



COVID-19 AND RESTRICTIONS ON RELIGIOUS WORSHIP: FROM NONDISCRIMINATION TO CHURCH AUTONOMY

KATHLEEN A. BRADY¹

ABSTRACT: During the coronavirus pandemic, religious groups challenging government restrictions on in-person worship services in the United States have typically argued that these restrictions discriminate against religion in violation of the Free Exercise Clause of the First Amendment. Demands for equal treatment have intuitive appeal, and they also fit with the Supreme Court's current religion clause jurisprudence. However, there are drawbacks to approaches that focus on equal treatment. It can be difficult to identify the appropriate secular benchmarks for determining whether discrimination has taken place, and what religious congregations have really wanted is not necessarily equal treatment but maximization of their ability to gather together safely in person. Indeed, although the Supreme Court has granted injunctive relief on a number of occasions after finding that the government's rules impermissibly favor secular activities over religious practice, the Court's real concern has been the impingement on religious worship. Many of the examples of discrimination given by those in the majority have seemed strained, and the justices have appeared most interested in subjecting restrictions on worship to the heightened scrutiny that follows from a finding of discrimination. The Court's shift in focus from discriminatory treatment to close scrutiny of worship restrictions is the right one, but those in the majority have neither acknowledged this shift nor signaled a new framework or approach that would explain or guide it. This essay argues that the appropriate framework for analyzing restrictions on religious worship is the doctrine of church autonomy that has been emerging in the Court's recent religion clause jurisprudence. Viewing conflicts over COVID-19 restrictions through this lens can better clarify what is at stake when clashes occur as well as better inform the scope and limits of institutional freedom in this context.

KEYWORDS: COVID-19, religious discrimination, equal treatment, church autonomy, free exercise, religious worship, worship restrictions,

1. Kathleen A. Brady is Senior Fellow and McDonald Distinguished Fellow, Center for the Study of Law and Religion, Emory University. Work on this paper benefited from a grant from the John Templeton Foundation to the Religious Freedom Institute for a three-year research project on the Freedom of Religious Institutions in Society.



First Amendment, Free Exercise Clause, religious exemptions

When the dangers of COVID-19 first became apparent to the American public in March 2020, few churches resisted state and local lockdown orders that prohibited or severely limited in-person worship services. The potential for congregational gatherings to rapidly spread the virus was widely understood, and most religious believers probably anticipated a relatively short disruption.

However, litigation began to increase as states implemented reopening plans and religious groups challenged rules that they viewed as impermissibly favoring nonreligious forms of gathering over religious worship. For example, in a case that reached the Supreme Court on an application for emergency injunctive relief in July 2020, a rural Nevada church argued that the state violated the Free Exercise Clause when its reopening plan capped indoor worship services at 50 people but allowed casinos, bars, restaurants, bowling alleys and gyms to open at 50 percent of building capacity regardless of the total number of people assembled.² The Court in *Calvary Chapel Dayton Valley v. Sisolak* denied the church's application for relief over strong dissents joined by four of the Court's conservative justices, and the case and others like it continued in the lower courts.³

As the summer—and the pandemic—wore on, many Americans grew increasingly frustrated with the substantial restrictions that remained on religious gatherings in many jurisdictions and with reopening rules that they believed prioritized commercial and recreational activities over religious practice. Not surprisingly, pushback against COVID-19 restrictions continued to grow.

In the fall and winter, with COVID-19 infections spiking, many American jurisdictions tightened restrictions on secular and religious gatherings, and some religious groups challenged new rules placing severe restrictions on in-person worship.⁴ In late November 2020, the Supreme Court granted applications for emergency injunctive relief brought by a Catholic diocese and several Orthodox Jewish entities challenging tight

2. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020).

3. In December 2020, following the Supreme Court's decision in *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam), the Ninth Circuit granted the church's request for a preliminary injunction. *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228 (9th Cir. 2020).

4. For example, in December 2020, the Catholic Archdiocese of Washington challenged a new 50-person limit on in-person worship services in the District of Columbia. Shortly thereafter, the Mayor agreed to relax this rule and issued a new order limiting in-person religious services to 25 percent of occupancy capacity or 250 persons, whichever is fewer, and ensuring parity with a variety of other activities including gyms, recreational facilities, restaurants, and essential and nonessential retail businesses. Mayor's Order 2020-126 (Dec. 16, 2020). This article discusses litigation challenging tightened rules in New York.



caps on in-person worship in COVID-19 hotspots in New York.⁵ According to the Court in *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, the 10- and 25-person limits on houses of worship in areas designated as red and orange zones under New York's Cluster Action Initiative favored secular activities over religious practice and failed to satisfy the strict scrutiny required of discriminatory action under the Free Exercise Clause.⁶ The distinctions drawn in New York's rules were less clearly discriminatory than those in Nevada's reopening plan. Certainly, the replacement of Justice Ginsburg with Justice Barrett in October 2020 tipped the balance on the Court in favor of the dissenters in *Calvary Chapel*. However, there were also signs that those who joined the majority may have been less interested in the threshold showing of discriminatory treatment than in applying heightened scrutiny to significant restrictions on religious worship. The examples of discrimination given by those in the majority seemed strained, and the justices appeared to be more concerned about the absence of a tight fit between the state's purposes and its religious restrictions.

The Court's move in *Diocese of Brooklyn* away from a focus on discrimination toward close scrutiny of worship restrictions is the right one, but the majority neither acknowledged this shift nor signaled a new framework or approach that would explain or guide it. I argue below that the appropriate framework for analyzing restrictions on religious worship is the doctrine of church autonomy that has been emerging in the Court's recent religion clause jurisprudence. Viewing conflicts over COVID-19 restrictions through this lens can better clarify what is at stake when clashes occur as well as better inform the scope and limits of institutional freedom in this context.

