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We the People (of Faith): The Supremacy of Religious Rights in the Shadow of a Pandemic

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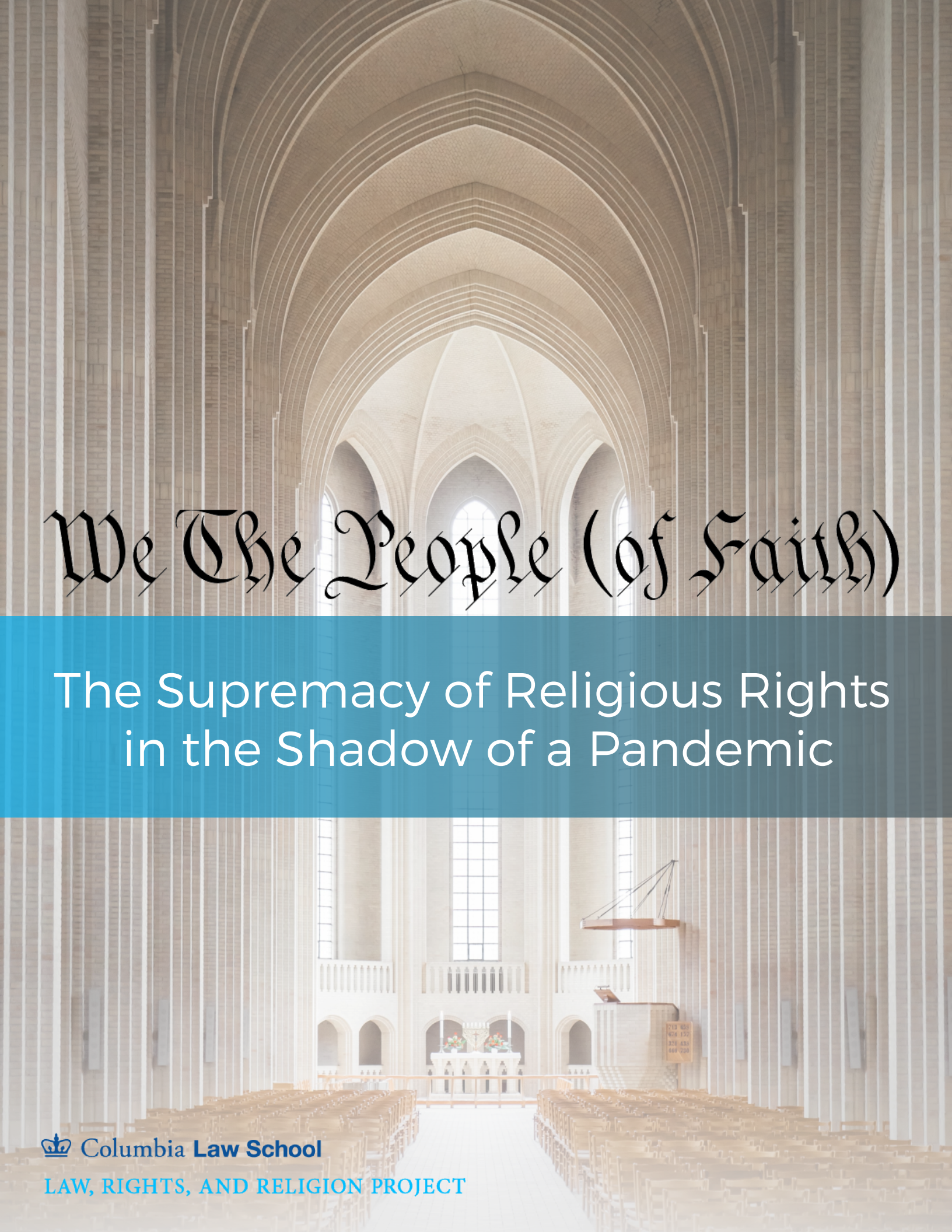

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Columbia Law School
LAW, RIGHTS, AND RELIGION PROJECT

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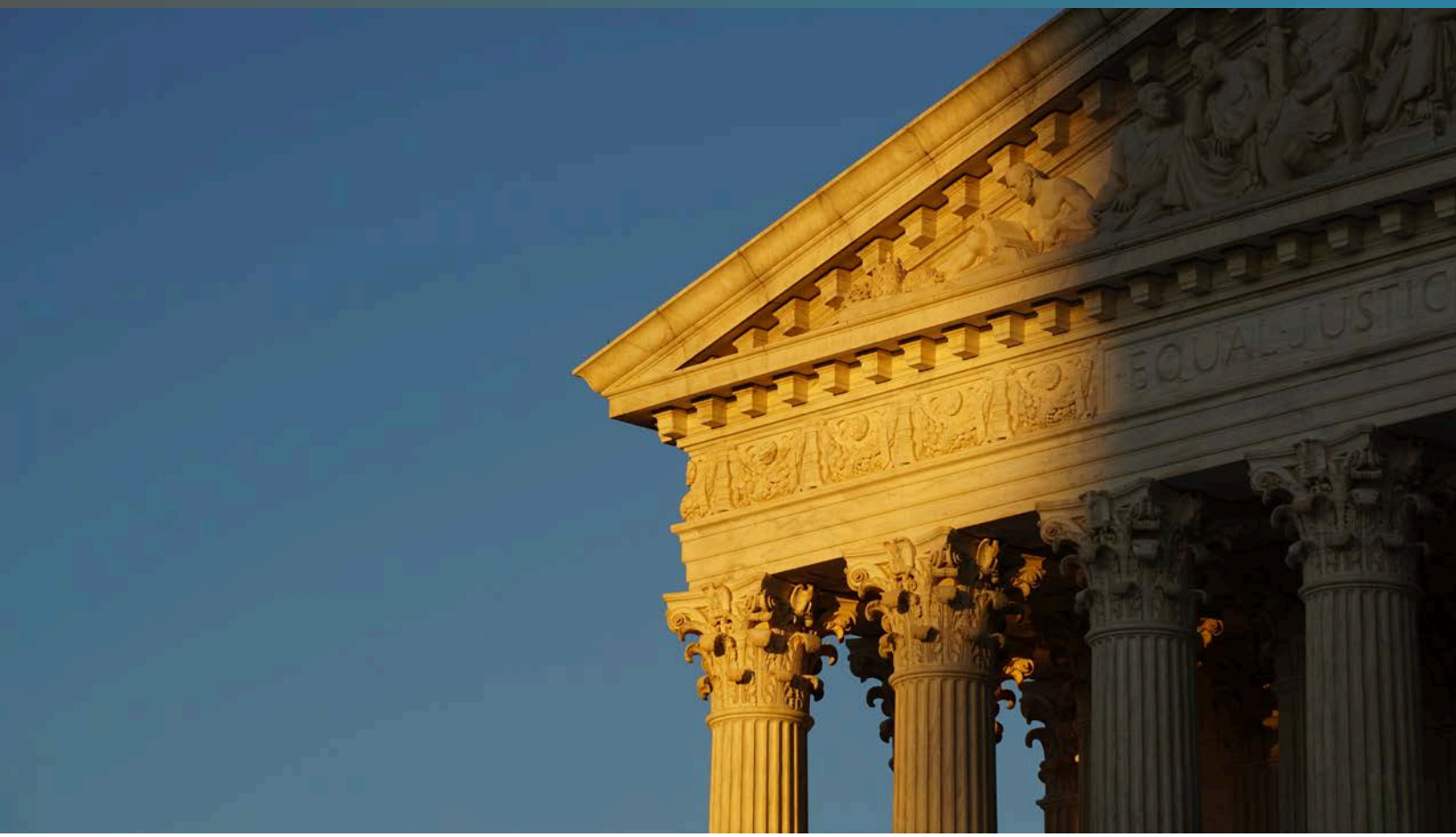


Executive Summary

Late on a Friday evening in April 2021, over a year into the COVID-19 crisis, the Supreme Court issued a brief opinion that dramatically transformed constitutional law. In the midst of a once-in-a-lifetime global pandemic, the Court ruled in *Tandon v. Newsom* that state and local governments seeking to curb the spread of the novel coronavirus may not restrict in-person religious gatherings more rigorously than *any other type of activity*, such as shopping for groceries or working at a warehouse. The opinion was only one in a barrage of cases filed in federal courts across the country—many brought by conservative legal nonprofits—seeking to deny states and localities the power to apply COVID restrictions to religious practitioners.

Dismissing evidence that group worship poses a graver threat of COVID transmission than many other activities, and that regulators can less easily monitor

houses of worship for COVID compliance, the Court has now ruled that treating *any* activity more favorably than religious exercise constitutes illicit—and likely unconstitutional—discrimination. The Court's new interpretation of the First Amendment amounts to a radical expansion of constitutional protections for religious exercise, made all the more remarkable by the fact that it has been accomplished on terms that severely limit efforts to protect public health during a deadly pandemic.

The Supreme Court's new approach provides religious activity with a level of constitutional protection greater than nearly any other fundamental right, including the right to free speech, abortion, and racial equality. In essence, the Supreme Court has adopted a view of the Constitution that ranks fundamental rights: religious liberty is now given top-tier protection, while other rights, such as equality and reproductive liberty, enjoy lower-tier status. This marks a fundamental change in the Court's approach to constitutional rights.

In offering such unprecedented legal protection to religious activities, *Tandon v. Newsom* will have ramifications far beyond the COVID-19 crisis. It is likely to undermine governments' ability to enforce laws and policies on those who object to them for religious reasons. Under this broad conception of religious liberty, policymakers could be constitutionally required to exempt religious adherents from regulations enacted to protect labor and workers' rights, public health, civil rights, and other critical policy goals.

This report explores three key changes in the Court's newly adopted free exercise doctrine, and how they will impact other areas of law and policy:

- First, the Supreme Court has radically redefined what constitutes religious "discrimination." The failure of the government to grant religious objectors an exemption from *nearly any law or policy* now amounts to religion-based discrimination, no matter the importance of the public interest being protected by the law – even the public's interest in staying healthy during a global pandemic.

- Second, the Court's new Free Exercise Clause standard amounts to a tiering of constitutional rights, offering religious practice a level of protection greater than other fundamental constitutional rights, including rights to privacy and equality.

- Third, by dispensing with the Court's longstanding deference to policymakers on matters of public health and safety—especially during a national emergency—the Court has made it very difficult for governments to justify the enforcement of critically important laws on religious objectors.

