THE "ESSENTIAL" FREE EXERCISE CLAUSE

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In the span of a year, COVID-19 would affect every corner of the globe. During this period, governments were confronted with difficult choices about how to respond to the evolving pandemic. In rapid succession, states imposed lockdown measures that ran headlong into the Constitution. Several states deemed houses of worship as non-essential, and subjected them_to stringent attendance requirements. In short order, states restricted the exercise of a constitutional right, but allowed the exercise of preferred economic privileges. And this disparate treatment was premised on a simple line: whether the activity was "essential" or "non-essential." If the activity fell into the former category, the activity could continue. If the activity fell into the latter category, it could be strictly regulated, or even halted immediately. Houses of worship challenged these measures as violations of the Free Exercise Clause of the First Amendment.

This Article provides an early look at how the courts have interpreted the "essential" Free Exercise Clause during the pandemic. This ongoing story can be told in six phases. In Phase 1, during the early days of the pandemic, the courts split about how to assess these measures. And for the first three months of the pandemic, the Supreme Court stayed out of the fray.

In Phase 2, the Supreme Court provided its early imprimatur on the pandemic. In *South Bay Pentecostal Church v. Newsom*, the Court

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declined to enjoin California's restrictions on religious gatherings. Chief Justice Roberts wrote a very influential concurring opinion that would become a superprecedent. Over the following six months, more than one hundred judges would rely on Chief Justice Roberts's opinion in cases that spanned the entire spectrum of constitutional and statutory challenges to pandemic policies.

In Phase 3, the Roberts Court doubled-down on *South Bay*. A new challenge from Nevada, *Calvary Chapel Dayton Valley Church v. Sisolak*, upheld strict limits on houses of worship. Once again, the Court split 5-4. Justice Kavanaugh wrote a separate dissent. He treated the Free Exercise of Religion as a "most-favored" right. Under Justice Kavanaugh's approach, the free exercise of religion is presumptively "essential," unless the state can rebut that presumption. *South Bay* and *Calvary Chapel* would remain the law of the land through November.

Phase 4 began when Justice Ruth Bader Ginsburg was replaced by Justice Amy Coney Barrett. The new Roberts Court would turn the tide on COVID-19 cases in *Roman Catholic Diocese of Brooklyn v. Cuomo*. Here, a new 5-4 majority enjoined New York's "cluster initiatives," which limited houses of worship in so-called "red" zones to ten parishioners at a time. Now, Chief Justice Roberts dissented. *Roman Catholic Diocese* effectively interred the *South Bay* superprecedent.

Phase 5 arose in the wake of *Roman Catholic Diocese*. Over the course of five months, the Court consistently ruled in favor of the free exercise of religion. *South Bay II* and *Harvest Rock II* enjoined California's prohibitions on indoor worship. And *Tandon v. Newsom* recognized the right of people to worship privately in their homes.

We are now in the midst of Phase 6. States are beginning to recognize that absolute executive authority cannot go unchecked during ongoing health crises. Going forward, states should impose substantive limits on how long emergency orders can last, and establish the power to revoke those orders.

The COVID-19 pandemic will hopefully soon draw to a close. But the precedents set during this period will endure.

INTRODUCTION

In the span of a year, the coronavirus disease 2019 (COVID-19) would affect every corner of the globe. In December 2019, COVID-19 was identified in Wuhan, China.[1] The first known transmission in the United States occurred in mid-January 2020.[2] On January 31, the United States declared a public health emergency, and placed restrictions on flights from China.[3] By February 6, the first person in America died from COVID-19.[4] On March 11, the World Health Organization declared a pandemic.[5] On March 13, a national emergency was declared.[6] By the end of March, there were confirmed cases in all fifty states, in the District of Columbia, and in the federal territories.[7] By the end of April, there were more than a million confirmed cases nationwide.[8]

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1. *Emergencies Preparedness, Response: Novel Coronavirus-China*, WORLD HEALTH ORG. (Jan. 12, 2020), https://www.who.int/csr/don/12-january-2020-novel-coronavirus-china/en/ [https://perma.cc/L3F2-D7FV].

2. Isaac Ghinai et al., *First known person-to-person transmission of severe acute respiratory syndrome coronavirus 2 (SATRS-CoV-2) in the USA*, NAT'L CTR. FOR BIOTECHNOLOGY INFO. (Mar. 13, 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7158585/ [https://perma.cc/H34V-QPHE].

3. Allison Aubrey, *Trump Declares Coronavirus a Public Health Emergency and Restricts Travel from China*, NPR (Jan. 31, 2020), https://www.npr.org/sections/health-shots/2020/01/31/801686524/trump-declares-coronavirus-a-public-health-emergency-and-restricts-travel-from-c [https://perma.cc/PZQ2-995H].

4. Jason Hanna et al., *2 Californians died of coronavirus weeks before previously known 1st US death*, CNN (Apr. 22, 2020), https://www.cnn.com/2020/04/22/us/california-deaths-earliest-in-us/index.html [https://perma.cc/NRZ2-ZP7M].

5. Tedros Adhanom Ghebreyesus, Director-General, World Health Org., Opening remarks at media briefing on COVID-19 (Mar. 11, 2020), https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 [https://perma.cc/S6VU-HL4V].

6. Kevin Liptak, *Trump Declares National Emergency—and Denies Responsibility for Coronavirus Testing Failures*, CNN (Mar. 13, 2020), https://www.cnn.com/2020/03/13/politics/donald-trump-emergency/index.html [https://perma.cc/H4ER-X6ZN].

7. *CDC Weekly Key Messages*, CDC (Mar. 29, 2020), http://www.wvha.org/get-media/98926b62-5e8d-4266-a460-0be3e1f4717d/CDC-Weekly-Key-Messages-March-29,2020.pdf.aspx [https://perma.cc/C478-R9DE].

8. Lynsey Jeffery, *U.S. Surpasses 1 Million Coronavirus Cases*, NPR (Apr. 28, 2020), https://www.npr.org/sections/coronavirus-live-updates/2020/04/28/846741935/u-s-surpasses-1-million-coronavirus-cases [https://perma.cc/TXL7-8SPJ].

During this period, local governments were confronted with difficult choices about how to respond to the evolving pandemic. In short order, most of the country was placed under an unprecedented lockdown. On March 15, 2020, New York City public schools were shuttered.[9] On March 17, Virginia banned public gatherings of more than ten people.[10] That same day, Ohio postponed all elective surgeries.[11] On March 19, California issued a statewide stay-at-home order.[12] On March 20, New York ordered that non-essential businesses must close to the public.[13] Essential businesses, however, could remain open.

In rapid succession, most states took similar measures. But some states, with different priorities, approached their lockdowns very differently. Most of these decisions had little bearing on constitutional law. Michigan, for example, deemed hardware stores essential, but prohibited those stores from selling paint or mulch.[14] These classifications were unreasonable but were not susceptible to a constitutional challenge under current doctrine.

Other lockdown measures, however, ran headlong into the

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9. Julia Marsh et al., *Coronavirus in NY: NYC schools will close*, N.Y. POST (Mar. 15, 2020), https://nypost.com/2020/03/15/coronavirus-in-ny-nyc-schools-will-close/ [https://perma.cc/Q277-E58C].

10. Jeff Williamson, *15 New Coronavirus Cases in Virginia, Now 67 Total Cases*, WSLS 10 NEWS (Mar. 17, 2020), https://web.archive.org/web/20200318041135/https://www.wsls.com/news/virginia/2020/03/17/15-new-coronavirus-cases-in-virginia-now-67-total-cases/.

11. *Ohio Barbershops, Hair and Nail Salons Ordered to Close amid Coronavirus Concerns*, WBNS 10 NEWS (Mar. 18, 2020), https://www.10tv.com/article/news/local/ohio/ohio-barbershops-hair-and-nail-salons-ordered-close-amid-coronavirus-concerns-2020-apr/530-744f8bdd-fbd8-4138-bafd-4a2922f8301b/ [https://perma.cc/U3NY-Y469].

12. Paris Martineau, *What's a 'Shelter in Place' Order, and Who's Affected?*, WIRED (Mar. 20, 2020, 6:21 PM), https://www.wired.com/story/whats-shelter-place-order-whos-affected/ [https://perma.cc/B7D7-DLQ2].

13. Bill Chappell & Vanessa Romo, *New York, Illinois Governors Issue Stay At Home Orders, Following California's Lead*, NPR (Mar. 20, 2020, 12:15 PM), https://www.npr.org/sections/coronavirus-live-updates/2020/03/20/818952589/coronavirus-n-y-gov-cuomo-says-100-of-workforce-must-stay-home [https://perma.cc/7CGU-7VBJ].

14. Cody Butler, *Michigan cracking down on non-essential business*, WILX 10 (Apr. 3, 2020, 9:04 PM), https://web.archive.org/web/20200926062440/https://www.wilx.com/content/news/Michigan-cracking-down-on-non-essential-business-569361041.html.

Constitution. Many states restricted the size of *non-essential* public gatherings to promote social distancing. Some of these orders limited how people of faith could assemble—either directly or indirectly. Different states drew different lines. In Texas, for example, houses of worship were exempt from limits on public gatherings.[15] Other states went in the opposite direction. Nevada deemed houses of worship as *non-essential*, and subjected them to stringent attendance requirements. But *essential* casinos were allowed to operate at fifty percent capacity, and could welcome guests by the thousands.[16] Nevada restricted the exercise of a constitutional right but allowed the exercise of preferred economic privileges. And this disparate treatment was premised on a simple line: whether the activity was "essential" or "non-essential." If the activity fell into the former category, the activity could continue. If the activity fell into the latter category, it could be strictly regulated or even halted immediately.

Houses of worship challenged these measures as violations of the Free Exercise Clause of the First Amendment. But these disputes differed from the usual First Amendment cases on the Supreme Court's docket. Long before the pandemic, governments burdened—directly or indirectly—the free exercise of religion in four general ways. First, states prohibited specific religious practices. Second, states targeted specific faiths for disparate treatment. Third, states conditioned the receipt of benefits on compelling people to engage in activity that is forbidden by their religions. Fourth, states compelled people to engage in activities prohibited by their faiths. During the pandemic, however, the novel restrictions imposed on the free exercise of religion did not fit any of these molds.

This Article provides an early look at how the courts have

15. 45 Tex. Reg. 2933 (Apr. 27, 2020), https://gov.texas.gov/uploads/files/press/EO GA-18_expanded_reopening_of_services_COVID-19.pdf/ [https://perma.cc/Y9J7-R6JU].

16. Lisette Voytko, *Nevada Gives Casinos Go-Ahead for June 4 Reopening*, FORBES (May 27, 2020, 8:52 AM), https://www.forbes.com/sites/lisettevoytko/2020/05/27/nevada-gives-casinos-go-ahead-for-june-4-reopening/?sh=1e8bb89d489c/ [https://perma.cc/YQ5P-L3XU].

interpreted the "essential" Free Exercise Clause during the pandemic. This ongoing story can be told in six phases.

In Phase 1, some states deemed religious gatherings to be "non-essential." During the early days of the pandemic, the courts split about how to assess these measures. Some courts compared the restrictions on houses of worship to restrictions imposed on *comparable* secular activities. Other courts compared the restrictions on houses of worship to restrictions imposed on *any* secular activity. Which lower courts were right? The Supreme Court's Free Exercise Clause cases did not provide a clear answer to this question. And for the first three months of the pandemic, the Supreme Court stayed out of the fray.

In Phase 2, the Supreme Court provided its early imprimatur on the pandemic. In *South Bay Pentecostal Church v. Newsom*,[17] the Court declined to enjoin California's restrictions on religious gatherings. The Golden State imposed a 100-person occupancy limit on houses of worship, regardless of their size.[18] The majority per curiam opinion did not include any reasoning. But Chief Justice Roberts wrote what would prove to be a very influential concurring opinion.[19] He determined that houses of worship were treated similarly to "comparable secular gatherings," and were treated better than "dissimilar activities."[20] This opinion sharply divided the Court. Four Justices dissented. Three of them insisted that California treated houses of worship worse than comparable secular gatherings.[21] After *South Bay*, Chief Justice Roberts's opinion became a *superprecedent*. Over the following six months, more than one hundred judges would rely on Chief Justice Roberts's opinion in cases that spanned the entire spectrum of constitutional and statutory challenges to pandemic policies.

In Phase 3, the Roberts Court doubled-down on *South Bay*. A new challenge from Nevada, *Calvary Chapel Dayton Valley Church v.*

17. 140 S. Ct. 1613 (2020) (mem.).
18. *Id.* at 1613 (Roberts, C.J., concurring in denial of application for injunctive relief).
19. *Id.* at 1613–14.
20. *Id.* at 1613.
21. *Id.* at 1614–15.

Sisolak,[22] upheld strict limits on houses of worship. Yet the Silver State permitted casinos to open without hard numerical caps.[23] Here, Chief Justice Roberts did not explain his reasoning. Once again, the Court split 5-4. Justice Alito's dissent hewed to the Court's doctrine, including *Employment Division v. Smith*.[24] Justice Kavanaugh wrote a separate dissent. He extended the Court's doctrine, and treated the Free Exercise of Religion as a "most-favored" right.[25] Under this approach, the government has the burden to show why it designated religious worship as "non-essential." If the state cannot articulate a sufficient rationale, then the religious worship must be given the same "essential" status as other related economic privileges. Justice Kavanaugh concluded that the free exercise of religion should be presumptively "essential," unless the state can rebut that presumption. *South Bay* and *Calvary Chapel* would remain the law of the land through November 2020.

Phase 4 began when Justice Ruth Bader Ginsburg was replaced by Justice Amy Coney Barrett. The new Roberts Court would turn the tide on COVID-19 cases in *Roman Catholic Diocese of Brooklyn v. Cuomo*.[26] Here, a new 5-4 majority enjoined New York's "cluster initiatives," which limited houses of worship in so-called "red" zones to ten parishioners at a time. The Court found that New York's directives treated houses of worship worse than they treated comparable secular businesses. The majority reasoned that the policy was not neutral toward religion, and must be reviewed with strict scrutiny.[27] Finally, the per curiam opinion found that New York's regime was far more restrictive than the policies upheld in Nevada and California. Now, Chief Justice Roberts dissented. He suggested that the strict limits on worship may be unconstitutional. But he would not have issued an injunction because the applicants were

22. 140 S. Ct. 2603 (2020) (mem.).

23. *Id.* at 2604.

24. 494 U.S. 872 (1990).

25. *Calvary Chapel*, 140 S. Ct. at 2612–13 (Kavanaugh, J., dissenting from denial of application for injunctive relief).

26. 141 S. Ct. 63 (2020) (per curiam).

27. *Id.* at 67.

no longer subject to the hard numerical caps.[28] *Roman Catholic Diocese* effectively interred the *South Bay superprecedent*.

Phase 5 arose in the wake of *Roman Catholic Diocese*. Over the course of five months, the Court consistently ruled in favor of the free exercise of religion. *South Bay II* and *Harvest Rock II* enjoined California's prohibitions on indoor worship. And *Tandon v. Newsom* recognized the right of people to worship privately in their homes. With this last case, the Court formally adopted Justice Kavanaugh's "most-favored" right framework. After *Tandon*, California finally lifted all "location and capacity" limits on places of worship.

We are now in the midst of Phase 6. The pandemic is waning, and soon the separation of powers will be restored. States are beginning to recognize that absolute executive authority cannot go unchecked during ongoing health crises. New York and other states have begun to impose limitations on gubernatorial power. Going forward, states should place substantive limits on how long emergency orders can last, and establish the protocols to revoke those orders.

The COVID-19 pandemic will hopefully soon draw to a close. But the precedents set during this period will endure.

I. PHASE 1: THE CIRCUITS SPLIT IN THE EARLY DAYS OF THE PANDEMIC

During the early days of the pandemic, governors drew bright lines between "essential" and "non-essential" gatherings. The former were permitted with few, if any limitations. The latter were heavily restricted and in some cases prohibited. Were religious gatherings "essential" or "non-essential"? Different states drew different lines. In several states, houses of worship were subjected to strict occupancy limits. Were these restrictions consistent with the Free Exercise Clause? The Supreme Court's precedents did not provide a clear answer. Or more precisely, the Court's precedents did not clarify which questions courts should even ask. Courts can frame the question presented in two different fashions. First,

28. *Id.* at 75 (Roberts, C.J., dissenting).

should courts compare the restrictions on houses of worship to restrictions imposed on *comparable* secular activities? Or second, should courts compare the restrictions on houses of worship to restrictions imposed on *any* secular activity? Initially, the Seventh Circuit followed the first test. And the Sixth Circuit followed the second test.

A. Prohibitions on "Non-Essential" Activities During "Marpril" 2020

The COVID-19 pandemic was new. But governors had longstanding authority to impose public health measures that control the spread of disease. For example, Connecticut law authorizes the state's governor to "order into quarantine or isolation, as appropriate, any individual, group of individuals or individuals present within a geographic area whom the commissioner [of public health] has reasonable grounds to believe to be infected with, or exposed to, a communicable disease."[29] And in 2014, the Connecticut governor authorized the health commissioner "to direct the isolation or quarantine of individuals whom she 'reasonably believe[d] to have been exposed to, infected with, or otherwise at risk of passing the Ebola virus.'"[30]

These delegations of authority were not limited to quarantine and isolations of people infected by communicable diseases. New York law authorizes the governor to issue any directive "necessary to cope with [a state] disaster [emergency]."[31] With this power, the governor can "temporarily suspend specific provisions of any statute, local law, ordinance, or orders, rules or regulations, or parts thereof, of any agency."[32] Moreover, the legislature does not need to affirmatively approve the governor's actions. Rather, the legislature must vote to halt a directive "by concurrent resolution."[33] The emergency directives sunset after thirty days, "but the Governor

29. CONN. GEN. STAT. § 19a-131b (2012).
30. Liberian Cmty. Ass'n of Conn. v. Lamont, 970 F.3d 174, 180 (2d Cir. 2020).
31. N.Y. EXEC. LAW § 29-a (2020).
32. *Id.*
33. *Id.*

may renew them an unlimited number of times."[34]

Historically, governors have "exercised this emergency authority in a limited and localized manner, most often in response to natural disasters such as severe storms or flooding."[35] But the COVID-19 pandemic radically altered how emergency directives have been used. Specifically, governors relied on emergency powers to regulate every facet of human interaction. And they did so under an unfamiliar rubric. Gatherings deemed "essential" could continue, perhaps with restrictions. But "non-essential" gatherings were prohibited, or perhaps permissible with stricter limits. The full scope of these emergency orders is beyond the scope of this Article.[36] Here, I will discuss restrictions on religious assembly, most of which were imposed in late March and early April of 2020. Satirist Dave Barry merged these interminable months as "Marpril."[37]

During this period, some states expressly exempted religious worship from their general prohibitions on gatherings. Alabama prohibited "all non-work related gatherings of any size, including drive-in gatherings, that cannot maintain a consistent six-foot distance between persons from different households."[38] However, "[o]rganizers of religious gatherings [were] strongly encouraged" to follow certain guidelines—encouraged, but not required, to comply.[39] Arkansas excluded places of worship from the lockdown order, and only "strongly encouraged [them] to continue to offer

34. Agudath Israel of Am. v. Cuomo, 983 F.3d 620, 625 (2d Cir. 2020).

35. *Id.*

36. Elsewhere, I have written about orders that affect the right to keep and bear arms. *See* Josh Blackman, *The "Essential" Second Amendment*, 26 TEX. REV. L. & POL. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3827441 [https://perma.cc/4S8W-ZQ9P].

37. *See* Dave Barry, *Dave Barry's Year in Review 2020*, WASH. POST (Dec. 27, 2020), https://www.washingtonpost.com/magazine/2020/12/27/dave-barrys-year-review-2020/ [https://perma.cc/NDA8-7N47].

38. Scott Harris, State Health Officer, Ala. Dep't of Pub. Health, Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by Covid-19 (May 21, 2020), https://www.alabamapublichealth.gov/legal/assets/order-adph-cov-gatherings-052120.pdf [https://perma.cc/LW7K-PHJW].

39. *Id.*

online platforms for participation in worship."[40] Colorado generally "limit[ed] gatherings of individuals to no more than (10) people to slow the spread of the COVID-19 virus."[41] However, houses of worship were deemed "critical businesses" that "may remain open."[42] Colorado "encouraged" houses of worship to limit attendance under ten people. In North Carolina, "Executive Order 138 . . . require[d] that all worship services involving more than 10 people must be held 'outdoors unless *impossible*' to hold outdoors."[43] This prohibition seemed to have a very large loophole.

Texas designated "religious services conducted in churches, congregations, and houses of worship" as essential services that could remain open without restrictions.[44] The Texas Attorney General concluded that "[l]ocal governments may not order houses of worship to close."[45] Justice Blacklock of the Texas Supreme Court, joined by three others, observed, "[i]n some parts of the country, churches have been closed by government decree, although Texas is a welcome exception."[46] In December 2020, Ohio enacted a statute that "prohibit[ted] a public official from ordering the closure of all places of worship."[47]

Some states expressly excluded religious worship from "essential" gatherings. The governor of Kentucky, for example, permitted "'normal operations at airports, bus and train

40. *COVID-19 Guidance for Places of Worship*, ARK. DEP'T OF HEALTH (May 4, 2020), https://www.healthy.arkansas.gov/programs-services/topics/covid-19-guidance-for-faith-based-organizations [https://perma.cc/EM8X-NT4A].

41. Lawrence v. Colorado, 455 F. Supp. 3d 1063, 1068 (D. Colo. 2020).

42. *Id.* at n. 12 (quoting PHO 20-24 at 8 (as amended Mar. 26, 2020), https://bit.ly/3i9LkKD [https://perma.cc/2NBR-XQMD]).

43. Berean Baptist Church v. Cooper, 460 F. Supp. 3d 651, 653 (E.D.N.C. 2020).

44. Tex. Executive Order No. GA-18 (Apr. 27, 2020), https://gov.texas.gov/uploads/files/press/EO-GA-18_expanded_reopening_of_services_COVID-19.pdf/ [https://perma.cc/Y9J7-R6JU].

45. Office of the Att'y Gen., *Guidance for Houses of Worship During the COVID-19 Crisis* (Apr. 21, 2020), https://bit.ly/342wq3Y [https://perma.cc/7FDM-XEX2].

46. *In Re* Salon A La Mode, No. 20-0340, 2020 WL 2125844, at *1 (Tex. May 5, 2020) (Blacklock, J., concurring in the denial of the petition for writ of mandamus).

47. H.B. 272, 133rd Gen. Assemb., Reg. Sess. (Oh. 2019–20), https://legiscan.com/OH/text/HB272/2019/ [https://perma.cc/WP2D-A8HL].

stations, . . . shopping malls and centers,' and 'typical office environments, factories, or retail or grocery stores where large numbers of people are present, but maintain appropriate social distancing.'"[48] But he prohibited "'[a]ll mass gatherings,' 'including, but not limited to, community, civic, public, leisure, *faith-based*, or sporting events.'"[49] The governor also permitted "life-sustaining" organizations to remain open.[50] (Here, "life-sustaining" seems to have the same meaning as *essential*.) "Laundromats, accounting services, law firms, hardware stores, and many other entities count as life-sustaining."[51] However, "religious organizations are not 'life-sustaining' organizations, except when they function as charities by providing 'food, shelter, and social services.'"[52]

Other states imposed specific limitations on religious worship that were not imposed on *essential* secular businesses. Connecticut placed a "49-person limit on religious, spiritual and worship gatherings."[53] In June 2020, that limit was "raised to 25 percent of capacity of the indoor space or a maximum of 100 people, whichever is smaller, and to 150 people for outdoor gatherings, provided in each case that appropriate safety and social distancing measures shall be employed."[54] Delaware required "[h]ouses of worship and other places of religious expression or fellowship [to] comply with all social distancing requirements set forth in" the state's general guidelines for other gatherings.[55] Those rules prohibited "attendance

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

49. *Id.* (emphasis added).

50. *Id.*

51. *Id.*

52. *Id.*

53. Conn. Exec. Order No. 7TT (Mar. 29, 2020), https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7TT.pdf?la=en [https://perma.cc/M84X-ZGAT].

54. *I Am Planning to Hold/Attend a Large Event in the Next Few Weeks. Am I Still Allowed to do This?*, CONN. STATE: CONN. COVID-19 RESPONSE (June 9, 2020), https://portal.ct.gov/Coronavirus/Covid-19-Knowledge-Base/Social-Events [https://perma.cc/E7XZ-MAMG].

55. Declaration, John C. Carney, Gov. of Delaware, A State of Emergency for the State of Delaware Due to a Public Health Threat (Apr. 6, 2020), https://governor.delaware.gov/health-soe/tenth-state-of-emergency/ [https://perma.cc/SR6K-SAKU].

of . . . more than 10 people for in-person services under any circumstances."[56]

Illinois "limit[ed] the size of public assemblies (including religious services) to ten persons."[57] "Religious services, too, [were] deemed 'essential,' . . . but they [were] not . . . exempted from the size limit."[58] In Maine, "Executive Order 14 stat[ed] that '[g]atherings of more than 10 people are prohibited throughout the State,'" and declared that such a prohibition was mainly aimed at "social, personal, and discretionary events, including those gatherings that are 'faith-based.'"[59]

Massachusetts ordered that "[a]ll businesses and other organizations that do not provide COVID-19 Essential Services shall close their physical workplaces and facilities ('brick-and-mortar premises') to workers, customers and the public."[60] However, the governor created a carveout for "[c]hurches, temples, mosques, and other places of worship."[61] These houses of worship would "not be required to close their brick and mortar premises to workers or the public; provided, however, that such institutions shall be required to comply with all limitations on gatherings."[62] Specifically, no "more than 10 persons [could gather] in any confined indoor or outdoor space."[63] There was no numerical limit on gathering "in an unenclosed, outdoor space."[64] These restrictions would "not apply to the operations or activities of any business or organization in its provision or delivery of COVID-19 Essential Services."[65] These

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56. *Id.*

57. Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341, 342 (7th Cir. 2020).

58. *Id.* at 343 (quoting 44 Ill. Reg. 8415 (Apr. 30, 2020), https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-32.aspx [https://perma.cc/LM6A-KZP8]).

59. Calvary Chapel of Bangor v. Mills, 459 F. Supp. 3d 273, 278–79 (D. Me. 2020).

60. Mass. Exec. Order No. 13 (Mar. 24, 2020), https://www.mass.gov/doc/march-23-2020-essential-services-and-revised-gatherings-order/download/ [https://perma.cc/A4V7-QWVP].

61. *Id.* at 2.

62. *Id.*

63. *Id.* at 3.

64. *Id.*

65. *Id.*

businesses could pack in far more than ten people.

Oregon permitted certain retail establishments to open without limitations.[66] For example, "art galleries, boutiques, furniture stores, and jewelry shops" could remain open.[67] However, "[a]ll cultural, civic, and faith-based gatherings of more than 25 people [were still] prohibited."[68] The Edgewater Christian Fellowship challenged the policy in court.[69] Two weeks later, the Oregon governor issued revised guidance. Churches could now open with up to 250 people, so long as they could maintain social distancing.[70]

Nevada "limit[ed] indoor worship services to 'no more than fifty persons.' Meanwhile, the directive cap[ped] a variety of secular gatherings at 50% of their operating capacity, meaning that they are welcome to exceed, and in some cases far exceed, the 50-person limit imposed on places of worship."[71] (*Calvary Chapel Dayton Valley v. Sisolak*, discussed *infra*, upheld those restrictions.)

In Virginia, "'[a]ll public and private in-person gatherings of more than ten individuals are prohibited. This [restriction] includes parties, celebrations, *religious*, or other social events, whether they occur indoor or outdoor."[72] However, "[t]his restriction does not apply . . . [t]o the operation of businesses not required to close to the public."[73]

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66. Or. Exec. Order No. 20-25 (May 14, 2020), https://www.oregon.gov/gov/admin/Pages/eo_20-25.aspx [https://perma.cc/2YT7-52QC].

67. *Id.*

68. *Id.*

69. *See* Plaintiffs' Verified Complaint, Edgewater Christian Fellowship v. Brown, No. 6:20-cv-00831 (D. Or. May 26, 2020), https://www.adflegal.org/sites/default/files/2020-05/Edgewater%20Christian%20Fellowship%20v.%20Brown%20-%20Complaint.pdf [https://perma.cc/F76M-78PF].

70. Donald Orr, *FAQ: What To Expect For Phase 2 Of Oregon's Reopening Plan*, OPB (Jun. 5, 2020), https://www.opb.org/news/article/oregon-reopen-phase-2-faq/ [https://perma.cc/MV5M-ZNVX].

71. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2604 (2020) (Alito, J., dissenting) (mem.) (quoting Directive 21, http://gov.nv.gov/News/Emergency_Orders/2020/2020-05-28_-_COVID-19_Declaration_of_Emergency_Directive_021_-_Phase_Two_Reopening_Plan_(Attachments) [https://perma.cc/QU74-6M7Z]).

72. Lighthouse Fellowship Church v. Northam, 458 F. Supp. 3d 418, 426 (E.D. Va. 2020) (emphasis added).

73. *Id.*

In March, California "designate[d] '[f]aith based services that are provided through streaming or other technology" as an essential part of the 'Other Community-Based Government Operations and Essential Functions' . . . The list otherwise makes no mention of faith, churches, religion, religious workers, Christianity, worship, or prayer."[74] Later, California "limit[ed] attendance at places of worship to 25% of building capacity or a maximum of 100 attendees."[75] And later still, California would prohibit all indoor religious worship.[76]

Many of these restrictions were challenged as violations of the Free Exercise Clause of the First Amendment. At first, the circuits split about how to assess the validity of these measures.[77] Were these measures neutral, because houses of worship were treated similarly to comparable forms of public gatherings, like concerts? Or were these measures not neutral, because houses of worship were treated dissimilarly from non-analogous forms of public gatherings, such as restaurants? The Supreme Court's Free Exercise Clause jurisprudence did not provide a ready answer to this question.

B. COVID-19 restrictions on houses of worship did not neatly fit into the Court's Free Exercise Clause jurisprudence

The Supreme Court's Free Exercise Clause jurisprudence was not prepared for COVID-19. None of the leading precedents neatly mapped onto the novel pandemic restrictions. First, as a threshold matter, the governors did not prohibit a specific religious practice. For example, in *Employment Division v. Smith*,[78] the state generally banned the use of certain controlled substances.[79] The prohibition made it illegal for members of the Native American Church to use

74. Cross Culture Christian Ctr. v. Newsom, 445 F. Supp. 3d 758, 764 (E.D. Cal. 2020).

75. S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (mem.).

76. *Infra* Part IV.I.

77. *See infra* Part I.C (discussing the early circuit splits).

78. 494 U.S. 872 (1990).

79. OR. REV. STAT. § 475.992(4) (1987).

peyote as a sacrament.[80] During the pandemic, governors did not attempt to impose specific restrictions on how people worship. There were no bans on singing, chanting, drinking from a chalice, receiving communion, or laying of hands. Rather, the specific act that was prohibited was not specifically religious: people could not assemble in large numbers.[81] But, by prohibiting people from assembling, the state was, in effect, prohibiting all religious practice that must be performed together. In this fashion, the state was able to stop people from singing, chanting, drinking from a chalice, receiving communion, and laying of hands, by preventing them from assembling in the first instance. Here, the states exercised the power to impose a broad, neutral ban on assembly. And these prohibitions, in effect, gave the state the lesser power to impose non-neutral bans on religious practice.

