

UNITED STATES SUPREME COURT APPROACH TO FIRST AMENDMENT FREEDOM OF RELIGION IN RESPONSE TO THE COVID PANDEMIC

*Delaine R. Swenson**

ABSTRACT

The 2020–21 Covid 19 Pandemic has raised many legal challenges as governments world-wide have struggled to deal with the public health and safety challenges of Covid. At the center of many of these decisions is the need to balance public health protections against other rights that have been infringed by legislation related to Covid Pandemic restrictions. One of the most important rights that have been implicated by Covid restrictions in the United States has been in the area of restrictions on religious worship which implicates the right to freedom of religion as enshrined in the United States Constitution. During the time of the Pandemic the United States Supreme Court, as the final arbiter of the United States Constitution has had to work to balance the interests of the government in protecting public health and safety with the right to freedom of religion. The Supreme Court's approach to these cases reflects the difficulties inherent in balancing two such important interests in difficult circumstances and also represents the reality of the shifting majority in the Court as a result of new Justices appointed under the administration of Donald Trump. The Court has transitioned from a majority that opposed restrictions on governmental action during COVID to a majority that is more willing to stop governmental action that is deemed to be in violation of the Free Exercise of Religion Clause of the First Amendment.

Keywords: US Constitution, Freedom of Religion, COVID 19, Free Exercise Clause, US Supreme Court

* Dr. Delaine R. Swenson, Professor, Faculty of Law, Canon Law and Administration, The John Paul II Catholic University of Lublin; correspondence address: Al. Raclawickie 14, 20-950 Lublin, Poland; e-mail: dswenson@kul.pl; <https://orcid.org/0000-0002-0781-0765>.

1. FREE EXERCISE OF RELIGION

The First Amendment to the United States Constitution contains the language that sets forth the basis for freedom of religion claims under US Constitutional law. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...”¹. Freedom of Religion in American jurisprudence traditionally contains two elements that are obvious from the language of the First Amendment. The first regulates the establishment of religion and deals with the need to separate church and state and the second deals with prohibitions on the free exercise of religion and deals with government restrictions on religion. It is the free exercise clause that is implicated by regulations that restrict religious worship due to the Covid pandemic².

The Supreme Court case that is often cited in determining when a government regulation infringes on the free exercise clause of the First Amendment is a 1993 case entitled *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*³. In this case a church that practiced the Santeria religion attempted to establish themselves in the City of Hialeah, Florida. The Santeria religion uses animal sacrifice as one of its principal forms of worship, the animals are killed during religious ceremonies by cutting their carotid arteries and are cooked and eaten except during healing and death rites. After the church leased land in Hialeah the city council held an emergency public session and then passed a number of resolutions and ordinances making ritual slaughter illegal in city limits. The clear purpose of this legislation was to prevent the establishment of the Santeria Religion within city limits due to opposition to their religious practices. The Supreme Court found that “The ordinances’ texts and operation demonstrate that they ... have as their object the suppression of Santeria’s central element, animal sacrifice”⁴.

¹ United States Constitution, Amendment 1.

² “Constitutional Constraints on Free Exercise Analogies,” *Harvard Law Review* 134, no. 5 (2021): 1782.

³ *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

⁴ *Church of Lukumi*, IBID at 521.

First, the Court confirmed in this case the rule that a law that burdens religious practice that is neutral and of general applicability should not be subjected to an increased standard of review⁵.⁶ However, they also emphasized that when the law under consideration is not neutral or not of general application, it must then comply with the strict scrutiny standard⁷. The strict scrutiny standard is a form of judicial review that the Court uses to determine the constitutionality of laws that impact on fundamental rights and is the highest form of review⁸. Freedom of Religion is a fundamental right under the United States Constitution so any law that is not neutral or of general applicability requires the application of the strict scrutiny standard.

The *Church of Lukumi* case also emphasized some additional principles important in considerations concerning government regulation that infringes on the right to the free exercise of religion. First, is the idea that it is not the job of the government to determine whether a particular religion or religious belief or practice is legitimate or not. That is a decision left to the individual believer. “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection”⁹. Secondly, the Court emphasizes that “a law targeting religious beliefs as such is never permissible”¹⁰, however if the object of the law is to infringe upon or restrict practices because of their religious motivation then the law is not neutral and the strict scrutiny standard applies. When examining the question of the neutrality of the law being reviewed the Court first looks at the text of the law since at a minimum the law must not discriminate on its face. In this case although the city

⁵ See *Employment div., Dept. Of Human Resources of Ore. v. Smith*, 494 U.S. 872, (1990) where the Court found that a state could deny unemployment benefits to a person fired for violating a state prohibition on the use of the drug peyote, even though the use of the drug was part of a native American religious ritual.

⁶ But see discussion about the Religious Freedom Restoration Act below.

⁷ *Church of Lukumi*, IBID at 521.

⁸ Roy G. Spece, Jr. and David Yokum, “Scrutinizing Strict Scrutiny,” *Vermont Law Review* 40 (2015): 285.

⁹ *Thomas v. Review Bd. Of Indiana Employment Security Div.*, 450 U.S. 707, 714(1981).

¹⁰ *Church of Lukumi*, IBID at 533.

ordinances in issue here used terms like “ritual” and “sacrifice” the court found that on its face the text remained neutral. However, the Court further found that textual (facial) neutrality by itself is not sufficient, the free exercise clause extends beyond facial discrimination and requires examination of the governmental motivation behind those actions. “The Free Exercise Clause protects against governmental hostility which is masked as well as overt”¹¹. In determining the neutrality of a particular piece of legislation the Court should consider the whole record of the case before the Court including the legislative history which includes the statements of legislators at the time the law was passed¹².

