Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **13th day of May, 2022** are as follows:

BY Crain, J.:

2021-KK-00876 *STATE OF LOUISIANA VS. MARK ANTHONY SPELL* (Parish of East Baton Rouge)

TRIAL COURT JUDGMENT REVERSED. MOTION TO QUASH GRANTED. SEE OPINION.

Weimer, C.J., dissents and assigns reasons.
Crichton, J., additionally concurs and assigns reasons.
Griffin, J., dissents for the reasons assigned by C.J. Weimer.

SUPREME COURT OF LOUISIANA

No. 2021-KK-00876

STATE OF LOUISIANA

VS.

MARK ANTHONY SPELL

On Supervisory Writ to the 19th Judicial District Court,
Parish of East Baton Rouge

CRAIN, J.

In this criminal proceeding, we find certain provisions of two executive orders, as applied to defendant, violate his fundamental right to exercise religion, do not survive strict scrutiny, and are thus unconstitutional.

FACTS AND PROCEDURAL HISTORY

The defendant is the pastor of a church in Central, Louisiana. On March 31, 2020, he was issued six misdemeanor citations for violating two executive orders issued by Governor Edwards in response to the COVID-19 pandemic, "Proclamation Number JBE 2020-30" (Order 30) and "Proclamation Number 33 JBE 2020" (Order 33).[1]

Order 30 was issued on March 16, 2020. In its preamble, the order recognizes the Governor previously declared a public health emergency due to the threat of COVID-19, which, as the order also recognizes, has "the ability . . . to spread via personal interactions." The preamble explains the outbreak had expanded significantly and required additional measures to protect public health and safety. The first of these measures is a restriction on gatherings:

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[1] These and other COVID-related executive orders are available at the following web address: https://www.gov.louisiana.gov/index.cfm/newsroom/category/10?si=471. Courts may take judicial notice of executive orders pursuant to La. Code Evid. art. 202B(1)(a).

> In an effort to reduce and limit the spread of COVID-19 in Louisiana, and to preserve the health and safety of all members of the public, all gatherings of **50** people or more between 12:00 a.m. Tuesday, March 17, 2020 and Monday, April 13, 2020 shall be postponed or cancelled. This applies only to gatherings in a single space at the same time where individuals will be in close proximity to one another. It does not apply to normal operations at locations like airports, medical facilities, shopping centers or malls, office buildings, factories or manufacturing facilities, or grocery or department stores. This order does not limit the ability of a local jurisdiction or political subdivision from enacting more restrictive limitations.

See 30 JBE 2020, Section 1 (emphasis in original).

In addition to this gathering limitation, the Governor closed certain businesses because they presented unacceptable risks to public health and safety, including casinos, video poker establishments, movie theaters, bars, bowling alleys, and fitness centers and gyms. *See* 30 JBE 2020, Section 2. Restaurants, cafes, and coffee shops had to cease on-premises consumption of food and beverage but could continue take-out, drive-thru, and delivery services. *See* 30 JBE 2020, Section 3.

About a week later on March 22, 2020, the Governor issued Order 33. The preamble recognizes that without additional measures to slow the spread of the virus, health care facilities throughout the state were at significant risk of being overwhelmed. The closure or limitation of "non-essential businesses" was necessary, in part, "because of the propensity of the COVID-19 virus to spread via personal interactions." The Governor tightened the restrictions on gatherings by prohibiting 10 or more people from being in a single space, but again allowed exceptions for normal operations at airports, medical facilities, office buildings, factories or manufacturing facilities, or grocery stores. The excepted businesses no longer included shopping centers, malls, and department stores. *See* 33 JBE 2020, Section 2.