Second, with one important exception,[82] governors did not target specific faiths for disparate treatment. In *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*,[83] the government banned animal sacrifice, an important ritual of the Santeria faith.[84] But the government "exempt[ed] kosher slaughter," which was performed in accordance with Jewish dietary laws.[85] During the pandemic, however, all faiths were treated the same in almost all cases: Christians, Jews, Muslims, Hindus, and others were subject to identical limitations on assembly.

Third, states did not condition the receipt of benefits on compelling people to engage in activity that was forbidden by their

80. *Smith*, 494 U.S. at 885 (1990) ("The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'" (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n., 485 U.S. 439, 451 (1988))).

81. *See supra* Part I.A (discussing prohibitions by various state authorities on gatherings, including for religious services).

82. *See infra* Part IV.G (discussing Governor Cuomo's targeting of Orthodox Jewish synagogues).

83. 508 U.S. 520 (1993).

84. *Id.* at 534 ("There are further respects in which the text of the city council's enactments discloses the improper attempt to target Santeria.").

85. *Id.* at 536.

religion. In *Sherbert v. Verner*,[86] the government put "pressure upon [Sherbert] to forego" observing the Sabbath on Saturday, so she could receive unemployment benefits.[87] This pressure, the Court held, clashed with the Free Exercise Clause.[88] But during the pandemic, the states did not provide any benefits to religious groups that followed certain rules.

Fourth, the governors did not compel people to engage in an activity that was prohibited by their faith. In *United States v. Lee*,[89] an Amish person argued that the "imposition of the social security taxes violated his First Amendment free exercise rights and those of his Amish employees."[90] The Court upheld the mandate: "The tax imposed on employers to support the social security system must be uniformly applicable to all, except as Congress provides explicitly otherwise."[91] During the pandemic, governors did not force anyone to take actions in conflict with their faith.

None of these precedents speak to the novel restrictions imposed on the free exercise of religion during the pandemic: houses of worship were placed under strict attendance requirements, or were completely shut down, for months on end. During a keynote address to the Federalist Society, Justice Alito observed that "the pandemic has resulted in previously unimaginable restrictions on individual liberty."[92] He added, "we have never before seen restrictions as severe, extensive and prolonged as those experienced, for most of 2020."[93] I agree. The sorts of restrictions imposed during Marpril 2020 were unprecedented. And these novel measures cannot be pigeonholed into the facts at issue in *Smith*, *Lukumi*, *Sherbert*, and *Lee*.

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86. 374 U.S. 398 (1963).

87. *Id.* at 404.

88. *Id.* at 406.

89. 455 U.S. 252 (1982).

90. *Id.* at 255.

91. *Id.* at 261.

92. Justice Alito, Keynote Address to the 2020 Federalist Society National Lawyers Convention (Nov. 12, 2020) (transcript available at Josh Blackman, *Video and Transcript of Justice Alito's Keynote Address to the Federalist Society*, REASON: VOLOKH CONSPIRACY (Nov. 12, 2020), https://reason.com/volokh/2020/11/12/video-and-transcript-of-justice-alitos-keynote-address-to-the-federalist-society/ [https://perma.cc/SHL3-HBCG]).

93. *Id.*

Moreover, none of these cases answer the legal question of how to compare the treatment of religion with the treatment of secular activities. Indeed, *Lukumi* declined to "define with precision the standard used to evaluate whether a prohibition is of general application."[94]

Courts can frame the question presented in two different fashions. First, should courts compare the restrictions on houses of worship to restrictions imposed on *comparable* secular activities? Or second, should courts compare the restrictions on houses of worship to restrictions imposed on *any* secular activity? Under the former test, so long as houses of worship are treated similarly to *some* non-religious gatherings, the policy is generally applicable. Under the latter test, if a house of worship is treated worse than any non-religious gathering, then the policy is not generally applicable. What is the correct denominator: *comparable* secular activities or *all* secular activities? The Supreme Court's precedents prior to 2020 do not say.

In the early days of the COVID-19 pandemic, the circuits split about which test to adopt. The Seventh Circuit followed the first test. And the Sixth Circuit followed the second test.

C. Sixth Circuit: Maryville Baptist Church v. Beshear

Shortly after the pandemic began, the Kentucky governor prohibited "[a]ll mass gatherings," including "community, civic, public, leisure, *faith-based*, or sporting events."[95] However, the governor exempted from the closure "normal operations at airports, bus and train stations, . . . [and] shopping malls and centers." He also permitted normal operations at "typical office environments, factories, or retail or grocery stores where large numbers of people are present, but maintain appropriate social distancing."[96] However, the governor ordered all religious organizations to close because they were not "life-sustaining."[97] Yet those same religious organizations

94. Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 543 (1993).

95. Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610, 611 (6th Cir. 2020) (alteration in original) (emphasis added).

96. *Id.* (omission in original).

97. *Id.*

could remain open to provide "food, shelter, and social services."[98] In other words, churches could operate soup kitchens and shelters for the homeless, but could not provide food and fellowship for worshippers.

On Easter Sunday, the Maryville Baptist Church in Kentucky held a drive-in service. "Congregants parked their cars in the church's parking lot and listened to a sermon over a loudspeaker."[99] The police "issued notices to the congregants that their attendance at the drive-in service amounted to a criminal act."[100] The church challenged the governor's orders as a violation of the Free Exercise Clause. (The church also brought suit under the Kentucky Religious Freedom Restoration Act;[101] I will not consider their statutory claim).

On appeal, the Sixth Circuit found that the governor's order violated the Free Exercise Clause.[102] The per curiam opinion focused on the fact that "worship services" were not included in the "definition" of "'life-sustaining' operations."[103] (Here, "life-sustaining" should be read as synonymous with "essential.") However, many "secular activities" were deemed "life-sustaining," even though they "pose *comparable* public health risks to worship services."[104] For example, the governor deemed as "'life-sustaining' . . . law firms, laundromats, liquor stores, and gun shops."[105] (Kentucky law required the governor to treat firearm stores as "life-sustaining.")[106] "But the orders [did] not permit soul-sustaining group services of faith organizations, even if the groups adhere to all the public

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 612.

102. *Id.* at 614 ("The Governor's orders also likely 'prohibit[ ] the free exercise' of 'religion' in violation of the First and Fourteenth Amendments, especially with respect to drive-in services.").

103. *Id.*

104. *Id.* (emphasis added).

105. *Id.*

106. KY. REV. STAT. ANN. § 39A.100(3) (West 2020) (prohibiting the Governor from "impos[ing] additional restrictions on the lawful possession, transfer, sale, transport, carrying, storage, display, or use of firearms and ammunition" during an emergency).

health guidelines required of essential services and even when they meet outdoors."[107] The Court drew a series of parallels between the secular gatherings that were permitted, and the religious gatherings that were prohibited:

> Assuming all of the same precautions are taken, why is it safe to wait in a car for a liquor store to open but dangerous to wait in a car to hear morning prayers? Why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister?[108]

Some parishioners may "use Zoom services or the like."[109] But not "every member of the congregation must see it as an adequate substitute."[110]

In a related opinion, *Roberts v. Neace*,[111] the Sixth Circuit observed, "[t]he Governor has offered no good reason for refusing to trust the congregants who promise to use care in worship in just the same way it trusts accountants, lawyers, and laundromat workers to do the same."[112] The Court added that the governor could not "assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings."[113] This disparate treatment suggests that the governor may have been motivated by animus: "[A]t some point a proliferation of unexplained exceptions turns a generally applicable law into a discriminatory one."[114]

Finally, the panel in *Maryville Baptist Church* disputed the government's rationale, as the "[r]isks of contagion turn on social interaction in close quarters."[115] The coronavirus "does not care" whether

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107. *Maryville Baptist Church*, 957 F.3d at 614.
108. *Id.* at 615.
109. *Id.*
110. *Id.*
111. 958 F.3d 409 (6th Cir. 2020).
112. *Id.* at 414.
113. *Id.*
114. *Id.*
115. *Maryville Baptist Church*, 957 F.3d at 615.

people are at church, Chick-fil-A,[116] or Costco.[117] The court asked why "the orders permit people who practice social distancing and good hygiene in one place but not another?"[118] If there were concerns about the spread of the virus in churches, "there is a straightforward remedy: limit the number of people who can attend a service at one time."[119]

The Sixth Circuit recognized that the governor could presumptively treat houses of worship as "non-essential," but the church could rebut that presumption by pointing out inconsistencies in the policies.[120] In this case, "[t]he way the orders treat comparable religious and non-religious activities suggests that they do not amount to the least restrictive way of regulating the churches."[121] Here, the court looked to "comparable activities."[122] And the numerous exceptions to the policies suggest the governor may have been

116. At a Chick-fil-A in Texas, fifteen employees tested positive for COVID-19. Eleanor Skelton et al., *11 More Beaumont Chick-Fil-A Employees Tested Positive for COVID-19, Bringing Total to 15*, 12 NEWS NOW (Apr. 25, 2020, 12:11 AM), https://www.12newsnow.com/article/news/health/coronavirus/11-more-beaumont-chick-fil-a-employees-tested-positive-for-covid-19-bringing-total-to-15/502-cb97bed8-dffb-4d2b-b862-ad43328ce0b2 [https://perma.cc/KS8P-NZA3].

117. At a Costco in Yakima, Washington, 145 employees tested were likely infected with COVID-19 by a "superspreader event" in the store. *145 employees infected in COVID outbreak at Yakima Co. Costco store*, KOMO NEWS (Dec. 30, 2020), https://komonews.com/news/local/145-workers-infected-in-covid-outbreak-at-yakima-co-costco-store [https://perma.cc/SUK9-VKPJ].

118. *Maryville Baptist Church*, 957 F.3d at 615; *see also Neace*, 958 F.3d at 415 ("There are plenty of less restrictive ways to address these public-health issues. Why not insist that the congregants adhere to social-distancing and other health requirements and leave it at that—just as the Governor has done for comparable secular activities? Or perhaps cap the number of congregants coming together at one time? If the Commonwealth trusts its people to innovate around a crisis in their professional lives, surely it can trust the same people to do the same things in the exercise of their faith. The orders permit uninterrupted functioning of 'typical office environments,' which presumably includes business meetings. How are in-person meetings with social distancing any different from in-person church services with social distancing? Permitting one but not the other hardly counts as no-more-than-necessary lawmaking.").

119. *Maryville Baptist Church*, 957 F.3d at 615.

120. *Id.* at 613.

121. *Id.*

122. *Id.* at 614 ("And many of the serial exemptions for secular activities pose comparable public health risks to worship services.").

motivated by animus toward religion. But, under the Sixth Circuit's rule, a more narrowly tailored order with fewer exceptions could pass constitutional muster.[123] The Kentucky governor blundered by creating so many blatant exemptions to his policy.

The Sixth Circuit assumed that a house of worship was "comparable" to a liquor or grocery store. Yet the panel did not explain why those activities were in fact comparable. What are the similarities between a liquor store and a church? People enter a building to obtain wine? The similarities are thin. Rather, the panel considered whether the risks those activities posed were comparable. In both buildings, people can congregate in close proximity to spread the disease. Still, people tend to spend more time in a church than in a liquor store. Restaurants present a closer comparison—people sit together for extended periods, often unmasked. I think the Sixth Circuit analysis did not really turn on how "comparable activities" were treated. In fact, the Sixth Circuit found a Free Exercise violation when a house of worship was treated dissimilarly from any secular activity. The Court did not require any meaningful degree of fit between the house of worship and the secular activity. Nothing in *Smith* or *Lukumi* dictates the requisite level of fit. Therefore, the Sixth Circuit's decision was entirely consistent with Supreme Court precedent. But the panel's core analysis was largely unexplained. In contrast, the Seventh Circuit refused to compare houses of worship to "essential" services that provide food, shelter, and other necessities.[124] That court required a very close fit between the house of worship and the secular activity. We will consider that precedent next.

D. Seventh Circuit: Elim Romanian Pentecostal Church v. Pritzker I

In Illinois, "essential businesses and operations" could open

123. *Id.* at 613 ("The likelihood-of-success inquiry instead turns on whether Governor Beshear's orders were 'the least restrictive means' of achieving these public health interests . . . All in all, the Governor did not narrowly tailor the order's impact on religious exercise.").

124. Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341, 343 (7th Cir. 2020).

without numerical limits.[125] And "religious . . . nonprofit organizations" were deemed "essential" "when providing food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise needy individuals."[126] The governor's order also designated "engag[ing] in the free exercise of religion" as an "essential activity."[127] But religious worship was limited to a ten person hard cap, regardless of the size of the church.[128] Somewhat paradoxically, "religious services" were deemed "essential" activities" for which people could assemble.[129] But the religious services were not exempted from the size limit, as were other essential businesses and operations.[130] Still, people could assemble at houses of worship, without limits, to feed the poor.[131] Churches could serve bread to a room full of unmasked homeless people, but could not give communion to eleven parishioners.[132]

Two churches challenged the order. They contended "that a limit of ten persons effectively forecloses their in-person religious services."[133] The churches rejected alternate approaches. For example, they did not find it an adequate substitute to "hold multiple ten-person services every week."[134] The churches also rejected "the Governor's proposed alternatives—services over the Internet or in parking lots while worshipers remain in cars."[135] The churches argued that in-person fellowship was an essential element of their faith.

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125. Ill. Exec. Order No. 2020-32 (Apr. 30, 2020), https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-32.aspx [https://perma.cc/AB5U-7YK5].

126. *Elim Romanian*, 962 F.3d at 343.

127. Ill. Exec. Order No. 2020-32, *supra* note 125, at 2(5)(vi).

128. *See Elim Romanian*, 962 F.3d at 342.

129. *Id.* at 343.

130. *See id.*

131. *See id.*

132. *See id.* ("The churches are particularly *put out* that their members may assemble to feed the poor but not to celebrate their faith." (emphasis added)).

133. *Id.* at 342–43.

134. *Id.* at 343.

135. *Id.*; *see* Ill. Exec. Order No. 2020-32, *supra* note 125, at 2(5)(vi) ("Religious organizations and houses of worship are encouraged to use online or drive-in services to protect the health and safety of their congregants.").

The district court ruled against the churches.[136] And the Seventh Circuit denied the churches' motion for an injunction pending appeal.[137] Here, the Seventh Circuit undertook the analysis that the Sixth Circuit did not: were houses of worship in fact "comparable" to other gatherings that were subject to less stringent requirements? The panel explained:

> The Executive Order's temporary numerical restrictions on public gatherings apply not only to worship services but also to the most *comparable* types of secular gatherings, such as concerts, lectures, theatrical performances, or choir practices, in which groups of people gather together for extended periods, especially where speech and singing feature prominently and raise risks of transmitting the COVID-19 virus.[138]

The panel continued, "[w]orship services do not seem *comparable* to secular activities permitted under the Executive Order, such as shopping, in which people do not congregate or remain for extended periods."[139] Critics can quibble with the degree of fit between houses of worship and grocery stores. But the Seventh Circuit tried to draw a line between comparable and non-comparable activities. Yet nothing in the Supreme Court's precedents explain whether activities had to be comparable at all.

Further, the Seventh Circuit seemed to praise the governor for allowing "religious services" to proceed at all, while "concerts [were] forbidden."[140] The Court seems to suggest that the state could have shut down all houses of worship, like it shut down all concerts. This policy was not an act of magnanimity. Closing all churches, synagogues, and mosques would have run afoul of the First Amendment, regardless of the pandemic. No state in the United States had

136. *See Elim Romanian*, 962 F.3d at 341.
137. *See id.* at 347.
138. *Id.* at 344 (emphasis added).
139. *Id.* (emphasis added).
140. *Id.* at 343.

attempted such a measure.[141] At least until California banned all indoor worship, and permitted only *outdoor* worship.[142] The Seventh Circuit's ruling, however, was only temporary. Two weeks later, the Supreme Court would set the nationwide standard in *South Bay Pentecostal Church v. Newsom*.

II. PHASE 2: CHIEF JUSTICE ROBERTS'S *SOUTH BAY* STANDARD

The second phase of COVID litigation began late in the evening on Friday, May 29, 2020. The Supreme Court sharply divided 5-4 in *South Bay Pentecostal Church v. Newsom*.[143] This per curiam opinion upheld California's restrictions on houses of worship. The majority did not explain its reasoning. But Chief Justice Roberts wrote what would prove to be a very influential concurring opinion. He articulated what I will refer to as the *comparator* approach. This framework assesses whether houses of worship were treated similarly to "comparable" non-essential institutions. Critically, the state can presumptively define what is "essential" and what is "non-essential." Chief Justice Roberts determined that houses of worship were treated similarly to "comparable secular gatherings," and were treated better than "dissimilar activities."[144] Justice Kavanaugh wrote a dissent, which was joined by Justices Thomas and Gorsuch.[145] Justice Kavanaugh accepted the general premise of the

141. A viral video reveals that this sort of regime was employed in Italy. *See* La Repubblica, *Coronavirus, il prete non interrompe la messa all'arrivo dei carabinieri: "È abuso di potere"*, YOUTUBE (Apr. 20, 2020), https://www.youtube.com/watch?v=Zyu9l3vAsIc [https://perma.cc/5S7M-3Q6Y]. A police officer interrupts a Mass, and tells the priest to stop the service, and disperse his parishioners. At the time, there were fourteen people, who were spaced out in a huge church. The government had planned to re-open certain businesses, including museums, but not churches. The dialogue is in Italian, but you can follow along. The priest tells the officer, "All right, I'll pay the fine, or whatever there is to pay." The officer says people can watch the live-stream. The priest replies that his parishioners cannot receive communion online. *See* Marc O. DeGirolami, *Temperatures Rising Quickly*, L. & RELIGION F. (Apr. 29, 2020), https://lawandreligionforum.org/2020/04/29/temperatures-rising-quickly/ [https://perma.cc/AA67-LYH7].

142. *See infra* Part IV.I.

143. 140 S. Ct. 1613 (2020) (mem.).

144. *Id.* at 1613 (Roberts, C.J., concurring in denial of application for injunctive relief).

145. *Id.* at 1614.

comparator approach, but he concluded that houses of worship were in fact treated worse than certain comparable gatherings.[146] In the wake of *South Bay*, Chief Justice Roberts's opinion would became a *superprecedent*. Over the following six months, more than one hundred cases relied on Chief Justice Roberts's opinion in cases that statutory and constitutional challenges to COVID-19 regulations.

A. South Bay United Pentecostal Church v. Newsom

The California governor "place[d] temporary numerical restrictions on public gatherings to address" the COVID-19 pandemic.[147] Subsequently, the state "limit[ed] attendance at places of worship to 25% of building capacity or a maximum of 100 attendees."[148] The South Bay Pentecostal Church challenged the constitutionality of these measures. The lower courts upheld the governor's orders.[149] On appeal, the church sought an injunction from the Supreme Court. On May 29, 2020, late on Friday evening, the Court split 5-4.[150] *South Bay United Pentecostal Church v. Newsom*, an unsigned, per curiam opinion denied the injunction.

Chief Justice Roberts wrote what would become an influential concurring opinion. He found that the "restrictions on places of worship . . . appear consistent with the Free Exercise Clause of the First Amendment."[151] He followed the same reasoning that the Seventh Circuit followed. Yet his analysis spanned only two sentences. First, Chief Justice Roberts found that "[s]imilar or more severe restrictions apply to *comparable* secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time."[152] Second, Chief Justice Roberts

146. *Id.* at 1615 (Kavanaugh, J., dissenting from denial of application for injunctive relief).

147. *Id.* at 1613 (Roberts, C.J., concurring in denial of application for injunctive relief).

148. *Id.*

149. *See* S. Bay United Pentecostal Church v. Newsom, 959 F.3d 938, 941 (9th Cir. 2020) (per curiam).

150. 140 S. Ct. at 1613 (mem.).

151. *Id.*

152. *Id.* (emphasis added).

observed that "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."[153] In short, church worship is treated similarly to "comparable secular gatherings," but is treated differently from secular "dissimilar activities." Chief Justice Roberts did not engage any of the Court's Free Exercise jurisprudence such as *Smith* or *Lukumi*.

Under Chief Justice Roberts's *comparator* approach, in theory at least, the challengers could rebut the presumption that houses of worship can be deemed "non-essential." But Chief Justice Roberts did not entertain any of the Church's arguments. Rather, the final portion of his analysis urged deference in the unique posture of this case. The Supreme Court should not intervene, he wrote, when "a party seeks emergency relief in an interlocutory posture, while local officials are actively shaping their response to changing facts on the ground."[154] It was not clear how Chief Justice Roberts's analysis would extend to an appeal that did not seek emergency injunctive relief, but arose on a motion for summary judgment. Yet these sorts of lockdown measures will almost always be resolved on an expedited basis, where facts on the ground are changing. Therefore, the *South Bay* approach would seem to apply to the review of all such measures. Then again, in *Roman Catholic Diocese*, Chief Justice Roberts would minimize the constitutional nature of his opinion.[155] Instead, he would later describe his concurrence as equitable in nature.

In *South Bay*, Justice Kavanaugh wrote a dissenting opinion, which was joined by Justices Thomas and Gorsuch.[156] (Justice Alito would have granted the application, but he did not join Justice

153. *Id.* (emphasis added).

154. *Id.* at 1614.

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

156. *S. Bay*, 140 S. Ct. at 1614 (Kavanaugh, J., dissenting from denial of application for injunctive relief).

Kavanaugh's dissent.)[157] As a threshold matter, Justice Kavanaugh accepted the *comparator* approach. (In *Calvary Chapel*, which we will discuss *infra*, Justice Kavanaugh changed course, and rejected the *comparator* approach.) But he would require a lesser degree of fit between houses of worship and other secular gatherings. He found that "California's latest safety guidelines discriminate against places of worship and in favor of comparable secular businesses."[158] Specifically, "*comparable* secular businesses are 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."[159] Justice Kavanaugh did not explain how the activities in a florist shop are similar to activities in a house of worship. Rather, he focused on whether those activities pose a comparable risk. Chief Justice Roberts's concurrence only mentioned *some* of these other "essential" commercial enterprises. He did not mention restaurants, which are more similar to houses of worship. People eat with their masks off for extended periods of time.[160]

In *South Bay*, Justice Kavanaugh grounded his analysis in the Court's Free Exercise Clause jurisprudence. He found that this "discrimination against religion is 'odious to our Constitution.'"[161] He also favorably cited the Sixth Circuit's precedent: "[R]estrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom."[162] Next, Justice Kavanaugh found that the governor's order

157. Justice Alito would also not join Justice Kavanaugh's dissent in *Calvary Chapel*. *See infra* note 160.

158. *S. Bay*, 140 S. Ct. at 1614 (Kavanaugh, J., dissenting from denial of application for injunctive relief).

159. *Id.* (emphasis added).

160. *Cf.* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2615 (2020) (Kavanaugh, J., dissenting) (mem.) ("I continue to think that the restaurants and supermarkets at issue in *South Bay* (and especially the restaurants) pose similar health risks to socially distanced religious services in terms of proximity to others and duration of visit.").

161. *S. Bay*, 140 S. Ct. at 1614 (Kavanaugh, J., dissenting) (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2015 (2017)).

162. *Id.* at 1614–15 (quoting Roberts v. Neace, 958 F.3d 409, 414 (6th Cir. 2020)).

should be reviewed under strict scrutiny: "What California needs is a compelling justification for distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subject to an occupancy cap."[163] Here, the burden was placed on the state to justify why religious worship services are treated worse than comparable secular businesses. And that justification must be "compelling."

Here, the dissenters found that California failed to meet this burden. "Assuming all of the same precautions are taken, why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister?"[164] In light of these exemptions, the dissenters concluded, "California's 25% occupancy cap on religious worship services indisputably discriminates against religion, and such discrimination violates the First Amendment."[165] Chief Justice Roberts did not respond to any of the dissenters' arguments.

B. Seventh Circuit: Elim Romanian Pentecostal Church v. Pritzker II

On May 16, 2020, the Seventh Circuit denied the Elim Romanian Pentecostal Church an injunction pending appeal.[166] Eleven days later, the church filed an application for injunctive relief with Circuit Justice Kavanaugh.[167] Illinois's response was due on May 28. Shortly before the response brief was filed, the Illinois governor signed Executive Order 2020-38.[168] This new policy "permit[ted] the resumption of all religious services" without numerical limits.[169] "What used to be a cap of ten persons became a

163. *Id.* at 1615.

164. *Id.* (quoting *Neace*, 958 F.3d at 414).

165. *Id.*

166. Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341, 344 (7th Cir. 2020).

167. Emergency Application for Writ of Injunction Relief Requested Before May 31, 2020, Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341 (7th Cir. 2020) (No. 20-1811).

168. Ill. Exec. Order No. 2020-38 (May 29, 2020), https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-38.aspx [https://perma.cc/Y4RL-W79R].

169. *Elim Romanian*, 962 F.3d at 344.

recommendation."[170] The state argued the case was now moot.[171] The plaintiffs countered that the new order was designed to frustrate appellate review, and the challenge remained ripe.[172] On May 29, the Court denied the Illinois petition with a summary order.[173] That same day, the Supreme Court decided *South Bay*.[174]

On remand to the Seventh Circuit, Illinois argued that the new order rendered the case moot. The churches countered that the governor could restore the old executive order at any point. The court agreed with the churches that the case was still ripe, even though the prior order was "no longer in effect."[175] Judge Easterbrook wrote the panel opinion. He explained that under *Employment Division v. Smith*, "the Free Exercise Clause does not require a state to accommodate religious functions or exempt them from generally

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170. *Id.*; *see* Ill. Dep't of Public Health, *COVID-19 Guidance for Places of Worship and Providers of Religious Services,* (June 30, 2020), https://www.dph.illinois.gov/covid19/community-guidance/places-worship-guidance [https://perma.cc/R9PH-CRUW].

171. Response in Opposition to Emergency Application for Writ of Injunction, Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341 (7th Cir. 2020) (No. 20-1811), https://bit.ly/30B0bHX [https://perma.cc/KAL3-4BB8].

172. Reply in Support of Emergency Application for Writ of Injunction Relief Requested before May 31, 2020 at 1, Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341 (7th Cir. 2020) (No. 20-1811) ("Mere hours before his Response was due in this Court, the Governor announced a sudden change in his 10-person limit on religious worship services (Resp. 1, n.1), after vigorously defending his policy in both lower courts, and having announced barely 3 weeks ago that it would be 12 to 18 months before numerical limits on worship services were lifted (App. 6). What changed? The Governor was summoned to the steps of this Court to give an account."), https://www.supremecourt.gov/DocketPDF/19/19A1046/144431/20200529091521338_Memo%20-%20Reply%20in%20Support%20of%20Emergency%20Application%20for%20Writ%20of%20Injunction%20FINAL.pdf [https://perma.cc/3T7F-28PX].

173. *See* Order in Pending Case at 1, Elim Romanian Pentecostal Church v. Pritzker, No. 19A1046 (U.S. May 29, 2020) ("The application for injunctive relief presented to Justice Kavanaugh and by him referred to the Court is denied. The Illinois Department of Public Health issued new guidance on May 28. The denial is without prejudice to Applicants filing a new motion for appropriate relief if circumstances warrant.").

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

175. *Elim Romanian*, 962 F.3d at 345.

applicable laws."[176] Moreover, the court found that "Illinois did not set out to disadvantage religious services compared with secular events."[177] At the time, "[f]unerals, weddings, and similar activities [were] subject to the same size limit that applie[d] to worship services."[178] The Court also found that there were no viable claims of animus toward a particular religion.[179]

Yet the churches framed their argument differently. They contended "that the ten-person cap disfavor[ed] religious services compared with" secular economic activities.[180] For example, "more than ten people at a time may be in a [grocery] store."[181] And in "warehouses . . . a substantial staff may congregate to prepare and deliver the goods that retail shops sell."[182] Indeed, the churches could admit more than ten people if they were "feeding and housing the poor."[183] The churches asked why "those businesses, and other essential functions . . . may place ten unrelated persons in close contact," but churches cannot do so for worship?[184] In other words, they asked, why is the Free Exercise of Religion not essential.

Next, the court confronted the question that Chief Justice Roberts only alluded to in *South Bay*: "[W]hat is the right comparison group: grocery shopping, warehouses, and soup kitchens, as plaintiffs contend, or concerts and lectures, as Illinois maintains?"[185] What is the right denominator? The churches relied on the *South Bay* dissent, as well as the Sixth Circuit majorities in *Maryville Baptist Church* and *Roberts v. Neace*.[186] And Illinois cited Chief Justice Roberts's *South*

176. *Id.* (citing Emp. Div. v. Smith, 494 U.S. 872 (1990)).

177. *Id.* at 346.

178. *Id.*

179. *See id.* (citing Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 532 (1993)).

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* ("Plaintiffs point us to two opinions of the Sixth Circuit plus two opinions

Bay concurrence.[187]

The Seventh Circuit "line[d] up with Chief Justice Roberts."[188] Judge Easterbrook wrote, "[i]t would be *foolish* to pretend that worship services are exactly like any of the possible comparisons, but they seem most like other congregate functions that occur in auditoriums, such as concerts and movies."[189] In that regard, *South Bay* resolved the case without much further analysis. Yet Judge Easterbrook performed the analysis that Chief Justice Roberts did not.

Judge Easterbrook acknowledged that some "essential" workplaces that were not subject to numerical limits did "present . . . risks."[190] He observed that "[m]eatpacking plants and nursing homes come to mind, and they have been centers of COVID-19 outbreaks."[191] Indeed, the court stated, "we do not deny that warehouse workers and people who assist the poor or elderly may be at much the same risk as people who gather for large, in-person religious worship."[192]

Yet these facilities were allowed to remain open without numerical limits. Judge Easterbrook responded to this argument: "it is hard to see how food production, care for the elderly, or the distribution of vital goods through warehouses could be halted."[193] In short, cooking, elder care, and deliveries were more important to our polity than religious worship. Why? There were adequate substitutes for in-person religious worship, but not for other "essential" functions. Judge Easterbrook distilled what the phrase "essential" actually means: *important*. But not *important* in any objective sense. This concept is entirely subjective, as determined by the

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dissenting from orders denying injunctions pending appeal. *See* Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610 (6th Cir. 2020)); Roberts v. Neace, 958 F.3d 409 (6th Cir. 2020); S. Bay United Pentecostal Church v. Newsom, 959 F.3d 938 (9th Cir. 2020) (Collins, J., dissenting); S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (mem.) (Kavanaugh, J., joined by Thomas & Gorsuch, JJ., dissenting).").

187. *Id.*

188. *Id.*

189. *Id.* (emphasis added).

190. *Id.* at 347.

191. *Id.*

192. *Id.*

193. *Id.*

powers that be. And those powers determined that the replacements for in-person religious worship were in fact sufficient. Judge Easterbrook made this point with admirable candor:

> Reducing the rate of transmission would not be much use if people starved or could not get medicine. That's also why soup kitchens and housing for the homeless have been treated as essential. Those activities *must* be carried on in person, while concerts can be replaced by recorded music, movie-going by streaming video, *and large in-person worship services by smaller gatherings, radio and TV worship services, drive-in worship services, and the Internet. Feeding the body requires teams of people to work together in physical spaces, but churches can feed the spirit in other ways*.[194]

"Churches can feed the spirit in other ways." In short, in-person worship is not as important as other activities. Therefore, it is not essential. To be sure, many houses of worship have moved worship services onto Zoom; some with alacrity, others with regret.[195] But the Illinois governor and Judge Easterbrook purported to decide for others whether virtual services are sufficient to "feed the spirit." People of faith do not get to decide if the substitutes are adequate.

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194. *Id.* (second emphasis added).

