More Than a Mask: Stay-at-Home Orders and Religious Freedom

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I. INTRODUCTION

From March 2020, the United States' public health law universe was dramatically transformed by measures taken to combat the new emerging respiratory virus, SARS-CoV-2, which causes the disease COVID-19.[1] The virus emerged in December 2019, and cases arrived in the United States

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1. *See* Lawrence O. Gostin, Eric A. Friedman & Sarah A. Wetter, *Responding to Covid-19: How to Navigate a Public Health Emergency Legally and Ethically*, HASTINGS CTR. REP., Mar.–Apr. 2020, at 8, 8–12, https://onlinelibrary.wiley.com/doi/epdf/10.1002/hast.1090 [https://perma.cc/MLT7-67BM].

as early as January 2020; though federal public health acted earlier,[2] widespread public health measures were not taken until March 2020.[3] The San Francisco Bay Area's counties were the first to issue widespread shelter-in-place orders, operative from March 17, 2020.[4] By March 30, 2020, over half the states issued shelter-in-place or stay-at-home orders.[5] Many of these state and local measures have dramatic impacts on individuals' freedom and daily lives. Balancing public health and rights in this situation is not easy, and courts have an important, difficult role to play.[6]

Predictably, legal challenges to these broad measures have already been filed.[7] Among them were a variety of challenges claiming that stay-at-home orders that apply to religious gatherings violate the First Amendment's guarantee of the free exercise of religion.[8] This Article addresses such claims.

This Article is unlikely to be published before the end of the current chapter of stay-at-home orders and subsequent challenges. But the analysis is still relevant: until the emergence of a COVID-19 vaccine—which will take some time—new waves of the disease could lead to additional restrictive measures.[9]

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2. Daniel B. Jernigan, *Update: Public Health Response to the Coronavirus Disease 2019 Outbreak–United States, February 24, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 216, 216–18 (2020). As of February 28, 2020, the response to the pandemic was still at the level of investigation and response to individual cases; the widespread social distancing measures came later. *See id.*

3. *See infra* notes 4–6 and accompanying text.

4. Erin Allday, *Bay Area Orders 'Shelter in Place,' Only Essential Businesses Open in 6* Counties, S.F. CHRONICLE (Mar. 16, 2020), https://www.sfchronicle.com/local-politics/article/Bay-Area-must-shelter-in-place-Only-15135014.php [https://perma.cc/C9RQ-USRZ]. Allday refers to the Bay Area order as a "shelter in place order." *Id.* Later orders used the language "stay-at-home." *See, e.g.*, sources cited *infra* note 5. Although our Article mentions both terms, in part because of the title the Bay Area counties used, "stay-at-home" orders will be used going forward for consistency.

5. *List: The 27 States that Now Have Stay-at-Home Coronavirus Orders*, MERCURY NEWS (Mar. 29, 2020, 1:07 PM), https://www.mercurynews.com/2020/03/29/coronavirus-list-the-27-states-that-now-have-stay-at-home-orders/ [https://perma.cc/9BJU-3GCP]; Alicia Lee, *These States Have Implemented Stay-at-Home Orders. Here's What that Means for You*, CNN (Apr. 7, 2020, 5:23 PM), https://www.cnn.com/2020/03/23/us/coronavirus-which-states-stay-at-home-order-trnd/index.html [https://perma.cc/8AYJ-AJPX].

6. *See* Lawrence O. Gostin & Lindsay F. Wiley, *Governmental Public Health Powers During the COVID-19 Pandemic: Stay-at-Home Orders, Business Closures, and Travel Restrictions*, 323 J. AM. MED. ASS'N 2137, 2137–38 (2020).

7. *See, e.g.*, *Judicial Trends in Public Health*, NETWORK FOR PUB. HEALTH L. (Apr. 2, 2020), https://www.networkforphl.org/resources/judicial-trends-in-public-health-april-2%202020/?fbclid=IwAR1UEbd%20%209TRJDgPXxbayUQQ_dVF6HqxtzR8nl3Pu1IqGFh40Hf3MH9AGQzI4 [https://perma.cc/95RE-64M2].

8. *See, e.g.*, Complaint, Binford v. Sununu, No. 217-2020-CV-00152 (N.H. Super. Ct. Mar. 17, 2020), https://www.courts.state.nh.us/caseinfo/pdf/civil/Sununu/031720Sununu-complaint.pdf [https://perma.cc/P897-J2VN].

9. *See* Sam Meredith, *Harvard Researchers Warn Social-Distancing Measures May Need to Remain in Place into 2022*, CNBC (Apr. 15, 2020, 7:15 AM), https://

Further, COVID-19 is unlikely to be the only infectious disease threat the United States faces. We have seen other threats of pandemic—for example, SARS in 2003,[10] luckily controlled, H1N1 in 2009,[11] and MERS in 2012.[12] There is every reason to expect future pandemics, even if we cannot anticipate their shape or breadth, or other public health threats. COVID-19's stay-at-home orders offer a precedent that may be used in future pandemics; the limits imposed by the First Amendment are, therefore, worth exploring. There are two parts to that discussion. The more obvious one is the tension between the First Amendment's Free Exercise Clause and stay-at-home orders that seek to limit religious gatherings. But another, more nuanced tension is between the Establishment Clause and stay-at-home orders that explicitly exempt churches.

The challenge in exploring the Free Exercise Clause is two-fold. First, changes to the composition of the Supreme Court raise the possibility that current First Amendment jurisprudence may change in the near future[13]—lower courts decisions that do not fit the current jurisprudence may end up adopted as an alternative view, rather than seen as an error. Specifically, current jurisprudence uses the framework of *Employment Division v. Smith*, and that framework may be modified or rejected by the Supreme Court in the near future—or not.[14] This Article identifies potential changes to this jurisprudence—but also points out that such change is uncertain—and provides a coherent approach under existing jurisprudence. Second, the current approach federal courts take may not fit comfortably in states

www.cnbc.com/2020/04/15/coronavirus-study-warns-social-distancing-may-need-to-stay-until-2022.html [https://perma.cc/HK3W-X37Y].

10. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, FACT SHEET: BASIC INFORMATION ABOUT SARS 1 (2004), https://www.cdc.gov/sars/about/fs-SARS.pdf [https://perma.cc/2CLQ-V6MW].

11. *See 2009 H1N1 Pandemic (H1N1pdm09 virus)*, CENTERS FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/flu/pandemic-resources/2009-h1n1-pandemic.html [https://perma.cc/N8QK-CY2H] (last reviewed June 11, 2019).

12. *See About MERS*, CENTERS FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/mers/about/index.html [https://perma.cc/XZ3K-E6X9] (last updated Aug. 2, 2019).

13. *See* Adam Liptak, *John Roberts Was Already Chief Justice. But Now It's His Court*, N.Y. TIMES (June 30, 2020), https://www.nytimes.com/2020/06/30/us/john-roberts-supreme-court.html [https://perma.cc/659M-85K6].

14. *See* Emp't Div. v. Smith, 494 U.S. 872, 878–79, 882 (1990).

with a Religious Freedom Restoration Act (RFRA).[15] Taking that into account, this Article suggests prescriptions that can be relevant both to states following the federal approach to the Free Exercise Clause and for states that adopted strict scrutiny through RFRAs.