The Court then looked at the whole record before it in the *Lukami* case. While the ordinances passed by the City of Hileah were neutral on their face, the court found that the motivation behind them were clearly designed to prevent a religious practice that the City felt was inappropriate, mainly animal sacrifice. And while the City attempted to state clearly secular purposes for the legislation including goals of protection of public health and safety and prevention of cruelty to animals the Court did not accept these reasons. First, the legislation outlawed the “unnecessary” killing of any animal and found killing for certain secular reasons to be necessary but stated that killing for religious reasons was unnecessary. This was not a neutral application of the law. Secondly the Court found that the laws were overbroad and therefore not “narrowly tailored” to advance the compelling governmental interest involved because they outlawed more practices that were necessary to meet the Cities health and safety and animal cruelty interests. In the end the Court’s conclusion is clear: “In sum, the neutrality inquiry leads to one conclusion: The ordinances had as their object the suppression of religion”¹³.

The Court then turned to the second requirement of the Free Exercise Clause, that a rule that burdens religious practice must be of general ap-

¹¹ *Church of Lukami*, IBID at 534.

¹² For example see *Wallace v. Jaffree*, 472 U.S. 38 (1985) where a legislator’s statements that the purpose of passing a law mandating a minute of silence each day in Alabama’s public schools was intended to re-introduce school prayer in violation of the Establishment clause resulted in the law being struck down by the Court for lacking a secular purpose.

¹³ *Church of Lukami*, IBID at 542.

plicability¹⁴. The Free Exercise Clause protects religious observers against unequal treatment by the government¹⁵. This means at a minimum that government cannot impose burdens only on conduct motivated by religious belief. In this case the Court found that the City failed to meet this standard because they selected only those acts that were of a religious nature for regulation. For example, under the guise of regulation of cruelty to animals the city ordinances outlawed animal sacrifice in religious practice but continued to allow animal extermination (rats and mice); euthanasia of stray, neglected, abandoned or unwanted animals, use of poison against animal pests and using animals in hunting other animals. The City of Hialeah failed to explain why the religious sacrifice of an animal was somehow more cruel than any of the other approved methods of killing animals. The City further failed to justify the ordinance based on public health and safety as other instances of slaughter of animals were allowed by the ordinances while those involved in a religious ceremony were not¹⁶.

Having found that Hialeah's ordinances were neither neutral nor of general applicability, the Court then applied the strict scrutiny standard of judicial review. The strict scrutiny test which was established in the *Sherbert* case is a two-part test. In order for a challenged law to be constitutional the government had to demonstrate a *compelling governmental interest* behind the law in question as well as show that the law was *narrowly tailored* to meet that interest¹⁷. The first part of the *Sherbert* test looks at the reasons behind the government regulation. Strict scrutiny requires a compelling governmental interest, in contrast to intermediate scrutiny which requires an important governmental interest and the lowest review standard, the rational basis standard which requires only that the law be based on a legitimate governmental interest. A compelling government interest has been described as "interests of the highest order"¹⁸, and a law under this test will survive strict scrutiny only in rare cases. The Court accepts that there may be compelling interests in this case, but finds that

¹⁴ *Employment Div. v. Smith*, IBID at 879–881.

¹⁵ *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987).

¹⁶ *Church of Lukami*, IBID at 545.

¹⁷ *Sherbert v. Verner*, 374 U.S. 398 (1963).

¹⁸ *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

they are irrelevant because the City has not met its burden with regard to the second part of the *Sherbert* test.

The second part of the *Sherbert* test looks at the way the law has been drafted to ensure that it was narrowly tailored (carefully written) to ensure that it does not encompass too much behavior (overbroad) or fails to address the compelling governmental interest. This is in contrast to the intermediate scrutiny standard that requires that the law be substantially related to the government interest and the rational basis standard that requires only that the law be rationally related to the governmental interest¹⁹. In this case the Court found that the laws that were challenged were not narrowly tailored by the city as they were both too broad by excluding what should have been legal activity and too narrow because they excluded too much behavior that undermined the stated compelling interests that they were supposed to protect. In short, this legislation did not pass the strict scrutiny standard for violation of the Free Exercise Clause.

The concluding words of the majority opinion are an instructive summary of the case that we can use later while considering COVID restrictions that have an impact on the Free Exercise of religious practices.

“The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void”²⁰.

¹⁹ “Levels of Scrutiny Under the Equal Protection Clause,” accessed April 2021, law2.umkc.edu; and see R. Randall Kelso, “Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The “Base Plus Six” Model and Modern Supreme Court Practice,” *Journal of Constitutional Law* 4, Issue 2 (2002): 225.

²⁰ *Church of Lukumi*, IBID at 547.

2. COVID RESTRICTIONS ON RELIGIOUS PRACTICE

As of April 2, 2021 there have been over 30.6 million Coronavirus (Covid) 19 infections in the United States of America and over 553,000 deaths²¹. In response government in the United States has had to pass and enforce regulations designed to slow the spread of the disease and protect public health and safety. These regulations have had a direct effect on the practice of religion in the United States. However, like many areas of US law it is difficult to clearly state what the legal regulation of Covid 19 is in the United States. This is due to the United States adoption of a system based on the concept of federalism. The American Constitution was written with the idea of limited government, in particular with the concept of separation of power, both horizontal and vertical. Horizontal separation of power is common in modern democracies and normally involves separating government power into three branches, the executive, the legislative and the judicial. Vertical separation of power splits power between various levels of government, in the case of the United States, government power is separated between the Federal (U.S. Government), the 50 States, and local governments. As the original 13 colonies enjoyed substantial independence at the moment the US Constitution was designed and adopted the US Constitutional system prioritizes the exclusive rights of each level of government to regulate areas in their control. For example, the Federal government enjoys powers over foreign affairs, interstate commerce, weights and measures, coining of money, and intellectual property²². However, each state retains the power to regulate in most areas of American's daily lives, including the important area that is commonly known as "police powers". The source of the states police powers lies in the 10th Amendment to the U.S. Constitution: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"²³. Police powers is the capacity of the states to regulate behavior for the betterment of health,

²¹ <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>, accessed April 2, 2021.

