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“Courting Anarchy”: Roman Catholic Diocese of Brooklyn v. Cuomo (2023)

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"COURTING ANARCHY": ROMAN CATHOLIC DIOCESE OF BROOKLYN V. CUOMO

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I. INTRODUCTION

On March 11, 2020, the World Health Organization officially declared the novel coronavirus, known as COVID-19, a global pandemic.[1] Within days, government officials across the country took unprecedented

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1. Laurel Wamsley, *March 11, 2020: The Day Everything Changed*, NPR (Mar. 11, 2021), www.npr.org/2021/03/11/975663437/march-11-2020-the-day-everything-changed [perma.cc/Z5HE-QFP5].

measures to minimize the spread of the virus, severely limiting both public and private activities through executive action.[2] Several state governors issued stay-at-home orders, encouraged private employers to shift to work-from-home, and designated certain businesses as essential, such as grocery stores, pharmacies, and daycares, while other businesses and activities were deemed non-essential.[3] Officials closed schools, restaurants, and government buildings, and limited or canceled large public gatherings.[4] Controversially, religious worship services were deemed "non-essential" in at least twenty-five states.[5]

This Case Note examines *Roman Catholic Diocese of Brooklyn v. Cuomo*'s position as the first case the Supreme Court decided in favor of the free exercise of religion in a series of COVID-19 free exercise cases.[6] It

2. *See Coronavirus State Actions*, NAT'L GOVERNORS ASS'N, www.nga.org/coronavirus-state-actions-all/ [perma.cc/97S2-RV5K] (last visited Jan. 8, 2023) (listing significant actions taken by state governments to deal with the effects of the COVID-19 pandemic between March 2020 and July 2020).

3. *See, e.g.*, N.Y. Exec. Order No. 202.6 (Mar. 18, 2020), www.governor.ny.gov/sites/default/files/atoms/files/EO202.6.pdf [perma.cc/VGT5-7YU2] (encouraging telecommuting for most industries and listing essential businesses); Cal. Exec. Order No. N-33-20 (Mar. 19, 2020), www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-EO-N-33-20-COVID-19-HEALTH-ORDER-03.19.2020-signed.pdf [perma.cc/8KKD-8H5E] (ordering residents to stay at home and designating sixteen "critical infrastructure sectors"); Ill. Exec. Order No. 2020-10 (Mar. 20, 2020), www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-10.pdf [perma.cc/287B-4CJ7] (ordering residents to stay at home as much as possible and designating essential functions); s*ee also* Sarah Mervosh, Denise Lu, & Vanessa Swales, *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 20, 2020), www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html [perma.cc/EA83-LL6V]. There was a lot of disagreement over which businesses and activities should be deemed essential and which should not. *See, e.g.*, Patrick McGeehan & Matthew Haag, *These Stores are Essential in the Pandemic. Not Everyone Agrees.*, N.Y. TIMES (Apr. 14, 2020), www.nytimes.com/2020/03/27/nyregion/coronavirus-essential-workers.html [perma.cc/VX38-C65F]. Business owners and citizens lobbied the state to add additional industries to the essential list. *Id.*

4. *See, e.g.*, N.Y. Exec. Order No. 202.1 (Mar. 12, 2020), www.governor.ny.gov/sites/default/files/atoms/files/EO_202_1.pdf [perma.cc/TP3E-68BB] (postponing gatherings larger than five-hundred people and limiting smaller events to 50% capacity); Ill. Exec. Order No. 2020-06 (Mar. 15, 2020), www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-06.pdf [perma.cc/6LBJ-FKME] (closing all Illinois public and private schools); N.Y. Exec. Order No. 202.4 (Mar. 16, 2020), www.governor.ny.gov/sites/default/files/atoms/files/EO%20202.4.pdf [perma.cc/9Z66-KUKF] (closing all New York schools); Ill. Exec. Order No. 2020-10 (Mar. 20, 2020) (banning all public gatherings of more than ten people).

5. *See, e.g.*, Eric Heisig, *As Easter Nears, See Which of the 50 States are Banning Religious Gatherings in Response to the Coronavirus*, CLEVELAND (Apr. 10, 2020), www.cleveland.com/metro/2020/04/as-easter-nears-see-which-of-the-50-states-are-banning-religious-gatherings-in-response-to-the-coronavirus.html [perma.cc/KVG4-DCN8] (discussing what limitations each state had in place with respect to religious gatherings in the month after the virus was declared a global pandemic).

6. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I; Roman Cath. Diocese of

will focus on the Court's manipulation of the "neutral and generally applicable" test, originally established in *Employment Division v. Smith*,[7] situated within the unique circumstances presented by the COVID-19 pandemic. It will discuss how the Court's new articulation of the effects and interpretation of "neutral and generally applicable" brings to life the Court's warning in *Reynolds v. United States* and Justice Scalia's fears laid bare in *Smith* – allowing exceptions for religious beliefs would cause "every citizen to become a law unto [themselves]."[8]

Part II of this Case Note provides relevant background on the Supreme Court's historical approaches to Free Exercise Clause analysis, including the Court's COVID-19 decisions prior to and including *Cuomo*. Part III examines the facts of *Cuomo* and the Court's many opinions in the case. It emphasizes Justice Gorsuch's and Justice Kavanaugh's concurring opinions and Justice Sotomayor's dissenting opinion, which plainly evidence the conflict that eventually led to the Court's reformation of *Smith*. Part IV discusses how the Court reformed the *Smith* test, and why it was wrong not to follow the logic of Justice Sotomayor's dissenting opinion. It also argues that the reformation of *Smith* will have a negative impact, allowing for a rash of exceptions to all kinds of laws based on individual religious beliefs, and causing confusion in the courts below.

II. BACKGROUND

The Court's approach to the application of free exercise doctrine to government restrictions has evolved over its roughly two-hundred-and-thirty-year history as part of the Constitution.[9] Part A of this section discusses the Court's application of the Free Exercise Clause, beginning with the late nineteenth century through the modern era. Part B addresses how the Court approached its application after the appearance of COVID-19. Part C briefly discusses the initial onset and impact of the COVID-19 pandemic in New York prior to this case. Part D describes the Executive Order at issue in *Cuomo* as well as the procedural history of the case.

A. History of Free Exercise Clause Analysis

After its addition to the Constitution in 1791, the Free Exercise

Brooklyn v. Cuomo, 141 S. Ct. 63 (2020); *see also* Harvest Rock Church Inc. v. Newsom (Newsom II), 141 S. Ct. 1289, 1289-90 (2021) (enjoining Governor Newsom's complete ban on indoor worship); S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716 (2021) (holding same); Tandon v. Newsom, 141 S. Ct. 1294, 1296-97 (2021) (granting injunctive relief to plaintiffs seeking to hold in person religious gatherings in their homes).

7. Empl. Div. v. Smith, 494 U.S. 872, 880 (1990).

8. *Id.* at 885; Reynolds v. United States, 98 U.S. 145, 167 (1878).

9. *See generally* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1410-421 (1990) (tracing the development of the right to free exercise through its inclusion in the Bill of Rights and its early judicial interpretation).

Clause of the First Amendment would be rarely invoked before the Supreme Court.[10] It was not until the late nineteenth century that the Court began to formulate rules for analyzing free exercise challenges beyond simply holding that it was an issue for the states.[11] Since 1878, the Court's approach has oscillated from holding that neutral laws do not violate the Free Exercise Clause to allowing exceptions to otherwise neutral laws unless the state can show it has a compelling interest and back again.[12]

1. Late Nineteenth Century Free Exercise Analysis

Beginning with *Reynolds v. United States* in the latter part of the nineteenth century, the Supreme Court examined the interrelation of the Free Exercise Clause and the Church of Jesus Christ of Latter-Day Saints' religious practices.[13] In *Reynolds*, the Court analyzed whether a federal law banning the practice of bigamy was violative of the Free Exercise Clause.[14] George Reynolds, who was arrested on charges of bigamy, argued that because the practice was a tenet of his religion, the Free Exercise Clause prohibited the government from prosecuting him for entering into a second marriage.[15] The Court disagreed, holding that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious *beliefs and opinions*, they may with *practices*."[16] This distinction between beliefs and actions became the Court's test for whether a law or regulation infringed on religious free

10. *Id.* at 1503.

11. *Id.* at 1503. *See* Permoli v. New Orleans, 44 U.S. (3 How.) 589, 609 (1845) (holding that the "Constitution of the United Stated makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws.").

12. *See* Kenneth Marin, *Employment Division v. Smith: The Supreme Court Alters the State of Free Exercise Doctrine*, 40 AM. U.L. REV. 1431, 1434-35 (1991) (discussing the Court's historical approaches to the Free Exercise Clause analysis and criticizing *Smith* for severely limiting the scope of the clause).

13. *Id.* at 1435; *Reynolds*, 98 U.S. at 145; *see also* Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 1-2 (1890) (upholding the Edmunds-Tucker Act which disincorporated the Church of Latter-Day Saints, required anti-polygamy oaths for voters, required civil marriage licenses, and seized property owned by the church). Members of the Church of Jesus Christ of Latter-Day Saints are more commonly known as "Mormons." *See* Lyman Kirk, *Using the Term "Mormon"*, CHURCH JESUS CHRIST LATTER DAY SAINTS (Apr. 19, 2010), www.newsroom.churchofjesuschrist.org/blog/using-the-term-mormon-[perma.cc/AG75-D2CE].

14. *Reynolds*, 98 U.S. at 161.

15. *Id.*

16. *Id.* at 166 (emphasis added). The Court partly based its holding on a letter from Thomas Jefferson, written over twenty years after the adoption of the First Amendment Free Exercise Clause, in which he declared his belief that "the legislative powers of government reach actions only, and not opinions . . . ." *Id.* at 164 (quoting Letter from Thomas Jefferson to Comm. Danbury Baptist Ass'n, 8 JEFF. WORKS 113 (Jan. 1, 1820)).

exercise for the next eighty-five years.[17]

In a second case, *Davis v. Beason*, the Court decided whether an Idaho statute, requiring individuals to swear they were neither a polygamist nor associated with any organization that promoted polygamy before they could vote, was constitutional.[18] In upholding the statute, the Court further clarified its test, finding that when a law is generally applicable, individuals cannot be excepted from the law's enforcement.[19] First, the Court followed *Reynolds* and held that the Free Exercise Clause was meant to protect beliefs, not actions, and therefore the law was valid.[20] Second and more importantly, it identified that Idaho's statute simply required individuals to affirm they were not violating a "general law applicable to all Territories and other places under the exclusive jurisdiction of the United States".[21]

2. Strict Scrutiny Era of Free Exercise Analysis

The Court continued applying this beliefs versus actions approach through the middle of the twentieth century.[22] In 1963, the Court altered its approach to Free Exercise Clause cases with *Sherbert v. Verner*.[23] In *Sherbert*, the Court no longer questioned whether the government regulation applied to religious beliefs or to actions, but instead began to apply what it referred to as the "compelling interest test."[24] Under the first prong of this test, a court asks whether a challenged government regulation imposes a burden on the free exercise of religion.[25] To meet

17. *See* Kathleen P. Kelly, *Abandoning the Compelling Interest Test in Free Exercise Cases: Employment Division, Department of Human Resources v. Smith*, 40 CATH. U.L. REV. 929, 941-42 (1991) (discussing the Court's approach to free exercise analysis since its inception, and criticizing the Court's decision in *Smith* for "contradict[ing] the purpose and intent of the Free Exercise Clause.").

18. Davis v. Beason, 133 U.S. 333, 345-47 (1890).

19. *Id.* at 348.

20. *Id.* at 343-44; *Reynolds*, 98 U.S. at 166.

21. *Davis*, 133 U.S. at 348.

22. *See, e.g.*, Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 265 (1934) (allowing the University of California to require students to take military training classes despite religious objection); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (upholding a child labor law conviction prohibiting a child from skipping school to sell religious materials on the street with a family member); Torcaso v. Watkins, 367 U.S. 488, 492 (1961) (overturning Maryland law requiring individuals seeking a public position to affirm a belief in God); Braunfeld v. Brown, 366 U.S. 599, 603-04 (1961) (upholding a state law requiring businesses to be closed on Sunday despite indirectly burdening Orthodox Jews whose businesses were already closed on Saturday for their Sabbath); Gallagher v. Crown Kosher Super Market of Massachusetts, Inc., 366 U.S. 617, 628-29 (1961) (holding same).

23. Sherbert v. Verner, 374 U.S. 398, 402 (1963); *see* Marin, *supra* note 12, at 1438-42 (summarizing the Supreme Court's development of a new compelling interest test to be applied to Free Exercise Clause challenges, foreclosing the previous beliefs versus actions approach utilized by the Court in *Reynolds*).

24. *Sherbert*, 374 U.S. at 403.

