

## RELIGIOUS LIBERTY IN A PANDEMIC

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### ABSTRACT

*The coronavirus pandemic caused an unprecedented shutdown of the United States. The stay-at-home orders issued by most states typically banned large gatherings of any kind, including religious services. Churches sued, arguing that these bans violated their religious liberty rights by treating worship services more strictly than analogous activities that were not banned, such as shopping at a liquor store or superstore. This Essay examines these claims, concluding that the constitutionality of the bans turns on the science of how the pathogen spreads, and that the best available scientific evidence supports the mass gathering bans.*

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### INTRODUCTION

We are facing an unprecedented public health crisis. The dangers of the pandemic cannot be overstated: medical researchers are still struggling to devise an effective treatment, and a vaccine is still months away. Meanwhile, the number of people testing positive for the novel

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coronavirus in the United States reaches into the millions,<sup>1</sup> with tens of thousands dying from complications associated with Covid-19, the disease caused by the virus.<sup>2</sup> To stem the spread of the highly contagious pathogen, much of the country shut down for at least a month in April 2020, with the vast majority of governors ordering people to stay at home as much as possible.<sup>3</sup> Unless essential, workers found themselves unemployed or working remotely.<sup>4</sup> Rather than attend school, students were at home logging into online classes.<sup>5</sup>

The emergency regulations usually included a ban on large gatherings. For example, Virginia barred in-person gatherings of more than ten people, and its illustrative list of affected public spaces included schools, restaurants, food courts, bars, theatres, concert halls, museums, fitness centers, indoor sports facilities, beauty salons, bowling alleys, skating rinks, escape rooms, “other places of indoor public amusement,” and, relevant here, houses of worship.<sup>6</sup> Most states

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1. According to Johns Hopkins’s Covid-19 Dashboard, the number of people testing positive has increased exponentially: By March 1, 2020, 30 people had tested positive; by April 1, the number increased to approximately 214,205; by May 1 it was 1.1 million; by June 1, 1.8 million; by July 1, 2.7 million; and by August 1, 4.6 million. *Covid-19 Dashboard*, JOHNS HOPKINS UNIV., CORONAVIRUS RES. CTR., <https://coronavirus.jhu.edu/us-map> [<https://perma.cc/ASR4-G6D8>] (last visited Aug. 21, 2020).

2. At least 100,000 people had died by mid-May of 2020. David Welna, ‘*We All Feel At Risk*’: 100,000 People Dead from COVID-19 in the U.S., NPR (May 27, 2020, 5:50 PM), <https://www.npr.org/2020/05/27/860508864/we-all-feel-at-risk-100-000-people-dead-from-covid-19-in-the-u-s> [<https://perma.cc/G44F-24QE>]. By mid-August, the death rate in the U.S. had increased to over 170,000. *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> [<https://perma.cc/3VR8-Q8X9>] (last visited Aug. 21, 2020).

3. See Jiachuan Wu, Savannah Smith, Mansee Khurana, Corky Siemaszko & Brianna DeJesus-Banos, *Stay-At-Home Orders Across the Country: What Each State is Doing – Or Not Doing – Amid Widespread Coronavirus Lockdowns*, NBC NEWS (Apr. 29, 2020), <https://www.nbcnews.com/health/health-news/here-are-stay-home-orders-across-country-n1168736> [<https://perma.cc/NX52-W32W>]. Some states started earlier, and some extended beyond April. See *id.*

4. Tony Romm, *Americans Have Filed More Than 40 Million Jobless Claims in Past 10 Weeks, as Another 2.1 Million Filed for Benefits Last Week*, WASH. POST (May 28, 2020, 9:00 AM), <https://www.washingtonpost.com/business/2020/05/28/unemployment-claims-coronavirus> [<https://perma.cc/BK55-9FEX>].

5. *Map: Coronavirus and School Closures*, EDUC. WK. (May 15, 2020), <https://www.edweek.org/ew/section/multimedia/map-coronavirus-and-school-closures.html> [<https://perma.cc/6A7W-K46W>].

6. As the Eastern District of Virginia noted in *Lighthouse Fellowship Church v. Northam*, Virginia’s regulation banned crowds of ten or more at schools, churches, and indoor spots including,

all dining and congregation areas in restaurants, dining establishments, food courts, breweries, microbreweries, distilleries, wineries, tasting rooms, and farmers markets . . . “all public access to recreational and entertainment businesses” including “[t]heaters, performing arts centers, concert venues, museums, and other indoor

had enacted equally comprehensive bans,<sup>7</sup> and this Essay’s analysis presumes a ban similar to Virginia’s.

Even as states began to reopen in the summer, many continued to prohibit large gatherings.<sup>8</sup> And with the resulting surges of cases in parts of the United States, some states are moving towards reimposing strict lock-down measures. California, for example, had reinstated a ban on indoor gatherings, including worship services, in many of its counties.<sup>9</sup>

Although some states always exempted worship services from their bans, others have not.<sup>10</sup> Exemptions, however, undermine public health and safety. Many researchers now believe that super-spreader events are the main means by which Covid-19 is spread; one study found that roughly 20 percent of Covid-19 cases—“all of them involving social gatherings”—lead to 80 percent of transmissions.<sup>11</sup> As a result, it has become more important than ever to try and curtail these high risk gatherings. Unfortunately, worship services are among these high risk activities, with multiple coronavirus outbreaks traced to religious gatherings.<sup>12</sup> These outbreaks endanger not only those who

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entertainment centers; [f]itness centers, gymnasiums, recreation centers, indoor sports facilities, and indoor exercise facilities; [b]eauty salons, barbershops, spas, massage parlors, tanning salons, tattoo shops . . . ; [r]acetracks and historic horse racing facilities; and [b]owling alleys, skating rinks, arcades, amusement parks, trampoline parks, fairs, arts and craft facilities, aquariums, zoos, escape rooms, indoor shooting ranges, public and private social clubs, and all other places of indoor public amusement.

Lighthouse Fellowship Church v. Northam, No. 2:20cv204, 2020 WL 2110416, at \*2 (E.D. Va. May 1, 2020).

7. See, e.g., *Maryville Baptist Church, Inc. v. Beshear*, No. 3:20-cv-278-DJH, 2020 WL 1909616, at \*1 (W.D. Ky. Apr. 18, 2020) (banning “[a]ll mass gatherings,” defined as “any event or convening that brings together groups of individuals” including “community, civic, public, leisure, faith-based, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities”).

8. Rachel Treisman, *West: Coronavirus-Related Restrictions by State*, NPR (July 2, 2020, 4:01 PM), <https://www.npr.org/2020/05/01/847416108/west-coronavirus-related-restrictions-by-state> [<https://perma.cc/SMA2-C3SZ>].

9. As of July 13, dine-in restaurants, bars, wineries, movie theatres, family entertainment centers, and museums are shut down statewide. Hard-hit counties must also close their indoor gyms, personal care services, shopping malls, “[o]ffices for non-critical infrastructure sectors,” and places of worship. *County Data Monitoring*, CA.GOV, <https://covid19.ca.gov/roadmap-counties> [<https://perma.cc/PDJ2-D77L>] (last visited Aug. 21, 2020).

10. See Wu et al., *supra* note 3.

11. Dillon C. Adams & Benjamin J. Cowling, *Just Stop the Superspreading*, N.Y. TIMES (June 2, 2020), <https://nyti.ms/2MnY6be> [<https://perma.cc/JSD2-QM9A>]; Christie Aschwanden, *How ‘Superspreading’ Events Drive Most COVID-19 Spread*, SCI. AM. (June 23, 2020), <https://www.scientificamerican.com/article/how-superspreading-events-drive-most-covid-19-spread/> [<https://perma.cc/E2SL-CSAZ>] (noting research suggests 10–20 percent of infected people at super-spreader events are responsible for 80 percent of transmissions).

12. See *infra* notes 125–128 and accompanying text (describing church outbreaks).

attend the services, but anyone the church attendees later come into contact with.<sup>13</sup>

Nevertheless, several churches have argued that these orders violate their constitutionally protected right to religious liberty. A flurry of lawsuits are working their way through the courts, with mixed results.<sup>14</sup> The Supreme Court recently weighed in with *South Bay United Pentecostal Church v. Newsom*,<sup>15</sup> in which the Court denied an injunction against California's modified restrictions established in May 2020.<sup>16</sup> This Essay examines whether mass gathering bans violate the free exercise of religion protected by the U.S. Constitution. It concludes that they probably do not, with the answer often turning on what activities are considered comparable to in-person worship in terms of the risk of contagion.

Part I of this Essay discusses the standard of review. Although a few courts have argued that in times of emergency, a more deferential approach controls, concern for constitutional rights counsels that the standard Free Exercise Clause doctrine should apply. That doctrine requires that a challenged law is first assessed for neutrality and general applicability, and if it does not satisfy both of those requirements, the law is subject to strict scrutiny. Part II applies that doctrine and examines whether state regimes that ban mass gatherings but allow exceptions for essential services are neutral and generally applicable.

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13. See *infra* notes 126–128 and accompanying text (describing CDC study of outbreaks traced to religious services); see also Ariana Eunjung Cha, 'Superspreading' Events, Triggered by People Who May Not Even Know They Are Infected, *Propel Coronavirus Pandemic*, WASH. POST (July 18, 2020, 1:58 PM), <https://www.washingtonpost.com/health/2020/07/18/coronavirus-superspreading-events-drive-pandemic> [<https://perma.cc/6L7X-QHCZ>] (reporting how one super-spreader event infected 144 people at the event and another 43 people across sixteen different counties who were not present).

14. See, e.g., *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (denying request for injunctive relief); *Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020) (granting request for injunctive relief pending appeal); *Elim Romanian Pentecostal Church v. Pritzker*, No. 20-1811, 2020 WL 2517093, at \*1 (7th Cir. May 16, 2020) (denying request for injunctive relief pending appeal).