²² United States Constitution, Article 3, Section 8.

²³ United States Constitution, Amendment 10.

safety, morals and the general welfare²⁴. This means that regulation related to Covid 19 restrictions are the responsibility of state and local governments and not the Federal government.

With 50 states and thousands of local jurisdictions there are many different responses to the Covid pandemic and hundreds of different approaches to Covid restrictions that impact on the free exercise of religion. In an effort to slow the spread of Covid, every state and many local governments have issued either guidelines or orders limiting social interaction. It is the impact of these guidelines and regulations on the practice of religion that is under consideration here. Such restrictions have limited both the form and function of religious worship in the United States, from outright bans on any gatherings, to limits on the number of worshipers, or other limits on the method of worship, for example bans on singing during services. One interesting snapshot of state regulation of social distancing and its impact on religious worship in the United States can be found in a Pew Research report on state regulation of religious worship from April of 2020²⁵. In this report the Pew Research Center looked at existing state regulation of religion as it related to Covid restrictions. The conclusion of the report was that most states intentionally carved out exemptions to Covid rules for the practice of religion. At the time 10 states were preventing in-person religious meetings in any form, 22 states and the District of Columbia were allowing religious gatherings but limiting them to 10 or fewer people. A few states had higher limits, 25 and 50 and 15 states had no limits at all. Another significant point is that some states had determined that religious worship was “essential”, and it was therefore put in the same category as food shopping and health care. There have been many instances of religious leaders resisting restrictions either by holding services in defiance of the restrictions, or by filing lawsuits to challenge the restrictions. In addition, many churches have gotten creative in the time of Covid either by livestreaming services online or television or holding “drive-in” services where people participate while self-isolating in their own car in a field of others in their cars.

²⁴ *Jacobson v. Massachusetts*, 197 U.S. 11, (1905).

²⁵ <https://www.pewresearch.org/fact-tank/2020/04/27/most-states-have-religious-exemptions-to-covid-19-social-distancing-rules/>, retrieved April 1, 2021.

In response to government regulations regarding Covid Americans have filed thousands of lawsuits under both state and federal law. These lawsuits have been based on a wide variety of claims including many related to federal Constitutional rights. Among these have been over 100 lawsuits under the Free Exercise Clause of the U.S. Constitution²⁶. This is in part a reflection of the reality that Covid restrictions have drastically affected religious worship in the United States²⁷. An early Court case involving a challenge to state Covid regulations occurred in Virginia in *Lighthouse Fellowship Church v. Northam*²⁸. In this case the Lighthouse Fellowship Church challenged executive orders of the Governor of the State of Virginia that made it illegal for any public gatherings in excess of 10 individuals. The Church sought a preliminary injunction pending trial and later a permanent injunction against enforcement of the Governor's executive orders as it related to their church services as they argued that the orders violated the Church's Freedom of Exercise under the First Amendment. The Federal Court then analyzed Virginia's actions under the standard set forth in *Church of the Lukumi Babalu Aye* case, namely the requirements of neutrality and general applicability in laws that burden religious practice. First, the Court determined that the Executive Orders that were being challenged were neutral both on their face and upon closer examination since there was no evidence of bias against religion in their design or implementation. The Court next examined the second element, the requirement that the laws being challenged must be of general applicability. In this context the Church asserted that the Governor's Executive orders were not of general applicability since they carved out an exception for "essential retail businesses" which included grocery stores, pharmacies, medical, laboratory, vision supply retailers, electronic retailers, automotive stores, building supply retailers and alcohol stores. An exception was also made for certain businesses that provided professional services even if the business was not considered essential. The Court found that the Executive

²⁶ [https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_cononavirus_\(COVID\)_pandemic,_2020](https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_cononavirus_(COVID)_pandemic,_2020), retrieved April 1, 2021.

²⁷ Jiwoon Kong, "Safeguarding the Free Exercise of Religion During the COVID-19 Pandemic," *Fordham Law Review* 89, Issue 4 (2021): 1589.

²⁸ *Lighthouse Fellowship Church v. Northam*, 458 F.Supp. 3d 418 (2020).

Orders were of general applicability as any exceptions pertaining to essential businesses and professional services were reasonable and designed to avoid harms equal to or greater than the spread of Covid. While the Court found that the practicing of one's religion and getting spiritual guidance are essential for some people, the Court found that the Church should still be able to provide this essential service with groups of 10 or less people or using alternative methods of contact. The Court therefore found no violation of the Freedom of Exercise Clause and the Church's request for an injunction was denied.