This Article proceeds in four parts. Part II describes the challenges COVID-19 poses, states' responses, and resulting lawsuits. Among other things, it points out that inevitably stay-at-home orders draw some lines and allow some activities. Part III explains the pre-existing jurisprudence regarding the Free Exercise Clause, and where we are in terms of the law. It suggests that under *Smith*, states have considerable leeway to enforce orders that are generally aimed at gatherings against religiously-motivated gatherings as well, even if the state allows other activities that are not characterized by large gatherings in closed spaces. It addresses—and rejects—a view that *Smith* is inapplicable if a law provides any exceptions, but highlights that there are circumstances under which strict scrutiny should apply to stay-at-home orders. It also describes the legal situation in states with a RFRA. Part IV critically analyzes the jurisprudence thus far and suggests general guidance for moving forward from two perspectives: how states should write stay-at-home orders to comply with the legal protections of religious freedom, and how courts should approach stay-at-home orders on review. Lastly, Part V addresses whether stay-at-home orders that exempt churches run afoul of separation of church and state, and concludes that generally, they do not.

II. COVID-19 AND STAY-AT-HOME ORDERS

In response to COVID-19, the vast majority of states passed stay-at-home orders. As of April 23, 2020, forty-two states have issued a stay-at-home order, and within three of the states that have not—Oklahoma, Utah, and Wyoming—several localities have issued stay-at-home orders.[16] Only five states—North Dakota, South Dakota, Nebraska, Iowa, and Arkansas—have no order, state-wide or otherwise.[17] The content of these orders varies locally. Relevant to this paper, several states expressly exempt

15. *See State Religious Freedom Restoration Acts*, NAT'L CONF. ST. LEGISLATURES (May 4, 2017), https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx [https://perma.cc/DL37-VJ7G].

16. Sarah Mervosh, Denise Lu & Vanessa Swales, *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 20, 2020), https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html [https://perma.cc/3HVK-CSDT].

17. *Id.*

religious services from the order.[18] Others do not. All of them allow some activities to continue.

Shortly after the start of stay-at-home orders, several lawsuits challenged the application of stay-at-home orders to religious events and gatherings; some resulted in temporary stays of the orders, while others were dismissed or had temporary orders denied. On March 17, 2020, three New Hampshire residents—David Binford, Holly Beene, and Eric Couture—sued Governor Sununu of New Hampshire for issuing an emergency order on March 16.[19] The complaint had several arguments, both statutory and constitutional, but among the arguments David Binford claimed that "The decree by the governor of New Hampshire prohibits him being able to attend religious services and right to practice his religion due to the fact that more than 50 people attend."[20] Similarly, the complaint alleged that "Plaintiff Eric Couture attends services 3 times a week at Bible Baptist church in Nashua and teaches Sunday school apologetics to the teens at his church. The order in question violates his right to peacefully attend and worship God with other church members and violates his conscience to do so."[21]

The New Hampshire executive order in question says:

> In accordance with CDC guidelines, the following activities are hereby prohibited within the State of New Hampshire:
>
> Scheduled gatherings of 50 people or more for social, spiritual and recreational activities, including but not limited to, community, civic, public, leisure, faith-based, or sporting events; parades; concerts; festivals; conventions; fundraisers; and similar activities. This prohibition does not apply to the General Court or to the day-to-day operations of businesses.[22]

The order clearly aims to be expansive and cover most gatherings, regardless of the goal. Even though it does mention "faith-based activities," it is not singling out religious gatherings, as its other sections place restrictions on,

18. *See, e.g.*, Mike Cason, *Gov. Kay Ivey Issues Stay-at-Home Order Effective Saturday*, AL.COM (Apr. 3, 2020), https://www.al.com/news/2020/04/gov-kay-ivey-to-give-update-on-coronavirus-response.html [https://perma.cc/7F47-KXRP].

19. Complaint at 1, Binford v. Sununu, No. 217-2020-CV-00152 (N.H. Super. Ct. Mar. 17, 2020), https://www.courts.state.nh.us/caseinfo/pdf/civil/Sununu/031720Sununu-complaint.pdf [https://perma.cc/DB7L-NL2V].

20. *Id.* at 3.

21. *Id.*

22. N.H. Emergency Order No. 2 Pursuant to Exec. Order No. 2020-04 (Mar. 16, 2020), https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/emergency-order-2.pdf [https://perma.cc/4L53-QNHJ].

for example, restaurants.[23] New York's order on the topic is even more general: it prohibited gatherings, without mentioning religious gatherings, simply saying, "Non-essential gatherings of individuals of any size for any reason (e.g. parties, celebrations or other social events) are canceled or postponed at this time."[24] Georgia's order also directed that "no business, establishment, corporation, non-profit corporation, organization, or county or municipal government shall allow more than ten (10) persons to be gathered at a single location if such gathering requires persons to stand or to be seated within six (6) feet of any other person."[25] An initial Florida order forbade all "social or recreational gatherings of 10 or more people."[26]

All of these orders had exceptions to staying at home, including, for example, going to grocery stores.[27]

Several outbreaks centered on religious services highlighted the reason for including religious services in the closures. For example, a church service in Arkansas attended by ninety-two people led to an outbreak of thirty-five cases in churchgoers, another twenty-six in the community, and four deaths, three of which were churchgoers.[28] Other outbreaks were also traced to churches, though none as large or lethal.[29] As we learn more about

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23. *See id.* ("Food and beverage sales are restricted to carry-out, delivery, curbside pick-up, and drive-through only, to the extent permitted by current law. No onsite consumption is permitted, and all onsite consumption areas in restaurants, diners, bars, saloons, private clubs, or any other establishment that offers food and beverages for sale shall be closed to customers.").

24. N.Y. Exec. Order No. 202.10 (Mar. 23, 2020), https://www.governor.ny.gov/news/no-20210-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency [https://perma.cc/A54Z-UBRM] (order has since been renewed).

25. Ga. Exec. Order No. 03.23.20.01 (Mar. 23, 2020), https://gov.georgia.gov/executive-action/executive-orders/2020-executive-orders [https://perma.cc/3RXC-KUK8]. The executive order is described as "[l]imiting large gatherings statewide, ordering 'shelter in place' for specific populations, and closing bars and nightclubs in Georgia for fourteen days." *2020 Executive Orders*, GOVERNOR BRIAN P. KEMP: OFF. GOVERNOR, https://gov.georgia.gov/executive-action/executive-orders/2020-executive-orders [https://perma.cc/GFP2-H7N8].

26. Fla. Exec. Order No. 20-83 (Mar. 24, 2020), https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-83.pdf [https://perma.cc/6NWZ-5CZC].

27. *See, e.g.*, Ga. Exec. Order No. 04.02.20.0 (Apr. 2, 2020), https://gov.georgia.gov/executive-action/executive-orders/2020-executive-orders [https://perma.cc/3RXC-KUK8] (permitting the obtaining of necessary supplies, engaging in essential health and safety activities, and engaging in socially distanced outdoor exercise).

28. Allison James et al., *High COVID-19 Attack Rate Among Attendees at Events at a Church–Arkansas, March 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 632, 633 (May 19, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6920e2-H.pdf [https://perma.cc/D42Y-7NMA].

29. *See, e.g.*, Stephanie Becker, *At Least 70 People Infected with Coronavirus Linked to a Single Church in California, Health Officials Say*, CNN (Apr. 4, 2020, 11:39 AM), https://www.cnn.com/2020/04/03/us/sacramento-county-church-covid-19-outbreak/index.html [https://perma.cc/4U3E-NP6X]; Richard Burkard, *Church at Center of COVID-19*

COVID-19, several factors that clearly increase risk are large gatherings, being indoors, and lengthy contact—conversely, smaller groups, being outdoors, and limited duration contacts are less risky.[30] These factors clearly apply to many religious gatherings—just as they apply to large university classes, concerts, theatre, sport events, and other venues.

In spite of this risk, some states expressly exempted religious gatherings from their restrictions. Ohio's stay-at-home order, after prohibiting "[a]ll public and private gathering of any number of people occurring outside a single household and connected property," specified that "[t]his Section does not apply to religious facilities, entities and groups and religious gatherings."[31] Other states allowed at least some religious services—for example, Alabama allowed them for less than ten people or as drive-through services.[32]

As mentioned, several lawsuits have been filed against stay-at-home orders claiming they violate the First Amendment's freedom of religion guarantee. We listed every decision we could find online in a Google spreadsheet.[33] We are not aware of any lawsuits against stay-at-home orders exempting churches.

