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Confusion in the Time of COVID: The Supreme Court's Lack of Clarification in Balancing a Public Health Emergency and the Constitutional Right to Free Exercise

Lauren M. Marsh

NOTE

Confusion in the Time of COVID: The Supreme Court's Lack of Clarification in Balancing a Public Health Emergency and the Constitutional Right to Free Exercise

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

Lauren M. Marsh[*]

I. INTRODUCTION

The case of *Calvary Chapel Dayton Valley v. Sisolak* demonstrates the breadth of a State's authority during a public health crisis.[1] The SAR-Co-V-2 ("COVID-19") pandemic led to the declaration of emergency orders and most states creating guidelines for the public to follow to reduce the potential spread of the virus.[2] These guidelines typically included bans on large gatherings, including gatherings in houses of worship, after research showed that large gatherings often turn into "superspreader" events.[3] This led to

* B.S. John Brown University, 2019; J.D. Candidate, University of Missouri School of Law, 2022; Associate Member, *Missouri Law Review*, 2020-2021; Associate Managing Editor, *Missouri Law Review*, 2021-2022.

1. 140 S. Ct. 2603 (2020).

2. Memorandum from National Governors Association to Interested Parties (Mar. 24, 2020), https://www.nga.org/state-covid-19-emergency-orders/ [https://perma.cc/7SPG-5SCX] (discussing an overview of state actions on business closure and personal movement restrictions in response to COVID-19); Rachel Treisman, *West: Coronavirus-Related Restrictions by State*, NPR (July 2, 2020), https://www.npr.org/2020/05/01/847416108/west-coronavirus-related-restrictions-by-state [https://perma.cc/8DBR-R4TJ].

3. A superspreader event is where "the number of cases transmitted will be disproportionately high compared to general transmission." Holly Honderich, *Coronavirus: What makes a gathering a "superspreader" event?* BBC NEWS (July 4, 2020), https://www.bbc.com/news/world-us-canada-53273382 [https://perma.cc/N9VH-TXY8]; *see also* Caroline Mala Corbin, *Religious Liberty in a Pandemic*, 70 DUKE L.J. ONLINE 1, 3 (2020); Dillon C. Adams & Benjamin J. Cowling, Opinion, *Just Stop the Superspreading*, N.Y. TIMES (June 2, 2020),

numerous lawsuits claiming impediments in violation of the First Amendment Free Exercise Clause of the United States Constitution.[4] The United States Supreme Court's lack of clarification of how to balance constitutional analysis with a public health emergency is a cause for confusion and concern in how States should proceed during a public health emergency.

Part II of this Note outlines the facts and procedural background of Plaintiff Calvary Chapel Dayton Valley's ("Calvary" or "Calvary Chapel") requests for emergency injunctive relief from COVID-19 pandemic restrictions. Part III provides the legal background relevant to the Supreme Court's ruling, focusing on the development of tests for religious discrimination under the Free Exercise Clause and state authority during a public health crisis. Part IV details the Supreme Court's ruling in Calvary's case, which denied Calvary's application for emergency injunction to be able to hold church services with more than fifty congregants. Part V discusses the consequences of the expanded state authority during a public health crisis in terms of personal liberty.

II. FACTS AND HOLDING

On May 28, 2020, Defendants, including Governor of Nevada Steve Sisolak, Attorney General of Nevada Aaron Ford, and Sheriff of Lyon County Frank Hunewill, issued and enforced "Emergency Directive 021 – Phase Two Reopening Plan" ("Emergency Directive" or "Directive") in response to the COVID-19 pandemic.[5] The Emergency Directive detailed how specific categories of businesses or social activities should proceed in the midst of the pandemic.[6] Notably, the Emergency Directive stated, "Effective 12:01am on May 29, 2020, consistent with other Directives on public gatherings, houses of worship may conduct indoor in-person services in a manner so that no more than fifty persons are gathered, and all social distancing requirements are satisfied."[7] Most other businesses and social activities were limited to fifty

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https://nyti.ms/2MnY6be [https://perma.cc/5M2Z-4YWS]; Christie Aschwanden, *How 'Superspreading' Events Drive Most COVID-19 Spread*, SCI. AM. (June 23, 2020), https://www.scientificamerican.com/article/how-superspreading-events-drive-most-covid-19-spread1 [https://perma.cc/THM9-DDE6]; Cassell v. Snyders, 458 F. Supp. 3d 981, 997 (N.D. Ill. 2020) (listing "examples where religious services have accelerated" COVID-19's spread).

4. Linda A. Sharp, *COVID-19 Related Litigation: Constitutionality of Stay-at-Home, Shelter-in-Place, and Lockdown Orders*, 55 A.L.R. FED. 3d Art. 3 (2020).

5. GOVERNOR SISOLAK, COVID-19 DECLARATION OF EMERGENCY DIRECTIVE 021 – PHASE TWO REOPENING PLAN, (May 28, 2020), https://gov.nv.gov/News/Emergency_Orders/2020/2020-05-28_-_COVID-19_Declaration_of_Emergency_Directive_021_-_Phase_Two_Reopening_Plan_(Attachments)/.

6. *Id.*

7. *Id.* at § 11.

percent of their fire code capacity, [8] but a few were limited to the lesser of fifty percent the fire code capacity or fifty people.[9]

Shortly thereafter, Calvary Chapel Dayton Valley filed suit against the state of Nevada.[10] Calvary Chapel is a protestant church located in Dayton, Nevada.[11] Calvary sought injunctive relief on First Amendment grounds to allow indoor, in-person church services with more than fifty people amid the COVID-19 pandemic, despite Nevada's Directive.[12]

A. The District Court

Calvary initially filed emergency motions for a temporary restraining order ("TRO") and a preliminary injunction on May 28, 2020 in the United States District Court of Nevada.[13] Calvary's motions focused on a First Amendment Free Exercise challenge and a selective enforcement challenge to the Directive,[14] arguing for the application of strict scrutiny because the Emergency Directive was neither generally applicable nor neutral.[15] Calvary also brought a Free Speech claim, but this argument was not given much weight in the motion or in the court's decision.[16] Further, Calvary argued the Emergency Directive failed strict scrutiny because the ban was not narrowly tailored to stopping the spread of COVID-19.[17] Finally, Calvary

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8. The listed businesses include non-retail indoor venues excluding indoor movie theaters (e.g., bowling alleys, arcades), non-retail outdoor venues (e.g., miniature golf facilities, amusement parks and theme parks), retail businesses, indoor malls, gyms, fitness facilities, public aquatic venues, and body art and piercing facilities. *Id.* at §§ 17–18, 20–21, 28–29, 31.

9. The listed businesses include movie theaters, art galleries, zoos, aquariums, and trade or technical schools. *Id.* at §§ 20, 30, 32.

10. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2604 (2020) (Alito, J., dissenting).

11. Calvary Chapel Dayton Valley v. Sisolak, No. 3:20-cv-00303-RFB-VCF, 2020 WL 4260438, at *1 (D. Nev. June 11, 2020), *rev'd and remanded*, 982 F.3d 1228 (9th Cir. 2020).

12. *Calvary Chapel*, 140 S. Ct. at 2604 (2020) (Alito, J., dissenting).

13. *Calvary Chapel*, 2020 WL 4260438, at *1.

14. *Id.*

15. Strict scrutiny applies for Free Exercise cases when the restrictions are not "neutral and generally applicable." *Id.* at *2 (citing Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 531 (1993)).

16. Plaintiff's Emergency Motion for Temporary Restraining Order and Preliminary Injunction at 17, Calvary Chapel Dayton Valley v. Sisolak, No. 3:20-cv-00303-RFB-VCF, 2020 WL 4260438 (D. Nev. June 11, 2020) [hereinafter "Plaintiff's Emergency Motion"].

