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INTRODUCTION

On January 20, 2020, the Centers for Disease Control (CDC) reported the first case of COVID-19 in the United States.[1] In response, the World Health Organization (WHO) categorized COVID-19 as a pandemic in March 2020, the Trump administration declared a national emergency, and states began to impose shut-down orders to public areas.[2] Louisiana Governor John Bel Edwards passed executive orders that restricted gatherings[3] and implemented stay at home orders.[4] The orders restricted gatherings "in a single space at the same time where individuals will be in close proximity to one another," but exempted some businesses like malls,

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1. *CDC Museum COVID-19 Timeline*, Archive of David J. Spencer CDC Musuem Exhibitions, CDC, https://www.cdc.gov/museum/timeline/covid19.html [https://perma.cc/R33Z-SA6G] (last visited Mar. 13, 2024).
2. *Id.*
3. *See* La. Proc. No. 30 JBE 2020–30 (Mar. 16, 2020).
4. *See id.*

grocery stores, and airports from having to restrict gatherings.[5] Notably, the order did not create an exemption for religious services; this non-exemption would be the downfall of the state's regulations.

Mark Spell is a pastor of a church in Central, Louisiana, who was issued six misdemeanor citations for violating the executive orders when he led in-person church services while the stay-at-home order was in effect.[6] Spell filed a motion to quash the bills of information, but the trial court denied the motion and the First Circuit Court of Appeal denied the writ application.[7] The Louisiana Supreme Court granted a writ of certiorari to review the constitutionality of the Governor's executive orders.[8]

> The Louisiana high court cited two important United States Supreme Court decisions about COVID-19 executive orders before making their determination. First, in *Tandon v. Newsom*, the U.S. Supreme Court granted injunctive relief to petitioners who successfully challenged California's state orders limiting gatherings in private households as a violation of their right to exercise their religion.[9] The second case was *Roman Catholic Diocese v. Cuomo*, in which New York petitioners successfully challenged the state order that limited gatherings at religious services to ten people while providing exceptions for "essential" businesses.[10] In both cases, the U.S. Supreme Court noted that if the state law is not neutral and generally applicable, the courts must apply strict scrutiny. Strict scrutiny is a judicial method that analyzes whether a law is narrowly tailored to serve a compelling state interest, and it is a high standard for a law to meet.[11] On the other hand, a state may place a burden on the exercise of religion only if the state law is neutral and generally applicable.[12] The Louisiana Supreme Court found the governors' orders violated the free exercise clause as they carved out exceptions that treated comparable secular activities less strictly than religious ones.[13]

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5. *See id.*
6. State v. Spell, 21-876, 339 So. 3d 1125, 1129–30 (La. 05/13/22).
7. *Id.*
8. *Id.*
9. *See generally* Tandon v. Newsom, 593 U.S. 61 (2021).
10. *See generally* Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14 (2020).
11. *Id.* at 65.
12. *Spell*, 339 So. 3d at 1132.
13. *See Tandon*, 593 U.S. at 63–64; *Roman Cath. Diocese of Brooklyn*, 592 U.S. at 16–17.

The Louisiana court used the same method to gauge Governor Edwards' orders and held that they were unconstitutional.[14] It noted that there was no medically identifiable difference between the so-called essential business and religious services in the spread of COVID-19. However, the order treated them differently.[15] Therefore, the laws were not neutral and generally applicable. Furthermore, the State did not prove that the governor's orders were narrowly tailored to address the state's interest to protect the public from COVID, so they were unconstitutional.[16] The court did imply—and the concurrence explicitly noted—that the state might have been able to succeed against the challenge if it provided more evidence to the record.[17]

The above cases exemplify the issue that arose across the country in response to a novel pandemic: states' public health orders were at odds with constitutional rights of religious expression. Even with facially neutral laws to combat the pandemic, governors and legislatures violated the constitutional right of free expression. Despite the deference the courts owe to the state's executive branch in its evaluation of medical science, states encounter the impossible issue of implementing valid pandemic precautions if the orders attempt to treat religious gatherings any differently than secular gatherings. Reasonable minds may disagree as to whether society would be better off protecting religious freedoms or implementing strict emergency orders. Nonetheless, the pandemic demonstrated that our current legal standards are unable to do both effectively.