25. Justin W. Aimonetti & M. Christian Talley, *Religious Exemptions as Rational Social Policy*, 55 U. RICH. L. REV. ONLINE 25, 33 (2021).

this prong, a plaintiff is required to prove "they were (a) asserting a religious belief, (b) that the belief was sincere, and (c) that the government had imposed a 'substantial burden' on their religious exercise."[26] If this prong is met, the government is required to provide a compelling state interest for why the imposed regulation should stand, and show that it employed the least restrictive means to achieve that interest.[27]

Adell Sherbert, a member of the Seventh-Day Adventist Church, was fired from her job for refusing to work on Saturdays, a day of rest under her religion.[28] She was subsequently denied unemployment compensation and brought suit challenging the denial under the Free Exercise Clause.[29] Analogizing the case to a First Amendment free speech challenge, Justice Douglas declared that, "to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties."[30] Applying the compelling interest test, the Court held that South Carolina's stated purpose to prevent fraudulent unemployment claims failed.[31] Additionally, the state had also failed to demonstrate that it could not achieve its interests through less burdensome means.[32]

Justice Harlan, joined by Justice White, strongly dissented, noting that the decision was "disturbing both in its rejection of existing precedent and in its implications for the future."[33] Justice Harlan reasoned that South Carolina would now be required to pay unemployment benefits for individuals who claimed an inability to work for purely religious reasons, even though it denied the same benefits to workers who claimed no religion.[34] Accordingly, he did not believe the Free Exercise Clause "compelled" such an outcome.[35]

3. Modern Free Exercise Analysis

In 1990, the Court returned to the roots of its free exercise analysis in *Employment Division v. Smith*.[36] Akin to *Sherbert*, *Smith* involved two individuals who were denied unemployment benefits after they were fired from their jobs for taking part in a peyote ritual as members of the Native American Church.[37] The individuals claimed that the denial of

26. *Id*.
27. *Id*.
28. *Sherbert*, 374 U.S. at 399.
29. *Id.* at 400-01.
30. *Id.* at 406.
31. *Id.* at 407.
32. *Id.*
33. *Id.* at 418 (Harlan, J., dissenting).
34. *Id.* at 419; *see also* Aimonetti & Talley, *supra* note 25, at 33.
35. *Sherbert*, 374 U.S. at 423.
36. *Smith*, 494 U.S. at 877-78.
37. *Id.* at 874; *Sherbert*, 374 U.S. at 399-401; *see* OR. REV. STAT. § 475.992(4) (1987) (prohibiting the possession of certain controlled substances, including peyote).

benefits was a violation of their right of free exercise, and asked the Court to find that "when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation."[38] The question for the Court was whether an Oregon law that criminally prohibited the use of peyote uniformly, including when used as part of a religious ceremony, was in violation of the Free Exercise Clause.[39] The majority relied on *Reynolds* and crafted a new test for determining whether a government regulation has improperly infringed on free exercise.[40] A court first needs to determine if the law is "a 'valid and neutral law of general applicability.'"[41] If it is not, the court must apply strict scrutiny.[42] However, if the law is neutral then it does not violate the Free Exercise Clause.[43] Applying this new test to the facts of *Smith*, the Supreme Court upheld the statute, finding that the law was a generally applicable and religion-neutral law that criminalized a particular action *for all*, and therefore did not violate the Free Exercise Clause.[44]

Justice Scalia's majority opinion spent a considerable amount of text explaining that the Constitution cannot be read to say that one's "religious motivation for [an action] places them beyond the reach of a criminal law that is not specifically directed at their religious practice."[45] Justice Scalia contended that continuing to apply the *Sherbert* compelling interest test would be "courting anarchy."[46] In his view, protecting both religious free exercise and ordered society required maintaining a system that applied laws equally to everyone:

> [p]recisely because 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference,' and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every

38. *Smith*, 494 U.S. at 882-83, 888. Justice Scalia cited several examples of laws and regulations that could be escaped should the plaintiffs' rule be applied to free exercise cases, including the draft, taxes, child endangerment and neglect laws, compulsory vaccination laws, minimum wage laws, traffic laws, and animal cruelty laws. *Id.* at 888-89.

39. *Id.* at 874-76.

40. *Id.* at 885.

41. *Smith*, 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)).

42. *See* Graham v. Richardson, 403 U.S. 365, 376 (1971) (holding that under strict scrutiny, "any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional."). The right at issue is *Richardson* is the right to travel. *Id.*

43. *Smith*, 494 U.S. at 879.

44. *Id.* at 878-79. This holding was expanded beyond criminal laws to include civil laws in cases like Vandiver v. Hardin County Bd. of Educ., 925 F.2d 927, 934 (6th Cir. 1991) (holding the Free Exercise Clause does not excuse a child from state education testing requirements). *See* Kelly, *supra* note 17, at 956 n.275 ("While the *Smith* case itself involves a *criminal* law of general applicability, lower courts have extended *Smith* to free exercise cases involving *any* neutral laws of general applicability, regardless of whether they are civil or criminal laws.").

45. *Smith*, 494 U.S. at 878.

46. *Id.* at 888.

> regulation of conduct that does not protect an interest of the highest order.[47]

Any other system, he feared, would create the chaos of an uncontrollable stream of exceptions and allow individuals "to become law unto [themselves]."[48]

Justice Blackmun, joined by Justices Brennan and Marshall dissented, maintaining that Oregon's fears of "a flood of other claims to religious exemptions" was misplaced.[49] The dissenting Justices would have applied *Sherbert*'s compelling interest test and found that the state's interest of public health and safety would not be harmed by the use of peyote in religious ceremonies.[50]

Nor were these dissenting Justices alone in their concerns as the immediate public reaction to the *Smith* decision was one of alarm.[51] This reaction is reminiscent of *Sherbert*'s rejection of the *Reynolds* test, which "disturbed" then-Justice Harlan.[52] However, after *Smith*, *Reynolds* was essentially revived.[53] The alarm after *Smith* was so great that Congress moved to legislatively override the decision, passing the Religious Freedom Restoration Act of 1993 ("RFRA").[54] Congress passed RFRA to reimpose the previous *Sherbert* "compelling interest" test on Free Exercise claims.[55] While this law remains on the books at the federal level, the Supreme Court struck the law as it applied to the states.[56]

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47. *Id.* at 888 (quoting *Braunfeld*, 366 U.S. at 606).

48. *Id.* (quoting *Reynolds*, 98 U.S. at 166-67).

49. *Id.* at 916 (Blackmun, J., dissenting).

50. *Id.* at 911-12.

51. *See* James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1409 (1992) (discussing the negative reaction to Smith after its passing).

52. *Sherbert*, 374 U.S. at 418; *Smith*, 494 U.S. at 908.

53. *Smith*, 494 U.S. at 888-889. The *Smith* decision was and remains wildly unpopular, with several articles written not long after the case was decided heavily criticizing its result. *See, e.g.*, Kelly, *supra* note 17, at 960 (arguing that the *Smith* decision "distort[ed] free exercise precedent . . ."); Marin, *supra* note 12, at 1476 (concluding that the "Court's decision effectively allowed [states] to criminalize the practice of . . . religion."). In just the year after *Smith* came down, at least fifteen articles were published lamenting the decision. *See* Ryan, *supra* note 51, at n.15 (discussing the negative reaction to Smith). Twenty-five years later, there were still scholars despairing its conclusions. *See, e.g.*, Charles C. Haynes, *Justice Scalia's Disastrous Decision on Religious Freedom*, FREEDOM F. INST. (Feb. 18, 2016), www.freedomforuminstitute.org/2016/02/18/justice-scalias-disastrous-decision-on-religious-freedom/ [perma.cc/9KLW-5KBK].

54. Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb (2022). Congress expressly asserts its disappointment with the *Smith* decision. *Id.* at (a)(4).

55. WHITNEY K. NOVAK, CONG. RSCH. SERV., IF11490, THE RELIGIOUS FREEDOM RESTORATION ACT: A PRIMER 1 (2020). RFRA requires that when the government substantially burdens an individual's religious free exercise, the action is "valid only if the government shows that the burden is (1) in furtherance of a compelling governmental interest and (2) the least restrictive means of furthering that interest." *Id.*

56. *See* City of Boerne v. Flores, 521 U.S. 507, 519, 536 (1997) (holding that Congress exceeded its authority under the Fourteenth Amendment when it passed the Religious Freedom Restoration Act and repealed its application to the states).

After *Smith* came another important modern Free Exercise Clause case, *Church of Lukumi Babalu Aye v. City of Hialeah*.[57] The Church of Lukumi, a Santeria church, opened a house of worship in Hialeah, Florida.[58] As part of the Santeria faith, animal sacrifices are performed at milestone moments, including births, marriages, and deaths.[59] After the Church of Lukumi received its permits, the City's residents became concerned about the practice being brought to town.[60] In response, the City enacted three ordinances outlawing the "ritual sacrifice of animals for purposes other than food consumption."[61] The majority found that under *Smith*, the ordinances were not "neutral" but specifically targeted the Church of Lukumi and its practice of animal sacrifice.[62] Justice Kennedy pointed to the fact that "almost the only conduct subject to [the ordinances] is the religious exercise of Santeria church members."[63]

Moving to the next part of the *Smith* test, the Court applied strict scrutiny and found that the government's claimed compelling interests of public health and safety were insufficient, given both the underinclusive and overbroad nature of the ordinances.[64] For example, slaughterhouses and restaurants were not subjected to the same carcass disposal rules.[65] Because the Court was convinced that the ordinances were specifically targeted at the church, they reversed the lower court's decision and held the City's regulations unconstitutional under *Smith*.[66]

The *Smith* test would remain a relatively unchallenged test for evaluating Free Exercise cases, until a novel virus came along to test the limits of government intrusion on religious freedom.

B. The Supreme Court's Decisions on COVID-19 Free Exercise Challenges Pre-Cuomo

Throughout the COVID-19 pandemic, a number of legal challenges sought to block government officials from perceived infringement on

57. Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 523 (1993).

58. *Id.* at 525-26.

59. *Id. at* 525.

60. *Id.* at 526.

61. *Id.* at 527 (citing Op. Att'y Gen. Fla. 87-56 (1987)).

62. *Id.* at 534-35.

63. *Id.* at 535. The ordinances, for example, did not affect the practice of Kosher slaughter. *Id.* at 536.

64. *Id.* at 546. A statute or regulation is underinclusive when "the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest in a comparable way." Williams-Yulee v. Fla. Bar, 575 U.S. 433, 451 (2015). The overbreadth doctrine "functions as a prophylactic doctrine, invalidating statutes that prohibit too much constitutionally protected conduct." Mark L. Rienzi & Stuart Buck, *Federal Courts, Overbreadth, and Vagueness: Guiding Principles for Constitution Challenges to Uninterpreted State Statutes*, 2002 UTAH L. REV. 381, 386 (2002).

65. *Id.* at 544.

66. *Id.* at 546-47 ("[A]ll four ordinances are overbroad or underinclusive in substantial respects . . . . The absence of narrow tailoring suffices to establish the invalidity of the ordinances.").

religious worship.[67] Prior to *Cuomo*, the Supreme Court denied relief in the cases that reached its docket.[68] These initial failures laid the foundation for the Court to consider the *Cuomo* case. Through this foundation and the facts and procedural history of *Cuomo* and the Justice's opinions, the roadmap to reformation of the *Smith* test becomes clear.

1. South Bay United Pentecostal Church v. Newsom

On March 19, 2020, California Governor Gavin Newsom issued an executive order requiring residents to remain at home and banning all public gatherings, including worship services.[69] On May 4, 2020, Governor Newsom announced plans to modify his order and allow certain businesses to reopen beginning May 8, 2020.[70] Houses of worship were not included on this list.[71] In response, South Bay United Pentecostal Church sought an injunction against the order in the Southern District of California.[72] A week after the suit was filed, Governor Newsom issued new guidance for houses of worship, allowing up to 25% capacity or 100 people, whichever was fewer.[73] Both the District Court and, subsequently, the Ninth Circuit Court of Appeals, denied South Bay's applications for an injunction.[74] The church appealed to the Supreme Court, which also denied relief.[75] Importantly however, Chief Justice Roberts issued a concurring opinion and Justice Kavanaugh issued a dissenting opinion, both of which set the foundation upon which the Court would eventually

67. *See, e.g.*, Matthew Szymanski, *Tracking Faith-Based Legal Challenges to Pandemic Orders*, CHRISTIANITY TODAY (Apr. 26, 2021), www.churchlawandtax.com/web/2020/may/tracking-pandemic-related-religious-liberty-cases.html [perma.cc/HVM9-U4Z5] (listing over forty cases filed across the country seeking relief from various government regulations on houses of worship or the free exercise of religion during the pandemic); *see also* Josh Blackman, *The "Essential" Free Exercise Clause*, 44 HARV. J.L. & PUB. POL'Y 637, 676 n.209 (2021) (listing additional cases in which religious plaintiffs sought relief from executive orders restricting religious gatherings).

68. S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020); Elim Romanian Pentecostal Church v. Pritzker, 140 S. Ct. 2823 (2020); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020).

69. Cal. Exec. Order No. N-33-20 (Mar. 19, 2020).

70. *See* Press Release, Cal. State, Governor Newsom Provides Update on California's Progress Toward Stage 2 Reopening (May 4, 2020) (on file with author) (allowing certain business sectors to reopen including various retail, manufacturing, and logistics businesses).

71. Complaint for Declaratory and Injunctive Relief at 10, S. Bay United Pentecostal Church v. Newsom, No. 20-CV-865 (S.D. Cal. May 18, 2020).

