID-19 restrictions in *Tandon*—this time, with respect to at-home religious gatherings.²⁵ The Court began with a potentially significant development in free exercise law, noting that “government 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.”²⁶ This language built upon the Court's free exercise framework holding that generally applicable and neutral laws need only survive rational basis scrutiny against free exercise challenges.²⁷ The Court had previously hinted at the meaning of both “generally applicable” and “neutral,”²⁸ but *Tandon* was the first time the Court had concluded that a single comparable secular activity treated more favorably than religious exercise would trigger strict scrutiny.²⁹

The Court next determined that in assessing California's restrictions, the “comparability [of religious and secular activities] is concerned with the risks various activities pose, not the reasons why people gather.”³⁰ The Court emphasized the government's burden of satisfying strict scrutiny and concluded it had not been met.³¹ Justice Kagan dissented, joined by Justices Breyer and Sotomayor, finding that the California regulations applied equally to *at-home* activities, whether religious or secular, and that the proper comparator for at-home religious activities is at-home secular activities rather than “hardware stores and hair salons.”³²

The five decisions summarized above are not the only free exercise challenges to COVID-19 shutdown orders. In December 2020, the Court considered and rejected a request for injunctive relief for religious schools,³³ and it remanded several other cases in light of its decision in

23. *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 719 (2021).

24. *Id.* at 719–20.

25. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296–97 (2021).

26. *Id.* at 1296.

27. *Emp. Div. Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 881–82 (1990).

28. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543–46 (1993); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018).

29. Then-Judge Alito had reached a similar conclusion in *Fraternal Ord. of Police v. Newark*, 170 F.3d 359, 360 (3d Cir. 1999) (holding that a police department's policy prohibiting officers from wearing beards must include a religious exception because it authorized exemptions for medical reasons).

30. *Tandon*, 141 S. Ct. at 1296.

31. *Id.* at 1296–97. The Court also noted that a case is not necessarily mooted upon the modification or lifting of COVID-19 restrictions, particularly when such restrictions could be reinstated. *Id.* at 1297.

32. *Id.* at 1298 (Kagan, J., dissenting).

33. *Danville Christian Acad., Inc. v. Beshear*, 141 S. Ct. 527, 528 (2020).

Diocese v. Cuomo.³⁴ And a number of lower courts have addressed other COVID-19 restrictions.³⁵

34. See, e.g., *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 1289, 1289–90 (2021); *Gish v. Newsom*, 141 S. Ct. 1290, 1290 (2021); *Gateway City Church v. Newsom*, 141 S. Ct. 1460, 1460 (2021). Justice Gorsuch also rejected a church’s request for injunctive relief in *Denver Bible Church v. Polis*, No. 20-1391, 2021 WL 2379811, at *28 (10th Cir. June 9, 2021), *appl. for inj. denied*, No. 20A163 (U.S. filed May 3, 2021).

35. During the COVID-19 pandemic, a number of courts have granted relief to plaintiffs in their challenges to shutdown orders. See *Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020) (granting injunction pending appeal of orders prohibiting in-person services at the plaintiff church if the church adheres to public health requirements); *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 616 (6th Cir. 2020) (granting injunction pending appeal of orders prohibiting drive-in services at plaintiff church if the church adheres to public health requirements); *Monclova Christian Acad. v. Toledo-Lucas Cty. Health Dep’t*, No. 20-4300, 2020 WL 7778170, at *4 (6th Cir. Dec. 31, 2020) (granting plaintiff religious private school’s motion for injunction against county resolution closing down all public, private, and parochial schools); *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 904 (W.D. Ky. 2020) (enjoining Louisville from enforcing prohibition on drive-in church services against petitioning church); *Tabernacle Baptist Church, Inc. of Nicholasville v. Beshear*, 459 F. Supp. 3d 847, 856 (E.D. Ky. 2020) (granting temporary restraining order and enjoining enforcement of “prohibition on mass gatherings with respect to any in-person religious service which adheres to applicable social distancing and hygiene guidelines”); *Berean Baptist Church v. Cooper*, 460 F. Supp. 3d 651, 660, 665 (E.D.N.C. 2020) (granting plaintiffs’ emergency motion for temporary restraining order, enjoining enforcement of executive order that worship services involving more than ten people be held outside unless “impossible” to hold outdoors); *Capitol Hill Baptist Church v. Bowser*, No. 20-CV-02710, 2020 WL 5995126, at *1 (D.D.C. Oct. 9, 2020) (granting injunctive relief under RFRA to church seeking to hold “socially-distanced outdoor worship services in which congregants wear masks”). Other courts have found relief to not be warranted. See *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 343–44 (7th Cir. 2020) (affirming district court’s denial of preliminary injunction, holding that an Illinois order does not discriminate on the basis of religion); *Lawrence v. Colorado*, 455 F. Supp. 3d 1063, 1072 (D. Colo. 2020) (denying relief to complainant because relief would not provide redress); *Legacy Church, Inc. v. Kunkel*, 472 F. Supp. 3d 926, 1087 (D.N.M. 2020) (denying relief from COVID-19 order); *Calvary Chapel of Bangor v. Mills*, 459 F. Supp. 3d 273, 285, 288 (D. Me. 2020) (finding “Gathering Orders” neutral toward religious organizations and denying plaintiff’s motion for temporary restraining order), *appeal dismissed*, No. 20-1507, 2020 WL 7585178 (1st Cir. Dec. 22, 2020); *Spell v. Edwards*, 460 F. Supp. 3d 671, 678 (M.D. La.) (denying plaintiffs’ motion for temporary restraining order and preliminary injunction), *order vacated, appeal dismissed*, 962 F.3d 175 (5th Cir. 2020) (finding the case moot); *Cross Culture Christian Ctr. v. Newsom*, 445 F. Supp. 3d 758, 769–71 (E.D. Cal. 2020) (denying temporary restraining order on COVID-19 order because court concluded the order was neutral toward religion), *appeal dismissed*, No. 20-15977, 2020 WL 4813748 (9th Cir. May 29, 2020); *Bullock v. Carney*, 463 F. Supp. 3d 519, 525 (D. Del. 2020) (denying request for temporary restraining order on COVID-19 order), *aff’d*, 806 F. App’x 157 (3d Cir. 2020), *and aff’d*, No. 20-2096, 2020 WL 7038527 (3d Cir. June 4, 2020); *Solid Rock Baptist Church v. Murphy*, 480 F. Supp. 3d 585, 601 (D.N.J. 2020) (finding executive order as to large indoor gatherings neutral and generally applicable and denying plaintiff’s emergency motion for preliminary injunction); *Andrew Wommack Ministries, Inc. v. Polis*, No. 20-CV-02922, 2020 WL 5810525, at *4 (D. Colo. Sept. 29, 2020) (denying plaintiff’s motion for temporary restraining order and preliminary injunction on COVID-19 order); *Antietam Battlefield KOA v. Hogan*, 461 F. Supp. 3d 214, 242 (D. Md. 2020) (denying plaintiffs’ motion for temporary restraining order of stay-at-home order), *appeal dismissed*, No. 20-1579, 2020 WL 6787532 (4th Cir. July 6, 2020); *Whitsitt v. Newsom*, No. 20-cv-00691, 2020 WL 4818780, at *1 (E.D. Cal. Aug. 19, 2020) (magistrate judge finding stay-at-home order neutral toward religion and recommending the granting of defendant’s motion to dismiss), *report and recommendation adopted*, No. 20-cv-00691, 2020 WL 5944195 (E.D. Cal. Oct. 7, 2020); see also *Cnty. of L.A. v. Grace Cmty. Church of the Valley*, No. 20STCV30695, 2020 WL 6302631, at *1

