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FIRST AMENDMENT: Executive Order by the Governor Limiting Large Gatherings Statewide

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FIRST AMENDMENT

Executive Order by the Governor Limiting Large Gatherings Statewide

U.S. CONSTITUTION:	U.S. CONST. amend. I
EXECUTIVE ORDER:	Ga. Exec. Order No. 03.23.20.01
EFFECTIVE DATE:	March 23, 2020
SUMMARY:	Beginning in March 2020, Georgia Governor Brian Kemp (R) issued a series of Executive Orders addressing the State’s response to the COVID-19 pandemic. Included in these Orders was a prohibition on large groups of people gathering in a single location. Though an effective means of curtailing the virus’s rapid transmission, this specific provision became a source of controversy for groups who believed such a prohibition infringed upon their First Amendment rights.

Introduction

Throughout American history, national emergencies have tested the resilience of the fundamental liberties found in the Bill of Rights.¹ In times of crisis, elected officials, especially those in the executive branches of federal and state governments, must delicately balance public safety with individual liberty. The resulting policy decisions often result in litigation, shifting the responsibility of this balancing act to the judiciary.² State government responses to the COVID-19

1. *See generally, e.g.,* *Korematsu v. United States*, 323 U.S. 214 (1944) (addressing the constitutionality an exclusionary order imposed against all persons of Japanese descent during World War II), *abrogated by* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (addressing the constitutionality of a compulsory vaccination law in Massachusetts).

2. *See, e.g., Korematsu*, 323 U.S. at 231 (Roberts, J., concurring) (“The liberty of every American citizen . . . must frequently, in the face of sudden danger, be temporarily limited or suspended.”).

pandemic presented the latest iteration of this constitutional tension. Specifically, state directives aimed at protecting public health by restricting large gatherings raise challenging First Amendment issues involving freedom of speech, assembly, and religion.³ In Georgia, Governor Brian Kemp’s (R) COVID-19 Executive Orders—although less prohibitive than those in other states—implicated these concerns and faced backlash from some residents.⁴

Background

The COVID-19 Pandemic

In January 2020, the World Health Organization (WHO) began investigating an outbreak of a novel coronavirus from Wuhan, China.⁵ This new disease, now known as COVID-19, spread quickly throughout the world.⁶ In response, the WHO declared a Public Health Emergency of International Concern on January 30.⁷ Less than two months later, on March 11, the WHO upgraded the outbreak to a pandemic and encouraged all jurisdictions to combat its spread with “urgent and aggressive action.”⁸ As of October 10, 2020, more

3. U.S. CONST. amend. I.

4. Eric Mandel, *Gov. Kemp Adds Some Business Restrictions, Does Not Order Full Shelter-in-Place*, ATLANTA BUS. CHRON. (Mar. 23, 2020, 5:58 PM), <https://www.bizjournals.com/atlanta/news/2020/03/23/gov-kemp-adds-some-business-restrictions-does-not.html>; Vandana Rambaran, *Georgia Gov. Kemp Orders Elderly to Shelter in Place, Days After Loosening Some Coronavirus Restrictions*, FOX NEWS (Apr. 30, 2020), <https://www.foxnews.com/us/georgia-elderly-shelter-in-place-coronavirus-restrictions> [<https://perma.cc/MB38-A6E2>].

5. *Novel Coronavirus – China*, WORLD HEALTH ORGANIZATION [WHO] (Jan. 12, 2020), <https://www.who.int/csr/don/12-january-2020-novel-coronavirus-china/en/> [<https://perma.cc/3YHC-RRR6>].

6. *WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19*, WORLD HEALTH ORGANIZATION [WHO] (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19—11-march-2020> [<https://perma.cc/3EXV-W8YM>] [hereinafter *WHO Opening Remarks*].

7. *Statement on the Second Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of Novel Coronavirus (2019-nCoV)*, WORLD HEALTH ORGANIZATION [WHO] (Jan. 30, 2020), [https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)) [<https://perma.cc/HG7L-UPR8>].

8. *WHO Opening Remarks*, *supra* note 6.

than 37 million confirmed cases existed globally, and over a million people had died from COVID-19.⁹

Scientists reported the first confirmed case of COVID-19 in the United States in late January.¹⁰ The Centers for Disease Control and Prevention (CDC) had confirmed over seven million cases and approximately 213,000 deaths from the virus in the United States as of October 10.¹¹ No state was immune from the spread of the virus; CDC data showed both confirmed cases and deaths in every state and most American territories.¹² Georgia grappled with high rates of contagion as well, reporting over 330,000 cases and 7,300 deaths as of October 10.¹³

The Government Response to COVID-19

In the wake of the WHO declaration, President Donald Trump (R) declared a public health emergency in the United States and allocated additional federal resources to respond to the COVID-19 outbreak.¹⁴ The federal government also outlined a series of recommendations and directives designed to “slow the spread” of the virus.¹⁵ These guidelines advised Americans to stay at home, limit travel, and avoid congregating in large groups.¹⁶

9. *Coronavirus Disease (COVID-19) Pandemic*, WORLD HEALTH ORGANIZATION [WHO], <https://www.who.int/emergencies/diseases/novel-coronavirus-2019> [<https://perma.cc/4JTN-PWPX>].

10. Michelle L. Holshue et al., *First Case of 2019 Novel Coronavirus in the United States*, 382 *NEW ENG. J. MED.* 929, 929–36 (2020).

11. United States COVID-19 Cases and Deaths by State of *CDC COVID Data Tracker*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> [<https://perma.cc/6XPG-8AMD>].

12. Cases in the U.S. of *Coronavirus Disease 2019 (COVID-19)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> [<https://perma.cc/EAQ3-3UUG>].

13. *Georgia Department of Public Health Daily Status Report*, GA. DEP’T OF PUB. HEALTH, <https://dph.georgia.gov/covid-19-daily-status-report> [<https://perma.cc/8PGE-XN83>].

14. Deb Riechmann, *US Declares Public Health Emergency from Coronavirus*, *BOS. GLOBE*, <https://www.bostonglobe.com/news/nation/2020/01/31/declares-public-health-emergency-from-coronavirus/9WMXL38AdA08GJworROtII/story.html> [<https://perma.cc/4FL8-X6K8>] (Feb. 1, 2020, 11:40 AM).

15. *15 Days to Slow the Spread*, WHITE HOUSE (Mar. 16, 2020), <https://www.whitehouse.gov/articles/15-days-slow-spread/> [<https://perma.cc/G9X7-NHPT>].

16. *The President’s Coronavirus Guidelines for America*, WHITE HOUSE 2 (Mar. 16, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf [<https://perma.cc/89RS-CXEC>].