17. "'[B]roadly formulated' statewide interests and generalized descriptions of health risks, like those referenced by the Governor here, are not compellng." *Id.* (citing Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 431 (2006). To survive strict scrutiny, a law that is not neutral or not generally applicable

argued that it was entitled to injunctive relief because Calvary would suffer irreparable harm without an injunction,[18] the balance of equities favored injunction,[19] and the injunction would serve the public interest.[20]

Nevada responded to Calvary's motion and argued for the application of rational basis scrutiny because both religious and secular activities were subject to the orders, therefore the Directive was generally applicable and neutral.[21] Nevada claimed that the businesses and activities included in the fifty-person limit were "places where 'people sit together in an enclosed space to share a communal experience,'" which includes both religious and secular gatherings.[22] Nevada additionally provided alternatives that Calvary could implement to be "consistent with the White House's Phase 2 guideline."[23] Further, Nevada asserted that the Directives should survive rational basis scrutiny because the goal of the Directive was to save lives by slowing the pandemic's infection rate, an interest that should qualify as compelling under even a heightened standard of review.[24] Nevada provided an additional

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must be "justified by a compelling governmental interest and is narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 531–32.

18. "The Supreme Court recognizes that 'the deprivation of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparably injury.'" Plaintiff's Emergency Motion, *supra* note 17, at 21, (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976)).

19. "The equities favor the Church because the law places a premium on protecting constitutional rights. . . Meanwhile, an injunction need not harm Defendants at all. Local health officials can subject infected persons to orders of isolation and quarantine. And the State remains free to adopt permissible and reasonable regulations for in-person worship services, including narrowly tailored social distancing and health and safety measures, in a similar fashion as it has done with secular activities." *Id.*

20. "'[I]t is always in the public interest to prevent the violation of a party's constitutional rights.' This is particularly true for First Amendment freedoms. Because the requested injunction will accomplish this, the public interest also favors an order protecting the Church." *Id.* (quoting de Jesus Ortega Melendres v. Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012)) (internal citation omitted).

21. Opposition to Plaintiff's Emergency Motion for Preliminary Injunction at 12–13, Calvary Chapel Dayton Valley v. Sisolak, No. 3:20-cv-00303-RFB-VCF, 2020 WL 4260438 (D. Nev. June 11, 2020) [hereinafter "Opposition to Plaintiff's Emergency Motion"].

22. *Id.* (quoting Gish v. Newsom, No. EDCV 20-755 JGB, 2020 WL 1979970 (Apr. 23, 2020)). Nevada lists schools, live concert halls, movie theaters, and sports venues with spectators as evidence that secular activities are included in the fifty-person limit. *Id.*

23. *Id.* (suggesting conducting drive-in services, online programs, and in-person assemblies of up to fifty people).

24. *Id.* at 17. "Further, Calvary's analysis as to why the emergency directives do not constitute the 'least restrictive means' of furthering any compelling interest highlights why *Jacobson* and *South Bay* provide state officials with added discretion when exercising emergency police powers. It is not the place of Calvary, Calvary's

analysis distinguishing this case from normal Free Exercise Clause cases because of State authority during a public health emergency, arguing that the Emergency Directive should be upheld under the additional deference granted to State authority during a public health crisis.[25]

The District Court of Nevada denied Calvary's motion on June 11, 2020, after conducting a review of the facial First Amendment Free Exercise challenge and the as-applied Free Exercise challenge,[26] finding that Calvary was not entitled to the TRO or preliminary injunction because Calvary's claims were not likely to succeed on the merits.[27] Regarding the facial challenge, the court agreed with Nevada that Nevada had broad deference during this public health crisis.[28] The district court also determined that places of worship were not treated less favorably than similarly secular activities.[29] Regarding the as-applied challenge, the district court found the selective enforcement claim to be premature given a lack of evidence.[30]

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counsel, or this court to exercise discretion on where or how to protect public health against a novel, highly contagious virus." *Id.*

25. *Id.* at 8.

26. A facial challenge "seeks to invalidate a statute or regulation itself" by claiming "the statute may rarely or never be constitutionally applied." 16 C.J.S. *Constitutional Law* § 243 (2021). An as-applied challenge seeks to invalidate the statute as to the operation of it in a particular case, "conced[ing] that a statute may be facially constitutional or constitutional in many of its applications but contends that it is not so under the particular circumstances of the case." *Id.*

27. Calvary Chapel Dayton Valley v. Sisolak, No. 3:20-cv-00303-RFB-VCF, 2020 WL 4260438, at *2 (D. Nev. June 11, 2020). "A preliminary injunction is 'an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.'" *Id.* at *1 (quoting Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008)). "To obtain a preliminary injunction, a plaintiff must establish four elements: '(1) a likelihood of success on the merits, (2) that the plaintiff will likely suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in its favor, and (4) that the public interest favors an injunction.'" *Id.* (quoting Wells Fargo & Co. v. ABD Ins. & Fin. Servs., Inc., 758 F.3d 1069, 1071 (9th Cir. 2014)).

28. *Id.* at *2 (quoting Marshall v. United States, 414 U.S. 417, 427 (1974)) ("When state officials 'undertake[] to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.'").

29. *Id.* at *3 ("[C]asinos are subject to substantial restrictions and limitations required by the Nevada Gaming Control Board which exist *in addition* to and in conjunction with the requirements and oversight provided by the Emergency Directive.") ("[O]ther secular entities and activities similar in nature to church services have been subject to similar or more restrictive limitations on their operations. [C]hurch services consist of activities, such as sermons and corporate worship, that are comparable in terms of large numbers of people gathering for an extend [sic] period of time to lectures, museums, movie theaters, specified trade/technical schools, nightclubs and concerts. All of these latter activities are also subject to the fifty-person cap or remain banned altogether under the Emergency Directive.").

30. *Id.* at *4 ("The Plaintiffs have not presented evidence of such a pattern of selective enforcement. While images of crowded casinos attached to its submission

The District Court of Nevada did grant Calvary leave to file a new motion requesting injunctive relief, provided Calvary produced more evidence regarding the as-applied Free Exercise challenge.[31] Instead, Calvary appealed the June 11 Order and requested the District court to reconsider an injunction.[32] On June 19, 2020, the Nevada District Court again denied Calvary's motion for injunction on the same basis as the June 11 Order.[33] Additionally, the district court took "judicial notice" of recent developments that further hindered Calvary's likelihood of success on the merits, such as modifications by the Nevada Gaming Control Board making casinos subject to more severe restrictions than places of worship and Nevada's recent record-breaking increase in COVID-19 infections[34]

B. The Ninth Circuit

Calvary filed an emergency motion for injunctive relief pending appeal with the United States Court of Appeals for the Ninth Circuit on June 22, 2020.[35] Calvary again argued for strict scrutiny alleging that comparable secular activities were treated more leniently under the Emergency Directive.[36] Calvary also repeated its argument that the Emergency Directive must fail strict scrutiny.[37] Calvary briefly addressed Nevada's argument and the district court's finding that Nevada had greater deference during a public health emergency, but quickly dismissed this contention, relying on their argument that the distinctions between activities do not further a compelling state interest.[38]

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may raise a potential future issue of selective enforcement, the Court must have more evidence than this to find a likelihood of success on the merits of a selective enforcement claim.").

31. *Id.*

32. Valley v. Sisolak, No. 3:20-cv-00303-RFB-VCF, 2020 WL 3404700, at *1 (D. Nev. June 19, 2020).

33. *Id.* ("Plaintiff has not demonstrated a strong showing of a likelihood of success on the merits of its claims.").

34. *Id.* at *2.

35. Emergency Motion for an Injunction Pending Appeal, Calvary Chapel Dayton Valley v. Sisolak, No. 20-16169, 2020 WL 4274901 (9th Cir., July 2, 2020).

36. *Id.* at 10–14 (citing examples from casinos, restaurants, amusement parks, gyms and fitness facilities, and mass protests).

37. *Id.* at 18 (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993)) ("Nevada has no compelling interest in allowing 50%-occupancy gatherings at casinos, restaurants, theme parks, and gyms (and no numerical limits on protests)—but only 50 people at houses of worship. . . Nor is the Governor's directive narrowly tailored. More favorable (50%-occupancy) rules apply to 'analogous nonreligious conduct,' and Nevada's health interests 'could be achieved by' adopting an identical rule for churches that burdens religion 'to a far lesser degree.'").

