From the Shadows: The Public Health Implications of the Supreme Court's COVID-Free Exercise Cases

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Abstract: This article analyzes the Supreme Court's "shadow docket" Free Exercise cases relating to COVID-19. The paper highlights the decline of deference, the impact of exemptions, and the implications of the new doctrine for vaccine and other public health laws.

The relationship between religious liberty and public health has always been fraught. When plagues strike, societies often turn to prayer and communal worship. Frequently they also scapegoat non-believers, heretics, and members of minority faiths.[1] That history should caution courts to be vigilant when pandemic responses target religious minorities and the exercise of religion. Yet, because pathogens do not distinguish between religious and secular activities, governments cannot ignore the risks that religious activities can pose during a pandemic. Since the start of the COVID-19 pandemic, American courts have struggled to reconcile these dueling imperatives.

Early in the pandemic, most courts, including the Supreme Court,[2] rejected challenges to public health emergency orders even when they applied to worship. Then on November 25, 2020, in *Roman Catholic Diocese v. Cuomo*,[3] the Court changed course, offering a strikingly different approach that casts a far more skeptical eye on state health orders that touch upon religious practices, especially in-person worship. Although much remains unclear, the Court's more recent decisions regarding COVID restrictions — all announced from the "shadow docket" without the benefit of argument[4] — forgo both deference to state officials and consideration of public health evidence in the determination of whether the state has regulated religious activities less favorably than comparable secular activities. Now almost any public health law that includes an exemption for some secular activity risks being subject to strict scrutiny in a Free Exercise claim. As a result, the states' capacity to carry out essential public health functions, as well as protect their populations from COVID-19 or other, potentially more lethal, pandemics, is in jeopardy. To ensure that states are not left impotent to protect the public's health, the Court needs to rethink its approach. While

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deference should not be absolute, states should not be precluded from protecting the public's health.

This paper develops these arguments. Part One briefly reviews the nation's failed response to COVID and the state orders that have impacted worship. Part Two summarizes the application of the Free Exercise law to public health measures prior to and early in the pandemic. Part Three surveys the Supreme Court's changing approach. Part Four interrogates the new approach, noting its most important features and highlighting areas of uncertainty. The Conclusion considers the potential impact of the COVID-cases on vaccine mandates and other public health laws post-pandemic.

Part One: A Patchwork of Orders

There is little question that the U.S. response to COVID-19 has been catastrophic. Although the U.S. does not have the highest per capita death rate in the world, more than 750,000 Americans had died from COVID-19 by November 3, 2021.[5] Millions more have been seriously ill, and thousands are long-haulers who face long-term health problems.[6] Communities of color and immigrants have been especially hard hit, both by the disease and its economic and social fallouts.[7]

Many factors impeded the nation's response to COVID-19.[8] For present purposes, three appear especially relevant. First, is political polarization. Although there was bipartisan consensus for the initial round of emergency orders issued in March 2020, it quickly faded.[9] By April 2020, the pandemic had taken on a distinctly political hue, with Republicans less concerned about the coronavirus and less supportive of state emergency orders than Democrats.[10] That political divide continued during a presidential campaign in which one candidate (then President Trump) minimized the pandemic and the other (now President Biden) made it his number one priority.[11] Given the pre-existing political alignment between religiosity and party affiliation,[12] not to mention President Trump's emphasis on re-opening church services, partisan differences over the pandemic easily converted into a divide between religiosity and secularism.[13]

Second, was the lack of a coordinated, federal response. Under the Constitution, states have primary responsibility for public health protection.[14] Nevertheless, pandemics cross state lines and necessitate a level of national coordination that has been largely absent during the pandemic.[15] As a result, states were largely left to go their own way as they tried contain the pandemic while mitigating its economic and social effects.[16] This led to a confounding and often incoherent patchwork of orders.[17]

Third, was insufficient economic support to buffer the economic fallout from pandemic-control measures.[18] As public health scholars have noted, the provision of economic (and other forms) of support can be critical to obtaining compliance with public health advice.[19] People are more likely to stay home following potential exposure to a contagious disease if they do not have to worry about losing their job. Likewise, businesses are more likely to support public health measures if they know they can avoid economic catastrophe. During a pandemic, economic relief can be a critical tool for disease mitigation.

Congress did provide significant support through the CARES[20] and the Families First Coronavirus Response Acts[21] in the spring of 2020. The December 2020 Coronavirus Response and Relief Supplemental Appropriations Act of 2021 offered additional aid,[22] as did the American Rescue Plan Act that President Biden signed into law in March 2021.[23] The support that these acts offered, however, did not reach everyone, and the delay in enacting further relief in the late summer and fall of 2020 added to the challenge that

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states faced as they tried to balance human and economic health.[24] The results were not pretty. Initially, most states issued a series of emergency orders that shuttered some, but not all businesses, and limited many, but not all, social gatherings. Then, as pandemic fatigue, economic stress, and partisan divisions grew, states began to "reopen."[25] Once cases re-surged in winter 2020-2021, some governors re-imposed some, but not all, of the restrictions.[26]

This less-than-coherent approach extended to religious worship. Early on, it became clear that religious worship and gatherings could serve as super-spreader events.[27] South Korea's initial outbreak, for example, was tied to services in a charismatic religious community.[28] In March 2020, an Arkansas church service was associated with 61 cases and four deaths.[29] As 2020 progressed, evidence accumulated that indoor activities where people are close to one another for an extended period, especially where there is singing or loud talking, are especially risky.[30] Nevertheless, the CDC did not recommend restrictions on worship, noting that millions of Americans "embrace worship as an essential part of life."[31]

In spring 2020, when COVID-restrictions were at their most stringent, most states exempted religious services from orders that shuttered mass gatherings.[32] According to the Pew Research Center, only 10 states barred in-person religious services in April 2020.[33] About one-third of states placed no caps at all on in-person religious gatherings.[34] Three states deemed religious worship to be "essential services."[35] Still, religious services did not escape regulation. In April 2020, 22 states limited religious gatherings to 10 or fewer persons.[36] Some states had even stricter and some had looser requirements.[37]

In the summer and fall of 2020, even as infections surged, more states "opened up," lifting restrictions on religious worship, as well as other activities.[38] Other states, including New York and California, maintained significant restrictions.[39] As the discussion below shows, challenges to these laws helped to reshape the Court's understanding of how the Free Exercise Clause applies to public health laws.

Part Two: Doctrinal Roots and the Early COVID Cases

Prior to COVID-19, the application of the Free Exercise clause to communicable disease laws was relatively stable, if under-theorized. Three cases formed the foundation for the analysis: *Jacobson v. Massachusetts*,[40] *Employment Division v. Smith*,[41] and *Church of the Lukumi Babalu Aye v. Hialeah*.[42]

Strictly speaking, *Jacobson* was not a Free Exercise case. The 1905 decision concerned a Cambridge, Massachusetts law requiring all residents to be vaccinated against smallpox or pay a $5 fine. The defendant, Henning Jacobson, was a Lutheran pastor who had both religious and secular objections to vaccination.[43] Yet, because the Supreme Court had yet to apply the Free Exercise Clause to the states,[44] he based his challenged on the due process clause, not the Free Exercise clause.[45]

