2021

COVID-19-related religious discrimination claims through the lens of the Free Exercise Clause of the First Amendment

Daniel Malik

COVID-19-related religious discrimination claims through the lens of the Free Exercise Clause of the First Amendment

I. INTRODUCTION

The onset of the global COVID-19 pandemic has resulted in various stay-at-home orders and other state-level restrictions on participation in live group events, including in-person religious services. These restrictions have not been implemented uniformly across the states. As time has passed since the first reported COVID-19 cases in the U.S., states have started to lift various aspects of these social gathering restrictions. As other parts of the community and economy begin to "reopen," however, many states continue to limit in-person religious services in an effort to contain the spread of the coronavirus. These restrictions have led to constitutional challenges pursuant to the Free Exercise Clause.

This paper analyzes the constitutionality of COVID-19 related restrictions on in-person religious gatherings. Section II explores the scientific basis that underlies these state-mandated restrictions and discusses examples of religious discrimination claims that have been brought in the wake of coronavirus. Section III provides an overview of the Supreme Court's Free Exercise jurisprudence. Section IV analyzes the constitutionality of COVID-19 orders under the Free Exercise Clause; specifically, this paper evaluates three recent COVID-19-related Free Exercise decisions issued by the U.S. Supreme Court: *S. Bay United Pentecostal Church v. Newsom, Calvary Chapel Dayton Valley v. Sisolak,* and *Roman Catholic Diocese v. Cuomo.* Ultimately, this paper concludes that COVID-19-related restrictions on in-person religious gatherings could withstand constitutional scrutiny under both the standard of "facially neutral and generally applicable" set forth in *Employment Division v. Smith* as well as the heightened standard of strict scrutiny.

II. BACKGROUND

a. Scientific Basis for COVID-19 Restrictions

The novel coronavirus (also known as COVID-19) is an infectious disease which can lead to numerous short- and long-term health issues and in more serious cases, can result in death.[1] According the Center for Disease Control and Prevention's (CDC's) data tracker, as of October 2020, there were over eight million confirmed cases in the United States, resulting in over 220,000 deaths.[2] A vaccine to combat the virus is not yet available to the mass public.[3]

The disease is known to spread most easily when a person who has been exposed to the virus "coughs, sneezes, or talks, and droplets from their mouth or nose are launched into the air and land in the mouths of people nearby."[4] Moreover, exposed individuals can spread the virus even without experiencing any COVID-19 related symptoms themselves.[5] With this knowledge in mind, doctors and public health organizations like the CDC recommend that the most effective method of tackling the spread of COVID-19 is to practice "social distancing."[6] Social distancing involves keeping at least six feet of distance from anyone who is not part of one's immediate household and avoiding crowded places, or spaces where it is impracticable to keep six feet away from others.[7]

Keeping in mind that social distancing is essential in controlling the spread of coronavirus, it naturally follows that it the best approach would be to limit the number of people

[1] Coronavirus Disease 2019 (COVID-19), CDC, https://www.cdc.gov/dotw/covid-19/index.html (last updated August 26, 2020).
[2] CDC COVID Data Tracker, CDC, https://covid.cdc.gov/covid-data-tracker/#cases_casesinlast7days (last updated October 21, 2020).
[3] CDC, *supra* note 1.
[4] Social Distancing, CDC, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html (last updated July 15, 2020).
[5] *Id*.
[6] *Id*. The CDC recommends that social distancing is most effective to combat the spread of the coronavirus when it is combined with additional preventative action including "wearing a mask, avoiding touching your face with unwashed hands, and frequently washing your hands with soap and water for at least 20 seconds."
[7] CDC, *supra* note 4.

gathering any particular location; in fact, this is exactly what the scientists have recommended.[8] In places where these recommendations have been ignored, disastrous results have followed.[9] "Superspreading" events (a term used for events involving a large gathering of people during the pandemic) have had particularly devastating effects.[10] Research has shown that "superspreading" events have accounted for up to 80 percent of new COVID-19 transmissions in areas where they are held.[11] Example of these events include weddings, funerals, and (perhaps infamously) places of worship.[12]

In South Korea, for example, a single megachurch experienced an outbreak of COVID-19 that infected over 7,000 of its congregants.[13] In California, more than 180 individuals were exposed to COVID-19 as a result of attendance at a single religious service.[14] A similar story has been repeated numerous times across the world. As a result, scientists have urged that these types of gatherings should be restricted wherever possible, and that stopping these superspreading events will significantly assist in controlling the spread of COVID-19.[15]

b. Overview of COVID-19 Related State Orders

Governments around the world were forced to take swift action to protect their citizenry from the harms of COVID-19. Knowing how the virus spreads and lacking a vaccine or other meaningful treatments to fight the illness, the most effective method was to limit the gathering of

---

[8] *Id*.
[9] Dillion C. Adam & Benjamin J. Cowling, *Just Stop the Superspreading*, N.Y. TIMES (June 2, 2020), https://www.nytimes.com/2020/06/02/opinion/coronavirus-superspreaders.html.
[10] *Id*. *See also* Christie Aschwanden, *How 'Superspreading' Events Drive Most COVID-19 Spread*, SCIENTIFIC AMERICAN (June 23, 2020), https://www.scientificamerican.com/article/how-superspreading-events-drive-most-covid-19-spread1/.
[11] *Id*.
[12] Aschwanden, *supra* note 10.
[13] Raphael Rashid, *Being Called a Cult is One Thing, Being Blamed for an Epidemic Is Quite Another*, N.Y. TIMES (March 9, 2020), https://www.nytimes.com/2020/03/09/opinion/coronavirus-south-korea-church.html.
[14] Meredith Deliso, *Nearly 200 possibly exposed to coronavirus at religious service that violated stay-at-home orders*, ABC NEWS (May 17, 2020), https://abcnews.go.com/US/200-possibly-exposed-coronavirus-religious-service-violated-stay/story?id=70733928.
[15] Adam & Cowling, *supra* note 9.

people in large groups.[16] To that end, most governments started restricting mass gatherings to enforce social distancing.[17]

In the United States, President Trump declared COVID-19 a national emergency on March 13, 2020, two weeks after the United States' first coronavirus-related death was reported in Seattle, Washington.[18] The White House and the CDC issued guidelines urging people to avoid all social gatherings of more than 10 people, work or attend school from home whenever possible, avoid eating or drinking at bars or restaurants, avoid discretionary travel, and practice good self-hygiene.[19] Additionally, the guidelines advised governors to close schools if the coronavirus was identified in the community associated with the schools.[20] Most importantly, the guidelines advised states to close bars, restaurants, gyms and "other indoor and outdoor venues where groups of people congregate" if there is any threat of COVID-19 spreading in the community.[21]