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

16. *Id.* at 1613 ("The application for injunctive relief presented to Justice K[agan] and by her referred to the Court is denied."). The Executive Order still banned mass gatherings but made a limited exception for houses of worship, who were allowed to fill their buildings to 25 percent capacity with a maximum of 100 attendees. *Id.* (Roberts, C.J., concurring). The Court similarly denied an injunction against Nevada's restrictions in July 2020. *Calvary Chapel Dayton Valley v. Sisolak*, No. 19A1070, 2020 WL 4251360 (U.S. July 24, 2020) (mem.). The Nevada Governor Steve Sisolak signed an order which allowed certain facilities—including casinos—to operate at 50 percent of their fire-code capacity, while religious facilities (like other permitted public gatherings) were required to cap their attendance at 50 persons. *Id.* at \*3 (Alito, J., dissenting). Without an opinion from any Justice in the majority, it is difficult to parse their reasoning in this much more difficult case.

It argues that our evolving scientific knowledge about the pathogen very much informs what activities ought to be deemed analogous or not. More specifically, worship services may become super-spreader events in a way that shopping trips do not. Part III then applies strict scrutiny.

### I. STANDARD OF REVIEW

Courts generally do not second-guess legislative judgments. Consequently, when they are challenged, courts usually review them deferentially. However, a law that infringes on a constitutional right will be subject to heightened scrutiny. Laws subject to the highest level of scrutiny, known as strict scrutiny, are unconstitutional unless the government can show that the law is the only way to accomplish a truly compelling government goal.<sup>17</sup> Although religious liberty challenges—where the claim is that the government has hampered someone’s ability to practice their religion<sup>18</sup>—may trigger strict scrutiny, they do not always.

Free exercise doctrine has undergone several shifts. At one point, under the *Sherbert v. Verner* test,<sup>19</sup> named after the 1963 case that established it, any law that substantially burdened someone’s religious exercise was subject to strict scrutiny.<sup>20</sup> If the law passed this rigorous review, it was constitutional. If the law failed, however, it was

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17. Cf. *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2260 (2020) (“To satisfy [strict scrutiny], government action must advance interests of the highest order and must be narrowly tailored in pursuit of those interests.” (internal citations and quotations omitted)).

18. The First Amendment contains two religion clauses: the Establishment Clause and the Free Exercise Clause. The Establishment Clause prevents the government from favoring religion or favoring one religion over others. *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). It would, for example, bar the government from declaring Christianity the official state religion or directly funding churches. The Free Exercise Clause, on the other hand, protects the right of individuals to practice their faith. *Emp. Div. v. Smith*, 494 U.S. 872, 877 (1990). It would, for example, ban the government from outlawing Christianity, or banning churches.

19. *Sherbert v. Verner*, 374 U.S. 398 (1963).

20. *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972) (“A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.” (citing *Sherbert*, 374 U.S. 398)). Not all burdens on religion result in a free exercise exemption under the *Sherbert v. Verner* test. The burden may not be deemed substantial. *Bowen v. Roy*, 476 U.S. 693, 700 (1986) (“The Federal Government’s use of a Social Security number for Little Bird of the Snow does not itself in any degree impair Roy’s ‘freedom to believe, express, and exercise’ his religion.”). Or even if substantial, the law that imposed it may nonetheless pass strict scrutiny. *See, e.g., United States v. Lee*, 455 U.S. 252, 257 (1982) (“The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.”).

unconstitutional as applied and those challenging it were entitled to a religious liberty exemption from it.

However, in 1990, the Supreme Court changed the constitutional doctrine in *Employment Division v. Smith*.<sup>21</sup> Ever since *Smith*, state regulations that are neutral and generally applicable do not violate the Free Exercise Clause, even if they do limit people's ability to practice their religion.<sup>22</sup> Only if a law is not "neutral and generally applicable" is it subject to strict scrutiny. In *Smith*, for example, members of a Native American church challenged Oregon's drug law which banned the peyote needed to fulfill a sacramental ritual.<sup>23</sup> Once the Supreme Court concluded that the law was neutral and generally applicable, however, the members had no right to a Free Exercise Clause exemption.<sup>24</sup>

In sum, under current constitutional doctrine, the first question is whether the challenged law is neutral and generally applicable. If it is, the law is constitutional and the analysis ends. No free exercise exemption is required. If the challenged law is not both neutral and generally applicable, then the *Sherbert v. Verner* test applies, where the government still prevails if the law satisfies strict scrutiny.<sup>25</sup>

Some courts faced with religious liberty challenges to Covid-19 mass gathering bans have eschewed traditional constitutional analysis, arguing that emergency circumstances call for more deferential review.<sup>26</sup> In particular, several courts have cited to *Jacobson v. Massachusetts*,<sup>27</sup> a 1905 Supreme Court case rejecting a constitutional challenge to mandatory vaccination during a smallpox epidemic.<sup>28</sup>

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21. *Emp. Div. v. Smith*, 494 U.S. 872 (1990).

22. *Id.* at 879 ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability . . .'" (quoting *Lee*, 455 U.S. at 263 n.3 (Stevens, J., concurring))).

23. *Id.* at 874.

24. *Id.* at 882.

25. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993) ("A law failing to satisfy these [neutral and generally applicable] requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.").

26. *See, e.g., Antietam Battlefield KOA v. Hogan*, No. CCB-20-1130, 2020 WL 2556496, at \*5 (D. Md. May 20, 2020); *Elim Romanian Pentecostal Church v. Pritzker*, No. 20 C 2782, 2020 WL 2468194, at \*2–3 (N.D. Ill. May 13, 2020), *aff'd*, 962 F.3d 341 (7th Cir. 2020); *Calvary Chapel of Bangor v. Mills*, No. 1:20-cv-00156-NT, 2020 WL 2310913, at \*7 (D. Me. May 9, 2020); *Cross Culture Christian Ctr. v. Newsom*, No. 2:20-cv-00832-JAM-CKD, 2020 WL 2121111, at \*3–4 (E.D. Cal. May 5, 2020); *Cassell v. Snyders*, No. 20 C 50153, 2020 WL 2112374, at \*6–7 (N.D. Ill. May 3, 2020).

27. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

28. *Id.* at 38–39.

Writing that “a community has the right to protect itself against an epidemic of disease which threatens the safety of its members,”<sup>29</sup> the *Jacobson* Court emphasized that no constitutional right was absolute,<sup>30</sup> and that individual liberty does not extend to harming others.<sup>31</sup>

According to these lower courts, the *Jacobson* Court applied a two-part standard in evaluating restrictions during a public health crisis like the current pandemic: “[C]ourts only overturn rules that lack a ‘real or substantial relation to [public health]’ or that amount to ‘plain, palpable invasion[s] of rights.’”<sup>32</sup> Religious objectors, these courts uniformly found, failed to make the necessary showing.<sup>33</sup>

I am wary of lowering constitutional scrutiny, even during a devastating pandemic.<sup>34</sup> It makes it too tempting for the state to use the emergency as a pretext to limit rights, especially the rights of the most vulnerable members of society. We have seen it happen in the past.<sup>35</sup> We see it now, where states hostile to women’s equality have successfully invoked the pandemic to stymie the constitutional right to abortion.<sup>36</sup>

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29. *Id.* at 27.

30. *Id.* at 26 (“But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint.”).

31. *Id.* at 26 (“Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own . . . regardless of the injury that may be done to others”); *see also id.* at 26–27 (“Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one’s own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others.”).

32. *Cassell v. Snyders*, No. 20 C 50153, 2020 WL 2112374, at \*6 (N.D. Ill. May 3, 2020).

33. *See, e.g., Elim Romanian Pentecostal Church v. Pritzker*, No. 20 C 2782, 2020 WL 2468194, at \*3 (N.D. Ill. May 13, 2020) (“[Plaintiffs] have failed to demonstrate either.”), *aff’d*, 962 F.3d 341 (7th Cir. 2020); *Cross Culture Christian Ctr. v. Newsom*, No. 2:20-cv-00832-JAM-CKD, 2020 WL 2121111, at \*4 (E.D. Cal. May 5, 2020).

34. *Cf. Legacy Church, Inc. v. Kunkel*, No. CIV 20-0327 JB/SCY, 2020 WL 1905586, at \*30 (D.N.M. Apr. 17, 2020) (“Nonetheless, no matter how grave the emergency, individual constitutional freedoms—such as the free exercise of religion, one of the United States’ most treasured and closely guarded liberties—constrain state action.”).

35. *See, e.g., Korematsu v. United States*, 323 U.S. 214, 219 (1944) (upholding forced internment of Japanese-American men, women, and children on national security grounds).

36. *See, e.g., In re Abbott*, 954 F.3d 772, 784–85 (5th Cir. 2020) (upholding ban on non-emergency abortions under *Jacobson* standard); *In re Rutledge*, 956 F.3d 1018, 1027–28 (8th Cir. 2020) (same); *Robinson v. Att’y Gen.*, 957 F.3d 1171, 1179–80 (11th Cir. 2020) (applying *Jacobson*). That these bans were a pretext to eliminate abortion rather than preserve medical resources or prevent the spread of coronavirus became evident by the bans’ inclusion of medical abortion, which can be provided remotely.

Of course, while “[t]here is no pandemic exception to the Constitution of the United States,”<sup>37</sup> we ought not pretend there is no national health crisis either. Thus, the doctrine from *Smith* should still be applied with an eye towards the exigencies of the pandemic.<sup>38</sup> In other words, I recommend analyzing the First Amendment claims under the regular rules, mindful that their application should nonetheless be informed by the background conditions. Notably, even the courts that cite to *Jacobson* also apply the *Smith* free exercise test to the religious liberty challenges.

There is a possibility that the Supreme Court will soon jettison *Smith*’s neutral and generally applicable test.<sup>39</sup> In *South Bay United Pentecostal Church v. Newsom*, it is not altogether clear whether the Justices thought *Jacobson*, *Smith*, or some other test should control, as five of the Justices did not join a written opinion.<sup>40</sup> Chief Justice Roberts never explicitly mentioned *Smith* or its test in his concurring opinion,<sup>41</sup> and neither did the dissent.<sup>42</sup> As stated above, I think the better approach is to follow the usual standards with an eye toward the present exigencies.<sup>43</sup>

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37. *Berean Baptist Church v. Cooper*, No. 4:20-CV-81-D, 2020 WL 2514313, at \*1 (E.D.N.C. May 16, 2020).

38. *Cf. Cassell v. Snyders*, No. 20 C 50153, 2020 WL 2112374, at \*6 (N.D. Ill. May 3, 2020) (“The Constitution does not compel courts to turn a blind eye to the realities of the COVID-19 crisis.”).