Without altering the standards of review in the face of a health emergency, courts have no choice but to use strict scrutiny to analyze state decisions if they implicate the First Amendment.[18] The United States Supreme Court and the Louisiana Supreme Court provide some suggestions as to how to accomplish this balance between emergency orders and free exercise.[19] But, if then-current medical science calls for a shutdown to prevent a pandemic, the governor is unable to both leave the economy open and shut down houses of worship without violating constitutional law. This leaves two alternatives – shut down the economy or allow unlimited gatherings for religious services. Both have serious flaws. If the economy is shut down, essential services are lost, and people lose their way of supporting themselves. If religious gatherings are

14. *See Spell*, 339 So. 3d 1125.
15. *Id.* at 1135.
16. *Id*. at 1139–40.
17. *Id*. at 1140–43.
18. *See infra* p. 9.
19. *See infra* p. 14.

unlimited, then those areas can (and have) become hot zones for the spread of a virus.[20]

The pandemic created legal challenges for both the governor attempting to protect the health of citizens and the courts in upholding constitutional principles in the face of a health emergency. In *State v. Spell*, the Supreme Court of Louisiana ruled that Governor Edwards' executive orders banning religious gatherings were unconstitutional as they violated the fundamental right of free exercise.[21] This Note addresses two problems: (1) the violation of religious freedom; and (2) the failure to implement constitutional solutions in the face of a health emergency. It considers the *State v. Spell* decision, which provides both helpful background caselaw on the constitutional law issues and an explanation of how lawmakers should proceed in the future to implement public health laws. Ultimately, there is no clear-cut solution to the tension between constitutional free expression and the state's fundamental police power. Courts will have to make a choice, and the current trend suggests that free exercise will prevail.

In Part I, this Note examines the United States Supreme Court decisions that set the stage for *State v. Spell*, the standard of strict scrutiny, and how the Supreme Court's decisions prioritized free exercise of religion. Part II analyzes the result in the Louisiana case of *State v. Spell* where the Louisiana court overturned the emergency orders but also addressed the tension between the public health emergency orders and free exercise court decisions. Finally, Part III considers the possible methods Louisiana or other states could utilize in the face of another pandemic, including writing more comprehensive laws, rejecting the current U.S. Supreme Court's strict scrutiny approach to free exercise cases, and creating a new legal scheme that applies during health crises. Part IV will conclude in recognition that there is no obvious or easy solution to this problem, but we must recognize that we are at a fork in the road.

I. U.S. SUPREME COURT PRECEDENT THAT LED TO *STATE V. SPELL*

States have traditionally been responsible for promoting the public welfare, including protecting the community from infectious diseases, but they do not have unlimited power over every medical decision for its

20. Allison James et. al., *High COVID-19 Attack Rate Among Attendees at Events at a Church*, 69 MMWR, CDC at 632 (May 22, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6920e2.htm#:~:text=Large%20gatherings%20pose%20a%20risk,%E2%89%A565%20years%20(50%25) [https://perma.cc/7UR8-J6TR].

21. *Spell*, 339 So. 3d at 1140.

citizens.[22] In *Jacobson v. Massachusetts*, the Supreme Court for the first time considered whether it was within a state's power to mandate vaccinations.[23] The Court decided that while the state law imposed restraints against individual liberties, the state was within its rights to pass a law to protect the health of its citizens.[24] The *Jacobson* Court specifically noted that "even if based on the acknowledged police powers of a state," a public-health measure "must always yield in case of conflict with . . . any right which [the Constitution] gives or secures"[25] Since *Jacobson*, most courts have ruled in favor of the state's public health policy when the policies were challenged, but the COVID-19 pandemic and the ensuing stay at home orders cast doubt on the *Jacobson* ruling.[26]

During the pandemic, state and federal courts addressed the extent to which a governor could impose executive orders limiting public and private gatherings during the pandemic. The analyses varied:

> At one end of the spectrum, some courts applied *Jacobson* rigidly providing a highly deferential review of the governor's executive orders. While some courts embraced this standard early in the pandemic, fewer courts since May 2020 have applied so rigid a standard. At the other end of the spectrum, a few courts . . . rejected *Jacobson* as the standard of review. Other courts fell somewhere in between.[27]

The novel pandemic created a split among courts on how to weigh executive power to implement health policies against protecting people's First Amendment rights.

States vest power in their executive to make laws and policies to protect the public health during times of emergency through their constitution or by statute. For example, Louisiana Revised Statute 29:724 gives the governor power "for meeting the dangers to the state and people presented by emergencies or disasters, and in order to effectuate the

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22. *See* Gibbons v. Ogden, 22 U.S. 1, 73 (1824)*; see also* Hill v. Colorado, 530 U.S. 703, 715 (2000). *See generally* Jacobson v. Massachusetts, 197 U.S. 11 (1905).

23. 197 U.S. 11 (1905).

24. *See id*. at 11, 38–39.

25. Agudath Isr. v. Cuomo, 983 F.3d 620, 635 (2d Cir. 2020).

26. Trudy Henson, *Safe at Home? Legal and Liberty Concerns with Stay-At-Home Orders*, 28 GEO. MASON L. REV. 509, 510–12 (2021).