II. CONSTITUTIONAL ANALYSIS

The constitutional analysis of the COVID-19 shutdown orders is complicated by the fractured landscape of free exercise law. The confusion began with the Court's 1990 decision, *Employment Division v. Smith*, a case involving Native American spiritualists seeking an exemption from a law banning the use of peyote.³⁶ Prior to *Smith*, courts generally reviewed government action confronted by free exercise claims with a high degree of scrutiny;³⁷ *Smith* unexpectedly and controversially lowered the level of constitutional protection.³⁸ Subsequent legislative and judicial responses to that decision at the federal and state levels created a patchwork landscape for adjudicating free exercise claims, introducing different standards of review depending on the jurisdiction or nature of the claim. For example, if a house of worship challenged a shutdown order from the federal government, the Religious Freedom Restoration Act (RFRA) would require courts to review the order with the highest level of judicial scrutiny.³⁹ However, if the challenged shutdown order came from a state or local government, RFRA would not apply, and the claim would depend on state constitutional and legislative protections and their interpretations by state courts.⁴⁰

Regardless of the order's source, any litigant may also assert a violation of the First Amendment's Free Exercise Clause, and this was the basis on which petitioners challenging the orders sought injunctive relief. After *Smith*, the first step of the free exercise analysis requires courts to decide

(Cal. Super. Sept. 10, 2020) (granting plaintiff county preliminary injunction against church meeting for indoor worship services). Following *Roman Cath. Diocese*, the Supreme Court granted certiorari to several petitions, vacated lower court opinions, and remanded in light of the opinion in *Roman Cath. Diocese*. See *High Plains Harvest Church v. Polis*, 141 S. Ct. 527, 527 (2020); *Harvest Rock Church v. Newsom*, 141, S. Ct. 889, 889 (2020). Lower courts, following suit, vacated and remanded district courts in light of *Roman Cath. Diocese*. See *Soos v. Cuomo*, No. 20-3737, 2021 WL 37592, at *1 (2d Cir. Jan. 5, 2021); and *S. Bay United Pentecostal Church v. Newsom*, 981 F.3d 765, 766 (9th Cir. 2020). In December 2020, the Museum of the Bible has indicated that it might bring suit under the Religious Freedom Restoration Act, alleging that the shuttering of the museum violates that free exercise of religion of employees and visitors. Sarah Pulliam Bailey & Peggy McGlone, *Museum of the Bible considers suing D.C. mayor over virus shutdown, citing religious freedom claims*, WASH. POST (Dec. 23, 2020, 4:58 PM), <https://www.washingtonpost.com/religion/2020/12/23/bible-museum-covid-restrictions-lawsuit/>.

36. *Emp. Div. Dep't of Hum. Res. v. Smith*, 494 U.S. 872, 874 (1990).

37. See, e.g., *Wis. v. Yoder*, 406 U.S. 205, 214 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

38. *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1883 (2021) (Alito, J., concurring) (summarizing the judicial, legislative, and scholarly critiques of *Smith*).

39. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014) (describing the RFRA least-restrictive-means standard as "exceptionally demanding").

40. See, e.g., *Maryville Baptist Church*, 957 F.3d at 612–13 (holding that a COVID-19 order likely violated Kentucky's version of RFRA); *On Fire Christian Ctr., Inc.*, 453 F. Supp. 3d at 913 (same). A later law amending RFRA, the Religious Land Use and Institutionalized Persons Act (RLUIPA), would possibly, though not at all certainly, increase the level of scrutiny applied to state and local restrictions. *Cross Culture Christian Ctr.*, 445 F. Supp. 3d at 771 (finding RLUIPA inapplicable to a COVID-19 shutdown order because order "regulate[s] conduct, not land use").

whether the challenged law or regulation is neutral and generally applicable. If the law is both neutral and generally applicable, then the government action faces only rational basis scrutiny. Under this deferential review of the challenged regulation, courts need only find a reasonable purpose underlying the action to uphold the action.⁴¹ If the law fails either of the neutrality or general applicability prongs, *Smith* suggests that it should be subjected to strict scrutiny, which means that the government must show a narrowly tailored compelling interest.⁴²

To determine neutrality and general applicability, courts generally look to a case decided three years after *Smith*: *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.⁴³ In *Lukumi*, the Court struck down an animal sacrifice restriction that affected practitioners of the Santeria religion. After finding that the restriction failed both the neutrality and general applicability requirements, the Court applied strict scrutiny and struck down the regulation.

One important dimension of the *Smith-Lukumi* test is that the distinct inquiries into general applicability and compelling interest usually cut in the same direction. For example, in *Lukumi*, numerous exemptions for non-religious animal killings indicated that the restriction lacked general applicability.⁴⁴ But those exemptions also undercut the government's claim to a compelling interest: if limiting animal killing was really such an important interest to justify restrictions on the free exercise of religion, then why were so many non-religious animal killings permitted?

41. *Agudath Isr. of Am. v. Cuomo*, No. 20-3572, 2020 WL 7691715, at *7 (2d Cir. Dec. 28, 2020) (“[A] neutral and generally applicable policy is subject to only rational-basis review.” (citing *Cent. Rabbinical Cong. of U.S. & Can. v. N.Y.C. Dep’t of Health & Mental Hygiene*, 763 F.3d 183, 193 (2d Cir. 2014))); see also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (“[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.”).

42. Under this test, the government would need to articulate a compelling interest, and its directive would need to be narrowly tailored toward accomplishing its interest. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 531–32 (“A law [that is not neutral and generally applicable] must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.”). The “narrowly tailored” requirement is absent from the version of the strict scrutiny test set forth in RFRA. See 42 U.S.C. § 2000bb-1(b) (“Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling interest.”); cf. *id.* at 1734 (Gorsuch, J., concurring) (referencing narrowly tailored prong and arguing “[t]oday’s decision respects these principles”). For an argument that the Court has been inconsistent in the free exercise context when it comes to the standard for strict scrutiny, see David Boyle, *It’s Time for Scalian Strict Scrutiny to “Strict Scrutiny” in RFRA, Zubik v. Burwell, and Elsewhere*, casetext (Mar. 18, 2016), <https://casetext.com/analysis/its-time-for-scalian-strict-scrutiny-to-strict-scrutiny-in-rfra-zubik-v-burwell-and-elsewhere>. Boyle characterizes strict scrutiny as consisting of three prongs—compelling state interest, narrow tailoring, and least-restrictive means—and notes how cases like *Lukumi* and *Hobby Lobby* muddy the waters on the exact formulation. *Id.*

43. 508 U.S. 520 (1993).

44. See *id.* at 542–46.

This convergence of general applicability and compelling interest holds across most free exercise contexts.⁴⁵ The COVID-19 shutdown orders provide a rare example of a lack of general applicability in some ways *strengthening* the government's claim to a compelling interest in restricting religious exercise. Social distancing to prevent the spread of COVID-19 presents a collective-action problem: it only works if most people decide to follow along,⁴⁶ even if their own individual preferences would have them do otherwise. But all shutdown orders include necessary exemptions for hospitals and certain essential government services, some of which will require large groups of people to congregate. These necessary exceptions increase the risk of spread, which strengthens the compelling nature of the government's interest in everybody else's compliance.⁴⁷

If COVID-19 shutdown orders only exempted hospitals and essential government services, then restrictions affecting houses of worship would likely survive strict scrutiny even though the restrictions would not be generally applicable.⁴⁸ The complication is that the various challenged orders exempted a dizzying array of other activities that made the orders far less generally applicable.⁴⁹ And, in at least one case, *Diocese v. Cuomo*, the

45. See, e.g., *Holt v. Hobbs*, 574 U.S. 352 (2015). In a well-known opinion from his time on the Third Circuit, then-Judge Samuel Alito concluded that a single nonreligious exemption to a police-department policy prohibiting beards on officers (the nonreligious exemption was for medical conditions) required the department to grant a religious exemption. *Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 367 (3d Cir. 1999).