39. Amy Howe, *Justices to Take Up Case Involving Faith-Based Adoption Agencies and Same-Sex Couples*, SCOTUSBLOG (Feb. 24, 2020, 3:33 PM), <https://www.scotusblog.com/2020/02/justices-to-take-up-case-involving-faith-based-adoption-agencies-and-same-sex-couples> [<https://perma.cc/9ZNU-E9L9>] (noting that the Supreme Court may reconsider its neutral and generally applicable test in *Fulton v. City of Philadelphia*).

40. Chief Justice Roberts wrote only for himself, while Justices Thomas and Gorsuch joined Justice Kavanaugh’s dissent. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613–14 (2020); *id.* at 1614 (Kavanaugh, J., dissenting).

41. Although the Chief Justice suggested that the executive order was neutral and generally applicable without ever using that particular language, *see id.* at 1613, he also cited *Jacobson* and emphasized that the politically accountable branches ought to have “especially broad” latitude during a pandemic rife with “medical and scientific uncertainties.” *Id.*

42. *See id.* at 1614–15 (Kavanaugh, J., dissenting).

43. It is also worth noting that eliminating *Smith* for Free Exercise Clause claims would not eliminate strict scrutiny, as it is part of the *Sherbert v. Verner* test as well. In addition to constitutional claims, some religious objectors have also brought claims under their state Religious Freedom Restoration Act (“RFRA”). *See, e.g.,* *Lighthouse Fellowship Church v. Northam*, No. 2:20cv204, 2020 WL 2110416, at \*14–16 (E.D. Va. May 1, 2020) (rejecting Virginia Act for Religious Freedom claim); *Cassell*, 2020 WL 2112374, at \*12–13 (rejecting Plaintiff’s Illinois RFRA claim). These state laws are based on the federal Religious Freedom Restoration Act, which only applies to federal laws. *See* Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb *et seq.*); *see generally* *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that the federal RFRA when applied to state laws was beyond Congress’s enforcement power under the 14th amendment). RFRAs

## II. BANS AS NEUTRAL AND GENERALLY APPLICABLE

An order is neutral if it does not target religion,<sup>44</sup> and it is generally applicable if it applies broadly to the relevant population.<sup>45</sup> Or, as the Ninth Circuit recently summarized: “Where state action does not ‘infringe upon or restrict practices because of their religious motivation’ [(neutrality)] and does not ‘in a selective manner impose burdens only on conduct motivated by religious belief,’ [(general applicability)] it does not violate the First Amendment.”<sup>46</sup> While neutrality and general applicability are separate inquiries, the two issues are interrelated. If a law is not neutral because it singles religion out for disfavor, then it stands a good chance of failing the generally applicable requirement as well.<sup>47</sup>

As in Virginia, in April 2020 most states imposed blanket bans on mass gatherings.<sup>48</sup> Louisiana’s ban on “the gathering of more than ten people in a single space at a single time” is typical.<sup>49</sup> By and large, these bans, which prohibit any gatherings of more than a certain number of people, are neutral because they do not single out religious gatherings, and they are generally applicable because they apply to all mass gatherings over a certain size.

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provide more protection than the U.S. Constitution because any substantial burden on religious practice will trigger strict scrutiny, not only those regulations that do not qualify as “neutral and generally applicable.” *Id.* at 532. In other words, it imports the old *Sherbert v. Verner* test into the statute. *Id.* at 515. However, as with a constitutional challenge, if a law passes strict scrutiny in a state RFRA challenge, then the state’s law must be followed.

44. A law is not neutral if “the object of [the] law is to infringe upon or restrict practices because of their religious motivation.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

45. A law is not generally applicable if it “in a selective manner impose[s] burdens only on conduct motivated by religious belief.” *Id.* at 543.

46. *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 939 (9th Cir. 2020) (quoting *Lukumi*, 508 U.S. at 533, 543).

47. *Lukumi*, 508 U.S. at 531 (“Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied.”).

48. *See supra* notes 3–7 and accompanying text.

49. *Spell v. Edwards*, No. 20-00282-BAJ-EWD, 2020 WL 2509078, at \*1 (M.D. La. May 15, 2020) (quoting La. Exec. Dep’t, Proclamation No. 52 JBE 2020, § 2(A) (Apr. 30, 2020), <http://lpdb.la.gov/Proclamations/52-JBE-2020-State-of-Emergency-COVID-19-Extension-to-May-15.pdf> [<https://perma.cc/6996-6SYX>]), *vacated as moot*, 962 F.3d 175 (5th Cir. 2020); *see, e.g.*, *Roberts v. Neace*, No. 2:20cv054 (WOB-CJS), 2020 WL 2115358, at \*1 (E.D. Ky. May 4, 2020) (“The Order [issued by the governor of Kentucky] states: ‘Mass gatherings include any event or convening that brings together groups of individuals, including, but not limited to, community, civic, public, leisure, faith-based, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities.’” (quoting Ky. Exec. Order No. 2020-319, § 2 (Mar. 19, 2020), [https://governor.ky.gov/attachments/20200319\\_Order\\_Mass-Gatherings.pdf](https://governor.ky.gov/attachments/20200319_Order_Mass-Gatherings.pdf) [<https://perma.cc/WYC2-5QF3>])).

Plaintiffs, mostly Christian churches, argue that these bans fail to meet this standard because they contain numerous exceptions for secular activities deemed essential. Virginia's Executive Order 53, for example, included a carveout for "essential retail businesses," which includes grocery stores, liquor stores, pet stores, pharmacies, electronics retailers, office supply stores, home improvement and garden stores, auto repair centers, gas stations, banks, and laundromats.<sup>50</sup> Other states had similar lists.<sup>51</sup> (The California Governor's re-opening plan challenged in *South Bay* allowed "lower risk" workplaces including retail, outdoor museums, childcare, and offices to reopen before "higher risk" activities such as entertainment venues, salons, gyms, and in-person religious services.)<sup>52</sup> As discussed below, whether the religious liberty claim has any traction depends on whether these exempted activities are analogous to religious services.

#### A. Neutrality

The neutrality requirement is meant to capture discriminatory treatment.<sup>53</sup> In fact, the Free Exercise Clause often functions as an equal protection clause for religion by prohibiting discrimination on the basis of religion. In fleshing out the meaning of neutrality, the Supreme Court specifically drew on equal protection doctrine in its

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50. The Virginia Executive Order defined essential businesses as:

[g]rocery stores, pharmacies, and other retailers that sell food and beverage products or pharmacy products, including dollar stores and department stores with grocery or pharmacy options; [m]edical, laboratory, and vision supply retailers; [e]lectronic retailers that sell or service cell phones, computers, tablets, and other communication technology; [a]utomotive parts, accessories, and tire retailers as well as automotive repair facilities; [h]ome improvement, hardware, building material, and building supply retailers; [l]awn and garden equipment retailers; [b]eer, wine, and liquor stores; [r]etail functions of gas and convenience stores; [r]etail located within healthcare facilities; [b]anks and other financial institutions with retail functions; [p]et and feed stores; [p]rinting and office supply stores; and [l]aundromats and dry cleaners.

Lighthouse Fellowship Church v. Northam, No. 2:20cv204, 2020 WL 2110416, at \*6 (E.D. Va. May 1, 2020).

51. For example, Maine's list of exempted businesses included "grocery stores, household goods stores, gas stations, hardware stores, home repair stores, garden centers and stores, child care services, and medical marijuana dispensaries." *Calvary Chapel of Bangor v. Mills*, No. 1:20-cv-00156-NT, 2020 WL 2310913, at \*3 (D. Me. May 9, 2020).

52. Meanwhile, these "higher risk" activities were to re-open before the "highest risk" activities such as concerts, convention centers, and live audience sports. CAL. DEP'T OF PUB. HEALTH, UPDATE ON CALIFORNIA'S PANDEMIC ROADMAP (2020), <https://www.gov.ca.gov/wp-content/uploads/2020/04/Update-on-California-Pandemic-Roadmap.pdf> [<https://perma.cc/YCX5-3GCL>].

53. See *supra* note 44.

analysis.<sup>54</sup> In particular, the Court referenced equal protection standards when it underscored that non-neutral laws encompass those that are “enacted “because of,” not merely “in spite of,” their suppression of . . . religious practice.”<sup>55</sup> In other words, the touchstone of neutrality is whether “the object of [the] law is to infringe upon or restrict practices *because of* their religious motivation.”<sup>56</sup>

At a minimum, a neutral law must be neutral on its face.<sup>57</sup> A ban on all mass gatherings, whether religious or secular, is neutral on its face.<sup>58</sup> A few religious objectors have argued that bans cannot be facially neutral when they mention religious worship by name,<sup>59</sup> but merely including “worship services” in a list of examples does not defeat facial neutrality.<sup>60</sup> Clarifying that religious gatherings are part of a long list of restricted gatherings<sup>61</sup> is not at all the same as singling out religious gatherings, and only religious gatherings, for restrictions.

Neutrality is not limited to facial neutrality. “The Free Exercise Clause protects against governmental hostility which is masked as well as overt.”<sup>62</sup> Nevertheless, in most if not all cases, there is little indication that the governors who shut down mass gatherings had any goal other than protecting the health and safety of their citizens.

However, some courts infer hostility if religion is treated differently from its secular counterparts. This certainly seems to be the

54. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (“In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases.”).

55. *Id.* (quoting *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

56. *Id.* at 533 (emphasis added).

57. *Id.*

58. *See, e.g., Cassell v. Snyders*, No. 20 C 50153, 2020 WL 2112374, at \*8 (N.D. Ill. May 3, 2020) (“[T]he Order proscribes secular and religious conduct alike. . . . Indeed, its limitations extend to most places where people gather, from museums to theaters to bowling alleys.” (citing Ill. Exec. Order No. 2020-32, § 2, ¶ 3 (Apr. 30, 2020), <https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-32.aspx> [<https://perma.cc/JY9D-SYFG>], which forbids “any gathering of more than ten people”)).

59. *See, e.g., First Baptist Church v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021, at \*7 (D. Kan. Apr. 18, 2020) (“EO 20-18 and EO 20-25 both state that their prohibitions against mass gatherings apply to ‘churches or other religious facilities.’ . . . These provisions show that these executive orders expressly target religious gatherings on a broad scale and are, therefore, not facially neutral.”).

