

# **The Ambiguous Legality of Religious Worship Restrictions for Pandemic Response: What we learned from COVID-19**

Brian Hutler, JD, PhD  
Jeff Jones, MBE  
Katelyn Esmonde, PhD  
Anne Barnhill, PhD

## **Abstract**

In response to the COVID-19 pandemic, many US states restricted in-person gatherings, including religious worship. Laws protecting against religious discrimination generally prohibit treating religious organizations less favorably than comparable secular organizations. Courts and government officials disagreed, however, about whether religious worship is more comparable to nonessential gatherings like sporting events, or to essential services like grocery shopping. Seizing on this ambiguity, some religious groups brought successful legal challenges against states that placed greater restrictions on religious worship than on activities deemed “essential.” Drawing on publicly available press releases and legal documents, this article describes the contrasting approaches to religious worship restrictions in four US states. Based on these case studies, this article argues that courts and lawmakers should develop an ethically consistent and epidemiologically sound approach to regulating religious worship for future pandemic response. (134 words)

## **Introduction**

In response to the COVID-19 pandemic, many US states imposed restrictions on in-person gatherings, including educational, recreational, commercial, political, and religious events.<sup>1</sup> Of these, restrictions on religious worship generated the most significant legal challenges, as plaintiffs argued that worship restrictions violated constitutional religious freedom protections against discrimination.<sup>2</sup> Plaintiffs relied principally on First Amendment doctrine, which says that the government must not intentionally treat religious organizations less favorably than comparable

---

<sup>1</sup> For a database of US state COVID-19 response policies, see A. Skinner et al., A database of US state policies to mitigate COVID-19 and its economic consequences. 22 BMC Public Health 1124 (2022).

<sup>2</sup> Wendy E. Parmet, The COVID Cases: A preliminary assessment of judicial review of public health powers during a partisan and polarized pandemic, 57 San Diego L. Rev. 999 (2020).

secular organizations.<sup>3</sup> Based on this standard, many courts, including eventually the US Supreme Court, blocked certain states from enforcing their religious worship restrictions.<sup>4</sup> But the Supreme Court did not reach a final disposition in these cases—they arose on what is known as the “shadow docket”—leaving significant legal questions unanswered.

Specifically, it remains unanswered whether the appropriate comparison for religious worship should be large secular social gatherings, like concerts or sporting events, or “essential” activities like grocery shopping. This question reflects a genuine ethical complexity. On the one hand, religious worship has deep spiritual significance for many people—it is an “essential” part of many people’s lives—and some religious activities can only be appropriately performed in person, which might justify giving it special permissions not granted to entertainment or recreational gatherings.<sup>5</sup> On the other hand, indoor religious worship shares the epidemiologically relevant features of a social gathering, including the fact that congregants often share indoor spaces for long periods of time and speaking, chanting, or singing are essential components of the activity. In fact, the CDC identified multiple “superspreader events” linked to religious worship early in the pandemic,<sup>6</sup> and religious worship has been shown to be especially conducive to spreading the coronavirus that causes COVID-19.<sup>7</sup>

As we move beyond the COVID-19 pandemic, it is incumbent on lawmakers and public health officials to think carefully about the best approach both ethically and legally to regulating

---

<sup>3</sup> See *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993) (describing the “minimum requirement of neutrality towards religion”).

<sup>4</sup> *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020).

<sup>5</sup> Mark L. Movsesian, *Law, Religion, and the COVID-19 Crisis*, 37 *J. of L. and Religion* 9 (2022).

<sup>6</sup> See L. Hamner et al., *High SARS-CoV-2 Attack Rate Following Exposure at a Choir Practice — Skagit County, Washington, March 2020*, 69 *MMWR Morb. Mortal. W’kly Rep.* 606 (2020); see also A. James et al., *High COVID-19 Attack Rate Among Attendees at Events at a Church — Arkansas, March 2020*, 69 *MMWR Morb. Mortal. W’kly Rep.* 632 (2020).

<sup>7</sup> F. Bert et al., *Outbreaks of COVID-19 in indoor places of worship: A systematic review*, *Perspectives in Public Health*, 17579139221118218 (2022). <https://doi.org/10.1177/17579139221118218>.

in-person religious worship in anticipation of future airborne infectious disease outbreaks. This article describes the experience of four different states and suggests lessons that can be learned. The variety of these states' policies, and the reasons for their successes and failures, illustrate the challenges of regulating religious worship during a pandemic, and how governments in the future might navigate these challenges.

## **Methods**

This article describes the religious worship pandemic-response policies and selected legal challenges in four states—Texas, Kentucky, New York, and California—between March 2020 and February 2021. (After this point, as vaccines became available and states relaxed their pandemic restrictions, most pending legal cases relating to religious worship restrictions were dropped or mooted.) This article draws upon publicly available legal documents, including executive orders accessed via state government websites and judicial decisions accessed via targeted searches on Westlaw. In some cases, the authors relied on the Internet Archive ([web.archive.org](http://web.archive.org)) to access official documents that have been updated or removed from government websites. The authors also relied upon a database created by our research team, which consists of press releases issued by state governor's offices during the period March 1, 2020, to September 15, 2021.