27. Kelly J. Deere, *Governing by Executive Order During the Covid-19 Pandemic: Preliminary Observations Concerning the Proper Balance Between Executive Orders and More Formal Rule Making*, 86 MO. L. REV. 721, 784 (2021).

provisions of this Chapter, the governor may issue executive orders, proclamations, and regulations and amend or rescind them."[28] State legislatures have criticized the broad reach of emergency executive power, especially during COVID. Several states introduced bills to reduce emergency powers to "subject public health actions to increased legislative or judicial review" or set "durational limits on emergency declarations or empower legislative or other oversight bodies to extend or overturn emergency orders."[29]

Notably, the Louisiana Legislature tried to pass a law that "would enable the Legislature to end an emergency declaration — or remove some provisions of one — by a petition signed by a majority of the House and of the Senate."[30] This legislation would have altered state law, allowing either chamber to end an emergency declaration; the law was challenged and blocked in state court. In the case of public health emergencies, the Act would require lawmakers to consult with a public health specialist before petitioning to end or alter the emergency declaration.[31] Governor Edwards ultimately vetoed the bill.[32] This bill was emblematic of an imbalance between the power of the executive under emergency powers and the desire of the people, through the legislature, to maintain their rights and prevent the governor from making laws unilaterally. While some disagreements with the governor were purely political, others a reflected genuine distrust of the executive branch as it stepped over generally protected liberties.

A recurring problem with unilateral executive action, even during emergencies, is that the actions often create conflicts with an individual's constitutional right to free exercise of religion. During the COVID-19 pandemic, several cases challenging executive orders as violating the First Amendment reached the U.S. Supreme Court.

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28. LA. REV. STAT. ANN. § 29:724 (2020).

29. James G. Hodge Jr. & Jennifer L. Piatt, *COVID's Counterpunch: State Legislative Assaults on Public Health Emergency Powers*, 36 BYU J. PUB. L. 31, 38 (2022).

30. Kevin McGill, *Bills to Curb Health Emergency Powers Advance in Louisiana*, AP NEWS (Apr. 13, 2022), https://apnews.com/article/covid-health-louisiana-state-legislature-john-bel-edwards-2297b7b0a5cae6bf383a4918365c5264 [https://perma.cc/JE9T-XSMN].

31. H.B. 149, 2021 Leg., Reg. Sess. (La. 2021).

32. Letter from Gov. John Bel Edwards to Clay J. Schexnayder, Speaker of the House, LA House of Rep. (July 1, 2021), https://www.legis.la.gov/legis/ViewDocument.aspx?d=1236618 [https://perma.cc/E37E-T3QL] ("Please be advised that I have vetoed House Bill 149 of the 2021 Regular Session.").

Early decisions were deferential to the states' executive branches. In May 2020, the Supreme Court heard *United Pentecostal Church v. Newsom*, in which it denied injunctive relief to plaintiffs challenging the executive orders.[33] Chief Justice Roberts' concurrence suggested that the Court should defer to the state in the pandemic's early stages based on the novelty of the disease and emergency.[34] Roberts echoed *Jacobson* in explaining that the law was of a general nature that did not target religious practice:

> 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.[35]

Roberts followed the Court's traditional method of analysis utilized in free exercise cases—if the state regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance.[36] But the Court phased out this method of analyzing laws in favor of applying strict scrutiny to any law that burdens religious expression.[37] Rather than giving deference to public officials, a strict scrutiny approach would require states to prove that the law was narrowly tailored to achieve a particular state interest—to curb the spread of COVID-19—despite incidental impact on free expression of religion.

By November 2020, the majority shifted entirely to the strict scrutiny approach.[38] In *Roman Catholic Diocese v. Cuomo,* the Court granted injunctive relief for an executive order similar to the one in *South Bay*

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33. S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring).

34. *Id.*

35. *Id.*

36. *See, e.g.*, Emp. Div. Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872 (1990).

37. *See S. Bay United Pentecostal Church*, 140 S. Ct. 1613 (Kavanaugh, J., dissenting) (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524 (1993)). *See generally* Burwell v. Hobby Lobby Stores, Inc., 572 U.S. 682 (2014).

