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ARTICLE

THE COVID-19 WORSHIP CASES LESSONS FOR GOVERNORS IN DEMOCRATIC GOVERNANCE AND TRANSPARENCY OVER “EDICTS”

ROBIN FRETWELL WILSON*

INTRODUCTION

Early in COVID-19’s emergence, governors acted swiftly to crush the spread of the virus, shuttering nearly every aspect of civil society.1 Although some states allowed religious gatherings,2 a number of governors issued confining executive orders.3 Some closed houses of worship4—

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4. “Houses of worship” and “places of worship” are used interchangeably in the three states surveyed here and in the resulting U.S. Supreme Court opinions. This article uses both terms throughout.
whatever the size of the facility or the number of faithful it could hold. Places of worship across the nation grappled with capacity restrictions or outright closure, but those in three specific states—California, New York, and Nevada—faced some of the most restrictive limits.

States regulated places of worship differently than other facilities of similar size or function. “Essential businesses” were permitted to open with social distancing and other safeguards to mitigate risk. Often, governors did not afford religious communities an opportunity to mitigate risk through social distancing, masking, eliminating singing or shouting, or installing Plexiglass barriers, as they did with other commercial facilities, like factories. When safeguards were allowed, they added to restrictions on the number of attendees, rather than displacing them.

Houses of worship in California, New York, and Nevada faced more restrictive limits on the number of attendees—no matter how large the building and no matter what other safeguards facilities might adopt. For example, California said for 11 months that “the maximum number of adherents who can safely worship in the most cavernous cathedral is zero,” as Chief Justice Roberts noted of California’s earliest round of strictures. And as governors released holds on the economy, places of worship came last, behind “liquor stores and bike shops” and other services deemed essential.


8. See Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2604 (2020) (Alito, J., dissenting) (“A church, synagogue, or mosque, regardless of its size, may not admit more than 50 persons, but casinos and certain other favored facilities may admit 50% of their maximum occupancy—and in the case of gigantic Las Vegas casinos, this means that thousands of patrons are allowed.”).


11. See, e.g., infra Part I.A.4 (summarizing the second challenge to restrictions South Bay brought before the Supreme Court).


13. Roman Cath. Diocese of Brooklyn, 141 S. Ct. at 72 (Gorsuch, J., concurring) (“It is time—past time—to make plain that, while the pandemic poses many grave challenges, there is
Religious figures cried foul.\textsuperscript{14} In California, where both the state and one local government limited religious gatherings in homes to three households, California pastors charged repression of religion: “Newsom encourages tens of thousands of people to gather for mass protests, he bans all in-person worship and home Bible studies and fellowship. Such repression is well-known in despotic governments, and it is shocking that even home fellowship is banned in America.”\textsuperscript{15}

In a span of 11 months, the U.S. Supreme Court in a series of 10 cases (the “COVID-19 Worship Cases”) ultimately found this different treatment of worship services to be discrimination against religion. “Singl[ing] out houses of worship for especially harsh treatment”\textsuperscript{16} merited the most stringent—strict—scrutiny.\textsuperscript{17}

The Supreme Court probed whether California, Nevada, and New York had treated houses of worship in the same manner as economic actors were treated. The Supreme Court ultimately found no coherence to the categories. Governors treated places of worship “worse”\textsuperscript{18} than other secular facilities. Governors did this with almost no explanation,\textsuperscript{19} leading one member of the Court to label the governors’ schemes “color-coded executive edicts.”\textsuperscript{20}

Many saw the COVID-19 Worship Cases as part of a larger pattern of the “Christian right” “racking up huge victories in the Supreme Court.”\textsuperscript{21} They saw the progression of these cases from upholding California’s earliest order to uniformly striking governors’ orders as the first “tangible ef-
fect” of Justice Amy Coney Barrett’s replacement of Justice Ruth Bader Ginsburg. In this account, the shift away from “defer[ring] to public health officials” is attributable to nothing more than “Justice Barrett join[ing] the Court.” But there is a more straightforward explanation.

The governors and their staffs in California, New York, and Nevada gave little, and sometimes no, public-facing explanation as to how the restrictions they issued were arrived at. Nor did they explain precisely why places of worship warranted different and more stringent capacity restrictions. At their press conferences, the governors rehashed stock advice from the U.S. Centers for Disease Control and Prevention (“CDC”) about the risk of contagion, citing spiraling case numbers that overwhelmed the hospitals in their states. They pointed to sixty-thousand-foot CDC recommendations about large gatherings. They stressed generic public health safeguards like wearing masks. But the governors gave no articulable explanation for why churches came in for different treatment. Whether constitutional rights would be infringed received scant discussion, if it was mentioned at all.

When called upon in litigation to explain their thinking, governors offered experts who appeared by affidavit or in telephonic hearings weeks or months after the relevant restriction’s release. The experts testified in great detail about the epidemiological basis for taking precautions generically, but gave little grounding for the specific manner in which places of worship were regulated and why this differed from the regulation of other entities. Across eight experts who gave testimony or filed affidavits in support of the states’ restrictions, summarized below, a single expert delved deeply and convincingly into the “exceptional risk” of transmission posed by

23. Millhiser, supra note 21.
25. To be sure, courts are open to the public and governors marshalled expert testimony in the legal challenges to their orders. See infra Part I.A.4.
“large group gatherings” and risks specific to worship, including “singing, chanting, or other loud vocalization.” But even this expert, Dr. George Rutherford, a professor at both the University of California, San Francisco School of Medicine and the University of California, Berkeley School of Public Health, ultimately undercut California’s position. His description of how risks were mitigated in secular settings showed that less restrictive means existed than shuttering places of worship.

As different highly transmissible variants sweep the country, the COVID-19 Worship Cases hold the key to what governors must do to issue public safety orders that will withstand constitutional scrutiny. Absent a colorable explanation for why churches need to be regulated differently, the governors will find themselves facing a hard reality: “Deference, though broad, has its limits,” as Chief Justice Roberts reminded.

Part I of this article details the stream of orders issued by governors in California, New York, and Nevada. It unpacks precisely what was said to justify restrictions on worship while “privileg[ing] restaurants, marijuana dispensaries, and casinos over churches, mosques, and temples.” The resounding silence around why churches merited special or different constraints struck not just the public as edicts, but members of state legislatures and the U.S. Supreme Court. This Part canvasses the explanations given in litigation by state experts after the fact, justifications that both repeated the sixty-thousand-foot advice by the CDC and pointed to

29. See infra Part I. Declaration of Dr. George Rutherford, MD, in Opposition to Motion for Preliminary Injunction at 12, 23–24, Calvary Chapel of Ukiah v. Newsom, 524 F. Supp. 3d 986 (E.D. Cal 2021) (No. 2:20-cv-01421-KJM-DMC) [hereinafter Rutherford Declaration] (explaining why singing and chanting in secular settings, such as childcare centers and day camps, differs from singing and chanting in indoor worship services).
30. See infra Part I (South Bay II).
34. See, e.g., Douglas D. Melegari, Governor Called ‘Hypocrite’ and ‘Hypocrat’ After Seen Violating Own Executive Order; Lifts Stay-At-Home Edict in Wake of Outrage, PINE BARRENS TRIB. (June 13, 2020), https://issuu.com/pinebarrenstribune/docs/june_13__2020 (explaining public outrage over Governor Murphy’s attendance at an outdoor protest despite his “stay-at-home edict,” including public Facebook comments expressing confusion and anger).
35. See, e.g., In Defense of Governor Newsom, CONGRESSMAN TOM McCLINTOCK (Nov. 19, 2020), https://mcclintock.house.gov/newsroom/speeches/in-defense-of-governor-newsom (“I rise this morning in defense of Governor Gavin Newsom who recently defied his own idiotic Covid edicts as he partied at one of the few restaurants that he has not yet forced out of business.”)).
36. See, e.g., Roman Cath. Diocese of Brooklyn, 141 S. Ct. at 72 (Gorsuch, J., concurring) (“[T]here is no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques.”); South Bay II, 141 S. Ct. at 719 (statement of Gorsuch, J.) (“Recently, this Court made it abundantly clear that edicts like California’s fail strict scrutiny and violate the Constitution.”).
worship gatherings as entailing risk. This Part explains why such testimony failed to address the driving consideration: whether worship gatherings pose a risk that was materially different than other less regulated activities.

Part II then examines why the Supreme Court ultimately found that restrictions in California, New York, and Nevada failed strict scrutiny and violated the Free Exercise guarantees of the U.S. Constitution. This Part reveals that no one rationale garnered a majority of votes on the Court for why the governors’ treatment of houses of worship amounted to unconstitutional discrimination against religion. The disposition favored by a majority of Justices is likely to have less precedential value as a result.37

Part III examines what was missing in the governors’ analysis, using a method that will be familiar to any legal reader—IRAC—but can be easily understood by non-lawyers. The governors, while marshalling considerable public health authorities, simply failed to apply CDC guidelines and public health recommendations to the specifics of their own regulatory schemes. They never explained why the houses of worship must be treated differently.

Part IV looks forward to the next public health crisis and concludes that, absent an explanation of why some parts of public life must stop while other parts proceed apace, the governors should not hope for better outcomes if future COVID-19 outbreaks, or pandemics of any sort, precipitate a cascade of new restrictions.

Figure 1. COVID-19 Worship Cases
THE COVID-19 WORSHIP CASES

I. GOVERNORS ISSUE A FLURRY OF ORDERS, WITH LITTLE OR NO EXPLANATION OR EVIDENCE DEMONSTRATING DIFFERENT RISK

This Part provides a snapshot of orders issued by governors in three states at a frenetic pace, as they attempted to contain fast-moving outbreaks of COVID-19 that threatened to overwhelm healthcare facilities in their states. Factually, COVID-19 outbreak clusters have centered in group settings like nursing homes,38 prisons,39 colleges and universities,40 food processing plants,41 and other places where a lot of people congregate.42 Early in the pandemic, places of worship had experienced outbreaks, sometimes from gathering before any public health order had been issued.

In early March 2020, an Arkansas church, the First Assembly of God, met for normal Sunday services in the days before Arkansas’s governor issued an executive order on March 11.43 35 church members contracted COVID-19 and three of them died. The 35 attendees represented more than one-third (38%) of the church’s membership. 26 additional cases cropped up in the surrounding community. This outbreak received much media attention. It is perhaps not surprising that the public health regulations hurriedly issued by the executive branch in all three states—California, Nevada, and New York—specifically included regulations for worship gatherings.

Factories had also been linked to super-spreader events early in the pandemic.44 However, these facilities were allowed to remain open or were permitted to reopen earlier than churches in the three states.45 Meat packing plants, where workers stand in place near another for long stretches of time, experienced significant outbreaks early on.46 By late April 2020, 4,913 documented cases among workers in 115 meat and poultry processing facilities had resulted in 20 deaths across 19 states, as the CDC reported online in its Morbidity and Mortality Weekly Report.47 That month, the U.S. Department of Labor had issued guidelines requiring workers to be spaced “at

44. As one example, between March 16 and April 25, 2020, more than a quarter (25.6%) of employees at a South Dakota meat processing facility contracted COVID-19; two died. Jonathan Steinberg, Erin D. Kennedy, Colin Basler, Michael P. Grant, Jessica R. Jacobs, Dustin Ortbahn, John Osburn, Sharon Saydah, Suzanne Tomasi & Joshua L. Clayton, COVID-19 Outbreak Among Employees at a Meat Processing Facility — South Dakota, March-April 2020, CDC Morbidity and Mortality Weekly Rep. (Aug. 7, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6931a2.htm; 210 people in the surrounding community became infected too. The CDC noted “the possibility of rapid transmission among meat processing facilities.” In that plant, “[t]he work was shoulder-to-shoulder . . . and the company hadn’t yet provided face coverings.” The CDC suggested that the plant’s “enhanced testing strategy,” begun during the three-week span, “might have led to increased case detection among employees.” Robert Klemko & Kimberly Kindy, He Fled Congo to Work in a U.S. Meat Plant. Then He— and Hundreds of His Co-workers— Got the Coronavirus, WASH. POST (Aug. 6, 2020), https://www.washingtonpost.com/national/he-fled-the-congo-to-work-in-a-us-meat-plant-then-he--and-hundreds-of-his-co-workers—got-the-coronavirus/2020/08/06/11e7e13e-c526-11ea-8ffe-372be8d82298_story.html.

45. In New York, although the state-ordered nonessential businesses to close in late March, a majority of the upstate factories were classified as essential and stayed open. Jimmy Vielkind, New York Factories That Stayed Open During Pandemic Have Safety Tips to Share, WALL ST. J. (May 5, 2020), https://www.wsj.com/articles/new-york-factories-that-stayed-open-during-pandemic-have-safety-tips-to-share-11588894395; In Nevada, it does not appear that manufacturing or meat processing plants were ever completely shut down, but their operations were modified on March 18, 2020. Lara Herrero, How Contagious is Delta? How Long Are You Infectious? Is It More Deadly? A Quick Guide to the Latest Science, ABC NEWS (Oct. 4, 2021, 6:02 PM), https://www.abc.net.au/news/2021-09-29/covid-delta-variant-what-the-science-says/100497804; In California, factories were permitted to open before places of worship. See infra Part I (South Bay II). To be sure, plant owners have considerable networks of influence. In at least one state—Colorado—meat packing plant executives successfully pushed back on government orders closing facilities. Local Colorado officials dropped plans nine days after critical calls from then Vice President Mike Pence. Klemko & Kindy, supra note 44.


least 6 feet apart and screened before they start working."48 Outbreaks at such facilities received national press.49

Across the pandemic, differences emerged in how states regulated worship versus other activities, as the case studies of California, New York, and Nevada show. The question arose whether governments should regulate all activities more stringently, as they regulated places of worship, or all less stringently, as they regulated “essential businesses.” In other words, the question arose whether governors should “equalize up . . . [or] equalize down.”50

The stark contrast between empty churches, shown in Figure 2, and packed casinos, shown in Figure 3, struck many as inexplicable, even if allowed.

**Figure 2.**


51. Cathedral of St. Mary of the Assumption, Sept. 2020 (image taken from Wilson, supra note 50).
In all the suits filed, plaintiffs sought extraordinary relief—temporary restraining orders (“TROs”), preliminary injunctions, and injunctions. For example, when New York Governor Andrew Cuomo imposed severe restrictions on an area defined as a micro-cluster, a Catholic diocese and a Jewish synagogue sought a motion for a TRO and preliminary injunction. The TRO was denied initially and the District Court subsequently denied the motion for preliminary injunction. The Diocese and the Synagogue then moved for expedited appeals of the denials and for emergency injunctions pending the appeals. They received expedited review but not the injunction. Courts could barely keep up with the flow of cases.

At the Supreme Court level, the Diocese and the Synagogue sought an injunction pending appeal. The application for injunctive relief was granted. Procedurally, to receive relief before a merits hearing requires an extraordinary showing.

52. Caesar’s Palace, Las Vegas, June 4, 2020 (image taken from Wilson, supra note 50).
53. A TRO is “[a] court order preserving the status quo until a litigant’s application for a preliminary or permanent injunction can be heard.” Temporary Restraining Order, BLACK’S LAW DICTIONARY (8th ed. 2004).
54. A preliminary injunction is “a temporary injunction issued before or during trial to prevent an irreparable injury from occurring before the court has a chance to decide the case.” Preliminary Injunction, BLACK’S LAW DICTIONARY (8th ed. 2004).
56. Id.
57. Agudath Isr. of Am. v. Cuomo, 979 F.3d 177, 179 (2d Cir. 2020).
58. Id; see also Agudath Isr. of Am. v. Cuomo, 980 F.3d 222, 228 (2d Cir. 2020).
60. For a TRO, “a likelihood of success on the merits” must be established and “the balance of equities [must] favor[ ] the Plaintiff.” Roman Cath. Diocese of Brooklyn, 493 F. Supp. 3d at 171. For an injunction pending appeal, the court considers whether the moving party has demonstrated that “he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). As the U.S. Court of Appeals for the Ninth Circuit noted, “[t]he standard for evaluating an injunction pending appeal is similar to that employed by district courts in deciding whether to grant a preliminary injunction.” Feldman v. Ariz. Sec’y of State’s Off., 843 F.3d 366, 367 (9th Cir. 2016). The Ninth Circuit reviews “the district court’s decision to grant or deny a preliminary injunction for abuse of
Figure 1 collects the decisions across 10 cases, showing the shift in case outcomes as the pandemic wore on. It includes facts about COVID-19’s transmission and places of concern for transmission and outbreaks, like churches and plants.

This Part tests the conclusion that this shift in outcome is attributable to the changing composition of the Supreme Court. It first chronicles the flurry of orders, containing little or no specific explanation for why governors imposed the different regulations they implemented. It summarizes the public explanations given at the time of the various orders’ release and whether Constitutional guarantees received discussion. It then summarizes testimony proffered in litigation over the orders brought by religious actors. It examines how the orders fared in litigation at the trial court, appellate court, and U.S. Supreme Court as orders went up and down, across dozens of filings and hearings.

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discretion.” Sw. Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (per curiam).

61. The Constitution received little attention in other states, too. When challenged about the implications for First Amendment protections of worship of New Jersey’s implemented strict social distancing measures across the state, New Jersey Governor Phil Murphy said that he “wasn’t thinking of the Bill of Rights when [he implemented the rules],” and that the consideration is “above [his] pay grade.” Mairead McArdle, N.J. Gov. Says He ‘Wasn’t Thinking of the Bill of Rights’ When He Imposed Strict Social Distancing Guidelines, YAHOO! (Apr. 16, 2020), https://www.yahoo.com/now/n-j-gov-says-wasn-142939828.html?soc_src=social-sh&soc_trk=MA.
Figure 4. California Timeline

[Diagram showing a timeline with various legal events and dates, including court decisions and legal actions.]
A. Governor Newsom’s Orders Restricting Public and Private Worship in California

California Governor Gavin Newsom has been a lightning rod for the debate over COVID-19 restrictions and the closing and reopening of the economy, culminating in a failed attempt to recall him as governor. Governor Newsom issued two sets of highly contested orders—one restricting places of worship and one restricting private worship in one’s own home. The orders sparked two rounds of litigation brought by two sets of plaintiffs. The Supreme Court ultimately resolved both cases, South Bay United Pentecostal Church v. Newsom and Tandon v. Newsom, in favor of allowing worship.

1. First Round of Restrictions on Places of Worship

On March 19, 2020, Governor Newsom ordered “all individuals living in the State of California to stay home at their place of residence,” as Figure 4 shows. Five weeks later, the California Public Health Officer issued an Essential Workforce Memorandum, designating essential sectors that would operate to “ensur[e] continuity of functions critical to public health and safety, as well as economic and national security.” That memorandum included clergy among the community-based service providers allowed to work. Nowhere did places of worship appear. They were treated as non-essential businesses. The implication that places of worship were...
not essential rankled social conservatives. Ultimately, the fact that houses of worship were not deemed essential would be a key piece of evidence for at least one Supreme Court Justice.

Not until May 7 did Governor Newsom release updated industry guidance, the Resilience Roadmap. That guidance created four stages to reopening:

- Stage 1: Safety and Preparedness
- Stage 2: Lower-Risk Workplaces
- Stage 3: Higher-Risk Workplaces
- Stage 4: End of Stay-at-Home Order

The May 7 Resilience Roadmap announced California’s transition into Stage 2, which allowed 70% of California’s economy to reopen in some form in regions with lower risk of transmission. As litigants would later note, the Resilience Roadmap permitted “retail, manufacturing and logistics – to begin reopening” in Stage 2 by taking steps to “reduce risk and establish a safer environment for workers and customers.”

