SAFEGUARDING THE FREE EXERCISE OF RELIGION DURING THE COVID-19 PANDEMIC

*Jiwoon Kong**

Religious worship is fundamentally rooted in physical and intimate interactions. For instance, the Bible calls on Christian congregations to physically gather, receive the Lord's Supper, sing praises, and confess their sins directly before ordained ministers. However, as the highly contagious and airborne COVID-19 disease relentlessly swept across the nation, religious establishments balanced fundamental religious traditions with the inherent dangers of carrying out such traditions. Inevitably, the free exercise of religion faces an unprecedented challenge as governors continue to enact executive orders limiting in-person religious worship gatherings. The jurisprudence thus far has shown alarming inconsistency in the protection of free exercise of religion, and this Note calls on the U.S. Supreme Court to provide clearer guidance for lower courts. Importantly, this Note argues that freedoms explicitly enumerated in the Bill of Rights nevertheless deserve the highest level of protection when infringed or burdened.

* J.D. Candidate, 2022, Fordham University School of Law; B.A., 2016, Boston College. This Note would not have been possible without the mentorship and guidance of Professor Abner Greene, the diligence of my primary editor, Nicholas Reade, and all other editors of the *Fordham Law Review*, and the steadfast support of my friends and family.

INTRODUCTION

On May 20, 2020, the First Pentecostal Church in Holly Springs, Mississippi, burned to the ground.[1] Underneath the smoldering mass of debris, graffiti on the church parking lot pavement read "Bet you Stay home Now YOU HYPOKRITS."[2] A few weeks prior, the church had filed a suit against the city for prohibiting in-person services, but with the church building now burned to the ground, the city argued that "the Church's First Amendment claim necessarily went up in smoke when the church did."[3] Although the city had permitted the church to hold drive-in services, Pastor Jerry Waldrop nevertheless decried the destruction of the church "because his congregants wanted to worship in-person."[4]

1. *See* First Pentecostal Church of Holly Springs v. City of Holly Springs, 959 F.3d 669, 670 (5th Cir. 2020) (Willett, C.J., concurring).
2. *Id.*
3. *Id.*
4. Caleb Parke, *Mississippi Pastor Says Church Was Burned Down "to Shame Us for Worshipping Together*,*"* FOX NEWS (May 28, 2020), https://www.foxnews.com/us/coronavirus-mississippi-church-fire-graffiti-holly-springs [https://perma.cc/D785-ZMWF].

Such was the peculiar reality in the spring of 2020, when all levels and branches of government faced the astronomical challenge of combating the COVID-19 pandemic. The lethal and highly contagious virus swept swiftly and relentlessly across the globe. After the first COVID-19 death in the United States on February 29, the country began implementing gathering restrictions throughout the nation to limit the spread of the airborne virus.[5]

Like most other gatherings, in-person religious worship gatherings were generally prohibited, raising significant questions about the constitutional right to free exercise of religion. President Donald Trump called for all houses of worship across the country to be reopened as "essential" to the nation.[6] However, with the nature of the pandemic still relatively unknown, governors, legislatures, and the courts were reluctant to open establishments other than those directly contributing to combating the spread of the virus. As COVID-19 infection rates began stabilizing, and with mounting pressure to reopen businesses, governors began implementing phases that determined when, how, and to what extent businesses could reopen.

The Free Exercise Clause of the First Amendment[7] has posed a challenge to courts faced with conflicts between religion and the government. Selective categorization of gatherings amidst reopening efforts has raised significant free exercise discrimination issues, predominantly regarding whether the state action in question satisfies the requirement of "general applicability." The U.S. Supreme Court's controversial decision in *Employment Division, Department of Human Resources v. Smith*[8] established the current standard for evaluating such predicaments. Writing for the majority, Justice Antonin Scalia declared that burdens on religious exercise will be upheld so long as the state law or action is neutral and generally applicable.[9] Justice Scalia offered an "across-the-board criminal prohibition"[10] as an example of a neutral and generally applicable law but did not provide further guidance on discerning the "infinity of hard cases" involving state actions that are not as extreme.[11]

Post-*Smith* free exercise jurisprudence has met its most significant challenge during the COVID-19 pandemic. Such a pandemic presents the

5. Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES (Jan. 10, 2021), https://www.nytimes.com/article/coronavirus-timeline.html [https://perma.cc/SWE5-ZSQ8]. In April, reports emerged that the earliest deaths attributable to COVID-19 actually occurred in early February. *See* Stephanie Soucheray, *Coroner: First US COVID-19 Death Occurred in Early February*, CIDRAP (Apr. 22, 2020), https://www.cidrap.umn.edu/news-perspective/2020/04/coroner-first-us-covid-19-death-occurred-early-february [https://perma.cc/NKA6-NJZ2].

6. Marisa Schultz, *Trump Announces that Houses of Worship Are "Essential," Calls on Governors to Open Them Up*, FOX NEWS (May 22, 2020), https://www.foxnews.com/politics/trump-announces-that-houses-of-worship-are-essential-calls-on-governors-to-open-them-up [https://perma.cc/8R3G-ZXEE].

7. U.S. CONST. amend. I, cl. 2.

8. 494 U.S. 872 (1990).

9. *See id.* at 878–79.

10. *Id.* at 884.

11. Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith*,* Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 859 (2001).

unique opportunity to examine the varied responses between states advocating for a higher standard of scrutiny and those following *Smith*. Can the controversial *Smith* and the rational basis test truly endure during a pandemic affecting virtually every corner of society? Or, will the pandemic finally prove the critics correct and highlight the need to subject all burdens on religious liberty to a higher standard of scrutiny?

This Note sides with the latter view and advances two main arguments. First, this Note denounces the inconsistent application of *Smith* in COVID-19 religious exemption cases and calls on the Court to clarify the general applicability standard when upholding burdens on free exercise. Second, this Note argues that religious freedoms deserve distinctive treatment through a narrow application of strict scrutiny. This Note endorses the strict scrutiny test as "a workable test for striking sensible balances" between religious freedoms and competing state interests, without impairing the compelling public health crisis.[12] For purposes of this Note, the scope of religious contexts primarily will focus on Christian denominations from which the significant majority of COVID-19 religious exemption cases arise.[13]

Part I provides the relevant contexts for the pandemic, its impact on religious worship, and the development of free exercise jurisprudence. Part II discusses the religious exemption cases during COVID-19 and highlights the unguided and inconsistent application of the general applicability standard. Specifically, this part argues that courts must carefully discern which gatherings are comparable and, to do so, the Supreme Court must step in to provide clearer guidance for courts in discerning general applicability. Part III argues that free exercise of religion deserves distinctive treatment. Thus, if *Smith* is overruled, courts should carefully apply a heightened strict scrutiny standard for religious exemption cases.

I. COVID-19 AND THE COURT'S FREE EXERCISE JURISPRUDENCE

This part concerns the interaction of three distinct topics. Part I.A describes events and considerations surrounding the COVID-19 pandemic. Part I.B discusses the impact of the pandemic on religion. Part I.C provides an overview of free exercise jurisprudence as it stands today.

A. COVID-19 Pandemic

On December 31, 2019, the World Health Organization (WHO) became aware of flu-like symptoms spreading in Wuhan City, China.[14] In early January 2020, shortly before the first reported death, health officials

12. 42 U.S.C. § 2000bb(a)(5).

13. It is important to note that cases involving gathering restrictions placed on Jewish synagogues have also played a significant role in free exercise jurisprudence during the pandemic. *See generally* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam); Soos v. Cuomo, 470 F. Supp. 3d 268 (N.D.N.Y. 2020).

14. *See Timeline: WHO's COVID-19 Response*, WORLD HEALTH ORG., https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline [https://perma.cc/D6J3-S4XR] (last visited Jan. 27, 2021).

determined the cause was a new coronavirus.[15] On January 21, WHO confirmed the human-to-human transmission of the virus, with Thailand, South Korea, Japan, and the United States confirming their first cases.[16] Through the rest of January and February, the virus spread through Asia, Europe, North America, and South America.[17] On February 29, the Centers for Disease Control and Prevention (CDC) confirmed the first death in the United States.[18]

As of early March, the virus was still relatively unknown, with scientific and political opinion sharply divided on how best to combat the virus; medical organizations debated the effectiveness of social distancing protocols and personal protective equipment (PPE).[19] Nonetheless, as of March 17, over 5000 were infected, with nearly one hundred casualties.[20]

The next day, California issued the nation's first statewide stay-at-home order,[21] urging all nonessential workers to stay home. Within the week, Illinois, New York, and Michigan declared their own statewide orders.[22] Following President Trump's declaration of COVID-19 as a public health emergency, between March 1 and May 31, forty-two states implemented gathering restrictions to some extent, with the most severely affected states, such as New York and New Jersey, implementing stricter directives.[23]

In mid-May, some southern and western states began to roll back their stay-at-home orders, allowing businesses such as gyms, hair and nail salons, and restaurants to reopen pursuant to health and safety measures.[24] Other states—as well as health officials—expressed concern for reopening the

15. *Id.*

16. *See id*; *see also Statement on the First Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of Novel Coronavirus (2019-nCoV)*, WORLD HEALTH ORG. (Jan. 23, 2020), https://www.who.int/news/item/23-01-2020-statement-on-the-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov) [https://perma.cc/UNE8-W4W4].

17. *Id.*

18. Emma Newburger, *Washington State Confirms First US Death from Coronavirus*, CNBC (Feb. 29, 2020, 5:19 PM), https://www.cnbc.com/2020/02/29/washington-state-confirms-first-us-death-from-coronavirus.html [https://perma.cc/58U8-WU4E].

19. German Lopez, *The Evidence for Everyone Wearing Masks, Explained*, VOX (Apr. 4, 2020), https://www.vox.com/2020/3/31/21198132/coronavirus-covid-face-masks-n95-respirator-ppe-shortage [https://perma.cc/C2QC-CXQN]; *see also* Tina Hesman Saey, *Why 6 Feet May Not Be Enough Social Distance to Avoid COVID-19*, SCIENCENEWS (Apr. 17, 2020, 6:00 AM), https://www.sciencenews.org/article/coronavirus-covid-19-why-6-feet-may-not-be-enough-social-distance [https://perma.cc/BA2M-BHCU].

20. *See supra* note 14.

21. Phil Helsel, *California Issues Statewide Stay-at-Home Order in Coronavirus Fight*, NBC NEWS (Mar. 19, 2020, 10:29 PM), https://www.nbcnews.com/news/us-news/california-issues-statewide-stay-home-order-coronavirus-fight-n1164471 [https://perma.cc/SM29-YQWE].

22. *See Coronavirus Restrictions and Mask Mandates for All 50 States*, N.Y. TIMES (Jan. 29, 2021), https://www.nytimes.com/interactive/2020/us/states-reopen-map-coronavirus.html [https://perma.cc/3CQA-RH28].

23. *See* Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020).

24. *See supra* note 22.

economy too prematurely.[25] During the summer months, the southern and western states—particularly those that partially reopened their economies—experienced a surge in cases, leading to the reinstatement of some stay-at-home orders.[26] Other states continued reopening efforts, implementing social distancing and PPE measures to reduce the spread of the virus.[27]

As of February 4, 2021, WHO had confirmed over 26 million cases and over 452,000 deaths in the United States and 100 million cases and 2.29 million deaths worldwide.[28]

B. The Pandemic's Impact on Religion in the United States

In Washington State, a 122-member choir normally gathers every Tuesday evening at Mount Vernon Presbyterian Church for two-and-a-half-hour rehearsals.[29] On March 15, 2020, the choir director notified the choir that six members had begun experiencing fevers, and by March 17, twenty-four members reported flu-like symptoms and at least three positive COVID-19 test results.[30] In total, fifty-three members were affected, and two members ultimately died from the virus.[31]

This event is noted as one of the earliest "super-spreader" events during the COVID-19 pandemic.[32] Such events have drawn considerable attention to religious worship and its role in spreading the virus. Some have vocalized the importance of providing spiritual support during a pandemic, while others have proclaimed that it is "'not Christian' to hold in-person services during a pandemic."[33]

Nearly all religious practices and traditions encompass intimate, face-to-face interactions. Christian denominations, specifically, generally believe that their congregations must meet in person each week to worship together as called on by God, who created humans as physical beings to gather and worship together.[34] Religious rituals, such as the Lord's Supper, are intimate and vital acts of the Christian faith that require the physical administering of

25. *See* Christina Maxouris & Amir Vera, *US Is Still "Knee-Deep" in the First Wave of the Coronavirus Pandemic, Fauci Says*, CNN (July 7, 2020, 8:02 AM), https://www.cnn.com/2020/07/06/health/us-coronavirus-monday/index.html [https://perma.cc/3TUG-T8KN].

26. *See id.*

27. *See id.*

28. *See WHO Coronavirus Disease (COVID-19) Dashboard*, WORLD HEALTH ORG. (Feb. 1, 2021, 10:19 AM), https://covid19.who.int/table [https://perma.cc/F4LG-FD5T]

29. *See* Lea Hamner et al., *High SARS-CoV-2 Attack Rate Following Exposure at a Choir Practice—Skagit County, Washington, March 2020*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 15, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6919e6.htm [https://perma.cc/VKS6-FXR3].

30. *Id.*

31. *Id.*

32. *Id.*

33. *See* Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610, 615 (6th Cir. 2020) (quoting Doral Chenoweth III, *Video: DeWine Says It's "Not Christian" to Hold Church During Coronavirus*, COLUMBUS DISPATCH (Apr. 1, 2020, 5:00 PM), https://www.dispatch.com/news/20200401/video-dewine-says-itrsquos-ldquonot-christianrdquo-to-hold-church-during-coronavirus [https://perma.cc/G3QU-ZLXW]).