Order 33 also imposed a "stay-at-home order" applicable to "all individuals within the state of Louisiana," unless the person was "performing an essential activity." *See* 33 JBE 2020, Section 3. The order defines that phrase to include

obtaining food, medicine, and non-elective medical care; going to and from a family member's home; engaging in outdoor activity; and "[g]oing to and from an individual's place of worship." Attending or participating in a worship service is not expressly identified as an essential activity. The order also deems an essential activity to include travel to and from an individual's workplace to perform certain job functions, including anything "otherwise deemed essential worker functions." The order then instructs:

> Guidance provided by the U.S. Department of Homeland Security, Cybersecurity & Infrastructure Security Agency (CISA) on what workers are essential is outlined at https://www.cisa.gov/idntifying-critical-infrastructure-during-covid-19.

See 33 JBE 2020, Section 3C.

The referenced guidance is in a document titled "Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response." It is qualified by an introductory memorandum stating, "[T]his list is advisory in nature. It is not, nor should it be considered to be, a federal directive or standard in and of itself." Subject to that disclaimer, the document sets forth a list of essential workers that spans seven pages and totals 129 job descriptions in 14 different sectors. Many of the 129 descriptions cover multiple jobs. All of them, by reference, are excepted from Order 33's stay-at-home mandate, including "[a]utomotive repair and maintenance facilities," "[m]anufacturers and distributors . . . of packaging materials," "manufacturing and distribution of animal . . . bedding," and "[c]ompany cafeterias." The extensive list, according to the agency, is subject to change: "CISA will continually solicit and accept feedback on the list . . . and will evolve the list in response to stakeholder feedback."

Order 33 also closed more businesses, including all places of public amusement, personal care and grooming businesses, and all malls except for stores with a direct outdoor entrance and exit that provided essential services or products.

See 33 JBE 2020, Section 4. All other non-essential businesses not closed by this order and Order 30 were required to reduce operations to minimize public contact and were subject to the 10-person limitation on gatherings. *See* 33 JBE 2020, Section 5.

These executive orders were issued by the Governor pursuant to the Louisiana Homeland Security and Emergency Assistance and Disaster Act at Louisiana Revised Statutes 29:721-39. Any person violating an executive order promulgated pursuant to that act is subject to a fine of not more than five hundred dollars or confinement in the parish jail for not more than six months, or both. *See* La. R.S. 29:724E. Relying on this provision, the state charged defendant with violating Orders 30 and 33. The bills of information provide little detail other than stating defendant violated Order 30 on March 17, 2020, (a Tuesday); and twice on March 22, 2020, (a Sunday) at 11:45 a.m. and 6:50 p.m. He is charged with violating Order 33 on March 24, 2020, (a Tuesday); and twice on March 29, 2020, (a Sunday) at 10:00 a.m. and 6:30 p.m. Although the bills of information do not specify which sections of the orders were violated, it is undisputed defendant continued to lead in-person worship services in the church's sanctuary building while each of the subject orders was in effect. It is also undisputed for present purposes the total attendance at these services exceeded the gathering limitation in each applicable order.[2]

The defendant filed a motion to quash the bills of information, arguing the executive orders violated his fundamental right to freely exercise religion and are unconstitutional. The trial court denied the motion, and the court of appeal denied defendant's writ application. This court granted a writ of certiorari. *See State v. Spell*, 21-00876 (La. 12/7/21), 328 So. 3d 406.

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[2] The record does not reflect if citations were issued to others in attendance at the worship services or how authorities determined defendant violated the orders by being at least the 50th person (under Order 30) or 10th person (under Order 33) in attendance at a service.

DISCUSSION

Although an executive order is under review, we are guided by jurisprudence governing constitutional challenges to statutes. The determination of the constitutionality of a statute presents a question of law subject to *de novo* review. *State v. Webb*, 13-1681 (La. 5/7/14), 144 So. 3d 971, 975.