46. Research suggests that the efficacy of social distancing depends on the number of those who practice it: “[t]he more participants practiced social distancing, the less likely they were to have contracted COVID-19 over the next [four months].” Russell H. Fazio, Benjamin Ruisch, Courtney Moore, Javier Granados Samayoa, Shelby Boggs & Jesse Ladanyi, *Social distancing decreases an individual's likelihood of contracting COVID-19*, PROCEEDINGS NAT'L ACAD. SCI. U.S. (Feb. 23, 2021), <https://www.pnas.org/content/pnas/118/8/e2023131118.full.pdf>.

47. The only other example I can think of that works this way is a mandatory vaccination that requires herd immunity to work. Because some immunocompromised members of the population are unable to be vaccinated, the state's interest in vaccinating everyone else (including religious objectors) might *increase* as a result of the exemption for those immunocompromised members if that exemption alone precludes other exemptions due to the necessity of herd immunity. My thanks to my former student Lilly Wurm for helping me see the connections between vaccines and free exercise general applicability in a December 2019 seminar paper that predated the COVID-19 pandemic.

48. In such a situation, the government would have a high compelling interest because granting exemptions to grocery stores and hospitals increases the need for reducing exposure elsewhere. Although consider grocery stores in a more lethal and more transmittable pandemic: officials could likely order home delivery only.

49. In red zones, only essential businesses can be open, dining is takeout only, and schools are only online; in orange zones, only “high-risk non-essential businesses” must be closed, outdoor dining only, and schools are only online; in yellow zones, businesses are open, indoor and outdoor dining is permitted, and schools are open. NY Order, *supra* note 18. “Essential businesses” include hardware stores, bicycle repair services, laundromats, pet food stores, banks, insurance companies, and others. Empire State Dev., *Guidance for Determining Whether a Business Enterprise Is Subject to a Workforce Reduction Under Recent Executive Orders*, N.Y. STATE (Oct. 23, 2020, 10:00 AM), <https://esd.ny.gov/guidance-executive-order-2026>.

analysis was further complicated by evidence that New York's regulation lacked neutrality as well as general applicability.

One final free exercise dimension to these cases is whether the government advanced its compelling interest in slowing the spread of COVID-19 through a narrowly tailored means. For example, if the best scientific evidence suggested that fifty masked and socially distanced congregants could meet for indoor worship, then a restriction limiting services to ten masked and socially distanced congregants, or a restriction shutting down in-person worship entirely, would arguably lack narrow tailoring.⁵⁰ On the other hand, if the best scientific evidence suggested that no amount of in-person worship could be safely conducted, then shutting down worship services entirely would be narrowly tailored.

Some commentary around these cases suggested that prohibiting in-person worship was permissible because virtual services are fully adequate substitutes.⁵¹ But from a constitutional perspective, if a claimant represents that virtual worship imposes a substantial burden on the free exercise of religion, then courts are not able to second-guess the soundness of that theological conclusion.⁵²

The preceding analysis covers only the substantive free exercise inquiry in these cases. Because all of the cases came to the Court on petitions for emergency injunctive relief, the justices also had to consider additional inquiries. One such issue was the threshold analysis of whether these cases were appropriately reviewable under the Court's justiciability doctrine. In *Diocese v. Cuomo*, Chief Justice Roberts concluded that they were not.⁵³ A

50. There is, of course, some disagreement as to what counts as the "best scientific evidence." But at the time of most of the challenged restrictions, there was widespread consensus that the virus spread most readily through airborne transmission, that non-circulating or poor-circulating airflow contributed to the likelihood of spread, and that wearing masks decreased the risk of spread. These factors increased the risk of indoor gatherings, particularly those in which participants would be closely gathered and unmasked. The plaintiffs in *Diocese v. Cuomo* ensured that their indoor gatherings were distanced and masked, exceeding the guidelines recommended by the CDC. Emergency Application for Writ of Injunction at 10–11, *Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (No. 20A87).

51. For a theological critique of the adequacy of virtual services, see Esau McCauley, *Why You Can't Meet God Over Zoom*, N.Y. TIMES (Dec. 24, 2020), <https://www.nytimes.com/2020/12/24/opinion/zoom-church-christmas-covid-loss.html> (describing the inadequacy of virtual worship).

52. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 723–24 (2014) (noting that it is not the Court's place to determine whether a religious belief is reasonable). The move to virtual services might also raise a different kind of substantial burden claim if it made access more difficult than in-person worship. Consider a house of worship without the networked infrastructure to stream virtual services, or with congregants who lack access to computers or Zoom. The move from in-person to virtual in these circumstances plausibly creates a substantial burden. Theoretically, if that is the only substantial burden (if, in other words, the congregants would be fully satisfied with virtual worship if they could access it), the state could pay for the technology and therefore satisfy the least restrictive means analysis.

53. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 75 (2020) (Roberts, C.J., dissenting).

second inquiry was whether the cases met the standard for emergency relief, which requires a showing of irreparable harm and a likelihood of success on the merits.⁵⁴ There is no indication in *South Bay* or *Calvary Chapel* that a majority of the Court believed these predicates had been met.⁵⁵ In contrast, in *Diocese v. Cuomo*, both the district court and the Supreme Court concluded that the houses of worship had met the standard for irreparable harm. The Supreme Court also concluded that the litigants had demonstrated a likelihood of success on the merits.⁵⁶

The Court's denials of injunctive relief in *South Bay* and *Calvary Chapel* generated mixed responses from scholars and pundits. *South Bay* received little criticism outside of right-leaning commentators.⁵⁷ *Calvary*

54. *Id.* at 66 (citing *Winter v. Nat. Res. Def. Couns., Inc.*, 555 U.S. 7, 20 (2008)). Generally, a violation of First Amendment rights is always going to be an irreparable harm. *Id.* at 67 (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion))).

55. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (2020) (Roberts, C.J., concurring) (noting that injunctive relief requires the legal rights be “indisputably clear” and finding it “improbable” that the government’s limitations were unconstitutional).

56. *Roman Cath. Diocese*, 141 S. Ct. at 66–68. The disagreement between Justice Gorsuch and Chief Justice Roberts regarding a 1905 Supreme Court case is illustrative of the culture-wars angle discussed *infra*. In *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the Supreme Court upheld a Massachusetts law that allowed local boards of health to require and enforce the vaccination of all their inhabitants if “necessary for the public health or . . . safety;” any adult who refused to comply with the law faced a fine of \$5 (about \$150 today). *Id.* at 70–71 (Gorsuch, J., concurring); *Id.* at 75–76 (Roberts, C.J., dissenting). Chief Justice Roberts’s *South Bay* concurrence cited *Jacobson*: “Our Constitution principally entrusts ‘[t]he safety and the health of the people’ to the politically accountable officials of the States ‘to guard and protect.’” *S. Bay United Pentecostal Church*, 140 S. Ct. at 1614 (Roberts, C.J., concurring in denial of application for injunctive relief) (quoting *Jacobson*, 197 U.S. at 38). In *Diocese v. Cuomo*, Justice Gorsuch’s concurrence discusses *Jacobson*: “*Jacobson* hardly supports cutting the Constitution loose during a pandemic.” *Roman Cath. Diocese*, 141 S. Ct. at 70 (Gorsuch, J., concurring). Justice Gorsuch argued that *Jacobson* “involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction.” *Id.* But Justice Gorsuch then went on to attack the Chief Justice: “[T]oday the author of the *South Bay* concurrence even downplays the relevance of *Jacobson* for cases like the one before us . . . But it would require a serious rewriting of history to suggest, as the Chief Justice does, that the *South Bay* concurrence never really relied in significant measure on *Jacobson*. That was the first case *South Bay* cited on the substantive legal question before the Court, it was the only case cited involving a pandemic, and many lower courts quite understandably read its invocation as inviting them to slacken their enforcement of constitutional liberties while COVID lingers.” *Id.* at 71 (citations omitted). In dissent, Chief Justice Roberts replied: “[W]hile *Jacobson* occupies three pages of today’s concurrence, it warranted exactly one sentence in *South Bay*.” *Id.* at 75 (Roberts, C.J., dissenting). The Chief Justice then quoted that sentence and said “[i]t is not clear which part of this lone quotation today’s concurrence finds so discomfiting. The concurrence speculates that there is so much more to the sentence than meets the eye, invoking—among other interpretive tools—the new ‘first case cited’ rule. But the actual proposition should be uncontroversial, and the concurrence must reach beyond the words themselves to find the target it is looking for.” *Id.* at 76.