60. *Lighthouse Fellowship Church v. Northam*, No. 2:20cv204, 2020 WL 2110416, at \*5 (E.D. Va. May 1, 2020) (“Executive Order 55 presents no neutrality problem; it merely uses religious gatherings as one of several examples of ‘all public and private in-person gatherings.’ The Orders are facially neutral.”).

61. *See supra* notes 6–7 and accompanying text for examples of religious services being included in a ban, rather than targeted specifically by a ban.

62. *Lukumi*, 508 U.S. at 534.

working assumption of the concurrence and dissent in *South Bay*, which both focus on how religious worship compares to its secular counterparts, and what in fact counts as a secular counterpart.<sup>63</sup>

If the true secular counterparts are other mass gatherings, then there is no discrimination: No hostility toward religion can be gleaned from banning all gatherings of a certain size, whether they be in schools, museums, movie theatres, restaurants, sports arenas, gyms, or houses of worship.<sup>64</sup> Or as Chief Justice Roberts wrote, “the Order exempts or treats more leniently only dissimilar activities.”<sup>65</sup>

Indeed, perhaps to “acknowledge religious worship’s importance,”<sup>66</sup> a few states treated religious gatherings more favorably than secular ones.<sup>67</sup> The governor of New Mexico, for example, let people gather to worship for a period of time after shuttering venues like movie theatres and concert halls.<sup>68</sup> Under Virginia’s stay-at-home order, houses of worship were one of the few places people were allowed to visit.<sup>69</sup> Thus, any differential treatment of mass gatherings tended to skew in favor of religious gatherings, not against them.

The dissent in *South Bay* disagreed as to which activities amounted to secular counterparts—an issue the next section discusses in depth. Even assuming some dissimilar treatment of similar conduct, it is still an open question whether all deviations amount to discrimination against religion. To allow all mass gatherings except religious worship inexorably leads to the conclusion that the point of the law was to burden religious exercise. It is harder to insist on that conclusion when not only religious gatherings are banned, but a long list of secular gatherings are as well, even if a few secular counterparts

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63. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613, 1615 (2020).

64. *Cf. Spell v. Edwards*, No. 20-00282-BAJ-EWD, 2020 WL 2509078, at \*5 (M.D. La. May 15, 2020) (“[T]he Governor’s order restricts religious and non-religious gatherings to the *exact* same extent and degree.”), *vacated as moot*, 962 F.3d 175 (5th Cir. 2020); *Maryville Baptist Church, Inc. v. Beshear*, No. 3:20-cv-278-DJH, 2020 WL 1909616, at \*3 (W.D. Ky. Apr. 18, 2020) (“[T]he order temporarily prohibits ‘*all*’ mass gatherings, not merely religious gatherings. Religious expression is not singled out.”).

65. *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring).

66. *Legacy Church, Inc. v. Kunkel*, No. CIV 20-0327 JB\SCY 2020 WL 1905586, at \*41 (D.N.M. Apr. 17, 2020).

67. *Id.* (“Moreover, religious organizations have received preferential treatment relative to their closest comparators . . .”).

68. *Id.*

69. *Lighthouse Fellowship Church v. Northam*, No. 2:20cv204, 2020 WL 2110416, at \*5 (E.D. Va. May 1, 2020) (“Executive Order 55 . . . singles out religion for *favorable* treatment by recognizing the importance of traveling to and from places of worship.”).

are still allowed. In sum, because mass gathering bans are not motivated by intentional targeting of religion, they are neutral.

### *B. General Applicability*

General applicability is another way to ferret out unfavorable treatment of religion. The idea is that “government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief.”<sup>70</sup> That is, the government cannot accomplish its goals at the expense of religious organizations alone. When religious conduct must bear the cost, but not secular conduct that “endangers [the government’s] interests in a similar or greater degree,”<sup>71</sup> a law is underinclusive and not generally applicable. A law may be underinclusive if its initial scope is too limited, or if it contains too many exemptions.<sup>72</sup> If this standard sounds somewhat vague, it is. The Court has not yet enunciated hard and fast rules for general applicability.<sup>73</sup>

As a result, the doctrinal line demarcating generally applicable from not generally applicable is not a bright one. Courts and commentators have argued that a law is not generally applicable if it contains no exemptions for religious conduct when there are exemptions for analogous secular conduct,<sup>74</sup> but disagree on how many exemptions are too many.<sup>75</sup> Plainly, a ban that is gerrymandered to target only religious conduct is not generally applicable,<sup>76</sup> especially

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

71. *Id.* (“They fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does.”); *see, e.g., Legacy Church*, 2020 WL 3963764, at \*81 (“Although all laws ‘are selective to some extent,’ a regulation is not generally applicable when the government affords favorable treatment to secular conduct ‘that endangers the [government]’s interests in a similar or greater degree’ as does restricted religious activity.”).

72. And when this happens, it also may raise the question about whether the government’s stated goal is its true goal or merely a pretext for discrimination, casting into doubt its neutrality.

73. *Cf. Lukumi*, 508 U.S. at 543 (“In this case we need not define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum standard necessary to protect First Amendment rights.”); *Legacy Church*, 2020 WL 3963764, at \*89 (“That the Supreme Court’s Justices and the lower courts cannot agree what states may do to guard against a once-in-a-generation public health threat demonstrates the confusion of the Supreme Court’s Free Exercise doctrine.”).

74. *Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020) (“[A] law might appear to be generally applicable on the surface but not be so in practice due to exceptions for comparable secular activities.”).

75. *Cf. Legacy Church*, 2020 WL 3963764, at \*89 (“The Sixth Circuit asserted, as a ‘rule of thumb,’ that ‘the more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law.’”).

76. *Lukumi*, 508 U.S. at 535 (“The design of these laws accomplishes instead a ‘religious gerrymander,’ an impermissible attempt to target petitioners and their religious practices.”).

when the decisionmakers openly express hostility towards religion.<sup>77</sup> However, a few lower courts have argued that even one secular exemption defeats general applicability.<sup>78</sup> Thus, for example, a police department ban on beards was held not generally applicable because it exempted officers with skin issues but not officers with religious commitments.<sup>79</sup> At the same time, the Supreme Court has acknowledged that “[a]ll laws are selective to some extent.”<sup>80</sup> Indeed, the drug ban found to be generally applicable in *Employment Division v. Smith* itself had exceptions.<sup>81</sup>

In addition to disagreement about how many analogous exceptions are too many, courts evaluating religious liberty challenges to the pandemic bans have disputed what counts as an analogous activity. If every large gathering is banned, with no exceptions, then the mass gathering bans are generally applicable. Religious and secular mass gatherings alike share the burden.

Nonetheless, churches argue that limiting the analysis to mass gatherings is the wrong denominator, and that myriad other comparable activities, like shopping in a liquor store and visiting a superstore, should also be included.<sup>82</sup> If the denominator is thereby expanded, the religious objectors claim, the states’ regulations become riddled with exemptions and cannot be generally applicable.<sup>83</sup> Indeed, Justice Kavanaugh, dissenting in *South Bay*, argues that to exempt secular counterparts and not worship services amounts to discrimination against religion that is “odious to our Constitution.”<sup>84</sup>

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77. *Id.* at 540–42 (cataloguing comments hostile to Santeria made by city council and residents).

78. *See Fraternal Ord. of Police v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999); *Mitchell Cty. v. Zimmerman*, 810 N.W.2d 1, 5 (Iowa 2012) (holding that a ban on vehicles with steel wheels was not neutral and generally applicable because school buses and fire trucks were exempted).

79. *Fraternal Ord. of Police*, 170 F.3d at 366.

80. *Lukumi*, 508 U.S. at 542.

81. *Emp. Div. v. Smith*, 494 U.S. 872, 874 (1990) (“Oregon law prohibits the knowing or intentional possession of a ‘controlled substance’ unless the substance has been prescribed by a medical practitioner.”).

82. *Cf. Cassell v. Snyders*, No. 20 C 50153, 2020 WL 2112374, at \*9 (N.D. Ill. May 3, 2020) (“If Walmart and Menards are allowed to host more than ten visitors, Plaintiffs’ theory goes, then so should the Beloved Church.”).

83. *See, e.g., Legacy Church, Inc. v. Kunkel*, No. CIV 20-0327 JB\SCY, 2020 WL 1905586, at \*34 (D.N.M. Apr. 17, 2020) (“Legacy Church contends that the April 11 Order is not generally applicable, because it allows ‘big box retailers to continue to welcome patrons’ while prohibiting church services.”).

84. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614–15 (2020) (Kavanaugh, J., dissenting).

Of course, churches cannot claim that they are victims of discrimination unless the state is treating like-activities differently.<sup>85</sup> If a state's order is treating two activities differently because they are in fact different—if the essential activities that are exempted are not analogous to the forbidden church services—then those activities should not form part of the general applicability denominator.

So what are these other activities, and are they comparable to in-person religious worship? As described above, states often have an extensive list of exceptions for essential businesses.<sup>86</sup> In addition to various retail stores ranging from grocery and liquor stores to garden centers to gas stations, some include child care facilities and a few also permit businesses like law and accounting firms to remain open.<sup>87</sup> Also included are exceptions for basic infrastructure like industry, transportation, and utilities. However, most challenges have focused on the other exceptions, particularly retail shops.<sup>88</sup> In deciding whether these activities are distinguishable or not, courts have compared (1) how essential the activities are, and (2) how dangerous.

### 1. *Essential versus Non-Essential*

In evaluating essentialness, courts have considered both whether the activity is essential in the sense that people could not do without it, and whether it is essential in the sense that there are no alternatives available.

#### a. *Essential as Necessary to Life*

Courts upholding the bans have offered different reasons for why these activities are distinguishable, some more persuasive than others. A few courts have argued that the exempted activities were essential

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85. *Legacy Church*, 2020 WL 1905586, at \*33 (“*Lukumi* and *Smith* require the Court, however, to compare analogous exemptions.”).

86. *Roberts v. Neace*, 958 F.3d 409, 412–13 (6th Cir. 2020) (“Among the many exempt entities are laundromats, accounting services, law firms, hardware stores, airlines, mining operations, funeral homes, landscaping businesses, and grocery stores.”).