195. *See, e.g.*, David E. Bernstein, *Is Attending a Political Protest More Important than Attending a Funeral?*, TIMES OF ISR. (June 11, 2020, 7:36 PM), https://blogs.timesofisrael.com/is-attending-a-political-protest-more-important-than-attending-a-funeral/ [https://perma.cc/5VDP-NYPJ] (noting that some rabbis favor in-person protests but not in-person worships); Faith Organizations' Statement Regarding State Legislation Granting Religious Exemptions to Emergency Orders (April 12, 2021), https://interfaithalliance.org/cms/assets/uploads/2021/04/2021-4-12-National-Faith-Orgs-Statement-Opposing-Religious-Exemptions-to-Emergency-Orders-Interfaith-Alliance-FINAL.pdf [https://perma.cc/LS74-7J8E] ("Indeed, all of our denominations have found creative ways to provide opportunities for worship during the pandemic, recognizing the spiritual sustenance and sense of community that religious practices provide."); G. Jeffrey MacDonald, *No pew? No problem. Online church is revitalizing congregations.*, CHRISTIAN SCI. MONITOR (Feb 9, 2021), https://www.csmonitor.com/USA/Society/2021/0209/No-pew-No-problem.-Online-church-is-revitalizing-congregations [https://perma.cc/8VY6-5V8J] ("As congregations have gone online to maintain ministries while social distancing, new worshippers from other regions have been showing up.").

The state makes that determination for them. The comparison between religious and secular activities was secondary. The court primarily focused on how important the state deemed in-person religious worship. And in *Elim II*, the court gladly deferred to the governor's determination that in-person religious worship was not that important, and could be substituted by online worship.

The Sixth Circuit framed the issue very differently: the state must treat so-called "life-sustaining"[196] businesses in the same fashion as "soul-sustaining" groups.[197] Long before the ink dried in Philadelphia, people understood how "soul-sustaining" activities were "life-sustaining." Judge Easterbrook, however, articulated a presumption of secularity that views in-person worship as a trifling convenience. Just another consumption good, like going to a movie or watching a concert. There is nothing intrinsically important about religion. So what if you have to stream a sermon on YouTube? Or be baptized over Zoom? Or download communion by emoji? 🏘️🕌🛕🙏🛐🤲.

In another context, New York City Mayor Bill de Blasio minimized the importance of religious congregation. He argued that a "devout religious person who wants to go back to services" had less of a compelling need to assemble than people protesting for racial justice.[198] Indeed, when Jewish people gathered for a funeral, the police broke up the assembly, and the Mayor publicly criticized those groups.[199] But other public gatherings, such as racial justice

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

197. *See id.* at 614, 616.

198. Joseph A. Wulfsohn, *De Blasio Slammed for Halting Prayer Gatherings But Not Protests; Mayor Cites '400 Years of American Racism'*, FOX NEWS (June 2, 2020), https://www.foxnews.com/politics/bill-de-blasio-slammed-for-halting-prayer-gatherings-but-allowing-protests-400-years-of-racism-is-not-the-same-as-religion [https://perma.cc/D35V-ECPW]. *But see* Robby Soave, *Democratic Leaders Praise George Floyd Protestors, Show Utter Contempt for Everyone Else Still in Lockdown*, REASON MAG. (June 2, 2020), https://reason.com/2020/06/02/george-floyd-protesters-deblasio-murphy-covid-19-lockdown/ [https://perma.cc/6XQB-S4W5] ("Mourning a deceased person is no less important to that person's loved ones than ending police brutality is for the thousands of people engaged in protest.").

199. Wulfsohn, *supra* note 198.

protests, were encouraged.[200]

In *Calvary Chapel Dayton Valley v. Sisolak*, which we will address *infra*, Justice Alito addressed a position similar to the one taken by the Nevada governor. In that case, the state permitted certain public protests, but imposed strict limits on religious gatherings.[201] Justice Alito addressed the Free Speech Clause. He observed that "[t]he State defends the governor on the ground that the protests expressed a viewpoint on *important issues*, and that is undoubtedly true, but favoring one viewpoint over others is anathema to the First Amendment."[202] He contended that discrimination against religion is a form of viewpoint discrimination. "Here, the Directive plainly discriminates on the basis of viewpoint."[203]

The Department of Justice rebuked this sort of double-standard. The federal government filed a statement of interest in a challenge to Washington's shutdown orders:

> The *value judgment* inherent in providing exemptions for secular activities like dine-in restaurants or taverns, which would seem to implicate the State's public health interests to a similar, if not greater degree, while not providing exemptions for Plaintiff's religious activities, tends to indicate that the State's actions may not be religion-neutral . . . This is equally true for the *value judgment* inherent in approving protests without a

200. *See* Julie Bosman & Amy Harmon, *Protests Draw Shoulder-to-Shoulder Crowds After Months of Virus Isolation*, N.Y. TIMES (June 2, 2020), https://www.nytimes.com/2020/06/02/us/coronavirus-protests-george-floyd.html [https://perma.cc/RSX6-AWZY]; Michael Powell, *Are Protests Dangerous? What Experts Say May Depend on Who's Protesting What*, N.Y. TIMES (July 6, 2020), https://www.nytimes.com/2020/07/06/us/Epidemiologists-coronavirus-protests-quarantine.html [https://perma.cc/H3SE-RDQB] ("For epidemiologists to turn around and argue for loosening the ground rules for the George Floyd marches risks sounding hypocritical. 'We allowed thousands of people to die alone,' [Dr. Nicholas A. Christakis, professor of social and natural science at Yale] said. 'We buried people by Zoom. Now all of a sudden we are saying, never mind?'").

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

202. *Id.* at 2608 (Alito, J., dissenting) (emphasis added).

203. *Id.* at 2607–08.

> numerical cap but requiring a cap for outdoor worship services.[204]

Like Judge Easterbrook, governors made "value judgments" about the importance of religious worship. They deemed it less important than other secular activities. They decided that "churches can feed the spirit" over Zoom. We *need* Amazon Prime, but receiving communion is a mere convenience.[205] Where is the line? If priests at a church-run soup kitchen recite a blessing when serving bread to the poor, does an essential activity become non-essential?

Not all worship can be digitized. Regrettably, during the COVID-19 epidemic, some observant Jewish people were not able to perform the Mourner's *Kaddish*, a prayer that requires a quorum of ten men.[206] Justice Gorsuch observed in his *Diocese* concurrence that numerical limits have a particularly harmful effect on Jewish women for that reason: "In the Orthodox Jewish community that limit might operate to exclude all women, considering 10 men are necessary to establish a *minyan*, or a quorum."[207] Not everyone can attend a limited number of ten-person services.

The *South Bay* comparator approach obfuscated the principal legal analysis. The threshold decision to designate certain economic

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204. The United States' Statement of Interest in Support of Plaintiff's Motion for a Temporary Restraining Order at 12 n.4, Harborview Fellowship v. Inslee (D. Wa. 2021) (No. 3:20-cv-05518-RBL), https://www.justice.gov/opa/press-release/file/1284756/download [https://perma.cc/VZY7-QNF5] (emphasis added).

205. *But see Why We Won't Be Sharing Communion via Zoom*, SANCTUARY BAPTIST CHURCH (Mar. 25, 2020), https://sanctuarybaptist.wordpress.com/2020/03/26/why-we-wont-be-sharing-communion-via-zoom/ [https://perma.cc/2L85-847C] ("[C]ommunion is, in part, about being physically united in Christ's presence: 'communion' just means 'union with'. And let's be honest: we're not physically together. Zoom is great, but we are embodied people whose bodies are far apart right now, and there is a sadness in that.").

206. Yehuda Shurpin, *Why Is a Minyan Need for Kaddish?*, CHABAD.ORG, https://www.chabad.org/library/article_cdo/aid/4721972/jewish/Why-Is-a-Minyan-Needed-for-Kaddish.htm [https://perma.cc/8H39-UGZB] ("In this new era of COVID-19, when virtually all synagogues are closed and almost no one is able to pray with a *minyan* (quorum of 10 men), many are tempted to say the Kaddish (which is chanted in honor of loved ones who have passed on) even while alone. Why can't this be done?").

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

privileges as "essential," but in-person worship as "non-essential," was always premised on an inherent "value judgment" that in-person worship was not important. That sentiment does not fit within the traditional mold of animus. In Illinois, the state was not treating one sect more favorably than another. Nor was it treating religion more favorably than secularism. Rather, the state was treating religion *less* favorably than it was treating certain economic activities, because the government simply diminished the significance of religion. Or to state the issue more precisely, in-person worship was deemed less *essential* than certain secular economic activities. The "value judgments" behind this presumption of secularity cannot be reconciled with the Free Exercise Clause.

C. Chief Justice Roberts's unexpected superprecedent from the Shadow Docket

Judge Easterbrook was not alone in lining up with Chief Justice Roberts. From June through November 2020, Chief Justice Roberts's concurrence in *South Bay* rapidly became one of the most influential Supreme Court decisions in the modern era. In this brief span, more than one hundred cases based their decisions on Chief Justice Roberts's solo opinion.[208] And the lower courts relied on Chief Justice Roberts's opinion in cases that spanned across the entire spectrum of constitutional and statutory challenges to pandemic policies. The bulk of the cases involved houses of worship challenging restrictions on public gatherings.[209] In every case but

208. *See* Josh Blackman, *Roman Catholic Diocese Part I: The End of the South Bay "Superprecedent"*, REASON: VOLOKH CONSPIRACY (Nov. 26, 2020, 2:14 AM), https://reason.com/volokh/2020/11/26/roman-catholic-diocese-part-i-the-end-of-the-south-bay-superprecedent/ [https://perma.cc/F96D-UKKN].

209. *See* Agudath Israel of Am. v. Cuomo, 980 F.3d 222, 226 (2d Cir. 2020); Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341, 346 (7th Cir. 2020); Calvary Chapel Dayton Valley v. Sisolak, 982 F.3d 1228 (9th Cir. 2020); Harvest Rock Church, Inc. v. Newsom, 977 F.3d 728, 731 (9th Cir. 2020), *vacated*, 981 F.3d 764 (9th Cir. 2020); High Plains Harvest Church v. Polis, 835 F. App'x 372 (10th Cir. 2020); Cty. of L.A. v. Superior Ct. of L.A. Cty., No. B307056, 2020 WL 4876658, at *1 (Cal. Ct. App. Aug. 15, 2020); Harvest Rock Church, Inc. v. Newsom, No. LACV 20-6414 (JGB)(KKX), 2020 WL

one,[210] the courts relied on elements of Chief Justice Roberts's concurrence, and ruled against the house of worship. Consistently, judges treated a solo concurrence to a per curiam summary order as if it were a persuasive, if not binding, Supreme Court precedent.

The *South Bay* concurrence, however, was not limited to Free Exercise Clause cases. Many courts relied on *South Bay* to defer to local governments in many other contexts. For example, many courts upheld various restrictions on voting rights in light of the fast-moving pandemic.[211] In these cases, the court deferred to the governments.

5265564, at *2 (C.D. Cal. filed Sep. 2, 2020), *vacated*, 981 F.3d 764 (9th Cir. 2020); Calvary Chapel San Jose v. Cody, No. 20-CV-03794-BLF, 2020 WL 6508565, at *2 (N.D. Cal. Nov. 5, 2020); Christian Cathedral v. Pan, No. 20-CV-03554-CRB, 2020 WL 3078072, at *2 (N.D. Cal. filed June 10, 2020); S. Bay United Pentecostal Church v. Newsom, No. 20-CV-00865-BAS-AHG, 2020 WL 6081733, at *10 (S.D. Cal. filed Oct. 15, 2020), *vacated*, 981 F.3d 765 (9th Cir. 2020); Abiding Place Ministries v. Newsom, 465 F. Supp. 3d 1068, 1071 (S.D. Cal. 2020); Denver Bible Church v. Azar, No. 1:20-CV-02362-DDD-NRN, 2020 WL 6128994, at *7 (D. Colo. Oct. 15, 2020); High Plains Harvest Church v. Polis, No. 1:20-CV-01480-RM-MEH, 2020 WL 3263902, at *2 (D. Colo. June 16, 2020); Spell v. Edwards, No. 20-00282-BAJ-EWD, 2020 WL 6588594, at *4 (M.D. La. Nov. 10, 2020); Calvary Chapel Lone Mountain v. Sisolak, 466 F. Supp. 3d 1120, 1123 (D. Nev., 2020), *rev'd*, 831 F. App'x 317 (9th Cir. 2020); Calvary Chapel Dayton Valley v. Sisolak, No. 3:20-CV-00303-RFB-VCF, 2020 WL 4260438, at *2 (D. Nev. June 11, 2020), *rev'd*, 982 F.3d 1228 (9th Cir. 2020); Legacy Church, Inc. v. Kunkel, 472 F. Supp. 3d 926, 996 (D.N.M. 2020); Solid Rock Baptist Church v. Murphy, No. 20-6805(RMB/JS), 2020 WL 4882604, at *8 (D.N.J. Aug. 20, 2020); Roman Cath. Diocese of Brooklyn v. Cuomo, No. 20-CV-4844(NGG)(CLP), 2020 WL 5994954, at *2 (E.D.N.Y. Oct. 9, 2020); Roman Cath. Diocese of Brooklyn v. Cuomo, No. 20-CV-4844(NGG)(CLP), 2020 WL 6120167, at *4 (E.D.N.Y. Oct. 16, 2020); Ass'n of Jewish Camp Operators v. Cuomo, 470 F. Supp. 3d 197, 214 (N.D.N.Y. 2020); Soos v. Cuomo, No. 1:20-CV-651(GLS/DJS), 2020 WL 6384683, at *4 (N.D.N.Y. Oct. 30, 2020); Elkhorn Baptist Church v. Brown, 466 P.3d 30, 34–35 (Or. 2020).

210. Soos v. Cuomo, 470 F. Supp. 3d 268, 279 (N.D.N.Y. 2020) ("To determine whether the aforementioned broad limits have been exceeded, which *Newsom* did not address, the court turns to Free Exercise Clause jurisprudence within the framework of the applicable standard of review.").

211. *See* Tex. Democratic Party v. Abbott, 961 F.3d 389, 393 (5th Cir. 2020) (holding that district court could not "require[] state officials . . . to distribute mail-in ballots to any eligible voter who wants one"); Sinner v. Jaeger, 467 F. Supp. 3d 774, 783–85 (D.N.D. 2020) (challenge to signature requirements for circulating petitions); Democratic Nat'l Comm. v. Bostelmann, 977 F.3d 639, 643 (7th Cir. 2020) (challenge to Wisconsin voter laws); Mi Familia Vota v. Hobbs, 977 F.3d 948, 952 (9th Cir. 2020)

Two district courts that halted restrictions on the franchise cited *South Bay*, but they failed to rely on Chief Justice Roberts's deferential framework.[212] One of those cases was affirmed, and the other was reversed.[213] Another court rejected a challenge brought by Donald J. Trump for President against New Jersey's expansion of mail-in voting.[214]

South Bay also played an important role in prisoner rights litigation. In most cases, district courts relied on Chief Justice Roberts's concurrence to reject challenges to conditions of confinement based on COVID-19.[215] Courts also cited *South Bay* in denying

(challenge to restrictions on voter registration); Tully v. Okeson, No. 1:20-CV-01271-JPH-DLP, 2020 WL 4926439, at *6 (S.D. Ind. Aug. 21, 2020), *aff'd*, 977 F.3d 608 (7th Cir. 2020) (challenge to absentee voting law); Eilenberg v. City of Colton, No. SA CV 20-00767-FMO (DFM), 2020 WL 5802377, at *5 (C.D. Cal. July 9, 2020), *report and recommendation adopted*, No. SA CV 20-00767-FMO (DFM), 2020 WL 5802379 (C.D. Cal. July 29, 2020) (voter challenging restrictions on signature gathering); Clark v. Edwards, 468 F. Supp. 3d 725, 737 (M.D. La. 2020) (voters challenging expansion of absentee ballots).

212. People First of Ala. v. Merrill, 467 F. Supp. 3d 1179, 1193 (N.D. Ala. 2020), *appeal dismissed*, No. 20-12184-GG, 2020 WL 5543717 (11th Cir. July 17, 2020) (finding that some voting restrictions were unlawful during pandemic); Common Cause Ind. v. Lawson, No. 1:20-CV-02007-SEB-TAB, 2020 WL 5798148, at *5 (S.D. Ind. Sep. 29, 2020) (challenge to absentee voting law), *rev'd*, 977 F.3d 663 (7th Cir. 2020).

213. People First of Ala. v. Sec'y of State for Ala., 815 F. App'x 505, 506 (11th Cir. 2020) (stay denied); Common Cause Ind. v. Lawson 977 F.3d 663 (7th Cir. 2020).

214. Donald J. Trump for President, Inc. v. Way, 492 F. Supp. 3d 354, 358–59 (D.N.J. 2020).

215. *See* Swain v. Junior, 961 F.3d 1276, 1293–94 (11th Cir. 2020) (pretrial detainees challenge conditions of confinement); Ahlman v. Barnes, No. 20-55568, 2020 WL 3547960, at *1, *12 (9th Cir. filed June 17, 2020) (Nelson, J., dissenting) (citing deference to elected officials as emphasized by the Chief Justice in *South Bay*, pretrial detainees challenge government's failure "to take adequate measures to prevent the spread of COVID-19 within the jail"); United States v. Mauldin, No. 18-371 (BAH), 2020 WL 2840055, at *4 (D.D.C. June 1, 2020); Hallinan v. Scarantino, 466 F. Supp. 3d 587, 609 (E.D.N.C. 2020) (federal inmates challenging prison conditions); Teague v. Crow, No. CIV-20-441-C, 2020 WL 4210513, at *1 (W.D. Okla. June 24, 2020), *report and recommendation adopted*, No. CIV-20-441-C, 2020 WL 4208941 (W.D. Okla. July 22, 2020) (prisoner "seeking immediate release from confinement for a twenty-one-day period of self-quarantine"); United States v. Myles, No. 3:11-CR-00253, 2020 WL 4350604, at *1 (M.D. Tenn. July 29, 2020) (prisoner seeking reduction in sentencing); Russell v. Harris Cty., Tex., No. H-19-226, 2020 WL 6585708, at *30 (S.D. Tex. Nov. 10, 2020) (pretrial bail).

compassionate release,[216] though some requests were granted.[217] In one case, an inmate challenged the denial of religious services in prison during the pandemic.[218]

District courts also relied on the *South Bay* concurrence in cases that asserted the freedom of association and the right to protest.[219] Other district courts extended Chief Justice Roberts's separate writing to Second Amendment challenges.[220] Several courts relied on *South Bay* to reject challenges to quarantine orders[221] and even mask mandates.[222] And many courts turned away challenges to

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216. *See* United States v. Queen, No. CR 17-58 (EGS), 2020 WL 3447988, at *3 (D.D.C. June 24, 2020) (referencing *South Bay* to describe COVID-19 situation while denying compassionate release); United States v. Pittman, 465 F. Supp. 3d 912, 913 (S.D. Iowa 2020) (same).

217. *See* United States v. O'Neil, 464 F. Supp. 3d 1026, 1030, 1036 (S.D. Iowa 2020); United States v. Ledezma-Rodriguez, 472 F. Supp. 3d 498, 501 (S.D. Iowa 2020); United States v. Clark, 467 F. Supp. 3d 684, 687, 692 (S.D. Iowa 2020); United States v. Jacobs, 470 F. Supp. 3d 969, 971, 976 (S.D. Iowa 2020); United States v. Grauer, No. 3:10-CR-00049, 2020 WL 6060927, at *1, *4 (S.D. Iowa Sept. 29, 2020) (granting compassionate relief); United States v. Dodd, No. 3:03-CR-00018, 2020 WL 5200900, at *1, *5 (S.D. Iowa July 29, 2020).

218. Payne v. Sutterfield, No. 2:17-CV-211-Z-BR, 2020 WL 5237747, at *6 (N.D. Tex. Sept. 2, 2020) (denying claim, citing *South Bay* as persuasive).

219. *See* Ill. Republican Party v. Pritzker, 470 F. Supp. 3d 813, 820–21 (N.D. Ill. 2020), *aff'd*, 973 F.3d 760 (7th Cir. 2020) (Illinois Republican party challenges ban on public assembly); Geller v. Cuomo, 476 F. Supp. 3d 1, 14–15 (S.D.N.Y. 2020) (asserting right to protest).

220. *See, e.g.*, McDougall v. Cty. of Ventura, 495 F. Supp. 3d 881, 885, 889 (C.D. Cal. 2020); Altman v. Cty. of Santa Clara, 464 F. Supp. 3d 1106, 1118–19 (N.D. Cal. 2020); Conn. Citizens Def. League, Inc. v. Lamont, 465 F. Supp. 3d 56, 73 (D. Conn. 2020) (granting preliminary injunction despite the deference that *South Bay* concurrence calls for); Dark Storm Indus. LLC v. Cuomo, 471 F. Supp. 3d 482, 503–04 (N.D.N.Y. 2020) ("In essence, Defendants made a policy decision about which businesses qualified as 'essential' and which did not. In the face of a global pandemic, the Court is loath to second-guess those policy decisions.").

221. *See, e.g.*, Carmichael v. Ige, 470 F. Supp. 3d 1133, 1141–42 (D. Haw. 2020); Armstrong v. Newsom, No. CV 20-3745-GW-ASX, 2020 WL 5585053, at *4 (C.D. Cal. Aug. 3, 2020); Murphy v. Lamont, No. 3:20-CV-0694 (JCH), 2020 WL 4435167, at *10 (D. Conn. Aug. 3, 2020).

222. *See, e.g.*, Vincent v. Bysiewicz, No. 3:20-CV-1196 (VAB), 2020 WL 6119459, at *12 (D. Conn. Oct. 16, 2020); Young v. James, No. 20 CIV. 8252 (PAE), 2020 WL 6572798, at *3 (S.D.N.Y. Oct. 26, 2020).

lockdown measures by various commercial establishments.[223] Courts even relied on *South Bay* in cases that did not assert constitutional rights. A judge on the Court of Appeals for Veterans Claims cited Chief Justice Roberts's opinion to deny an applicant emergency relief.[224] A federal judge rejected a challenge regarding the emergency supplemental nutritional assistance program (SNAP) during the pandemic.[225] Other cases cited *South Bay* and denied challenges to eviction moratoriums.[226]

In less than six months, *South Bay* may have become Chief Justice Roberts's most influential opinion during his entire tenure on the Court. It became a *superprecedent*![227] To be sure, Chief Justice

223. *See, e.g.*, Talleywhacker, Inc. v. Cooper, 465 F. Supp. 3d 523, 537–40 (E.D.N.C. 2020) (dance clubs); Pro. Beauty Fed'n of Cal. v. Newsom, No. 2:20-CV-04275-RGK-AS, 2020 WL 3056126, at *9 (C.D. Cal. June 8, 2020) (cosmetology businesses); League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer, 468 F. Supp. 3d 940, 949 (W.D. Mich. 2020) (fitness instructors); PCG-SP Venture I LLC v. Newsom, No. EDCV 20-1138 JGB (KKX), 2020 WL 4344631, at *5 (C.D. Cal. June 23, 2020) (hotels); Bellwether Music Festival, LLC v. Acton, 471 F. Supp. 3d 827, 829 (S.D. Ohio 2020) (musical festival organizers); DiMartile v. Cuomo, 478 F. Supp. 3d 372, 386 (N.D.N.Y. 2020) *vacated, appeal dismissed for mootness* No. 20-2683, 2021 WL 389650, at *1 (2d Cir. Feb. 4, 2021) (wedding planners); 4 Aces Enter., LLC v. Edwards, 479 F. Supp. 3d 311, 329 (E.D. La. 2020) (bars); Nat'l Ass'n of Theatre Owners v. Murphy, No. 3:20-CV-8298 (BRM) (TJB), 2020 WL 5627145, at *16 (D.N.J. Aug. 18, 2020) (theaters); Alsop v. DeSantis, No. 8:20-CV-1052-T-23SPF, 2020 WL 4927592, at *2 (M.D. Fla. Aug. 21, 2020) (vacation rental properties); Paradise Concepts, Inc. v. Wolf, No. 20-2161, 2020 WL 5121345, at *5 (E.D. Pa. Aug. 31, 2020) (retail establishments); Fowler v. Paul, No. 3:20-CV-3042, 2020 WL 5258458, at *4 (W.D. Ark. Sept. 3, 2020) (chuck wagon races); Luke's Catering Serv., LLC v. Cuomo, 485 F. Supp. 3d 369, 379–82 (W.D.N.Y. 2020) (catering services); Bimber's Delwood, Inc. v. James, No. 20-CV-1043S, 2020 WL 6158612, at *6–7 (W.D.N.Y. Oct. 21, 2020) (billiards hall); AJE Enter. LLC v. Justice, No. 1:20-CV-229, 2020 WL 6940381, at *4 (N.D.W. Va. Oct. 27, 2020) (night club); Bocelli Ristorante Inc. v. Cuomo, 139 N.Y.S. 3d 481, 488 (N.Y. Sup. Ct. 2020) (restaurant); Beshear v. Acree, 615 S.W.3d (Ky. 2020) (automobile racing track).

224. Gray v. Wilkie, No. 20-2232, 2020 WL 4033252, at *2 (Vet. App. July 17, 2020).

225. Gilliam v. USDA, 486 F. Supp. 3d 856, 861 (E.D. Pa. 2020).

226. Baptiste v. Kennealy, 490 F. Supp. 353, 372–73 (D. Mass. 2020); Brown v. Azar, No. 1:20-CV-03702-JPB, 2020 WL 6364310, at *11 (N.D. Ga. Oct. 29, 2020).

227. *Cf.* Jeffrey Rosen, *So, Do You Believe in 'Superprecedent'?*, N.Y. TIMES (Oct. 30, 2005), https://www.nytimes.com/2005/10/30/weekinreview/so-do-you-believe-in-superprecedent.html [https://perma.cc/D535-4CEM] ("The term superprecedents first surfaced at the Supreme Court confirmation hearings of Judge John Roberts, when

Roberts has written many important opinions. But those cases affected discrete controversies. *NFIB v. Sebelius*[228] resolved the constitutionality of the ACA.[229] *Shelby County v. Holder*[230] resolved the status of Section 4 of the Voting Rights Act.[231] The Census and DACA cases resolved controversies specific to the Trump era.[232] But *South Bay* settled cases of first impressions that have spanned the entire spectrum of litigation. And judges of all stripes fell in line with Chief Justice Roberts. In disputes between state and localities, *South Bay* served as a tiebreaker. This case was the alpha and omega of COVID-19 adjudication in 2020. It is difficult to account for how broadly governments at all levels have relied on Chief Justice Roberts's opinion when formulating policies. Conservatives and liberals latched onto Chief Justice Roberts's cursory analysis as the alpha and omega of COVID deference. Before *South Bay*, several courts ruled for the religious claimants.[233] But after *South Bay*, houses of worship consistently lost.[234] Truly, the impact of the *South Bay* concurrence was staggering.

In the abstract, it is not clear that the *South Bay* concurrence should have been so influential. First, Chief Justice Roberts wrote a solo concurrence. The views of a single person, even the then-median Justice, cannot represent the views of the Supreme Court. Second, *South Bay* was not an argued case. Rather, the Court denied an

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Senator Arlen Specter of Pennsylvania, the chairman of the Judiciary Committee, asked him whether he agreed that certain cases like Roe had become superprecedents or 'super-duper' precedents—that is, that they were so deeply embedded in the fabric of law they should be especially hard to overturn. In response, Judge Roberts embraced the traditional doctrine of 'stare decisis'—or, 'let the decision stand'—and seemed to agree that judges should be reluctant to overturn cases that had been repeatedly reaffirmed.").

228. 567 U.S. 519 (2012).

229. *See generally id.*

230. 570 U.S. 529 (2013).

231. *See generally id.*

232. Dep't of Com. v. New York, 139 S. Ct. 2551 (2019); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915 (2020).

233. *See supra* note 186 (discussing Sixth Circuit precedent).

234. *See supra* notes 208–226 and accompanying text.

injunction on the so-called "shadow docket."[235] It is not clear that orders from the shadow docket should ever be precedential.[236] These decisions merely decide whether to grant or deny preliminary injunctive relief. Even a grant of relief does not represent a decision on the merits. And relief can be denied for a host of equitable factors that are not necessarily explained. A one-sentence per curiam opinion does not give the courts any guidance. I agree with Judge O'Scannlain that *South Bay* was "precedential only as to 'the precise issues presented and necessarily decided.'"[237] The per curiam opinion should not, by its own force, have extended to different cases and to different contexts.

Third, Chief Justice Roberts's opinion was remarkably narrow. The sole question presented was whether the Supreme Court should issue an injunction pursuant to the All Writs Act.[238] Chief Justice Roberts wrote that an injunction should only issue if the Church's claim for relief was "indisputably clear."[239] At the Supreme Court, such extraordinary relief requires a "more demanding standard than that which applies to the motion for an injunction pending appeal" in the court of appeals, or a motion for a preliminary injunction in the district court.[240] In other words, the Supreme Court should rarely intervene in an interlocutory fashion. The lower courts, however, do not face such restraints. The overwhelming majority of lower court decisions that cited Chief Justice Roberts's concurrence failed to account for the unique posture under the All Writs Act. Fourth, Chief Justice Roberts did not engage any of the Court's Free Exercise Clause jurisprudence. Chief Justice

235. William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015).

236. *See id.*

237. Harvest Rock Church, Inc. v. Newsom, 977 F.3d 728, 732 (9th Cir. 2020) (O'Scannlain, J., dissenting), *vacated on denial of reh'g en banc*, 981 F.3d 764 (9th Cir. 2020) (quoting Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam)).

238. 28 U.S.C. § 1651 (2018).

239. S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020 (Roberts, C.J., concurring in denial of application for injunctive relief)) (mem.) (quoting Stephen M. Shapiro et. al., SUPREME COURT PRACTICE § 17.4 at 17-9 (11th ed. 2019)).

240. *Harvest Rock Church*, 977 F.3d at 732 (O'Scannlain, J., dissenting).

Roberts said nothing at all about whether the lockdown measure was generally applicable. He relied entirely on equitable considerations to deny the injunction: "The notion that it is 'indisputably clear' that the Government's limitations are unconstitutional seems quite improbable."[241] Chief Justice Roberts did not definitively rule how *Smith* should be applied to pandemic measures in all contexts.

Chief Justice Roberts wrote for a very specific context, yet more than a hundred judges cited it in unrelated circumstances. The *South Bay* concurrence took on a life of its own, far beyond Chief Justice Roberts's likely intentions. In *Roman Catholic Diocese*, Chief Justice Roberts would confirm the narrow reading of his opinion.[242] Chief Justice Roberts, however, would do nothing to disabuse courts of relying on a broad reading of *South Bay* over the ensuing months.

III. PHASE 3: *CALVARY CHAPEL* AND THE "MOST-FAVORED" RIGHT

During June and July, Chief Justice Roberts's *South Bay* concurrence remained the law of the land. At the end of July, the Supreme Court would decide another Free Exercise Clause case on appeal from the Ninth Circuit.[243] The Nevada governor permitted casinos and other commercial establishments to open at reduced capacity, but without numerical limits. Houses of worship, however, were subject to fixed numerical limits. The Calvary Chapel Dayton Valley Church in Nevada challenged this order as a violation of the Free Exercise Clause of the First Amendment. The lower courts, relying on the *South Bay* concurrence, upheld this regime.[244] On appeal, *Calvary Chapel Dayton Valley v. Sisolak* once again sharply divided the Court. Like in *South Bay*, Chief Justice Roberts, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan denied the

241. *S. Bay*, 140 S. Ct. at 1614.

242. *See infra* Part IV.