38. Notably, "the majority opinion . . . does not even cite to Jacobson." Deere, *supra* note 27, at 783.

Pentecostal. The Court did not give the same deference as given in *South Bay* and ruled that the restrictions were not neutral and generally applicable because some secular businesses like shopping malls and manufacturing plants did not have the same restrictions as churches and synagogues.[39] For example, areas with the harshest restrictions limited gatherings in houses of worship to ten people, but placed no restrictions on businesses deemed essential.[40] Therefore, the Court applied strict scrutiny to determine whether the regulation was narrowly tailored.[41] The Court had an issue with the severity of the New York restrictions as more than what was required to prevent the spread of the virus and suggested that remote viewing of services was not enough to exempt them from strict scrutiny.[42] Importantly, the state failed to show that attendance at the services was spreading the virus.[43] The Court was not willing to reduce the standard from strict scrutiny if the law burdened religion in any way differently than any other type of activity.[44]

In April 2021, the Court specified its rulings on COVID-19 government orders and their effect on religion. California Governor Newsom implemented an executive order limiting private gatherings for religious services. The Supreme Court explained that a government regulation is not neutral, and thus infringes on a religious right, when it treats any comparable secular activity with more leniency than the religious activity.[45] This interpretation was a shift from earlier rationale that a law was considered generally applicable when comparable secular actives were treated as harshly.[46] In other words, if there are any exceptions for any secular activity, the law infringes on First Amendment rights and triggers strict scrutiny. The guidance given by the Court to determine the comparability of activities for purposes of the Free Exercise Clause was that the activity should be considered against the government interest. Therefore, the COVID-19 restrictions were considered against the risks posed by the different activities that the state was restricting.[47]

Under strict scrutiny, the state had the burden to establish that easing restrictions on religious activity could not prevent the spread of COVID-

39. Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14 (2020).
40. *Id.*
41. *Id.* at 66–67.
42. *Id.* at 67.
43. *Id.*
44. *Id.*
45. Tandon v. Newsom, 593 U.S. 61, 62 (2021).
46. *See e.g., S. Bay United Pentecostal Church*, 140 S. Ct. 1613; Emp. Div. Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872 (1990).
47. *Tandon*, 593 U.S. at 63.

19 and to justify that any activities given exceptions from the rules are less dangerous than religious gatherings.[48] California limited private gatherings in homes for religious services to three households.[49] The Court discussed how California allowed hair salons, retail stores, and other businesses to continue operating with more people than three households. The Court rejected the Ninth Circuit's conclusion that allowing more than three households to worship in a home, like the secular activities, would not be effective.[50] The Court ruled that the state cannot "assume the worst when people go to worship but assume the best when people go to work."[51]

Nonetheless, the dissenting justices argued that since the statute treats all *at hom*e behavior the same, it does not infringe upon First Amendment rights. Also, the dissenting justices asserted that the majority ignored the Ninth Circuit's jurisprudence that people in private are more likely to remain longer, engage in conversation, and be unable to social distance.[52] Justice Kagan's dissent concludes that the majority "insists on treating unlike cases, not like ones, equivalently and it once more commands California to ignore its experts' scientific findings, thus impairing the State's effort to address a public health emergency."[53]

Tandon v. Newsom finalized the shift in the COVID cases from deference to strict scrutiny, a burden that most orders would be unable to meet. Moreover, the Court did not set a standard or methodology for deciding whether activities are similar, which was a problem the Louisiana court would face in *State v. Spell*.[54] In neither *Tandon* nor *Roman Catholic Diocese* does the Court's majority discuss the fact that it can be easier to remain socially distanced in large public areas like grocery stores than in a private home or sitting beside others in church. When considering how COVID spread, there is a difference between people gathering in public to shop or work and people gathering in smaller spaces to worship. For one, people are singing and remaining in proximity for a long time at religious services, in contrast to people shopping at grocery stores or working in the office.[55] The CDC has noted that churches specifically became epicenters

48. *Id.* at 64.
49. *Id.*
50. *Id.*
51. *Id.*
52. *See id.* at 65-66.
53. *Id.* at 66 (quotations omitted).
54. Other than they "must be judged against the asserted government interest that justifies the regulation at issue." *Id.* at 62.
55. *See Roman Cath. Diocese of Brooklyn*, 592 U.S. 14, 37.

for COVID breakouts.[56] The Court did not explain why it is not possible to contrast these secular activities from religious gatherings; instead they chose to apply strict scrutiny.[57] *Tandon* and *Roman Catholic Diocese* effectively overruled *Jacobson*, thereby prompting the Louisiana Supreme Court to apply strict scrutiny to the state's COVID-19 emergency orders, rather than give deference to public officials for matters of public health. In *State v. Spell*, the state was not able to meet the burden of proving that religious and secular activities required different methods to prevent the spread of COVID-19.[58]