The goal of this report is to help activists, attorneys, policymakers, journalists, and the public prepare for the ways in which the Supreme Court's new interpretation of religious liberty rights may upend long-standing government authority to act in areas ranging from wage and hour law to environmental regulations to civil rights.

Introduction

In the Spring of 2020, during the initial months of the raging coronavirus pandemic, states and localities issued unprecedented regulations limiting in-person gatherings in an effort to curb the virus's spread. In response, churches, ministers, and worshippers across the country began filing lawsuits challenging these orders, and demanding the right to hold in-person group services despite the risks posed by the pandemic. Initially, the Supreme Court declined to exempt these religious practitioners from the coronavirus stay-at-home orders. Months later, however—after hundreds of thousands of Americans had died—the Court began to reverse course, issuing decision after decision requiring that religious activities be exempted from COVID health restrictions.

These opinions represented the culmination of a decades-long campaign by the conservative legal movement to expand the right to religious exemptions under the law. In a series of cases over the 1960s, 70s, and 80s, the Supreme Court began to reconsider its longstanding denial of the constitutional right to religious exemptions.[1] It held that the Free Exercise Clause of the First Amendment sometimes entitled religious practitioners to accommodations from laws and policies that conflicted with their faith-

based practices. In 1990, however, the Supreme Court backtracked. It ruled in *Employment Division v. Smith* that religious practitioners must abide by all neutral and generally applicable laws, even those that unintentionally burdened religious exercise.

Since then, a group of conservative litigators and activists have worked diligently to overrule or limit *Smith*. They have now succeeded in the most unlikely of circumstances: by gaining the right to constitutional exemptions from emergency regulations issued during a once-in-a-lifetime public health crisis. This extraordinary result suggests a new Free Exercise standard even more rigorous than that of the pre-*Smith* era, when the Court denied even some modest religious exemption requests, such as the right of a Jewish officer to wear a yarmulke in the military.[2]

Looking at the COVID-19 lawsuits in the context of the decades-long effort to expand the right to religious exemptions, it is clear that these cases will have an impact far beyond the current emergency. The Christian Right legal movement has for years been making steady progress towards expanding the right to exemptions from discrete reproductive health, antidiscrimination, and labor laws.[3] This movement will surely harness their success in the COVID cases to seek exemptions from a far wider range of health, workplace, civil rights, environmental, and other laws that conflict with particular religious beliefs. This report explores three key developments from the COVID litigation, and how they will influence other areas of law, with an eye towards preparing for potential policy changes and litigation.

COVID Litigation & the Supreme Court

Since the start of the COVID-19 pandemic, churches, religious organizations, and faith practitioners have brought dozens of lawsuits under the Free Exercise Clause of the First Amendment challenging state and local stay-at-home orders, resulting in well over a hundred judicial opinions. This litigation onslaught did not arise spontaneously. Roughly half of these cases were brought by a small handful of allied conservative legal nonprofits, including Liberty Counsel, Alliance Defending Freedom, the Thomas More Society, the Foundation for Moral Law, and First Liberty Institute. These firms have years of experience litigating Free Exercise cases, primarily on behalf of conservative Christians challenging LGBTQ civil rights protections and reproductive health laws.

Many of the arguments made by religious objectors in the COVID-19 cases were developed in earlier waves of litigation challenging, for example, the Affordable Care Act's contraceptive mandate, state and local sexual orientation antidiscrimination laws, and same-sex couples' right to marry. While efforts to create exemptions from reproductive health and civil rights laws have garnered extensive media coverage and coordinated opposition from progressive legal advocates, the COVID cases received comparatively little attention or resistance. Freed from the baggage of the "culture war," conservative Christian groups managed to achieve unprecedented legal wins in the COVID cases without triggering a dramatic backlash. One could therefore see this

litigation campaign as a form of "COVID opportunism," using the pandemic as an opening to secure long-sought changes to religious liberty doctrine that will remain in effect even after the virus has subsided.

The scale and success of this effort took some religion law experts by surprise. When lawsuits challenging the stay-at-home orders began, many lawyers working at the intersection of religion, LGBTQ, and reproductive rights thought these challenges would be a bridge too far even for the increasingly conservative federal judiciary. Even Russell Moore—who as former president of the Southern Baptist Convention's public policy arm fought *for* broad religious exemptions—wrote of the COVID challenges in March 2020: the "current situation facing us is not a case of the state overstepping its bounds, but rather seeking to carry out its legitimate God-given authority."[4]

Many hoped that courts that had previously allowed exemptions from reproductive health or antidiscrimination laws would resist exempting religious practitioners from public health orders in the midst of a pandemic. This intuition appeared to be correct at the start of the crisis. Many early exemption requests were denied, and those initially granted often included relatively modest requests. For example, in one of the first religious liberty challenges to a COVID order, a church requested only the right to hold outdoor, in-car services for Easter – a request that was granted.[5]

As the pandemic wore on, however, churches began seeking—and winning—the right to hold large indoor services with limited restrictions. For instance, in October 2020 a federal judge in Colorado struck down the application of a mask mandate to religious services.[6] Over that fall and winter, multiple California churches filed suits demanding the right to engage in indoor group singing – a particularly effective way to spread the virus according to public health experts.[7] In February 2021, the Supreme Court tentatively upheld California's singing ban as applied to worship, though it expressed openness to exempting houses of worship from the ban with additional evidence.[8] Perhaps in an attempt to ward off further litigation, California issued new orders allowing performers, though not congregants, to sing at indoor religious services.[9] However, even this change did not cause churches to drop their challenges.

The Supreme Court's approach to exemption cases changed dramatically, moreover, with the death of Justice Ruth Bader Ginsburg and the immediate appointment of Amy Coney Barrett to fill her seat. Beginning in November 2020, the Court granted nearly every religious exemption request it received.[10] This change happened over the course of months and entirely on the Court's "shadow docket," meaning without the benefit of full trials or extensive briefing.[11] In many cases, the Court issued decisions with no majority opinion at all, leaving lower courts and legislatures to guess what types of restrictions on houses of worship the Court might uphold. While the Supreme Court's opinions have not always been clear, they will—as discussed below—have a dramatic impact on governors' and other elected officials' ability to govern.

1. The Supreme Court's New Free Exercise Standard: "Discrimination" on Steroids

The Supreme Court's COVID decisions, culminating in *Tandon v. Newsom,* have dramatically expanded the constitutional right to be exempt from laws and policies that conflict with one's religious beliefs. This shift was accomplished by redefining what it means for the state to discriminate on the basis of religion. Since the Court's 1990 *Employment Division v. Smith* decision, religious practitioners have (at least under the First Amendment) been expected to abide by all "neutral and generally applicable" laws: that is, laws not passed with the intent to discriminate against religious practice. While legislators could not intentionally persecute religion, they need not exempt religious practitioners from routine health, labor, criminal, and other laws that unintentionally burdened their faith practices – such as drug laws that banned peyote, even when used within a religious ritual.[12] As Justice Antonin Scalia put it in *Smith*, a broad right to religious exemptions would make each person's conscience "a law unto itself."[13]

In response to *Smith*, Congress passed a law in 1993—the Religious Freedom Restoration Act (RFRA)—to provide a broad *statutory* right to religious exemptions from neutral laws. RFRA only applies to federal laws and policies, however. It does not impact states or localities.[14] Further, as legislation rather than a constitutional standard, Congress could potentially withdraw or limit RFRA. Thus, despite the robust protections of RFRA, conservative religious advocates have for years sought to expand constitutional protections for religious practices by urging the Supreme Court to overturn the *Smith* decision. So far, the Supreme Court has declined to do so.

In lieu of overturning *Smith*, in a series of opinions issued during the COVID pandemic, the Court has reinterpreted *Smith* in a way that would be unrecognizable to Justice Scalia. It has so profoundly changed the meaning of "discrimination" against religion that *Smith's* central holding—that religious objectors must obey nondiscriminatory laws—has been largely hollowed out.

The Redefinition of Religious "Discrimination"

The Court's recent opinions have adopted the novel view that laws discriminate against religion if they treat *any* secular activity or enterprise more favorably than religious activities and enterprises. Specifically, the Court ruled that COVID orders discriminate against religion when they restrict religious gatherings more severely than other activities, such as shopping for groceries or liquor. This is true even if religious activity is treated *more favorably* than many other activities, such as movies and concerts.[15] In *Tandon v. Newsom*, the Court found that the provision of California's "COVID Blueprint for a Safer Economy" limiting in-home gatherings to three households discriminated against an in-home Bible study group. The Court found the household

cap discriminatory because it did not apply to, among other locations, restaurants – despite the fact that *all* in-home gatherings, religious or secular, were treated equally.

Since the Supreme Court found that the COVID Blueprint discriminated against religion, it was subject to the most rigorous constitutional test: strict scrutiny, which requires a law to be narrowly tailored to achieve a compelling government interest.[16] Unsurprisingly, the Court found that the Blueprint failed this test, and struck down the household cap on in-home religious gatherings. In *Tandon,* the Court elevated a form of supercharged religious liberty rights over the public health judgments of expert officials, and in so doing substituted its own judgment about how to protect public safety during a deadly pandemic.

Under the Court's new Free Exercise standard, any law or regulation that contains an accommodation or exemption for *any reason*—but fails to extend the same accommodation or exemption to alleviate a burden on religious practice—discriminates against religion and is likely unconstitutional.[*] Put another way, a law must have universal application to be considered nondiscriminatory vis-à-vis religion. This is an extraordinary definition of "discrimination," and one that will render nearly all laws and policies constitutionally suspect. Laws almost always contain limitations or carve-outs of one type or another – a natural function of the complex process of drafting rules for a diverse populace with countless varying interests. As one judge wrote regarding a state COVID order, "[p]eople must have access to food, medicine, and water in the midst of

[*] On its face, *Tandon v. Newsom* holds that laws discriminate against religion only when they treat *comparable* secular activities more favorably than religious exercise. It states: "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny…whenever they treat *any* comparable secular activity more favorably than religious exercise." The fact that the COVID cases treated communal religious services as comparable to shopping for groceries, however, shows that the Court has adopted a narrow and peculiar understanding of comparability.