57. See Lawrence Friedman, Opinion, *Supreme Court rightly allows the states to combat the coronavirus*, THE HILL (Aug. 11, 2020, 2:00 PM), <https://thehill.com/opinion/judiciary/511458-supreme-court-rightly-allows-the-states-to-combat-the-coronavirus>; Ian Millhiser, *Why 4 justices on the Supreme Court voted to reopen churches in the pandemic*, VOX (May 30, 2020, 2:05 PM), <https://www.vox.com/2020/5/30/21275379/supreme-court-churches-roberts-kavanaugh-south-bay-united-pentecostal-newsom>; Mark Movesian, *Quick Thoughts on the California Church-Clo-*

Chapel faced stronger criticisms from across the political spectrum, especially given Nevada's exemption for casinos.⁵⁸ But the real firestorm came after *Diocese v. Cuomo*.

III. *DIOCESE V. CUOMO* AND THE CULTURE WARS

To some on the right, *Diocese v. Cuomo* represented a massive victory for religious liberty writ large. Megachurch pastor John MacArthur, who had earlier declared “there is no pandemic” and flouted state restrictions by holding indoor worship for 7,000 unmasked parishioners, tweeted: “It’s divine providence at work as the Lord uses the death of Ruth Bader Ginsberg, the hubris of @NYGovCuomo, the determination of @realDonaldTrump, and the convictions of Justice Barrett to protect the freedom of his church.”⁵⁹ California pastor Greg Fairrington cheered the Supreme Court’s decision from the pulpit the following Sunday.⁶⁰ Some reactions on the left were similarly grandiose. Writing in *USA Today*, law professors Laurence Tribe and Michael Dorf fretted that *Diocese v. Cuomo* foreshadowed “the theocratic and misogynist country in Margaret Atwood’s dystopian ‘The Handmaid’s Tale.’”⁶¹ In a follow-up post, Dorf warned of a “SCOTUS Theocracy.”⁶²

sure Case, REASON: THE VOLOKH CONSPIRACY (June 2, 2020, 11:03 AM), <https://reason.com/volokh/2020/06/02/quick-thoughts-on-the-california-church-closure-case/>. *But see* Carrie Campbell Severino, *The Court Deals a Blow to a Pentecostal Church Just before Pentecost Sunday*, NAT’L REV. (June 1, 2020, 1:31 PM), <https://www.nationalreview.com/bench-memos/the-court-deals-a-blow-to-a-pentecostal-church-just-before-pentecost-sunday>.

58. See Matthew T. Martens, Opinion, *I told fellow believers our liberties would be protected in the pandemic. The court proved me wrong.*, WASH. POST (July 28, 2020, 2:29 PM), <https://www.washingtonpost.com/opinions/2020/07/28/closing-churches-is-grievous-burden-courts-should-not-impose-it-lightly/>; Henry Olsen, Opinion, *John Roberts strikes again. Conservatives should be furious.*, WASH. POST (July 27, 2020, 4:51 PM), <https://www.washingtonpost.com/opinions/2020/07/27/john-roberts-strikes-again-conservatives-should-be-furious/>; Editorial, *Rendering Unto Caesars Palace: The Supreme Court lets Nevada discriminate against churches.*, WALL ST. J. (July 26, 2020, 5:15 PM), <https://www.wsj.com/articles/rendering-unto-caesars-palace-11595798141>. *But see* Linda Greenhouse, Opinion, *The Supreme Court’s Religious Crusaders Take On the Pandemic Response*, N.Y. TIMES (July 30, 2020), <https://www.nytimes.com/2020/07/30/opinion/supreme-court-religion-coronavirus.html>.

59. John MacArthur (@johnmacarthur), TWITTER (Nov. 26, 2020, 10:22 AM), <https://twitter.com/johnmacarthur/status/1331996773217431557?s=20>.

60. Dale Kasler, “Biblical mandate”: California churches ready to defy Newsom after Supreme Court ruling, SACRAMENTO BEE (Dec. 1, 2020), <https://www.sacbee.com/news/california/article247507750.html> (reporting that Fairrington “opened Sunday’s service by pulling out his cell phone and reading aloud from a fresh U.S. Supreme Court decision” and “then looked out at his congregants at Destiny Church and shouted: ‘The Supreme Court of the United States of America — yeah! We have a biblical mandate and First Amendment rights!’”).

61. Laurence H. Tribe & Michael C. Dorf, Opinion, *To this Supreme Court, religious freedom trumps public health – even amid COVID-19 plague*, USA TODAY (updated Nov. 29, 2020, 4:38 PM), <https://www.usatoday.com/story/opinion/2020/11/29/religious-rights-trump-covid-illness-deaths-supreme-court-column/6436196002>.

62. Michael C. Dorf, *Under-reacting to SCOTUS Theocracy*, DORF ON LAW (Dec. 2, 2020, 11:03 AM), <http://www.dorfonlaw.org/2020/12/under-reacting-to-scotus-theocracy.html>.

The narrow ruling in *Diocese v. Cuomo* hardly justifies these reactions. To reach its decision, five justices decided complicated—and not entirely black-and-white—questions about legal standing, the standard for injunctive relief, and the application of free exercise law. Collectively, they reasoned, these facts merited granting the relief. Reasonable minds can differ about the Court’s conclusions, but the limited ruling has little direct influence on constitutional doctrine.⁶³

Seen through a cultural rather than a constitutional lens, *Diocese v. Cuomo* signaled a great deal more. One reason is that Justice Amy Coney Barrett’s vote was likely outcome-determinative. In *South Bay* and *Calvary Chapel*, with Justice Ginsburg still on the bench, the Court had denied injunctive relief. During Justice Barrett’s confirmation hearing, commentators and pundits had emphasized the symbolism of Justice Barrett replacing Justice Ginsburg.⁶⁴ Many of them had forecasted significant changes in the Court’s decisions, even though Barrett represented the sixth reliably conservative vote on a court in which the fifth vote matters most.⁶⁵ But at least in some cases, Justice Barrett’s replacement of Justice Ginsburg would make the difference. And *Diocese v. Cuomo* was not only the first of these—it was a case involving the hot-button issue of religious freedom.

Justice Neil Gorsuch’s inflammatory concurrence also raised the temperature in *Diocese v. Cuomo*.⁶⁶ Passages like this one seem designed to poke the reader skeptical of the Court’s decision:

[T]he Governor has chosen to impose no capacity restrictions on certain businesses he considers “essential.” And it turns out the businesses the Governor considers essential include hardware stores, acupuncturists, and liquor stores. Bicycle repair shops, certain signage companies, accountants, lawyers, and insurance

63. Dorf and Tribe’s rhetoric mirrors worries on the cultural right that Sharia law is going to undermine the Constitution. See Philip Bump, *How sharia law became embedded in our political debate*, WASH. POST (July 15, 2016, 9:00 AM), <https://www.washingtonpost.com/news/the-fix/wp/2016/01/08/how-sharia-law-became-embedded-in-our-politics/>.