Because of the federal system in the United States, however, the government response to COVID-19 largely depended on the decisions of each state.¹⁷ By mid-March, every state had followed the federal government's lead and declared a state of emergency.¹⁸ These emergency declarations were accompanied by variations of a shelter-in-place Order, which generally prohibited gatherings of large groups.¹⁹ In most states, the Executive Orders specifically banned any public gatherings of more than ten people and mandated the closure of many businesses.²⁰ The scope and duration of these Executive Orders varied by jurisdiction.²¹ As discussed *infra*, Georgia's Governor first issued an Executive Order imposing shelter-in-place requirements on April 2, 2020, and gradually lifted and amended parts of the Order over the subsequent weeks and months.²²

Challenges to Governor Kemp's Executive Order

Unlike other States' Executive Orders, the shelter-in-place provisions of Governor Brian Kemp's (R) COVID-19-related Orders did not face highly publicized First Amendment lawsuits, and the issue now appears moot.²³ The mandatory enforcement provisions of the Order expired on May 1.²⁴

17. See generally Diane Messere Magee, *The Constitution and Federalism in the Age of Pandemic*, 68 R.I. B. J. 11 (2020).

18. *List of States with Emergency Declaration due to COVID-19*, HOLLYWOOD L.A. NEWS (Mar. 17, 2020), <https://www.hollywoodlanews.com/states-list-coronavirus-state-of-emergency/> [https://perma.cc/7RUQ-P4TH].

19. Jorge L. Ortiz & Grace Hauk, *Coronavirus in the US: How All 50 States Are Responding – and Why Eight Still Refuse to Issue Stay-at-Home Orders*, USA TODAY, <https://www.usatoday.com/story/news/nation/2020/03/30/coronavirus-stay-home-shelter-in-place-orders-by-state/5092413002/> [https://perma.cc/TY6S-S32K] (Apr. 9, 2020, 2:32 PM).

20. *Id.*

21. *Id.*

22. Ga. Exec. Order No. 04.02.20.01 (Apr. 2, 2020) (on file with the Georgia State University Law Review); Ga. Exec. Order No. 06.29.20.01 (June 29, 2020) (on file with the Georgia State University Law Review).

23. See *Barrow v. Raffensperger*, 308 Ga. 660, 667, 842 S.E.2d 884, 891 (2020) (“A case is moot ‘when it seeks to determine an issue which, if resolved, cannot have any practical effect on the underlying controversy, or when such resolution will determine only abstract questions not arising upon existing facts or rights.’” (quoting *Pimper v. State ex rel. Simpson*, 274 Ga. 624, 626, 555 S.E.2d 459, 461 (2001))). Moot issues are not justiciable. *Id.*; see also discussion *infra* Part Analysis.

24. See Ga. Exec. Order No. 04.08.20.03, at 6 (Apr. 8, 2020) (on file with the Georgia State University Law Review); see also *Coronavirus in Georgia: Shelter-in-Place Comes to an End for Most*

While the Orders were in effect, however, at least one church disregarded the restrictions on large gatherings by holding in-person worship services.²⁵ The Statesboro-based Redeeming Love Church of God the Bibleway's defiance of the Governor's Orders resulted in the Georgia State Patrol issuing citations to church leaders.²⁶ As of October 2020, these citations remained pending adjudication.²⁷ The church's pastor, Dr. Clayton Cowart, indicated the possibility of First Amendment litigation to challenge the applicability of the Executive Orders to religious gatherings and churches.²⁸

Free Exercise Clause challenges to similar bans on large gatherings by religious groups in other states led to the development of a body of federal case law culminating in an opinion by the U.S. Supreme Court declining to grant an interlocutory emergency injunction against California's restriction on large gatherings as applied to churches.²⁹ Although that Order arguably established that these types of restrictions are consistent with the First Amendment,

Georgians, WSB-TV, <https://www.wsbtv.com/news/local/coronavirus-georgia-shelter-in-place-comes-an-end-most-georgians/R4QGJPB3QFGHTMQUGI7G6OP36M/> [<https://perma.cc/8FFF-ZRDL>] (May 1, 2020, 9:59 AM). A comprehensive Westlaw and Lexis search of trial court documents by the authors revealed no cases and no pending litigation asserting First Amendment claims against Governor Kemp or any other Georgia officials related to the Executive Orders as of October 2020. A similar search of news aggregators and a web search generally did not reveal any reports of First Amendment challenges to the Orders. Various businesses and groups, however, filed Second Amendment and Fourteenth Amendment claims against the State of Georgia, as well as voting rights claims related to the COVID-19 restrictions. *See, e.g.,* Coal. for Good Governance v. Raffensperger, No. 1:20-cv-01677-TCB, 2020 WL 1932930 (N.D. Ga. Apr. 20, 2020); Ga. Ass'n of Latino Elected Officials, Inc. v. Gwinnett Cnty. Bd. of Registration and Elections, No. 1:20-cv-01587-WMR, 2020 WL 1870338 (N.D. Ga. Apr. 14, 2020).

25. Greg Bluestein, *A Statesboro Church's Defiance Underscores Kemp's Shutdown Dilemma*, ATLANTA J.-CONST. (Apr. 7, 2020), <https://www.ajc.com/blog/politics/statesboro-church-defiance-underscores-kemp-dilemma/BZhxqcdDE1wemnOL0xs19L/> [<https://perma.cc/K8ZM-SZ7E>].

26. La'Tasha Givens, *Georgia Pastor, Church Members Cited for Not Following Shelter-in-Place Order*, 11ALIVE, <https://www.11alive.com/article/news/health/coronavirus/georgia-pastor-and-church-members-cited-for-not-following-stay-in-shelter-order/85-d226c371-d53a-4796-82ee-4fbc1286ec5b> (Apr. 7, 2020, 10:12 PM).

27. Telephone Interview with Dr. Clayton Cowart, Presiding Apostle, Redeeming Love Church of God the Bibleway, (May 26, 2020) (on file with the Georgia State University Law Review) [hereinafter Cowart Interview]; *see also* Al Hackle, *'Bibleway 5' File to Have Charges Dismissed After Church Met Through COVID Shutdown*, STATESBORO HERALD, <https://www.statesboroherald.com/local/bibleway-5-file-to-have-charges-dismissed-after-church-met-through-covid-shutdown/> [<https://perma.cc/VUX2-8KNT>] (Sept. 4, 2020).