Places of worship were not permitted to open in any capacity until Stage 3. At Governor Newsom’s press conference launching the Resilience Roadmap, Sacramento Bee reporter Andrew Sheeler asked Governor Newsom to “clarify why churches and salons are in [Stage] Three and not [Stage] Two.” Governor Newsom responded that the State was “looking at the science, epidemiology, looking again at frequency, duration, time and looking at low risk, high reward, low risk, low reward.” When pushed about worship services, Governor Newsom responded, “Our fear is simply this, congregations of people mixing from far and wide, coming together,

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75. Governor Newsom Releases Updated Industry Guidance, supra note 72.

76. Complaint for Declaratory and Injunctive Relief at 1, S. Bay United Pentecostal Church, 508 F. Supp. 3d 756 (No. 3:20-cv-00865-AJB-MDD).


78. Id.
proximate in an enclosed space at large scales is a point of obvious concern and anxiety.”79

“Guidelines for physical distancing,” he said, “looking at the unique conditions that exist [in places of worship] and reside within their own facilities that may make some further accommodations in that space happen earlier” would be forthcoming.80

Governor Newsom stressed that his own upbringing made him “very sensitive” to the concerns about limitations on worship: “I grew up [in] the church . . . we say grace every night before dinner with the family. I’m very sensitive to those that want to get back into church and into these facilities.”81 Throughout the press conference, Governor Newsom emphasized that the restrictions were “an iterative process.”82 At no time during the press conference did Governor Newsom directly address why places of worship were “more high risk than schools”83 or why other facilities were permitted to open with safeguards.84

Two and a half weeks later, on May 25, 2020, an update to the Resilience Roadmap outlined plans for the reopening of places of worship at 25% capacity or a maximum of 100 attendees, whichever is lower.85 This document contained a half page of Considerations for Places of Worship (“Worship Guidance”) that urged Californians to “strongly consider discontinuing singing, group recitation, and other practices and performances.”86 As before, “lower-risk” facilities were permitted to reopen under conditions of social distancing, providing temperature screenings and/or symptom screenings, providing their staff with disposable gloves to wear especially when “handling items contaminated by body fluids,” and other measures.87

In the corresponding press conference, Governor Newsom stressed “common sense and the rules of engagement.”88 He said:

That’s why with places of worship, we’re limiting to 25% capacity or 100 people. Whichever one is lower. I know some people think that’s too much, too fast, too soon. Others think, frankly,

79. Id.
80. Id.
81. Id.
82. Id.
83. Governor Gavin Newsom California COVID-19 Briefing Transcript May 7, supra note 77.
84. Governor Gavin Newsom California COVID-19 Briefing Transcript May 7, supra note 77.
86. Id.
87. Id. at 12.
that, didn’t go far enough. But . . . at a statewide level, we now are affording this opportunity again, . . . [knowing] that people will start to mix and be in cohorts of people they haven’t been in, in the past.89

He stressed that it “is incumbent upon us to practice . . . physical distancing within these places of worship.”90 His administration is “working with our other state partners, looking at best practices from across this country, working through the CDC guidelines and the like.”91

As to “the 25% or 100 person cap on places of worship,” Governor Newsom said: “[W]e’re interested in evidence, we want to see how some of these phased-in approaches go before we make even more meaningful modifications to them.”92

Governor Newsom did not explain exactly how the 25% of building capacity or 100-person cap93 was chosen or why places of worship warranted that restriction. Instead, he said that “this was the first rollout in this space. And again, we want to be non-ideological about how we conduct ourselves in this space.”94 The different limits across categories of facilities went unexplored and unexplained. No scientific evidence for different capacity limits was directly cited.

In an appearance on The View three days after the press conference, Governor Newsom explained, “Perfect’s not on the menu. We’re trying our best to accommodate people’s faiths, their needs, businesses’ needs to reopen, people’s need and desire to get back out, but to do so safely.”95 He again cited no scientific evidence as an explanation for why places of worship warranted different regulation.

2. South Bay Sues Over Public Worship in South Bay I

South Bay United Pentecostal Church in San Diego County and Harvest Rock Church in Los Angeles County (together, South Bay) are two of the many churches that were not allowed to open for worship until Stage 3.96

89. Id.
90. Id.
91. Id.
92. Id.
On April 28, 2020, Governor Newsom held a press conference to talk about the four-stage plan for reopening California. He was accompanied by Dr. Sonia Angell, Director of the California Department of Public Health. Dr. Angell explained how business operations and physical environments of firms could be “modified to make them safer”:

In stage 2, we’re going to really start focusing on lower risk workplaces, that means gradually opening some of those workplaces with adaptations. These include things like: Retail, allowing for curbside pickup; Manufacturing, . . . like toys, clothing, other things, furniture, that was not a part of the essential sector; . . . offices . . . where telework is not possible, but by modifying the environment itself, it can make it lower risk for individuals; and then ultimately . . . opening more public spaces, things like parks and trails . . . that may have historically been limited because of our concerns, trying to think about how we can modify that to make them safer for individuals to enjoy the outdoor spaces because we know physical activity is so important to our health . . . .

South Bay sued Governor Newsom in the U.S. District Court for the Southern District of California, filing a motion for a TRO with respect to the Resilience Roadmap. On May 15, Judge Cynthia A. Bashant held a telephonic hearing and opened the hearing by describing the state as keying the timing and circumstances of reopening in specific stages to whether a gathering was transitory. Specifically, she said, Stage 2, “Lower-Risk Workplaces,” generally had “initially curbside [contact] only.” These are “facilities where one moves through quickly without long periods of time together. Entering these workplaces in the Stage 2 are—they’re places that are by their nature transitory.” In comparison, “Higher-Risk Workplaces” in Stage 3 “involve people gathering in close proximity with one another for extended periods.”


98. Complaint for Declaratory and Injunctive Relief, S. Bay Pentecostal United Church, 508 F. Supp. 3d 756 (No. 3:20-cv-0865-AJB-MDD). Plaintiffs sought extraordinary relief. In California, the United States District Court for the Southern District of California denied South Bay United Pentecostal Church’s motion for a TRO. The Plaintiffs then filed an emergency motion for injunctive relief pending appeal. The Court of Appeals vacated and remanded. The district court, however, denied the motion injunction, so the Plaintiffs appealed. The Supreme Court vacated and remanded to the Ninth Circuit.


101. Id.
Worship services would fall into Stage 2, Judge Bashant stated, “[i]f your religion involves walking into a church, a few people at a time, keeping six feet apart, picking something up from the church, and going home with you.”\textsuperscript{102}

Worship services at South Bay, Judge Bashant said, involved groups of 200 to 300 congregants per service, and beginning with Bible classes of ten to 100 people, . . . having people with special needs or sickness come stand around an [altar] where hands are laid on them and they are anointed, . . . congregants [approaching] the alter at once . . . practicing baptism by full immersion in the water on a weekly or daily basis . . . .\textsuperscript{103}

The hearing then turned to South Bay’s specific claims that the bans violated the First Amendment’s Free Exercise Clause. Counsel emphasized the different treatment of secular and non-secular facilities:

[T]he problem with these orders in the Reopening Plan is that there’s arbitrary exceptions and unequal treatment of churches. So the government can’t explain, for example, why factories and schools, which don’t involve transitory—you know, transitory measures—why those places can open in Stage 2 but not churches. So what [the defendants have] tried to argue without support is that places of worship are sidelined for scientific reasons . . . .\textsuperscript{104}

The State countered with a simple plea for “judicial deference to the governor’s good faith order.”\textsuperscript{105} They touted “the well-reasoned decisions of the governor and the public health officer [which are] based on science, data, facts, and experts in infectious disease and epidemiology and public health.”\textsuperscript{106} The State emphasized that it was regulating like things in the same way, pointing to the categories of facilities it grouped into Stage 3: “[W]hen you have people singing and standing close together . . . that’s why in Stage 3, you’ll see that movie theaters, concerts, other events that may be similar that are not religious are also in Stage 3.”\textsuperscript{107} Because the State grouped like things in Stage 3, it contended, “there really can[not] be an argument that the state or the county are targeting religion or religious practices. That’s just not borne out by the facts or the order.”\textsuperscript{108} In explaining why factories could open in Stage 2 but churches could not,\textsuperscript{109} the State pointed to “different risk,” saying factories involve “leaving transitions.

\textsuperscript{102.} Id. at 1826.
\textsuperscript{103.} Id.
\textsuperscript{104.} Id. at 1827.
\textsuperscript{105.} Id. at 1834.
\textsuperscript{106.} Hearing Transcript, supra note 100, at 1834.
\textsuperscript{107.} Hearing Transcript, supra note 100, at 1838.
\textsuperscript{108.} Hearing Transcript, supra note 100, at 1839.
\textsuperscript{109.} Hearing Transcript, supra note 100, at 1840. The hearing noted that schools factually could not open at this time.
These aren’t mass groups of people gathered together for a communal experience” as happens with churches.110

When the hearing turned to a specific discussion of what California grouped into Stage 2 versus Stage 3—factories versus churches—counsel for the state “underscore[d the judge’s opening remarks] that the exceptions are based on the risk factors. They’re not arbitrary based on the content of what’s going on at the different activities.”111 Schools, counsel noted, were still meeting remotely112 and “[w]ith regard to factories, again, that’s based on the risk factors. As Your Honor pointed out, these are leaving transitions. These aren’t mass groups of people gathered together for a communal experience.”113

Counsel for the County of San Diego, a defendant together with the State of California, stressed that churches had been loci for “super-spreader events,” as Figure 3 notes generally.114

Counsel for the State contended that “there seems to be something about indoor congregation, for extended periods of time especially, that are dangerous with this virus.”115 Online worship services could of course continue.116

By June 2020, the CDC had traced more than 650 cases to religious institutions.117 However, by May 2020, factories had also been linked to super-spreader events despite being grouped in Stage 2.118 Advice by the CDC for large gatherings issued in April 2020, and updated in May 2020, urged modified layouts that could lower the risk, including “[u]s[ing] multiple entrances and exits and discourag[ing] crowded waiting areas.”119

On May 15, 2020, roughly two months into the pandemic, Judge Bashant denied South Bay’s motion for the temporary restraining order in a telephonic hearing.120 She found it unlikely that plaintiffs would succeed on the merits of their claims.121 The court cited Jacobson v. Massachusetts.122

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110. Hearing Transcript, supra note 100, at 1836.
111. Hearing Transcript, supra note 100, at 1835.
112. Hearing Transcript, supra note 100, at 1835.
113. Hearing Transcript, supra note 100, at 1835.
114. Wilson, supra note 50.
115. Hearing Transcript, supra note 100 at 1838.
116. Hearing Transcript, supra note 100 at 1852.
118. See infra Part II.
the Supreme Court’s foundational public health decision, for the proposition that the State “may limit an individual’s right to freely exercise his religious beliefs when faced with a serious health crisis.”\textsuperscript{123} Moreover, because the manner of the services would pose a risk of exposure to the virus, Judge Bashant concluded that the restrictions did not place a burden on in-person worship services because of religious motivation,\textsuperscript{124} citing \textit{Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah}.\textsuperscript{125} Even if strict scrutiny applied to the plaintiffs’ claim, “the restrictions were narrowly tailored to further a compelling governmental interest—the State’s interest in protecting public health.”\textsuperscript{126} Following the denial, South Bay filed an emergency motion for injunctive relief pending appeal before the U.S. Court of Appeals for the Ninth Circuit.\textsuperscript{127}

On May 18, 2020, Judge Bashant denied the plaintiffs’ motion for an injunction pending appeal, for the same reasons she had denied the TRO three days prior.\textsuperscript{128}

On May 22, the Ninth Circuit denied South Bay’s motion, agreeing that South Bay had “not demonstrated a sufficient likelihood of success on appeal.”\textsuperscript{129} Specifically, California’s restrictions did not “infringe upon or restrict practices because of their religious motivation,” nor did they selectively “impose burdens only on conduct motivated by religious belief.”\textsuperscript{130} The Ninth Circuit stressed the need to consider the public health threat when making these decisions:

\begin{quote}
We’re dealing here with a highly contagious and often fatal disease for which there presently is no known cure. In the words of Justice Robert Jackson, if a “[c]ourt does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.” \textit{Terminiello v. City of Chicago}, 337 U.S. 1, 37, 69 S. Ct. 894, 93 L. Ed. 1131 (1949) (Jackson, J., dissenting).\textsuperscript{131}
\end{quote}

Ninth Circuit Judge Daniel Paul Collins dissented, contending that the State misinterprets \textit{Jacobson} to say that public health emergencies “give[ ] the Governor the power to restrict any and all constitutional rights, as long as he has acted in ‘good faith’ and has ‘some factual basis’ for his edicts.”\textsuperscript{132}

\textsuperscript{122} Jacobson v. Massachusetts, 197 U.S. 11 (1905).
\textsuperscript{123} Order Denying Plaintiff’s Renewed Motion, \textit{supra} note 121, at 797.
\textsuperscript{124} Order Denying Plaintiff’s Renewed Motion, \textit{supra} note 121, at 797.
\textsuperscript{125} Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).
\textsuperscript{126} Order Denying Plaintiff’s Renewed Motion, \textit{supra} note 121, at 797.
\textsuperscript{127} S. Bay United Pentecostal Church v. Newsom, 959 F.3d 938 (9th Cir. 2020).
\textsuperscript{128} Order Denying Plaintiffs’ Ex Parte Motion, \textit{supra} note 120, at *3.
\textsuperscript{129} S. Bay United Pentecostal Church, 959 F.3d at 938.
\textsuperscript{130} \textit{Id.} (citing \textit{Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah}, 113 S. Ct. 2217 (1993)).
\textsuperscript{131} \textit{Id.} at 939.
\textsuperscript{132} \textit{Id.} (Collins, J., dissenting).
South Bay then filed a petition for a writ of certiorari, asking the U.S. Supreme Court to enjoin the restrictions. On May 29, 2020, the Supreme Court, in a 5-4 decision, denied the application for injunctive relief and declined to enjoin California’s restrictions on religious gatherings. Justices Thomas, Alito, Gorsuch, and Kavanaugh would have granted the application. Chief Justice Roberts, in his solely authored concurring opinion, found that California’s restrictions placed on places of worship “appear consistent with the Free Exercise Clause of the First Amendment.” “[L]ocal officials,” Justice Roberts observed, “are actively shaping their response to changing facts on the ground,” making it “quite improbable” that “Government’s limitations are unconstitutional.” Citing Jacobson, Justice Roberts noted “[o]ur Constitution principally entrusts ‘[t]he safety and the health of the people’ to the politically accountable officials of the States ‘to guard and protect.’”

On the question of comparators, Chief Justice Roberts noted that California appears to treat like alike: “Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time.” Moreover, California “exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.”

In his dissent to the denial, Justice Kavanaugh, joined by Justices Thomas and Gorsuch, raised the question that would bedevil governors’ request for deference: what is the proper comparator for places of worship? He noted that “comparable secular businesses are not subject to a 25% occupancy cap” and contended California had not shown “a compelling justification for distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subject to an occupancy cap.”

134. *Id.*
135. *Id.* (Roberts, C.J., concurring).
136. *Id.* at 1614.
137. *Id.*
139. *Id.*
140. *Id.* at 1614.
141. *Id.* at 1614 (Kavanaugh, J., dissenting).
142. *Id.* at 1615.
3. Second Round of Restrictions on Private Worship

Four months after the economy’s closure, on July 1, 2020, California banned “singing and chanting activities” because they “negate the risk reduction achieved through six feet of physical distancing,” augmenting its occupancy cap. California’s updated Worship Guidance explained that:

Even with adherence to physical distancing, convening in a congregational setting of multiple different households to practice a personal faith carries a relatively higher risk for widespread transmission of the COVID-19 virus, and may result in increased rates of infection, hospitalization, and death, especially among more vulnerable populations. . . . Places of worship must therefore discontinue indoor singing and chanting activities and limit indoor attendance to 25% of building capacity or a maximum of 100 attendees, whichever is lower.

The Worship Guidance expanded on the Resilience Roadmap. It also did not explain why 100 attendees was chosen as the benchmark. In a July 13, 2020, press conference, Governor Newsom announced the closure of indoor operations of different sectors in an effort to contain COVID-19. In addition to closing indoor operations of restaurants, bars, museums, and other sectors in all counties, this announcement effectively banned indoor worship services in higher-risk counties. It grouped worship services alongside fitness centers, offices for non-critical sectors, personal care services, hair salons, and indoor malls.

On August 28, 2020, Governor Newsom released California’s Blueprint for a Safer Economy (“Blueprint”), carrying forward the restrictions on worship in the Resilience Roadmap in a tiered structure; it keyed the restrictions on various activities to the level of infection in a specific geographic area, depending on whether an area experienced widespread, doing fewer than 150 tests per 100,000 residents daily (over a 7-day average)
- More than 100 new cases per 100,000 residents over the past 14 days. . . Or having more than 25 new cases per 100,000 residents and an 8% test positivity rate
- 10% or greater increase in COVID-19 hospitalized patients over the past 3 days
- Fewer than 20% of ICU beds available
- Fewer than 25% ventilators available

California Governor, supra note 146.
substantial, moderate, or minimal infection. This guidance remained unchanged until March 11, 2021. Under the Blueprint, indoor worship services simply could not occur in places of widespread infection (Tier 1 places), while in Tier 2 locations with substantial infection, indoor gatherings were “strongly discouraged, but allowed with modifications,” at a maximum of 25% of capacity or 100 people. In both Tier 3 and Tier 4, indoor gatherings were “strongly discouraged, but allowed with modifications,” at a maximum of 50% of capacity or 200 people. The Blueprint also “prohibit[ed] indoor private gatherings of individuals outside the immediate household” in Tier 1 areas and limited indoor gatherings to three households in Tiers 2-4. Private “outdoor gatherings were limited to no more than three households in all tiers.” Meanwhile, even in places with the highest rate of infection (Tier 1 locations), malls and destination centers could open and swap meets could occur indoors, with modifications, at up to 25% of capacity.

4. South Bay Renews Motion for Preliminary Injunction in South Bay II

As the second round of restrictions rolled out—in particular the updated Worship Guidance banning in-person singing and chanting and the Blueprint’s ban on indoor worship in Tier 1 high-risk counties—South Bay


151. Updated Guidance for Gatherings, supra note 150.

152. Updated Guidance for Gatherings, supra note 150.

153. Updated Guidance for Gatherings, supra note 150.

154. Updated Guidance for Gatherings, supra note 150.

155. Updated Guidance for Gatherings, supra note 150.

renewed its motion for a temporary restraining order or preliminary injunction with the district court on August 10, 2020. It argued that “California’s ‘scientific pronouncements’ are ‘largely baseless.’” Further, “the State’s restrictions treat certain secular businesses more favorably than religious organizations and have been enforced in a discriminatory manner.” The plaintiffs also requested that restrictions on singing be enjoined.

In this renewed request, South Bay proffered the testimony of Dr. George Delgado, a physician who is board certified in family medicine and hospice and palliative medicine. Dr. Delgado argued that “resumption of religious services can take place, with singing and indoors, in a manner that does not jeopardize public health” through mitigation efforts such as temperature checks, COVID-19 screeners, masks, and social-distancing devices that the State required of factories and other businesses when reopening.

Then, for the first time, in the context of the litigation, California set forth criteria for how risky something is. Instead of just broadly asserting that California’s regulations were based on risk, the State proffered declarations of public health officials and biostaticians.