64. See, e.g., Ross Douthat, *The Meaning of Amy Coney Barrett*, N.Y. TIMES (Sept. 26, 2020), <https://www.nytimes.com/2020/09/26/opinion/amy-coney-barrett-supreme-court.html> (“[A]s the Notorious R.B.G., . . . [Justice Ginsburg] embodied liberal feminism, a history of struggle and achievement condensed into three initials and one life. Amy Coney Barrett, President Trump’s choice to take her seat, is a signifier of a different sort.”); Lara Bazelon, *Amy Coney Barrett Is No Ruth Bader Ginsburg*, N.Y. TIMES (Sept. 26, 2020), <https://www.nytimes.com/2020/09/26/opinion/amy-coney-barrett-nominee.html> (“Judge Barrett . . . has impeccable . . . credentials—and a record that stands in stark contrast to Justice Ginsburg’s.”).

65. See, e.g., Bazelon, *supra* note 64 (“Make no mistake: Judge Barrett’s confirmation will be the wrecking ball that finally smashes *Roe v. Wade* and undoes the Affordable Care Act. Her crucial vote on these cases and so many others will undo decades of the progress that Justice Ginsburg worked her whole life to achieve.”); Ian Millhiser, *Who is Amy Coney Barrett, Trump’s nominee to the Supreme Court?*, VOX (Sept. 26, 2020, 5:04 PM), <https://www.vox.com/21446700/amy-coney-barrett-trump-supreme-court> (predicting that Justice Barrett would vote to undercut Obamacare, significantly expand the Second Amendment, and restrict abortion rights).

66. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring).

agents are all essential too. So, at least according to the Governor, it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians. Who knew public health would so perfectly align with secular convenience?⁶⁷

Here and elsewhere, Justice Gorsuch's concurrence harnesses the kind of rhetoric that neglects judicial temperament and confuses "constitutional decisions with cosmic battles."⁶⁸ Justice Gorsuch isn't the only jurist who laces his prose with quotable zingers and hyperbolic claims, but the context of this decision made his words stand out in relief.⁶⁹

On the other hand, it's just a concurrence, and none of the other Justices joined it. A solo concurrence rarely has precedential value and hardly portends a jurisprudential sea change.⁷⁰ Nor is Justice Barrett's vote utterly shocking. The Court's denial of injunctive relief in *Calvary Chapel* was met with fierce criticism, and the New York restrictions at issue in *Diocese v. Cuomo* were even more severe than Nevada's restrictions. Given this history, it's not entirely surprising that Justice Barrett sided with the majority.

The bigger reason for the outsized reactions to *Diocese v. Cuomo* might not be the decision itself but its symbolic connections to the culture wars: the particular mix of law, science, and policy infusing legal challenges to COVID-19-related restrictions;⁷¹ the fear by some religious conservatives that the government is out to get them and using public health

67. *Id.*

68. See H. Jefferson Powell, *Judges as Superheroes: The Danger of Confusing Constitutional Decisions with Cosmic Battles*, 72 S.C. L. REV. 917 (2021).

69. Justice Gorsuch's subsequent concurrence in *South Bay II*—a statement joined by Justice Alito and Justice Thomas—was notably more restrained. *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 718 (2021) (Gorsuch, J., concurring) ("No one before us disputes that factors like these may increase the risk of transmitting COVID-19. And no one need doubt that the State has a compelling interest in reducing that risk. This Court certainly is not downplaying the suffering many have experienced in this pandemic."). In contrast, Justice Kagan's dissent in *South Bay II* is less measured. See *id.* at 722 (Kagan, J., dissenting) ("Is it that the Court does not believe the science, or does it think even the best science must give way?"); *id.* at 723 (critiquing the Court's "armchair epidemiology").

70. The primary exception is "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices," in which case "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Ga.*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). This rule has been instrumental in lower court decisions following *June Medical Serv. LLC v. Russo*, 140 S. Ct. 2103 (2020), where Chief Justice Roberts' concurrence is arguably the narrowest. See, e.g., *Hopkins v. Jegley*, 968 F.3d 912, 915 (8th Cir. 2020) (finding the Chief Justice's concurrence controlling). But see *Whole Woman's Health v. Paxton*, 972 F.3d 649, 652 (5th Cir. 2020) (finding that the Chief Justice's concurrence did not change the undue burden test because his concurrence and the plurality did not agree on "common denominator").

71. See Jennifer Frey, *Political Wisdom and the Limits of Expertise*, BREAKING GROUND (July 2, 2020), <https://breakingground.us/political-wisdom-and-the-limits-of-expertise>.

restrictions as a cover to trample their religious freedom;⁷² and the anxiety of some progressives that Justice Barrett and her conservative colleagues will use religious freedom to entrench a kind of social conservatism in Supreme Court jurisprudence that will burden and restrain progressive causes for a generation.⁷³

Seen in this light, *Diocese v. Cuomo* and the COVID-19 free exercise cases that followed are relatively narrow rulings with a broad, expressive wake: Justice Barrett's first outcome-determinative votes in religion cases ensuring a torrent of hot takes, Justice Gorsuch's concurrence in *Diocese v. Cuomo* fueling the fire, and commentators eyeing other culture wars cases on the horizon. The next section explores some of these larger cultural implications.⁷⁴

IV. BROADER IMPLICATIONS

The reactions to *Diocese v. Cuomo* and other free exercise challenges to COVID-19 restrictions point to broader cultural trends that may play into future religion cases outside of the pandemic context. As the Court turns to these other cases, it will need to confront three issues highlighted in the COVID-19 cases: the importance of religion, the nature of a substantial burden, and the inevitability of balancing. Each of these issues is a necessary part of free exercise analysis, and the COVID-19 cases illustrate the combustible nature of all of them.

A. *The Importance of Religion*

In one sense, every free exercise challenge asks courts to opine on the importance of religion and the extent to which it might be limited by government interests. But the COVID-19 cases amplified this question through a linguistic happenstance: the labeling of some activities exempted from

72. See Nathanael Blake, *Supreme Court Supports Democrat Efforts To Make Christians Second-Class Citizens*, FEDERALIST (Aug. 4, 2020), <https://thefederalist.com/2020/08/04/supreme-court-supports-democrat-efforts-to-make-christians-second-class-citizens>.

73. See Howard Gillman & Erwin Chemerinsky, *The Weaponization of the Free-Exercise Clause*, ATLANTIC (Sept. 18, 2020), <https://www.theatlantic.com/ideas/archive/2020/09/weaponization-free-exercise-clause/616373/> (arguing that the Supreme Court's conservative majority is turning the Free Exercise Clause into a sword for "politically powerful Christian conservatives" to "flout" discrimination laws).

74. Because I am focusing on the substantive free exercise implications of the Court's COVID-19 decisions, I do not address procedural critiques against the Court's handling of these cases. See Stephen I. Vladeck, *The Supreme Court Is Making New Law in the Shadows*, N.Y. TIMES (April 15, 2021), <https://www.nytimes.com/2021/04/15/opinion/supreme-court-religion-orders.html> ("Reasonable minds will disagree on [Tandon's] standard for free exercise claims. But a far more glaring problem with the court's decision is that it wasn't an appropriate moment to reach it. Like so many of the justices' more controversial rulings in the last few years, this one came on the court's 'shadow docket,' and in a context in which the Supreme Court's own rules supposedly limit relief to cases in which the law is 'indisputably clear.' Whatever else might be said about it, this case, *Tandon v. Newsom*, didn't meet that standard.").

shutdown orders as “essential” and the implication that others were “non-essential.”⁷⁵

From a constitutional perspective, the question of whether worship is “essential” is easily answered: religious worship (and the free exercise of religion more generally) is a fundamental civil liberty. There is no question that the right to religious worship is “essential.”⁷⁶ That doesn’t mean the right is absolute; to the contrary, worship and any other First Amendment activity can be subjected to some regulations and constraints. But worship is important, fundamental, and essential.