Recognizing communal worship as an aspect of church autonomy will also require government and religious leaders to work with one another to achieve shared interests in religious freedom and the preservation of human life. Partnerships between religious groups and government officials can, in turn, build trust and increase the investment of religious believers in safety measures that benefit us all.

5. *Diocese of Brooklyn*, 141 S. Ct. 63.

6. *Id.* at 66-67. The restrictions in New York's Cluster Action Initiative were implemented by N.Y. Exec. Order No. 202.68 (Oct. 6, 2020).



1. COVID-19 RESTRICTIONS AND RELIGIOUS DISCRIMINATION

Throughout the pandemic, the chief claim of religious litigants has been that the COVID-19 restrictions they challenge impermissibly discriminate against religious worship in favor of secular activities. Demands for equal treatment have intuitive appeal, and they also fit with the Supreme Court's current religion clause jurisprudence. Prior to its decision in *Employment Division v. Smith* in 1990⁷, the Court construed the Free Exercise Clause to afford relief where laws substantially burden religious practice and do not pass strict scrutiny.⁸ Strict scrutiny requires the government to demonstrate that the application of its rule to the believer is the least restrictive means of achieving a compelling state interest.⁹ In *Smith*, the Free Exercise Clause became largely a protection against religious discrimination. With a few exceptions, heightened scrutiny only applies where religious plaintiffs can show that laws burdening religious practice are not neutral or not generally applicable.¹⁰

The Court clarified the meaning of neutrality and general applicability in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.¹¹ Laws are not neutral if they target religious practice.¹² They are not generally applicable if the government pursues its interests only against religious conduct or leaves unregulated substantial secular conduct that undermines the state's interests to the same or greater degree.¹³ Religious plaintiffs typically argue that COVID-19 restrictions fail both of these standards. Rules that specify limitations on in-person worship that are stricter than restrictions on comparable secular activities target religion, and they are not generally applicable.¹⁴

There are a number of drawbacks to approaches that focus on equal treatment. One is the difficulty of identifying the appropriate benchmarks for determining whether COVID-19 restrictions discriminate against religion. Religious plaintiffs, government officials and judges frequently dis-

7. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

8. *Sherbert v. Verner*, 374 U.S. 398, 406-07 (1963); see also *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

9. *Sherbert*, 374 U.S. at 406-07; see also *Yoder*, 406 U.S. at 215.

10. *Smith*, 494 U.S. at 878-84; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

11. *Lukumi*, 508 U.S. at 533-46.

12. *Id.* at 533-40.

13. *Id.* at 542-43. In April 2021 in a case involving a challenge to COVID-19 restrictions on in-home religious gatherings, the Court indicated that laws are not generally applicable "whenever they treat any comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

14. See, for example, the Diocese of Brooklyn's Emergency Application for Writ of Injunction at 19, *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, 141 S. Ct. 63 (2020).



agree about these benchmarks. For example, in *Diocese of Brooklyn*, Justices Sotomayor and Kagan argued that New York’s Cluster Action Initiative treated religious worship better than comparable secular activities because stricter rules applied to secular gatherings like lectures, concerts and movies.¹⁵ These justices agreed with the state that the relevant comparisons to religious worship were gatherings where large numbers of people arrive simultaneously, congregate for extended periods of time, and leave together.¹⁶ The justices in the majority pointed instead to activities identified by the state as essential and not capped, such as shopping in grocery and hardware stores, using laundromats, congregating in transportation facilities, and working in plants manufacturing chemicals and microelectronics.¹⁷ (Preexisting rules governed these and other activities, including a 50 percent occupancy limit on essential retail businesses.¹⁸) The same disagreement reappeared in February 2021 when the Court enjoined California’s prohibition on indoor worship services in the state’s hardest hit regions.¹⁹

Certainly, worship services would be riskier than an activity like grocery shopping if worship is held without masks, social distancing and limitations on singing. However, most religious congregations, including the applicants in *Diocese of Brooklyn*, comply with state and local safety rules, and many, like the diocese, have developed far more rigorous safety plans. The applicants in *Diocese of Brooklyn* also did not object to New York’s preexisting rules limiting worship services to 33 percent of church or synagogue occupancy capacity,²⁰ and the diocese had been using a

15. *Diocese of Brooklyn*, 141 S. Ct. at 80–81 (Sotomayor, J., dissenting). New York prohibited nonessential secular gatherings altogether in red zones and limited them to 10 people in orange zones. N.Y. Exec. Order No. 202.68 (Oct. 6, 2020).

16. See Opposition to Application for Writ of Injunction at 37, *Diocese of Brooklyn*, 141 S. Ct. 63.

17. *Diocese of Brooklyn*, 141 S. Ct. at 66–67 (per curiam); id. at 69 (Gorsuch, J., concurring); id. at 73 (Kavanaugh, J., concurring).

18. N.Y. Dep’t Of Health, Interim Guidance For Essential & Phase II Retail Business Activities During The Covid-19 Public Health Emergency (Jul. 1, 2020), <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/RetailMasterGuidance.pdf>.

19. *Compare S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 717–19 (2021) (statement of Gorsuch, J.) (arguing that California discriminates against religious worship when it places more stringent restrictions on indoor services than on many businesses, such as grocery and retail operations, shopping malls, and transportation facilities), with id. at 720–21 (Kagan, J., dissenting) (arguing that the relevant comparisons to worship services are other activities where large groups of people gather closely together for extended periods of time, such as political assemblies, lectures, movies and concerts).