In a complex and multi-faceted opinion by Justice Harlan, the Court rejected Jacobson's contentions, emphasizing that a community has the "right to protect itself against an epidemic of disease which threatens the safety of its members."[46] This did not mean that communicable disease laws were wholly beyond judicial review. Rather, the Court recognized that the police power extended only to "reasonable regulations, as the safety of the general public may demand,"[47] and that courts should step in when public health laws have "no real or substantial relation" to their "objects," or are "beyond all question, a plain, palpable invasion of rights secured by the fundamental law."[48] The Court also noted that some regulations might be "so arbitrary and oppressive in particular cases, as to justify the interference of the courts."[49] Still, *Jacobson* provided strong support for the principle that states can limit individual liberty to prevent the spread of communicable diseases, and that courts should provide considerable deference to the elected branches, and the health officials to whom they delegate power, to determine what steps are needed to stop an epidemic.[50]

For more than 100 years, *Jacobson* remained the Court's leading infectious disease case, and primary authority for the constitutionality of vaccine mandates (even in the absence of an epidemic).[51] Moreover, although *Jacobson* was not a Free Exercise case, the Court cited it in several notable religious liberty cases. For example, the Court referenced it in *Prince v. Massachusetts* while rejecting a religious liberty challenge to a child labor law.[52] The Court also cited *Jacobson* in *Sherbert v. Verner*,[53] which held that the denial of unemployment benefits to a Seventh-Day Adventist who refused to work on her Sabbath violated the Free Exercise Clause, for the proposition that the Constitution does not require accommodations to laws that regulate actions that "pose[] some substantial threat to public safety, peace or order."[54]

Smith overruled *Sherbert,* but in doing so, the Court did not reject the point that *Sherbert* drew from *Jacobson.* Rather, Justice Scalia's opinion in *Smith* ruled that all generally applicable regulations of conduct, and not simply those that seek to prevent a substantial threat to public safety, peace or order, were subject to rational basis review, even if they burdened someone's exercise of religion.[55]

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Lukumi added an important limitation to *Smith*.[56] In *Lukumi,* the Court clarified that laws that were facially neutral, but targeted religion, were subject to strict scrutiny, and were constitutional only if they were narrowly tailored to a compelling state interest.[57] In *Masterpiece Cakeshop v. Colorado Civil Rights Commissio*n, the Court relied on *Lukumi* to hold that the Colorado Civil Rights Commission violated the Free Exercise Clause because it acted with hostility toward the religious beliefs of a baker who refused to decorate a cake celebrating a same-sex marriage.[58] Tellingly, Justice Gorsuch, in a concurring opinion, wrote "*Smith* remains controversial in many quarters."[59] However, he did not call for overruling *Smith.* Instead, he argued that the state had failed to act with neutrality in applying an intent requirement to the state's civil rights laws to bakeshops that refused service.[60]

Gorsuch's focus on the state's perceived lack of neutrality in *Masterpiece Cake* echoed Justice Alito's 2016 dissent in *Stormans, Inc. v. Wiseman* [61] *Stormans* challenged a Washington State law that required pharmacists to sell contraceptives, including Plan B. Relying on *Smith* and *Lakumi,* the Ninth Circuit concluded that because the state's rule was neutral and generally applicable, strict scrutiny was not required.[62]

In a dissent from the Court's denial of certiorari, Justice Alito, joined by the Chief Justice and Justice Thomas, argued that because the Washington allowed pharmacies to refuse to fill prescriptions when they did not accept the customer's insurance it was neither neutral nor generally applicable; hence strict scrutiny was required.[63] This analysis suggested — or foretold — that the existence of *any* secular exemption from a regulation that also implicated a religious practice would trigger strict scrutiny.

The interest among some justices in narrowing *Smith* was also evident by the Court's February 2020 decision to grant certiorari in *Fulton v. City of Philadelphia*.[64] In *Fulton,* a Catholic foster care agency challenged Philadelphia's refusal to enter into new contracts with the agency due to its refusal to place children with same-sex couples. The Third Circuit had found that the city's policy was a generally applicable law, subject under *Smith*, to rational basis review.[65] The grant of certiorari included the question whether *Smith* should be overruled.[66]

Despite these forewarnings, until COVID-19, lower courts usually upheld communicable disease laws against Free Exercise claims. This was especially apparent with regard to state vaccine laws.[67] For example, even after California and New York repealed religious exemptions for school-based mandates, courts relied on *Smith* and/or *Jacobson* to reject Free Exercise challenges.[68] The existence of other exemptions — for example, for medical reasons — did not change the conclusion.

In the spring and summer of 2020, most lower courts followed past practice and rejected Free Exercise challenges to public health orders regarding COVID-19.[69] Although they used different approaches to reconcile *Jacobson* with contemporary Free Exercise cases, courts generally read *Jacobson* as requiring them to grant substantial deference to public health emergency orders.[70] Most courts also relied on *Smith* to conclude that strict scrutiny was inapplicable because the state had restricted a range of comparable secular activities, and hence acted in a manner that was neutral toward religion.[71]

Still, the heated political debates over the treatment of religious services, combined with the fact that all states included multiple exemptions to their emergency orders, created anger and constitutional peril. On April 14, 2020, Attorney General William Barr warned that "government may not impose special restrictions on religious activity that do not also apply to similar nonreligious activity … Religious institutions must not be singled out for special burdens."[72]

Some courts agreed. For example, in *Maryville Baptist Church v. Beshear,* the Sixth Circuit held that orders by Kentucky Governor Beshear prohibiting drive-in services "by name" while allowing secular, "'life-sustaining' businesses [including] law firms, laundromats, liquor stores, and gun shops to continue to operate so long as they follow social-distancing and other health-related precautions" were likely unconstitutional.[73] The court stated:

> Assuming all of the same precautions are taken, why is it safe to wait in a car for a liquor store to open but dangerous to wait in a car to hear morning prayers? Why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister? The Commonwealth has no good answers. While the law may take periodic naps during a pandemic, we will not let it sleep through one.[74]

A few days later, the same panel in *Roberts v. Neace* enjoined the Governor's ban on in-door services.[75] The Sixth Circuit's decisions pointed to the dilemma that courts faced during the pandemic. In the absence of federal coordination, inadequate financial support, and changing epidemiological and political conditions, state officials imposed orders that often appeared perplexing. Why exempt liquor stores but not churches? Laundromats but not worship? An

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epidemiologist might answer that because worship brings many people together for an extended period, with singing and chanting, it creates a greater risk than retail stores or laundromats. The Sixth Circuit, however, did not consider public health evidence, relying instead on its own assessment of risks. Soon the Supreme Court would do likewise.

Part Three: The Supreme Court Steps In

The Court's Early COVID Cases:

Between May and November 2020, the composition of the Supreme Court changed. So, too, did its approach to Free Exercise challenges to COVID orders. As the views of the justices who were initially in the dissent became those of the majority, the Court established a new doctrinal framework that devalued public health evidence and could subject almost any public health law to strict scrutiny.

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On May 22, 2020, the Supreme Court issued its first decision regarding a COVID-restriction in *South Bay United Pentecostal Church v. Newsom (South Bay I)*.[76] Like the other COVID-cases that the Court would hear, *South Bay I* was an emergency petition decided from the "shadow docket,"[77] without the benefit of argument or full briefing. The issue before the Court was California Governor Gavin Newsom's order limiting attendance at places of worship to 25% of capacity or a maximum of 100 attendees.[78] Many other secular activities, including lecture halls, concerts, movie theaters, and sports events faced similar limits, but others, including retail stores, restaurants, and hair salons faced less strict limits.[79]

By a 5-4 vote, the Court rejected the emergency petition without issuing an opinion. Concurring, Chief Justice Roberts explained that the order appeared to treat religious worship similarly to "comparable secular gatherings … where large groups of people gather in close proximity for extended periods of time."[80] Citing *Jacobson*, he explained that the Constitution "principally entrusts" health and safety to"politically accountable officials,"[81] and that courts should be reluctant to second-guess officials when they "'undertake[] to act in areas fraught with medical and scientific uncertainties.'"[82] This reluctance, he added, was particularly appropriate in deciding an emergency petition.[83]

In a strongly worded dissent, Justice Kavanaugh, joined by Justices Thomas and Gorsuch, argued that California had not imposed the identical occupancy limit on "comparable secular businesses."[84] Tellingly, he pointed to no evidence to support the conclusion that exempt businesses were "comparable" to religious services. Nor did he explain how courts should determine the relevant comparators.