87. *Lighthouse Fellowship Church v. Northam*, No. 2:20cv204, 2020 WL 2110416, at \*3 (E.D. Va. May 1, 2020) (“The Order permits ‘business operations offering professional rather than retail services to remain open,’ but directs that ‘they should utilize teleworking as much as possible.’”).

88. See, e.g., *Calvary Chapel of Bangor v. Mills*, No. 1:20-cv-00156-NT, 2020 WL 2310913, at \*8 (D. Me. May 9, 2020) (“In particular, the Plaintiff notes that there is an exemption from the ten-person limit for ‘liquor stores, warehouse clubs, supercenter stores, [and] marijuana dispensaries.’”).

to survival in a way that church is not.<sup>89</sup> For example, people literally cannot live without food, drink, and medicine.<sup>90</sup> Health care workers could not get to their jobs and save people's lives without gas and childcare.<sup>91</sup> People cannot work from home without certain equipment and technology.<sup>92</sup> As one court ruled, "[t]his limited carveout does not target religious gatherings. It simply ensures that people have access to essential goods."<sup>93</sup>

This argument has two potential weaknesses. To start, it does not fully explain the exemptions for professionals that a few states have included. Stores ensure ample food and drink and habitable homes safeguard people's physical survival, but how does your accountant? One court used income as the link: If professional people lose their jobs, they will lack the income and health care necessary to sustain themselves and their families.<sup>94</sup> But hospitality workers also need to earn money, yet hotels and restaurants were still shuttered under the mass gathering bans.<sup>95</sup> Perhaps the argument is that in contemporary society, certain professional skills are also necessary for families to survive, although this expands the definition of survival beyond immediate physical need.

In addition, the conclusion arguably embeds a contested value judgment about what is essential to human flourishing.<sup>96</sup> The objecting churches argue houses of worship provide just as essential a service as supermarkets and certainly more essential than liquor stores. Judge Justin Walker agreed, writing: "But if beer is 'essential,' so is Easter."<sup>97</sup>

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89. *Legacy Church*, 2020 WL 1905586, at \*40 ("Each and every business mentioned by Legacy Church either sells items necessary for everyday life or to facilitate the mitigation of COVID-19.").

90. *Id.* ("All these stores facilitate the purchase of necessary items that help treat ill individuals who are staying at home, or that make a house habitable, or that feed people so they can stay alive.").

91. *Id.*

92. *Lighthouse Fellowship Church*, 2020 WL 2110416, at \*7.

93. *Id.* at \*6; *see also* *Roberts v. Neace*, No. 2:20cv054 (WOB-CJS), 2020 WL 2115358, at \*3 (E.D. Ky. May 4, 2020) ("[T]here is an undeniable difference between certain activities that are, literally, life sustaining and other that are not.").

94. *Lighthouse Fellowship Church*, 2020 WL 2110416, at \*7 ("Although these [professional] businesses may not be essential, the exception crafted on their behalf is essential to prevent joblessness at a time when people desperately need to retain their income and healthcare . . .").

95. *See supra* notes 6–7 and accompanying text.

96. *Cf. Roberts*, 2020 WL 2115358, at \*3 ("And while plaintiffs argue that faith-based gatherings are as important as physical sustenance, as a literal matter, they are not *life*-sustaining in the physical sense.").

97. *On Fire Christian Ctr., Inc. v. Fischer*, No. 3:20-CV-264-JRW, 2020 WL 1820249, at \*7 (W.D. Ky. Apr. 11, 2020).

At first blush, the designation of liquor stores as essential may be puzzling. Yet many sell more than just alcohol, and so they are classified as a food and beverage establishment.<sup>98</sup> Moreover, as one court pointed out, the abrupt denial of alcohol to those dependent on it may endanger them and burden the health care system.<sup>99</sup> Or as *Scientific American* put it, “Because so few people have access to medications for AUD [Alcohol Use Disorder], access to alcohol becomes a matter of life or death.”<sup>100</sup> Still, the initial point remains: people must nourish their souls as well as their bodies. Indeed, to valorize the physical over the spiritual may not adequately express everyone’s priorities. For some, cultivating their relationship with God provides more benefit than cultivating a garden.

b. *Essential as No Alternative Available*

Nevertheless, even assuming worship services are equally “essential”<sup>101</sup> in terms of religion’s centrality to people’s lives, gathering in person to worship may not be necessary in the way that heading to the market is. That is, there may be no other way to procure an exempted essential service but to physically go somewhere in person, while alternatives exist for religious services.<sup>102</sup> We must eat, yet most of us cannot grow our own food and therefore must purchase it from a supermarket. For those who must worship, alternatives to in-church services abound.<sup>103</sup> People may pray to God on their own at

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98. Keith Dunlap, *Why Are Liquor Stores Considered ‘Essential’ During Covid-19 Pandemic? Here Are Five Reasons*, CLICK ORLANDO (Mar. 31, 2020, 10:56 AM), <https://www.clickorlando.com/features/2020/03/31/why-are-liquor-stores-considered-essential-during-covid-19-pandemic-here-are-5-reasons> [https://perma.cc/TPE8-MUJ9] (noting that many liquor stores sell food).

99. *Lighthouse Fellowship Church*, 2020 WL 2110416, at \*7 (“The danger posed by sudden alcohol withdrawal to those suffering from alcohol dependence, and the added burden upon health facilities that this might trigger, are significant factors that must be considered.”).

100. Max Jordan Nguemeni Tiako & Kelsey C. Priest, *Yes, Liquor Stores Are Essential Businesses*, SCI. AM. (Apr. 7, 2020), <https://blogs.scientificamerican.com/observations/yes-liquor-stores-are-essential-businesses> [https://perma.cc/ZQH4-7RZV].

101. *Legacy Church, Inc. v. Kunkel*, No. CIV 20-0327 JB\SCY, 2020 WL 1905586, at \*40 (D.N.M. Apr. 17, 2020) (“The Court recognizes that, to many individuals, religious worship is equally essential and important to life.”).

102. *Antietam Battlefield KOA v. Hogan*, No. CCB-20-1130, 2020 WL 2556496, at \*8 (D. Md. May 20, 2020) (“[U]nlike religious services, [these essential services] cannot operate remotely.”).

103. *Lighthouse Fellowship Church*, 2020 WL 2110416, at \*8 (“Plaintiff has failed to demonstrate that it is incapable of practicing its religion or providing spiritual guidance to its members in groups of ten or fewer.”).

home or together outside, online, or at drive-in services.<sup>104</sup> Certainly, most houses of worship provided alternate ways to meet their congregations' religious needs.<sup>105</sup> To be sure, the experience is not exactly the same as in-person fellowship,<sup>106</sup> but little in our lives today is exactly the same.<sup>107</sup>

There are rebuttals and counter-rebuttals to both claims. Although people must buy food, why not have it delivered rather than purchase it in person? Of course, that assumes both the availability and affordability of delivery services, which simply may not be the state of affairs for all people and for all stores.<sup>108</sup> At the same time, even if most religions do not mandate that worship take the form of large in-person gatherings, perhaps a few do.<sup>109</sup> Then again, whether the fact that a small number of churches insist that they are religiously obliged to meet en masse should defeat general applicability is a different question. After all, there are presumably secular activities that are equally meaningful for people that are likewise precluded by the ban on mass gatherings.<sup>110</sup>

## 2. Public Health Risk

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104. Cf. *Maryville Baptist Church, Inc. v. Beshear*, No. 3:20-cv-278-DJH, 2020 WL 1909616, at \*1 (W.D. Ky. Apr. 18, 2020) (“None of the challenged orders limits other avenues of group worship, such as drive-in, online, video or telephone conferencing, Facebook, or broadcast radio or television.”); *Cassell v. Snyders*, No. 20 C 50153, 2020 WL 2112374, at \*13 (N.D. Ill. May 3, 2020) (“In addition to drive-in services and smaller worship services, the Order permits Cassell and other staff members to visit and minister to parishioners in their homes. It allows small group meetings, bible study meetings, and prayer gatherings at the church or in private homes, subject to the ten-person limit.”).

105. See, e.g., Emily McFarlan Miller, *Churches Go Back to the Future with Drive-In Services in the Time of the Coronavirus*, RELIGION NEWS SERV. (Mar. 23, 2020), <https://religionnews.com/2020/03/23/churches-go-back-to-the-future-with-drive-in-services-in-the-time-of-the-coronavirus> [<https://perma.cc/MN3E-JS37>]; Sarah Pulliam Bailey & Ruth Eglash, *With Passover, Easter and Ramadan Looming, Clergy Scramble to Create Holidays at a Distance*, WASH. POST (Apr. 3, 2020, 11:53 AM), <https://www.washingtonpost.com/religion/2020/04/03/easter-passover-ramadan-religious-coronavirus-closures> [<https://perma.cc/382P-ASR2>].

106. Cf. *Tabernacle Baptist Church, Inc. v. Beshear*, No. 3:20-cv-00033-GFVT, 2020 WL 2305307, at \*2 (E.D. Ky. May 8, 2020) (“For Plaintiff, these substitutes offer cold comfort.”).

107. *Cassell*, 2020 WL 2112374, at \*2 (“The virus has killed hundreds of thousands, infected millions, and disrupted the lives of nearly everyone on the planet.”); *Roberts v. Neace*, No. 2:20cv054 (WOB-CJS), 2020 WL 2115358, at \*4 (E.D. Ky. May 4, 2020) (“Indeed, it is hard to imagine that there is any American that has not been impacted [by the pandemic].”).

108. Moreover, some items cannot be delivered, like gas.

109. *On Fire Christian Ctr., Inc. v. Fischer*, No. 3:20-CV-264-JRW, 2020 WL 1820249, at \*9 (W.D. Ky. Apr. 11, 2020) (“On Fire ‘and its members have a sincerely held religious belief that physical corporate gathering of believers each Sunday . . . is a central element of religious worship commanded by the Lord.’”).

