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RELIGION, LAW AND COVID-19 EMERGENCY

Reconciling the Protection of Public Health with Religious Freedom: the Viability of Shared Responses

by Adelaide Madera*

mail: adelaide.madera@unime.it

The Coronavirus pandemic has generated an unprecedented health emergency, that has severely affected our daily lives. Government "alarmed"[1] responses, aimed at limiting the devastating impact of the health crisis "have led to a resurgence of authoritarianism, particularly in Western democracies,"[2] resulting in unimaginable restrictions of fundamental rights and liberties. In this framework, the pandemic has had serious implications on religious freedom, as measures restricting gatherings have deeply affected faith communities' practices and rituals.

Undoubtedly, in a first phase, the pressing need to safeguard the compelling interests of public health and safety prevailed. However, the pandemic has also emphasized the crucial interplay between competing rights and the courts have often had the difficult task of reaching a reasonable balance between the conflicting claims of individual liberty and preservation of health[3].

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* Associate Professor of Law and Religion at the University of Messina (Italy)

[1] See S. Ferrari, *In Praise of Pragmatism*, in A. Ferrari, S. Pastorelli (eds.), *The Burqa Affair Across Europe: Between Public and Private Space*, Routledge, London-New York, 2016, pp. 10-11.

[2] See M. Hill, *Locating The Right to Freedom of Religion or Belief Across Time and Territory* in S. Ferrari, M. Hill, A. Jamal, R. Bottoni (eds.), *Routledge Handbook of Freedom of Religion or Belief*, Routledge, 2021 (forthcoming), *Introduction*.

[3] See C. McCrudden, *Democracy, Protests and Covid 19: the Challenge of (and for) Human Rights*, in *UKCLA*, 19 June 2020, https://ukconstitutionallaw.org/2020/06/19/christopher-mccrudden-democracy-protests-and-covid-19-the-challenge-of-and-for-human-rights/.

In the U.S. context, state restrictions on religious freedom claims have been fiercely litigated during the lockdown, resulting in complex dynamics between state governors, federal courts and the US Department of Justice[4]. Two cases concerning state limitations on religious assemblies reached the U.S. Supreme Court. Both of them raise crucial concerns; what is the proper standard of judicial review? What is the role of the judiciary during a health crisis?

In *South Bay United Pentecostal Church, et al., v. Gavin Newsom, Governor of California, et al.*[5], a highly "polarized"[6] Supreme Court denied a church's request to enjoin California's Executive Order restricting attendance at houses of worship to 25 percent of a building's capacity or a maximum of 100 people. Immediately, some commentators claimed that "The Supreme Court just completed a contentious term in which it handed down some significant legal victories for the religious right. The Court's Republican majority, which includes Roberts, is often quite sympathetic to religious objectors who claim they should not have to follow laws that burden their religious beliefs. So it's more than a little surprising that the church did not prevail in *Calvary Chapel*"[7].

[4] See A. Madera, *Some Preliminary Remarks on the Impact of COVID-19 on the Exercise of Religious Freedom in the United States and Italy*, in *Stato, Chiese e Pluralismo Confessionale*, *Rivista telematica, (www.statoechiese.it)*, 70-2020; C. Graziani, *Libertà di culto e pandemia (COVID-19): La Corte Suprema degli Stati Uniti divisa*, in 2 *Consulta on Line,* 357, 2020 (*www.giurcost.org*); A. Licastro, *Normativa anti Covid vs. Free Exercise Clause nella giurisprudenza della Corte Suprema USA: un ritorno alla dottrina della "neutralità" nell'interpretazione dei principi costituzionali in materia religiosa?* in *Stato, Chiese e Pluralismo Confessionale*, *Rivista telematica,* (www.statoechiese.it), 34-2020.

[5] See *South Bay United Pentecostal Church, et al., v. Gavin Newson, Governor of California, et al.*, 590 U.S._ (2020).

[6] See M.O. De Girolami, *Constitutional Contraction: Religion and the Roberts Court*, in P. Annicchino (ed.), *La Corte Roberts e la tutela della libertà religiosa*, European University Institut, Fiesole, 2017, p. 23.