The four states described in this article were chosen based on three criteria: differences in approach to regulating religious worship; importance of legal challenges to the state's policies; and national political significance. As described below, all four states implemented pandemic response policies that specifically referred to religious worship. But these states dealt with religious worship in very different ways. Texas adopted the most permissive approach, treating religious worship on a par with essential businesses like grocery stores. Kentucky initially adopted a very restrictive approach—prohibiting in-person religious worship along with other mass

gatherings—but it eventually rescinded its restriction in the face of legal challenges. California and New York also initially prohibited in-person religious worship, but each eventually adopted a middle-ground position that treated religious worship differently from both essential businesses and other mass gatherings. While New York’s policy was eventually struck down by the US Supreme Court, California’s middle-ground approach survived multiple legal challenges. California’s approach therefore provides a starting point for evaluating restrictions on religious worship in future public health emergencies.

### **Texas: A Permissive Approach**

In the early weeks of the COVID-19 pandemic, the decision to restrict religious worship in Texas was left to local authorities. On March 24, 2020, Lina Hidalgo, the Democratic elected executive of Harris County (where Houston is located) issued an order requiring residents to stay at home except to engage in “essential activities,” a list that included grocery shopping and outdoor recreation but not religious worship.<sup>8</sup> This order was immediately challenged in state court on grounds of both state and federal religious freedom protections.<sup>9</sup>

On March 31, 2020, however, Governor Greg Abbott, a Republican, issued an executive order superseding Harris County’s order and expressly permitting in-person religious worship statewide.<sup>10</sup> Governor Abbott’s order called on Texas residents to “minimize in-person contact with people who are not in the same household,” but provided an exception for essential services, including “religious services conducted in churches, congregations, and houses of worship.” In

---

<sup>8</sup> Order of County Judge Lina Hidalgo, “Stay Home, Work Safe,” March 24, 2020, <https://houstonemergency.org/wp-content/uploads/03-24-20-Stay-Home-Work-Safe-Order-by-the-County-Judge.pdf>

<sup>9</sup> *In re Hotze*, No. 20-0249, Emergency Petition for Writ of Mandamus (Tex. filed Mar. 30, 2020).

<sup>10</sup> Executive Order by the Governor of the State of Texas, No. GA-14, March 31, 2020, <https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2020/GA-14.pdf>

support of this order, the Texas Attorney General’s Office issued a guidance document referencing state and federal religious freedom protections.<sup>11</sup>

In short, Texas permitted in-person religious worship for nearly the entire pandemic, subject only to the hygiene and social distancing guidelines that also applied to essential businesses. Texas’s permissive policy avoided religious freedom litigation, but it was not clear that it achieved an appropriate balance of the competing interests. Governor Abbott received praise from religious leaders,<sup>12</sup> but some local government leaders, including Austin Mayor Steve Adler, criticized the approach.<sup>13</sup>

### **Kentucky: A Restrictive Approach**

In contrast to Texas, Kentucky initially adopted a restrictive approach to religious worship, prompting a flurry of legal challenges that ultimately caused the state to reverse course. On March 19, 2020, the Commissioner of Public Health issued an order, pursuant to Governor Andy Beshear’s state of emergency declaration, prohibiting “all mass gatherings,” and explicitly listing “faith-based” gatherings together with other prohibited gatherings like “sporting events, parades, concerts, festivals, conventions, and fundraisers.”<sup>14</sup> Libraries, shopping malls, train stations, offices, and grocery stores, were exempt from the order on the grounds that people in those spaces were “in transit” or were able to “maintain appropriate social distancing.” Subsequent orders

---

<sup>11</sup> “Guidance for Houses of Worship During the COVID-19 Crisis,” Office of the Attorney General of Texas, <https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/AG%20Guidance%20for%20Houses%20of%20Worship%20During%20the%20COVID-19%20Crisis.pdf>

<sup>12</sup> C. Lindell, *Wisdom of Abbott’s order on faith gatherings debated*, AUSTIN AMERICAN STATESMAN (April 1, 2020), <https://www.statesman.com/story/news/coronavirus/2020/04/01/wisdom-of-abbotts-order-on-faith-gatherings-debated/1410442007/>

<sup>13</sup> V. Davila, *A church is hands on: Why these Texas churches aren’t closing their doors*, TEXAS TRIBUNE (April 2, 2020), <https://www.texastribune.org/2020/04/02/texas-churches-coronavirus-arent-closing-doors/>

<sup>14</sup> “Order,” Kentucky Cabinet for Health and Family Services, March 19, 2020, [https://governor.ky.gov/attachments/20200319\\_Order\\_Mass-Gatherings.pdf](https://governor.ky.gov/attachments/20200319_Order_Mass-Gatherings.pdf)

issued by Governor Beshear, a Democrat, required all businesses that were “not life-sustaining” to cease in-person operations while “life-sustaining” businesses such as grocery stores to remain open.<sup>15</sup> Religious organizations that provided food, shelter, or other life necessities were allowed to remain open, but in-person religious worship was not permitted.