34. *See Acts* 20:7; 1 *Corinthians* 15, 16:2; *Genesis* 2:7.

bread and wine as the representation or embodiment of the body and blood of Jesus Christ.[35] Congregational singing is particularly essential to the Protestant worship experience, as it represents an outpouring of thankfulness and filling of the heart with the Holy Spirit. The Bible calls on believers to "sing[] psalms and hymns and spiritual songs."[36] Apostle Paul also teaches that, through singing, believers shall "[give] thanks always and for everything to God the Father in the name of our Lord Jesus Christ."[37]

Inevitably, the risk of transmission associated with physical contact and singing have compelled religious worshipers to endure a cautious and reluctant transition to online worship, drive-in services, and virtual community groups.[38] Furthermore, death and mourning are deeply religious life events that typically bring people together.[39] The pandemic's increased death toll, for many, has produced a greater need for religious traditions, yet social distancing and appropriate health measures continue to prevent the customary exercise of such traditions.[40]

As of late 2019, Christianity is the largest religion in the United States, with approximately 167 million adult Christians in the country.[41] However, nearly one-fifth of regular church attendees are not participating in online worship services, and the numbers are even greater for those who were already not regularly attending service.[42] Nearly 12 percent of religious individuals indicated that their primary houses of worship did not provide alternative virtual solutions, while nearly 5 percent indicated that they were unsure.[43]

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35. *See Shorter Catechism*, THE ORTHODOX PRESBYTERIAN CHURCH, https://www.opc.org/sc.html [https://perma.cc/R36U-K3K7] (last visited Jan. 27, 2021) ("The Lord's supper is a sacrament, wherein, by giving and receiving bread and wine according to Christ's appointment, his death is showed forth; and the worthy receivers are, not after a corporal and carnal manner, but by faith, made partakers of his body and blood, with all his benefits, to their spiritual nourishment and growth in grace.").

36. *Colossians* 3:16.

37. *Ephesians* 5:20.

38. *See* Hamner et al., *supra* note 29; *see also* Rebecca Heilweil, *Religious Leaders Are Becoming Content Creators to Keep Their Followers Engaged*, VOX (Sept. 18, 2020, 4:39 PM), https://www.vox.com/recode/2020/9/18/21443661/religion-logging-off-online-engagement-content-creators [https://perma.cc/YH5U-W5N7]; Emily McFarlan Miller, *Churches Go Back to the Future with Drive-in Services in the Time of the Coronavirus*, RELIGION NEWS SERV. (Mar. 23, 2020), https://religionnews.com/2020/03/23/churches-go-back-to-the-future-with-drive-in-services-in-the-time-of-the-coronavirus/ [https://perma.cc/RNY6-5TZV].

39. *See* Joseph O. Baker et al., *Religion in the Age of Social Distancing: How COVID-19 Presents New Directions for Research*, 81 SOCIO. RELIGION 357, 358 (2020).

40. *Id.*

41. *See In U.S., Decline of Christianity Continues at Rapid Pace*, PEW RSCH. CTR. (Oct. 17, 2019), https://www.pewforum.org/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace/ [https://perma.cc/A7VG-ZGDF].

42. *See* Claire Gecewicz, *Few Americans Say Their House of Worship Is Open, but a Quarter Say Their Faith Has Grown Amid Pandemic*, PEW RSCH. CTR. (Apr. 30, 2020), https://www.pewresearch.org/fact-tank/2020/04/30/few-americans-say-their-house-of-worship-is-open-but-a-quarter-say-their-religious-faith-has-grown-amid-pandemic/ [https://perma.cc/UX6D-KYJC].

43. *Id.*

Thus, like most other aspects of society, the pandemic has drastically affected religious worship. Whereas the gravity and nature of the pandemic has, for some, produced a greater "demand" for religious practices, traditions, comfort, and support, COVID-19 public health concerns have severely limited the "supply" of customary religious experiences.[44] While some have embraced this opportunity to assist public health efforts, others have questioned how to "render to Caesar the things that are Caesar's, and to God the things that are God's."[45]

C. Free Exercise Jurisprudence

The First Amendment to the U.S. Constitution declares that Congress "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[46] The second clause is the Free Exercise Clause, which prohibits government interference with religious beliefs and practices.[47] The most common issue in free exercise jurisprudence arises when a neutral and generally applicable state law or action has the incidental effect of interfering with a particular religious practice or belief.[48] In analyzing this issue, the Court has generally raised two inquiries: (1) whether the law is in fact neutral and generally applicable; and (2) whether the law, if not neutral and generally applicable, is nevertheless supported by a compelling and narrowly tailored state interest.[49] If neither inquiry is satisfied, then the state action or law may not exempt religious gatherings from favorable categorizations.[50]

The Court established the current law through its ruling in *Smith* and other significant developments in 1993. However, the development of this jurisprudence has been controversial at times. Cases regarding religious gathering restrictions during COVID-19 often have turned on the question of general applicability and whether state interests were tailored narrowly enough to justify the burden on religious gatherings.

1. Early Developments and the *Sherbert* Test

In addressing free exercise issues, the Supreme Court first distinguished between religious belief and religious conduct. The Free Exercise Clause "embraces two concepts,—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be."[51] Whereas the

44. *See* Baker et al., *supra* note 39, at 358.
45. *Matthew* 22:21.
46. U.S. CONST. amend I.
47. *Id*. cl. 2.
48. *See* Christopher C. Lund, *Religion Is Special Enough*, 103 VA. L. REV. 481, 482 (2017) ("With the Free Exercise Clause, the persistently recurring issue has been whether the government should provide religious exemptions from generally applicable laws.").
49. *See infra* Part II.C.4.
50. *See infra* Part II.C.3.
51. Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940).

freedom to believe is unquestionably protected, the freedom to act on those beliefs may be subject to regulation by the government.[52]

The first free exercise of religion case before the Supreme Court, *Reynolds v. United States*,[53] addressed this distinction. In this 1878 case, a grand jury indicted George Reynolds, a member of the Church of Jesus Christ of Latter-day Saints, for practicing polygamy in violation of a federal statute.[54] Reynolds argued that the practice of polygamy was essential to the Mormon faith.[55] However, the Court ultimately deemed the statute constitutional, concluding that, although the government may not regulate or punish individuals because of their religious beliefs, it may regulate conduct motivated by such beliefs.[56] The Court justified denying an exemption to the law for the church by stating that Congress has the ability to "reach actions which were in violation of social duties or subversive to good order."[57] The Court further appealed to the concept of equality before the law, stating that exemptions for religiously motivated conduct that would otherwise be regulated would place "religious belief superior to the law of the land."[58] On the other hand, the Court has kept the door "tightly closed against any governmental regulation of religious *beliefs*."[59]

The Court did not hear a free exercise case again until 1940, in *Cantwell v. Connecticut*.[60] Here, in striking down a state statute creating a prior restraint on a Jehovah's Witness's free exercise of his religion, the Court expanded free exercise protections to state and local laws.[61] The Court ruled that the Fourteenth Amendment protection against state action incorporates the Free Exercise Clause of the First Amendment.[62]

Together, *Reynolds* and *Cantwell* formed the initial scope of free exercise cases. First, the government may only regulate religious conduct, not religious belief.[63] Second, the Court expanded religious liberty, as protected by the First Amendment to state and local laws.[64] This expanded understanding of the First Amendment significantly strengthened individuals' religious liberty protections under the Constitution. However, the Court had yet to specify a consistent standard of review or framework for evaluating such cases and therefore, a series of conflicting decisions followed.

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52. *See id.* at 304.
53. 98 U.S. 145 (1878).
54. *Id.* at 146.
55. *Id.* at 161.
56. *Id.* at 166 ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.").
57. *Id.* at 164.
58. *See id.* at 166–67.
59. Sherbert v. Verner, 374 U.S. 398, 402 (1963). *See generally* Torcaso v. Watkins, 367 U.S. 488 (1961); Fowler v. Rhode Island, 345 U.S. 67 (1953); Murdock v. Pennsylvania, 319 U.S. 105 (1943).
60. 310 U.S. 296 (1940).
61. *Id.* at 308–11.
62. *See id.* at 305.
63. *Reynolds*, 98 U.S. at 166.
64. *Cantwell*, 310 U.S. at 308–11.

Finally, in the 1963 case of *Sherbert v. Verner*,[65] the Supreme Court created its first framework for evaluating free exercise claims. Adell Sherbert, a Seventh-day Adventist, was discharged by her employer due to her refusal to work on Saturdays, her faith's Sabbath.[66] After failing to obtain other employment, she filed a claim for unemployment compensation benefits.[67] The South Carolina law at issue deemed individuals to be ineligible for such benefits if they failed to "accept available suitable work when offered."[68] The state subsequently denied Sherbert unemployment benefits, concluding that she had failed to accept suitable employment when offered, despite its conflict with her religious beliefs.[69] The state reasoned that allowing exemptions to the unemployment compensation laws for religious individuals would "dilute the unemployment compensation fund" and "hinder the scheduling by employers of necessary Saturday work."[70]

The Supreme Court ultimately ruled in favor of Sherbert and utilized a two-step analysis.[71] First, the Court deliberated on whether the state law placed any burden on Sherbert's religious practice.[72] The Court emphatically concluded that such a burden existed, stating that her ineligibility for benefits derived solely from the practice of her religion and forced her to choose between following her religion and forfeiting benefits.[73] Second, the Court considered whether the state showed a compelling state interest justifying the burden on Sherbert's religious practice.[74] To satisfy this standard, the Court required more than a "merely . . . rational relationship to some colorable state interest" in such a "highly sensitive constitutional area."[75] In stating that only "the gravest abuses, endangering paramount interest, give occasion for permissible limitation," the Court concluded that the dilution of the unemployment fund and possible scheduling issues fell short of such a standard.[76] Even if the state could prove a likely increase in fraudulent claims or scheduling issues, the Court required the government to show that no alternative methods could "combat such abuses without infringing First Amendment rights."[77] Thus, the state was required to further justify its burden on religious belief or practice by showing that the state action was the least restrictive means for achieving the state interest.

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65. 374 U.S. 398 (1963).
66. *See id.* at 399.
67. *Id.* at 399–400.
68. *Id.* at 401.
69. *See id.*
70. *See id.* at 407.
71. *See id.* at 402–04.
72. *Id.* at 403 ("We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion. We think it is clear that it does.").
73. *Id.* at 404.
74. *Id.* at 406.
75. *Id.*
76. *See id.* at 406–07 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).
77. *Id.* at 407.

The Court thus established the *Sherbert* test, which requires the government to prove that the allegedly infringing law (1) furthers a compelling state interest and (2) is narrowly tailored to achieve the state interest.[78] If the government succeeds in proving these elements, plaintiffs must comply with the law regardless of their religious exercises.[79] If the government fails to meet its burden, then plaintiffs are granted an exemption from the law.[80]

2. *Yoder* and the Limited Application of the *Sherbert* Test

The Court extended the *Sherbert* test beyond state unemployment compensation laws and into criminal law in *Wisconsin v. Yoder*.[81] An Amish family contested a Wisconsin criminal statute that imposed sanctions on parents whose children did not attend school through the age of sixteen.[82] The family claimed that this conflicted with the Amish religion, which required them to be insulated from "worldly influence" and to be trained in the self-reliant, agrarian community during their formative years.[83] The state responded that the compulsory education was intended to develop a productive, self-reliant citizenry.[84]

The Supreme Court, applying the *Sherbert* test, concluded that nothing in the record showed that the state interest in public education outweighed the "grave interference" with Amish belief and practices.[85] The Court additionally held that the state could still achieve its interest in a productive citizenry by requiring education only through age fourteen, eliminating the burden to the Amish community's right to freely exercise its religion while still serving the state's interest.[86] Because the state failed to show that compulsory education was the least restrictive means to achieve its compelling interest, the Court concluded that the Amish were constitutionally entitled to an exemption from the law.[87]

Despite its application and expansion in *Yoder*, the Court applied the *Sherbert* test in only three other unemployment benefits cases from 1972 to 1990.[88] These three cases—along with *Sherbert*—became known as the "*Sherbert* Quartet."[89] In *Thomas v. Review Board of the Indiana*

78. *Id.* at 403.
79. *See id.*
80. *See id.*
81. 406 U.S. 205 (1972).
82. *Id.* at 207–09.
83. *Id.* at 210.
84. *Id.* at 221.
85. *Id.* at 218.
86. *Id.* at 222.
87. *See id.* at 218, 234.
88. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1110, 1120 (1990) (referring to *Yoder* as the "last major free exercise victory").
89. Prabha Sipi Bhandari, Note, *The Failure of Equal Regard to Explain the* Sherbert *Quartet*, 72 N.Y.U. L. REV. 97, 97 (1997).

