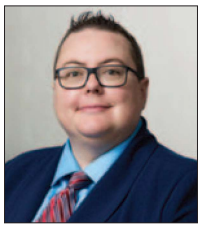
# COVID-19 'Stay at Home' Orders Provoke First Amendment Challenges

by C.J. Griffin and Howard Pashman

**As state and local authorities scrambled in March and April 2020 to respond to COVID-19, a disease caused by the novel coronavirus, it became hard to explain to the public why houses of worship had restrictions that other places did not. In Louisville, Kentucky, drive-through liquor stores could operate, but drive-in churches could not. In Kansas, religious gatherings were limited to 10 congregants with an unlimited number of clerics, musical performers, and others leading a service, while detoxification centers, hotels, and libraries had no restrictions on the number of people who could gather. In Illinois, religious gatherings were limited to 10 people total, but large warehouses and stores selling recreational cannabis were not.**



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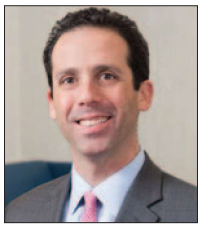

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Religious organizations around the country sued to enjoin these restrictions on the grounds that they violated the Free Exercise Clause of the First Amendment. Courts reached widely divergent conclusions on these cases, unable to agree even on the standard of review to apply. This article explores the issues that arose under the Free Exercise Clause when states imposed restrictions on gatherings to slow the spread of COVID-19. Those issues, in New Jersey and elsewhere, are unlikely to be fully resolved in the courts. They will be addressed through revised executive orders and policy decisions about how to balance public health and public sentiment.

## How Courts Approach Free Exercise Challenges to COVID-19 Regulations

The Free Exercise Clause of the First Amendment, applied to the states through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1] This right, like others, can be regulated, particularly during a public health crisis. What is unclear is what standard of review applies to determine whether the restrictions that governors across the nation have placed upon religious gatherings are constitutionally permissible, and courts in different jurisdictions have come to different conclusions.

In *Jacobson v. Commonwealth of Mass.*, 197 U.S. 11 (1905), the Supreme Court rejected a Fourteenth Amendment challenge to compulsory vaccination against smallpox. The Court reasoned that "[t]he possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community."[2] This principle is particularly true during a public health crisis because "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."[3] However, the Court recognized that this power is limited: any law enacted to protect public health or safety must nonetheless be rejected if it "has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law."[4] As concisely summarized by the Fifth Circuit:

> The bottom line is this: when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some "real or substantial relation" to the public health crisis and are not "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." Courts may ask whether the state's emergency measures lack basic exceptions for "extreme cases," and whether the measures are pretextual—that is, arbitrary or oppressive." At the same time, however, courts may not second-guess the wisdom or efficacy of the measures.[5]

Some courts have applied what might be called the *Jacobson* standard to Free Exercise challenges to COVID-19 regulations. This standard of review asks whether the restrictions on religious gatherings have a "real or substantial relation" to protecting public health, or if the regulations are "beyond all question, a plain, palpable invasion of rights."[6] These courts typically focus on the severity of the current public health crisis and affirm restrictions on religious gatherings.[7]

Some courts have applied a more traditional Free Exercise Clause analysis that gives no special weight to the fact that the challenged regulations were intended to address a pandemic. This view starts with the proposition that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[8] Thus, a neutral, generally applicable law that only incidentally burdens religious practice needs a rational basis.[9] Courts applying this form of scrutiny to COVID-19 restrictions ask whether the challenged law is facially neutral or if it specifically targets religion. In doing so, courts often focus on the fact that the regulations explicitly restrict religious practice while allowing a wide range of secular, commercial activity as essential—everything from manufacturing facilities to supermarkets, hardware stores to liquor stores.[10] The restrictions on religious gatherings that do not apply to "essential" businesses are cited as evidence that there is no rational basis for them. As one judge in the Western District of Kentucky put it, "If beer is 'essential,' so is Easter."[11]

Other courts have applied the rational basis standard but reached a different result. Instead of comparing the restrictions on religious gatherings to essential commercial activities to see if secular activity is treated differently, these courts compare religious gatherings to gatherings like concerts and sporting events. As one judge in the Northern District of Illinois saw it,

> retailers and food manufacturers are not comparable to religious organizations.... The key distinction turns on the nature of each activity. When people buy groceries, for example, they typically enter a building quickly, do not engage directly with others except at points of sale, and leave once the task is complete. The purpose of shopping is not to gather with others or engage them in conversation and fellowship, but to purchase necessary items and then leave as soon as possible. By comparison, religious services involve sustained interactions between many people.[12]

In this view, the fact that certain businesses can operate is irrelevant to the restrictions on religious gatherings and does not prove that those restrictions lack a rational basis.