28. Cowart Interview, *supra* note 27.

29. *See* S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613, 1614 (2020) (Roberts, C.J., concurring) ("The notion that it is 'indisputably clear' that the Government's limitations are unconstitutional seems quite improbable.").

the potential for future litigation continues to loom large, especially when considering the possibility that renewed shelter-in-place Orders may be issued in response to an ongoing pandemic, such as COVID-19, or similar health-related emergencies that may occur in the future.³⁰ Should Georgia implement a new version of its ban on large gatherings, organizations such as Dr. Cowart's church would likely file suit and force courts to decide whether such bans comport with the religious liberty and freedom of assembly rights protected by the First Amendment.³¹

Governor Kemp's Executive Order Limiting Public Gatherings

On March 23, 2020, Governor Kemp issued an Executive Order prohibiting gatherings of more than ten people in a single location "if such gathering requires persons to stand or to be seated within six (6) feet of any other person."³² This ten-person limit remained in effect until June 1 when the State permitted gatherings of twenty-five people so long as the gatherers maintained six feet of distance between each person.³³ And on June 11, Governor Kemp issued a new Order increasing the number of people permitted to be in a single location to fifty.³⁴

Although some Georgians viewed Governor Kemp's ban on gatherings as a crucial defense against the virus's spread, the Order also gave rise to constitutional concerns.³⁵ In particular, some religious leaders in the state saw the ban on gatherings as a direct impediment to their right to freely exercise their religion and to peaceably assemble.³⁶ Although these constitutional concerns largely

30. *Id.*; cf. Arielle Mitropoulos et al., *Novel Coronavirus Hospitalizations Increasing in 17 States*, ABC NEWS (June 19, 2020, 2:54 PM), <https://abcnews.go.com/US/coronavirus-hospitalizations-increasing-17-states/story?id=71349014> [<https://perma.cc/J6QQ-4V5T>] (discussing the increasing numbers of COVID-19 cases throughout the early summer of 2020, suggesting that renewed shelter-in-place Orders could be issued to combat the spread of the disease).

31. Cowart Interview, *supra* note 27.

32. Ga. Exec. Order No. 03.23.20.01, at 2 (Mar. 23, 2020) (on file with the Georgia State University Law Review).

33. Ga. Exec. Order No. 05.28.20.02, at 4 (May 28, 2020) (on file with the Georgia State University Law Review).

34. Ga. Exec. Order No. 06.11.20.01, at 4 (June 11, 2020) (on file with the Georgia State University Law Review).

35. See Cowart Interview, *supra* note 27.

36. *Id.*

faded as Governor Kemp eased restrictions on gatherings, the potential for renewed restrictions loomed large as confirmed cases of the virus continued to surge statewide throughout the summer of 2020.³⁷

In a March 16 press release, Governor Kemp encouraged, but did not require, all faith-based organizations to cancel their in-person services and public events.³⁸ On April 2, Governor Kemp issued his most restrictive Executive Order of the pandemic—the statewide shelter-in-place Order that prohibited gatherings of ten or more people.³⁹ Although this Order did not specifically reference churches, it also lacked any explicit exemptions for religious organizations or faith-based communities.⁴⁰ The assumption that it applied to worship services sparked outrage from some religious leaders who wished to continue unaltered services.⁴¹

However, unlike governors from other states, Governor Kemp never specifically ordered religious communities to stop holding services.⁴² And on April 20, Governor Kemp formally announced that churches could begin holding in-person services again as part of his expansive efforts to reopen the state.⁴³ Additionally, when President Trump declared all houses of worship to be “essential

37. Rebecca Lindstrom, *Georgia Hospitals See Increase in Patients As COVID-19 Numbers Keep Climbing*, 11ALIVE, <https://www.11alive.com/article/news/health/coronavirus/coronavirus-numbers/georgia-covid-hospitalization-numbers-increase/85-5b03542a-45bb-47f9-8ff8-d9a01c2f2365> (July 14, 2020, 6:31 PM).

38. Press Release, Brian P. Kemp, Gov. of Georgia, *Kemp: Public Health Emergency in Georgia Effective March 14, 2020* (Mar. 16, 2020), <https://gov.georgia.gov/press-releases/2020-03-16/kemp-public-health-emergency-georgia-effective-march-14-2020> [https://perma.cc/G6UK-EXBK].

39. Ga. Exec. Order No. 04.23.20.02 (Apr. 23, 2020) (on file with the Georgia State University Law Review).

40. *See id.*

41. *See* Cowart Interview, *supra* note 27.

42. Brian Paglia, *'Felt Like Homecoming' – Forsyth County Churches Begin to Gather Again Amid Coronavirus*, FORSYTH CNTY. NEWS, <https://www.forsythnews.com/life/faith-charity/felt-like-homecoming-forsyth-county-churches-begin-to-gather-again-amid-coronavirus/> [https://perma.cc/5RYZ-TX7H] (May 30, 2020, 6:00 AM). The most notable clashes between a governor and church leaders occurred in California, where Governor Gavin Newsom (D) tightly regulated the reopening of houses of worship. *See Churches Amid the Pandemic: Some Outbreaks, Many Challenges*, N.Y. TIMES (July 12, 2020), <https://www.nytimes.com/aponline/2020/07/12/us/ap-virus-outbreak-churches-and-covid.html> [https://perma.cc/2UCT-UGSM].

43. Lorenzo Reyes, *Many Georgia Churches Stay Shut Despite Governor's Measure that Allows In-Person Services*, USA TODAY, <https://www.usatoday.com/story/news/health/2020/04/26/coronavirus-georgia-most-churches-remain-closed-services/3029894001/> [https://perma.cc/W4JJ-TKK9] (Apr. 26, 2020, 7:28 PM).

services” on May 22, Governor Kemp applauded the decision and encouraged churches, synagogues, and mosques to reopen their doors.⁴⁴ Governor Kemp further rolled back restrictions on June 11, allowing gatherings of up to fifty people with appropriate social distancing.⁴⁵

Although Georgia’s restrictions on religious services were some of the most lenient in the nation, at least one church in the state created controversy when it defied all social distancing and crowd limit measures, and held services as usual.⁴⁶ Just days after the statewide shelter-in-place Order went into effect, Redeeming Love Church of God the Bibleway in Statesboro held in-person services.⁴⁷ Dr. Cowart, the church’s pastor, had no compunction in admitting that the twenty-to-forty attendees did not practice social distancing; as part of their worship ceremony, they touched each other and held hands.⁴⁸ When state troopers saw the gathering, they shut it down and issued citations to the pastor and three other attendees for reckless conduct.⁴⁹

Analysis

Given that Governor Brian Kemp’s (R) Executive Orders regulated the way Georgians gathered and expressed their beliefs, the Orders necessarily implicated the First Amendment. Specifically, Governor Kemp’s ban on gatherings affected Georgians’ right to assemble and their free exercise of religion.