Dr. James Watt, Chief of the Division of Communicable Disease Control of the Center for Infectious Diseases at the California Department of Public Health, outlined:

[F]ive criteria to judge the riskiness of a particular human activity/business:

1. being indoors;
2. bringing human activity/business;
3. having close proximity between individuals;
4. gathering for an extended duration (unlimited); and

157. Memorandum of Points & Authorities in Support of Renewed Motion for a Temporary Restraining Order or Preliminary Injunction at 1, South Bay II (No. 3:20-cv-00865). The object of a preliminary injunction must be related to the basis for a claim for permanent relief. To seek a preliminary injunction, the plaintiff must seek final equitable relief, either the same injunction made permanent or similar relief arising in equity and not just in law. In other words, in a suit for damages as a final remedy, a plaintiff may not seek a preliminary injunction to preserve a fund for such damages, although the plaintiff can seek other pre-trial remedies, such as a pre-trial attachment or lien. Unlike a temporary restraining order, or TRO, a PI requires a hearing with notice to the defendant allowing the defendant a reasonable opportunity to oppose the injunction. *Preliminary Injunction*, The Wolters Kluwer Bouvier Law Dictionary Desk Edition (2012).

158. Order Denying Plaintiff’s Renewed Motion, *supra* note 121, at 788. South Bay also contended that by “‘all reasonable scientific measurements,’ the COVID-19 health emergency ‘has ended.’” Order Denying Plaintiff’s Renewed Motion, *supra* note 121 at 788.

159. Order Denying Plaintiff’s Renewed Motion, *supra* note 121 at 788.


162. *Id.* at 4.
5. having substantial singing and vocalizing that generally takes place at events.163

When applying these criteria to other facilities allowed to open earlier such as factories, the State required additional COVID-19 safeguards, such as temperature and symptom screening.164 Dr. Watt also noted that factories pose less risk because they “are subject to strict health and safety, building code and other requirements” and “workers in factories typically are not gathered together with a large group of individuals, all of whom are in close proximity to each other for an extended duration.”165 Of course, outbreak clusters at factories and meatpacking plants belie this assertion.166

Dr. Watt contended houses of worship posed materially greater or different risk than other facilities like grocery stores where gatherings are “less extended, [of] fleeting nature” and with smaller crowds.167 South Bay countered with studies showing “specific evidence” that singing at churches is safe168 when using effective risk mitigation options like social distancing, masking, and proper ventilation.169

California’s expert, Dr. George Rutherford, a professor who holds appointments at both the University of California, San Francisco School of Medicine and the University of California, Berkeley School of Public Health, addressed disparity of risk directly. He gave a detailed explanation of why other potential comparators—such as restaurants, grocery stores, and outdoor protests—posed less risk than places of worship, relying heavily on arguments of length, proximity of exposure, and quality of ventilation:170

Based on my knowledge, experience and study of the . . . relevant publications, shopping at a grocery store involves less risk of COVID 19 transmission than attending an indoor worship service (or similar cultural event) in several respects . . . [G]rocery shopping generally involves less close proximity between shoppers

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164. Id.
165. Id.
167. Watt Declaration, supra note 163.
169. Id.
than there is between congregants during an indoor worship service.\textsuperscript{171}

Shoppers typically aim to “get in and get out as soon as possible.”\textsuperscript{172} They do not stay together “for an extended period of an hour at minimum.”\textsuperscript{173} Indeed, “it is unlikely that grocery shoppers are ever within six feet of each other for more than 15 minutes.”\textsuperscript{174} Dr. Rutherford pointed to differences in physical plants: “grocery store buildings on average are larger in size, of more recent construction, and better ventilated than houses of worship.”\textsuperscript{175}

Dr. Rutherford also contrasted indoor dining and “indoor worship service (or similar cultural event)”: [U]nlike congregants at worship services, diners generally do not enter restaurants at the same time, do not know or talk with others not at their table, and do not eat for the same duration and thus do not exit at the same time, all of which reduces the likelihood of interaction and infection.\textsuperscript{176}

On safety measures, Dr. Rutherford noted that California had instituted protective measures in restaurants. State guidelines “required that tables be spaced six feet apart” and also required “physical distancing in kitchens where cooks ordinarily work in close quarters.”\textsuperscript{177}

Likewise, Dr. Rutherford stated that factories, warehouses, and logistical center operations were safer than houses of worship because they are subject to “workplace safety and other requirements that help mitigate the risk of transmitting COVID 19.”\textsuperscript{178} “[T]emperature and symptom screening of all workers is generally required.”\textsuperscript{179} Employers must do “comprehensive risk assessment[s] of all work areas and, where infection is a hazard, implement infection control measures, such as Plexiglass barriers.”\textsuperscript{180}

\textsuperscript{171.} Id. at 18.
\textsuperscript{172.} Id.
\textsuperscript{173.} Id.
\textsuperscript{174.} Id.
\textsuperscript{175.} Id.
\textsuperscript{176.} Rutherford Declaration, \textit{supra} note 170, at 19.
\textsuperscript{177.} Rutherford Declaration, \textit{supra} note 170, at 19.
\textsuperscript{178.} Rutherford Declaration, \textit{supra} note 170, at 20.
\textsuperscript{179.} Rutherford Declaration, \textit{supra} note 170, at 20.
\textsuperscript{180.} Rutherford Declaration, \textit{supra} note 170, at 20.
On the controversial subject of public protests, he noted that “in general outdoor protests would involve a lower risk of COVID 19 transmission than indoor worship services or similar cultural events.”

Ironically, Dr. Rutherford’s exhaustive explanation of safeguards muting risk ultimately boomeranged on California. The State did not marshal evidence that no church would be capable of instituting the safeguards California identified as permitting restaurants and factories to operate with acceptable levels of risk.

In a parallel case, Calvary Chapel of Ukiah v. Newsom, recording studio and film executives described strict protective measures they implemented to ensure artists were able to record music safely, such as daily or weekly testing, social distancing, and ventilation upgrades. The State used these declarations to contend that singing in the recording and film industry “did not carry the same level of risk.”

On October 14, 2020, Judge Bashant again denied South Bay’s renewed request for a TRO, concluding that they had “not met their burden to demonstrate they are entitled to a preliminary injunction—‘an extraordinary remedy never awarded as of right.’” The district court again ruled that the restrictions did not infringe First Amendment rights or constitute religious targeting.

On December 8, 2020, the Ninth Circuit vacated the order denying injunctive relief, and remanded the case back to the district court for further

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181. Dr. Rutherford also contrasted risks from attending outdoor protests, which had become an explosive bone of contention across the nation. Outraged pastors said, “Newsom encourages tens of thousands of people to gather for mass protests [even as] he bans all in-person, worship and home Bible studies and fellowship,” without recognizing that “droplets disperse into much greater volumes of air” when outdoors. Rutherford Declaration, supra note 170, at 20; Mat Staver, founder and chairman of Liberty Counsel for Harvest Church in its lawsuit against the Governor, said the different treatment amounted to “repression” emblematic of “despotic governments.” See Caleb Parke, California Church Network Sues Gov. Newsom over Ban on Worship, Home Bible Studies, Fox News (July 20, 2020), https://www.foxnews.com/us/california-church-newsom-coronavirus-worship-ban; Claims of hypocrisy by government actors cropped up across the pandemic, as governors were seen dining maskless indoors after urging Californians to stay home. Tejal Rao, Why Was Newsom’s French Laundry Moment Such a Big Deal? Our California Restaurant Critic Explains, N.Y. Times (Sept. 14 2021), https://www.nytimes.com/2021/09/14/us/elections/french-laundry-newsom.html; See also Part I.B re governor Sisolak.

182. Rutherford Declaration, supra note 170, at 20.

183. See infra Part II.


185. Declaration of Duncan Crabtree-Ireland in Opposition to Motion for Preliminary Injunction at *2, Calvary Chapel of Ukiah, 2020 LEXIS 208530 (No. 2:20-cv-01431) (Exhibit 63).


189. Id.
consideration. As Figure 1 shows, the Supreme Court’s decisions in *Roman Catholic Diocese of Brooklyn v. Cuomo* and *Harvest Rock Church, Inc. v. Newsom* came down in the weeks after the district court’s denial.

South Bay again sought injunctive relief on an emergency basis. The district court again denied the motion for an emergency TRO enjoining enforcement of the regulation. This was not because no burden existed. Rather, Judge Bashant denied relief because the burden would be transient:

The Court does not doubt that not being able to congregate indoors imposes a burden on Plaintiffs’ religion. Nevertheless, the Court also recognizes that the burden is a temporary one, with widespread vaccination in close sight. The Court concludes that it serves the public interest to continue to protect the population as a whole, in this dire phase of the pandemic.

On December 24, 2020, the Ninth Circuit denied the plaintiffs’ motion for injunction pending appeal. On January 22, 2021, the Ninth Circuit “affirm[ed] denial of South Bay’s request to enjoin California’s temporary prohibition on indoor worship under . . . Tier 1 of the Blueprint.”

As for South Bay’s claim that the “25% capacity or 100 people” limit on indoor worship for Tier 2 and the “50% capacity or 200 people” limit for Tier 3 violated the Free Exercise Clause, the Ninth Circuit conclude[d] that South Bay is likely to succeed on its challenge to the 100-and 200-person attendance caps under Tiers 2 and 3 of the Blueprint. After *Roman Catholic Diocese*, we apply strict scrutiny to these attendance caps because California has imposed different capacity restrictions on religious services relative to non-religious activities and sectors. Specifically, in Tier 2, indoor worship services are limited to the lesser of 25% capacity or 100 people, whereas retail may operate at 25% capacity and grocery stores may operate at 50% capacity, both without attendance caps. In Tier 3, indoor worship services are limited to the lesser of 50% capacity or 200 people, whereas retail and grocery stores may operate without capacity limits subject to mandatory industry guidance.

The Ninth Circuit agreed that California submitted “substantial evidence as to why indoor worship is unsafe at any level in counties where COVID-19 is ‘widespread’ and ICU capacity is non-existent.”

190. S. Bay United Pentecostal Church v. Newsom, 981 F.3d 765 (9th Cir. 2020).
194. Id. at 774.
195. S. Bay United Pentecostal Church v. Newsom, 983 F.3d 383 (9th Cir. 2020).
197. Id. at 1152.
198. Id. at 1151–52.
But the Ninth Circuit could find no “record evidence to support [California’s] assertion that the [capacity limits] are necessary to achieve its goal in further slowing community spread,” citing Roman Catholic Diocese. Attendees in a cavernous church can socially distance more easily than people in a small chapel where “100 or 200 people could easily overwhelm” it. Consequently, “South Bay is likely to succeed on the merits of its Free Exercise claim with respect to the numerical caps in Tiers 2 and 3.”

Regarding California’s ban on indoor singing and chanting, the Ninth Circuit found, “the challenge lacks merit” because the ban “applies to all indoor activities, sectors, and private gatherings. South Bay has not pointed to any record evidence demonstrating that this ban results in disparate treatment of religious gatherings, and we cannot find any.”

On February 5, 2021, the application for injunctive relief arrived at the Supreme Court again. Three restrictions were in question in South Bay II: the total ban on indoor worship in Tier 1 counties; the ban on singing at indoor services; and the 25% capacity limit on indoor services at any tier.

This time the opinions of the Court were far more varied, and the Court granted the injunction in part. The Court, 6-3, enjoined California “from enforcing the Blueprint’s Tier 1 prohibition on indoor worship services,” over a sharp dissent from Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan.

Also in a 6-3 decision, favoring the State, the Court agreed that California could continue to ban singing and chanting at indoor services. Almost unanimously, 8-1, the Court permitted the 25% capacity restriction in Tier 1 counties to continue, with Justice Alito as the sole dissenter.

199. Id.
200. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020) (“[T]here are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services.”).
201. S. Bay United Pentecostal Church, 985 F.3d at 1151.
202. Id. at 1152.
203. Id.
206. South Bay II, 141 S. Ct. 716 (2021). The Court, with a 6-3 majority, enjoined the respondents from enforcing the ban on worship services occurring indoors in Tier 1 counties. However, the Court did not enjoin the respondents from enforcing the singing and chanting ban at indoor worship services. The Court also sustained the capacity limitations in the case where indoor services were allowed to occur. Chief Justice Roberts, Justice Barrett, and Justice Kavanaugh concurred with the majority decision. The Court also notes that Justice Gorsuch, Justice Thomas, and Justice Alito would have granted the application in full and offered more relief. Justice Kagan, Justice Breyer, and Justice Sotomayor dissented and would not have granted any relief.
208. Id.
209. Id.
Notably, Chief Justice John Roberts, Justice Brett Kavanaugh, and Justice Amy Coney Barrett formed a block of votes for each decision. Despite the prevailing wisdom that Justice Barrett would give priority to religion over all else,210 Justice Barrett affirmed California’s public health safeguards—namely, its 25% capacity cap and restrictions on singing and chanting.

In a departure from South Bay I, this time Chief Justice Roberts agreed that the complete ban on worship should be enjoined. Deference to the officials with public health expertise was not based on the record, he said:

[T]he State’s present determination – that the maximum number of adherents who can safely worship in the most cavernous cathedral is zero – appears to reflect not expertise or discretion, but instead insufficient appreciation or consideration of the interests at stake.211

Agreeing, Justice Gorsuch, with whom Justice Thomas and Justice Alito joined, also faulted California for not explain[ing] why it cannot address its legitimate concerns with rules short of a total ban. Each of the State’s shortcomings are telltale signs this Court has long used to identify laws that fail strict scrutiny.212

The Court fractured over its role during a pandemic, when so many scientific determinations underpin executive action. In dissent, Justices Kagan, Breyer, and Sotomayor stressed: “Justices of this Court are not scientists. Nor do we know much about public health policy. Yet today the Court displaces the judgments of experts about how to respond to a raging pandemic.”213

Justices Thomas, Alito, and Gorsuch countered that:

Of course we are not scientists, but neither may we abandon the field when government officials with experts in tow seek to infringe a constitutionally protected liberty. The whole point of strict scrutiny is to test the government’s assertions, and our precedents make plain that it has always been a demanding and rarely satisfied standard. . . . Even in times of crisis—perhaps especially in times of crisis—we have a duty to hold governments to the Constitution.214

211. South Bay II, 141 S. Ct. at 716 (Roberts, C.J., concurring).
213. Id. at 729 (Kagan, J., dissenting).
214. Id. at 718.
The three Justices simply did not buy California’s explanations for allowing commercial gatherings with safeguards, but not worship services.

Six Justices ultimately agreed that California had not “explain[ed] why the less restrictive option of limiting the number of people who may gather at one time is insufficient for houses of worship, even though it has found that answer adequate for so many stores and businesses.”215 Nor did California explain why “the narrower options it thinks adequate in many secular settings—such as social distancing requirements, masks, cleaning, Plexiglas barriers, and the like—cannot suffice here.”216

5. South Bay III

Despite vindication in South Bay II, with the Court ruling that California could not shutter houses of worship entirely, South Bay was not entirely satisfied. They filed suit a third time. “The outcome here,” they contended, “should be no cap [in any Tier], as in 38 states . . . or at the very least the 50–60% [capacity limit] allowed in 11 states.”218

On April 26, 2021, the Supreme Court remanded the case to the Ninth Circuit for further consideration in light of its ruling in Tandon v. Newsom, discussed below.219 On June 1, 2021, Judge Bashant entered a permanent injunction stipulated to by the parties.220 California was permanently enjoined from issuing or enforcing regulations which imposed:

- “any capacity or numerical restrictions on religious worship services and gatherings at places of worship”221 so long as hospital admissions and daily statewide COVID-19 cases remained below specified levels;
- “any new public health precautions on religious worship services and gatherings at places of worship not in the current guidance, unless those precautions are either identical to, or at least as favorable as, the precautions imposed on other similar gatherings of similar risk;”222 and
- “any restrictions or prohibitions on the religious exercise of singing and chanting during religious worship services and gatherings at places of worship besides generally applicable restrictions or prohibitions included in the guidance for live events and performances.”223

215. Id. at 718 (Roberts, C.J., concurring).
216. Id. at 718–19.
219. Id.
221. Id. at *1.
222. Id.
223. Id.
6. Second Round of Litigation: Tandon Sues Governor Newsom Over Private Worship

Like everyone, houses of worship navigated not only state-wide restrictions on what could be done during COVID-19, but local regulations, too. Santa Clara County initially prohibited both indoor and outdoor gatherings, including worship services, but later relaxed restrictions to allow outdoor religious services without restriction.224 During the time it was classified as a Tier 1 location, Santa Clara allowed only members of the same household to gather to worship, even in their private homes.225 Parroting California’s Blueprint.226 As the county moved into lower-risk tiers, Santa Clara limited worship in one’s private home to no more than three households of unrelated persons, even if the gathering happened outdoors.227 The County also issued capacity restrictions on gatherings permitted by the State.228

On October 13, 2020, three groups of “business,” “free speech,” and “free exercise” plaintiffs229 sued California and Santa Clara County, alleging violations of the First and Fourteenth Amendments.230 The “Free Exercise” plaintiffs (the “Free Exercise Plaintiffs”) did not challenge restrictions on worship in public places, but rather the restrictions on religious gatherings in private households.231

Pre-pandemic, Free Exercise Plaintiffs Jeremy Wong and Karen Busch hosted in-person weekly Bible studies and worship sessions with eight to twelve people. After California’s November 13, 2020, Gatherings Guidance, it became impossible for the plaintiffs to resume at-home worship with more than two other households despite being allowed to gather at

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226. In Tier 1 areas, California’s Blueprint “prohibit[ed] indoor private gatherings of individuals outside the immediate household and restrict[ed] outdoor private gatherings to three households.” In Tiers 2–4, indoor private gatherings were still limited to three households. Id. at 947.
227. Id. at 947.
228. Id. (Declaration of Jason M. Bussey with Exhibits A and Exhibits B) (stating it went from barring all indoor gatherings regardless of size, in July 2020 to limiting indoor gatherings to a maximum of 100 people in October 2020 to again prohibiting indoor gatherings by November 2020.).
229. Id. at 943, 945–56.
230. Id. at 943. The three groups of plaintiffs’ alleged violation of the right to free speech and assembly; free exercise; the right to earn a living under the Due Process Clause of the Fourteenth Amendment; equal protection; and violation of the prohibition on unconstitutionally vague criminal laws. ECF No. 1 ¶¶ 122–160. The plaintiffs sought declaratory and injunctive relief. ECF No. 1.
houses of worship.\textsuperscript{232} The reason: “The State does not consider a home to be a ‘house of worship.’”\textsuperscript{233} The Free Exercise Plaintiffs stressed the incoherence of different regulations based on where worship occurred:

Thus, while churches, synagogues, and mosques in Santa Clara County are now allowed to hold indoor gatherings with up to 50% capacity given the County’s recent move to Tier 3, Wong and Busch still cannot invite more than two other households, which typically means two other people, to their home for a Bible study, prayer meeting, or worship service. And while such religious gatherings could be held in their backyards, even outdoors the State limits “gatherings” to no more than three households.\textsuperscript{234}

For Wong and Busch, “in person [sic] communal religious assembly, study, and worship are indispensable to their faith . . . . Remote worship, moreover, is an inadequate substitute because not every member of their faith communities has access to such technology.”\textsuperscript{235}

On October 22, 2020, the Free Exercise Plaintiffs filed a motion for a preliminary injunction,\textsuperscript{236} asking that the United States District Court for the Northern District of California enjoin both California and Santa Clara County’s restrictions.