3. UNITED STATES SUPREME COURT RESPONSE TO FREE EXERCISE AND COVID RESTRICTIONS

Ultimately when it comes to the United States Constitution First Amendment Free Exercise of Religion Clause the final word rests with the highest court in the United States, the U.S. Supreme Court. Under the doctrine of Judicial Review the United States Supreme Court has final say in interpreting the United States Constitution²⁹. To date the Supreme Court has issued several decisions that involved challenges to government regulation dealing with Covid that were challenged under the Free Exercise Clause of the First Amendment³⁰. These came in the form of Opinions relating to Orders granting or denying injunctive relief from the state Covid actions involved. Injunctive relief, or an injunction, is a remedy available which restrains a party from doing certain acts and is issued before the primary case in chief has been heard and decided by the Court. Injunctive relief is usually only granted in extreme circumstances, as the party asking for injunctive relief has to prove a likelihood of winning the case on the merits and that irreparable harm will occur without the Court's intervention³¹. In these cases the plaintiffs were all religious organizations that filed suit against state Covid restrictions based on violation of the Con-

²⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

³⁰ Josh Blackman, "The "Essential" Free Exercise Clause," *Harvard Journal of Law & Public Policy* 4, no. 3 (2020): 637.

³¹ *Federal Rules of Civil Procedure*, Rule 65. Injunctions and Restraining Orders.

stitution's provision on Free Speech, Freedom of Assembly and the Free Exercise Clause.

4. SOUTH BAY UNITED PENTECOSTAL CHURCH I

The first of these cases to be decided was *South Bay United Pentecostal Church, ET AL. v. Gavin Newsom, Governor of California, ET AL.*³². The Governor of California, Gavin Newsom enacted an Executive Order designed to limit the spread of Covid in part by restricting public gatherings including limiting attendance at places of worship to 25% of building capacity or a maximum of 100 attendees. The Church objected because comparable secular businesses such as factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons and cannabis dispensaries were not subject to this limitation. They argued that these guidelines discriminated against places of worship and in favor of secular businesses in violation of the Free Exercise Clause.

The Court in a 5–4 vote rejected the request for injunctive relief. The four votes against the injunction consisted of the 4 more liberal members of the Court and Chief Justice Roberts, with the more conservative members of the Court voting in favor of granting an injunction and finding a Free Exercise violation³³. Chief Justice Roberts writing a concurring opinion for the majority stated that the restrictions were not likely a violation of the Free Exercise clause because although there are restrictions on places of worship, there are similar or more severe restrictions on comparable secular gatherings where large groups of people gather in close prox-

³² *South Bay United Pentecostal Church, ET AL. v. Gavin Newsom, Governor of California, ET AL.*, 590 U.S. ____ (2020).

³³ At the time of the *South Bay I* decision, Justices appointed by a Democratic President and considered more liberal included Justices Stephen Breyer, Sonia Sotomayor, Elena Kagan and Ruth Bader Ginsburg. Justices appointed by a Republican President and considered more conservative included Justices Samuel A. Alito, Neil M. Gorsuch, Brett Kavanaugh and Clarence Thomas. Chief Justice John G. Roberts, appointed by a Republican President, and generally considered more conservative, sometimes serves as a swing vote supporting the position of the liberal justices as he did in this case.

imity for extended periods of time. The order does treat other activities more leniently, but those are activities that are dissimilar because they are activities in which people do not congregate in large groups nor remain in close proximity for extended periods of time. Roberts thus creates a proximity and duration factor to determine whether Covid restrictions are similar or different to establish if they are compliant with the Free Exercises Clause. For example, the orders to similar businesses in terms of duration and proximity of human contact such as lectures, concerts, movies, and spectator sports are treated similarly to worship services. Whereas dissimilar activities in terms of duration and proximity are treated more leniently such as grocery stores, banks and laundromats. Roberts then emphasizes the need for the Courts to defer to the judgement of elected officials on issues such as this that involve a dynamic and fact-intensive matter subject to reasonable disagreement. “Our Constitution principally entrusts “the safety and the health of the people” to the politically accountable officials of the states “to guard and protect”³⁴. He further states that where the elected officials act in areas full of medical and scientific uncertainties, the latitude given to them should be especially broad³⁵. The Majority then defers to the discretion of the elected officials in the implementation of the Covid regulations under consideration in this case and refuses to grant the preliminary injunction requested by the Church.

Justice Kavanaugh wrote the dissent and was joined by Justices Thomas and Gorsuch. The minority would have granted the injunction to the Church because they felt the Covid guidelines discriminated against religion in favor of secular locations and this discrimination violated the First Amendment. Despite the fact that the Church in this case has agreed to comply with all the state rules that apply to secular businesses, including social distancing and hygiene requirements, California still chose to discriminate against religious practices. This discrimination is not allowed by the United States Constitution and as Kavanaugh points out discrimination against religion is “odious to our Constitution”³⁶. In light

³⁴ *South Bay United*, IBID at 2, quoting from *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905).

³⁵ *Marshall v. United States*, 414 U.S. 417 (1974).

³⁶ *Trinity Lutheran Church of Columbia, inc. v. Comer*, 582 U.S. ____ (2017). (slip op., at 15).

of this discrimination Kavanaugh insists that the *Sherbert* strict scrutiny test as confirmed in *Church of Lukumi*³⁷ should be applied. First, California must assert a compelling governmental interest in the law that was passed. Kavanaugh concedes that California has a compelling interest in combating the spread of Covid and protecting the health of its citizens, but asks the deeper question as to whether California has a compelling justification for distinguishing between religious worship services and the other secular businesses that were not subject to an occupancy cap. In the opinion of the minority California provides no compelling basis for this disparate treatment and therefore California does not pass strict scrutiny review. Interestingly, the minority does not deal with Chief Justice Roberts proximity and duration arguments that he maintains distinguishes the secular exceptions from religious services. As for Robert's argument that the Court should give elected officials great deference in public health and safety matters, Kavanaugh agrees but points out one important limitation. "The State also has substantial room to draw lines, especially in an emergency. But as relevant here, the Constitution imposes one key restriction on that line-drawing: The State may not discriminate against religion"³⁸.