44. Ryan Kruger, *Gov. Kemp, Local Churches React to President Trump’s Comments of Houses of Worship Reopening*, 11ALIVE, <https://www.11alive.com/article/news/health/coronavirus/trump-churches-essential-reopen/85-555c58ec-f142-4f6e-bdbc-0a5ea145b460> (May 23, 2020, 12:24 AM). In a May 28 press conference, Governor Kemp also emphasized that “we never closed places of worship.” Press Release, Brian P. Kemp, Gov. of Georgia, Kemp, State Officials Give Update on COVID-19 (May 28, 2020), <https://gov.georgia.gov/press-releases/2020-05-28/kemp-state-officials-give-update-covid-19> [<https://perma.cc/6KBQ-FMLA>]. Instead, he merely “encouraged congregations to hold online or drive-in services to mitigate the risk of exposure.” *Id.*

45. Ga. Exec. Order No. 06.11.20.01, *supra* note 34.

46. Adam McCann, *States with the Fewest Coronavirus Restrictions*, WALLETHUB (July 21, 2020), <https://wallethub.com/edu/states-coronavirus-restrictions/73818/> [<https://perma.cc/HL7X-4FNN>]; Givens, *supra* note 26.

47. Cowart Interview, *supra* note 27.

48. *Id.*

49. *Id.*

The First Amendment, incorporated to the states through the Fourteenth Amendment, prohibits the government from “abridging the freedom of speech . . . or the right of the people peaceably to assemble.”⁵⁰ Additionally, the First Amendment’s Free Exercise Clause ensures that no law prevents “the free exercise” of religion.⁵¹ The Supreme Court has interpreted these rights as jointly serving “a common core purpose of assuring freedom of communication.”⁵² Moreover, these individual rights “are not confined to verbal expression,” but rather encompass a broad range of conduct, speech, and action.⁵³ Further intermingling these rights, the Court has analyzed some purported religious restrictions under the Freedom of Speech Clause because religious viewpoints inherently constitute expression.⁵⁴ Regardless of the precise method of analysis, any laws or executive actions that implicate the fundamental rights articulated in the First Amendment will be subject to heightened scrutiny.⁵⁵

Despite their breadth, however, First Amendment freedoms are not absolute. The extenuating circumstances presented by the pandemic led some courts to deviate from otherwise applicable First Amendment black letter law.⁵⁶ Courts revived older doctrines applicable only in emergency situations.⁵⁷ Citing century-old case law, courts applied these rationales to claims of freedom of assembly and religion.⁵⁸

Specifically, the extraordinary nature of the threats to public health posed by the novel pandemic led courts to breathe new life into the

50. U.S. CONST. amend. I; *see also* Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018) (“The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits laws that abridge the freedom of speech.”).

51. U.S. CONST. amend. I.

52. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 575 (1980).

53. *Brown v. Louisiana*, 383 U.S. 131, 141–42 (1966).

54. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2607 (2020) (Alito, J., dissenting) (“Laws that restrict speech based on the viewpoint it expresses are presumptively unconstitutional . . . and under our cases religion counts as a viewpoint.” (first citing *Iancu v. Brunetti*, 139 S. Ct. 2294, 2298–99 (2019); then *Rosenberger v. Rector*, 515 U.S. 819, 831 (1995))).

55. *See, e.g.*, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

56. *Cassell v. Snyders*, No. 20 C 50153, 2020 U.S. Dist. LEXIS 77512, at *6 (N.D. Ill. May 3, 2020).

57. *Id.*; *In re Abbott*, 954 F.3d 772, 783 (5th Cir. 2020); *Gish v. Newsom*, No. EDCV 20-755 JGB, 2020 U.S. Dist. LEXIS 74741, at *5 (C.D. Cal. Apr. 23, 2020).

58. *See, e.g.*, *Best Supplement Guide, LLC v. Newsom*, No. 2:20-cv-00965-JAM-CKD, 2020 U.S. Dist. LEXIS 90608, at *8 (E.D. Cal. May 22, 2020) (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905)) (collecting COVID-19-related cases applying *Jacobson*).

1905 Supreme Court decision *Jacobson v. Massachusetts*.⁵⁹ Decided in the midst of a smallpox outbreak, *Jacobson* upheld Massachusetts's mandatory vaccination law.⁶⁰ In reaching its holding, the Court recognized each state's "unquestioned power to preserve and protect the public health."⁶¹ Nearly every court that opined on COVID-19 restrictions in the midst of the pandemic cited to *Jacobson*, one of the few established Supreme Court precedents directly related to a public health crisis.⁶² Courts almost uniformly agreed that "COVID-19 qualifie[d] as the kind of public health crisis that the Court contemplated in *Jacobson*."⁶³

Many courts relied on *Jacobson* to hold that "traditional tiers of constitutional scrutiny [did] not apply" during the ongoing pandemic.⁶⁴ Instead, this alternate constitutional analysis called on the judicial branch to only interfere with state-imposed restrictions when the pronouncements had no "real or substantial relation to the protection of the public health" or when they were "beyond all question, a plain, palpable invasion of rights secured by the fundamental law."⁶⁵ This test affords state governments broad deference in regulating activities during a public health emergency.⁶⁶

59. *Benner v. Wolf*, No. 20-cv-775, 2020 U.S. Dist. LEXIS 89425, at *15 (M.D. Pa. May 21, 2020) (citing *Jacobson*, 197 U.S. at 26) (recognizing *Jacobson* as "a case similar to the circumstances presently before us"); *Antietam Battlefield KOA v. Hogan*, No. CCB-20-1130, 2020 U.S. Dist. LEXIS 88883, at *14–15 (D. Md. May 20, 2020) (citing *Jacobson*, 197 U.S. at 12–13, 28, 30–31) ("Since the challenged orders are public health measures to address a disease outbreak, *Jacobson* provides the proper scope of review.")

60. *Jacobson*, 197 U.S. at 11–22.

61. *Id.* at 22.

62. *See, e.g., Benner*, 2020 U.S. Dist. LEXIS 89425, at *15; *Hogan*, 2020 U.S. Dist. LEXIS 88883, at *14–15.

63. *Cassell v. Snyders*, No. 20 C 50153, 2020 U.S. Dist. LEXIS 77512, at *19 (N.D. Ill. May 3, 2020); *Hogan*, 2020 U.S. Dist. LEXIS 88883, at *14 ("Numerous cases have applied the standard in [*Jacobson*], when reviewing measures that curtail constitutional rights during the COVID-19 pandemic.")