I. Burden of Proof and Fundamental Right of Religious Freedom

The burden of proof is particularly important in this case because limited evidence was introduced at the hearing in the trial court. Generally, statutes are presumed constitutional, and the party challenging the validity of the statute bears the burden of proving it is unconstitutional. *State v. Hatton*, 07-2377 (La. 7/1/08), 985 So. 2d 709, 719; *State v. Fleury*, 01-0871 (La. 10/16/01), 799 So. 2d 468, 472. However, this presumption does not apply when a statute infringes upon a fundamental right. *See San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16-17; 93 S.Ct. 1278, 1288; 36 L.Ed.2d 16 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 343; 92 S.Ct. 995, 1003; 31 L.Ed.2d 274 (1972); *State in Interest of J.M.*, 13-1717 (La. 1/28/14), 144 So. 3d 853, 860. In those instances, the state bears a "heavy burden" of proving the law's validity under the strict-scrutiny standard. *See Rodriguez*, 411 U.S. at 16-17; 93 S.Ct. at 1288; *Dunn*, 405 U.S. at 343; 92 S.Ct. at 1003. This rigorous standard is imposed because fundamental rights are "so essential to the structure of our society" and are "deeply rooted in this Nation's history and tradition." *See Webb*, 144 So. 3d at 978; *Washington v. Glucksberg*, 521 U.S. 702, 703; 117 S.Ct. 2258, 2260; 138 L.Ed.2d 772 (1997). This court described the state's burden of proof as follows:

> Where strict judicial scrutiny is required, [the] state is not entitled to the usual presumption of validity, [and] the state rather than the complainant must carry a heavy burden of justification[.] [T]he state must demonstrate its [action] has been structured with precision, and is tailored narrowly to serve legitimate objectives, and that it has selected the less drastic means for effectuating its objectives. In meeting this heavy burden of justification, the state's role is to present evidence of

> the compelling nature of the government's interest served by the regulation and to demonstrate the restrictions are narrowly tailored to achieve the asserted interest.

Interest of J.M., 144 So. 3d 860-61 (citations and internal quotation marks omitted).

The fundamental right at issue in this case is the free exercise of religion. The First Amendment, applicable to the states through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof....* " U.S. Const., Amdt. 1 (emphasis added); *Fulton v. City of Philadelphia, Pennsylvania*, 141 S.Ct. 1868, 1876; 210 L.Ed.2d 137 (2021). Article I, Section 8 of the Louisiana Constitution similarly provides, "No law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof."

The free exercise of religion means the right to believe and profess whatever religious doctrine one desires. *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877; 110 S.Ct. 1595, 1599; 108 L.Ed.2d 876 (1990). The pursuit of religious liberty was a powerful force driving early settlers to this continent and remained a powerful force at the time of the founding of the American republic. *See* Brett G. Scharffs, *The Autonomy of Church and State*, 2004 B.Y.U.L. Rev. 1217, 1230 (2004). "Nothing but the most telling of personal experiences in religious persecution suffered by our forebears could have planted our belief in liberty of religious opinion any more deeply in our heritage." *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203, 214; 83 S.Ct. 1560, 1567; 10 L.Ed.2d 844 (1963) (citation omitted). James Madison, who was instrumental in drafting the First Amendment, viewed religious liberty as "the fundamental freedom." *See* Mark E. Chopko, Michael F. Moses, *Freedom to Be A Church: Confronting Challenges to the Right of Church Autonomy*, 3 Georgetown Journal of Law and Public Policy 387, 402 (2005). Similarly, Thomas Jefferson believed religious freedom to be the "most inalienable and sacred of all human

rights." *Id*. at 402-03. As expressed by one Supreme Court justice almost two centuries later, "[N]o liberty is more essential to the continued vitality of the free society which our Constitution guarantees than is the religious liberty." *Sherbert v. Verner*, 374 U.S. 398, 413; 83 S.Ct. 1790, 1799; 10 L.Ed.2d 965 (1963) (Stewart, J., concurring). This most sacred right to freely exercise one's religion is both fundamental and inalienable. *See* La. Const. art. I, §1. Nevertheless, it is subject to government regulation under precisely defined circumstances.