Tandon held that "whether two activities are comparable…must be judged against the asserted government interest that justifies the regulation at issue." Thus, the only permitted factor in comparing a church and a grocery store is the government's interest in stopping the spread of COVID—not, for example, its interest in ensuring public access to food. Since both churches and grocery stores present a risk of COVID transmission, the Court treated them as "comparable" and found that the failure to regulate them equally was discrimination. Looking beyond the COVID cases, governments are unlikely to be able to argue that existing exemptions in a law are not "comparable" to requested religious exemptions under this very narrow definition of comparability.

a pandemic"[17]; thus, policymakers' decision to exempt grocery and drug stores, but not houses of worship, from a gathering ban hardly suggests illicit "discrimination."

A sampling of the types of laws that currently contain limits or exemptions includes school vaccination mandates (medical exemptions), employment and housing antidiscrimination laws (exemptions for small employers and landlords), minimum wage laws (exemptions for tipped and contract workers), gun laws (exemptions for security guards) and traffic laws (exemptions for emergency and high occupancy vehicles).[18] Applying the Court's new standard to these rules would mean that their failure to contain comparable *religious* exemptions would be considered discrimination against religion and make them subject to strict judicial scrutiny. Thus, religious objectors may gain a right to exemptions allowing them to avoid compliance with these laws and many others.

Looking Beyond a Single Statute

Some lower federal courts' definition of "discrimination" is even more expansive than what the Supreme Court laid out in *Tandon v. Newsom*. In *Tandon*, the Court held that a regulation like the California Blueprint discriminates when it treats religious activities differently than at least some secular activities. A few judges, however, have looked beyond the scope of a challenged COVID regulation to find evidence of religious discrimination – even when the regulation itself was clearly neutral and generally applicable.

For example, one district court opinion held that even though New York's COVID order did not contain any explicit exemption for political protests, the Governor's *statements* in support of Black Lives Matter protests "likely demonstrate[d] the creation of a de facto exemption" from the state's stay-at-home order, thus evidencing discrimination against religion.[19] Justice Gorsuch took a similar approach in analyzing a Kentucky COVID regulation that applied equally to both religious and secular schools. An entirely separate order applied lesser regulations to stores and restaurants. Criticizing the lower court's opinion upholding the school COVID regulation, Gorsuch

claimed: "the court had an obligation to address the plaintiffs' argument that the two [orders], considered together, resulted in unconstitutional discrimination against religion. Whether discrimination is spread across two orders or embodied in one makes no difference; the Constitution cannot be evaded merely by multiplying the decrees."[20]

Applying such a standard outside the COVID-19 context, this would mean that if one statute applied, say, an environmental or occupational safety standard neutrally to *all* workplaces—religious or secular—while a separate statute applied special standards to a highly dangerous industry, such as mining, the two laws should be read together to find the first discriminatory towards religion. This approach to religious "discrimination" will make it all but impossible for legislatures to write laws that can be applied to religious objectors.[21]

Even criminal laws could be implicated. Say members of a religious group like the Westboro Baptist Church, known for engaging in hate speech and aggressive protests,

were charged with violating a state law that prohibited making criminal threats. The church members could point to specific incidents of the government deciding not to prosecute that crime—such as a parent threatening to kill the man who murdered his son[22]—as evidence that the law, as applied, discriminates against religious objectors. The church members could then demand a religious exemption.

The New Standard Summarized

In sum: The Court's new "discrimination on steroids" standard is that a law is discriminatory if it fails to apply to *any entity*, but does not similarly exempt religious objectors. This rule would seem to provide religious objectors with a constitutional right to an exemption in almost every circumstance. The Supreme Court in recent years has already been dramatically expanding the right to both statutory and constitutional religious exemptions.[23] The Court's new standard for Free Exercise violations will exacerbate this trend. To give some examples of how this regime could play out:

- A religious nonprofit seeking an exemption from paying the state minimum wage could argue that the law is discriminatory, since it exempts contract and tipped work, but not religious work.

- A large, for-profit company owned by a religious person who believes that women should not hold positions of authority over men could argue that a workplace antidiscrimination law is discriminatory since it exempts small businesses, but not businesses with religious owners.

- Parents whose religious beliefs support corporal punishment[24] could argue that—even if a child abuse law contains no exemptions—a state's decision not to press charges in certain circumstances (such as when the parent is also experiencing violence) should be taken as a *de facto* exemption, making the law discriminatory towards religion.

A finding of non-neutrality does not necessarily condemn a law or regulation. A law's alleged "discrimination" against religion could theoretically be found warranted under the strict scrutiny test. The fact that the government has decided *not* to apply the law in particular contexts, however, will make it difficult for the government to meet this exceptionally demanding test – even for laws protecting interests of the highest order, such as civil rights.[25] Thus, the Court's redefinition of religious "discrimination" is likely to open the door to carve-outs from countless health, labor, economic, and other regulations, for the benefit of religious institutions and communities.

2. Tiering of Rights

In contrast to the Supreme Court's expansive protection of Free Exercise rights during the pandemic, it has taken a far weaker approach to protecting other liberty and equality rights. Most notably, the Court declined to robustly protect the constitutional right to reproductive health care during the pandemic. Nor has the Court stepped in with regard to the constitutional rights of people in prison, the free speech rights of businesses or political parties, or to enforce the Establishment Clause.[26] Furthermore, the Court's recent changes to Free Exercise doctrine have elevated religious liberty rights above the constitutional right to equal protection.[27] Taken together, these developments amount to a tiering, or hierarchy, of constitutional rights, with religious exercise elevated to a top-tier right and other fundamental rights, such as equality, relegated to second-tier status.

The view that free exercise rights are paramount and must supersede all other rights when they are in conflict was, in fact, explicitly advanced during the COVID litigation by conservative religious liberty advocates. "As America's 'first freedom,'" stated one brief, "religious liberty holds a prized place in the 'hierarchy of constitutional values.'"[28]

The Right to Abortion

Most public health officials did their best to balance the COVID emergency with other public health needs in the early days of the pandemic. A few officials, however, used the pandemic as an opportunity to severely curtail abortion rights – decisions presumably motivated by anti-abortion sentiment rather than public health. For example, in the spring of 2020, the Food and Drug Administration (FDA) under President Trump announced that, in light of the pandemic, it would cease enforcing a longstanding rule requiring patients to pick up certain medications in person at a clinic. However, the FDA said it would continue enforcing this rule for the drug mifepristone, used for medical abortion.

Medical associations and advocacy groups sued, and a district court made an initial ruling in their favor, which paused the in-person pick-up rule for mifepristone. The court found that—in the context of the pandemic—the pick-up requirement likely violated the constitutional right to abortion. The opinion explained that the rule would increase abortion patients' exposure to COVID, and noted the current difficulty of reaching a clinic given the closure of childcare facilities and public transportation. The judge also commented on the fact that abortion patients are disproportionately people of color, who in turn are more likely to be essential workers and more likely to have pre-existing medical conditions. The opinion therefore concluded, "these barriers, in combination, delay abortion patients from receiving a medication abortion…[or] prevent them from receiving [one] at all."[29]

In January 2021, the Supreme Court overruled this decision. While the Court issued no majority opinion, Chief Justice Roberts' brief concurrence said the lower court should not have overruled the FDA, as courts "owe significant deference to the politically accountable entities with the background, competence, and expertise to assess public health."[30] While the five most conservative judges appear to have ruled in favor of the FDA, none issued an opinion. This makes it impossible to compare their reasoning for striking down numerous COVID regulations as violating free exercise rights, but upholding the FDA's restriction of the fundamental right to abortion.

Some state governments also restricted abortion access during the pandemic. Just as many governors were issuing bans on mass gatherings as part of a comprehensive response to COVID-19, a few also issued bans on "non-urgent" medical procedures, including abortion. Prohibiting abortion as a non-urgent surgery could be understood as opportunistic, as governors who opposed abortion seized the chance to restrict its practice in the name of protecting public health. In response, abortion providers and reproductive health groups brought several cases challenging the bans. Lower courts' opinions in these cases varied: the 5th and 8th Circuits largely upheld the COVID abortion bans while the 6th and 11th Circuits, as well as two district courts, prevented them from going into effect – at least with regard to some patients.[31]

The Supreme Court did not rule on the constitutionality of any of these state COVID abortion bans. Instead, the Court stepped in only after the orders had already expired. With the bans no longer in effect, the Court issued two rulings instructing the 5th Circuit (which had upheld an abortion ban) and the 6th circuit (which had found one unconstitutional) to "vacate" their opinions, making them legally void.[32] The Court then instructed the lower courts to issue new opinions dismissing these cases as "moot," or no longer relevant given that the bans had expired. The Court's motive for eliminating

lower court opinions that both upheld and struck down COVID abortion bans is not clear. However, it is worth noting that while the Court dismissed these cases as "moot" once the abortion bans had expired, it has not taken the same approach for COVID regulations impacting religion. The Court has been unwilling to dismiss Free Exercise challenges, even when the challenged restrictions have been changed or withdrawn by policymakers.[33] Looking at its COVID opinions as a whole, the Court has shown itself far more concerned with preserving the right to communal religious exercise during the pandemic than the right to abortion.

Justice Gorsuch explicitly supported the tiering of constitutional rights in one COVID opinion from December 2020. Specifically, he argued that an influential 1905 public health decision—*Jacobson v. Massachusetts,* which upheld a vaccine mandate during a measles outbreak and has been cited in nearly every COVID case—should not be interpreted to restrict Free Exercise rights during a pandemic. This is, according to Gorsuch, because *Jacobson* involved a less important right than religious liberty: the right to "bodily integrity," which is not mentioned explicitly in the Constitution but has been developed over time through many court opinions. Gorsuch explained that, "even if judges may impose emergency restrictions on rights that some of them have found hiding" in the Constitution, "it does not follow that the same fate should befall the textually explicit right to religious exercise."[34] In other words, he argues that free exercise of religion may not be subject to the same restrictions during an emergency as those rights not mentioned by name in the Constitution – including the right to abortion, contraception, marriage, and childbirth.

While the full Court has not openly admitted to its tiering of constitutional rights, the pattern is clear. Coronavirus restrictions impacting Free Exercise rights have been subject to intense judicial scrutiny. Despite being promulgated by public health experts during a national emergency, these orders have been deemed discriminatory and unconstitutional. In contrast, the Supreme Court deferred to the expertise of the FDA in its one substantive decision on COVID restrictions impacting abortion rights. If such an imbalanced approach to constitutional rights has been adopted in the midst of a public health crisis, it seems likely this tiering of rights will carry over past the pandemic.

