

ARTICLE

## COVID-19, Religious Freedom and the Law: The United States' Case

Ryan Houser\* and Andrés Constantin

Georgetown University's Global Health Initiative and O'Neill Institute for National and Global Health Law, 37th and O Streets, N. W., Washington USA 20057

\*Corresponding author email: [rsh251@georgetown.edu](mailto:rsh251@georgetown.edu)

### Abstract

During the emergence of SARS-CoV-2 and the COVID-19 pandemic, public health officials exercised their police powers to combat the spread of the virus. The pandemic-related legal interventions adopted throughout the United States included lockdown orders and mask mandates. However, these policies and interventions meant to promote the general welfare of the public, in defense of common good, were met with legal challenges, especially in opposition to interventions' impact on the exercise of religion. This article provides a legal analysis of the policies meant to curb the COVID-19 pandemic with a focus on legislative and judiciary actions and their implications for religious freedom. Ultimately, we hope this article will help inform future legal analyses on conflicts between public health and religious freedom in the context of pandemic legal preparedness efforts.

**Keywords:** Religious Freedom; Infectious Diseases; Pandemic; Policy; Public Health; COVID-19

### Introduction

To combat the spread of the SARS-CoV-2 virus and control the COVID-19 pandemic, government officials in the United States have adopted various legal interventions. Some of these interventions have come into conflict with the exercise of religious freedom. In total, forty-two states implemented some form of stay-at-home order throughout the pandemic, which some faith communities considered to be an excessive use of emergency powers.<sup>1</sup> Other religious contentions with public health orders included mask-wearing and vaccinations. These contentions also extended to vaccine mandates required to travel, to return to in-person work in offices, or for children returning to schools.<sup>2</sup>

In the United States, and within a pandemic setting, a conflict arises when the government looks to protect population health with various emergency measures while imposing limits on fundamental freedoms, such as religious freedom, which are enshrined in the U.S. Constitution. The resulting limits or restrictions on religious freedom yielded lawsuits that emphasize the legal and constitutional implications of this tension between public health and fundamental freedoms.

The COVID-19 pandemic has highlighted the various legal perspectives that exist — and are in conflict — within the United States, particularly regarding the counter-majoritarian role of courts and the extent to which religious freedom has been used as a tool to overturn public health measures. In that

<sup>1</sup>Sarah Mervosh et al., *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 11, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html> [<https://perma.cc/MQ43-JVM3>].

<sup>2</sup>See Lydia Wheeler, *Religious Objections Stand in Path of Mask, Vaccine Mandates*, BLOOMBERG LAW (Jul. 29, 2021), <https://news.bloomberglaw.com/health-law-and-business/religious-objections-stand-in-path-of-mask-vaccine-mandates> [<https://perma.cc/5KMY-SYAV>].

context, religious freedom seems to be incongruent with the government's duty to protect the public's health during a pandemic. The COVID-19 pandemic is not the first and will not be the last pandemic; any pandemic legal preparedness effort must assess whether religious freedom can supersede the protection of other rights, even during a pandemic, or how to best balance conflicting rights and interests in this context.

To that end, in this article, we describe the contours of religious freedom in the United States and its interaction with public health measures. We then examine legal actions adopted and implemented in the context of the COVID-19 pandemic in the United States. We continue with an analysis of said actions and distill some reflections on the future of pandemic legal preparedness and the role of law in responding to emerging disease outbreaks. Finally, we conclude with a reflection on how legal decisions and lessons learned throughout this pandemic should inform next steps for policymakers and government officials.

### Public health, religious freedom, and police power

Religious freedom is a fundamental protection enshrined in the U.S. Constitution. The Constitution specifically prohibits the government from directly favoring one religion over another,<sup>3</sup> and restricts the government from interfering with Americans' rights to pursue their religious beliefs.<sup>4</sup>

The founders of the United States believed in a separation of Church and State: Thomas Jefferson even referenced a "wall" between the two.<sup>5</sup> This idea was advanced in *Everson v. Board of Education*, which influenced a balancing test for religious restrictions that required laws that incidentally burden religious freedoms be neutral in effect and that laws that burden religious freedoms to be justified via government's compelling interests.<sup>6</sup> However, in *Employment Division v. Smith*, the U.S. Supreme Court moved away from the balancing test to a test that inquires as to whether a law that burdens a religious practice is *neutral* and *generally applicable*.<sup>7</sup> Neutrality and general applicability are interrelated, and a failure to satisfy one requirement is a likely indication that the other has not been satisfied. If the law is deemed neutral and generally applicable, the law will be upheld so long as the law is rationally related to a legitimate government interest.<sup>8</sup> If the law is not neutral or generally applicable, then the law "must be justified by a compelling government interest" and must be narrowly tailored to advance that interest.<sup>9</sup>

In *Smith*, the Court applied the rational basis test, distinguishing its holding from earlier cases in which it applied strict scrutiny to laws that infringed on free exercise rights.<sup>10</sup> The Court explained that the "only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated actions have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections."<sup>11</sup> Thus the *Smith* test was established, which provides that states may only pass laws that burden religious exercise when the law is facially neutral and of general applicability.<sup>12</sup> When a law burdens religious exercise and it is not actually neutral or generally applicable, it must be "justified by a compelling governmental interest" and be "narrowly tailored to advance that interest."<sup>13</sup>

<sup>3</sup>U.S. CONST. amend. I.

<sup>4</sup>*Id.*

<sup>5</sup>Hana M. Ryman & J. Mark Alcorn, *Establishment Clause (Separation of Church and State)*, THE FIRST AMENDMENT ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/885/establishment-clause-separation-of-church-and-state> [<https://perma.cc/SSY8-PPY8>].

<sup>6</sup>*Everson v. Bd. of Educ.*, 330 U.S. 1, 16-18 (1947).

<sup>7</sup>*Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990).

<sup>8</sup>*Id.* at 879-80.

<sup>9</sup>*Id.* at 883, 894.

<sup>10</sup>*See generally id.*

<sup>11</sup>*Id.* at 881.

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

The Religious Freedom Act of 1993 (RFRA) altered the test to require the government to show that their compelling interests were addressed through the least restrictive means available.<sup>14</sup> Courts must evaluate whether the government could prove that the law in question served a purpose so “compelling” that it was justified in taking action and whether the law required or forbade actions “narrowly tailored” to achieve its purpose with as little interference on individual liberties as possible.<sup>15</sup> Congress essentially reinstated the balancing test by passing the RFRA, but the Act was held unconstitutional as applied to the states in *City of Boerne v. Flores*.<sup>16</sup> Therefore, when analyzing whether a state law unconstitutionally infringes on a citizen’s free exercise of religion, *Smith* still applies, and a rational basis analysis must be used if the law is neutral and generally applicable.

Religious freedom has been at the center of pandemic-related lawsuits, as public health measures restricted religious gatherings – including funeral services, prayer services, and religious services – to prevent the spread of COVID-19.<sup>17</sup> A key dimension of these lawsuits is the question of whether the reasonable application of state-based police powers implemented to ensure public health standards is met.

Police powers are an expression of civil authority that were first validated during the Revolutionary War in Philadelphia to control the threat of Yellow Fever.<sup>18</sup> Police powers give public health officials the power to compel treatment, prohibit or direct certain conduct, or detain and isolate if they can demonstrate the actions are necessary to further public health objectives. In 1824, the Supreme Court affirmed this power noting the power to quarantine was “permissible to provide for the health of the citizens.”<sup>19</sup>

As the current COVID-19 pandemic and various historical pandemics have shown, the uncontrolled spread of infectious diseases can require the implementation of urgent measures to protect the public.<sup>20</sup> Doctrinal elaborations of these powers from the 18<sup>th</sup> through early 20<sup>th</sup> centuries permitted the power to detain without pre-intervention review and regulation of private behavior and property.<sup>21</sup> The communitarian philosophy that underlined this approach has persisted in public health decision making. However, it has been challenged, and subsequently consolidated the rights of states to exercise police powers when an expression of other constitutional rights was prejudiced.<sup>22</sup>

Constitutional arguments around these powers are often framed as violations of the Fourteenth Amendment, because the Supreme Court has only reviewed police power measures when the degree of restriction to personal liberties is unconscionable.<sup>23</sup> The Fourteenth Amendment precludes states from making or enforcing laws that “abridge the privileges or immunities of citizens of the United States” and restrict states from any actions which “deprive any person of life, liberty, or property, without due process of law.”<sup>24</sup> Subsequent interpretations of this amendment have been leveraged as a barrier to

<sup>14</sup>Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb).