Outbreak Responds, MESSENGER (Apr. 7, 2020), https://www.the-messenger.com/news/local/article_59dcb9b2-063a-56fe-a89a-e72ee157483f.html [https://perma.cc/FDP6-3G3A]; *Coronavirus Outbreaks Reported at Some Churches with In-Person Services*, FOX 8 (May, 21, 2020, 11:27 AM), https://www.fox8live.com/2020/05/21/coronavirus-outbreaks-reported-some-churches-with-in-person-services/ [https://perma.cc/YA2B-WH9C].

30. Daniela Hernandez, Sarah Toy & Betsy McKay, *How Exactly Do You Catch Covid-19? There Is a Growing Consensus*, WALL ST. J. (June 16, 2020, 10:39 AM), https://www.wsj.com/articles/how-exactly-do-you-catch-covid-19-there-is-a-growing-consensus-11592317650?fbclid=IwAR0k4y0U63Eb8XlzQyciNZhH_X_PGhqVnkZNVyyUPINoUmfeeq1dj8j2eFE [https://perma.cc/2GR9-JG8M].

31. Ohio Dep't of Health, Director's Stay Safe Ohio Order (Apr. 30, 2020), https://coronavirus.ohio.gov/static/publicorders/Directors-Stay-Safe-Ohio-Order.pdf? [https://perma.cc/JSP5-J8YU].

32. Ala. Dep't of Health, Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19 (Apr. 3, 2020), https://governor.alabama.gov/assets/2020/04/Final-Statewide-Order-4.3.2020.pdf [https://perma.cc/FK32-Q3KC].

33. Dorit R. Reiss & Madeline Thomas, COVID-19 Freedom of Religion Cases (unpublished spreadsheet), https://docs.google.com/spreadsheets/d/1w69aTvolgoMOZ6xLSm8WjbFIdXZLpunnNhM3NNyXMEM/edit#gid=593149470 [https://perma.cc/8ATN-TXPL].

III. FIRST AMENDMENT JURISPRUDENCE

The strength of claims challenging stay-at-home orders under the First Amendment depends on two things. First, the facts of the case, including the content of the challenged order and the practices sought or found in violation. Second, the standard used to evaluate the order. The latter, in turn, also depends on several things.

The current federal jurisprudence standard for assessing when a religious exemption is required is *Employment Division v. Smith*, under which states do not have to provide religious exemptions when they enact a law that is neutral on its face and of general applicability.[34] Under *Smith*, as long as the law does not target religion and is not motivated by hostility to religion, it can apply even if it burdens religion.[35] *Smith*'s approach to the First Amendment was a change from previous jurisprudence and was not without its critics at the time.[36] Nonetheless, there are several reasons to see *Smith* as difficult to completely overturn, even in the face of recently decided cases suggesting a potentially increased sympathy for protecting religious views by a majority of Supreme Court Justices.[37] *Smith* was written by Justice Scalia, a leading conservative.[38] The basis for *Smith* was, among other things, concern that any law would be vulnerable if any person's interpretation of religion justified waivers of laws that person claimed religious objection to—with the only barrier being a subjective sincerity determination—and the potential expansion of the doctrine in ways that undermine public policy.[39] These concerns can appeal even to those with strong religious views.

The Supreme Court limited Congress's attempts to overturn *Smith* by the federal Religious Freedom Restoration Act, leaving states free, from a constitutional standpoint, to pass general laws affecting religion

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34. Emp't Div. v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

35. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993) ("[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 . . . [but a] law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." (citing Emp't Div. v. Smith, 494 U.S. 872 (1990)); *see also* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1729–32 (2018) (providing additional precedent).

36. *See* Kenneth Marin, Employment Division v. Smith*: The Supreme Court Alters the State of Free Exercise Doctrine*, 40 AM. U. L. REV. 1431, 1431–33 (1990).

37. *See* Paul Horwitz, *The* Hobby Lobby *Moment*, 128 HARV. L. REV. 154, 167–71 (2014); William P. Marshall, *Extricating the Religious Exemption Debate from the Culture Wars*, 41 HARV. J.L. & PUB. POL'Y 67, 74–77 (2018).

38. Marshall, *supra* note 37, at 68.

39. *See id.* at 69–72.

without a religious exemption.[40] But shortly after *Smith,* in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* in 1993, the Court drew one line: it ruled that laws that are not neutral and generally applicable will still be held to strict scrutiny.[41] In *Lukumi*, the City of Hialeah, Florida enacted a set of ordinances clearly aimed at stopping a church belonging to the Santeria religion from engaging in ritual animal sacrifice.[42] Although the language of the ordinances was neutral, the Court found from the record and the city's prior resolutions that their clear objective was to prevent ritual sacrifice by this specific church, and therefore, the ordinances were not neutral: they were targeting a single church's unique religious practice.[43] The natural reading of *Lukumi* on its facts is that laws or ordinances motivated by hostility to religion are subject to strict scrutiny, even if they are neutral on their face.[44]

That is not, however, the only available interpretation. In *FOP Newark Lodge 12 v. City of Newark,* a panel of the Third Circuit Court of Appeals —including current Supreme Court Justice Alito, then a circuit judge— ruled that *Smith* does not to apply to cases where the statute in question included individualized exceptions on secular grounds, finding that the Court in *Lukumi* held just that—if there are secular exceptions to the statute, the lack of religious exception would be subject to strict scrutiny.[45] That interpretation has not been adopted by the Supreme Court, and was rejected expressly by several federal courts.[46] It was, however, adopted by some lower courts, including subsequent Third Circuit decisions.[47] It

40. City of Boerne v. Flores, 521 U.S. 507, 511, 534–36 (1997); *see* Matthew A. Brown, Coronavirus and Church Closures: Will the Covid-19 Gathering Bans Survive Free Exercise Challenges? 5–6 (Apr. 21, 2020) (unpublished comment), https://ssrn.com/abstract=3580135 [https://perma.cc/6M2C-S5JP].

41. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993).

42. *Id.* at 524–28.

43. *Id.* at 533–36.

44. *Id.* at 534–36.

45. Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 364–66 (3d Cir. 1999).

46. *E.g.*, Grace United Methodist Church v. City of Cheyenne, 427 F.3d 775, 784 (10th Cir. 2005); Brock v. Boozman, No. 4:01CV00760 SWW, 2002 WL 1972086, at *8 (E.D. Ark. Aug. 12, 2002); Booth v. Maryland, 207 F. Supp. 2d 394, 398 (D. Md. 2002).

47. *See, e.g.*, Blackhawk v. Pennsylvania, 381 F.3d 202, 206–09, 212 (3d Cir. 2004); Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 167–72 (3d Cir. 2002); InterVarsity Christian Fellowship/USA v. Univ. of Iowa, 408 F. Supp. 3d 960 (S.D. Iowa 2019); Cunningham v. City of Shreveport, 407 F. Supp. 3d 595, 605, 607–08 (W.D. La. 2019); Stormans Inc. v. Selecky, 844 F. Supp. 2d 1172, 1199 (W.D. Wash. 2012); Riback

was also reiterated by Justice Gorsuch in his concurrence in *Masterpiece Cakeshop.*[48] In one article it was suggested as a potential alternative if the Court decides to limit, but not overrule, *Smith.*[49]

We find this approach unconvincing. First, it is not well grounded in *Smith. Smith* did distinguish *Sherbert v. Verner,* on the ground that the standard in *Sherbert* required individual assessment—the standard was that an individual is not eligible for unemployment benefits if "without good cause" the individual quit work.[50] That is not quite the same as having generalized, broad exemptions. Even more importantly, that language was followed by language that suggested a complete overturning of *Sherbert*, and indeed, following decisions interpreted *Smith* as similarly abandoning *Sherbert*.[51] The Court said:

> We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." . . . To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself," . . . —contradicts both constitutional tradition and common sense.[52]

The interpretation fits even less comfortably with *Lukumi.* The reference to exceptions in *Lukumi* was not to argue that *Smith* is inapplicable where other exceptions exist; rather, the Court merely pointed out that the number and extent of exceptions left the ordinances applicable only to the Church of Lukumi Babalu, showing that hostility to the Santerian religion was the city's true motivation.[53]

Further, practically all laws have some exceptions. *Smith* was about as close to a law without exception as you get: it was a general policy not to

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v. Las Vegas Metro. Police Dep't, No. 2:07–CV–1152–RLH–LRL, 2008 WL 3211279, at *4 (D. Nev. Aug. 6, 2008).

48. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1737 (2018) (Gorsuch, J., concurring).

49. *See* Brown, *supra* note 40, at 16–17.

50. Emp't Div. v. Smith, 494 U.S. 872, 884–85 (1990) (distinguishing Sherbert v. Verner, 374 U.S. 398 (1963)).

51. Paul S. Zilberfein, Employment Division, Department of Human Resources of Oregon v. Smith*: The Erosion of Religious Liberty*, 12 PACE L. REV. 403, 427–28 (1992).

52. *Smith*, 494 U.S. at 885 (citations omitted) (first quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988); then quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)).

53. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534–35 (1993).

use illegal drugs or alcohol by counselors.[54] Even there, however, there was a line between drugs defined as illegal and those that were not. And the examples positively cited in *Smith* did not fall into that category—for example, *United States v. Lee* addressed refusal to pay social security tax, and there were other exceptions from that.[55] In *Brock v. Boozman,* the court suggested that exemptions are a problem if they are adopted because of a value judgment in favor of a secular motivation, and against a religious one.[56] Exemptions that are in line with the general purpose of the act, and do not make a value judgment preferring secular motivations over religious ones, are not a problem.[57] We believe this offers a reasonable interpretation of *FOP*, and preserves the core of *Smith* while preventing hidden discrimination against religious values. We would say that laws that draw lines based on general, reasonable, neutral factors are not less neutral if they have some broad exemptions that fit such general criteria. We realize that this may allow the policy maker to tailor measures to disguise hostility to religion under a façade of neutrality, but—as in *Lukumi*—expect such deliberate efforts to leave traces that can be demonstrated, and if that is the situation, *Smith* would not apply. There is no good basis to see most state stay-at-home orders that way—as we point out, if anything, some lean the other way. *Smith* allows neutral lines to be drawn, though—as we discuss below—there are limits to those lines.

Reflecting this, in a recent set of decisions examining claims that removing nonmedical exemptions from school immunization mandates violates the Free Exercise Clause of the First Amendment, several courts concluded that the requirements are subject to *Smith* and constitutionally valid—even though these courts make clear distinctions elsewhere.[58]

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54. *See* Zilberfein*, supra* note 51, at 424–25.

55. *See* United States v. Lee*,* 455 U.S. 252, 258–62 (1982).

56. Brock v. Boozman, No. 4:01CV00760 SWW, 2002 WL 1972086, at *7–8 (E.D. Ark. Aug. 12, 2002).

57. *Id.*

58. *See, e.g.*, Brown v. Smith, 235 Cal. Rptr. 3d 218, 224–25 (Cal. Ct. App. 2018); Whitlow v. California, 203 F. Supp. 3d 1079, 1086 n.4 (S.D. Cal. 2016); Love v. State Dep't of Educ., 240 Cal. Rptr. 3d 861, 865 (Cal. Ct. App. 2018); F.F. *ex rel.* Y.F. v. New York, 108 N.Y.S.3d 761, 772–73 (N.Y. Sup. Ct. 2019); Dorit Rubinstein Reiss, *Litigating Alternative Facts: School Vaccine Mandates in the Courts*, 21 U. PA. J. CONST. L. 207, 240–43 (2018). *Smith* was not the only relevant law, and these cases may stand even if *Smith* is overturned. School mandates jurisprudence stands on more than *Smith*. *See* Reiss, *supra*, at 240–43.

Supreme Court Justices raised questions about the continuing viability of *Smith,* and a case currently before the Supreme Court may lead the Court to reexamine *Smith*.[59] However, recent Supreme Court cases that ended with favorable outcomes for those challenging policies that allegedly interfered with their religion were carefully and intentionally decided on narrow grounds. The decisions ultimately reaffirmed—rather than overturned—*Smith,* suggesting that it is far from clear that *Smith* will be fully overturned.

The first of these cases was *Burwell v. Hobby Lobby,* in which the Court found that requiring privately held corporations, acting as employers, to cover certain contraceptives for their employees violated the federal Religious Freedom Restoration Act (RFRA).[60] Importantly, the decision interpreted the case under the RFRA—rather than the First Amendment—and the majority explicitly reiterated that *Smith* was the Court's interpretation of the First Amendment.[61]

In the later *Masterpiece Cakeshop* case*,* a majority of the Court overturned the Colorado Civil Rights Commission's sanction against a baker who refused to bake a wedding cake for a same-sex couple.[62] Here, too, the Supreme Court did not overturn *Smith*, instead finding that the commission's comments showed hostility to religion.[63] We can expect efforts to interpret this ruling broadly—for example, anti-vaccine groups in New York tried to claim that the state legislature's repeal of the religious exemption to its school immunization mandate was motivated by religious hostility.[64] But attempting to interpret a precedent broadly or narrowly is routine legal practice, and it is the role of courts to avoid broadening the decision in a way that would undermine any law that could have an impact on religion, to the point of overturning *Smith* or sacrificing the policies protected by it. New York courts, so far, have rejected the effort to apply *Masterpiece*

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59. *See* Fulton v. City of Philadelphia, 140 S. Ct. 1104 (2020) (cert. granted); Fulton v. City of Philadelphia, Pennsylvania, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/fulton-v-city-of-philadelphia-pennsylvania [https://perma.cc/D88T-JS43] (describing the issues the case raises for the Court to consider).

60. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 692, 736 (2014). *Hobby Lobby* has been strongly criticized for its potentially harmful effect on contraceptive rights and discrimination. *See* Alex J. Luchenitser, *A New Era of Inequality?* Hobby Lobby *and Religious Exemptions from Anti-Discrimination Laws*, 9 HARV. L. & POL'Y REV. 63, 63–64 (2015); Ira C. Lupu, Hobby Lobby *and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 92–95 (2015). That, however, is somewhat beyond the scope of this specific Article.

61. *See Hobby Lobby*, 573 U.S. at 693.

62. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723–24 (2018).

63. *See id.* at 1729–32.

64. *See* F.F. *ex rel.* Y.F. v. New York, 108 N.Y.S.3d 761, 767–68 (N.Y. Sup. Ct. 2019).