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

244. Calvary Chapel Dayton Valley v. Sisolak, No. 3:20-CV-00303-RFB-VCF, 2020 WL 4260438, at *2 (D. Nev. June 11, 2020), *appeal denied*, 2020 WL 4274901 (9th Cir. 2020), *cert. denied*, 140 S. Ct. 2603, rev'd, 982 F.3d 1228 (9th Cir. 2020).

application.[245] However, in this case, Chief Justice Roberts did not write a concurrence to explain his thinking. Justices Thomas, Alito, Gorsuch, and Kavanaugh would have enjoined the Nevada directives. There were three dissents by Justices Alito, Gorsuch and Kavanaugh. Justice Alito's dissent hewed to the Court's doctrine and followed the comparator approach.[246] Justice Gorsuch thought the case was "simple."[247] Justice Kavanaugh extended the Court's doctrine and treated the Free Exercise of Religion as a "most-favored" right.[248]

A. Lower Court proceedings in Calvary Chapel

In May 2020, the governor of Nevada began "Phase Two" of the state's reopening plan.[249] Under this regime, "[c]ommunities of worship and faith-based organizations [were] allowed to conduct in-person services so long as no more than fifty people [were] gathered, while respecting social distancing requirements."[250] But the order "allow[ed] casinos to reopen at 50% their capacity," without a fixed numerical limit.[251] The casinos were also "subject to further regulations," such as "regular and explicit inspection of all aspects of the respective casino's reopening plan."[252] As a result, "a casino with a 500-person occupancy limit may let in up to 250 people," but "a church with a 500-person occupancy limit may let in only 50 people, not 250 people."[253]

The Calvary Chapel Dayton Valley Church challenged this disparate treatment. The district court upheld the order in light of *South Bay*.[254] Indeed, the district court did not even note that Chief Justice's opinion was a concurrence. The separate writing was

245. *Calvary Chapel*, 140 S. Ct. at 2603.
246. *Id.* at 2605–07 (Alito, J., dissenting).
247. *Id.* at 2609 (Gorsuch, J., dissenting).
248. *Id.* at 2612–13 (Kavanaugh, J., dissenting).
249. *Calvary Chapel*, 2020 WL 4260438 at *1.
250. *Id.*
251. *Id.*
252. *Id.* at *3.
253. *Calvary Chapel*, 140 S. Ct. at 2609 (Kavanaugh, J., dissenting).
254. *Calvary Chapel*, 2020 WL 4260438 at *2.

treated as if it were controlling.[255] The district court found that the governor's order was "neutral and generally applicable and does not burden Plaintiff's First Amendment right to free exercise."[256] Next, the district court determined that casinos were not comparable to houses of worship. But "even if the Court were to accept casinos as the nearest point of comparison for its analysis of similar activities and their related restrictions imposed by the governor, the Court would nonetheless find that casinos are subject to much greater restrictions on their operations and oversight of their entire operations than places of worship."[257] The Ninth Circuit Court of Appeals denied the plaintiff's motion for injunctive relief pending appeal with a one sentence order that cited *South Bay*.[258]

B. The Supreme Court denies injunctive relief in Calvary Chapel

Calvary Chapel sought an application for an injunction from the Supreme Court. Chief Justice Roberts, as well as Justices Ginsburg, Breyer, Sotomayor, and Kagan, denied the application.[259] Justices Thomas, Alito, Gorsuch, and Kavanaugh dissented; they would have granted the application for injunctive relief.[260] There were three separate dissenting opinions by Justices Alito, Gorsuch, and Kavanaugh. Justice Alito's dissent was joined by Justices Thomas and Kavanaugh but not by Justice Gorsuch. It is not clear that Justice Gorsuch would have disagreed with anything Justice Alito said. Rather, Justice Gorsuch thought the case was "simple."[261] His solo dissent did not cite any cases.[262] Justice Kavanaugh also wrote

255. *Id.* ("The Supreme Court examined the relationship between COVID-19 related executive orders and the Free Exercise Clause in its recent order in *South Bay United Pentecostal Church v. Newsom*.").

256. *Id.*

257. *Id.* at *3.

258. Calvary Chapel Dayton Valley v. Sisolak, No. 20-16169, 2020 WL 4274901, at *1 (9th Cir. July 2, 2020).

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

260. *Id.*

261. *Id.* at 2609 (Gorsuch, J., dissenting).

262. *Id.*

a solo dissent. He provided a novel way to consider the lockdown measures. Rather than presuming that the state can define religious institutions as non-essential, Justice Kavanaugh contended that the starting presumption should be that religion is essential.[263] Moreover, the state bears the burden of showing why the free exercise of religion was not afforded the "most-favored" status that was afforded to the exercise of other secular activities.[264]

C. Justice Alito's dissent

Justice Alito's principal dissent seemed to accept the general premise of Chief Justice Roberts's *South Bay* concurrence: the courts should compare religious worship to *comparable* secular activity. He wrote "[t]he Governor's directive specifically treats worship services differently from other activities that involve extended, indoor gatherings of large groups of people."[265] Justice Alito contended that the governor's directive was not "neutral" toward religion.[266] Still, this comparator approach is somewhat circular: "neutral" with respect to what? Are churches and casinos analogous? What is the correct denominator? The district court found that casinos are heavily regulated in ways that churches are not. Justice Alito did not acknowledge the existence of these regulations. Perhaps the district court was correct that churches were more closely comparable to movie theaters, which were subject to strict numerical caps. This counterargument highlights the shortcomings of the *South Bay* comparator approach: there is no neutral baseline by which to compare religious worship to other activities. Any comparison requires some "value judgment" about comparative risks and the importance of certain activities.

Justice Alito concluded that "the directive blatantly discriminates against houses of worship and thus warrants strict scrutiny under the Free Exercise Clause."[267] Given this rigid standard, he

263. *Id.* at 2609–13 (Kavanaugh, J., dissenting).
264. *Id.*
265. *Id.* at 2605 (Alito, J., dissenting).
266. *Id.*
267. *Id.* at 2607.

contended that the directive was not narrowly tailored: "[W]hile Calvary Chapel cannot admit more than 50 congregants even if families sit six feet apart, spectators at a bowling tournament can *sit together in groups of 50* provided that each group maintains social distancing *from other groups*."[268] Justice Alito would have enjoined the directive.

D. Justice Gorsuch's dissent

Justice Gorsuch did not join either Justice Alito's dissent, or Justice Kavanaugh's dissent. Instead, he wrote a single paragraph. It began, "This is a simple case."[269] And he did not cite any cases. Respectfully, this case is not simple. This case is difficult. I am inclined to agree with the dissenters, but there is a lot of analytical work necessary to reach that conclusion. *Calvary Chapel* was not the first time Justice Gorsuch dismissed a complex question as "simple."[270] This case warranted more attention than a single, citationless paragraph—even one I ultimately agree with.

E. Justice Kavanaugh's dissent

Justice Kavanaugh wrote a solo dissent in *Calvary Chapel*. Though he "join[ed] Justice Alito's dissent in full,"[271] his separate writing was in some tension with the principal dissent. Justice Kavanaugh's analysis did not rely on *South Bay*'s comparator approach. Instead, he advanced a novel framework. I will refer to it as the *Calvary Chapel* approach.

Justice Kavanaugh provided a taxonomy to understand different types of laws that favor or disfavor religion. The most relevant

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268. *Id.*

269. *Id.* at 2609 (Gorsuch, J., dissenting).

270. Bostock v. Clayton Cty., 140 S. Ct. 1731, 1741 (2020) ("The [Civil Rights Act of 1964's] message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions."); *cf.* Josh Blackman, *Justice Gorsuch's Legal Philosophy Has a Precedent Problem*, ATLANTIC (July 24, 2020), https://www.theatlantic.com/ideas/archive/2020/07/justice-gorsuch-textualism/614461/ [https://perma.cc/UT6A-V82A]; Nelson Lund, *Unleashed and Unbound: Living Textualism in* Bostock v. Clayton County, 21 FEDERALIST SOC'Y REV. 158 (2020).

271. *Calvary Chapel*, 140 S. Ct. at 2609 (Kavanaugh, J., dissenting).

category for the COVID cases is the fourth: when the government "divv[ies] up organizations into a favored or exempt category and a disfavored or non-exempt category."[272] Justice Kavanaugh explained that if *any* secular activity is given the favored status, then religious institutions must presumptively be afforded the same favored status.[273] The state has the burden to demonstrate why the religious institution should be deemed non-essential. The *Calvary Chapel* approach flips the presumption of constitutionality from *South Bay* into a presumption of liberty. Justice Kavanaugh suggested this doctrine was grounded in *Employment Division v. Smith*.[274] I respectfully disagree. His approach is novel, but salutary.

1. Four categories of law that favor or disfavor religion

Justice Kavanaugh distinguished between "four categories of laws" that favor or disfavor religion. First, there are "laws that expressly discriminate against religious organizations because of religion."[275] Such laws are "straightforward examples of religious discrimination" and will almost always violate the Free Exercise Clause.[276] The COVID-19 lockdown measures did not fall in this first category. No state overtly stated that they were subjecting houses of worship to stricter regulations *because* they were religious. Rather, the states cited other factors related to religion. For example, states argued that a distinct risk is posed when people congregate for long periods in close proximity.[277]

Second, there are "laws that expressly favor religious

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272. *Id.* at 2611–12.

273. *Id.* at 2612 ("Unless the State provides a sufficient justification otherwise, it must place religious organizations in the favored or exempt category.").

274. *Id.*

275. *Id.* at 2610.

276. *Id.* (citing, *inter alia*, Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246 (2020); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017)).

277. *See* Harvest Rock Church, Inc. v. Newsom, 977 F.3d 728, 730 (9th Cir. 2020), *vacated on denial of reh'g en banc*, 981 F.3d 764 (9th Cir. 2020) ("However, the Governor offered the declaration of an expert, Dr. James Watt, in support of the claim that the risk of COVID-19 is elevated in indoor congregate activities, including in-person worship services.").

organizations over secular organizations."[278] Such laws will often run afoul of the Establishment Clause.[279] One court suggested that exempting a large church from social-distancing measures may impermissibly advance religion.[280] Consider a hypothetical: what if the state permitted people to assemble in a house of worship in larger numbers if they agreed to not sing, chant, drink from a chalice, receive communion, or lay hands. This sort of arrangement could raise entanglement concerns under the Establishment Clause. That is, monitoring whether churches are in fact adhering to social distancing guidelines could run afoul of the Establishment Clause. (I assume for present purposes that the *Lemon* test still has vitality under the Supreme Court's current jurisprudence.)[281] There is a perverseness to this position: in order to prevent burdening free exercise with intrusive monitoring, the state will burden religion even more so by shutting down services altogether. Yet the government raised this exact concern in *Lukumi*. The city contended that monitoring the Church for compliance with sanitation laws would create entanglement concerns under the Establishment Clause.[282] Therefore, its preferred remedy was to prohibit the ritual slaughter

278. *Id.* at 2611.

279. *Id.* (citing, *inter alia*, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2092–94 (2019) (Kavanaugh, J., concurring)).

280. Spell v. Edwards, 460 F. Supp. 3d 671, 677 (M.D. La.), *vacated, appeal dismissed*, 962 F.3d 175 (5th Cir. 2020) ("Shielding Plaintiffs' congregation of 2,000 from the Governor's orders based solely upon their preference to assemble larger groups for their services may amount to a carveout that is not available to other non-religious businesses, in violation of the Establishment Clause.").

281. *But see* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2097 (2019) (Thomas, J., concurring) ("I would take the logical next step and overrule the *Lemon* test in all contexts.").

282. Brief of Respondent at *40, Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520 (1993) (No. 91-948) ("The City could not enforce less restrictive ordinances which permitted but regulated animal sacrifices without locating members of the Santeria Church, constantly monitoring their activities and closely administrating the ordinances. Clearly, this would constitute an excessive entanglement with religion and would be unconstitutional. *See, e.g.*, *Hernandez*, 490 U.S. at 696–97; *Aguilar*, 473 U.S. at 414.").

outright.[283] The Supreme Court did not find this position persuasive. Indeed, the Court did not even mention this countervailing concern.

Justice Kavanaugh identified a third category of laws that "present no impermissible discrimination or favoritism."[284] Rather, they "apply to religious and secular organizations alike without making any classification on the basis of religion."[285] Still, laws in this third category may "sometimes impose substantial burdens on religious exercise. If so, a religious organization may seek an exemption . . . ."[286] Justice Kavanaugh explained that some of the laws in this third category may appear "facially neutral [but were] actually motivated by animus against religion and [are] unconstitutional on that ground."[287] Many of the COVID-19 lockdown measures fall into this third category: governors who permitted political gatherings but prohibited religious gatherings may have been motivated by an animus against—or at least disfavor—of more orthodox faiths that require in-person assembly.

Justice Kavanaugh found that Nevada's regulations fell into the fourth category. The governor's order "suppl[ied] no criteria for government benefits or action, but rather divv[ied] up organizations into a favored or exempt category and a disfavored or non-exempt category."[288] During the pandemic, the former category has been designated as "essential" or "life-sustaining."[289] The latter category has been designated as "non-essential" or "non-life-

283. *Id.* at *36 ("Even if such alternatives were workable, they necessarily would "enmesh government in religious affairs." Jimmy Swaggart Ministries v. California Bd. of Equalization, [493 U.S. 378, 395 (1990)]. Entanglement of city and church through "comprehensive measures of surveillance and contacts", Lemon v. Kurtzman, 403 U.S. 602, 621 (1971), is unconstitutional in its own right. *See also* Hernandez v. C.I.R., 490 U.S. 680, 696–97 (1989); Aguilar v. Felton, 473 U.S. 402, 414 (1985).").

284. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2611 (2020) (Kavanaugh, J., dissenting) (mem.).

285. *Id.*

286. *Id.* (citing Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049, 2070 (2020)).

287. *Id.* at 2611–12 (citing *Lukumi*, 508 U.S. 520).

288. *Id.*

289. *See supra* Part I.A.

sustaining."[290] This sort of regime "expressly treat[ed] religious organizations equally to some secular organizations but better or worse than other secular organizations."[291] Justice Kavanaugh explained that "[t]hose laws provide[d] benefits only to organizations in the favored or exempt category and not to organizations in the disfavored or non-exempt category."[292] Stated differently, houses of worship exercising religion are treated worse than commercial enterprises engaging in economic activity. When courts review this fourth category of regulations, they are not required to compare in-person religious worship to any specific secular business. Justice Kavanaugh's framework avoids the *South Bay* comparator approach.

In this fourth category, the state does not discriminate against the religious institutions because they are religious. Rather, they are discriminating against those institutions based on a "value judgment" that in-person religious worship is simply not as important—as *essential*—as certain retail establishments.[293] Stimulating economic recovery is deemed more worthwhile than stimulating spiritual recovery.

Next, Justice Kavanaugh posed the critical question: is the government "*required* to place religious organizations in the favored or exempt category rather than in the disfavored or non-exempt category"?[294] According to Justice Kavanaugh, "[t]he Court's free-exercise and equal-treatment precedents" suggest that the answer to this question is yes: "Unless the State provides a sufficient justification otherwise, it must place religious organizations in the favored or exempt category."[295] But he did not cite a case to support this proposition. Rather, Justice Kavanaugh cited a thirty-year-old law review article by Professor Douglas Laycock, which was written

290. *See id.*
291. *Calvary Chapel*, 140 S. Ct. at 2610 (Kavanaugh, J., dissenting).
292. *Id.* at 2612.
293. *Id.* at 2614.
294. *Id.* at 2612.
295. *Id.*

shortly after *Smith* was decided.[296] Professor Laycock argued that *Smith* "would seem to require that religion gets something analogous to most favored-nation status."[297] In the context of international trade, a country afforded "most-favored" status under a treaty can enjoy the same privileges that the treaty "accords to other countries under similar circumstances."[298] For example, if a treaty grants Country #1 a certain benefit, Country #2 with most-favored status should receive that same benefit. Professor Laycock explained that "[r]eligious speech should be treated as well as political speech, religious land uses should be treated as well as any other land use of comparable intensity, and so forth."[299] Professor Laycock cited several examples in which zoning boards treated religious buildings worse than certain secular structures. "Alleged distinctions—explanations that a proposed religious use will cause more problems than some other use already approved—should be subject to strict scrutiny."[300]

2. *Calvary Chapel* and *Smith*

Justice Kavanaugh attempted to square his position with *Smith*. Justice Kavanaugh cited *Smith*, which stated that "where the State has in place a system of *individual* exemptions, it may not refuse to extend that system to cases of religious hardship *without compelling reason*."[301] I emphasize the word "individual," because Justice Scalia's majority opinion was discussing a very specific factual situation: "a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an [individual] applicant's unemployment."[302] Here is the full sentence from which Justice Kavanaugh

296. *Id.* (citing Douglas Laycock, *The Remnants of Free Exercise*, 1990 S. CT. REV. 1, 49–50 (1990)).

297. Laycock, *supra* note 296, at 49.

298. *Most favored nation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

299. Laycock, *supra* note 296, at 49–50.

300. *Id.*

301. *Calvary Chapel*, 140 S. Ct. at 2612 (Kavanaugh, J., dissenting) (first emphasis added; second emphasis in *Calvary Chapel*) (quoting Emp. Div. v. Smith, 494 U.S. 872 (1990)).

302. *Smith*, 494 U.S. at 884.

quoted: "As the plurality pointed out in *Roy*, our decisions in the unemployment cases stand for the proposition that where the State has in place a system of *individual* exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[303]

Justice Scalia was not making a broad pronouncement about Free Exercise Clause jurisprudence. He was speaking about a specific aspect of unemployment compensation. There may be other regimes with a series of individualized assessments that cannot be viewed as generally applicable. But *Smith* did not hold that the Free Exercise Clause *in all contexts* affords the free exercise of religion "something analogous to most-favored nation status."[304]

In *Calvary Chapel*, Justice Kavanaugh concluded: "[W]hen a law on its face favors or exempts some secular organizations as opposed to religious organizations, a court entertaining a constitutional challenge by the religious organizations must determine whether the State has sufficiently justified the basis for the distinction."[305] Stated differently, "the First Amendment requires that religious organizations be treated *equally* to the favored or exempt secular organizations, unless the State can sufficiently justify the differentiation."[306] Justice Kavanaugh did not conclude that the "sufficient justification" test translates to *strict scrutiny*, but I think that is a fair reading of his opinion. Indeed, Justice Kavanaugh joined Justice Alito's dissent, which expressly reviewed the directive with strict scrutiny.[307]

Justice Kavanaugh did not accurately describe the current state of Free Exercise jurisprudence. But the COVID-19 cases identified a gap in the Court's precedents: when the state treats secular retail businesses more favorably than religious institutions, because the

303. *Id.* (citing Bowen v. Roy, 476 U.S. 693, 708 (1986)) (emphasis added).

304. Laycock, *supra* note 296, at 49.

305. *Calvary Chapel*, 140 S. Ct. at 2612–13 (Kavanaugh, J., dissenting).

306. *Id.* at 2613.

307. *Id.* at 2607 (Alito, J., dissenting) ("In sum, the directive blatantly discriminates against houses of worship and thus warrants strict scrutiny under the Free Exercise Clause.").

former is deemed more "important." Justice Kavanaugh's framework would extend *Smith*'s framework to fill that gap.

Consider a counterfactual based on *Smith*. Imagine that the state adopted a rule of general applicability in which people who were terminated from their jobs for using an illegal controlled substance could not collect unemployment benefits. Under this regime, a Rastafarian who smokes ganja as part of a religious ritual and is subsequently fired would not be allowed to collect benefits. This regime would be constitutional under *Smith*, because the law applies generally to all religions. No single faith is targeted for disparate treatment. Later, the state legalizes the use of medicinal marijuana for those who obtain a license from a doctor. Under this new regime, a person who is fired for using licensed medicinal marijuana would be able to collect unemployment benefits—his use was not illegal. However, the Rastafarian who smokes ganja without a license would still be in violation of the law. Therefore, he could not collect unemployment benefits. Once again, the unemployment law is still one of general applicability: only those who use *illegal* controlled substances are denied benefits. But as a practical matter, some people are allowed to use marijuana, and some people are not. Specifically, secular usage is permitted by obtaining a license. But religious usage is prohibited.

Does the unemployment program comply with *Smith*? Yes. It employs a rule of general applicability. The medicinal marijuana law includes a large exemption, but it would still be generally applicable. Indeed, many states have legalized medicinal marijuana without legalizing religious usage of marijuana. Does this regime display any animus toward religion under *Lukumi*? I think the answer is no. This framework was established to ensure that doctors could prescribe marijuana for medicinal purposes, not to prevent Rastafarians from exercising their ritual. As a result, I think this regime complies with the Court's current Free Exercise Clause jurisprudence. (I table for now whether this regime complies with the more stringent requirements of the federal Religious Freedom Restoration Act).

This counterfactual illustrates why the COVID cases do not fit

into the *Smith-Lukumi* framework. For the most part, the lockdown orders could be viewed as rules of general applicability. Houses of worship were treated in the same fashion, or perhaps even better, than some comparable secular activities. And all faiths were subject to the same constraints. For purposes of this analysis, I will presume that the governors did not issue their orders with animus toward religion. I hedge only slightly. New York's orders targeted Orthodox Jews.[308] Moreover, other states implicitly favored sects that could worship on Zoom and disfavored those sects that required in-person congregation.[309] Certain worship services require face-to-face interactions. Other worship services do not require face-to-face interactions. For example, a holy communion cannot be delivered over email. The Jewish mourner's prayer, known as the *Kaddish*, requires a quorum of ten people in person to recite;[310] a breakout room would not suffice. Moreover, certain sects *cannot* use electricity on days of prayers.[311] Zoom is not an alternative for Orthodox Jews. But I will presume there is a lack of hostility. Given these facts, the comparison between a house of worship and a movie theater would fail to account for how the COVID regulations affected houses of worship. Justice Kavanaugh's *Calvary Chapel* framework provides a more realistic account of how governors treated houses of worship.

3. The *Calvary Chapel* Two-Step

Justice Kavanaugh's *Calvary Chapel* approach has two steps. First, the courts should ask whether a law fails to treat "religious organizations" as part of a "favored . . . class of organizations." If so, then second, the government must prove, with a "sufficient justification," why the religious organization was not treated with the favored status. Again, I do not think this approach is required by *Smith*. That case considered whether a law is neutral and generally

308. *See infra* Part IV.

309. *See supra* Part II.B.

310. *See* Shurpin, *supra* note 206.

311. Aryeh Citron, *Electricity on Shabbat*, CHABAD.ORG, https://www.chabad.org/library/article_cdo/aid/1159378/jewish/Electricity-on-Shabbat.htm [https://perma.cc/X8QP-94RA].

applicable toward religion or whether the law intentionally discriminates against religion. But Justice Kavanaugh's first step here looks beyond neutrality or intentional discrimination. Rather, the failure to give religious organizations the same favored treatment other institutions receive—even if the law is facially neutral—is *presumptively* unconstitutional, unless the state can prove otherwise. *Smith* provides that neutral laws are reviewed with something akin to rational basis scrutiny. And, with rational basis scrutiny, the individual has the burden to show disparate treatment.[312] The *Calvary Chapel* dissent placed the burden on the state to defend its disparate treatment.[313] In this fashion, Justice Kavanaugh inverted *Smith*'s presumption of constitutionality and replaced it with a presumption of liberty. The burden is not on the challenger to show bias. Rather, the burden is on the state to prove why they did not privilege the religious organization.

The *Calvary Chapel* framework has a significant advantage over the *South Bay* comparator approach. The first step "does not require judges to decide whether a church is more akin to a factory or more like a museum, for example."[314] The comparator approach was always circular. There are countless ways to compare and contrast different establishments. And it was never clear what the proper denominator was. Nor was it clear how much deference the state should be afforded to draw different types of lines. Can the court second-guess the government's determination that a grocery store should not be comparable to a church? But with the *Calvary Chapel* framework, the only question presented is whether the free exercise of religion was being disfavored. Or, stated differently, whether

312. *Cf.* Emp. Div. v. Smith, 494 U.S. 872, 894 (1990) (O'Connor, J., dissenting) (noting that prior to *Smith*, the Court had "respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by *requiring the government to justify* any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest." (emphasis added)).

313. *Id.* at 2613 (Kavanaugh, J., dissenting) ("[T]he First Amendment requires that religious organizations be treated equally to the favored or exempt secular organizations, *unless the State can sufficiently justify the differentiation*." (emphasis added)).

314. *Id.*

religion was denied a benefit that was given to secular groups.

Moreover, the second step of *Calvary Chapel* cannot be resolved in a conclusory fashion: "[I]t is not enough for the government to point out that other secular organizations or individuals are also treated *unfavorably*."[315] Once again, Justice Kavanaugh cited Professor Laycock and his co-author, Professor Steven T. Collis: "The point 'is not whether one or a few secular analogs are regulated. The question is whether a *single* secular analog is *not* regulated.'"[316] So long as a *single* secular institution is given favorable treatment, then the state must sufficiently justify why the religious institution is denied that same favorable treatment. Here, the denominator is not limited to comparable gatherings. Rather, the denominator would include *all* regulated entities that are afforded some benefit. Justice Kavanaugh concluded that this "point is subtle but absolutely critical."[317] He added, "if that point is not fully understood, then cases of this kind will be wrongly decided."[318] He is right. Judge Easterbrook did not acknowledge this point.

The *South Bay* comparator approach allows the state to shield a novel form of religious discrimination, under the guise of economic recovery. I agree with Professors Laycock and Collis: "It is not enough to treat a constitutional right like the least favored, most heavily regulated secular conduct."[319] If *any* secular conduct receives an exemption, the state must explain why religious conduct is denied an exemption.

4. The *Calvary Chapel* framework as applied to the Nevada directives

Justice Kavanaugh applied his new framework to the Nevada directives. According to the regulations, houses of worship were denied a benefit that secular casinos were granted. There is no need to compare churches to casinos. Nor must the court smoke out an

315. *Id.*

316. *Id.* (first emphasis added) (quoting Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 22 (2016)).

317. *Id.*

318. *Id.*

319. Laycock & Collis, *supra* note 316, at 23.

improper animus toward religion. The fact that houses of worship were denied a benefit afforded to secular businesses satisfies the first step. Next, Justice Kavanaugh moved to the second step. The state "gestured at two possible justifications for that discrimination: public health and the economy."[320] First, Nevada had "not explained why a 50% occupancy cap is good enough for secular businesses where people congregate in large groups or remain in close proximity for extended periods—such as at restaurants, bars, casinos, and gyms—but is not good enough for places of worship."[321] With the *Calvary Chapel* approach, the government has the burden to explain why the houses of worship were not exempted. In contrast, under the *South Bay* approach, the religious institution has the burden to show that the government acted irrationally by not exempting the house of worship.

Next, Justice Kavanaugh turned to the second proffered "economic rationale."[322] Nevada, a tourism-dependent state, "want[ed] to jump-start business activity and preserve the economic well-being of its citizens."[323] Therefore, it "loosened restrictions on restaurants, bars, casinos, and gyms in part because many Nevada jobs and livelihoods, as well as other connected Nevada businesses, depend on those restaurants, bars, casinos, and gyms being open and busy."[324] But Justice Kavanaugh did not find this justification persuasive. "[N]o precedent," he wrote, "suggests that a State may discriminate against religion simply because a religious organization does not generate the economic benefits that a restaurant, bar, casino, or gym might provide."[325]

Justice Kavanaugh suggested that the governor's directives "reflect an *implicit judgment* that for-profit assemblies are important and religious gatherings are less so; that moneymaking is more

320. *Calvary Chapel*, 140 S. Ct. at 2613.
321. *Id.*
322. *Id.* at 2614.
323. *Id.*
324. *Id.*
325. *Id.*

important than faith during the pandemic."[326] In short, the state cannot prefer money-making activities over religious activities. Justice Kavanaugh forcefully rejected this premise: "[t]he Constitution does not tolerate discrimination against religion merely because religious services do not yield a profit."[327]

There is a third possible justification, which Justice Kavanaugh folded into the second justification, but is really distinct: the governor of Nevada thought people of faith should be able to substitute in-person religious worship for online worship. This determination reflects a separate "implicit judgment."[328] Judge Easterbrook candidly admitted what Nevada would not: "Feeding the body requires teams of people to work together in physical spaces, but churches can feed the spirit in other ways."[329] This claim does not precisely map onto the third category, in which laws are motivated by *animus* toward religion. The governor no doubt thought he was being magnanimous toward religion. He simply did not see why in-person worship was essential when Zoom services were a viable alternative. Here, the governor failed to appreciate how public assembly was *essential* to the free exercise of religion. Justice Kavanaugh hinted at this dynamic. He wrote, "The legal question is not whether religious worship services are all alone in a disfavored category, but why they are in the disfavored category to begin with."[330] To use the language from the Sixth Circuit, the presumption must be that "soul-sustaining" activities are treated with the same consideration as "life-sustaining" activities.[331] Stated differently, the exercise of enumerated rights must be placed on the same plane as the exercise of economic privileges.

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326. *Id.* (emphasis added).

327. *Id.*

328. *See id.*

329. Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341, 347 (7th Cir. 2020).

330. *Calvary Chapel*, 140 S. Ct. at 2614 (citing Emp. Div. v. Smith, 110 S. Ct. 1595, 1603 (1990)). *Smith* does not support this proposition.

331. *See* Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610, 614 (6th Cir. 2020) ("But the orders do not permit *soul-sustaining* group services of faith organizations, even if the groups adhere to all the public health guidelines required of essential services and even when they meet outdoors." (emphasis added)).

Before the District of Nevada, the governor did not have to explain *why* he chose not to exempt churches. Under *South Bay*, the burden was on the challenger. But the *Calvary Chapel* framework would require the governor to state this point plainly. Now, "tradeoffs that can be unpleasant to openly discuss" would have to be openly discussed.[332] Or, if the governor fails to make his case, then the presumption goes unrebutted. Thus, the directives would violate the Free Exercise Clause. The starting point under *Calvary Chapel* is a presumption of liberty: religious institutions should be given the same favorable status that other organizations are given. This principle should be the default rule. To depart from this default rule, the state needs to provide a sufficient justification.

Chief Justice Roberts did not respond to Justice Kavanaugh's powerful dissent.

IV. PHASE 4: *THE ROMAN CATHOLIC DIOCESE OF BROOKLYN* TURNS THE TIDE

South Bay, as reinforced by *Calvary Chapel*, would remain the law of the land through November. But the tide would turn after Justice Amy Coney Barrett replaced Justice Ruth Bader Ginsburg on the Supreme Court. On Thanksgiving Eve, the new Roberts Court changed course in *Roman Catholic Diocese of Brooklyn v. Cuomo*. This case divided 5-4 in the other direction.[333] The Court enjoined[334] New York's "cluster action initiative."[335] This policy imposed hard caps on the number of people who could attend a house of worship in "red" and "orange" zones.[336] The Court found that New York treated houses of worship worse than comparable secular

332. *See Calvary Chapel*, 140 S. Ct. at 2614.

333. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 68–69 (2020) (per curiam).

334. *See id.* at 69.

335. *See Cluster Action Initiative*, N.Y. FORWARD, https://forward.ny.gov/cluster-action-initiative [https://web.archive.org/web/20201015001507/https://forward.ny.gov/cluster-action-initiative].