<sup>15</sup>*Id.*

<sup>16</sup>*City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (“Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance. The judgment of the Court of Appeals sustaining the Act’s constitutionality is reversed.”).

<sup>17</sup>See Samirah Majumdar, *How COVID-19 Restrictions Affected Religious Groups Around the World in 2020*, PEW RESEARCH CENTER (Nov. 29, 2022), [https://www.pewresearch.org/religion/wp-content/uploads/sites/7/2022/11/PF\\_2022.11.29\\_restrictions\\_REPORT.pdf](https://www.pewresearch.org/religion/wp-content/uploads/sites/7/2022/11/PF_2022.11.29_restrictions_REPORT.pdf) [<https://perma.cc/S5WM-LDAS>].

<sup>18</sup>See *Smith v. Turner*, 48 U.S. (7 How.) 283, 340-41 (1849).

<sup>19</sup>*Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

<sup>20</sup>See DYLAN CAIN, *COVID-19 AND THE CONSTITUTION: STATE POLICE POWERS AND JUDICIAL SCRUTINY* (2022), <https://truman.missouri.edu/sites/default/files/publication/covid-19-and-the-constitution-state-police-powers-and-judicial-scrutiny.pdf> [<https://perma.cc/4PE5-873L>].

<sup>21</sup>Lawrence O. Gostin et al., *The Law and the Public’s Health: A Study of Infectious Disease Law in the United States*. 99 COLUM. L. REV. 59, 78-88 (1999).

<sup>22</sup>*Calder v. Bull*, 3 U.S. (3 Dall.) 386, 386-89 (1798).

<sup>23</sup>Jorge E. Galva et al., *Public Health Strategy and the Police Powers of the State*, 120 PUB. HEALTH REPS. 20, 20-21 (SUPP. 1 2005).

<sup>24</sup>U.S. CONST. amend. XIV, § 1.

regulating private concerns of American citizens.<sup>25</sup> The courts have upheld public health activities within this challenge as a defense of the common good despite private regulation concerns.

*Jacobson v. Massachusetts* is the seminal case discussing governmental interference with individual liberties through communicable disease regulations.<sup>26</sup> In that case, the U.S. Supreme Court upheld the universal presumption of the constitutionality of vaccination statutes through a deferential standard of review – with similar extension to quarantine statutes as a result of the holding.<sup>27</sup> In *Jacobson*, a Cambridge City Board of Health order, pursuant to its authority, required all adults to be vaccinated for smallpox after cases surged in Cambridge. Otherwise, citizens would face a statutory penalty for refusing the vaccine, a monetary fine of \$5 (about \$100 today), although no provision for forcing the vaccination on any person was present. Massachusetts statute granted city boards of health the authority to require vaccination “when necessary for public health or safety.”<sup>28</sup> Henning Jacobson refused the vaccination and was fined, prompting the case to rise eventually to the Supreme Court.<sup>29</sup> The Court ultimately clarified that individual liberties are not absolute, but rather subject to the police power of the state, and therefore upheld the state’s authority to enact a compulsory vaccination law as the best way to protect public health.<sup>30</sup>

Supported by the legal principles of *sic utere tuo ut alterum non laedas* and *salus publica suprema lex est*, these public health police powers have been leveraged to promote the general welfare during a pandemic through legislative action that may partially restrict individual liberty.<sup>31</sup> *Sic utere tuo ut alterum non laedas* – use that which is yours so as not to injure others – is a general limitation on complete freedom that still permits enjoyment of individual rights, so long as they do not infringe on others.<sup>32</sup> At the beginning of the 20<sup>th</sup> century, there was unanimity for police powers to be utilized to implement necessary, immediate actions to preserve public health – even if they infringed on or limited individual freedoms.<sup>33</sup> However, the late 20<sup>th</sup> century prompted social, ideological, and legal transformations that limited the police power’s role in public health emergencies.<sup>34</sup> The main legal contention has revolved around *salus publica suprema lex est* – public well-being is the supreme law – as courts have been asked to limit police powers if they infringe on religious freedom.<sup>35</sup>

The COVID-19 pandemic produced new interest in precedential Supreme Court decisions around public health and the limitations on individual liberties within the scope of police powers meant to protect the general welfare of a community.<sup>36</sup> In *Jacobson*, Justice Harlan confirmed that the Constitution protects individual liberties, but noted that liberty is not “an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint.”<sup>37</sup> The Court noted that the vaccination law applied “only when, in the opinion of the board of health, that was necessary for the public health or

<sup>25</sup>See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding a liberty interest exists for married couples to purchase contraceptives); *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding a liberty interest exists for gay adults to engage in consensual sexual activity); but see *Washington v. Glucksberg*, 521 U.S. 702 (1997) (holding no liberty right for assisted suicide against state statutes); *Dobbs v. Jackson*, 142 S. Ct. 2228 (2022) (holding no constitutional right to obtain an abortion against state statutes).

<sup>26</sup>*Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

<sup>27</sup>See *id.*

<sup>28</sup>MASS. REV. LAWS c. 75, § 137 (1901).

<sup>29</sup>*Jacobson*, 197 U.S. at 26.

<sup>30</sup>See generally *id.*

<sup>31</sup>Lawrence O. Gostin et al., *The law and the public’s health: a study of infectious disease law in the United States*, 99 COLUM. L. REV. 59, 78-88 (1999).

<sup>32</sup>*Id.*

<sup>33</sup>Galva et al., *supra* note 24, at 21.

<sup>34</sup>*Id.* at 20.

<sup>35</sup>*Id.* at 21.

<sup>36</sup>See, e.g., Marc S Stern, *The Constitution is Not a Suicide Pact: Quarantine, Masks, and the Constitution*, AM. BAR ASS’N (Jul. 27, 2022), [https://www.americanbar.org/groups/senior\\_lawyers/publications/voice\\_of\\_experience/2022/july-2022/quarantine-masks-and-the-constitution/](https://www.americanbar.org/groups/senior_lawyers/publications/voice_of_experience/2022/july-2022/quarantine-masks-and-the-constitution/) [<https://perma.cc/E8VL-VMUA>].

<sup>37</sup>*Jacobson*, 197 U.S. at 26.

the public safety,” deferring to the public health officials.<sup>38</sup> There were limitations on this holding: the Court cautioned that “the police power of a state, whether exercised directly by the legislature, or by a local body acting under its authority, may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression,” ultimately suggesting the role that courts play in ensuring that measures are constitutional within their given rules of analysis.<sup>39</sup> This observation was explained by noting that the law should not be understood to mandate vaccinations on any persons who could show the vaccination would impair their health or cause death.<sup>40</sup>

Subsequent cases, such as *Zucht v. King*, held that *Jacobson* “settled that it is within the police power of a state to provide for compulsory vaccination” and the case and others “also settled that a state may, consistently with the federal Constitution, delegate to a municipality authority to determine under what conditions health regulations shall become operative.”<sup>41</sup> Current application of *Jacobson* has become a source of scholarly debate: some argue the precedent no longer applies, as vaccines are not as medically necessary to prevent the spread of disease,<sup>42</sup> while others maintain that *Jacobson* remains important in providing power to protect the public health especially with the threat of pandemics, such as COVID-19.<sup>43</sup>

### Legal actions during the COVID-19 pandemic in the U.S.

In response to the devastating effects of the COVID-19 pandemic, U.S. state legislatures took extraordinary steps to respond to the spread of the virus. Among some of the most contentious measures were temporary orders limiting large gatherings, including religious gatherings.<sup>44</sup> Under the U.S. federalist system, each state is given the power to control the police powers of health, education, and welfare.<sup>45</sup> States thus implemented their own individual precaution measures in response to the outbreak.<sup>46</sup> While numerous states’ orders were contested in court, the measures in contention in each order were unique enough to highlight the current ideological balance between measures protecting public health and those ensuring religious freedom.<sup>47</sup> New York’s restrictions were the only restrictions between New York, California, and Nevada that were overturned, although notably, the Supreme Court’s composition changed after the California and Nevada cases and before the New York case, with Justice Barrett succeeding Justice Ruth Bader Ginsburg, who passed away in September 2020 (see Table 1).