At the state level, all 50 states declared states of emergency and governors began to use their executive powers to implement stay-at-home orders in the hopes of slowing the spread of the disease.[22] Almost every state in the country closed its schools to avoid COVID-19's rapid spread among children.[23] Initially, many states required all nonessential business to remain

[16] How to Protect Yourself & Others, CDC, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html, (last updated Sept. 11, 2020).
[17] Rachel Treisman, *West: Coronavirus-Related Restrictions By State*, NPR (Sept. 3, 2020), https://www.npr.org/2020/05/01/847416108/west-coronavirus-related-restrictions-by-state.
[18] Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES (Aug. 6, 2020), https://www.nytimes.com/article/coronavirus-timeline.html.
[19] The White House, *The President's Coronavirus Guidelines for America, 30 Days to Slow the Spread* (Mar. 31, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf?.
[20] *Id.*
[21] *Id.*
[22] Treisman, *supra* note 17.
[23] Kamran Rahman and Alice Miranda Ollstein, *How states are responding to coronavirus, in 7 maps*, POLITICO (last updated Mar. 25, 2020), https://www.politico.com/news/2020/03/24/coronavirus-state-response-maps-146144.

closed, and limited essential businesses to grocery stores, pharmacies, and hospitals.[24] Most importantly, these orders generally banned large gatherings of people for any reason; this included closing sports stadiums, movies theaters, shopping malls, and private social gatherings including those for religious purposes.[25]

For example, the Governor of Virginia issued Executive Order 53, which banned all gatherings of more than 10 people (public and private), as well as the operation of all dining establishments, all recreational and entertainment businesses, and all other businesses that it deemed nonessential.[26] Executive Order 53, however, carved out exemptions for essential businesses and this mainly included businesses which sold food items, medicine or medical equipment, alcohol, home improvement items, and communications or electronics items.[27] This was shortly followed by Executive Order 55, which required all residents to remain at home, with the exception of essential travel, limited to obtaining essential items or medical services.[28] Executive Order 55 reiterated Executive Order 53's ban of gatherings of more than 10 people; then, it explicitly banned parties, celebrations, religious gatherings, any other social event.[29]

Beginning in the summer of 2020, many states started to loosen their ban on keeping nonessential businesses closed and started taking steps forward to reopen their economies.[30] For example, California moved into Phase 2 of its reopening plan in May 2020, which meant that in-person retail shopping and houses of worship (which were both initially required to remained

[24] *Id*.
[25] *Id*. *See e.g*., Lighthouse Fellowship Church v. Northam, 458 F. Supp. 3d 418 (E.D. Va. 2020).
[26] Northam, 458 F. Supp. 3d at 426.
[27] *Id*. Businesses which were deemed to be essential could not, however, operated at their pre-COVID-19 capacities. Executive order 53 required that in person shopping be limited to 10 individuals per establishment and everyone adhered to social distancing guidelines.
[28] Northam, 458 F. Supp. 3d at 426.
[29] *Id*.
[30] Treisman, *supra* note 17.

closed) were allowed to resume operation and services at a reduced capacity.[31] Mass gatherings remained restricted in many states throughout the summer.[32] But as the summer ended, many states began to reverse some of their reopening plans, as number of new positive COVID-19 cases began to rise.[33] Overall, in many states, religious institutions were not deemed essential and were subjected to various limitations on in-person gatherings.[34]

c. Overview of COVID-19 Related Religious Discrimination Claims

Avoiding large social gatherings is a crucial practice to "flattening the curve" of COVID-19.[35] Due to necessity, all states have carved out exemptions from their general bans on large gathering for various essential activities; some have included religious gathering in the essential category, whereas many others continue to ban or limit live gatherings for religious purposes.[36] As a consequence, many religious organizations have challenged these bans as being unconstitutional and in violation of their First Amendment rights to free exercise of religion and freedom of assembly.[37]

States' decisions to exclude houses of worship from their "essential" categories has triggered a number of lawsuits in various jurisdictions.[38] Religious organizations have argued that religion is a fundamental part of many people's lives, making it an essential function of society.[39] Some religious organizations protested the fact that marijuana dispensaries and liquor

[31] *Id*.
[32] *Id*.
[33] *Id*.
[34] *Id*.
[35] CDC, *supra* note 4.
[36] Treisman, *supra* note 17.
[37] Legacy Church, Inc. v. Kunkel, 2020 U.S. Dist. LEXIS 68415, at 23 (D.N.M. Apr. 17, 2020).
[38] Isabella Redjai, *Coronavirus: Churches are essential. If protesters can assemble, so should people of faith*, USA TODAY (Aug. 8, 2020), https://amp.usatoday.com/amp/332308200.
[39] Peggy Fletcher Stack, *Religion is essential, even during a pandemic, Latter-day Saint apostle David Bednar tells global forum*, THE SALT LAKE TRIBUNE (Oct. 14, 2020), https://www.sltrib.com/religion/2020/10/14/religion-is-essential/.

stores were allowed to remain open during COVID-19 shutdowns as "essential businesses," while in-person religious services (which in their view are far more essential to people's wellbeing) were categorized as nonessential.[40]

Additionally, in some places, religious organizations claimed they were being unequivocally discriminated against by the stay at home orders.[41] In Nevada, a state order limited houses of worship to operate at a 50 person capacity, regardless of the size of the building; however, the state allowed casinos to operate at 50 *percent* capacity, which in theory could mean thousands of people in the same building.[42] The sense among some religious organizations that they were being discriminated against was exacerbated by the protests which followed George Floyd's death.[43] California, which limited attendance at places of worship to 25 percent capacity, nonetheless did not place similar limits on thousands of protestors who gathered to protest the death of George Floyd at the hands of the police.[44] These organizations argued that the state selectively protected the First Amendment Freedom of Assembly rights of the protesters but failed to protect the same rights when it applied to religious gatherings.[45]

Many religious organizations attributed the issue to government officials' inability to fully comprehend how fundamental faith is to the lives of so many Americans.[46] They highlighted the reality that for many, a house of worship is more than a place to pray; instead it is a community.[47] They urge that just as a protests cannot take place on Zoom, religious community cannot happen on a virtual format either.[48] This sense of discrimination and

[40] Redjai, *supra* note 38.
[41] *Id*.
[42] *Id*. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2604 (2020) (Alito, J., dissenting).
[43] Redjai, *supra* note 38.
[44] *Id*.
[45] *Id*.
[46] Stack, *supra* note 39.
[47] *Id*.
[48] Redjai, *supra* note 38.

interpretation of the constitution is not only limited to religious organizations; President Trump also stated that religious gathering should be regarded as essential.[49] President Trump declared houses of worships to be essential and demanded that governors allow them to hold in person services.[50]

Separately, many religious organizations argue that they are well equipped to take the necessary precautions to protect themselves and their congregants by setting their own quotas on attendees, checking temperatures, requiring masks and practicing social distancing.[51] Ultimately, frustrated with the state bans and limitations on their right to assemble and to practice their religion the way they see fit, many have taken to the courts, where the constitutionality of these limitations is now being determined.