64. *Cassell*, 2020 U.S. Dist. LEXIS 77512, at *6 (citing *Jacobson*, 197 U.S. at 27); *Calvary Chapel of Bangor v. Mills*, No. 1:20-cv-00156-NT, 2020 U.S. Dist. LEXIS 81962, at *16 (D. Me. May 9, 2020) (quoting *Cassell*, 2020 U.S. Dist. LEXIS 77512, at *6). *But see, e.g., S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 942 (9th Cir.) (Collins, J., dissenting) ("Nothing in *Jacobson* supports the view that an emergency displaces normal constitutional standards."), *denying injunction pending appeal*, 140 S. Ct. 1613 (2020).

65. *Jacobson*, 197 U.S. at 31.

66. *See, e.g., Open Our Or. v. Brown*, No. 6:20-cv-773-MC, 2020 U.S. Dist. LEXIS 87942, at *2–3 (D. Or. May 19, 2020) ("[T]his Court is inclined to side with the chorus of other federal courts in pointing to *Jacobson* and rejecting similar constitutional claims brought by Plaintiffs challenging similar COVID-19 restrictions in other states.")

Even during a crisis, however, a State may not discriminate based on race or religion, or impose content-based suppressions of speech.⁶⁷

After states began responding to the spread of COVID-19 by imposing stay-at-home restrictions and bans on large gatherings, a number of courts heard First Amendment challenges to those decrees.⁶⁸ Although not entirely consistent in their reasoning, courts generally upheld the regulations as reasonable measures necessary to contain the disease.⁶⁹ Religious organizations were particularly litigious in this area. Although a divided Supreme Court denied the injunctive relief sought by a California church on an interlocutory appeal challenging that state's restrictions on Free Exercise Clause grounds and later dismissed an analogous appeal by Nevada plaintiffs, federal circuit courts hearing similar cases from other states came to different conclusions.⁷⁰

Assembly Clause

The First Amendment guarantees individuals the right to assembly.⁷¹ This right does not cover generalized licensing laws or rights of “social association.”⁷² Instead, the right to freedom of assembly includes “expressive association,” which are assemblies deemed necessary to the exercise of other First Amendment rights such as speech and religion.⁷³ In other words, the Supreme Court traditionally protects assemblies and associations formed to combine and elevate the participants' individual rights of expression.⁷⁴

67. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2614 (2020) (Kavanaugh, J., dissenting) (“COVID-19 is not a blank check for a State to discriminate against religious people, religious organizations, and religious services.”).

68. *See generally, e.g., Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020); *First Pentecostal Church of Holly Springs v. City of Holly Springs*, 959 F.3d 669 (5th Cir. 2020); *S. Bay United Pentecostal Church*, 959 F.3d at 938.

69. *Mills*, 2020 U.S. Dist. LEXIS 81962, at *17 (collecting cases and noting that “courts across this country have repeatedly upheld orders meant to curb the spread of COVID-19”).

70. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020); *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 346 (7th Cir. 2020) (“We line up with Chief Justice Roberts.”); *Neace*, 958 F.3d at 416 (striking down Kentucky's ban on mass gatherings as unconstitutional and granting the church's motion for injunctive relief).

71. U.S. CONST. amend. I.

72. *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

73. *Id.*

74. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

A key inquiry in freedom of assembly cases is whether the state's restriction is content-based or content-neutral.⁷⁵ Typically, "peaceable assembly for lawful discussion cannot be made a crime."⁷⁶ But a State may impose neutral restrictions on such assembly whose purposes are not related to the content or message expressed at the assembly.⁷⁷ Courts subject these time, place, and manner restrictions to intermediate scrutiny—a lower level than the strict scrutiny applied to restrictions a State imposes for the purpose of suppressing expression.⁷⁸ Under intermediate scrutiny in the First Amendment context, a restriction must be "narrowly tailored to serve a significant governmental interest" and must "leave open ample alternative channels for communication of the information."⁷⁹

Applying the Assembly Clause to COVID-19 Restrictions

State bans on gatherings, like those imposed during the COVID-19 pandemic, implicate the freedom of assembly because they limit the individual's ability to congregate for expressive purposes.⁸⁰ Therefore, in deciding whether a ban on gathering violates the Assembly Clause, courts must determine whether the ban is content-based or content-neutral.⁸¹ A ban on gatherings is content-neutral when it does not distinguish between types of gatherings and requires no inquiry into the content expressed at certain gatherings.⁸² On the other hand, bans on gatherings are

75. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

76. *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

77. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

78. *Id.* Content-based restrictions will survive only where they are narrowly tailored to serve a compelling state interest. *Reed*, 576 U.S. at 163.

79. *Ward*, 491 at 791.

80. *See, e.g., Ramsek v. Beshear*, No. 3:20-cv-00036-GFVT, 2020 U.S. Dist. LEXIS 110668, at *23–27 (E.D. Ky. June 24, 2020); *McCarthy v. Cuomo*, No. 20-cv-2124 (ARR), 2020 U.S. Dist. LEXIS 107195, at *11–12 (E.D.N.Y. June 18, 2020); *ACA Int'l v. Healey*, No. 20-10767-RGS, 2020 U.S. Dist. LEXIS 79716, at *10–11 (D. Mass. May 6, 2020).

81. *Reed*, 576 U.S. at 164.

82. *McCarthy*, 2020 U.S. Dist. LEXIS 107195, at *11–12; *Ramsek*, 2020 U.S. Dist. LEXIS 110668, at *28. Although the Kentucky ban was content-neutral, the court struck it down because it did not pass intermediate scrutiny. *Ramsek*, 2020 U.S. Dist. LEXIS 110668, at *28. Specifically, the district court found the ban to be overbroad and not narrowly tailored to advance the government's goal of mitigating the spread of COVID-19. *Id.* at *29.

content-based when they exempt certain types of gatherings and require officials to inquire into the content of the gatherings.⁸³

Even if a ban is content-neutral, it will still fail intermediate scrutiny if it is overbroad.⁸⁴ The U.S. District Court for the Eastern District of Kentucky applied this type of analysis in *Ramsek v. Beshear* when it found that Kentucky’s ban on gatherings was not narrowly tailored despite being content-neutral.⁸⁵ The court took issue with the fact that the Kentucky Order implemented an unnecessary blanket ban on *all* large gatherings.⁸⁶ The court opined that the Order could have more narrowly tailored the ban and still achieved its goals by requiring masks, social distancing, and hand-washing, as were required in commercial establishments.⁸⁷ In one of the few cases where the plaintiffs prevailed, the district court held that Kentucky’s ban on gatherings was unconstitutional because it “completely eliminate[d] Kentuckians’ ability to gather for in-person exercise of their First Amendment rights.”⁸⁸