72. *Id.* at 44; Emergency Motion for an Injunction Pending Appeal Following Limited Remand Under Circuit Rule 27-3(b) at 27, S. Bay United Pentecostal Church v. Newsom, 959 F.3d 938 (9th Cir. 2020) (No. 20-56358).

73. *California Governor Issues Guidelines for Churches to Open*, KPBS (May 25, 2020), www.kpbs.org/news/evening-edition/2020/05/25/california-governor-issues-guidelines-churches-ope [perma.cc/L3DC-LB2X].

74. S. Bay United Pentecostal Church v. Newsom, No. 20-CV-865, 2020 U.S. Dist. LEXIS 86992 at 3 (S.D. Cal. May 18, 2020); *S. Bay*, 959 F.3d at 940.

75. *S. Bay*, 140 S. Ct. at 1613.

reform *Smith*.[76]

In his concurrence, Chief Justice Roberts noted that under the order, "similar or more severe restrictions appl[ied] to *comparable* secular gatherings . . . where large groups gather in close proximity for extended periods of time," and that the order "treats more leniently *only dissimilar* activities . . . in which people neither congregate in large groups nor remain in close proximity for extended periods."[77] In his view, this distinction by the government, based on *how* people gather and the science behind the spread of the virus, was not in violation of the Free Exercise Clause.[78] The question only need be "whether houses of worship were treated similarly to 'comparable' non-essential institutions," not whether there were other activities that were treated better.[79]

Conversely, Justice Kavanaugh stated that the distinction is not one of *how* people gather, but *whether they gather at all*.[80] Framed this way, the order does not meet the *Smith* requirement of neutrality and should face strict scrutiny.[81] While acknowledging that the state had a compelling interest given the COVID-19 pandemic, he drew the line at whether houses of worship *can take the same precautions* as businesses that are allowed to operate without capacity restrictions.[82] Through that lens, Justice Kavanaugh stated that if *any* activity is treated more favorably than houses of worship, the order violates the Free Exercise Clause.[83] For him, "[w]hat California needs is a compelling justification for distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subject to the occupancy cap."[84]

2. Calvary Chapel Dayton Valley v. Sisolak

On May 28, 2020, Nevada Governor Steve Sisolak issued an emergency declaration as the state entered "Phase Two" of its plan to gradually reopen after the initial wave of state-ordered COVID-19 closures.[85] Under this phase, houses of worship were permitted to host no more than fifty people beginning on May 29, 2020.[86] Notably, however, casinos were allowed to operate at 50% capacity.[87] Calvary Chapel

76. *Id.* at 1613-15; *see also* Blackman, *supra* note 67, at 666-68 (summarizing Justice Kavanagh's dissent, joined by Justice Gorsuch, in which he begins to argue for a new, non-*Smith* standard to be applied to COVID-19 Free Exercise Clause challenges).

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

78. *Id.*

79. Blackman refers to Chief Justice Roberts' concurring opinion as the "comparator approach." Blackman, *supra* note 67, at 664.

80. *S. Bay*, 140 S. Ct. at 1615 (Kavanaugh, J., dissenting).

81. *Id.* at 1614; *Smith*, 494 U.S. at 879.

82. *S. Bay*, 140 S. Ct. at 1614.

83. *Id.*

84. *Id.* at 1615.

85. Nev. Declaration of Emergency Directive No. 021 (May 28, 2020), nvhealthresponse.nv.gov/wp-content/uploads/2020/05/Directive-021-Phase-Two-Reopening-Plan.pdf [perma.cc/ZCX4-EZEA].

86. *Id.*

87. *Id.* The limitation on worship services did not apply to what were referred to

Dayton Valley challenged Governor Sisolak's declaration.[88] The United States District Court for the District of Nevada and the Ninth Circuit Court of Appeals, relying partly on Chief Justice Roberts' concurrence in *South Bay*, denied injunctive relief.[89] On July 24, 2020, the Supreme Court also denied injunctive relief.[90]

Justice Alito, Justice Gorsuch, and Justice Kavanaugh all issued dissenting opinions.[91] Justice Gorsuch wrote the shortest dissent, stating plainly that "this is a simple case," and that "the First Amendment prohibits such obvious discrimination against the free exercise of religion."[92] He did not cite to any case law or further explain how or why the Free Exercise Clause prohibits these types of restrictions.[93] He only expressed exasperation at the fact that movie theaters and casinos were allowed to operate with more patrons than were allowed to gather for religious worship.[94]

According to Justice Alito, Nevada's hierarchy of businesses "blatantly discriminates" against houses of worship and strict scrutiny should be applied.[95] First, Justice Alito noted that Nevada's emergency directive was issued more than two months after the onset of the crisis and officials had enough evidence regarding the virus to "craft policies in light of that evidence."[96] Justice Alito then reasoned, using similar logic to Chief Justice Roberts in *South Bay*, that houses of worship should be treated no less favorably than "other activities that involve extended, indoor gatherings of large groups of people," but reached the opposite conclusion.[97]

In other words, Justice Alito fully acknowledged that the government had created a hierarchy of activities and appears to have endorsed the argument that it was permissible for the government to

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as "drive-up services" where worship services were held outside, and the congregants remained in their vehicles. Andrew Chow, '*Come as You Are in the Family Car.' Drive-In Church Services Are Taking Off During the Coronavirus Pandemic*, TIME (Mar. 28, 2020), www.time.com/5811387/drive-in-church-coronavirus/ [perma.cc/EMN9-B7A8].

88. Calvary Chapel Dayton Valley v. Sisolak, No. 20-CV-00303, 2020 U.S. Dist. LEXIS 103234, at *7 (D. Nev. June 11, 2020).

89. *Id.*; Calvary Chapel Dayton Valley v. Sisolak, No. 20-16169, 2020 U.S. App. LEXIS 20727, at *1-2 (9th Cir. July 2, 2020).

90. *Calvary Chapel*, 140 S. Ct. at 2603.

91. *Id.* at 2603, 2609 (Gorsuch, J., dissenting).

92. *Id.* at 2609. Justice Gorsuch did not cite to any authority in his dissenting opinion. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 2607.

96. *Id.* at 2605; *see also* Jiwoon Kong, *Safeguarding the Free Exercise of Religion During the COVID-19 Pandemic*, 89 FORDHAM L. REV. 1589, 1621-22 (2021) (discussing the effect of COVID-19 on religious worship in the United States and arguing that the Court has been inconsistent in protecting religious freedom and that it needs to do more to both protect religion and provide clearer guidance to the courts below).

97. *Calvary Chapel*, 140 S. Ct. at 2605-07 (Alito, J., dissenting); *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring); *S. Bay*, 140 S. Ct. at 1615 (Kavanaugh, J., dissenting); *see* Blackman, *supra* note 67, at 686 (arguing "the courts should compare religious worship to *comparable* secular activity. . .") (emphasis in the original).

regulate based on what were "comparable" secular activities, but still dissented from the denial of relief.[98] Justice Alito focused heavily on casinos, reasoning that the state cannot possibly justify treating houses of worship differently because, similar to Justice Kavanaugh's reasoning in *South Bay*, they can adopt the same precautions.[99]

Finally, Justice Kavanaugh, not joined by any other Justice, pushed his dissent from *South Bay* forward.[100] Justice Kavanaugh began by acknowledging that "[t]he definitional battles over what constitutes favoritism, discrimination, equality, or neutrality can influence, if not decide, the outcomes of religion cases."[101] He then laid out "four categories of laws" that favor or disfavor religion, and noted that the Nevada declaration fell into the fourth category of "laws that expressly treat religious organizations equally to some secular organizations, but better or worse than other secular organizations."[102]

Examining this category, he cited to three Establishment Clause cases in which religious organizations were treated more favorably.[103] He noted that these cases "make clear that the legislature *may* place religious organizations in the favored category" and not run afoul of the Establishment Clause.[104] Justice Kavanaugh then posited that "the converse free-exercise question is whether the legislature is required to place religious organizations in the favored or exempt category rather than in the disfavored category . . . ."[105] With no Court precedent to support the claim—beyond a mere assertion that the Free Exercise Clause inherently supports his position and a citation to a law review article—Justice Kavanaugh answered his own question.[106] He declared that,

98. *Calvary Chapel*, 140 S. Ct. at 2606-07 (Alito, J., dissenting).

99. *Id.* at 2606; *S. Bay*, 140 S. Ct. at 1614-15 (Kavanaugh, J., dissenting).

100. *Calvary Chapel*, 140 S. Ct. at 2609 (Kavanaugh, J., dissenting).

101. *Id.* at 2610.

102. *Id.* ("In my view, some of the confusion and disagreement can be averted by first identifying and distinguishing four categories of laws: (1) laws that expressly discriminate against religious organizations; (2) laws that expressly favor religious organizations; (3) laws that do not classify on the basis of religion but apply to secular and religious organizations alike . . ."). As it relates to the free exercise clause, Justice Kavanaugh cites no cases to support or evidence that the Free Exercise Clause applies to the fourth category as described above. *Id. See also* Blackman, *supra* note 67, at 687 (explaining and examining how "Justice Kavanaugh provided a taxonomy to understand the different types of laws that favor or disfavor religion.").

103. *See* Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 696 (1970) (allowing states to give property tax exemptions to religious organizations); Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 14 (1989) (allowing states to grant certain sales tax subsidies to both secular and non-secular organizations); Concerned Citizens of Carderock v. Hubbard, 84 F. Supp. 2d 668 (D. Md. 2000) (allowing states to grant houses of worship a more favorable zoning classification along with certain other secular businesses).

104. *Calvary Chapel*, 140 S. Ct. at 2612 (emphasis in the original). Notably, the restrictions at issue are not laws and the case deals with executive power, not the legislature. *Id.* at 2603.

105. *Id.* at 2612.

106. *Id.* (citing Douglas Laycock, *The Remnants of Free Exercise*, 1990 S. CT. REV. 1, 49 (1990)).

"[u]nless the State provides a sufficient justification otherwise, it *must* place religious organizations in the favored or exempt category."[107]

Based on this conclusion, Justice Kavanaugh put forth a new, two-step inquiry for determining when the government can leave houses of worship out of the favored category: "[f]irst, does the law create a favored or exempt class of organizations, and if so, do religious organizations fall outside of that class" and second, if they are not favored, "has the government provided a sufficient justification for the differential treatment and disfavoring religion."[108] Citing back to the law review article, Justice Kavanaugh posited that "it is not enough for the government to point out that other secular organizations or individuals are also treated unfavorably. The point 'is not whether one or a few secular analogs are regulated. The question is whether a single secular analog is *not* regulated.'"[109] Finally, he applied this new framework to Governor Sisolak's declaration, and reasoned that Nevada "has not explained why the 50% occupancy cap is good enough for secular businesses . . . but is not good enough for places of worship" and therefore the injunction was warranted.[110]

As the pandemic dragged on, lower courts continued to follow the Supreme Court's lead and deny relief to houses of worship in cases challenging government restrictions.[111] The next big case that would change the Court's approach came when New York Governor Andrew Cuomo did not just treat worship and business differently but began enforcing different restrictions on different houses of worship.[112]

C. COVID-19 in New York

New York was one of the states hit hardest as the COVID-19 virus began to circulate in the United States.[113] On March 1, 2020, the state

107. *Id.* (emphasis added). *See also* Blackman, *supra* note 67, at 691 ("Stated differently, houses of worship exercising religion are treated worse than commercial enterprises engaging in economic activity. When courts review this fourth category of regulations, they are not required to compare in person religious worship to any specific secular business."); *see* Laycock, *supra* note 106, at 49–50 (arguing that Smith "require[s] that religion gets something analogous to most favored nation status.").

108. *Calvary Chapel*, 140 S. Ct. at 2613.

109. *Id.* (quoting Laycock, *supra* note 106) (emphasis in original).

110. *Id.*

111. *See, e.g.*, Robinson v. Murphy, No. 20-5420, 2020 U.S. Dist. LEXIS 185070, at *1-2 (D.N.J. Oct. 2, 2020) (siding with Governor Murphy's restrictions on religious gatherings); Solid Rock Baptist Church v. Murphy, 480 F. Supp. 3d 585, 587 (D.N.J. 2020) (holding same).

112. N.Y. Exec. Order No. 202.68 (Oct. 6, 2020), www.governor.ny.gov/sites/default/files/atoms/files/EO202.68.pdf [perma.cc/EE85-STRC].

113. *See* Mitch Smith, et al., *What Places Are Hardest Hit by the Coronavirus? It Depends on the Measure*, N.Y. TIMES (Dec. 9, 2020), www.nytimes.com/2020/11/12/us/coronavirus-crisis-united-states.html [perma.cc/A3ND-3P5V] (stating that New York City was the center of the pandemic within the United States in the early months with more than 1,000 cases reported per day in the city alone, not including the rest of the state, in May 2020).

recorded its first definitively known COVID-19 case.[114] On March 10, 2020, Governor Cuomo declared the state's first COVID-19 containment zone.[115] Four days later, New York recorded its first known deaths from COVID-19.[116] By the time Governor Cuomo instituted the October 6, 2020, executive order at issue in *Cuomo*, at least 465,515 people in New York had suffered from COVID-19 and approximately 25,527 had died from the illness.[117]

Governor Andrew Cuomo initially deemed houses of worship as non-essential and encouraged them not to hold services.[118] However, in June 2020, COVID-19 cases started to decline, and the state began to reopen.[119] Governor Cuomo implemented new executive orders that allowed houses of worship to reopen so long as they operated at no more than 25% capacity, which later increased to 33% capacity.[120] But as the United States entered the fall of 2020, cases began to climb again and Governor Cuomo issued another order designating certain areas of the state under new, more severe restrictions.[121] This executive order and

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114. *See* Chris Francescani, *Timeline: The First 100 Days of New York Gov. Andrew Cuomo's COVID-19 Response*, ABC NEWS (June 17, 2020, 7:58 AM), www.abcnews.go.com/US/News/timeline-100-days-york-gov-andrew-cuomos-covid/story?id=71292880 [perma.cc/K49E-LK7J] (outlining the impact of COVID-19 and its rapid movement throughout the state of New York during the early days of the pandemic in the United States).