II. *STATE V. SPELL* – LOUISIANA'S FAILURE TO OVERCOME STRICT SCRUTINY

In *State v. Spell*, the Louisiana Supreme Court encountered a similar order that the United States Supreme Court enjoined in *Tandon v. Newsom*.[59] Louisiana Governor John Bel Edwards passed executive orders that restricted gatherings[60] and implemented stay at home orders.[61] The orders restricted gatherings "in a single space at the same time where individuals will be in close proximity to one another" but exempted some businesses, like malls, grocery stores, and airports from having to restrict gatherings.[62] The orders limited gatherings to under 50 people except as

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56. James et. al., *supra* note 20, at 632; *see, e.g.*, Brenda Gregorio-Nieto, *Health Officials Alert Public Over 2 Additional Outbreaks at Awaken Church Locations*, NBC SANDIEGO (Dec. 20, 2020), https://www.nbcsandiego.com/news/local/health-officials-alert-public-over-2-additional-outbreaks-at-awaken-church-locations/2460223/ [https://perma.cc/5GR4-ZQU7]; Bill Hutchinson, *Pastor Says He Won't Close Church After COVID-19 Outbreak Infected 74 Members*, ABC7NEWS (May 10, 2021), https://abc7news.com/pastor-says-he-wont-close-church-after-covid-19-outbreak-infected-74-members/10607581/ [https://perma.cc/69FR-Q8A7]; Anna Boiko-Weyrauch, *A Sunday Service, a Funeral, and a Conference: How Some Churches Spread Covid in the Seattle Area*, KUOW (Jun. 3, 2021), https://www.kuow.org/stories/covid-outbreaks [https://perma.cc/GF4Z-8JH4].

57. This Note will only focus on how the Louisiana Supreme Court dealt with this issue, rather than criticizing or justifying the implementation of strict scrutiny in the U.S. Supreme Court COVID cases.

58. 339 So. 3d 1125 (La. 05/13/22).

59. *Id.*

60. Gov. John Bel Edwards, JBE 2020–30, *Additional Measures for COVID-19 Public Health Emergency*, EXEC. DEP'T OF LA. (Mar. 16, 2020) [hereinafter JBE 2020-30].

61. *Id.*

62. *Id.*

allowed by the order, which included work and activity at places like airports, medical facilities, shopping malls, and offices. Louisiana's stay at home order had an exception for "essential activities."[63] Essential activities included getting food, medicine, medical care, going to and from family, outdoor activities, and going to and from worship. The actual worship ceremony was not considered essential and was ordered to close, but certain jobs as identified by US Homeland Security were deemed essential and allowed to remain open.[64]

The Louisiana Supreme Court considered whether the executive orders were generally applicable. If not, they would not infringe on a fundamental right and would be subject to strict scrutiny. Like the U.S. Supreme Court cases, this issue turned on whether the law treated comparable secular activity more favorably than religious exercise. Also, if there were exemptions in the statute, the state could not refuse to extend an exemption to religious exercise without "compelling reason."[65]

Both executive orders[66] contained exceptions for secular activities but not for religious activities. However, the state did not put on evidence that the risk of the virus was different in gatherings at office buildings than at religious gatherings. For example, there was no evidence that shopping in a retail store was safer than someone socially distanced at a religious service.[67] The *Spell* court contrasted other generally applicable laws, like building codes and zoning, as those rules equally apply to office buildings and other secular buildings.[68] In other words, the state did not provide a valid reason for treating them differently, but as the concurrence notes, the outcome may have been different if they did.[69]

Upon application of strict scrutiny, the court again noted that the state had not shown evidence that religious exercise is more dangerous to the spread of COVID than secular ones.[70] Because there was no clear evidentiary distinction between COVID's spread in religious or secular activities that justified the state's discriminatory action, the orders were not narrowly tailored to address the state's interest to protect the public from COVID. While "reasonable reliance on scientific evidence" can

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63. *Spell*, 339 So. 3d 1125, 1129.
64. *Id.*
65. *Id.* at 1133.
66. *See* JBE 2020-30, *supra* note 60; Gov. John Bel Edwards, JBE 2020–33, *Additional Measures for COVID-19 Stay at Home*, EXEC. DEP'T OF LA. (Mar. 22, 2020).
67. *Spell*, 339 So. 3d at 1135.
68. *Id.* at 1136.
69. *Id.* at 1143.
70. *Id.* at 1139.

determine whether the law is narrowly tailored, the state did not identify what scientific evidence existed to distinguish the exceptions from the rule that applied to church services.[71] Likewise, the state did not present evidence as to why jobs considered essential business are more important than the right to exercise religion.[72]