5. CALVARY CHAPEL V. SISOLAK

The next of these cases to be decided was *Calvary Chapel Dayton Valley v. Steve Sisolak, Governor of Nevada, ET AL.*³⁹. Calvary Chapel is a Christian church located in rural Nevada that wished to hold religious services with a number of attendees equivalent to 50% of its fire code capacity during the time of Covid restrictions. Their intention to do so violated the terms of an Executive Directive from the Governor of Nevada that limited indoor worship services to no more than 50 persons, no matter the capacity of the church involved. This was in direct contrast to the regulation

³⁷ *Church of Lukumi*, IBID at 531–532.

³⁸ *South Bay United*, Kavanaugh, J., dissenting, IBID at 3.

³⁹ *Calvary Chapel Dayton Valley v. Steve Sisolak, Governor of Nevada, ET AL.* 591 U.S. ____ (2020).

of the state gaming industry⁴⁰ where for example Casinos were limited to 50% of their operating capacity, which in the case of many of the large casinos in Nevada would mean thousands of patrons. Calvary Chapel sued and argued that this constituted a violation of the Free Exercise Clause.

The same 5–4 majority-minority outcome as in the *South Bay United* case decided this case with the majority refusal of the injunction consisting only of a one sentence statement. It is the dissents filed by the conservative minority that are interesting in this case and a good indication of the thinking that would prevail in the next two cases when the membership of the Court underwent change. Justice Alito wrote a dissent in this case as did Justice Kavanaugh and Gorsuch. Much of the dissent's objections center around the contrast between the restrictions placed on religious services and those that were not placed on the gaming industry. "That Nevada would discriminate in favor of the powerful gaming industry and its employees may not come as a surprise, but this Court's willingness to allow such discrimination is disappointing"⁴¹ and the following quote makes this clear: "The Constitution guarantees the free exercise of religion. It says nothing about the freedom to play craps or black-jack, to feed tokens into a slot machine, or to engage in any other game of chance"⁴². Justice Alito then finds that the Nevada regulation is neither neutral nor of general application due to its disparate treatment of Churches verses Casinos and several other privileged secular businesses. Alito then insists the Nevada regulation must pass the strict scrutiny test from *Sherbert*, and as in the *South Bay* dissent fails to find a compelling interest on the part of the State of Nevada to distinguish between casinos and churches. Interestingly, Alito does reference Chief Justice John Roberts findings in the *South Bay United* case by pointing out that the Chief Justice's references to proximity and duration of contact reasoning would not apply in this case as the average amount of contact time in a casino is over two hours (verses a 45- minute religious service) and the fact that Casino have multiple areas

⁴⁰ Nevada's gaming industry (gambling) is the biggest employer in Nevada and the most important sector in the state's economy, accounting for almost 40% of all state tax revenue and over 450,000 jobs. <https://nevadabusiness.com/2020/nevada-gaming-industry-outlook/>.

⁴¹ *Calvary Chapel*, Alito J. Dissenting at 1.

⁴² *Calvary Chapel*, Alito J. Dissenting at 1.

of close interaction between patrons, certainly more than a carefully run church service. Justice Kavanaugh re-enforces many of these points in his extensive dissent as well.

It is interesting that the Majority issued no written opinion to support their position that an injunction should not be issued in this case. Perhaps in part this a reflection of the difficulty of justifying allowing Casino's, movie theatres and bowling alleys to operate at 50% of capacity and religious services at a set number regardless of the size of the church. The minority effectively points out this inconsistency and rightfully asks how it can be justified by the State as well as the majority. Justice Gorsuch's dissent deserves to be quoted here in full as it is a good summation of the point made by the minority in this case, a position that went unchallenged by the majority.

This is a simple case. Under the Governor's edict, a 10 screen "multiplex" may host 500 moviegoers at any time. A casino, too, may cater to hundreds at once, with perhaps six people huddled at each crap table here and similar number gathered around every roulette wheel there. Large numbers and close quarters are fine in such places. But churches, synagogues, and mosques are banned from admitting more than 50 worshippers-no matter how large the building, how distant the individuals, how many wear face masks, no matter the precautions at all. In Nevada, it seems, it is better to be in entertainment than religion. Maybe this is nothing new. But the First Amendment prohibits such obvious discrimination against the exercise of religion. The world we inhabit today, with a pandemic upon us, poses unusual challenges. But there is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel⁴³.

6. ROMAN CATHOLIC DIOCESE OF BROOKLYN V. CUOMO

This case represents a significant shift in the jurisprudence of the Court in contrast to the two previous cases. This shift is due to two significant changes that occurred between the two decisions. The first of these was

⁴³ *Calvary Chapel*, Gorsuch J. Dissenting at 1.

the death of liberal Justice Ruth Bader Ginsberg on September 18, 2020⁴⁴. This not only took a reliable liberal vote it also created a vacancy on the nine-person Supreme Court. Republican President Donald Trump and the Republican majority in the United States Senate acted fast to fill that vacancy⁴⁵. On September 26, 2020 Donald Trump announced the nomination of Judge Amy Coney Barrett who was serving as a Judge on the United States Court of Appeals for the Seventh Circuit to the vacant position created by Justice Ginsburg's death. On October 26th the Republican controlled Senate with all but one member of the Republican Party voting in favor and most Democrats voting against, confirmed Barrett's nomination to the Supreme Court⁴⁶. In judicial philosophy and practice Justice Barrett seems to be a reliable conservative shifting the balance on the Court further to the right. This may very well be one of the strongest lasting legacies of the Donald Trump presidency. President Trump appointed 234 Article III Judges, including three associate justices of the Supreme Court, 54 judges for the United States Court of Appeals, 174 District Court (Federal Trial Level) judges, and 3 judges for the United States Court of International Trade. In addition, he made 26 appointments under Article 1 of the US Constitution including judges to the US Court of Federal Claims, the US Tax Court, the US Court of Appeals for Veterans Claims, US Court of Appeal for the Armed Forces and the US Court of Military Commission Review⁴⁷. Donald Trump was quite frank in his statements as a candidate and as President about his desire to appoint as many Federal Judges as possible who shared a conservative judicial philosophy. The United States