20. In Phase 4 of New York Forward, the state’s reopening plan, religious services were limited to “no more than 33% of the maximum occupancy for a particular area as set by the certification of occupancy for services occurring indoor or no more than 50 people for services occurring outdoor.” If separate buildings were available, each could be used at 33% of occupancy capacity if there were separate entrances and exits and attendees did not interact. N.Y. Dep’t of Health, Interim Guidance for Religious & Funeral Services During the



more restrictive limit of 25 percent of building capacity in its churches. It is not clear how to evaluate the relative safety of church services and grocery shopping when congregants are masked, distanced, and meeting at 33 percent of building capacity and many more people may be shopping in a space of similar size on a busy day. In its amicus brief in *Diocese of Brooklyn*, the American Medical Association argued that worship services are always especially risky activities even with safety measures and, indeed, pose a risk comparable to indoor dining.²¹ However, it was undisputed that there had been no outbreaks at the applicants' churches and synagogues,²² and the church outbreaks cited by the American Medical Association were either early in the pandemic or not clearly traceable to congregations adhering to mask requirements, social distancing and sanitation rules.²³ How the increased community spread of COVID-19 over the fall and winter months may have affected the relative safety of different activities is a further complicating factor as is the emergence of more contagious variants of the virus.

Covid-19 Public Health Emergency 2 (June 26, 2020).

21. Motion for Leave to File Brief as Amici Curiae and Brief of the American Medical Association and the Medical Society of the State of New York as Amici Curiae in Support of Respondent at 3, 6-7, 9, *Diocese of Brooklyn*, 141 S. Ct. 63.

22. *Diocese of Brooklyn*, 141 S. Ct. at 66 (per curiam).

23. Brief of the American Medical Association, *supra* note 20, at 7 n.15. Limited data exists from contract tracing regarding the relative risks of worship services and other activities that the AMA identified as high risk, and existing contract tracing data does not disaggregate spread associated with congregations following rigorous safety rules from those that do not. However, the data that does exist suggests that religious services are not, at least in aggregate, among the most common vehicles of COVID-19 spread. For example, in early December 2020, Washington, D.C. released data from August 1, 2020 to November 26, 2020 showing that only 1.8 percent of COVID-19 outbreaks were associated with places of worship while the percentages for colleges and universities (27.5%), K-12 school buildings (17.4%), childcare/daycare (13.8%), restaurants and bars (13.8%), food retail buildings (8.3%), and office buildings (7.3%) were far higher. COVID-19 Outbreak Data Guide, D.C. GOV'T (Dec. 6, 2020), https://coronavirus.dc.gov/sites/default/files/dc/sites/coronavirus/page_content/attachments/Outbreak%20Data%20Guide%20FINAL%202012-6-20.pdf. Later in December, the governor of New York released statewide contact tracing data from September to November showing that religious activities were the exposure source for only .69 percent of COVID-19 cases, a slightly higher percentage than retail businesses (.61%), a substantially lower percentage than restaurants and bars (1.43%), transit (.96%) and manufacturing (.84%), and dwarfed by household/social gatherings (73.84%). Nick Reisman, What New York's Contact Tracing Data Show, SPECTRUM NEWS, Dec. 11, 2020, <https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2020/12/11/what-new-york-s-contact-tracing-data-show>.

See also Hallie Miller, Maryland Releases More Contact Tracing Data Showing 'High-Risk' Locations for Coronavirus, BALTIMORE SUN, Sept. 24, 2020, <https://www.baltimoresun.com/coronavirus/bs-md-high-risk-locations-coronavirus-20200923-tiky7niftzb4vgybyji2vvqgoq-story.html> (summarizing data indicating that fewer COVID-19 patients reported visiting worship services than working outside the home, shopping indoors, dining indoors, dining outside, or going to a gym); Selena Simmons-Duffin, Fourteen States Make Contact Tracing Data Public: Here's What They're Learning," NPR, Aug. 14, 2020, <https://www.npr.org/sections/health-shots/2020/08/14/902271822/13-states-make-contact-tracing-data-public-heres-what-they-re-learning> (summarizing data from Louisiana showing that the number of COVID-19 cases from outbreaks at religious services was lower than the number of cases stemming from retail settings, restaurants, bars, offices, child daycare, colleges and universities, food processing, industrial settings and casinos).



The fact that most COVID-19 limitations on religious worship are part of a complex series of proscriptions and prescriptions also complicates the identification of appropriate benchmarks for evaluating claims of religious discrimination. For example, in the directive at issue in Calvary Chapel, Nevada’s governor had detailed a series of rules that applied a range of restrictions to many different kinds of activities that can transmit COVID-19.²⁴ Varying occupancy limits were just part of these rules. Commercial businesses that Nevada permitted to operate at 50 percent of building capacity had to comply with additional restrictions that did not apply to churches, and some of these were carefully tailored to the nature of the enterprise. Nevada’s casinos, in particular, had to develop and abide by plans that included a variety of safety measures subject to government oversight.²⁵ In contexts like these, the standard for equal treatment is not clear.²⁶

Moreover, religious congregations are usually not actually asking for equal treatment. While those in the majority in Diocese of Brooklyn identified comparable secular activities to be essential businesses, like grocery shopping, pet stores and transportation, the applications to the Court did not demand the same occupancy rules that New York applies in these contexts. The applicants did not object to preexisting rules limiting worship services to 33 percent of occupancy capacity, and their application for relief only contested the 10- and 25-person caps in red and orange zones. The Supreme Court’s injunction was limited to those restrictions. Similarly, the church in Calvary Chapel did not really want to be governed by the same rules as Nevada’s casinos. It demanded the right to hold in-person worship services with the same occupancy limits as casinos, but it also developed its own safety plan that was in many ways more protective than rules that applied to commercial entities.

What most religious congregations want is to maximize their ability to gather together safely in person. As states reopened and time passed over the summer and early fall, religious believers grew increasingly concerned that their institutions were being left behind even as our improving understanding of how the virus spreads made safer forms of larger gatherings possible. As COVID-19 cases spiked in the fall and winter, some religious believers, like the applicants in Diocese of Brooklyn, ob-

24. Nev. Declaration of Emergency: Directive 021 (May 28, 2020).

25. Nev. Gaming Control Bd. Gaming Comm’n, Health And Safety Policies For Resumption Of Gaming Operations—Nonrestricted Licenses (May 27, 2020).