Justice Crichton, in his concurrence, agreed that the executive order was not narrowly tailored, but he also highlighted that more evidence on the record would have helped their analysis as to the state's compelling interest.[73] Crichton stressed that the state needs to show that there is something about religious activities that make them more dangerous than similar secular activities.[74] Theoretically, the state could have presented evidence of how the virus spreads in churches as compared to businesses. The concurrence also cited the U.S. Supreme Court's explanation that there could have been other restrictions that still allowed people to worship, but in proportion to the space in which they gather.[75] Crichton concluded by emphasizing that the state should have done a better job with the record, implying that they may have been able to meet the standard for narrowly tailored if they did.[76]

Justice Weimer's dissent further explained that the record lacked evidence of how to treat the virus, how contagious the virus was, who was impacted, how lethal it was, and how the virus is transmitted.[77] The dissent criticized the majority opinion for ignoring the circumstances of the emergency order in its application of strict scrutiny. Instead, the dissent rejected the use of strict scrutiny as the defense did not establish that religious services were "actually impacted" by the restrictions requiring them to be outdoors or virtual.[78] The dissent concluded that the arguments were made without evidentiary record, especially the lack of information about the capacity and activities of the church.[79] The dissent and concurrence suggest that with a more robust factual basis to support the government's rationale for the crowd limits, the law could have prevailed even under strict scrutiny.

Louisiana's laws during the pandemic were not upheld because the state created exceptions without evidentiary support, making the laws non-

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71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 1143.
75. *Id.*
76. *Id.* at 1144.
77. *Id.* at 1139.
78. *Id.* at 1142.
79. *Id.*

generally applicable. Therefore, under the Louisiana court's strict scrutiny analysis, the law was not narrowly tailored, nor was the state interest compelling.

III. WHAT ARE STATES SUPPOSED TO DO?

The *Spell* court concluded that there was nothing else they could do; without evidence in the record to distinguish secular from religious activities, infringing upon free exercise triggers strict scrutiny, and the law is overruled. As the United States Supreme Court trends toward hearing more free exercise issues and protecting citizens' First Amendment rights,[80] what can state leaders do to respond quickly to novel health challenges? Should the legal community rethink the court's role in overseeing public health policies? The COVID pandemic pushed political leaders to a standstill where they could not simultaneously take public health measures recommended by scientists and provide for fully free exercise of religion. One side had to prevail, and *State v. Spell* is an example of how religious freedom won.

The COVID cases provided some suggestions from the courts regarding what states can do at these crossroads. Most obviously, states should make no exceptions in the executive orders. Such orders would be a neutral and generally applicable law that would not trigger strict scrutiny. In other words, states should narrowly tailor the law to avoid constitutional violations. This all-or-nothing approach forces elected officials to be flawless and exacting scientists, which is beyond the scope of their responsibilities. Instead, a practical approach must give some deference to elected public servants to make good faith efforts to protect the public.

The Court in *Roman* Catholic *Church v. Cuomo* suggested a more realistic and detailed approach to narrowly tailoring public health laws. By making more scientifically tailored restrictions, like correlating the maximum attendance to the size of the building, a state can pass strict scrutiny.[81] If a state wants to limit religious gatherings to 50 people or three households, it must impose the same limit on secular gatherings. States could also consider imposing a limitation based on square footage rather than the type of gathering. By categorizing gatherings and including

80. For a discussion of how the "Roberts Court, to a great extent, has adopted this conservative approach in religious freedom cases, returning to some supposedly idyllic pre-1937 constitutional jurisprudence—sustaining a white, Christian America," *see* Stephen M. Feldman, *The Roberts Court's Transformative Religious Freedom Cases: The Doctrine and the Politics of Grievance*, 28 CARDOZO J. EQUAL RTS. & SOC. JUST. 507 (2022).

81. *See Roman Cath. Diocese of Brooklyn*, 592 U.S. 14, 18–19.

religious attendance as one of the categories, the law will be subject to strict scrutiny. Also, states should show that there are scientific distinctions among public venues when it comes to how viruses spread. States are burdened to "tailor their orders based on latest scientific advancements. Recent scientific data points to COVID-19 transmitting easily in cafes, restaurants, gyms and reducing capacity in those venues to somewhere between 20-30% would significantly reduce infections."[82] If the states can meet the burden of justifying exactly why their capacity limits were chosen, they have a better argument that their rules are narrowly tailored. As mentioned, the Supreme Court did not explore how to compare activities enough to provide helpful guidance for state leaders.[83]

States should also consider how other states successfully implemented vaccine mandates as an example of protecting health without stepping on First Amendment rights. The U.S. Second Circuit noted that vaccine mandates did not force religious people "to perform or abstain from any action that violates their religious beliefs. Because Plaintiffs have refused to get vaccinated, they are on leave without pay. The resulting loss of income undoubtedly harms Plaintiffs, but that harm is not irreparable."[84] States should try to model their laws akin to the vaccine laws and make sure the law does not "prohibit religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."[85]