Kentucky’s restrictive approach may have been motivated in part by a reported superspreader event at a “church revival” in Hopkins County on March 15 and 16, 2020.<sup>16</sup> On April 9, 2020, Governor Beshear reported that the Hopkins County revival had resulted in 54 coronavirus cases and six deaths, noting that “it’s very important that we worship from home, or a non-in-person setting.”<sup>17</sup>

Kentucky’s religious worship restrictions soon became the subject of numerous legal challenges. On Thursday, April 9, during the week of Passover and just before Easter, Louisville Mayor Greg Fischer, a Democrat, said that he would enforce the state’s worship restrictions, and “strongly suggested” that churches should not hold drive-in services.<sup>18</sup> That same day, Mitch McConnell, the Republican US Senator from Kentucky, wrote an official letter to Mayor Fischer urging him to permit drive-in services.<sup>19</sup> And the next day, on April 10, the first legal challenge to Kentucky’s restrictions was filed in federal district court, brought by On Fire Christian Church,

---

<sup>15</sup> Executive Order by the Governor of Kentucky 2020-246, “State of Emergency,” March 22, 2020, [https://governor.ky.gov/attachments/20200322\\_Executive-Order\\_2020-246\\_Retail.pdf](https://governor.ky.gov/attachments/20200322_Executive-Order_2020-246_Retail.pdf); and Executive Order by the Governor of Kentucky 2020-257, “State of Emergency,” March 25, 2020, [https://governor.ky.gov/attachments/20200325\\_Executive-Order\\_2020-257\\_Healthy-at-Home.pdf](https://governor.ky.gov/attachments/20200325_Executive-Order_2020-257_Healthy-at-Home.pdf).

<sup>16</sup> J. Muhammad, *A Number of Positive Cases as the Result of a Church Revival*, SPECTRUM NEWS 1 (April 2, 2020), <https://spectrumnews1.com/ky/louisville/news/2020/04/02/kentucky-church-revival-results-in-positive-covid-19-cases>.

<sup>17</sup> “Gov. Beshear Praises Faith Leaders Helping in COVID-19 Fight,” State of Kentucky Press Release, Apr. 9, 2020, <https://www.kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=121>

<sup>18</sup> A. Wolfson, *Judge rejects Louisville mayor’s claim he was ‘suggesting’ drive-through services were banned*, LOUISVILLE COURIER JOURNAL (April 14, 2020), <https://www.courier-journal.com/story/news/2020/04/14/judge-judge-weighs-drive-through-church-services-weighs-drive-through-church-services/2993470001/>

<sup>19</sup> Letter from Senator Mitch McConnell to Mayor Greg Fischer, Apr. 9, 2020, <https://www.documentcloud.org/documents/6834707-McConnell-Letter-to-Louisville-Mayor.html>.

based in Louisville, who was seeking to hold a drive-in worship service on Easter Sunday. Notably, On Fire Church was represented by First Liberty Institute, a national organization known for religious freedom litigation.<sup>20</sup> State Attorney General Daniel Cameron, a Republican elected official (and later a 2023 gubernatorial candidate), filed a brief supporting the plaintiffs and arguing that the governor's orders had the effect, whether intentional or not, of prohibiting drive-in worship.<sup>21</sup>

On Saturday, April 11, a federal district court granted a temporary restraining order allowing On Fire Church to hold drive-in services on Easter.<sup>22</sup> Notably, the federal judge wrote that by enforcing the state's worship restrictions, Mayor Fischer had "criminalized the communal celebration of Easter." After the ruling, Mayor Fischer and On Fire Church reached a compromise agreement allowing On Fire Church to continue holding drive-in worship services going forward. Both sides spoke favorably about the agreement, and Mayor Fischer thanked On Fire Church "for their recognition of the need for social distancing as we battle this deadly pandemic."<sup>23</sup>

On April 12, Governor Beshear issued a press release stating that while most congregations had complied with the state's worship restrictions, seven congregations had violated the restriction by holding in-person worship services on Easter Sunday.<sup>24</sup> Maryville Baptist Church, located in a Louisville suburb, was the site of one of these in-person services. News reports confirmed that

---

<sup>20</sup> "First Liberty Reclaims Religious Liberty for Two Churches Hosting Drive-In Services," First Liberty Institute, April 24, 2020, <https://firstliberty.org/news/reclaim-drive-in-services/>.

<sup>21</sup> *On Fire Christian v. Fischer*, No. 3:20-cv-264, Amicus Curiae Brief of Attorney General Daniel Cameron, Apr. 17, 2020, available at: <https://www.ag.ky.gov/about/Office-Divisions/Amicus%20Briefs/On%20Fire%20Christian%20Ctr.%20v.%20Fischer.pdf>.

<sup>22</sup> *On Fire Christian v. Fischer*, 453 F. Supp. 3d 901 (W.D. Ky. 2020).

<sup>23</sup> B. Tobin, *Louisville mayor, On Fire Christian Church enter agreement to end drive-in service lawsuit*, LOUISVILLE COURIER JOURNAL (April 21, 2020), <https://www.courier-journal.com/story/news/2020/04/21/louisville-mayor-fire-christian-enter-agreement-end-lawsuit/2999818001/>.