[49] Aylin Woodward, *Trump declared houses of worship essential. Mounting evidence shows they're super-spreader hotspots*, BUSINESS INSIDER (May 28, 2020), https://www.businessinsider.in/science/news/trump-just-declared-houses-of-worship-essential-mounting-evidence-shows-theyre-super-spreader-hotspots-/articleshow/75907337.cms.
[50] *Id*.
[51] Redjai, *supra* note 38.

III. FREE EXERCISE CLAUSE

The Free Exercise Clause provides that "Congress shall make no law…prohibiting the free exercise [of religion]."[52] This clause has been the subject of myriad Supreme Court decisions over the years. Through this jurisprudence, the United States Supreme Court has placed certain limits on the bounds of the Free Exercise Clause.

Free Exercise claims "usually arise when a citizen's civic obligation to comply with a law conflicts with that citizen's religious beliefs or practices."[53] Through various cases dating back more than a century, the Supreme Court has limited the seemingly absolute nature of the Free Exercise Clause to impose some limits on "the ability to act on [religious] beliefs" where such limits are related to government objectives.[54] For example, in the 1878 case *Reynolds v. United States*, the Supreme Court upheld a federal prohibition on polygamy in the face of a challenge brought by Mormons who argued that the practice of polygamy was a part of their religious tradition (and, in fact, a duty of their faith).[55] In upholding the ban, the Court reasoned that Congress had not legislated against the Mormons' religious *belief* in the duty of polygamy, but rather had legislated against an action taken on that belief "which [was] in violation of social duties or subversive to good order."[56] *Reynolds* thus stood for the proposition that there is a distinction between laws that restrict religious belief and laws that restrict actions based on religious belief.[57]

---

[52] U.S. Const. amend. I.
[53] Claire Mullally, *Free-Exercise Clause Overview*, FREEDOM FORUM INSTITUTE (Sept. 16, 2011), https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-religion/free-exercise-clause-overview/.
[54] *Id*.
[55] Reynolds v. United States, 98 U.S. 145 (1878).
[56] Reynolds, 98 U.S. at 164 (1878).
[57] Mullally, *supra* note 53.

The *Reynolds* rational basis test formed the bedrock of Free Exercise jurisprudence well into the twentieth century, insofar as generally applicable laws (such as a ban on polygamy) were concerned.[58] In 1940, the First Amendment's Free Exercise Clause was incorporated against the states in *Cantwell v. Connecticut*.[59] In *Cantwell*, the Court overturned the convictions of two Jehovah's Witnesses who had been charged with violating a state statute requiring door-to-door solicitors to obtain a certificate before soliciting funds from the public, on the grounds that the First Amendment was incorporated against the states via the Due Process Clause of the Fourteenth Amendment and that the convictions violated the petitioners' First Amendment right to the free exercise of religion.[60] The *Cantwell* decision laid the groundwork for citizens to challenge state-level restrictions on religious exercise.

The "rational basis" test established in *Reynolds* was replaced in 1963 by a "compelling interests" test established in *Sherbert v. Verner*.[61] Sherbert, a member of the Seventh-Day Adventist Church was fired from her job with the State of South Carolina because she refused to work on Saturdays (Saturday being the Sabbath Day in the Seventh-Day Adventist religious tradition).[62] She subsequently filed a state unemployment claim after she was unable to find another job (again because she refused to work on Saturdays), but her application for unemployment was denied on the basis that she was ineligible because she "failed, without good cause, to accept available suitable work when offered" to her.[63] Sherbert argued that the state's denial of unemployment benefits violated the Free Exercise Clause, but the South Carolina Supreme Court ruled against her, holding that the state's unemployment requirements "'place[d]

[58] Fredrick Gedicks & Michael McConnell, *The Free Exercise Clause*, NATIONAL CONSTITUTION CENTER (last visited Oct. 22, 2020), https://constitutioncenter.org/interactive-constitution/interpretation/amendment-i/interps/265.
[59] *Id*. Cantwell v. Connecticut, 310 U.S. 296 (1940).
[60] *Id*. Gedicks & McConnell, *supra* note 58.
[61] Sherbert v. Verner, 374 U.S. 398 (1963); *see also* Gedicks & McConnell, *supra* note 58.
[62] Sherbert, 374 U.S. at 398.
[63] *Id*.

no restriction upon [Sherbert's] freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience.'"[64] The United States Supreme Court overturned this decision, holding that a law that resulted in "any incidental burden on the free exercise of…religion" required the state to provide justification in the form of a "compelling state interest in the regulation of a subject within the state's constitutional power to regulate."[65] Writing for the majority, Justice Brennan thus changed the Free Exercise standard from "rational basis" to "compelling state interest," a much higher bar for the state to clear in order to justify a law of general applicability that incidentally burdens a citizen's religious practices and beliefs.[66]

In addition to introducing the "compelling interest" test for constitutionality under the Free Exercise Clause, *Sherbert* also stood for the proposition that a law that is generally applicable on its face can have unintended and unequal effects on the practice of certain religious beliefs.[67] This principle was reaffirmed nine years later in *Wisconsin v. Yoder*.[68] In *Yoder*, a group of Amish parents challenged a Wisconsin law that required children to attend school through the age of 16.[69] The Amish family argued that this requirement violated their free exercise of religion because exposing their children to outside schooling after age 14 would violate their traditional religious beliefs and undermine the insular nature of the Amish community.[70] The Supreme Court found in favor of the Amish family, holding that although the state had a strong interest in compulsory education, the Amish also had a strong interest in their centuries-old tradition of training young adults after the age of 14 to be part of their ("separated")

[64] *Id*. at 40.
[65] *Id*. at 404.
[66] Mullally, *supra* note 53.
[67] *Id*.
[68] *Id*.; Wisconsin v. Yoder, 406 U.S. 205 (1972).
[69] Yoder, 406 U.S. at 243.
[70] *Id*.

community, and that the state's interest could be achieved by requiring mandatory education through the age of 14 (rather than 16).[71] In this decision, the Court found that the generally applicable law requiring formal education applied unequally to the particular group on the basis of religious belief, and that to justify the law, the state would need to show that the interest could not otherwise be served.[72]