The State and County opposed the Free Exercise Plaintiffs’ motion on November 18, 2020.\textsuperscript{237}

On December 18, 2020, United States District Judge Lucy H. Koh held a virtual Zoom hearing on the plaintiffs’ motion.\textsuperscript{238} In this hearing, Robert Dunn, counsel for the Free Exercise Plaintiffs, emphasized the “interesting exemptions” in the Blueprint for the entertainment industry: “[Y]ou could film a TV show in a house for two hours, but you couldn’t have a Bible study with the same number of people in the same house for an hour.”\textsuperscript{239}

Dr. Jayanta Bhattacharya, a Stanford University Professor of Medicine and researcher in epidemiology and health economics, filed a declaration in support of the Free Exercise Plaintiffs. Dr. Bhattacharya argued that “[w]ithout a publicly available model that makes explicit its assumptions about [the Blueprint’s tiered model], the claimed benefits of restricting the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{232} Id. at 940.
\item \textsuperscript{233} Emergency Application for Writ of Injunction or in the Alternative for Certiorari Before Judgment or Summary Reversal at 19, Tandon v. Newsom, No. 21-15228 (U.S. Apr. 3, 2021).
\item \textsuperscript{234} Id.
\item \textsuperscript{235} Id.
\item \textsuperscript{236} Order Denying Motion for Preliminary Injunction at 943, Tandon v. Newsom, 517 F. Supp. 3d 922 (N.D. Cal. Feb. 5, 2021) (No. 5:20-cv-07108).
\item \textsuperscript{237} Id.
\item \textsuperscript{239} Id. at 22–23.
\end{itemize}
\end{footnotesize}
normal activities of people in higher tier counties has inadequate scientific justification.”240

California again produced the declarations of doctors Rutherford and Watt, as well as Dr. Michael A. Stoto, an epidemiologist, statistician, and health policy analyst.241 Each provided declarations regarding the length of gathering and conversations, the smaller size of and reduced ventilation in private homes, and the reduced likelihood of social distancing and masking.242

Counsel for the State, Lara Haddad, and for the County, Jason Bussey, referenced doctors Rutherford, Watt, and Stoto.243 Mr. Bussey contended Dr. Bhattacharya showed that “most of the transmission occurring right now is in households.”244 Mr. Dunn doggedly contended that “a home of worship should be treated the same as a house of worship.”245

On February 5, 2021, United States District Judge Lucy H. Koh denied the Free Exercise Plaintiffs’ motion for preliminary injunction.246

On February 9, 2021, the Free Exercise Plaintiffs appealed the lower court’s order, and the court stayed its proceedings pending appeal by stipulation of the parties on February 10, 2021. On February 17, 2021, the Free Exercise Plaintiffs ex parte asked for injunction pending appeal, which Judge Koh denied on February 19. On March 4, 2020, the Free Exercise Plaintiffs sought an emergency motion for injunction pending appeal with the Ninth Circuit. On March 5, 2020, the State asked the court to “either deny the Motion for lack of emergency or grant State Defendants the time allotted in the Federal Appellate Rules to respond on a non-emergency basis.”247 Substantively, the State contended it treated all gatherings in a given setting alike, whatever the purpose:

Far from targeting religious activity, the gatherings guidance imposes categorical restrictions . . . , which apply to secular as well

241. State Appellees’ Answering Brief at 34, Tandon v. Newsom, No. 21-15228 (9th Cir. Apr. 6, 2021) (citing declarations from Drs. Rutherford, Stoto, Watt, and three other experts).
242. Id.
243. Id. (“As the district court explained, the State imposes restrictions on location and attendance, beyond such precautions as face coverings and distancing, based on objective risk criteria related to the spread of COVID-19, and these factors all show that private gatherings create a great risk of spread, leading the “vast consensus of public health experts” to believe such gatherings must be limited.”).
245. Id.
as religious activity. The guidance is also content-neutral and does not in any way differentiate based on the topics discussed or the idea or message expressed. Finally, the guidance and the business restrictions . . . are motivated by the COVID-19 pandemic and the need to combat the spread of . . . disease rather than any (implausible) animus against business.248

On March 30, 2021, the Ninth Circuit denied the Free Exercise Plaintiffs’ motion for an emergency injunction pending appeal.249 Despite the Free Exercise Plaintiffs’ contention that restrictions on in-home worship were harsher than for other comparable secular activities, the restrictions did not garner strict scrutiny: “the record does not support that private religious gatherings in homes are comparable—in terms of risk to public health or reasonable safety measures to address that risk—to commercial activities, or even to religious activities, in public buildings.”250

On April 2, 2021, the Free Exercise Plaintiffs filed an emergency application for writ of injunction or, in the alternative, for certiorari before judgment or summary reversal relief with the U.S. Supreme Court.251 They argued that “[California’s] Gatherings Guidance is substantially underinclusive,” making it “neither neutral nor generally applicable”252 and therefore not entitled to the generous, rational basis review under Employment Division v. Smith, discussed below. Whether indoor or outdoor, gatherings to worship, they asserted, were subject to greater restrictions:

The State allows a broad swath of “comparable” activities to occur, both indoors and outdoors, that implicate its purported interest in combatting the spread of COVID-19, while simultaneously prohibiting the in-home religious gatherings that both Wong and Busch wish to hold.253

Those residing in Tier 1 or 2 counties may congregate outdoors, “generally without any numerical limit,” at “[w]ineries, [b]reweries, and [d]istilleries.”254 They may also gather outdoors at “[f]amily [e]ntertainment [c]enters” for “[k]art [r]acing” and “[m]ini [g]olf.”255 “Thus, although Wong or Busch could watch John Legend sing outdoors at

248. Id.
250. Tandon v. Newsom, 992 F.3d 916, 920 (9th Cir. 2021).
254. Id. at 21.
255. Id.
one of their favorites [sic] bars or wineries, they cannot host their faith community in their backyard for worship, prayer, or Bible study.256

In Tier 3 counties, such as Santa Clara County, residents can dine indoors as long as the restaurant’s capacity limit is below 50% maximum capacity or 200 people, whichever is fewer.257 More than three families could gather at movie theatres and zoos but not worship together in their home.

On April 6, 2020, just days before the Supreme Court’s decision, Governor Newsom announced that California “aim[ed] to fully reopen on June 15,”258 provided that the State had sufficient vaccination rates and supply and stably low hospitalization rates. Common-sense measures like masking would continue.259 In an April 6, 2021, press conference, Governor Newsom declared that it was “time to turn the page on our tier system and begin looking to fully reopen California’s economy” and to “begin planning for our lives post-pandemic.”260 Notwithstanding that bold announcement, places of worship remained closed or under capacity restrictions for another two months, until June 15.261

On April 9, 2021, the Supreme Court overturned the Ninth Circuit’s decision in a per curiam 5-4 decision, granting the injunction pending appeal. California could not enforce restrictions on worship gatherings in private homes.262 The restrictions were “not neutral and generally applicable” under Employment Division v. Smith, the Court’s guiding standard for giving deferential review in claims of religious burden under the Free Exercise Clause. Strict scrutiny is triggered whenever governments “treat any comparable secular activity more favorably than religious exercise.”263 California could not explain why at-home worshipers could not gather in larger numbers using the safety measures applied to secular activities and “the Ninth Circuit erroneously declared that such measures might not ‘translate readily’ to the home.”264

In a dissenting opinion joined by Justice Breyer and Justice Sotomayor, Justice Elena Kagan stressed that California “treat[s] religious conduct as well as . . . comparable secular conduct” because it issued a “blanket restriction on at-home gatherings of all kinds, religious and secular

256. Id.
257. Id. at 28.
259. Id.
260. Id.
261. Id.
263. Id. at 1296.
264. Id. at 1297.
alike.”265 “[A]t-home secular gatherings [served as] the obvious comparator here.”266 In her view, “California need not . . . treat at-home religious gatherings the same as hardware stores and hair salons.”267

Justice Kagan pointed to the “uncontested testimony of California’s public-health experts”268 about prolonged conversation in homes, different ventilation, smaller rooms, and different norms around mask-wearing and social distancing, all “inconvenient” evidence for “the per curiam’s preferred result.”269

On June 11, 2021, Governor Newsom released a State Public Health Officer Order, which removed all previous public health directives relating to COVID-19 and replaced them with “limited and temporary public health requirements,” effective on June 15, 2021. These limited requirements encompassed face covering requirements and K-12 school directives.270

On June 24, 2021, by stipulation, the parties agreed to a permanent injunction.271 The Free Exercise Plaintiffs agreed to the dismissal of their claims “without prejudice” and received attorneys’ fees of $500,000.272 If California reinstated numerical and capacity restrictions, the Free Exercise Plaintiffs could file a new action.273

265. Id. at 1298 (Kagan, J., dissenting).
266. Id.
267. Id.
269. Id.
272. Id. at 3 (“The California Department of Public Health shall pay Plaintiffs the sum of $500,000 for Plaintiffs’ reasonable attorney’s fees and costs necessarily incurred in this case. Pursuant to 28 U.S.C. § 1961, post-judgment interest shall begin to accrue 90 days from the date the Court signs the final judgment.”).
273. Id.
FIGURE 5. NEW YORK TIMELINE

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B. Governor Cuomo’s Regulation of Clusters Across New York


These opportunities include schools, churches, synagogues, and other event spaces where large numbers of people gather and remain together for extended periods of time. Although we believe that the risk generally to New Yorkers is low, I have recommended this strategy to reduce opportunities for further spread with the goal of reducing the number of new cases . . . \footnote{Id.}

On March 12, 2020, the State suspended in-person public meetings, authorizing public meetings to be held virtually.\footnote{State of N.Y. Exec. Chamber No. 202.1, supra note 275.}

On March 16, 2020, Governor Cuomo directed local government to close schools\footnote{State of N.Y. Executive Chamber, No. 202.4, Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency (Mar. 16, 2020), https://www.governor.ny.gov/sites/default/files/atoms/files/EO_202.3.pdf.} and to specify at least 50% of the local workforce as non-essential, who would be assigned to work from home or take leave.\footnote{Some of the schools still weren’t in-person in New York at the end of the school year of 2020–2021. See, e.g., School Responses to the Coronavirus (COVID-19) Pandemic During the 2020-2021 Academic Year, Ballotpedia (Feb. 27, 2022), https://ballotpedia.org/School_responses_to_the_coronavirus_(COVID-19)_pandemic_during_the_2020-2021_academic_year#NewYork.} Executive Order (“EO”) 202.3 required that “any large gathering or event (concert, conference, worship service, performance before a large audience,
etc.) . . . be cancelled or postponed if more than fifty persons are expected in attendance . . . . “ 283 It stopped restaurants and bars from serving food or beverages for on-premise consumption. 284 Casinos, gyms, fitness centers, movie theaters, schools, and all other businesses deemed non-essential to New York’s COVID-19 emergency response were also shut down. A majority of New York’s upstate factories were classified as essential and stayed open.285

On March 18, 2020, Governor Cuomo issued a pair of Executive Orders. EO 202.5 closed retail shopping malls. 286 EO 202.6 outlined different categories of essential businesses or services. 287 Houses of worship were not declared as essential in either executive order.288

Governor Cuomo directed New York’s Economic Development Corporation (“ESD”) to “issue guidance as to which businesses are determined to be essential.” 289 On March 20, 2020, ESD listed categories of essential businesses and gave examples within those categories; for instance, “essential retail” included grocery stores and farmers markets. 290 Houses of worship were not included as essential businesses but were “not ordered closed.” 291 ESD “strongly recommended no congregate services be held and social distance maintained.” 292

Concerned with reducing the risk from travelers to New York, on June 24, 2020, Governor Cuomo set quarantine restrictions on travelers arriving in New York “from a state with a positive test rate higher than 10 per


284. Id.


289. STATE OF N.Y. EXEC. CHAMBER NO. 202.6, supra note 287.


291. Id.

292. Id.
100,000 residents, or higher than a 10\% test positivity rate, over a seven-
day rolling average.\textsuperscript{293} In early October, certain neighborhoods in New York City experienced
positivity rates nearly double the city’s average.\textsuperscript{294} Orthodox Jews com-
prised a significant portion of those who lived in the affected ZIP code areas.\textsuperscript{295}

On October 5, 2020, during a press conference, Governor Cuomo said that:

Religious gatherings, especially in these communities. New
Rochelle, first hotspot, was an Orthodox Jewish man who went to
a temple, hundreds of people. And then a wedding. Hundreds of
people. Orthodox Jewish gatherings often are very, very large.
And we’ve seen what one person can do in a group. Look at this
Rose Garden with the President, by the way. Outdoor event. “Oh,
those are safe. Outdoor events.” No, no, no. Safer than indoor.
Nobody ever said safe. Safer than indoor. And look at that grow-
ing list of people at a Presidential Rose Garden event who were
theoretically tested before they came in. How many people could
have been infected? One, two?\textsuperscript{296}

He continued, saying “I have to say to the Orthodox community to-
morrow, ‘If you’re not willing to live with these rules, then I’m going
to close the synagogues.’”\textsuperscript{297} Governor Cuomo may have had evidence that
Orthodox Jewish synagogues led to outbreaks on a greater scale than other
gatherings, but he did not present it.

On October 6, 2020, Governor Cuomo issued EO 202.68 to control
rising infections of COVID-19\textsuperscript{298} and announced a “New Cluster Action
Initiative”\textsuperscript{299} which used a micro-cluster strategy to address COVID-19

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\textsuperscript{293.} State of N.Y. Executive Chamber, No. 205, Quarantine Restrictions on Trav-

\textsuperscript{294.} Jonathan Allen & Maria Caspani, New York City Set to Impose New COVID-19 Closures

\textsuperscript{295.} J.J. Goldberg, When COVID-19 Rules Are Flouted by Ultra-Orthodox Jews, it isn’t Anti-

\textsuperscript{296.} New York Gov. Andrew Cuomo Press Conference Transcript October 5, REV Tranc-

\textsuperscript{297.} Id.

\textsuperscript{298.} State of N.Y. Executive Chamber, No. 202.68, Continuing Temporary Suspension

\textsuperscript{299.} Governor Cuomo Announces New Cluster Action Initiative, GOVERNOR OF N.Y. STATE
“hot spots clusters” of cases by restricting the surrounding area. 300 EO 202.68 color-coded certain areas as red, orange, and yellow zones according to the reported number of people diagnosed with COVID-19 in the micro-cluster. Zones with higher infection rates received greater restrictions. “Red” zones immediately surrounded a cluster in a concentric circle, “orange” zones surrounded those areas, and “yellow” zones surrounded the orange. 301 The first micro-clusters included parts of Brooklyn and Queens. 302 Brooklyn’s “red” zone encompassed Gravesend, Midwood, and Borough Park, home to large Orthodox Jewish communities. 303

EO 202.68 set capacity limits for services in houses of worship at between 10 or 25 people, depending on which “zone” the house of worship was located, as follows:

- In red zones, “houses of worship [were] subject to a capacity limit of 25% of maximum occupancy or 10 people, whichever is fewer.”
- In orange zones, houses of worship could accommodate “the lesser of 33% of maximum occupancy or 25 people, whichever is fewer.”
- In yellow zones, attendance at worship serves was limited to 50% of the building’s capacity. 304

Gatherings in violation of the Order could result in fines up to $15,000.305 Under EO 202.68, essential businesses were allowed to remain open in red zones.

Gathering for other purposes, like dining, received different treatment. In red zones, restaurants and taverns could serve take-out but could not have indoor dining, while in orange zones restaurants and taverns could provide take-out meals and serve outdoor parties, not exceeding four people, and in yellow zones, restaurants and taverns could serve parties of four.

302. State of N.Y., supra note 298.
305. Id.
or fewer, inside and outside. EO 202.68 otherwise placed no capacity restrictions on total number seated across the restaurant or tavern in orange and yellow zones.

The day of the EO 202.68’s release, October 6, 2020, Bishop Nicholas DiMarzio of the Roman Catholic Diocese of Brooklyn (the “Diocese”) said:

To think that some of our churches have the capacity to hold a thousand people for Mass, a capacity range of 10 to 25 people is disrespectful to Catholics and to the clergy who all have followed the rules and, as such, have prevented a spike in COVID cases within the confines of the hot zones.

Governor Cuomo’s new restrictions on houses of worship were “outrageous,” “unfair,” “disrespectful,” and an attack on religious freedom, Bishop DiMarzio charged.

Orthodox Jewish communities in New York City protested the restrictions, arguing that the governor was unfairly targeting them. EO 202.68 came amidst the Jewish holiday of Sukkot, and Agudath Rabbi David Zweibel said the restrictions “basically wip[ed] out the entirety of the spirit of the holiday.”

In the ensuing days, Governor Cuomo insisted the new restrictions were “based solely on science and coronavirus case clusters in areas that, in his view, have flouted the state’s existing virus-safety rules.”

On October 8, 2020, the Diocese sued Governor Cuomo in federal court under 42 U.S.C. § 1983, demanding, among other remedies, emergency injunctive relief in the form of a TRO and a preliminary injunction. The Diocese claimed that Governor Cuomo’s New Cluster Action Initiative in EO 202.68 violated the Free Exercise Clause of the First Amendment as applied to the Diocese’s churches.

308. Id.
310. Id.
313. Shaffrey & Villeneuve, supra note 311 (quoting Rabbi Zwiebel as saying, “We are now, you know, on the precipice of an enormous sense of despair.”).
314. Shaffrey & Villeneuve, supra note 311.
316. STATE OF N.Y., supra note 298.
On October 9, 2020, Governor Cuomo said on CNN that “the cluster is a predominantly ultra-orthodox cluster. The Catholic schools are closed because they happen to be in that cluster, but the issue is with that ultra-orthodox community. . . . This [is] in the middle of Brooklyn. They will make other people sick.”

That same day, a Friday, Judge Eric R. Komitee of the Eastern District of New York held an emergency oral argument to consider the TRO motion before Sunday’s mass. The hearing was held by telephone.

Counsel for the Diocese stressed the “disparate treatment” of houses of worship, pointing out that in red zones businesses like pet stores, grocery stores, hardware stores, banks, and accountants were deemed essential and allowed to remain open without a size restriction.

Judge Komitee asked “[w]hat are the restrictions on essential businesses, what the state calls essential businesses in the red zone.” Counsel for the State described the different restrictions and pinned the different risk profile for those businesses “still allowed to operate” to the fact that people enter at different times when they enter restaurants, grocery stores, and other businesses:

The essential—food stores can still operate. A restaurant has to have take-out and delivery only. . . . Costco which sells food. It sells pharmaceuticals. It also sells a number of other products. The nature of how people come to a Costco or pet store or, frankly, their accounting office is quite different than the nature of how they come to a worship service. So a worship service, Your Honor, involves a set time where a large number of people arrive at the same time. They sit in a worship service. They perhaps pray, chant, sing in groups, which as Your Honor alluded to earlier, has its own potential risk factor.


319. “This case is assigned to the Honorable Nicholas G. Garaufis. Because Judge Garaufis was unavailable to hear the case on an expedited basis, the undersigned (as the assigned Miscellaneous Judge) heard oral argument, and issued this Order shortly thereafter. The case will revert to Judge Garaufis for all purposes going forward.” Roman Cath. Diocese of Brooklyn v. Cuomo, 493 F. Supp. 3d 168, 171 n.1 (E.D.N.Y. 2020).

320. Roman Cath. Diocese of Brooklyn, 495 F. Supp. 3d at 123.


323. Id. at 27:19–21.

324. Id. at 27:23–28:15.
Judge Komitee characterized the case as “a difficult decision for two reasons.” First, unlike with other challenged restrictions, EO 202.68 “contains provisions made expressly applicable to houses of worship.” Second, Governor Cuomo “made remarkably clear that this Order was intended to target a different set of religious institutions,” namely ultra-Orthodox Synagogues, and the Diocese “appears to have been swept up in that effort despite having been mostly spared, so far at least, from the problem at hand.” Nonetheless, Judge Komitee sided with the State and denied the TRO, citing the government’s “wide latitude” to manage public health policy to combat disease.

On October 14, Governor Cuomo said again on CNN, “We’re now having issues with the Orthodox Jewish community in New York where because of their religious practices . . . we’re seeing a spread.”