[7] See I. Millhiser, *The Supreme Court's Surprising Decision on Churches and Pandemic, Explained*, in *Vox*, 25 July 2020, *https://www.vox.com/2020/7/25/21338216/supreme-court-churches-pandemic-covid-samuel-alito-brett-kavanaugh-calvary-chapel*.

Actually, the *Jacobson* rationale[8] governs the ruling[9]. Although there is no majority opinion, Justice Roberts explained, in his own opinion, the reason of the dismissal of the church's claim: the churches had been treated equally to comparable secular businesses. However, the *South Bay* case underlines the blurred boundary between equal treatment of churches and selective discrimination, that is strictly connected to the identification of "the most appropriate secular comparator"[10]. This is a crucial issue, and the judges show conflicting understandings of it, emphasizing the sharp division between them[11].

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[8] See *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 31 (1905). According to this landmark decision: "If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law."

[9] According to Justice Roberts "The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically ac-countable officials of the States "to guard and protect." [ ] When those officials "undertake [ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." [ ] Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not ac-countable to the people". See *South Bay United Pentecostal Church, et al., v. Gavin Newson, Governor of California, et al.*, cit. However, see C.M. Corbin, *Religious Liberty during a Pandemic*, 70 *Duke Law Journal Online* 1, 8 (2020). According to the Author, "In *South Bay United Pentecostal Church v. Newsom*, it is not altogether clear whether the Justices thought *Jacobson*, *Smith*, or some other test should control, as five of the Justices did not join a written opinion. Chief Justice Roberts never explicitly mentioned *Smith* or its test in his concurring opinion, and neither did the dissent. As stated above, I think the better approach is to follow the usual standards with an eye toward the present exigencies."

[10] See A. Madera, *Some Preliminary Remarks*, cit., p. 111.

[11] See *South Bay United Pentecostal Church, et al., v. Gavin Newson, Governor of California, et al.*, cit. According to the Chief Justice Roberts: "Although California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods." According to the dissenting opinion of Justice Kavanaugh: "As a general matter, the "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." The claimant Church "would suffer irreparable harm from not being able to hold services on Pentecost Sunday in a way that comparable secular businesses and persons can conduct their activities."

In *Calvary Chapel Dayton Valley v. Sisolak*[12], the Supreme Court rejected in a one-sentence order a claim from Calvary Chapel Dayton Valley to hold services on the same terms as other secular facilities in Nevada (such as casinos). The underlying rationale is that religious organizations have to comply with valid and neutral laws of general applicability and they cannot ask for specific exemptions from them. However, the order disfavored houses of worship because it limited attendance to a maximum of 50 people while it allowed secular undertakings (casinos, gyms, bars and restaurants) to operate at 50 percent of the building capacity.

In his sharp dissent, Justice Alito pointed out: "That Nevada would discriminate in favor of the powerful gaming industry and its employees may not come as a surprise, but this Court's willingness to allow such discrimination is disappointing. We have a duty to defend the Constitution, and even a public health emergency does not absolve us of that responsibility"[13].

According to Alito's dissenting opinion, Nevada's discriminatory treatment infringes the First Amendment; also, on the basis of an empirical analysis, he claims that the State's argument that religious gatherings cause greater risks than other secular activities (such as casinos) is "hard to swallow"[14], as well as the idea that the State's supervision over casinos guarantees compliance with the health measures in a more effective way than local authority enforcement of the provisions for houses of worship is not "compelling enough to justify differential treatment of religion"[15]. Although in phase one a robust restrictive public response was acceptable, in the long run, "public

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Furthermore, it is upon state authorities to provide a "compelling justification for distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subject to an occupancy cap;" also, the state has "substantial room to draw lines, especially in an emergency" and the state cannot "assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings." See *South Bay United Pentecostal Church, et al., v. Gavin Newson, Governor of California, et al.*, cit.

[12] See *Calvary Chapel Dayton Valley v. Steve Sisolak, Governor of Nevada, 591 U. S. (2020)*.

[13] See *Calvary Chapel Dayton Valley v. Steve Sisolak, Governor of Nevada*, cit. (Justice Alito, dissenting opinion).

[14] See A. Howe, *Justices Decline to Intervene in Dispute over Nevada COVID-19 Restrictions*, in *Scotusblog*, 24 July 2020, *https://www.scotusblog.com/2020/07/justices-decline-to-intervene-in-dispute-over-nevada-covid-19-restrictions/*.