The Court's second COVID case, *Calvary Chapel Dayton Valley v. Sisolak*, concerned Nevada's 50-person cap on religious services; certain other activities, including gaming, were allowed to admit 50% of their maximum occupancy.[85] By another 5-4 vote, again from the shadow docket and without an opinion, the majority rejected an emergency petition to enjoin the occupancy limit. Justices Alito, Gorsuch, and Kavanaugh published three separate dissents previewing the arguments that the majority would later adopt.

In his dissent, Alito, joined by Thomas and Kavanaugh, argued that the petitioner was likely to succeed on the merits of its Free Exercise claim because the state had "made no effort" to show that the religious services were riskier than activities that were permitted, such as "going to the gym" or "what goes on in casinos."[86] Thus like Kavanaugh in *South Bay,* Alito appeared to assume that the state bore the burden of establishing that the services were not comparable to the exempted activities.[87] He added that because *Jacobson* was not a First Amendment case it was not relevant, and that "a public health emergency does not give Governors and other public officials *carte blanche* to disregard the Constitution for as long as the medical problem exists."[88]

In his own dissent, Kavanaugh pinpointed the problem presented by the juxtaposition of restrictions and exemptions: "when a law on its face favors or exempts

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some secular organizations as opposed to religious organizations, a court … must determine whether the State has sufficiently justified the basis for the distinction."[89] Recognizing that states were "struggling" to balance economic and health risks, he stated, "The Constitution does not tolerate discrimination against religion merely because religious services do not yield a profit."[90] He added,

> This Court's history is littered with unfortunate examples of overly broad judicial deference to the government when the government has invoked emergency powers … The court of history has rejected 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.[91]

A New Approach:

Two months later, Justice Ruth Bader Ginsburg, who had voted with the majority in *South Bay I* and *Calvary Chapel*, died.[92] On October, 26, 2020 President Trump's nominee, Amy Coney Barrett, was confirmed to the Supreme Court.[93] One month later, in *Roman Catholic Diocese of Brooklyn (RCD),* the approach of the dissenters in *South Bay I* and *Calvary Christian* became that of the majority. [94]

RCD concerned New York Governor Cuomo's order barring more than 10 persons from attending religious services in "red-zones" (areas identified as COVID-19 "hotspots") and more than 25 persons from attending services in "orange zones" (areas adjacent to red zones)."[95] By the time the case had reached the Supreme Court, the Governor had reclassified the areas where the plaintiffs were located, enabling them to hold services at 50% of capacity.[96]

Despite the fact that the plaintiffs were no longer subject to the order at issue, the Court took up the emergency appeal and by a 5-4 vote, in a short *per curiam* opinion, concluded that the plaintiffs had "made a strong showing that the challenged restrictions violate 'the minimum requirement of neutrality' to religion."[97] In support of its claim, the plaintiff Agudath Israel of America had referenced statements by Cuomo that could be construed as targeting Orthodox Jews.[98] The Court could have rested on those facts.[99] Such a decision would have signaled that the deference that Roberts commended in *South Bay I* did not extend to orders when there was evidence of animus toward a religious group, perhaps especially a religious minority.

The majority, however, did not rely on extra-textual evidence of animus. Rather, it found that discrimination existed because certain secular activities, including "acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential," were subject to less onerous restrictions.[100] From this, and the fact that the restrictions specified religious services by name, the majority concluded, without pointing to any public health evidence, that the contested orders were not of general applicability. In effect, as in the *South Bay I* and *Christian Calvary* dissents, the majority relied on its own intuition to determine which activities were comparable to the religious services that were restricted. The majority also appeared, without stating, to treat the state as having the burden of persuasion on that threshold issue.

Applying strict scrutiny, the majority held that the regulations were not narrowly tailored to the compelling state interest of preventing the transmission of COVID-19. In so doing, the Court noted that many other "hard-hit" jurisdictions had less onerous restrictions, showing how the variation among states that had come to characterize the pandemic response could be used to establish a lack of narrow tailoring.[101] The Court also pointed out that there were no reported outbreaks of COVID-19 at plaintiffs' services, suggesting that states could not act to prevent the transmission of the virus until a super-spreader event at a particular religious facility was documented.[102]

Both Gorsuch and Kavanaugh added strongly worded concurring opinions. In his, Gorsuch derided governors who "[A]t the flick of a pen, … have asserted the right to privilege restaurants, marijuana dispensaries and casinos over churches, mosques, and temples."[103] He also criticized the Chief Justice's concurrence in *South Bay I* for relying on *Jacobson,* which he termed a "modest" decision that applied to a different set of facts and a different constitutional claim.[104] He warned that while the impulse for courts to "stay out of the way in times of crisis … may be understandable or even admirable in other circumstances, we may not shelter in place when the Constitution is under attack. Things never go well when we do."[105]

In his concurrence, Kavanaugh accepted that the Constitution "'principally entrusts the safety and health of the people to the politically accountable officials of the States,'" but explained that "judicial deference in an emergency or a crisis does not mean wholesale judicial abdication, especially when important questions of religious discrimination, racial discrimination, free speech, or the like are raised."[106] He added that "once a state creates a favored class of businesses … the State

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must justify why houses of worship are excluded from that favored class."[107] He did not explain, however, how the Court should determine which favored "classes of businesses" were comparable to worship.

In dissent, Justice Sotomayor warned of the potential danger of this approach: "Justices of this Court play a deadly game in second guessing the expert judgment of health officials about the environment in which a contagious virus, now infecting a million Americans each week, spreads most easily."[108] In the three months that followed the Court's decision, approximately 250,000 more Americans died from COVID-19.[109] Still, on its own, *RCD* might have been read as a limited decision, motivated by the draconian nature of Governor Cuomo's order, and serving to remind officials to tread carefully when restricting worship.