<sup>24</sup> "Gov. Beshear: Kentuckians are Living Their Faith by Protecting Others," Official Press Release, April 12, 2020, <https://www.kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=124>.

while some congregants remained in the parking lot and listened to the service over a loudspeaker, others left their car and entered the building, in violation of the state's prohibition.<sup>25</sup> While the service was being held, Kentucky State Police arrived and recorded congregants' license plate numbers, and letters were later sent to vehicle owners requiring them to quarantine for fourteen days or be subject to further sanction.<sup>26</sup>

On Friday, April 17, Maryville Baptist Church filed suit in federal court, with representation from another national religious advocacy group, Liberty Council.<sup>27</sup> The plaintiffs argued that Kentucky's worship restrictions violated their rights under state and federal religious freedom laws, and specifically that in-person religious worship was treated unfairly compared to the "life-sustaining" businesses like grocery stores that were allowed to remain open. The district court denied plaintiffs' motion for a temporary restraining order, arguing that religious worship is "by design a communal experience," and that the appropriate secular comparison would be "a movie, concert, or sporting event, where individuals come together in a group in the same place at the same time for a common experience."<sup>28</sup>

On May 2, however, the Sixth Circuit reversed, and granted Maryville Baptist an injunction blocking the state's enforcement of its worship restrictions.<sup>29</sup> Specifically, the injunction prevented the governor from "enforcing orders prohibiting drive-in services at the Maryville Baptist Church," as long as the Church complied with the public health requirements for "life-sustaining"

---

<sup>25</sup> S. Ladd, *Easter churchgoers defiant after Kentucky troopers write down their license plate numbers*, LOUISVILLE COURIER JOURNAL (April 12, 2020), <https://www.courier-journal.com/story/news/2020/04/12/kentucky-churches-hold-in-person-easter-services-despite-order/5127260002/>.

<sup>26</sup> *Ibid.* A copy of the letter sent to the congregants is available here: <https://lc.org/041520Pace-Health-letter-revised.pdf>.

<sup>27</sup> See "America's Soul Hangs in the Balance," Liberty Council, July 6, 2020, <https://www.lc.org/newsroom/details/20200706americas-soul-hangs-in-the-balance>.

<sup>28</sup> *Maryville Baptist Church, Inc. v. Beshear*, 455 F. Supp. 3d 342, 345 (W.D. Ky. 2020).

<sup>29</sup> *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020).

businesses. The court's order explicitly allowed drive-in worship, but the impact of the court's decision on indoor worship remained ambiguous.

The Sixth Circuit's intervention in the Maryville Baptist case signaled its skepticism about the state's religious worship restrictions, and within a week of the Sixth Circuit's decision, two additional cases were brought in different federal district courts in Kentucky seeking injunctions against the mass gatherings ban.<sup>30</sup> On May 8, a federal judge in the Eastern District issued a state-wide injunction, noting that this step was recommended by the state Attorney General. Rather than continue to fight these lawsuits, Governor Beshear announced plans for reopening houses of worship starting May 20.<sup>31</sup>

Hoping to avoid high-transmission events such as the religious revival in March 2020, Kentucky initially adopted a very restrictive approach to religious worship. Kentucky's approach, however, attracted attention from prominent politicians like Senator McConnell and national advocacy groups like First Liberty Institute and Liberty Council, and ultimately proved unsustainable in the face of numerous legal challenges and an unsympathetic Sixth Circuit. Under pressure from the courts, Governor Beshear reversed course and, much like Texas, adopted a more permissive approach to religious worship.

### **New York: A Failed Middle-ground Approach**

After initially restricting religious worship completely, the State of New York attempted to find a middle-ground solution by categorizing religious worship as distinct from both large secular gatherings and essential services. In March 2020, Governor Andrew Cuomo, a Democrat,

---

<sup>30</sup> Roberts v. Neace, 457 F.Supp.3d 595 (E.D. Ky. 2020) (brought by congregants of Maryville Baptist Church) and Tabernacle Baptist Church v. Beshear, 459 F.Supp.3d 847 (E.D. Ky. 2020).

<sup>31</sup> "Gov. Beshear Announces Requirements for Houses of Worship, Retail, Others to Reopen," Official Press Release, May 8, 2020, available at: <https://www.kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=158>.

issued a series of executive orders restricting the size of gatherings and limiting the capacity of businesses, culminating in an order requiring the cancellation or postponement of all “non-essential gatherings of any size for any reason.”<sup>32</sup> As in Kentucky, Governor Cuomo initially included religious worship among these non-essential gatherings, issuing official guidance that “worship services... must remain closed and are not eligible for designation as an essential business.”<sup>33</sup>

But, as in Kentucky, New York’s restrictions prompted criticism from religious leaders, including most notably R.R. Reno, the editor of *First Things*, who argued that religious persons should not be guided by the “fear of death and causing death.”<sup>34</sup> Perhaps anticipating legal challenges, on May 21, 2020, Governor Cuomo issued a modified executive order permitting religious services or ceremonies so long as they were limited to 10 persons or fewer.<sup>35</sup> A guidance document further specified that “faith leaders should continue to...use alternative forms of worship,” and limiting total indoor congregate capacity to 10 persons.<sup>36</sup>

Despite this modification, in June 2020, two Catholic priests from Upstate New York and three Orthodox Jewish congregants from Brooklyn filed suit seeking to block New York’s policy. As in Kentucky, the plaintiffs were represented by a national advocacy group, the Thomas More

---

<sup>32</sup> State of New York Executive Order No. 202.10, Mar. 23, 2020, [https://www.governor.ny.gov/sites/default/files/atoms/files/EO\\_202.10.pdf](https://www.governor.ny.gov/sites/default/files/atoms/files/EO_202.10.pdf).

