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Legal Sidebar

Banning Religious Assemblies to Stop the Spread of COVID-19

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Most of the United States is now subject to some form of state or local order directing residents to "stay at home" and closing nonessential businesses in response to Coronavirus Disease 2019 (COVID-19). While the particulars of the orders vary, some state and local orders prohibit in-person religious gatherings and require houses of worship to shut down physical facilities. To the extent that the orders burden residents' exercise of religion, they may implicate federal and state protections for religious freedom, including the Free Exercise Clause of the U.S. Constitution's First Amendment. Some of these bans are already being challenged in court, and at least one Kentucky church has prevailed in its legal challenge: on April 11, 2020, a federal district court entered a temporary restraining order preventing the Louisville mayor from prohibiting "drive-in church services." By contrast, a day earlier, another federal court had declined to grant a California church an exemption from a San Diego order prohibiting in-person religious gatherings.

This Legal Sidebar explores legal challenges to orders prohibiting religious gatherings, focusing on Free Exercise Clause arguments. A separate Sidebar discusses other First Amendment considerations raised by the gathering bans, including whether stay-at-home orders violate federal constitutional protections for freedom of speech.

Legal Background: Free Exercise Clause

The First Amendment to the U.S. Constitution bars federal and state governments from "prohibiting the free exercise" of religion. (The First Amendment applies to state governments through the Fourteenth Amendment.) Governments may not regulate religious *beliefs*, for example, by compelling people to affirm certain views or punishing the expression of specific beliefs. Governments also may not punish religiously motivated *actions* if the government is motivated by a purpose to disapprove of a specific religion or religion in general. Thus, the Supreme Court has said that a law specifically prohibiting casting statues for worship or "bowing down before a golden calf" "would doubtless be unconstitutional."

However, governments can regulate religious actions through laws of general applicability that do not specifically target religious activity. In *Employment Division v. Smith*, the Supreme Court held that a state could, without violating the Free Exercise Clause, deny unemployment benefits to two members of a Native American church who had used peyote for sacramental purposes. The church members' peyote use violated state drug laws: criminal laws that generally prohibited the use of certain drugs and were "not

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specifically directed at their religious practice." The Supreme Court said 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).'" Accordingly, under *Smith*, if a law is generally applicable and neutral with respect to religion—that is, if it does not "target" specific types of religious exercise or reflect hostility towards religion, but prohibits specific activities regardless of whether they are religiously motivated—the government can apply that law to religiously motivated activities without violating the First Amendment's Free Exercise Clause, even if the law "would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs."

On the other hand, the Court has said that if a law does "infringe upon or restrict practices because of their religious motivation," it will be subject to strict scrutiny and ruled "invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." The Supreme Court has struck down laws that were "gerrymandered" to prohibit only religious activities and laws that, on their face, "expressly discriminate[d] against" individuals because they are religious. The Supreme Court has also ruled that governments may violate the Free Exercise Clause if they *apply* laws in a way that demonstrates hostility to religion. For example, in a 1953 decision, the Supreme Court held that a city acted unconstitutionally when it applied a local law prohibiting people from "address[ing] any political or religious meeting in any public park" to a minister who addressed a group of Jehovah's Witnesses. Observing that other religious groups had been allowed to hold church services in local parks, the Court concluded that, by treating the Jehovah's Witnesses' service differently, the city was unconstitutionally "preferring some religious groups over this one."

It is possible, however, that courts might apply different standards of review to free exercise challenges in emergency situations. As discussed in more detail in this Sidebar, some intermediate federal courts of appeal have held that in limited emergency circumstances, courts may apply a more lenient standard of review to analyze the constitutionality of measures responding to the emergency. The U.S. Court of Appeals for the Fifth Circuit outlined one such standard on April 7, 2020, in a case considering the constitutionality of a Texas order affecting the availability of abortions. The Fifth Circuit said that in an emergency, the government may "curtail constitutional rights so long as the measures have at least some 'real or substantial relation' to the public health crisis and are not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'" The court was quoting from a 1905 Supreme Court decision, *Jacobson v. Massachusetts*, in which the Court rejected a constitutional challenge to a law requiring smallpox vaccinations. Other federal appellate courts have applied an emergency-circumstances standard that asks whether the government acted in "good faith" and "whether there is some factual basis" to conclude that the acts "were necessary to maintain order." There is, however, relatively little judicial precedent specifically testing how free exercise challenges should be adjudicated in an emergency.

Gathering Bans

Most states and many local governments have responded to the threat posed by COVID-19 by adopting orders that direct residents to stay at home, ban certain types of in-person gatherings, and shut down the facilities of nonessential businesses. Some state orders, like Maryland's March 30 order, expressly prohibit religious gatherings. Other orders implicitly ban religious services if they qualify as in-person gatherings that meet the relevant size requirements, and may require houses of worship to close physical facilities if they qualify as covered nonessential businesses. To the extent that these coronavirus-related emergency orders prohibit religious gatherings, they may implicate the Free Exercise Clause of the First Amendment. In light of these concerns, some state orders exempt houses of worship or provide other forms of accommodation to religious exercise. New York, for example, issued guidance stating that "houses of worship are not ordered closed," interpreting an early iteration of its order closing in-person

activities of non-essential businesses. Texas's statewide order issued on March 31 classified "religious services conducted in churches, congregations, and houses of worship" as "essential services."