That was not to be. In the weeks and months that followed, the Supreme Court issued a series of decisions relating to the Free Exercise clause.[110] Among the more interesting was *South Bay United Pentecostal Church v. Newsom (South Bay II).*[111] In a short, unsigned opinion, once again from the shadow docket, a six justice majority (including Roberts, Thomas, Alito, Gorsuch, Kavanaugh, and Barrett) blocked California's ban on indoor services, but left in place a 25% capacity limit plus a ban on singing and chanting.[112]

Although the majority agreed to enjoin part of the state's order, the separate opinions of the justices in the majority showed continuing disagreement. Now stating that deference had its "limits," Roberts supported enjoining the orders restricting worship, but would have kept in place the ban on singing, noting that he saw no basis for "overriding that aspect of the state public health framework."[113] In contrast, Gorsuch, joined by Thomas and Alito, argued that the state had targeted religion, and that as a result, strict scrutiny was required.[114] Regarding the ban on chanting, Gorsuch noted, "California's powerful entertainment industry has won an exemption. So once more we appear to have a State playing favorites during a pandemic …"[115] In a separate statement, Alito indicated that he would stay the injunction on capacity limits and singing and chanting for 30 days, to be lifted unless the state "demonstrates clearly that nothing short of those measures will reduce the community spread of COVID-19 at indoor religious gatherings to the same extent as do the restrictions the State enforces with respect to other activities it classifies as essential."[116]

In contrast, Barrett, joined by Kavanaugh, agreed that the capacity limits should also be blocked, but was content to accept the state's limits on singing and chanting.[117] In reaching that conclusion, the newest justice stated that the petitioners did not "carry their burden," suggesting that she thought they had the burden of establishing that they were entitled to relief from that ban.[118] In contrast, in her dissent, Justices Kagan, joined by Breyer and Sotomayor, lamented the majority's failure to credit the state's scientific evidence and hoped that the Court's decision would not "worsen the Nation's COVID crisis."[119]

Despite the absence of a majority opinion in *South Bay II,* on February 26, 2021, by a six-three vote, the Court in *Gateway City Church v. Newsom,*[120] granted emergency relief to a church contesting restrictions on indoor gatherings.[121] Although the restrictions in *Gateway City Church* were quite unlike the ones in the earlier cases in that they applied to all indoor gatherings and did not specify worship, the Court ruled that the outcome was "dictated by this Court's decision" in *South Bay II*.[122]

Then on April 9, the Court, by a 5-4 vote — again from the shadow docket — issued its most far-reaching COVID decision in *Tandon v. Newsom*.[123] *Tandon* challenged the application of California's limits on the number of people from separate households who could gather in private homes.[124] The plaintiffs claimed that the restrictions violated their rights under the Free Exercise Clause to conduct prayer meetings in homes because the state permitted more people to gather for secular purposes in certain public spaces, such as train stations and shopping malls.[125] The Ninth Circuit panel, by a vote of 2-1, disagreed, finding that such public settings were not comparable to in-home gatherings "in terms of risk to public health or reasonable safety measures to address that risk."[126] The Appeals Court explained:

> [T]he district court found that the State reasonably concluded that when people gather in social settings, their interactions are likely to be longer than they would be in a commercial setting; that participants in a social gathering are more likely to be involved in prolonged conversations; that private houses are typically smaller and less ventilated than commercial establishments; and that social distancing and mask-wearing are less likely in private settings and enforcement is more difficult.[127]

Having rejected the analogy to gatherings in public spaces, the Ninth Circuit concluded that the state's restriction on private gatherings was a neutral law of general applicability, and not subject to strict scrutiny.[128]

The Supreme Court disagreed. In a *per curiam* opinion, the Court held that the restrictions on in-home

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gatherings were neither neutral nor generally applicable.[129] In reaching its conclusion, the Court stated, "it is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue."[130] The Court then explained that comparability "must be judged against the asserted government interest that justifies the regulation at issue," and that comparability is concerned "with the risks various activities pose, not the reasons why people gather."[131]

Applying those principles, the Court determined that strict scrutiny was required, and that the restrictions could not pass that high bar. In reaching that decision, the Court overlooked the testimony that was offered by the state's experts, and pointed again to the exemptions the state offered for some secular activities, stating that the state "cannot 'assume the worst when people go to worship but assume the best when people go to work.'"[132] In effect, the very factors that led the Court to conclude that strict scrutiny was required led it to find that the order was not narrowly tailored, and hence failed strict scrutiny. The Court added that the fact that the state had changed its policy after the petition for certiorari was filed made no difference, stating that "officials with a track record of 'moving the goalposts' retain authority to reinstate those heightened restrictions at any time."[133]

In dissent, Kagan, who was joined by Breyer and Sotomayor, argued that because the state had adopted a "blanket restriction on at-home gatherings of all kind, religious and secular alike," it had not treated religious activity less favorably than comparable secular activities.[134] The First Amendment, she claimed, does not demand "that the State equally treat apples and watermelons."[135] She added that the majority had ignored the lower courts' factual findings that in-home gatherings posed a greater risk than the commercial activities that were less stringently regulated in other ways.[136] She concluded by lamenting that the Court "once more commands California 'to ignore its experts' scientific findings,'" thereby weakening its ability to address the health emergency.[137] Less than three weeks later, the Court issued its third order in the *South Bay* litigation, this time vacating without an opinion the Ninth Circuit's judgment.[138]

Out from the Shadows:

On June 17, 2021, the Court emerged from its shadow docket and released its long-awaited decision in *Fulton v. City of Philadelphia*.[139] By a unanimous vote, the Court held that Philadelphia had violated the Free Exercise clause. However, in his opinion for the Court, which never cited the COVID cases, Roberts declined to overrule *Smith,* finding instead that Philadelphia's policy was not neutral and generally applicable because the City's contract with foster care agencies contained a provision granting it the sole discretion to create exceptions to its anti-discrimination requirement.[140] The Court also held that it need not decide if the City's anti-discrimination law violated the Free Exercise clause because the agency plaintiff was not a public accommodation.[141]

In concurring opinions, however, five justices expressed dissatisfaction with *Smith.* Barrett, who was joined by Kavanaugh, stated that the "textual and structural arguments against *Smith* are more compelling" than those supporting it.[142] Nevertheless, she noted that overruling *Smith* would raise a host of difficult questions that the Court need not answer for the reasons explained in the majority's decision.

Alito felt no such compunctions. In a lengthy concurring opinion that Gorsuch and Thomas joined, he argued that an originalist interpretation of the First Amendment compelled the Court to overrule *Smith* and apply strict scrutiny to all laws that burden the exercise of religion.[143] Although he did not rely on the COVID cases, he pointed to them to demonstrate that the Court's current approach under *Smith* in determining comparability was unworkable.[144] This point was echoed in Gorsuch's concurrence, which Alito and Thomas joined.[145]

Part Four: Themes and Questions

The protection of the public's health, especially but not solely from outbreaks of communicable disease, has long been considered a core component of the states' police power.[146] The Court's most recent COVID-Free Exercise cases portend a fundamental change in the Court's assessment of such laws, and raise many questions about the state's ability to protect public health in the years to come.

A. The Decline of Deference

At the start of the pandemic, most courts, usually citing *Jacobson*, granted substantial deference to state health officials in deciding whether restrictions on religious worship violated the Free Exercise Clause.[147] In his concurring opinion in *South Bay I,* Roberts signaled that such deference was appropriate; the dissenters disagreed.[148]

Once the dissenters became the majority, deference diminished.[149] Starting with *RCD,* the majority has not cited *Jacobson;* nor has it offered any deference to state health officials. Even the Chief Justice appears to have changed his tone, noting in *South Bay II* that, while courts "owe significant deference to politically accountable officials," deference has its "limits."[150] Those limits, it now appears, extend not only to the

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deference granted to health officials. As Kagan suggested in *Tandon,* the Court now also seems unwilling to defer to the factual findings — based on public health evidence — of the lower courts.[151]

Critically, the Court has not replaced deference to public health officials or trial courts with a searching or even casual review of the scientific evidence. Instead, starting with *RCD,* the Court has ignored the public health evidence in the record. In its place, the Court seems to be relying on the justices' own intuition as to what secular activities pose risks that are comparable to the activities that the petitioners seek to have exempt. Thus the Court assumes that retail establishments, casinos, and acupuncture are comparable in terms of risk to in-person worship, but at least in *South Bay II*, some justices appeared to accept that in-person singing and chanting are more dangerous.[152] The justices offered no evidence in support of these distinctions.