<sup>33</sup> “Governor Cuomo Issues Guidance on Essential Services Under The ‘New York State on PAUSE’ Executive Order,” Official Press Release, March 20, 2020, <https://web.archive.org/web/20200324233419/https://www.governor.ny.gov/news/governor-cuomo-issues-guidance-essential-services-under-new-york-state-pause-executive-order>.

<sup>34</sup> R.R. Reno, ‘No’ to Death’s Dominion, *FIRST THINGS* (March 23, 2020), <https://www.firstthings.com/web-exclusives/2020/03/say-no-to-deaths-dominion>.

<sup>35</sup> State of New York Executive Order No. 202.32, May 21, 2020, [https://www.governor.ny.gov/sites/default/files/atoms/files/EO\\_202.32.pdf](https://www.governor.ny.gov/sites/default/files/atoms/files/EO_202.32.pdf).

<sup>36</sup> “Reopening New York,” accessed May 25, 2020, <https://web.archive.org/web/20200525085922/https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/ReligiousandFuneralServicesSummaryGuidance.pdf>.

Society, which is a Catholic organization originally created to defend anti-abortion activists.<sup>37</sup> A federal district court sided with the plaintiffs, noting that “drive-in” worship is not an effective alternative for Catholic congregants, since remaining in a car “prevents congregants from kneeling while receiving Holy Communion.”<sup>38</sup> The court also noted that the many Jewish prayers require “a minimum quorum of ten adult males called the minyan,” meaning that “female and non-adult male family members are always prevented from attending the services.”<sup>39</sup> (The court eventually lifted its restraining order after New York updated its policy, as described below.)

Perhaps in response to legal pressure, New York again changed course in October 2020, allowing houses of worship a special status that was more permissive than nonessential businesses but still more restrictive than essential businesses. The Governor’s updated order imposed restrictions based on color-coded “zones” that varied depending on the rate of COVID-19 cases within a geographical area.<sup>40</sup> In “red zones,” all nonessential businesses were required to operate remotely, while houses of worship were allowed a maximum of 10 persons or 25% capacity (whichever is lower). In “orange zones,” nonessential gatherings were limited to 10 persons, while houses of worship were allowed to increase to 25 persons or 33% capacity. In “yellow zones,” nonessential gatherings were limited to 25 persons, while again houses of worship were given more favorable treatment, up to 50% capacity with no maximum cap. Although this policy granted some accommodations to religious worship, Governor Cuomo said in a televised interview that

---

<sup>37</sup> “About Us,” Thomas More Society, <https://thomasmoresociety.org/about/>.

<sup>38</sup> *Soos v. Cuomo*, 470 F. Supp. 3d 268, 276 (N.D.N.Y. 2020), appeal withdrawn (May 27, 2021).

<sup>39</sup> *Ibid.* at 277.

<sup>40</sup> New York State Executive Order No. 202.68, Oct. 6, 2020, <https://www.governor.ny.gov/sites/default/files/atoms/files/EO202.68.pdf>.

the approach was designed in part to target orthodox Jewish communities in Brooklyn that were experiencing high rates of infection.<sup>41</sup>

On October 8, two religious organizations—Agudath Israel of America, an Orthodox Jewish organization based in Manhattan, and the Roman Catholic Diocese of Brooklyn—filed lawsuits claiming that the worship restrictions under the new color-coded zone scheme were discriminatory. The federal district court and the Second Circuit upheld the state’s worship restrictions,<sup>42</sup> prompting plaintiffs to seek intervention from the U.S. Supreme Court, with additional support from First Liberty Institute.<sup>43</sup>

On November 25, 2020, not long after the appointment of Justice Amy Coney Barrett, the US Supreme Court blocked New York’s worship restrictions.<sup>44</sup> This was the first case in which the Supreme Court blocked worship restrictions. In a *per curiam* opinion, the Court held that plaintiffs were likely to prevail on their First Amendment claims because New York’s restrictions “single out houses of worship for especially harsh treatment” compared to essential businesses, which were allowed to remain open without capacity restrictions even in red zones. Justice Gorsuch, writing in concurrence, noted that “the only explanation for treating religious places differently seems to be a judgment that what happens there just isn’t as ‘essential’ as what happens in secular spaces.... *That* is exactly the kind of discrimination the First Amendment forbids.”<sup>45</sup>

---

<sup>41</sup> “Audio & Rush Transcript: Governor Cuomo Is a Guest on CNN Newsroom with Poppy Harlow and Jim Sciutto,” Official Press Release, October 9, 2020, <https://www.governor.ny.gov/news/audio-rush-transcript-governor-cuomo-guest-cnn-newsroom-poppy-harlow-and-jim-sciutto>

<sup>42</sup> Roman Catholic Diocese of Brooklyn v. Cuomo, 493 F. Supp. 3d 168 (E.D.N.Y. 2020); Agudath Israel of Am. v. Cuomo, 980 F.3d 222 (2d Cir. 2020).

<sup>43</sup> Roman Catholic Diocese of Brooklyn v. Cuomo, No. 20A87. Brief of First Liberty Institute as Amicus Curiae, November 17, 2020, [https://www.supremecourt.gov/DocketPDF/20/20A87/161004/20201117154639544\\_20A87%20Amicus%20Brief%20First%20Liberty.pdf](https://www.supremecourt.gov/DocketPDF/20/20A87/161004/20201117154639544_20A87%20Amicus%20Brief%20First%20Liberty.pdf)

<sup>44</sup> Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020).