### Gathering Focused Cases

Cases claiming discrimination against religious institutions were also filed throughout the country. In *Capitol Hill Baptist Church v. Bowser*, an evangelical church sued the District of Columbia claiming that religious services were prohibited, while large anti-racism First Amendment demonstrations were

<sup>38</sup>*Id.* at 27.

<sup>39</sup>*Id.* at 38.

<sup>40</sup>*Id.* at 39.

<sup>41</sup>*Zucht v. King*, 260 U.S. 174, 176 (1922). This was another vaccination case which upheld a city ordinance that prohibited anyone from attending a public or private school without a certificate of smallpox vaccination.

<sup>42</sup>See, e.g., Note, *Toward A Twenty-First-Century Jacobson v. Massachusetts*, 121 HARV. L. REV. 1820 (2008).

<sup>43</sup>See, e.g., GEORGE J. ANNAS ET AL., AM. C.L. UNION, PANDEMIC PREPAREDNESS: THE NEED FOR A PUBLIC HEALTH – NOT A LAW ENFORCEMENT/NATIONAL SECURITY– APPROACH (2008), [https://www.acu.org/sites/default/files/pdfs/privacy/pemic\\_report.pdf](https://www.acu.org/sites/default/files/pdfs/privacy/pemic_report.pdf) [<https://perma.cc/8WD4-3XTE>].

<sup>44</sup>See, e.g., Majumdar, *supra* note 18.

<sup>45</sup>U.S. CONST. amend. X.

<sup>46</sup>Alexandra Skinner et al, *A database of US state policies to mitigate COVID-19 and its economic consequences*, BMC PUB. HEALTH (2022), <https://bmcpublichealth.biomedcentral.com/counter/pdf/10.1186/s12889-022-13487-0.pdf> [<https://perma.cc/CYT6-RJ4D>]; see also Xue Zhang & Mildred E. Warner, *COVID-19 Policy Differences across US States: Shutdowns, Reopening, and Mask Mandates*, Int. J. Envir. Res. & Pub. H. (Dec, 18, 2020).

<sup>47</sup>Laurie Sobel & MaryBeth Musumeci, *Litigation Challenging Mandatory Stay at Home and Other Social Distancing Measures*, KFF (Jun. 5, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/litigation-challenging-mandatory-stay-at-home-and-other-social-distancing-measures/> [<https://perma.cc/T5LK-2UXH>].

**Table 1.** The restrictiveness of selected state lockdowns regarding religious freedom due to COVID-19 during the pandemic based on data from the respective executive orders

State and Executive Order	Restrictions on Public Gatherings	Restrictions on Religious Gatherings	Pandemic Context
New York: Executive Order 202.68 <sup>48</sup>	<p>Most severe, or “red zones”: non-essential gatherings of any size were not permitted; all non-essential businesses were required to be 100% remote; any restaurant or tavern were permitted to be open for takeout or delivery only; all schools were closed for in-person instruction, except for a few complications</p> <p>In moderate severity warning areas or “orange zones”: non-essential gatherings were limited to 10 people; certain non-essential businesses, were required to work remote if the risk of spread was deemed to be high; any restaurant or tavern were permitted to provide outdoor service, but with party capacity limit of 4 people; schools remained remote except for a few complications</p> <p>In precautionary or “yellow zones”: Non-essential gatherings were limited to no more than 25 people; any restaurant or tavern were required to limit party size to 4 people; schools were required to have mandatory testing of students and school personnel</p>	<p>Most severe, or “red zones”: houses of worship shall be subject to a capacity limit of 25% of maximum occupancy or 10 people, whichever is fewer.</p> <p>In moderate severity warning areas or “orange zones”: houses of worship shall be subject to a maximum capacity limit of the lesser of 33% of maximum occupancy or 25 people, whichever is fewer.</p> <p>In precautionary or “yellow zones”: houses of worship shall be subject to a capacity limit of 50% of its maximum occupancy and shall adhere to Department of Health guidance.</p>	<p>New York City (NYC) was an early epicenter of the COVID-19 pandemic in the United States. Approximately 203,000 cases of laboratory-confirmed COVID-19 were reported in NYC during the first 3 months of the pandemic<sup>49</sup></p>
California Executive Order N-33-20 <sup>50</sup>	<p>Retail had a 50% capacity limit</p> <p>Offices, manufacturing, food packaging, museums, and every other sector had no percentage limit</p>	<p>Under the original orders, California insisted that all religious worship take place only at home, by live-streaming</p> <p>Limit attendance to 25 percent of building capacity or a maximum of 100 attendees, whichever is lower</p>	<p>As of mid-October 2020, California had surpassed New York for total cases to date.</p>
Nevada Emergency Directive 021 <sup>51</sup>	<p>Casinos, restaurants, and amusement parks were limited to 50 percent of their fire-code capacities</p>	<p>Houses of worship had a static 50-person limit</p>	<p>N/A</p>

<sup>48</sup>N.Y. Exec. Order No. 202.68, N.Y. COMP. CODES R. & REGS. tit. 9 § 8.202.68 (Oct. 6, 2020) (ordering the continuation of the “temporary suspension and modification of laws relating to the Disaster Emergency” and promulgating further directives relating to the COVID-19 pandemic).

<sup>49</sup>CTR. FOR DISEASE CONTROL & PREVENTION, 69 MMWR 46, at 1725–1729 (discussing New York COVID-19 statistics in a “Morbidity and Mortality Weekly Report” issued by the CDC).

<sup>50</sup>Newsom, G, Exec. Order No. N-33-20 (Mar. 19, 2020). <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf>.

<sup>51</sup>Sisolak, S., Declaration of Emergency Directive 021 - Phase Two Reopening Plan (May 28, 2020), <https://nvhealthresponse.nv.gov/wp-content/uploads/2020/05/Directive-021-Phase-Two-Reopening-Plan.pdf>.



permitted.<sup>52</sup> In response, the U.S. District Court issued a preliminary injunction allowing the church members to gather outdoors while the lawsuit moves forward determining that the District's actions likely violate RFRA.<sup>53</sup> The Judge in the case wrote that the District's restrictions "substantially burden the Church's exercise of religion."<sup>54</sup> *Id.* Moreover, the District has failed to offer evidence at this stage showing that it has a compelling interest in preventing the Church from meeting outdoors with appropriate precautions, or that this prohibition is the least-restrictive means to achieve its interest.<sup>55</sup>

A similar case was filed in Virginia: *Lighthouse Fellowship Church, v. Ralph Northam*, where plaintiffs sought a permanent injunction to stop enforcement of executive orders issued by the governor prohibiting gatherings of more than ten people during the coronavirus pandemic against the church.<sup>56</sup> U.S. District Judge Arenda Wright Allen denied the request for an emergency injunction finding that the governor's orders were not "flagrantly and patently violative of express constitutional prohibitions."<sup>57</sup> The judge wrote that the "Court agrees that practicing one's religion and obtaining spiritual guidance are essential for some people."<sup>58</sup> However, it was believed that the "plaintiff is capable of practicing its religion in small-group form, through methods other than physical gathering, and in safe combinations of these options."<sup>59</sup>

A District Judge in *Berean Baptist Church v. Cooper* was one of few judges throughout the country who granted temporary restraining order relief from an executive order.<sup>60</sup> In the case of North Carolina governor's order designed to have all gatherings of ten or more people "take place outdoors unless impossible" the judge found differential treatment.<sup>61</sup> He mentioned "those who operate or gather and wait at an airport, bus, or train terminal, a medical facility, a shopping [center], Walmart, Lowes" just having to "follow ... Social Distancing ... as much as possible, and... circulate within the space so that there is no sustained contact between people." In North Carolina a sheriff had the power to decide whether entities met the "no-more-than-10-inside-unless-impossible" requirement, leaving glaring inconsistencies for the judge.<sup>62</sup> The judge also pointed out the inconsistent permittance of funerals which allowed fifty people to gather, while restricting religious entities to only have ten people inside a religious institution to worship.<sup>63</sup> The judge claimed he "trusts worshipers and their leaders to look after one another and society while exercising their free exercise rights just as they and their fellow citizens (whether religious or not) do when engaged in non-religious activities" – deference to religious institutions rather than public health officials.<sup>64</sup>

A 7th Circuit Court of Appeals allowed the Illinois governor's executive order banning public gatherings to stand.<sup>65</sup> In this case, the order was contested by the state Republican party for privileging religious worship while placing a burden on political assembly. The order was found by the three-judge panel to "permissibly accommodate religious activities."<sup>66</sup> In *Legacy Church v. Kunkel*, a District Judge denied a temporary restraining order that challenged an order prohibiting gatherings of five or more people in a connected space.<sup>67</sup> The church claimed to have a large facility and could comply with strict

<sup>52</sup>Capitol Hill Baptist Church v. Bowser, No. 20-cv-02710 (TNM) (D.D.C. Oct. 9, 2020).