COVID and Other Constitutional Rights

In addition to abortion, the Supreme Court has been less willing during the COVID-19 pandemic to take a broad approach to protecting constitutional rights in cases involving claims of cruel and unusual punishment, unconstitutional conditions of confinement, and limits on the right to vote.[35] Several constitutional claims brought by incarcerated people stuck in crowded prisons, where the coronavirus had already killed a number of residents, failed to garner the kind of concern the Court expressed for shuttered churches. Even a religious liberty claim brought by religious advisors to two men on death row who sought to postpone the men's executions until the advisors felt safe entering the prison to administer last rites were rejected.[36] Efforts to expand access to the ballot given the pandemic were also largely unsuccessful.[37] And claims brought by individuals, stores, and political parties involving the right to free speech and protest during the pandemic were denied by lower courts – and, in one case, denied consideration by the Supreme Court.[38]

Another largely undiscussed side effect of the Supreme Court's COVID decisions is the further erosion of the Establishment Clause, which has historically protected religious pluralism by prohibiting the government from favoring or disfavoring any particular religion, or religion in general.[39] The Court's COVID opinions were, of course, framed as *preventing* discrimination against religion. In practice, however, its decisions have resulted in religious entities being treated far *more* favorably than other activities that are also protected under the First Amendment, such as concerts, movies, or lecture series. As one lower court noted, worship was hardly the only protected activity to be restricted during the pandemic: "The residents of California are confined to their homes, unable to gather with friends and family, unable to attend political rallies, unable to enjoy art and recreation."[40] Under the Court's new Free Exercise standard, however, only religious activities have been granted a broad right to exemptions.

Despite this, almost no COVID cases have considered the Establishment Clause implications of such disparities. In one of the rare exceptions, a district court judge from Louisiana explained that "[s]hielding Plaintiffs' congregation of 2,000 from the Governor's orders…may amount to a carveout that is not available to other non-

religious businesses, in violation of the Establishment Clause."[41] Interestingly, one of Justice Kavanaugh's COVID opinions also noted that "laws that expressly favor religious organizations over secular organizations…can sometimes trigger Establishment Clause challenges because of the apparent favoritism of religion."[42] This admission did not lead him or any conservative justice, however, to object to exemptions that favor religious practice over similar free speech activities.[43]

The Supreme Court has taken an increasingly narrow approach to the Establishment Clause for years, in cases permitting ever broader benefits for religious adherents and organizations. Its decisions in the COVID cases continue this trend by affording new privileges for the exercise of religion not offered to other constitutionally protected activities, such as political protests or theater. This disparity could be extended to other contexts outside the COVID pandemic. Consider, for example, certain widely accepted restrictions on free speech rights (sometimes called "time, place, and manner" restrictions), such as limits on electric amplification in residential

neighborhoods. To the extent that such restrictions have *any* existing limits or exemptions, they might no longer be enforced against religious actors. This interpretation of the Free Exercise Clause—which privileges a Bible study above a political meeting, a church above a theater, and a pastor above a philosophy lecturer—violates the spirit (if, no longer, the letter) of the Establishment Clause.

The Right to Equal Protection

Finally, looking beyond the COVID cases, the Court's expansion of the definition of religious "discrimination" might be less troubling if this new, robust definition applied equally to other forms of discrimination, such as race discrimination. But it doesn't. A constitutional commitment to equality now means something entirely different when it applies to people of faith under the Free Exercise Clause as compared to people of color under the Equal Protection Clause. Here, again, we see the emergence of a kind of constitutional religious favoritism.

Prior to the current revolution in religious liberty law, the Free Exercise Clause standard was similar to the standard in Equal Protection Clause cases, in that both hinged largely on intentional targeting of a disfavored group. As one district court said in a COVID case, in evaluating whether a law discriminates against religion, "courts draw on principles developed in the context of the Fourteenth Amendment's Equal Protection Clause."[44]

Now, however, no showing of intentional animus is needed to prove that a law discriminates against religion.[45] Moreover, even prior to *Tandon v. Newsom's* abandonment of the animus requirement, the Supreme Court in recent opinions has dramatically lowered the threshold for finding anti-religious animus.[46] For example, in the 2018 opinion *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Court ruled that one member of a human rights commission's stray comments, including that "religion has been used to justify all kinds of discrimination throughout history," amounted to unconstitutional religious discrimination.[47] Three Justices in a pre-*Tandon* COVID case went so far as to suggest that the fact that California's "spreadsheet

summarizing its pandemic rules even assigns places of worship their own row" was evidence of discrimination.[48] In another case, a lower federal court held that a Governor's mere acknowledgment that religious gatherings had facilitated the spread of COVID constituted evidence of discrimination.[49]

In contrast, the abundance of evidence needed to prove illicit intent in cases involving discrimination on the basis of race has made winning race-based Equal Protection cases extremely difficult. The Supreme Court has issued recent opinions, for example, overruling a lower court's finding of racial discrimination in a gerrymandering case (despite what Justice Sotomayor called "undeniable proof of intentional discrimination")[50] and upholding a state ban on affirmative action programs.[51] Perhaps most notably, in *Trump v. Hawaii* the Supreme Court declined to strike down as discriminatory (under the Establishment Clause) a federal travel restriction that President Trump had repeatedly described as a ban on Muslim immigration.[52] While the standard for striking down laws as discriminatory against racial and religious minorities is high, the Court has now set the standard for finding "discrimination" in Free Exercise cases exceedingly low.

With this series of cases the Supreme Court has discovered, or created, a new doctrine of equality nested within the Free Exercise clause of the First Amendment. The Court's new First Amendment-based equality rule is significantly more protective of the rights of people of faith than the promise of equality contained in the Fourteenth Amendment's Equal Protection Clause, the textual source of all other equality rights for people of color, women, LGBTQ people, people with disabilities, and others.

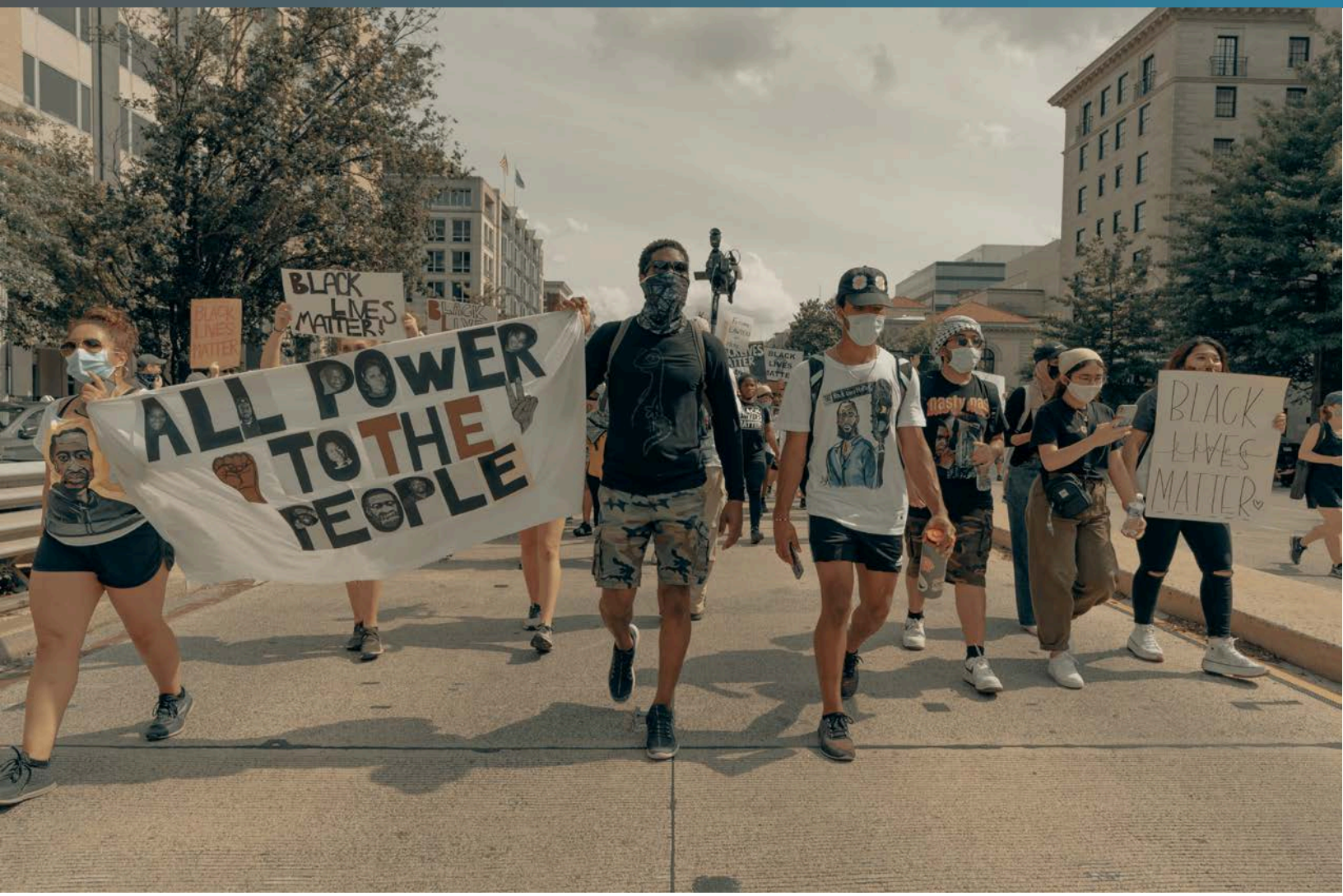
Free Exercise as a "First-Tier" Right

The Court's COVID opinions place free exercise of religion as a kind of top-tier right, above free speech and protest activities (which need not be exempted from COVID restrictions), abortion (covered by the lesser "undue burden" standard[53]), and racial equality (requiring a showing of discriminatory intent). The harms of such a regime are self-evident: a host of important and, at least theoretically, fundamental

constitutional rights could be forced to yield in order to accommodate the beliefs and practices of particular religious communities. While some tension between rights is to be expected, a wide gulf between levels of protection for various fundamental rights will elevate certain practices and communities above others in destructive ways.