Based on *Sherbert* and *Yoder*, for the next three decades, to find a violation of the Free Exercise Clause, the relevant jurisprudence required plaintiffs to demonstrate that the government had significantly burdened a sincerely motivated religious practice in a manner that was not justified by a compelling state interest.[73] However, there was a major shift in Supreme Court Free Exercise jurisprudence in 1990 in the case *Employment Division v. Smith*.[74] *Smith* (sometimes known as the peyote case) involved two drug rehabilitation counselors who were fired from their jobs for ingesting peyote (a controlled substance under state law) at a religious ceremony of the Native American Church.[75] The counselors sued after they were denied unemployment benefits on the basis that they were terminated for job-related misconduct.[76] In writing for the majority, Justice Scalia noted that the state law banning peyote possession was facially neutral; in other words, it applied to everyone and was not specifically aimed at the religious use of peyote.[77] The Court refused to apply the "compelling interest" test used in *Sherbert* and *Yoder*; instead, Scalia wrote, the Court had held in favor of Free Exercise claimants under that standard only where the Free Exercise claim was related to other constitutional protections, like the right of parents to direct their children's upbringing and education in *Yoder*,

[71] *Id*. at 245.
[72] *Id*. at 245-46; Mullally, *supra* note 53.
[73] *Id*.
[74] Empl. Div. v. Smith, 494 U.S. 872 (1990); Gedicks & McConnell, *supra* note 58.
[75] Smith, 494 U.S. at 875.
[76] *Id*.
[77] Smith, 494 U.S. at 879.

and that "the present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right."[78] Because the counselors could not show that the denial of their unemployment benefits were tied to some other constitutional right, and because there was "no contention that [the state's] drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs," their Free Exercise claim failed.[79] The rule from *Smith* is that "the government is no longer required to articulate a compelling interest in regulation that burdens religious exercise so long as the law is 'neutral' and 'generally applicable.'"[80] Accordingly, taken together with *Sherbert* and *Yoder*, there exist three types of cases where strict scrutiny continues to apply to a Free Exercise claim: (1) a claim where the law is not generally applicable or facially neutral (*Smith*), (2) a claim requiring an individualized assessment (*Sherbert*), and (3) hybrid claims, as described above (*Yoder*).

Smith represented the first time since *Sherbert* that the Supreme Court declined to apply the "compelling interests" test and thus created significant uncertainty in the application of the Free Exercise Clause to laws of general applicability.[81] In a case three years after *Smith*, however, the Supreme Court found that a city ordinance violated the Free Exercise Clause precisely because it was not a facially-neutral or generally applicable.[82] In that case, the City of Hialeah passed ordinances which targeted the Church of the Lukumi Babalu Aye and its practices.[83] Specifically, the ordinance prohibited ritual slaughters and sacrifices of animals, which was a key practice in the Santeria tradition.[84] The Supreme Court struck down the

[78] Smith, 494 U.S. at 881; Mullally, *supra* note 53.
[79] Smith, 494 U.S. at 882.
[80] Zalman Rothschild, *Free Exercise's Lingering Ambiguity*, 11 CALIF. L. REV. ONLINE 282, 283 (2020).
[81] *Id*.
[82] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).
[83] *Id*.
[84] *Id*. at 524-25.

ordinance, reasoning that its history showed that it specifically targeted the Santeria faith, for example by providing exemptions for other types of animal slaughter. Consequently, the Court held that the ordinance was not facially neutral, nor generally applicable in its execution; and that it burdened a particular religious practice.[85] As a result, in *Lukumi*, the standard the Court used to evaluate the ordinances' constitutionality was strict scrutiny.[86]

IV. ANALYSIS

Courts have applied the Free Exercise doctrine inconsistently to COVID-19 stay-at-home orders.[87] This inconsistency has led to a patchwork of holdings with no clear rules to guide officials as they weigh constitutional considerations against public health and safety protocols related to a global pandemic. As described further below, courts ought to apply the *Smith* test, determining whether stay-at-home orders are generally applicable and facially neutral, by assessing whether the orders restrict similar types of social interaction equally.[88] If not, courts should then turn to a strict scrutiny analysis and assess whether the restrictions at issue are narrowly tailored to address a compelling state interest.[89] This section addresses each of these legal analyses in turn.

[85] *Id*. at 546-47. *See also* Mullally, *supra* note 53.
[86] Lukumi, 508 U.S. at 547.
[87] This paper focuses on COVID-19 orders restricting in-person religious services through the lens of the Free Exercise clause. This does not suggest that the Free Exercise Clause is the only constitutional provision that could, in theory, be used to challenge COVID-19 orders. For example, it is conceivable that a litigant could challenge such orders under the First Amendment's Free Speech Clause or Right to Assembly Clause and the Fourteenth Amendment's Due Process Clause. The Fourteenth Amendment Due Process Clause argument is unlikely to succeed, however, based on a 1905 United States Supreme Court case, upholding a Massachusetts law that allowed cities to require that residents be vaccinated against smallpox on the grounds that the law was a legitimate exercise of state power to protect public health and safety. Jacobson v. Massachusetts, 197 U.S. 11 (1905).
[88] S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020).
[89] Lukumi, 508 U.S. at 531.

a. Under *Smith*

The first question in this analysis is whether the state COVID-19 orders are facially neutral and generally applicable.[90] If they are, *Smith* says that there is no further analysis needed, as facially neutral and generally applicable laws do not violate the Free Exercise Clause if they are supported by rational basis.[91] This section will address each of these prongs.

1. Facial Neutrality

As stated by the Supreme Court in Lukumi, "[t]he meaning of 'neutrality' – or more precisely its absence – is fairly clear: [w]hen laws are enacted "'because of,' not merely 'in spite of,' their suppression of religious practice….", these laws are not neutral.[92] Simply put, a law cannot be neutral if it is specifically designed to target a particular religious practice.[93] Conversely, facially neutral laws are those that read neutral on the surface.[94]

Under this standard, it is clear that orders restricting the size and location of *all* mass gatherings, regardless of whether they involve religious or secular activity, are facially neutral.[95] It is difficult to argue that restrictions on mass gatherings implemented specifically to address the global pandemic after it had reached U.S. soil were implemented for any other reason but the stated purpose of combating the spread of the virus. As described above, these orders were a reaction to advice from the medical and scientific community that a key way to reduce COVID-19 infections and deaths was to limit opportunities for individuals to gather in groups for prolonged periods of time.[96] The stay-at-home orders restricting mass gatherings (including, but

[90] Smith, 494 U.S. at 880.
[91] *Id*. *See also* Caroline Mala Corbin, *Religious Liberty in a Pandemic*, 70 DUKE L.J ONLINE 1, 6 (2020).
[92] Rothschild, *supra* note 80, at 283.
[93] *Id*. *See also* Lukumi, 508 U.S. at 531.
[94] Lukumi, 508 U.S. at 533.
[95] *E.g.*, Northam, 458 F. Supp. 3d at 428 (holding that state orders were facially neutral and lacked discriminatory treatment because they prohibited "all social gathering of more than ten individuals, secular and religious.").
[96] *See e.g.*, CDC, *supra* note 4. *See also* Aschwanden, *supra* note 10; Adam & Cowling, *supra* note 9.