38. *Id.* at 18–19 (quoting Roberts v. Neace, 958 F.3d 409, 414 (6th Cir. 2020)) ("Even applying *Jacobson*, which addressed a neutral across-the-board vaccination

Nevada responded, again arguing that Calvary was not likely to succeed on the merits under rational basis review.[39] Nevada stressed the broad deference granted to state officials during public health emergencies and repeated that comparable activities were subject to the same restrictions as places of worship.[40] Additionally, Nevada provided multiple, recent cases where courts rejected similar public health emergency Free Exercise challenges.[41] The Ninth Circuit promptly denied this motion on July 2, 2020, simply citing *Hilton v. Braunskill*[42] and *South Bay United Pentecostal Church v. Newsom*[43] as support.[44]

C. The Supreme Court

Calvary subsequently submitted an application for injunctive relief to the U.S. Supreme Court on July 8, 2020.[45] Calvary's application contained each argument that it presented at the lower courts,[46] but placed more emphasis on

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requirement, the Governor's discriminatory treatment of constitutionally-protected worship services 'has no real or substantial relation to [public health], or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law.' *Jacobson*, 197 U.S. at 31. Restrictions 'inexplicably applied to one group and exempted from another do little to further [health] goals,' although they 'do much to burden religious freedom.'"). Calvary also brought a free speech claim, but this argument is not given priority. *Id.* at 17.

39. State Defendant's Opposition to Emergency Motion for an Injunction Pending Appeal at 25–26, Calvary Chapel Dayton Valley v. Sisolak, No. 20-16169, 2020 WL 4274901 (9th Cir., July 2, 2020) ["Hereinafter "Opposition to Emergency Motionn for an Injunction Pending Appeal"].

40. "Instead of acknowledging these comparable secular activities and the governing consensus, Calvary speculates that other activities it deems comparable are treated better than houses of worship. With the exception of casinos and mass protests, none were addressed with record evidence with the district court. Instead, Calvary breezily offers its opinion as to restaurants, amusement and theme parks, and gyms and fitness facilities, substituting it for Nevada's public health officials who are responsible for addressing the COVID-19 pandemic." *Id.* at 21–22 (internal citations omitted).

41. *Id.* at 17–21 (citing South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (May 29, 2020)).

42. 481 U.S. 770, 776 (1987) (defining "the factors regulating the issuance of a stay").

43. 140 S. Ct. 1613 (2020) (denying a church's application for injunction to be able to hold in-person church services in defiance of the Governor's COVID-19 Executive Order).

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

45. Emergency Application for an Injunction Pending Appellate Review, Calvary Chapel Dayton Valley v. Sisolak, No. 19A1070, 2020 WL 4251360 (U.S. July 24, 2020) [hereinafter "Emergency Application"].

46. Calvary's arguments include that the Emergency Directive is subject to strict scrutiny (not neutral or generally applicable), that the Emergency Directive should fail

the Free Speech claim, claiming "[t]he directive violates the Free Speech Clause by favoring commercial over non-commercial speech and the communication of secular perspectives over religious views."[47] Calvary also failed to emphasize Nevada's argument for broad deference granted to states during public health crises – by reserving only one page out of a twenty-eight page motion to address this argument – demonstrating Calvary's belief that the constitutional analysis should be primary.[48]

Nevada responded by first arguing that the State is due additional deference during a public health crisis and describing similar public health emergency Free Exercise challenges that the courts have rejected.[49] Nevada then repeated its argument that the Directives should be judged under a rational basis review and that the Directives do not violate the First Amendment.[50]

Calvary submitted a reply brief disputing Nevada's claim that secular activities were not comparable to houses of worship and specifying how comparable secular activities and business were treated better than houses of worship.[51] Calvary also used this reply brief to provide more analysis on the state authority during a public health emergency argument, recognizing that this analysis was primary to the lower courts decisions.[52] Calvary distinguished the facts of this case from *South Bay* and *Jacobson v.*

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strict scrutiny (not narrowly tailored to lowering COVID-19 infection rate) and that the emergency public health crisis does not justify arbitrary distinctions that do not aid health goals. *Id.* at 12–27.

47. *Id.* at 18.

> By empowering businesses like casinos, movie theaters, fitness classes, bars, theme parks, and bowling alleys to express commercial messages to larger in-person audiences than places of worship are allowed to communicate noncommercial, religious messages, the Governor's directive simply turns the First Amendment on its head. . . Nevada officials blatantly demonstrated a preference for secular viewpoints here: they allow many business; for-profit inducements to thrive and applaud, encourage, and even participate in unlawful mass protests, all while threatening places of worship who refuse to play by their lopsided rules. . . Governor Sisolak cannot decide that proliferating commercial speech and secular protests is worth the cost and then deem communicating religious ideas less valuable or worthwhile.

Id. at 19–20.

48. *Id.* at 25–26.

49. Respondents Steve Sisolak & Aaron D. Ford's Response to Emergency Application for an Injunction at 10–14, Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020) [hereinafter Sisolak & Ford's Response to Emergency Application"].

50. *Id.* at 9–24.

51. Reply Brief in Support of Emergency Application for an Injunction Pending Appellate Review at 5–14, Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020).

52. *Id.* at 17–19.

Massachusetts,[53] emphasizing the *Jacobson* holding that a mandate would be unreasonable if there was "'no real or substantial relation to [the] object' of protecting public health or safety 'or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'"[54]

The Supreme Court rejected Calvary's arguments and denied the application for injunctive relief. Without detailing the reasoning in an opinion along with the decision, the Court leaves the unanswered question of whether the Court found Nevada's arguments persuasive or whether the Court determined the case on an entirely different basis. When a religious organization's in-person worship services are restricted during a public health emergency, the Court leaves uncertainty in how burdensome and targeted the restrictions can be.

III. LEGAL BACKGROUND

This Part analyzes the development of jurisprudence surrounding the Free Exercise Clause and moves to an examination of the development of State authority during a public health crisis.

A. The Free Exercise Clause

The First Amendment forbids the United States government from "establish[ing] religion" or "prohibiting the free exercise thereof."[55] Although the language of the First Amendment appears absolute, courts have often been tasked with distinguishing between restrictions that unduly impede on the free exercise of religion and restrictions that may be permitted for the "protection of society."[56] The Supreme Court has been developing this Free

53. 197 U.S. 11 (1905). *Jacobson* is a 1905 case that upheld a mandatory vaccination law as a legitimate use of a state's police power to protect public health and safety. *Id.* at 39.

54. Reply Brief in Support of Emergency Application for an Injunction Pending Appellate Review at 18, Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020) (quoting *Jacobson*, 197 U.S. at 31).

55. U.S. CONST. amend. I. (quoting the Establishment Clause and the Free Exercise Clause, respectively). The Free Exercise Clause is enforceable against States under Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); U.S. CONST. amend. XIV.

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> The [First] Amendment embraces two concepts,--freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.

Cantwell v. Connecticut, 310 U.S. 296, 303–304 (1940); *see also* Reynolds v. United States, 98 U.S. 145, 164 (1878) ("Congress was deprived of all legislative

Exercise jurisprudence since *Reynolds v. U.S.*, the first Supreme Court case to address the issue of Free Exercise.[57]

In *Reynolds*, the Court upheld a federal law that banned polygamy, despite religious objections by members of the Church of Jesus Christ of Latter-day Saints, who claimed polygamy as part of their religious practice.[58] The Court held that marriage is a "sacred obligation," but it is also "a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal."[59]

The original test for Free Exercise challenges came from *Sherbert v. Verner*.[60] In *Sherbert*, the plaintiff was unable to work on Saturdays due to her religious beliefs.[61] The plaintiff filed for unemployment after she was unable to find employment that would not require her to work on Saturdays.[62] The Employment Security Commission found that the plaintiff was ineligible for unemployment benefits under the South Carolina Unemployment Compensation Act because she did not have good cause to refuse other employment, as required under the Act.[63] The Supreme Court determined that if this action was to withstand the constitutional challenge,

> it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'[64]

The Supreme Court found this action imposed a substantial burden on the plaintiff's free exercise of her religion.[65] Next, the Supreme Court found that South Carolina did not have a compelling state interest that justified the burden.[66] Therefore, the Supreme Court reversed the judgment disqualifying

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power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.").