The Court has also not addressed the critical question of which party has the burden of persuasion in establishing what secular activities present the appropriate comparator for the religious exercise that has been burdened. Although the state clearly has the burden of proof once strict scrutiny is found to be applicable, the plaintiff should have had the burden of establishing comparability, as it is a necessary element for invoking strict scrutiny.[153] In *RCD,* the Court hinted that the plaintiffs had that burden, pointing to their "strong showing" on the issue of comparability.[154] In later cases, however, the Court failed to point to any evidence produced by the plaintiffs to establish comparability. In effect, the Court appeared to assume (without explicitly saying) that the state has the burden of showing that the secular activities it regulated more lightly were not comparable to the religious activities that were subject to stricter regulations. Interestingly, the state appears to have this burden even when plaintiffs are seeking emergency petitions to stay refusals by the lower courts to enjoin state laws.[155]

B. The Dangers of Exemptions

Since *RCD,* the existence of exemptions, as in Justice Alito's *Stormans*' dissent, has proven critical to the Court's Free Exercise analysis.[156] In *Fulton*, the Court held that strict scrutiny was required because a provision in the City's contract with foster care agencies gave it discretion to offer individualized exemptions.[157] The fact that the City had no intention of granting such exemptions was, according to the Court, irrelevant.[158]

The impact of that analysis to public health laws remains unclear. Few public health laws include the type of contractual provision at issue in *Fulton.* On the other hand, many of the emergency powers laws used during the pandemic grant executive officials broad discretion to determine the type and level of restrictions imposed on different activities.[159] Other public health laws, such as quarantine laws, have typically been applied on an individualized basis; inevitably officials use their discretion in determining when to issue orders. Under *Fulton*, a religious litigant challenging any of these laws could potentially argue that the mere existence of discretion and the possibility (in some cases) of an individualized analysis demands strict scrutiny.

The Court, however, may not and should not read *Fulton* as holding that any broad grant of discretion to executive officials — including discretion over enforcement — compels strict scrutiny. Doing so would eviscerate the ability of all administrative agencies to exercise discretion over their enforcement priorities. It would also make it difficult for officials to impose just the type of carefully tailored and measured responses that strict scrutiny theoretically favors. The Court, therefore, should limit *Fulton's* reach to the type of contractual grant of discretion at issue in that case. Even so, the COVID cases show that the mere existence of exemptions from public health laws can trigger strict scrutiny.

In the COVID-cases, the key issue was comparability: whether the secular activities that were regulated less strictly were comparable to the religious practices that were regulated more strictly. As noted above, the Court appeared to rely on its own intuition, rather than deference or an evaluation of the public health evidence, in making the comparability determination.[160] The approach creates enormous uncertainty and risk for states that seek to implement non-pharmaceutical interventions during a public health emergency, forcing them to choose between implausibly restricting all activities or providing religious objectors "most-favored nation status."[161]

Critically, states cannot avoid the problem by offering no exemptions. Shuttering everything is simply not possible. People need health care, especially in a pandemic. They also need food and medicine, and the people who work in health care and food distribution need access to transportation and often childcare. Yet, by granting these necessary exemptions, states treat some secular activities more favorably than some religious activities (in-person worship). This sets a comparability trap, in which the state has to show — apparently without the benefit of deference — that none of the exempted activities is comparable to the religious activity asserted by the plaintiff.

Prior to *Tandon*, Caroline Corbin argued that comparability should be based on two factors: the dangerousness of the activity and its essentiality.[162] If that were

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the case, a court might conclude emergency rooms are not comparable to in-home prayer meetings because the former are more critical to society writ large during a pandemic than the latter. In *Tandon,* however, the Court insisted that comparability depends solely on the "risks various activities pose, not the reasons why people gather."[163] That approach allows the Court to avoid deriding the exercise of religion as "nonessential." It also means that as long as hospitals pose as a great a risk of transmission as in-person worship (a likely assumption early in a pandemic), a court might treat the two activities as comparable, requiring the state to defend, subject to strict scrutiny, its decision to allow the former but not the latter.

Importantly, the COVID cases show that states cannot escape the trap by treating religious activities more favorably than many other secular activities. Indeed, by singling out some types of religious activity (e.g. worship), and treating it more favorably than some types of secular activity (e.g. entertainment venues), the state may be found to have targeted religion. According to Sotomayor, this is precisely what happened in *RCD.*[164] The state regulated worship more strictly than some secular activities, but less strictly than others that the state deemed comparable. Still, the majority saw the state as impermissibly discriminating against religious activities.[165]

Theoretically, strict scrutiny need not doom a public health measure. Indeed, it may well be that although the Court will require strict scrutiny in most Free Exercise cases, that test will not always prove to be "fatal in fact."[166] In his concurrence in *Fulton,* Alito argued that certain peace and public safety laws, recognized at the time of the founding, should survive strict scrutiny.[167] He did not include public health laws in that category, even though courts in the ante-bellum period accepted restraints on religion that related to health.[168] He also pointed to some potential laws, including bans on circumcision that could be defended on public health grounds, as examples of anti-religious measures that warranted strict scrutiny.[169] It therefore seems possible that Alito and the justices who joined his concurrence might not endorse a more relaxed approach to strict scrutiny for public health laws. Nor did the majority in the COVID cases seem willing to apply a less-than-fatal form of strict scrutiny. Indeed, *Tandon* suggests that the very fact that a comparable secular activity faces less stringent restrictions can serve to establish that the state has less restrictive means of protecting the public's health.[170]

More chilling, in a dissent to a later case in which the majority refused, without opinion, to block a COVID vaccine mandate for health care workers, Gorsuch, who was joined by Thomas and Alito, suggested that preventing deaths from COVID-19 may not remain a compelling state interest.[171] If so, no public health law that implicates religion could survive strict scrutiny.

Undoubtedly, the Court's approach to comparability in the COVID cases responded at least in part to the messy and often quite questionable mix of laws and exemptions that characterized the state response to the pandemic.[172] In the absence of a uniform national approach to pandemic mitigation, states adopted, rescinded, and re-imposed a dizzying array of restrictions. Given the inconstancies between jurisdictions, and the ever-changing orders within jurisdictions (some due to new evidence and the virus' shifting epidemiology and some due to political and economic pressures), it is not surprising that the Court questioned the application of strict measures to religious worship.[173] Still, it is difficult to see how states can protect the public from disease threats without granting officials substantial discretion, and implementing some distinctions between activities. Moreover, in the early days of a new pandemic, when the science is still evolving, the exercise of discretion will invariably be messy. Officials will make mistakes, and measures that appear to be necessary at one point of time may later be shown to be either unnecessary or ineffective. If we want officials to be able to save lives in the early stages of a pandemic, we need to give them some leeway. The Court, however, seems to be in an unforgiving mood.

C. Beyond Worship

One of the unusual features of the Supreme Court's initial COVID-Free Exercise cases is that in each instance, the challengers claimed that the state regulation burdened their ability to worship. As a result, the Court did not have to consider the impact of its less deferential and changing stance to public health laws that regulated other exercises of religion.

Many other Free Exercise cases, however, focus on laws that burden religion without regulating worship. In *Fulton,* for example, the Court accepted that the city's policy burdened the plaintiff's religious exercise "by putting it to the choice of curtailing its mission or approving relationships inconsistent with its belief."[174] Although the religious activity infringed upon was not worship, the Court insisted that the plaintiff's assertion that the law restricted its religious beliefs should be accepted.[175] This is the typical approach.[176]

What happens when the Court's well-established deferential stance to determining what constitutes a burden on religion meets its new less deferential approach to public health laws? Will the mere existence of exemptions (or per *Fulton,* the mere possibility of exemptions) mean that any religious litigant can demand an exemption to any public health law, even if

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it restricts practices that most people would regard as purely secular. This is the issue that has arisen in litigation that has challenged COVID-vaccine mandates, but it is not limited to such cases.