26. When the Ninth Circuit granted Calvary Chapel’s request for a preliminary injunction after the Supreme Court’s decision in *Diocese of Brooklyn*, it concluded that Nevada’s rules were discriminatory based solely on the variations in the state’s capacity limits. *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1233 (9th Cir. 2020).



jected to blunt rules that they viewed as unnecessarily restrictive even as many of the activities of daily life continued. Religious congregations are making important fairness claims; they want their religious needs to be treated with at least as much urgency as commercial and recreational interests, and they view them as essential as food, transportation and health care. However, religious congregations do not necessarily envision the same rules as those for nonreligious entities. They are not, in fact, asking for equal treatment, but they are asking for the type of heightened scrutiny that applies when courts find religious discrimination.

Indeed, those in the majority in Diocese of Brooklyn also seemed less focused on equal treatment than on remedying the loose fit between New York's objectives and its religious restrictions. While those in the majority argued that New York's rules discriminated against religion, most of their comparisons to essential activities that were uncapped in the Cluster Action Initiative seem strained. With safety rules, worship services might be comparable to garages, grocery stores, acupuncture facilities, and laundromats as I have discussed above, but those in the majority did not go into this detail or respond to obvious objections to their comparability. It is certainly far less clear that New York's rules discriminated against religion than Nevada's more lenient treatment of casinos, restaurants and gyms.

The real concern of those in the majority in Diocese of Brooklyn became the religious restrictions themselves. What mattered most to them about New York's rules was that the state had placed severe restrictions on worship that were not narrowly tailored.²⁷ The Court was right, but it did not acknowledge its shift or signal the principle or doctrine that could explain it.

2. COVID-19 RESTRICTIONS AND CHURCH AUTONOMY

Instead of focusing on discrimination, a better starting point is to focus on what is at stake in conflicts over COVID-19 restrictions on religious worship. Government restrictions on in-person worship services interfere with one of the most fundamental aspects of religious practice.²⁸ Differ-

27. Indeed, three weeks later, in his dissent from the Court's decision to deny emergency relief in *Danville Christian Academy, Inc. v. Beshear*, 141 S. Ct. 527 (2020), Justice Gorsuch, joined by Justice Alito, suggested that the guarantee of free exercise in this context is not limited to a prohibition against religious discrimination but also includes affirmative protections. *Id.* at 529 (Gorsuch, J., dissenting from the denial of application to vacate stay) (stating that "[i]t is far from clear ... why the First Amendment's right to free exercise should be treated less favorably than other rights, or ought to depend on the presence of another right before strict scrutiny applies"). *Danville Christian Academy* involved a challenge by a Christian school to a state order closing all public and private K-12 schools for in-person instruction from mid-November 2020 through the winter holiday break.

28. In another sign that the Court was moving away from a focus on discrimination to the burden of worship



ent religious groups have described the significance of worship services in different ways. In his efforts in September 2020 to loosen city rules limiting outdoor worship to 50 persons and barring indoor services altogether, San Francisco Archbishop Salvatore Joseph Cordileone emphasized the sacramental nature of the Catholic Church.²⁹ San Francisco's limits deprived many Catholics of the Eucharist at a difficult time. In a challenge that same month to Washington, D.C.'s 100-person limit on indoor and outdoor worship gatherings, Capitol Hill Baptist Church described weekly gatherings of its covenanted members as essential to what it means to be a church.³⁰ The Orthodox Jewish applicants in *Diocese of Brooklyn* described synagogues as “a necessary and critical component of Jewish life”³¹ and joining together in prayer as “an emotional connection to God and community.”³² For most of America's faiths, regular in-person worship services are indispensable; indeed, they are the lifeblood of the religious community.

In recent case law the Supreme Court has begun to articulate a doctrine of “church autonomy” with protections for religious institutions that do not depend on the existence of religious discrimination, and this doctrine should extend to disputes over worship services. The antecedents for this doctrine lie in a series of cases spanning over a century and limiting government involvement in intra-church disputes over property and related matters of church leadership.³³ In 2012 the Court drew on these precedents to recognize a ministerial exception from employment discrimination laws.³⁴ Eight years later in *Our Lady of Guadalupe School v. Morrissey-Berru*, the Court grounded this exception in a “general principle of church autonomy”³⁵ that affords religious institutions freedom over faith and doctrine and interrelated matters of church government “essential to

restrictions themselves, the Court in *Diocese of Brooklyn* described COVID-19 restrictions as “striking at the very heart of the First Amendment’s guarantee of religious liberty.” *Diocese of Brooklyn*, 141 S. Ct. at 68 (per curiam).

29. Archbishop Salvatore Joseph Cordileone, *Americans’ Right to Worship is Being Denied by Governments: I Won’t Be Silent Anymore*, WASH. POST, Sept. 16, 2020, <https://www.washingtonpost.com/opinions/2020/09/16/archbishop-salvatore-cordileone-right-to-worship/>.

30. Plaintiff’s Original Complaint at 6–7, *Capitol Hill Baptist Church v. Bowser*, 496 F. Supp. 3d 284 (D.D.C. 2020).

31. Complaint for Declaratory and Injunctive Relief at 11, *Agudath Israel of Am. v. Cuomo*, No. 1:20-cv-4834 (E.D.N.Y. Oct. 9, 2020) (hearing and bench ruling denying motion for temporary restraining order).

32. *Id.* at 13.

33. *Jones v. Wolf*, 443 U.S. 595 (1979); *Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevic*, 426 U.S. 696 (1976); *Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg*, 396 U.S. 367 (1970); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440 (1969); *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1960); *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94 (1952); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929); *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131 (1872); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872).

34. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).

35. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2061 (2020).



the institution's central mission."³⁶ The question in *Guadalupe* was whether the ministerial exception extended to teachers of religion in faith-based schools even if they do not have the status of clergy and are also responsible for secular subjects. The Court's answer was yes. Religious education "lie[s] at the very core of the mission of a private religious school,"³⁷ and it is also of vital importance to the larger religious communities of which these schools are a part.³⁸ Closely-related matters of internal government and decision making, such as the selection and supervision of religion teachers, must be free from government interference.³⁹

The Court in *Guadalupe* spoke of a "sphere" of autonomy protected from state intrusion by both the Free Exercise and Establishment Clauses.⁴⁰ The Court has only begun to fill in the contours of this freedom, and its holdings exempting religious institutions from neutral laws of general applicability are limited to the ministerial exception. The limited reach of the Court's holdings has, perhaps, made litigants hesitant to draw on the concept of church autonomy in cases challenging COVID-19 restrictions. However, religious worship is clearly a matter at the core of a church's religious mission, and decisions about congregational worship belong within the scope of church autonomy. While church autonomy does not afford "a general immunity from secular laws,"⁴¹ its scope is "broad," the Court has said.⁴² The selection of ministerial employees is a "component,"⁴³ but not exhaustive.

Of course, church autonomy cannot be a principle without limits, and conflicts over COVID-19 restrictions test the limits of this freedom. While few matters are more important to religious groups than worship, crowded services without safety precautions would risk the lives of those inside and outside the congregation. These are exceptional circumstances where the state clearly has a compelling interest in protecting public health. Whatever other limits on the principle of church autonomy there may be, governments must be able to act to protect the community where church activities endanger the lives of those outside the congregation.

However, this interest in protecting human life does not give gov-

36. *Id.* at 2060; *see also id.* at 2061.

37. *Id.* at 2064.

38. *Id.* at 2064-66.

39. *Id.* at 2055.

40. *Id.* at 2060.

41. *Id.* at 2060.

42. *Id.* at 2061.

43. *Id.* at 2060.



ernments unbounded power. Public health protections must be drawn to minimize intrusion upon religious worship, and in the context of COVID-19, this means that government officials must carefully tailor their rules to maximize the ability of congregations to meet safely in person. Numerical and other limits on church attendance must be justified with precision and scientific support, and when it is possible to increase attendance by adding precautions like mask-wearing, social distancing and sanitation protocols, government regulations must reflect this. General references to the riskiness of large gatherings where people arrive, congregate and leave together are not sufficient. Restrictions must take into account the effects of mask-wearing, social distancing and other precautions on the safety of religious worship. They must also take into account the experiences of religious congregations that have followed rigorous safety protocols. The congregations in *Diocese of Brooklyn* had followed New York's preexisting rules and experienced no outbreaks even as COVID-19 infections spiked and the virus spread in congregations that failed to follow the state's rules.⁴⁴

Careful tailoring also means that officials must continuously evaluate and update their rules in light of new information about the virus and how it spreads. At the outset of the pandemic, relatively little was known about how COVID-19 spreads, and the availability of testing was limited. Now we know that masks, distancing, and limitations on singing and loud talking can dramatically decrease virus transmission. In his dispute with San Francisco's mayor in the summer of 2020, Archbishop Cordileone observed that there was no evidence linking any Catholic masses that followed mask-wearing, social distancing and sanitation guidelines with COVID-19 outbreaks.⁴⁵ There have been many stories in the media pointing to examples of church services as sources of outbreaks, but most of these examples are from early in the pandemic or from situations where safety protocols were not universally followed.⁴⁶ Careful tailoring also requires consideration of the experiences of other jurisdictions with less restrictive rules for worship as well as the effects of more lenient treat-

44. Liam Stack & Joseph Goldstein, *How a Virus Surge Among Orthodox Jews Became a Crisis for New York*, N.Y. Times, Oct. 8, 2020, <https://www.nytimes.com/2020/10/08/nyregion/orthodox-jews-queens-brooklyn-closures.html>.

45. Cordileone, *supra* note 28 (citing Thomas W. McGovern et al., *Evidence-Based Guidelines to Celebrate Mass Safely are Working*, Realclear Science (August 19, 2020), https://www.realclearscience.com/articles/2020/08/19/evidence-based_guidelines_to_celebrate_mass_safely_are_working.html).

46. See, e.g., Kate Conger et al., *Churches Were Eager to Reopen: Now They are Confronting Coronavirus Cases*, N.Y. Times, Jul. 8, 2020, <https://www.nytimes.com/2020/07/08/us/coronavirus-churches-outbreaks.html>.



ment of commercial and recreational activities upon public safety.

Additionally, where a jurisdiction adopts less restrictive rules for secular activities that are clearly just as, if not more, risky than in-person worship such as indoor dining and fitness centers, this disparate treatment is evidence that regulations of worship have not been narrowly tailored. Disparate treatment itself is not definitive. Some jurisdictions may allow dangerous forms of secular activities to continue for economic reasons or because of political pressure. One suspects that this may have been the case when Nevada opened its casinos at 50 percent of building capacity without ensuring adequate enforcement of effective safety rules and COVID-19 cases spiked soon thereafter over the summer of 2020.⁴⁷

Few religious congregations want to sacrifice human life in order to engage in dangerous forms of in-person worship. For example, Nevada's Calvary Chapel wanted to meet at 50 percent of building capacity like casinos, but it also proposed its own rigorous and detailed safety plan covering everything from arrivals and departures, parking, sanitation, social distancing, food consumption, and restroom use.⁴⁸ The principle of church autonomy allows governments to intervene where religious worship endangers human life, but it also requires governments to do all they can to minimize this interference. There was more that Nevada could have done to facilitate safe worship, and Calvary Chapel's plan illustrated some possibilities.