The rational basis test only applies where the law is a neutral, generally applicable one that incidentally burdens religion. But "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest."[13] Thus, if a COVID-19 restriction targets religious practice, then it must pass strict scrutiny, which those restrictions rarely if ever have done. Courts applying strict scrutiny rely on the fact that the restrictions are not facially neutral since they expressly limit the number of people who can gather for religious purposes. Moreover, such courts cite the fact that religious gatherings are restricted in a way that "essential" businesses are not as evidence that the restrictions are not narrowly tailored. As one court put it when enjoining enforcement of an executive order by the Governor of Kansas, nothing suggests that "mass gatherings at churches pose unique health risks that do not arise at airports, offices, and production facilities."[14]

The U.S. Supreme Court appears as divided as the District Courts over these issues. A California church sought interlocutory injunctive relief from Gov. Gavin Newsom's executive order limiting houses of worship to 25% capacity, and the Court denied the application. Chief Justice Roberts—writing for Justices Kagan, Sotomayor, Ginsburg, and Breyer—relied on *Jacobson* in finding that political leaders have primary responsibility for protecting "the safety and health of the people" during a pandemic.[15] Chief Justice Roberts also suggested that California's restrictions on religious gatherings "appear consistent with the Free Exercise Clause" because "[s]imilar 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."[16]

On the other hand, Justice Kavanaugh—writing for himself and Justices Alito, Thomas, and Gorsuch—would have granted the application. Justice Kavanaugh applied strict scrutiny and found that the restrictions on houses of worship were not narrowly tailored: California lacked "a compelling justification for distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subject to an occupancy cap."[17] According to Justice Kavanaugh, "[t]he basic constitutional problem is that comparable secular businesses are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries."[18] Thus, the Supreme Court appears divided, with some Justices relying on *Jacobson* in deferring to elected leaders to protect public health during a pandemic, and finding that restrictions placed on houses of worship should resemble those placed on gatherings like concerts and spectator sports; but other Justices applying strict scrutiny to gauge whether the restrictions are narrowly tailored by comparing them to limitations on retail businesses like restaurants, malls, and bookstores.

In sum, COVID-19 regulations, usual-

ly in the form of executive orders, are sometimes analyzed under the *Jacobson* standard, and other times through rational basis or strict scrutiny. Of course, the exact nature of the regulations affect how courts interpret them. But courts have not identified which type of scrutiny should be used in which circumstance. The result has been a patchwork of approaches, with some courts analyzing the regulations under multiple standards of review, perhaps to cover their bases.[19]

### Resolving Disputes Over COVID-19 Restrictions

Despite the conflicting guidance from the courts, or perhaps because of it, Free Exercise challenges to COVID-19 restrictions have been resolved in other venues or have been mooted by new or revised executive orders. For instance, the plaintiffs challenging an executive order in Kansas voluntarily dismissed their suit when the order expired and was replaced by one that allowed in-person worship provided that the congregants observed social distancing.[20] Other governors amended their executive orders to address rapidly changing public health conditions. Officials in New York, New Jersey, and elsewhere relaxed restrictions on religious gatherings and other events as those states met certain benchmarks in reducing the spread of the virus.

In addition to the changing conditions in the spread of the virus, widespread social upheaval forced officials to reevaluate their positions on large gatherings. In particular, protests following the killing of George Floyd in Minneapolis forced leaders to reconcile their support for the racial justice protests with their desire to continue limiting gatherings to prevent a spike in infections. Large racial justice protests have happened in all 50 states and no state has issued citations for violating bans on gatherings.[21]

New Jersey is a case in point in how these political balances could have unintended constitutional implications. Gov. Phil Murphy's Executive Order 107, issued on March 21, 2020, prohibited all "gatherings of individuals" such as "parties, celebrations, or other social events" with limited exceptions.[22] Paragraph 2 of the same executive order permitted people to leave home for a "religious reason," though it was unclear where they might go since they could not create a "gathering of individuals" for religious purposes. Executive Order 142, issued on May 13, relaxed that broad restriction by providing that gatherings could take place if attendees stayed in their cars or if the gatherings were limited to 10 people.[23] On May 22, Executive Order 148 allowed outdoor gatherings of up to 25 people, not in their cars and excluding contact sports, provided attendees followed social distancing.[24] Thus, as the weather improved and the virus spread more slowly, New Jersey started to allow religious and other gatherings to resume as part of the "re-opening" of New Jersey.

The protests, however, changed the planned trajectory of re-opening by requiring Murphy to balance his support for the protests against his executive orders that made large gatherings illegal. On June 1, Murphy declared that "I support these protests and thank the thousands of people who peacefully and respectfully took part."[25] While such a view may be a sound and even laudable political position, it likely opens the door to Free Exercise challenges to his executive orders limiting gatherings. There would be no constitutionally permissible basis for Murphy or any other governor to enforce restrictions only against religious gatherings but not political ones simply because the governor agrees with the goals of the political gathering. To put the point even more starkly: Imagine 50 people attend a protest where they chant, pray, and are not ticketed. If those same people recite the same prayers and gather at church the next day, then they could be cited for it under the current executive order. This double standard could not pass constitutional muster, regardless of what type of scrutiny courts use.[26]

Perhaps recognizing his untenable position, on June 9, Murphy issued Executive Order 152, which recognized that "religious gatherings and political activity" are "particularly important to the functioning of the State and of society."[27] The new executive order permitted outdoor gatherings of up to 100 people with "an exception explicitly allowing outdoor gatherings of more than 100 persons for First Amendment-protected outdoor activities."[28] The same executive order allowed either 25 percent of a building's capacity or 50 people, whichever is lower, to gather indoors for religious purposes.[29] However, if New Jersey experiences a second wave of COVID-19 that requires tightening restrictions on gatherings all over again, then the Governor will need to navigate these legal shoals very carefully in order to avoid a First Amendment challenge similar to the one the Supreme Court recently addressed in California.