Employment Security Division,[90] Eddie Thomas refused his employer's request to transfer him from a manufacturing department to an industrial department that produced military equipment.[91] Thomas reasoned that the industrial work conflicted with his pacifist religious beliefs as a Jehovah's Witness.[92] Thomas subsequently quit and was denied unemployment benefits.[93] Ruling in favor of Thomas, the Court stated that "only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion."[94] The Court arrived at similar conclusions in *Hobbie v. Unemployment Appeals Commission*,[95] ruling that a state could not deny unemployment benefits to a Seventh-day Adventist who was fired for refusing to work on the Sabbath.[96] The Court added that it made no difference that the employee adopted certain religious practices after employment began; it is nonetheless an impermissible burden to compel employees to modify their religious practices to qualify for unemployment benefits.[97] In *Frazee v. Illinois Department of Income Security*,[98] the Court similarly ruled that a state may not deny unemployment benefits due to a person's refusal to work on the Sabbath, even if that person holds a sincere belief independent of membership in any established religion.[99]

Beyond the *Sherbert* quartet and *Yoder*, the Court rejected every claim requesting exemption from burdensome laws.[100] The *Sherbert* test came under increasing scrutiny in the 1980s, and the Court began narrowing the concept of "significant burden" while more readily labeling state interests as "compelling" where religious practice was significantly burdened. For example, in *Lyng v. Northwest Indian Cemetery Protective Ass'n*,[101] the Court reversed a lower court injunction prohibiting the U.S. Forest Service from building a roadway based on the rationale that it would damage grounds historically used by Native Americans for religious rituals.[102] The Court reasoned that the impact on religious practice was incidental—as opposed to an explicit prohibition of such practice—and thus did not require the government to bring forward a compelling justification.[103] In *United States v. Lee*,[104] the Court denied an exemption for an Amish employer who refused to pay social security tax, stating that "it would be difficult to accommodate . . . myriad exceptions flowing from a wide variety of religious

90. 450 U.S. 707 (1981).
91. *See id.* at 709.
92. *See id.* at 710–11.
93. *See id.* at 710–12.
94. *See id.* at 718 (alteration in original) (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).
95. 480 U.S. 136 (1987).
96. *See id.* at 139–42.
97. *See id.* at 143–44.
98. 489 U.S. 829 (1989).
99. *See id.* at 834–35.
100. *See* McConnell, *supra* note 88, at 1110.
101. 485 U.S. 439 (1988).
102. *Id.* at 458.
103. *Id.* at 450–51.
104. 455 U.S. 252 (1982).

beliefs."[105] Surveying the application of the test, one commentator criticized the test as "more talk than substance," referring to the Court's reluctance to side with free exercise claimants.[106] Others noted that the test was "strict in theory but feeble in fact."[107]

Thus, through the 1980s, the Court loosened the standard set by *Sherbert*, marking an extensive period of religious exemption denials. This period eventually culminated in the Court's full departure from strict scrutiny in its 1990 decision in *Smith*.

3. The *Smith* Requirements: Neutrality and General Applicability

In *Smith*, two Native Americans, Alfred Smith and Galen Black, were terminated from their counselor positions at a drug rehabilitation clinic for ingesting a hallucinogenic substance called peyote.[108] The claimants ingested the substance for sacramental purposes at a Native American Church ceremony.[109] Upon denial of unemployment compensation benefits, Smith and Black filed suit claiming that such denial was a violation of their right to free exercise of religion.[110]

The Court ultimately refused to grant an exception to the claimants.[111] Writing for the majority, Justice Scalia first distinguished prior free exercise cases granting exemptions to claimants, stating that those cases were limited to unemployment compensation matters that were particularly suited for applying exemptions.[112] Specifically, Justice Scalia distinguished the *Sherbert* line of cases, reasoning that those cases "stand for the proposition that where the State has in place a system of individual exemptions," the state may not refuse to incorporate cases of religious hardship without a compelling reason.[113] In other words, unemployment compensation programs already involve examination of individual circumstances to evaluate for possible exemptions.[114] This is distinguishable from an "across-the-board criminal prohibition on a particular form of conduct," such as the use of peyote.[115]

105. *See id.* at 253 (distinguishing Wisconsin v. Yoder, 406 U.S. 205 (1972)).
106. *See* McConnell, *supra* note 88, at 1109.
107. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994). Notably, Professors Christopher L. Eisgruber and Lawrence G. Sager argued that the *Sherbert* test was not suited for religious exemption cases in general. However, in cases involving administrative systems evaluating individuals on a case-by-case basis, such as those in the *Sherbert* quartet, Eisgruber and Sager argued that a refusal of benefits on religious grounds "represent[ed] a failure of equal regard" as compared to benefits granted for those who quit their jobs for secular reasons, such as family or health. *See id.* at 1287.
108. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 874 (1990).
109. *Id.*
110. *See id.* at 872.
111. *Id.* at 890.
112. *Id.* at 884.
113. *Id.* (citing Bowen v. Roy, 476 U.S. 693, 708 (1986) (plurality opinion)).
114. *Id.*
115. *Id.*

Additionally, Justice Scalia controversially distinguished prior cases upholding exemptions, including *Yoder*, as "hybrid"[116] cases that involved "not the Free Exercise Clause alone, but . . . other constitutional protections," such as free speech or parental rights.[117] The Court reasoned that because such cases involved other constitutional rights, they were not applicable to Smith in this case.[118] Because the facts in this case did not present "such a hybrid situation," the Court did not apply similar constitutional protections as those granted in *Yoder*.[119]

In so ruling, the Court abandoned the compelling state interest test from *Sherbert*, deemed to be "courting anarchy" due to the diversity of religious beliefs in the United States.[120] Instead, the Court held that religious beliefs may not be grounds for exemption when concerned with "valid and neutral law[s] of general applicability."[121] A state could justify a law with incidental burdens on religious practice so long as the law was neutral and generally applicable.[122]

Justice Sandra Day O'Connor, though concurring in the judgment, disagreed with the Court's abandonment of the compelling state interest standard.[123] The First Amendment, Justice O'Connor stated, "does not distinguish between laws that are generally applicable and laws that target particular religious practices."[124] Although Justice Scalia and the majority held that generally applicable laws are "one large step" removed from laws regulating specific religious practices,[125] Justice O'Connor contended that the First Amendment "ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice."[126] Furthermore, Justice O'Connor pointed out that the Court's protection of generally applicable laws entailed explicitly overruling *Yoder*, where the Court acknowledged areas of conduct protected by the Free Exercise Clause "beyond the power of the State to control, *even under*

116. *Id.* at 882.

117. *Id.* at 881 ("The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections . . . .").

118. *Id.*

119. *Id.* at 882 (stating that the facts of the case show "a free exercise claim unconnected with any communicative activity or parental right").

120. *Id.* at 888 (stating that applying the *Sherbert* test "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind").

121. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

122. *Id.* at 878 ("[I]f prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.").

123. *Id.* at 892 (O'Connor, J., concurring in the judgment).

124. *Id.* at 894.

125. *Id.* at 878 (majority opinion).

126. *Id.* at 894 (O'Connor, J., concurring in the judgment).

regulations of general applicability."[127] In effect, Justice O'Connor believed that the *Smith* requirements of neutrality and general applicability are "merely evidence of a legitimate state interest, not reasons to change the standard for evaluating that interest."[128]

Justice Harry Blackmun, in his dissent, similarly expressed concern for the Court's overruling a "settled and inviolate principle of this Court's First Amendment jurisprudence."[129] He first clarified that the state interest involved is not the "broad interest in fighting the critical 'war on drugs'" but the "State's narrow interest in refusing to make an exception for the religious, ceremonial use of peyote."[130] Following the evidentiary reasoning in *Yoder* and *Thomas*, Justice Blackmun undermined the state's alleged compelling interest, stating that Oregon had never enforced a peyote prohibition nor was there any evidence that peyote "has ever harmed anyone."[131] Additionally, Justice Blackmun described the majority's assertion that granting an exemption would cause "a flood of other claims to religious exemptions" as "purely speculative" and inconsistent with prior cases granting exemptions in the face of similarly speculative arguments.[132]

Smith remains a highly controversial case. Some have vehemently supported the decision, claiming that religious exemptions create "a constitutional preference for religious over non-religious belief systems"[133] that unfairly "insulate[s] religious beliefs from social forces," while "competing secular beliefs . . . must stand or fall on their own accord."[134] Others found the decision "troubling, bordering on the shocking,"[135] arguing that the First Amendment "treats religious belief differently—sometimes

127. *Id.* at 896 (quoting Wisconsin v. Yoder, 406 U.S. 205, 220 (1972)). Justice O'Connor also extracted language from *Yoder* contradicting the Court's opinion on neutrality. *Id.* ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion." (quoting Wisconsin v. Yoder, 406 U.S. 205, 220 (1972))).

128. David Bogen, *Generally Applicable Laws and the First Amendment*, 26 SW. U. L. REV. 201, 211–12 (1996).

129. *Smith*, 494 U.S. at 908 (Blackmun, J., dissenting).

130. *Id.* at 909–10. Justice Blackmun also cites *Yoder*. *Id.* at 910 ("'Where fundamental claims of religious freedom are at stake,' the Court will not accept a State's 'sweeping claim' that its interest in compulsory education is compelling; despite the validity of this interest 'in the generality of cases, we must searchingly examine the interests that the State seeks to promote . . . and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.'" (alteration in original) (quoting Wisconsin v. Yoder, 406 U.S. 205, 221 (1972))).

131. *Id.* at 911–12 ("[T]his Court's prior decisions have not allowed a government to rely on mere speculation about potential harms, but have demanded evidentiary support for a refusal to allow a religious exception."); *see also* Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 719 (1981).

132. *Smith*, 494 U.S. at 916–17 (Blackman, J., dissenting).

133. William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 319 (1991).

134. *Id.* at 322; *see also* Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 7 (1961); Mark Tushnet, *Of Church and State and the Supreme Court: Kurland Revisited*, 1989 SUP. CT. REV. 373, 390 (asserting that granting religious exemptions amounted to government favoritism of religion that raised serious constitutional concerns).

135. *See* McConnell, *supra* note 88, at 1120.

better, sometimes worse" and echoing the sentiments of Justice O'Connor and Justice Blackmun.[136]

4. *Lukumi*: Neutrality and General Applicability Defined

During the three years following *Smith*, an onslaught of free exercise cases decided against religious groups culminated in the Supreme Court's decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[137] This case involved a Santeria church that engaged in animal sacrifice as a central form of devotion.[138] The City of Hialeah attempted to prohibit such a religious practice through ordinances with the intent of "protecting the public health and preventing cruelty to animals."[139] In its decision, the Court applied the general propositions from *Smith*—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."[140] A law is not neutral and generally applicable must then be justified by a compelling state interest and must be narrowly tailored to advance that interest.[141]

First, unlike its view of the prohibition of peyote in *Smith*, the Court found the ordinances prohibiting animal sacrifice to be neither neutral nor generally applicable.[142] In analyzing neutrality, the Court weighed the object of the city ordinances against the burden on the Santeria church's religious practices.[143] In doing so, the Court ultimately found sufficient evidence—particularly in the legislative history of the ordinances—of improper targeting of the Santeria church and thus, concluded that the object of the ordinances was to suppress religion.[144] In particular, the Court concluded that the broad ordinances prohibited the Santeria church's practice of animal sacrifice even when it did not threaten the city's interest in public health.[145] The ordinances "gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings" thus "target[ing]" the Santeria church.[146]

Next, the Court held that the ordinances were not generally applicable.[147] Although Justice Anthony Kennedy declined to "define with precision the

136. *See* Michael W. McConnell, *A Response to Professor Marshall*, 58 U. CHI. L. REV. 329, 331 (1991); *see also* Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1643 (1992) ("[T]he Court in *Employment Division v. Smith* lumped religious values together with secular ones and permitted no conscience to trump the political process, to become 'a law unto itself.'" (quoting *Smith*, 494 U.S. at 890)).

137. 508 U.S. 520 (1993).

138. *Id.* at 524.

139. *Id.* at 543.

140. *Id.* at 531.

141. *Id.*

142. *Id.* at 546.

143. *Id.* at 533–34.

144. *Id.* at 541–42.

145. *Id.* at 538–39.

146. *Id.* at 542.

147. *Id.* at 543.

standard used to evaluate" general applicability, he nevertheless concluded that Hialeah's ordinances fell "well below the minimum standard necessary to protect First Amendment rights."[148] Notably, Justice Kennedy examined the ordinances' inclusivity, evaluating whether similar, nonreligious conduct was also subjected to similar prohibitions.[149] The Court ultimately concluded that the ordinances were underinclusive because they failed to prohibit "nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does."[150] For example, the Court cited fishing, extermination of mice, and the hunting of hogs as examples of nonreligious conduct that nevertheless were not prohibited by the city ordinances.[151] Additionally, the Court pointed out that the city failed to regulate actors who improperly disposed of carcasses, such as hunters or restaurants, but only found an issue when it "results from religious exercise."[152] In sum, the Court concluded that only conduct specific to the Santeria church was subjected to the ordinances and thus the ordinances were not generally applicable.[153]

After determining that the ordinances were discriminatory, the Court examined whether they were nevertheless justified by a compelling state interest and if they were narrowly tailored to achieve such an interest. Drawing from the *Smith* requirement analysis, the Court concluded that the ordinances were "overbroad or underinclusive in substantial respects" to justify its alleged state interests.[154] The Court reasoned that the government's failure to restrict similar secular conduct, while also limiting conduct protected by the First Amendment, is an indication that the "interest given in justification of the restriction is not compelling."[155] Thus, *Lukumi* applied the tenets of *Smith* by first discerning neutrality and general applicability, then on a finding of discrimination, further examined the case under strict scrutiny.

Although *Smith* established neutrality and general applicability as the main requirements for discerning religious exemption cases, *Lukumi* elaborated and established the framework for evaluating these requirements. Despite Justice Kennedy's reluctance to define a particular standard for discerning either neutrality or general applicability, he nevertheless provided ample guidelines for analysis.[156]

148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 543–44.
152. *Id.* at 545.
153. *Id.*
154. *Id.* at 546.
155. *Id.* at 546–47. Justice Kennedy further stated that, "[i]t is established in our strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'" *Id.* at 547 (alteration in original) (quoting Fla. Star v. B.J.F., 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring in part and concurring in judgment)).
156. *See id.* at 543.