Some houses of worship have defied state and local gathering bans. On March 30, one Florida pastor who held church services disobeying a local quarantine order was arrested and faced misdemeanor charges. (The Florida governor later issued a statewide stay-at-home order classifying religious activities as permitted "essential activities." The statewide order superseded "conflicting" local orders.) Other churches and religious individuals have brought lawsuits preemptively challenging state orders in California, Virginia, and elsewhere. For instance, the Department of Justice recently filed a statement of interest in one proceeding in a federal trial court in Mississippi, arguing that a city measure prohibiting drive-in church services is unconstitutional because the measure treats churches worse than other businesses, such as restaurants, that are permitted to operate drive through services.

Under *Smith*, to the extent that emergency orders prohibiting in-person gatherings are generally applicable to a variety of different gatherings and neutral with respect to religion, they could likely be applied to religious gatherings without having to satisfy strict scrutiny under the First Amendment. In at least one free exercise challenge in San Diego, the government argued that its order is permissible under *Smith* as a valid and neutral law of general applicability. Nonetheless, even if a law is generally applicable on its face, if there is evidence that a government is targeting certain religious groups for violating quarantine orders, or if a government is giving preferential treatment to secular gatherings, as compared to similarly situated religious gatherings, a court might review the government's action under a heightened standard of scrutiny. Government actions may be particularly susceptible to legal challenge if they do not appear sufficiently tailored to address the particular emergency at hand.

For example, one federal trial court in Kentucky ruled on April 11 that by prohibiting "drive-in church services," the mayor of Louisville, Kentucky, was not acting in "a manner that" was "'neutral' between religious and non-religious conduct." The court said the mayor made "orders and threats that [were] not 'generally applicable' to both religious and non-religious conduct," allowing other types of activities to continue by way of parking or drive-through. (Some have questioned whether this order did in fact sanction drive-in church services—the mayor said he had not threatened any "legal enforcement" against drive-in services—but the court described it as doing so.) The court noted that Louisville had allowed drive-through liquor stores to remain open. As a result, the court concluded that the city had to satisfy strict scrutiny and show that the prohibition on religious services was narrowly tailored to a compelling government interest. The court held that the city likely could not meet this strict standard, ruling that prohibiting residents from "worshiping together" "in the relative safety of their cars" likely violated the First Amendment. The trial court cited the Fifth's Circuit's test for evaluating emergency orders quoted above, saying that the mayor could implement emergency measures that "have at least some 'real or substantial relation' to the public health crisis and are not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'" But because the court concluded that the mayor's order did, "beyond all question," violate the Free Exercise Clause, the order did not pass muster under this more lenient standard. The Kentucky trial court entered a temporary restraining order, an initial decision that may be subject to further review.

Other pending legal challenges may test whether other governments can meet the strict scrutiny standard. Some have argued that measures responding to a global pandemic should satisfy strict scrutiny, pointing out the gravity of the threat and noting that most orders are limited in time and allow individuals to continue worshipping in alternative ways. For instance, in response to the Florida pastor above who argued that the local government violated the First Amendment by prosecuting him, the government claimed (as summarized by the *Washington Post*) that it had "a compelling government interest of stopping the virus, the order is narrowly tailored to be temporary, and the church—like other services—can still reach its audience online." On April 10, a federal judge in California denied a church's request for an order that would have prevented San Diego County from enforcing its stay-at-home order

prohibiting religious gatherings. The court's precise reasoning is not entirely clear from news reports discussing the court's ruling, which was issued by telephone, but it appears that the judge viewed the government as having a compelling interest in responding to "a severe public health crisis," and noted that the church had alternative methods of worship, such as live-streaming its services. On the other hand, as the Kentucky ruling demonstrates, government orders may not satisfy strict scrutiny, particularly if an order prevents methods of gathering such as drive-through services that are allowed for non-religious gatherings. It will likely be more difficult for broader prohibitions that reach beyond face-to-face gatherings or are not limited in duration to satisfy heightened review standards.

Considerations for Congress

As the Department of Justice's recent filing in the Mississippi litigation reflects, state level restrictions on religious gatherings may implicate federal interests in protecting free exercise rights. Moreover, cases testing the constitutionality of the gathering bans will be relevant to Congress as it mulls federal responses to COVID-19. These cases may demonstrate whether and how the government may limit religious gatherings in response to emergency circumstances. In late March, some lawmakers called for a uniform federal stay-at-home order. Commentators have argued that religious exemptions from gathering bans undermine public health efforts by allowing the disease to spread at religious gatherings. If the federal government were to properly exercise one of its enumerated powers to institute a nationwide order, *Smith* suggests that, so long as the order is generally applicable and neutral with respect to religion, it could be applied to religious gatherings without violating the Free Exercise Clause. The constitutionality of any such action may, however, still depend on whether religious gatherings are treated similarly to other types of nonreligious activities.

On the other hand, others have raised concerns about inadequate protections for religious practice during the pandemic. To the extent Congress shares those concerns, it could potentially invoke its power under Section 5 of the Fourteenth Amendment to protect free exercise rights and prevent states and localities from prohibiting religious gatherings. However, when Congress exercises its Section 5 authority, the Supreme Court has said that Congress's response must be congruent and proportional to a demonstrated harm. Any law would have to be carefully tailored to respond to state action, and a court would probably look for a legislative record "show[ing] the evidence . . . of a constitutional wrong."

More broadly, these cases may also shed light on an area of the law—free exercise jurisprudence—that is somewhat in flux. In February, the Supreme Court granted the petition for certiorari in *Fulton v. City of Philadelphia*. The petitioners in that case have asked the Court to reconsider *Smith*, reflecting broader dissatisfaction with the rule announced in that decision. How lower courts evaluating challenges to stay-at-home orders treat *Smith* and what standard they to use to review challenged actions may provide further insight into an evolving area of the law.

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