[15] See *Calvary Chapel Dayton Valley v. Steve Sisolak, Governor of Nevada*, cit. (Justice Alito, dissenting opinion).

health emergency does not give Governors and other public officials *carte blanche* to disregard the Constitution for as long as the medical problem persists"[16], but a more careful balance has to be reached that takes into consideration all the competing rights. For all these reasons, restrictions upon religious assemblies are not "neutral and of general applicability" and should be subject to strict scrutiny. This implies resorting to a three-pronged test: that the government must show that substantially burdening religious freedom is the least restrictive alternative to pursue a compelling state interest[17]. Furthermore, the directives favor "secular expression in casinos" over "religious expression in houses of worship", so they not satisfy the standards required by the Free Speech Clause too[18].

In his dissenting opinion, Justice Kavanaugh raised similar concerns, adding his own remarks. Kavanaugh distinguished four classes of laws affecting religious organizations[19]. He complained that "fourth are laws—like Nevada's in this case—that supply no criteria for government benefits or action, but rather divvy up organizations into a favored or exempt category and a disfavored or non-exempt category. Those laws provide benefits only to organizations in the favored or exempt category and not to organizations in the disfavored or non-exempt category"[20].

During a pandemic, a state choice to discriminate religious activities compared to certain secular counterparts, as they do not generate a profit, would not be coherent with the protection of religious freedom that is at the core of the constitutional

[16] See *Calvary Chapel Dayton Valley v. Steve Sisolak, Governor of Nevada*, cit. (Justice Alito, dissenting opinion).

[17] See *Sherbert v. Verner*, 374 U.S. 398 (1963).

[18] See *Calvary Chapel Dayton Valley v. Steve Sisolak, Governor of Nevada*, cit. (Justice Alito, dissenting opinion).

[19] See *Calvary Chapel Dayton Valley v. Steve Sisolak, Governor of Nevada*, cit. (Justice Kavanaugh, dissenting opinion): "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; and (4) laws that expressly treat religious organizations equally to some secular organizations but better or worse than other secular organizations."

[20] See *Calvary Chapel Dayton Valley v. Steve Sisolak, Governor of Nevada*, cit. (Justice Kavanaugh, dissenting opinion). See J. Blackman, *The Three Dissents in Calvary Chapel Dayton Valley v. Sisolak*, in *The Voloch Conspiracy*, 25 July 2020, *https://reason.com/2020/07/25/the-three-dissents-in-calvary-chapel-dayton-valley-v-sisolak/*.

framework[21]. He also emphasized that although during a pandemic courts should embrace a "deferential" approach towards government guidelines, "COVID–19 is not a blank check" that allows any form of state discrimination against "religious people, religious organizations, and religious services," as "there are certain constitutional red lines that a State may not cross even in a crisis", namely, "racial discrimination, religious discrimination, and content-based suppression of speech"[22].

As this is well documented, lower courts embraced different standards of judicial review when they had ruled the legitimacy of COVID-19 restrictions to the exercise of religious freedom. Some of them required a strict scrutiny, which implies that a substantial burden can be imposed on religious freedom only in the pursuit of a compelling state interest and whether it is the least restrictive means to achieve that interest. Other courts had been more inclined to prefer the *Smith* rationale, that implies that as long as a public measure is religiously neutral and generally applicable there is no need to accommodate religious practices[23]. The only limit is that government cannot selectively target religion[24]. The latter approach imposes a heightened standard of review compared to the *Jacobson* ruling, that would allow a "more deferential" attitude toward state authorities, and would bypass a strict "constitutional analysis"[25].

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21 See *Calvary Chapel Dayton Valley v. Steve Sisolak, Governor of Nevada*, cit. (Justice Kavanaugh, dissenting opinion): "Nevada's 50-person attendance cap on religious worship services puts praying at churches, synagogues, temples, and mosques on worse footing than eating at restaurants, drinking at bars, gambling at casinos, or biking at gyms. In other words, Nevada is discriminating against religion. And because the State has not offered a sufficient justification for doing so, that discrimination violates the First Amendment."