Another suggestion from the dissents of *Roman Catholic Church* is that the courts should give more deference to political leaders during times of crisis and allow restrictions if comparable secular activities are treated the same.[86] Such a standard would return to the pre-COVID rule of *Jacobson*, which has still not been officially overturned and some circuits still apply.[87]

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82. *Id.*

83. Another issue brought up by Roman Cath. Diocese of Brooklyn v. Cuomo is that the state's somewhat arbitrary selection of what jobs were considered essential businesses and exempt from strict mandates lessened their position that their law was narrowly tailored. *Id*. That issue is as much economics as it is law, and this note will not be addressing that issue, although it does seem key to the courts' analyses.

84. Kane v. De Blasio, 19 F.4th 152, 172 (2d Cir. 2021).

85. *Id.* at 165.

86. *See Roman Cath. Diocese of Brooklyn*, 592 U.S. at 37–38.

87. *See, e.g.*, Kheriaty v. Regents of the Univ. of Cal., No. 22-55001, 2022 WL 17175070 (9th Cir. Nov. 23, 2022) (citing Jacobson v. Massachusetts, 197 U.S. 11 (1905) (decision to dismiss a suit challenging a vaccine mandate)).

Another way to provide more deference to public officials is for the courts to refrain from using strict scrutiny. Strict scrutiny applies when a state law interferes with a fundamental right; then, the law may create a burden on the exercise of religion if there is a "compelling state interest in the regulation."[88] But rejecting strict scrutiny would be an unusual departure from judicial norms.

The dissent in *State v. Spell* considered the application of strict scrutiny to the executive orders inappropriate as there was no evidence that the modifications impacted religious exercise.[89] However, the United States Supreme Court has become strict in their scrutiny of laws' impact on religion. A new, more conservative group on the bench has been more critical of what they view as laws that appear neutral but in fact prejudice religion.[90] Now, laws that in no way target religion are considered not narrowly tailored after strict scrutiny.[91] The Court emphasized that there is no emergency standard of review.[92] Even a temporary restriction on religious exercise is a cognizable injury.[93]

The dissent in *State v. Spell* counters the Supreme Court's reasoning that such a standard as applied to *Spell* is inconsistent with the leeway given by the Supreme Court to state governments at the early stages of the pandemic.[94] Similarly, Justice Kagan's dissent in *South Bay* argues that this high level of scrutiny favors religion over secular activities in defiance of medical advice on public health.[95] The Court is stuck between two beliefs as they are unwilling to lessen their protections of religious activity, with good reason, but they do not follow their own advice and defer to public health experts.

The Court could consider returning to the approach outlined by Justice Scalia in *Employment Division v. Smith*.[96] There, Scalia said the government may "enforce generally applicable prohibitions of socially harmful conduct," like restricting the use of peyote, without "mak[ing] an individual's obligation to obey such a law contingent upon the law's

88. Sherbert v. Verner, 374 U.S. 398, 403 (1963).

89. *Spell*, 339 So. 3d 1125, 1142.

90. Wendy K. Mariner, et al., *Shifting Standards of Judicial Review During the Coronavirus Pandemic in the United States*, 22 GERMAN L.J. 1039, 1052–53 (2021).

91. *Id.* at 1053.

92. *Id.* at 1056.

93. *Id.* at 1057.

94. *See Spell*, 339 So. 3d at 1141.

95. *See S. Bay United Pentecostal Church*, 141 S. Ct. 716, 720 (Kagan, J., dissenting).

96. *See Smith*, 494 U.S. 872.

coincidence with his religious beliefs."[97] Under the *Smith* framework, the state can pass laws within its traditional police power, even if it burdens religious expression. This methodology would protect legislators and governors who pass laws to protect public health and welfare. But *Smith* has proven controversial, and some justices have suggested overruling it altogether.[98] Scalia's framework in *Smith* successfully balances the government's power to pass neutral laws for health and safety with incidental burdens on the exercise of religion, but the opponents of *Smith* may win out because of the current Court's return to a tradition and history analysis of constitutional provisions.[99]

To some scholars, the courts are overstepping as a matter of policy: "the judiciary should not interfere the way it did in *Roman Catholic Diocese* and defer to the governor more. As some legal scholars have suggested, some degree of deference should be given to the executive during times of emergency, but traditional constitutional analysis should not be abandoned."[100] By making their own decisions as to whether the executive order was narrowly tailored, the Court overstepped and decided policy on behalf of the governor. Courts should balance the "urgent need to curb transmission of the virus with potential constitutional violations. It should not be there to substitute its decision for that of the governor."[101] During times of emergency, there is insufficient time for the legislature to pass legislation. Executive orders are necessary. With that in mind, courts should be hesitant to overrule executive orders that attempt to curb a pandemic or other public health emergency.