115. *Id.*

116. *Id.*

117. Press Release, N.Y. State, Governor Cuomo Updates New Yorkers on State's Progress During COVID-19 Pandemic (Oct. 5, 2020) (on file with author). On August 24, 2021, Kathy Hochul became Governor of New York after a number of scandals, some related to Governor Cuomo's handling of the COVID-19 pandemic, pushed him out of office. Gregory Krieg, *Kathy Hochul becomes governor of New York as Cuomo leaves in disgrace*, CNN POLITICS (Aug. 24, 2021), www.cnn.com/2021/08/23/politics/kathy-hochul-new-york-governor/index.html [perma.cc/T3NK-CFCQ]. The number of deaths reported would later increase after it was discovered that Governor Cuomo's Office had been not counting certain deaths. *See, e.g.*, Shannon Young, *Hochul Adds 12,000 Deaths to Covid Tally, Departing from Cuomo Methods*, POLITICO (Aug. 25, 2021), www.politico.com/states/new-york/albany/story/2021/08/25/hochul-adds-12-000-deaths-to-covid-tally-departing-from-cuomo-methods-1390469 [perma.cc/7L4V-M9HD] (discussing Governor Hochul's attempts to correct the state's COVID-19 death count after Governor Cuomo was found excluding deaths that occurred at home or in a setting other than a hospital, nursing home, or adult care facility). On August 24, 2021, Governor Hochul updated the state's COVID-19 tracker to include the approximately 12,000 deaths not previously counted under Governor Cuomo. *Id.*

118. N.Y. Exec. Order No. 202.6 (Mar. 18, 2020); Press Release, N.Y. State, Governor Cuomo Issues Guidance on Essential Services Under the 'New York State on PAUSE' Executive Order (Mar. 20, 2020) (on file with author).

119. Press Release, N.Y. State, Governor Cuomo Announces Five Regions on Track to Enter Phase IV of Reopening Friday (June 20, 2020) (on file with author).

120. N.Y. Exec. Order No. 202.38 (June 6, 2020), www.governor.ny.gov/sites/default/files/atoms/files/EO-202.38-final.pdf [perma.cc/25GP-RHWP]; Press Release, N.Y. State, Governor Cuomo Announces Lowest Number of Hospitalizations and Deaths Since Beginning of COVID-19 Pandemic (June 6, 2020).

121. N.Y. Exec. Order No. 202.68 (Oct. 6, 2020).

many others across the country were immediately met with legal challenges under the Free Exercise Clause, landing on the Court's so called "shadow docket," including *Cuomo*.[122]

At the time *Cuomo* was filed, courts were following the 1990 holding of *Employment Division v. Smith* when analyzing challenges under the Free Exercise Clause involving the states.[123] Under *Smith's* holding, if a government regulation is a "valid and neutral law of general applicability" it does not violate the Free Exercise Clause.[124] Under normal circumstances, a government regulation shuttering houses of worship while leaving secular businesses open would almost certainly fail under this test, but the pandemic presented a unique situation – the need for government officials to protect the public from a rapidly spreading deadly virus with no vaccine or known cure.[125]

D. Varying Capacity Limits – Roman Catholic Diocese of Brooklyn v. Cuomo

On October 6, 2020, Governor Cuomo issued the executive order at issue in this case creating zones throughout the state of New York "based upon cluster-based cases of COVID-19 at a level that compromises the

122. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket* 1 (U. Chi. Pub. L. & Legal Theory, Working Paper No. 508, 2015) (coining the phrase "shadow docket" to refer to how the Supreme Court handles cases and issues orders outside of its normal procedures). "While the term ["shadow docket"] only dates to 2015, the shadow docket has been around for as long as the Supreme Court." *See The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on Courts, Intel. Prop., and the Internet of H. Comm. on the Judiciary*, 117th Cong. 1 (2021) (statement of Prof. Stephen I. Vladeck), www.justsecurity.org/wp-content/uploads/2021/02/Vladeck-Shadow-Docket-Testimony-02-18-2021.pdf [perma.cc/T9U7-2LZX]. The Court's typical docket, the "merits" docket, "includes the approximately 60-70 cases each Term in which the Justices hear oral argument and resolve the dispute in a signed 'opinion of the court.'" *Id.* The "shadow docket" consists of decisions that are "handed down . . . as 'orders' . . ." *Id.* Such orders "typically come after no more than one round of briefing (and sometimes less); are usually accompanied by no reasoning (let alone a majority); invariably provide no identification of how (or how many of) the Justices voted; and can be handed down at all times of day – or, in some exceptional cases, in the middle of the night." *Id.* at 2. The term "shadow" is a metaphor describing "the contrast between such orders and merits decisions." *Id.*

123. *Smith*, 494 U.S. at 890.

124. *Id.* at 879 (quoting *Lee*, 455 U.S. at 263 n.3); *Cuomo*, 141 S. Ct. at 73; *see also Church of Lukumi*, 508 U.S. at 533, 543 (finding a law is not general or neutral when it "infringes upon or restricts practices because of their religious motivation," or "in a selective manner imposes burdens only on conduct motivated by religious belief.").

125. Edwin Chemerinsky, *Op-Ed: Yes, the Government Can Restrict Your Liberty to Protect Public Health*, L.A. TIMES (Apr. 20, 2020, 2:47 PM), www.latimes.com/opinion/story/2020-04-20/government-can-restrict-your-liberty-to-protect-public-health-courts-have-made-that-clear [perma.cc/ZL7B-N5HJ]. *See also* Jacobson v. Massachusetts, 197 U.S. 11, 37-38 (1905) (holding that a law requiring individuals to be vaccinated against smallpox or be subject to a $5.00 fine was constitutional because of the state's inherent power to protect the public health and safety of its citizens).

State's containment of the virus."[126] Under this order, houses of worship located in "red" zones were limited to 25% occupancy or ten people, whichever was fewer, and in "orange" zones they were limited to 33% capacity or twenty-five people, whichever was fewer.[127] The order also regulated several secular activities, some treated more favorably than houses of worship, others treated less favorably.[128]

Two days after the executive order was issued, the Roman Catholic Diocese of Brooklyn and Agudath Israel of America filed an "as-applied challenge" in the Eastern District of New York seeking a declaratory judgment that Governor Cuomo's order violated the First Amendment, and preliminary and permanent injunctions enjoining enforcement.[129] Both operated churches and synagogues falling within the red and orange zones.[130] The petitioners had been successfully operating without any outbreaks since they initially reopened at 33% capacity under the Governor's prior order, and argued that because they maintained more strict regulations than were even required, they should be allowed to continue operating at 33%.[131] On November 6, 2020, Governor Cuomo changed the zone designation of Brooklyn to "yellow," allowing houses of worship to open at 50% capacity.[132] On November 12, 2020, after being denied preliminary injunctive relief and relief pending appeal, the petitioners filed an Emergency Application for Writ of Injunction with the Supreme Court of the United States.[133] On November 18, 2020, the respondents filed an Opposition to Application for Writ of Injunction.[134]

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126. N.Y. Exec. Order No. 202.68 (Oct. 6, 2020).

127. *Id.* Three zones, red, orange, and yellow, were created based on the "severity of cluster activity." Press Release, N.Y. State, Video, Audio, Photos & Rush Transcript: Governor Cuomo Updates New Yorkers on State's Progress During COVID-19 Pandemic (Oct. 5, 2020) (on file with author). Essential and non-essential activities were regulated most severely in red zones and least severely in yellow zones. *Id.* Zones were imposed geographical areas of the state based upon the levels of community transmission of the virus. *Id*.

128. *Id.* For example, in red zones, restaurants were allowed to offer outdoor and takeout dining, but schools, gyms, and personal service salons were required to close entirely. *Id.*

129. Complaint & Demand for Jury Trial at 22, Roman Cath. Diocese of Brooklyn, New York v. Cuomo, (No. 20-4844) (E.D.N.Y. Oct. 8, 2020). An "as-applied challenge" is "a claim that a statute is unconstitutional on the facts of a particular case or its application to a particular party." *As-applied challenge*, BLACK'S LAW DICTIONARY (Deluxe 10th ed. 2014).

130. *Cuomo*, 141 S. Ct. at 65-66. The Supreme Court consolidated both parties' applications for emergency relief and ruled on both in *Cuomo*. *Id.* at 65.

131. *Id.* at 66.

132. *See* Press Release, Governor Cuomo Announces Updated COVID-19 Micro-Cluster Focus Zones (Nov. 6, 2020) (on file with author) (changing the zone designations of petitioners' geographical locations to yellow based on declining rates in positive cases).

133. *See generally* Roman Cath. Diocese of Brooklyn v. Cuomo, 495 F. Supp. 3d 118, 132 (E.D.N.Y. 2020), *rev'd and remanded sub nom.*, Agudath Israel of Am. v. Cuomo, 979 F.3d 177, 181-82 (2d Cir. 2020); Emergency Application for Writ of Injunction, Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. (Nov. 18, 2020) (No. 20-3590).

134. Opposition to Application for Writ of Injunction, Roman Cath. Diocese of Brooklyn. v. Cuomo, 141 S. Ct. 63, 63 (2020) (No. 20-3572).

On November 25, 2020, the Court granted the petitioners' application.[135]

III. ANALYSIS

Prior to *Cuomo*, the Supreme Court rejected the Free Exercise challenges arising from the COVID-19 pandemic.[136] But on September 18, 2020, Justice Ruth Bader Ginsburg passed away.[137] With her death came the appointment of Justice Amy Coney Barrett on November 26, 2020, shifting the balance of the current Court further to the right on the Court's perceived political spectrum.[138] *Cuomo* marks the first time the Court sided with religious plaintiffs in a COVID-19 free exercise challenge.[139] COVID-19 also offered the Supreme Court a unique opportunity. Given the particular ways in which states distinguished between essential and non-essential activities and businesses, certain Justices took the chance to reinvent the holding of *Smith*.[140] Part A of this section will examine the four parts of the Court's *per curiam* decision, while Parts B and C will address the concurring and dissenting opinions respectively.

A. Per Curiam Decision

In a *per curiam* opinion, the Court granted the petitioners injunctive relief, enjoining enforcement of the October 6 executive order.[141] Based on who concurred and who dissented, Justices Gorsuch, Kavanaugh, Alito, Thomas, and Coney Barrett made up the majority, while Chief Justice Roberts and Justices Breyer, Kagan, and Sotomayor dissented.[142] The

135. *Cuomo*, 141 S. Ct. at 63.

136. *See S. Bay*, 140 S. Ct. at 1613 (denying applicants relief from state executive order limiting attendance at religious worship services due to the spread of COVID-19 throughout those states); *Elim Romanian*, 140 S. Ct. at 2823 (holding same); *Calvary Chapel*, 140 S. Ct. at 2603 (holding same).

137. Nina Totenburg, *Justice Ruth Bader Ginsburg, Champion of Gender Equality, Dies At 87*, NPR (Sept. 18, 2020), www.npr.org/2020/09/18/100306972/justice-ruth-bader-ginsburg-champion-of-gender-equality-dies-at-87 [perma.cc/N8Q3-GX4J].

138. Barbara Sprunt, *Amy Coney Barrett Confirmed to Supreme Court, Takes Constitutional Oath*, NPR (Oct. 26, 2020), www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court [perma.cc/2X6X-7GP8]; *How Amy Coney Barrett Would Reshape the Court — And the Country*, POLITICO MAG. (Sept. 26, 2020, 11:00 AM), www.politico.com/news/magazine/2020/09/26/amy-barrett-scotus-legal-experts-422028 [perma.cc/T8E9-VGLF]. Justice Coney Barrett's appointment shifted the Court closer to what it was prior to the 1950s and 1960s where it began to embrace "larger democratic forces." *Id.* Her addition to the Court means less Congressional authority to act in a national crisis, less authority for administrative agencies to act, diminished voting rights, and less protection for civil and human rights overall. *Id.*

139. *Cuomo*, 141 S. Ct. at 69.

140. *Id.* at 68. *See Constitutional Constraints on Free Exercise Analogies*, 134 HARV. L. REV. 1782, 1795-96 (2021) (describing Justice Kavanaugh's willingness to adopt a new approach to Free Exercise Clause analysis).

141. *Cuomo*, 141 S. Ct. at 68-69.