22 See *Calvary Chapel Dayton Valley v. Steve Sisolak, Governor of Nevada*, cit. (Justice Kavanaugh, dissenting opinion): "This Court's history is littered with unfortunate examples of overly broad judicial deference to the government when the government has invoked emergency powers and asserted crisis circumstances to override equal-treatment and free-speech principles. The court of history has rejected those jurisprudential mistakes and cautions us against an unduly deferential judicial approach, especially when questions of racial discrimination, religious discrimination, or free speech are at stake".

23 See *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

24 See *Church of the Lukumi Babalu Aye, Inc., v. Hialeah*, 508 U.S. 520 (1993). A law cannot be considered neutral if "the object of the law is to infringe upon or restrict practices because of their religious motivation" (533) and it is not of general applicability if it "in a selective manner imposes burdens only on conduct motivated by religious belief." (543).

25 See C.M. Corbin, *Religious Liberty during a Pandemic: Constitutional Challenges to Mass Gathering Bans*, in *Canopy Forum*, 2 October 2020, "*Law, Religion, and the Coronavirus in the United States: A Six-Month Assessment*", *https://canopyforum.org/2020/10/02/religious-liberty-in-a-pandemic-constitutional-challenges-to-mass-gathering-bans/*.

However, these judgements emphasize all the risks of a formally neutral approach. Comparing different kinds of settings to identify the most appropriate "secular comparator" is extremely difficult. The judicial analysis has to take into considerations many nuanced distinctions requiring a careful context-sensitive analysis. Distinctions can be founded on "essentialness" of goods and services: these factors have given rise to different judicial responses about what is "essential"[26]. However, how can we qualify religion as less "essential" than secular assets during an unprecedented health crisis?[27] Also, the assessment of the level of health risk in different settings, so as to define fair coronavirus restrictions, is connected to multiple factors (social distancing, compliance with sanitation rules, number of attending people, indoor/outdoor, building's capacity). Last but not least, uniform restrictions on religious gatherings underestimate U.S. religious diversity, which implies a different impact of Covid-19 limitations on various religious communities with different convictions, practices, and rituals[28]. All the dissenting opinions in *Calvary Chapel Dayton Valley v. Sisolak* raised concerns about the difficulty to guarantee an effective equal treatment[29] to religious organizations compared to their secular counterparts[30]. In an age of deep economic crisis, the risk of state guidelines and reopening plans giving priority to activities generating a profit is emphasized, to the detriment of genuine religious claims[31].

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[26] See C.M. Corbin, *Religious Liberty during a Pandemic: Constitutional Challenges to Mass Gathering Bans*, cit.

[27] See W.C. Durham, Jr., *The Coronavirus, The Compelling State Interest in Health, and Religious Autonomy*, in *Canopy Forum*, 2 October 2020, "*Law, Religion, and the Coronavirus in the United States: A Six-Month Assessment*", *https://canopyforum.org/2020/10/02/the-coronavirus-the-compelling-state-interest-in-health-and-religious-autonomy/*.

[28] See W.C. Durham, Jr., *The Coronavirus, The Compelling State Interest in Health, and Religious Autonomy*, cit.; M. Faggioli, *Pandemic and Religious Liberty in the USA; Between Privatization of the Church and Neo-Integralism*, in *Diresom*, 8 April 2020, *https://diresom.net/2020/04/08/pandemic-and-religious-liberty-in-the-usa-between-privatization-of-the-church-and-neo-integralism/*.

[29] See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. _ (2017): "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified, if at all, only by a state interest 'of the highest order.'"; *McDaniel* v. *Paty*, 435 U. S. 618, 639 (1978): "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits."

[30] See C. Lund, *Quarantines, Religious Groups and Some Questions About Equality*, *in Canopy Forum*, 2 October 2020, "*Law, Religion, and the Coronavirus in the United States: A Six-Month Assessment*", *https://canopyforum.org/2020/10/02/quarantines-religious-groups-and-some-questions-about-equality/*.

[31] See *Calvary Chapel Dayton Valley v. Steve Sisolak, Governor of Nevada*, cit. (Justice Kavanaugh, dissenting opinion): "Nevada's rules reflect an implicit judgment that for-profit assemblies

The inability of public authorities to give adequate legal responses could give rise to harsh reactions of faith communities, resorting to religious autonomy as their last defense[32]. I agree that an analysis focusing on discrimination underestimates that the right of faith communities to gather is one of the fundamental aspects of religious practice, closely connected with religious autonomy[33]. Also, courts are not equipped to intrude into internal church matters and identify "adequate" substitutive ways of worshipping, as this would imply that the courts unduly judge how individuals comply with the commands of their religious faith[34].