II. Regulation of Religious Acts: Neutral Laws of General Applicability and Effect of Exemptions for Comparable Secular Activity

The First Amendment excludes all government regulation of religious beliefs. *Smith*, 494 U.S. at 877; 110 S.Ct. at 1599. The exercise of religion, however, involves "not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, and abstaining from certain foods or certain modes of transportation." *Smith*, 494 U.S. at 877; 110 S.Ct. at 1599. The "Free Exercise Clause" thus embraces two concepts: freedom to believe and freedom to act. *Cantwell v. State of Connecticut*, 310 U.S. 296, 303-04; 60 S.Ct. 900, 903; 84 L.Ed. 1213 (1940). The first is absolute, but the second is not. *Id*.

A law that substantially burdens the free exercise of religion violates the First Amendment. *See Hernandez v. Commissioner,* 490 U.S. 680, 699, 109 S.Ct. 2136, 2148, 104 L.Ed.2d 766 1989); *Thomas v. Review Bd. of Indiana Employment Security Div.,*, 718, 101 S.Ct. 1425, 1432, 67 L.Ed.2d 624 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 220; 92 S.Ct. 1526, 1536; 32 L.Ed.2d 15 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403; 83 S.Ct. 1790, 1793; 10 L.Ed.2d 965 (1963). This standard, sometimes called the "*Sherbert* test," was applied by the Supreme Court for almost 30 years to determine whether government action was subject to strict scrutiny under the Free Exercise Clause. In *Smith*, however, the Supreme Court held

that, regardless of its burden on religious exercise, a law that is "neutral" and "generally applicable" does not violate the Free Exercise Clause and is not subject to strict scrutiny. *See Smith*, 494 U.S. at 878-80; 110 S.Ct. at 1600. If prohibiting the exercise of religion is "merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Smith*, 494 U.S. at 878; 110 S.Ct. at 1600. *Smith* effectively carved out an exception to the *Sherbert* test that allows restrictions on religious liberty that previously may not have survived strict scrutiny. After *Smith*, under the federal jurisprudence, a law burdening religious exercise is subject to strict scrutiny only if it is *not* neutral and generally applicable. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546; 113 S.Ct. 2217, 2233; 124 L.Ed.2d 472 (1993).[3]

A government regulation burdening religious exercise is not neutral and generally applicable if, by granting exemptions, it treats any comparable secular activity more favorably than religious exercise. *See Fulton*, 141 S.Ct. at 1877; *Tandon v. Newsom*, ___ U.S. ___, ____; 141 S.Ct. 1294, 1296; 209 L.Ed.2d 355 (2021) (*per curiam*); *Roman Catholic Diocese of Brooklyn v. Cuomo*, ___ U.S. ___, 141 S.Ct. 63, 66-67; 208 L.Ed.2d 206 (2020) (*per curiam*). As *Smith* recognized, a law may violate the Free Exercise Clause and trigger strict scrutiny if "the State has

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[3] *Smith*, authored by Justice Scalia, is cited frequently herein because it is the prevailing interpretation of the Free Exercise Clause by the Supreme Court. As noted above, the Louisiana Constitution has a Free Exercise Clause with nearly identical language. In applying our state constitution, we are not bound by the Supreme Court's interpretation of the similar language in the First Amendment. *See State v. Perry*, 610 So. 2d 746, 755 (La. 1992). We further note that *Smith* is not without controversy. In response to the decision, federal and state legislatures enacted laws purporting to restore the *Sherbert* test ("substantial burden") to Free Exercise challenges of "a rule of general applicability." *See* 42 U.S.C. §2000bb1-4 (held unconstitutional as a violation of separation of powers in *City of Boerne v. Flores*, 521 U.S. 507, 536; 117 S.Ct. 2157, 2172; 138 L.Ed.2d 624 (1997)); *see also* La. R.S. 13:5232-42. Like the federal act, the Louisiana statute purports to require strict-scrutiny of any government action substantially burdening the exercise of religion, "even if the burden results from a facially neutral rule or a rule of general applicability." La. R.S. 13:5233. While *Smith* continues to be controversial, *see Fulton*, 141 S.Ct. at 1882-1931 (Barrett, J., concurring; Alito, J., concurring), its departure from *Sherbert* is not determinative in this case because we find the subject orders are not neutral and generally applicable. Strict scrutiny thus applies under both *Smith* and *Sherbert*. Because we apply the strict scrutiny standard, we pretermit consideration of whether La. Const. art. I, Sec. 8 should be construed in accordance with *Smith*'s interpretation of the First Amendment, and whether the degree of judicial scrutiny applicable to a constitutional challenge of state action can be legislatively mandated by statute.