As the virus ebbs and flows, with its economic effects deepening, and as demands for wide-ranging social justice reform persist, political leaders will have to balance fundamental interests such as public health, the right to free speech, and the free exercise of religion. Given the murky state of the law, whether challenges to restrictions on religious gatherings are upheld by the judiciary will largely depend on the standard of review that the federal court in a particular jurisdiction applies. But more likely, most challenges will be resolved by amendments to executive orders due to changing circumstances or voluntary acknowledgment that the executive orders were problematic. ⚖

**Endnotes**

1. U.S. Const. Amend. I.
2. *Jacobson*, 197 U.S. at 26.
3. *Jacobson*, 197 U.S. at 27.
4. *Jacobson*, 197 U.S. at 31.
5. *In re Abbott*, 954 F.3d 772, 784-85 (5th Cir. 2020) (internal citations omitted).
6. *See, e.g.*, *Elim Romanian Pentecostal Church v. Pritzker*, Civ. Action No. 20-cv-02782, 2020 WL 2468194, at *3 (N.D.Ill. May 13, 2020) *aff'd*, No. 20-1811, 2020 WL 2517093 (7th Cir. May 16, 2020); *Cassell v. Snyders*, Civ. Action No. 20-C-50553, 2020 WL 2112374, at *6 (N.D.Ill. May 3, 2020).
7. *Elim*, 2020 WL 2468194, at *3; *Cassell*, 2020 WL 2112374 at *6.
8. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).
9. *Lukumi*, 508 U.S. at 531-32; *Emp't Div. Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990).
10. *See, e.g.*, *First Baptist Church v. Kelly*, Civ. Action No. 20-1102-JWB, 2020 WL 1910021, at *7 (D.Kan. Apr. 18, 2020).
11. *On Fire Christian Center v. Fischer*, Civ. Action No. 3:20-cv-264-JRW, 2020 WL 1820249, *7 (W.D.Ky. Apr. 11, 2020).
12. *Cassell*, 2020 WL 2112374, at *9. *See also Elim*, 2020 WL 2468194, at *3; *Maryville Baptist Church v. Beshear*, Civ. Action No. 3:20-cv-278-DJH, 2020 WL 1909616, at *2 (W.D.Ky. Apr. 18, 2020) (comparing religious gatherings to concerts and sporting events, unlike the "singular and transitory experience" of shopping at supermarkets and big box stores), *rev'd*, 957 F.3d 610 (6th Cir. 2020).
13. *Lukumi*, 508 U.S. at 533.
14. *First Baptist*, 2020 WL 1910021, at *7. *See also On fire*, 2020 WL 1820249, at *7.
15. *S. Bay United Pentecostal Church v. Newsom*, No. 19A1044, 2020 WL 2813056, at *1 (U.S. May 29, 2020) (quoting *Jacobson*, 197 U.S. at 38).
16. *Ibid*.
17. *Id*. at *2.
18. *Ibid*.
19. *See, e.g.*, *Elim Romanian*, 2020 WL 2468194, at *3-4.
20. *First Baptist Church*, Civ. Action No. 20-1102-JWB [ECF Doc. No. 60] (D. Kan. May 4, 2020).
21. Some jurisdictions have issued tickets to protesters for other reasons, such as violating curfews.
22. Gov. Murphy, Exec. Order 107 ¶5.
23. Gov. Murphy, Exec. Order 142 ¶¶4, 8.
24. Gov. Murphy, Exec. Order 148 ¶1.
25. Alex Napoliello and Brent Johnson, "Murphy commends peaceful protests in N.J., but says more needs to be done. 'Racism exists here.", NJ Advance Media for NJ.com (June 2, 2020), published at nj.com/politics/2020/06/murphy-commends-peaceful-protests-in-nj-but-says-more-needs-to-be-done-racism-exists-here.html.
26. Enforcing the executive order in church but not in a street protest would make the order particularly susceptible to the claim that it "regulates or prohibits conduct because it is undertaken for religious reasons." *Lukumi*, 508 U.S. at 532
27. Gov. Murphy, Exec. Order 107.
28. Matt Arco, "Churches, synagogues, and Mosques can reopen for indoor Services with New capacity limits, Murphy says," NJ Advance Media for NJ.com (June 9, 2020), published at nj.com/coronavirus/2020/06/churches-synagogues-and-mosques-can-reopen-for-indoor-services-with-new-capacity-limits-murphy-says.html.
29. Gov. Murphy, Exec. Order 107 ¶1.