Neutrality is determined by the object of the law, and general applicability involves categories of selection.[157] Essentially, any law affecting religion must use the proper means (general applicability) to achieve a proper end (neutrality).[158] In analyzing neutrality, the breadth of the state action or law is examined to see if its burden on religious exercise is necessary to satisfy the state interest; if the burden is not necessary, then the law is deemed nonneutral.[159] In other words, neutrality examines whether the state action or law targets a specific religion or religion generally. General applicability analysis discerns inclusiveness; if religious exercise is burdened while similarly situated secular practices are not, then the law is deemed underinclusive and thus not generally applicable.[160] In this manner, neutrality is a necessary component of a law of general applicability, and a "failure to satisfy one requirement is a likely indication that the other has not been satisfied."[161]

For example, the prohibition of peyote in *Smith* was deemed neutral by the Court because the object of the law—to abolish drug trafficking and protect the health and safety of citizens—required necessary participation from both religious and nonreligious citizens.[162] In other words, to create exemptions for religious use of peyote would frustrate the state's ability to curb the use of harmful substances. The prohibition was deemed generally applicable because similarly situated secular conduct—in fact, all uses of peyote—were subjected to the same prohibition.

The across-the-board prohibition of peyote is distinguishable from the ordinances in *Lukumi* that were found to limit slaughtering of animals only when undertaken by the Santeria church, while permitting other forms of slaughter without similar regulations.[163] Justice Kennedy emphasized that although "[a]ll laws are selective to some extent . . . categories of selection are of paramount concern" when religious exercise is burdened.[164] By limiting slaughtering for religious purposes but not for other similar secular purposes, the Hialeah ordinances failed to meet the standards of general applicability.[165]

157. *See* Bogen, *supra* note 128, at 208.
158. *See id.* at 208–09.
159. *See id.* at 209.
160. *See id*. at 208–09.
161. *Lukumi*, 508 U.S. at 531.
162. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 911 (1990).
163. Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 5 (2016).
164. *Lukumi*, 508 U.S. at 542. Justice Kennedy further elaborated that "[t]he 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." *Id.* at 543.
165. *See id.* at 543–44.

5. The Religious Freedom Restoration Act of 1993

In the aftermath of *Smith*, religious and civil liberties groups banded together to draft and support the passage of the Religious Freedom Restoration Act of 1993[166] (RFRA). Passing with overwhelming support in both chambers of Congress, the RFRA was signed into law on November 17, 1993, by President Bill Clinton. The RFRA reestablished the *Sherbert* test as the default standard for evaluating free exercise claims, "guarantee[ing] its application in all cases where free exercise of religion is substantially burdened."[167] Specifically, the law expressly provided that a government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," directly challenging *Smith*.[168] Only when supported by a compelling state interest that is narrowly tailored to further that interest may the government place any burden on religious practices.[169]

However, the Supreme Court's ruling in *City of Boerne v. Flores*[170] in 1997 diminished the RFRA significantly. The Court ruled the RFRA unconstitutional as applied to the states, as it was beyond congressional authority to compel states to provide greater protection of religious liberty than the First Amendment.[171] The Court stated that the law was "a considerable congressional intrusion into the States' traditional prerogatives"[172] and "contradict[ed] vital principles necessary to maintain separation of powers and the federal balance."[173]

Despite this setback, the Supreme Court has continued to uphold applications of the RFRA to the federal government without addressing constitutional questions. In *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*,[174] the U.S. Customs Services's seizure of hoasca—a tea used by the respondent-church for communion purposes—was held unjustified under the RFRA because the government failed to show a sufficient compelling state interest.[175] Notably, Chief Justice Roberts, writing for the majority, echoed the reasoning in *Yoder* that the compelling interest test is satisfied

166. Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended in scattered sections of 5 and 42 U.S.C.).
167. 42 U.S.C. § 2000bb(b)(1).
168. *Id.* § 2000bb-1(a).
169. *Id.* § 2000bb-1(b).
170. 521 U.S. 507 (1997).
171. *Id.* at 531–32.
172. *Id.* at 534.
173. *Id.* at 536. Specifically, Congress attempted to use Section 5 of the Fourteenth Amendment to enforce the RFRA against the states. However, Justice Kennedy expressed that "[t]he Amendment's design and § 5's text are inconsistent with any suggestion that Congress has the power to decree the substance of the Amendment's restrictions on the States." *Id.* at 508. Justice Kennedy continued that "[l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause" and Congress has the power to merely enforce and "not the power to determine what constitutes a constitutional violation." *Id.* at 519.
174. 546 U.S. 418 (2006).
175. *See id.* at 423.

through "application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened."[176] In narrowing the scope of inquiry under the RFRA to the particular exemption in question, the Court found the compelling state interest to be unfounded and concluded that "there is no indication that Congress . . . considered the harms posed by . . . the sacramental use of hoasca by the [church]."[177]

In the more recent *Burwell v. Hobby Lobby Stores, Inc.*,[178] the Court again upheld an exemption for religious liberty claimants. Here, corporate owners contested a Department of Health and Human Services (HHS) mandate requiring them to provide coverage for contraceptive services when issuing health insurance plans to employees.[179] The owners held that providing contraceptive coverage conflicted with their sincere religious beliefs.[180] The Court ultimately ruled that the corporate owners should be exempted, holding that HHS failed to satisfy the RFRA's least-restrictive-means standard and failed to show that "it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion."[181]

Some states have extended the protections of the federal RFRA, either by passing state equivalents or by construing state constitutions to adopt strict scrutiny.[182] State supreme courts that have rejected *Smith* and opted for the strict scrutiny test often compare the text of their state constitutions to that of the Free Exercise Clause. In *State v. Hershberger*,[183] the Minnesota Supreme Court declared that the Minnesota Constitution's free exercise provision provides "greater protection for religious liberties against governmental action . . . than under the first amendment of the federal constitution."[184] The court subsequently applied the strict scrutiny test and granted exemptions to the claimants.[185] In *First Covenant Church v. City of Seattle*,[186] the Washington State Supreme Court similarly ruled that the Washington Constitution was "stronger than the federal constitution" in protecting

176. *Id.* at 420 (quoting Wisconsin v. Yoder, 406 U.S. 205, 221 (1972)). Chief Justice Roberts stated, "despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote . . . and the impediment to those objectives that would flow from recognizing *the claimed Amish exemption*." *Id.* at 431 (alteration in original) (quoting Wisconsin v. Yoder, 406 U.S. 205, 213, 221 (1972)). Chief Justice Roberts further noted, "[t]he Court explained that the State needed 'to show with more particularity how its admittedly strong interest . . . would be adversely affected by granting an exemption *to the Amish*.'" *Id.* (alteration in original) (quoting Wisconsin v. Yoder, 406 U.S. 205, 236 (1972)).

177. *Id.* at 432.

178. 573 U.S. 682 (2014).

179. *Id.* at 689–90.

180. *Id.*

181. *Id.* at 728.

182. *See* Paul Benjamin Linton, *Religious Freedom Claims and Defenses Under State Constitutions*, 7 U. ST. THOMAS J.L. & PUB. POL'Y 103, 186 (2013) (listing Alaska, Indiana, Maine, Massachusetts, Michigan, Minnesota, New York, Ohio, Washington, and Wisconsin).

183. 462 N.W.2d 393 (Minn. 1990).

184. *Id.* at 397.

185. *Id.* at 399.

186. 840 P.2d 174 (Wash. 1992).

conduct that "merely 'disturbs' another on the basis of religion."[187] In *Swanner v. Anchorage Equal Rights Commission*,[188] the Alaska Supreme Court similarly rejected *Smith* and adopted strict scrutiny, reasoning that Alaska is under no obligation to emulate the U.S. Supreme Court in evaluating religious exemption cases.[189] Other notable rulings were made in Massachusetts and Vermont.[190]

Today, in addition to the federal RFRA, twenty-one states have passed their own versions of the law, mandating that the state may burden the free exercise of religion only when in furtherance of a compelling state interest and via the least restrictive means.[191] An additional ten states have religious freedom protections in place via state court decisions.

6. Current Law

Smith stands as the default standard today. So long as a state law is neutral and generally applicable, a state may refuse to grant a religious exemption even to substantially burdened religious practice, so long as it has a rational basis for doing so. As detailed in *Lukumi*, a law is neutral if the object of the law is not to burden religious liberty. A law is generally applicable if it is fully inclusive of all similarly situated conduct—both secular and religious. A law found not neutral or not generally applicable faces the *Sherbert* strict scrutiny test.

II. THE FAILURE OF GENERAL APPLICABILITY IN COVID-19 ORDERS

In evaluating COVID-19 restriction cases, courts generally agree on several points. First, there is little controversy concerning the neutrality requirement under *Smith*; courts largely agree that gathering restrictions under state executive orders are not motivated by animus toward people of faith and are not attempts to single out faith-based practices for disfavored treatment.[192] Second, courts do not contest that the orders burden sincere faith practices.[193] Third, courts generally presume that executive orders

187. *Id.* at 186.
188. 874 P.2d 274 (Alaska 1994).
189. *Id.* at 280–81.
190. *See* Att'y Gen. v. Desilets, 636 N.E.2d 233, 236 (Mass. 1994) (stating that the Massachusetts Supreme Judicial Court "prefer[red] to adhere to the standards of earlier First Amendment jurisprudence," specifically noting that the court had previously used "the balancing test that the Supreme Court had established under the free exercise of religion clause in *Wisconsin v. Yoder*"); Hunt v. Hunt, 648 A.2d 843, 853 (Vt. 1994) (holding that the Vermont Constitution "protects religious liberty to the same extent that the Religious Freedom Restoration Act" does under the U.S. Constitution).
191. *State Religious Freedom Restoration Acts*, NAT'L CONF. OF STATE LEGISLATURES (May 4, 2017), https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx [https://perma.cc/HL9Q-ET3J].
192. Roberts v. Neace, 958 F.3d 409, 413 (6th Cir. 2020) ("Were the Governor's orders motivated by animus toward people of faith? We don't think so. . . . [W]e don't think it's fair at this point and on this record to say that the orders or their manner of enforcement turn on faith-based animus.").
193. *See id.* at 415 ("No one contests that the orders burden sincere faith practices.").

satisfy *Smith*'s rational basis requirement because they are intended to combat the spread of COVID-19.[194] Lastly, the courts fully acknowledge the dangers of COVID-19 and have expressed little doubt that governors are doing their utmost in issuing executive orders to curb the spread of the virus.[195]

The primary issue, therefore, lies in the general applicability requirement. Under *Smith* and the rational basis test, a finding of general applicability ends the inquiry and precludes any strict scrutiny analysis.[196] However, courts are left unguided as to how to discern what similarly situated or comparable gatherings are when evaluating the general applicability of gathering restrictions.[197] Ultimately, the fundamental right to free exercise of religion has been left vulnerable to inconsistent and, at times, troubling treatment.

Therefore, this part first argues that, under *Smith*, the general applicability standard must be clarified to help courts more consistently apply the *Smith* analysis. Specifically, the Court should step in and provide guidance on how to define comparable gatherings. Even so, courts should be more careful in finding general applicability—either through selected criteria or through deference to political branches—when fundamental constitutional rights are involved. Ultimately, such an unprecedented onslaught of religious exemption cases should prompt courts deepen to their analysis in a way similar to strict scrutiny rather than finding general applicability along unguided lines.

Part II.A notes, for comparison purposes, the relatively uncontroversial court rulings at the onset of stay-at-home orders. Part II.B discusses the Supreme Court's attempt to create a framework for religious exemption cases in *South Bay United Pentecostal Church v. Newsom*.[198] Part II.C surveys the inconsistency in cases following *South Bay* that demonstrates the need for clearer guidance for the courts. Part II.D discusses *Calvary Chapel Dayton Valley v. Sisolak*[199] and the height of uncertainty for free exercise rights during the COVID-19. Part II.E discusses the latest Supreme Court order in *Roman Catholic Diocese of Brooklyn v. Cuomo*,[200] which provided additional perspectives from the Court yet nevertheless failed to clarify general applicability.

194. *See* Soos v. Cuomo, 470 F. Supp. 3d 268, 281 (N.D.N.Y. 2020) ("[O]nly rational basis need be shown, which is self-evident: preventing the spread of COVID-19.").

195. *See* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2604–05 (2020) (mem.) (Alito, J., dissenting) ("States and their subdivisions have responded to the pandemic by imposing unprecedented restrictions on personal liberty, including the free exercise of religion. This initial response was understandable. In times of crisis, public officials must respond quickly and decisively to evolving and uncertain situations. At the dawn of an emergency—and the opening days of the COVID-19 outbreak plainly qualify—public officials may not be able to craft precisely tailored rules."); *see also Neace*, 958 F.3d at 414 ("We don't doubt the Governor's sincerity in trying to do his level best to lessen the spread of the virus or his authority to protect the Commonwealth's citizens.").

196. *See supra* Part I.C.3.

197. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993).

198. 140 S. Ct. 1613 (2020).

199. 140 S. Ct. 2603 (2020) (mem.).

200. 141 S. Ct. 63 (2020) (per curiam).

A. Initial Stay-at-Home Orders

Cases decided earlier in the pandemic timeline were relatively uncontroversial. Beginning in March 2020, when the virus was still relatively unknown, the nation experienced widespread gathering restrictions with very few exceptions.[201] These exceptions were typically limited to hospitals, essential businesses, and transportation hubs.[202] Thus, categories of establishments were binary—essential or nonessential—with uniform restrictions applying to the latter. Because gathering restrictions applied uniformly across most industries, the executive orders were readily deemed to be generally applicable.