Senior Judge Nicholas G. Garaufis on October 15, 2020, heard the request for a preliminary injunction by videoconference, at which witnesses testified and the court considered declarations and affidavits submitted by the parties. New York Commissioner of Health Dr. Howard Zucker and Dr. Debra Blog of the New York State Department of Health submitted declarations for the proceeding. Elizabeth M. Dufort, M.D., FAAP, the Medical Director of the Division of Epidemiology, submitted a notarized affidavit, and Bryon Backenson, an Assistant Professor of Epidemiology & Biostatistics at the University of Albany, testified at the evidentiary hearing on October 15.

Dr. Dufort’s affidavit stressed the need for regulating non-essential businesses: “Restrictions on the operation of non-essential businesses and indoor gatherings are necessary to ensure sufficient space for proper distancing, thereby reducing potential transmission rates.”

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326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.*
330. *Id.* at 124.
333. *Id.* at 120–21.
Dr. Dufort did not explain why some businesses were deemed essential and others were not. The only time she referred to essential or non-essential businesses was to recount the governor’s orders.

Dr. Blog’s declaration stressed World Health Organization guidance to faith-based organizations advising them to “conduct faith activities remotely, rather than in-person, using available technology to maintain community and continue worship.” Dr. Blog added that:

In a religious service or ceremony, the idea is a group of people coming together as a community to interact and pray together. Generally, the congregants are arriving and leaving at the same time and are together over an extended period of time. This type of close interaction, while having deep meaning for the congregants, poses a higher risk of transmission of the virus.

In his declaration, Dr. Zucker explained the cluster zones and data mapping:

The Red Zone contains the highest level and concentration of positive cases, which is the cluster itself and is created by analyzing the mapping of the positivity rates and using streets as a boundary. When we are mapping the positive cases and creating the zones, we are not looking at the businesses or entities located within those zones, only the number and grouping of positive cases. We do not take into account who or what are located in that zone - whether it is a non-essential business, school, yeshiva, church, synagogue, or a car dealership - as they all face restrictions, if justified by the scientific data, whether or not that particular school, car dealership, or religious group has positive cases within it. The data drives the zone.

With regards to the Orange or Yellow Zones, Dr. Zucker explained:

There is no specific percentage or threshold to determine when an area should be designated as an Orange or Yellow Zone, as it is a nuanced process that takes multiple factors into account and not solely the positivity percentage. It is important, for instance, to consider the population density of the area. The positivity percentages indicate the level of spread beyond the cluster and require some level of mitigation to prevent any further spread.

On October 15, 2020, Professor Backenson testified to the court. On cross examination, the Diocese’s counsel asked whether he was “aware of any evidence of the spread of COVID from the ultra-orthodox community to the Diocese’s churches in Brooklyn and Queens?” Professor Backenson

338. Id.
answered: “I’m not aware, but it doesn’t mean it doesn’t exist.” He did, however, acknowledge that the Diocese was in fact taking the necessary precautions when informed that the Diocese’s churches were “rigorously enforcing the mask requirement and social distancing.”

Counsel for the Diocese summarized the evidence:

The only evidence is of spread and outbreak in a certain community, the ultra-Orthodox Jewish community, and there’s no evidence of any spread beyond that community into the Catholic churches. And that’s a track record over three plus months and includes September and early October, before the Governor imposed this order.

As to density, Professor Backenson said

[ Density is important, basically, in trying to limit the number of people that one individual can potentially transmit to. It’s why we . . . recommend masking and social distancing. It’s why we have certain limits for gatherings, why we have staggered workplaces, why we have staggered school settings, why we have no fans in stadiums. It basically is trying to prevent events where one or two positive individuals who may or may not know that they are ill or positive can potentially give this to many, many other people at once.]

The State’s witnesses did not address why staggered arrival or spacing could mute risk inside factories but not churches. It was assumed that places of worship would have attendees arrive and depart en masse, rather than staggering or scheduling times.

The Diocese proffered testimony from Joseph J. Esposito, former Commissioner of New York City Emergency Management and Chief of Department of the New York City Police Department, who had spent countless hours “meticulously crafting protocols [with an internal committee, to] permit parishioners to safely return to worship.”

Commissioner Esposito testified that the Dioceses’ protocols conformed “at all times [to] the guidance of [the] City, State, and Federal authorities.” The measures instituted by the Diocese included limiting the number of church services, including the number of worshippers who could


342. Id. at 102.

343. Id. at 110.

344. Id. at 69.


attend, applying social distancing measures, requiring mask-wearing, spreading worshippers out into distanced pews, and modifying the way Holy Communion is taken. Specifically, Commissioner Esposito stressed “keeping all doors open so that worshipers may enter and exit in a socially distant manner.”

On October 16, 2020, Judge Garaufix denied the Diocese’s motion for preliminary injunction, stating:

Because EO 202.68 treats religious gatherings as well or better than comparable gatherings, and in light of the fact that state and local governments are more equipped than courts to determine what is comparable, the court finds that it is a neutral, generally applicable law, subject to rational basis review. Based on the evidence proffered, the court has no reason to doubt that the policy was crafted based on science and epidemiological purposes. Given the pandemic, EO 202.68 is clearly “rationally related to a legitimate state interest” and it is therefore exceedingly unlikely to infringe on the Diocese’s First Amendment free exercise rights.

Agudath contemporaneously challenged EO 202.68. Its motion for a preliminary injunction was also denied.

During a press conference on October 21, 2020, Governor Cuomo said about the Jewish community:

I’m sorry that they are disrupted, their religious ceremonies are disrupted. How many people they can have in a synagogue is disrupted. How many people they can have at a wedding is disrupted. The operation of their schools is disrupted. I am sorry for that. In the same way, I’m sorry to the Catholic community and to the Muslim community and to all New Yorkers.

In the same press conference Governor Cuomo explained how the COVID-19 micro-clusters were constructed:

[T]he embers are what we call micro clusters, and we can identify them from the testing data, from the hospitalization data and mapping software. We identify the micro cluster, that’s called a red zone. We then put a buffer around it. That’s called an orange zone. We then put a buffer around the orange zone, which is a yellow zone.

347. Id.
351. Id.
That same day, Rev. Dr. Andrew Bennett of the Religious Freedom Institute wrote an open letter to Governor Cuomo. Rev. Dr. Bennett expressed concern that the governor was continually making the Orthodox Jewish community the “subject of [his] public addresses,” making a claim about the community that lacked a proper basis. He said:

[Y]our words and actions directed at the Orthodox Jewish community seem motivated by fear rather than by evidence. . . . There is no scientific basis to conclude that the Orthodox Jewish community is the primary reason for the persistence of the Covid-19 epidemic in New York, but you are speaking and acting as if they are.

The Governor’s claims placed religious freedom at risk in New York. Rev. Dr. Bennett urged the Governor to “ensure that [his] actions . . . be based on empirical evidence rather than fear.”

Agudath and the Diocese both appealed to the U.S. Court of Appeals for the Second Circuit, asking it to grant an injunction pending appeal. On November 9, 2020, after hearing the cases in tandem telephonically, the Second Circuit denied the Diocese’s motion for an injunction pending appeal but granted the motion to expedite the appeal. The Second Circuit said that the Diocese had not cleared the “high bar necessary to obtain an injunction pending appeal” because: “while it is true that the challenged order burdens the Appellants’ religious practices, the order is not ‘substantially underinclusive’ given its greater or equal impact on schools, restaurants, and comparable secular public gatherings.”

The Second Circuit pointed to Chief Justice Roberts’ concurring opinion in *South Bay I* that COVID-19 restrictions that treat places of worship on par with comparable secular gatherings do not run afoul of the Free Exercise Clause.

On November 9, 2020, the Diocese filed an emergency application for injunctive relief against EO 202.68 with the Supreme Court. EO 202.68 treated the Diocese more harshly and placed more restrictions on it than secular facilities in the same color zone, such as acupuncture centers, liquor

353. *Id.*
354. *See id.*
355. *Id.*
356. Agudath Isr. of Am. v. Cuomo, 979 F.3d 177, 179 (2d Cir. 2020).
357. *Id.* at 180–81.
358. *Id.*
stores, and bicycle shops, the Diocese maintained.\textsuperscript{360} Agudath followed with an emergency application on November 16.\textsuperscript{361}

On November 20, 2020, New York moved the Diocese and Agudath into yellow zones, giving them the ability to open to 50% occupancy, “a limit that the synagogues are not challenging.”\textsuperscript{362} New York’s Solicitor General urged the Supreme Court not to grant review, saying Governor Cuomo did not attribute COVID-19 outbreaks to “the ultra-Orthodox Jewish community” and factually treated “religious gatherings more favorably than secular activities that involve comparable risks—such as plays, concerts, spectator sports and movies—by allowing them to remain open, with limits on attendance.”\textsuperscript{363}

On November 25, 2020, the Supreme Court addressed the Diocese’s and Agudath’s applications for injunctive relief in the same opinion.\textsuperscript{364} In a 5-4 \textit{per curiam} decision, the Supreme Court granted the plaintiffs’ application for injunctive relief in part and enjoined New York from enforcing EO 202.68’s capacity limits on worship services of 10 persons in red zones and 25 persons in orange zones.\textsuperscript{365} This win for houses of worship in New York represented a shift from the Court’s previous decision, \textit{South Bay I},\textsuperscript{366} and the Court’s denial of injunctive relief in \textit{Calvary Chapel}.\textsuperscript{367}

New York’s capacity limits are “far more restrictive than any COVID–related regulations that have previously come before the Court, much tighter than those adopted by many other jurisdictions hard-hit by the pandemic, and far more severe than has been required to prevent the spread of the virus at the applicants’ services.”\textsuperscript{368}

The Court wrote:

Not only is there no evidence that the applicants have contributed to the spread of COVID–19 but there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services. Among other things, the maximum attendance at a religious service could be tied to the size of the church or synagogue.\textsuperscript{369}

Although the Court noted that “[m]embers of this Court are not public health experts, and we should respect the judgment of those with special

\textsuperscript{360}. See \textit{Id}.

\textsuperscript{361}. Emergency Application for Writ of Injunction Relief Requested by 3:00 PM on Friday, November 20, 2020, Agudath Isr. of Am. v. Cuomo, 979 F.3d 177 (2d Cir. 2020) (No. 20A90).


\textsuperscript{363}. \textit{Id}.

\textsuperscript{364}. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020).

\textsuperscript{365}. \textit{Id.} at 69.

\textsuperscript{366}. \textit{South Bay I}, 140 S. Ct. 1613 (2020).


\textsuperscript{368}. \textit{Roman Cath. Diocese of Brooklyn}, 141 S. Ct. at 67.

\textsuperscript{369}. \textit{Id.} at 68.
expertise and responsibility in this area,” it nevertheless stated that even in a pandemic, 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.370

New York’s failure to show why EO 202.68’s blanket rules were needed in facilities of all sizes perplexed the Court: “It is hard to believe that admitting more than 10 people to a 1,000–seat church or 400–seat synagogue would create a more serious health risk than the many other activities that the State allows.”371

Concurring, Justice Kavanaugh stressed the disconnect between New York’s “strict and inflexible numerical caps” of 10 or 25 people and the size of the regulated facilities, some of which “ordinarily can hold hundreds of people and that, with social distancing and mask requirements, could still easily hold far more than” allowed.372 He found New York’s restrictions on houses of worship to be “not only . . . severe, but also . . . discriminatory.”373

In red and orange zones, houses of worship must adhere to numerical caps of 10 and 25 people, respectively, but those caps do not apply to some secular buildings in the same neighborhoods. In a red zone, for example, a church or synagogue must adhere to a 10-person attendance cap, while a grocery store, pet store, or big-box store down the street does not face the same restriction. In an orange zone, the discrimination against religion is even starker: Essential businesses and many non-essential businesses are subject to no attendance caps at all.374

Justice Gorsuch, in his concurrence, underscored the disrespect shown to worship by the State’s scheme:

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? . . . The only explanation for treating religious places differently seems to be a judgment that what happens there just isn’t as “essential” as what happens in secular spaces.375

Justice Gorsuch also stressed the passage of time since the Court’s earliest decisions:

370. Id.
371. Id. at 67.
372. Id. at 73 (Kavanaugh, J., concurring).
373. Id.
375. Id. at 69 (Gorsuch, J., concurring).
Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical. Rather than apply a nonbinding and expired concurrence from *South Bay*, courts must resume applying the Free Exercise Clause. Today, a majority of the Court makes this plain.\textsuperscript{376}

By the time the Supreme Court issued its ruling in *Catholic Diocese*, Chief Justice Roberts noted in dissent, houses of worship in the disputed zones were able to hold services at 50% capacity, which was “at least as favorable as the relief” the Diocese and Agudath sought.\textsuperscript{377} He saw no reason to enjoin a restriction no longer in place.

Justices Breyer, with whom Justices Kagan and Sotomayor joined, dissented:

> [T]here is no need now to issue any such injunction. Those parts of Brooklyn and Queens where the Diocese’s churches and the two applicant synagogues are located are no longer within red or orange zones. . . .

> The specific applicant houses of worship are now in yellow zones where they can hold services up to 50% of maximum capacity. And the applicants do not challenge any yellow zone restrictions, as the conditions in the yellow zone provide them with more than the relief they asked for in their applications. [If restrictions were reimposed], they could refile their applications [and] this Court, if necessary, could then decide the matter in a day or two, perhaps even in a few hours. Why should this Court act now without argument or full consideration in the ordinary course (and prior to the Court of Appeals’ consideration of the matter) when there is no legal or practical need for it to do so? I have found no convincing answer to that question.\textsuperscript{378}

On a November 26, 2020 call, Governor Cuomo said the Supreme Court’s ruling was “irrelevant of any practical impact because . . . the zone they were talking about is moot.”\textsuperscript{379} Governor Cuomo attributed the Supreme Court’s reversal of course—from denying injunctive relief in earlier cases to granting it—to Justice Barrett’s addition to the Court. The ruling was “more illustrative of the Supreme Court than anything else”\textsuperscript{380} and “an opportunity for the Court to express its philosophy and politics,” Governor Cuomo said.\textsuperscript{381}

\textsuperscript{376} Id. at 70.
\textsuperscript{377} Id. at 75 (Roberts, C.J., dissenting).
\textsuperscript{378} Id. at 77 (Breyer, J., dissenting).
\textsuperscript{380} Id.
Ultimately the parties stipulated to an injunction.\textsuperscript{382} The final judgement enjoined the Defendant from “enforcing the fixed-capacity limits set forth in EO 202.68.”\textsuperscript{383}

The parties’ agreement noted:

So long as the Disaster Declaration remains in effect, [New York], shall not enforce against Plaintiff’s houses of worship any capacity limits regarding indoor religious gatherings that are inconsistent with the Agudath Injunction. While the Disaster Declaration remains in effect, gatherings at Plaintiffs houses of worship shall remain subject to all generally applicable Department public health guidance (such as requirements, if any, for facial coverings, social distancing, and cleaning and sanitizing protocols), which may be updated as public health conditions require. This Settlement Agreement shall not preclude Plaintiff from challenging, in a new action, any future restrictions that are issued by Defendant subsequent to the execution of this Settlement Agreement and which are inconsistent with the provisions of the Agudath Injunction.\textsuperscript{384}

The Diocese and Agudath received a gross sum of $400,000 in attorneys’ fees.\textsuperscript{385}


\textsuperscript{383} Id. at 3–4.

\textsuperscript{384} Id. at 3.

\textsuperscript{385} Id. at 4–5 (“In full consideration of Plaintiff’s execution of this Settlement Agreement, its agreement to be bound by its terms, and its undertakings as set forth herein, including the final resolution of the Action, and other good and valuable consideration, the sufficiency of which is hereby acknowledged, the State of New York, on behalf of the Defendant, shall pay the gross sum of FOUR HUNDRED THOUSAND DOLLARS ($400,000.00), for which I.R.S. Form 1099 shall be issued to Plaintiff’s counsel in this amount, in full and complete satisfaction of any and all claims, allegations, or causes of action for attorneys’ fees, costs, disbursements, and expenses incurred by Plaintiff or Plaintiff’s attorneys for any and all counsel who have at any time represented or assisted Plaintiff in the Action, or in connection with any other proceeding (administrative, judicial, or otherwise) and any other claim or action arising from, related to, based upon, or alleging any of the acts, transactions, occurrences, or omissions asserted or purportedly asserted in the Action.”).
FIGURE 6. NEVADA TIMELINE

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C. Sisolak/Nevada

On March 13, 2020, the same day that President Trump declared a national emergency, Nevada Governor Steve Sisolak issued a Declaration of Emergency.386 At the time, Nevada had 11 presumptive and confirmed COVID-19 cases throughout the state.387

On March 15, 2020, Governor Sisolak took further measures to contain COVID-19’s spread, including closing K-12 schools for three weeks and recommending all Nevadans who could work from home should work from home.388 Governor Sisolak addressed part of his recommendations to faith leaders, “respectfully request[ing]” that those who were unable to follow social-distancing protocols “consider postponing services for their congregations.”389

Governor Sisolak explained these measures by saying: “[For] gatherings, the risk is not just based on how many people there are, but rather how closely they are gathered and how they are interacting with each other. The risk does not disappear in smaller gatherings. It’s the distance and precautions that will make the difference.”390

Less than two weeks later, on March 27, 2020, Governor Sisolak released Directive 003, which defined essential businesses.391 The Nevada Department of Health and Human Services issued guidance to Directive 003.392 Only licensed businesses were deemed “essential businesses” and “encouraged to continue operation” but had to “adopt COVID-19 risk mitigation measures.”393

By contrast, nonessential businesses—defined as “businesses that promote recreational social gathering activities, or promote extended periods of public interaction where the risk of transmission of COVID-19 is high”—were all ordered closed by 11:59 PM on Friday, March 20, 2020.394 Counted among nonessential businesses were nightclubs, day clubs, broth-
els, and adult entertainment facilities.\footnote[395]{Id.} Places of worship appeared nowhere in the list of essential or nonessential businesses.\footnote[396]{Id.} Businesses that were not named as either essential or nonessential could “continue operations, not to include retail sales, if they [were] able to implement social distancing safeguards for the protection of their employees . . . .”\footnote[397]{Declaration of Emergency for COVID-19-Directive 003, Nev. Emergency Order No. 003 (Mar. 20, 2020).} Under Directive 003, houses of worship could continue operations.