not limited to, in-person religious services) were a direct response to this scientific consensus, and to the extent this is reflected on the face of these orders, they are facially neutral under *Smith*.[97]

Some challengers of these orders have argued that they are not facially neutral where the order specifically includes religious services in its litany of examples of the types of gatherings that are subject to the order's restrictions.[98] This argument is flawed, however, to the extent religious services are merely provided as one example of many, such as in the Virginia order.[99] Challengers have also argued that orders that provide for exemptions to general bans on gathering are not facially neutral by virtue of those exemptions.[100] As described in further detail below, this argument is more aptly addressed by the general applicability prong of the *Smith* test.[101] In short, orders enacted as a direct response to the pandemic are facially neutral if they apply to both secular and religious mass gatherings and do not single out religious services for different treatment.[102]

2. General Applicability

The general applicability prong of *Smith* is arguably more nuanced than the meaning of "facially neutral."[103] To pass constitutional muster under Free Exercise jurisprudence, it is not sufficient for a law to simply be facially neutral – rather, the application of the law must also be

[97] *E.g.*, CDC, *supra* note 4; CDC, *supra* note 16.
[98] *E.g.*, Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610 (6th Cir. 2020) (mentioning religious groups by name as an example of the types of activities restricted does not render the order discriminatory). *See also* Northam, 458 F. Supp. 3d at 429 (E.D. Va. 2020) ("Executive Order 55 presents no neutrality problem….It merely uses religious gathering as one of several examples of 'all public and private in-person gatherings.' The Orders are facially neutral."); Corbin, *supra* note 91, at 11.
[99] *E.g.*, Northam, 458 F. Supp. 3d at 429.
[100] *Id*.
[101] Smith, 494 U.S. at 880.
[102] Lukumi, 508 U.S. at 531; Corbin, *supra* note 91, at 11.
[103] Rothschild, *supra* note 80, at 283.

even as between secular and religious conduct.[104] "[A] law fails the test of general applicability where, 'in pursuit of legitimate interests, [the government] in a selective manner imposes burdens only on conduct motivated by religious belief….'"[105] In other words, regardless of the interests it is seeking to address, and although "all laws are selective to some extent" the government is not permitted to single out religiously motivated conduct for particular restrictions.[106] When a law's restrictions on conduct include exceptions, this presents challenges for courts in determining whether those exceptions tip the law into discriminatory territory from a general applicability perspective. Exceptions leave much up to interpretation.[107]

In the coronavirus context, courts have had different interpretations of exceptions provided in orders restricting mass gatherings.[108] The issue of whether exceptions for certain types of in-person interaction render restrictions on live worship services unconstitutional has come down to how courts have interpreted what counts as comparable activity to these services.[109]

For example, in *S. Bay United Pentecostal Church v. Newsom*, petitioners challenged a California COVID-19 order that capped in-person attendance at religious services to 25 percent

[104] Lukumi, 508 U.S. at 533; Northam, 458 F. Supp. 3d at 428.
[105] Northam, 458 F. Supp. 3d at 428 (quoting Lukumi, 508 U.S. at 543).
[106] *E.g.*, Calvary Chapel of Bangor v. Mills, 459 F. Supp. 3d 273, 286 (D. Me. 2020) (quoting Lukumi, 508 U.S. at 543).
[107] *See*, *e.g.*, Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark (applying strict scrutiny to the Newark Police Department's policy prohibiting police officers from wearing beards). In Fraternal Order of Police, the Third Circuit noted that the department's policy exempted officers with medical conditions and officers acting undercover from the beard restriction but did not exempt officers who cited religious reasons for wanting to wear a beard. The Third Circuit held that the policy (1) was not generally applicable because it included medical (secular) exemptions but not a religious one, and (2) violated the Free Exercise Clause because the police department did not offer a compelling interest to justify providing a secular exemption but not granting similar treatment to officers who had to wear beards for religious reasons. Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 366 (3d Cir. 1999).
[108] S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020).
[109] *Compare* S. Bay, 140 S. Ct. at 1613 (Roberts, C.J., concurring) *with S.* Bay, 140 S. Ct. at 1615 (Kavanaugh, J., dissenting).

occupancy.[110] In a concurrence to the Court's decision to deny an injunction, Chief Justice Roberts wrote of the petitioners' request that "similar or more severe restrictions apply to comparable secular gatherings" such as "lectures, concerts, movie showings, spectator sports and theatrical performances, where large groups of people gather in close proximity for extended periods of time."[111] Chief Justice Roberts continued, "[a]nd the Order 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."[112] Stated differently, Chief Justice Roberts compared in-person religious gatherings to other types of group activities that take place with large numbers of people congregating in close proximity to participate in a common activity.[113] In his dissent, Justice Kavanagh took a different approach, noting that "comparable secular businesses [were] not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries."[114]

In *S. Bay*, Chief Justice Roberts and Justice Kavanagh therefore disagreed on the appropriate criteria to use in determining whether the California order was generally applicable for Free Exercise purposes.[115] Chief Justice Roberts appeared to compare the characteristics of the restricted versus unrestricted gatherings, highlighting distinctions in how people operate within the respective settings, while Kavanagh appeared focused on the fact that many secular activities were subject to fewer or no restrictions than those imposed on religious gatherings even

[110] S. Bay, 140 S. Ct. at 1613 (Roberts, C.J., concurring).
[111] *Id*.
[112] *Id*.
[113] *Id*. at 1613-14.
[114] S. Bay, 140 S. Ct. at 1614 (Kavanaugh, J., dissenting).
[115] *Id*. at 1613-14

though both types of activity involved people coming into contact with others.[116] These arguments are illustrative of the approaches courts and litigants have taken to evaluating mass gathering restrictions under COVID-19 stay-at-home orders.

The Chief Justice Roberts approach is more persuasive in light of the abundant evidence that mass gatherings contribute to the accelerated spread of coronavirus.[117] Religious institutions "cannot claim that they are victims of discrimination unless the state is treating like-activities differently."[118] Accordingly, whether a COVID-19 order's restrictions on religious gatherings are in fact "generally applicable" should be assessed by whether the order equally restricts gatherings of similar types. This distinction turns on the nature of the conduct associated with the relevant gathering.[119]

For example, although Kavanagh describes in-person worship services and secular businesses such as supermarkets, retail stores, shopping malls, bookstores, florists and pet grooming salons (among other similar settings) as "comparable", in practice, the conduct of people in these secular settings is very different from the conduct of participants at in-person religious services.[120] Whereas "worship services are extended affairs" full of attendees who speak, sing, and chant for extended periods of time, behavior in shopping and similar business settings is typically marked by brief, quick interactions with limited interpersonal conduct in spaces that are conducive to physical distancing.[121] These business settings are thus markedly different from houses of worship. Instead, attendance at a religious event is more akin to attendance at a concert, movie screening or theatrical performance, where attendees spend