<sup>53</sup>*Id.* at 26.

<sup>54</sup>*Id.* at 17.

<sup>55</sup>*Id.* at 1.

<sup>56</sup>Lighthouse Fellowship Church v. Northam, 458 F. Supp. 3d 418, 418 (E.D. Va. 2020).

<sup>57</sup>*Id.* at 430.

<sup>58</sup>*Id.* at 423.

<sup>59</sup>*Id.* at 435.

<sup>60</sup>Berean Baptist Church v. Cooper, 460 F. Supp. 3d 651, 651 (E.D.N.C. 2020).

<sup>61</sup>*Id.* at 657.

<sup>62</sup>*Id.* at 660.

<sup>63</sup>*Id.* at 659.

<sup>64</sup>*Id.* at 664.

<sup>65</sup>Illinois Republican Party v. J. B. Pritzker, No. 20-2175 (7th Cir. 2020).

<sup>66</sup>*Id.* at 8.

<sup>67</sup>Legacy Church, Inc. v. Kunkel, 472 F. Supp. 3d 926, 927 (D.N.M. 2020).

health protocols.<sup>68</sup> The Judge — citing *Jacobson* and a 5<sup>th</sup> Circuit decision, *In re Abbott*,<sup>69</sup> that relied on *Jacobson* to allow Texas to infringe upon abortion rights during its COVID-19 pandemic response — stated that courts should defer to state pandemic responses and decisions in all but the clearest cases of constitutional harm.<sup>70</sup> The judge found no evidence of discrimination against religion in general.<sup>71</sup>

In *Fire Christian Center v. Fischer*, a judge found that an order prohibiting religious services, including drive-ins, was differential treatment.<sup>72</sup> Judge Walker acknowledged the pandemic and the Supreme Court's precedential instructions to courts to give great deference to public health officials during public health crises but held that differential treatment was “violating the Free Exercise Clause beyond all question” regardless of the city's motives.<sup>73</sup> The mayor's restrictions allowed secular establishments, including liquor stores, to host unlimited cars in their parking lots and offer drive-through and in store services. The mayor said “[w]e are not allowing churches to gather either in person or in any kind of drive-through capacity” right before the Easter holiday.<sup>74</sup> Judge Walker found that “if beer is ‘essential,’ so is Easter.”<sup>75</sup>

In Kansas, a District Judge ruled in favor of two churches who contended that they should be permitted to hold in-person worship services, provided “the congregants follow rigorous ... safety protocols applicable to similar secular facilities.”<sup>76</sup> A temporary restraining order against the governor in *First Baptist Church v. Kelly* laid out an extensive list of safety protocols offered by the churches and found that the governor had not “argued that mass gatherings at churches pose unique health risks that do not arise in mass gatherings at airports, offices, and production facilities” which had permitted in person gatherings and comparable risks of infection.<sup>77</sup> A District Judge denied a temporary restraining order in *Cassell v. Snyders*.<sup>78</sup> An order from the Illinois governor allowed worshippers to engage in religious activities if they “compl[ie]d with Social Distancing Requirements and refrain from gatherings of more than ten people.”<sup>79</sup> The judge found that while permitting full in-person services might be less restrictive “it would not advance the [state's] interest in curtailing COVID-19 to the same degree as the ten-person limit.”<sup>80</sup> As such, the judge found “that no equally effective but less restrictive alternatives are available under these circumstances.”<sup>81</sup>

Following most courts that considered similar executive orders in other states, a District Judge in Maine, in the case of *Calvary Chapel v. Mills* concluded an executive order from the governor did not “violate the Free Exercise Clause when it limits in-person religious services to ten people, at least as long as the state permits drive-in services.”<sup>82</sup> In Maine, churches remained “free to conduct drive-in services, online programs, and in-person assemblies of up to ten people.”<sup>83</sup> The judge found that gatherings in houses of worship carried greater risks to public health than shopping at stores as shoppers in those environments are usually quickly in and out compared to a religious service. As such, the judge found that the order imposed burdens “equally on all types of conduct that are likely to spread COVID-19.”<sup>84</sup>

<sup>68</sup>*Id.* at 957.

<sup>69</sup>*In re Abbott*, 956 F.3d 696 (5th Cir. 2020).

<sup>70</sup>Legacy Church, *supra* note 68, at 944.

<sup>71</sup>*Id.* at 932.

<sup>72</sup>*On Fire Christian Ctr. v. Fischer*, 453 F. Supp. 3d 901 (W.D. Ky. 2020).

<sup>73</sup>*Id.* at 908.

<sup>74</sup>DN 1 ¶ 27 (quoting Greg Fischer, Daily COVID-19 Briefing By Louisville Mayor Greg Fischer (Apr. 9, 2020), <https://www.wave3.com/2020/04/09/fischer-confirms-new-cases-more-deaths/> (embedded video)).

<sup>75</sup>*On Fire Christian Ctr.*, *supra* note 73, at 910.

<sup>76</sup>*First Baptist Church v. Kelly*, 455 F. Supp. 3d 1078 (D. Kan. 2020).

<sup>77</sup>*Id.* at 1087.

<sup>78</sup>*Cassell v. Snyders*, 458 F. Supp. 3d 981 (N.D. Ill. 2020).

<sup>79</sup>*Id.* at 988.

<sup>80</sup>*Id.* at 1000.

<sup>81</sup>*Id.* at 1001.

<sup>82</sup>*Calvary Chapel Bangor v. Mills*, 459 F. Supp. 3d 273 (D. Me. 2020).

<sup>83</sup>*Id.* at 285.

<sup>84</sup>*Id.* at 286.



Similar reasoning was utilized in *Spell v. Edwards*, where the judge sided with the governor's restrictions of "gathering[s] of more than ten people in a single space at a single time" in Louisiana.<sup>85</sup> The governor stated, and the judge concurred, that "the transient, in-and-out nature of consumer interaction with businesses ... are markedly different from the extended, more densely packed environments of churches."<sup>86</sup>

A church in Colorado claimed that a fifty-person cap on gatherings was discriminatory as the church claimed that "thousands of people began to gather in Denver and other cities in Colorado to protest police violence," and the state "permitted and encouraged these protest gatherings while continuing to impose draconian restrictions on religious gatherings."<sup>87</sup> However, a District Judge *High Plains Harvest Church v. Polis* rejected those arguments, claiming there was no evidence that "outdoor protests" were "comparable secular gatherings" to "indoor, in-person church services."<sup>88</sup> He also found that there was no support that "from an epidemiological perspective, the protests were far more intense than any religious service" nor was the failure of the state to enforce "social distancing during a protest" indicative of the state being "engaged in a variety of constitutional misconduct directed at religious institutions."<sup>89</sup>

### Education-Based Cases

The concerns over disparities between secular and religious institutions also exist within religious education. In *Monclova Christian Academy, v. Toledo-Lucas County Health Dept.*, the 6th Circuit granted an injunction filed by nine Christian schools against a county health department order which required that all schools that serve children in grades 7-12 cease in-person instruction for five weeks.<sup>90</sup> The schools argued that the order violated their First Amendment rights because similar restrictions were not placed on comparable secular businesses. The Court agreed, finding that schools were closed, while gyms, tanning salons, office buildings, and the Hollywood Casino remained open. The Court cited the *Roman Catholic Diocese of Brooklyn v. Cuomo* decision.<sup>91</sup>

Notably, the same district court held months earlier that a Kentucky executive order prohibiting in-person learning at public and private elementary, middle, and high schools was permissible since the order "in question is neutral and of general applicability."<sup>92</sup> The Court also addressed the New York Supreme Court ruling, noting the Cuomo decision challenged an order restricting gathering at places of worship, distinguishing this case from the Supreme Court case. The Court held that there were "no such comparable exception[s]" that were prevalent in this case and the "contours of the order at issue" did not "correlate to religion."<sup>93</sup>

### Key Supreme Court Cases

The arguments in Supreme Court cases about the legislative actions of New York, California, and Nevada during COVID-19 questioned the imposition of public health measures on religious communities. The Court upheld the actions in Nevada and California but found that the restrictions in New York violated the First Amendment's protection of the free exercise of religion, although the actual action was to refuse to issue an emergency stay. The majority found that New York's orders treated secular activities more

<sup>85</sup>*Spell v. Edwards*, 460 F. Supp. 3d 671, 673, 676 (M.D. La. 2020).