As spikes in COVID-19 infections in the fall and winter made clear, in an evolving public health crisis, governments must have the flexibility to respond to rapidly changing circumstances and the room to take proactive steps if conditions worsen. Governments should also be permitted to err on the side of safety particularly at the outset of a crisis, in deteriorating circumstances, or where our understanding is limited. In his concurrence in an early decision denying a church's application for emergency injunctive relief from California's COVID-19 restrictions, Chief Justice Roberts rightly observed that the political branches of government bear the primary responsibility for responding to a public health crisis and

47. See CDC COVID Data Tracker, Centers For Disease Control and Prevention, <https://covid.cdc.gov/covid-data-tracker/> (last visited Sept. 10, 2021), for information about the growth in cases in Nevada and across the country. Soon after Nevada's casinos reopened in early June, photographs circulated of tightly packed crowds of maskless casino-goers. See Sergei Klebnikov, *In Photos: Customers Crowd into Casinos After Las Vegas Reopens*, *Forbes*, June 5, 2020, <https://www.forbes.com/sites/sergeiklebnikov/2020/06/05/photos-las-vegas-casinos-reopening/?sh=42c3878c3ea2>; Mary Forgiione & Jay Jones, *Nevada Issues New Face Mask Order: Las Vegas Visitors Must Now Cover Up*, *L.A. Times*, June 24, 2020, <https://www.latimes.com/travel/story/2020-06-24/nevada-face-mask-order-las-vegas-must-wear-masks>.

48. Emergency Application for an Injunction Pending Appellate Review at 4-5, *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020).



that substantial judicial deference is appropriate where governments act “in areas fraught with medical and scientific uncertainties.”⁴⁹ The scope of scientific uncertainty has contracted significantly since Chief Justice Roberts wrote this in May 2020 in *South Bay United Pentecostal Church v. Newsom*, but we are continuously learning about how the virus spreads and where dangers lie.

However, the level of caution that governments exercise with respect to religious worship must match their stances in the context of activities they view as essential. For religious believers, worship practices nourish life just as food does, and the protections of the religion clauses in our Constitution reflect the value that religion has for believers. The same rules need not apply to churches and retail stores, but governments must make the same efforts to maximize the ability of religious believers to worship together in person as they do to keep other essential functions open. New York’s Cluster Action Initiative placed no new limits on customers at essential retail stores while effectively shuttering in-person worship even where congregations following existing restrictions had not experienced outbreaks. This approach does not reflect the urgency of minimizing burdens on religious worship even if retrenchment is justified.

Narrow tailoring of restrictions on protected activities is a requirement of heightened scrutiny in many contexts where governments impinge on fundamental rights, but the principle of church autonomy demands more. This principle reflects the view that church and state are, at least in matters essential to religious mission, separate spheres with distinctive purposes and unique governing structures. Religious worship, in particular, is quintessentially a matter for religious institutions and their members and leaders. Of course, church and state coexist in the same environments, and they often interact. Some forms of interaction are familiar and ongoing; for example, religious organizations cooperate with the government to help the poor, elderly and neglected, and these social ministries have continued during the pandemic. Now worship itself has become an area where both religious and compelling government interests are at stake.

49. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974)). Chief Justice Roberts repeated his position when the litigation in this case came before the Court again in February 2021. *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 716–17 (2021) (Roberts, C.J., concurring in the partial grant of application for injunctive relief). See also *id.* at 722–23 (Kagan, J., dissenting) (drawing on Chief Justice Roberts’s statements in May); *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, 141 S. Ct. 63, 73–74 (2020) (Kavanaugh, J., concurring) (approving Chief Justice Roberts’s position advocating “substantial deference” to state and local jurisdictions during the pandemic).



However, when church and state interact, the independence of each must be recognized and respected. In the context of COVID-19, this means that religious leaders and government officials both have a role to play in developing the restrictions that apply to worship. At a minimum, government officials must communicate with religious leaders and give them an opportunity to provide input as decisions are made and rules are reevaluated and adjusted. When disputes arise, governments must show that this input has been received and considered carefully and in good faith. Religious congregations must also be given an opportunity to submit plans that may deviate from general rules but safely adapt congregational worship to the distinctive religious needs of their communities. These plans should be evaluated in a timely matter, and rejections must be explained and justified.⁵⁰ Spikes in COVID-19 infections and the emergence of new variants may call for new communication and new plans, but governments must respect the role and responsibilities of religious leaders in their own communities.

Indeed, government officials and religious leaders must treat each other as partners in addressing the risks of COVID-19. Governments and religious communities share the same interests in today's crisis. Both are committed to the values of religious freedom and the preservation of human life. However well-meaning, unilateral action by government officials disregards the independent institutional structures of faith communities and, with them, the expertise that religious leadership brings about the needs and experiences of their congregations. The result has been anger and resistance at a time when cooperation is essential.⁵¹

Religious believers have also been guilty of their own unilateralism. Feeling threatened by government involvement in core religious practice, believers have too often envisioned the government as a dangerous Goliath.⁵² In a democracy, government is one of the ways that citizens,

50. COVID-19 restrictions frequently provide for the submission and evaluation of plans by covered entities such as businesses and schools. Conflicts have arisen across the country where religious groups have submitted carefully tailored plans for safe worship and government officials have failed to evaluate these plans or have rejected them without specific justifications. See, e.g., Cordileone, *supra* note 28 (writing in mid-September 2020 that while the Archdiocese of San Francisco "submitted [its] safety plans to the city in May along with other faith communities, and while indoor retailers had their plans approved and went into operation, we are still waiting to hear back"); Plaintiff's Original Complaint, *supra* note 29, at 15-16 (stating that request for waiver from Washington, D.C.'s restrictions on large gatherings to permit church to worship outside with masks and distancing went unanswered for three months and was then denied without specific justifications).