[116] *Id*. *See also* Rothschild, *supra* note 80, at 289.
[117] CDC, *supra* note 1; Aschwanden, *supra* note 10; Rothschild, *supra* note 80, at 290.
[118] Corbin, *supra* note 91, at 15.
[119] *Id*.
[120] S. Bay, 140 S. Ct. at 1614 (Kavanaugh, J., dissenting).
[121] Corbin, *supra* note 91, at 23.

extended periods of time in close quarters with each other, laughing, cheering or otherwise expressing emotion similar to how congregants may sing, speak or chant during service.[122] The casual, often distanced interpersonal conduct that occurs in a store or salon is fundamentally dissimilar to the close physical contact experienced in large-group events.[123] This distinction is paramount because placing restrictions on large-group, close-quarter static gatherings is consistent with what public health officials deem necessary to slow the spread of COVID-19.[124] Moreover, as described above, prolonged large-scale gatherings such as in-person religious services have been deemed super-spreader events, with high rates of infection being traced to single events.[125]

Challengers to these COVID-19 orders also point out that certain professional office settings, such as those of accountants, lawyers and finance professionals, were permitted to remain open under certain of these orders while religious gatherings were restricted.[126] Again, these are not comparable social settings. Unlike in-person worship services, professional office settings may provide for physical distancing (such as by having individual offices with doors) and do not require close interpersonal interaction because meeting sizes can be kept limited through teleconferencing and other means.[127] These settings are thus distinct from in-person religious services and it is not useful to compare the two for purposes of assessing whether restrictions on gatherings satisfy the generally applicable standard. The correct comparison is

[122] *Id*. at 12. *See also* S. Bay, 140 S. Ct. at 1613 (Roberts, C.J., concurring).
[123] Corbin, *supra* note 91, at 23.
[124] Aschwanden, *supra* note 10.
[125] *Id*.; Adam & Cowling, *supra* note 9.
[126] Maryville Baptist Church, Inc. v. Beshear, 460 F. Supp. 3d 651, 661 (W.D. Ky. 2020).
[127] *E.g.*, Northam, 458 F. Supp. 3d at 431-32.

instead between religious gatherings and secular large-group, close proximity gatherings such as schools, theaters, sporting events and the like.[128]

3. *Calvary Chapel* and *Roman Catholic Diocese*

The Chief Justice Roberts approach described above, whereby restrictions on mass gatherings are evaluated for general applicability based on whether they impact gatherings of similar qualities equally, is an appropriate and logical standard for courts to employ in assessing the constitutionality of COVID-19 orders that restrict in-person worship.[129] Nevertheless, it seems that the Supreme Court failed to apply Chief Justice Roberts' rationale in his *S. Bay* concurrence to the two subsequent cases it heard on this topic.[130] Because these cases were, like *S. Bay*, about petitions for injunctive relief, they were not decided on the merits. The Court's potential reasoning in a merits case, however, can be inferred from the decisions made by the Court in these applications for injunctive relief.

In *Calvary Chapel Dayton Valley v. Sisolak*, the governor of Nevada issued a COVID-19 order that restricted in-person attendance at religious services (limiting admission to no more than 50 people), but allowing casinos to open with up to 50 percent of maximum occupancy (which, for the state's largest casinos in Las Vegas, could mean up to thousands of casino patrons in a single building at one time).[131] A Nevada church challenged this COVID-19 order,

[128] Calvary Chapel of Bangor v. Mills, 459 F. Supp. 3d 273, 286 (D. Me. 2020) ("religious gatherings . . . are more akin to restaurants, entertainment venues, movie theaters, and schools").
[129] S. Bay, 140 S. Ct. at 1613 (Roberts, C.J., concurring).
[130] The Supreme Court has decided three cases involving petitions for injunctive relief from state COVID-19 orders. In addition to S. Bay, it has also decided the same issue in Calvary Chapel Dayton Valley v. Sisolak, and Roman Catholic Diocese v. Cuomo. Additionally, on December 15, 2020, the Supreme Court vacated two district court opinions that denied religious organizations injunctions against state COVID-19 orders that set capacity limits on worship service attendance. The Court ordered the district courts to reconsider these cases, in which the plaintiffs challenged COVID-19 orders in Colorado and New Jersey, for further consideration in light of the Court's decision in Roman Catholic Diocese v. Cuomo. High Plains Harvest Church v. Polis, 2020 WL 7345850 (U.S. Dec. 15, 2020); Kevin v. Murphy, 2020 WL 7346601 (U.S. Dec. 15, 2020).
[131] Calvary Chapel, 140 S. Ct. at 2604 (Alito, J., dissenting).

arguing that it violated the Free Exercise Clause by, on its face, permitting casinos and certain other institutions to abide by a less restrictive occupancy cap than that to which houses of worship were required to adhere.[132] The Supreme Court denied injunctive relief.[133] In a dissent, Justice Alito (joined by Justices Thomas and Kavanaugh) argued that the order discriminated in favor of casinos in violation of the Free Exercise Clause.[134] The dissenters argued that because the Nevada COVID-19 order permitted casinos a significantly larger occupancy rate than religious institutions, notwithstanding the fact that both settings would permit large groups of people to gather in close proximity, the order clearly was not intended to be (and cannot be read to be) generally applicable.[135]

In denying the petition for injunctive relief, the Court in *Calvary Chapel* appeared to disregard Chief Justice Roberts' approach in *S. Bay* of evaluating comparable gatherings, and thus signaled how the Court may be likely to decide this type of case on the merits. Casinos, like houses of worship, facilitate the gathering of large numbers of people in close proximity to one another.[136] Moreover, the interpersonal conduct that occurs within a casino is not transient, casual contact like occurs in a supermarket, but rather is designed to be prolonged like a church service.[137] Casino settings, like in-person religious services, are thus comparable to other large-group settings like theaters, sports stadiums and schools and should be treated the same by restrictions on gatherings. Accordingly, under Chief Justice Roberts' *S. Bay* reasoning, the Nevada order would not be found generally applicable (nor facially neutral, because on its face the order favored casinos) and would need to be evaluated under a strict scrutiny standard, as

[132] *Id*. at 2605.
[133] *Id*. at 2603.
[134] *Id*. at 2607.
[135] *Id*. at 2606-7.
[136] *Id*.
[137] *Id*.

described below.[138] This was not the approach the Court signaled, however, in denying the injunction, notwithstanding the strong scientific basis to support Roberts' legal theory of comparing similar gatherings to evaluate general applicability.[139]