However, during the age of COVID-19, a synergic interaction between religious leaders and state authorities is increasingly urged in the pursuit of shared responses. Religious communities are required to make a "responsible" use of the constitutional freedom they enjoy[35]. Religious leaders can not only provide guidance to their communities, solicit behaviors that do not affect the rights of others and facilitate the implementation of health measures[36], but they can also propose "reasonable alternatives"[37]. On their part, state authorities should recognize the relevance of the

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are important and religious gatherings are less so; that moneymaking is more important than faith during the pandemic."

32 See *Hosanna-Tabor Lutheran Evangelical Church & School v. EEOC*, 565 U.S. 171 (2012).

33 See W.C. Durham, Jr., *The Coronavirus, The Compelling State Interest in Health, and Religious Autonomy*, cit.

34 See *Elim Romanian Pentecostal Church and Logos Baptist Ministries v. Jay Robert Pritzker, Governor of Illinois*, No. 20-1811, 7th Circuit, 16 June 2020; S.J. Levine, *Hands-Off Religion in the Early Months of Covid-19*, in *Canopy Forum*, 2 October 2020, "*Law, Religion, and the Coronavirus in the United States: A Six-Month Assessment*", https://canopyforum.org/2020/10/02/hands-off-religion-in-the-early-months-of-covid-19/.

35 See A.C. Carmella, *The Protection of Children and Young People: Catholic and Constitutional Visions of Responsible Freedom*, in 44 *Boston College Law Review,* 1031, 2003.

36 See F. Sanei, *Re-Centering Religious Freedom v. Public Health Debate*, in *Canopy Forum*, 29 April 2020 (https://canopyforum.org/2020/04/29/recentering-the-religious-freedom-v-public-healthdebate/?fbclid=IwAR2VLBQc5et863R1N20S7jxY7W70FfruthLPBDiCt7iYMHqqQ0Jm__ita6c).

37 See W.C. Durham, Jr., *The Coronavirus, The Compelling State Interest in Health, and Religious Autonomy*, cit.

role of religious organizations in civil society[38] and the contribution that religious authorities can offer in developing plans to cope with the coronavirus threat[39].

Certainly the right to practice religion is not absolute[40] and health protection is a compelling state interest. However, in the long run, a pluralist and democratic society requires "narrowly tailored" measures and a careful monitoring of the effective health risk in different geographical contexts[41], and the role of the courts is to properly balance the protection of public health and the claims for reasonable accommodation of religion of various religious groups, in order to prevent uncontrolled state discretion that arbitrarily discriminates primary religious needs[42]. According to Gorsuch's words, "The world we inhabit today, with a pandemic upon us, poses unusual challenges. But there is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel"[43].

[38] See A. Madera, *The Impact of Coronavirus on Public Funding of Religious Organizations*, in *Canopy Forum*, 2 October 2020, "*Law, Religion, and the Coronavirus in the United States: A Six-Month Assessment*", https://canopyforum.org/2020/10/02/the-impact-of-coronavirus-on-public-funding-of-religious-organizations/.

[39] See K.A. Brady, *Covid-19 and Restrictions on Religious Institutions: Constitutional Implications*, in *Canopy Forum*, 2 October 2020, "*Law, Religion, and the Coronavirus in the United States: A Six-Month Assessment*", https://canopyforum.org/2020/10/02/covid-19-and-restrictions-on-religious-institutions-constitutional-implications/?fbclid=IwAR351bt2Z5l9eqRxLJW548cZ4vpxYYWb9NSWWIZ41PansCO-IsUcZWqC2HAK.A.

[40] See *Prince v. Massachusetts*, 321 U.S. 158 (1944).

[41] See K.A. Brady, *Covid-19 and Restrictions on Religious Institutions: Constitutional Implications*, cit.

[42] See F. Sanei, *Re-Centering Religious Freedom v. Public Health Debate*, in *Canopy Forum*, cit.

[43] See *Calvary Chapel Dayton Valley v. Steve Sisolak, Governor of Nevada, cit. (Justice Gorsuch, dissenting opinion*).