Cakeshop to a change of law that was motivated by public health, and we can expect that to continue.[65]

The general rule that a policy motivated by hostility to religion cannot avoid scrutiny just by cloaking itself came out of *Lukumi,* shortly after *Smith*.[66] There are good grounds to stop state policies that target religion, because that is directly within the type of religious oppression the Free Exercise Clause was created to prevent. That goal is not in tension with *Smith.*

Since *Masterpiece Cakeshop*, there has been a change in the Supreme Court's composition. Justice Kennedy—who wrote the *Masterpiece Cakeshop* opinion—retired in 2018, and Justice Brett Kavanaugh—who appears in favor of overturning *Smith*—replaced Justice Kennedy on the Court.[67] However, it is still not clear that there is a majority for overturning *Smith* on the Court; in the most recent decisions on point, the court seemed inclined to uphold *Smith*.[68] The Court may preserve or limit *Smith,* perhaps following Justice Alito's *FOP* approach;[69] however, at this point, we cannot assume that. The most recent Supreme Court decision on the First Amendment—*Espinoza v. Montana Department of Revenue,* decided June 30, 2020—did not generally address *Smith*, since the situation in question was one where a state expressly refused a benefit to religious institutions, clearly treating religion differently.[70] Further, while some of the concurrences—especially those by Justice Thomas and Justice Gorsuch—suggested an inclination to depart from the *Smith* approach and broaden the connection between state and religion, the fact that those were separate concurrences suggests that there is no majority of the court endorsing those views.[71]

Since *Smith,* a significant minority of states adopted a religious freedom restoration act (RFRA), which requires applying strict scrutiny when a

65. *See id.* at 774–75.

66. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534–35 (1993) ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.").

67. *See* Dyan Matthews, *America under Brett Kavanaugh*, VOX (Oct 5, 2018, 3:50 PM), https://www.vox.com/2018/7/11/17555974/brett-kavanaugh-anthony-kennedy-supreme-court-transform [https://perma.cc/HRK6-WE95].

68. We discuss a recent Supreme Court decision about stay-at-home orders and churches below, *see infra* Part IV, because it fits better.

69. *See supra* notes 45–49 and accompanying text.

70. *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2251, 2255, 2260–63 (2020).

71. *See id.* at 2263–67 (Thomas, J., concurring); *id.* at 2267–74 (Alito, J., concurring); *id.* at 2274–78 (Gorsuch, J., concurring).

statute substantially burdens religion.[72] If the Supreme Court overturns *Smith*, or if a state adopts a RFRA, the applicable standard to any state order affecting religious establishments would decidedly be strict scrutiny.

There are therefore at least two, possibly more, standards we need to consider. First, we need to address the existing *Smith/Lukumi* framework. However, since the existence of state RFRAs means that at least some states will apply strict scrutiny, we will address that alternative as well—and our discussion of it will also cover a situation in which the Supreme Court overturns *Smith.*

Under the *Smith/Lukumi* framework, the most important question for courts facing stay-at-home orders would be whether they are, in fact, of general applicability and neutral on their face.[73] If they are, a religious exemption is not required.[74] If there are any indications of hostility to religion, strict scrutiny will apply.[75] Under our analysis, just the existence of other exceptions would not take us out of *Smith*, but if similar activities to religious ones are permitted while religious activities are not, the law may still violate the standard.

COVID-19 is potentially lethal and can cause severe disease in a substantial number of the cases, therefore states will likely have little trouble meeting the first prong of strict scrutiny, showing a compelling state interest.[76] Traditionally, controlling or preventing infectious diseases that cause mortality and significant morbidity was found to be a compelling state interest.[77] The challenge in withstanding strict scrutiny will be whether the order in question is the "least restrictive means" of achieving that interest.[78] In that, the content of the order will matter substantially. This is reflected, in part, in the way courts have already approached existing orders. We turn to that now.

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72. *See State Religious Freedom Restoration Acts*, NAT'L CONF. ST. LEGISLATURES (May 4, 2017), https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx [https://perma.cc/E2HG-VLX2]. As of 2017, twenty-one states had them. *Id.*

73. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (citing Emp't Div. v. Smith, 494 U.S. 872, 879 (1990)).

74. *See id.* (citing *Smith*, 494 U.S. at 879).

75. *Id.* at 533 (citing *Smith*, 494 U.S. at 878–79).

76. *Reiss*, *supra* note 58, at 238–39.

77. *Id.* at 238; *see also* Brock v. Boozman, No. 4:01CV00760 SWW, 2002 WL 1972086, at *8 (E.D. Ark. Aug. 12, 2002) (emphasizing that public health, in relation to the Hep. B vaccine, is an extremely important government interest, indicating that it would easily satisfy even strict scrutiny).

78. *See* Reiss, *supra* note 58, at 238.

IV. STAY-AT-HOME AND RELIGIOUS FREEDOM JURISPRUDENCE: THE IS AND THE SHOULD

The cases across the nation vary. As mentioned, we provide a detailed list of them in a separate spreadsheet, and do not think this paper requires that.[79] Instead, we will try to map the cases here in broader strokes.

While these suits are widespread across the nation, and thus differ depending on the text of the specific challenged order, the arguments are often similar. The strongest and most consistent claim by challengers is that the COVID-19 stay-at-home orders display a governmental distrust in places of worship to abide by social distancing and other public health guidelines, and that they treat these establishments worse than they treat others. Even the most general of orders will have exceptions for some activities deemed essential—and, while the specific facts and language of the orders mattered, individual judges also differed in the weight they gave to the existence of such exceptions. Below, we present a range of approaches by different courts in different situations.

The argument that exceptions make stay-at-home orders non-neutral prevailed in several cases. Most problematically, Judge Broomes from the District Court in Kansas used it when granting a TRO against the Kansas order in *First Baptist Church*.[80] The Kansas Governor's challenged stay-at-home order began with a general provision prohibiting mass gatherings —gatherings of more than ten—in "auditoriums, theaters, movie theaters, museums, stadiums, . . . and churches or other religious facilities."[81] There, churches were just part of a long list. The section that followed was specific to churches:

> With regard to churches or other religious services or activities, this order prohibits gathering of more than ten congregants or parishioners in the same building or confined or enclosed space. However, the number of individuals—such as preachers, lay readers, choir or musical performers, or liturgists—conducting or performing a religious service may exceed ten as long as those individuals follow appropriate safety protocols, including maintaining a six-foot distance between individuals and following other directives regarding social distancing, hygiene, and other efforts to slow the spread of COVID-19.[82]

79. *See* Reiss & Thomas, *supra* note 33.

80. *See* First Baptist Church v. Kelly, No. 20-1102-JWB, 2020 U.S. Dist. LEXIS 68267, at *24–30 (D. Kan. Apr. 18, 2020).

81. Kan. Exec. Order No. 20-18 (Apr. 7, 2020), https://governor.kansas.gov/wp-content/uploads/2020/04/20-18-Executed.pdf [https://perma.cc/WKU4-KCY4].

82. *Id.*

The court ruled that this fit better within the legal framework set out in *Lukumi* than that of *Smith.* Judge Broomes said:

> In this case, EO 20-18 and EO 20-25 expressly purport to restrict in-person religious assembly by more than ten congregants. In that sense, they are not facially neutral. Defendant asserts that despite the express restrictions imposed on religious assembly, the laws are facially neutral because they apply as well to a much broader swath of secular activity in addition to the overt limitations placed on church gatherings. Nevertheless, while these executive orders begin with a broad prohibition against mass gatherings, they proceed to carve out broad exemptions for a host of secular activities, many of which bear similarities to the sort of personal contact that will occur during in-person religious services. Lukumi indicates that a court should evaluate these exemptions in assessing a law's neutrality.[83]

The Kansas order was explicitly designed to limit all large gatherings, for a specific public health purpose, and listed religious services as just one of a broad range of activities to be limited.[84] This situation is very, very different from that at issue in *Lukumi,* where the City's measures were clearly aimed at limiting the practices of a church belonging to the Santeria religion.[85] The mere mentioning of religion, among a long list of other secular activities, all of which are characterized by large gatherings, does not entail that a given measure be classified as hostile to religion. This is especially the case when the order was the result of a real, objective public health emergency—something that did not exist in *Lukumi.*

If anything, the section specific to religious services can be read as charitable to religion, as it creates an exception not offered to other types of gatherings. This seemingly better treatment for religion may raise questions under the Establishment Clause—raising the specter of state over-involvement in religion—but not under the Free Exercise Clause. Analogizing the Kansas order to the measures challenged in *Lukumi*, as similarly hostile to religion is, in our view, misapplying the jurisprudence or incorrectly characterizing the facts.