In a subsequent case, *Roman Catholic Diocese of Brooklyn v. Cuomo*, the plaintiffs, religious organizations in New York City, challenged a statewide order that restricted in-person "attendance at religious services in areas classified as 'red' or 'orange' zones."[140] Instead of imposing blanket restrictions statewide, the New York COVID-19 order sought to enforce mass gathering restrictions in certain areas based on virus infection rates.[141] In areas classified as "red zones," "no more than 10 persons" were allowed to "attend each religious service," however, "businesses categorized as 'essential' [were permitted to] admit as many people as they wish[ed].[142] And the list of 'essential' businesses include[d] things such as acupuncture facilities, camp grounds, garages, as well as . . . all plants manufacturing chemicals and microelectronics and all transportation facilities."[143] In "orange zones," "attendance at houses of worship [was] limited to 25 person," however, "even non-essential businesses [were permitted to] decide for themselves how many persons to admit."[144] In imposing the limits on these gatherings, the orders did not consider the size of the house of worship or the safety procedures followed by the establishment.[145]

---

[138] Neither the Supreme Court nor the lower courts undertook an analysis of the Nevada COVID-19 order under a strict scrutiny standard; the lower court decisions pertained to an application for an injunction. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020); Valley v. Sisolak, 2020 U.S. App. Lexis 20727 (9th Cir. July 2, 2020); Valley v. Sisolak, 2020 U.S. Dist. LEXIS 94667 (D. Nev. May 29, 2020).
[139] S. Bay, 140 S. Ct. at 1613 (Roberts, C.J., concurring).
[140] Roman Catholic Diocese v. Cuomo, No. 20A87, 2020 WL 6948354, *1 (U.S. Nov. 15, 2020).
[141] Nicholas J. Nelson & Bruce Jones, *Supreme Court Orders Preliminary Injunction in Roman Catholic Diocese of Brooklyn v. Cuomo*, THE NAT'L L. REV. (Nov. 30, 2020), https://www.natlawreview.com/article/supreme-court-orders-preliminary-injunction-roman-catholic-diocese-brooklyn-v-cuomo.
[142] *Id*.; Roman Catholic Diocese, 2020 WL 6948354, at *1.
[143] Roman Catholic Diocese, 2020 WL 6948354, at *1-2.
[144] *Id*.
[145] *Id*.

The Supreme Court granted injunctive relief and prevented New York from enforcing the red and orange zones restrictions in a per curiam opinion.[146] The Court held that "the applicants have made a strong showing" that the New York regulations discriminated against the religious organizations by "singl[ing] out houses of worship for especially harsh treatment."[147] Additionally, the Court found that by specifically naming religious services as a category of restricted gathering, the New York order was not neutral.[148] As a result, the Court held that because the orders "cannot be viewed as neutral" or "'of general applicability,' they must satisfy 'strict scrutiny[.]'"[149]

In issuing this decision, the Court's reasoning was flawed for two reasons. First, merely naming religious services as a type of restricted gathering – when the order's restrictions on gatherings also applied to secular events in the red and orange zones – is not sufficient to render the order "not neutral."[150] Instead of singling out religion on its face, the order merely pointed to religious services as an example of a gathering type that would be subject to the order.[151] In other words, the order did not on its face treat religion differently, but instead was facially neutral because secular events were specifically subject to equal restrictions as religious gatherings.

Second, the Court failed to draw the proper comparisons between gathering types in evaluating whether the New York order was generally applicable. The Court did not apply Roberts' reasoning from *S. Bay* (which, again, is backed by scientific evidence) and instead

---

[146] *Id*. at *4. Unlike *S. Bay* and *Calvary Chapel*, where the relevant orders were issued without an opinion of the Court, in *Roman Catholic Diocese*, the Court issued a majority opinion, per curiam.
[147] Roman Catholic Diocese, 2020 WL 6948354, at *1.
[148] *Id*. at *13.
[149] Roman Catholic Diocese, 2020 WL 6948354, at *2; Nelson & Jones, *supra* note 140.
[150] Corbin, *supra* note 91, at 11. *See also* Northam, 458 F. Supp. 3d at 429 (holding that the ban on mass gatherings was neutral because "it merely uses religious gatherings as one of several examples of 'all public and private in-person gatherings.'")
[151] *See* Agudath Israel of Am. v. Cuomo, 979 F.3d 177, 181 (2d Cir. 2020).

compared religious services in the red and orange zones to factually incomparable settings, such as camp grounds, manufacturing plants and transportation facilities.[152] The settings cited by the Court as examples of exempted activities under the New York order are dissimilar to religious services in that none of them involve prolonged gatherings in close quarters of large numbers of people that may involve singing, chanting, talking or other interpersonal interactions that may facilitate the spread of a respiratory illness.[153] Again, the proper comparison to religious services in the red and orange zones would have been schools, theaters, sporting events or concert halls, which faced more severe restrictions under New York's order than even houses of worship.[154] This was noted by the Second Circuit in *Agudath Israel of Am. v. Cuomo*, which found that the New York order did not violate the Free Exercise Clause because "the order subjects religious services to restrictions that are similar to or, indeed, *less severe than* those imposed on comparable secular gatherings" (emphasis in original).[155] The Second Circuit's conclusion that the New York order was generally applicable for Free Exercise purposes is consistent with Roberts' conclusions in *S. Bay*, and the Supreme Court erred in holding otherwise.[156]

b. Strict Scrutiny

As indicated above, to the extent a law is neither facially neutral nor generally applicable, a Free Exercise Clause challenge to that law must be assessed under a strict scrutiny standard.[157] To justify a law that burdens religious belief or practice, the government must demonstrate a compelling interest in enacting the relevant law and show that it used the least restrictive means

[152] Roman Catholic Diocese, 2020 WL 6948354, at *2; S. Bay, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring).
[153] *See* Roman Catholic Diocese, 2020 WL 6948354, at *10 (Breyer, J., dissenting). *See also* Agudath Israel, 979 F.3d at 181; Corbin, *supra* note 91, at 23.
[154] *Id*.
[155] Agudath Israel, 979 F.3d at 180.
[156] *Id*. at 181; S. Bay, 140 S. Ct. at 1613 (Roberts, C.J., concurring).
[157] Lukumi, 508 U.S. at 578.