<sup>45</sup> *Ibid.* at 69, Gorsuch, J., concurring.

In a dissenting opinion, Justice Sotomayor (joined by Justice Kagan) acknowledged that the government “may not discriminate against religious institutions, even when faced with a crisis as deadly as this one.”<sup>46</sup> But, she argued, “the Constitution does not forbid States from responding to public health crises through regulations that treat religious institutions equally or more favorably than comparable secular institutions.” Justice Sotomayor argued further that religious worship should be compared to other activities based on its relationship to COVID-19 transmission, noting that “epidemiologists and physicians generally agree that religious services are among the riskiest activities,” and that essential businesses like grocery stores do not involve “large groups of people gathering, speaking, and singing in close proximity indoors for extended periods of time.” She also noted that religious worship was given greater permissions under New York’s policy than “comparable secular gatherings” like concerts, sporting events, and theatrical performances.

In short, although some Supreme Court Justices would have upheld it, New York’s middle-ground approach ultimately failed, in part because it failed to make clear why religious worship is a distinctive type of activity in need of special rules. This lack of clarity prompted disagreement about which secular activities were appropriately “comparable” to religious worship, as some Justices emphasized that worship was epidemiologically similar to other large gatherings, while others argued that because of its spiritual significance, religious worship must be treated like essential businesses. As a result, New York not only provoked backlash from religious groups, but also failed to provide a sufficient nondiscriminatory rationale for its worship restrictions.

### **California: A Successful Middle-ground Approach**

After initially adopting a restrictive approach, California, perhaps learning from the experience of other states, eventually crafted a more successful middle-ground solution to religious

---

<sup>46</sup> *Ibid.* at 89, Sotomayor, J., dissenting.

worship restrictions. On March 19, 2020, Governor Gavin Newsom, a Democrat, issued an order requiring residents to stay at home except when accessing necessities such as food, prescriptions, and health care, with no exemption made for religious worship.<sup>47</sup> On May 7, the state released a “Resilience Roadmap” that included religious gatherings on a list of “higher-risk workplaces”—along with nightclubs, festivals, theme parks, and museums—that were required to remain closed.<sup>48</sup> Newsom’s stay-at-home order and the Roadmap had the effect of prohibiting in-person religious worship for much of March, April, and May.

California’s worship restrictions provoked backlash from religious communities, however, prompting the state to adopt a more moderate position. Most notably, South Bay United Pentecostal Church, located outside of San Diego, filed suit in federal court arguing that the state’s treatment of religious worship was discriminatory. As in New York, the Church was represented by the Thomas More Society.<sup>49</sup> The Church argued that it was discriminatory to restrict religious worship when businesses like “shopping malls, car washes [and] pet grooming” were allowed to reopen. The Church also argued that in-person worship restrictions had a distinctive impact on Pentecostalism, because “being together spiritually and physically is key in their preaching, teaching, and worship,” and the “ability to approach the altar...is central to their experience of faith.”<sup>50</sup> Despite these arguments, both the district court and the Ninth Circuit both upheld the

---

<sup>47</sup> State of California Executive Order, N-33-20, March 19, 2020, <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf>.

<sup>48</sup> Resilience Roadmap, May 7, 2020, <https://web.archive.org/web/20200508004556/https://covid19.ca.gov/roadmap/>

<sup>49</sup> “South Bay United Pentecostal Church,” Thomas More Society, accessed January 31, 2023, <https://thomasmoresociety.org/client/south-bay-united-pentecostal-church/>.

<sup>50</sup> S. Bay Pentecostal Church v. Newsom, No. 20-CV-865-AJB-MDD, First Amendment Complaint on behalf of Plaintiffs, May 11, 2020, at 11, 13, <https://thomasmoresociety.org/wp-content/uploads/2020/05/1.Complaint.First-Amended-sans-exhibitsSouthBay.pdf>.

state's worship restrictions.<sup>51</sup> The Ninth Circuit noted that COVID-19 was a “highly contagious and often fatal disease for which there presently is no known cure,” and quoted the famous line originating with Justice Robert Jackson that the Bill of Rights is not a “suicide pact.”<sup>52</sup>

Perhaps in anticipation of an appeal to the Supreme Court, Governor Newsom announced on May 22 that the State was “working with the faith community” to allow “churches [to] reopen...in a safe and responsible manner.”<sup>53</sup> The state government issued new guidelines on May 25, allowing in-person worship to resume subject to a limit of 100 attendees or 25% of building capacity (whichever is lower).<sup>54</sup> The next day, San Diego County officially allowed South Bay United Pentecostal to hold in-person services pursuant to the guidelines issued by the State.<sup>55</sup>

Despite these changes, South Bay Pentecostal still asked the Supreme Court to intervene, arguing that even the 100-person or 25% limit on in-person worship posed an irreparable harm to its ability to celebrate Pentecost Sunday, which was May 31. On May 29, the Court denied the Church's request for an injunction, however, and Chief Justice Roberts authored a short opinion concurring with the decision, arguing that courts should defer to the government's effort to protect the “safety and the health of the people,” especially given scientific uncertainty about the virus.<sup>56</sup>

---

<sup>51</sup> *S. Bay Pentecostal Church v. Newsom*, No. 20-CV-865-BAS-AHG, 2020 WL 2529620, (S.D. Cal. May 18, 2020) (denying injunction pending appeal); *S. Bay Pentecostal Church v. Newsom*, 959 F.3d 938 (9th Cir. 2020) (denying injunction pending appeal).