It’s understandable that state and local officials would deem certain activities (like hospitals) “essential” and others “non-essential” for purposes of implementing shutdown orders and restrictions. But it’s also an unfortunate word choice, leading to heightened emotions that could have been avoided with a more cumbersome but less charged distinction like “services required to stay open to fight the pandemic” and “services not required to stay open to fight the pandemic.”⁷⁷

75. Empire State Dev., *supra* note 49; Nev. Declaration, *supra* note 14; Ned Lamont, Conn. Exec. Order No. 7H (Mar. 20, 2020), <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7H.pdf> (requiring non-essential businesses or not-for-profits to reduce in-person workforces by 100 percent and categorizing essential businesses as including critical infrastructure sectors, essential health care operations, essential retail, banks, insurance companies, and pest control, among others); *see also* Aaron Radford-Wattley, *What is a nonessential business?*, Fox Bus. (May 8, 2020), <https://www.foxbusiness.com/lifestyle/what-is-a-non-essential-business> (offering general categories of non-essential businesses); *Essential v. Nonessential Businesses*, JUSTIA (updated Apr. 2020), <https://www.justia.com/covid-19/business-assistance-during-the-coronavirus-pandemic/essential-vs-nonessential-businesses> (noting that there is “agreement among many states” that businesses “geared toward recreation and entertainment” are considered non-essential).

76. The same is also true of the right to protest. In April 2020, the Raleigh Police Department’s official Twitter account tweeted that “protesting is a non-essential activity.” Jeff Reeves, *Raleigh police release statement after department tweets ‘protesting is a non-essential activity’*, CBS 17 (updated Apr. 14, 2020, 9:40 PM), <https://www.cbs17.com/news/local-news/wake-county-news/raleigh-police-release-statement-after-department-tweets-protesting-is-a-non-essential-activity/>.

77. Others have also taken issue with labeling religion “non-essential.” *See* Peggy Fletcher Stack, *Religion is essential, even during a pandemic, Latter-day Saint apostle David Bednar tells global forum*, SALT LAKE TRIB. (updated Oct. 14, 2020, 6:03 PM), <https://www.sltrib.com/religion/2020/10/14/religion-is-essential/>; Jill Colvin & Zeke Miller, *Trump declares churches ‘essential,’ calls on them to reopen*, AP NEWS (May 22, 2020), <https://apnews.com/article/8a34b6599602dbd751f2c1fcb93387fe>; Editorial, *In our opinion: When government mistakes religion as ‘nonessential’*, DESERET NEWS (Oct. 16, 2020, 6:00 AM), <https://www.deseret.com/opinion/2020/10/16/21516185/bednar-religion-essential-pandemic-covid-19-g20-interfaith-forum> (“It is a critical failure of some governments that they did not recognize religion as essential . . .”); *cf.* Kevin J. Jones, *Former Judge: Coronavirus Restrictions Have a Place, but Religion is ‘Essential’*, CATH. TEL. (May 15, 2020), <https://www.thecatholictelegaph.com/covid-19-restrictions-religion-essential/66260> (describing Judge Michael McConnell’s argument that while some restrictions on religious exercise are appropriate, “religious worship is essential.”). *But see* Rick Aaron, *Are religious services ‘essential’ during the pandemic?*, ABC4 NEWS (updated Oct. 14, 2020, 5:57 PM), <https://www.abc4.com/news/top-stories/are-religious-services-essential-during-the-pandemic/> (noting Atheists of Utah President’s statement that religion is “not an essential service like they talk about . . . I don’t think religion is essential.”). One Pew Research survey found that eight-in-

B. Substantial Burden

A second and distinct question is whether the shutdown orders and restrictions substantially burdened religious exercise. Free exercise doctrine has long required a threshold determination of substantial burden.⁷⁸ The analysis is confusing and at times contested.⁷⁹ Perhaps most notoriously, the Supreme Court concluded that a United States Forest Service road being built through a Native American holy ground did not substantially burden religious practice.⁸⁰ In other cases, the justices have disagreed about what qualifies as a substantial burden.⁸¹

Despite this confusion, two aspects of substantial burden are clear. First, restrictions on religious worship amount to a substantial burden.⁸² Second, whether a proposed alternative alleviates that burden is generally a

ten Americans think that “houses of worship should be required to follow the same rules about social distancing and large gatherings as other organizations or businesses in their local area.” *Americans Oppose Religious Exemptions from Coronavirus-Related Restrictions*, PEW RES. CTR. (Aug. 7, 2020), <https://www.pewforum.org/2020/08/07/americans-oppose-religious-exemptions-from-coronavirus-related-restrictions/>.

78. *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 447 (1988) (finding it unnecessary for the government to demonstrate a compelling need to engage in its activity because the activity did not legally burden the claimant).

79. See, e.g., Chad Flanders, *Substantial Confusion about “Substantial Burdens”*, 2016 U. ILL. L. REV. ONLINE 27, 30 (2016) (“How are courts supposed to know whether or not the law is pressuring a person to violate an *important or unimportant part* of her belief system, or compromising her belief *massively* or only *slightly*, without undertaking a searching and (for that reason) problematic theological inquiry? What to one person might be a slight or ‘attenuated’ imposition on her religious practice may be to another a very serious cost. Courts cannot and should not have to adjudicate this point. They should instead assess whether there is a large amount of pressure (‘substantial’ pressure) being put on the person to violate her beliefs.”).

80. In *Lyng*, the government did not burden the petitioner’s religious exercise because the Court found that the government “building . . . a road or . . . harvesting . . . timber on publicly owned land” was like the government using a Social Security number to identify a person—each are internal government affairs that do not coerce another person and cannot burden the religious claimant. See *Lyng*, 485 U.S. at 448–49.

81. Compare *Burwell v. Hobby Lobby*, 573 U.S. 682, 724 (2014) (concluding that it was not the Court’s place to determine whether providing health insurance coverage for contraception would substantially burden the exercise of religion), with *id.* at 758–60 (Ginsburg, J., dissenting) (arguing that a deeply held belief is not sufficient for a RFRA claim but that the Court must conclude that the plaintiff’s religious exercise is substantially burdened and finding the religious objection and the action objected too attenuated).

82. See, e.g., *Agudath Isr. v. Cuomo*, 979 F.3d 177, 181 (2d Cir. 2020) (concluding that an order, although ultimately constitutional, restricting religious gatherings burdens religious exercise); *Roberts v. Neace*, 958 F.3d 409, 415 (6th Cir. 2020) (per curiam) (“No one contests that the orders burden sincere faith practices. . . . Orders prohibiting religious gatherings . . . will chill worship gatherings.”). But see *Lighthouse Fellowship Church v. Northam*, 458 F. Supp. 3d 418, 439 (E.D. Va. 2020) (concluding that a ten-person limit on religious gatherings did not “substantially burden” the free exercise of religion under the Virginia RFRA statute because the plaintiff organization could “assemble in groups of ten or fewer more frequently, or [combine] small group worship . . . with online worship services”), *appeal dismissed*, No. 20-1515, 2020 WL 6074341 (4th Cir. Oct. 13, 2020).

question that courts are not able to answer.⁸³ After *Diocese v. Cuomo*, at least one commentator noted that different religious traditions and adherents had different views about the viability of virtual worship as an alternative to in-person worship, especially during a pandemic.⁸⁴ But differences over that theological question do not factor into the constitutional question of whether virtual worship is an adequate alternative. If litigants assert that their religious worship is substantially burdened by virtual rather than by in-person services, courts must generally accept that representation.⁸⁵

C. *Balancing*

Each of the preceding questions—whether religion is important and whether religion is substantially burdened—are heated questions in some circles. But in the free exercise challenges to COVID-19 restrictions on worship, they should be straightforward and uncontroversial as a constitutional matter: religion is important and restrictions on religious worship substantially burden religious exercise. The more difficult constitutional question is whether the substantial burdening of an important religious activity can be justified by the government’s interests in limiting a pandemic. The tensions underlying these cases don’t evaporate by asking the right questions, but the right questions at least help us see more clearly what’s at stake.