Maryville Baptist Church v. Beshear, where an injunction was granted in part to the challenged Kentucky order, is more easily defensible.[86] The Kentucky orders prohibited mass gatherings, including for "faith-based" activities, but carved out "life-sustaining" exceptions in which some businesses —i.e., law firms, laundromats, liquor stores, and gun shops—were allowed to operate so long as they comply with social distancing guidelines.[87] The

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83. *First Baptist Church*, 2020 U.S. Dist. LEXIS 68267, at *17–18.
84. *See* Kan. Exec. Order No. 20-18.
85. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534–35, 538, 540–42 (1993).
86. *See* Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610, 614–15 (6th Cir. 2020).
87. *See id.* at 614.

Sixth Circuit found discrimination here because these "life-sustaining" exceptions "do not permit soul-sustaining group services of faith organizations, even if the groups adhere to all the public health guidelines required of essential services and even when they meet outdoors."[88]

This argument is much stronger. "Faith-based" activities were clearly excluded from the list of exceptions that used the value-laden language of "life-sustaining" activity.[89] Whether religion should be considered "life-sustaining" is a charged question drawing on one's values, and churches have a plausible argument that seeing a broad array of secular activities, including liquor and gun stores, as life-sustaining but not religious ones, and allowing the former but not the latter, involves a value judgment. We therefore agree with the Sixth Circuit that a law prohibiting drive-in religious services that follow social distancing requirements, but allowing other drive-in services like liquor stores, laundromats, and gun stores because they are "life sustaining" is not generally applicable, nor neutral on its face. Accordingly, the law does not fall under *Smith*, and is subject to strict scrutiny.

Further, drive-through situations do not involve gatherings, and people are not close together. Unless a state can point to a meaningful difference between the situations that make religious drive-throughs more risky than other drive-through situations, it has no good basis to treat them differently.

Contrast that to the *Binford v. Sununu* order.[90] In upholding the New Hampshire Governor's emergency order under both federal and state constitutional protections, the court held:

> As established above, Emergency Order #2 is content neutral. Nothing in Emergency Order #2 suggests that it is intended to target any religion or specific religious practice. While a ban on scheduled gatherings of 50 or more people may have an impact on the ability for a congregation to assemble at church, the Court concludes that such an impact is merely incidental to the neutral regulation and is otherwise reasonable given the limited duration of the order and public health threat facing the citizens of this State.[91]

We agree with the court. General orders like the ones in New Hampshire, passed in response to a documented public health emergency, cannot be reasonably seen as motivated by hostility to religion, and should thus be

88. *Id.*
89. *See* Ky. Exec. Order No. 2020-257 (Mar. 25, 2020).
90. Binford v. Sununu, No. 217-2020-cv-00152, 2020 N.H. Super. LEXIS 20 (N.H. Super. Ct. Mar. 25, 2020).
91. *Id.* at *28.

examined under *Smith* and, given the deferential standard and the public health emergency, upheld.

The possibility that other judges may misapply *Smith* and *Lukumi* the way the court in *First Baptist Church* did is concerning, especially since we are, again, seeing quite a few of these cases.[92]

On May 29, 2020, the Supreme Court addressed the issue, rejecting an injunctive relief against California Governor Newsom's order limiting church activities.[93] The order—a revision of a previous, more restrictive order—limited attendance at "places of worship to 25% of building capacity or a maximum of 100 attendees."[94] The Supreme Court's majority simply rejected the request for an injunction, but in a concurrence, Chief Justice Roberts found that the restrictions are

> consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.[95]

In a dissent joined by Justices Thomas and Gorsuch, Justice Kavanaugh wrote that the state's choice to allow some activities requires meeting a strict scrutiny standard when setting limits on religion. Justice Kavanaugh stated:

> [A]bsent a compelling justification (which the State has not offered), the State may not take a looser approach with, say, supermarkets, restaurants, factories, and offices while imposing stricter requirements on places of worship. [¶] The State also has substantial room to draw lines, especially in an emergency. But as relevant here, the Constitution imposes one key restriction on that line-drawing: The State may not discriminate against religion.[96]

We find Chief Justice Roberts's argument more compelling. California's distinction was, in fact, between places where people gather closely for extended periods and places where people pass through.[97] Towards places of gathering, the state's order was facially neutral, and should be approached as such. Without allowing states limiting gatherings to apply those limits to all gatherings, courts are requiring those states to put their populations

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92. *See* Reiss & Thomas, *supra* note 33.
93. *See* S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (mem.).
94. *Id.* at 1613 (Roberts, C.J., concurring).
95. *Id.*
96. *Id.* at 1615 (Kavanaugh, J., dissenting).
97. *See id.* at 1613 (Roberts, C.J., concurring).

at risk. Limiting gatherings for gathering's sake is not targeted at religion and should not be considered hostile.

A. Take-Aways from the Jurisprudence

Conclusions from the legal analysis above apply to two situations. First, states should be mindful of the legal limits in crafting orders that apply to religious establishments; second, courts should approach orders crafted during an emergency with a practical, realistic frame of mind.

The goal of stay-at-home orders is to reduce the spread of COVID-19 and its attendant harms—potential sickness, long-lasting effects, and deaths. As a first step, states should tailor the requirements to the need, and less restrictive measures are better than more restrictive ones, even in a crisis.[98] In other words, if the concern is that large gatherings increase transmission, large gatherings should be limited, but smaller gatherings, or forms of gatherings that do not pose the same risk, can be allowed. An order that prohibits gatherings of "more than fifty people" or limits gatherings to a number that allows for "social distancing between members of different households," and applies this to any type of gathering, is more directly aimed at that goal and less restrictive than a complete ban on any gathering of any size. An order that allows gatherings via drive-through, when people stay in cars, but limits in-person gathering by size, is more likely to be upheld than an order that also prohibits drive-in. And this order allows for consistency across diverse types of gathering. Note that these recommendations are relevant whether a *Smith* framework is used or a strict scrutiny one: for *Smith*, a general framework helps uphold an order, and a more tailored approach makes the order more reasonable. Under strict scrutiny, closer tailoring can help meet the least restrictive means requirement.[99] This approach also fits what seems to have been behind the majority in *South Bay United Pentecostal Church*—and was clearly at the basis of Chief Justice Roberts's concurrence.[100]

In a *Smith* jurisdiction, grouping activities by level of risk—rather than comparing secular and religious venues or practices—can more clearly signal that the rules are not targeting religion. A focus on "any gathering over fifty people" is general, and goes directly to the heart of a factor

98. *See* Lindsay F. Wiley, *Public Health Law and Science in the Community Mitigation Strategy for Covid-19,* 7 J.L. & BIOSCIENCES 1, 7, 19 (2020).
99. *See* Reiss, *supra* note 58, at 238.
100. *See S. Bay Pentecostal Church*, 140 S. Ct. at 1613 (Roberts, C.J., concurring).

that increases risk: higher numbers of people. A focus on indoor versus outdoor activities similarly addresses a risk factor, as we know that the virus spreads more easily in closed, indoor environments.[101]

In a serious outbreak of COVID-19, prohibitions on any size of gatherings may be justified. In those cases, again, a general rule prohibiting large, indoor gatherings is better than spelling out specific types of gatherings. And exceptions should be considered by type. Allowing services that do not require long exposure to other people, while prohibiting situations where people are in close contact for long period of times, draws relevant lines, and these are situations courts are more likely to uphold.[102]

The reality is that in an emergency situation, orders will not always be carefully written. An easy way for states to avoid closer scrutiny under *Smith* is, as mentioned, to be more general in their orders: not to mention religious services, but to simply ban gatherings of ten or more without specificity or qualifiers, such as "life-sustaining," that will be more vulnerable to value judgments.[103] That being said, to have judicial decisions stand or fall on careful writing alone is not a good policy result. And general orders also have their drawbacks. More information as to what is covered is helpful to the public. States should not get the message that providing less information or being more vague will make their executive orders more judgment-proof, but that is exactly the message that literal adherence to *Smith* sends. We believe courts should acknowledge that general stay-at-home orders are valid, even if they mention religious services as part of a long list of other areas subject to limits, as long as the basis for the limit is not religious: just like prohibiting peyote by Oregon's controlled substances act did not make the law in question in *Smith* less neutral, even though peyote is used for religious ceremonies.[104] Mentioning religion in a long list of gatherings does not make stay-at-home orders less neutral, nor does it entail hostility to religion. When religious ceremonies are included in that group as an also run—just part of a list of activities that are characterized by gatherings—the measure is not targeting religion, and it should be examined under *Smith* and upheld as neutral.