336. *See Roman Cath.*, 141 S. Ct. at 65–66.

businesses.[337] The majority also reasoned that Governor Cuomo's initiative was "far more restrictive" than the regimes from California and Nevada.[338] Justices Gorsuch and Kavanaugh wrote separate concurring opinions. They attempted to reconcile the majority's opinion with the Court's Free Exercise Clause precedents.[339] But *Smith* and *Lukumi* do not tell us how to compare prohibited religious activities with permitted secular activities. There were three dissenting opinions. First, Justice Sotomayor lamented the Court's abandonment of *South Bay*.[340] She added, correctly in my view, that *Smith* and *Lukumi* did not create the rule cited by Justices Gorsuch and Kavanaugh.[341] Second, Chief Justice Roberts dissented that there was no need to enjoin the directive.[342] New York had moved the petitioners out of the restrictive red and orange zones.[343] Yet Chief Justice Roberts cast doubt on the validity of Governor Cuomo's policy.[344] Third, Justice Breyer dissented along similar equitable grounds, but expressed some agreement with Justice Sotomayor's analysis.[345]

The Court was unwilling to expressly overrule *South Bay* or *Calvary Chapel*. But this decision effectively interred the *South Bay superprecedent*.

A. Governor Cuomo's Cluster Action Initiative

On March 7, 2020, New York Governor Andrew Cuomo declared a disaster in light of the pandemic.[346] This declaration "allow[ed] him to exercise extraordinary executive powers."[347] Over the duration of eleven months, and counting, Governor Cuomo's 90+

337. *See id.* at 66–67.
338. *See id.* at 67.
339. *Id.*
340. *See id.* at 79 (Sotomayor, J., dissenting).
341. *See id.* at 80 n.2.
342. *See id.* at 75 (Roberts, C.J., dissenting).
343. *See id.*
344. *See id.*
345. *See id.* at 78 (Breyer, J., dissenting).
346. *See* Agudath Israel of Am. v. Cuomo, 983 F.3d 620, 625 (2d Cir. 2020).
347. *Id.*

executive orders were "unprecedented in their number, breadth, and duration."[348] The Second Circuit observed that "[t]hose orders affect[ed] nearly every aspect of life in the State, including restrictions on activities like private gatherings and travel."[349]

On October 6, 2020, New York Governor Andrew Cuomo announced a new "Cluster Action Initiative."[350] This policy imposed increasingly stringent restrictions or specific areas, or *clusters*, with higher COVID-19 infection rates. (The state never specified what precise metrics would trigger new restrictions). These clusters would be color-coded. In so-called *red* zones, "[n]on-essential gatherings" were prohibited and "non-essential businesses" were required to close their storefronts.[351] Restaurants could only serve "takeout or delivery."[352] Houses of worship would be subject to two types of capacity limits: "25% of maximum occupancy or 10 people, whichever is fewer."[353] I will refer to the former as the *percentage* limit, and the latter as the *numerical* limit. However, "essential" businesses could remain open, subject to restrictions that apply statewide.[354] The state explained that "essential" businesses "provid[e] products or services that [were] required to maintain the health, welfare and safety of the citizens of New York State."[355]

In so-called *orange* zones, "[n]on-essential gatherings" were limited to ten people, and certain "non-essential" businesses were closed.[356] Restaurants could "provide outdoor service."[357] Houses of

348. *Id.*

349. *Id.*

350. Press Release, N.Y. State, Governor Cuomo Announces New Cluster Action Initiative (Oct. 6, 2020), https://www.governor.ny.gov/news/governor-cuomo-announces-new-cluster-action-initiative [https://perma.cc/2VWA-5FYX].

351. *See* N.Y. Exec. Order No. 202.68 (Oct. 6, 2020); *Agudath*, 983 F.3d at 626.

352. *See* N.Y. Exec. Order No. 202.68 (Oct. 6, 2020); *Agudath*, 983 F.3d at 626.

353. N.Y. Exec. Order No. 202.68 (Oct. 6, 2020); *Agudath*, 983 F.3d at 626.

354. *See Agudath*, 983 F.3d at 626 n.6.

355. *See Frequently Asked Questions for Determining Whether a Business Subject to a Workforce Reduction Under Recent Executive Order Enacted to Address COVID-19 Outbreak*, EMPIRE STATE DEV., https://esd.ny.gov/sites/default/files/ESD_EssentialEmployer-FAQ_032220.pdf [https://perma.cc/7QT4-5DTG]; *Agudath*, 983 F.3d at 626.

356. *See Agudath*, 983 F.3d at 626 (quoting N.Y. Exec. Order No. 202.68 (Oct. 6, 2020)).

357. *See* N.Y. Exec. Order No. 202.68 (Oct. 6, 2020); *Agudath*, 983 F.3d at 626.

worship were restricted to "33% of maximum occupancy or 25 people, whichever is fewer."[358] Finally, in so-called *yellow* zones, "non-essential gatherings" were limited to twenty-five people.[359] Restaurants could remain open. Houses of worship were not subject to a numerical limitation, only a fifty percent capacity limitation.[360]

Initially, Governor Cuomo created "restricted zones in Brooklyn and Queens in New York City," but later "changed the zone designations at least nine times."[361] The governor's regime was challenged by the Roman Catholic Diocese of Brooklyn and Agudath Israel of America.[362] The former group operates churches in Brooklyn and Queens.[363] The latter operates Orthodox Jewish synagogues in both boroughs.[364] Several of these houses of worship are huge.[365] Even before the governor's order, these houses of worship voluntarily adopted measures to prevent the spread of COVID-19. For example, "the Diocese voluntarily limited all church services to twenty-five percent of building capacity."[366] And Agudath Israel synagogues "shortened the length of services, and . . . split services into multiple separate gatherings to decrease the number of congregants present at one time."[367] These large facilities can practice social distancing. Two churches can seat more than 1,000 people, and two churches can seat more than 700.[368] One synagogue in

358. *See* N.Y. Exec. Order No. 202.68 (Oct. 6, 2020); *Agudath*, 983 F.3d at 626.

359. *Agudath*, 983 F.3d at 626.

360. *See id.*

361. *See id.* at 628.

362. I represent parents and a Jewish school that also challenged Governor Cuomo's orders. I also filed an amicus brief in support of Agudath Israel before the Second Circuit. *See* Josh Blackman, *Briefs Filed in Lebovits v. Cuomo and Agudath Israel of America v. Cuomo*, REASON: VOLOKH CONSPIRACY (Oct. 27, 2020, 9:00 AM), https://reason.com/volokh/2020/10/27/briefs-filed-in-lebovits-v-cuomo-and-agudath-israel-of-america-v-cuomo/ [https://perma.cc/CDA9-J9FU].

363. *Agudath*, 983 F.3d at 628.

364. *See id.*

365. *See* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020) (per curiam).

366. *Agudath*, 983 F.3d at 628.

367. *Id.* at 628–29.

368. *See Roman Cath.*, 141 S. Ct. at 67.

Queens can serve up to 400 people.[369] Before the cluster initiative, neither institution had seen any evidence of COVID-19 outbreaks.[370]

Two district court judges ruled against the religious organizations,[371] and the Second Circuit affirmed.[372] These cases were bound for the Supreme Court. But first, the composition of the Court would change.

B. The New Roberts Court in Red November

From May through November, Chief Justice Roberts's concurrence in *South Bay* remained the law of the land. But that consensus would soon be unsettled. By the time Governor Cuomo announced the cluster initiative on October 6, that change was already underway. On September 18, Justice Ruth Bader Ginsburg passed away.[373] Nine days later, on September 26, President Trump nominated Judge Amy Coney Barrett to fill the vacancy.[374] On October 9, the U.S. District Court for the Eastern District of New York ruled against the Plaintiffs.[375] Three days later, Judge Barrett's confirmation hearing began.[376] On October 26, Justice Barrett was confirmed.[377] And on November 9, the Second Circuit ruled against the

369. *See id.*

370. *Id.* at 628–29.

371. *See* Roman Cath. Diocese of Brooklyn v. Cuomo, 495 F. Supp. 3d 118, 132 (E.D.N.Y. 2020), *rev'd and remanded sub nom.* Agudath Israel of Am. v. Cuomo, 983 F.3d 620, 637 (2d Cir. 2020).

372. *See* Agudath Israel of Am. v. Cuomo, 979 F.3d 177, 181–82 (2d Cir. 2020).

373. *See* Linda Greenhouse, *Ruth Bader Ginsburg, Supreme Court's Feminist Icon, Is Dead at 87*, N.Y. TIMES (Sept. 24, 2020), https://www.nytimes.com/2020/09/18/us/ruth-bader-ginsburg-dead.html [https://perma.cc/8JTZ-8EF8].

374. *See* Peter Baker & Nicholas Fandos, *Trump Announces Barrett as Supreme Court Nominee, Describing Her as Heir to Scalia*, N.Y. TIMES (Sept. 28, 2020), https://www.nytimes.com/2020/09/26/us/politics/amy-coney-barrett-supreme-court.html [https://perma.cc/Z6XC-ATW9].

375. *Roman Cath.*, 495 F. Supp. 3d 132, *rev'd and remanded sub nom. Agudath*, 983 F.3d 620.

376. *See* Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html [https://perma.cc/6HFA-57T9].

377. *Id.*

Plaintiffs, relying on *South Bay*.[378] At that time, Chief Justice Roberts's concurrence was on its last legs.

On November 12, the Roman Catholic Diocese of Brooklyn sought an injunction from the Supreme Court.[379] Four days later, Agudath Israel filed a similar request.[380] Soon, Justice Barrett would cast the first consequential vote of her Supreme Court tenure.[381]

On November 25, shortly before midnight, the Supreme Court decided *Roman Catholic Diocese of Brooklyn v. Cuomo*.[382] The majority issued an unsigned per curiam opinion. But, by the process of elimination,[383] we can infer that Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett were in the majority. Chief Justice Roberts and Justices Breyer, Sotomayor, and Kagan were in dissent.[384] Justice Ginsburg could no longer maintain the *South Bay* majority. Now, Justice Barrett helped the new conservative Court form a new 5-4 majority. The close of the prior term had been marked by a decided turn to the left. I dubbed this period *Blue June*.[385] Now, Justice

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378. *Agudath*, 980 F.3d at 227–28.

379. Docket No. 20A87, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20a87.html [https://perma.cc/4R3A-JDD9].

380. Docket No. 20A90, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20a90.html [https://perma.cc/4TDJ-GEXU].

381. On October 28, only two days after she was confirmed, Justice Barrett recused herself from an election case. Republican Party of Pa. v. Boockvar, 141 S. Ct. 1 (2020) (mem.); *see* Adam Liptak, *Supreme Court Allows Longer Deadlines for Absentee Ballots in Pennsylvania and North Carolina*, N.Y. TIMES (Dec. 11, 2020), https://www.nytimes.com/2020/10/28/us/supreme-courtpennsylvania- north-carolina-absentee-ballots.html [https://perma.cc/S8UU-4HLL] ("Justice Barrett had not participated 'because of the need for a prompt resolution' and 'because she has not had time to fully review the parties' filings.'").

382. 141 S. Ct. 63 (2020) (per curiam).

383. Josh Blackman, *Invisible Majorities: Counting to Nine Votes in Per Curiam Cases*, SCOTUSBLOG (July 23, 2020, 3:23 PM), https://www.scotusblog.com/2020/07/invisible-majorities-counting-to-nine-votes-in-per-curiam-cases/ [https://perma.cc/HN74-GV2Q] ("But short of a 5-4 split in which all four dissenters note their dissent, it is impossible to know for certain how all of the justices voted in a per curiam opinion.").

384. *Roman Cath.*, 141 S. Ct. at 75–76.

385. Josh Blackman, *October Term 2019 in Review: Blue June*, U. CHI. L. REV. ONLINE (Aug. 27, 2020), https://lawreviewblog.uchicago.edu/2020/08/27/seila-blackman/ [https://perma.cc/3J4Q-X8BP].

Barrett's addition to the Court ushered in *Red November* shortly before Thanksgiving 2020.

The unsigned per curiam opinion was very short. At less than 2,000 words, this decision appeared to be the byproduct of a series of compromises. The opinion managed to repudiate Chief Justice Roberts's *South Bay* framework without articulating a coherent replacement. Justices Gorsuch and Kavanaugh wrote separate concurring opinions. There were three separate dissenting opinions. Chief Justice Roberts would have denied the application because he determined that the dispute was moot. Chief Justice Roberts did not address the merits. But he did respond to Justice Gorsuch's concurrence, which had harshly criticized his *South Bay* concurrence. Justices Breyer and Sotomayor wrote separate dissents.

C. The Per Curiam Majority Opinion

The majority opinion concluded that the Roman Catholic Diocese and Agudath Israel—the applicants—had "clearly established their entitlement to relief."[386] The Court's analysis, alas, was thin. Indeed, the majority "provide[d] only a brief summary of the reasons why immediate relief [was] essential" in order to "issue an order promptly."[387] The per curiam had four primary parts.

1. New York's regulations were not "neutral"

The Court found that the "applicants [had] made a strong showing that the challenged restrictions violate[d] 'the minimum requirement of neutrality' to religion."[388] Why? Because the restrictions "single[d] out houses of worship for especially harsh treatment."[389] In red zones, houses of worship were limited to a hard limit of ten people. But "essential" businesses in red zones could "admit as many people as they wish[ed]."[390] And in orange

386. *Roman Cath.*, 141 S. Ct. at 66.

387. *Id.*

388. *Id.* at 66 (quoting Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533 (1993)).

389. *Id.*

390. *Id.*

zones, "[w]hile attendance at houses of worship [was] limited to 25 persons, even non-essential businesses may decide for themselves how many persons to admit."[391]

The majority explained that these "categorizations" amounted to "disparate treatment."[392] But "disparate" how? Here, the Court did not attempt to compare churches and synagogues to comparable businesses.[393] Instead, the Court listed a wide range of "essential" secular businesses: "acupuncture facilities, camp grounds, [and] garages."[394] Why these three entities? Who knows? Acupuncture services are provided indoors. Camp grounds are outdoors. And garages store cars, not people. The Court also compared houses of worship to stores, "factories[,] and schools."[395] All of these businesses were "treated less harshly than the Diocese's churches and Agudath Israel's synagogues, which ha[d] admirable safety records."[396]

The majority went further and suggested that other businesses deemed "essential" in fact provide[d] "services [that were] not limited to those that can be regarded as essential."[397] In other words, the Court declined to defer to the State's determination of what is and is not essential. For example, New York had deemed essential "plants manufacturing chemicals and microelectronics and all transportation facilities."[398] The Court's adoption of this eclectic list implicitly rejected the *South Bay* comparator approach. A lower court can read between the lines and recognize that Chief Justice Roberts's comparator approach was repudiated. These disparate entities have little in common, other than the fact that the state treated them more favorably.

Justice Gorsuch concurred. He feigned surprise that the governor's judgment about what is "essential" "would so perfectly align

391. *Id.*
392. *Id.*
393. *See id.*
394. *Id.*
395. *Id.* at 67.
396. *Id.*
397. *Id.* at 66.
398. *Id.*

with secular convenience."[399] He further expanded the scope of possible comparators: "hardware stores, acupuncturists, and liquor stores," and "bicycle repair shops, certain signage companies, accountants, lawyers, and insurance agents."[400] Justice Gorsuch quipped, "So, at least according to the Governor, it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians."[401] He concluded, "[t]he only explanation for treating religious places differently seems to be a judgment that what happens there just isn't as 'essential' as what happens in secular spaces."[402] After all, houses of worship could operate soup kitchens and homeless shelters without strict limits, but could not hold worship services. The former were deemed "essential," but the latter were not. Perhaps the state would argue that people need to eat, but do not need to worship. Judge Easterbrook made just this argument in *Elim* II.[403] But the First Amendment "forbids" this sort of "value judgment." The state must treat so-called "life-sustaining" businesses in the same fashion as "soul-sustaining" groups.[404] Justice Gorsuch explained that the State cannot deem "traditional religious exercises" as not "essential" while "laundry and liquor, travel and tools" are "essential."[405]

Justice Sotomayor dissented. She described the *South Bay* rule as "clear and workable."[406] She explained that the government "may restrict attendance at houses of worship so long as *comparable* secular institutions face restrictions that are at least equally as strict."[407] The *Roman Catholic* majority eliminated the requirement to

399. *Id.* at 69 (Gorsuch, J., concurring).

400. *Id.*

401. *Id.*

402. *Id.*

403. *See infra* Part II.B.

404. *See* Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610, 611, 614–15 (6th Cir. 2020).

405. *Roman Cath.*, 141 S. Ct. at 69 (Gorsuch, J., concurring).

406. *Id.* at 79 (Sotomayor, J., dissenting).

407. *Id.* (emphasis added).

compare houses of worship to "comparable secular institutions."[408] Any secular institution will now suffice. I agree with Justice Gorsuch: "[A] majority of the Court makes . . . plain" that "courts must resume applying the Free Exercise Clause" and get rid of "a nonbinding and expired concurrence from *South Bay*."[409]

2. The Court reviewed New York's orders with strict scrutiny

The majority found that the regulations "must satisfy 'strict scrutiny'" because they were "not 'neutral' and of 'general applicability.'"[410] Therefore, the regulations "must be 'narrowly tailored' to serve a 'compelling' state interest."[411] New York's directives satisfied the latter requirement: "[s]temming the spread of COVID-19 is unquestionably a compelling interest."[412] But the regime was not narrowly tailored. In the previous paragraph, the majority effectively interred the *South Bay* comparator standard. But here, the Court suggested that New York's regime was "far more restrictive" than the regimes from California, as well as from Nevada.[413] The majority was unwilling to expressly overrule *South Bay* or *Calvary Chapel*.

The Court also observed that New York's restrictions were "much tighter than those adopted by many other jurisdictions hard-hit by the pandemic."[414] No specific restrictions were cited here. Moreover, the majority seemed skeptical that the measures were really necessary. New York's regulations, the Court observed, were "far more severe than has been shown to be required to prevent the spread of the virus at the applicants' services."[415] Indeed,

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408. *Id.*

409. *Id.* at 70 (Gorsuch, J., concurring).

410. *Id.* at 67 (per curiam) (quoting Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 546 (1993)).

411. *Id.* (quoting *Lukumi*, 508 U.S. at 546).

412. *Id.*

413. *Id.* at 67 n.2 (citing Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020) (mem.); S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (mem.)).

414. *Id.* at 67.

415. *Id.*

the applicants had voluntarily implemented safety measures, and there had not been any known outbreaks.[416] Here, the Court was willing to second guess the state's judgment, given the past success of these churches and synagogues.

The second-guessing continued. The Justices proposed "other less restrictive rules that could be adopted to minimize the risk to those attending religious services."[417] For example, "the maximum attendance at a religious service could be tied to the size of the church or synagogue."[418] The majority observed, "It is hard to believe that admitting more than 10 people to a 1,000-seat church or 400-seat synagogue would create a more serious health risk than the many other activities that the State allows."[419] Here, the Court further expanded the relevant scope for comparisons. Not only did the Court compare New York churches to New York "secular" businesses,[420] but the Court compared New York churches to churches in other states.[421] Of course, different states had different COVID-19 conditions. And different states place different levels of importance on the free exercise of religion. For example, Texas, which has a Religious Freedom Restoration Act, was required to treat houses of worship more favorably.[422] It is unclear how the Court saw fit to compare New York, which lacks an RFRA, to other states that are bound by an RFRA.

3. The directives inflicted irreparable harm

Next, the majority found that New York's restrictions "[would] cause irreparable harm."[423] As a threshold matter, restricting attendance to ten people will prevent "the great majority of those

416. *Id.*

417. *Id.*

418. *Id.*

419. *Id.*

420. *Id.* at 69 (Gorsuch, J., concurring).

421. *Id.* at 72–73 (Kavanaugh, J., concurring).

422. TEX. ATT'Y GEN., GUIDANCE FOR HOUSES OF WORSHIP DURING THE COVID-19 CRISIS (2020), https://www.dallascounty.org/Assets/uploads/docs/covid-19/community/RevisedGuidanceforHousesofWorshipDuringtheCOVID-19Crisis-Final.pdf [https://perma.cc/E2R3-Q8VJ].

423. *Roman Cath.*, 141 S. Ct. at 67.

who wish to attend Mass on Sunday or services in a synagogue on Shabbat."[424] But what about Zoom? Judge Easterbrook observed that "large in-person worship services" "can be replaced by" "radio and TV worship services, drive-in worship services, and the Internet."[425]

The Supreme Court emphatically rejected Judge Easterbrook's equivalency. The majority observed that "while those who are shut out may in some instances be able to watch services on television, such remote viewing is not the same as personal attendance."[426] For example, "Catholics who watch a Mass at home cannot receive communion."[427] And Orthodox Jewish people are prohibited from using electricity on holidays. This faith's "important religious traditions . . . require personal attendance."[428] Here, the Court rejected the implicit value judgment that many governors and judges embraced: online worship is a sufficient substitute for in-person worship.

4. An injunction was in the public interest

Finally, the Court found that an injunction would not "harm the public."[429] This analysis repeated two of the Court's prior findings. First, "the State ha[d] not claimed that attendance at the applicants' services ha[d] resulted in the spread of the disease."[430] It is unclear how the analysis would have shifted if *one* person contracted COVID-19 at one of the applicants' houses of worship. And it also seems irrelevant to the Court whether other houses of worship, who were not before the Court, adopted less stringent protocols. The Court's injunctions would, as a legal matter, only apply to the named plaintiffs.[431] But as a practical matter, the governor would

424. *Id.*

425. Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341, 347 (7th Cir. 2020).

426. *Roman Cath.*, 141 S. Ct. at 68.

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.*

431. *See* Josh Blackman & Howard Wasserman, *The Process of Marriage Equality*, 42 HASTINGS CONST. L.Q. 243 (2015).

likely be forced to stop enforcing the directives statewide.[432]

Second, the "State ha[d] not shown that public health would be imperiled if less restrictive measures were imposed."[433] Again, this element seems duplicative of the narrow tailoring analysis discussed earlier. Here, the state has a very difficult burden to satisfy. The government must show that allowing more people into houses of worship would "imperil" the public health. Proving such a counterfactual in the midst of a dynamic pandemic is a tall order. Here, strict scrutiny is fatal in fact.

The members of the majority acknowledged that they were "not public health experts."[434] And, the Court said it "should respect the judgment of those with special expertise and responsibility in this area."[435] But there is always a "[b]ut."[436] The Court explained that "even in a pandemic, the Constitution cannot be put away and forgotten."[437] And the Justices had "a duty to conduct a serious examination of the need for such a drastic measure."[438] The Court concluded that New York's restrictions, "by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty."[439] Therefore, an injunction was warranted.

5. Justice Gorsuch's concurrence

Justice Gorsuch wrote a solo concurring opinion. He began with this brief synopsis of the Court's Free Exercise Clause jurisprudence: The First Amendment "prohibits government officials from treating religious exercises worse than comparable secular activities, unless they are pursuing a compelling interest and using the

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432. Soos v. Cuomo, No. 20-3737, 2021 WL 37592 (2d Cir. Jan. 5, 2021) (enjoining restrictions as to other houses of worship in New York in light of Roman Catholic Diocese).

433. *Roman Cath.*, 141 S. Ct. at 68.

434. *Id.*

435. *Id.*

436. *Id.*

437. *Id.*

438. *Id.*

439. *Id.*

least restrictive means available."[440] Citing *Lukumi*, Justice Gorsuch described these "principles" as "long-settled."[441] In my view, Justice Gorsuch misread the Court's precedents. The Supreme Court did not state this exact position, but Justice Gorsuch's analysis does flow from *Lukumi*.

Let's revisit the structure of *Lukumi*. Part II.A of Justice Kennedy's majority opinion concluded that the Hialeah ordinances targeted the Santeria faith.[442] Based on this finding of targeting, Part II-B determined that the City did not impose a "requirement of general applicability."[443] In other words, the law was not neutral because it targeted a specific religion. Part III laid out the relevant standard: "A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny."[444] Next, the Court reviewed the ordinances with strict scrutiny. The strict scrutiny analysis in Part III began by discussing narrow tailoring. Here, the Court found that "all four ordinances are overbroad or underinclusive in substantial respects."[445] Specifically, "[t]he proffered objectives are not pursued with respect to *analogous non-religious conduct*, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree."[446] Justice Kennedy concluded, "[T]he absence of narrow tailoring suffices to establish the invalidity of the ordinances."[447]

Justice Gorsuch's reading of *Lukumi* suggests a circularity. He wrote, the First Amendment "prohibits government officials from

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440. *Id.* at 69 (Gorsuch, J., concurring) (citing Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 546 (1993)). Gorsuch later stated the test in similar terms. *Id.* at 70 ("The First Amendment traditionally requires a State to treat religious exercises at least as well as comparable secular activities unless it can meet the demands of strict scrutiny—showing it has employed the most narrowly tailored means available to satisfy a compelling state interest." (quoting *Lukumi*, 508 U.S. at 546)).

441. *Id.* at 69.

442. *Lukumi*, 508 U.S. at 542 ("The pattern we have recited discloses animosity to Santeria adherents and their religious practices. . . .").

443. *Id.* at 545–46.

444. *Id.* at 546.

445. *Id.*

446. *Id.* (emphasis added).

447. *Id.*

treating religious exercises worse than comparable secular activities, unless they are pursuing a compelling interest and using the least restrictive means available."[448] First, the Court must determine if the law is generally applicable. If the answer is yes, then the law is reviewed with rational basis scrutiny. If the answer is no, then the law is reviewed with strict scrutiny. And, as part of the strict scrutiny analysis, the Court must consider if the law is narrowly tailored. The Court has followed a well-established method to determine if a law is narrowly tailored: to consider if the regime is overinclusive or underinclusive.[449] And one way to determine overinclusiveness or underinclusiveness is, as Justice Kennedy wrote, to compare how the religious conduct and "analogous non-religious conduct" are treated.[450] This approach resembles *South Bay's* comparator approach—with a twist. In *Lukumi*, this comparison takes place *after* determining that a non-neutral law must be reviewed with strict scrutiny. *Lukumi* did not use the comparator approach to determine if the law was neutral. But Justice Gorsuch seems to be saying that under *Lukumi*, the Court can consider narrow tailoring at Step #1. If "religious exercise [is treated] worse than comparable secular activities," then strict scrutiny is appropriate.[451]

The Sixth Circuit stated Justice Gorsuch's point more directly: "A rule of general application, in this sense, is one that restricts religious conduct the same way that 'analogous non-religious conduct'

448. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring) (per curiam) (citing *Lukumi*, 508 U.S. at 546). The Sixth Circuit adopted a similar reading of *Lukumi*. Monclova Christian Acad. v. Toledo-Lucas Cty. Health Dep't, 984 F.3d 477, 480 (6th Cir. 2020). ("A rule of general application, in this sense, is one that restricts religious conduct the same way that 'analogous non-religious conduct' is restricted." (quoting Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 546 (1993))); *see also* Josh Blackman, *Sixth Circuit Declares Closure of Religious Schools in Toledo Violates Free Exercise Clause*, REASON: VOLOKH CONSPIRACY (Jan. 1, 2021, 6:17 PM), https://reason.com/volokh/2021/01/01/sixth-circuit-declares-closure-of-religious-schools-in-toledo-violates-free-exercise-clause/ [https://perma.cc/4LXR-7SXU].

449. *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 801–803 (2011) (holding that California law limiting the sale of violent video games was both "seriously underinclusive" and "vastly overinclusive.").

450. *Lukumi*, 508 U.S. at 546.

451. *Roman Cath.*, 141 S. Ct. at 69.

is restricted."[452] The Sixth Circuit panel plucked the phrase "analogous non-religious conduct" from *Lukumi*'s strict scrutiny analysis and used the comparator approach to determine whether strict scrutiny was warranted in the first place.[453] The panel put the cart before the horse. The question of narrow tailoring becomes relevant only after the Court determines that the law is not generally applicable. But the Sixth Circuit used the narrow tailoring analysis to find the law was not general applicable.

Yet my criticism is muted. The Sixth Circuit and Justice Gorsuch adopted a plausible reading of Justice Kennedy's muddled majority opinion. After all, Part II-B of *Lukumi*, which considered whether the ordinances were generally applicable, did consider one facet of narrow-tailoring: underinclusiveness. Justice Kennedy found that the Hialeah ordinances were "underinclusive" to accomplish the government's stated "interests: protecting the public health and preventing cruelty to animals."[454] Specifically, the laws "fail to prohibit *nonreligious conduct* that endangers these interests in a similar or greater degree than Santeria sacrifice."[455] In other words, Justice Kennedy used a tool of strict scrutiny—narrow tailoring—to conclude that strict scrutiny was warranted. *Lukumi* adopted a circular analysis. COVID-19 made that circularity patent.

Is the "nonreligious conduct" in Part II-B equivalent to the "analogous non-religious conduct" in Part III? Perhaps. Part III specifically invites comparisons. In Part II-B, the requirement for comparison is less obvious. For this reason, I think Justice Gorsuch adopts a plausible reading of *Lukumi*. But this reading is not "long-settled."

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452. *Monclova Christian Acad.*, 984 F.3d at 480 (quoting *Lukumi*, 508 U.S. at 546); *see also* Josh Blackman, *Sixth Circuit Declares Closure of Religious Schools in Toledo Violates Free Exercise Clause*, REASON: VOLOKH CONSPIRACY (Jan. 1, 2021, 6:17 PM), https://reason.com/volokh/2021/01/01/sixth-circuit-declares-closure-of-religious-schools-in-toledo-violates-free-exercise-clause/ [https://perma.cc/4LXR-7SXU].

453. *Monclova*, 984 F.3d at 480.

454. *Lukumi*, 508 U.S. at 543.

455. *Id.* (emphasis added).

D. Justice Kavanaugh's concurrence

Justice Kavanaugh also wrote a concurring opinion. He followed his framework from *Calvary Chapel*. Under his view, the free exercise of religion should be viewed as a "favored" right, akin to "most-favored" nation status.[456] Thus, there is no need to compare houses of worship to "comparable" or "analogous" secular activities. The state "impermissibly discriminated against religion" even if "*some* secular businesses are subject to similarly severe or even more severe restrictions."[457] Justice Kavanaugh explained that "under this Court's precedents, it does not suffice for a State to point out that" "some secular businesses such as movie theaters must remain closed and are thus treated less favorably than houses of worship."[458] New York created a "favored class of [essential] businesses."[459] At that point, "the State must justify why houses of worship are excluded from that favored class."[460] Specifically, "the State must justify imposing a 10-person or 25-person limit on houses of worship but not on favored secular businesses."[461] And, he concluded, "the New York restrictions on houses of worship are not tailored to the circumstances given the First Amendment interests at stake."[462] Specifically, "New York's restrictions discriminate against religion by treating houses of worship significantly worse than *some* secular businesses."[463] The key word is "some." He does not limit the comparisons of houses of worship to comparable, or analogous secular gatherings. If *any* secular business is given preferential treatment, the state must justify its failure to give the house of worship the same benefit. The denominator includes all businesses that are afforded favorable treatment.

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456. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2612–13 (2020) (Kavanaugh, J., dissenting) (mem.).

457. *Roman Cath.*, 141 S. Ct. at 73 (citing *Lukumi*, 508 U.S. at 537–38; *Smith*, 494 U.S. at 884) (emphasis in original).

458. *Id.*

459. *Id.*

460. *Id.*

461. *Id.*

462. *Id.*

463. *Id.* (emphasis added).