⁴⁴ Adam Liptak, "Justice Ruth Bader Ginsburg Dies at 87," *The New York Times*, <https://eu.statesman.com/story/news/local/2020/09/18/justice-ruth-bader-ginsburg-dies-at-87/114083464/>.

⁴⁵ Article III of the United States Constitution mandates that all Federal Judges, including Supreme Court Justices serve for a life term and are appointed by the US President and confirmed by the US Senate. The US House of Representatives has no role in the appointment of Federal Judges.

⁴⁶ 51 Republican Senators voted in favor, 1 voted no (Collins-ME), 47 Democratic Senators voted no and 1 did not vote (Harris-CA). https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=116&session=2&vote=00222.

⁴⁷ https://ballotpedia.org/Federal_judges_nominated_by_Donald_Trump, retrieved April 1, 2021.

Senate, controlled by his fellow Republicans shared this goal and as a result a substantial number of appointments were made. Some have argued that this constitutes the greatest lasting legacy of the Trump Presidency⁴⁸.

This legacy certainly became evident in the jurisprudence of the Court involving Covid Restrictions and the Free Exercise of Religion Clause. In *Roman Catholic Diocese of Brooklyn, New York v. Andrew M. Cuomo, Governor of New York*⁴⁹, and a companion case *Agudath Israel of America, et. Al. v. Cuomo*⁵⁰, the Supreme Court was again faced with a request for an injunction by religions institutions against an Executive Order that restricted their practice of religion as part of Covid restrictions, this time it was an order from the Governor of New York State. The Governor's executive orders divided New York into different zones depending on the state of Covid infections in that particular zone. If it was a red zone (the highest) then a synagogue or church could admit no more than 10 persons, no matter how big the building was. In an orange zone (second highest) attendance at houses of worship was limited to 25 persons, again without regard to the size of the building involved. This was in direct contrast to essential businesses who were allowed to admit as many people as they wished in the red zone and in the orange zone even non-essential businesses could decide how many people they wished to admit.

In this case the preliminary injunction was granted by the Court in a 5–4 decision. The 4 more conservative justices (the previous minority) were joined in this case by the newly appointed Justice Barrett who voted to grant the injunction. The three remaining liberal Justices and Chief Justice Roberts constituted the new minority. Applying the *Church of Lukami* criteria, the Majority first found that the Executive order was neither neutral nor of general application because of its discriminatory treatment of religious worship in comparison to similar secular businesses. For example, the Court pointed out that while a local church would be limited to 10 or 25 people at a worship service, a local large store next to

⁴⁸ Rebecca Ruiz, Robert Gebeloff, Steve Eder, and Ben Protess, "A Conservative Agenda Unleashed on the Federal Courts," *New York Times*, March 14, 2020.

⁴⁹ *Roman Catholic Diocese of Brooklyn, New York v. Andrew M. Cuomo, Governor of New York*, 592 U.S. ____ (2020).

⁵⁰ *Agudath Israel of America, et. al. v. Cuomo*, Case No. 20A90 (2020).

the church could have hundreds of people shopping there on any given day. They also pointed out that both the churches and synagogues involved in the lawsuit had admirable safety records and that while there had been evidence of Covid infections from secular businesses there was none from these religious institutions⁵¹.

Since the New York Executive orders were neither neutral nor of general applicability then the *Sherbert* strict scrutiny test had to be applied. The majority conceded again that the regulation of public health and safety as related to Covid was a compelling governmental interest in this case but found that the Executive Order was not narrowly tailored to achieve that interest. The majority pointed out that these Covid restrictions were the strictest to come before the Court to date, that they were more restrictive than many other jurisdictions hard hit by Covid and were more severe than necessary to prevent the harm, particularly given the churches and synagogues successful health and safety records. They also found that the State should use other less restrictive methods that could still advance the compelling state interest, for example by connecting the maximum attendance at a religious service to the size of the church or synagogue, pointing out that 26 Catholic churches could seat at least 500 people, 14 could accommodate at least 700 and 2 could seat over 1000. A similar situation existed with the synagogues. Under this analysis the strict scrutiny test was not passed in this case and the majority authorized the injunction. “Members of this Court are not public health experts, and we should respect the judgment of those with special experience and responsibility in this area. But even in a pandemic, the Constitution cannot be put away and forgotten”⁵².

Justice Gorsuch makes some important points in his concurring opinion. He points out that the Governor of New York has made the decision that certain businesses are essential and should therefore not be subject to Covid restrictions. Among these businesses are laundromats, banks, hardware stores and liquor shops. Justice Gorsuch goes on to write: “The only explanation for treating religious places differently seems to be a judgment that what happens there just isn’t as essential as what happens in

⁵¹ *Roman Catholic Diocese of Brooklyn*, IBID at 2,3.

⁵² *Roman Catholic Diocese of Brooklyn*, IBID at 5.

secular places... *That* is exactly the kind of discrimination the First Amendment forbids”⁵³.