57. 98 U.S. 145 (1878).

58. *Id.* at 166–67.

59. *Id.* at 165.

60. 374 U.S. 398 (1963).

61. *Id.* at 399.

62. *Id.* at 399–400.

63. *Id.* at 401 (quoting South Carolina Unemployment Compensation Act, S.C. Code § 68-404 (1962)).

64. *Id.* at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

65. *Id.* at 404 ("The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.").

66. *Id.* at 406–09 ("The appellees suggest no more than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to

plaintiff from obtaining unemployment benefits.[67] Thus, the *Sherbert* test requires that "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest."[68]

The Court shifted the Free Exercise doctrine in *Employment Division v. Smith*.[69] In this case, two counselors at a drug rehabilitation organization were fired for ingesting peyote during a religious ceremony of the Native American Church.[70] The Supreme Court undertook the case to determine whether Oregon's prohibition of the religious use of peyote was lawful under the Free Exercise Clause.[71] The Court in *Smith* declined to apply the *Sherbert* test, determining that the *Sherbert* test should only be applied in the unemployment compensation field.[72] The Court narrowed the constitutional doctrine, finding that state regulations that are neutral and generally applicable do not violate the First Amendment, even if they unintentionally burden religious practices.[73] The Court concluded that the law was neutral and generally applicable, therefore, the counselors did not have a valid claim for a Free Exercise Clause exemption.[74]

Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work.").

67. *Id.* at 410.

68. Emp. Div., Dept. of Human Res. Of Oregon v. Smith, 494 U.S. 872, 883 (1990) (citing *Sherbert*, 374 U.S. at 401–03). "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) (citing *Sherbert*, 374 U.S. 398).

69. *Smith*, 494 U.S. 872.

70. *Id.* at 874. Peyote is a Schedule 1 drug, which is defined by the Drug Enfrocement Administration as having no accepted medical use and and a likely potential for abuse. *Id.* at 903. Ingesting peyote is a sacramental ritual in the Native American Church. *Id.* at 883.

71. *Id.* at 876.

72. *Id.* at 883 ("Applying that test we have, on three occasions, invalidated state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion. We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. Although we have sometimes purported to apply the *Sherbert* test in contexts other than that, we have always found the test satisfied.") (internal citations omitted).

73. *Id.* at 879. "Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion proscribes (or prescribes).'" *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263, n. 3 (1982)).

74. *Id.* at 882.

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[75] the Court succinctly summarized the current analysis for Free Exercise challenges.[76]

> In addressing the constitutional protection for exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. ... A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.[77]

The Court further considered what it means for a law to be neutral and generally applicable.[78] To determine neutrality, the Court focused on the purpose of the law, stating that a law is not neutral if the law's objective "is to infringe upon or restrict practices because of their religious motivation."[79] To determine whether the law's purpose is to restrict religious practices, courts first analyze the text of the law, "for the minimum requirement of neutrality is that a law not discriminate on its face."[80] The general applicability analysis rests on whether religious activities are burdened to the same extent as nonreligious activities.[81]

If the law allegedly burdening religious practice is not neutral or generally applicable, it must withstand strict scrutiny.[82] In other words, the

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75. 508 U.S. 520, (1993) (internal citation omitted). This case involved a city ordinance passed to effectively prohibit a Santeria church's practice of ritual animal slaughter by prohibiting all animal slaughter except by "'licensed establishments' of animals 'specifically raised for food purposes.'" *Id.* at 527–28.

76. *Id.* at 531–32.

77. *Id.*

78. *Id.* at 533, 543.

79. *Id.* at 533.

80. *Id.* "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.*

81. *Id.* at 542–43("[I]nequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation. The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause").

82. *See id.* at 531 ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny."). Strict scrutiny applies to laws that discriminate on the base of a "suspect" classification—*e.g.*, race, alienage—and laws that burden the exercise of fundamental rights, *e.g.*, Free Speech, Free Association, Free Exercise. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268–69 (June 2007). There are other levels of scrutiny including intermediate scrutiny and rational basis scrutiny. Intermediate scrutiny applies when laws involve classifications of quasi-suspect classifications—*e.g.*, gender, illegitimacy—and incidental burdens on free speech. Gayle Lyne Pettinga,

law must be narrowly tailored to accomplish a compelling state interest.[83] While the Court did not define everything that could be a compelling interest, it did find that "[w]here the government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling."[84] Additionally, a restriction is not narrowly tailored if the compelling interests "could be achieved by narrower ordinances that burdened religion to a far lesser degree."[85] Thus, if there is a less burdensome way of accomplishing the compelling interest, strict scrutiny requires that the restriction utilize the less burdensome means.[86]

B. State Authority During a Public Health Emergency

Since the early nineteenth century, the Tenth Amendment has been recognized as the basis for states' police powers during public health

Rational Basis With Bite: Intermediate Scrutiny by Any Other Name, 62 IND. L. J. 799, 784 (1987). The withstand intermediate scrutiny, the law must further an important (rather than compelling) government interest and must do so by means substantially related (rather than narrowly tailored) to that interest. *Id.* Rational basis scrutiny applies when neither fundamental rights nor suspect classifications are at issue. Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VIRGINIA L. REV. 1627, 1629 (2016). To withstand rational basis scrutiny, the law must have a legitimate state interest (rather than important or compelling) and the law must be rationally related (rather than substantially related or narrowly tailored) to the state's interest. *Id.*

83. *See Lukumi*, 508 U.S. at 531–32 ("To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interest.") (quoting McDaniel v. Paty, 435 U.S. 618, 628 (1978); Emp. Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring) ("[W]e have respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest.").

84. *Lukumi*, 508 U.S. at 546–47.

85. *Id.* at 546.

86. *See id.*; *see also* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 847 (2011) (Thomas J., dissenting) (defining a law that passes strict scrutiny as "narrowly tailored to further a compelling interest, without there being a less restrictive alternative that would be at least as effective.") (internal quotation marks omitted).

emergencies.[87] Each state has a statute that outlines the actions that the state may take during a public health emergency.[88]

In 1905, the Supreme Court through *Jacobson v. Massachusetts* upheld mandatory vaccination during a smallpox epidemic despite constitutional challenges.[89] The Court in *Jacobson* stated specifically, "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."[90] *Jacobson* also imparts a two-part standard in determining whether the requirement should be overturned. First, the rule should be overturned if it "has no real or substantial relation to [the] object" of public health.[91] Second, the rule should be overturned if it is "beyond all question, a plain, palpable invasion of rights secured by the fundamental law."[92] The Court in *Jacobson* recognized that there may be different modes to combat a public health crisis.[93] In this situation, "[i]t is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain."[94]

The Ebola outbreak over a century later supplied a few public health emergency cases, mostly focusing on mandatory quarantines.[95] In *Mayhew v. Hickox*, a nurse was placed under mandatory quarantine upon her return to the United States after she was potentially exposed to Ebola while in Sierra Leone.[96] The court found that the quarantine was unreasonable because the

87. The Tenth Amendment reserves to the states all powers "not delegated to the United States by the Constitution." U.S. CONST. amend. X. In 1824, the Supreme Court ruled that the Tenth Amendment provided states with the power to quarantine their citizens. Gibbons v. Odgen, 22 U.S. 1, 112–13 (1824).

88. *State Quarantine and Isolation Statutes,* NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/research/health/state-quarantine-and-isolation-statutes.aspx [https://perma.cc/G293-HNDG] (last updated Aug. 7, 2020).

89. 197 U.S. 11, 37–38 (1905).

90. *Id.* at 27; *see also* Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944) ("The right to practice religion freely does not include liberty to expose the community . . . to communicable disease.").

91. *Jacobson*, 197 U.S. at 31.

92. *Id.*

93. *Id.* at 30.

94. *Id.* Additionally, "the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious disease." *Id.* at 35.

95. Liberian Cmty. Ass'n of Connecticut v. Lamont, 970 F.3d 174 (2d Cir. 2020); Hickox v. Christie, 205 F. Supp. 3d 579 (D.N.J. 2016).

96. No. CV-2014-36, (Me. Dist. Ct., Aroostook, Oct. 31, 2014), https://supremecourt.nebraska.gov/sites/default/files/misc/order_pending_hearing.pdf [].