How does the majority's approach differ from that of Justice Kavanaugh's concurrence? The majority compares houses of worship to an eclectic ensemble of secular businesses that are *not* comparable. Justice Kavanaugh states, expressly, that it is irrelevant whether the comparators are comparable. There is thus little daylight between the two opinions. In effect, the majority adopted Justice Kavanaugh's "most favored" right approach without saying so expressly. (The Supreme Court would expressly adopt Justice Kavanaugh's concurrence in *Tandon v. Newsom*.[464])

Justice Kavanaugh contends that his reading of the First Amendment is consistent with "this Court's precedents."[465] To support this reading, Justice Kavanaugh cited pages 537–38 of *Lukumi* and page 884 of *Smith*.[466] These citations are different from the pages that Justice Gorsuch cited. Justice Kavanaugh's *Lukumi* citation refers to Part II-A. This was the correct portion of the opinion to cite. In this section, Justice Kennedy found that the Hialeah ordinance targeted the Santeria faith.[467] Justice Kennedy observed that the government determined that "[k]illings for religious reasons are deemed unnecessary, whereas most other killings fall outside the prohibition."[468] In Hialeah, secular killings, such as "hunting, slaughter of animals for food, eradication of insects and pests, and euthanasia [are] necessary."[469] And, the Court observed, hunting and fishing for sport were also likely necessary.[470] Or, in COVID-speak, these secular activities are *essential*. And *essential* is simply a synonym for *important*. Justice Kennedy explained that the "test of necessity devalues religious reasons for killing by judging them to be *of lesser import* than nonreligious reasons."[471] Lesser import means less important. Or, stated differently, non-essential. Justice Kavanaugh cited the language from *Lukumi* that bears most directly on the COVID-19

464. *See infra* Part V.D.
465. *Id.* at 73.
466. *Id.*
467. Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 537–38 (1993).
468. *Id.*
469. *Id.*
470. *Id.*
471. *Id.* (emphasis added).

restrictions.

But the City also treated favorably another type of non-secular activity: "kosher slaughter" was expressly exempted.[472] Here, Hialeah was not just treating religious activity worse than a comparable secular activity. Rather the government was only treating one sect's religious activity worse than comparable secular *and* religious activity. The Court did not base its decision on "differential treatment of two religions."[473] Instead, this disparate treatment showed that the law was "gerrymander[ed]" to target the Santeria faith.[474]

Next, Justice Kennedy turned to the analysis upon which Justice Kavanaugh appears to rely. At page 884 of *Smith*, Justice Scalia explained that the unemployment insurance program from *Sherbert* involved an "individualized governmental assessment" of individual conduct.[475] In other words, the government had to consider "the particular circumstances behind an applicant's unemployment."[476] In *Lukumi*, Justice Kennedy expanded on this standard: when "individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of 'religious hardship' without compelling reason.'"[477] Hialeah's ordinances "require[d] an evaluation of the particular justification for the killing."[478] These individualized exemptions placed Hialeah's policy closer to the insurance policy in *Sherbert* than to the generally applicable criminal law in *Smith*. Therefore, "religious practice is being singled out for discriminatory treatment."[479]

Yet this citation is unhelpful for Justice Kavanaugh's analysis. New York's cluster initiative does not permit individualized exemptions, like the regime at issue in *Sherbert*. Some "essential" gatherings were permitted, without regard to particular circumstances. Other "non-essential" gatherings were prohibited, without regard

472. *Id.* at 536.
473. *Id.* (citing Larson v. Valente, 456 U.S. 228, 244–46 (1982)).
474. *Id.*
475. Emp. Div. v. Smith, 494 U.S. 872, 884 (1990).
476. *Id.*
477. *Lukumi*, 508 U.S. at 537 (quoting *Smith*, 494 U.S. at 884).
478. *Id.*
479. *Id.*

to particular circumstances. For example, a church could not ask to increase the occupancy limit for Easter Sunday or Christmas Mass.

The Justice Gorsuch and Justice Kavanaugh concurrences flow from the reasoning of *Lukumi*. But neither Justice Kennedy clerk accurately stated the holding of *Lukumi*.

E. Justice Sotomayor's dissent

There were three separate dissents. Chief Justice Roberts wrote a solo dissent. Justice Breyer wrote a dissent joined by Justices Sotomayor and Kagan. And Justice Sotomayor wrote a dissent joined by Justice Kagan. The former two opinions did not engage the Free Exercise Clause arguments. Justice Breyer referred to New York's rules as "severe restrictions."[480] And he wrote that the occupancy "numbers are indeed low."[481] But whether those low numbers are unconstitutional, Justice Breyer queried, was "far from clear" in the unique context of this request for an injunction pending appeal.[482] Justice Breyer seemed noncommittal of how this case would have been resolved on a motion for summary judgment. Chief Justice Roberts also agreed with Justice Kavanaugh that New York's regulations were "distinguishable from those [the Court] considered" in *South Bay* and *Calvary Chapel*.[483] We will return to Chief Justice Roberts's and Justice Breyer's dissents later. Justice Sotomayor, however, responded to Free Exercise Clause analyses in the majority and concurring opinions. Let's start there.

Justice Sotomayor saw "no justification for the Court's change of heart" from *South Bay* and *Calvary Chapel*.[484] These precedents "provided a clear and workable rule."[485] Governments may "restrict attendance at houses of worship so long as comparable secular

480. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 77 (2020) (Breyer, J., dissenting) (per curiam).

481. *Id.*

482. *Id.*

483. *Id.* at 75 (Roberts, C.J., dissenting).

484. *Id.* at 79 (Sotomayor, J., dissenting).

485. *Id.*

institutions face restrictions that are at least equally as strict."[486] According to Justice Sotomayor, New York treated houses of worship like "comparable secular gatherings."[487] That analogous treatment, she wrote, "should be enough to decide this case."[488]

Next, Justice Sotomayor rejected the Diocese's argument that the regulations were not "neutral with respect to the practice of religion."[489] True enough, the regulation "refers to religion on its face."[490] But that reference, by itself, does not trigger strict scrutiny. "New York treats houses of worship far more favorably than their secular comparators."[491] The state, she wrote, does not "discriminate[] against" houses of worship.[492]

Justice Sotomayor further criticized Justice Kavanaugh for developing a new standard. She contended that *Lukumi* and *Smith* did not hold "that states must justify treating even noncomparable secular institutions more favorably than houses of worship."[493] Those precedents "created no such rule."[494] Justice Sotomayor was correct, and Justices Kavanaugh and Gorsuch were wrong.

F. Equitable dissents from Chief Justice Roberts and Justice Breyer

New York announced the cluster initiative on October 6, 2020.[495] The state zealously defended its policy in the district court and in the court of appeals. On November 16, Agudath Israel filed an

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486. *Id.* (citing S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (mem.)).

487. *Id.*

488. *Id.*

489. *Id.* at 80.

490. *Id.*

491. *Id.*

492. *Id.*

493. *Id.* at 80 n.2.

494. *Id.*

495. Press Release, N.Y. State, Governor Cuomo Announces New Cluster Action Initiative, New York State Governor's Press Office (Oct. 6, 2020), https://www.governor.ny.gov/news/governor-cuomo-announces-new-cluster-action-initiative [https://perma.cc/UFK7-PNC9].

application for injunctive relief with the Supreme Court.[496] The state filed its response November 20.[497] Also on November 20, New York downgraded certain neighborhoods in Brooklyn from an orange zone to a yellow zone.[498] The brief explained, "Consequently, there are currently no red or orange zones anywhere in New York City, and both of the synagogues for which Agudath Israel seeks relief are now located in yellow zones."[499] As cases skyrocketed throughout the country, and families were urged to stay home for Thanksgiving, New York removed restrictions in the very "cluster" that was currently before the Supreme Court.[500]

In *Diocese*, both Chief Justice Roberts and Justice Breyer dissented, largely on equitable grounds. Chief Justice Roberts found that there was "simply no need" to "grant injunctive relief under the present circumstances."[501] At present, none of the applicants were subject to the "fixed numerical restrictions."[502] Chief Justice Roberts acknowledged that "[t]he Governor might reinstate the numerical restrictions."[503] At that point, "the applicants can return to this Court, and we could act quickly on their renewed applications."[504] But for now, "it is a significant matter to override determinations made by public health officials concerning what is necessary for public safety in the midst of a deadly pandemic."[505] Chief Justice Roberts concluded, "An order telling the Governor not to do what he's not doing fails to meet [the] stringent standard" for "'the

496. Emergency Application for Writ of Injunction, Agudath Israel of Am. v. Cuomo, No. 20-3572 (Nov. 16, 2020).

497. Opposition to Application for Writ of Injunction, Agudath Israel of Am. v. Cuomo, No. 20-3572 (Nov. 20, 2020).

498. *Id.* at 17.

499. *Id.*

500. Press Briefing Transcript, Centers for Disease Control and Prevention (Nov. 19, 2020), https://www.cdc.gov/media/releases/2020/t1118-covid-19-update.html [https://perma.cc/7BZH-FRZ6].

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

502. *Id.*

503. *Id.*

504. *Id.*

505. *Id.*

extraordinary remedy of injunction.'"[506]

Justice Breyer likewise found that "there [was] no need now to issue any such injunction."[507] He explained, "[N]one of the applicants are now subject to the fixed-capacity restrictions that they challenge in their applications."[508] And were the state to "reimpose the red or orange zone restrictions," the parties "could refile their applications."[509] Justice Breyer suggested that the "Court, if necessary, could then decide the matter in a day or two, perhaps even in a few hours."[510] Justice Breyer was unduly optimistic. On average, it took weeks, and not days for the Court to decide COVID-19 Free Exercise Clause cases.[511] (*Tandon v. Newsom*, however, which we will discuss *infra*, was decided hours after briefing concluded.)[512] Finally, Justice Breyer urged New York to "seek ways of appropriately recognizing the religious interests here at issue without risking harm to the health and safety of the people of New York."[513]

The majority found there was "no justification" to "deny relief at this time" in light of New York's changed policy.[514] The Court explained, "[i]t is clear that this matter is not moot."[515] Moreover, "injunctive relief is still called for because the applicants remain under a constant threat that the area in question will be reclassified as red or orange."[516] Indeed, the Court observed that Governor Cuomo "regularly change[d] the classification of particular areas without

506. *Id.* (quoting Nken v. Holder, 556 U.S. 418, 428 (2009)).

507. *Id.* at 77 (Breyer, J., dissenting).

508. *Id.*

509. *Id.*

510. *Id.*

511. Josh Blackman, *How The Briefing Schedule Stole Christmas!*, REASON: VOLOKH CONSPIRACY (Dec. 12, 2020, 1:53 PM), https://reason.com/volokh/2020/12/24/how-the-briefing-schedule-stole-christmas/ [https://perma.cc/YJH7-5H3J].

512. Josh Blackman, *Breaking: SCOTUS Grants Injunction in Tandon v. Newsom*, REASON: VOLOKH CONSPIRACY (Apr. 10, 2021), https://reason.com/volokh/2021/04/10/breaking-scotus-grants-injunction-in-tandon-v-newsom/ [https://perma.cc/XHF2-TMKX].

513. *Roman Cath.*, 141 S. Ct. at 78 (Breyer, J., dissenting).

514. *Id.* at 68 (majority opinion).

515. *Id.*

516. *Id.*

prior notice."[517]

The Court cited two cases that relied on two exceptions to the mootness doctrine. First, the Court cited *Federal Election Commission v. Wisconsin Right to Life, Inc.*,[518] which invoked "the established exception to mootness for disputes capable of repetition, yet evading review."[519] Second, the Court cited *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*[520] This case stated the test for the voluntary cessation doctrine: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."[521] The Court did not reference either doctrine by name but embraced both doctrines.

In his concurrence, Justice Kavanaugh added that the applicants "face an imminent injury *today*" because their neighborhoods may be " classified as red or orange zones in the very near future."[522] He wrote, there "is no good reason to delay issuance of the injunctions."[523]

Agudath Israel characterized the government's "abrupt" change of policy as a cynical "feign[ed] retreat."[524] This reversal was all-too familiar. Over the prior nine months of COVID litigation, there had been a familiar pattern. The governor of Illinois modified the restrictions on houses of worship shortly before the Supreme Court would consider the policy.[525] The California governor also

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517. *Id.*

518. 551 U.S. 449 (2007).

519. *Id.* at 462; *see Roman Cath.*, 141 S. Ct at 68.

520. 528 U.S. 167, 189 (2000); *see Roman Cath.*, 141 S. Ct at 68.

521. Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (quoting United States v. Concentrated Phosphate Exp. Ass'n, Inc., 393 U.S. 199, 203 (1968)).

522. *Roman Cath.*, 141 S. Ct at 74 (Kavanaugh, J., concurring).

523. *Id.*

524. Reply Brief in Support of Emergency Application For Writ of Injunction at 2, Agudath Israel of Am. v. Cuomo, No. 20-3572 (Nov. 22, 2020), https://www.supremecourt.gov/DocketPDF/20/20A90/161477/20201122083829884_Reply%20Brief%20iso%20Emergency%20Application%20for%20Writ%20of%20Injunction-FINAL.pdf [https://perma.cc/C9T8-FDM4].

525. *See supra* Part II.B.

attempted to moot the *South Bay* case.[526] The churches argued that "[t]he eleventh hour attempts by California and Illinois to moot the applications to this Court do not impact the analysis."[527] However, Chief Justice Roberts (apparently) found the controversy was live and ruled for the government. There were several other efforts to moot COVID-19 cases before they reached the Supreme Court.[528]

When a case is on the doorstep of the Supreme Court, the government suddenly realizes that the restrictive measures zealously defended in the lower court were no longer necessary. And, graciously, the government relaxes the policy. An optimist would praise such government flexibility. A cynic would counter that these reversals are motivated, at least in part, by a desire to moot the case. Justice Gorsuch expressed that cynicism in *Roman Catholic Diocese I*. He wrote, "To turn away religious leaders bringing meritorious claims just because the Governor decided to hit the 'off' switch in the shadow of our review would be, in my view, just another sacrifice of fundamental rights in the name of judicial modesty."[529] Justice Gorsuch reiterated this point in *South Bay II*, which we will discuss *infra*: "Government actors have been moving the goalposts on pandemic-related sacrifices for months, adopting new benchmarks that always seem to put restoration of liberty just

526. Josh Blackman, *Mooting Corona Cases Before They Reach the Supreme Court*, REASON: VOLOKH CONSPIRACY (June 3, 2020, 8:30 AM), https://reason.com/volokh/2020/06/03/mooting-corona-cases-before-they-reach-the-supreme-court/ [https://perma.cc/WYC3-RAM8] ("First, on May 26, the South Bay United Pentecostal Church in California filed an application for injunctive relief with Circuit Justice Kagan. That same day, the County of San Diego adopted a new policy: a limited number of people could meet in houses of worship so long as they comply with certain social distancing guidance. Unsurprisingly, California argued that the appeal is now moot, or at least in flux because of the new policy. As a result, relief should be denied.").

527. Reply Brief in Support of Emergency Application For Writ of Injunction at 1, S. Bay Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021) (No. 20-55533) (mem.) (footnote omitted).

528. Blackman, *supra* note 526; *see also* Josh Blackman, *The "Essential" Second Amendment*, 26 TEX. REV. L. & POL. (forthcoming 2021), http://ssrn.com/abstract=3827441 [https://perma.cc/MT8B-DKEG].

529. *Roman Cath.*, 141 S. Ct at 72 (Gorsuch, J., concurring).

around the corner."[530] Alas, people of faith are stuck playing this never-ending game of constitutional Whac-a-Mole.[531]

G. The majority declined to consider Agudath Israel's targeting claim

The majority concluded that New York's law was not neutral, and that strict scrutiny was thus warranted. But the Court declined to address an alternate theory advanced by Agudath Israel: that Governor Cuomo's policy targeted Orthodox Jews.[532]

Judge Park dissented from the Second Circuit's denial of an injunction. He observed that prior to "issuing the order, the Governor

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530. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 720 (2021) (Gorsuch, J., concurring) (mem.).

531. *See* Josh Blackman, *The Irrepressible Myth of* Cooper v. Aaron, 107 GEO. L.J. 1135, 1153 (2019) ("The Justices attempted to thwart the massive-resistance game of whack-a-mole, whereby officials who were not directly bound by federal court judgments would sequentially refuse to voluntarily comply with the precedent."); Josh Blackman, *New York's COVID-19 Microcluster Whac-A-Mole Game*, REASON: VOLOKH CONSPIRACY (Nov. 22, 2020, 5:02 PM), https://reason.com/volokh/2020/11/22/new-yorks-covid-19-microcluster-whac-a-mole-game/ [http://perma.cc/F4SU-NNMD]. New York Times columnist Bret Stephens used the same imagery. Bret Stephens, *Thank You, Justice Gorsuch*, N.Y. TIMES (Nov. 30, 2020), https://www.nytimes.com/2020/11/30/opinion/cuomo-gorsuch-coronavirus.html [https://perma.cc/5LXP-5GBD] ("Another was the game of Hot Zone *Whac-a-Mole* that Cuomo tried to play with the court as the case was working its way through the legal system, by switching the affected areas' designations back to 'yellow.'" (emphasis added)); Josh Blackman, *About Two Hours After Bible Worship Groups Seeks Emergency Injunction, California Relaxes Guidance for April 15–After Easter, of Course*, REASON: VOLOKH CONSPIRACY (Apr. 2, 2021, 11:21 PM), https://reason.com/volokh/2021/04/02/about-two-hours-after-bible-worship-group-seeks-emergency-injunction-california-relaxes-guidance-for-april-15-after-easter-of-course/ [https://perma.cc/3XTH-P6VZ] (noting that two hours after Bible Worship group filed appeal with Supreme Court, California revised challenged gathering guidance).

532. According to reports, Governor Cuomo has sometimes voiced anti-Semitic sentiments. *See* Matt Flegenheimer, *Andrew Cuomo's White-Knuckle Ride*, N.Y. TIMES (Apr. 13, 2021), https://www.nytimes.com/2021/04/13/magazine/andrew-cuomo.html [https://perma.cc/JT2G-VF4F] ("[Cuomo] could also bridle at the indignity of voter courtship, growing especially irritated about an event celebrating Sukkot, the Jewish harvest holiday when the faithful gather outdoors beneath temporary shelters of branches and greenery. 'These people and their fucking tree houses,' Cuomo vented to his team, according to a person who witnessed it and another who was briefed on his comments at the time.").

said that if the 'ultra-Orthodox [Jewish] community' would not agree to enforce the rules, 'then we'll close the institutions down.'"[533] Judge Park cited these statements to show that Governor Cuomo "intended to target the free exercise of religion."[534] However, the Court said even if those "those comments [are put] aside," the regulations, on their face, still "cannot be viewed as neutral because they single out houses of worship for especially harsh treatment."[535]

In dissent, Justice Sotomayor claimed that the Diocese's argument deviated from *Trump v. Hawaii*.[536] That case, she wrote,

> declined to apply heightened scrutiny to a Presidential Proclamation limiting immigration from Muslim-majority countries, even though President Trump had described the Proclamation as a "Muslim Ban," originally conceived of as a "total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on."[537]

She added that if President Trump's "statements did not show 'that the challenged restrictions violate the 'minimum requirement of neutrality' to religion,' it is hard to see how Governor Cuomo's do."[538]

Here, Justice Sotomayor compared apples and oranges. *Hawaii*

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533. Agudath Israel of Am. v. Cuomo, 980 F.3d 222, 229 (2d. Cir. 2020); *see also* Josh Blackman, *Understanding Governor Cuomo's Hostility Towards Jews*, REASON: VOLOKH CONSPIRACY (Oct. 8, 2020, 8:56 PM), https://reason.com/volokh/2020/10/08/understanding-governor-cuomos-hostility-towards-jews/ [https://perma.cc/8YAD-ZW9S]; Josh Blackman, *Revisiting Governor Cuomo's Hostility Towards Orthodox Jews In Light of His "Fucking Tree Houses" Comment*, REASON: VOLOKH CONSPIRACY (Apr. 13, 2021, 5:08 PM), https://reason.com/volokh/2021/04/13/revisiting-governor-cuomos-hostility-towards-orthodox-jews-in-light-of-his-fucking-tree-houses-comment/ [https://perma.cc/46EN-EXS9].

534. *Agudath*, 980 F.3d at 229.

535. *Roman Cath.*, 141 S. Ct at 66.

536. 138 S. Ct. 2392 (2018).

537. *Roman Cath.*, 141 S. Ct. at 80 (Sotomayor, J., dissenting) (citation omitted) (quoting *Hawaii*, 138 S. Ct. at 2417).

538. *Id.* (quoting Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533 (1993)).

was an Establishment Clause challenge.[539] Those seeking entry to the United States could not assert Free Exercise rights. Therefore, the precedents do not line up neatly. Moreover, the Court generally reviews with deference policies that implicate "the admission and exclusion of foreign nationals," which "is a 'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'"[540] In *Hawaii*, the Court followed its longstanding precedent, *Kleindienst v. Mandel*,[541] and not Establishment Clause cases. These precedents provide the appropriate "circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen."[542] The analogy to *Lukumi* heightened scrutiny is simply inapt.

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Roman Catholic Diocese provided some answers to the lower courts, but still left many issues unresolved. Over the next five months, the Court would provide some clarity about how the Free Exercise Clause governs COVID-19 conflicts.

V. PHASE 5: THE AFTERMATH OF *ROMAN CATHOLIC DIOCESE*

In the wake of *Roman Catholic Diocese*, the Court's approach to Free Exercise cases would radically change. In December 2020, the Court remanded three cases for reconsideration in light of *Roman Catholic Diocese*: *Harvest Rock Church, Inc. v. Newsom*,[543] *High Plains Harvest Church v. Polis*,[544] and *Robinson v. Murphy*.[545] A fourth case, *Danville Christian Academy, Inc. v. Beshear*,[546] was dismissed because

539. *Hawaii*, 138 S. Ct. at 2416. My position is that the Establishment Clause has no bearing on immigration law. *See* Josh Blackman, *The Domestic Establishment Clause*, 23 ROGER WILLIAMS U. L. REV. 345 (2018).

540. *Hawaii*, 138 S. Ct. at 2418 (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)).

541. 408 U.S. 753 (1972).

542. *Id.* at 2419 (citing Kleindienst v. Mandel, 408 U.S. 753, 769 (1972)).

543. 141 S. Ct. 889 (2020) (mem.).

544. 141 S. Ct. 527 (2021) (mem.).

545. 141 S. Ct. 972 (2021) (mem.).

546. 141 S. Ct. 547 (2021) (mem.).

the order would soon expire. However, the next four months would bring four victories for houses of worship. In February 2021, the Court decided *South Bay II* and *Harvest Rock II*. These orders enjoined California's absolute ban on indoor worship. Later that month, *Gateway City Church v. Newsom*[547] halted Santa Clara County's ban on indoor worship. Finally, in April, *Tandon v. Newsom*[548] held that California could not restrict private, in-home worship.[549] After that last case, California lifted all "location and capacity" limits on places of worship.[550] At long last, the California COVID-19 cases seem to have drawn to a close.

A. The Advent after Roman Catholic Diocese

Roman Catholic Diocese was decided on November 25, 2020. Almost immediately, the 5-4 case turned back the *South Bay* tide. A Ninth Circuit panel observed that *Roman Catholic Diocese* "arguably represented a seismic shift in Free Exercise law."[551] And, relying on that new precedent, the panel declared unconstitutional Nevada's directives that the pre-Barrett Court declined to enjoin in *Calvary Chapel*.[552] "The Supreme Court's decision in *Roman Catholic Diocese* compels" that result, the panel found.[553] And the Second Circuit declared unconstitutional other aspects of New York's restrictions on houses of worship. The panel observed *Roman Catholic Diocese* "has supplanted" the "Chief Justice's concurring opinion in *South*

547. 141 S. Ct. 1460 (2021) (mem.).

548. 141 S. Ct. 1294 (2021).

549. Id. at 1296–98.

550. *See* John Blackman, *Breaking: California Lifts All "Location" and Capacity Limits on Places of Worship*, REASON: VOLOKH CONSPIRACY (Apr. 12, 2021, 6:53 PM), https://reason.com/volokh/2021/04/12/breaking-california-lifts-all-location-and-capacity-limits-on-places-of-worship/ [https://perma.cc/4B8W-98B5].

551. Calvary Chapel Dayton Valley v. Sisolak, 982 F.3d 1228, 1232 (9th Cir. 2020).

552. Josh Blackman, *Ninth Circuit Rules for Calvary Chapel, Calls Diocese Case "Seismic Shift in Free Exercise Law" (Updated)*, REASON: VOLOKH CONSPIRACY (Dec. 15, 2020, 3:51 PM), https://reason.com/volokh/2020/12/15/ninth-circuit-rules-for-calvary-chapel-calls-dioecese-case-seismic-shift-in-free-exercise-law/ [https://perma.cc/GSY3-QPVS].

553. *Calvary Chapel*, 982 F.3d at 1233.

Bay."[554] During the month of December, as the pandemic waned, the Supreme Court would decide four Free Exercise cases on the shadow docket.

1. *Harvest Rock II*

On December 3, 2020, the Court ruled on another case from California, *Harvest Rock Church, Inc. v. Newsom*.[555] The lower court had upheld restrictions on houses of worship. Here, the Court issued an unsigned order. The Court "treated" an "application for injunctive relief" as a "petition for a writ of certiorari before judgment," and then "granted" that petition.[556] The Court then vacated the district court's decision and remanded the case to the Ninth Circuit "with instructions to remand to the district court for further consideration in light of" *Roman Catholic Diocese*. There were no recorded dissents from this order. I described the unusual GVR as a "creative punt."[557] I surmise that the Justices hoped the lower courts would follow *Roman Catholic Diocese* and enjoin California's directives. However, on remand, the lower courts upheld an expanded version of the governor's order. As a result, this case would come back to the Court in February.

2. *High Plains Harvest Church* and *Robinson*

On December 15, 2020, the Court ruled on appeals from Colorado and New Jersey, respectively.[558] In *High Plains Harvest Church v.*

554. Agudath Israel of Am. v. Cuomo, 983 F.3d 620, 635 n.20 (2d Cir. 2020); *see also* Josh Blackman, *Second Circuit Rules for Agudath Israel and Brooklyn Diocese*, REASON: VOLOKH CONSPIRACY (Dec. 28, 2020, 2:58 PM), https://reason.com/volokh/2020/12/28/second-circuit-rule-for-agudath-israel-and-brooklyn-diocese/ [https://perma.cc/6T4Z-JNP3].

555. 141 S. Ct. 889 (2020) (mem.).

556. *Id.*

557. Josh Blackman, *SCOTUS Creatively Punts in COVID Appeal from 9th Circuit: Grants Cert Before Judgment, then Vacates and Remands*, REASON: VOLOKH CONSPIRACY (Dec. 3, 2020, 12:36 PM), https://reason.com/volokh/2020/12/03/scotus-creatively-punts-in-covid-appeal-from-9th-circuit-grants-cert-before-judgment-then-vacates-and-remands/ [https://perma.cc/W7MT-E52A].

558. Josh Blackman, *SCOTUS GVRs COVID Cases from Colorado and New Jersey*, REASON: VOLOKH CONSPIRACY, (Dec. 15, 2020, 12:07 PM),

Polis,[559] the Court ordered the Tenth Circuit to reconsider Colorado's restrictions on houses of worship in light of *Roman Catholic Diocese*.[560] Justice Kagan dissented, joined by Justices Breyer and Sotomayor.[561] She found that state had "lifted all" of the challenged limits, and therefore the case was moot.[562] The other case, *Robinson v. Murphy*, arose in New Jersey.[563] This case had not become moot. Unlike Colorado, New Jersey did not modify its policies in light of *Roman Catholic Diocese*. Here, the unsigned order remanded the case to the Third Circuit to reconsider New Jersey's restrictions in light of *Roman Catholic Diocese*. The Supreme Court did not enter an injunction in *Murphy*. As a result, New Jersey could continue enforcing its policy, notwithstanding *Roman Catholic Diocese*. There were no recorded dissents in *Murphy*.

3. *Danville Christian Academy*

Fourth, on December 17, 2020, the Court decided *Danville Christian Academy, Inc. v. Beshear*.[564] In this case, the Kentucky governor closed all schools, secular and non-secular alike.[565] But other businesses were allowed to remain open. The district court preliminarily enjoined the policy.[566] On appeal, the Sixth Circuit stayed the injunction,[567] based on what I described as a flawed reading of *Roman Catholic Diocese*.[568] The Supreme Court found that the "school-closing Order effectively expires this week or shortly thereafter,

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https://reason.com/volokh/2020/12/15/scotus-gvrs-covid-cases-from-colorado-and-new-jersey/[https://perma.cc/TD79-FJWW].

559. 141 S. Ct. 527, 527 (2020) (mem.).

560. *See id.*

561. *See id.*

562. *Id.*

563. Robinson v. Murphy, 141 S. Ct. 972 (2020) (mem.).

564. 141 S. Ct. 527 (2020) (mem.).

565. *See id.*

566. Danville Christian Acad., Inc. v. Beshear, No. 3:20-CV-00075-GFVT, 2020 WL 6954650, at *1 (E.D. Ky. Nov. 25, 2020).

567. Commonwealth v. Beshear, 981 F.3d 505, 511 (6th Cir. 2020).

568. *See* Josh Blackman, *Sixth Circuit Buries South Bay, but Distinguishes Diocese*, REASON: VOLOKH CONSPIRACY, (Nov. 29, 2020, 6:01 PM), https://reason.com/volokh/2020/11/29/sixth-circuit-buries-south-bay-but-distinguishes-diocese/ [https://perma.cc/TD79-FJWW].

and there is no indication that it will be renewed."[569] The Court, therefore, denied the application in light of "the timing and the impending expiration of the Order."[570] Justice Alito wrote a dissent, which was joined by Justice Gorsuch. He explained that the applicants proceeded "expeditiously," and it was "unfair to deny relief on this ground since this timing is in no way the applicants' fault."[571] Briefing had concluded in this case on December 9. It did not take the Justices nine days to write a short per curiam opinion. I surmised that "the Court held this order till the day-before-the order expired."[572] Once again, the Court manipulated the timing of the shadow docket, and "found a creative way to punt the case away."[573] Justice Gorsuch wrote a separate dissent, which Justice Alito joined. He wrote that Kentucky's order likely violated the Free Exercise Clause in light of *Roman Catholic Diocese*.

After the Kentucky case, the Supreme Court would take a two month hiatus from Free Exercise decisions. In February 2021, however, *South Bay* and *Harvest Rock* came roaring back to a very fractured bench.

B. The return of South Bay II *and* Harvest Rock II

On the morning of December 3, the Supreme Court GVR'd[574] *Harvest Rock Church, Inc. v. Newsom*, which challenged California's restrictions on houses of worship.[575] The Court asked the lower courts

569. Danville Christian Acad., Inc. v. Beshear, 141 S. Ct. 527, 527 (2020) (mem.).

570. *Id.* at 528.

571. *Id.* (Alito, J., dissenting).

572. *See* Josh Blackman, *Making Sense of* Danville Christian Academy v. Beshear, REASON: VOLOKH CONSPIRACY, (Dec. 18, 2020, 2:10 AM), https://reason.com/volokh/2020/12/18/making-sense-of-danville-christian-academy-v-beshear/ [https://perma.cc/FR5W-H3CH].

573. *Id.*

574. *See* Erin Miller, *Glossary of Supreme Court terms*, SCOTUSBLOG (Dec. 31, 2009), *https://www.scotusblog.com/2009/12/glossary-of-legal-terms/* [https://perma.cc/C2BS-5KQ2] ("When the Court 'GVRs,' it 'grants certiorari, vacates the decision below, and remands' a case to the lower court without hearing oral argument or deciding its merits.").