A different situation exists when states do, indeed, pass orders specific to churches: those will be subject to strict scrutiny. The decisions in *Maryville Baptist Church* and in *On Fire Christian Center v. Fischer* (*On Fire*), addressing orders—city and state—allowing drive-through liquor services,

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101. *See* Hernandez, Toy & McKay, *supra* note 30.

102. *See* Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 HARV. L. REV. F. 179, 189, 191, 207–08 (2020).

103. *See* Maryville Baptist Church v. Beshear, 957 F.3d 610, 614, 616 (6th Cir. 2020).

104. *See* Emp't Div. v. Smith, 494 U.S. 872, 890 (1990).

but not drive-through religious services, are good examples.[105] While *On Fire* problematically reflects a judge's religious point of view, which is troubling in a country whose constitution requires separation of church and state,[106] it correctly reflects the law. Laws that single out religion—those that are specific to religious events—do need to meet strict scrutiny.[107]

The question is whether a specific restriction would be the least restrictive means of achieving the designated state interest.[108] To this end, we think the judge in *On Fire* was right to consider the mayor of Louisville's order in *On Fire* problematic. The order completely prohibited drive-through religious services[109]—which could be conducted in a manner that works with social distancing—while permitting drive-throughs for other activities. A less restrictive means would impose rules that provide for social distancing while allowing drive-through services to continue.

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105. *See Maryville Baptist Church,* 957 F.3d at 611–12, 614; On Fire Christian Ctr. v. Fischer, No. 3:20-CV-264-JRW, 2020 U.S. Dist. LEXIS 65924, at *14 (W.D. Ky. Apr. 11, 2020).

106. For example, the decision ends with the following, highly religious paragraphs:

> The Christians of On Fire, however, owe no one an explanation for why they will gather together this Easter Sunday to celebrate what they believe to be a miracle and a mystery. True, they can attempt to explain it. True, they can try to teach. But to the nonbeliever, the Passion of Jesus—the betrayals, the torture, the state-sponsored murder of God's only Son, and the empty tomb on the third day—makes no sense at all. And even to the believer, or at least to some of them, it can be incomprehensible as well.
>
> But for the men and women of On Fire, Christ's sacrifice isn't about the logic of this world. Nor is their Easter Sunday celebration. The reason they will be there for each other and their Lord is the reason they believe He was and is there for us. For them, for all believers, "it isn't a matter of reason; finally, it's a matter of love."

On Fire Christian Ctr., 2020 U.S. Dist. LEXIS 65924, at *22–23 (quoting ROBERT BOLT, A MAN FOR ALL SEASONS 88 (2013)). That language, and the personal devotion to religion it reflects, is certainly within the rights of a private individual, but is not part of the law of the land and including it in a judicial decision is troubling.

107. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546–47 (1993).

108. *See* Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 718 (1981) (requiring a showing that a burdensome regulation represents "the least restrictive means of achieving some compelling state interest").

109. *See On Fire Christian Ctr.*, 2020 U.S. Dist. LEXIS 65924, at *12 (discussing how Louisville "targeted religious worship by prohibiting drive-in church services").

V. THE ESTABLISHMENT CLAUSE AND STAY-AT-HOME ORDERS

Under the Establishment Clause of the First Amendment, "Congress shall make no law respecting an establishment of religion."[110] The clause embodies the idea of separation of church and state, though its meaning is conflicted and subject to extensive debate.[111] As currently applied by the Supreme Court, it is relatively clear that states—or the federal government—cannot treat different religions differently without facing strict scrutiny.[112] Less clear is what states can do that affects religious establishments.[113] Under the traditional *Lemon* test, laws affecting religion have to have a secular purpose, cannot have a primary effect of advancing or inhibiting religion, and cannot involve excessive entanglement of government and religion.[114] In 2019 a plurality of the Supreme Court expressed reservations about the *Lemon* test, suggesting it does not achieve its purpose, but the Court did not provide an alternative approach.[115] That said, *American Legion v. American Humanist Association* reinforced the reality that the application of the *Lemon* test by the Supreme Court is, at best, confusing.[116] That confusion was also reflected in *Espinoza v. Montana Department of Revenue*, where the question of whether a constitutional provision forbidding state aid to religious schools was examined under the Free Exercise Clause but put aside for Establishment Clause purposes.[117]

Relevant to this Article, several state stay-at-home orders exempt religious organizations from the restrictions imposed on other gathering.[118] It is not clear if this is the result of personal support for religion, a view that most constituents support religion, or a misunderstanding of the constitutional

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110. U.S. CONST. amend. I.

111. *See* William J. Cornelius, *Church and State—The Mandate of the Establishment Clause: Wall of Separation or Benign Neutrality?*, 16 ST. MARY'S L.J. 1, 6–8 (1984).

112. *See* Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947).

113. *See* Marcia S. Alembik, Note, *The Future of the* Lemon *Test: A Sweeter Alternative for Establishment Clause Analysis*, 40 GA. L. REV. 1171, 1173–74 (2006).

114. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

115. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080–82, 2087–89 (2019).

116. *See id.*; *see also* Cornelius, *supra* note 111, at 6–8; Alembik, *supra* note 113, at 1188–92. *Compare* Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 708–11 (1985) (finding that a Connecticut statute that provided employees an absolute right not to work on their Sabbath violates the Establishment Clause), *with* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 329–30 (1986) (finding that exempting religious organizations from the anti-discrimination provisions of Title VII is constitutional).

117. *See* Espinoza v. Mont. Dep't. of Revenue, 140 S. Ct. 2246, 2251, 2254 (2020).

118. *See* Madeline Holcombe & Stephanie Gallman, *Here's A Look at What States Are Exempting Religious Gatherings from Stay at Home Orders*, CNN (Apr. 2, 2020, 7:39 AM), https://www.cnn.com/2020/04/02/us/stay-at-home-order-religious-exemptions-states-coronavirus/index.html [https://perma.cc/TLR2-2WBF].

jurisprudence as requiring an exception for religions. A statement by the Governor of Florida suggested the latter. Speaking to the press, Governor DeSantis indicated "that local authorities actually can in fact enforce stricter rules (like closing a park for jogging), but not when it comes to churches."[119] The Governor further remarked, "Look, I don't think that the government has the authority to close a church."[120]

As discussed above, this is not a good reflection of *Smith.* But the reality is that several states have exempted churches from stay-at-home orders. The question is whether the law supports them in doing that.

