



# Religious Freedom During COVID-19 and Beyond



# Religious Freedom and COVID-19

# COVID-19 Pandemic of 2020

- The pandemic hit the United States in March 2020
- By late April 2020, several governors restricted in-person religious gatherings:
  - 10 states prohibited in-person religious gatherings altogether
  - 25 states limited the size of religious gatherings
  - 15 states allowed religious gatherings without size limitations

## *South Bay United Pentecostal Church v. Newsom*

- The California governor restricted worship gatherings to 25% of building capacity or 100 people, whichever was less
- Activities subject to the restriction included:
  - Lectures, concerts, movie showings, spectator sports, and theatrical performances

## *South Bay United Pentecostal Church v. Newsom*

- Activities exempted from the restriction:
  - Factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries

## South Bay Holding

- With it being so early in the pandemic, the Supreme Court also noted:

*“[The executive orders] 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 accountable to the people.”*

*– Chief Justice Roberts*

## *Calvary Chapel Dayton Valley v. Sisolak*

- The Nevada governor restricted houses of worship to 50 people, but allowed “privileged facilities” to be at 50% capacity
  - “Privileged facilities” included bowling alleys, breweries, fitness facilities, and casinos (with gambling, circus acts, and live shows)
- In a 5-4 decision without an opinion, the Supreme Court held that the governor’s restrictions could be enforced

## Calvary Chapel Dissent

- The dissent argued that, unless the State provides a compelling justification otherwise, it must place religious organizations in the privileged category

*“In Nevada, it seems, it is better to be in entertainment than religion.”*

*– Justice Gorsuch*



## *Roman Catholic Diocese of Brooklyn v. Cuomo*

- New York governor restricted worship gatherings to a maximum of 10 or 25 people, but “essential” businesses could stay open with no limits
  - “Essential” businesses included hardware stores, acupuncturists, liquor stores, bicycle repair shops, accountants, lawyers, and insurance agents
- In a 5-4 decision, the Supreme Court held that the governor’s restrictions could not be enforced

## *Roman Catholic Diocese Concurring Opinion*

“So, at least according to the Governor, it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians. Who knew public health would so perfectly align with secular convenience?”

– *Justice Gorsuch*

## *Roman Catholic Diocese Concurring Opinion*

“It is time—past time—to make plain that, while the pandemic poses many grave challenges, 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.”

– *Justice Gorsuch*

## *South Bay United Pentecostal Church v. Newsom*

- As of February 5, 2021, most of California was still under Tier 1 forbidding indoor worship altogether
- The Supreme Court granted an injunction, holding:
  - Prohibiting all indoor worship was not enforceable
  - 25% capacity limitation was enforceable
  - Prohibiting singing and chanting was enforceable

## *Current State of Religious Freedom in a Pandemic*

- Supreme Court's orders were not final decisions
- Religious organizations likely must be treated as favorably as least restricted activities
- Arbitrary per person limitations, without regard to capacity, likely will not stand going forward

# H.R. 5 – Equality Act

# The Equality Act

- First introduced in 1994 to prohibit discrimination in employment based on sexual orientation
  - That version exempted religious organizations
- H.R. 5 would prohibit sex discrimination in employment and housing, public education and financing, public accommodation, etc.
  - Broadens definitions to include religious organizations without exceptions

# Status of the Equality Act

- Passed the House in February 2021 by margin of 224 – 206
- As of April 21, 2021, remains in committee in the Senate
  - Requires 60 votes to pass the Senate



# Challenges to Tax-Exempt Status

# Challenges to Tax-Exempt Status and Other Benefits

- Tax-Exempt Status after Obergefell v. Hodges
- Clergy Housing Allowance

# Eligibility for Public Benefits

*Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017)

- Exclusion of a non-profit simply because it is religious violates the Free Exercise Clause of the First Amendment

*The exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand.*

*– Chief Justice Roberts*

## Q&A

- The responses you receive during this Q&A session are insurance risk management recommendations and should not be understood or relied upon as legal advice.
- Please consult a local attorney for legal advice specific to your church's operations and local jurisdiction.

## Thank You

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