142. *Id.* at 65, 69, 72, 75, 76, 78; *see also* Blackman, *supra* note 67, at 705 (noting that "[b]ut, by the process of elimination, we can infer that Justices Thomas, Alito,

decision was brief, quickly summarizing why the parties had met their burden of clearly establishing the elements of the test for preliminary injunctive relief.[143]

1. Likelihood of Success on the Merits

In examining the executive order, the Court found that it did not meet the "minimum requirement of neutrality" with respect to free exercise.[144] First, in dicta, the Court seemed to agree with the petitioners' arguments that Governor Cuomo's statements demonstrated that he had specifically targeted the Orthodox Jewish community when imposing the new restrictions.[145] However, the Court goes on to ignore those comments, finding the order discriminatory on its face.[146]

In determining that the order was facially discriminatory, the Court

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Gorsuch, Kavanaugh, and Barrett were in the majority. Chief Justice Roberts and Justices Breyer, Sotomayor, and Kagan were in dissent."). Interestingly, while sitting on the Seventh Circuit, Justice Barrett signed on to an opinion denying the Illinois Republican Party a preliminary injunction against an executive order issued by Governor JB Pritzker banning gatherings over fifty people. Ill. Republican Party v. Pritzker, 470 F. Supp. 3d 813, 820–21 (N.D. Ill. 2020), *aff'd*, 973 F.3d 760 (7th Cir. 2020). The Court denied the Republican Party's claims under the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. *Id.* The Seventh Circuit panel cited to Chief Justice Roberts' *South Bay* concurrence and recognized that the danger of spreading COVID-19 tipped the balance in favor of Governor Pritzker. *Id.*

143. *Cuomo*, 141 S. Ct. at 65-68; Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 20 (2008) (explaining that when deciding whether to grant a preliminary injunction, a court should consider the following factors: 1) whether the plaintiff "is likely to succeed on the merits," 2) whether the plaintiff "is likely to suffer irreparable harm," 3) whether "the balance of equities" and hardships is "in [the plaintiff's] favor," and 4) whether "an injunction is in the public interest."). The per curiam opinion did not explicitly address the balance of equities and hardships factor in this case. *Cuomo*, 141 S. Ct. at 65-69.

144. *Cuomo*, 141 S. Ct. at 66 (quoting *Church of Lukumi*, 508 U.S. at 533).

145. *Id.* While the Court does not hold based on the Governor's statements, it becomes an important sticking point for Justice Sotomayor in her dissenting opinion. *Id.* at 80 (Sotomayor, J., dissenting). The Court was referring to statements made by Governor Cuomo at the press conference the day before he issued his order. *Id.* at 66 (per curiam). *See* Press Conference, *Cuomo Updates New Yorkers on State's Progress During COVID-19 Pandemic, Off. of the Governor* (Oct. 5, 2020), www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-cuomo-updates-new-yorkers-states-progress-during-1 [perma.cc/373V-KTSN] (noting that the Governor stated: "If we're going to keep religious institutions open, it can only be with two conditions. One, the community must agree, whether it's the Jewish community, whether we're talking about Black churches, whether we're talking about Roman Catholic churches, the religious community has to agree to the rules and they have to agree that they are going to follow the rules. And they have to agree that they are going to be a full partner in the enforcement of the rules. That's condition one. I'm going to meet with members of the ultra-Orthodox community tomorrow. I want to have that conversation directly, myself. This cannot happen again. If you do not agree to enforce the rules, then we'll close the institutions down. I am prepared to do that. Second, after we receive the agreement, and agreement is only as good as the enforcement . . .") [hereinafter Press Conference].

146. *Cuomo*, 141 S. Ct. at 66.

returned to the "definitional battles" that presented tension between the majorities and dissents in *South Bay* and *Calvary Chapel*. The narrow question for the Court was, within the special context of COVID-19, what is a comparable business for the purposes of determining whether an order restricting religious services is discriminatory or neutral?[147] In *Cuomo*, the Court listed a few businesses for comparison: acupuncture facilities, campgrounds, mechanic garages, and manufacturing plants.[148] The Court then observed that these and other businesses and activities included on New York's essential list are not the kind that "can be regarded as essential," but does not define "essential."[149] In other words, the Court did exactly what it appeared to take issue with the state for doing – labeling businesses as essential without setting clear criteria for doing so.[150] This approach fully disregarded and overruled the heavy reliance by many lower courts on Chief Justice Roberts' concurrence in *South Bay*.[151] In *South Bay*, Chief Justice Roberts had attempted to strike the proper balance between deferring to public health experts and the job of the Court to protect the fundamental rights of citizens.[152]

2. Irreparable Harm

The Court very briefly acknowledged that leaving the restrictions in place would cause irreparable harm.[153] It based its reasoning on the fact that individuals would be deprived of participation in important, in-person religious ceremonies and rituals, such as Catholic Holy Communion.[154] While the Court recognized that many churches were able to pivot to provide worship services through streaming platforms or drive-up services, it found these substitutions unsuitable because these in person rituals cannot be done virtually.[155] Interestingly, the Court

147. *Id. See also Constitutional Constraints on Free Exercise Analogies*, *supra* note 140, at 1782 (stating "[t]he COVID-19 cases exposed a longstanding problem in free exercise jurisprudence: the difficulty of evaluating purportedly generally applicable laws with secular exemptions.").

148. *Cuomo*, 141 S. Ct. at 66; *see also* Blackman, *supra* note 67, at 707 (asking "[w]hy these three entities? Who knows? Acupuncture services are provided indoors. Camp grounds are outdoors. And garages store cars, not people.").

149. *Cuomo*, 141 S. Ct. at 66; *see Guidance for Determining Whether a Business Enterprise is Subject to a Workforce Reduction Under Recent Executive Orders*, EMPIRE STATE DEV. (Oct. 23, 2020), www.esd.ny.gov/guidance-executive-order-2026 [perma.cc/LH39-LUEJ] (providing guidance to businesses for determining whether they are considered an essential or non-essential business for purposes of Governor Cuomo's executive orders).

150. Blackman, *supra* note 67, at 708.

151. *Id.*; *S. Bay*, 140 S. Ct. at 1613-14.

152. *S. Bay*, 140 S. Ct. at 1613-14; Blackman, *supra* note 67, at 708.

153. *Cuomo*, 141 S. Ct. at 67-68.

154. *Id.*

155. *Compare Cuomo*, 141 S. Ct. at 68 (finding that "while those who are shut out may in some instances be able to watch services on television, such remote viewing is not the same as personal attendance. Catholics who watch a Mass at home cannot receive communion, and there are important religious traditions in the Orthodox Jewish faith that require personal attendance . . ."), *with Elim Romanian*, 962 F.3d at

expended no text addressing the contrasting potential harm that a COVID-19 outbreak might cause to a congregation, their families, or their communities were one to occur at a house of worship.[156]

3. Public Interest

The Court's analysis of why an injunction is in the public interest is similarly thin.[157] The Court again failed to consider the harm a COVID-19 outbreak within a congregation might cause to the public at large when determining that a preliminary injunction was in the public interest.[158] The Court agreed that because the state failed to argue in-person services taking place under the prior order at 33% capacity were a significant contributor to the spread of COVID-19, they had "not shown that public health would be imperiled if less restrictive measures were imposed."[159] The Court did not appear swayed by the state's claim that cases were on the rise; it did not at all address any data or scientific evidence presented in the courts below or Governor Cuomo's filing in opposition to the injunction.[160]

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347 (finding that "[r]educing the rate of transmission would not be much use if people starved or could not get medicine. That's also why soup kitchens and housing for the homeless have been treated as essential. Those activities must be carried on in person, while concerts can be replaced by recorded music, movie-going by streaming video, and large in-person worship services by smaller gatherings, radio and TV worship services, drive-in worship services, and the Internet. Feeding the body requires teams of people to work together in physical spaces, but churches can feed the spirit in other ways.").

156. *Cuomo*, 141 S. Ct. at 67-68.

157. *Id.* at 68-69.

158. *Id.* The courts below looked to the data on COVID-19 infections and to Chief Justice Roberts' concurrence in *South Bay* in deciding that the injunction was not in the public interest. *See also* Agudath Israel of Am. v. Cuomo, 979 F.3d 177, 181 (2d Cir. 2020) (finding that the state only issued the executive order in response to the changing situation on the ground caused by the COVID-19 pandemic and in response to changes in data showing that case counts were on the rise in the areas of New York placed within a zone); *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) ("The Governor of California's Executive Order aims to limit the spread of COVID-19, a novel severe acute respiratory illness that has killed thousands of people in California and more than 100,000 nationwide. At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect others.").

159. *Cuomo*, 141 S. Ct. at 68.

160. *Id.* at 68-69; Christie Aschwanden, *How 'Superspreading' Events Drive Most COVID-19 Spread*, SCI. AM. (June 23, 2020), www.scientificamerican.com/article/how-superspreading-events-drive-most-covid-19-spread1/ [perma.cc/6967-CMUL]; CTRS. DISEASE CONTROL, CORONAVIRUS DISEASE 2019 (COVID-19): CONSIDERATIONS FOR EVENTS AND GATHERINGS (2020), stacks.cdc.gov/view/cdc/89603/cdc_89603_DS1.pdf [perma.cc/JH8M-B25F]; Appendix For Respondent – Volume I of II at 32-70, 84-104, 109-110, 142-150, 163-173, Opposition to Application for Writ of Injunction, Roman Cath. Diocese of Brooklyn. v. Cuomo, 141 S. Ct. (Nov. 18, 2020) (No. 20-3572).

4. Mootness

Finally, the Court addressed the claims made by the dissenting Justices who argued that, by the time the case reached the Court, the Governor had, "reclassified the areas in question from orange to yellow," rendering the case moot and a ruling unnecessary.[161] The Court noted that injunctive relief was still appropriate because the Governor could, at any time after the Court dismissed the action, reimpose the orange and red zones on those areas of New York.[162] The opinion noted both that Governor Cuomo, by reclassifying the areas, voluntarily mooted the case, and that the plaintiffs "remain under a constant threat" of reclassification as red or orange.[163] The dissenting opinions heavily attacked this aspect of the *per curiam* opinion.[164]

B. Concurring Opinions

1. Justice Gorsuch

In a solo opinion, Justice Gorsuch concurred with the Court's *per curiam* opinion.[165] Strangely however, his opinion spent little time discussing the merits of that opinion, but instead spent several pages both attacking Chief Justice Roberts' concurring opinion in *South Bay* and answering the question of why the Court ever thought it could allow state governments to restrict religious worship in the first place.[166]

Justice Gorsuch began by noting that it is a "long settled principle" that government officials may not treat "religious exercises worse than *comparable* secular activities . . ." and that this principle has been ignored throughout the pandemic.[167] To support this proposition, he cited to a single sentence in *Church of Lukumi*, in which Justice Kennedy stated that even if the City of Hialeah's interests were compelling, the ordinances could not be upheld because the "proffered objectives [were] not pursued with respect to analogous nonreligious conduct."[168] He then turned to the fundamental issue in the COVID-19 free exercise cases: what constitutes

161. *Cuomo*, 141 S. Ct. at 68.

162. *Id.*

163. *Id. See also* Friends of the Earth, Inc. v. Laidlaw Env't. Servs. (TOC), Inc., 528 U. S. 167, 189 (2000) (holding that "[a] defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case. . ."); FEC v. Wis. Right to Life, Inc., 551 U. S. 449, 462 (2007) (finding that there is an exception to the mootness doctrine when ". . . (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." (quoting Spencer v. Kemna, 523 U.S. 1, 17 (1998)).

164. *Cuomo*, 141 S. Ct. at 75, 76, 78.

165. *Id.* at 69-72 (Gorsuch, J., dissenting).

166. *Id. See also S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (reasoning that the Court should be deferential to the executive branch about what businesses and activities to deem essential due to the circumstances and nature of the COVID-19 pandemic).

167. *Cuomo*, 141 S. Ct. at 69.

168. *Id.*; *Church of Lukumi*, 508 U.S. at 546.

a proper comparable business?[169] Like the *per curiam* opinion however, Justice Gorsuch failed to define "comparable" or "essential."[170] In other words, he agreed with the petitioners' assessment that the Governor had made inappropriate "value judgments" about what activities are permissible and which are not.[171] He also noted that these judgments are "exactly the kind the First Amendment forbids," but does not go on to say what judgments they should have made or *how* they were inappropriate.[172]

Justice Gorsuch then moved away from the present case and addressed the restrictions on religious worship stemming from the pandemic more broadly.[173] First, Justice Gorsuch agreed with Justice Alito's dissenting comments from *Calvary Chapel* that governments should have enough information now about the nature of the virus to stop "tak[ing] a holiday" from the Constitution due to the pandemic.[174]

Next, Justice Gorsuch focused in on the dissenting opinions, supported by Chief Justice Roberts' concurrence from *South Bay*, which reasoned that Governor Cuomo's order should stand while the lower court reviewed the case.[175] He noted what he perceives as a misplaced heavy reliance on *Jacobson v. Massachusetts* in the *South Bay* opinion, which he said the Court had "mistaken" for a "towering authority that overshadows the Constitution during a pandemic."[176] Justice Gorsuch

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169. *Cuomo*, 141 S. Ct. at 69-70.