Chief Justice Roberts dissented from the majority in its decision to grant injunctive relief although he did it based on a technical standing issue and seemed to agree at least in part with the reasoning of the majority on the issue of violation of the Free Exercises Clause. Prior to the Court’s decision the Governor of New York removed the churches and synagogues involved in the case to yellow zones of restriction, therefore no longer limiting them to the 10 or 25 attendance limits. Roberts found that because they were no longer subject to the limits a preliminary injunction was not warranted. The majority disagreed because there was a substantial likelihood that they could be moved back to those zones in the future. Chief Justice Roberts did break with the three more liberal justices on the substantive question of violation of the Free Exercise Clause, acknowledging that the facts in this case were different from the previous two cases and indicating that there may be a constitutional problem. “Numerical capacity limits of 10 and 25 people, depending on the applicable zone, do seem unduly restrictive. And it may well be that such restrictions violate the Free Exercise Clause”⁵⁴. The three dissenting liberal justices argued a number of points in favor of their dissents. First, they, like Roberts, argued an injunction was not necessary since the involved churches were no longer subject to the restrictions. Secondly, they argued that the previous two cases where they were in the majority were decided correctly and should continue to govern these decisions. A great deal was also mentioned about the need of the Courts to defer to elected officials and medical professionals in a time of a health crisis. Judges should not substitute their judgement for those professionals.

7. SOUTH BAY UNITED PENTECOSTAL CHURCH II

In February of 2021 the United States Supreme Court once again heard a challenge to the Governor of California’s Executive Orders dealing

⁵³ *Roman Catholic Diocese of Brooklyn*, IBID, concurring opinion of Gorsuch, J. at 2.

⁵⁴ *Roman Catholic Diocese of Brooklyn*, IBID dissenting opinion of Roberts, C.J at 1.

with limitations on religious worship in the time of COVID in *South Bay United Pentecostal Church, et al., v. Gavin Newsom, Governor of California, et al.* 592 U.S. ____ (2021). (Hereafter referred to as South Bay II.) In this case we can see the effect of the change in the Court's majority as unlike the first case this time the request for injunctive relief was at least partially successful. This case primarily was focused on California's regulations that stated that religions in Tier 1 areas, which were most areas of the state, were banned completely from holding any indoor religious services. The Court did not grant an injunction based on capacity limits of 25% in those cases but did grant an injunction regarding the total ban on indoor services. The Court also looked at the interesting question of the banning of singing and chanting during religious services but ultimately did not issue an injunction on that ban.

Chief Justice Roberts reemphasizes some of the points that he made in the earlier decision although in this case he sides with the majority in granting the injunction on the total ban on indoor religious services. First he emphasizes that "the federal courts owe significant deference to politically accountable officials with the "background, competence, and expertise to assess public health"⁵⁵. This is part of his acknowledgement that the Constitution principally trusts the health and safety of the people to the politically accountable officials of the states. He finds however that although deference is owed to the politically accountable officials, the Courts do have a duty to ensure that Constitutional rights are protected and in this particular case the total ban on indoor religious services does not comply with the Constitution. By a six to three vote a majority agrees with him on the issue of the complete ban on indoor religious services.

The three liberal Justices dissent in an opinion authored by Justice Kagan. Justice Kagan essentially rejects the assertion of the majority that California is treating places of religious worship any differently than similar secular venues such as theatres where individuals may be subject to longer term exposure to COVID. She also emphasizes as did the Chief Justice the need of the Courts to defer to the decisions of elected officials

⁵⁵ *South Bay United Pentecostal Church, et al., v. Gavin Newsom, Governor of California, et al.*, 592 U.S. ____ (2021), at 2.

who are advised by medical and scientific experts. Justices Sotomayor and Breyer agree with her.

The Court in this case also considered the Governor's ban on singing or chanting during religious services. While acknowledging that singing could raise issues involving a threat to public health and safety beyond those recognized in the indoor ban on services, Justice Gorsuch would support an injunction on this ban (joined by Justices Thomas and Alito) as he argued that California has an exception to its ban on singing for the State's powerful and important entertainment industry and he raised the question whether a ban on a single singer in Church is any different from allowing a singer in an entertainment show to do the same. Justice Barrett and Kavanaugh did not accept this argument since they assert that the record in the case is not clear on this issue. They encouraged further filings in the case in order to determine if this ban is truly neutral or not. If the evidence proves it is not neutral then they would reconsider their decision regarding this ban.

8. TANDON V NEWSOM

In April of 2021 in the case of *Tandon v. Newsom*⁵⁶ the Supreme Court underlined their recent jurisprudence regarding the issue of COVID regulations in light of the Free Exercise Clause of the First Amendment. Through a *per curiam* opinion⁵⁷ the majority of the Court emphasized that recent First Amendment decisions make four points clear. First, government regulations cannot be considered neutral and generally applicable whenever they treat any comparable secular activity more favorably than religious exercise. Doing so invokes the strict scrutiny standard of constitutional review. Second, comparison of two activities for Free Exercise Clause purposes has to be judged against the asserted government interest that the state is using to justify the regulation at issue. This element should focus on the risks various

⁵⁶ *Ritesh Tandon, et al. v Gavin Newsom, Governor of California, et al.*, 593 U.S. _____ (2021).

⁵⁷ A *per curiam* opinion is a court opinion issued in the name of the court rather than being an opinion of particular judges.

activities pose, not the reason people are gathering. Third, the government has the burden to establish that any challenged law or regulation satisfies the strict scrutiny test. The narrow tailoring of the strict scrutiny test requires the government to show that measures less restrictive of the Constitutional activity could not address its interest in protecting against COVID. Precautions allowed for other activities must be allowed as well for religious activities. Fourth, governmental withdrawal or modification of a restriction is not sufficient to moot the case against the government when the applicants remain under a constant threat that governmental officials will use their power to reinstate challenged restrictions⁵⁸.