Governor Brian Kemp’s Executive Orders Likely Comply with the Assembly Clause

Governor Kemp’s ban on large gatherings likely did not violate the Assembly Clause of the First Amendment for three primary reasons. First, none of Governor Kemp’s bans on gatherings made content-based distinctions.⁸⁹ Unlike the Illinois ban that carved out an exception for religious gatherings, Georgia’s ban prohibited “*all* businesses, establishments, corporations, non-profit corporations, [and] organizations” and local governments from allowing gatherings.⁹⁰ Under Georgia’s ban, government officials did not need

83. *Ill. Republican Party v. Pritzker*, No. 20 C 3489, 2020 U.S. Dist. LEXIS 116383, at *16 (N.D. Ill.), *aff’d* 973 F.3d 760 (7th Cir. 2020). Here, Illinois specifically exempted religious gatherings from the statewide ban on gatherings. *Id.* at *3–4. This exception required government officials to inquire into the nature and content of gatherings in enforcing the Order. *Id.* Such an inquiry is evidence of a content-based restriction. *Id.* However, this ban survived strict scrutiny because it was narrowly tailored to advance a compelling interest. *Id.* at *24–25.

84. *Ramsek*, 2020 U.S. Dist. LEXIS 110668, at *34.

85. *Id.*

86. *Id.* at *29.

87. *Id.* at *10.

88. *Id.* at *34.

89. *See, e.g.*, Ga. Exec. Order No. 03.23.20.01, *supra* note 32.

90. *See, e.g.*, Ga. Exec. Order No. 04.23.20.02, *supra* note 39, at 11 (emphasis added).

to differentiate between types of gatherings and types of content to enforce the ban effectively. For this reason, Georgia’s ban on gatherings was content-neutral.

Second, Georgia’s ban on gatherings was narrowly tailored to achieve a significant government interest. Every court that took up the issue acknowledged that stopping the spread of COVID-19—Georgia’s reason for imposing its ban—was not only a significant interest but a compelling one.⁹¹ Further, Georgia advanced this interest through a narrowly tailored means. Since April 23, 2020, Governor Kemp qualified his ban by allowing for gatherings where the grouping was “transitory or incidental, or if their grouping [was] the result of being spread across more than one Single Location.”⁹² Gatherings were also permitted where persons maintained six feet of distance from any other person.⁹³ Unlike Kentucky’s unqualified, blanket prohibition on all gatherings, Georgia’s ban still allowed for gatherings under certain circumstances. For example, some of the largest protests in Georgia’s history occurred during the summer of 2020 in response to police killings of Black civilians.⁹⁴ Nevertheless, these massive gatherings did not conflict with Governor Kemp’s Orders because protestors were not required to be within six feet of other persons.⁹⁵

Third, the Executive Orders never banned expression, but to the extent that they did, Governor Kemp provided adequate alternative channels of expression. In *Ramsek*, the court noted that it was “not good enough” for Kentucky to provide, as an alternative for in-person political protest, the ability to gather in parked cars in a parking lot.⁹⁶ The Kentucky decree challenged in that case, of course,

91. *E.g.*, *Ill. Republican Party v. Pritzker*, No. 20 C 3489, 2020 U.S. Dist. LEXIS 116383, at *11 (N.D. Ill.), *aff’d*, 973 F.3d 760 (7th Cir. 2020); *Ramsek*, 2020 U.S. Dist. LEXIS 110668, at *27; *McCarthy v. Cuomo*, No. 20-cv-2124 (ARR), 2020 U.S. Dist. LEXIS 107195, at *12 (E.D.N.Y. June 18, 2020).

92. Ga. Exec. Order No. 04.23.20.02, *supra* note 39, at 4.

93. *Id.*

94. J. Scott Trubey et al., *Thousands March As Protests Continue for 10th Day Across Metro Atlanta*, ATLANTA J.-CONST., <https://www.ajc.com/news/local-govt—politics/thousands-march-protests-continue-for-10th-day-across-metro-atlanta/eYOLEBV9I3V0ZF1qkLSxxM/> [https://perma.cc/8HRG-HQVH] (June 7, 2020).

95. Adrienne M. Haney, *Gov. Kemp Blames Spike in COVID-19 Cases on Widespread Protests on Racial Injustice*, 11ALIVE, <https://www.11alive.com/article/news/health/coronavirus/atlanta-protests-covid-spike-kemp-claims/85-b16993e3-ce89-43a3-808a-723a5347a568> (July 17, 2020, 8:03 PM).

96. *Ramsek*, 2020 U.S. Dist. LEXIS 110668 at *5.

was very different from Georgia's Order, which did not categorically ban in-person protests or gatherings. Indeed, the social distancing requirements on large gatherings were not so cumbersome so as to prevent expression in the first place.⁹⁷ For these reasons, Georgia's ban on gatherings would likely survive a freedom of assembly challenge.

Free Exercise Clause

The First Amendment protects religious liberty; this concept, embodied in the Free Exercise Clause, includes the right of individuals to believe in the religion of their choice, or lack thereof, and the right of individuals to generally act in accordance with those beliefs.⁹⁸ Religious activities, however, are not exempt from generally applicable laws.⁹⁹ On the other hand, any laws, regulations, or other government acts targeting religion are subject to strict scrutiny.¹⁰⁰ Those laws will only survive constitutional scrutiny if they are “justified by a compelling interest and [are] narrowly tailored to advance that interest,” meaning that a State must typically defend its actions by providing the court with strong policy justifications that it cannot achieve through less restrictive means.¹⁰¹ In June 2020, the Supreme Court reaffirmed that states unconstitutionally target religion when they treat religious groups differently than secular groups or when laws discriminate based on religious affiliation.¹⁰²

Under a traditional Free Exercise Clause framework, churches and other religious organizations wishing to challenge restrictions on in-person gatherings would need to demonstrate that the challenged

97. See Ga. Exec. Order No. 04.23.20.02, *supra* note 39.

98. *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940).

99. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 878–79 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, 107 Stat. 1488, *as recognized in Holt v. Hobbs*, 574 U.S. 352 (2015).

100. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2016 (2017).

101. *Lukumi Babalu Aye*, 508 U.S. at 531–32.

102. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2254 (2020) (“The Free Exercise Clause, which applies to the States under the Fourteenth Amendment, ‘protects religious observers against unequal treatment’ and against ‘laws that impose special disabilities on the basis of religious status.’” (quoting *Trinity Lutheran*, 137 S. Ct. at 2021)).