State failed to prove that quarantine was "necessary to protect other individuals from the dangers of infection."[97]

Most recently, state actions taken to curb the spread of the COVID-19 pandemic have given rise to an abundance of public health emergency litigation.[98] The Supreme Court alone heard nine cases which concerned state responses to the COVID-19 pandemic as of October, 2020.[99] Claims range from due process claims resulting from restrictions on non-essential surgeries and procedures (including abortion) as part of a state's COVID-19 response[100] to Free Exercise claims resulting from restrictions on large gatherings as part of a state's COVID-19 response.[101]

Two recent Supreme Court cases overlap Free Exercise claims and state authority during a public health emergency, one of which is the subject of this note.[102] In *South Bay*, the Supreme Court denied an application for injunctive relief that would enable a church to bypass restrictions ordered by the Governor of California in response to the COVID-19 pandemic.[103] The Court did not write an opinion along with the denial, but Chief Justice Roberts wrote a concurring opinion, finding the restrictions did not violate the Free Exercise Clause because "similar or more severe restrictions appl[ied] to comparable

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97. The nurse was asymptomatic, and Ebola can only be transmitted when symptoms are present. Instead of quarantine, the court allowed her to undergo direct active monitoring pursuant to Center for Disease Control Guidelines. *Id.*

98. *Lawsuits about State Actions and Policies in Response to the Coronavirus (COVID-19) Pandemic, 2020*, BALLOTPEDIA, https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020 [https://perma.cc/Y8RF-PWGP] (listing 997 cases as of Oct. 18, 2020).

99. Stephen Wemiel, *SCOTUS for law students: COVID-19 and Supreme Court emergencies*, SCOTUSBLOG (May 19, 2020 2:45 PM), https://www.scotusblog.com/2020/05/scotus-for-law-students-covid-19-and-supreme-court-emergencies/ [https://perma.cc/VU3K-TFQ3].

100. *In re* Abbott, 954 F.3d 772 (5th Cir. 2020) (applying a *Jacobson* analysis, upholding a ban on non-emergency abortions in a COVID-19 emergency order),) *vacated sub nom.* Planned Parenthood v. Abbott, No. 20-305, 2021 WL 231539 (U.S. Jan. 25, 2021); Adams & Boyle, P.C. v. Slatery, 956 F.3d 913 (6th Cir. 2020) (upholding an injunction against Tennessee's temporary ban on elective and non-urgent surgeries, balancing the constitutional rights of a woman's control of her body and of the state's power during a public health emergency) *vacated sub nom.* Att'y Gen. of TN v. Adams & Boyle, P.C., No. 20-482, 2021 WL 231544 (U.S. Jan. 25, 2021); In re Rutledge, 956 F.3d 1018 (8th Cir. 2020) (applying *Jacobson*, upholding a ban on non-emergency abortions in a COVID-19 emergency order).

101. J. Matthew Szymanski, *Tracking Faith-Based Legal Challenges to Pandemic Orders*, CHURCH LAW & TAX, https://www.churchlawandtax.com/web/2020/may/tracking-pandemic-related-religious-liberty-cases.html [https://perma.cc/8DVH-HSD8] (collecting cases).

102. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020); South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020).

103. *South Bay*, 140 S. Ct. at 1613.

secular gatherings…where large groups of people gather in close proximity for extended periods of time."[104] Chief Justice Roberts further found that only dissimilar activities "in which people neither congregate in large groups nor remain in close proximity for extended times" are treated more leniently.[105] This appears to be a Free Exercise analysis finding that the California order was neutral and generally applicable.[106] Chief Justice Roberts then discussed state authority during a public health emergency, acknowledging that restrictions on social activities "is a dynamic and fact-intensive matter subject to reasonable disagreement," while also recognizing that matters of public health are entrusted "to the politically accountable officials of the States."[107] Chief Justice Roberts further discussed the broad deference entrusted to state officials, stating, "where those broad limits are not exceeded, they should not be subject to second guessing by an 'unelected federal judiciary.'"[108] Roberts emphasized that the fact that deference should be given "is especially true where, as here, a party seeks emergency relief in an interlocutory posture, while local officials are actively shaping their response to changing facts on the ground."[109]

Chief Justice Roberts's concurrence in *South Bay* did not clearly assert which test, the *Smith* Free Exercise test or the *Jacobson* deference during a public health emergency test, would control when faced with a Free Exercise challenge in the midst of a public health emergency.[110] The concurrence indicates that the COVID-19 Order would satisfy the constitutional analysis because houses of worship were not treated differently than comparable non-religious activities.[111] Chief Justice Roberts also indicates that COVID-19 Order would satisfy a *Jacobson* analysis because the Order did not exceed the

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104. *Id.* (Roberts, C.J., concurring).

105. *Id.*

106. *See id.* Although Chief Justice Roberts does not explicitly mention the test from *Smith* (a law that is not generally appliable or neutral must be justified by a compelling government interest and must be narrowly tailored to that interest), the discussion of comparing secular and religious is most similar to the general applicability analysis which rests on whether religious activity is burdened equally to nonreligious activities. *Id.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542–43 (1993) ("[I]nequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation. The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause.").

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

108. *Id.* at 1613–14 (quoting Garcia v. San Antonia Metro. Transit Auth., 469 U.S. 528, 545, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985)).

109. *Id.* at 1614.

110. *Id.* at 1613–14.

111. *Id.* ("[The] restrictions appear consistent with the Free Exercise Clause of the First Amendment. . . . That notion that it is 'indisputably clear' that the Government's limitations are unconstitutional seems quite improbable.").

"broad limits" of deference.[112] It may be inferred that this *Jacobson* determination was only made *after* concluding the Order was consistent with the Free Exercise Clause. The question remains unanswered which test would control if the outcomes for the two analyses were at odds, which is to say: what if the state singled out houses of worship for different treatment from similarly-situated secular activities during a pandemic?[113] There is little judicial precedent to guide how States should handle such Free Exercises challenges amidst an emergency.[114]

IV. INSTANT DECISION

In the instant case, the majority denied the application for injunctive relief without providing any rationale, and no Justice provided a concurring opinion.[115] This was a five-to-four decision with the majority opinion presented by Justice Kagan, joined by Justices Ginsburg, Roberts, Sotomayor, and Breyer.[116] There were three dissenting opinions. These opinons, collectively, were joined by four justices, but Justice Thomas did not write his own dissent.[117]

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112. *Id.*

113. Some circuit courts have addressed this issue regarding abortion, but the decisions are inconsistent. *Compare In re* Abbott, 954 F.3d 772 (5th Cir. 2020) (applying a *Jacobson* analysis, upholding a ban on non-emergency abortions in a COVID-19 emergency order) *and In re* Rutledge, 956 F.3d 1018 (8th Cir. 2020) (applying *Jacobson*, upholding a ban on non-emergency abortions in a COVID-19 emergency order) *with* Robinson v. Attorney Gen., 957 F.3d 1171 (11th Cir. 2020) (upholding an injunction of a health officer's order requiring non-emergency procedures to be postponed) *and* Adams & Boyle, P.C. v. Slatery, 956 F.3d 913 (6th Cir. 2020) (upholding an injunction against Tennessee's temporary ban on elective and non-urgent surgeries, balancing the constitutional rights of a woman's control of her body and of the state's power during a public health emergency).

114. U.S. CONGRESSIONAL RESEARCH SERVICE, UPDATE: BANNING RELIGIOUS ASSEMBLIES TO STOP THE SPREAD OF COVID-19, 3 (Updated June 1, 2020), https://crsreports.congress.gov/product/pdf/LSB/LSB10450 [https://perma.cc/B3VK-YMXU]. "[S]ome intermediate federal courts of appeal have held that in limited emergency circumstances, courts may apply a more lenient standard of review to analyze the constitutionality of measures responding to the emergency. . . Other federal appellate courts have applied an emergency-circumstances standard that asks whether the government acted in 'good faith' and 'whether there is some factual basis' to conclude that the acts 'were necessary to maintain order.'" *Id.* at 2–3.