51. New York's Cluster Action Initiative sparked protests in ultra-Orthodox communities in the state's hotspots. Liam Stack, *Backlash Grows in Orthodox Jewish Areas Over Virus Crackdown* by Cuomo, N.Y. Times, Oct. 7, 2020, <https://www.nytimes.com/2020/10/07/nyregion/orthodox-jews-nyc-coronavirus.html>.

52. See, for example, the statement of the First Liberty Institute, counsel for a number of organizations challenging COVID-19 restrictions, describing "shocking and outrageous attacks" on houses of worship during the pandemic and an "all-out assault on our constitution and faith community." First Liberty Institute, *COVID-19 Victories and*



including religious citizens, act together for the common good, and in today's conflicts, believers and nonbelievers alike share common goals. Too often this is forgotten.

Partnerships founded on dialogue and engagement are needed and have many benefits. Where scientific and medical data is shared in an environment that is open to input from religious communities, the collection and dissemination of accurate data about the risks of COVID-19 and effective precautions are enhanced. Where government officials are more aware of the needs and experiences of America's diverse religious communities, trust is built and more sensitive responses to the risks inherent in in-person worship can be fashioned. The result will be government regulations and church policies that are more effective at achieving shared goals.

Indeed, where religious leaders are fully informed about the risks associated with COVID-19 and the effects of virus spread on the health, socio-emotional well-being, and economic security of those inside and outside the congregation, they may well prefer precautions that exceed regulatory requirements. This was the case with the Diocese of Brooklyn's COVID-19 commission, which regularly consulted with medical professionals and was chaired by the former Commissioner of New York City's Office of Emergency Management.⁵³ Indeed, many religious congregations across the country made decisions to worship remotely out of concern for members and the larger community.⁵⁴ Fully informed religious leaders can also play an important role in conveying information about the risks of COVID-19, necessary precautions, and the benefits of vaccination to those in their communities. Many religious communities already play this role.⁵⁵

Effective partnerships that build trust also reduce the likelihood that

Breaking Cases: History in the Making, First Liberty, <https://firstliberty.org/covidvictories/> (last visited Sept. 10, 2021).

53. Emergency Application for Writ of Injunction, *supra* note 13, at 8-9. The chair, Joseph Esposito, was also former Chief of Department of the New York City Police Department. *Id.*

54. See Wenei Philimon, *Online Prayers, Social Distancing in the Pews: Christian Leaders Debate How to Do Church Amid Pandemic*, U.S.A. Today, Aug. 15, 2020, <https://www.usatoday.com/story/news/nation/2020/08/15/church-restrictions-amid-covid-19-faith-leaders-find-ways-operate/5539943002/>.

55. See, e.g., The COVID-19 Vaccines: A Conversation with Dr. Francis Collins, Ethics & Religious Liberty Comm'n (Dec. 3, 2020), <https://www.facebook.com/erlcsbc/videos/242359160567399/> (webinar discussion between the Director of the National Institutes of Health and the President of the Ethics & Religious Liberty Commission of the Southern Baptist Convention discussing the importance of masks and other safety protections and the reliability and benefits of COVID-19 vaccines); Letter from Most Reverend Salvatore J. Cordileone, Archbishop of San Francisco to Priests of the Archdiocese on Reopening for public Masses, part 6, Archdiocese of San Francisco 3 (July 30, 2020), https://ec-prod-site-cache.s3.amazonaws.com/static/sfarchdiocese.org/documents/2020/7/Memo32to32Priests32re32Reopening32Public32Masses_Part326_073020.pdf (directing priests to remind parishioners "to follow the safety practices necessary to curb the spread of the virus," in particular "to observe the 'three W's'").



religious congregations will violate safety rules or insist on risky behaviors. As the pandemic drags on, more congregations are taking these risks, and some are challenging basic safety precautions like masks and social distancing.⁵⁶ New York's governor tied rising infection rates in many of the state's hotspots to the failure on the part of many in the ultra-Orthodox Jewish community to follow existing rules, and he launched his Cluster Action Initiative against the backdrop of his frustration.⁵⁷ However, heavy-handed responses that do not involve affected communities only deepen suspicions and make resistance more likely.

Establishing partnerships that build trust will not always be easy especially in our increasingly polarized environment. It will often require persistence, patience, and a willingness to listen and be flexible. However, if religious adherents believe that their governments recognize the urgency of their concerns and will work with them to mitigate the effects of the virus on their faith lives, all of our communities will be safer. Indeed, cooperative relationships between governments and faith communities in the context of COVID-19 may lay the groundwork for de-escalating divisive conflicts over other issues of religious liberty in the years ahead.

56. David Crary, *More U.S. Churches Sue to Challenge COVID-19 Restrictions*, AP News, Aug. 13, 2020, <https://apnews.com/article/virus-outbreak-mn-state-wire-religion-ca-state-wire-lawsuits-7d2933ca919f33aa8c-4c845e1d3febdc>.

57. Stack & Goldstein, *supra* note 43.



BIBLIOGRAPHY

Bouldin v. Alexander, 82 U.S. (15 Wall.) 131 (1872).

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

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

CDC COVID Data Tracker, Centers for Disease Control And Prevention, <https://covid.cdc.gov/covid-data-tracker/> (last visited Sept. 10, 2021).

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

Complaint for Declaratory and Injunctive Relief, *Agudath Israel of Am. v. Cuomo*, No. 1:20-cv-4834 (E.D.N.Y. Oct. 9, 2020) (hearing and bench ruling denying motion for temporary restraining order).

Conger, Kate et al. “Churches Were Eager to Reopen: Now They are Confronting Coronavirus Cases.” *N.Y. Times*, Jul. 8, 2020, <https://www.nytimes.com/2020/07/08/us/coronavirus-churches-outbreaks.html>.