<sup>86</sup>*Id.* at 676.

<sup>87</sup>*High Plains Harvest Church v. Polis*, No. 1:20-cv-01480-RM-MEH, 2020 U.S. Dist. LEXIS 105247 at \*2 (D. Colo. June 16, 2020).

<sup>88</sup>*Id.*

<sup>89</sup>*Id.*

<sup>90</sup>*Monclova Christian Acad. v. Toledo - Lucas Cnty. Health Dep't*, 984 F. 3d 477, 479-82 (6th Cir. 2020).

<sup>91</sup>*Id.* at 480-82 (citing *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 66-67, 69 (2020)).

<sup>92</sup>*Commonwealth v. Beshear*, 981 F.3d 505, 507 (6th Cir. 2020).

<sup>93</sup>*Id.* at 509.

favorably than religious ones, thus imposing undue restrictions on the free exercise of religion.<sup>94</sup> The dissenting judges agreed with this finding, with Justice Sotomayor stating, “states may not discriminate against religious institutions, even when face[d] with a crisis as deadly as this one.”<sup>95</sup>

The New York case was the first instance in which the Supreme Court intervened on lower court cases involving COVID-19 regulations that applied to houses of worship, issuing a preliminary injunction. The narrow majority ruled based on the Free Exercise Clause as it applied to the states through the Due Process Clause of the Fourteenth Amendment. The New York order limited religious service attendance to ten people in areas that were designated as “high risk” of COVID-19 infections. The majority concluded that the plaintiffs had shown “that their First Amendment claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest.”<sup>96</sup>

The Court weighed the neutrality of the restrictions and the injury caused to the religious entities and held that the restrictions violated a “minimum requirement of neutrality” by permitting secular businesses categorized as essential to have different requirements than specifically named religious entities.<sup>97</sup> The Court found that the loss of First Amendment freedoms, caused by these restrictions “for even minimal periods of time, unquestionably constitutes irreparable injury.”<sup>98</sup> The Court also found that the government did not demonstrate the harm to the public that would be mitigated by the requested relief of the restrictions since they did not claim attendance at the religious services resulted in spread of the virus.<sup>99</sup>

While the majority felt that the government had established a compelling interest, with the intent to control the spread of the pandemic, the Court found it unlikely that the order, which was more restrictive than similar orders in other states, was narrowly tailored to meet the interests of the state.<sup>100</sup> The Court acknowledged they were not health experts, but observed that “even in a pandemic, the Constitution cannot be put away and forgotten,” especially when such regulations “strike at the very heart of the First Amendment’s guarantee of religious liberty.”<sup>101</sup>

Justice Gorsuch wrote a concurring opinion in which he reiterated that even in a crisis, the Constitution must be upheld, and that religious institutions were just as essential as other businesses where the number of people who could gather in the space was not capped. Justice Gorsuch also indicated that he did not believe *Jacobson* was intended to have such a broad impact on religious freedom.<sup>102</sup> Justice Kavanaugh wrote that federal courts must “afford substantial deference to state and local authorities about how best to balance competing policy considerations during the pandemic,” but still believed that the restrictions of New York were more severe than in other states.<sup>103</sup> Chief Justice Roberts acknowledged that the limits of ten and twenty-five people seemed “unduly restrictive.”<sup>104</sup>

Dissenting, Justices Breyer, Sotomayor, and Kagan evaluated the comparison of the houses of worship to other establishments. Although they concurred that the houses of worships were treated differently than grocery stores and banks, the rules for these religious institutions were similar to meetings at concerts and theatrical performances where people would be gathered more closely for longer periods of time.<sup>105</sup> Justice Sotomayor, joined by Justice Kagan, referred to the decision not to issue similar injunctions in the cases of *South Bay United Pentecostal Church* and *Calvary Chapel Dayton Valley*

<sup>94</sup>Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S.Ct. 63, 65-66 (2020).

<sup>95</sup>*Id.* at 81.

<sup>96</sup>*Id.* at 65-66.

<sup>97</sup>*Id.* at 66.

<sup>98</sup>*Id.* at 67 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

<sup>99</sup>*Id.* at 68.

<sup>100</sup>*Id.* at 67.

<sup>101</sup>*Id.* at 68.

<sup>102</sup>*Id.* at 71.

<sup>103</sup>*Id.* at 74 (Kavanaugh, J., concurring).

<sup>104</sup>*Id.* at 75 (Roberts, C.J., dissenting).

<sup>105</sup>*Id.* at 79 (Sotomayor, J., dissenting); see also *id.* at 76, 78 (Breyer, J., dissenting).

(2020).<sup>106</sup> The justices questioned the Courts' role in second-guessing decisions by states and local officials on issues related to public health indicating that "[t]he 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."<sup>107</sup>

This decision contrasted with the Court's earlier *South Bay United Pentecostal Church v. Newsom* decision, in which it declined to enjoin enforcement of the governor's Executive Order limiting attendance at places of worship to 25% or a maximum capacity of one hundred persons.<sup>108</sup> In his concurrence, Chief Justice Roberts wrote that "[a]lthough California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment."<sup>109</sup> Chief Justice Roberts, in contrast to Justice Gorsuch's later opinion, cited *Jacobson* as support, noting the "Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect."<sup>110</sup> The dissent, authored by Justice Kavanaugh and joined by Justices Thomas and Gorsuch, noted that the guidelines from California "discriminate[d] against places of worship and in favor of comparable secular businesses."<sup>111</sup> Justice Kavanaugh believed that "California ha[d] ample options that would allow it to combat the spread of COVID-19 without discriminating against religion."<sup>112</sup>

The Supreme Court struck down another California restriction in *Tandon v. Newsom*.<sup>113</sup> In this case, restrictions on religious gatherings in private homes were lifted with the court saying that restrictions could not bar religious activities such as prayer meetings and Bible study classes. The majority found that the restrictions violated the Constitution by disfavoring prayer meetings.<sup>114</sup> The majority found that "California treats some comparable secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts and indoor restaurants."<sup>115</sup> The dissent again argued that the majority was comparing the wrong kinds of activities. In her dissent, Justice Kagan — joined by Justices Breyer and Sotomayor — stated "[t]he First Amendment requires that a state treat religious conduct as well as the state treats comparable secular conduct."<sup>116</sup> Justice Kagan stated that "limit[ing] religious gatherings in homes to three households," as did the California restrictions at issue, complies with the First Amendment "[i]f the state also limits all secular gatherings in homes to three households."<sup>117</sup> Justice Kagan stated that California "adopted a blanket restriction on at-home gatherings of all kinds, religious and secular alike" and thus it need not "treat at-home religious gatherings the same as hardware stores and hair salons" arguing that "the law does not require that the state equally treat apples and watermelons."<sup>118</sup> Similarly, the Ninth Circuit found that "the state reasonably concluded that when people gather in social settings, their interactions are likely to be longer than they would be in a commercial setting; that participants in a social gathering are more likely to be involved in prolonged conversations; that private houses are typically smaller and less ventilated than commercial establishments; and that social distancing and mask-wearing are less likely in private settings and enforcement is more difficult."<sup>119</sup>

<sup>106</sup>*Id.* at 79-80 (Sotomayor, J., dissenting).

<sup>107</sup>*Id.* at 81.

<sup>108</sup>*S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020).

<sup>109</sup>*Id.*

<sup>110</sup>*Id.*

<sup>111</sup>*Id.*

<sup>112</sup>*Id.*

<sup>113</sup>*Tandon v. Newsom*, 141 S. Ct. 1294, 1294 (2021).

<sup>114</sup>*Id.* at 1294-97.

<sup>115</sup>*Id.* at 1297.