A few claimants nevertheless alleged that allowing secular, essential businesses to remain open while restricting religious gatherings was a violation of the free exercise of religion. For example, in *Lighthouse Fellowship Church v. Northam*,[203] a church claimed that Virginia governor Ralph Northam's executive orders were discriminatory because they restricted religious gatherings to ten individuals while "carv[ing] out broad exemptions for a host of secular activities," predominantly those of essential businesses.[204]

The Eastern District of Virginia denied the injunction, utilizing the *Lukumi* standard of analyzing neutrality and general applicability. First, the court stated that the orders were neutral because they did "not refer to a religious practice to single it out for discriminatory treatment."[205] Rather, the orders "prohibit *all* social gatherings of more than ten individuals, secular and religious."[206] Second, the court found general applicability was present because the orders "are not underinclusive,"[207] rebutting the church's claim that allowing essential businesses to open is discriminatory against religious gatherings. The court labeled the exemption for essential businesses as a "limited carveout [that] does not target religious gatherings," stating that it "simply ensures that people have access to essential goods."[208] In response to the church's claim that some businesses were misconstrued as essential, the court provided detailed justifications for opening several businesses, including electronic equipment stores, liquor stores, and gas station retail centers.[209] The court added that the exemptions for essential businesses were

201. *See Coronavirus Restrictions and Mask Mandates for All 50 States*, *supra* note 22.
202. *Id.*
203. 458 F. Supp. 3d 418 (E.D. Va. 2020).
204. *Id.* at 429.
205. *Id.* at 428.
206. *Id.*
207. *Id.* at 432.
208. *Id.* at 430.
209. *Id.* In defense of electronic equipment businesses, the court stated that "[w]ith more people working from home, people need access to electronic equipment, to the parts and labor necessary to repair their electronic devices." *Id.* In defense of liquor stores, the court stated that the "[d]anger posed by sudden alcohol withdrawal to those suffering from alcohol dependence, and the added burden upon health facilities that [restrictions] might trigger" is sufficient reasoning to keep liquor stores open. *Id.* at 431. In defense of gas station retail centers, the court stated that "*at the very least*, healthcare professionals and grocery store

"reasonable" and were carved out for "specific reasons to avoid harms equal to or greater than the spread of this deadly pandemic."[210] Ultimately, exemptions for essential businesses were not considered to render the executive orders discriminatory and thus, the orders were upheld, despite the burden on religious practices.[211]

This decision is reasonable. States were effectively shutting down all operations not directly assisting in the public health efforts or sustaining remote work. It was wholly understandable for the court to deny an exemption to a religious organization at a time when all nonessential gatherings were similarly restricted.[212] Even if the court had reviewed under strict scrutiny, the state would have been likely to prevail due to the compelling interest of keeping essential hospitals and other businesses open during the initial uncertain phases of the pandemic. Because the stay-at-home orders were applied across the board irrespective of industry or location, early cases were more akin to the across-the-board prohibition of peyote in *Smith*. Therefore, in such contexts, *Smith* has provided sufficient guidance on the application of general applicability.

B. Increasing Categorizations Under South Bay

As states began to reopen businesses, restrictions were no longer across the board but applied on a state-by-state, establishment-by-establishment basis. Courts could no longer apply the across-the-board reasoning of *Smith* but were nevertheless tasked with discerning general applicability by comparing religious gatherings with the activities of other nonessential businesses. Free exercise claims increased drastically, with numerous churches claiming that secular gatherings that posed similar or greater danger to the states' public health interests were subjected to more lenient restrictions. Courts were now faced with the task of discerning general applicability as required under *Smith* yet were unguided by any defined criteria. Spurred by the Supreme Court's injunctive order in *South Bay*, courts were left to discern general applicability along unclear lines.

1. Possible Criteria for Comparison: Proximity and Duration

In *South Bay*, California governor Gavin Newsom placed a restriction on 25 percent of building capacity or a maximum of one hundred attendees across all places of worship throughout the state.[213] When a church sought an injunction against these orders, the Court, in a 5-4 decision, denied the

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personnel need to get to and from their essential jobs," thus utilizing gas stations and purchasing essential goods from its retail centers. *Id.*

210. *Id.* at 432.

211. *Id.*

212. Although certainly related, the full extent of the discussion regarding the essentiality of religious worship during a public health crisis is beyond the scope of this Note.

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

injunction.[214] In his concurring opinion, Chief Justice Roberts primarily reasoned that because religious gatherings were treated similarly to other comparable secular gatherings, there was no discrimination.[215] Similar or more severe restrictions were applied to lectures, concerts, movie showings, spectator sports, and theatrical performances "where large groups of people gather in close proximity for extended periods of time."[216] More favorable restrictions were applied to what Chief Justice Roberts labeled as "dissimilar activities,"[217] where people "neither congregate in large groups nor remain in close proximity for extended periods."[218] The opinion listed grocery stores, banks, and laundromats as examples of such dissimilar activities.[219]

Chief Justice Roberts said nothing more regarding the disparate restrictions. He did not explicitly mention the *Smith* requirements of neutrality and general applicability but concluded that the California guidelines "appear consistent with the Free Exercise Clause of the First Amendment."[220] Chief Justice Roberts distinguished between gatherings based on duration and proximity, presumably these criteria were consistent with California's interest in curbing the spread of COVID-19.

In contrast, Justice Kavanaugh, in his dissent, provided a more complete *Lukumi* analysis.[221] First, in his *Smith* analysis, Justice Kavanaugh provided a more exhaustive list of businesses not subject to the 25 percent occupancy cap, including "factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries."[222] Viewing such establishments as comparable secular businesses, Justice Kavanaugh described this to be the "basic constitutional problem" of the case and concluded that "[s]uch discrimination violates the First Amendment."[223]

Having found discrimination, Justice Kavanaugh then evaluated the state order under strict scrutiny.[224] Specifically, Justice Kavanaugh clarified that the compelling state interest must justify not the state action itself but the state's refusal to exempt in-person religious worship.[225] Justice Kavanaugh proposed a more focused and detailed strict scrutiny standard that required a compelling justification for distinguishing between religious worship services and comparable secular businesses, which were not subject to the

214. *Id.*
215. *Id.* at 1614.
216. *Id.* at 1613.
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.* at 1614 (Kavanaugh, J., dissenting).
222. *Id.*
223. *Id.*
224. *Id.* at 1614–15.
225. *Id.* at 1614. Justice Kavanaugh admits that "California undoubtedly has a compelling interest in combating the spread of COVID-19 and protecting the health of its citizens." *Id.* However, "restrictions inexplicably applied to one group and exempted from another do little to further these goals." *Id.* (quoting Roberts v. Neace, 958 F.3d 409, 414 (6th Cir. 2020)).

more restrictive occupancy cap.[226] Ultimately, Justice Kavanaugh stated that California failed to show such a compelling justification for why establishments such as restaurants and shopping malls were placed under more lenient state directives while similar leniencies were denied for churches.[227]

Justice Kavanaugh then examined whether California's order was the least restrictive means of furthering its interest in curbing COVID-19.[228] He concluded that it was not, stating that, despite having "ample options" to combat the spread of COVID-19, California nevertheless discriminated against religion.[229] These ample options included administering safety precautions such as social distancing and other health requirements "just as the Governor has done for comparable secular activities."[230]

Both Chief Justice Roberts and Justice Kavanaugh provided helpful starting points for discussion but ultimately raised more questions than answers. Chief Justice Roberts's opinion suggested proximity and duration as possible criteria to discern comparability of gatherings for the general applicability analysis. Although promising, as Justice Kavanaugh pointed out, the application of these criteria seems incomplete. Although it is convincingly clear that people typically gather for longer periods in close proximity at a church than a bank, it is much less clear when compared to factories, restaurants, and shopping malls. For example, the concurrence did not address possibilities, such as gatherings in crowded offices or factory environments in close proximity and for long hours, or the relative dangers of restaurant patrons dining and conversing with no masks on. In this light, Chief Justice Roberts seemingly omitted such entities in his opinion and instead included only those deemed to be essential businesses in prior cases.[231] In considering the more exhaustive list of more favorably treated secular gatherings, it is considerably more difficult to see why on the basis of duration and proximity that these gatherings are fundamentally distinct from that of religious gatherings.

Despite Chief Justice Roberts's seemingly incomplete analysis, it is difficult to ignore the importance of duration and proximity in evaluating the comparability of gatherings in combating an airborne, contagious virus. And despite noting the concurrence's shortcomings, Justice Kavanaugh himself did not directly address or evaluate the criteria of duration and proximity, nor did he suggest other justifiable criteria. Instead, Justice Kavanaugh inquired why someone can "safely walk down a grocery store aisle but not a pew?"[232] This statement simply presumes that churches and grocery stores are

226. *Id.* at 1615.
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *See* Lighthouse Fellowship Church v. Northam, 458 F. Supp. 3d 418, 432 (E.D. Va. 2020) (classifying grocery stores, banks, and laundromats as essential).
232. *S. Bay*, 140 S. Ct. at 1615 (Kavanaugh, J., dissenting) (quoting Roberts v. Neace, 958 F.3d 409, 414 (6th Cir. 2020)).

comparable but does not address the justification of duration and proximity or any justification at all. Therefore, it is unclear whether Justice Kavanaugh believes that duration and proximity are justifiable grounds that were simply incorrectly applied or if the criteria themselves are unjustifiable.

Despite providing intuitive criteria for discerning comparability between gatherings, Chief Justice Roberts's concurrence raised for more questions than answers. Duration and proximity are helpful and intuitive in theory but pose challenges for courts who are dealing with complex and case-specific facts.

2. Deference to the State

Chief Justice Roberts's concurring opinion is more often cited for its passage on deference. Chief Justice Roberts declared that it is not the judiciary's place to determine when restrictions on particular gatherings should be lifted, for such questions are "dynamic and fact-intensive matter[s] subject to reasonable disagreement."[233] Instead, the "politically accountable officials of the States" are deemed more equipped to act in areas "fraught with medical and scientific uncertainties," rather than the "unelected federal judiciary," which "lacks the background, competence, and expertise to assess public health and is not accountable to the people."[234] In doing so, Chief Justice Roberts echoed the deference notion raised in *Jacobson v. Massachusetts*,[235] which stated that a court should not "determine which of two modes is likely to be the most effective for the protection of the public against disease."[236]

Justice Kavanaugh contested this notion, stating that although the state has "substantial room to draw lines, especially in an emergency," the Constitution nevertheless provides key restrictions on line drawing, namely that the "[s]tate may not discriminate against religion."[237] The Court must be appropriately deferential to the expertise of public health officials in evaluating potential distinctions between the secular gatherings listed in the orders and religious gatherings.[238] But such deference will not justify action that is "beyond all question, a plain, palpable" violation of free exercise principles.[239]

Broadly, the suggestion of deference is a reasonable and important one. In a public health emergency, where there is "no known cure, no effective treatment, and no vaccine," it is understandable for the Court to defer to the judgment of the political branches of government.[240] Justice Kavanaugh

233. *Id.* at 1613 (Roberts, C.J., concurring).
234. *Id.* at 1613–14.
235. 197 U.S. 11 (1905).
236. *Id.* at 30.
237. *S. Bay*, 140 S. Ct. at 1615 (Kavanaugh, J., dissenting).
238. *See Jacobson*, 197 U.S. at 31.
239. *Id.*
240. *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring).

conceded this point, merely stating that the state cannot discriminate against religion while exercising such wide discretionary power.[241]

However, this deference raises two key issues. First, this deference may thwart meaningful investigation of possible differentiators for evaluating general applicability. By leaving the determination of categorizations to "politically accountable officials," courts do not evaluate whether the state action is truly generally applicable but instead accept the justification provided by the state.[242] This seems irreconcilable with the judiciary's responsibility to protect fundamental constitutional freedoms. Although the judiciary may lack "the background, competence, and expertise to assess public health," the courts are nevertheless the most competent and important defenders of constitutional rights. The issue of comparing establishments is critical to the determination of general applicability and, consequently, the free exercise claim as a whole; to defer on this key issue may be determinative for the claim in its entirety. Thus, the courts should be empowered with further guidance on the protection of fundamental rights rather than encouraged to readily defer to the judgment of the political branches. For example, public officials may more competently determine the relative impact of singing in the spread of COVID-19. However, the Court should provide guidance to lower courts on how much significance singing should be given relative to other criteria to determine general applicability. Although public health may be beyond the judiciary's expertise, state actions may nonetheless deeply affect the very rights that the courts were meant to protect. When it comes to such fundamental constitutional rights, courts should be empowered to exercise their competence in assessing the validity of free exercise claims before invoking deference.

Second, the scope of deference is left unclear. *Jacobson* deference requires courts to uphold the exercise of emergency police powers in addressing public health measures unless (1) there is no real or substantial connection to public health or (2) the state action is "beyond all question" a "plain, palpable invasion of rights secured by fundamental law."[243] In other words, only the clearest cases of discrimination will defeat deference to the state. However, this seems irreconcilable with Chief Justice Roberts's statement that the categorization of gatherings is a "dynamic and fact-intensive matter subject to *reasonable disagreement*."[244] If the categorization of gatherings is inherently prone to reasonable disagreement

241. *Id.* at 1615 (Kavanaugh, J., dissenting) ("The State also has substantial room to draw lines, especially in an emergency.").

242. In Judge Daniel Collins's dissent in the Ninth Circuit decision below, he interpreted deference to mean that the court was to determine "whether [the Governor's] actions were taken in good faith and whether there is some factual basis for [the] decision." S. Bay United Pentecostal Church v. Newsom, 959 F.3d 938, 942 (9th Cir. 2020) (Collins, J., dissenting) (quoting United States v. Chalk, 441 F.2d 1277, 1281 (4th Cir. 1971)), *aff'd*, 140 S. Ct. 1613. Judge Collins emphatically rejected this seemingly low threshold as "fundamentally inconsistent with our constitutional order." *Id.*

243. *Jacobson*, 197 U.S. at 25.