However, on April 8, 2020, Governor Sisolak issued Directive 013 to close “loopholes” Nevadans were using to meet in person despite the earlier emergency directives.\footnote[398]{Declaration of Emergency Directive 013, Nev. Emergency Order No. 013 (Apr. 8, 2020).} Section 4 limited in-person services at places of worship to 10 people or less, even “drive-in and pop-up services, for the remainder of the Declaration of Emergency.”\footnote[399]{Id.} Places of worship could hold worship services “via alternative means, including but not limited to, video, streaming, or broadcast.”\footnote[400]{Id.}

The next day, Nevada issued guidance explaining Directive 013.\footnote[401]{Id.; Nevada Health Response, supra note 392.} It bluntly said: “Because we are trying to get everyone to stay home . . . this is not yet the time to get people together to celebrate their faith. Right now, nobody should be physically attending in-person worship services . . . .”\footnote[402]{Id.}

In April 2020, Governor Sisolak said that reopening would be slow and “insisted he won’t succumb to pressure from critics demanding reopening of casinos and nonessential businesses for short-term economic gain or provide a specific timeline of when that might happen.”\footnote[403]{Id.} On April 30, 2020, he introduced a plan to reopen businesses and industry: Nevada United: Roadmap to Recovery.\footnote[404]{State of Nevada Executive Department, Nevada’s Roadmap to Recovery: Transition Plan (March 15, 2021).} The Roadmap to Recovery’s first phase began on May 7 and allowed for drive-in religious services to resume under strict social distancing guidelines, much like drive-in theaters, although retail businesses were allowed to open at 50% of fire code capacity.\footnote[405]{Local Empowerment Advisory Panel, Roadmap to Recovery for Nevada: Guidelines and Protocols for Individuals and Businesses (2021).}

In a letter addressed to Governor Sisolak in mid-May 2020, roughly 200 religious leaders asked him to reconsider Directive 013, calling it “one of the most restrictive orders in the United States.”\footnote[406]{Letter to Governor Sisolak, Request to Immediately Lift the Ban on In-Person Worship Services Where Ten or More Persons May Gather So Long as Each Church Develops, Implo-
the need to take safety precautions to prevent members from contracting or spreading COVID-19, but said that the lines drawn between houses of worship and other facilities appeared to be arbitrary:

The distinctions being made between a salon and a gym or a big box store/restaurant and a church don’t appear to have a coherent rationale. Concluding that a restaurant with a capacity of 100 can open to 50 people at a time as long as they practice social distancing, utilize personal protective equipment ("PPE"), and follow other health and safety guidelines, but houses of worship cannot do the same does not make sense to any of us or the people we serve in our congregations and communities.\(^\text{407}\)

In a press conference on May 15, 2020, the governor responded to the claim of arbitrariness.\(^\text{408}\) “No one wants churches to open more than me . . . [a]t the same time it is difficult to social distance in a house of worship,” he contended.\(^\text{409}\) Furthermore, many of those who attend church regularly are elderly, a population dangerously susceptible to COVID-19.\(^\text{410}\) The religious leaders’ attempt to resolve the issue by sending Governor Sisolak a letter fell flat.

On May 22, 2020, Calvary Chapel Dayton Valley (“Calvary Chapel”), a church in Dayton, Nevada, sued Governor Sisolak in federal district court, because Nevada failed to “recognize the Free Exercise Clause.”\(^\text{411}\) They sought an injunction against Directive 003 and Directive 013, identified in the complaint as “the Church Gathering Ban.”

On May 28, 2020, as part of Nevada’s Phase Two reopening, Governor Sisolak, in Directive 021, instituted a 50-person cap on worship services, grouping religious gatherings in with certain other public gatherings in the state, like going to the movies.\(^\text{412}\) By contrast, casinos and other non-essential businesses were allowed to operate at a 50% capacity if they complied with sanitary measures and social distancing rules.\(^\text{413}\) Calvary Chapel wanted to host worship services on the same terms as casinos: at 50% of its


\(^{407}\) Id.


\(^{409}\) Id.

\(^{410}\) Id.


\(^{413}\) Id. ("[g]yms, fitness facilities, and fitness studios, including but not limited to dance and yoga studios may reopen to the public.").
capacity with other social-distancing and necessary precautions, rather than being capped at 50 people.\footnote{414}

On May 29, 2020, Calvary Chapel amended its May 22 complaint, seeking an injunction against Directive 021, alleging both as applied and facial challenges.\footnote{415} Calvary Chapel noted that different sections of Directive 021 had effectively replaced Directives 003 and 013:

Communities of worship and faith-based organizations are allowed to conduct in-person services so long as no more than fifty people are gathered, while respecting social distancing requirements. Section 20 similarly limits movie theaters to a maximum of fifty people. Section 35 . . . allows casinos to reopen at 50% their capacity and subject to further regulations promulgated by the Nevada Gaming Control Board.\footnote{416}

Calvary Chapel sought to enjoin Emergency Directive 021. The State opposed the motion.\footnote{417}

On June 1, 2020, Calvary Chapel supplemented its motion for preliminary injunction with details of its plan for safely gathering for worship, based on CDC guidelines. Under Calvary Chapel’s plan:

- “Gatherings will be limited to [sic] maximum of 50% capacity;
- Social Distancing will be strictly adhered to;
- Services will be shortened, and sanitation will occur between services;
- Attendance will be by reservation only;
- Tithes and offerings will not be gathered; and
- Attendees, Team and Staff members will refrain from shaking hands/hugging; etc.”\footnote{418}

As it would throughout the course of litigation, Calvary Chapel contended:

[S]o long as the CDC guidelines are followed, there is no scientific or medical reason to limit the number of persons at a religious gathering while not imposing the same restrictions on shopping malls, big box stores, restaurants or bars, gyms or fitness centers, barbershops or hair salons, movie theaters, muse-

\footnote{414} Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2604 (2020).
ums, water parks, offices, workplace meetings, gambling casinos, factories, supermarkets, farmer’s markets, retail stores, demonstrations, or other places where individuals interact, gather, or share space.419

In advance of the Court’s first hearing, Nevada filed an expert declaration from Dr. Ihsan Azzam, Chief Medical Officer for the State of Nevada.420 Dr. Azzam stressed the importance of individual “physical distancing interventions,” such as wearing cloth masks.421 He pointed out why Nevada took the large-scale measure of preventing people from gathering, rather than leaving it up to individuals to protect themselves when at gatherings:

Based on my experience with infectious disease prevention, measures that depend on individual behavior, such as mask wearing, are difficult to sustain and less effective than systematic measures, such as canceling gatherings and curtailing activities that increase the risk of transmission.422

While “any gathering poses some risk,” Dr. Azzam contended houses of worship “pose specific risks for disease transmission.”423 “Operations at work places pose a lower risk of transmission than in large gatherings that have the purpose of engaging in a shared communal experience” because “[w]orkers often work independently or on small teams most of the time, social interactions are typically brief and ancillary, precautions can be mandated easily because of the employer/employee relationship and contact tracing can be easier to carry out in the case of an outbreak.”424 Additionally, unlike houses of worship, “places like restaurants are subject to stringent health and safety guidelines that can mitigate transmission.”425

On June 9, 2020, District Court Judge Richard F. Boulware II held a teleconferenced hearing on two separate challenges to Directive 021, Calvary Chapel’s and that of Calvary Chapel Lone Mountain (“Lone Mountain”).426

Calvary Chapel’s expert, Dr. Timothy Flanigan, a Catholic deacon and infectious disease specialist at Brown University, urged individual measures to contain COVID-19 in an interview:

421. Id. at 2–3.
422. Id. at 4.
423. Id. at 5.
424. Id.
425. Ihsan Azzam Declaration, supra note 420, at 5.
Anybody who’s ill . . . should not go to church and avoid any situation with very tight crowds. You could stay at home and tune into Mass on TV or the internet. We know that during a time when coronavirus . . . might be circulating, particularly in your state, that it is a good time to forgo Communion from the chalice. And there’s the option of forgoing the handshake at the Sign of Peace. We can acknowledge each other in a kind and friendly manner with a smile. Normal distances at church do not pose any significant risk.  

Dr. Flanigan explained: “There is no scientific or medical reason that a religious service that follows the guidelines issued by the CDC would pose a more significant risk of spreading SARS-CoV-2 than gatherings or interactions at other establishments or institutions.”

Judge Boulware asked for evidence of impermissible bias or discrimination warranting a more exacting review:

The inquiry for me is whether or not the choices that have been made reflect some type of bias or partial treatment with respect to secular activities over other religious activities. So what . . . can you point to that tells me that this is about religious worship being targeted rather than simply an attempt to differentiate different types of activities which are in some ways very different . . . [A] movie theater or a bowling alley or . . . museum, they’re still very different social activities.

Lone Mountain’s counsel pointed to movie theaters as secular facilities analogous to houses of worship, which were being regulated differently under Directive 021:

[T]here could be 20 screens in an AMC theater which still will allow 50 people per screen . . . with a total square footage at that AMC theater to be about 1,000 people . . . here . . . why is a 60—16,000 square foot building capped at 50 people and a casino, or a gambling hall or a bar allowed at 50 percent occupancy?

Calvary Chapel also “has those rooms,” warranting more attendees at its services.

The judge expressed a set of concerns, first about courts’ “micromanaging” by determining how many people were allowed in what facilities. After all, Plaintiffs were not talking about the “difference be-

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430. Hearing Transcript Calvary Chapel, supra note 426, at 11–12.

431. Hearing Transcript Calvary Chapel, supra note 426, at 11–12.

432. Hearing Transcript Calvary Chapel, supra note 426, at 13.
tween being closed and being open,” he said, but about “particular aspects
of the State’s order, namely, the 50% people were allowed.” 433 Second,
could the court act quickly enough given rapidly changing directives from
the state? 434

In response, Lone Mountain argued that Chief Justice Roberts’ concur-
ring opinion in *South Bay I* and Justice Harlan’s majority opinion in *Jacob-
son v. Massachusetts* both “specified that . . . it is the Court’s duty to get
involved in these situations where the decisions exceed the constitutionality
of what [the State is] mandating.” 435

The Solicitor General for Nevada countered that there was no unfair-
ness, noting that: “Justice Roberts identified a number of secular activities
he believed were comparable to churches and religious services more generally:
lectures, concerts, moving [sic] showings, spectator sports, theatrical
performances. All of those, other than movie showings, are not allowed to
have audiences currently under . . . Directive 021.” 436

Calvary Chapel included with its complaint the photograph included in
this Article as Figure 3, showing that social distancing did not occur in
casinos, despite the legal regulation of casinos. 437 When pushed on the
comparison to casinos, counsel for Nevada responded that it could not com-
ment on:

> what the Gaming Commissioner or the Gaming Control Board
will or will not do in response to the types of pictures and anecdo-
tal evidence that’s provided by plaintiffs in this case. I just can’t
judge that, and it’s not the place of the Governor or the Attorney
General to prejudge that. 438

Determining how different activities should be treated during the pan-
demic was a “dynamic and fact-intensive matter subject to reasonable disa-
greement,” meriting, the State said, deference from the court. 439 The pair of
suits, Nevada’s counsel said, attempted:

> to subvert the Governor as the elected official’s best attempt to do
best in terms of reopening the state in the context of the COVID-
19 pandemic and substitute [its] own judgment or attempt to have
this Court substitute its judgment and micromanage. And casinos
are—there are arguments both ways in terms of what those things
could be, but ultimately those decisions rest with elected officials
. . . . 440

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When the argument turned to Calvary Chapel’s claims, Calvary Chapel argued Chief Justice Roberts’ concurrence in *South Bay I* “points toward deciding this case in [Calvary Chapel’s] favor.” Chief Justice Roberts had laid out “three factors that a court can look at to determine whether or not a particular secular comparator is being treated better than the church.” The relative secular comparator rested on 1) large groups of people 2) gathering in close proximity 3) for extended periods of time.

Calvary Chapel emphasized that it was not asking the court to micromanage. Instead, the court’s task is to examine whether the State is treating religious activities as it does “secular comparators”:

The issue is when you look at a very high level, what constitutes a large group of people? What constitutes . . . close proximity or extended periods of time? You look at the category of secular comparators of casinos, bars, gyms and fitness facilities . . . which were not addressed by Justice Roberts in [*South Bay I*], [and] those secular comparators being treated better than the church, therein lies the free exercise problem. . . . Justice Roberts did not give a blank check to local officials to do whatever they wanted to do.

Counsel for Calvary Chapel emphasized that churches were “not filing lawsuits” across the United States in instances where “the church is being treated equally.” Calvary Chapel sued over Directive 021 because there is “no order worse than the one that’s in Nevada” in terms of preferencing the secular over the religious.

Nevada’s counsel responded once more that Directive 021 treated comparable events alike:

[The secular comparables in terms of looking at what . . . a religious service typically is and people interacting and communications back and forth in relatively close quarters, the functional equivalent is to that in terms of looking at Section 022 of Directive 021 where there’s no spectators allowed for any live events in the State of Nevada, whether it be someone’s preferred sports, concerts, spoken lecture, anything of that sort.]

On June 9, 2020, Judge Boulware orally denied Calvary Chapel’s facial challenge to Directive 021’s 50-person cap, explicitly deferring to the State’s public health determinations:

The Court does find that there are secular activities that are treated equally or that are treated worse. The Court finds that

442. Hearing Transcript Calvary Chapel, *supra* note 426, at 32.
443. Hearing Transcript Calvary Chapel, *supra* note 426, at 32.
these regulations appear to be based upon the nature of the activity, but don’t appear to be specifically in any way targeting or singling out places of worship or religious practice. The Court finds that this is a fact-intensive and fluid determination, and that it’s not for the Court to substitute its judgment for the judgment of the executive as it relates to the fine details of these types of restrictions. The State clearly, as the parties acknowledge, has the authority to be able to impose restrictions on social activity in a time of a public health crisis. The Supreme Court recognized that in South Bay.448

The judge also denied Calvary Chapel’s as-applied challenge:

[I]f there was, in fact, a pattern or practice that could be established through evidence that places of worship were being treated differently with respect to enforcement, that could potentially create a claim. However, on the record before me now I don’t have such an established pattern or practice. . . . [T]here may not be strict enforcement of social distancing based upon a few images or pictures, but that’s not enough for there to be a basis for an as-applied challenge with respect to deferential treatment between places of secular activity and places of worship.449

The judge denied Calvary Chapel’s motion for a preliminary injunction and its motion to stay the court’s order orally at the hearing, followed by a written opinion on June 11, 2020.450 The judge then denied Calvary Chapel’s request for an injunction pending appeal on June 19, 2020.451

The written opinion anchored the decision to the standard for a preliminary injunction. Calvary Chapel had not demonstrated a likelihood of success on its First Amendment Free Exercise claim.452 The court found that the:

Emergency Directive is neutral and generally applicable and therefore does not burden Plaintiff’s First Amendment right to free exercise. Consequently, the Court finds that Plaintiff has not demonstrated a likelihood of success on the merits of its claim.453

Responding to Calvary Chapel’s claim that Nevada treated “comparable activit[ies] . . . including casinos, restaurants, nail salons, massage centers, bars, gyms, bowling alleys and arcades” differently:

the Court agrees that church services may in some respects be similar to casinos, in that both are indoor locations in which a

448. Hearing Transcript Calvary Chapel, supra note 426, at 49.
449. Hearing Transcript Calvary Chapel, supra note 426, at 51.
453. Id. at *2.
large number of people may remain in close proximity for an extended period of time. The Court, however, disagrees that casinos are actually treated more favorably than places of worship.454

On June 19, 2020, before receiving word from the Ninth Circuit on its appeals of Judge Boulware’s denial, Calvary Chapel filed an emergency application for an injunction pending appellate review to the Supreme Court since

it [would have] take[n] several months to obtain a ruling from the Ninth Circuit on the church’s preliminary-injunction appeal, by which time the legal landscape may have changed but the irreparable harm to the church’s First Amendment rights will be irreversible.455

Calvary Chapel asserted that Directive 021 violated parishioners’ Free Exercise, Free Speech, and Public Assembly rights under the First Amendment because it gave priority to secular gatherings over religious ones.456

On July 2, 2020, the Ninth Circuit affirmed the lower court’s decision, also denying the motion for injunctive relief pending appeal,457 citing South Bay I as support.458

On July 24, 2020, the Supreme Court, in a 5-4 decision, summarily denied Calvary Chapel’s request for an injunction.459 The Supreme Court’s plurality decision by five Justices, including Chief Justice Roberts, Justice Breyer, Justice Sotomayor, Justice Kagan, and Justice Ginsburg, came with no explanation.460 Justices Kavanaugh, Gorsuch, Alito, and Thomas dissented.

In a strident dissent authored by Justice Alito and joined by Justices Thomas and Kavanaugh, the Justices channeled the outrage of religious people: “The Constitution guarantees the free exercise of religion. It says nothing about the freedom to play craps or blackjack.”461 Directive 021, Justice Alito maintained, “plainly discriminates on the basis of viewpoint. Compare the directive’s treatment of casino entertainment and church ser-

454. Id. at *3.
456. Id. at ii, 20.
457. In Calvary Chapel, the United States District Court for the District of Nevada denied the church’s motion for a preliminary injunction after which the church appealed. No. 3:20-cv-00303-RFB-VCF, 2020 WL 4260438. At the Ninth Circuit, the Appellant’s emergency motion for injunctive relief was denied. Calvary Chapel Dayton Valley v. Sisolak, No. 20-16169, 2020 WL 4274901 (9th Cir. July 2, 2020). At the Supreme Court, the motion for an emergency injunction was also denied. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020). On December 15, 2020, the Ninth Circuit granted the motion for preliminary injunction and reversed and remanded the lower court’s decision. Calvary Chapel Dayton Valley v. Sisolak, 982 F.3d 1228 (9th Cir. 2020).
459. Calvary Chapel Dayton Valley, 140 S. Ct. at 2603.
460. Id.
461. Id.
vices. Both involve expression, but the directive favors the secular expression in casino shows over the religious expression in houses of worship.”

Justice Gorsuch also noted the favoritism: True, he observed, “[t]he world we inhabit today, with a pandemic upon us, poses unusual challenges. But there is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel.” The treatment of secular interests over sectarian ones galled Justice Gorsuch: “[i]n Nevada, it seems, it is better to be in entertainment than religion.”

For Justice Kavanaugh, “. . . COVID-19 is not a blank check for a State to discriminate against religious people, religious organizations and religious services. . . . Nevada is discriminating against religion.”

The summer of public protests over the death of George Floyd did not go unnoticed. Nevada “favored certain speakers over others” when enforcing public health protections, Justice Alito charged:

When large numbers of protesters openly violated provisions of the Directive, such as the rule against groups of more than 50 people, the Governor not only declined to enforce the directive but publicly supported and participated in a protest. He even shared a video of protesters standing shoulder to shoulder. The State’s response to news that churches might violate the directive was quite different. The attorney general of Nevada is reported to have said, “You can’t spit . . . in the face of law and not expect law to respond.”

That Nevada allowed protests did not absolve it of responsibility to also respect the liberty of worshipers: “[R]especting some First Amendment rights is not a shield for violating others.” In fact, it is an “anathema to the First Amendment,” Justice Alito observed.

Procedurally, emergency relief for Calvary Chapel from the Supreme Court was not forthcoming. Calvary Chapel’s suit continued. On September 30, 2020, Governor Sisolak amended Directive 021 with Directive 033, which allowed in-person worship at either 50% of fire code capacity or 250 people, whichever was lesser.

462. Id. at 2607.
463. Id. at 2609 (Gorsuch, J., dissenting).
464. Id.
466. Id. at 2607 (Alito, J., Thomas, J., Kavanaugh, J., dissenting).
467. Id. (citation omitted).
468. Id. at 2607–08.
469. Id. at 2608.
On October 26, 2020, the Ninth Circuit, in an unreported decision, denied Nevada’s motion to dismiss the church’s appeal on the basis that more liberal restrictions mooted the suit.\footnote{Order, Calvary Chapel Dayton Valley v. Sisolak, No. 20-16169 (9th Cir. Oct. 26, 2020), ECF No. 54.}

On November 5, 2020, before receiving a decision from the Ninth Circuit, Calvary Chapel filed a petition for writ of certiorari to the Supreme Court. In the petition, Calvary Chapel noted:

Governor Sisolak has consistently doubled down on religious discrimination, and he and other government officials around the country will continue to do so until this Court intervenes. . . . Governor Sisolak’s directive facially treated better than religious services at least seven categories of secular assemblies “where large groups of people gather in close proximity for extended periods of time,” S. Bay, 140 S. Ct. at 1613 (Roberts, C.J., concurring), not to mention the effective exemptions state officials carved out for mass protests and polling locations. And Directive 033 doubles down and adds several more. In short, no real argument exists that the Governor’s restrictions on public gatherings are “neutral and of general applicability,” Lukumi, 508 U.S. at 531, which means the directive must undergo “strict scrutiny,” id. at 546.\footnote{Petition for a Writ of Certiorari Before Judgement at 7, 20, Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020) (No. 20-16169).}

Further, Calvary Chapel contended,

Directive 021 turned the First Amendment on its head by empowering businesses like casinos, movie theaters, live dinner shows and circus acts, fitness classes, certain bars, theme parks, and bowling alleys to express commercial messages to larger in-person audiences than places of worship communicating their religious messages.\footnote{Id. at 27–28.}

By November 30, the capacity limit for places of worship dropped from 50% capacity or 250 people to 25% capacity or 50 people after Nevada’s hospitalization rate soared and the state racked up a quarter of all its positive cases since the pandemic’s beginning in the early weeks of November.\footnote{See Declaration of Emergency Directive 035, Nev. Emergency Order No. 035 (Nov. 23, 2020).}

On December 8, 2020, the Ninth Circuit heard oral argument on Calvary Chapel’s request for preliminary injunction.\footnote{Transcript of Oral Argument, Calvary Chapel Dayton Valley v. Sisolak, 982 F.3d 1228 (9th Cir. 2020) (No. 20-16169).} On December 15, 2020, the Ninth Circuit reversed and remanded the district court’s denial of Calvary Chapel’s preliminary injunction because “Calvary Chapel has demon-
strated a likelihood of success on the merits of its Free Exercise claim.”