Cordileone, Salvatore Joseph. “Americans’ Right to Worship is Being Denied by Governments: I Won’t Be Silent Anymore.” *Wash. Post*, Sept. 16, 2020, <https://www.washingtonpost.com/opinions/2020/09/16/archbishop-salvatore-cordileone-right-to-worship/>.

COVID-19 Outbreak Data Guide, D.C. Gov’t (Dec. 6, 2020), https://coronavirus.dc.gov/sites/default/files/dc/sites/coronavirus/page_content/attachments/Outbreak%20Data%20Guide%20FINAL%2012-6-20.pdf.

Crary, David. “More U.S. Churches Sue to Challenge COVID-19 Restrictions.” *AP News*, Aug. 13, 2020, <https://apnews.com/article/virus-outbreak-mn-state-wire-religion-ca-state-wire-lawsuits-7d2933ca-919f33aa8c4c845e1d3febd>.

Danville Christian Academy, Inc. v. Beshear, 141 S. Ct. 527 (2020).

Employment Div. v. Smith, 494 U.S. 872 (1990).

First Liberty Institute. “COVID-19 Victories and Breaking Cases: History in the Making.” *First Liberty*, <https://firstliberty.org/covidvictories/> (last visited Sept. 10, 2021).

Forgione, Mary & Jay Jones. “Nevada Issues New Face Mask Order: Las Vegas Visitors Must Now Cover Up.” *L.A. Times*, June 24, 2020, <https://www.latimes.com/travel/story/2020-06-24/nevada-face-mask-order-las-vegas-must-wear-masks>.

Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929).

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S.



171 (2012).

Jones v. Wolf, 443 U.S. 595 (1979).

Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94 (1952).

Klebnikov, Sergei. “In Photos: Customers Crowd into Casinos After Las Vegas Reopens.” *Forbes*, June 5, 2020, <https://www.forbes.com/sites/sergeiklebnikov/2020/06/05/photos-las-vegas-casinos-reopening/?sh=42c3878c3ea2>.

Kreshik v. Saint Nicholas Cathedral, 363 U.S. 190 (1960).

McGovern, Thomas W., et al. “Evidence-Based Guidelines to Celebrate Mass Safely are Working.” Realclear Science, August 19, 2020. https://www.realclearscience.com/articles/2020/08/19/evidence-based-guidelines_to_celebrate_mass_safely_are_working.html), cited by Cordilione, 2020.

Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, 396 U.S. 367 (1970).

Miller, Hallie. “Maryland Releases More Contact Tracing Data Showing ‘High-Risk’ Locations for Coronavirus.” BALTIMORE SUN, Sept. 24, 2020, <https://www.baltimoresun.com/coronavirus/bs-md-high-risk-locations-coronavirus-20200923-tiky7niftz-b4vgbyji2vvqgoqq-story.html>.

N.y. Dep’t of Health, Interim Guidance for Essential & Phase II Retail Business Activities During the Covid-19 Public Health Emergency (Jul. 1, 2020), <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/RetailMasterGuidance.pdf>.

N.Y. Dep’t of Health, Interim Guidance for Religious & Funeral Services During the Covid-19 Public Health Emergency (June 26, 2020).

N.Y. Exec. Order No. 202.68 (Oct. 6, 2020).

Nevada Declaration of Emergency: Directive 021 (May 28, 2020).

Nevada Gaming Control Bd. Gaming Comm’n, Health and Safety Policies for Resumption of Gaming Operations—Nonrestricted Licenses (May 27, 2020).

Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

Philimon, Wenei. “Online Prayers, Social Distancing in the Pews: Christian Leaders Debate How to Do Church Amid Pandemic.” *U.S.A. Today*, Aug. 15, 2020, <https://www.usatoday.com/story/news/nation/2020/08/15/church-restrictions-amid-covid-19-faith-leaders-find-ways-operate/5539943002/>.



Plaintiff’s Original Complaint, *Capitol Hill Baptist Church v. Bowser*, 496 F. Supp. 3d 284 (D.D.C. 2020).

Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church, 393 U.S. 440 (1969).

Reisman, Nick. “What New York’s Contact Tracing Data Show.” *Spectrum News*, Dec. 11, 2020, <https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2020/12/11/what-new-york-s-contact-tracing-data-show>.

Roman Catholic Diocese of Brooklyn, New York v. Cuomo, 141 S. Ct. 63 (2020).

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

S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021).

Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich, 426 U.S. 696 (1976).

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

Simmons-Duffin, Selena. “Fourteen States Make Contact Tracing Data Public: Here’s What They’re Learning.” *NPR*, Aug. 14, 2020, <https://www.npr.org/sections/health-shots/2020/08/14/902271822/13-states-make-contact-tracing-data-public-heres-what-they-re-learning>.

Stack, Liam & Joseph Goldstein. “How a Virus Surge Among Orthodox Jews Became a Crisis for New York.” *N.Y. Times*, Oct. 8, 2020, <https://www.nytimes.com/2020/10/08/nyregion/orthodox-jews-queens-brooklyn-closures.html>.

Stack, Liam. “Backlash Grows in Orthodox Jewish Areas Over Virus Crackdown by Cuomo.” *N.Y. Times*, Oct. 7, 2020, <https://www.nytimes.com/2020/10/07/nyregion/orthodox-jews-nyc-coronavirus.html>.

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

The COVID-19 Vaccines: A Conversation with Dr. Francis Collins, Ethics & Religious Liberty Comm’n (Dec. 3, 2020), <https://www.facebook.com/erlcsbc/videos/242359160567399/> (webinar discussion between the Director of the National Institutes of Health and the President of the Ethics & Religious Liberty Commission of the Southern Baptist Convention).

Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872).

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