9. THE RELIGIOUS FREEDOM RESTORATION ACT

The Religious Freedom Restoration Act (RFRA) has not played a significant role in the decisions of the Court regarding religious freedoms during the time of COVID although it remains an important piece of federal legislation in the area of the Free Exercise of Religion. Following the Supreme Court's 1990 decision in *Employment Division v. Smith*⁵⁹ where the Supreme Court found that laws that were of general applicability that effect religious freedom should not be subject to the strict scrutiny test of *Sherbert v. Verner*⁶⁰, there was a bipartisan consensus that a law of general applicability that burdens religion should be subject to the *Sherbert* strict scrutiny standards. This consensus led to the adoption of the *Religious Freedom Restoration Act of 1993*⁶¹ which restored the practice of reviewing governmental actions effecting religious practice to the pre-*Employment Division v. Smith* standards. This law continues in effect today and has led to some Federal government actions being denied due to Free Exercises arguments.

⁵⁸ *Tandon v. Newson*, IBID at 2,3.

⁵⁹ *Employment Division, Department of Human Resources of Oregon v Smith*, 494 U.S. 872 (1990).

⁶⁰ *Sherbert v. Verner*, IBID.

⁶¹ Religious Freedom Restoration Act codified at 42 U.S.C §2000bb through 43 U.S.C. §2000bb-4.

The primary reason why the RFRA has not been involved in the COVID/Free Exercise debate is largely because in 1997 in *Boerne v. Flores*⁶² the Supreme Court found that the federal government did not have the legal authority to pass such a law that would subsequently impact state and local governments. Therefore, any consideration of state or local government action regarding the Free Exercise clause could not be subject to the RFRA, only actions taken by the Federal government would be subject to the law. Since most health and safety regulations are mandated by state law most of the decisions regarding COVID restrictions are not subject to the RFRA. As a result of the *Boerne* decision 21 states have passed a state version of the RFRA that does limit state and local governments actions with regard to the Free Exercise Clause. These state laws provide another possible legal avenue for challenging COVID restrictions.

10. CONCLUSION

The Covid Pandemic has presented governments with many challenges including balancing the need for regulations and restrictions that promote public health and safety with human rights guarantees. One of the most controversial areas has been government regulations that inhibit the freedom of worship that is protected by the First Amendment's Freedom of Exercise clause. To date the United States Supreme Court decisions on these questions has not let to a substantial shift in the Court's jurisprudence for Free Exercise questions. The court has affirmed the principles enunciated in both the *Church of Lukumi* and *Sherbert* cases. First, laws and regulations that are passed by state or federal governments must be neutral toward religion and of general application. If they are not then the Court will apply the *Sherbert* strict scrutiny test, a test that is difficult for government to win. The jurisprudence in this area also offers a clear indication of the importance of a changing court majority to the application of these tests as we see the shift from a majority reluctant to limit governmental action in Free Exercise cases to a majority that is more mindful of Free Exercises limits and more willing to limit governmental action. This is

⁶² *City of Boerne v. Flores*, 521 U.S. 507 (1997).

a reflection of the changing court majority and an indication of the impact of the appointment of Judges by President Donald Trump. It is interesting to note that all of these Free Exercise cases involving Covid have been decided at the preliminary phase of the cases as requests for injunctive relief. It will be further instructional to see how the cases are finally resolved after the full review process has been completed and a more thorough legal and factual analysis, and corresponding legal opinions of the Court becomes available.

REFERENCES

- “Constitutional Constraints on Free Exercise Analogies.” *Harvard Law Review* 134, no. 5 (2021): 1782–1803.
- “Levels of Scrutiny Under the Equal Protection Clause.” Accessed April 2021. law2.umkc.edu.
- “Religious Exemptions by state.” Retrieved April 1, 2021. <https://www.pewresearch.org/fact-tank/2020/04/27/most-states-have-religious-exemptions-to-covid-19-social-distancing-rules/>.
- Blackman, Josh. “The “Essential” Free Exercise Clause.” *Harvard Journal of Law & Public Policy* 4, no. 3 (2020): 637–760.
- Kelso, R. Randall. “Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The “Base Plus Six” Model and Modern Supreme Court Practice.” *Journal of Constitutional Law* 4, Issue 2 (2002): 225–259.
- Kong, Jiwoon. “Safeguarding the Free Exercise of Religion During the COVID-19 Pandemic.” *Fordham Law Review* 89, Issue 4 (2021): 1589–1633.
- Liptak, Adam. “Justice Ruth Bader Ginsburg Dies at 87.” *The New York Times*. <https://eu.statesman.com/story/news/local/2020/09/18/justice-ruth-bader-ginsburg-dies-at-87/114083464/>.
- New York Times Corona Virus Cases. Accessed April 2, 2021. <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.
- Religious Freedom Restoration Act codified at 42 U.S.C. §2000bb through 43 U.S.C. §2000bb-4.
- Ruiz, Rebecca, Robert Gebeloff, Steve Eder, and Ben Protess. “A Conservative Agenda Unleashed on the Federal Courts.” *New York Times*, March 14, 2020.
- Spece, Roy G. Jr., and David Yokum. “Scrutinizing Strict Scrutiny.” *Vermont Law Review* 40 (2015): 285–351.

State lawsuits about COVID. Retrieved April 1, 2021. [https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_\(COVID\)_pandemic,_2020](https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_(COVID)_pandemic,_2020).