By that point, Directive 035, not Directive 021, governed houses of worship’s capacity. Nonetheless, the Ninth Circuit found the case was not moot: “Although the only directive before us today is [Directive 021], we emphasize that all subsequent directives are subject to the same principles outlined in this opinion, and that many issues we identify in [Directive 021] persist in Directive 035.”

Relying on the Supreme Court’s decision in *Roman Catholic Diocese of Brooklyn v. Cuomo* weeks before, on November 25, 2020, the Ninth Circuit applied strict scrutiny review to Directive 021’s regulation of houses of worship:

Just like the New York restrictions, [Directive 021] treats numerous secular activities and entities significantly better than religious worship services. Casinos, bowling alleys, retail businesses, restaurants, arcades, and other similar secular entities are limited to 50% of fire-code capacity yet houses of worship are limited to fifty people regardless of their fire-code capacities. As a result, the restrictions in [Directive 021], although not identical to New York’s, require attendance limitations that create the same “disparate treatment” of religion.

Because “disparate treatment” of religion triggers strict scrutiny review, the Court then reviewed Directive 021 using strict scrutiny. Although “[s]temming the spread of COVID-19 is unquestionably a compelling interest,” Directive 021 is not narrowly tailored. As with New York’s restrictions in *Roman Catholic Diocese*, the Ninth Circuit reasoned that “[n]ot only is there no evidence that the [two houses of worship] have contributed to the spread of COVID-19[,] but there were many other less restrictive rules that could be adopted to minimize the risk to those attending religious services.” The court preliminarily enjoined Nevada from “imposing attendance limitations on in-person services in houses of worship that are less favorable than 25% of the fire-code capacity.” The Ninth Circuit reversed and remanded the lower court’s decision.

Governor Sisolak expressed disappointment with the Ninth Circuit’s decision, noting his own personal relationship with faith:

The purpose of [Directive 021] – and all of the directives the State has issued since the onset of this global pandemic – was and is to save lives and protect the health of the public. While we’re disappointed by the Court’s decision, we respect and will comply

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476. Calvary Chapel Dayton Valley v. Sisolak, 982 F.3d 1228, 1234 (9th Cir. 2020).
477. Id. at 1230 n.1.
478. Id. at 1233.
479. Id.
480. Id. (quoting Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66–67 (2020)).
481. Id. (quoting Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66–67 (2020)).
482. Id. at 1234.
with this Order. I continue to encourage Nevadans to practice their religious faiths in a manner that is safe for them and their families, particularly with the upcoming holidays. I have often talked to Nevadans about my personal faith and I will continue to participate in virtual masses at this time.483

Meanwhile, Calvary Chapel’s petition for writ of certiorari to the Supreme Court was still pending. On January 11, 2021, the Supreme Court directed Governor Sisolak to respond to Calvary Chapel’s petition.484 Governor Sisolak filed a brief in opposition on January 19, 2021,485 charging that Calvary Chapel was:

| Emboldened by the change in circumstances . . . to suggest th[e Supreme] Court should take up the Ninth Circuit’s intervening opinion because, according to Calvary, the lower court did not go far enough in granting preliminary injunctive relief. That question, however, is not presented by the petition.486 |
| Further, Nevada urged, the case is a poor vehicle for addressing questions beyond those the Ninth Circuit already resolved in Calvary’s favor. . . . [It] lacks the necessary evidentiary record to adequately address issues. . . . First, . . . the Ninth Circuit did more than enjoin Directive 021. . . . It granted a prospective injunction that limits Nevada’s ability to impose directives on attendance limits for religious services going forward, which the Ninth Circuit tied to Nevada’s current limitations for comparable secular gatherings. . . . The scope of that injunction, which is what Calvary now wishes to challenge, is reviewed for an abuse of discretion.487 |

On January 25, 2021, the Supreme Court denied the petition for writ of certiorari.488

On May 13, 2021, Calvary Chapel and Nevada entered into a consent decree.489 The consent decree permanently enjoined Nevada from enforcing Directives 021 and 035, and from:

| [e]nforcing a percentage capacity limit on indoor religious gatherings that is less favorable than the highest of the percentage capacity limits imposed on indoor: (a) casinos; (b) entertainment venues . . . ; (c) food and spirits establishments . . . ; (d) museums, |

486. Id. at 2.
487. Id. at 2–3.
art galleries, zoos, and aquariums; and (e) gyms, fitness facilities, and fitness studios.\textsuperscript{490}

II. U.S. SUPREME COURT ENJOINS RESTRICTIONS ON HOUSES OF WORSHIP AS DISCRIMINATORY

As the arc of cases bent from upholding governors’ orders early on to reining them in in later decisions, some charged the Court with creating “new law.”\textsuperscript{491} Law professor Steve Vladeck said after \textit{Tandon}, “Everyone understands that the court made new law on Friday [when deciding \textit{Tandon v. Newsom}], that the court changed the scope and meaning and applicability of the free exercise clause.”\textsuperscript{492}

The toggle for determining the level of review—whether a law receives generous rational basis review or a more probing examination—dates back to the Court’s still-controversial decision in \textit{Employment Division, Department of Human Resources of Oregon, et al., Petitioners v. Smith}.\textsuperscript{493}

As Part II A shows, a set of defining principles have guided Free Exercise jurisprudence since \textit{Smith}. Part II B shows how the Supreme Court arrived at \textit{per curiam} majority decisions by cobbling together different understandings of why the governors’ restrictions encroached on religious freedom.

A. Principles of Neutrality

1. Neutral and Generally Applied

In \textit{Smith}, the U.S. Supreme Court held that a law is constitutional under the Free Exercise Clause if it is facially neutral and generally applied.\textsuperscript{494} Writing for the majority, Justice Antonin Scalia observed that:

The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities. . . . To permit this would be to make the professed doctrines of religious belief supe-

\textsuperscript{490}. Id. at *4.
\textsuperscript{492}. Id.
\textsuperscript{494}. See \textit{Smith}, 494 U.S. at 881.
rior to the law of the land, and in effect to permit every citizen to become a law unto himself.495

Thus, the right to the free exercise of one’s religion does not excuse worshippers from complying with “neutral, generally applicable regulatory law[s].”496

2. No Targeting of Religion

In the decades since Smith, the Court has made clear that while laws that specially burden religious people can receive deference, the laws in fact must be neutral. “[T]he minimum requirement of neutrality is that a law not discriminate on its face.”497 Laws that single out religious acts for “distinctive treatment,” or target religious groups or practices do not receive deference; courts instead apply the “most rigorous of scrutiny.”498 For instance, in Church of the Lukumi Babalu Aye v. City of Hialeah,499 the Hialeah City Council enacted an ordinance prohibiting animal sacrifice, but exempted areas zoned as slaughterhouses. In one church, the members, Santerias, engaged in animal sacrifice. At the meeting considering the ordinance, one councilmember publicly declared that members of the Santeria church “are in violation of everything this country stands for;” another councilmember “distinguished Kosher slaughter because it had a ‘real purpose.’”500 The promulgated law outlawed “religious killings of animals but [operated] to exclude almost all secular killings.”501

The Court found that “the ordinances’ texts and operation demonstrate that they are not neutral, but have as their object the suppression of Santeria’s central element, animal sacrifice.”502 Because “few if any killings of animals are prohibited other than Santeria sacrifice,” “these ordinances target Santeria sacrifice.”503 Hialeah effectively restricted only the Santeria’s actions, “conduct protected by the First Amendment, and fail[ed] to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort.”504 The government’s interests could not be seen as compelling, and the Court invalidated the laws.505

As Lukumi makes clear, the judiciary is to meticulously examine “governmental categories to eliminate, as it were, religious gerrymanders” because the “Free Exercise Clause protects against governmental hostility

495. Id. at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166–67 (1878)).
496. Id. at 880.
498. Id. at 534.
499. Id.
500. Id. at 541.
501. Id. at 542.
502. Id. at 521.
504. Id. at 522.
505. Id. at 534.
which is masked, as well as overt.” Courts of appeal have extended this searching examination to laws that treat sectarian interests less favorably than secular ones. Courts of appeal have extended this searching examination to laws that treat sectarian interests less favorably than secular ones. "When the government makes a value judgment in favor of secular motivations, but not religious motivations, the government’s actions must survive heightened scrutiny."

3. No Hostility Toward Religion

The State may not enforce laws based on hostility towards religion. Take, for example, the Supreme Court’s 7-2 decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*. There, the Court sided with Jack Phillips, the baker who refused to make a cake for a same-sex wedding due to his religious beliefs, and reversed the penalties that had been imposed on Phillips by Colorado. A commissioner on Colorado’s civil rights commission had called Phillips’ view of marriage “‘despicable and merely rhetorical,’ no different than justifying the Holocaust or slavery” when the Commission set the penalties; the statements went unchallenged by others. Colorado “violated the State’s duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.”

This religious discrimination paradigm has undergirded Free Exercise decisions for decades. As the United States District Court for the Eastern District of New York noted in *Catholic Diocese v. Cuomo*, the challenge in the COVID-19 Worship Cases is “determin[ing] whether [a] case is more like Smith—that is, a neutral law that incidentally burdens religion—or more like Lukumi and Fraternal Order, where religious worship was being singled out for disfavored treatment.”

As Professor Michael Helfand has observed of the COVID-19 Worship Cases, “[A] majority of the Court, however, clearly views the religious discrimination paradigm as sufficiently capacious to even support the outcomes in these recent COVID cases.” After *Tandon*, "what has become
clear is that the Court can broaden the umbrella of religious liberty protections significantly without expressly overruling Employment Division v. Smith or explicitly discarding the religious discrimination paradigm.515

B. The COVID-19 Worship Cases

While the COVID-19 Worship Cases stand on Smith, they rest on varied understandings. No one conception of what it means to discriminate against religion garnered a majority of votes. The fracturing began in South Bay I and continued.

In dissenting from South Bay I’s per curiam denial of injunctive relief against California’s restrictions on religious gatherings, Justices Kavanaugh, Thomas, and Gorsuch sounded concerns about general applicability: “Restrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom.”516 To sustain such a burden, California must show that treating worship services differently than other secular businesses was “justified by a compelling governmental interest” and “narrowly tailored to advance that interest.”517

Justice Kavanaugh also faulted the classification itself: “Government may not use religion as a basis of classification for the importance of duties, penalties, privileges, or benefits.”518

Catholic Diocese v. Cuomo and South Bay II rested on a second ground for applying strict scrutiny within the framework of Smith: religious targeting. In South Bay II, Justices Gorsuch, Thomas, and Alito, also took issue with breaking religion out separately:

Since the arrival of COVID–19, California has openly imposed more stringent regulations on religious institutions than on many businesses. The State’s spreadsheet summarizing its pandemic rules even assigns places of worship their own row. . . . Apparently, California is the only State in the country that has gone so far as to ban all indoor religious services. When a State so obviously targets religion for differential treatment, our job becomes that much clearer.519

In Catholic Diocese v. Cuomo, the targeting went beyond the formal structure of the regulations. New York’s tiered zones keyed restrictions in the same “zone” by the kind of entity being regulated—places of worship, or essential businesses, or other non-essential businesses. In explaining

515. Id. at 103.
517. Id. at 1614 (quoting Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531–32 (1993)).
518. Id. (quoting McDaniel v. Paty, 435 U.S. 618, 639 (1978) (Brennan, J., concurring)).
New York’s scheme, authorities said they solely examined “data and d[id] not take into account who or what are located in that zone.” 520

However, Governor Cuomo publicly and repeatedly referenced large gatherings by the Orthodox Jewish community. Micro-clusters were constructed to “‘close the synagogues.’” 521 He presented no evidence at the press conferences described in Part I connecting the outbreaks to Jewish community, his experts explained that zones were drawn without respect to who was in the zone. A review of the CDC’s Morbidity and Mortality Weekly Report found no contemporaneous reports of such events. 522 “Catholics schools” got swept up 523 “because they happen to be in that cluster.” 524

Given the testimony of New York’s own experts, it is perhaps not surprising that the Supreme Court, in a 5-4 decision, found that New York’s restrictions were not “‘neutral’ and of ‘general applicability,’” requiring them to survive strict scrutiny. 525

A third ground for striking laws arose in the later per curiam and concurring opinions, namely, that the government cannot treat secular interests more favorably than sectarian ones. 526 What benchmark to use to gauge disfavored treatment became the bone of contention with dissenting justices. Even justices who agreed that the State had discriminated against religious actors seemed to hold very different conceptions of what “discrimination” means.

Early on, in dissent to the Court’s summary denial of injunctive relief to Calvary Chapel in an unsigned 6-3 decision, 527 Justice Alito stressed different treatment: “The Governor’s directive specifically treats worship services differently from other activities that involve extended, indoor gatherings of large groups of people.” 528

Ripping examples from the “face of the directive,” Justice Alito noted that “houses of worship” may admit “no more than fifty persons,” while “many favored facilities that host indoor activities may operate at 50% capacity.”

524. Audio & Rush Transcript: Governor Cuomo Is a Guest on CNN Newsroom with Poppy Harlow and Jim Sciutto, supra note 318.
527. Id. at 2603 (“The application for injunctive relief presented to JUSTICE KAGAN and by her referred to the Court is denied. JUSTICE ALITO, with whom JUSTICE THOMAS and JUSTICE KAVANAUGH join, dissenting from denial of application for injunctive relief.”).
528. Id. at 2605 (Alito, J., dissenting).
Privileged facilities include bowling alleys, breweries, fitness facilities, and most notably, casinos, which have operated at 50% capacity for over a month; sometimes featuring not only gambling but live circus acts and shows. . . . While the directive’s treatment of casinos stands out, other facilities are also given more favorable treatment than houses of worship.\(^{529}\)

Such different treatment “blatantly discriminates against houses of worship and thus warrants strict scrutiny under the Free Exercise Clause,” Justice Alito maintained.\(^{530}\)

Justice Gorsuch, writing a separate dissent in *Calvary Chapel*, also faulted Nevada for its favoritism: “[T]here is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel.”\(^{531}\)

Later in *Catholic Diocese*, Justices Gorsuch and Kavanaugh, in concurrences, keyed in on disadvantage. Justice Gorsuch took issue with the delayed reopening of houses of worship:

Government is not free to disregard the First Amendment in times of crisis. At a minimum, that Amendment prohibits government officials from treating religious exercises *worse than* comparable secular activities, unless they are pursuing a compelling interest and using the least restrictive means available. Yet recently, during the COVID pandemic, certain States seem to have ignored these long-settled principles.\(^{532}\)

Justice Kavanaugh echoed that notion: the State cannot put “praying at churches, synagogues, temples, and mosques on worse footing than eating at restaurants, drinking at bars, gambling at casinos, or biking at gyms.”\(^{533}\)

The Constitution, he said, “protects religious observers against unequal treatment.”\(^{534}\) By giving less generous treatment, Nevada “is discriminating against religion. And because the State has not offered a sufficient justification for doing so, that discrimination violates the First Amendment.”\(^{535}\)

Justice Kavanaugh suggested that the State’s action is discriminatory when it treats differently things that are in the “same neighborhood.”\(^{536}\) He explained:

\(^{529}\). *Id.* at 2605–07 (noting that bowling alley grandstands could “admit up to 50% of capacity” and allow groups of up to 50 to sit together “provided that they maintain social distancing from other groups,” an allowance that may pose “far more danger than the plan Calvary Chapel proposes.”).

\(^{530}\). *Id.* at 2607.

\(^{531}\). *Id.* at 2609 (Gorsuch, J., dissenting).


\(^{533}\). *Calvary Chapel Dayton Valley*, 140 S. Ct. at 2615 (Kavanaugh, J., dissenting).

\(^{534}\). *Id.* (quoting *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2019 (2017)).

\(^{535}\). *Id.*

\(^{536}\). *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 73 (Kavanaugh, J., concurring).
New York’s restrictions on houses of worship not only are severe, but also are discriminatory. In red and orange zones, houses of worship must adhere to numerical caps of 10 and 25 people, respectively, but those caps do not apply to some secular buildings in the same neighborhoods. . . . In an orange zone, . . . [e]ssential businesses and many non-essential businesses are subject to no attendance caps at all.\textsuperscript{537}

Justice Barrett, in a concurrence joined by Justice Kavanaugh in \textit{South Bay II}, keyed in on whether restrictions allowed specific conduct in some places but not others: “Of course, if a chorister can sing in a Hollywood studio but not in her church, California’s regulations cannot be viewed as neutral.”\textsuperscript{538} The deciding question would be “whether the singing ban applies across the board (and thus constitutes a neutral and generally applicable law) or else favors certain sectors (and thus triggers more searching review).” In \textit{South Bay II}, she voted with the majority to permit the ban on singing and chanting to stand because “the record is uncertain.”\textsuperscript{539}

For many on the Court, the fight over whether “religious conduct [was treated] as well as . . . comparable secular conduct” distilled down what should be compared. In \textit{Tandon}, Justices Kagan, Breyer, and Sotomayor thought that California’s “blanket restriction on at-home gatherings of all kinds, religious and secular alike,”\textsuperscript{540} sufficed to show the State did not disadvantage religion. “[A]t-home secular gatherings [served as] the obvious comparator here.”\textsuperscript{541} In their view, “California need not . . . treat at-home religious gatherings the same as hardware stores and hair salons.”\textsuperscript{542}

Factually, Justices Sotomayor and Kagan simply disagreed that houses of worship were treated less favorably. “New York treats houses of worship far more favorably than their secular comparators. . . . The Constitution does not forbid States from responding to public health crises through regulations that treat religious institutions equally or more favorably than comparable secular institutions, particularly when those regulations save lives.”\textsuperscript{543}

Litigants in the later COVID-19 Worship Cases drained all the meaning and value they could from Chief Justice Roberts’ descriptor in \textit{South Bay I} of a “comparable secular gathering.” Plaintiffs’ counsel repeatedly

\textsuperscript{537} \textit{Id.}
\textsuperscript{538} \textit{South Bay II}, 141 S. Ct. 716, 717 (2021) (Barrett, J., concurring).
\textsuperscript{539} \textit{Id.} (“As the order notes, however, the applicants remain free to show that the singing ban is not generally applicable and to advance their claim accordingly.”).
\textsuperscript{541} \textit{Id.}
\textsuperscript{542} \textit{Id.}
made comparisons to other places “where large groups of people gather in close proximity for extended periods of time.”

For a majority of the Court, however, the governors needed to bring coherence to their choices across categories. In *Tandon*, a majority of justices agreed that the touchstone for “whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue” risks posed are the key, “not the reasons why people gather.”