244. *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (emphasis added).

and not "beyond all question," *Jacobson* deference appears indispensable, particularly given that courts have no guidance in comparing entities for the general applicability analysis. Again, this provides wide discretion for courts to exercise deference. Perhaps in close cases, the courts may defer to the judgment of the state. However, such a sweeping justification, as suggested in *South Bay*, may be inconsistent with the judiciary's responsibility of protecting constitutional liberties.

Ultimately, deference is a reasonable concept in theory but one that must not substitute or overshadow the need for a clearer standard for courts to better evaluate general applicability. Otherwise, so long as "broad limits are not exceeded,"[245] deference allows courts to readily presume a finding of general applicability. The Court in *Jacobson* recognized that the state's power in dire situations "is not absolute" and may go "beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons."[246] Thus, in assessing the gravity of public health, the courts should not forsake their commitment to protecting constitutional rights.

Accordingly, *South Bay* demonstrated the need for a clearer standard that more carefully compares and contrasts relevant metrics for determining which types of gatherings are and are not similar in their risk of spreading COVID-19. Chief Justice Roberts's concurring opinion provided a step in the right direction by offering two possible criteria: proximity and duration. In doing so, the case established two tenets of COVID-19 religious exemption cases. First, if churches are restricted in a similar manner to comparable secular gatherings in terms of proximity and duration, then the relevant executive order is generally applicable; if generally applicable, no further inquiry is required under *Smith* and the executive order is upheld. Second, courts should defer to and recognize the broad limits of state power when determining the categorization of businesses and establishments for reopening.

*C. Further Inconsistencies in Post–*South Bay *Decisions*

Following the *South Bay* order, some cases adhered closely to Chief Justice Roberts's reasoning when comparing gatherings. In *Legacy Church v. Kunkel*,[247] the District Court of New Mexico concluded that movie theaters and concert venues are most like religious mass gatherings in terms of "high contact intensity and high number of contacts."[248] Similarly, in *Elim Romanian Pentecostal Church v. Pritzker*,[249] the Seventh Circuit deemed worship gatherings to be more comparable to concerts and lectures than to

245. *Id.*

246. *Jacobson*, 197 U.S. at 25. The Sixth Circuit recently echoed this notion, stating that "[w]hile the law may take periodic naps during a pandemic, we will not let it sleep through one." Roberts v. Neace, 958 F.3d 409, 414–15 (6th Cir. 2020).

247. 472 F. Supp. 3d 926 (D.N.M. 2020).

248. *Id.* at 1037.

249. 962 F.3d 341 (7th Cir. 2020).

more leniently treated secular gatherings, such as those that occur at warehouses, grocery stores, and soup kitchens.[250] Because "movies and concerts seem a better comparison group," the court stated that "discrimination has been in favor of religion."[251] Interestingly, the court stated its uncertainty as to whether warehouse workers engaged in "the sort of speech or singing that elevates the risk of transmitting the virus" or that the workers "remain close to one another for extended periods."[252] The court admitted that "some workplaces present both risks" but quickly declared that it was "hard to see how [essential workplaces] . . . could be halted."[253] In some cases, the court did not conduct any comparative analysis. In *Whitsitt v. Newsom*,[254] the Eastern District of California merely reasoned that because the California order was not "selectively enforced against religious entities or that plaintiff's church was [not] singled out," the order was generally applicable.[255]

However, in some cases, despite being presented with similar gatherings and executive orders, courts have differed drastically in their conclusions, and such variance in the protection of constitutional liberties warrants greater guidance for courts. In *Soos v. Cuomo*,[256] the Northern District of New York ruled in favor of a church despite comparing it to similar establishments as discussed in *South Bay*. Churches in New York had been restricted to 25 percent indoor capacity while other nonessential businesses, such as restaurants, salons, retail stores, and educational services, were afforded 50 percent indoor capacity.[257] Whereas Chief Justice Roberts noted that churches constitute "large groups of people . . . in close proximity for extended periods of time,"[258] the district court applied this same reasoning but in favor of churches, stating that salons themselves "involve the congregation of people for a length of time."[259] Additionally, the court noted that restaurant patrons "sit and congregate . . . in close proximity for a lengthy period of time" while maintaining "close contact with their hosts and servers" with no face coverings while seated.[260] The court ruled that these nonessential businesses were "not justifiably different than houses of worship" and thus, the state order was underinclusive.[261] The District Court of the District of Columbia agreed in *Capitol Hill Baptist Church v.*

250. *Id.* at 346.

251. *Id.* at 347; *see also* Cross Culture Christian Ctr. v. Newsom, 445 F.Supp.3d 758, 770 (E.D. Cal. 2020) ("[T]he type of gathering that occurs at in-person religious services is much more akin to conduct the orders prohibit—attending movies, restaurants, concerts, and sporting events—than that which the orders allow.").

252. *Elim*, 962 F. 3d at 347.

253. *Id.*

254. No. 20-cv-00691, 2020 WL 4818780 (E.D. Cal. Aug. 19, 2020).

255. *Id.* at *3.

256. 470 F. Supp. 3d 268 (N.D.N.Y. 2020).

257. *Id.* at 282.

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

259. *Soos*, 470 F. Supp. 3d at 282.

260. *Id.*

261. *Id.*

Bowser,[262] similarly questioning why restaurants were treated more favorably even though they involve "more than just providing food for consumption [but also] serve as focal points for fellowship and communion, not unlike worship services."[263] Contrarily, in *Legacy Church*, the court upheld more lenient restrictions for restaurants, reasoning that restaurants are "more transitory and so will involve less person-to-person contact."[264]

Another prominent criterion was the indoor-outdoor distinction, primarily when comparing religious gatherings to mass protests. Following the murder of George Floyd, protestors gathered in major urban areas throughout the nation to call attention to racial injustice and the specific need for police reform. In *Soos*, depending on the region of New York State, outdoor gatherings were restricted to either ten or twenty-five people.[265] However, Governor Andrew Cuomo and New York City mayor Bill de Blasio endorsed the gathering of outdoor mass protests of several hundred people and allowed 150-person outdoor graduation ceremonies to proceed.[266]

The district court ruled in favor of the plaintiffs. Individual exemptions, the court argued, signified that the law was "substantially underinclusive" of nonreligious conduct that endangered the government's interest in a similar or greater degree than the religious conduct.[267] The court first recognized the limitation of Chief Justice Roberts's deference argument—that "there are 'broad limits' which may not be eclipsed."[268] The court concluded that "it is plain to this court that broad limits of that executive latitude have been exceeded."[269] Governor Cuomo and Mayor de Blasio's public comments encouraging and applauding the protests were deemed to have created a de facto exemption.[270] Although they "could have just as easily discouraged protests, short of condemning their message, in the name of public health," Governor Cuomo and Mayor de Blasio nevertheless "sent a clear message that mass protests are deserving of preferential treatment."[271] With the added exemption of 150-person outdoor graduation ceremonies, the court concluded that the government may not refuse to extend that system of exemptions to "cases of 'religious hardship' without compelling reason."[272]

Contrarily, the District Court of Colorado in *High Plains Harvest Church v. Polis*[273] declared that there was no evidence in the record that would

262. No. 20-cv-02710, 2020 WL 5995126 (D.D.C. Oct. 9, 2020).
263. *Id.* at *9.
264. Legacy Church, Inc. v. Kunkel, 472 F. Supp. 3d 926, 1038 (D.N.M. 2020).
265. *Soos*, 470 F. Supp. 3d at 273.
266. *Id.* at 274–76.
267. *Id.* at 280.
268. *Id.* at 279 (quoting S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring)).
269. *Id.*
270. *Id.* at 282.
271. *Id.* at 283.
272. *Id.* at 280 (quoting Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 884 (1990)).
273. No. 20-cv-01480, 2020 WL 4582720 (D. Colo. Aug. 10, 2020), *vacated*, 141 S. Ct. 527 (2020) (mem.).

support a finding that outdoor protests are comparable secular gatherings to indoor, in-person church services.[274] The court reasoned that relief should be denied based on the "myriad of differences between the protests and [religious] services," namely that outdoor gatherings pose less risk of spreading COVID-19 than indoor gatherings.[275] Although the court in *Soos* placed significant weight on the individualized exemption granted to protests, the court here categorized the protests as an "unprecedented and potentially explosive situation with a modicum of restraint" and found "little trouble" in upholding the executive order.[276] However, the Supreme Court vacated the judgment in *High Plains* subsequent to the Court's ruling in *Roman Catholic Diocese*.[277]

Thus, although *South Bay* provided initial criteria for comparing establishments, courts were nevertheless unguided on how to apply or compare different criteria when evaluating general applicability. Subsequently, the Court had an opportunity to step in and provide such guidance in *Calvary Chapel* but ultimately failed to do so.

D. Calvary Chapel *and the Ultimate Collapse of General Applicability During COVID-19*

COVID-19 free exercise jurisprudence reached its climax—and its most controversial moment—with the Supreme Court's order in *Calvary Chapel*. If *Lighthouse* stands at one extreme, *Calvary Chapel* stands at the other. The former justified lenient treatment for hospitals during a public health crisis. The latter demonstrated that even casinos were favored over free exercise.

In *Calvary Chapel*, Nevada restricted religious gatherings to fifty people, while other secular gatherings—most notably, casinos and their affiliated entertainment venues—were permitted to admit 50 percent of their maximum capacities.[278] In a 5-4 decision, the Court denied injunctive relief for the church.[279]

In their dissents, Justices Alito, Gorsuch, and Kavanaugh conducted a *Lukumi* analysis in fierce opposition to the decision. They resoundingly agreed that the Nevada orders were not neutral and generally applicable. Justice Alito first denounced the decision, claiming that the Constitution "guarantees the free exercise of religion" but that it says "nothing about the freedom to play craps or blackjack."[280] He further claimed that the departure from the *Smith* standard "is hardly subtle" because the directive "treats worship services differently from other activities."[281] Justice Gorsuch found "obvious discrimination," remarking that "[l]arge numbers and close quarters

274. *Id.* at *2.
275. *Id.*
276. *Id.*
277. *High Plains*, 141 S. Ct. at 527.
278. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2604 (2020) (mem.) (Alito, J., dissenting).
279. *Id.* at 2603.
280. *Id.*
281. *Id.* at 2605.

are fine in [casinos and movie theaters]" but churches "are banned from admitting more than 50 worshippers . . . no matter the precautions at all."[282] Justice Kavanaugh simply stated that Nevada is "discriminating against religion."[283]

The dissenting Justices subsequently evaluated the Nevada directives under strict scrutiny, declaring that "it is apparent that this discriminatory treatment cannot survive."[284] Justice Alito argued that the state "cannot claim to have a compelling interest" when it leaves "appreciable damage to that supposedly vital interest unprohibited.'"[285] Justice Alito added that the 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."[286] Notably, Justice Kavanaugh more strictly applied *Lukumi*, stating that the state "must articulate a sufficient justification for treating some secular organizations or individuals *more favorably* than religious organizations or individuals."[287] In Justice Kavanaugh's view, the state had failed to provide a "persuasive public health reason for treating churches differently from restaurants, bars, casinos, and gyms."[288]

Furthermore, Justices Alito and Kavanaugh rebuked Chief Justice Roberts's deference argument in *South Bay*. Justice Alito in particular acknowledged the difficulties state officials faced at the outset of an emergency and was understanding of the need for courts to tolerate very blunt rules.[289] However, he noted that at the time of the case, more than two months had passed; Nevada had gathered more medical and scientific evidence and therefore had had "time to craft policies in light of that evidence."[290] Justice Alito raised concerns regarding the scope of deference, stating that public officials are not given "*carte blanche* to disregard the Constitution."[291] Justice Kavanaugh echoed this concern, stating that "COVID-19 is not a blank check for a State to discriminate against religious people."[292]

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282. *Id.* at 2609 (Gorsuch, J., dissenting).
283. *Id.* at 2613 (Kavanaugh, J., dissenting).
284. *Id.* at 2608 (Alito, J., dissenting).
285. *Id.* (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993)).
286. *Id.*
287. *Id.* at 2613 (Kavanaugh, J., dissenting) (citing Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 884 (1990)).
288. *Id.* Justice Kavanaugh also considered the economic justification for the discrimination. *Id.* at 2614 ("It is understandable for the State to balance public health concerns against individual economic hardship. Almost every State and municipality in America is struggling with that balance."). Justice Kavanaugh ultimately rejected this argument as well. *Id.* ("[N]o precedent suggests that a State may discriminate against religion simply because a religious organization does not generate the economic benefits that a restaurant, bar, casino, or gym might provide.").
289. *Id.* at 2604–05 (Alito, J., dissenting).
290. *Id.* at 2605.
291. *Id.*
292. *Id.* at 2614 (Kavanaugh, J., dissenting).