Orders would not qualify as generally applicable laws.¹⁰³ Potential plaintiffs increase their likelihood of success when they point to evidence that the Orders subjected them to restrictions beyond those applied to other types of gatherings.¹⁰⁴ Crucially, as explained *supra*, “laws that burden religion while exempting the non-religious must pass strict scrutiny.”¹⁰⁵

Applying the Free Exercise Clause to COVID-19 Restrictions

Congregations challenging COVID-19 restrictions attempted to invoke strict scrutiny by showing that purported bans on large gatherings were not enforced against protesters.¹⁰⁶ In other cases, plaintiffs argued that the Executive Orders targeted churches while exempting other types of gatherings such as food banks and essential social services.¹⁰⁷ In one notable case, the Sixth Circuit struck down Kentucky’s ban on large gatherings, reasoning that the Governor’s Orders violated the Free Exercise Clause because they explicitly outlawed “faith-based based gatherings by name” while exempting comparable secular groups and businesses such as law firms and liquor stores.¹⁰⁸

The Supreme Court addressed similar arguments in May 2020 when it denied interlocutory injunctive relief to a California church challenging a ban on large gatherings under the Free Exercise Clause.¹⁰⁹ Chief Justice Roberts, concurring in the judgment, noted that “[s]imilar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances.”¹¹⁰ Chief Justice Roberts went on to opine that gatherings at grocery stores and banks, exempted from the ban under California Governor Gavin Newsom’s (D) Executive Order, did not qualify as similar or comparable to

103. *Smith*, 494 U.S. at 878–79; *Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020) (analyzing COVID-19 restrictions on religious gatherings).

104. *Neace*, 958 F.3d at 413–14.

105. *Spell v. Edwards*, 962 F.3d 175, 181 (5th Cir. 2020) (Ho, J., concurring).

106. *Id.*

107. *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 345 (7th Cir. 2020).

108. *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614 (6th Cir. 2020).

109. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020).

110. *Id.* (Roberts, C.J., concurring).

church gatherings.¹¹¹ When conducting a Free Exercise Clause analysis, courts should instead examine whether Executive Orders subject churches to the same restrictions as other “large groups of people gather[ed] in close proximity for extended periods of time.”¹¹² Justice Kavanaugh dissented and explicitly disagreed, stating that “California’s latest safety guidelines discriminate against places of worship and in favor of comparable secular businesses.”¹¹³

The Court reaffirmed its deference to state regulations of religious gatherings in *Calvary Chapel Dayton Valley v. Sisolak*.¹¹⁴ In *Calvary Chapel*, the Court rejected a Nevada church’s request for an injunction against the state’s fifty-person limit on religious gatherings.¹¹⁵ The church argued that churches were singled out by this policy because Nevada allowed casinos, restaurants, and bars to operate at higher capacities.¹¹⁶ The State argued, however, that the policy treated churches the same as other venues where large crowds gathered—such as concerts and sporting events.¹¹⁷ Although the Court majority provided no reasoning for its ruling, the central question for the district court judge who presided over the case was “[w]hether a church is more like a casino or more like a concert or lecture hall for purposes of assessing risk of COVID-19 transmission.”¹¹⁸ This distinction echoed the one drawn by Chief Justice Roberts in the challenge to California’s restrictions.¹¹⁹

111. *Id.* Chief Justice Roberts also said that he reached this result, in part, because the plaintiffs applied for injunctive relief as opposed to a stay, and that “[s]uch a request demands a significantly higher justification than a request for a stay because, unlike a stay, an injunction does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.” *Id.* And courts should only grant this type of relief where “the legal rights at issue are indisputably clear” and, even then, do so “sparingly and only in the most critical and exigent circumstances.” *Id.*

112. *Id.*

113. *Id.* at 1614 (Kavanaugh, J., dissenting).

114. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020).

115. *Id.*

116. *Id.* at 2605 (Alito, J., dissenting).

117. *Id.*

118. Adam Liptak, *Split 5 to 4, Supreme Court Rejects Nevada Church’s Challenge to Shutdown Restrictions*, N.Y. TIMES (July 24, 2020), <https://www.nytimes.com/2020/07/24/us/supreme-court-nevada-church-coronavirus.html> [<https://perma.cc/XB5T-JS5Z>].

119. *Calvary Chapel Dayton Valley*, 140 S. Ct. at 2608 (Alito, J., dissenting); *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020).

*Governor Brian Kemp's Executive Orders Likely Comply with
the Free Exercise Clause*

Although this area of law remains prone to rapid evolution, Governor Kemp's Executive Orders would likely survive constitutional scrutiny, especially under the *Jacobson* public health emergency standard applied by numerous circuit courts and by Chief Justice Robert's concurrence in *South Bay United Pentecostal Church v. Newsom*.¹²⁰ Those courts denied injunctive relief when churches challenged Executive Orders significantly more burdensome to the exercise of religion than the Georgia Orders.¹²¹ Governor Kemp's Order did not single out religious groups but rather banned gatherings of more than ten people at any "business, establishment, corporation, non-profit corporation, or organization."¹²²

Even under the reasoning of dissenting Justices Kavanaugh and Gorsuch, respectively, the Georgia restrictions could prevail because the dissenters emphasized how California and Nevada's executive actions specifically subjected churches to restrictions not applicable to other businesses. As Justice Kavanaugh explained, "the Court's precedents do *not* require that religious organizations be treated *more favorably* than all secular organizations. Rather, the First Amendment requires that religious organizations be treated *equally* to the favored or exempt secular organizations"¹²³ He went on to question how the states' proffered justifications for limiting church services—the public health risks of gathering in large groups—would not apply with equal force to restrictions on restaurants and casinos.¹²⁴ Because he found that both the California and Nevada laws discriminated against religion, he would have applied strict scrutiny and granted injunctive relief to the plaintiffs.¹²⁵ Justice Gorsuch expressed his

120. See, e.g., *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613. The Supreme Court only heard these challenges at the injunctive relief phase without full briefing or oral argument on the merits of the claims. See, e.g., *id.*; *Calvary Chapel Dayton Valley*, 140 S. Ct. at 2603.

121. *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613; see also discussion *supra* Section *Applying the Free Exercise Clause to COVID-19 Restrictions*.

122. Ga. Exec. Order No. 03.23.20.01, *supra* note 32.

123. *Calvary Chapel Dayton Valley*, 140 S. Ct. at 2613 (Kavanaugh, J., dissenting).