<sup>52</sup> *Ibid.* at 939.

<sup>53</sup> B. Christopher, *Facing defiant counties and churches, Newsom willing to bend*, CALMATTERS (May 22, 2020), at: <https://calmatters.org/politics/2020/05/newsom-defiant-counties-churches-coronavirus-shutdown-restrictions/>. See also, Governor Gavin Newsom May 22 California COVID-19 Briefing Transcript, May 22, 2020, <https://www.rev.com/blog/transcripts/governor-gavin-newsom-may-22-california-covid-19-briefing-transcript>.

<sup>54</sup> “COVID-19 Industry Guidance: Places of Worship and Providers of Religious Services and Cultural Ceremonies,” California Department of Public Health, May 25, 2020, at 3, archived at: <https://web.archive.org/web/20200525181727/https://covid19.ca.gov/pdf/guidance-places-of-worship.pdf>.

<sup>55</sup> County of San Diego, Order of the Health Officer and Emergency Regulations, May 27, 2020, [https://www.sandiegocounty.gov/content/dam/sdc/hhsa/programs/phs/Epidemiology/covid19/covid19PHOrders/PUBLIC\\_HEALTH\\_ORDER\\_EFFECTIVE\\_DATE\\_05.27.20\\_EXECUTED\\_DATE\\_05.26.20.pdf](https://www.sandiegocounty.gov/content/dam/sdc/hhsa/programs/phs/Epidemiology/covid19/covid19PHOrders/PUBLIC_HEALTH_ORDER_EFFECTIVE_DATE_05.27.20_EXECUTED_DATE_05.26.20.pdf)

<sup>56</sup> *S. Bay Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020).

Four Justices—Thomas, Alito, Gorsuch, and Kavanaugh—dissented, and would have blocked California’s restrictions. Justice Kavanaugh wrote a brief dissent, insisting that the state lacked a “compelling justification for distinguishing between religious worship services and the other secular businesses that are not subject to an occupancy cap.” Kavanaugh argued further that the government may not “assume the worst when people go to worship, but assume the best when people go to work or go about the rest of their daily lives.”<sup>57</sup>

Although the Court sided with the state, South Bay Pentecostal’s lawsuit may have succeeded in prompting California to adopt the 100-person or 25% approach, which was significantly more permissive than New York’s 10-person or 25% capacity limit in red zones. Over the summer, California made two additional modifications to its middle-ground approach. First, on July 1, 2020, the Department of Public Health released guidance stating that, in addition to the capacity limits, places of worship must “discontinue indoor singing and chanting activities”<sup>58</sup>—also known as California’s “singing ban.”<sup>59</sup> Then, on August 28, 2020, California replaced the previous Roadmap with a new reopening plan, the “Blueprint for a Safer Economy.”<sup>60</sup> As in New York, this Blueprint used a color-coded scheme to tailor restrictions to geographic areas based on COVID-19 case rates. In Tier 1 (purple) counties, where cases were “widespread,” religious

---

<sup>57</sup> *Ibid.* at 1614, 1615 (Kavanaugh, J., dissenting) (citing to *Roberts v. Neace*, 958 F. 3d 409, 414 (6<sup>th</sup> Cir. 2020)).

<sup>58</sup> “COVID-19 Industry Guidance: Places of Worship and Providers of Religious Services and Cultural Ceremonies,” California Department of Public Health, July 1, 2020, at 3, archived at: <https://web.archive.org/web/20200703080201/https://files.covid19.ca.gov/pdf/guidance-places-of-worship.pdf>.

<sup>59</sup> C. Beech, *Three California churches sue Newsom over singing ban*, LOS ANGELES TIMES (July 16, 2020), <https://www.latimes.com/california/story/2020-07-16/california-churches-sue-newsom-singing-ban>

<sup>60</sup> “Governor Newsom Unveils Blueprint for a Safer Economy, a Statewide, Stringent and Slow Plan for Living with COVID-19,” Official Press Release, August 28, 2020, <https://www.gov.ca.gov/2020/08/28/governor-newsom-unveils-blueprint-for-a-safer-economy-a-statewide-stringent-and-slow-plan-for-living-with-covid-19/>.

worship was completely prohibited. But in Tier 2 (red), where cases were “substantial,” places of worship were allowed to open indoors at 25% of building capacity, with no specified maximum number of people.<sup>61</sup> By comparison, most retail businesses were allowed to operate at 50% capacity in Tier 2, while movie theaters were subject to the same restrictions as religious worship, and bars and wineries were not allowed indoor operations at all.

South Bay Pentecostal Church again challenged these revised restrictions, and on February 5, 2021, the Supreme Court revisited the case. This time the Court blocked the Tier 1 restrictions but upheld the 25% capacity limit in Tier 2 and the singing ban.<sup>62</sup> Notably, three conservative Justices—Barrett, Kavanaugh, and Chief Justice Roberts—joined with their more liberal colleagues in upholding the 25% cap and the singing ban. Justices Barrett and Kavanaugh noted that the singing ban was not discriminatory, so long as it was generally applicable and did not apply only to religious worship.<sup>63</sup> The three more liberal Justices—Kagan, Breyer, and Sotomayor—argued that even the Tier 1 restrictions were constitutionally permissible.<sup>64</sup> But despite this disagreement about the Tier 1 restrictions, the Court’s decision in this case reflected agreement among both conservative and liberal Justices that the 25% limit and the singing ban were likely constitutionally permissible.