Tandon and *Fulton* raised the issue. The law in *Tandon*, for example did not regulate worship qua worship, it simply impacted worship by regulating in-home gatherings. Other public health laws may implicate other activities that individuals may feel are related to their exercise of religion. Consider for example, an outbreak of a deadly gastrointestinal disease that seems to be spreading unchecked in restaurants. Early in the outbreak, health officials have little information about the specific practices that are spreading the disease. They only know that several fatal outbreaks have been associated with restaurants; and that the death toll is climbing quickly. To slow the spread, they shutter restaurants, but allow food services to continue in hospitals and congregate care facilities.

Now imagine that a restaurant owner — Plaintiff X — claims that her religion compels her to cook and serve meals to strangers. She claims that the order shuttering restaurants burdens her ability to exercise her religion. She points to the fact that hospitals and nursing homes are permitted to remain open. They too could spread the disease. The state, she claims, has not treated comparable secular activities comparably to her religious practice of running her restaurant.

How would the Court decide such a case? Would the fact that restaurants are not typically thought of as a religious activity result in the Court giving greater weight to the testimony of health officials than it did in the cases concerning the regulation of worship? In other words, would the Court, perhaps without saying so, be more willing to defer to health officials when reviewing claims that do not fall within the justices' own pre-existing assumptions as to what constitutes a religious activity? Would the Court instead rely on its own intuition to decide that even if restaurants are a religious activity, they are simply not comparable to hospital cafeterias and nursing home dining rooms? Or, would the Court follow the logic of the COVID cases and apply strict scrutiny? Unfortunately, the COVID-cases offer little basis for answering those questions.

The possibility that courts would strike down public health orders that do not touch upon commonly recognized forms of worship or religious activity is not far-fetched. Indeed, the uncertainty as to what Tandon and Fulton may require has already spawned a wave of litigation challenging COVID-vaccine mandates on Free Exercise grounds. Although many courts have rejected such challenges, ruling that the mandates are neutral laws of general applicability,[176] others have held that by offering medical but not religious exemptions, the mandates violate the Free Exercise clause.[177]

To date, the Supreme Court has not ruled on this issue. On October 29, 2021, however, the court rejected an emergency appeal in case denying a Free Exercise challenge to Maine's requirement that health care workers be vaccinated against COVID-19.[178] The majority did not write an opinion. In a brief concurring opinion, Barrett, who was joined by Kavanaugh, stated that the Court should not use its discretion to take the case without benefit of "full briefing and oral argument."[179] In a heated dissent, Justice Gorsuch, who was joined by Thomas and Alito, argued that medical exemptions are comparable to religious exemptions and that strict scrutiny was required.[180]

To date, it is not clear whether the Court will take another vaccine case, or how it will resolve one should it do so. What is certain is that *Fulton* plus the COVID cases suggests that the Court does not mean to cabin its approach to laws that regulate worship qua worship.[181] Nor should the Court do so. Those whose practice their faith by selling food or educating students should not be given less protection than those who practice their faith by attending church on Sunday.

Bad facts make bad law. There is no doubt that the facts during the pandemic have been awful. The ever-changing and inconsistent patchwork of regulations and exemptions that tried to balance health and economic imperatives were often hard to fathom and difficult to explain. The sense of anger and grievance that much of the country felt regarding the COVID-restrictions, some of it justified and much of it stoked by President Trump and his allies, certainly added to the perception that state restrictions were motivated by animus and bigotry towards the faith-based community.

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The problem is that when the appropriately expansive notion of what constitutes a religious practice is combined with the less deferential approach to comparability, all laws that seek to preserve the safety and well-being of society — during a pandemic and otherwise — are threatened. Any law can burden *someone's* religious practice; and all laws have exemptions. Yet, freed from deference, and unconcerned with empirical facts, the Court is left with little but its own intuition to determine which secular activities pose health risks that are comparable to the regulated activities that the plaintiff sincerely views as religious. The result may be a Free Exercise jurisprudence that dramatically limits the states' ability to protect public health, except when the Justices' intuition tells them that the religious activity at issue is not comparable to the exempt secular activities. Judicial intuition, however, seems a thin reed upon which to rest the public's health.

Conclusion

Bad facts make bad law. There is no doubt that the facts during the pandemic have been awful. The ever-changing and inconsistent patchwork of regulations and exemptions that tried to balance health and economic imperatives were often hard to fathom and difficult to explain. The sense of anger and grievance that much of the country felt regarding the COVID-restrictions, some of it justified and much of it stoked by President Trump and his allies, certainly added to the perception that state restrictions were motivated by animus and bigotry towards the faith-based community.

Still, by dispensing with deference, disregarding public health evidence, and limiting the determination of comparability to the risks posed by activities without any consideration of their benefits, the Court opened a Pandora's Box that threatens to undermine the public's health. While punting on the question of *Smith*'s fate, *Fulton* did little to close that box. Rather it has invited more litigation on the impact of broad grants of discretion.

As a result, all public health laws now face uncertainty. This cloud extends to vaccine mandates, not only for COVID, but also for measles, mumps, rubella, and other long-required vaccinations. As noted above, for more than a century, courts looked to *Jacobson* to affirm the state's right to mandate vaccination.[182] *Smith* provided further support.[183] Now, with the majority ignoring *Jacobson*, and five justices questioning *Smith,* these laws face new dangers. Most ominously, the Court's analysis of exemptions in both *Fulton* and the COVID cases raises the question whether vaccine mandates that include any exemptions, as all do,[184] are subject to strict scrutiny.[185] Further, a decision by a state to mandate vaccination in some employment settings — say nursing homes — but not others — say prisons — could also fall victim to the comparability trap. Of course, a court might find that nursing homes are not comparable to prisons, or that vaccine mandates for nursing home workers can survive strict scrutiny. The problem is that the outcome of all of such questions seems now to depend on judicial intuition more than public health evidence.

Future social distancing laws may also be at risk. COVID-19 will not be the last pandemic. When the next one strikes, the protection of the public may once again require the imposition of some forms of social distancing measures until a vaccine or treatment is developed. Ideally, those measures will be more carefully crafted and more consistently applied than they have been during the COVID-19 pandemic. Nevertheless, the Court's new jurisprudence suggests that the existence of any exemptions may lead to strict scrutiny, and that the state's careful reliance on public health evidence may prove to be of little help to the state.

Also imperiled are day-to-day laws and regulations that protect population health. Fire safety laws, food inspection laws, and tobacco control laws, to name just a few examples, may face new challenges by individuals who claim that compliance burdens their exercise of religion. Will all such laws be subject to strict scrutiny as long as a litigant can show that officials have broad discretion, or that the laws are under-inclusive? Will we have anything more than judicial intuition to ensure that the mass of laws that keep us safe are not toppled?

Perhaps, after the pandemic is over, the Supreme Court's eagerness to police public health orders through its shadow docket will diminish. Importantly, Justices Barrett and Kavanaugh have voiced their concerns about ruling on vaccine mandates without the benefit of full briefing and argument.[186] Hopefully, when the Court next speaks, it will not be from the shadow docket, and the justices will provide us with an opinion that relies less on the rage and intuition that seemed to propel the Court's COVID-cases and offer instead a more thoughtful and nuanced analysis of how to reconcile the Constitution's protections for religious liberty with the protection of public health. Such an approach might accept a narrowed *Smith*, but might also make clear that public health evidence matters in the determination of comparability and the application of strict scrutiny. It might also accept that states should be able to consider not only the risk of an activity subject to regulation, but also its benefits. By offering such an approach, the Court could continue

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the important task of policing anti-religious animus, especially aimed at religious minorities, without subjecting all public health laws to the comparability trap.