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

116. *Id.*

117. *Id.*

A. Justice Alito's Dissenting Opinion

Justice Alito wrote a dissenting opinion joined by Justices Thomas and Kavanaugh.[118] Justice Alito recognized that "imposing unprecedented restrictions on personal liberty, including the free exercise of religion . . . was understandable [as an initial response]," but the restrictions are not permitted to last for the entire length of the pandemic.[119] Instead, Justice Alito suggested that "[a]s more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights."[120] Indicating that the Emergency Directive was issued more than two months after Governor Sisolak declared a state of emergency, Justice Alito would not characterize the declaration as one of exigency.[121]

Justice Alito examined the directive under the Free Exercise and Free Speech claims, arguing that Calvary would likely succeed on both claims.[122] First, Alito determined that the directive was not generally applicable or neutral because the "directive specifically treats worship services differently from other activities that involve extended, indoor gatherings of large groups of people."[123] Following this conclusion, Justice Alito asserted that the directive must withstand strict scrutiny.[124] The directive does not hold up under strict scrutiny according to Justice Alito's analysis.[125] Justice Alito reiterated the fact that "Nevada does not even try to argue that the directive can withstand strict scrutiny."[126] Justice Alito concludes that the limit on religious gatherings does not serve the compelling interest because it does not attempt to serve that interest in other areas, such as casinos.[127] Justice Alito additionally suggests that even if the limitation of fifty people at religious

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118. *Id.* at 2603–09(Alito, J., dissenting).

119. *Id.* at 2604–05.

120. *Id.* at 2605.

121. *Id.*

122. *Id.* at 2605–09.In terms of the free speech claim, Alito found that the Governor favored certain speech, namely Black Lives Matter protests, over religious speech, in violation of the First Amendment. *Id.* at 2607–08.

123. *Id.* at 2605–06 (comparing the fifty person limit for churches to the 50% capacity limit for bowling alleys, breweries, fitness facilities, and casinos) ("[F]acilities other than houses of worship, such as museums, art galleries, zoos, aquariums, trade schools, and technical schools, are also treated less favorably than casinos, but obviously that does not justify preferential treatment for casinos.").

124. *Id.* at 2607.

125. *Id.* at 2608.

126. *Id.*

127. *Id.* (quoting Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1992) ("[A] law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest prohibited.")).

services serves a compelling interest, it would not survive strict scrutiny because there were less restrictive options.[128]

After arguing that the directive must be examined under strict scrutiny and that the directive would fail that examination, Justice Alito turned to the issue of deference to state authority during a public health emergency.[129] Justice Alito, unconvinced that the Nevada directive would satisfy the *Jacobson* test,[130] stated that the *Jacobson* analysis should not be determinative in situations "when statewide measures of indefinite duration are challenged under the First Amendment or other provisions not at issue in that case."[131] Justice Alito rejected Nevada's contention that the Emergency Directive deserves greater deference following the decision in *South Bay*.[132] After recounting that Justice Alito had dissented in that opinion also, Justice Alito distinguished this case from *South Bay* because in *South Bay*, the activities and businesses that were treated more favorably than churches were dissimilar in that "people neither congregate in large groups nor remain in close proximity for extended periods."[133] In this case, Justice Alito found that the businesses and activities favored in the Nevada Emergency Directive were not dissimilar to churches in that way.[134]

B. Justice Kavanaugh's Dissenting Opinion

Justice Kavanaugh joined Justice Alito's dissenting opinion arguing that the Emergency Directive is overtly discriminatory toward religion but wrote a separate dissenting opinion to add further comments.[135] Justice Kavanaugh sought to clarify that he outlined a test for religious discrimination cases where the law "divv[ies] up organizations into a favored or exempt category and a

128. *Id.* ("And even if the 50-person limit served a compelling interest, that State has not shown that public safety could not be protected at least as well by measures such as those Calvary Chapel proposes to implement.").

129. *Id.* at 2608–09.

130. *Id.* at 2608 ("[W]hen a state exercises emergency policy powers to enact an emergency public health measure, courts will uphold it unless (1) there is no real or substantial relation to public health, or (2) the measures are beyond all question, a plain[,] palpable [invasion] of rights secured by the fundamental law.") (internal quotation marks omitted).

131. *Id.* (indicating that *Jacobson* was a case concerned with substantive due process).

132. *Id.* at 2608–09.

133. *Id.* (quoting South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1614 (Roberts, C. J., concurring)).

134. *Id.* at 2609("In casinos and other facilities granted preferential treatment under the directive, people congregate in large groups and remain in close proximity for extended periods.").

135. *Id.* at 2609–15 (Kavanaugh, J., dissenting).

disfavored or nonexempt category."[136] The test is used to determine whether the religious organizations fits the requirement Justice Kavanaugh defined: That "religious organizations be treated *equally* to the favored or exempt secular organizations, unless the State can sufficiently justify the differentiation."[137] Justice Kavanaugh describes this test as synonymous to the *Smith* test.[138]

Justice Kavanaugh also responded to Nevada's claim of expanded deference to the state during a public health emergency.[139] Justice Kavanaugh agreed that courts should allow greater deference to states when it comes to opening certain businesses and activities during a pandemic, but since he had already determined that the law was discriminatory, Kavanaugh stressed that "COVID-19 is not a blank check for a State to discriminate against religious people, religious organizations, and religious services. There are certain constitutional red lines that a State may not cross even in a crisis."[140]

Justice Kavanaugh, like Justice Alito, dissented in *South Bay*, "but accepting *South Bay* as a precedent," distinguished this case because of the types of businesses and activities that are alleged to be dissimilar to religious services.[141] Justice Kavanaugh determined that bars, casinos, and gyms "entail people congregating in large groups or remaining in close proximity for extended periods of time" and are therefore not dissimilar to religious services.[142]

C. Justice Gorsuch's Dissenting Opinion

136. *Id.* at 2611–12. Three other categories of laws under review in Free Exercise or Establishment cases, as defined by Justice Kavanaugh, are as follows: "(1) laws that expressly discriminate against religious organizations; (2) laws that expressly favor religious organizations; (3) laws that do not classify on the basis of religion but apply to secular and religious organizations alike." *Id.* at 2610.

137. *Id.* at 2613 (emphasis in original). Justice Kavanaugh concedes that "the Court's precedents do *not* require that religious organizations be treated *more favorably* than all secular organizations." Only that if there is an organization that is exempt or treated favorably, religious organizations must be too. *Id.* (emphasis in original).

138. *Id.* at 2612.

139. *Id.* at 2613–15.

140. *Id.* at 2614."This Court's history is littered with unfortunate examples of overly broad judicial deference to the government when the government has invoked emergency powers and asserted crisis circumstances to override equal-treatment and free-speech principles. The court of history has recognized those jurisprudential mistakes and cautions us against an unduly deferential judicial approach, especially when questions of racial discrimination, religious discrimination, or free speech are at stake." *Id.* at 2614–15.

141. *Id.* at 2615. In *South Bay*, the dissimilar businesses were restaurants, supermarkets, retail stores, pharmacies, hair salons, and offices. Here, the allegedly dissimilar businesses and activities are bars, casinos, and gyms. *Id.*

142. *Id.*

Justice Gorsuch wrote a separate dissenting opinion, comparing the restrictions for movie theaters and casinos to churches.[143] Justice Gorsuch concluded that, "[i]n Nevada, it seems, it is better to be in entertainment than religion. . . . But there is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel."[144]

V. COMMENT

The Supreme Court has yet to explicitly state how to balance a constitutional analysis of Free Exercise claims during a public health emergency. In this case, the Court did not clarify how it arrived at its decision to deny an application for emergency injunction. Three differing inferences, of consequence, could be made based on the analyses in the dissenting opinions – all of which focus on the likelihood of success on the merits.[145]

A. Prioritizing Free Exercise

First, one could infer that the Court prioritized a Free Exercise analysis, but denied the injunction because Calvary failed to show that they were likely to succeed on the merits of this claim.[146] It is plausible that the majority did not find that the Emergency Directive violated the Free Exercise Clause and would have prioritized the Free Exercise analysis had Calvary brought a meritorious claim. This is the most likely reasoning under the inference that Chief Justice Roberts's concurrence in *South Bay* prioritized the constitutional analysis. If this is the analysis the majority chose, the majority erred in denying the emergency injunction. Calvary Chapel should have been granted the emergency injunction because, unlike many of the other churches claiming a violation of the Free Exercise Clause due to COVID-19 restrictions,[147] Calvary Chapel's claim would likely succeed on the merits of a Free Exercise analysis because the Emergency Directive would not survive strict scrutiny.