The ultimate legal analysis inevitably comes down to a weighing of values, or what courts usually refer to as a balancing of interests.⁸⁶ This weighing and balancing requires judgments from courts and judges. At best, these judgments follow a kind of reasoning and restraint that is bounded by

83. See *Little Sisters of the Poor Saints Peter and Paul Home v. Pa.*, 140 S. Ct. 2367, 2391 (2020) (Alito, J., concurring) (“The inescapable bottom line is that the accommodation demanded that parties like the Little Sisters engage in conduct that was a necessary cause of the ultimate conduct to which they had strong religious objections. . . . Where to draw the line in a chain of causation that leads to objectionable conduct is a difficult moral question, and our cases have made it clear that courts cannot override the sincere religious beliefs of an objecting party on that question.”).

84. Jack Jenkins (@jackmjenkins), TWITTER (Nov. 27, 2020, 12:04 PM), <https://twitter.com/jackmjenkins/status/1332384856467271680?s=20> (“Two things are true at the same time: 1. The court can do its best to avoid weighing in on theological disputes. 2. Whether the court’s decision avoids arbitrating theological differences isn’t up to the court—it’s up to the religious groups. That’s how religion works.”).

85. See *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981) (noting that it is not the judiciary’s place to work out whether a petitioner’s religious basis for a claimed burden accords with his claimed religion). However, if a plaintiff claims that his religious exercise is being burdened by a pandemic restriction, a court can still inquire into whether the plaintiff’s religious belief is sincere. See *Holt v. Hobbs*, 574 U.S. 352, 360–61 (2015) (noting that for relief under RLUIPA, a plaintiff’s “request for an accommodation must be sincerely based on a religious belief and not some other motivation” (citing *Hobby Lobby*, 573 U.S. at 717 n.28)).

86. In legal terms, the court (assuming that a restriction is narrowly tailored to a government interest) is asking whether the government’s asserted interest is sufficiently compelling to justify burdening the litigant’s religious exercise.

the practice of legal interpretation; at worst, they become politically motivated decisions.⁸⁷

The free exercise analysis of COVID-19-related restrictions affecting houses of worship pits a core aspect of religious exercise against a core government interest in ensuring health and safety. The proper constitutional framework should require strict scrutiny: has the government adequately explained a narrowly tailored compelling government interest sufficient to restrict the fundamental right to the free exercise of religion? But the distortion of free exercise analysis in *Employment Division v. Smith* and the lack of clarity on both the neutrality and the general applicability prongs of *Smith's* threshold inquiry complicate this framework. These ambiguities clouded the Court's analysis in *Diocese v. Cuomo* and supercharged the emotional backlash to the decision. And they will likely do so even more in future cases.

V. RECENT CASE STUDIES: *MASTERPIECE CAKESHOP* AND *FULTON*

A. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*

To illustrate the implications of the preceding analysis for free exercise cases outside of pandemic-related restrictions, consider first the Court's 2018 decision in *Masterpiece Cakeshop*. In that case, the Supreme Court found that the Colorado Civil Rights Commission's consideration of whether a baker who refused to bake a wedding cake for a same-sex couple because of his religious beliefs "was inconsistent with the State's obligation of religious neutrality."⁸⁸ The Commission had determined that the baker's refusal constituted a violation of a state anti-discrimination law. But in making this determination, the Commission treated the baker's "sincere religious beliefs" with "clear and impermissible hostility."⁸⁹ Relying on

87. Zalman Rothschild, *Free Exercise Partisanship*, 107 CORNELL L. REV. (forthcoming 2022) (surveying free-exercise cases over the past five years and concluding that "free exercise partisanship has increased dramatically.") (manuscript at 13), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3707248. According to Rothschild's study, "COVID-19-related free exercise cases had the most jarring results" given that "Democrat-appointed judges sided with the government 100% of the time, while Republican-appointed judges sided with the government 34% of the time and with religious plaintiffs 66% of the time." *Id.* (manuscript at 17).

88. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1723 (2018). The baker was acknowledged by the Court to be a "devout Christian" and noted that for the baker to create a wedding cake would be "equivalent to participating in a celebration that is contrary to his most deeply held beliefs." *Id.* at 1724. When two men asked the baker to make a cake for their wedding—a wedding which would not have been recognized in the baker's state—the baker said he would not make one for their wedding but he could "make your birth cakes, shower cakes, [and] sell you cookies and brownies." *Id.* The next day, one of the men's mothers called the baker and the baker explained that his refusal was because of his religious opposition to same-sex marriage and because his state did not recognize same-sex marriages. *Id.*

89. *Id.* at 1729. The Court noted that commissioners had "endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain," and that one commissioner had described the baker's faith as "one of the most despicable pieces of rhetoric that people can use." *Id.* at 1729–30. The Court further relied on the Commission's disparate treatment

Church of Lukumi, the Court held this treatment to violate the Free Exercise Clause by “act[ing] in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.”⁹⁰

One reason that *Masterpiece Cakeshop* is relevant to the current inquiry is its treatment of the threshold prongs in *Smith* of neutrality and general applicability. In *Masterpiece Cakeshop*, as in *Lukumi* and *Diocese v. Cuomo*, the Court found not only a lack of general applicability but also a lack of neutrality, or what the Court refers to as “animus” toward religion. The shift from “lack of neutrality” to “animus” may be subtle, but it reflects the move from *Smith* to post-*Smith* analysis, and from Justice Antonin Scalia (who authored *Smith*) to Justice Anthony Kennedy (who authored *Lukumi* and *Masterpiece Cakeshop*).

The problem with Justice Kennedy’s animus framing is that it is largely bereft of legal analysis. In fact, this may be one reason the Court cited *Lukumi* in *Diocese v. Cuomo* but steered clear of *Masterpiece Cakeshop*. Justice Kennedy’s *Masterpiece Cakeshop* opinion omits entirely the strict scrutiny analysis purportedly required under *Smith*. After concluding that the Colorado regulation failed the neutrality prong of *Smith*’s threshold analysis, Justice Kennedy struck down the regulation with zero analysis of the government’s interest or whether the law was narrowly tailored.⁹¹ And none of the other Justices took issue with that shortcut.

In *Masterpiece Cakeshop*, Justice Kennedy focuses instead on subjective judgments about stigma and dignity.⁹² These are important concepts that reflect genuine emotional and psychological harms. But they are very difficult to constitutionalize. This is one reason, for example, that free speech law generally protects even hateful and emotionally damaging speech: subjective harms by definition are experienced differently by different people. Society cannot function by allowing anyone subjectively offended to restrict the words and actions that caused that offense.⁹³

of other bakers who had refused to bake cakes which was derogatory toward same-sex marriage, allowing a conscientious refusal in those cases but not in the instant case. *Id.* at 1730.

90. *Id.* at 1731.

91. See Chad Flanders & Sean Oliveira, *An Incomplete Masterpiece*, 66 UCLA L. REV. DISCOURSE 154, 169 (2019).

92. See *Masterpiece Cakeshop*, 138 S. Ct. at 1728–29 (simultaneously stressing the importance of preventing “all purveyors of goods and services” from objecting to gay marriages because it would “impose a serious stigma on gay persons” but emphasizing that the baker was “entitled to the neutral and respectful consideration of his claims . . .”). This same emotive approach infuses Justice Kennedy’s opinions in other cases, notably *Obergefell v. Hodges*, 576 U.S. 644 (2015) and *United States v. Windsor*, 570 U.S. 744 (2013). Reading opinions like *Obergefell* and *Masterpiece Cakeshop*, one gets the sense that Justice Kennedy is trying really hard to broker a peace treaty in the culture wars between religious conservatives and proponents of gay rights.