A system of tiered rights could allow faith practitioners to be exempt from laws that arguably discriminate more profoundly on the basis of *race* than religion. For example, laws that ban people with felony convictions from voting, or that require government IDs to vote, have a disproportionate impact on communities of color regardless of their religion. Unless one can prove that such laws were passed with an *intent* to discriminate based on race, however, they will not be found to violate the Equal Protection Clause. No such discriminatory intent is needed to find a violation of the Free Exercise Clause, however. Thus, faith practitioners who object to these laws may be entitled to exemptions from them – at least if they are able to point to any existing exemptions or limitations to the laws. In sum: a law that in practice targets people on account of *race* could instead be held to target people on account of *religion*. This discrepancy in treatment will incentivize litigants to frame their legal claims, whenever possible, in religious terms.

The Court's new Free Exercise standard could have another potential impact on other rights, such as racial justice and abortion access. Under the "discrimination on steroids" standard, legislatures will be faced with two choices if they want to minimize the chance of Free Exercise litigation: remove *all* secular exemptions or accommodations within a law or policy to ensure that it's considered nondiscriminatory, or affirmatively grant exemptions to religious objectors. This choice could pressure policymakers to withdraw existing accommodations within laws and policies, including accommodations that are intended to protect "second-tier" rights and communities. In other words, in order to make sure that a law or policy is considered nondiscriminatory towards religion, legislators may write laws in absolute terms, rather than create nuanced policies that account for a variety of interests – such as the interest in promoting racial or gender equality.



For example, in *Fulton v. City of Philadelphia*, a Catholic nonprofit that refuses to certify same-sex couples as potential foster parents argued that a city's decision not to grant them a contract because of this refusal amounted to religious discrimination.[54] In a decision issued two months after *Tandon*, the Supreme Court agreed. The Court focused its analysis on the fact that the nondiscrimination provision within the City's standard foster care contract *already* allowed for exceptions.[55] The Court acknowledged that no exception had ever been granted allowing agencies to discriminate during the parent certification process. In fact, the exception was created not to benefit foster care agencies at all, but to allow agencies to make decisions on the basis of race during the child placement process when doing so would serve the best interests of foster care children, who are disproportionately children of color.

The Court nevertheless took this exception as evidence that the Catholic agency was entitled to an exemption from the contract's nondiscrimination provision so that they could turn away same-sex couples. As Justice Alito noted in his concurrence, this reasoning will likely incentivize the city, in order to avoid having to grant such religious exemptions, to withdraw the existing exception to the nondiscrimination provision in its standard contract.[56] Thus, the desire to avoid broad religious exemptions may push policymakers to reject exemptions intended to benefit marginalized communities, or to promote racial equity or other rights. Ironically, in the *Fulton* case, a policy that created the possibility for race-conscious placement of children with foster parents of the same race was used to justify a right of religious foster care agencies to engage in conduct that the City otherwise considered discriminatory against same-sex couples.

Finally, in addition to its potential impact on existing laws, the "discrimination on steroids" standard will also profoundly impact policymakers' ability to craft new laws and regulations. The pressure on legislators to either include no exceptions to a rule, or to include religious exemptions, will make it more difficult for them to make the kind of compromises usually required to garner enough votes to pass new legislation. The Court's new Free Exercise standard could also incentivize some religious communities to advocate for secular exemptions from laws and policies as a backdoor way of extending such exemptions to faith communities without having to explicitly write them into the law.

Rather than using the onslaught of litigation during the COVID pandemic as an opportunity to adopt a consistent rule on protecting constitutional rights during times of emergency, the Supreme Court has done the opposite: hugely expanded protections under the Free Exercise Clause while resisting demands to protect abortion access, voting, or the rights of incarcerated people. Looking past the pandemic, the tiering of constitutional rights stands to have a profound impact on the ways in which legislatures craft and enforce laws, giving religious communities a level of protection not available to other communities including those in prison, people seeking reproductive health care, and racial minorities. This hierarchy of rights additionally creates an incentive to frame constitutional challenges to government policies in religious terms whenever possible, in essence theocratizing the constitution.

3. The End of Legislative Deference (and Common Knowledge)

A final development of note in recent COVID litigation is the rejection of deference to policymakers and scientific experts in Free Exercise cases – even during a public health emergency. The Court also appeared to reject what might be deemed common knowledge, including basic facts about routine activities such as shopping for groceries.

No Legislative Deference to Experts

In the COVID/religious liberty cases, courts had a choice about whether to frame the underlying issue as one that implicated the state's power to protect public health, or one that concerned individual rights to religious liberty. In its early COVID opinions in the spring of 2020, the Supreme Court joined many lower courts in deferring to the decisions made by scientific experts. In doing so, members of the Court cited the broad police powers to protect public health secured under the 1905 mandatory vaccination case *Jacobson v. Massachusetts*.[57] In a concurrence issued in May 2020, Chief Justice Roberts adopted a public health approach to analyzing the COVID orders:

> The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." [Citation to] *Jacobson v. Massachusetts*…When those officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad. Where those broad limits are not exceeded, they should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health.[58]

After Justice Barrett was confirmed in October 2020, however, this changed. In its first COVID Free Exercise opinion after Barrett joined the Court, *Roman Catholic Diocese of Brooklyn v. Cuomo*, the majority made no mention of deference to medical expertise in finding that New York's COVID order violated the Free Exercise Clause. Nor did it cite to *Jacobson*. Justice Gorsuch's concurrence even critiqued the Chief Justice's "willingness to defer to executive orders in the pandemic's early stages."[59] In February 2021, the Court struck down parts of California's COVID Blueprint, declining to defer to what the lower court called the state's "mountain of scientific evidence"[60] – though Justice Gorsuch admitted that the justices were "not scientists."[61]

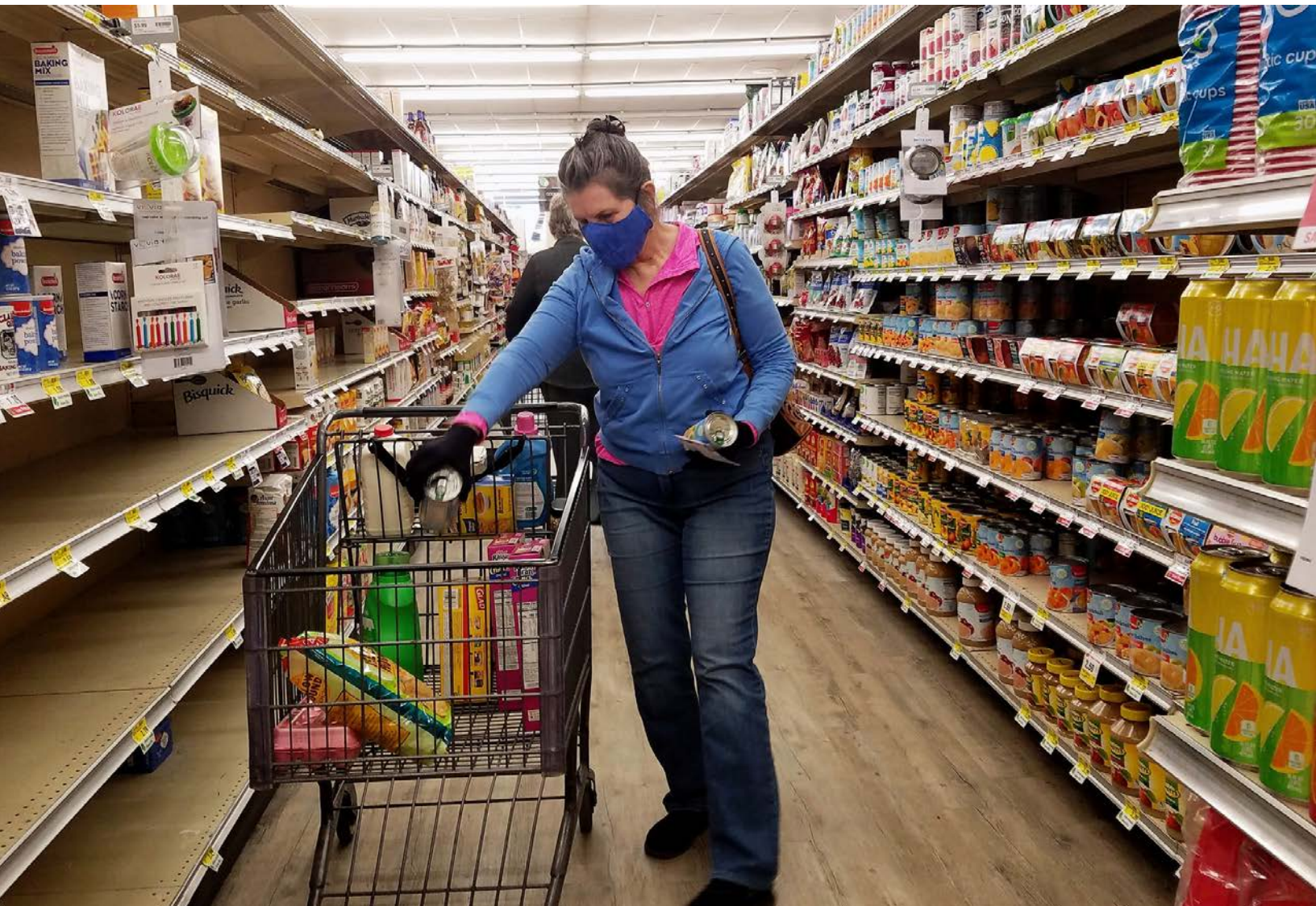
By the time the Court issued *Tandon v. Newsom* in April 2021, neither legislative deference nor *Jacobson* were discussed at all. Even in the context of a global health emergency involving a new virus, the Court refused to accept the government's testimony that the risks of COVID transmission presented by religious gatherings are more acute than the risks of other activities, such as grocery shopping or factory work.[62]

The change in approach and tone adopted by the Court beginning in the fall of 2020 left the impression that the country was experiencing a religious liberty emergency, not a public health crisis. In one opinion, Justice Gorsuch claimed that "our first freedom has fallen on deaf ears" during the pandemic, and urged, "we may not shelter in place when the Constitution is under attack."[63] Justice Kavanaugh warned that "judicial deference in an emergency or a crisis does not mean wholesale judicial abdication."[64] And Justice Alito, in an address to the Federalist Society in November 2020 in which he discussed the COVID pandemic, decried what he called policymaking by an "elite group of appointed experts." Alito further alleged that "religious liberty is fast becoming a disfavored right."[65]

Over the course of less than a year, the Supreme Court's COVID/religious exercise opinions shifted from emphasizing deference to the expertise of public health officials during a pandemic to explicitly rejecting such deference. If the Court is unwilling to defer to scientific evidence and expertise in the midst of a health emergency, it seems unlikely they will do so in future Free Exercise challenges.