As an initial matter, he Emergency Directive should invoke strict scrutiny because it is not generally applicable. The analysis for general

143. *Id.* at 2609.

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

145. Other inferences could be that the Court prioritized a *Jacobson* analysis, but still found that the directive would survive strict scrutiny, that the Court did not find that Calvary would suffer irreparable harm, or that neither the balance of equities nor the public would favor an injunction. These inferences are not likely based on the focus of lower courts' findings and the arguments from the dissenting opinions. Even if these inferences were accurate, it would still be beneficial for the Supreme Court to demonstrate its reasoning.

146. This would be the most likely inference if Chief Justice Roberts's concurrence in *South Bay* is read to conduct the *Jacobson* analysis only *after* finding the Order at issue to be consistent with the constitutional analysis.

147. *See e.g., COVID-19 Related Litigation: Constitutionality of Stay-at-Home, Shelter-in-Place, and Lockdown Orders*, 55 A.L.R. Fed. 3d Art. 3 § 4 (2020).

applicability falls on whether the activities that are exempted – casinos, bars, and gyms – are similar to the activities that are not exempted – namely, houses of worship.[148] Casinos and group fitness classes are similar to churches because these are three activities where "large groups of people gather in close proximity for extended periods of time."[149] *Calvary Chapel* can be distinguished from *South Bay* because *South Bay* restricted all businesses and activities comparable to churches in the same way that churches were restricted.[150] In *Calvary Chapel*, other comparable businesses and activities were restricted just as much as churches, but some comparable businesses and activities were not.[151]

The Emergency Directive should fail strict scrutiny because the State's interest is not compelling, and the Emergency Directive is not narrowly tailored to a compelling interest. While a general desire to promote health and safety amid a pandemic is a clearly compelling interest,[152] Justice Alito's analysis accurately follows the precedent in *Lukumi* in that the general compelling interest does not necessarily create a compelling interest for the action taken.[153] This is particularly so when the action is not applied in a consistent manner to all potential targets. Nevada "fail[ed] to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort," such as the spread of COVID-19 at businesses and activities similar to churches—such as casinos.[154]

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148. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542–43 (1993) ("[I]nequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation. The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause.").

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

150. *Id.*

151. *See* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2605 (2020) (Alito, J., dissenting).

152. *See id.* at 2613 (Kavanaugh, J., dissenting) ("Nevada undoubtedly has a compelling interest in combating the spread of COVID-19 and protecting the health of its citizens."); *South Bay*, 140 S. Ct. at 1614 (Kavanaugh, J., dissenting) ("California undoubtedly has a compelling interest in combating the spread of COVID-19 and protecting the health of its citizens."); Roberts v. Neace, 958 F.3d 409, 415 (6th Cir. 2020) ("[N]o one contests that the Governor has a compelling interest in prevent the spread of a novel, highly contagious, sometimes fatal virus.").

153. *Calvary Chapel*, 140 S. Ct. at 2608 (Alito, J., dissenting) ("Having allowed thousands to gather in casinos, the State cannot claim to have a compelling interest in limiting religious gatherings to 50 people—regardless of the size of the facility and the measures adopted to prevent the spread of the virus.").

154. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546–47 (1993); *see also* GOVERNOR SISOLAK, *supra* note 6, at § 35.

Assuming an analysis where the interest is compelling in the context of the Emergency Directive's specific restrictions,[155] the Emergency Directive would still fail strict scrutiny because the limit of fifty people in a place of worship is not narrowly tailored to the goal of limiting the spread of COVID-19. As in *Lukumi*, Nevada had other means of serving the general compelling interest of curbing the spread of COVID-19 without a strict fifty person limit on houses of worship.[156] For example, Nevada could have utilized the same limits for houses of worship and casinos, whether that be a strict fifty-person limit or a limit of fifty percent of the building's capacity.

A consequence of prioritizing the Free Exercise analysis is that during times of emergency, states typically would not have adequate time to fully develop their emergency policies. Like Justice Roberts expressed, "local officials are actively shaping their response to changing facts on the ground."[157] Instead of effectively facing the emergency, states would be "bogged down in litigation."[158]

B. Prioritizing Jacobson

Second, the Court may have prioritized a *Jacobson* analysis and denied injunction despite finding Calvary likely to succeed on the merits of a Free Exercise claim because the *Jacobson* analysis essentially lowered the scrutiny of government officials' actions during a public health crisis. The inference that the Court prioritized a *Jacobson* analysis and denied injunction despite finding Calvary likely to succeed on the merits of a Free Exercise claim is plausible. The dissenting opinions in *Calvary Chapel* each suggest that the dissenters would prioritize the Free Exercise analysis, lending support to the inference that the majority did not.[159] Justice Kavanaugh's dissent specifically supports this inference in his discussion of the Supreme Court's history of "unfortunate examples of overly broad judicial deference to the government when the government has invoked emergency powers and asserted crisis circumstances to override equal-treatment and free-speech principles."[160]

If *Jacobson* controls, it would effectively lower constitutional scrutiny. There are numerous situations, like Justice Kavanaugh alluded, where broad deference to the government in the name of an emergency has been destructive to a vulnerable demographic's constitutional rights.[161] Reducing

155. *Cf.*, *Lukumi*, 508 U.S. at 546–47 (finding the city failed to demonstrate that the government interests were compelling "in the context of these ordinances").

156. *See id.* at 546.

157. *South Bay*, 140 S. Ct. at 1614.

158. *Calvary Chapel*, 140 S. Ct. at 2614 (Kavanaugh, J., dissenting).

159. *See id.* at 2603–15 (majority opinion)

160. *Id.* at 2615 (Kavanaugh, J., dissenting).

161. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (upholding an Executive Order requiring Japanese-Americans to relocate to internment camps under the guise of national security following the attack on Pearl Harbor); Hirabayashi v.

constitutional scrutiny would create a temptation for a state to use an emergency as an excuse to hinder rights belonging to "the most vulnerable members of society."[162] Currently, states unsympathetic to women's rights have attempted to use the COVID-19 pandemic as justification to cripple a woman's bodily autonomy with varying levels of success.[163] Additionally with the current public health emergency, it is not clear how long the situation could last. Justice Alito recognized that greater deference may be necessary at the onset of the emergency, but the emergency does not allow governors "to disregard the Constitution for as long as the medical problem persists."[164] If the state officials retained heightened deference for the entire length of the emergency, this grant of power could also lead to an unwillingness to acknowledge when the emergency is over.

C. Equal Weight to Free Exercise and Jacobson

Third, the Court may have provided equal weight to the Free Exercise analysis and the *Jacobson* analysis, but still denied injunction because Calvary failed to show that they were likely to succeed on the merits of this claim. As described above, if this is the analysis the majority chose, the majority erred in denying the emergency injunction because I would find that Calvary would be likely to succeed on the merits of the claim.

In balancing the consequences of prioritizing the two competing analyses, the potential for states to take advantage of an emergency situation to discriminate against vulnerable populations outweighs the potential inconvenience a state may face when establishing emergency policies. While

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United States, 320 U.S. 81 (1943) (upholding a curfew for Japanese-Americans under the guise of national security following the attack on Pearl Harbor) ("[I]n time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of different ancestry.").