124. *Id.*

125. *Id.*

similar sentiments more bluntly: “In Nevada, it seems, it is better to be in entertainment than religion. Maybe that is nothing new. But the First Amendment prohibits such obvious discrimination against the exercise of religion.”¹²⁶

This reasoning—that strict scrutiny applies because of the disparate treatment of religion—likely would not apply to Governor Kemp’s Executive Orders because the Georgia restrictions on large groups did not distinguish between religious congregations and other gatherings. In contrast to the California and Nevada Orders, and also unlike the Kentucky ban struck down by the Sixth Circuit, Governor Kemp’s proclamations did not even mention churches. Instead, the Orders applied broadly to a large number of potential gatherings and businesses.¹²⁷

Churches could successfully challenge the Orders, however, if they demonstrate that the Orders—as-applied—unfairly targeted their organizations. Dr. Clayton Cowart, the president of Redeeming Love Church of God the Bibleway’s parent company, would likely make this argument, especially after his church received citations from the Georgia State Patrol for continuing to congregate during the shelter in place.¹²⁸ If Dr. Cowart could produce evidence that non-religious gatherings were not penalized in the way his church service was, he may have grounds to assert a Free Exercise Clause challenge because state actions “that single out the religious for disfavored treatment” in any way “trigger the strictest scrutiny.”¹²⁹

Dr. Cowart would similarly have a case if he could demonstrate that the intent of the Executive Orders was to target religious groups, especially after the decision in *Espinoza v. Montana Department of Revenue*.¹³⁰ In *Espinoza*, the Court devoted considerable attention to

126. *Id.* at 2609 (Gorsuch, J., dissenting).

127. *See* Ga. Exec. Order No. 04.02.20.01, *supra* note 22, at 2 (“No business, establishment, corporation, non-profit corporation, organization, . . . shall allow more than ten (10) persons to be gathered at a single location.”).

128. Cowart Interview, *supra* note 27. The church filed motions to dismiss the criminal charges brought against five of its members for violating the shelter-in-place Order. Hackle, *supra* note 27. The motions relied primarily on the Free Exercise Clause, arguing that the State discriminatorily enforced the Executive Order against churches but permitted commercial establishments such as Wal-Mart to continue operating. *Id.* As of October 10, 2020, Bulloch County State Court had not yet ruled on the church’s motions. *Id.*

129. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2015 (2017).

130. *Espinoza v. Montana Dep’t of Revenue*, 140 S. Ct. 2246, 2254–57 (2020).

the discriminatory origins of a Montana law prohibiting aid to religious schools, which the Court held unconstitutional as violative of the Free Exercise Clause.¹³¹ Thus, if Dr. Cowart chose to bring suit against the governor on that basis, he would likely need evidence of the executive branch's animus towards his church or towards religious groups generally.¹³² This hypothetical, of course, is unlikely. In fact, Governor Kemp specifically expressed that he never required houses of worship to close, and he was one of the first governors in the nation to encourage them to reopen.¹³³

Any Forthcoming Challenges to Governor Brian Kemp's Executive Orders are Likely Moot

As of October 2020, no court had ruled on a Free Exercise Clause challenge to Governor Kemp's Executive Orders banning large gatherings.¹³⁴ In June 2020, Governor Kemp amended the ban to allow for gatherings of up to fifty people.¹³⁵ If a social event, business, church, or other gathering was cited for violating the new limit of fifty people, then their dispute could be resolved in accordance with the aforementioned frameworks. Governor Kemp's office and other executive branch agencies, however, did not show strong willingness to enforce any aspects of the fifty-person ban.

Moreover, because the relevant provisions of the Orders evolved, courts could find that any new challenge to the prior, more restrictive ban would fail justiciability requirements, and a court would not proceed to analyze the merits.¹³⁶ Specifically, the expiration of the prior Orders would likely render plaintiffs' claims moot. Under Georgia law, "[a] case is moot 'when it seeks to determine an issue which, if resolved, cannot have any practical effect on the underlying controversy, or when such resolution will determine only abstract questions not arising upon existing facts or rights.'"¹³⁷

131. *Id.*

132. *Id.*

133. Press Release, *supra* note 44.

134. *See* discussion *supra* note 24.

135. Ga. Exec. Order No. 06.11.20.01, *supra* note 34.

136. *Shelley v. Town of Tyrone*, 302 Ga. 297, 308, 806 S.E.2d 535, 543 (2017) ("[M]ootness is an issue of jurisdiction and thus must be determined before a court addresses the merits of a claim.").

137. *Barrow v. Raffensperger*, 308 Ga. 660, 667, 842 S.E.2d 884, 891 (2020) (quoting *Pimper v. State*

Federal courts have similar mootness requirements.¹³⁸ In fact, when hearing a First Amendment challenge to Louisiana’s since-rescinded COVID-19 restrictions, the Fifth Circuit held that rescission rendered the plaintiffs’ claim moot.¹³⁹ The court acknowledged that the governor might eventually reimpose the restrictions but characterized that possibility as “speculative, at best.”¹⁴⁰ Other courts addressing this issue similarly affirmed mootness adjudications, even suggesting that “it seems unlikely that [COVID-19 restrictions] w[ould] be reissued.”¹⁴¹ Even if Governor Kemp or future governors eventually reinstate some form of shelter-in-place or ban on gatherings, a court cannot speculate that future Orders will include identical language as the prior ones.

Conclusion

The First Amendment is implicated any time the government places restrictions on how and when people may gather to express their beliefs and religions. Measures adopted in response to a global pandemic are no exception to this. However, Governor Brian Kemp’s (R) ban on gatherings likely did not infringe upon the First Amendment rights of Georgians for three reasons. First, the revived prominence of *Jacobson* bestows upon state officials great latitude in addressing public health emergencies. Second, Governor Kemp’s ban on gatherings was content-neutral and narrowly tailored to achieve a substantial interest. And third, the ban in no way targeted religion.

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ex rel. Simpson, 274 Ga. 624, 626, 555 S.E.2d 459, 461 (2001)).

138. *See generally* *United States v. Sanchez-Gomez*, 138 S. Ct. 1532 (2018). If it appears likely that Governor Kemp will reinstate a similar ban on large gatherings at any time, plaintiffs could argue that the mootness exception for controversies “capable of repetition, yet evading review” applies. *See id.* at 1540. The nuances of the mootness doctrine are beyond the scope of this *Peach Sheet*, but absent a direct threat of future persecution by state officials under the large-gathering prohibition, plaintiffs would likely not succeed. *See Spell v. Edwards*, 962 F.3d 175, 175 (5th Cir. 2020).

139. *Spell*, 962 F.3d at 175.

140. *Id.*

141. *Cameron v. Beshear*, No. 3:20-cv-00023-GFVT, 2020 U.S. Dist. LEXIS 89594, at *2 (E.D. Ky. May 21, 2020); *see also Spell*, 962 F.3d at 175 (“The trend in Louisiana has been to reopen the state, not to close it down.”).