Rejection of Common Knowledge

In addition to the court's unwillingness to accept evidence from public health experts, one of the most mystifying patterns within the COVID opinions has been judges' embrace of a kind of willful ignorance about typical human behaviors. It hardly takes a degree in epidemiology to understand the ways in which participation in a religious service typically differs from a trip to the grocery store, and might therefore be regulated differently. Many lower courts acknowledged the ways in which these activities differ.[66] As one judge (appointed by President George W. Bush) explained: "church services involving large numbers of often elderly and vulnerable individuals sitting and singing hymns in the same room for an hour or more pose health risks in the COVID-19 context which simply do not exist in other businesses…To ignore this fact would, in this court's view, represent highly irresponsible governance which would very likely result in citizens losing their lives."[67]



Thus, statements like Justice Gorsuch's in *Brooklyn Diocese*—"[p]eople may gather inside for extended periods in bus stations and airports, in laundromats and banks, in hardware stores and liquor shops. No apparent reason exists why people may not gather, subject to identical restrictions, in churches or synagogues"—are disingenuous.[68] So too are questions like Justice Kavanaugh's in *South Bay I*: "why can someone safely walk down a grocery store aisle but not a pew?"[69] People attending a church service do much more than walk down a pew, and people do not actually gather closely for extended periods of time in laundromats or hardware stores. It's also worth remembering that one *can't* necessarily "safely walk down a grocery store aisle," as Kavanaugh claims. The fact that states did not decide to restrict public access to food does not mean that this activity is without risk of COVID transmission.[70] Comments by judges suggesting that the reason for stricter restraints on churches than other locations is a lack of trust for religious people and institutions similarly miss the mark, ignoring the ways in which such activities differ both in their risk level and the services they provide.[71]

Finally, the Supreme Court also chose not to factor into its later coronavirus opinions states' assessment that it is easier to monitor secular businesses for COVID compliance than houses of worship or in-homes services – something acknowledged by several lower court judges.[72] In fact, a significant government presence in religious gatherings could violate the Establishment Clause.[73] Despite this, the Supreme Court in *Tandon* chided the lower court's seemingly uncontroversial finding that the "precautions used in secular activities… might not 'translate readily' to the home."[74]

Playing "A Deadly Game"

Even in the context of a new and deadly pandemic, the Supreme Court has been unwilling to defer to legislative decision-making, playing what Justice Kagan argues is a "deadly game in second guessing the expert judgment of health officials."[75] Not only has the Court dismissed states' scientific evidence, it appears willing to overlook what many lower courts might consider to be common knowledge, including the many ways in which various religious and secular activities differ, and therefore might be regulated

differently. Looking beyond the COVID cases, the withdrawal of legislative deference will hamper governments' ability to make judgments about religious and secular exemptions based on its own expertise in a wide variety of areas, from public health to education to housing.[76]

Further, if policymakers attempt to explain within a law or regulation *why* they believe it should contain a particular secular exemption, but not a religious exemption, this explanation itself could be taken as animus against religion, triggering strict scrutiny. This is because, as mentioned previously, the Supreme Court's threshold for finding animus against religion has become extremely low in recent years.

As the coronavirus pandemic slowly abates and the Court's docket moves on, we should expect that policymakers' expertise—and perhaps even common knowledge—will receive little deference in the context of Free Exercise challenges, even with regard to laws protecting interests of the highest order.

Conclusion

Having gained the long-sought expanded right to religious exemptions—in the midst of a global crisis no less—Christian Right advocates are sure to continue to litigate for ever-broader carve-outs from a wide array of health, labor, and civil rights laws. The Supreme Court's new "discrimination on steroids" test for religion cases, its tiering of constitutional rights over the course of the pandemic, and its lack of deference to expertise in religious liberty cases all point to a new Free Exercise standard in which religious objectors gain an unprecedented right to legal exemptions. In response to this constitutional hierarchy, more and more legal claims challenging government laws and policies may be brought under the Free Exercise Clause rather than other constitutional provisions. It is therefore critical that advocates, litigators, and legislators understand the Free Exercise opinions issued by the Supreme Court over the course of the COVID pandemic, and prepare for ways in which they might thwart policymakers' ability to enforce even the most essential laws and policies on religious objectors.

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Endnotes

[1] *Compare* Reynolds v. United States, 98 U.S. 145 (1879), *with* Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205, 219 (1972).

[2] Goldman v. Weinberger, 475 U.S. 503 (1986).

[3] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014); Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719 (2018); Fulton v. Philadelphia, No. 19-123, 2021 WL 2459253 (2021); Brush & Nib Studio, LC v. City of Phoenix, 247 Ariz. 269 (Ariz. 2019); Miller v. Davis, 123 F. Supp. 3d 924 (E.D. Ky. 2015), *vacated by* Miller v. Davis, No. CV 15-44-DLB, 2016 WL 11695944 (E.D. Ky. Aug. 18, 2016).

[4] Russell Moore, *Does It Violate Religious Liberty to Close Churches Over Coronavirus?*, RUSSELL MOORE, March 19, 2020, https://www.russellmoore.com/2020/03/19/does-it-violate-religious-liberty-to-close-churches-over-coronavirus/.

[5] First Pentecostal Church of Holly Springs v. City of Holly Springs Mississippi, 456 F. Supp. 3d 783 (N.D. Miss. 2020). For examples of early Supreme Court cases rejecting COVID exemption claims, *see* S. Bay United Pentecostal Church et al v. Newsom, 140 S. Ct. 1613 (2020); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020).

[6] Denver Bible Church v. Azar, 494 F. Supp. 3d 816 (D. Colo. 2020); *see also* Libertas Classical Ass'n v. Whitmer, No. 1:20-CV-997, 2020 WL 7050563 (W.D. Mich. Oct. 19, 2020) (challenging mask and social distancing requirements); Denver Bible Church v. Becerra, No. 120CV02362DDDNRN, 2021 WL 1220758 (D. Colo. Mar. 28, 2021) (challenging "any and all restrictions").

[7] S. Bay United Pentecostal Church v. Newsom, 494 F. Supp. 3d 785 (S.D. Cal. 2020); Calvary Chapel of Ukiah v. Newsom, No. 220CV01431KJMDMC, 2021 WL 916213 (E.D. Cal. Mar. 10, 2021).

[8] S. Bay United Pentecostal Church et al v. Newsom, 141 S. Ct. 716 (2021).

[9] Calvary Chapel of Ukiah, 2021 WL 916213.

[10] Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020); Harvest Rock Church, Inc. v. Newsom, 141 S. Ct. 889 (2020); Robinson v. Murphy, 141 S. Ct. 972 (2020); High Plains Harvest Church v. Polis, 141 S. Ct. 527 (2020); S. Bay United Pentecostal Church et al v. Newsom, 141 S. Ct. 716 (2021); Harvest Rock Church, Inc. v. Newsom, 141 S. Ct. 1289 (2021); Gish v. Newsom, 141 S. Ct. 1290 (2021); Gateway City Church v. Newsom, 141 S. Ct. 1460 (2021); Tandon et al v. Newsom, 141 S. Ct. 1294 (2021) *but see* Danville Christian Acad., Inc. v. Beshear, 141 S. Ct. 527 (2020).

[11] For a criticism of the Supreme Court's recent use of the shadow docket, *see* Stephen I. Vladeck, *The Supreme Court Is Making New Law in the Shadows*, N.Y. TIMES, Apr. 15, 2021, https://www.nytimes.com/2021/04/15/opinion/supreme-court-religion-orders.html?action=click&module=Opinion&pgtype=Homepage.

[12] Emp't Div. v. Smith, 494 U.S. 872 (1990); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). That said, religious institutions have been granted constitutional exemptions from neutral laws in certain narrow circumstances, such as exemptions from laws that would otherwise restrict their selection of ministers. *See e.g.*, Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., 565 U.S. 171, 174-5 (2012).

[13] *Smith*, 494 U.S. at 890.

[14] City of Boerne v. Flores, 521 U.S. 507 (1997). While the federal RFRA only impacts the federal government, some states have passed their own religious exemption laws, sometimes called "mini-RFRAs." *State Religious Freedom Restoration Acts*, NAT'L CONF. OF ST. LEGISLATURES, May 4, 2017, http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx; John Riley, *Montana Governor Signs "Religious Freedom" Bill That Critics Worry Will Condone Anti LGBTQ Discrimination*, METRO WEEKLY, April 27, 2021, https://www.metroweekly.com/2021/04/montana-governor-signs-rfra-bill-that-critics-worry-will-condone-anti-lgbtq-discrimination/.

[15] This discrimination standard has been dubbed the "most favored nation rule." *See* Doug Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 1-68 (1990), https://www.law.virginia.edu/system/files/faculty/hein/laycock/1990sup_ct_rev1_1990.pdf.

[16] *Lukumi*, 508 U.S. at 546 ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny").

[17] Lighthouse Fellowship Church v. Northam, 458 F. Supp. 3d 418, 430 (E.D. Va. 2020).

[18] Zalman Rothschild, *Free Exercise in a Pandemic*, THE UNIV. OF CHICAGO L. REV. ONLINE, June 10, 2020, https://lawreviewblog.uchicago.edu/2020/06/10/free-exercise-pandemic/ ("Surely the 'secular' exemption for emergency vehicles does not require that the government also exempt Orthodox Jews rushing to get home before

sundown from general traffic laws on Fridays"). The conservative law firm First Liberty Institute has already cited *Tandon* for the proposition that a university's policy permitting medical—but not religious—exemptions from a mandatory vaccination policy violates religious liberty. Letter from Christine Pratt, Couns., First Liberty Inst., to Ray L. Watts, M.D. President, University of Alabama at Birmingham, & John Daniel, Deputy General Couns. and Chief University Couns., University of Alabama at Birmingham (May 13, 2021) https://firstliberty.org/wp-content/uploads/2021/05/Gale-Jackie-Demand-Letter_Redacted.pdf.