The COVID pandemic allowed scholars to reconsider the role of the courts during health emergencies. Gilad Abiri and Sebastian Guidi argue that special principles of judicial review are needed in emergencies.[102] To prevent political power-grabbing inherently at-risk during emergency orders, courts should apply the strictest standard of review to any law or rule affecting the democratic process, like restrictions on voting rights or

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97. *Id.* at 885.

98. *See, e.g.*, Fulton v. City of Philadelphia, Pennsylvania, 141 S. Ct. 1868, 1883 (2021) (Alito, J., concurring).

99. *Id*. Also, while *Smith*'s specific holding preventing Native American tribes from using peyote during religious ceremony is ripe for criticism, the framework presented is nonetheless a good tool in balancing state power to promote health and safety with free exercise. *See Smith*, 494 U.S. 872.

100. Deere, *supra* note 27, at 785.

101. Deere, *supra* note 27, at 791.

102. *See* Gilad Abiri & Sebastian Guidi, *The Pandemic Constitution*, 60 COLUM. J. TRANSNAT'L L. 68, 121 (2021).

attempts to grant new powers to the executive branch.[103] The goal here is to uphold the rights of the people and hold leaders accountable. If the legislature or governor tried to pass a law to restrict voting during a pandemic, the court would then apply strict scrutiny Second, courts should defer to scientific leaders and political decision-makers, acting as a "translator" of science contained in policies. The stated goal is to increase the legitimacy of the policies. After some time, the courts gradually should reintroduce stricter scrutiny.[104] This approach is perhaps akin to what the dissent implies should have happened in *Spell*. Courts should give extreme deference to science and medicine in times of emergency, and when faced with a lawsuit challenging a public health law, courts should interpret the laws with that deference in mind.

Such an enormous shift in the legal system is unrealistic, but this kind of creative thinking illuminates the difficulty in rectifying the current approach to judicial decision-making in times of crisis. Such an enormous shift in the legal system is unrealistic, but this kind of creative thinking illuminates the difficulty in rectifying the current approach to judicial decision-making in times of crisis. These ideas are radical departures from the Supreme Court's preference to uphold constitutional principles in times of emergency. But in a pandemic, policy makers need to uphold the democratic process and increase the public's belief in the legitimacy of the policies put in place to protect them. Meanwhile, courts must uphold the Constitution but also defer to political decision-makers when it comes to science and public health.[105]

CONCLUSION

State v. Spell exemplifies how the Supreme Court's doctrine of strict scrutiny of burdens on free exercise is at odds with the core state function to promote health and safety. Strict scrutiny is considered strict in theory and fatal in fact, and it was fatal to many COVID emergency orders.[106] If the government cannot impose reasonable limitations during a public health emergency, then religious groups have significant leeway to bypass generally applicable laws. *Employment Division v. Smith* set a more practicable framework in the hopes that one's adherence to the law should not depend on their faith. All constitutional rights, especially those in the Bill of Rights, deserve strong protection from the courts. However, to

103. *Id.*
104. *Id.* at 127–28.
105. *See, e.g.*, *S. Bay United Pentecostal Church*, 140 S. Ct. 1613, 1615.
106. *See* Fullilove v. Klutznick, 448 U.S. 448, 519 (1980).

continually hold that one of those rights is free from any limitations is unrealistic.

As it currently stands, the state cannot decide that secular activities are arbitrarily more essential than religious practices, as they are a fundamental right and subject to strict scrutiny. Perhaps this notion is flawed in an emergency like a pandemic, but neither the Supreme Court nor lower courts are changing a statute's scrutiny level because of emergencies. There is some opportunity for future litigants to argue the issue of comparability by presenting evidence that secular businesses are necessarily treated differently than religious ones because they are not comparable. Such an argument strengthens the state's case that their law is narrowly tailored. Nevertheless, lawmakers must be perfect to meet strict judicial scrutiny's high bar.

In *State v. Spell*, the Louisiana Supreme Court demonstrated how, in the future, states can meet the burden of narrowly tailoring their laws for the current strict scrutiny doctrine's sake. While the courts must apply strict scrutiny per the guidance of the U.S. Supreme Court, state courts can be deferential to defendants who can build an evidentiary record with scientific backing. This is the most effective way for states to implement emergency health measures that affect religious activities. Hopefully, lawmakers can walk the fine line between effective public health and constitutional religious protection, but the COVID cases have demonstrated the difficulty in balancing both crucial state interests.