162. Caroline Mala Corbin, *Religious Liberty in a Pandemic*, 70 DUKE L.J. ONLINE 1, 7 (2020).

163. *Id.*; *See, e.g.*, *In re* Abbott, 954 F.3d 772 (5th Cir. 2020) (applying a *Jacobson* analysis, upholding a ban on non-emergency abortions in a COVID-19 emergency order); *In re* Rutledge, 956 F.3d 1018 (8th Cir. 2020) (applying *Jacobson*, upholding a ban on non-emergency abortions in a COVID-19 emergency order); Robinson v. Attorney Gen., 957 F.3d 1171 (11th Cir. 2020) (denying a motion to stay an injunction of a health officer's order requiring non-emergency procedures to be postponed); Adams & Boyle, P.C. v. Slatery, 956 F.3d 913 (6th Cir. 2020) (upholding an injunction against Tennessee's temporary ban on elective and non-urgent surgeries, balancing the constitutional rights of a woman's control of her body and of the state's power during a public health emergency). *See also* Laurie Sobel, *State Action to Limit Abortion Access During the COVID-19 Pandemic*, KFF (Aug. 10, 2020), https://www.kff.org/coronavirus-covid-19/issue-brief/state-action-to-limit-abortion-access-during-the-covid-19-pandemic/ [https://perma.cc/ZC3S-TMCN]; Corbin, *supra*, at 7 n.36 ("That these bans were a pretext to eliminate abortion rather than preserve medical resources or prevent the spread coronavirus became evident by the bans' inclusion of medical abortion which can be provided remotely.").

164. *Calvary Chapel*, 140 S. Ct. at 2605 (Alito, J., dissenting).

states should still be given deference under a *Jacobson* analysis in times of public health emergency, that deference should not allow the state to discriminate without withstanding strict scrutiny. To give states deference despite infringing on constitutional rights would be to unnecessarily expand a state's discretion. Justice Kavanaugh is correct that the Free Exercise analysis should control because emergency powers should not be used as an excuse for veiled discrimination.[165] Greater deference should not be blindly given to states, even in crisis, when strict scrutiny would be invoked.[166] When a challenged law is subject to intermediate or rational basis scrutiny, a greater amount of deference may be given to the State because the stakes would not be as high.[167]

D. The Aftermath

No matter which constitutional analysis the Court used, the new Court – consisting of the Trump appointee Justice Barrett in the late Justice Ginsburg's seat – denied Calvary Chapel's writ of certioriari which encouraged the Court to review the case in full, after its denial of the emergency injunction.[168] While awaiting the Court's decision on the writ of certioriari, the Ninth Circuit reversed the denial of Calvary Chapel's motion for a preliminary injunction, wholly because of the precedent provided by the decision in *Roman Catholic Diocese*.[169] *Roman Catholic Diocese* was similarly at the Supreme Court on application for injunctive relief.[170] In this case, the Court provided a per curiam opinion, two separate concurrences, and three separate dissents.[171]

Perhaps if the majority in *Calvary Chapel* had written an opinion or provided a concurring opinion, the new Court may not have had the ability to shift Free Exercise jurisprudence without explicitly overturning past

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165. *Id.* at 2614.

166. Strict scrutiny is invoked for laws that discriminate on the base of a "suspect" classification—*e.g.*, race, alienage—and laws that burden the exercise of fundamental rights, *e.g.*, Free Speech, Free Association, Free Exercise. Fallon, *supra* note 83, at 1268–69.

167. Intermediate scrutiny applies when laws involve classifications of quasi-suspect classifications—*e.g.*, gender, illegitimacy—and incidental burdens on free speech. Pettinga, *supra* note 83, at 784. Rational basis scrutiny applies when neither fundamental rights nor suspect classifications are at issue. Nachbar, *supra* note 83, at 1629.

168. Calvary Chapel Dayton Valley v. Sisolak, No. 20-639, 2021 U.S. LEXIS 709 (Jan. 25, 2021).

169. Calvary Chapel Dayton Valley v. Sisolak, 982 F.3d 1228, 1232 (9th Cir. 2020) (citing Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam)) ("The Supreme Court's recent decision in Roman Catholic Diocese . . . compels the result in this case.").

170. 141 S. Ct. at 63.

171. *Id.* at 63–81.

precedent.[172] Additionally, if the Supreme Court had written an opinion along with the denial of injunctive relief for Calvary, the Ninth Circuit may not have determined that *Roman Catholic Diocese* compelled reversal. Instead, the Ninth Circuit may have been able to distinguish *Calvary Chapel* and *Roman Catholic Diocese.*[173]

VI. CONCLUSION

Public health emergencies are not new, and there are likely to be more in the future. Without a clear decision from the Supreme Court on how to balance the competing constitutional analysis and public health emergency analysis, courts are likely to continue to vary, creating confusion and conflicting outcomes.[174] Arguably, the majority in *Calvary Chapel* should have written an opinion or concurrence to demonstrate the analysis for these issues. If the Court had walked through the constitutional analysis, showing that the Emergency Directive was neutral and generally applicable, it would have made clear that the constitutional analysis was the top priority, even during a pandemic. On the other hand, if the Court had shown that the Emergency Directive was neither neutral nor generally applicable and would not satisfy strict scrutiny, but still rejected the injunction, this would provide the lower courts with a clear procedure to follow for the inevitable multitude of lawsuits filed against COVID-19 policies. Instead, lower courts have

172. The per curiam opinion in *Roman Caholic Diocese* does not explicitly overturn the decisions in *South Bay* or *Calvary Chapel* or even refer to these previous cases. *See id.* at 63–69. The concurring opinions imply that *Roman Catholic Diocese*'s facts are distinct from these previous cases. *See id.* at 69–75; *id.* at 72–73 (Kavanaugh J., concurring) (citing Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020)) ("To reiterate, New York's restrictions on houses of worship are much more severe than the California and Nevada restrictions at issue in *South Bay* and *Calvary*.); South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020)).

173. Justice Kavanaugh's concurrence in *Roman Catholic Diocese does* distinguish the present case from *Calvary Chapel*. *Id.* ("To begin with, New York's 10-person and 25-person caps on attendance at religious services in red and orange zones (which are areas where COVID-19 is more prevalent) are much more severe than most other States' restrictions, including the California and Nevada limits at issue in *South Bay*. . . . and *Calvary Chapel.*").

174. *Compare* Phillips v. City of New York, 775 F.3d 538, 543 (2d Cir. 2015) (finding that *Jacobson* does not control a Free Exercise claim) *and* Adams & Boyle, P.C. v. Slatery, 956 F.3d 913 (6th Cir. 2020) (upholding an injunction against Tennessee's temporary ban on elective and non-urgent surgeries, balancing the constitutional rights of a woman's control of her body and of the state's power during a public health emergency) *with In re* Abbott, 954 F.3d 772, 786 (5th Cir. 2020) ("*Jacobson* instructs that all constitutional rights may be reasonably restricted to combat a public health emergency.") *and In re* Rutledge, 956 F.3d 1018 (8th Cir. 2020) (applying *Jacobson*, upholding a ban on non-emergency abortions in a COVID-19 emergency order).

interpreted different reasonings to the decision in *Calvary Chapel* which has created confusion in a time that is chaotic enough.[175]

175. As of November 20, 2020, twenty cases already cited *Calvary Chapel* as precedent. A Maryland District Court recently characterized the precedent as requiring a court to "apply *Jacobson* to determine whether the plaintiffs' constitutional claims survive the motion to dismiss," despite noting contrary authority such as Justice Alito's dissent in *Calvary Chapel*. Antietam Battlefield KOA v. Lawrence J. Hogan, No. CV CCB-20-1130, 2020 WL 6777590, at *2 (D. Md. Nov. 18, 2020) (citing *South Bay* and four circuit court decisions); Antietam Battlefield KOA v. Lawrence J. Hogan, No. CV CCB-20-1130, 2020 WL 6777590, at *2 n.4 (D. Md. Nov. 18, 2020). Adversely, a Pennsylvania District Court rejected a balancing of Jacobson outright because of the concern that emergency measures could be indefinite, instead opting to apply "regular" constitutional scrutiny. Cty. of Butler v. Wolf, No. 2:20-CV-677, 2020 WL 5510690, at *8 (W.D. Pa. Sept. 14, 2020). The Pennsylvania court was persuaded by Professors Wiley and Vladeck of Harvard Law School who argue that courts have been erroneously applying a suspension model of judicial review during the COVID-19 pandemic in which "constitutional constraints on government [are] suspended in times of emergency." Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 Harv. L. Rev. F. 179 (2020).