[19] Soos v. Cuomo, 470 F. Supp. 3d 268, 282 (N.D.N.Y. 2020) (appeal filed). *See also* Capitol Hill Baptist Church v. Bowser, 496 F. Supp. 3d 284, 298-300 (D.D.C. 2020); Monclova Christian Academy v. Toledo-Lucas County Health Department, 984 F.3 477, 481 (6th Cir. 2020) ("A myopic focus solely on the provision that regulates religious conduct would thus allow for easy evasion of the Free Exercise guarantee of equal treatment).

[20] Danville Christian Academy, Inc. v. Beshear, 141 S. Ct. 527, 529 (2020) (Gorsuch, J., dissenting). One commentator has noted that if this standard for "discrimination" truly reflected the Court's decision in *Smith*, that case should have come out the other way, as criminalizing peyote but not alcohol would not be considered neutral application of the government's interest in prohibiting mood-altering substances. Mark Silk, *How SCOTUS Is Selectively 'Restoring' Religious Liberty*, RELIGION NEWS SERVICE, April 12, 2021, https://religionnews.com/2021/04/12/how-scotus-is-restoring-religious-liberty/.

[21] States have already struggled to draft COVID regulations that would be upheld by the Court. As Justice Kagan complained in dissent, "It is difficult enough…to craft COVID policies that keep communities safe. That task becomes harder still when officials must guess which restrictions this Court will choose to strike down." S. Bay United Pentecostal Church et al v. Newsom, 141 S. Ct. 716, 723 (2021) (Kagan, J., dissenting). *See also* S. Bay United Pentecostal Church v. Newsom, No. 20-CV-00865-BAS-AHG, 2020 WL 7488974, at *1 (S.D. Cal. Dec. 21, 2020), aff'd, 985 F.3d 1128 (9th Cir. 2021) ("In drawing this difficult balance between religious liberty and public health, the Court must follow the higher courts' precedents, when the precedents seem to change course as quickly as the various pandemic restrictions"); Legacy Church v. Kunkel, 472 Supp. 3d 926, 1047-1048 (D.N.M. 2020) ("States need to know what they can do to fight the pandemic, and religious individuals and institutions need to know what their rights are, but the Supreme Court has not created a workable, determinative framework. . . . The nation deserves better").

[22] Troy McMullen, *Victim's Dad Vows to Murder Child Killer Michael Woodmansee if He Gets Out*, ABCNEWS, Mar. 8, 2011, https://abcnews.go.com/US/child-killer-michael-woodmansee-early-release-victims-father/story?id=13086509.

[23] Adam Liptak, *An Extraordinary Winning Streak for Religion at the Supreme Court*, N.Y. TIMES, April 5, 2021, https://www.nytimes.com/2021/04/05/us/politics/supreme-court-religion.html; Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014); Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

[24] Clark v. Stone, No. 20-5928, 2021 WL 1997205 (6th Cir. May 19, 2021).

[25] Fulton v. Philadelphia, No. 19-123, 2021 WL 2459253 at *9 (2021) ("The creation of a system of exceptions under the contract undermines the City's contention that its non-discrimination policies can brook no departures"). We have also seen this dynamic in recent RFRA cases. *See, e.g.*, Hobby Lobby, 573 U.S. at 730 ("HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs").

[26] Brandon L. Garrett, *The Supreme Court's COVID Cases Show That One Part of the Constitution Gets Extra Special Attention*, SLATE, Dec. 17, 2020, https://slate.com/news-and-politics/2020/12/supreme-court-covid-cases-elevated-religion-constitution.html; *Supreme Court Sides With Jail Over Covid-19 Safety Measures*, EQUAL JUSTICE INITIATIVE, Aug. 13, 2020, https://eji.org/news/supreme-court-sides-with-jail-over-covid-19-safety-measures/; Ariane de Vogue, *Supreme Court Denies Request from Geriatric Prisoners Seeking Covid Relief*, CNN, Nov. 16, 2020, https://www.cnn.com/2020/11/16/politics/supreme-court-texas-covid-19/index.html.

[27] For a comparison of the *Tandon* standard and equal protection theory, *see* Vikram David Amar and Alan Brownstein, *"Most Favored-Nation" ("MFN") Style Reasoning in Free Exercise Viewed Through the Lens of Constitutional Equality*, VERDICT (May 21, 2021), https://verdict.justia.com/2021/05/21/most-favored-nation-mfn-style-reasoning-in-free-exercise-viewed-through-the-lens-of-constitutional-equality.

[28] Brief of First Liberty Institute As Amicus Curiae in Support of Petitioners, Little Sisters of the Poor v. Pennsylvania, 2020 WL 1391895 at 3 (citing Michael W. McConnell, *Why Is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243, 1243 (2000)).

[29] American College of Obstetricians and Gynecologists v. United States Food and Drug Administration, 472 F. Supp. 3d 183 (D. Mary. 2020).

[30] Food and Drug Administration v. American College of Obstetricians and Gynecologists, 141 S. Ct. 578 (2021).

[31] *Compare* In re Abbott, 956 F.3d 696 (5th Cir. 2020), and In re Rutledge, 956 F.3d 1018 (8th Cir. 2020), *with* Adams & Boyle, P.C. v. Slatery, 956 F.3d 913 (6th Cir. 2020), rehearing en banc denied; Robinson v. Attorney General, 957 F.3d 1171 (11th Cir. 2020), and Preterm-Cleveland v. Attorney General of Ohio, 456 F. Supp. 3d 917 (S.D. Ohio 2020); S. Wind Women's Center LLC v. Stitt, 455 F. Supp. 3d 1219 (W.D. Okla. 2020). Interestingly, one district court judge in Louisiana referenced the 5th Circuit's opinion upholding the COVID abortion ban in upholding a COVID restriction imposed on religious entities. Spell v. Edwards, 460 F. Supp. 3d 671, 675 (M.D. La. 2020).

[32] Planned Parenthood Ctr. for Choice v. Abbott, 141 S. Ct. 1261, (2021); Slatery v. Adams & Boyle, P.C., 141 S. Ct. 1262, (2021).

[33] *See, e.g.*, Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020); Tandon v. Newsom, 141 S. Ct. 1294, 1297 (2021) ("even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case").

[34] Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 71 (2020) (Gorsuch, J., concurring). *See also* S. Bay United Pentecostal Church et al v. Newsom, 959 F.3d 938, 942 (9th Cir. 2020) (Collins dissenting) ("*Jacobson* merely rejected what we would now call a 'substantive due process' challenge to a compulsory vaccination requirement…consequently, *Jacobson* says nothing about what standards would apply to a claim that an emergency measure violates some other, enumerated constitutional right") (emphasis added); Danville Christian Acad., Inc. v. Beshear, No. 3:20-CV-00075-GFVT, 2020 WL 6954650, at *6 (E.D. Ky. Nov. 25, 2020) ("The Court is skeptical that *Jacobson*, which was written in the context of a substantive due process challenge, has the same force in the context of a statewide executive order that is being challenged under the enumerated rights of the First Amendment"); Capitol Hill Baptist Church v. Bowser, 496 F. Supp. 3d 284, 296 (D.D.C. 2020) ("The unique array of claims before the *Jacobson* Court—such as that the regulation violated the preamble and spirit of the Constitution—included none under the First Amendment"); Roberts v. Neace, 958 F.3d 409, 416 (6th Cir. 2020) ("religious freedom [is] in a place of honor in the Bill of Rights: the First Amendment").

[35] Barnes v. Ahlman, 140 S. Ct. 2620 (2020); Valentine v. Collier, 141 S. Ct. 57 (2020); Mark Williams v. Craig Wilson, 2020 WL 2988458 (2020); Marlowe v. LeBlanc, 140 S. Ct. 2823 (2020); Chad Flanders, *COVID-19, Courts, and the 'Realities of Prison Administration.' Part II: The Realities of Litigation*, St. Louis Univ. L. Sch. Legal Stud. Rsch. paper series, No. 2021-07, 2021, https://scholarship.law.slu.edu/cgi/viewcontent.cgi?article=1600&context=faculty.

[36] Megan Mineiro, *Priests Defeated in Lawsuit to Delay Executions During Covid-19*, COURTHOUSE NEWS SERVICE, July 17, 2020, https://www.courthousenews.com/priests-defeated-in-lawsuit-to-delay-executions-during-covid-19/.

[37] Emmett Witkovsky-Eldred & Nina Totenberg, *As Concerns About Voting Build, The Supreme Court Refuses To Step In*, NPR, July 25, 2020, https://www.npr.org/2020/07/25/895185355/as-concerns-about-voting-build-the-supreme-court-refuses-to-step-in.

[38] Givens v. Newsom, 459 F. Supp. 3d 1302 (E.D. Cal. 2020); Mitchell v. Newsom, No. CV208709DSFGJSX, 2020 WL 7647741 (C.D. Cal. Dec. 23, 2020); Midway Venture LLC v. Cty. of San Diego, 274 Cal. Rptr. 3d 383 (Ct. App. 2021); Zaal Ventures Corp. v. Baker, No. CV 20-12054-LTS, 2021 WL 1026715 (D. Mass. Mar. 17, 2021); Illinois Republican Party v. Pritzker, 973 F.3d 760 (7th Cir. 2020), cert. denied, No. 20-1081, 2021 WL 1163871 (U.S. Mar. 29, 2021).

[39] Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 226, (1963) ("In the relationship between man and religion, the State is firmly committed to a position of neutrality."); Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968) ("Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite.").

[40] Gish v. Newsom, No. EDCV20755JGBKKX, 2020 WL 1979970, at *4 (C.D. Cal. Apr. 23, 2020).

[41] Spell v. Edwards, 460 F. Supp. 3d 671, 677 (M.D. La. 2020). *See also* Ass'n of Jewish Camp Owners v. Cuomo, 470 F. Supp .3d 197, 224 (N.D.N.Y. 2020) ("were the Court to grant Plaintiffs' requested relief, the ban on overnight camps would have to be lifted…not only for all religious overnight camps, but also for all *secular* overnight camps…To say otherwise would be to contradict the Supreme Court's decision [prohibiting] laws which aid one region, aid all religions, or prefer one religion over another") (internal citations omitted).