110. Large family reunions, for example, cannot take place.

Courts have also considered the threat to public health posed by extended worship services compared to the exceptions, like those for grocery store shopping. Indeed, the issue of risk is usually the pivotal question.<sup>111</sup> Those courts and Justices that have found in-person religious services less safe than shopping for food or other essential services have ruled against the objecting churches, whereas those finding they pose an equal health risk have ruled in favor of them.<sup>112</sup> For example, one district court ruled in favor of a church with the observation that “[i]f social distancing is good enough for Home Depot and Kroger, it is good enough for in-person religious services.”<sup>113</sup> In contrast, Chief Justice Roberts found in *South Bay* that religious gatherings were “dissimilar” from activities “such as operating grocery stores, banks, and laundromats.”<sup>114</sup>

For the most part, the science right now suggests worship services and activities like shopping are not comparable. Although there is still much we do not know about the virus and its transmission, studies have established that people are contagious even before they exhibit symptoms.<sup>115</sup> Experts also think that the coronavirus spreads mainly by person-to-person contact via droplets (which are larger) and aerosols (which are smaller and airborne).<sup>116</sup> As a result, the risks of

111. *Cassell*, 2020 WL 2112374, at \*9 (“But the question is not whether any secular organization faces fewer restrictions than any religious organization. Rather, the question is whether secular conduct ‘that endangers the [government]’s interests in a similar or greater degree’ receives favorable treatment.”); *Calvary Chapel of Bangor v. Mills*, No. 1:20-cv-00156-NT, 2020 WL 2310913, at \*8 (D. Me. May 9, 2020) (same).

112. *Compare* *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020) (“[M]any of the serial exemptions for secular activities pose comparable public health risks to worship services.”), *with* *Calvary Chapel*, 2020 WL 2310913, at \*8 (“Gatherings in houses of worship present a greater risk to the public health than shopping at a grocery store or other retail outlet.”).

113. *Tabernacle Baptist Church, Inc. v. Beshear*, No. 3:20-cv-00033-GFVT, 2020 WL 2305307, at \*5 (E.D. Ky. May 8, 2020).

114. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring).

115. In fact, infectiousness may peak right at the beginning. At least one study “observed the highest viral load in throat swabs at the time of symptom onset, and inferred that infectiousness peaked on or before symptom onset.” Xi He et al., *Temporal Dynamics in Viral Shedding and Transmissibility of COVID-19*, 26 NATURE MED. 672, 672 (2020); see also Tina Hesman Saey, *Covid-19 May Be Most Contagious One or Two Days Before Symptoms Appear*, SCI. NEWS (Apr. 15, 2020, 5:39 PM), <https://www.sciencenews.org/article/coronavirus-covid-19-infection-contagious-days-before-symptoms-appear> [<https://perma.cc/942X-22VT>] (noting that individuals are most likely to spread Covid-19 before they feel ill). Roughly 40 percent of transmission occurs before the person shows symptoms according to CDC estimates. Aschwanden, *supra* note 11.

116. *How Covid-19 Spreads*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> [<https://perma.cc/JLV8-94Q4>] (last updated June 16, 2020); Tanya Lewis, *How Coronavirus Spreads Through the Air: What We Know So Far*, SCI. AM. (May

transmission appear greater in closed spaces, especially if they are poorly ventilated;<sup>117</sup> when many people are close together;<sup>118</sup> and when they interact with each other for longer periods of time.<sup>119</sup> The World Health Organization is now advising people to “Avoid the Three C’s: Confined and enclosed places, Crowded places, and Close-contact settings.”<sup>120</sup>

Singing and speaking also seem to be risk factors.<sup>121</sup> For instance, one of the most notable outbreaks in the United States was traced to a choir rehearsal at a church.<sup>122</sup> Even though the singers took care to apply hand sanitizer and observe social distancing, 53 out of 61

12, 2020), <https://www.scientificamerican.com/article/how-coronavirus-spreads-through-the-air-what-we-know-so-far1> [<https://perma.cc/LG89-82B6>]; Lidia Morawska & Donald K. Milton, *It Is Time To Address Airborne Transmission of COVID-19*, CLINICAL INFECTIOUS DISEASES (July 6, 2020) <https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa939/5867798> [<https://perma.cc/9J3T-GLYW>]; Apoorva Mandavilli, *The Coronavirus Can Be Airborne Indoors, W.H.O. Says*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/07/09/health/virus-aerosols-who.html> [<https://perma.cc/HK2F-UE98>]; Phoebe Southworth, *Coronavirus Could Travel Five Meters Through Air, Study Finds*, TELEGRAPH (Aug. 15, 2020, 5:00 PM), <https://www.telegraph.co.uk/news/2020/08/15/coronavirus-could-travel-five-metres-air-study-finds> [<https://perma.cc/8QKT-5LB7>].

117. Kai Kupferschmidt, *Why Do Some COVID-19 Patients Infect Many Others, Whereas Most Don’t Spread the Virus at All?*, SCIENCE (May 19, 2020, 5:25 PM), <https://www.sciencemag.org/news/2020/05/why-do-some-covid-19-patients-infect-many-others-whereas-most-don-t-spread-virus-all> [<https://perma.cc/372D-PGUS>] (“Researchers in China studying the spread of the coronavirus outside Hubei province—ground zero for the pandemic—identified 318 clusters of three or more cases between 4 January and 11 February, only one of which originated outdoors.”); *see also id.* (describing another study that concluded that the risk of infection inside was 19 times higher than outside).

118. Aschwanden, *supra* note 11 (describing the catalyst for super-spreader events as “large indoor crowd sizes, close contact between people, and confined spaces with poor ventilation”).

119. *See id.* (“Time matters too. The longer a group stays in contact, the greater the likelihood that the virus will spread among them.”).

120. WHO (@WHO), TWITTER (July 16, 2020, 11:36 PM), <https://twitter.com/WHO/status/1283787493096202240?s=20> [<https://perma.cc/5QCD-PGCH>]; Epidemiologists in Japan have long warned against the three Cs: closed spaces, crowded places, and close-contact settings where people are talking face-to-face. OFFICE FOR NOVEL CORONAVIRUS DISEASE CONTROL, GOV’T OF JAPAN, AVOID THE ‘THREE CS!’ (2020) <https://corona.go.jp/prevention/pdf/en.cluster2.pdf> [<https://perma.cc/62WS-VVCN>].

121. Kupferschmidt, *supra* note 117 (“[O]ne thing links numerous clusters: They happened in places where people shout or sing.”); Lewis, *supra* note 116 (“Some evidence suggests that talking could be a significant mode of viral transmission.”). For this reason, Germany has banned singing in churches. Kate Connolly, *Germany to Set Out Rules for Religious Services Including Singing Ban*, GUARDIAN (Apr. 29, 2020, 12:09 PM), <https://www.theguardian.com/world/2020/apr/29/germany-to-set-out-rules-for-religious-services-including-singing-ban> [<https://perma.cc/Q3LB-35MZ>].

122. Richard Read, *A Choir Decided to Go Ahead with Rehearsal. Now Dozens Have Covid-19 and Two Are Dead*, L.A. TIMES (Mar. 29, 2020, 7:34 PM), <https://www.latimes.com/world-nation/story/2020-03-29/coronavirus-choir-outbreak> [<https://perma.cc/39Y5-4U55>].

contracted Covid-19.<sup>123</sup> One doctor described that “[t]he combination of singing in close quarters and decreased ventilation” as “nothing short of a petri [sic] dish (or cell plate) for viral growth.”<sup>124</sup>

In fact, religious services have been the vector for multiple coronavirus outbreaks.<sup>125</sup> One CDC study found that after two positive worshippers attended church events, at least 35 of 92 attendees fell ill, with three dying.<sup>126</sup> Moreover, at least 26 additional cases in the community could be traced to the outbreak, with one known death.<sup>127</sup> Every week brings new reports of churches serving as the locus of an outbreak.<sup>128</sup> Despite efforts to sit six feet apart and avoid contact, churches that have reopened have found themselves closing again after an outbreak.<sup>129</sup> Consequently, even when churches make considerable

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123. Lea Hamner et al., *High SARS-CoV-2 Attack Rate Following Exposure at a Choir Practice — Skagit County, Washington, March 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 606, 607 (2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6919e6-H.pdf> [<https://perma.cc/LPK9-2F3U>].

124. Kevin Kavanaugh, *Churches Could be the Deadliest Places in the Covid-19 Pandemic*, INFECTION CONTROL TODAY (Apr. 3, 2020), <https://www.infectioncontrolday.com/covid-19/churches-could-be-deadliest-places-covid-19-pandemic> [<https://perma.cc/JM5B-URWD>].

125. See, e.g., Kyle Pfannenstiel, *Officials Say Religious Revival Linked to 5 Hospitalizations, 35 COVID-19 Cases*, IDAHO FALLS POST REG. (June 9, 2020), [https://www.postregister.com/coronavirus/officials-say-religious-revival-linked-to-5-hospitalizations-35-covid-19-cases/article\\_7a403f8e-ee4d-553a-92e8-0897c6419492.html](https://www.postregister.com/coronavirus/officials-say-religious-revival-linked-to-5-hospitalizations-35-covid-19-cases/article_7a403f8e-ee4d-553a-92e8-0897c6419492.html) [<https://perma.cc/5NN2-SQPP>]; Alex Wigglesworth, *More COVID-19 Cases Linked to California Church Services*, L.A. TIMES (May 24, 2020, 12:02 PM), <https://www.latimes.com/california/story/2020-05-24/more-coronavirus-cases-linked-to-california-church-services> [<https://perma.cc/KK4E-27P7>]; Jeremy Redmon, *Georgia Struggles Over Whether to Restrict Congregations Amid Pandemic*, ATL. J-CONST. (Mar. 27, 2020), <https://www.ajc.com/news/breaking-news/the-struggle-over-whether-restrict-congregations-amid-pandemic/xjDx2urFFZqS7qsIR6Ma5H> [<https://perma.cc/AD4Q-BRK6>]; see also Cassell v. Snyders, No. 20 C 50153, 2020 WL 2112374, at \*9 (N.D. Ill. May 3, 2020) (listing multiple “examples where religious services have accelerated the pathogen’s spread.”).

126. Allison James et al., *High COVID-19 Attack Rate Among Attendees at Events at a Church — Arkansas, March 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 632, 634 tbl. 1 (2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6920e2-H.pdf> [<https://perma.cc/2K4Q-V2VS>].