COVID-19 has stressed our society and our jurisprudence in a multitude of ways. Unfortunately, the next pandemic may be more lethal. It is also likely to have a different epidemiological profile, and require a very different mix of interventions than those that states used in 2020. To guide us through the inevitable clashes between religious liberty and public health that will then arise, we need a Free Exercise doctrine that takes both the science and the potentially adverse consequences of religious liberty more seriously than the opinions from the shadow docket.

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68. *See, e.g., Brown v. Smith*, 235 Cal. Rptr. 3d 218 (Cal. Ct. App. 2018); *Whitlow v. Cal. Dep't of Educ.*, 203 F. Supp. 3d. 1079 (S.D. Cal. 2016); *F.F. v. State of New York*, 114 N.Y.S.3d 852 (N.Y. Sup. Ct. 2019).
69. Parmet, *supra* note 9, at 1026.
70. *Id.* at 1002.
71. *E.g., Elim Romanian Pentecostal Church v. Pritzker*, No. 201811, 2020 WL 2517093 (7th Cir. May 16, 2020); *South Bay United Pentecostal Church v. Newsom*, 959 F.3d 938 (9th Cir. 2020), *aff'g* 140 S. Ct. 1613 (2020); *Antietam Battlefield KOA v. Hogan*, No. CCB-20-1130, 2020 WL 2556496 (D. Md. May 20, 2020).
72. U.S. Department of Justice, "Office of Public Affairs, Attorney General William P. Barr Issues Statement on Religious Practice and Social Distancing; Department Files State of Interest in Mississippi Church Case," April 14, 2020, *available at* <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-issues-statement-religious-practice-and-social-distancing-0> (last visited March 2, 2021).
73. 957 F.3d 610, 614 (6 th Cir. 2020).
74. *Id.* at 615.
75. 958 F.3d 409, 416 (6 th Cir. 2020).
76. 140 S. Ct. 1613 (2020).
77. M. Walsh, "The Supreme Court's 'Shadow Docket' is Drawing Increasing Scrutiny," ABA Journal, Aug. 20, 2020, *available at* <https://www.abajournal.com/web/article/scotus-shadow-docket-draws-increasing-scrutiny#:~:text=The%20Supreme%20Court's%20'shadow%20docket'%20is%20drawing%20increasing%20scrutiny,-By%20Mark%20Walsh&text=Image%20from%20Shutterstock.com.,of%20argued%20cases%20and%20decisions> (last visited October 1, 2021).
78. 140 S. Ct. 1613 (Roberts, C.J., concurring).
79. *Id.* (Kavanaugh, J., dissenting).
80. *Id.* (Roberts, CJ, concurring).
81. *Id.* (citing and quoting 197 U.S. at 38).
82. *Id.* (quoting *Marshall v. United States*, 414 U.S. 417 (1974)).
83. *Id.*
84. *Id.* at 1614 (Kavanaugh J., dissenting).
85. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2603-09 (2020) (Alito, J., dissenting) (finding that petitioner was likely to succeed on the merits of a free speech claim

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86. *Id.* at 2604 (Alito J., dissenting). Justice Alito also found that the petitioner was likely to succeed on the merits of a free speech claim.
87. *Id.*
88. *Id.* at 2605 -2608.
89. *Id.* at 2612 (Kavanaugh J., dissenting).
90. *Id.* at 2614.
91. *Id.* at 2615.
92. L. Greenhouse, "Ruth Bader Ginsburg, Supreme Court's Feminist Icon, is Dead at 87," *New York Times*, Sept. 24, 2020, *available at* <https://www.nytimes.com/2020/09/18/us/ruth-bader-ginsburg-dead.html> (last visited October 1, 2021).
93. B. Sprunt, "Amy Coney Barrett Confirmed to Supreme Court, Takes Constitutional Oath," National Public radio, Oct. 26, 2020, *available at* <https://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court> (last visited October 1, 2021).
94. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020)(per curiam).
95. *Id.* at 65.
96. *Id.* at 68.
97. *Id.* at 66 (citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993)).
98. *Id.* at 67. For example, although the Governor stated his "love for the Orthodox community," *Roman Catholic Diocese of Brooklyn v. Cuomo*, 495 F. Supp. 3d 118, 122 (E.D.N.Y. 2020), *aff'd Agudath Israel of Americ v. Cuomo*, 979 F.3d 177 (2d Cir. 2020), rev'd *Roman Catholic Diocese v. Brooklyn*, 1414 S.Ct. 889 (2020)(per curiam), he also warned that if that community did not comply with his orders "we'll close the institution down." *Agudth Israel of America*, 979 F.3d 177, 183 (2d Cir. 2020)(Park J., dissenting), rev'd 141 S, Ct, 889 (2020) (per curiam).
99. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1719 (2018).
100. *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 66.
101. *Id.* at 67.
102. *Id.*
103. *Id.* at 69 (Gorsuch, J., concurring).
104. *Id.* at 70-71.
105. *Id.*
106. *Id.* at 73 (Kavanaugh, J., concurring (quoting *South Bay United Pentecostal Church v. Newsom*, 590 U.S. __, 140 S. Ct. 1613 (Roberts, C.J. concurring)).
107. *Id.*
108. *Id.* at 79 (Sotomayor, J., dissenting). In his dissent, Chief Justice Roberts argued that although Gov. Cuomo's orders were troubling, the Court had no need to act because the orders were no longer affecting the petitioners.
109. By Thanksgiving, the U.S. had recorded 269,000 deaths from COVID-19. S. Kim, "1,311 People Die of COVID on Thanksgiving Day in the U.S.," *Newsweek*, Nov. 27, 2000, *available at* <https://www.newsweek.com/coronavirus-us-death-toll-thanksgiving-travel-infections-cases-hospitalizations-1550760> (last visited June 1, 2021). On February 22, 2021, the nation recorded its 500,000 death. P. Huang, "'A Loss to the Whole Society': U.S. COVID-19 Death Toll Reaches 500,000," NPR, Feb. 22, 2021, *available at* <https://www.npr.org/sections/health-shots/2021/02/22/969494791/a-loss-to-the-whole-society-u-s-covid-19-death-toll-reaches-500-000> (last visited October 1, 2021).
110. *See infra* text accompanying notes 111-138; *High Plains Harvest Church v. Polis*, 141 S. Ct. 527, 527 (2020)(mem.).
111. *South Bay United Pentecostal Church v. Newsom* (*South Bay II*), 141 S. Ct. 716, 716 (2021).
112. *Id.*
113. *Id.* at 717 (Roberts, C.J. concurring).
114. *Id.* at 719 (statement of Gorsuch, J).
115. *Id.*
116. *Id.* at 716 (statement of Alito, J.).
117. *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 717-18 (2021)(Barrett, J. concurring).
118. *Id.*
119. *Id.* at 723 (Kagan, J., dissenting).
120. *Gateway City Church v. Newsom*, 141 S. Ct. 1460, 1460 (2020).
121. A. Howe, "Court Clears Way for Indoor Worship Services in Northern California," SCOTUSBlog, Feb. 26, 2020, *available at* <https://www.scotusblog.com/2021/02/court-clears-way-for-indoor-worship-services-in-northern-california/> (last October 1, 2021).
122. *Gateway City Church. v. Newsom*, 141 S. Ct. at 1460 (2021).
123. *Tandon v. Newsome*, 141 S. Ct. 1294, 1294-99 (2021)(per curiam).
124. *Tandon v. Newsom*, 992 F.3d 916 (9th Cir. 2021), vacated by 141 S. Ct. 1294 (2021).
125. *Id.* at 920.
126. *Id.*
127. *Id.* at 925 (citing *Tandon v. Newsom*, 2021 WL 411375, No. 20-CV-07108-LHK (N.D. Cal. Feb. 5, 2021), at *30).
128. *Id.* at 920.
129. *Tandon*, 141 S. Ct. at 1296 (2021).
130. *Id.* citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. ___, 141 S. Ct. 63, 66-67 (2020)(Kavanaugh, J., concurring).
131. *Id.* citing 141 S. Ct. at 67 (per curiam); 141 S. Ct. at 66 (Gorsuch, J., concurring).
132. *Id.* at 1297 (quoting *Roberts v. Neace*, 958 F.3d 409, 414 (6 th Cir. 2020).
133. *Id.* at 1297 (citing South Bay II, 141 S. Ct. at 720 (statement of Gorsuch, J.)).
134. 141 S. Ct. at 1298 (Kagan, J., dissenting).
135. *Id.*
136. *Id.* at 1298.
137. *Id.* at 1299 (quoting *South Bay Pentecostal Church v. Newsom*, 141 S.Ct. 717, 722 (Kagan J., dissenting))
138. *South Bay Pentecostal v. Newsom*, 2021 WL 1602607 (U.S. 2021)(citing *Tandon*, 141 S. Ct . at 1294).
139. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021).
140. *Id.* at 1878-1879.
141. *Id.* at 1880.
142. *Id.* at 1880 (2021)(Barrett J., concurring).
143. *Id.* at 1883 (2021)(Alito, J., concurring).
144. *Id.* at 1921.
145. *Id.* at 1926 (2021)(Gorsuch, concurring).
146. *See* W.E. Parmet, *Populations, Public Health and the Law* (Georgetown University Press, 2009): at 41-47.
147. *See* Parmet, *supra* note 9, at 1010-1012.
148. *See supra* text accompanying notes 80-84.
149. *See* C. Sunstein, "Our The Anti-Korematsu," December 29, 2020, *available at* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3756853> at 5 (last visited October 1, 2021).
150. *S. Bay United Pentecostal Church v. Newsom*, 141 S .Ct. 716, 716 (2021)(Roberts, CJ, concurring). Less than a month later, the Chief Justice, however, took a different position *in Food and Drug Administration v. American College of Obstetricians and Gynecologists*, 141 S.Ct. 578 (2021)(Roberts, C.J. concurring). In that brief opinion concurring with the Court's decision to stay a lower court order that would have required the FDA to allow pharmacists to dispense mifespristone (which is used in medical abortions) without an in-person visit, Roberts restated his comments about deference from *South Bay I*.
151. *See Tandon*, 141 S. Ct. at 1298-99 (Kagan, J., dissenting).
152. *See South Bay United Pentecostal Church v. Newsom* (*South Bay II*), 141 S. Ct. 716, 716 (2021)(mem).
153 *See Winter v. Natural Resources Defense Council*, Inc., 555 U.S. 7, 20 (2008)(explaining that a party seeking a preliminary injunction "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest); *Schaffer ex re. Schaffer v. Weast*, 546 U.S. 49 (2005)("we have usually assumed without comment that plaintiffs bear the burden of persuasion regarding the essential aspects of their claim."). For a further discussion of burdens of proof and