170. *Id.* Justice Gorsuch does suggest that Governor Cuomo seems to have defined "essential" to "perfectly align with secular convenience" but does not himself offer any criteria for determining what otherwise might be considered the proper comparison. *Id.*

171. *See* Emergency Application for Writ of Injunction at 23, Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. (Nov. 18, 2020) (No. 20-3590) (arguing that New York has made impermissible value judgments in placing differing capacity limits on churches and some secular businesses).

172. *Cuomo*, 141 S. Ct. at 69. *See* Fraternal Ord. of Police Network Lodge No. 12 v. City of Newark, 170 F.3d 359, 366 (3d Cir. 1999) (holding that "when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny.").

173. *Cuomo*, 141 S. Ct. at 70.

174. *Id.*; *Calvary Chapel*, 140 S. Ct. at 2605.

175. *Cuomo*, 141 S. Ct. at 70; *S. Bay*, 140 S. Ct. at 1613.

176. *Cuomo*, 141 S. Ct. at 70; *S. Bay*, 140 S. Ct. at 1613; Jacobson v. Massachusetts, 97 U.S. 11, 11 (1905). Like Justice Gorsuch, the petitioners spent a considerable amount of time discussing *Jacobson*, but the state on the other hand only mentions it once to say that the outcome of the case does not need to rely on *Jacobson*. *Compare* Emergency Application for Writ of Injunction at 30, *Cuomo*, 141 S. Ct. (No. 20-3590) (arguing that relying on *Jacobson* in order to continue infringing on a fundamental right is dangerous and misplaced), *with* Opposition to Application for Writ of Injunction at 35, *Cuomo*, 141 S. Ct. (No. 20-3572) (stating that the case does not require reliance on *Jacobson* in order to find Governor Cuomo's order constitutional). It is odd that Justice Gorsuch and the petitioners spent so much time railing against the use of *Jacobson* for two reasons. First, as Chief Justice Roberts points out, *Jacobson* occupied just one sentence in his *South Bay* concurrence. *Cuomo*, 141 S. Ct. at 75 ("Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'"). Second, the State in this case specifically argues that *Jacobson* does not apply to the present

began by saying that *Jacobson* is the wrong case to rely on because the "mode of analysis," the "right asserted," and the "nature of the restriction[s]" between these two cases were not similar.[177] The Court in that case applied rational basis review, as the question was one of due process, and the law gave individuals a choice of whether to be vaccinated or pay a fine.[178] Justice Gorsuch reasoned that no part of *Jacobson* explains why the Court should allow a state government to impose "such serious and long lasting intrusions into settled constitutional rights."[179]

What Justice Gorsuch failed to acknowledge in this analysis is first, that the restrictions at issue were novel, and second, that the petitioners had been satisfied and were only seeking less intense restrictions, not a full abatement.[180] Next, he pointed out that the restrictions were long lasting, but he could not predict the length of Governor Cuomo's order because it was based on scientific criteria surrounding the virus.[181]

Finally, Justice Gorsuch addressed the mootness argument made by some of the dissenting Justices.[182] He more aggressively suggested that Governor Cuomo purposely mooted the case in an effort to escape a ruling against him, while continuing to publicly assert that he could reimpose the more severe restrictions at any time.[183] He concluded by returning to the fundamental issue and reiterating his view that "there is no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques."[184]

2. Justice Kavanaugh

Justice Kavanaugh also filed a concurring opinion not joined by any other justice.[185] He reasoned that because the limits on attendance at religious worship services "likely violate the First Amendment," he would grant the injunction.[186] In his concurrence, he continued to push his *South Bay* and *Calvary Chapel* dissents, under which "the free exercise of religion should be viewed as a 'favored' right."[187]

Justice Kavanaugh began by focusing on the severity of the limits on attendance in the New York order by comparing them to those at issue in *South Bay* and *Calvary Chapel*.[188] It is an odd comparison given that Justice

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circumstances and does not rely on it. Opposition to Application for Writ of Injunction at 35, *Cuomo*, 141 S. Ct. (No. 20-3572).

177. *Cuomo*, 141 S. Ct. at 70-71; *Jacobson*, 197 U.S. at 11.
178. *Cuomo*, 141 S. Ct. at 70-71; *Jacobson*, 197 U.S. at 11.
179. *Cuomo*, 141 S. Ct. at 71; *Jacobson*, 197 U.S. at 11.
180. *Cuomo*, 141 S. Ct. at 66, 71.
181. *Id.* at 71.
182. *Id.*
183. *Id.* at 72.
184. *Id.*
185. *Id.* (Kavanaugh, J., concurring).
186. *Id.*
187. Blackman, *supra* note 67, at 715.
188. *Cuomo*, 141 S. Ct. at 72-73; *see also S. Bay*, 140 S. Ct. at 1613 (determining

Kavanaugh dissented in those cases and still would have granted injunctive relief, even though both those cases involved higher attendance caps than in *Cuomo*.[189] He also reasoned that the New York order is discriminatory because the attendance limits are not applied to "secular buildings in the same neighborhood[s]," including grocery stores, pet stores, and big box stores.[190] But unlike Justice Gorsuch and the *per curiam* opinion, while Justice Kavanaugh did not define "essential," he did fully address the core issue in the case of what is a comparable business when restricting religious worship due to COVID-19.[191]

While Justice Kavanaugh acknowledged the state's argument that the order is generally applicable because "the order treats indoor religious gatherings more favorably than secular activities presenting a similar 'super-spreader' risk," he dismissed it because for him, there is no comparable business.[192] Justice Kavanaugh, citing to *Church of Lukumi* and *Smith*, found that the state did not sufficiently show that there was a reason to treat churches any differently than these secular businesses.[193] He pointed to the following language from *Church of Lukumi*: "[t]he problem, however, is the interpretation given to the ordinance . . . Killings for religious reasons are deemed *unnecessary*, whereas most other killings fall outside the prohibition. The city, on what seems to be a per se basis, deems hunting, slaughter of animals for food, eradication of insects and pests, and euthanasia as necessary."[194] From this language and a seemingly irrelevant and brief discussion of how individualized exemptions might be appropriate in the unemployment compensation context from *Smith*, Justice Kavanaugh opined that these cases support his *Calvary Chapel* concurrence.[195] He stated that, ". . . once a State creates a favored class of business, as New York has done in this case, the State *must justify why houses of worship are excluded from that favored class*."[196]

Next, Justice Kavanaugh addressed whether the order is in the public interest.[197] He recognized the ongoing pandemic and that "[t]he

whether limits on attendance at places of worship to 25% of building capacity or no more than 100 attendees should be allowed to continue); *Calvary Chapel*, 140 S. Ct. at 2604 (deciding whether attendance limits at house of worship set at no more than 50 people regardless of size should be allowed to continue).

189. *Cuomo*, 141 S. Ct. at 72-73; *S. Bay*, 140 S. Ct. at 1614 (Kavanaugh, J., dissenting); *Calvary Chapel*, 140 S. Ct. at 2609 (Kavanaugh, J., dissenting).

190. *Cuomo*, 141 S. Ct. at 73 (Kavanaugh, J., concurring).

191. *Id.* at 73.

192. *Id.*; Opposition to Application for Writ of Injunction, *Cuomo*, 141 S. Ct. (No. 20-3572).

193. *Cuomo*, 141 S. Ct. at 73 (Kavanaugh, J., dissenting); *Church of Lukumi*, 508 U. S. at 537-538; *Smith*, 494 U. S. at 884.

194. *Church of Lukumi*, 508 U. S. at 537 (emphasis added).

195. *Id. See Smith*, 494 U.S. at 884 (noting that in the unemployment context, there is a "good cause standard" which "created a mechanism for individualized exemptions") (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)); *Cuomo*, 141 S. Ct. at 73 (Kavanaugh, J., concurring); *Calvary Chapel*, 140 S. Ct. at 2603.

196. *Cuomo*, 141 S. Ct. at 73 (Kavanaugh, J., concurring) (emphasis added).

197. *Id.*

Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States."[198] However, he agreed with Justice Gorsuch that the Court cannot abdicate its role in protecting the rights of citizens, "especially when important questions of religious discrimination . . . are raised."[199]

Finally, Justice Kavanaugh addressed the mootness claims of Chief Justice Roberts and Justice Breyer. He singled out Chief Justice Roberts' opinion and disagreed with the suggestion that the injunction should not be issued "unless and until a house of worship applies for an injunction and is still in a red or orange zone on the day the injunction is finally issued."[200] Justice Kavanaugh reasoned most strongly against not ruling on the case, and specifically pointed out that Governor Cuomo had not withdrawn the order; he only re-designated the areas where the affected houses of worship are located into a less restrictive zone.[201] He also noted that the state itself does not deny that the case is moot.[202] Therefore, he found it appropriate to issue the injunction.[203]

C. Dissenting Opinions

1. Chief Justice Roberts

Chief Justice Roberts filed a short dissent stating that he would have dismissed the petitioners' challenge on procedural grounds, noting that an injunction is an "extraordinary remedy."[204] He disagreed with the holding in the *per curiam* opinion that this was a situation of voluntary mootness that required the Court to issue an opinion.[205]

Contrary to some of the other Justices, Chief Justice Roberts seemed to always view the issue through the lens of the ongoing global health crisis.[206] He acknowledged that Governor Cuomo might reissue the more restrictive executive order as soon as the Court declined to rule, but found it proper that the Court should defer that decision to the state executive branch given the extenuating circumstances.[207] While ten and twenty-five person limits may seem restrictive, Chief Justice Roberts maintained his assessment laid out in *South Bay* – it would be "a significant matter to override determinations made by public health officials concerning what is necessary for public safety in the midst of a deadly pandemic."[208] He posited that it is a difference of opinion on how to approach being the

198. *Id.* at 74 (citing *S. Bay*, 140 S. Ct. at 1613).
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.* at 74-75.
204. *Id.* at 75 (Roberts, C.J., dissenting) (citing Nken v. Holder, 556 U. S. 418, 428 (2009)).
205. *Id.* at 75.
206. *Id.*; *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring).
207. *Cuomo*, 141 S Ct. at 75 (Roberts, C.J., dissenting).
208. *Id.*; *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring).

Supreme Court when there is a deadly pandemic.[209]

To end his short dissent, Chief Justice Roberts questioned Justice Gorsuch's attack on his *South Bay* concurrence.[210] He did not understand the attack and noted that the Court deferring to state officials to guard the health and safety of its citizens "should be uncontroversial."[211]

2. Justice Breyer

Like Chief Justice Roberts, Justice Breyer found that the Court did not need to address the issue any longer because "[t]hose parts of Brooklyn and Queens where the Diocese's churches and the two applicant synagogues are located are no longer within red or orange zones."[212] He also reasoned that because this case was on appeal for the purpose of obtaining a preliminary injunction while the case was heard on the appellate level, the Supreme Court should not be making a ruling on the merits when the relief sought has already been granted and the lower court can now hear the case on the merits.[213]

Next, Justice Breyer addressed whether or not the petitioners have met their burden of showing that they are entitled to a preliminary injunction.[214] Justice Breyer laid out the full context of the circumstances surrounding the issuance of the executive order, unlike the *per curiam* opinion or either concurring opinion, which only briefly addressed these circumstances.[215] Looking to the courts below, he agreed with their assessments of the issue regarding what is a comparable business.[216]

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209. *Cuomo*, 141 S. Ct. at 75 (Roberts, C.J., dissenting) ("That is because the 'Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States.'") (internal citations omitted).

210. *Id.* at 75-76.

211. *Id.* at 76.

212. *Id.* at 77 (Breyer, J., dissenting); *see also* Opposition to Application for Writ of Injunction at 17, *Cuomo*, 141 S. Ct. (No. 20-3572) (noting that "[c]ontemporaneously with the Second Circuit's decision, the Health Department's iterative review process caused relevant zone boundaries to be redrawn once again, causing what remained of the Brooklyn red zone to be downgraded to an orange zone.").

213. *Cuomo*, 141 S. Ct. at 77.

214. *Id.* (citing *Nken*, 556 U. S. at 428).

215. *Id.* at 76-77.

216. *Id.* at 76. Justice Breyer noted that:

> After receiving evidence and hearing witness testimony, the District Court in the Diocese's case found that New York's regulations were 'crafted based on science and for epidemiological purposes.' It wrote that they treated 'religious gatherings . . . more favorably than similar gatherings' with comparable risks, such as 'public lectures, concerts or theatrical performances.'. The court also recognized the Diocese's argument that the regulations treated religious gatherings less favorably than what the State has called 'essential businesses,' including, for example, grocery stores and banks. But the court found these essential businesses to be distinguishable from religious services and declined to 'second guess the State's judgment about what should qualify as an essential business.'

Id. (quoting *Cuomo*, 495 F. Supp. 3d at 129, 130).