Thus, *Calvary Chapel* has added more complexity to free exercise jurisprudence. Courts that have upheld state executive orders in the face of free exercise claims have invoked, among others, the following reasons: Secular entities such as hospitals and taxi services were favored because they were essential in directly addressing the public health crisis.[293] Restaurants were found to be distinct from churches because dining experiences were typically more transitory than scheduled church services with only a few entryways.[294] Gatherings such as those at grocery stores were favored because they did not involve large numbers of people in close proximity to one another.[295] Gatherings at retail establishments were preferred because they do not entail singing or chanting as is typical of church services. Some courts have favored mass protests because they were held outdoors, as opposed to typical worship services and because protests entail constitutional freedoms of their own.[296]

The facts in *Calvary Chapel* directly opposed all of these arguments. There is virtually nothing essential or constitutional about casinos and their affiliated entertainment platforms.[297] Visitors to Las Vegas gamble for more than two hours per day on average, which exceeds the duration of most religious services.[298] Even at 50 percent capacity, casinos may draw thousands of patrons, with average capacities far exceeding fifty persons per venue.[299] Live circuses, shows, and bowling tournaments seat hundreds of spectators where visitors can sit together.[300] The facts of *Calvary Chapel* contradicted nearly every rational justification that courts have used to uphold state orders. And yet the Court still upheld the order. Justice Gorsuch put it best: "This is a simple case."[301] But the Court somehow still managed to uphold a state action burdening religious practice.

E. Roman Catholic Diocese*: Another Missed Opportunity by the Supreme Court*

In *Roman Catholic Diocese*, the Supreme Court was presented with yet another opportunity to clarify the general applicability requirement.[302] Contrary to *South Bay* and *Calvary Chapel*, in this case, the Court granted injunctive relief for religious gatherings during the COVID-19 pandemic.[303]

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293. *See* Lighthouse Fellowship Church v. Northam, 458 F. Supp. 3d 418, 430 (E.D. Va. 2020).
294. *See* Legacy Church, Inc. v. Kunkel, 472 F. Supp. 3d 926, 1038 (D.N.M. 2020).
295. *See* S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring).
296. *See* High Plains Harvest Church v. Polis, No. 20-cv-01480, 2020 WL 4582720, at *2 (D. Colo. Aug. 10, 2020), *vacated*, 141 S. Ct. 527 (2020) (mem.).
297. *Calvary Chapel*, 140 S. Ct. at 2603 (Alito, J., dissenting).
298. *Id.* at 2606.
299. *Id.* at 2604.
300. *Id.* at 2605.
301. *Id.* at 2609.
302. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam).
303. *Id.* at 65.

However, although the Court presented viewpoints from several Justices, it ultimately clarified little on the application of general applicability.

In *Roman Catholic Diocese*, Governor Cuomo used COVID-19 metrics to designate specific regions as either red or orange and religious gatherings were restricted to ten and twenty-five people respectively.[304] A church and a synagogue submitted applications seeking injunctive relief from these restrictions.[305] The Court's opinion, issued per curiam, granted the injunctive relief.[306] The opinion first noted that establishments such as "acupuncture facilities, camp grounds, [and] garages" and a large store with hundreds of shoppers were subject to more lenient restrictions.[307] The Court concluded that such "categorizations lead to troubling results" and such "disparate treatment" precludes general applicability.[308] Having found discrimination, the Court examined the restrictions under strict scrutiny. The Court readily accepted that the state has a compelling interest in "[s]temming the spread of COVID-19."[309] However, the Court ruled that the restrictions were not narrowly tailored because they were "more severe than has been shown to be required to prevent the spread of the virus."[310] Additionally, the Court suggested that the state could have enforced maximum attendance based on building capacities, a measure that could minimize health risks while also minimizing the burden on free exercise.[311] Because the state failed to carry out more narrowly tailored measures, the Court ruled that the restrictions failed strict scrutiny.[312] Although Justice Kavanaugh's concurrence was remarkably similar to that of his dissent in *Calvary Chapel*, Justice Gorsuch outwardly criticized Chief Justice Roberts's deference reasoning in *South Bay* as "towering authority that overshadows the Constitution during a pandemic."[313] Justice Gorsuch's concurrence additionally reinforced the discrimination claim, stating that people similarly "gather inside for extended periods in bus stations and airports, in laundromats and banks" as they do in churches.[314]

In his dissent, Chief Justice Roberts provided no clarification on the proximity and duration criteria he put forth in his *South Bay* concurrence but defended his deference reasoning as nothing more than a simple assertion that the politically accountable officials are entrusted "to guard and

304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.* at 66.
308. *Id.*
309. *Id.* at 67.
310. *Id.*
311. *Id.*
312. *Id.*
313. *Id.* at 71 (Gorsuch, J., concurring).
314. *Id.* at 69.

protect."[315] In their dissents, Justices Breyer[316] and Sotomayor[317] returned to the reasoning in *South Bay* that religious gatherings are more akin to concerts, lectures, and movies rather than grocery stores, banks, or laundromats. Notably, Justice Sotomoyor stated that *South Bay* and *Calvary Chapel* provided a "clear and workable rule" for the state when implementing executive orders: "they may restrict attendance at houses of worship so long as comparable secular institutions face restrictions that are at least equally as strict."[318] This statement is not instructive, however, and is merely a reiteration of the very issue that courts continue to grapple with: how should courts discern what are "comparable" gatherings?

Ultimately, the decisive question in this case was no different from that of every other religious exemption case during the pandemic: are places of worship more comparable to laundromats, banks, airports, and grocery stores, or are they more comparable to concerts, lectures, and movies? Justices Breyer and Sotomayor seem to suggest that science and epidemiology should govern, thereby warranting greater deference to the political branches.[319] The Court's per curiam opinion and the concurrences suggest a wider spectrum of secular analogs where people are likely to gather for an extended period of time.

Nonetheless, the Court has not yet explicitly formulated the relevant criteria for comparing gatherings, nor has it provided careful guidance on how courts should handle various criteria relevant to discerning general applicability. The Court's ruling in *Roman Catholic Diocese* has added yet another complication and inconsistency to First Amendment jurisprudence during COVID-19.

III. DISTINCTIVE TREATMENT FOR RELIGIOUS GATHERINGS UNDER STRICT SCRUTINY

If *Smith* is overruled and strict scrutiny is the definitive standard, religious entities may seek judicial relief even from generally applicable laws. Strict scrutiny provides a heightened standard that is exceptionally demanding. But even under such a legal standard, free exercise of religion should be afforded distinctive treatment via a more careful and specific application of strict scrutiny. Courts may use a low standard of rational basis when comparing bowling alleys and restaurants. But when the constitutional right to free exercise is at stake, courts should afford maximum protections to religious entities and individuals.

States may nonetheless meet this high standard, particularly given the nature of the COVID-19 pandemic. However, the demanding burden should be placed on the state to prove that religion was exempted (or not exempted)

315. *Id.* at 76 (Roberts, C.J., dissenting) (quoting S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring)).
316. *See id.* at 77–78 (Breyer, J., dissenting).
317. *Id.* at 78–80 (Sotomayor, J., dissenting).
318. *Id.* at 79.
319. *Id.* at 76.

due to a compelling state interest. This distinctive treatment of religious freedom is not a novel proposition but one that has been long overlooked under *Smith*.

Part III.A details the elements of strict scrutiny and how each element can be narrowly applied to protect religious liberty. Part III.B then argues that courts should emulate the exemption granted in *Yoder* in evaluating free exercise cases to further support a distinctive treatment of religion.

A. Narrower Application of Strict Scrutiny

Under *Smith*, cases under the RFRA or state equivalents have already demonstrated the use of strict scrutiny to evaluate religious exemption cases. In a world where *Smith* is overruled, courts must further define and standardize the strict scrutiny elements to avoid the inconsistency that marred the general applicability analyses. This section argues for a specific and narrow application of the strict scrutiny elements to provide as much protection for religious liberty as possible.

1. Substantial Burden

Under strict scrutiny, a church must first show a substantial burden on its religious exercise. Generally, courts have readily accepted the assertion that gathering restrictions place a substantial burden on religious practice; the precise rationales were often presumed or overlooked.[320] However, in instances where the state challenges the substantial burden on churches, courts should defer to the religious parties if the burden is placed on an exercise grounded in sincere religious beliefs.

Free exercise case law establishes that courts are to defer to the religious parties' assertions about their sincerely held religious beliefs.[321] For the purposes of evaluating substantial burden, however, it is critical to understand the religious party's perspective in conducting a full strict scrutiny analysis. Christian churches believe that their congregations must meet in person each week to worship together. This is rooted deeply in Scripture. Christians believe that God created humans as physical beings who are called to gather and worship together.[322] The Bible specifically designates the church to be a corporate body, not just individuals.[323]

The significance of gathering in person is also evident in doctrine and in practice. Most notably, the Lord's Supper is an intimate and vital sacrament for Christian denominations, requiring the physical administering of bread and wine as the representation or embodiment of the body and blood of Jesus Christ.[324] Because the very nature of the Lord's Supper is a physical sign

320. *See* Berean Baptist Church v. Cooper, 460 F. Supp. 3d 651, 662 (E.D.N.C. 2020) ("[N]o one contests that the assembly for religious worship provisions . . . 'burden sincere faith practice.'" (quoting Roberts v. Neace, 958 F.3d. 409, 415 (6th Cir. 2020))).

321. *See* Reynolds v. United States, 98 U.S. 145, 166 (1878).

322. *See Acts* 20:7; 1 *Corinthians* 15, 16:2; *Genesis* 2:7.

323. *See Ephesians* 4; *Romans* 12:3–8.

324. *See Shorter Catechism*, *supra* note 35.

and seal of a spiritual promise and because the elements are to be set aside by a minister, congregants cannot partake of the Lord's Supper unless gathering together physically.[325]

A substantial burden exists when a government action rises above de minimis inconveniences and places "substantial pressure on an adherent to modify his behavior and to violate his beliefs."[326] In other words, questions of substantial burden arise when individuals are required to choose between following their beliefs and receiving a governmental benefit or when individuals must act contrary to their religious beliefs to avoid facing legal penalties.

Nevertheless, despite accepting the sincerity of church beliefs, some cases have questioned whether the availability of remote services, multiple services, or drive-in services undermines any claims of substantial burden on religious practice. In *Capitol Hill*, the state asserted that the church could "hold multiple services, host a drive-in service, or broadcast the service online or over the radio."[327] In doing so, the state argued that the church had failed to prove that the gathering restrictions have substantially burdened the church's religious exercise.

The district court emphatically declared that the state "misses the point."[328] The court reasoned that the claimed burden is based on sincerely held theological beliefs and that the substantial burden inquiry does not ask "whether [the Church] is able to engage in other forms of religious exercise."[329] The court declared that it is for the church, not the state, to define the meaning of "not forsaking the assembling of ourselves together," as indicated in the Bible.[330] Thus, the court declared that restrictions on gatherings should be interpreted as "foreclose[ing] the Church's *only* method to exercise its belief . . . as its faith requires."[331]

Therefore, the availability of other formats for worship should not foreclose the finding of a substantial burden under strict scrutiny. Many cases will presume the substantial burden element, but when challenged, courts must not judge how individuals comply with their own faith as they see it.

2. The Compelling State Interest

The compelling state interest component has also been generally presumed. In *Roberts v. Neace*,[332] the court stated that "no one contests that

325. *See Acts* 2:46 ("And day by day, attending the temple together and breaking bread in their homes, they received their food with glad and generous hearts.").

326. Kaemmerling v. Lappin, 553 F.3d 669, 678 (D.C. Cir. 2008) (quoting Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 718 (1981)).

327. Capitol Hill Baptist Church v. Bowser, No. 20-cv-02710, 2020 WL 5995126, at *5 (D.D.C. Oct. 9, 2020).

328. *Id.* at *5.

329. *See id.* (citing Holt v. Hobbs, 574 U.S. 352, 361–62 (2015)).

330. *See id.* (citing *Hebrews* 10:25).

331. *See id.* at *6.

332. 958 F.3d 409 (6th Cir. 2020).

the Governor has a compelling interest" in combating COVID-19.[333] In *Maryville Baptist Church, Inc. v. Beshear*,[334] the court similarly stated that the state has a "compelling interest in preventing the spread of a novel, highly contagious, sometimes fatal virus."[335] In *Berean Baptist Church v. Cooper*,[336] the court concluded that "no one contests the Governor's compelling interest in seeking to prevent the spread of COVID-19."[337]

However, these broad notions fall short of fully protecting religious liberties. Rather, courts should apply a closer reading of strict scrutiny under the RFRA, highlighted in *O Centro Espirita*. There, in examining exemptions for the religious use of the drug hoasca, the Supreme Court rejected the state's assertion that controlling a substance having "a high potential for abuse" was a compelling state interest sufficient to survive strict scrutiny.[338] Instead, the Court stressed that under strict scrutiny, the burden at issue must be on the person.[339] In other words, the Court required "an inquiry more focused than the Government's categorical approach"[340]—an approach that focused solely on "the particular use at issue here."[341] Therefore, rather than asserting the general importance of the state to regulate harmful substances, the state was required to provide a compelling state interest to explain why hoasca specifically should not be exempted.

Similarly, during the COVID-19 pandemic, courts must "look[] beyond broadly formulated interests" of combating the spread of COVID-19. Instead, courts must examine whether the state has adequately provided a compelling justification for excluding religious worship from more favorable executive order categorizations. Justice Kavanaugh advocated for this position in his dissent in *South Bay*, stating that California's compelling justification required a distinction between the religious worship services in question and the secular businesses not subject to occupancy restrictions.[342] He repeated this assertion in his dissent in *Calvary Chapel*, stating that Nevada had failed to demonstrate how the public health justification specifically applied to allowing looser restrictions for casinos and bars but not churches.[343]

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333. *Id.* at 415.
334. 957 F.3d 610 (6th Cir. 2020).
335. *Id*. at 613.
336. 460 F. Supp. 3d 651 (E.D.N.C. 2020).
337. *Id*. at 662.
338. Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 432 (2006).
339. *Id.* at 423 (citing 42 U.S.C. § 2000bb-1(b)).
340. *Id.* at 430.
341. *Id.* at 432.
342. S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1615 (2020) (Kavanaugh, J., dissenting).
343. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2613 (2020) (mem.) (Kavanaugh, J., dissenting) ("Nevada undoubtedly has a compelling interest in combating the spread of COVID-19 and protecting the health of its citizens. But it does not have a persuasive public health reason for treating churches differently from restaurants, bars, casinos, and gyms.").