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standards applicable to Free Exercise claims, see R.J. Krotoszynski, Jr., "If Judges Were Angels: Religious Equality, Free Exercise, the (Underappreciated) Merits of Smith," *Northwestern Law Review* 102 (2008): 1189-1274.
154. *Roman Catholic Diocese of Brooklyn v. Cuomo,* 141 S. Ct. 63, 67 (2020)(per curiam).
155. Vlacdeck, *supra* note 4, at 16.
156. *See supra* text accompanying notes 61-63.
157. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021).
158. *Id.*
159. Wiley, *supra* note 26.
160. *See supra* text accompanying notes 151-152.
161. D. Laylock, "The Remnants of Free Exercise," *Supreme Court Review* (1990): 1-69, at 49.
162. C. Corbin, "Religious Liberty in a Pandemic," *Duke Law Journal Online* 70 (2020): 1-28, at 15-26, *available at* <https://dlj.law.duke.edu/2020/09/religiouspandemic/> (last visited June 1, 2021).
163. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (citing Roman Catholic Diocese of *Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (Gorsuch, J., concurring)).
164. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 79 (2020)(Sotomayor, dissenting).
165. *Id.* at 65-67.
166. *See* A. Winkler, "Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny," *Vanderbilt Law Review* 59 (2006): 793-871 (discussing study showing that strict scrutiny was often not fatal).
167. *Fulton v. City of Philadelphia*, 141 S. CT. 1868, 1883 (2021) (Alito, J., concurring).
168. J.F. Witt, *American Contagion: Epidemics and the Law From Smallpox to COVID-19* (New Haven, CT, Yale Univ. Press, 2020): at 24.
169. 141 S. CT. 1884 (Alito, J. concurring).
170. *See supra* text accompanying notes 132-134.
171. *Does 1-3 v. Mills*, 2021 WL 5027177 (Oct. 29, 2021)(Gorsuch, J., dissenting).
172. *See supra* notes 8-39.
173. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 at 66-67 (2020).
174. 141 S. Ct. 1868, 1876 (2021).
175. *Id.*
176. For a discussion of how courts assess claims of substantial burden, and the problems with deferring to the plaintiff's assertion, see F. M. Gedicks "'Substantial' Burdens: How Courts May (and Why they Must) Judge Burdens on Religion Under RFRA," *George Washington Law Review* 85 (2017): 94-151.
177. *E.g., Dahl v. Bd. of Trustees, Western Michigan University*, 14 F. 4th 728 (2021): *Dr. A. v. Hochul*, 1:21-CV-1009, 2001 WL 4734404 (N. D. N.Y. Oct. 12, 2021), vacated, *We the Patriots USA v. Hochul*, No. 21-2566, 2021 WL 5121983 (2d Cir. Nov. 4, 2021).
178. 595 U.S. ___, 2001 WL 5027177 (Oct. 29, 2021).
179. *Id.* (Barrett, J., concurring).
180. *Id.* (Gorsuch, J., concurring).
181. *See also Danville Christian Acad., Inc. v. Beshear*, 141 S. Ct. 527, 527-28 (2020)(Gorusch, J., dissenting)(questioning constitutionality on Free Exercise grounds of health order closing all schools).
182. *See supra* text accompany notes 45-68.
183. *See supra* text accompany notes 67-68.
184. National Conference of State Legislatures, "States with Religious and Philosophical Exemptions from School Immunization Requirements," *available at* <https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx> (last visited October 1, 2021).
185. *See supra* text accompanying notes 181-184. For a discussion of the potential impact of the COVID-cases and *Fulton* on vaccine mandates, see D. R. Reiss, "Vaccines Mandates and Religion: Where are We Headed with the Current Supreme Court?" *Journal of Law, Medicine & Ethics* 49, no. 4 (2021): 552-563.
186. 595 U.S. ___, 2001 WL 5027177 (Oct. 29, 2021)(Barrett, J., concurring).

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