Justice Breyer reasoned that "the nature of the epidemic, the spikes, the uncertainties, and the need for quick action, taken together mean that the state has countervailing arguments based upon health and safety that must be balanced against the applicants' First Amendment challenges."[217] In other words, the petitioners had not shown that a preliminary injunction was in the public interest given the reality of the "changing facts on the ground."[218]

3. Justice Sotomayor

Justice Sotomayor filed a dissenting opinion joined by Justice Kagan.[219] Given that the virus was still spreading and causing spikes in the number of cases, Justice Sotomayor would have continued to follow the Court's denials of relief in *South Bay* and *Calvary Chapel* because they "provided a clear and workable rule for state officials seeking to control the spread of COVID-19."[220] Justice Sotomayor did not agree with either Justice Gorsuch's approach to comparing houses of worship to other businesses without defining why those businesses are comparable, or Justice Kavanaugh's approach of placing houses of worship above all other businesses.[221]

Justice Sotomayor got right to the heart of her disagreement with Justice Gorsuch's concurrence and attacked his attempts to redefine what activities are similar in risk as failing to "square his examples with the conditions medical experts tell us facilitate the spread of COVID-19."[222] She called out his failure to acknowledge the global pandemic still raging, calling it "a deadly game in second guessing."[223] With Justice Kavanaugh, Justice Sotomayor pointed out that his readings of *Smith* and *Church of Lukumi* were misplaced, and these cases did not in fact hold that houses of worship must be treated no worse than any secular activity.[224]

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217. *Id.* at 78 (Breyer, J., dissenting).

218. *Id.* (quoting *S. Bay*, 140 S. Ct. at 1614).

219. *Id.* at 78.

220. *Id.* at 79. *See S. Bay*, 140 S. Ct. at 1613 (finding that state governments may limit attendance at houses of worship only if similarly strict restrictions are placed on comparable secular activities); *Calvary Chapel*, S. Ct. at 2603 (holding same).

221. *Cuomo*, 141 S. Ct. at 79, 80 n.2.

222. *Id.* at 79.

223. *Id.*

224. *Id.* at 80 n.2. Justice Sotomayor takes issue with Justice Kavanaugh's interpretations of *Smith* and *Lukumi*, stating:

> [T]hose cases created no such rule. *Lukumi* struck down a law that allowed animals to be killed for almost any purpose other than animal sacrifice, on the ground that the law was a 'religious gerrymander' targeted at the Santeria faith. *Smith* is even farther afield, standing for the entirely inapposite proposition that 'the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'

Id. (first quoting *Church of Lukumi*, 508 U.S. at 535; then quoting *Smith*, 494 U.S. at 879).

Finally, Justice Sotomayor discussed the *per curiam* opinion's mention that it could be said that New York was targeting religion based on statements made by then-Governor Cuomo regarding the Orthodox Jewish community.[225] She compared the statements to those made by former President Trump regarding his "Muslim Ban" and reasoned that if those statements did not equate to the federal government targeting religion, Governor Cuomo's statements could not be seen as targeting religion either.[226]

IV. PERSONAL ANALYSIS

Part A of this analysis will examine the particular circumstances created by the COVID-19 pandemic that allowed the Court an opportunity to distort the *Smith* test, how that distortion was accomplished, and why it is a manipulation rather than the Court simply clarifying a test or overruling itself.[227] Part B will briefly argue that the Court in *Cuomo* should have abided by Chief Justice Roberts' concurrence in *South Bay* and Justice Sotomayor's dissent given the shifting landscape caused by the COVID-19 pandemic.[228] Part C will discuss the conceivable implications of the Court's manipulation moving forward.

A. The Supreme Court's Manipulation of the Smith Test

The COVID-19 pandemic provided several favorable conditions for the Supreme Court to shift its approach to Free Exercise Clause analysis, moving back to a more "pro-religion," *Sherbert*-like rule.[229] First, a lack of information about the virus, its spread, and its mutations led state governments to seriously infringe on individual activities and liberties.[230] Second, regulations were often incredibly broad because so much was unknown about the virus, leaving them ripe for challenge.[231] Next, the nature of these regulations, coupled with the fact that multiple states imposed the same or similar restrictions, meant that the Court evaluated multiple cases challenging restrictions on free exercise in a relatively short period of time.[232] Finally, the timing of the enactment of states'

225. *Id.* at 80.

226. *Id. See generally* Trump v. Hawaii, 138 S. Ct. 2392 (2018) (finding that the President's statements prior to enacting his Executive Order did not demonstrate that the subsequent order was not neutral).

227. *Smith*, 494 U.S. at 878-79.

228. *Cuomo*, 141 S. Ct. at 78-81; *S. Bay*, 140 S. Ct. at 1613.

229. *See Sherbert*, 374 U.S. at 398, 407 (holding that requiring an individual to stray from their closely held religious beliefs and work on Saturdays is an unconstitutional burden on religious free exercise).

230. *See* Connor Friedersdorf, *How to Protect Civil Liberties in a Pandemic*, THE ATLANTIC (Apr. 24, 2020), www.theatlantic.com/ideas/archive/2020/04/civil-libertarians-coronavirus/610624/ [perma.cc/V9Y2-Q829] (discussing various infringements on civil liberties).

231. *See, e.g.*, *supra* note 3 and accompanying text.

232. *S. Bay*, 140 S. Ct. at 1613; *Calvary Chapel*, 140 S. Ct. at 2603; *Elim Romanian*,

restrictions and the fact that religious plaintiffs were often seeking emergency relief meant these cases ended up on the Court's "shadow docket."[233] As such, the parties were not given the chance to orally argue their positions and the Justices based their findings only on the pleadings and decisions below.[234] The Court took advantage of these circumstances and distorted the free exercise test articulated in *Smith*, which had been applied to Free Exercise Clause challenges for roughly thirty years.

While all of these factors contributed to this distortion, the most crucial factor leading to *Smith*'s reformation was the nature of the government's restrictions and how they were implemented. In New York and many other states, the government divided activities into essential and non-essential categories.[235] This delineation provided a loophole in the Court's approach under *Smith* that the *per curiam* majority and concurring Justices exploited.[236] Prior to COVID-19, the question under the *Smith* test was whether a government regulation was "generally applicable" and "neutral."[237] However, *Smith* did not define "generally applicable" or "neutral."[238] Looking at prior cases that applied *Smith*, the lack of a definition does not appear to have caused an issue when the Court applied the test as written.[239] Those cases involved the government targeting a specific religion or religious practice.[240]

In *Cuomo* and other COVID-19 court cases however, state

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140 S. Ct. 2823 (2020); *S. Bay*, 141 S. Ct. at 716; *Tandon*, 141 S. Ct. at 1294; Harvest Rock Church Inc. v. Newsom (Newsom I), 141 S. Ct. 889 (2020); *Newsom II*, 141 S. Ct. 1289 (2021); Gish v. Newsom, 141 S. Ct. 1290 (2021); Gateway City Church v. Newsom, 1414 S. Ct. 1460 (2021).

233. *See* Baude, *supra* note 122; Stephen Wermiel, *On the Supreme Court's Shadow Docket, the Steady Volume of Pandemic Cases Continues*, SCOTUS BLOG (Dec. 23, 2020, 3:16 PM), www.scotusblog.com/2020/12/on-the-supreme-courts-shadow-docket-the-steady-volume-of-pandemic-cases-continues/ [perma.cc/4X5V-MZ9L].

234. *Id.* (discussing how the Supreme Court handles cases that make their way to it outside of its normal docket and procedures).

235. *See, e.g.*, *supra* note 3 and accompanying text.

236. *Cuomo*, 141 S. Ct. at 65, 73. While Justice Kavanaugh's opinion was only a concurrence, the *per curiam* opinion holds essentially the same. Blackman, *supra* note 67, at 717 (stating "there is thus little day-light between the two opinions. In effect, the majority adopted Justice Kavanaugh's 'most-favored' right approach without saying so expressly."). Looking forward, the Court very quickly fully adopts his language and approach with respect to free exercise as it adjudicated out the remaining COVID-19 free exercise restrictions after its decision in *Cuomo*. *Id. See also Tandon*, 141 S. Ct. at 1296 (citing *Cuomo's per curiam* opinion, Justice Kavanaugh's concurring opinion, and Justice Gorsuch's concurring opinion all within the first four paragraphs of the opinion).

237. *Smith*, 494 U.S. at 879.

238. *Id.* at 872; *Constitutional Constraints on Free Exercise Analogies*, *supra* note 140, at 1784.

239. *See, e.g.*, *Church of Lukumi*, 508 U.S. at 520 (finding the government targeted a specific religion and its specific practices when it passed an ordinance banning certain animal sacrifices); Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1730 (2018) (finding the government targeted a specific religion in the language it used when debating where it was a civil rights violation to refuse to bake a cake for a gay couple's wedding).

240. *Church of Lukumi*, 508 U.S. at 520; *Masterpiece Cakeshop*, 138 S. Ct. at 1730.

governments were not targeting a particular religion or even religion as a whole, but instead were targeting the virus and its spread.[241] In these cases, the bifurcated regulation of businesses and activities by the government was distinctive in that a large number of public and even some private activities and businesses were all being regulated in some regard.[242] In fact, as Justice Sotomayor points out in her dissent, many activities were being treated much worse than houses of worship, with concert and lecture halls, movie theaters, and sporting events being completely shut down.[243] These regulations, divided and layered, not targeted at one specific industry, created a point of divergence in the Court's seemingly well-settled understanding of *Smith* and how to apply it.

To answer the question of whether the government regulations at issue in *Cuomo* are generally applicable and neutral, despite there being no express definition for these terms, Justice Sotomayor reasoned that these concepts should be determined based on the category in which houses of worship were placed and in comparison to other houses of worship.[244] While *Smith* does not expressly define "neutral," it does stand for the proposition that a person cannot be exempted from a law that is neutral on its face.[245]

We can glean from this proposition a definition. If no one can attend a worship service with more than ten or twenty-five people present, regardless of the religious denomination, the regulation is neutral with respect to religion. Additionally, within the non-essential category there were secular activities that no one could attend.[246] This more favorable treatment for religious activities further evidences the neutrality of the regulation. This approach makes sense; in order to determine if something is neutral, it is necessary to evaluate its position in comparison to what it is being positioned against.

The majority and concurring Justices on the other hand, particularly Justice Kavanaugh, did not use the same comparisons to determine whether the regulation in *Cuomo* was neutral.[247] Justice Kavanaugh reasoned that there was only one comparison to be made and that is whether religion comes out on top as compared to any secular activity.[248] However, as Justice Sotomayor points out, Justice Kavanaugh reached his conclusion through the misapplication of certain language from *Church of Lukumi* and *Smith*.[249] He relied on Justice Kennedy's use of the term

241. *Cuomo*, 141. S. Ct. at 78 (Sotomayor, J., dissenting).
242. *Id.* at 65-66 (per curiam).
243. *Id.* at 79.
244. *Id.*
245. *Smith*, 494 U.S. at 878-79; *see also Church of Lukumi*, 508 U. S. at 533 (stating that the "minimum requirement of neutrality" is "a law that does not discriminate on its face" and stating that a "a law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context.").
246. *Cuomo*, 141. S. Ct. at 79.
247. *Id.* at 66, 73.
248. *Id.* at 73.
249. *Id.* at 80 n.2 (Sotomayor, J., dissenting).

"necessary," likening it to "essential."[250] Except *Church of Lukumi* did not involve the comparison of two religions, but instead the targeting of a particular religion based on one of its tenets.[251] Reliance on this language is therefore indeed misplaced.[252]

In determining that the majority has distorted the *Smith* test, it is important to acknowledge that as a matter of course, the Supreme Court clarifies, expands, narrows, or even overrules tests it once abided by.[253] As a pertinent example, we have seen in this Case Note many times that the Court has taken a new approach to free exercise challenges by overruling itself.[254] The *Cuomo* majority, however, did none of these things. In *Cuomo*, instead of overruling *Smith* and implementing a new test, the *per curiam* majority has ostensibly kept the *Smith* test in place. In reality, it is now a wolf in sheep's clothing. The Court completely reimagined its application. Without having to contend with stare decisis, the Court has destroyed the original intent and purpose behind the creation of the test in *Smith* and reverted back to an approach like the Court used in *Sherbert v. Verner*.[255] *Smith* now stands for the exact opposite of what it stood for in the last thirty years. The so-called "conservative majority" has managed to transform the *Smith* test into one in which a government regulation will almost always fail against a Free Exercise Clause challenge.[256]

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250. Blackman, *supra* note 67, at 717; *Church of Lukumi*, 508 U.S. at 537-38; *Cuomo*, 141 U.S. at 73.

251. *Church of Lukumi*, 508 U.S. at 520.

252. *Cuomo*, 141 U.S. at 80 n.2 (Sotomayor, J., dissenting).

253. *Compare* Plessy v. Ferguson, 163 U.S. 537 (1896) (holding that separate but equal accommodations for Black and white individuals did not violate the 13th and 14th Amendments of the Constitution), *and* Roe v. Wade, 410 U.S. 113 (1973) finding that the 14th Amendment to the Constitution encompasses a right to privacy that protects a woman's right to choose to have an abortion), *with* Brown v. Bd. Of Educ., 347 U.S. 483 (1954) (holding that the concept of separate but equal accommodations is unconstitutional when applied to public schools), *and* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (finding that the Constitution does not confer a right to an abortion because abortion is not referred to in the Constitution and the right to one is not "deeply rooted" in the country's history and tradition).

254. *Reynolds*, 98 U.S. at 166 (making a distinction between religious practices and religious beliefs and holding that government actions may interfere with practices but not with beliefs or opinions); *Sherbert*, 374 U.S. at 403-04 (applying a compelling interest test to Free Exercise Clause challenges; a plaintiff must show that their religious practice has been substantially burden, and if they can, the government must show there was a compelling interest for the intrusion); *Smith*, 494 U.S. at 878-79 (holding that a generally applicable, religion neutral law that prohibited a certain action for *everyone*, not just members of a particular religion, did not violate the Free Exercise Clause).