127. *Id.*

128. Wyatt Massey, *Church of God Denomination Facing Significant COVID-19 Outbreak; Leaders Won’t Say How Many Infected*, CHATTANOOGA TIMES FREE PRESS (July 7, 2020), <https://www.timesfreepress.com/news/local/story/2020/jul/07/church-god-denomination-outbreak/527007/#/questions/2602258> [<https://perma.cc/SD4B-TD6H>]; Celina Tebor, *Oregon’s Biggest Coronavirus Outbreak Yet is Linked to Union County Church, State Officials Confirm*, OREGONIAN (last updated June 17, 2020), <https://www.oregonlive.com/coronavirus/2020/06/coronavirus-outbreak-linked-to-eastern-oregon-church-surpasses-200-cases.html> [<https://perma.cc/56NP-MJKQ>].

129. Kate Conger, Jack Healy & Lucy Tompkins, *Churches Were Eager to Reopen. Now They Are Confronting Coronavirus Cases*, N.Y. TIMES (July 10, 2020), <https://www.nytimes.com/2020/07/08/us/coronavirus-churches-outbreaks.html> [<https://perma.cc/8528-9Y8J>] (describing multiple outbreaks); Lateshia Beachum, *Two Churches*

efforts to protect their congregations—and not all churches are making these efforts<sup>130</sup>—coronavirus can spread. “[As] public health experts have emphasized . . . even with social distancing, the virus can easily spread through the air when hymns are sung and sermons preached inside closed spaces.”<sup>131</sup>

No such clusters have been traced to people shopping at stores.<sup>132</sup> The nature of the excursion differs from worship services, and these differences present a lower risk profile.<sup>133</sup> As Chief Justice Roberts observed, religious services where “large groups of people gather in close proximity for extended periods of time” are not analogous to activities like shopping where “people neither congregate in large groups nor remain in close proximity for extended periods.”<sup>134</sup>

First, the typical time spent inside is much shorter. When people shop, they generally enter and leave the store as fast as they can.<sup>135</sup>

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*Reclose After Faith Leaders and Congregants Get Coronavirus*, WASH. POST (May 10, 2020, 4:33 PM), <https://www.washingtonpost.com/religion/2020/05/19/two-churches-reclose-after-faith-leaders-congregants-get-coronavirus> [<https://perma.cc/TP79-QJMU>].

130. See, e.g., Carol Kuruvilla, *Texas Pastor Apologizes After Allowing Hugging at Church After Dozens Contract COVID-19*, HUFFINGTON POST (last updated July 8, 2020), [https://www.huffpost.com/entry/calvary-chapel-san-antonio-covid-19\\_n\\_5f036d95c5b6acab285432ac](https://www.huffpost.com/entry/calvary-chapel-san-antonio-covid-19_n_5f036d95c5b6acab285432ac) [<https://perma.cc/8MTP-HKH8>]; Bethany Clough, *‘I Want to Go to Church;’ Fresno Church Defies Health Orders with Singing and a Crowd*, FRESNO BEE (May 31, 2020, 12:54 PM), <https://www.fresnobee.com/news/coronavirus/article243135876.html> [<https://perma.cc/UF73-JBS6>]; Daniel Burke, *A Louisiana Pastor Defies A State Order and Holds a Church Service with Hundreds of People*, CNN (Mar. 18, 2020, 8:28 PM), <https://www.cnn.com/2020/03/18/us/louisiana-pastor-coronavirus/index.html> [<https://perma.cc/9E5J-VPRN>].

131. Conger, Healy & Tompkins, *supra* note 129 (describing multiple outbreaks).

132. *Cassell v. Snyders*, No. 20 C 50153, 2020 WL 2112374, at \*9 (N.D. Ill. May 3, 2020) (“There are many examples where religious services have accelerated the pathogen’s spread . . . In comparison, Plaintiffs have failed to identify a grocery store or liquor store that has acted as a vector for the virus.”). The calculus may differ for those working unprotected all day long at these locations.

133. While not exactly analogous, a study of an outbreak at a South Korean call center highlights the different risks of transitory interactions compared to extended contact. Roughly half the employees on one floor, most sitting on the same side of the floor, became infected. Yet, according to the Korean CDC, “[d]espite considerable interaction between workers on different floors of building X in the elevators and lobby, spread of COVID-19 was limited almost exclusively to the 11th floor, which indicates that the duration of interaction (or contact) was likely the main facilitator for further spreading.” Aylin Woodward, *You’re Most Likely To Catch the Coronavirus in a Poorly Ventilated Space. That Makes Offices Very Risky.*, BUS. INSIDER (May 6, 2020, 12:46 PM), <https://www.businessinsider.com/coronavirus-risk-higher-tight-indoor-spaces-with-little-air-flow-2020-5> [<https://perma.cc/6KPW-HE9E>].

134. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring).

135. *Cassell*, 2020 WL 2112374, at \*9 (“The purpose of shopping is . . . to purchase necessary items and then leave as soon as possible.”).

“Shoppers, particularly in the current environment, enter a store, gather the items they need as quickly as possible, check out, and promptly leave.”<sup>136</sup> Worship services are extended affairs. A usual Sunday Catholic Mass takes at least an hour, and other services can be even longer: one plaintiff church’s service lasted an hour and forty-five minutes.<sup>137</sup> Thus, the answer to Justice Kavanaugh’s question, “Why can someone safely walk down a grocery store aisle but not a pew?”<sup>138</sup> is that they can but do not: people sit in pews, not walk down them.<sup>139</sup>

Second, people in stores generally try to minimize their interactions as much as possible, a feat made easier by the ability to constantly move around.<sup>140</sup> In contrast, the point of in-person religious services is to commune with one’s fellow worshippers.<sup>141</sup> Even when social distancing, congregants are still in an open room, perhaps with questionable ventilation, filled with people in front of them, in back of them, and to the sides of them. It is not surprising, then, that in its Guidance for Governors, the Johns Hopkins Bloomberg School of Public Health rated the contact intensity of shopping as low and the contact intensity of places of worship as high.<sup>142</sup>

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136. *Calvary Chapel of Bangor v. Mills*, No. 1:20-cv-00156-NT, 2020 WL 2310913, at \*8 (D. Me. May 9, 2020).

137. *Elim Romanian Pentecostal Church v. Pritzker*, No. 20 C 2782, 2020 WL 2468194, at \*4 (N.D. Ill. May 13, 2020) (“[L]ast Sunday’s service . . . was one hour, forty-seven minutes long, with virtually no one in the congregation or clergy wearing a face covering.”), *aff’d*, 962 F.3d 341 (7th Cir. 2020); *see also Calvary Chapel*, 2020 WL 2310913, at \*8 (“In contrast, the Plaintiff seeks to hold worship service for ‘no more than a few hours twice per week.’”).

138. *S. Bay*, 140 S. Ct. at 1614 (Kavanaugh, J., dissenting) (quoting *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020)).

139. A similar rebuttal answers Justice Kavanaugh’s question, “[w]hy can someone safely interact with a brave deliverywoman but not with a stoic minister?” *Id.* Customers interact briefly or not at all with people delivering goods to their home, which is not the case with worshippers and their clergy. Also, people at church interact with all the other congregants as well as the clergy.

140. *Cassell*, 2020 WL 2112374, at \*9 (“The purpose of shopping is not to gather with others or engage them in conversation and fellowship . . .”).

141. *Maryville Baptist Church, Inc. v. Beshear*, No. 3:20-cv-00033-GFVT, 2020 WL 1909616, at \*2 (W.D. Ky. Apr. 18, 2020) (noting that “the purpose of community-centered religious organizations” is “to congregate and converse”).

142. *JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH, PUBLIC HEALTH PRINCIPALS FOR A PHASED RE-OPENING DURING COVID-19: GUIDANCE FOR GOVERNORS* 12, 16 (Apr. 17, 2020), [https://www.centerforhealthsecurity.org/our-work/pubs\\_archive/pubs-pdfs/2020/200417-reopening-guidance-governors.pdf](https://www.centerforhealthsecurity.org/our-work/pubs_archive/pubs-pdfs/2020/200417-reopening-guidance-governors.pdf) [<https://perma.cc/VJ2A-WDNW>]. The Guide also rated worship services as “high” in number of contacts, compared to “medium” for retail. *Id.*

Moreover, the fellow worshippers surrounding them are speaking and even singing for an extended period of time.<sup>143</sup> Such an experience, with the accompanying exposure to droplets and aerosols potentially carrying the virus, makes it a particularly high risk activity.<sup>144</sup> And this is assuming that the church would forgo the communal sharing of food and wine that marks many services, although whether they do would be difficult to police. In sum, “[c]asual contact (briefly passing someone in the aisle of a big box store[]) entails a much smaller risk of contracting Covid-19 than a group congregating near one another for a longer period.”<sup>145</sup>

Notably, many of the same factors that make gathering to worship dangerous may also make gathering at professional businesses dangerous, especially in open plan offices where many people work all day in a single room.<sup>146</sup> A large meeting with many people discussing or celebrating next quarter’s projections can be just as conducive to contagion as a large gathering with people discussing or celebrating the Bible.<sup>147</sup> As the Sixth Circuit fairly asked, “How are in-person meetings with social distancing any different from in-person church services with social distancing?”<sup>148</sup>

Although exemptions for professional firms do weaken the claim of general applicability for those emergency orders that have them, such exemptions do not preclude general applicability. There may be other ways to distinguish the two, such as the argument that unlike religious services, legal and financial services cannot move entirely

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143. *Cassell*, 2020 WL 2112374, at \*9 (“Given that religious gatherings seek to promote conversation and fellowship, they ‘endanger’ the government’s interest in fighting COVID-19 to a ‘greater degree’ than the secular businesses Plaintiffs identify.”).

144. In a chart created by highly credentialed healthcare experts, attending church in person was listed as a “high risk” activity. Working in an office was “medium/high risk” while retail shopping was “low/medium risk.” What is low risk? Staying at home; running or biking; picking up take-out. *COVID-19 Activity Risk Levels*, EZEKIEL J. EMANUEL (June 30, 2020), <http://www.ezekielemanuel.com/writing/all-articles/2020/06/30/covid-19-activity-risk-levels> [<https://perma.cc/H648-46B5>].