[42] Calvary Chapel Dayton Valley, 140 S. Ct. 2603, 2611 (2020) (Kavanaugh, J., dissenting). Justice Kagan has also noted the disparity in treatment among First Amendment-protected activities—without mentioning the Establishment Clause—in finding that California's COVID "policies treat worship just as favorably as secular activities (including political assemblies)." S. Bay United Pentecostal Church et al v. Newsom, 141 S. Ct. 716, 720 (2021) (Kagan, J., dissenting). *See also* Gish v. Newsom, 2020 WL 1979970, at *4 (C.D. Cal. 2020) (noting that the public is "unable to attend political rallies").

[43] While not the focus of this paper, similar Establishment Clause questions are raised by COVID Executive Orders promulgated with broad religious exemptions and by laws being proposed across the country to shield religious institutions—and only religious institutions—from public health and other emergency regulations. *See, e.g.*, Isaia Mitchell, Law to Keep Faith Organizations 'Essential' During Disasters Takes Immediate Effect, THE TEXAN, June 22, 2021, https://thetexan.news/law-to-keep-faith-organizations-essential-during-disasters-takes-immediate-effect/.

[44] Cassell v. Snyders, 458 Supp. 3d 981, 995 (N.D. Ill., 2020).

[45] Justice Alito has argued against use of the animus rule in Free Exercise cases, claiming it is too difficult to administer. *See* Fulton v. Philadelphia, No. 19-123, 2021 WL 2459253 at *39 (2021) (Alito, J., dissenting) ("Post-*Smith* cases have also struggled with the task of determining whether a purportedly neutral rule 'targets' religious exercise or has the restriction of religious exercise as its 'object.'"). His opinion makes no mention of the difficulty of finding animus in Equal Protection Clause cases.

[46] The notable exception to this trend is *Trump v. Hawaii*, in which the Supreme Court upheld President Trump's Muslim travel ban. Trump v. Hawaii, 138 S. Ct. 2392 (2018). As Justice Kagan noted in one COVID dissent, "Just a few Terms ago, this Court declined to apply heightened scrutiny to a Presidential Proclamation limiting immigration from Muslim-majority countries, even though President Trump had described the Proclamation as a 'Muslim Ban'…If the President's statements did not show that the challenged restrictions violate the minimum requirement of neutrality' to religion, it is hard to see how Governor Cuomo's do." Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 80 (Kagan, J., dissenting) (internal citations omitted).

[47] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1729 (2018).

[48] S. Bay United Pentecostal Church et al v. Newsom, 141 S. Ct. 716, 717 (2021) (Gorsuch, J., concurring).

[49] Soos v. Cuomo, 498 F. Supp. 3d 318, 323 (N.D.N.Y. 2020) (citing as evidence of discrimination the statement: "We know mass gatherings are the super spreader events. We know there have been mass gatherings going on in concert with religious institutions in these communities for weeks."). *See also* Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610, 614 (6th Cir. 2020) ("The Governor's orders have several potential hallmarks of discrimination. One is that they prohibit 'faith-based' mass gatherings by name.").

[50] Abbott v. Perez, 138 S. Ct. 2305, 2336 (2018) (Sotomayor, J., dissenting).

[51] Schuette v. Coalition to Defend Affirmative Action, 572 U.S. 291 (2014).

[52] Trump v. Hawaii, 138 S. Ct. 239 (2018).

[53] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

[54] Brief for Petitioner at 1, Fulton v. City of Philadelphia, No. 19-123, 2020 WL 2836494 at *1 (U.S. May 2020) (describing the City's withdrawal of a contract to a nonprofit that refused to certify same-sex couples as foster parents as a "rush to penalize [] religious exercise").

[55] Fulton v. Philadelphia, No. 19-123, 2021 WL 2459253 at *5 (2021).

[56] *Id.* at *13 (Alito, J., dissenting) ("if the City wants to get around today's decision, it can simply eliminate the never-used exemption power").

[57] Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11 (1905).

[58] S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613-1614 (Roberts, J. concurring) (internal citations omitted).

[59] Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring).

[60] S. Bay United Pentecostal Church v. Newsom, 985 F.3d 1128, 1157 (9th Cir. 2021). *See also* Harvest Rock Church, Inc. v. Newsom, No. EDCV 20-6414 JGB, 2020 WL 7639584 at *6 (C.D. Cal. 2020) (slip copy) ("California's Blueprint is also painstakingly tailored to address the risks of Covid-19 transmission specifically"); Gateway City Church v. Newsom, No. 5:20-CV-08241-EJD, 2021 WL 308606 at *13 (N.D. Cal. Jan. 29, 2021) ("In the context of a dynamic and unprecedented pandemic, this Court is satisfied that 'California did exactly what the narrow tailoring requirement mandates—that is, California has carefully designed the different exemptions to match its goal of reducing community spread, based on a neutral, seven-factor risk analysis.'") (internal citations omitted).

[61] S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 718 (2021) (Gorsuch, J., concurring). Justice Roberts, meanwhile, continued to insist on the importance of legislative deference in this case, even while he ruled against a state for the first time during the pandemic. *Id.* at 716 (Roberts, C.J., concurring) ("federal courts owe significant deference to politically accountable officials with the background, competence, and expertise to assess public health") (internal citations omitted).

[62] This lack of deference to scientific evidence was by no means restricted to the Supreme Court. *See, e.g.*, Harvest Rock Church, Inc. v. Newsom, 985 F.3d 771, 773 (9th Cir. 2021) ("the State submitted many pages of expert testimony setting forth its understanding of how COVID-19 is spread and why indoor activities present a risk of such spread. But

even if we were to accept that testimony as true, it does not support a *total ban* on indoor services") (O'Scannlain, specially concurring).

[63] Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 70-71 (Gosuch, J., concurring).

[64] *Id.* at 74 (Kavanaugh, J., concurring). Justice Kavanaugh did provide lip service to the idea of legislative deference: "Federal courts therefore must afford substantial deference to state and local authorities about how best to balance competing policy considerations during the pandemic." *Id.* at 74.

[65] Justice Samuel Alito, Keynote Address to the Federalist Society (Nov. 12, 2020), https://reason.com/volokh/2020/11/12/video-and-transcript-of-justice-alitos-keynote-address-to-the-federalist-society/.

[66] *See, e.g.*, Calvary Chapel of Bangor v. Mills, 459 F. Supp. 3d 273, 286 (D. Me. 2020) ("Several other courts have distinguished churches from places where individuals shop, noting that the purpose of shopping—unlike the purpose of community-centered religious organizations—is not to congregate and converse but instead to find and purchase items with limited contact with others"); Maryville Baptist Church, Inc. v. Beshear, 455 F. Supp. 3d 342, 345 (W.D. Ky.) (comparing the "a singular and transitory experience" of shopping with the "communal experience" of religious worship); Elim Romanian Pentecostal Church v. Pritzker, No. 20 C 2782, 2020 WL 2468194, at *4 (N.D. Ill. May 13, 2020) ("The congregants do not just stop by Elim Church. They congregate to sing, pray, and worship together. That takes more time than shopping for liquor or groceries").

[67] First Pentecostal Church of Holly Springs v. City of Holly Springs Mississippi, No. 3:20CV119 M-P, 2020 WL 2495128, at * 4 (N.D. Miss. May 14, 2020).

[68] Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring).

[69] S. Bay United Pentecostal Church et al v. Newsom, 140 S. Ct. 1613, 1615 (2020) (Kavanaugh, J., dissenting) (quoting Roberts v. Neace, 958 F.3d 409 (6th Cir. 2020)). *See also* Roman Catholic Archbishop of Washington v. Bowser, No. 20-CV-03625 (TNM), 2021 WL 1146399, at *15 (D.D.C. Mar. 25, 2021) (comparing a Catholic mass with the unlikely scenario of "an infected person rubbing shoulders with many strangers over the course of a trip to the grocery store.").

[70] Gish v. Newsom, No. EDCV20755JGBKKX, 2020 WL 1979970, at *6 (C.D. Cal. Apr. 23, 2020) ("despite social distancing the virus is spreading at these locations—grocery store employees are falling ill and dying. If the state applies the same rules to in-person religious gatherings as it does to grocery stores, people will get sick and die from attending religious gatherings just as they are dying from working in grocery stores.").

[71] *Compare* Cross Culture Christian Center v. Newsom, 445 F. Supp. 3d 758, 767 (E.D. Cal. 2020) ("the State and County's designation of essential activities [does not turn] solely upon people's ability to comply with the CDC guidelines while engaged in those activities"), *with* Berean Baptist Church v. Cooper, 460 F. Supp. 3d 651, 662 (E.D.N.C. 2020) ("[the] Governor appears to trust citizens to perform non-religious activities…but does not trust them to do the same when they worship indoors together"); First Pentecostal Church of Holly Springs v. City of Holly Springs Mississippi, 959 F.3d 669, 671 (5th Cir. 2020) ("why can its members be trusted to adhere to social-distancing in a secular setting (a gym) but not in a sacred one (a church)?" (Willett concurrence); Roberts v. Neace, 958 F.3d 409, 414 (6th Cir. 2020) (per curiam) (The State cannot "assume the worst when people go to worship but assume the best when people go to work.").

[72] *See, e.g.*, First Pentecostal Church of Holly Springs v. City of Holly Springs Mississippi, 456 F. Supp. 3d 783, 785 (N.D. Miss. 2020) (noting "the inherent difficulties involved in policing meetings behind closed doors").

[73] *See, e.g.*, Lighthouse Fellowship Church v. Northam, 458 F. Supp. 3d 418, 434 (E.D. Va. 2020) (Establishment Clause claim based on "invasive monitoring" during the COVID pandemic); Calvary Chapel of Ukiah, 2021 WL 916213, at *14 (E.D. Cal. 2021) (dismissing an Establishment Clause claim because claimants "do not argue, for example, that law enforcement officers are present at their services or otherwise engaged in close monitoring of their religious activities").

[74] Tandon v. Newsom, 141 S. Ct. 1294, 1297 (2021).

[75] Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 79 (2020) (Kagan, J., dissenting).

[76] Other courts have acknowledged urgency of the pandemic and been more accommodating to policymakers. *See, e.g.*, First Pentecostal Church of Holly Springs v. City of Holly Springs Mississippi, 456 F. Supp. 3d 783, 786 (N.D. Miss. 2020) ("This court notes that municipalities throughout this state have been forced to draft ordinances to deal with a pandemic emergency which is nearly without precedent, and it is quite unsurprising that some have done a better job in this regard than others.").