<sup>116</sup>*Id.* at 1298.

<sup>117</sup>*Id.*

<sup>118</sup>*Tandon v. Newsom*, 992 F.3d 916, 925 (9th Cir. 2021).

<sup>119</sup>*Id.*

It would seem that sweeping regulations are more likely to be supported by the courts as they do not provide disparate requirements and thus discriminatory restrictions to religious entities. The Supreme Court considered comparable services in their review of each case to determine the extent to which measures were being applied to religious activities as compared to secular activities.

## Analysis

The conflicts observed between public health and religious freedom emphasize the divergent ways in which various stakeholders view their roles in the landscape of public health emergency responses. Politicians, public health officials, and the courts each have their own unique roles in a pandemic response, and all impact each other.<sup>120</sup>

As set forth by Dr. Anthony Fauci, who became one of the United States' most trusted voices throughout the pandemic,<sup>121</sup> an important role that public health officials occupy in the face of public health emergencies like pandemics is to remain within the integrity of science. Dr. Fauci stated that

if you are in a position where you have got to deal with everyone and people are looking to you for something that is not tainted by politics, [something] that's pure science, then you have got to really be careful about not getting into a situation where you are expressing a political view.<sup>122</sup>

The public health sector plays a vital role in keeping people informed about infectious diseases and other potential health risks. Its actions and direction should be evidence-based and focused on the health interests of the public.<sup>123</sup> However, during the COVID-19 pandemic, health measures generally were tainted by political pursuits, which led to inconsistent pandemic responses across the United States.

A study conducted by the University of Chicago, Divinity School and The Associated Press-NORC Center for Public Affairs Research in May of 2020 found that two-thirds of Americans did not think that prohibiting in-person religious services during a pandemic was a violation of religious freedom.<sup>124</sup> This support remained consistent with most evangelical Christians and Republicans.<sup>125</sup> The terminology of "placing restrictions" rather than "prohibiting" increased opinions that there were no violations of religious liberty to 82%.<sup>126</sup> Less than 9% of Americans thought religious services should be permitted without restriction during the pandemic, with 50% supporting the prohibition of in-person services all together.<sup>127</sup> This is cognizant of the fact that just prior to the COVID-19 outbreak in the United States, 55% of respondents in a national poll stated that religious freedom was very or extremely important to

<sup>120</sup>See Christine Vestal & Michael Olove, *Politicians Shunt Aside Public Health Officials*, STATELINE (June 18, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/06/18/politicians-shunt-aside-public-health-officials> [https://perma.cc/XLK4-YHRT].

<sup>121</sup>Andrew Solender, *Amid White House Attacks, Polls Show Dr. Fauci Remains Nations Most Trusted Voice on Covid-19*, FORBES (July 15, 2020, 3:41 PM) <https://www.forbes.com/sites/andrewsolender/2020/07/15/amid-white-house-attacks-polls-show-dr-fauci-remains-nations-most-trusted-voice-on-covid-19/?sh=92eaec41ee28> [https://perma.cc/3RP5-6CX4].

<sup>122</sup>Haider J. Warraich, *Fauci's Strategy for Effective Public Health Advocacy: 'You Cannot be Ideological'*, STAT (July 14, 2020) <https://www.statnews.com/2020/07/14/fauci-advice-public-health-advocacy-you-cannot-be-ideological/> [https://perma.cc/W8JX-LVT9].

<sup>123</sup>Enrique Regidor et al., *The Role of the Public Health Official in Communicating Public Health Information*, 97 AM. J. PUB. HEALTH S93, S94 (2007).

<sup>124</sup>*Religious Practice in the Time of Coronavirus*, ASSOCIATED PRESS & NORC (Dec. 16, 2020), <https://apnorc.org/projects/religious-practice-in-the-time-of-coronavirus/> [https://perma.cc/TCR6-S3N7].

<sup>125</sup>Claire Gecewicz & Gregory A. Smith, *Americans Oppose Religious Exemptions From Coronavirus-Related Restrictions*, PEW RSCH. CTR. (Aug. 7, 2020), [https://www.pewresearch.org/religion/wp-content/uploads/sites/7/2020/08/PF\\_08.07.20\\_coronavirus.religious.services.FULL\\_REPORT.pdf](https://www.pewresearch.org/religion/wp-content/uploads/sites/7/2020/08/PF_08.07.20_coronavirus.religious.services.FULL_REPORT.pdf).

<sup>126</sup>See *Religious Practice in the Time of Coronavirus*, supra note 127.

<sup>127</sup>Elena Schor & Emily Swanson, *Poll: Most in us back curbing in-person worship amid virus*, ASSOCIATED PRESS-NORC CTR. FOR PUBLIC AFFAIRS RSCH. (May 8, 2020), <https://apnorc.org/poll-most-in-us-back-curbing-in-person-worship-amid-virus/> [https://perma.cc/GS72-JMKR].

them.<sup>128</sup> These polls suggest that while Americans generally value the freedom of religion highly, they also have a nuanced view of how the in-person practice relates to health and safety during a pandemic.

The federal government and state governments both share a responsibility to respond to a pandemic, but according to the 10<sup>th</sup> Amendment, the governors have the authority to take public health emergency actions.<sup>129</sup> This ultimately means that governors are charged to control the spread of a virus and to promote public health. Various governors around the country enacted different measures, such as state quarantine orders (Ohio), halted state evictions (Illinois), amended criminal procedure by allowing witnesses to appear virtually in felony hearings (New York), among general restrictions, such as social distancing and mask mandates.<sup>130</sup> Governors voiced their concerns for public health as well as a desire to get their constituents back to work and to form a semblance of normalcy.<sup>131</sup> These different desires are often in opposition, as a sense of normalcy through reopening and less stringent measures can lead to a continuation of the pandemic.

Local governments also responded with their own specific regulations using their emergency powers to curb the spread of the virus. Local governments have generally been able to use their own emergency powers to respond to any public health threats, so long as their measures do not conflict with federal or state laws.<sup>132</sup> These processes are largely dependent upon state legislation. For instance, Atlanta's Mayor enacted a mask mandate through an executive order, which was later challenged in court by the Governor of Georgia who claimed that the Mayor exceeded her legal authority and contradicted state executive orders, which suggested but did not mandate face masks.<sup>133</sup> In contrast, the state of Idaho did not adopt a mask mandate, but permitted local governments to create their own policies regarding face coverings.<sup>134</sup> The powers of local governments have been previously debated in the Supreme Court, which held that “[m]unicipal corporations are political subdivisions of the State, created as convenient agencies for exercising much of the governmental powers of the State as may be intrusted to them” leaving the discretion to the nature of powers to the State.<sup>135</sup>

Disagreements within the state legislatures and among politicians also exist within court systems. The general perspectives from judges about their roles fall into a handful of different categories that account for the need for accurate and immediate public health decisions as well as the need to remain protective of individual freedoms.<sup>136</sup>

For instance, Judge Nicholas G. Garaufis, a Federal District Court Judge in Brooklyn, believed that in difficult cases such as those involving pandemic-based religious freedom contentions, judges should

<sup>128</sup>Elana Schor & Hannah Fingerhut, *Religious freedom in America: Popular and Polarizing*, ASSOCIATED PRESS-NORC CTR. FOR PUBLIC AFFAIRS RSCH. (Aug. 5, 2020), <https://apnorc.org/religious-freedom-in-america-popular-and-polarizing/> [<https://perma.cc/7NQ2-4EWF>].

<sup>129</sup>*Two centuries of law guide legal approach to modern pandemic*, AM. BAR ASSOC. (Apr. 2020), <https://www.americanbar.org/news/abanews/publications/youraba/2020/youraba-april-2020/law-guides-legal-approach-to-pandemic/#:~:text=The%2010th%20Amendment%2C%20which%20gives,setting%20quarantines%20and%20business%20restrictions> [<https://perma.cc/W9B9-UF99>].

<sup>130</sup>Amy Acton, *Director's Stay at Home Order*, OHIO DEP'T PUB. HEALTH (March 22, 2020); II Exec. Order No. 2020-10, *Executive Order in Response to Covid-19* (March 20, 2020); Hon. Norman St. George, J.S.C., District Administrative Judge, 10th Judicial District-Nassau County, *Virtual Bench Trial Protocols and Procedures*; Tomas J. Aragon, *Guidance for the Use of Facemasks*, CAL. HEALTH & HUM. SERVS. AGENCY CAL. DEP'T OF PUB. HEALTH.