Religious exemptions from various laws, while not required under *Smith*, do exist in all states. One example is the fact that most states provide a nonmedical exemption from school immunization mandates, and the majority of these states explicitly offer religious exemptions.[121] That said, there are at least some scholars who believe religious exemptions violate the *Lemon* test.[122] One court—Mississippi's Supreme Court—found a religious exemption to violate equal protection, finding that it discriminates against families without religious views, who do not receive a waiver of the requirement.[123] No other court, however, has followed the Mississippi's Supreme Court's lead.[124] And courts have upheld laws exempting religions from requirements that apply to others, as discussed.[125]

Strict application of the *Lemon* test may lead to striking down stay-at-home orders that expressly exempt religious establishments, because such an exemption would fail the first requirement of a secular purpose.[126]

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119. Colin Wolf, *Orlando Lawyer for Pastor Who Held Services During Coronavirus Outbreak Says Church Lost Its Insurance*, ORLANDO WKLY.: BLOGGYTOWN (Apr. 3, 2020, 4:07 PM), https://www.orlandoweekly.com/Blogs/archives/2020/04/03/orlando-lawyer-for-pastor-who-held-services-during-coronavirus-outbreak-says-church-lost-its-insurance [https://perma.cc/Z7J3-X3ZS].

120. *Id.*

121. *See States with Religious and Philosophical Exemptions from School Immunity Requirements*, NAT'L CONF. ST. LEGISLATURES (June 26, 2020), https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx [https://perma.cc/BH4R-UGFL].

122. *See, e.g.*, Alicia Novak, Comment, *The Religious and Philosophical Exemptions to State-Compelled Vaccination: Constitutional and Other Challenges*, 7 U. PA. J. CONST. L. 1101, 1115–16 (2005).

123. Brown v. Stone, 378 So. 2d 218, 223 (Miss. 1979).

124. Allan J. Jacobs, *Do Belief Exemptions to Compulsory Vaccination Programs Violate the Fourteenth Amendment?*, 42 U. MEM. L. REV. 73, 90–91 (2011).

125. Cornelius, *supra* note 111, at 6–10; Alembik, *supra* note 113, at 1180–81.

126. *See* Stone v. Graham, 449 U.S. 39, 41 (1980).

However, as the Court summarized in *American Legion,* a similar claim could be made about opening legislative sessions with prayer—the purpose is clearly religious—and nonetheless, the Supreme Court upheld the practice as constitutional.[127] The Court described the upholding of the practice of prayer in the legislature as

> an example of respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans. Where categories of monuments, symbols, and practices with a longstanding history follow in that tradition, they are likewise constitutional.[128]

Some of these arguments would apply in support of exempting churches from stay-at-home orders, and some would work against it. COVID-19 is a new disease, but diseases of this sort—those leading to closures—are not new. To give one example, the 1918–1919 influenza pandemic did lead to closures of religious establishments, providing a precedent that goes against the churches here—suggesting the longstanding history may go the other way.[129] Inclusivity and nondiscrimination could work either way, because exempting religion would have to apply to all religions, but would not apply to non-religion community centers holding symbolic events. Exempting religion would certainly fit into acknowledging the importance of religion in the lives of many Americans.[130] In short, under the Supreme Court's reasoning in the legislature case, it is unclear that these exemptions would stand. The *American Legion* plurality has not offered a clearer case.

The argument that religious establishments serve a secular purpose of offering emotional and spiritual support during a serious crisis could also be attempted. However, if that is the argument, it is unclear why religious establishments should be treated differently than other sources of comfort —for example, fitness establishments that allow exercise, because exercise can offer emotional benefits.[131]

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127. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087–89 (2019).

128. *Id.* at 2089.

129. Miles Ott et al., *Lessons Learned from the 1918–1919 Influenza Pandemic in Minneapolis and St. Paul, Minnesota*, 122 PUB. HEALTH REP. 803, 804 (2007), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1997248/pdf/phr122000803.pdf [https://perma.cc/2ZYF-XTJB]; *see* Richard J. Hatchett, Carter E. Mecher & Marc Lipsitch, *Public Health Interventions and Epidemic Intensity During the 1918 Influenza Pandemic*, 104 PROC. NAT'L ACAD. SCI. U.S. 7582, 7582–84, 7586 (2007); Nina Strochlic & Riley D. Champine, *How Some Cities 'Flattened the Curve' During the 1918 Flu Pandemic*, NAT'L GEOGRAPHIC (Mar. 27, 2020), https://www.nationalgeographic.com/history/2020/03/how-cities-flattened-curve-1918-spanish-flu-pandemic-coronavirus/#close [https://perma.cc/7HB5-APXY].

130. This approach would also fit Cornelius's suggestion of benign neutrality towards religion. *See* Cornelius, *supra* note 111, at 35–37.

131. *See, e.g.*, LOUISE J. GENEEN ET AL., PHYSICAL ACTIVITY AND EXERCISE FOR CHRONIC PAIN IN ADULTS: AN OVERVIEW OF COCHRANE REVIEWS (2017), https://www.cochrane

This is a place where the recent jurisprudence suggesting sympathy to claims of religious discrimination may matter. Indeed, it would be hard to reconcile *Hobby Lobby*—requiring that employers with religious objections to contraceptives be exempt from covering contraceptives for employees—with prohibiting religious exemptions for churches from stay-at-home orders.[132] At the least, the plurality approach in *American Legion* suggests that the Supreme Court is leaning to a flexible test that allows some religiously-motivated activity by state actors. The Supreme Court upholding the distribution of legal aid to religious schools in *Espinoza v. Montana Department of Revenue* also fits this approach.[133]

Our view is that there is enough precedent for religious exemptions, and enough cases allowing religious exemptions, to suggest that states providing exceptions from stay-at-home orders to religious establishments are on constitutionally sound grounds doing it and unlikely to have their exceptions overturned. There is, however, a chance some judges will go the other way and find that such exceptions violate the Establishment Clause and the separation of church and state.[134]

VI. CONCLUSION

The COVID-19 pandemic tests states and countries in many ways. It also poses legal challenges for the United States. This Article points out that the jurisprudence on the First Amendment is confusing, but that reasonable restrictions on gatherings are a reasonable response to the pandemic that can also apply to religious gatherings—within limits, and as long as they do not negatively single out religious establishments. That

library.com/cdsr/doi/10.1002/14651858.CD011279.pub3/epdf/full [https://perma.cc/Y9AS-XEYZ]; Emily E. Bernstein & Richard J. McNally, *Acute Aerobic Exercise Helps Overcome Emotion Regulation Deficits*, 31 COGNITION & EMOTION 834, 839 (2017); Emily E. Bernstein & Richard J. McNally, *Exercise as a Buffer Against Difficulties with Emotion Regulation: A Pathway to Emotional Wellbeing*, 109 BEHAV. RES. & THERAPY 29, 29, 33–34 (2018); Meghan K. Edwards, Ryan E. Rhodes & Paul D. Loprinzi, *A Randomized Control Intervention Investigating the Effects of Acute Exercise on Emotional Regulation*, 41 AM. J. HEALTH BEHAV. 534, 541 (2017); Brett R. Gordon et al., *Association of Efficacy of Resistance Exercise Training with Depressive Symptoms*, 75 J. AM. MED. ASS'N PSYCHIATRY 566, 566, 571, 574 (2018); Darren E.R. Warburton & Shannon S.D. Bredin, *Health Benefits of Physical Activity: A Systematic Review of Current Systematic Reviews*, 32 CURRENT OPINION CARDIOLOGY 541 (2017).

132. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 692 (2014).
133. *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2262–63 (2020).
134. *See, e.g.*, Brown v. Stone, 378 So. 2d 218, 223 (Miss. 1979).

is not to say that all judges will arrive at the correct result on this issue, but it is where courts should end. The Article also warns states that do negatively single out religious establishments correctly face a higher bar. We also point out that governors do not have to exempt religious establishments from stay-at-home orders, and we believe that it is risky and bad policy to do so—given the several large COVID-19 outbreaks centered on churches—but that they are unlikely to have exemptions overturned.

We all face a lot of uncertainty about the coming years. Where possible, we should at least reduce uncertainty in the law.