145. *Antietam Battlefield KOA v. Hogan*, No. CCB-20-1130, 2020 WL 2556496, at \*8 (D. Md. May 20, 2020); *see also* *Spell v. Edwards*, No. CV 20-00282, 2020 WL 2509078, at \*3 (M.D. La. May 15, 2020) (“[T]he transient, in-and-out nature of consumer interaction with businesses, like those identified by the Plaintiff, are markedly different from the extended, more densely packed environments of churches . . .”), *vacated as moot*, 962 F.3d 175 (5th Cir. 2020).

146. That was, after all, the configuration of the Korean call center. *See supra* note 133.

147. *Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020) (“It’s not as if law firm office meetings . . . always take less time than worship services.”); Woodward, *supra* note 133 (describing the risk of poorly ventilated offices).

148. *Roberts*, 958 F.3d at 415.

online.<sup>149</sup> Or the argument may be that while worship services necessarily involve large indoor gatherings, legal and accounting services do not. Professional firms may be small, and they are more likely to have individual offices than open floor plans. Furthermore, they usually provide their professional services without large meetings. After noting, “Plaintiffs also complain that the Order classifies law and accounting firms as essential, with no ten-person limit, suggesting that this somehow shows that the Order targets religion,” one federal court responded, “Again, however, people do not go to those places to gather in groups for hours at a time.”<sup>150</sup>

Nonetheless, general applicability does not ultimately depend on the persuasiveness of these distinctions.<sup>151</sup> Instead, the argument may be that one or two exceptions to an order should not automatically disqualify it from being neutral and generally applicable, especially when the vast majority of gatherings are still banned. As mentioned above, the *Lukumi* Court has acknowledged that nearly all laws are underinclusive to some degree, whether they be federal anti-drug laws or executive orders meant to slow down the spread of a pandemic.<sup>152</sup> The rule that a single secular exemption automatically triggers strict scrutiny is an arguably untenable proposition that would make every religious objector “a law unto himself.”<sup>153</sup>

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149. Filing a legal brief, for example, requires printing, photocopying, tabs, and special stationary. They also often include elaborate and detailed documentary submissions. And while some courts allow online submissions, not all do. The Courts of Appeals will accept online briefs initially, but hard copies in triplicate need to be submitted soon after. Or at the trial level, responding to document requests may require printing out thousands of pages.

150. *Elim Romanian Pentecostal Church v. Pritzker*, No. 20 C 2782, 2020 WL 2468194, at \*4 (N.D. Ill. May 13, 2020), *aff'd*, 962 F.3d 341 (7th Cir. 2020).

151. It does, however, make it easier to satisfy general applicability if there is no secular counterpart that is exempted. It may be for this reason that California’s most recent order puts worship services and offices that are not part of critical infrastructure in the same category. *See supra* note 9. According to California, critical infrastructure includes things like emergency services, healthcare, energy, water, dams, transportation, information technology, critical manufacturing, etc. CAL. DEP’T OF PUB. HEALTH, ESSENTIAL WORKFORCE (2020), <https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf> [<https://perma.cc/7QXZ-BYB6>].

152. *See supra* note 80 and accompanying text.

153. *Emp. Div. v. Smith*, 494 U.S. 872, 879 (1990) (“To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”); Colin A. Devine, *A Critique of the Secular Exceptions Approach to Religious Exemptions*, 62 UCLA L. REV. 1348, 1352 (2015) (“If religious exemptions must be granted from any law with secular exceptions, they will be granted from nearly every law.”).

The current science suggests that crowded indoor spots where people talk, sing, and socialize for an extended period of time are high risk and potential “super-spreader events.”<sup>154</sup> While that generally does not describe people at their local supermarket or even liquor store, it does describe religious services. The bottom line, then, is that mass gatherings and shopping are not analogous in terms of risk. Accordingly, disparate treatment of these dissimilar activities does not indicate discrimination or defeat general applicability.

### III. STRICT SCRUTINY

Even if not considered neutral and generally applicable, the bans on gatherings over a certain size will still pass constitutional muster if they survive strict scrutiny. A law passes strict scrutiny if its goal is compelling and the means used narrowly tailored.<sup>155</sup> A law is narrowly tailored if there is not an alternative, equally effective way to accomplish the government’s goal that infringes less on religious liberty.<sup>156</sup>

There is no goal more compelling than promoting health and safety, generally, and saving lives, particularly. Few dispute that these orders are motivated by a state interest of the highest magnitude.<sup>157</sup> “[N]o one contests that [governors have] a compelling government interest in preventing the spread of a novel, highly contagious, sometimes fatal virus.”<sup>158</sup>

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154. Aylin Woodward, *Trump Declared Houses of Worship Essential. Mounting Evidence Shows They’re Super-Spreader Hotspots*, BUS. INSIDER INDIA (May 31, 2020, 11:20 PM), <https://www.businessinsider.in/science/news/trump-just-declared-houses-of-worship-essential-mounting-evidence-shows-theyre-super-spreader-hotspots-/articleshow/75907337.cms> [<https://perma.cc/JR8E-2DV4>] (“[Super-spreader] events have shared a few key characteristics: They’ve mostly been indoors and puts lots of people from different households in close, extended contact. That’s precisely the type of gathering that churches, mosques, and synagogues facilitate.”).

155. *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2260 (2020) (“To satisfy [strict scrutiny], government action ‘must advance “interests of the highest order” and must be narrowly tailored in pursuit of those interests.”).

156. *Brown v. Ent. Merchants Ass’n*, 564 U.S. 786, 847 (2011) (Thomas, J., dissenting) (defining a law passing strict scrutiny as “‘narrowly tailored’ to further a “compelling interest,” without there being a ‘less restrictive’ alternative that would be ‘at least as effective’”).

157. *Maryville Baptist Church, Inc. v. Beshear*, No. 3:20-cv-278-DJH, 2020 WL 1909616, at \*3 (W.D. Ky. Apr. 18, 2020) (“Plaintiffs do not contend that the Commonwealth lacks a compelling governmental interest in restricting mass gatherings to prevent the spread of COVID-19.”).

158. *Roberts v. Neace*, 958 F.3d 409, 415 (6th Cir. 2020); *see also* *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (2020) (Kavanaugh, J., dissenting) (“California undoubtedly has a compelling interest in combating the spread of COVID-19 and protecting the health of its citizens.”).

The strict scrutiny analysis turns instead on whether the state can persuade the court that it cannot achieve its life-saving mission without restricting large religious gatherings. Evaluating tailoring is more of an art than science, and even with strict scrutiny, courts have some discretion. Two factors might influence a court's analysis. First, the strictness of a court's application may depend on its assessment of the gravity of the pandemic.<sup>159</sup> The more compelling the government's goal, the less demanding the court may be (consciously or unconsciously) with regard to fit.<sup>160</sup> Thus, those courts focused on the deadliness of the pandemic, and high risk of super-spreader events, may prove more willing than usual to find that the state has made its showing.<sup>161</sup> For example, in upholding California's ban, the Ninth Circuit observed, "We're dealing here with a highly contagious and often fatal disease for which there presently is no known cure."<sup>162</sup>

The second factor is whether a court finds that there are exemptions for activities with parallel risks, underscoring how critical this question is for the overall analysis. In fact, courts that believe that restricted worship services are more analogous to essential services exempted from the ban have concluded that the ban's goals could therefore be readily achieved with one more exemption.<sup>163</sup> Thus, the Sixth Circuit ruled that "[t]here 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

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159. See, e.g., *Lighthouse Fellowship Church v. Northam*, No. 2:20cv204, 2020 WL 2110416, at \*16 (E.D. Va. May 1, 2020) ("The equities, in the context of a deadly pandemic, tip in Defendant's favor.").

160. It is not so much that courts are applying *Jacobson sub rosa*, see *supra* Part I, but that courts may prove more deferential when evaluating what they perceive as an emergency situation.

161. See, e.g., *Maryville Baptist Church*, 2020 WL 1909616, at \*3 ("Given that COVID-19 is widely understood to be transmitted through person-to-person contact, including persons with and without symptoms of illness, Beshear will likely be able to demonstrate that restricting large in-person gatherings is the least restrictive means of accomplishing the Commonwealth's objective."); *Roberts*, 2020 WL 2115358, at \*4 ("This Court agrees [that the church has failed to demonstrate a likelihood of success]. The current public health crisis presents life-or-death dangers.").

162. *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 939 (9th Cir. 2020). The Ninth Circuit added, "In the words of Justice Robert Jackson, if a [c]ourt does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." *Id.*

163. *First Baptist Church v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021, at \*8 (D. Kan. Apr. 18, 2020) ("Plaintiffs can likely show that the broad prohibition against in-person religious services of more than ten congregants is not narrowly tailored to achieve the stated public health goals where the comparable secular gatherings are subjected to much less restrictive conditions.").

at that—just as the Governor has done for comparable secular activities?”<sup>164</sup>

In addition to the fact that multiple outbreaks have been traced to church gatherings, the scientific knowledge at this time supports upholding the application of mass gathering bans to houses of worship. The best available evidence points to large indoor gatherings with extended interactions, especially those that involve speaking and singing, as major vectors of contagion. Consequently, gatherings that fit that profile ought to be curtailed, even if they do sweep in religious services. As one court noted: “Every gathering of more than ten people endangers health and life and increases the burden on the frontline healthcare workers tasked with caring for those afflicted.”<sup>165</sup>

### CONCLUSION

Bans on all mass gatherings, including religious ones, are both sensible and constitutional in the midst of a pandemic. Indeed, in rejecting a religious liberty challenge to a child welfare law in 1944, the Supreme Court noted, “The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.”<sup>166</sup> That sentiment still holds true today. Our constitutional rights are precious, but none of them are absolute.<sup>167</sup> Even the right to religious liberty is not absolute, especially if exercising it endangers others. “After all, without life, there can be no liberty or pursuit of happiness.”<sup>168</sup>

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164. *Roberts*, 958 F.3d at 415. Of course, this argument turns on whether the activities are in fact comparable.

165. *Lighthouse Fellowship Church v. Northam*, No. 2:20cv204, 2020 WL 2110416, at \*16 (E.D. Va. May 1, 2020).

166. *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944).

167. *Lighthouse Fellowship Church*, 2020 WL 2110416, at \*17 (“[T]he libert[ies] secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint.” (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905))).

168. *Cassell v. Snyders*, No. 20 C 50153, 2020 WL 2112374, at \*1 (N.D. Ill. May 3, 2020).