<sup>131</sup>Casey Leins, *Governors Select Business Leaders for Task Forces to Help Rebuild State Economies*, U.S. NEWS & WORLD REP. (Apr. 23, 2020), <https://www.usnews.com/news/best-states/articles/2020-04-23/americas-governors-are-calling-on-business-leaders-to-rebuild-their-state-economies>.

<sup>132</sup>See Lawrence O. Gostin & Lindsay F. Wiley, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* 396, 400 (Univ. of Cal. Press, 2nd ed. 2008).

<sup>133</sup>Complaint for Declaratory and Injunctive Relief, *Kemp v. Bottoms*, No. 2020CV338387, 2020 WL 4036827 (Ga., Super. Ct. July 16, 2020).

<sup>134</sup>James Dawson, *Callers Demand Statewide Mask Mandate in Idaho from Gov. Brad Little*, Boise State Public Radio (NPR) (Sept. 30, 2020) [<https://perma.cc/77FX-P9MU>].

<sup>135</sup>*State Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).

<sup>136</sup>*Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020).

defer to the governor who enacted them.<sup>137</sup> He stated that “[i]f the court issues an injunction and the state is correct about the acuteness of the threat currently posed by hot-spot neighborhoods the result could be avoidable death on a massive scale like New Yorkers experienced in the spring.”<sup>138</sup> This contention is similar to that set forth in a concurring opinion by Chief Justice Roberts in the California decision, in which he noted that government officials should not “be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence and expertise to assess public health and is not accountable to the people.”<sup>139</sup>

Other Justices have emphasized the need to remain protective of the Constitution: in a concurring opinion in the New York case, Justice Gorsuch wrote that “while the pandemic poses many grave challenges, there 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.”<sup>140</sup> Justice Sotomayor’s dissenting opinion stated that “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.”<sup>141</sup>

The lack of deference to public health officials through countering legislation enacted by politicians is dangerous precedent, and can lead to “exacerbate[d]... nation[al] suffering” and to dangerous situations within the pandemic continuum.<sup>142</sup> The Wisconsin Supreme Court struck down a statewide mask mandate, suggesting that the Governor exceeded his power in issuing it.<sup>143</sup> The Court suggested that it was their role to determine not whether the governor acted wisely, but if he acted lawfully.<sup>144</sup> The timing of the striking of the order came as new virus cases in Wisconsin shot up 34% over the two previous weeks.<sup>145</sup> While courts have a duty to ensure the legality of measures instituted to protect citizens from the infringement on the freedoms enshrined by the Constitution, deference to the science behind intentional public health measures is critical amid a public health emergency.

Although in-person services were restricted during the pandemic, many Americans still found ways to practice their religion. Close to half of Americans reported regularly attending a religious congregation before the pandemic, with 48% having a regular congregation and only 7% having an open congregation as of May 2020.<sup>146</sup> Following the start of the pandemic 38% of those with a religious affiliation reported participating in an online prayer or group event, 30% speaking with a spiritual or religious leader by phone or video, and 10% participated in drive-through religious services.<sup>147</sup>

Religion generally follows the communitarian ideals that are also associated with public health measures. Religious teachings and practices are meant to reinvigorate these ideals, but within the COVID-19 pandemic context, when there are larger communitarian goals that extend beyond the borders of various religions, some religious groups have challenged these measures. By evoking a reductionist approach to communitarianism and defining their “communities” just by those who are similar and equal to them rather than the entire population, some groups resorted to religious freedom to

<sup>137</sup>Adam Liptak, *Case on Churches, Cuomo and Coronavirus Arrives at Supreme Court*, N.Y. TIMES (Nov. 16, 2020), <https://www.nytimes.com/2020/11/16/us/supreme-court-coronavirus-cuomo.html#:~:text=Judge%20Garaufis%2C%20who%20was%20appointed%20by%20President%20Bill,concluded%20that%20he%20would%20defer%20to%20the%20governor> [https://perma.cc/99WM-QD7U].

<sup>138</sup>Roman Cath. Diocese of Brooklyn, New York v. Cuomo, 495 F. Supp. 3d 118, 132 (E.D.N.Y.), *rev'd and remanded sub nom.* Agudath Israel of Am. v. Cuomo, 983 F.3d 620 (2d Cir. 2020) (noting that New York had the worst-case count in the entire country at this time).

<sup>139</sup>S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613,1614 (2020) (Roberts, J., concurring).

<sup>140</sup>Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 72 (2020).

<sup>141</sup>*Id.* at 81.

<sup>142</sup>*Id.* at 79.

<sup>143</sup>Fabick v. Evers, 956 N.W.2d 856 (Wis. 2021).

<sup>144</sup>*Id.*

<sup>145</sup>Eileen Sullivan, *A Wisconsin Court Strikes Down the State’s Mask Order*, N.Y. TIMES (Mar. 31, 2021), <https://www.nytimes.com/live/2021/03/31/world/covid-19-coronavirus/wisconsin-masks> [https://perma.cc/C5PX-Z69A].

<sup>146</sup>See *Religious Practice in the Time of Coronavirus*, *supra* note 127.

<sup>147</sup>*Id.*



contest public health measures. And as the pandemic progressed, new avenues for legal contention arose against public health measures from a religious perspective. Legal contentions have been raised about mask mandates, vaccinations, and vaccine passports within a religious discrimination frame.<sup>148</sup> Discussions around the adoption of vaccine passports, mask mandates, and vaccine mandates ultimately became complicated points of contention.

Religious exemption arguments have also been raised against mask mandates under the Civil Rights Act of 1964.<sup>149</sup> Leaders in Palm Beach County, Florida enacted a mask mandate that allowed for religious exemptions, but of thirty-six mask mandates throughout the country as of August 2020, there were no explicitly detailed religious-based exemptions for individuals entering stores and other public places.<sup>150</sup> Some states have, however, permitted mask exemptions for individuals in places of worship.<sup>151</sup> The general mask exemptions were for “children, those with disabilities, those who are medically incapable of wearing a mask and those engaged in specific activities like exercise, eating or drinking.”<sup>152</sup>

In his refusal to wear a mask, an Ohio lawmaker was quoted saying “[w]e are all created in the image and likeness of God. That image is seen the most by our face.”<sup>153</sup> He questioned whether it is the “role of government to protect us from death, which is inevitable” or if it is “the role of government to radically protect our freedom and our liberty.”<sup>154</sup> Similarly, parents of children who attend religious schools in Michigan have argued that mask mandates deny educational and spiritual opportunities in a lawsuit against an order requiring students to wear masks in the classroom.<sup>155</sup> In that case, parents indicated that the order required the school and families to “either violate their sincerely held religious beliefs or face criminal prosecution.”<sup>156</sup> In an almost identical quote to the Ohio lawmaker the parents stated that “[i]n accordance with the teachings of the Catholic faith, Resurrection School believes that every human has dignity and is made in God’s image and likeness,” stating that “...a mask shields our humanity. And because God created us in His image, we are masking that image.”<sup>157</sup>

Religious exemptions have been recognized under various police power measures. Following the fatal police shooting in Brooklyn Center of Daunte Wright, Governor Walz of Minnesota issued a curfew in Hennepin, Ramsey, Anoka, and Dakota counties in the wake of a night of unrest.<sup>158</sup> The curfew exempted those traveling to and from religious services.<sup>159</sup> There already exists, however, institutional boundaries on religious gatherings to promote health and safety, such as institutional fire codes that

<sup>148</sup> Lydia Wheeler, *Religious Objections Stand in Path of Mask, Vaccine Mandates*, BLOOMBERG LAW (July 29, 2021), <https://news.bloomberglaw.com/health-law-and-business/religious-objections-stand-in-path-of-mask-vaccine-mandates> [https://perma.cc/VT6L-T7K8]. See Bryan Thomas et al., *Vaccine Ins and Outs: An Exploration of the Legal Issues Raised by Vaccine Passports 12-15* (July 2021) (unpublished manuscript) (on file with C.D. Howe Institute).

<sup>149</sup> Devon Link, *Fact check: Civil Rights Act of 1964 Does Not Create Religion-based Exemption from Mask Mandates*, USA TODAY (Aug. 6, 2020), <https://www.usatoday.com/story/news/factcheck/2020/08/06/fact-check-1964-law-does-not-create-religious-exemption-masks/5530976002/> [https://perma.cc/9Y5U-Z]XJH].