93. See generally JOHN INAZU, CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE 93–103 (2016) (describing the difficulty of legal restrictions for speech based on subjective harms).

By injecting subjective judgments about dignity, the Court made it much more challenging to weigh the core interests at stake in *Masterpiece*: the religious exercise of the baker, on one hand, and the state's anti-discrimination interest, on the other. Stigma and dignity are difficult to weigh, and attempting to do so increases the chances that balancing devolves into politically motivated reasoning. By contrast, focusing the inquiry on the baker's burden and the government's interest helps restrain these impulses—even though no test can completely avoid the dangers inherent in balancing interests.

The Court's focus on stigma and dignity opened the door for commentators to highlight these shortcomings. One of the more pronounced features of commentary surrounding this case was a general lack of empathy in all directions. Commentators on the right were quick to dismiss the harm experienced by the gay customers and suggested that the lawsuit was nothing more than an activist sham.⁹⁴ And on the left, some commentators labeled Jack Phillips's claim to religious exercise as thinly-veiled bigotry and rejected his arguments that baking that particular cake would have substantially burdened that exercise.⁹⁵ This commentary sidestepped the challenging questions of religion's importance, substantial burden's nature,

94. See Richard Epstein, *Symposium: The worst form of judicial minimalism — Masterpiece Cakeshop deserved a full vindication for its claims of religious liberty and free speech*, SCOTUSBLOG (Jun. 4, 2018, 8:29 PM), <https://www.scotusblog.com/2018/06/symposium-the-worst-form-of-judicial-minimalism-masterpiece-cakeshop-deserved-a-full-vindication-for-its-claims-of-religious-liberty-and-free-speech> (noting that the same-sex couple “are blessed with multiple choices if [the anti-discrimination law] does not apply” but that the baker “has no place to run” if the law applies); Joy Pullmann, *7 Key Takeaways from ACLU Spin On Their Masterpiece Cakeshop Loss*, FEDERALIST (June 7, 2018), <https://thefederalist.com/2018/06/07/7-key-takeaways-aclu-spin-masterpiece-cakeshop-loss> (describing the same-sex couple's advocates as using “big money [to] exploit two men's hurt feelings” and describing the stakes in *Masterpiece Cakeshop* as “[a] handful of gay couples having to buy a wedding product from the second small business owner they consult.”).

95. See Mary Bonauto, *Symposium: Commercial products as speech — When a cake is just a cake*, SCOTUSBLOG (Sept. 15, 2017, 10:24 AM), <https://www.scotusblog.com/2017/09/symposium-commercial-products-speech-cake-just-cake> (describing the baker's case as an attempt to “circumvent the demands of equality” and arguing that cakes are not generally thought to convey the commercial baker's message); Curtis M. Wong, *Supreme Court's Cake Case Could Set America Back 50 Years, Activists Warn*, HUFFPOST (Mar. 15, 2018, 2:09 PM), https://www.huffpost.com/entry/masterpiece-cakeshop-piggie-park_n_5aa9d381e4b0600b82ffec48 (describing a coalition of pro-LGBTQ organization's advertisement that compares the *Masterpiece Cakeshop* case to a 1968 case where a barbecue owner “discriminated against a black customer . . .”); Antonia Blumberg, *Here's What's At Stake In the Supreme Court's Gay Wedding Cake Case*, HUFFPOST (updated Dec. 5, 2017), https://www.huffpost.com/entry/supreme-court-gay-wedding-cake-case_n_5a25925ee4b03350e0b8a7e0 (noting that LGBTQ advocates say the issue in *Masterpiece Cakeshop* was “the ability of ordinary commercial businesses to use religion to pick and choose which parts of anti-discrimination law they'll obey.”); Vanita Gupta, *Symposium: Discrimination is not a fundamental American value*, SCOTUSBLOG (Sept. 12, 2017, 2:28 PM), <https://www.scotusblog.com/2017/09/symposium-discrimination-not-fundamental-american-value> (“[T]he question in *Masterpiece Cakeshop* is whether we recognize this human dignity, or instead grant companies sweeping license to discriminate against millions of our LGBT neighbors and family members on the basis of personal religious conviction.”).

and balancing's difficulty—leading to a rash of culture-wars hot takes that downplayed the sincerity and humanity of the other side.

B. *Fulton v. City of Philadelphia*

In 2021, the Court again faced an opportunity to revisit or even overrule *Smith*. In *Fulton*, the Court unanimously held that Philadelphia's refusal to contract with Catholic Social Services (CSS), a Catholic adoption agency, for foster care services on account of the agency's policy not to place foster children with same-sex couples violated the Free Exercise Clause.⁹⁶ But the Court declined the petitioner's invitation to revisit *Smith*, concluding that the case "falls outside *Smith* because the City has burdened the religious exercise of CSS through policies that do not meet the requirement of being neutral and generally applicable."⁹⁷ The Court also avoided the neutrality analysis of *Masterpiece Cakeshop*, deciding the case "under the rubric of general applicability."⁹⁸ In doing so, the Court found that a rule is not generally applicable when it gives state officials discretion to make exceptions—regardless of whether such exceptions have been made—because such a rule "'invite[s]' the government to decide which reasons for not complying with the policy are worthy of solicitude."⁹⁹

Justice Gorsuch's concurrence (joined by Justices Thomas and Alito) argued that the Court should have overruled *Smith*.¹⁰⁰ While the *Fulton* majority avoided any mention of the Court's earlier COVID-19 decisions,¹⁰¹ Justice Gorsuch cited *Tandon* for the view that "exceptions for one means strict scrutiny for all" and suggested that *Tandon* "began to resolve at least some of the confusion surrounding *Smith*'s application."¹⁰² Justice Gorsuch also emphasized that "*Tandon* treated the symptoms, not the underlying ailment."¹⁰³

A number of commentators view *Fulton* as a punt that failed to address the balance between free exercise protections and government interests, particularly interests related to LGBTQ equality.¹⁰⁴ Additionally, by focusing

96. *Fulton v. City of Phila.*, 141 S. Ct. 1868 (2021).

97. *Id.* at 1872. Three Justices made clear their wish to overrule *Smith*, see *id.* at 1924 (Alito, J., concurring). Two more Justices found "the textual and structural arguments against *Smith* . . . compelling." *Id.* at 1882 (Barrett, J., concurring).

98. *Id.* at 1877.

99. *Id.* at 1879 (quoting *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 884 (1990)). See also *id.* at 1878 ("No matter the level of deference we extend to the City, the inclusion of a formal system of entirely discretionary exceptions in section 3.21 renders the contractual non-discrimination requirement not generally applicable.").

100. *Id.* at 1926 (Gorsuch, J., concurring).

101. See *Fulton*, 141 S. Ct. at 1874–82 (majority opinion).

102. *Id.* at 1930–31 (Gorsuch, J., concurring).

103. *Id.* at 1931.

104. See Richard W. Garnett, *After Fulton, Religious Foster Care Agencies Still Vulnerable*, FIRST THINGS (June 22, 2021), <https://www.firstthings.com/web-exclusives/2021/06/after-fulton-religious-foster-care-agencies-still-vulnerable> ("Some commentators—as well as three of the jus-

on secondary analyses under *Smith*, the Court once again sidestepped more central questions related to the importance of religion, the nature of a substantial burden, and a balancing of interests analysis.

VI. CONCLUSION

The Court's COVID-19 decisions illustrate the dangers of ignoring important predicate questions about the free exercise of religion. It's not that better legal analysis will satisfy everyone. These cases will always be hard, and many people will focus on outcomes more than the reasoning underlying those outcomes. But a legal analysis focused on the right questions at least provides the contours for a debate and requires both sides to make arguments within those contours. And that might be a small step toward quieting the culture wars.

tices—have said that the Court's ruling is 'narrow' and CSS's win ephemeral.'"). Professor Garnett himself views *Fulton* as having much broader implications. *Id.*