255. *Cuomo*, 141 U.S. at 63.

256. *Id.*; Nina Totenberg, *The Supreme Court Is the Most Conservative in 90 Years*, NPR (July 5, 2022), www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative [perma.cc/99BT-YGA3]; Blackman, *supra* note 67, at 727-48. For a more in-depth discussion of judicial conservatism, see generally David A. Strauss, *The Death of Judicial Conservatism*, 4 DUKE J. CONST. L. & PUB. POL'Y 1 (2009).

B. The Court Should Have Followed Justice Sotomayor's Dissent in Cuomo and Chief Justice Roberts' Concurrence in South Bay

The Supreme Court, given the circumstances under which *Cuomo* hit its docket, should not have taken advantage of the opportunity to completely redefine its approach to free exercise analysis.[257] First, Justice Breyer and Chief Justice Roberts were correct in reasoning that the case was no longer at issue.[258] However, the Court failed to really consider the changes made by Governor Cuomo to the regions in which the petitioners were located.[259] The changes not only granted them more relief than they were seeking, but also went further than the prior order in place under which the churches were happy to operate.[260] Seemingly, the petitioners were more cognizant of the dangers of COVID-19 than the majority was willing to recognize.

On the other hand, even if the Court did find it appropriate to rewrite its approach to the Free Exercise Clause and return to a more *Sherbert*-like test, it should have given more deference to the government's "compelling interest" in protecting public health and safety.[261] The Court's *per curiam* and concurring opinions pay only lip service to the circumstances and best known-at-the-time science at play in New York's decision to restrict attendance at houses of worship.[262]

Without pointing to any data, the Court and a few individual Justices refute that there is any difference between sitting in church and shopping in a grocery store or visiting the acupuncturist's office.[263] What the Court failed to acknowledge is that a full congregation may have hundreds or even thousands of people, while the number of people one will run into in an acupuncturist's office is likely to be much fewer. As Chief Justice Roberts noted in his *South Bay* concurrence, and as was still true when the Court decided *Cuomo*, "[a]t this time there is no known cure, no effective treatment, and no vaccine."[264] As such, as Justice Sotomayor aptly put it, there is "no justification for the Court's change of heart."[265] If the Court had continued to follow Justice Roberts' *South Bay* concurrence, deferring to the executive branches and the scientists, we may not have seen some of the differing decisions by lower courts that have come down regarding religious exemptions for vaccine mandates.[266] The Court

257. *Cuomo*, 141 U.S. at 63.

258. *Id.* at 75.

259 N.Y. Exec. Order No. 202.38 (June 6, 2020), www.governor.ny.gov/sites/default/files/atoms/files/EO-202.38-final.pdf [perma.cc/25GP-RHWP].

260. *Id.*

261. *Sherbert*, 374 U.S. at 403.

262. *Cuomo*, 141 S. Ct. at 68, 73.

263. *Id.* at 66, 73.

264. *S. Bay*, 140 S. Ct. at 1613.

265. *Cuomo*, 141 S. Ct. at 79 (Sotomayor, J., dissenting).

266. *Compare* Tierney Sneed, *Judge Blocks Navy Vaccine Policy for Legal Challengers Citing Religious Objections*, CNN (Jan. 3, 2022), www.cnn.com/2022/01/03/politics/navy-covid-vaccine-policy-religious-objection/index.html

should have handed down rulings that allowed the executive branches more flexibility. Over the last few years, the country has battled against new COVID-19 variants, some that have spread rapidly.[267] As a result, hospitals have at times been overwhelmed.[268] Not following the "clear and workable rule for state officials seeking to control the spread of COVID-19" handed down in *South Bay* left states almost powerless to stop large religious gatherings from contributing to the spread.[269]

C. The Implications of Reforming Smith

In every case that came to the Supreme Court after *Cuomo* challenging government COVID-19 restrictions on religious services, the Justices struck down the regulations and granted relief to the plaintiffs.[270] Putting religion in a "most-favored" position poses several issues which Justice Scalia's majority decision in *Smith* predicted.[271] First, a major purpose of the Court's decision in *Smith* was to avoid courts needing to delve into "the 'centrality' of religious beliefs" and making determinations about religion it is not equipped to make.[272] A test that allows for exceptions for religious beliefs will require courts to make determinations as to the importance of certain beliefs or tenants. Inevitably, district and circuit courts across the country will disagree,

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[perma.cc/A6PW-SU4U] (discussing federal appellate court ruling allowing members of the Navy to receive religious exemptions to the Navy's vaccine requirement), *with* Laura Ban, *Federal Appeals Court Allows New York COVID Vaccine Mandate for Healthcare Workers Over Religious Exemption Claims*, JURIST (Nov. 1, 2021), www.jurist.org/news/2021/11/federal-appeals-court-denies-new-york-healthcare-workers-religious-exemption-to-covid-19-vaccine-mandate/ [perma.cc/8H2Q-9WKB] (discussing federal appeals court's denial of religious exemptions for a New York vaccine mandate for healthcare workers).

267. Reis Thebault et al., *U.S. Approaches New Records as Experts Debate Which Numbers are Most Important*, WASH. POST (Jan. 6, 2022), www.washingtonpost.com/nation/2022/01/06/covid-omicron-variant-live-updates/ [perma.cc/32FG-D64Q]; Kathy Katella, *Omicron, Delta, Alpha, and More: What to Know About the Corona Virus Variants*, YALE MED. (Jan. 6, 2023), www.yalemedicine.org/news/covid-19-variants-of-concern-omicron [perma.cc/F8UC-TEDZ].

268. Jennifer Sinco Kelleher & Terry Tang, *Omicron Explosion Spurs Nationwide Breakdown of Services*, AP NEWS (Jan. 8, 2022), www.apnews.com/article/coronavirus-pandemic-health-business-education-pandemics-76830eee3a8c2a5688df4fc77488195a [perma.cc/QDF4-T9P4]; Dylan Scott, *2022 Was the Worst for Many US Hospitals. The Aftershocks Will Last for Years.*, VOX (Dec. 29, 2022), www.vox.com/policy-and-politics/2022/12/29/23510957/covid-19-surges-rural-hospitals-primary-care-rsv-flu-monkeypox [perma.cc/PW49-N4B8].

269. *Cuomo*, 141 S. Ct. at 79; *S. Bay*, 140 S. Ct. at 1613; Haley Cohen, *After Supreme Court Ruling, New Yorkers go Back to Synagogue*, THE JERUSALEM POST (Dec. 3, 2020), www.jpost.com/diaspora/after-supreme-court-ruling-new-yorkers-go-back-to-synagogue-651101 [perma.cc/HA7W-PK3J].

270. *Cuomo*, 141 S. Ct. at 63; *S. Bay*, 141 S. Ct. at 716 (granting relief to houses of worship from state COVID-19 restrictions); *Tandon*, 141 S. Ct. at 1294 (holding same); *Newsome* I, at 889 (holding same); *Newsom II*, 141 S. Ct. at 1289 (holding same); *Gish*, 141 S. Ct. at 1290 (holding same); *Gateway City*, 1414 S. Ct. at 1460 (holding same).

271. *Smith*, 494 U.S. at 885.

272. *Id. Smith*, 494 U.S. at 872, 887.

causing both confusion and the Supreme Court to become the arbiter of whether one individual's religious beliefs are more important than another's.

Second, in *Smith*, Justice Scalia noted that the compelling interest standard in *Sherbert* was already difficult for the government to overcome.[273] Now, under the new two-part test that *requires* a government to show that it has a compelling interest for not treating religion "most-favorable," the test will be even harder to meet.[274]

After stay at home orders were lifted the Free Exercise fight shifted to vaccination requirements and those seeking religious exemptions.[275] While for now, the Supreme Court has sided with governments, it may, as it did in *Cuomo*, effectively ignore the pandemic and reject any attempts by states and the federal government to protect the health and safety of their citizens.[276] The Court appears poised to allow religious exemptions under its new approach to *Smith* and free exercise.[277] All the more reason the Court should not have taken advantage of the COVID-19 crisis to reform its approach to its Free Exercise Clause analysis.

V. CONCLUSION

The long-lasting effects of the COVID-19 pandemic continue to unfold and will continue to be realized.[278] The virus killed more

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273. *Smith*, 494 U.S. at 888. Scalia opined:

> Moreover, if 'compelling interest' really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them.

Id.

274. *Calvary Chapel*, 140 S. Ct. at 2612.

275. *See, e.g.*, Jeremy Gorner & Dan Petrella, *Illinois Legislators Send Gov. J.B. Pritzker Measure to Eliminate Potential Loophole on Covid-19 Vaccination Mandates*, CHI. TRIB. (Oct. 29, 2021), www.chicagotribune.com/politics/ct-illinois-legislature-right-of-conscience-20211029-rj733ubgabehxoxbkltvhrq2i-story.html [perma.cc/N8BS-9XGL] (discussing Illinois passage of an amendment to its Health Care Right of Conscience Act due to individuals attempting to use the law to "skirt coronavirus vaccination mandates by citing moral or religious objections."); *Cuomo*, 141 U.S. at 65.

276. *See, e.g.*, Does 1-3 v. Mills, 142 S. Ct. 17, 17 (2021) (denying application for injunctive relief by various healthcare workers subject to a COVID-19 vaccine mandate in Maine); Biden v. Missouri, 142 S. Ct. 647 (2022) (allowing the Department of Health and Human Services ("HHS") to require employees in healthcare facilities that receive HHS funding to be vaccinated against COVID-19).

277. *See* Donna Gitter, *The Supreme Court Threatens to Undermine Vaccination Decisions Entrusted to the States*, BILL OF HEALTH (Oct. 27, 2022), blog.petrieflom.law.harvard.edu/2022/10/27/the-supreme-court-threatens-to-undermine-vaccination-decisions-entrusted-to-the-states [perma.cc/7Q2Z-UM5B] (discussing the Supreme Court's path to allowing religious exemptions to government vaccine mandates).

278. *See* Jen Christensen, *COVID-19 Vaccines Have Saved More Than 3 Million Lives*

individuals across the country in 2021 than in 2020.[279] It killed more than 267,000 people in 2022, and is not going to disappear.[280] Other countries have seen incredible surges and the United States is not immune from a similar fate.[281] The COVID-19 free exercise cases, including *Cuomo*, fast tracked the Court's ability to reform *Smith* and shift to a more *Sherbert*-like analysis. This allowed for exemptions to general laws based on religious convictions.[282] The immediate implication of changing the Free Exercise Clause approach came to fruition as government officials sought to keep citizens safe in the face of an unknown and quickly developing health crisis. Additionally, this new approach may jeopardize future attempts by government officials to keep their citizens in the face of a new health crisis. On a broader scale, abandoning the *Smith* test as it was originally articulated will, as Justice Scalia put it, "court[] anarchy."[283]

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in US, Study Says, but the Fight Isn't Over, CNN HEALTH (Dec. 13, 2022), www.cnn.com/2022/12/13/health/covid-19-vaccines-study/index.html [perma.cc/62LU-QLHQ] (noting that as of the time of publication "[a]bout 14% of the US population lives in an area that meets the CDC's criteria for a 'high' Covid-19 community level, including New York City, Los Angeles County and Maricopa County, Arizona – a sharp increase from less than 5% last week but far below levels of prior surges. And at this level, the CDC recommends wearing a mask indoors."); Kathy Katella, *Is It Time To Put On a Mask Again?*, YALE MED. (Dec. 15, 2022), www.yalemedicine.org/news/cdc-mask-guidance [perma.cc/V82Y-LSRZ] (writing that, as of the time of publication, the CDC was encouraging individuals to wear masks to prevent the spread of COVID-19).

279. Farida B. Ahmad, et al., *Provisional Mortality Data – United States, 2021*, CDC MORBIDITY & MORTALITY WKLY. REP. (Apr. 29, 2022), www.cdc.gov/mmwr/volumes/71/wr/mm7117e1.htm [perma.cc/G9UN-U5XF].

280. Deirdre McPhillips, *Covid-19 Killed Fewer People in the US in 2022, but Early Data Suggests it was Still a Leading Cause of Death*, CNN HEALTH (Dec. 13, 2022), www.cnn.com/2023/01/17/health/covid-death-reporting-2022/index.html [perma.cc/2NVY-9JU6]; Scott Neuman, *Fauci Says COVID-19 Won't Go Away Like Smallpox, but Will More Likely Become Endemic*, NPR (Jan. 18, 2022), www.npr.org/sections/coronavirus-live-updates/2022/01/18/1073802431/fauci-says-covid-19-wont-go-away-like-smallpox [perma.cc/32K7-YS9C].

281. David Pierson, *This Is What Shanghai's COVID Outbreak Looks Like*, N.Y. TIMES (Jan. 10 2023), www.nytimes.com/2023/01/10/world/asia/china-covid-shanghai-photos.html [perma.cc/3LPT-WDMP].

282. *Cuomo*, 141 S. Ct. at 63; *Smith*, 494 U.S. at 872; *Sherbert*, 374 U.S. at 398.

283. *Smith*, 494 U.S. at 888.