(i.e., the least burdensome on religion) to enact it.[158] Like the *Smith* standard, this is also a fact-dependent test.[159] In the COVID-19 cases, courts that have analyzed stay-at-home orders under strict scrutiny have generally found that the relevant orders were not narrowly tailored to a compelling state interest.[160] This reasoning is flawed in the context of the coronavirus pandemic.[161] Few would dispute that the government has a compelling interest in curbing the spread of the coronavirus.[162] But although courts analyzing gathering restrictions have generally found that these restrictions are not narrowly tailored to address that interest, this finding is not supported by the science that underlies the relevant restrictions on in-person gatherings. In other words, restrictions on mass social gatherings *are* narrowly tailored to help curb the spread of COVID-19. There is clear, uniform, scientific consensus among experts that gatherings of large groups of people, congregating and speaking in close proximity to one another for extended periods of time, are conditions that facilitate the spread of this airborne disease.[163]

In *Roman Catholic Diocese v. Cuomo*, because the Court found that the order was not facially neutral and generally applicable, the analysis moved to strict scrutiny.[164] The Court held

[158] Sherbert, 374 U.S. at 400 (1963); Mullally, *supra* note 53.
[159] *See generally* Calvary Chapel, 140 S. Ct. at 2608 (Alito, J., dissenting).
[160] *See, e.g.*, Roman Catholic Diocese, 2020 WL 6948354, at *3. *See also* Beshear, 460 F. Supp. 3d at 614.
[161] Corbin, *supra* note 91, at 22-24.
[162] In some of the COVID-19 Free Exercise cases, religious organizations have argued that the fact that states include exceptions to social gatherings in certain secular settings like grocery stores and pharmacies indicates that the state does not actually have a compelling interest in restricting social gatherings. Berean Baptist Church v. Cooper, 460 F. Supp. 3d 651 (E.D.N.C. 2020). Indeed, in *Lukumi*, the Court found that the state had not shown a compelling interest in regulating the conduct at issue on the basis of numerous exceptions that disfavored the Santeria faith at the expense of secular institutions. Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). However, the COVID-19 cases are not comparable to the facts of *Lukumi* for two key reasons. First, settings such as grocery stores, pharmacies and other stores where people can buy food, medicine and other goods facilitate individuals' ability to physically survive the pandemic. No such life-or-death conditions existed to support the City of Hialeah's attempts to regulate animal slaughter. Second, for the reasons described in this paper, the types of social interactions restricted at in-person religious services under these COVID-19 orders are dissimilar from the types of interactions that occur in places like supermarkets. Those differences are directly related to the likelihood of virus transmission. In *Lukumi*, by contrast, the conduct at issue was effectively the same regardless of whether it occurred in a religious or secular setting.
[163] Aschwanden, *supra* note 10; Adam & Cowling, *supra* note 9.
[164] Roman Catholic Diocese, 2020 WL 6948354, at *2; Nelson & Jones, *supra* note 140.

that the New York order was not narrowly tailored to address the state's interest in mitigating the spread of coronavirus because "there [were] many other less restrictive rules that could be adopted" such as setting attendance limits for in-person worship services based on "the size of the church or synagogue."[165] In coming to this conclusion, the Court entirely disregarded the scientific underpinnings of the New York order.[166] Under the Court's reasoning, which would link capacity restrictions to the physical size of a venue, a megachurch, for example, could theoretically hold in-person services with hundreds of congregants present even if restricted to half its capacity.[167] Although the ability to physically distance attendees is one factor in reducing the spread of coronavirus, that factor alone is not dispositive.[168] The science is clear that reducing the *number* of people who gather together in any one place is a crucial factor in reducing the spread of the virus, at least in part because increasing the number of people allowed at a gathering increases the likelihood that a COVID-positive individual will be in attendance.[169] In holding that the New York order was not narrowly tailored and thus failed strict scrutiny, the Court ignored these realities and instead measured the risk mitigation options available to the state against a standard that was not supported by science. Because the state has no meaningful alternative to restricting indoor mass gatherings, such restrictions are narrowly tailored to address the state's interest in mitigating the spread of COVID-19, and therefore the order should have survived strict scrutiny.

The facts of *Calvary Chapel*, however, lend themselves to a different outcome under strict scrutiny. As indicated above, the Supreme Court did not address a strict scrutiny analysis

[165] Roman Catholic Diocese, 2020 WL 6948354, at *3; Nelson & Jones, *supra* note 140.
[166] Roman Catholic Diocese, 2020 WL 6948354, at *11-13 (Breyer, J., dissenting).
[167] Roman Catholic Diocese, 2020 WL 6948354, at *3; Nelson & Jones, *supra* note 140.
[168] Roman Catholic Diocese, 2020 WL 6948354, at *12 (Sotomayor, J., dissenting); CDC, *supra* note 4; CDC, *supra* note 16.
[169] Roman Catholic Diocese, 2020 WL 6948354, at *12 (Sotomayor, J., dissenting).

in that case. However, assuming, as asserted above, that the Nevada order at issue was not facially neutral and generally applicable, a strict scrutiny analysis would be warranted.[170] Unlike the New York order, which restricted similar types of indoor mass gatherings, Nevada selectively applied such restrictions to particular types of institutions but not others – namely, the restrictions applied to houses of worship but not to casinos.[171] It would therefore be difficult for the state to assert that this rule was "narrowly tailored" to address the pandemic because the state could reasonably have implemented equal rules for similar gathering types.[172] Because Nevada's order did not do so, and instead provided preferential treatment to a kind of secular institution (casinos) at the expense of religion, it would be unlikely to survive a strict scrutiny analysis.

V. CONCLUSION

The global COVID-19 pandemic has altered nearly every aspect of social life since its onset. In-person religious services have not escaped the impact of the virus. In an effort to mitigate the effects of COVID-19 and curb its spread, various states have issued orders impacting the ability of houses of worship to host in-person services. These orders have been challenged under the Free Exercise Clause, presenting challenges for courts in determining the appropriate criteria to apply. In the three primary COVID-19-related cases considered to date by the U.S. Supreme Court, the Justices have applied inconsistent reasoning in rendering decisions about these orders. Were the Court to consistently apply Chief Justice Roberts' reasoning in his

[170] Calvary Chapel, 140 S. Ct. at 2607 (Alito, J., dissenting). Even if the Nevada order were to be facially neutral and generally applicable, applying the hybrid analysis articulated in *Yoder*, a strict scrutiny analysis may nevertheless be warranted if the court were to determine that, in addition to Free Exercise claims, there are other constitutional claims (such as freedom of assembly) at issue. However, based on the COVID-19 decisions to date, this does not appear to be an approach the Supreme Court is adopting. In Roman Catholic Diocese v. Cuomo, the Court moved to strict scrutiny only after finding that the New York COVID-19 order was not facially neutral and generally applicable. Roman Catholic Diocese, 2020 WL 6948354, at *2.
[171] Calvary Chapel, 140 S. Ct. at 2606.
[172] Calvary Chapel, 140 S. Ct. at 2606-07 (Alito, J., dissenting).

S. Bay concurrence, it is likely that the Court would find that stay-at-home orders that restrict both in-person religious services and in-person gatherings at secular venues of similar characteristics pass constitutional muster. Because the Court has not always adopted this approach (which is grounded in scientific evidence), certain stay-at-home orders (such as the one in New York) that arguably satisfied the Free Exercise Clause have been struck down, while others that appear to plainly discriminate against religious services (such as Nevada) have been allowed to continue. With no clear end to the pandemic in sight, states will need to balance public health considerations against the need to comply with the Free Exercise Clause.