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Elisha Fieldstadt, *Ohio Lawmaker Refuses to Wear a Mask Because He Says it Dishonors God*, NBC NEWS, (May 6, 2020 3:20 PM), <https://www.nbcnews.com/news/us-news/ohio-lawmaker-refuses-wear-mask-because-he-says-it-dishonors-n1201106> [https://perma.cc/2MY8-96F7].

<sup>154</sup> *Id.*

<sup>155</sup> Megan Banta, *Religious School, Parents Argue Mask Mandates Deny Educational, Spiritual Opportunities*, LANSING STATE J. (Oct. 28, 2020), <https://www.lansingstatejournal.com/story/news/local/2020/10/28/michigan-ingham-mask-mandate-lawsuit-resurrection-school/6051937002/> [https://perma.cc/M4WG-8MXD].

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> Katie Galioto, *Curfew In Effect In Hennepin, Ramsey, Anoka, Dakota Counties, by order of Gov. Walz*, STAR TRIBUNE: POLITICS (Apr. 12, 2021, 7:54 PM), <https://www.startribune.com/gov-walz-sets-7-p-m-curfew-in-hennepin-ramsey-anoka-dakota-counties/600045134/?refresh=true> [https://perma.cc/F4NG-JYB2].

<sup>159</sup> *Id.*

prohibit excessive gatherings.<sup>160</sup> Similar deference must be paid to public health measures during a public health emergency. It is crucial to understand the complex intricacies that exist in the space of public health, especially during a pandemic. Arguments against restrictions of religious gatherings have revolved around the disparate evaluation and treatment of religious institutions compared to other services that were considered essential.<sup>161</sup> While the Constitution does indeed protect freedom of religion, religious gatherings pose a risk similar to concerts rather than grocery stores.<sup>162</sup> One substantial outbreak of SARS-CoV-2 was traced among church attendees after an infectious chorister sang at multiple services.<sup>163</sup> Twelve secondary cases were detected with the secondary cases being seated further than fifteen meters from the primary-case patient without any close physical contact.<sup>164</sup>

As new COVID-19 variants continue to loom on the horizon, the Supreme Court took a step that seemed to show its intention to protect health. In a December 2021 decision centered upon the issue of religious exemptions to COVID-19 public health measures, the Court ruled against two emergency applications that a group of Christian doctors and nurses brought to New York's refusal to allow religious exemptions to the state's mandate that healthcare workers be vaccinated against COVID-19.<sup>165</sup> In its decision, the Court reaffirmed its previous reasoning in a similar case in Maine.<sup>166</sup> Challenges to President Biden's vaccine mandates affecting the private and public sector are pending in lower courts.<sup>167</sup>

In the midst of public health emergencies, deference to science and health are critical for saving lives. A more deferential standard of review supports the notion that the government is meant to protect the health and well-being of the public, especially in circumstances like a novel emerging infectious disease like COVID-19.

## Conclusion

Over one hundred years after *Jacobson*, neither public health nor Constitutional law are the same. The evolution of the Supreme Court's decisions, along with lower courts' decisions throughout the country, highlight the different ways in which states' power can be characterized and the ways in which power to restrict personal liberty is evaluated. The Supreme Court has generally adopted a belief that the Constitution is the only limit on state power.<sup>168</sup> As such, discerning its purpose is becoming increasingly important. As Justice Charles Evans notes, "[w]e are under a Constitution, but the Constitution is what judges say it is."<sup>169</sup>

The cases and decisions generated during the COVID-19 pandemic should inform future legal analyses on conflicts between public health and individual liberties, in particular religious freedom, in the context of pandemic emergencies. The United States continues to struggle with the question of whether

<sup>160</sup>Nat. Fire Prot. Ass'n, *Fire Safety In Assembly Occupancies*, NATIONAL FIRE PROTECTION ASSOCIATION: PUBLIC EDUCATION (Oct. 12, 2004), <https://www.nfpa.org/Public-Education/Staying-safe/Safety-in-living-and-entertainment-spaces/Nightclubs-assembly-occupancies/Fire-safety-in-assembly-occupancies> [https://perma.cc/M6SL-8W7D].

<sup>161</sup>See Samirah Majumdar, *How COVID-19 Restrictions Affected Religious Groups Around the World in 2020*, PEW RESEARCH CENTER: RELIGIOUS FREEDOMS & RESTRICTIONS (Nov. 29, 2022), <https://www.pewresearch.org/religion/2022/11/29/how-covid-19-restrictions-affected-religious-groups-around-the-world-in-2020/> [https://perma.cc/Y3MT-GKAC].

<sup>162</sup>TEX. MED. ASS'N, BE INFORMED: KNOW YOUR RISK DURING COVID-19 (2020), [https://www.texmed.org/uploadedFiles/Current/2016\\_Public\\_Health/Infectious\\_Diseases/309193%20Risk%20Assessment%20Chart%20V2\\_FINAL.pdf](https://www.texmed.org/uploadedFiles/Current/2016_Public_Health/Infectious_Diseases/309193%20Risk%20Assessment%20Chart%20V2_FINAL.pdf).

<sup>163</sup>Anthea Katelaris et al., *Epidemiologic Evidence for Airborne Transmission of SARS-CoV-2 during Church Singing, Australia, 2020*, 27 EMERGING INFECTIOUS DISEASES 1677, 1677 (2021).

<sup>164</sup>*Id.*

<sup>165</sup>Dr. A. v. Hochul, 142 S. Ct. 552, 552 (2021) (mem).

<sup>166</sup>*Id.*

<sup>167</sup>Adam Liptak, Editorial, *Supreme Court Allows Vaccine Mandate for New York Health Care Workers*, N.Y. TIMES, (Dec. 13, 2021), <https://www.nytimes.com/2021/12/13/us/politics/supreme-court-vaccine-mandate-new-york-healthcare.html> [https://perma.cc/L64W-D7L3].

<sup>168</sup>See, e.g., *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

<sup>169</sup>Charles Evans Hughes, Speech Before the Elmira Chamber of Commerce, May 3, 1907, in ADDRESSES OF CHARLES EVANS HUGHES, 1906–1916 179, 185 (Jacob Gould Schurman ed., 2nd ed. 1916).

religious freedom should supersede the protection of public health. Challenges to restrictions on religious practice have often divided federal judges along partisan lines, suggesting the need for deference to public health needs over political ideology. Clarification on the limits and boundaries of individual liberties in light of public health emergencies is necessary to respond swiftly to a crisis that can quickly evade control. Any pandemic-focused legal preparedness reforms in the pursuit of an adequate balance between public health and religious freedom must facilitate democratic accountability, while also ensuring public health officials have the authority necessary to provide for the health of those within the United States. As Justice Robert Jackson notes, if a “court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”<sup>170</sup>

**Ryan Houser** is a graduate student and current dual fellow at Rutgers Law School serving as a Health Equity Fellow at the Center for Law, Inequality and Metropolitan Equity and a Legal Fellow with the Center for Security, Race and Rights. He was previously a dual fellow at Georgetown University within the O’Neill Institute for National and Global Health Law at Georgetown University Law Center as a Global Health Initiative Fellow and within the Elizabeth R. Griffin Program at the Center for Global Health Science and Security as a Biosafety and Biosecurity Fellow. Ryan has a Master of Science in Biohazardous Threat Agents and Emerging Infectious Diseases and an Executive Master of Professional Studies in Emergency and Disaster Management from Georgetown University among other graduate and professional degrees. Ryan’s research critically examines health security, biological threats, emergency preparedness, law, and medicine. He has legal education from Rutgers University Law School in Newark.

**Andrés Constantín** is the Acting Director of Health Law Programs at the O’Neill Institute and an adjunct professor of law at Georgetown University. He currently works on legal and policy issues relating to health at the international level. Constantín holds a Doctorate of Juridical Sciences from Georgetown University Law Center, where he focused his research on the shift and expansion in the use of conscience-based claims in liberal democracies and their impact on human rights. He also holds an abogado (J.D. equivalent) degree from Universidad Torcuato Di Tella and an LL.M. in global health law from Georgetown University, where he made the dean’s list with distinction.

---

<sup>170</sup>Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).