575. Harvest Rock Church, Inc. v. Newsom, No. 20A94, 2020 WL 7061630, at *1 (U.S. Dec. 3, 2020).

to reconsider Governor Newsom's policies in light of *Roman Catholic Diocese*. Did Governor Newsom take this opportunity to wind back his orders to comply with the New York case? No. He did the exact opposite. Several hours later, Governor Newsom announced a new "regional stay-at-home order" that would prohibit *all* indoor religious worship.[576] Churches were no longer limited to a certain number of worshippers at a time. Now they must shutter altogether in certain zones. But, the governor permitted "places of worship and political expression" to "allow outdoor services only."[577]

Two district courts found the ban on indoor worship was consistent with *Roman Catholic Diocese*. And the Ninth Circuit agreed. On appeal, the Supreme Court enjoined the prohibitions by a 6-3 vote. But the Court's conservatives split 3-3 about whether the state could prohibit singing and chanting in houses of worship.

1. *Harvest Rock II* District Court proceedings

On December 3, the Harvest Rock church sought a Temporary Restraining Order in the district court, but the court declined to rule on the motion right away.[578] That same day, the church bypassed the Ninth Circuit and asked the Supreme Court for an emergency

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576. Amy Graff & Eric Ting, *Newsom reveals what California's impending stay-at-home order will look like*, S.F. GATE (Dec. 3, 2020, 2:32 PM), https://www.sfgate.com/bayarea/article/Newsom-California-shelter-in-place-order-purple-15773220.php [https://perma.cc/HP5G-77SQ]; Josh Blackman, *A Few Hours After SCOTUS Punts on California Case, Governor Newsom Announces that "Regional Stay Home" Order That Would Prohibit All Indoor Religious Services*, REASON: VOLOKH CONSPIRACY (Dec. 3, 2020, 5:49 PM), https://reason.com/volokh/2020/12/03/a-few-hours-after-scotus-punts-on-california-case-governor-newsom-announces-that-regional-stay-home-order-that-would-prohibit-all-indoor-religious-services/ [https://perma.cc/P59C-Q4BJ].

577. *Governor Newsom Issues Regional Stay-at-Home Order Pending ICU Capacity*, CITY OF IRVINE (December 3, 2020), https://www.cityofirvine.org/news-media/news-article/governor-newsom-issues-regional-stay-home-order-pending-icu-capacity [https://perma.cc/U9DR-PD5L].

578. Josh Blackman, *Harvest Rock Files Renewed Emergency Application for Injunction with Supreme Court in light of California's New Restrictions*, REASON: VOLOKH CONSPIRACY (Dec. 9, 2020, 6:04 PM), https://reason.com/volokh/2020/12/09/harvest-rock-files-renewed-emergency-application-for-injunction-with-supreme-court-in-light-of-californias-new-restrictions/ [https://perma.cc/3W48-QBXR].

injunction.[579] Five days later, the Court rejected the submission without explanation. A note on the docket stated that the application was "not accepted for filing."[580] An attorney for Harvest Rock told me there was an "unwritten rule" that the Supreme Court will not grant emergency relief before the district court had an opportunity to decide.

On December 21, 2020, the district court denied Harvest Rock's request for a temporary restraining order.[581] It found that a complete prohibition of indoor worship was consistent with *Roman Catholic Diocese*. Why? California's "[b]lueprint offers something the New York and Nevada Orders did not: the ability to legally congregate in unlimited numbers for worship—so long as that worship occurs outside."[582] The district court failed to address the elements. During inclement weather, it is impossible to worship outside.[583] For example, on Christmas in San Francisco, the forecast predicted an eighty percent chance of rain, wind gusts up to twenty-five miles per hour, and temperatures below fifty degrees.[584] Moreover, obtaining peace and serenity in an urban jungle may be impossible.

Finally, outdoor worship is a poor substitute. Observant Jewish people may not be able to carry religious texts to outdoor locations during holidays.[585] And in Mormonism, certain rituals can only be

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579. Renewed Emergency Application for Writ of Injunction Relief, Harvest Rock Church, Inc. v. Newsom, No. 20A94, 2020 WL 7061630, at *1 (U.S. Dec. 3, 2020).

580. Docket No. 20A94, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20a94.html [https://perma.cc/NSY3-Q92C].

581. Harvest Rock Church, Inc. v. Newsom, No. EDCV206414JGBKKX, 2020 WL 7639584, at *1 (C.D. Cal. Dec. 21, 2020).

582. *Id.* at *7.

583. Josh Blackman, *Federal Judge in California Flouts Catholic Diocese, Dares SCOTUS to Reverse Him*, REASON: VOLOKH CONSPIRACY (Dec. 23, 2020, 2:00 PM), https://reason.com/volokh/2020/12/23/federal-judge-in-california-flaunts-catholic-diocese-dare-scotus-to-reverse-him/ [https://perma.cc/N77E-VZM4].

584. *See* Screenshot of Weather Forecast for December 25, 2020 in San Francisco, REASON, https://reason.com/wp-content/uploads/2020/12/weather.png [https://perma.cc/VES7-P8WV].

585. Josh Blackman, *The Prohibition on Carrying on the Sabbath Makes it Virtually Impossible for Jewish People to Worship Outside*, REASON: VOLOKH CONSPIRACY (Dec. 25, 2020,

performed inside a temple.[586] The district court judge also misread *Diocese*. He wrote that California "treats religious activity better than *comparable* secular activity and even better than essential services."[587] Chief Justice Roberts's *South Bay* concurrence asked if religious worship was treated differently than a "comparable secular" activity. [588] But *Roman Catholic Diocese* eliminated that requirement. Now, the religious activity must be compared to any secular activity, whether "comparable" or not.[589] Later that day, another federal court in California turned away the South Bay Pentecostal Church's challenge to the new policy.[590]

2. *Harvest Rock II* before the Ninth Circuit

On December 23, 2020, Harvest Rock sought an injunction pending appeal with the Ninth Circuit.[591] And the church requested relief by December 24, so there could be worship services for Christmas. The Ninth Circuit, however, set a briefing schedule that made such relief impossible: the government's response was not due till December 28.[592] I referred to this order as the briefing schedule that stole Christmas.[593] Judge O'Scannlain dissented from the order. He

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2:22 AM), https://reason.com/volokh/2020/12/25/the-prohibition-on-carrying-on-the-sabbath-makes-it-virtually-impossible-for-jewish-people-to-worship-outside/ [https://perma.cc/SUJ4-QHJG].

586. *Id.*

587. Harvest Rock Church, Inc. v. Newsom, EDCV206414JGBKKX, 2020 WL 7639584, at *4 (C.D. Cal. Dec. 21, 2020) (emphasis added).

588. S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (mem.).

589. Josh Blackman, *Why Exactly Was New York's COVID-19 Regime Not "Neutral"?*, REASON: VOLOKH CONSPIRACY (Nov. 26, 2020, 4:45 PM), https://reason.com/volokh/2020/11/26/why-exactly-was-new-yorks-covid-19-regime-not-neutral/ [https://perma.cc/HZJ4-XG34].

590. S. Bay United Pentecostal Church v. Newsom, No. 20-CV-00865-BAS-AHG, 2020 WL 7488974, at *1 (S.D. Cal. Dec. 21, 2020), *aff'd*, 985 F.3d 1128 (9th Cir. 2021).

591. Emergency Motion for Injunction Pending Appeal, Harvest Rock Church, Inc. v. Newsom, 982 F.3d 1240 (9th Cir. 2020) (No. 20-56357), https://drive.google.com/file/d/1FSegn_FicN1WCtJ80fdHh_Wr3r2PrY7O/view [https://perma.cc/R989-4LX5].

592. Harvest Rock Church, Inc. v. Newsom, 982 F.3d 1240 (9th Cir. 2020).

593. Josh Blackman, *How The Briefing Schedule Stole Christmas!*, REASON: VOLOKH

would have "granted the church at least the temporary relief it needs to ensure that its members can exercise freely the fundamental right to practice their Christian religion on one of the most sacred Christian days of the year."[594]

The *South Bay* panel moved more expeditiously because "the issues presented in this appeal 'strike at the very heart of the First Amendment's guarantee of religious liberty.'"[595] The briefing would conclude by December 14, 2020 and oral argument would be held on January 15, 2021. Still, there would be no relief by Christmas. Silent night would be spent on the chilly streets of San Francisco.[596]

On January 22, 2021 the Ninth Circuit ruled against South Bay.[597] The panel agreed with the district court: "California's restrictions differ markedly from the New York order under review in *Roman Catholic Diocese*."[598] Three days later, on January 25, 2021 the Ninth Circuit ruled against *Harvest Rock*.[599] Here, the *Harvest Rock* panel found itself bound by the new *South Bay* circuit precedent. Judge O'Scannlain concurred. He wrote that *South Bay* was "woefully out of step with" *Roman Catholic Diocese*.[600] Later that day on January 25, California lifted the regional stay at home order.[601] At the time, I questioned "if this timing was occasioned by the Ninth Circuit's

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CONSPIRACY (Dec. 24, 2020, 1:53 PM), https://reason.com/volokh/2020/12/24/how-the-briefing-schedule-stole-christmas/ [https://perma.cc/Y7JE-U5V3].

594. Harvest Rock Church, Inc. v. Newsom, 982 F.3d 1240 (9th Cir. 2020) (O'Scannlain, J., concurring in part and dissenting in part).

595. S. Bay United Pentecostal Church v. Newsom, 982 F.3d 1239, 1239 (9th Cir. 2020) (quoting Roman Cath. Diocese of Brooklyn v. Cuomo, 41 S. Ct. 63, 68 (2020) (per curiam)).

596. Alix Martichoux, *Will It Rain on Christmas? Bay Area Weather Forecast Looks Wet*, 7NEWS (Dec. 23, 2020), https://abc7news.com/rain-forecast-bay-area-will-it-on-christmas-sf-weather/9007154/ [https://perma.cc/7HGB-FZ2K].

597. S. Bay United Pentecostal Church v. Newsom, 985 F.3d 1128, 1131 (9th Cir. 2021).

598. *Id.* at 1148.

599. Harvest Rock Church, Inc. v. Newsom, 985 F.3d 771, 771 (9th Cir. 2021).

600. *Id.* at 772 (O'Scannlain, J., dissenting).

601. Thomas Fuller & Jill Cowan, *California Ends Strict Virus Restrictions as New Cases Fall*, N.Y. TIMES (Jan. 25, 2021), https://www.nytimes.com/2021/01/25/us/california-covid-restrictions.html [https://perma.cc/6FUG-ALTR].

double-rulings."[602] However, even though the statewide order was lifted, certain local counties continued to enforce the state's prohibition on indoor worship.[603] However, even though the statewide order was lifted, certain local counties continued to enforce the state's prohibition on indoor worship.[604] California would agree that the controversy was not moot.[605]

3. *Harvest Rock II* before the Supreme Court

Both Harvest Rock and South Bay sought injunctions from the Supreme Court. And on February 5, 2021, the Court granted relief in both *South Bay II* and *Harvest Rock II*.[606] First, the Court blocked Governor Newsom from prohibiting indoor worship.[607] Second, the Court allowed the state to limit attendance in churches to twenty-five percent.[608] Third, the Court allowed the state to prohibit "singing and chanting" in houses of worship.[609]

Several justices wrote separately. Justices Thomas and Gorsuch would have granted "the application in full."[610] In other words, they would have enjoined the percentage caps, and the ban on singing and chanting indoors. Justice Alito would have given the state thirty days to prove that the percentage caps and ban on singing

602. Josh Blackman, *Is SCOTUS Done with Emergency COVID-19 Free Exercise Litigation? (Updated)*, REASON: VOLOKH CONSPIRACY, (Jan. 26, 2021, 3:03 AM), https://reason.com/volokh/2021/01/26/is-scotus-done-with-emergency-covid-19-free-exercise-litigation/ [https://perma.cc/Y7LQ-2KY9].

603. *Id.*

604. *Id.*

605. *See* Josh Blackman, *South Bay and Harvest Rock Are Now Fully Briefed Before the Supreme Court*, REASON: VOLOKH CONSPIRACY (Mar. 10, 2021), https://reason.com/volokh/2021/01/30/south-bay-and-harvest-rock-are-now-fully-briefed-before-the-supreme-court/ [https://perma.cc/4LJP-GZCX].

606. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021) (mem.); Harvest Rock Church, Inc. v. Newsom, 141 S. Ct. 1289 (2021) (mem.); *see also* Josh Blackman, *SCOTUS Decides* South Bay v. Newsom II*, Enjoins Complete Prohibition on Indoor Worship Services*, REASON: VOLOKH CONSPIRACY (Mar. 10, 2021), https://reason.com/volokh/2021/02/06/scotus-decides-south-bay-v-newsom-ii-enjoins-complete-prohibition-on-indoor-worship-services/ [https://perma.cc/3KK9-BJMC].

607. *Harvest Rock*, 141 S. Ct. at 1289.

608. *Id.* at 1290.

609. *Id.*

610. *Id.*

would absolutely essential to prevent community spread.[611] If the state could not meet that burden, then in thirty days, the stay would lift. Critically, Justice Alito would have placed the burden on the state to justify its policy.[612]

Justice Gorsuch wrote a statement, which was joined by Justices Thomas and Alito. He found that the complete prohibition on indoor worship was not narrowly tailored. For example, California cannot "explain why the less restrictive option of limiting the number of people who may gather at one time is insufficient for houses of worship, even though it has found that answer adequate for so many stores and businesses."[613] Further, Justice Gorsuch wrote that California could not rely on its "mild climate."[614] (Justice Kagan cited California's "mild climate" to defend the policy.) This disparate treatment, he concluded, ran afoul of *Roman Catholic Diocese*: "this Court made it abundantly clear that edicts like California's fail strict scrutiny and violate the Constitution."[615]

Justice Barrett wrote a concurrence, which was her first separate writing on the Court.[616] She was joined by Justice Kavanaugh. Justice Barrett seemed to agree with the bulk of Justice Gorsuch's statement. But she wrote that the churches had "the burden of establishing their entitlement to relief from the singing ban."[617] And the applicants had not yet met their burden.[618]

Chief Justice Roberts wrote a two-paragraph concurring opinion, in which he repeated his call for "significant deference" from *South Bay I*. Chief Justice Roberts saw "no basis" to enjoin the prohibition on "singing indoors," which the state found "poses a heightened

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611. *Id.*

612. *See id.*

613. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 718 (2021) (statement of Gorsuch, J.) (mem.).

614. *Id.*

615. *Id.* at 719.

616. Josh Blackman, *Justice Barrett's First Opinion as a Justice*, REASON: VOLOKH CONSPIRACY (Mar. 10, 2021), https://reason.com/volokh/2021/02/06/justice-barretts-first-opinion-as-a-justice/ [https://perma.cc/7QFD-RC98].

617. 141 S. Ct. at 717 (Barrett, J., concurring in the partial grant of application for injunctive relief).

618. *Id.*

risk of transmitting COVID–19."[619] But Chief Justice Roberts rejected the absolute prohibition on indoor worship: reducing the "maximum number of adherents who can safely worship in the most cavernous cathedral" to "zero . . . appears to reflect not expertise or discretion, but instead insufficient appreciation or consideration of the interests at stake."[620] Chief Justice Roberts did not explain what those "interests at stake" were. Nor did he cite the Free Exercise Clause of the First Amendment. The precise basis of his analysis is unclear.

The votes in this case were complicated. Six Justices immediately enjoined the ban on indoor worship: Roberts, Thomas, Alito, Gorsuch, Kavanaugh, Barrett. Two justices (Thomas and Gorsuch) would have also immediately enjoined the percentage caps and ban on singing. One justice (Alito) would have enjoined the ban on singing and put the burden on the state to defend the percentage caps. Three justices (Roberts, Kavanaugh, and Barrett) would have put the burden on the church to introduce evidence showing that the percentage caps and ban on singing were not generally applicable.

Justice Kagan wrote a five-page dissent, which was joined by Justices Breyer and Sotomayor.[621] She began with the same refrain from *Roman Catholic Diocese*: the Justices are not scientists, and religious worship is treated more favorably than secular activities.[622] She wrote that the "mandate defies our caselaw, exceeds our judicial role, and risks worsening the pandemic." Justice Kagan contended that California's prohibition differs from the policy set aside in *Roman Catholic Diocese*: "California has treated houses of worship identically to other facilities with the same risk."

Nine months elapsed from *South Bay I* to *South Bay II*. In that period, the Roberts Court underwent a religious liberty revolution. Over the following two months, the Supreme Court would decide two more COVID-19 cases on the shadow docket—both from

619. *Id.* (Roberts, C.J., concurring in the partial grant of application for injunctive relief).

620. *Id.*

621. *Id.* at 720 (Kagan, J., dissenting).

622. *Id.*

California.

C. Gateway City Church v. Newsom

In the wake of *South Bay II* and *Harvest Rock II*, California ceased to enforce the complete prohibition on indoor prayer. However, Santa Clara, California continued to shutter all houses of worship. On February 12, 2021, a panel of the Ninth Circuit found that Santa Clara's ban was consistent with *South Bay II* and *Roman Catholic Diocese*. Why? Judges Canby, Graber, and Friedland found that the "County's prohibition on indoor gatherings is a neutral law of general applicability and therefore properly subject to rational basis review."[623] On February 17, the Gateway City Church sought an injunction from the Supreme Court.[624] On February 24, the County filed a reply.[625] And on February 25, the County informed the Court that the restrictions would be lifted on March 3.[626] Once again, the government tried to play COVID-19 Whac-a-mole.[627] However, the better practice is to rescind the policy before the reply brief is due.

The Court, however, did not wait. On February 26, the Court enjoined the Santa Clara policy. The unsigned order stated that "[t]he Ninth Circuit's failure to grant relief was erroneous. This outcome is *clearly dictated* by" *South Bay II*.[628] Here the Court used very strong

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623. Gateway City Church v. Newsom, No. 21-15189, 2021 WL 781981, at *1 (9th Cir. Feb. 12, 2021), *disapproved in later proceedings sub nom.* Gateway City Church v. Newsom, No. 20A138, 2021 WL 753575 (U.S. Feb. 26, 2021).

624. Emergency Application for Injunction, Gateway City Church v. Newsom, No. 20A138, 2021 WL 753575 (U.S. Feb. 21, 2021).

625. Opposition to Emergency Application for Injunction, Gateway City Church v. Newsom, No. 20A138, 2021 Westlaw 753575 (U.S. Feb. 25, 2021), http://www.supremecourt.gov/DocketPDF/20/20A138/169877/20210224152237242_Gateway%20SCOTUS%20Opp.pdf [https://perma.cc/3GG3-T56B].

626. Letter from James R. Williams, Cty. Counsel, to Hon. Scott S. Harris, Clerk of the Court, Supreme Court of the United States (Feb. 25, 2021), https://www.supremecourt.gov/DocketPDF/20/20A138/170114/20210225220817920_2021.02.25%20Gateway%20Letter%20-%20To%20File.pdf [https://perma.cc/N33N-G3Z6].

627. *See supra* note 531.

628. Gateway City Church v. Newsom, 141 S. Ct. 1460, 1460 (2021) (mem.) (emphasis added).

language. I was not able to find the phrase "clearly dictated" used in any other ruling on the shadow docket. Justice Kagan dissented for the reasons set out in her *South Bay II* dissent.[629] She was joined by Justices Breyer and Sotomayor.[630]

There would be one more COVID-19 case on the Court's shadow docket from California.

D. Tandon v. Newsom

By April 2021, the COVID-19 pandemic had entered its denouement. Vaccination rates were on the upswing.[631] Hospitalization rates were on the downswing.[632] And cities and states began to lift pandemic-related restrictions.[633] Nearly one year to the date after the last in-person oral argument,[634] the Supreme Court would decide its last COVID-19 case. And once again, the appeal would arise from California. Governor Newsom's latest restrictions "prohibit[ted] indoor gatherings and limits outdoor gatherings to three households."[635] Once again, the district court upheld the restrictions. Once again, the Ninth Circuit found the prohibition consistent with *Roman Catholic Diocese*. And once again, the Supreme Court summarily reversed the Ninth Circuit. In this case, the Court formally adopted Justice Kavanaugh's "most-favored" right framework from *Calvary Chapel* and found that California's restrictions

629. *Id.*

630. *Id.*

631. Liz Hamel et al., *KFF COVID-19 Vaccine Monitor–April 2021*, KAISER FAM. FOUND. (May 6, 2021), https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-april-2021/ [https://perma.cc/JM67-Z9DD].

632. *See, e.g.*, *Going Once? Going Twice? Vaccinated!*, CDC (May 7, 2021), https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html#print [https://perma.cc/37HW-RRKL].

633. Tim Fitzsimmons & The Associated Press, *These states are rolling back Covid restrictions, including mask mandates and indoor capacity caps*, NBC (Apr. 20, 2021, 2:23 PM), https://www.nbcnews.com/news/us-news/these-states-are-rolling-back-covid-restrictions-including-mask-mandates-n1259751 [https://perma.cc/4N8Q-S6YQ].

634. *Calendar of Events*, SCOTUSBLOG (Feb. 2020), https://www.scotusblog.com/events/2020-03/ [https://perma.cc/9JCJ-LPVG].

635. Tandon v. Newsom, No. 20-CV-07108-LHK, 2021 WL 411375, at *13 (N.D. Cal. Feb. 5, 2021).

were not neutral and generally applicable.

1. *Tandon* district court proceedings

In October 2020, Pastor Jeremy Wong and Karen Busch challenged the constitutionality of California's restrictions on in-home worship.[636] They held "Bible studies, theological discussions, collective prayer, and musical prayer at their homes."[637] The Plaintiffs argued that the state's restrictions violated the Free Exercise Clause. The case lingered in the district court for four months, as the Supreme Court decided *Roman Catholic Diocese*. On February 5, 2021—the same day the Supreme Court decided *South Bay II*—the district court rejected the Free Exercise challenge.[638]

2. *Tandon* before the Ninth Circuit

Nearly two months later, on March 30, 2021, a divided Ninth Circuit panel declined to grant an injunction pending appeal.[639] At this point, the Supreme Court had already decided *Gateway City Church*. That decision halted the governor's restrictions on houses of worship.[640] Yet the Ninth Circuit found that the restrictions on in-home worship were distinguishable from the restrictions on houses of worship: "When compared to analogous secular in-home private gatherings, the State's restrictions on in-home private religious gatherings are neutral and generally applicable and, thus, subject to rational basis review."[641] And the court found this decision consistent with *Roman Catholic Diocese*, *South Bay II*, and *Gateway City Church*.[642]

Judge Bumatay dissented from the denial of the injunction. He contended that "[t]he instructions provided by the Court are clear and, by now, redundant."[643] Judge Bumatay distilled three

636. *Id.* at *11.
637. *Id.* at *13.
638. *Id.* at *38–40.
639. Tandon v. Newsom, 992 F.3d 916, 930 (9th Cir. 2021).
640. Gateway City Church v. Newsom, 141 S. Ct. 1460, 1460 (2021) (mem.).
641. *Tandon*, 992 F.3d at 930.
642. *Id.*
643. *Id.* at 932 (Bumatay, J., dissenting).

principles from the Court's cases. "First, regulations must place religious activities on par with the *most favored class* of comparable secular activities, or face strict scrutiny."[644] Here, Judge Bumatay cited the majority opinion from *Roman Catholic Diocese*, but the discussion of the "most favored" right came from Justice Kavanaugh's concurrence in *Calvary Chapel*.[645] "Second, the fact that a restriction is itself phrased without reference to religion is not dispositive."[646] California's restrictions should be reviewed with strict scrutiny because "*some* comparable secular activities are less burdened than religious activity."[647] Judge Bumatay selected the correct comparator: not *all* comparable secular activities, but *any* comparable secular activities. "Third, businesses are analogous comparators to religious practice in the pandemic context."[648] On appeal, the Supreme Court would recognize each of these three principles.

3. *Tandon* rockets through the shadow docket

On April 2, Pastor Wong and Karen Busch sought an emergency injunction from the Supreme Court.[649] Right away, California engaged in yet another game of whac-a-mole.[650] The petitioners filed their application around 5:00 PM PT. About two hours later, California changed course, and announced it would lift the restrictions on in-home worship. The state issued a new guidance document. The Metadata on the PDF indicated the document was modified at 4:56 PM PT.[651] Soon enough, the petitioners would be allowed to

644. *Id.* (citing Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66–67 (2020) (per curiam)).

645. *See supra* text accompanying notes 294–300.

646. *Tandon*, 992 F.3d at 932.

647. *Id.* (emphasis added).

648. *Id.* (citing *Roman Cath. Diocese*, 141 S. Ct. at 67).

649. Docket No. 20A151, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/search.aspx?filename=/docket/DocketFiles/ html/Public/20A151.html [https://perma.cc/YQ5E-2KD3].

650. *See* Tandon v. Newsom, 141 S. Ct. 1294, 1297 (2021) ("California officials changed the challenged policy shortly after this application was filed . . . .").

651. Josh Blackman, *About Two Hours After Bible Worship Group Seeks Emergency Injunction, California Relaxes Guidance for April 15–After Easter, of Course*, REASON: VOLOKH

worship in their homes. Alas, not in time for Easter Sunday, which was on April 4. The new rules would go into effect on Monday, April 15.[652] At the time, I doubted the timing was coincidental.[653] Thirteen days later, the case for injunctive relief would become much weaker. I speculated that California was "once again, trying to frustrate Supreme Court review."[654]

Here, the briefing schedule would be very important. Had the Supreme Court granted California two weeks to file a reply, the state could have arguably run out the clock. However, Circuit Justice Kagan moved with dispatch. She ordered the governor to file his response by April 8.[655] And on noon pacific time on April 9, the Petitioners filed their reply brief. How long would the Court take to resolve this dispute? In prior COVID-19 cases, the Court took several days after briefing concluded to resolve emergency applications. *Danville Christian Academy* took nine days.[656] *Roman Catholic Diocese* took six days.[657] *South Bay II* also took six days.[658] The one paragraph order in *Gateway City Church* took one day.[659]

Tandon, however, would rocket through the shadow docket. On the evening of April 9, shortly before midnight eastern time, the

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CONSPIRACY (Apr. 2, 2021), https://reason.com/volokh/2021/04/02/about-two-hours-after-bible-worship-group-seeks-emergency-injunction-california-relaxes-guidance-for-april-15-after-easter-of-course/ [https://perma.cc/AB9Y-MS8J].

652. *Blueprint for a Safer Economy*, REASON: VOLOKH CONSPIRACY (Apr. 13, 2021), https://reason.com/wp-content/uploads/2021/04/Dimmer-Framework-September_2020-1.pdf [https://perma.cc/B78A-QQT2].

653. *See* Blackman, *supra* note 651.

654. *Id.*

655. Docket No. 20A151, *supra* note 649.

656. Docket No. 20A96, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/ public/20a96.html [https://perma.cc/GNX3-99H6].

657. Docket No. 20A87, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/docket/docketfiles/html/public/20a87.html [https://perma.cc/7645-NQ7Y].

658. Docket No. 20A136, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/ public/20a136.html [https://perma.cc/PG9Q-S6QM].

659. Docket No. 20A138, SUPREME COURT OF THE UNITED STATES.

Court granted the injunction.[660] The vote was 5-4. Justice Kagan wrote a two-page dissent, which Justices Breyer and Sotomayor joined.[661] Chief Justice Roberts dissented without writing a separate opinion.[662]

Over the prior year, no other COVID case moved as quickly on the Supreme Court's docket. Indeed, it is fair to speculate that the Justices decided *Tandon* and circulated draft opinions before the parties had even submitted their briefs. Less than nine hours after briefing was completed, the Court issued a four-page per curiam opinion.[663] Here, the Court concluded that the Ninth Circuit clearly erred.[664] The majority seemed ready to reverse the lower court, regardless of what California argued. The timing of this case also differed from the timing in *Danville Christian Academy*. On April 15, the case for emergency injunctive relief would become weaker. At that point, the state would no longer enforce the restrictions on private gatherings.[665]

The Court could have dragged its feet till the last minute, and found that there was no longer any need to decide the case. *Danville* executed that punt.[666] But in *Tandon*, the Court waited barely nine hours before enjoining the governor's restrictions.

4. The *Tandon* per curiam opinion

The per curiam opinion had four principal elements. First, the Court formally embraced Justice Kavanaugh's *Calvary Chapel*

660. Josh Blackman, *Breaking: SCOTUS Grants Injunction in* Tandon v. Newsom, REASON: VOLOKH CONSPIRACY (Apr. 10, 2021), https://reason.com/volokh/2021/04/10/breaking-scotus-grants-injunction-in-tandon-v-newsom/ [https://perma.cc/6UJV-HDPR].

661. Tandon v. Newsom, 141 S. Ct. 1294, 1298 (2021).

662. *See id.*

663. Blackman, *supra* note 660.

664. *Id.* at 1296 ("The Ninth Circuit's failure to grant an injunction pending appeal was *erroneous*." (emphasis added)).

665. *See* Adam Beam & Janie Har, *California to allow indoor gatherings as virus cases plummet*, ASSOCIATED PRESS (Apr. 2, 2021), https://www.usnews.com/news/best-states/california/articles/2021-04-02/california-to-allow-indoor-gatherings-as-virus-cases-plummet [https://perma.cc/LA79-MSWU].

666. *See supra* Part V.A.3 (discussing the *Danville* punt).

framework. The opinion explained that "government regulations are not neutral and generally applicable . . . whenever they treat *any* comparable secular activity more favorably than religious exercise."[667] Here, the key word is "any." If "*any* comparable secular activity" is given some special status, then the free exercise of religion must also be afforded that "most-favored" status. The Court explained that "[i]t is no answer that a State treats *some* comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue."[668] Here, the per curiam Court relied on Justice Kavanaugh's *Roman Catholic Diocese* concurrence. Now, Justice Kavanaugh's framework became the Court's framework. The Court had come full circle since *South Bay I* and *Calvary Chapel*. And I suspect *Tandon* was decided in the shadow of the not-yet-decided *Fulton v. City of Philadelphia*.[669]

In light of this standard, California's regulation was not neutral. "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 to bring together more than three households at a time."[670] Again, the most important word in that sentence is *some*. If some, or any comparable businesses are treated "more favorably" than the house of worship, the regulation is not neutral.

Next, the Court identified a second principle. It was irrelevant "*why* people gather."[671] Rather, courts should perform the comparison analysis based on the "risks various activities pose."[672] Here, the Court formally embraced Justice Gorsuch's framework from

667. *Tandon,* 141 S. Ct. at 1296 (citing Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67–68 (2020) (per curiam)) (emphasis added).

668. *Id.* (citing *Roman Cath. Diocese*, 141 S. Ct. at 66–67 (Kavanaugh, J., concurring)).

669. Docket No. 19-123, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/docket/docketfiles/html/public/19-123.html [https://perma.cc/FT2M-SCAU].

670. *Tandon*, 141 S. Ct. at 1297 (emphasis added).

671. *Id.* at 1296 (emphasis added) (citing *Roman Cath. Diocese*, 141 S. Ct. at 66 (Gorsuch, J., concurring)).

672. *Id.*

Roman Catholic Diocese. The Ninth Circuit erred. The panel did not consider whether "comparable secular activities," such as restaurants and movie theaters, "pose a lesser risk of transmission" than "religious exercise at home" pose.[673] Instead, "[t]he Ninth Circuit erroneously rejected these comparators simply because this Court's previous decisions involved public buildings as opposed to private buildings."[674] This distinction was immaterial. A person's choice to pray in a church or at home does not affect the analysis.