The *Tandon* majority also set up a benchmark for deciding when regulations would need to satisfy strict scrutiny: “[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.”

This standard has been criticized as giving “most favored nation” status to houses of worship, preferencing them rather than placing them on equal footing. As Professor Tom Berg has noted:

> If the presence of just one secular exception means that a religious claim for exemption wins as well [absent a compelling interest], the result will undermine the *Smith* rule and its expressed policy of deference to democratically enacted laws.

Some lower courts have “refused to interpret *Smith* as standing for the proposition that a secular exemption automatically creates a claim for a religious exemption.”

As state schemes became more elaborate and precise, governors strained to explain the many distinctions being drawn, running headlong into concerns about religious gerrymandering. In a 5-4 per curiam opinion, the Court enjoined California’s restrictions on private gatherings. The scheme contained “myriad exceptions and accommodations” for secular activities comparable to religious activities, triggering strict scrutiny for violation of the Free Exercise Clause.

Safeguards and mitigation strategies played a prominent role in later decisions, too. Governors explained the non-closure or early reopening of

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545. *Tandon*, 141 S. Ct. at 1296.
546. Id.
547. Id.
549. Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 651 (10th Cir. 2006).
551. Id. at 1298.
some commercial facilities by stressing how the regulations require businesses to “modify the environment itself, it can make it lower risk for individuals.”552 Once they had economic actors online, officials said they would then turn to “opening more public spaces, things like parks and trails, [exploring] how we can modify that to make them safer.”553 In Catholic Diocese, the Supreme Court observed that the same mitigation efforts represent “less restrictive rules that could be adopted to minimize the risk to those attending religious services.”554 The State was not excused from explaining “why it could not safely permit at-home worshipers to gather in larger numbers while using the same precautions taken in secular activities.”555

An overarching question of who should make public health decisions fractured the Court across the COVID-19 Worship Cases. As Justice Jackson noted, if a “[c]ourt does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”556 Early on, Chief Justice Roberts’ decisions hinged on respect for the executive branch’s authority: “[o]ur Constitution principally entrusts ‘[t]he safety and the health of the people’ to the politically accountable officials of the States ‘to guard and protect.’”557 As time passed, arguments for giving deference waned in their impact on Justice Roberts, who added a crucial vote comprising the majority.

III. COULD GOVERNORS HAVE ISSUED ORDERS THAT WITHSTAND SCRUTINY? THE MISSING R AND A IN IRAC

Every law student learns early on that if she wants to succeed at law school and in legal practice,558 she needs to analyze problems in a rigorous linear fashion, often abbreviated as “IRAC”: Issue, Rule, Application, Conclusion.559 This is so ingrained that a large part of the first-year curriculum

553. Id.
555. Tandon, 141 S. Ct. at 1297.
559. There are also many alternate forms of organizing these arguments, such as CRAC (Conclusion, Rule, Application, Conclusion) or CREAC (Conclusion, Rule, Explanation, Application, Conclusion). See CREAC, LEWIS & CLARK L. SCH. WRITING CTR., https://law.lclark.edu/centers/law_school_writing_center/tips_for_better_writing/creac (last visited Mar. 1, 2022); Christine Tamer, CRAC: An Overview, UNT DALLAS COLL. OF L. CTR. FOR WRITING EXCELLENCE, https://lawschool.untdallas.edu/sites/default/files/center_for_writing_excellence-crac_overview.pdf (last visited Mar. 1, 2022).
is devoted to making sure that IRAC becomes “second nature.” IRAC is the “format used by lawyers in preparing legal memoranda,” and “the structure that most judges use in drafting judicial opinions,” and should be a standard for lawmakers as well “because it echoes the structure of effective legal reasoning.”

Giving the reader the outline of the law first is important to laying out a clear argument. The third step—the analysis—is the “heart of the discussion,” when the writer applies the rule to the facts of the case, drawing comparisons or differentiating the facts of the case at hand from the cases used in the rule section.

Following IRAC yields a comprehensive analysis, highlighting the key inquiry, the governing law or rule, application to novel facts at hand, and a conclusion. Skipping or failing to fully analyze the application of the rule to facts results in hefty deductions on an exam.

Yet the governors and their staffs did exactly this.

When announcing restrictions, the governors devoted little time and explanation to how categories of restrictions were being constructed and how the factors guiding those categories matched up to the specific risks posed by worship.

The governors used the escalating case counts as the pressing reason for acting precipitously to contain a raging virus. But they did not move from that urgency to explaining what factors guided the categories they created. In other words, they never articulated why factories could safely open but houses of worship could not. In IRAC terms, the governors skipped the critical rule and application sections of IRAC, leaving the court little to which it could give deference as time passed.

By not articulating a defining rule, governors and their staffs could not locate the incoherence of their own categories. Consider Nevada’s Directive

563. See id.
565. Students are advised to “track the order and key phrases of the Rule section so that [the] reader can easily follow along.” Organizing A Legal Discussion (IRAC, CRAC, etc.), supra note 560. This section is often the longest and most crucial part of any legal analysis. See id.
566. For law students, “almost all” of law school exam points come not from the student’s knowledge of the rule itself, but from the “application of the elements of the rule to the facts presented by the exam.” The “A” in my IRAC, Reddit, https://www.reddit.com/r/LawSchool/comments/2bfriot/the_a_in_my_irac (last visited Mar. 1, 2022).
021, which capped attendance at houses of worship at fifty.567 Nevada’s Solicitor General urged that houses of worship were being treated like “lectures, concerts, moving [sic] showings, spectator sports, [and] theatrical performances,” which also could not “have audiences,” either.568 But there was one problem: theatres could have “50 people per screen.”569 The Solicitor General attempted to salvage the argument by saying Nevada treated all “live events” the same way.570

Substantively, if the governors had applied IRAC, they would have started with the U.S. Constitution. But across dozens of press conferences and orders, the Constitution is never mentioned. Clear standards existed in legal precedent for restrictions on worship and what will trigger strict scrutiny, as Part II shows. Realizing that strict scrutiny “has always been a demanding and rarely satisfied standard,”571 the governors and their staffs should have taken greater care to avoid targeting religious activities and the implication that categories were gerrymandered to reach that result or de facto operated in that fashion.

To make this concrete, if the governors had worked forward from Smith and Lukumi, they would not have created categories that gave churches “their own row.”572 The justices did not “discover these rules” in the COVID-19 Worship Cases. They merely applied them to the governors’ schemes, a step the governors and their staffs would have worked through if they conducted a proper IRAC before issuing their orders.

Placing restrictions alongside the First Amendment framework may have helped officials to avoid impugning specific religious communities. In any event, officials would have come armed with public health data showing specific gatherings as the genesis of the increase in COVID-19 positivity in that community, precisely to avoid the implication of targeting.

The governors and their experts in litigation named certain activities which carried specific risks (arriving at one time, sitting in place, etc.), but did not go through why places of worship—rather than, say, laundro-
mats—carried a high risk of COVID-19 transmission. Dr. Watt in California emphasized “close proximity between individuals,” “extended duration,” and “substantial singing and vocalizing,” without recognizing that two of the three, and maybe all three, apply to laundromats, where people congregate and yell over the din of machinery. In litigation, plaintiffs made considerable hay out of this failure.

The fact that modifications could lower risk teed up the natural question—could safeguards not be used in all contexts, permitting gatherings? Here governors’ experts, relying “on their experience,” made predictive judgments that employees would follow employer directives but that parishioners would not.

No more explanation was given than these assertions or personal observations. No structured arguments were offered about why churches operate differently than, say, laundromats or factories. Do people sit at laundromats during the whole wash and dry cycle? Do they slip out for smokes while parishioners stay glued to their seats?

California experts justified the earlier opening of factories based on mitigation measures like temperature and symptom screening, both of which houses of worship could implement and offered to. California experts also pointed to the “strict health and safety, building code and other requirements” factories and employers are subjected to. The States’ witnesses did not explain why safeguards like staggered arrival or spacing inside larger facilities could suffice to mute risk for worship gatherings, other than to posit that employers would make employees follow safeguards.


575. Id. at 26.

576. See e.g., Petition for a Writ of Certiorari Before Judgement, supra note 472, at 9–10 (The church’s safety plan included:

- asking people to arrive no more than 25 minutes early;
- organizing parking attendants to direct cars;
- guiding attendees to a designated entrance;
- ensuring one-way traffic via a first-in-last-out model and placing signs on walls and floors;
- leaving a half-hour gap between services in which to clean and sanitize the sanctuary, hallways, bathrooms, and common surfaces;
- advising attendees of proper social-distancing methods;
- directing attendees to seating that provides at least six feet of separation between families and those in different households;
- making hand-sanitizer stations readily accessible;
- prohibiting handouts or passing other items between persons; stopping the service of coffee and snacks;
- limiting restroom use to one person at a time;
- using prepackaged Communion elements;
- directing attendees out of the building; and
- instructing people not to congregate in the building).

577. Declaration of Dr. James Watt, supra note 574, at 26.
Compliance with the law and greater safety by factories seems counterfactual. Factory workers stand “shoulder-to-shoulder” in the assembly line for hours, potentially as close as worshipers in church pews.578 Two people standing on a factory line are there for more than 15 minutes. The experts never explained why factories or other congregate settings possessed a singular ability to comply with safety measures. Presumably, officials could not make out such a case since factories have been frequent sites of outbreaks.579

Furthermore, when pushed on why casinos could reopen and places of worship could not, Nevada’s expert responded that he could not comment on Gaming Control Board requirements.580

Government experts did delve into peculiarities of worship services—that there is a mixing of young and old, for example. But no consideration was given to how many churches have youth organizations or daycares. Could that mixing be avoided? And, more importantly, does mixing occur elsewhere in places and spaces they kept open, like barbershops, hairdressers, nail salons, and retail stores?

If the governors had used IRAC, they would have started with their criteria, worked forward through each relevant industry, and decided how the criteria could be applied and if the mitigation measures could be implemented. They would have matched the categories to the risk and explained the different categories in terms of that risk, backing their restrictions up with evidence.

Of all the experts that were brought forth by the states, Dr. Rutherford was one of the few to provide a thorough application that would meet the standards of a law school exam. But even this was too late. Next time around, governors should lead with the expert explanation.

This Article does not contend that worship is truly like the many activities treated more favorably. Instead, the point here is about what was not said. The governors did not explain why different regulated activities were not alike. That silence is the most obvious explanation for the treatment that the governors received in the COVID-19 Worship Cases. As COVID-19 variants spread in successive waves, if governors want these regulations and restrictions to stick, they need to bring experts to the front to explain to the public, “why this, and not that.”

578. “The work was shoulder-to-shoulder . . . and the company hadn’t yet provided face coverings.” Klemko & Kindy, supra note 44; The CDC suggested that the plant’s “enhanced testing strategy,” begun during the three-week span, “might have led to increased case detection among employees.” Steinberg, Kennedy, Basler, Grant, Jacobs, Ortbahn, Osburn, Saydah, Tomasi & Clayton, supra note 44.

579. For example, between March 16 and April 25, 2020, more than a quarter (25.6%) of employees at a South Dakota meat processing facility contracted COVID-19; two died. See Steinberg, Kennedy, Basler, Grant, Jacobs, Ortbahn, Osburn, Saydah, Tomasi & Clayton, supra note 44.

580. Hearing Transcript Calvary Chapel, supra note 426, at 21.
IV. LESSONS FOR DELTA AND FUTURE VARIANTS


The COVID-19 Worship Cases illustrate the tradeoffs between public health mandates and individual liberties. The Supreme Court’s opinions...
provide a roadmap for governors to follow if they want future restrictions to stick. This Part summarizes four key lessons.

Lesson #1: Begin with the Constitution and Guiding Precedent

As the per curiam opinion in Catholic Diocese noted, “[E]ven in a pandemic, 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.”

When restrictions violate the Constitution, the courts “have a duty to defend the Constitution . . . even [in] a public health emergency.” As Part III shows, it is possible to write coherent rules that apply articulated categories to specific zones of commerce or society. This is not to say that what to do is always clear-cut. As Justice Kavanaugh pointed out in his dissent in Calvary Chapel:

The definitional battles over what constitutes favoritism, discrimination, equality, or neutrality can influence, if not decide, the outcomes of religion cases. But the parties to religion cases and the judges deciding those cases often do not share a common vocabulary or common background principles. And that disconnect can muddy the analysis, build resentment, and lead to litigants and judges talking past one another.

Different conceptions of what “discrimination” means present challenges for governors who want to make good-faith efforts to craft regulations consonant with the First Amendment. But, starting with the Constitution is always necessary.

Regulations must impose the least restrictive means possible, meaning precautions put into place should consider restrictions and mitigation taken as a package. And the State must provide a clear, evidence-based explanation—a compelling interest—for any potentially discriminatory restrictions.

Lesson #2: Silence Sows Distrust

Clear, evidence-based explanations of the restrictions that regulated some of the deepest aspects of our lives—with whom we gather and how we worship—were missing in public announcements and justifications. There were no factual comparisons of different industries or activities and how and why risk mitigation measures can—or cannot—be used in these spaces. Without satisfactory explanations, questions of illicit bias naturally become more pronounced.

590. Roman Cath. Diocese of Brooklyn, 141 S. Ct. 63, 68.
592. Id. at 2610 (Kavanaugh, J., dissenting).
One expert for plaintiffs asked, fairly, for “a publicly available model that makes explicit its assumptions about [the Blueprint’s tiered model explicit, without which], the claimed benefits of restricting the normal activities of people in higher tier counties has inadequate scientific justification.”\textsuperscript{593} Without such evidence, one might surmise, as Justice Gorsuch suggested, that “[t]he only explanation for treating religious places differently seem\{ed\} to be a judgment that what happens there just isn’t as ‘essential’ as what happens in secular spaces.”\textsuperscript{594}

Justice Gorsuch voiced the skepticism and distrust of many, sarcastically asking, “Who knew public health would so perfectly align with secular convenience?”\textsuperscript{595}

Without explanation, observers are left to surmise that the restrictions adopted by the state, when taken as a package, respond to pure economic imperatives. As Justice Kavanaugh observed, “The Constitution does not tolerate discrimination against religion merely because religious services do not yield a profit.”\textsuperscript{596} Without clear and public explanations, the Justices were left to assume the worst.

Lesson #3: Relax Restrictions as Risk Subsides and Use Devices That Mitigate Risk in One Context in All Contexts

Early in the pandemic, the courts sided more frequently with the state. As Chief Justice Roberts said in \textit{South Bay I}, state officials “should not be subjected to second-guessing by an ‘unelected federal judiciary,’ especially . . . [when] actively shaping their response to changing facts on the ground.”\textsuperscript{597}

With the passage of time, however, governors had the opportunity to tailor measures. For an increasing fraction of the court, a public health emergency does not give Governors and other public officials \textit{carte blanche} to disregard the Constitution for as long as the medical problem persists. As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights.\textsuperscript{598}

As states leveraged successful mitigation techniques, they naturally faced an obligation to show proof that their restrictions on worship did the least harm possible. Governors must convincingly explain why if factories and other businesses can mitigate, houses of worship and other impacted entities cannot.

\textsuperscript{593} Declaration of Dr. Jayanta Bhattacharya, \textit{supra} note 240, at ¶ 21.
\textsuperscript{594} \textit{Roman Cath. Diocese of Brooklyn}, 141 S. Ct. at 69 (Gorsuch, J., concurring).
\textsuperscript{595} \textit{Id}.
\textsuperscript{596} \textit{Calvary Chapel Dayton Valley}, 140 S. Ct. at 2614 (Kavanaugh, J., dissenting).
\textsuperscript{598} \textit{Calvary Chapel Dayton Valley}, 140 S. Ct. at 2605 (Alito, J., dissenting).
Lesson #4: Favor Simplicity and Soundness in Restrictions and Explanations

Much of the confusion came from a lack of clarity and rapid changing of the restrictions and categories. Governors strained to explain elaborate regulatory schemes. When sued, the governors’ experts proffered explanations which sometimes undercut their own claims of necessity.

As discussed in Part III, governors failed to clarify criteria used to assign businesses to a category, to set different restrictions across like categories, and even to set different restrictions within a category. The explanations followed the regulation’s release by weeks and months and were given in rarified courtroom settings that were even more difficult for the public to access during COVID-19.

If governors find themselves issuing restrictions again, they should aim to keep their categories as simple, yet sound, as possible. Categories should be based on risk, with all types of enterprises and activities afforded an equal opportunity to apply mitigation measures. Public explanations, perhaps following IRAC, should be supplied at release.

Governors could also save everyone time by saying what the secular comparators are and why—to avoid costly litigation and to cabin second guessing by the courts. Ultimately the states paid attorneys’ fees for violating civil rights that ran into the hundreds of thousands.

Houses of worship should have been given the opportunity to mitigate risk, as factories and other businesses were. That the “vast consensus of public health experts” believed worship gatherings must be limited missed the fact that the State permitted workers at factories to gather. These choices read as the State precluding gatherings that the experts or state officials may have seen as carrying less value and therefore an unnecessary risk of spread. Governors used the consensus about risk of gatherings to justify outright closure, without considering whether places of worship could implement the very measures that reduced risk in secular facilities.

The arguments for why businesses and factories were permitted to open while places of worship remained closed rested heavily on the capacity of businesses to adhere to and enforce compliance with rules. One place where differences between factories and houses of worship emerged concerned the physical plant. Experts for the State cited higher-quality ventilation at businesses and factories due to building codes. It is true that places of worship can be subject to less stringent ventilation requirements.

599. State Appellee’s Answering Brief, supra note 241, at 34 (citing declarations from Drs. Rutherford, Stoto, Watt, and three other experts) (“As the district court explained, the State imposes restrictions on location and attendance, beyond such precautions as face coverings and distancing, based on objective risk criteria related to the spread of COVID-19, and these factors all show that private gatherings create a great risk of spread, leading the “vast consensus of public health experts” to believe such gatherings must be limited. 1-ER-0065”).

600. Declaration of Dr. James Watt, supra note 574, at 26.
under typical building codes. But they were not given the opportunity to upgrade ventilation to meet a minimum standard to open.

Even the states’ response to ventilation capacity was inconsistent. California instructed businesses to “increase filtration efficiency to the highest level compatible with the existing ventilation system.” Yet, California’s guidance said:

existing ventilation requirements, such as those established in the California Building Code and Title 24, were not intended to control exposures to small aerosols of hazardous infectious agents such as COVID-19. Consequently, code compliance should be considered as the baseline, or starting point, in creating more protective environments.

Now, if the State actually checked the ventilation of each building before permitting it to reopen or monitored if businesses maintained this highest filtration efficiency possible—despite “increased energy bills or increased wear and tear on ventilation system components”—that regulation presumably would have withstood scrutiny.

Places of worship should receive the grace extended to secular businesses to accommodate their ability to operate by mitigating risk. Perhaps not all places of worship would have been able to upgrade their ventilation or implement mitigation safeguards to meet these requirements, but regulations should give them equal opportunity to try.

V. CONCLUSION

In March 2020, the world came to a standstill. What some thought would be a few weeks away from the office turned into months of state-mandated lockdowns and years of dislocation. During this time, places of worship took a back seat to economic interests, being regulated differently and permitted to open only after large parts of the secular economy had come back online.

There may be reasons that houses of worship pose different risks warranting this approach, such as antiquated physical plants. But the governors did not explain their decisions in thoughtful ways that the public and courts could understand. If governors want deference to their decisions, at the very least, governors need to try to make a public case for infringing liberties.

604. Id.
The public might be more likely to go along if they were made aware of the reasons for asking them to separate from a source of support during a crisis. In the end, no one could explain why houses of worship had to stand empty while the rest of the economy reopened.