This narrower approach is subtle, but it is critical in providing an additional layer of protection for religious freedoms. Although preventing the spread of COVID-19 was sufficient to satisfy rational basis under *Smith*, strict scrutiny challenges the states to provide a fuller and narrower justification for limiting constitutional rights. This is not an undue burden on states because it leaves ample room for states to nevertheless succeed if the justification is sufficiently compelling. Such a high standard is appropriate in safeguarding the constitutional right to exercise one's religion.

3. Narrowly Tailored: The "Least Restrictive Means" Standard

Most gathering restriction cases during COVID-19 have hinged on the second requirement of "least restrictive means." Some courts that were generous in accepting states' broad formulations of compelling state interests nevertheless imposed injunctions finding the states had failed to satisfy the least restrictive means criterion. In evaluating this element, courts must more carefully and more strictly apply the standard in three particular ways: (1) permitting substitute forms of worship should not render restrictions on in-person worship narrowly tailored, (2) a favoring of analogous secular conduct is indicative of a violation of the least restrictive means standard, and (3) the willingness of religious entities to conform their religious exercise according to health requirements must be taken into account.

First, some cases have considered the availability of other platforms of worship to signify—not the lack of substantial burden—but that the order was the least restrictive means. In essence, states argued that because only in-person services were restricted and other platforms were left intact, the order was least restrictive in its application. This severely misses the point. As mentioned, the presumption of viable substitutes for worship undermines the churches' right to determine its form of worship based on sincerely held beliefs.[344] To presume the validity of these substitutes is a misconception of the sincere, religious basis for in-person worship. The necessity of in-person religious worship "is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."[345] The court in *Neace* further added that the state cannot presume that "every member of the congregation has access to the necessary technology" or that "every member of the congregation must see [such technology] as an adequate substitute."[346]

Second, the favoring of analogous secular gatherings should indicate that the state had, at its disposal, options for achieving its objectives that would burden religion to a far lesser degree. In *Berean*, the state could not provide a rationale for allowing fifty people to gather indoors at a funeral but restricting indoor church gatherings to ten individuals.[347] Therefore, the

344. *See* Capitol Hill Baptist Church v. Bowser, No. 20-cv-02710, 2020 WL 5995126, at *5 (D.D.C. Oct. 9, 2020).

345. Wisconsin v. Yoder, 406 U.S. 205, 216 (1972).

346. Roberts v. Neace, 958 F.3d 409, 415 (6th Cir. 2020).

347. Berean Baptist Church v. Cooper, 460 F. Supp. 3d 651, 661 (E.D.N.C. 2020).

court ruled that the assembly for religious worship provisions were "not narrowly tailored to accomplish the compelling interest in protecting public health."[348] In *Maryville*, the Sixth Circuit invoked the Kentucky equivalent of the RFRA, which parallels the RFRAs enacted by Congress and by other states.[349] In evaluating the Kentucky governor's executive order that allowed "typical office environments" but restricted drive-in church services, the court determined that the order "[did] not amount to the least restrictive way of regulating the churches."[350] The court questioned why the state permitted hundreds of cars to be parked in parking lots but reprimanded those who wished to park in a lot for religious purposes.[351]

Third and relatedly, even if there are no direct secular analogs, a court should take into account a religious organization's willingness and attempts to incorporate health requirements when discerning the least restrictive means. For example, in *South Bay*, churchgoers were willing to implement social distancing measures, "requiring congregants to wear face coverings, prohibiting the congregation from singing, and banning hugging, handshakes, and hand-holding."[352] Under *Smith*, the court would not be obligated to consider these circumstances but only to evaluate whether churches in general should be excluded from more favorable categorizations. However, under a stricter application of least restrictive means, the Court may have acknowledged the church's efforts to minimize its risks sufficient to achieve the state's compelling interest. By voluntarily "regulating the specific underlying risk-creating behaviors," the court held that the state can nonetheless achieve its ends while minimizing the burden on religious exercise.[353]

B. Reinstating Yoder*-Like Exemptions*

Such a careful and more precise application of the strict scrutiny test is not a novel proposition. In fact, this was precisely the basis on which the Supreme Court decided *Yoder*, the one true religious exemption case.[354] The Court first concluded that there was a substantial burden on religious practice, finding that the compulsory education requirement through age sixteen was "in marked variance with Amish values and the Amish way of

348. *Id.* at 663.

349. *See* Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610, 612 (6th Cir. 2020); *see also* KY. REV. STAT. ANN. § 446.350 (West 2021) ("Government shall not substantially burden a person's . . . . right to act . . . in a manner motivated by a sincerely held religious belief . . . unless the government proves by clear and convincing evidence that it . . . has used the least restrictive means to further [a compelling governmental interest].").

350. *See Maryville*, 957 F.3d at 613.

351. *Id.* at 615.

352. *See* S. Bay United Pentecostal Church v. Newsom, 959 F.3d 938, 946 (9th Cir. 2020) (Collins, J., dissenting), *aff'd*, 140 S. Ct. 1613 (2020).

353. *Id.*

354. *See* McConnell, *supra* note 88, at 1110 (referring to *Yoder* as the "last major free exercise victory").

life."[355] Second, the Court narrowly applied the compelling interest test, declaring that where "fundamental claims of religious freedom are at stake . . . we cannot accept such . . . sweeping claim[s]" of state interest.[356] Instead, the Court stated that it was the state's responsibility to specifically show "with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish."[357] Third, the Court ruled that compulsory education through the age of fourteen accomplished the state's interest in maintaining an educated citizenry.[358] Because the state interest could be achieved while placing far less of a burden on Amish values, the Court ruled that the compulsory education requirement was not narrowly tailored.[359] Ultimately, the Court granted the Amish an exemption from the compulsory education requirement.

Such granting of religion-based exemptions was preempted by *Smith*, limiting *Yoder*'s reasoning to be only applicable to "hybrid rights" cases. However, a close reading of *Yoder*, as elucidated by Justice O'Connor in *Smith*, demonstrates that the Court based its decision squarely on the Free Exercise Clause alone and not on parental rights.[360] The Court explicitly concluded that testimony, history, and practice support the claim that "enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs" with no reference to parental rights.[361] Such a claim was justified because the Amish were "capable of fulfilling the social and political responsibilities of citizenship without . . . jeopardizing their free exercise of religious belief."[362]

Justice David Souter, in his concurrence in *Lukumi*, similarly challenged the hybrid distinction as "untenable."[363] Justice Souter reasoned that according to Justice Scalia's definition of a hybrid claim, the scope of hybrid

355. Wisconsin v. Yoder, 406 U.S. 205, 211 (1972). The Court also found that "[a]gainst this background, it would require a more particularized showing from the State on this point to justify the severe interference with religious freedom such additional compulsory attendance would entail." *Id.* at 227.

356. *Id.* at 221.

357. *Id.* at 236.

358. *See id.* at 225. ("[The Amish] are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade at the price of jeopardizing their free exercise of religious belief.").

359. *See id.* at 228–29.

360. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 896 (1990) (O'Connor, J., concurring). Justice O'Connor stated in her concurring opinion that

> [t]he Court endeavors to escape from our decisions in *Cantwell* and *Yoder* by labeling them 'hybrid' decisions but there is no denying that both cases expressly relied on the Free Exercise Clause and that we have consistently regarded those cases as part of the mainstream of our free exercise jurisprudence.

Id. (citations omitted).

361. *See Yoder*, 406 U.S. at 219.

362. *See id.* at 225.

363. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring).

exceptions would be "so vast as to swallow the *Smith* rule."[364] Additionally, if a hybrid claim involves another constitutional provision that is sufficient ground for obtaining an exemption from a neutral and generally applicable law, then "there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all."[365] Ultimately, Justice Souter was not persuaded and believed that "fundamental claims of religious freedom [were] at stake."[366] Professor Michael McConnell stated that, by its own account, *Smith* itself should have been classified as a hybrid case and undergone higher scrutiny.[367] Professor McConnell ultimately concluded that "the *Smith* Court's notion of 'hybrid' claims was not intended to be taken seriously"[368] and that one may reasonably "suspect[] that the notion of 'hybrid' claims was created for the sole purpose of distinguishing *Yoder* in [*Smith*]."[369]

If *Smith* is overruled, *Yoder* must be freed from this controversial "hybrid-rights" designation by Justice Scalia. As a practical matter, under *Smith*, *Yoder* was typically regarded as either an exception to the general *Smith* rule or as a "constitutional anomaly" to standard exemption analyses.[370] However, *Yoder* has long been considered to be the "high watermark of free exercise protection"[371] and a "pinnacle of judicial recognition of free exercise exemptions."[372] Its principled approach to examining free exercise cases afforded substantial protections for religiously motivated conduct.[373]

Perhaps under *Yoder* as the commanding law in free exercise jurisprudence, religious gatherings may have a claim to injunctive relief even in situations where all other secular gatherings are restricted. Rather than comparing religious gatherings to secular analogs, courts must look to grant an exemption to religious parties "save in the most extreme circumstances."[374] Certainly, COVID-19 has presented an abundance of such extreme circumstances, and the state may reasonably and successfully defend its executive orders. Thus, free exercise claimants undoubtedly face a very steep hill in seeking exemptions during COVID-19; solely allowing

364. *Id.*
365. *Id.*
366. *Id.* at 566 (citing *Yoder*, 406 U.S. at 221).
367. *See* McConnell, *supra* note 88, at 1122.
368. *Id.*
369. *Id.* at 1121.
370. *See* Comment, Smith*'s Free-Exercise "Hybrids" Rooted in Non-Free-Exercise Soil*, 6 REGENT U. L. REV. 201, 203 (1995).
371. Richard S. Myers, *The Right to Conscience and the First Amendment*, 9 AVE MARIA L. REV. 123, 127 (2010).
372. Elizabeth Harmer-Dionne, Note, *Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy as a Case Study Negating the Belief-Action Distinction*, 50 STAN. L. REV. 1295, 1304 (1998).
373. *See* Michael A. Helfand, *Religious Institutionalism, Implied Consent, and the Value of Voluntarism*, 88 S. CAL. L. REV. 539, 557–58 (2015) ("[B]oth the *Sherbet* and *Yoder* courts afforded broad protection to religiously motivated conduct against the substantial burdens imposed by otherwise valid laws—insisting that such religiously motivated conduct was guaranteed free exercise protections save in the most extreme of circumstances.").
374. *Id.*

churches to open alongside hospitals is understandably a far-fetched objective.

However, *Yoder*, at the very least, makes such claims possible and allows free exercise claims to be tested against the harshest state laws. If state actions are nevertheless upheld via strict scrutiny under *Yoder*, free exercise claimants can be reassured that the severity of the public health situation compels the curbing of the fundamental right to exercise religion. The decision, however, should not be marred by inconsistent treatment of religion under a low standard when a higher standard can afford better protections for religious freedoms while nevertheless maintaining the state's ability to assert a compelling state interest.

The instinct to protect religious liberty is certainly not novel in American history, nor is it limited merely to the religious. Justice Blackmun, in his dissent in *Smith*, stated that the very purpose of drafting the Establishment and Free Exercise Clauses was "precisely in order to avoid [religious] intolerance."[375] James Madison stated that "[t]he Religion then of every man must be left to the conviction and conscience of every man" and it must be maintained as a "right of every man to exercise it as these may dictate."[376] Madison affirmed that "[i]t is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him."[377]

In sum, should *Smith* be overruled, the Supreme Court should support a narrow application of strict scrutiny to discern whether a state action that burdens the free exercise of religion should nevertheless be upheld. This narrow and demanding standard affords distinctive treatment for religious liberties. This proposition is grounded in a simple principle: constitutional rights deserve the highest protection. As Professor E. Gregory Wallace stated, "[r]eligion requires special constitutional treatment precisely because it involves something transcendent, objective, normative, and exclusive."[378] Fundamental rights are, by their very nature, inalienable and essential and deserve the utmost protection by the judiciary.

CONCLUSION

COVID-19 gathering restrictions have exposed the current *Smith* standard as misguided and inconsistently applied. Such an inconsistent standard cannot be the determining factor in free exercise exemption analyses because it undermines the distinctive treatment religion deserves. The narrow

375. *See* Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 909 (1990) (Blackmun, J., dissenting) ("I do not believe the Founders thought their dearly bought freedom from religious persecution a 'luxury,' but an essential element of liberty—and they could not have thought religious intolerance 'unavoidable,' for they drafted the Religion Clauses precisely in order to avoid that intolerance." (quoting *id.* at 888, 890 (majority opinion))).

376. *See* JAMES MADISON, *A Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), *reprinted in* SELECTED WRITINGS OF JAMES MADISON 21, 22 (Ralph Ketcham ed., 2006).

377. *See id.*

378. E. Gregory Wallace, *Justifying Religious Freedom: The Western Tradition*, 114 PENN ST. L. REV. 485, 491 (2009).

application of strict scrutiny under a *Yoder*-like analysis elevates free exercise to a higher standard so that states rely significantly on the compelling nature of the state interest rather than on comparisons with secular analogs. This Note does not advocate undermining state efforts in combatting COVID-19. It fully recognizes that individual rights secured by the Constitution may nonetheless accommodate state efforts to combat a pandemic. However, fundamental rights must *always* be afforded distinctive treatment, for the true strength of constitutional guarantees shines brightest when applied unhesitatingly in times of peace and crisis alike.