Third, under this form of strict scrutiny, the government bears the burden of proof to defend the policy. The house of worship does not have the burden of proof to attack the policy. The Court explained that the government's arguments must go beyond generalities of the pandemic. The state cannot simply identify "certain risk factors [that] 'are always present in worship, or always absent from the other secular activities' [that] the government may allow."[675] Rather, "narrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID."[676] This test resembles the least-restrictive means standard.[677]

For example, it is not enough to simply assert that people gather for extended periods of time in private at-home worship. People also gather in close quarters for extended periods of time in theaters and restaurants. The government permits these activities with precautionary measures, such as distancing and mask-wearing. "Where the government permits other activities to proceed with precautions," the Court explains, "it must show that the religious

673. *Id.* at 1297.

674. *Id.*

675. *Id.* at 1296 (citing S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 718 (2021) (statement of Gorsuch, J.) (mem.); *id.* at 717 (Barrett, J., concurring) (mem.)).

676. *Id.* at 1297.

677. Thomas v. Review Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the *least restrictive* means of achieving some compelling state interest." (emphasis added)); *see also* 42 U.S.C. 2000bb-1(b) (2018) ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest; and is the *least restrictive means* of furthering that compelling governmental interest." (emphasis added)).

exercise at issue is *more dangerous* than those activities even when the same precautions are applied."[678] Whatever "precautions [may] suffice for" permitted activities should "suffice for religious exercises too."[679] To satisfy this test, the government must prove that prohibiting indoor worship is the *only* way to achieve its interests. Of course, this standard cannot be met. Distancing, mask wearing, and other precautionary measures could help the government reduce the spread of COVID-19. The ban on indoor worship was not the least restrictive means to accomplish the state's goal.

In this case, the Plaintiffs "were more than willing to . . . require[e] attendees to wear masks, socially distance and stay away if symptomatic."[680] They were even willing to worship outside. But the state did not afford them the same accommodations that other, preferred secular activities were afforded. And "[t]he State cannot 'assume the worst when people go to worship but assume the best when people go to work.'"[681] Here, the Court formally embraces the Sixth Circuit's opinion in *Roberts v. Neace*, which predated *South Bay I*.[682]

Finally, the Court turned to a fourth principle: the controversy was still live. Here, even if California *planned* to withdraw the restrictions, the case was not yet moot. The Plaintiffs "'remain[ed] under a constant threat' that government officials will use their power to reinstate the challenged restrictions."[683] Thus, they remained "entitled to emergency injunctive relief."[684] The Court stressed that relief was especially appropriate because California had a "track record of 'moving the goalposts,'" and "retain[ed] authority to

678. *Tandon*, 141 S. Ct. at *1297.*

679. *Id.* (citing Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 69–70; *South Bay*, 141 S. Ct. at 719 (statement of Gorsuch, J.)).

680. Robert Dunn, *Op-Ed: Supreme Court decision on at-home worship wisely supported religious liberty*, L.A. TIMES (Apr. 13, 2021, 12:47 PM), https://www.latimes.com/opinion/story/2021-04-13/supreme-court-california-worship-covid-bible-study [https://perma.cc/D6D8-SWMA].

681. *Tandon*, 141 S. Ct. at 1297 (quoting Roberts v. Neace, 958 F. 3d 409, 414 (6th Cir. 2020)).

682. *Id.*; *see supra* Part I.C (discussing Sixth Circuit precedent).

683. *Tandon*, 141 S. Ct. at 1297 (quoting *Roman Cath. Diocese*, 141 S. Ct. at 68).

684. *Id.*

reinstate those heightened restrictions at any time."[685] California would lose this final game of whac-a-mole.

The per curiam opinion concluded that "[t]his Court's decisions have made" these four "points clear."[686] Moreover, "[t]hese [four] principles dictated the outcome in this case."[687] I would not say the principles were "clear." Nor did the prior cases "dictate" the result. I think *Tandon* elucidated the necessary reasoning underlying *Roman Catholic Diocese*. Up to this point, the Court had been somewhat cagey about how to define neutrality. Justice Kavanaugh was the only member of the Court who tried to answer this question. And I think Justice Kavanaugh's framework was the only way to understand why New York's policies were unconstitutional. Relief, in *Tandon*, was not "unsurprising." Judge Bumatay accurately read *Roman Catholic Diocese*. The Ninth Circuit panel majority did not.

5. Justice Kagan's *Tandon* dissent

Justice Kagan wrote a two-page dissent in *Tandon*. And she "den[ied] the application largely for the reasons stated in" her *South Bay II* dissent.[688] Justice Kagan acknowledged that "finding the right secular analogue may [sometimes] raise hard questions."[689] But, she reasoned, this case was not tough. California "ha[d] adopted a blanket restriction on at-home gatherings of all kinds, religious and secular alike."[690] Religious in-home gatherings were treated the same as secular in-home gatherings. Justice Kagan was not willing to compare religious *indoor* gatherings to other types of secular *indoor* gatherings, such as restaurants or movie theaters. She narrowed the scope of comparisons to "gatherings in homes," which she labelled the "obvious comparator."[691] California, Justice Kagan wrote, was not required to "treat at-home religious gatherings the same as

685. *Id.* (citing *South Bay*, 141 S. Ct. at 720 (2021) (statement of Gorsuch, J.)).
686. *Id.* at 1296.
687. *Id.* at 1297.
688. *Id.* at 1298 (Kagan, J., dissenting).
689. *Id.*
690. *Id.*
691. *Id.*

[indoor gatherings at] hardware stores and hair salons."[692]

Justice Kagan also shined a light on the shadow docket. She wrote that the Court "reli[ed] on separate opinions and *unreasoned orders*."[693] This criticism rings hollow, and comes a bit late. For much of 2020, Chief Justice Roberts's separate opinion was the law of the land. Dozens of federal courts cited it, without hesitation. Indeed, Justice Kagan had cited Chief Justice Roberts' separate opinion.[694] The *Tandon* majority should be entitled to at least as much respect, if not more, than a solo concurrence.

* * *

For the "fifth time" in four months, the Supreme Court "summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise."[695] Two days after the Court ruled, California lifted all "location and capacity limits on places of worship."[696] At long last, California's pandemic restrictions on the free exercise of religion had drawn to a close.

VI. PHASE VI: THE PANDEMIC WANES, THE SEPARATION OF POWERS ARE RESTORED

In time, the COVID-19 pandemic will draw to a close. And this sixth, and final phase will afford our polity an opportunity to assess the legal strictures that endured for more than a year. And this introspection should let the states carefully consider a foundational question: which branch of government should decide how to restrict civil liberties during an ongoing emergency. In the past, it was

692. *Id.*

693. *Id.* (emphasis added).

694. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 721 (2021) (Kagan, J., dissenting).

695. *Tandon,* 141 S. Ct. at 1297 (citing Harvest Rock Church, Inc. v. Newsom, 141 S. Ct. 889 (2020) (mem.); South Bay, 141 S. Ct. 716 (2021) (mem.); Gish v. Newsom, 141 S. Ct. 1290 (2021); Gateway City Church v. Newsom, 141 S. Ct. 1460 (2021)).

696. Josh Blackman, *Breaking: California Lifts All "Location and Capacity Limits on Places of Worship"*, REASON: VOLOKH CONSPIRACY (Apr. 12, 2021), https://reason.com/volokh/2021/04/12/breaking-california-lifts-all-location-and-capacity-limits-on-places-of-worship/ [https://perma.cc/89GG-GT4S].

widely assumed that governors should have wide latitude.[697] Unitary executives could react nimbly to short-term crises like hurricanes or earthquakes.[698] But in light of a viral outbreak that lasted for months on end, the legislature must be able to assert itself. Indeed, in the spring of 2021, New York and other states began to impose limitations on gubernatorial power during health emergencies. Going forward, states should consider three models to bring balance to state government. First, state legislatures can preemptively define certain activities as "essential" or "life-sustaining." Second, states should require legislative approval for emergencies that extend beyond x days. Third, states should make it easier for legislatures to terminate emergency executive orders. As the pandemic wanes, legislatures can restore the separation of powers.

A. Which branch of government decides during the pandemic?

During the pandemic, courts largely deferred to government's determinations of what policies would best promote public health. Chief Justice Roberts expressed this sentiment in *South Bay I*. "The precise question of when restrictions on particular social activities should be lifted," he wrote, "is a dynamic and fact-intensive matter subject to reasonable disagreement."[699] Chief Justice Roberts explained that "[o]ur Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials

697. *See* John Farmer Jr., *9/11 commission official calls on government to change response to coronavirus immediately: OPINION*, ABC NEWS (Mar. 28, 2020, 5:06 AM), https://abcnews.go.com/Politics/911-commission-official-calls-government-change-response-coronavirus/story?id=69822778 [https://perma.cc/U3QP-NVRR] ("Our national emergency response system, which rests on the normally sound assumption that governors are best equipped to make critical decisions, has been overrun by a global pandemic that by definition respects no political boundaries.").

698. NAT'L GOVERNORS ASS'N, A GOVERNOR'S GUIDE TO HOMELAND SECURITY 3 (2019), https://www.nga.org/wp-content/uploads/2010/11/NGA_HomelandSecurityGuide_2.19_update.pdf [https://perma.cc/T96R-KK28] ("Governors have considerable authority to call for additional resources. . . . Knowing how to effectively and expediently use these assets and assistance is essential to how quickly a state can respond to an event.")

699. S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (mem.).

of the States 'to guard and protect.'"[700] But which politically accountable officials made these decisions?

For the most part, state legislatures stayed on the sidelines. Rather, during the COVID-19 pandemic, governors exercised sweeping authority to regulate all aspects of human existence. The Second Circuit observed that New York Governor Andrew Cuomo's executive orders were "unprecedented in their number, breadth, and duration."[701] A 1979 law stated that "the governor may by executive order temporarily suspend any" law if that suspension was "necessary to assist or aid in coping with such disaster."[702] And in March, the New York state legislature gave Cuomo the power to "issue any directive . . . necessary to cope with the disaster."[703] Between March and December 2020, the governor "issued almost 90 executive orders" that "affect[ed] nearly every aspect of life in the State, including restrictions on activities like private gatherings and travel."[704] And he issued "500 directives, modifications or suspensions of state regulations."[705]

And were these decisions made solely on the basis of science? Of course not. Politically accountable politicians make political decisions. In a press conference, Governor Cuomo admitted that he does not blindly follow the recommendations of scientists.[706] "When I say 'experts' in air quotes, it sounds like I'm saying I don't really trust the experts. Because I don't. Because I don't."[707] All

700. *Id.* (quoting Jacobson v. Massachusetts, 197 U.S. 11, 38 (1905)).

701. Agudath Israel of Am. v. Cuomo, 983 F.3d 620, 625 (2d Cir. 2020).

702. N.Y. EXEC. LAW § 29-a (McKinney 2020), https://www.nysenate.gov/legislation/laws/EXC/29-A [https://perma.cc/QM4L-XGN5].

703. Edward McKinley, *Democrats Forge Deal to Strip Cuomo's Emergency Powers*, TIMES UNION (Mar. 2, 2021, 6:14 PM), https://www.timesunion.com/news/article/Democrats-forge-deal-to-strip-Cuomo-emergency-15994351.php [https://perma.cc/8BFH-MLRZ]; EXEC. § 29-a, https://www.nysenate.gov/legislation/laws/EXC/29-A [https://perma.cc/QM4L-XGN5].

704. *Id.*

705. McKinley, *supra* note 703.

706. J. David Goodstein et al., *9 Top Health Officials Have Quit as Cuomo Scorns Expertise*, N.Y. TIMES (Feb. 1, 2021), https://www.nytimes.com/2021/02/01/nyregion/cuomo-health-department-officials-quit.html [https://perma.cc/55KP-3MVR].

707. *Id.*

politicians are motivated by politics. And politicians can find experts who submit declarations that support their views.

Consider an example from New York. In December 2020, the Buffalo Bills made the National Football League's playoffs.[708] Sport venues in New York could not host fans for games. But Governor Cuomo established an elaborate scheme that would permit nearly 7,000 fans to watch the game in Bills Stadium.[709] During this time, the state was urging people not to congregate with family and friends for Christmas or New Year's.[710] But New York established an elaborate scheme to let fans watch football in person. Why? My guess is politics. Voters in upstate New York are an influential voter bloc, and Cuomo wanted to appease this constituency. Why did Governor Cuomo not approach Christian groups about hosting large gatherings for Christmas? What about a large Menorah lighting for Chanukah? To the governor, people of faith were apparently not as important as the Bills Mafia.[711] Likewise, in California, Governor Newsom began to roll back COVID restrictions in the face of a recall movement.[712] Politicians are not scientists. Nor should they

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708. *See* Ken Belson, *The Bills will play in the A.F.C. championship game for the first time in 27 years*, N.Y. TIMES (Jan. 16, 2021, 11:40 PM), https://www.nytimes.com/live/2021/01/16/sports/nfl-playoffs [https://perma.cc/99XB-6ES5].

709. *See* Marcel Louis-Jacques, *Buffalo Bills Granted Permission to Have Fans at Playoff Game, First Crowd of Season*, ESPN (Dec. 30, 2020), https://www.espn.com/nfl/story/_/id/30625221/buffalo-bills-granted-permission-fans-playoff-game-first-crowd-season [https://perma.cc/K2PB-UFLN].

710. *See, e.g.*, Press Release, N.Y. State, Governor Cuomo Announces 89,000 New Yorkers Have Received First COVID-19 Vaccine Dose (Dec. 23, 2020), https://www.governor.ny.gov/news/video-audio-rush-transcript-governor-cuomo-announces-89000-new-yorkers-have-received-first [https://perma.cc/BF7H-RQSA] ("More travel is a proxy for more social gatherings, more social gatherings, fewer precautions, more spread. . . . Celebrate. But just be smart about the way you celebrate, right? Avoid the density, open the windows, take a walk outside.").

711. *See* Adam Kilgore, *'Bills Mafia' Waited a Generation for a Team Like This. It Has Had to Embrace It from Afar.*, WASH. POST (Jan. 7, 2021), (https://www.washingtonpost.com/sports/2021/01/07/bills-mafia-fans-coronavirus/ [https://perma.cc/J98N-RJHV].

712. *See* Taryn Luna, *As Recall Threat Grows, California Gov. Gavin Newsom Shifts his Governing Style, Pushing Reopenings*, YAHOO NEWS (Feb. 27, 2021), https://news.yahoo.com/recall-threat-grows-california-gov-130019079.html [https://perma.cc/D3T5-

be. Yet courts should take stock of these simple dynamics when considering emergency measures that were not approved by the legislatures. Blind deference is not warranted.

In the midst of a crisis, the unitary executive can be more energetic and nimbler than the bicameral legislature.[713] Andy Beshear, the governor of Kentucky, stated that state executives "have done the right things in trying times and circumstances, and their willingness and courage to do it is exactly why their authority has to remain with them."[714]

However, as time lapsed, and governments began to learn more about COVID-19, this unilateral action became harder to defend. As 2020 turned to 2021, state legislatures began to assert themselves. And unaccountable governors became accountable.

B. New York and other states reclaim power from the governors

In the spring of 2021, statehouses began to restore the separation of powers. In New York, the Democratic-controlled legislature reached a compromise to cabin the Democratic governor's powers.[715] The *New York Times* observed, "In a kind of rear-guard action, legislatures in more than 30 states are trying to restrict the power of governors to act unilaterally under extended emergencies that have traditionally been declared in brief bursts after floods, tornadoes or similar disasters."[716] Specifically, the legislation barred the "the governor from unilaterally issuing new executive orders related to the pandemic without legislative review."[717] This statute

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R37K] ("Newsom flatly rejects the suggestion that politics have played a role in his pandemic decisions and has not publicly acknowledged the recall effort even as he shifts to campaign-style events in major media markets across the state. But his aides have acknowledged the obvious: Newsom's chances of beating back the effort would be higher if schools are open and Californians are widely vaccinated before a possible election, allowing fatigued voters to resume their daily lives.").

713. *See* THE FEDERALIST NO. 70 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

714. *See* Trip Gabriel, *State Lawmakers Defy Governors in a Covid-Era Battle for Power*, N.Y. TIMES (Feb. 22, 2021), https://www.nytimes.com/2021/02/22/us/politics/republicans-democrats-governors-covid.html [https://perma.cc/HR6G-NMVD].

715. McKinley, *supra* note 703.

716. Gabriel, *supra* note 714.

717. McKinley, *supra* note 703.

stripped the governor's power to "issue any directive during a state disaster emergency."[718] But Cuomo still "retain[ed] the ability to tweak or renew existing orders relating to slowing the spread of COVID-19."[719] Andrew Stewart-Cousins, the state Senate Majority Leader, acknowledged that the situation had changed since March 2020.[720] "The public deserves to have checks and balances," he said.[721] "Our proposal would create a system with increased input while at the same time ensuring New Yorkers continue to be protected."[722] Carl E. Heastie, the Assembly Speaker, expressed a similar sentiment. In March, "temporary emergency powers were granted as New York was devastated by a virus we knew nothing about."[723] But by February 2021, it became "time for our government to return to regular order."[724]

In March 2021, the New York legislature enacted Chapter 71.[725] The statute "declares that it is time to restore the pre-pandemic balance of power of the governor and legislature."[726] Now the governor cannot impose measures unilaterally. Rather, the Commissioner of Health must certify how the changes will "address the spread and/or reduction of the COVID–19 virus."[727] And the governor must submit those modifications to the legislature for notice and comment.[728] Moreover, "No directive may be extended or modified more than once unless the governor has responded, including electronically, to any comments provided" by the legislature.[729] Finally, "The legislature may terminate by concurrent resolution executive orders issued under this section at any time."[730] This statute

718. S. 4888, 2021 Leg., 244th Sess. (N.Y. 2021).
719. McKinley, *supra* note 703.
720. *Id.*
721. *Id.*
722. *Id.*
723. *Id.*
724. *Id.*
725. 2021 N.Y. Sess. Laws Ch. 71 (McKinney).
726. *Id.* § 1.
727. *Id.* § 2.1.
728. *Id.* § 2.2(b).
729. *Id.* § 2.2(f).
730. *Id.* § 2.2(g).

should prevent Governor Cuomo from unilaterally deciding all aspects of public health policy.

Other states have taken similar steps to restrict gubernatorial emergency powers. The Kansas legislature revoked all emergency orders and created a specific process by which the governor could reissue those orders.[731] The Ohio legislature made it tougher for the governor to issue emergency orders.[732] Now, the legislature can cancel any health orders that last more than thirty days, and the governor must seek legislative authorization to extend his order beyond sixty days.[733] The Utah legislature terminated the state's mask mandate, and curbed emergency powers.[734] The executive branch now has to give notice to the legislature before imposing public health constraints.[735] Moreover, emergencies can expire thirty days after they are declared.[736] North Dakota seems to have enacted the *Roman Catholic Diocese* standard into law. Now, the government cannot "[t]reat religious conduct more restrictively than any secular conduct of reasonably comparable risk, unless the government demonstrates through clear and convincing scientific evidence that

731. *Governor Kelly signs emergency response bill, will reissue executive orders to protect COVID-19 recovery*, KSN News (Mar. 24, 2021, 5:00 PM), https://www.ksn.com/news/local/governor-kelly-signs-emergency-response-bill-to-re-issue-executive-orders-to-protect-covid-19-recovery [https://perma.cc/5KR8-W9LF]; 2021 Kan. Sess. Laws 7 (SB40), http://kslegislature.org/li/b2021_22/measures/documents/sb40_enrolled.pdf [https://perma.cc/3XWW-P4E9].

732. Jeremy Pelzer, *Ohio lawmakers override DeWine veto, pass limits on governor's coronavirus powers*, CLEVELAND.COM (Mar. 24, 2021), https://www.cleveland.com/open/2021/03/ohio-lawmakers-override-dewine-veto-pass-limits-on-governors-coronavirus-powers.html [https://perma.cc/KUW7-YW4U].

733. OHIO REV. CODE ANN. §§ 107.42(D)(1), 107.42(E) (West 2021), https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_134/bills/sb22/EN/05?format=pdf [https://perma.cc/5K45-2TTH].

734. Bethany Rodgers, *Utah's statewide mask mandate will end April 10 after Gov. Spencer Cox signed pandemic 'endgame' bill*, SALT LAKE TRIB. (Mar. 24, 2021), https://www.msn.com/en-us/news/us/utah-e2-80-99s-statewide-mask-mandate-will-end-april-10-after-gov-spencer-cox-signed-pandemic-e2-80-98endgame-e2-80-99-bill/ar-BB1eVTRY [https://perma.cc/S4R5-UJYC].

735. 2021 Utah Laws ch. 437 (S.B. 195) (amending UTAH CODE ANN. § 26-23b-104(b)(i) (West 2021)), https://le.utah.gov/~2021/bills/static/SB0195.html [https://perma.cc/8GP3-ZYZ9].

736. *Id.* (amending UTAH CODE ANN. § 26-23b-104(4)(a)(ii) (West 2021)).

a particular religious activity poses an extraordinary health risk."[737]

As this Article goes to print, more than 300 measures were being considered nationwide.[738] Pennsylvania voters approved a constitutional amendment to limit the governor's authority.[739] This measure forces an emergency declaration to automatically expire after twenty-one days, regardless of the severity.[740] Finally, the Pacific Legal Foundation, a libertarian public interest law firm, has proposed model legislation.[741]

C. How legislatures should respond to COVID-19

Going forward, state governments should glean some lessons from the pandemic. And, in the process, legislatures should reclaim their station in the separation of powers. I think there are three general approaches states can follow.

First, state legislatures can preemptively define certain activities as "essential" or "life-sustaining." As a result, state governors would not be able to shutter, on an ad hoc basis, certain activities deemed as non-essential. Ohio and Arkansas enacted laws that

737. 2021 N.D. Legis. Serv. 195 (West) (S.B. 2181), https://legiscan.com/ND/text/2181/2021 [https://perma.cc/N72M-72K3].

738. Michael Wines, *State lawmakers take aim at the emergency powers governors have relied on in the pandemic.*, N.Y. TIMES (Mar. 27, 2021), https://www.nytimes.com/2021/03/26/world/covid-governors-emergency-powers.html [https://perma.cc/R6NU-PFQH].

739. Josh Blackman, *Pennsylvania Voters Can Approve Constitutional Amendment To Limit Governor's Emergency Powers*, REASON: VOLOKH CONSPIRACY (Mar. 28, 2021, 9:00 PM), https://reason.com/volokh/2021/03/28/pennsylvania-voters-can-approve-constitutional-amendment-to-limit-governors-emergency-powers/ [https://perma.cc/8QPC-SSMR]; Sarah Anne Hughes, *Voters back curtailing Wolf's emergency powers in win for GOP lawmakers*, SPOTLIGHT PA (May 19, 2021), https://www.spotlightpa.org/news/2021/05/pa-primary-2021-ballot-question-disaster-declaration-results/ [https://perma.cc/4CU9-A243].

740. *Proposed Amendments to the Constitution of Pennsylvania*, PENN. DEP'T OF STATE, https://www.dos.pa.gov/VotingElections/Pages/Joint-Resolution-2021-1.aspx [https://perma.cc/CW9R-TZ87].

741. PAC. LEGAL FOUND., EMERGENCY POWER LIMITATION ACT (2021), https://pacificlegal.org/wp-content/uploads/2021/02/PLF-Model-Legislation-Emergency-Power-Limitation-Act-10-09-20.pdf [https://perma.cc/7TVQ-MFGE].

restrict governors from limiting the free exercise of religion.[742]

States can look to prior treatment of the Second Amendment for direction. In the wake of Hurricane Katrina, several states enacted laws that prevented governors from restricting access to firearms during a pandemic.[743] During that catastrophe, New Orleans police officers seized firearms from civilians.[744] Other states had similar policies. On March 23, 2020, the governor of Kentucky explained that his shut-down order did not "interfere with the lawful sale of firearms and ammunition."[745] But the order did not designate firearm stores as "life-sustaining."[746] Rather, Kentucky law specifically prohibited its governor from "impos[ing] additional restrictions on the lawful possession, transfer, sale, transport, carrying, storage, display, or use of firearms and ammunition" during an emergency.[747] The Kentucky governor's hands were tied.

A similar dynamic played out in Nevada. The Nevada governor did not designate firearm stores as essential businesses.[748] But a 2007 state law limited the governor's emergency powers. Specifically, the governor could not "impos[e] additional restrictions as to the lawful possession, transfer, sale, carrying, storage, display or

742. *See* Act of Sept. 1, 2020, No. 272, 2020 Ohio Laws 44, sec. 1, § 9.57; Act of Feb. 11, 2021, No. 1211, 2021 Ark. Acts 94, sec. 2, § 12-75-134.

743. Riley Snyder, *Guns and Ammunition Sellers Allowed to Operate, Exempted in Law From 'Nonessential' Business Shutdown*, NEV. INDEP. (Mar. 23, 2020), https://thenevadaindependent.com/article/guns-and-ammunition-sellers-allowed-to-operate-exempted-in-law-from-nonessential-business-shutdown [https://perma.cc/57SF-QE6A].

744. Alex Berenson & John M. Broder, *Police Begin Seizing Guns of Civilians*, N.Y. TIMES (Sep. 9, 2005), https://www.nytimes.com/2005/09/09/us/nationalspecial/police-begin-seizing-guns-of-civilians.html [https://perma.cc/U8CW-B5RQ]; *see also* Adam Weinstein, *The NRA Twisted a Tiny Part of the Katrina Disaster to Fit Its Bigger Agenda*, TRACE (Aug. 31, 2015), https://www.thetrace.org/2015/08/nra-hurricane-katrina-gun-confiscation/ [https://perma.cc/4XQ9-K2J8].

745. Ky. Exec. Order 2020-246 (Mar. 22, 2020), https://governor.ky.gov/attachments/20200322_Executive-Order_2020-246_Retail.pdf [https://perma.cc/G278-G9SJ].

746. *Id.*

747. KY. REV. STAT. ANN. § 39A.100(3) (West 2021).

748. *See* Steve Sisolak, Governor of Nevada, Declaration of Emergency for COVID-19- Directive 003 (Mar. 20, 2020), https://gov.nv.gov/News/Emergency_Orders/2020/2020-03-20_-_COVID-19_Declaration_of_Emergency_Directive_003_(Attachments)/ [https://perma.cc/6Z6X-CQ4S].

use of: (a) Firearms; (b) Ammunition; or (c) Components of firearms or ammunition."[749] One Nevada sheriff referenced this statute, and said "[W]e haven't seen anything that indicates it's going to be a problem."[750] According to one report, gun sales in Nevada had tripled after the COVID-19 outbreak.[751] Other states should consider enacting similar laws. Texas, for example, empowers the governor to restrict the sale of firearms during an emergency.[752]

State legislatures can consider a second model based on the War Powers Resolution. Under this important federal law, the President can engage in armed conflict for up to sixty days without express congressional authorization.[753] If Congress approves, the President can continue his actions. If Congress disapproves, the President has an additional thirty-day withdrawal period. In December 2020, I suggested a possible extension of this regime to state laws: "The Governor's emergency powers would expire unless the legislature approves an extension of those powers."[754] For example, a state could allow the governor to suspend state laws for up to thirty days after the declaration of an emergency. Beyond that initial grace period, the state legislature would have to approve the extension of emergency orders beyond thirty days.

Now, I do not think this proposal is foolproof. I acknowledge risks to it. Governors could seek to skirt this regime in much the

749. NEV. REV. STAT. § 414.155 (2007).

750. Jeremy Chen, *Nevada Law Allowing Gun Stores to Remain Open During COVID-19 Outbreak*, KTNV 13 NEWS (Mar. 29, 2020), https://www.ktnv.com/news/nevada-law-allowing-gun-stores-to-remain-open-during-covid-19-outbreak [https://perma.cc/DGE6-4VGX].

751. Anjeanette Damon & Amy Alonzo, *Coronavirus May be Driving Up Gun Sales in Nevada Amid Pandemic Concerns*, RENO GAZETTE J. (Mar. 18, 2020), https://www.rgj.com/story/news/2020/03/18/nevada-gun-sales-spike-during-coronavirus-pandemic/2870320001/ [https://perma.cc/87MM-NKZF].

752. *See* TEX. GOV'T CODE ANN. § 418.019 (1987) ("The governor may suspend or limit the sale, dispensing, or transportation of alcoholic beverages, firearms, explosives, and combustibles.").

753. 50 U.S.C. § 1541–1548 (1973).

754. Josh Blackman, *Second Circuit Rules for Agudath Israel and Brooklyn Diocese*, REASON: VOLOKH CONSPIRACY (Dec. 28, 2020), https://reason.com/volokh/2020/12/28/second-circuit-rule-for-agudath-israel-and-brooklyn-diocese/ [https://perma.cc/CDA9-J9FU].

same way that Presidents broadly construe the War Powers Resolution. For instance, governors could simply issue a new emergency every thirty days, thus resetting their powers. Precise legislation may avoid potential abuse. But legislative manacles may prove harmful during a pending crisis. Still, legislatures should be able to reach some happy medium, short of gubernatorial carte blanche. The risk could also cut in the other direction. A significant disaster could prevent the legislature from assembling. If the legislature cannot extend the governor's power, he would be rendered impotent. Still, if the legislature is unable to meet for more than a month, then it is safe to assume that our system of government has collapsed. Even during the height of the pandemic, some state governments found ways to assemble, even if virtually.[755] States should adopt continuity of operations plans to make sure that the governor's powers can be carefully reviewed, even during a crisis. So far, we have seen progress on this front. During the pandemic, nearly thirty states adopted measures to allow virtual voting.[756]

State legislatures could consider a third model, based on the Congressional Review Act.[757] This federal statute created a fast-track process by which Congress can overrule federal regulations. Avi Weiss has proposed that states could create a similar fast-track process, by which legislatures can terminate emergency executive orders.[758] This regime would "keep the origination of emergency response proposals in the hands of the executive, while preserving the right—and responsibility—of the legislature to deliberate over emergency policy, leading to a more representative and

755. *2020 State Legislative Session Calendar*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/research/about-state-legislatures/2020-state-legislative-session-calendar.aspx [https://perma.cc/7X8Y-RA43].

756. *Continuity of Legislature During Emergency*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/research/about-state-legislatures/continuity-of-legislature-during-emergency.aspx [https://perma.cc/K45L-7PMZ].

757. Pub. L. No. 104–121, 110 Stat. 847 (1996) (codified at 5 U.S.C. § 801 (2018)).

758. *See* Avi Weiss, *Binding the Bound: State Executive Emergency Powers and Democratic Legitimacy in the Pandemic*, 121 COLUM. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3791065 [https://perma.cc/Y7XY-5C5B].

democratically legitimate response."[759] This regime would avoid the risk of the legislature being unavailable to extend emergency powers.[760]

Going forward, states should consider some, or all of these approaches to ensure the separation of powers endures during never-ending emergencies.

CONCLUSION

Historically, constitutional law has developed at a glacial pace. Change could be measured in years and decades. But during the COVID-19 pandemic, courts were rapidly confronted with novel and difficult questions. Did the state have the power to restrict religious assembly, but permit other type of commercial gatherings? These cases were resolved in a manner of days and weeks. Judges reached to longstanding First Amendment doctrine. But none of these cases were well suited for the unprecedented nature of COVID-19 lockdown measures. Initially, courts largely deferred to the states. But as this pandemic stretched from weeks to months, that restraint inevitably waned. And the patience for unilateral executive action faded. The journey from *South Bay* to *Tandon* tells the story of the American experience with civil liberties and COVID-19. And as this Article goes to press in May 2021, our polity can begin to reflect on this remarkable journey.

759. *Id.*

760. *Id.* ("During a pandemic, legislatures will meet even less frequently. Relying on the state legislature to initiate a quick reaction to an emergency would thus likely mean an intolerable delay in changing the status quo.").