As in Kentucky and New York, California’s initial religious worship restrictions were subject to legal challenges, eventually prompting the state to modify its approach. But unlike in the other states, California arrived at a workable middle-ground, by imposing a 25% capacity limit and a singing ban that applied to both religious and secular activities. California’s approach proved

---

<sup>61</sup> “Blueprint Activity and Business Tiers,” California Department of Public Health, Sept. 22, 2020, at 3, [https://web.archive.org/web/20200923022631/https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Dimmer-Framework-September\\_2020.pdf](https://web.archive.org/web/20200923022631/https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Dimmer-Framework-September_2020.pdf).

<sup>62</sup> *S. Bay Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021).

<sup>63</sup> *Ibid.* at 717.

<sup>64</sup> *Ibid.* at 720.

successful because it tailored its restrictions to epidemiologically relevant features of religious worship without singling out religion. A limit based on percentage of building capacity allows religious groups that possess or have access to large venues some flexibility in the total number of congregants who may attend a religious worship service. Moreover, a singing ban that applies in both religious and secular contexts diminished concerns about religious discrimination. As such, California's middle-ground approach provides a useful starting point for a legal and ethical analysis of religious worship restrictions going forward.

## **Conclusion**

We can learn various lessons from the differing approaches to regulating religious worship adopted by the four states described in this article. Texas avoided legal and political backlash by treating religious worship as an essential service, while Kentucky, New York, and California each attempted to restrict religious worship, but chose to adjust their policies after legal challenges. Kentucky abandoned its restrictions, while New York and California developed different middle-ground solutions. The Supreme Court ultimately blocked New York's 10-person or 25% capacity limit, but it upheld California's 25% limit and its singing ban. These case studies suggest that policies targeted at epidemiologically relevant activities that do not explicitly mention religion, such as the singing ban, are more likely to be nondiscriminatory.

One striking feature of the states described in this article is that elected officials from the Democratic party—Governors Beshear, Newsom, and Cuomo, as well as Louisville Mayor Fischer and Harris County executive Hidalgo—all sought, at least initially, to restrict religious worship. In contrast, Republican elected officials—Governor Abbott, Senator McConnell, and Attorney General Cameron—opposed worship restrictions. Moreover, national religious advocacy groups—including First Liberty Institute, Liberty Council, and the Thomas More Society—were

instrumental in challenging religious worship restrictions. These patterns suggest that national political divisions impacted states' religious worship policies, making it more difficult to strike an acceptable balance between religious freedom and public health. Mark L. Movsesian draws a similar conclusion: "the COVID-19-related legal cases reveal a cultural and political divide that makes consensual resolution of conflicts over religious freedom increasingly problematic, and perhaps impossible, even during a once-in-a-century pandemic."<sup>65</sup>

Against this partisan political backdrop, it was counterproductive to classify religious worship as either an "essential service" or a "mass gathering." As Christopher C. Lund has argued, the government cannot "classify religious organizations without, at least implicitly, deciding on...the value of religion itself."<sup>66</sup> But deciding on the value of religion is not an appropriate task for government officials or for the courts. Moreover, the perception that the value of religion was at stake may have contributed to the political polarization surrounding religious worship restrictions. Given this context, it is not surprising that some courts (and some Supreme Court Justices) emphasized the unfair treatment of religion and downplayed the risks of the pandemic. And given the lack of a clear legal standard, government officials in the future may choose to avoid legal and political backlash by treating religious worship on a par with essential businesses, despite the greater epidemiological risks of religious worship.

Lawmakers and public health officials should not accept this current legal *status quo*, but should instead work to address the underlying ethical questions posed by religious worship during a pandemic. Ideally, before the next pandemic we should develop a legal and ethical framework for evaluating religious worship restrictions that can avoid the problems caused by categorizing

---

<sup>65</sup> Movsesian, *op. cit.*, note 5, p. 24.

<sup>66</sup> C.L. Lund, *Quarantines, Religious Groups, and Some Questions About Equality*, FIDES ET LIBERTAS (2021).

religious worship as either an essential service or a mass gathering. Religious worship is epidemiologically different from essential businesses, but also carries more personal significance than most large secular gatherings. We must also leave room for religious leaders to work together with government officials to develop policies that are appropriate to the different forms that worship takes in specific religious communities. Within some limits, states should have the ability to tailor infectious disease response policies to the specific features of religious worship in different religious groups, such as the Jewish 10-person quorum or the importance of kneeling for Catholic mass. Finally, restrictions should, whenever possible, be targeted to the specific activities that increase transmission risk—such as singing and chanting—rather than to the broader category of religious worship. Lawmakers and public health officials can learn from the successes and failures of the states described in this article to be better prepared for the future.

### **Funding Statement**

This work was supported by a Greenwall Foundation Making a Difference Grant No. 90094554, titled “Enabling Ethical Analysis, Public Engagement and Public Justification in State-Level Pandemic Responses in the United States.”

### **Acknowledgements**

Additional thanks to Chris Reid for research support.

### **Conflict of Interest Statement**

No conflicts to disclose.