in place a system of individual exemptions" from the law. *Smith*, 494 U.S. at 884; 110 S.Ct. at 1603. If the statute grants exemptions, the government "may not refuse to extend that system to cases of religious hardship without compelling reason." *Smith*, 494 U.S. at 884; 110 S.Ct. at 1603 (internal quotation marks omitted). It is not sufficient for the state to point out that it treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue. *Tandon*, 141 S.Ct. at 1296. Rather, once a state creates any favored class of business, the state must justify why houses of worship are excluded from that favored class. *Roman Catholic Diocese*, 141 S.Ct. at 73 (Kavanaugh, J., concurring); *see also Church of the Lukumi*, 508 U.S. at 537; 113 S.Ct. at 2229.

Whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue. *Tandon*, 141 S.Ct. at 1296; *Roman Catholic Diocese*, 141 S.Ct. at 67. The government interest at issue in *Tandon* and *Roman Catholic Diocese*, as in the present case, was reducing the spread of COVID-19. In this context, comparability is concerned with the risks of exposure posed by various activities, not the reasons why people gather. *Tandon*, 141 S.Ct. at 1296.

In *Tandon* the Supreme Court reviewed a California state order limiting private gatherings to three households. *Tandon*, 141 S.Ct. at 1294. Plaintiffs asserted this limitation violated their right to freely exercise religion because it prevented them from holding in-home Bible studies and communal worship with more than three households in attendance. The Supreme Court observed the executive order did not place the same gathering limitation on some comparable secular businesses and activities, such as hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants. *Tandon*, 141 S.Ct. at 1297. The Court further noted the court of appeal, which ruled against plaintiffs, did not expressly find those comparable activities

posed a lesser risk of virus transmission than applicants' proposed religious exercise at home. *Id*. Instead the lower court erroneously rejected these comparable activities because they involved gatherings in public buildings and not private homes. Precautions used in public venues, according to the court of appeal, might not "translate readily" to a home. *Tandon v. Newsom*, 992 F.3d 916, 926-27.

The Supreme Court rejected this rationale, stating: "The State cannot assume the worst when people go to worship but assume the best when people go to work." *Tandon*, 141 S.Ct. at 1297 (quoting *Roberts v. Neace*, 958 F.3d 409, 414 (C.A.6 2020) (*per curiam*) (internal quotation marks omitted). The Court found plaintiffs would likely succeed on the merits of their claim and granted an injunction pending appeal, emphasizing:

> California's [order] contains myriad exceptions and accommodations for comparable activities, thus requiring the application of strict scrutiny. And historically, strict scrutiny requires the State to further "interests of the highest order" by means "narrowly tailored in pursuit of those interests." That standard is not watered down; it really means what it says.

Tandon, 141 S.Ct. at 1298 (quoting in part *Church of the Lukumi*, 508 U.S. at 546; 113 S.Ct. at 2233; some internal quotation marks omitted).

The Supreme Court granted similar relief in *Roman Catholic Diocese*. There, the governor of New York issued an executive order limiting attendance at houses of worship to no more than 10 or 25 people, depending on the classification of the church's geographical zone based on virus prevalence. *Roman Catholic Diocese*, 141 S.Ct. at 66. The order placed no admission limitations on "essential" businesses, which included, among others, acupuncture facilities, camp grounds, garages, plants manufacturing chemicals and microelectronics, and all transportation facilities. *Id*.

The Court found the order was not neutral or generally applicable and, applying the strict-scrutiny standard, found it "hard to see how the challenged regulations can be regarded as narrowly tailored." *Roman Catholic Diocese*, 141

S.Ct. at 67. The order was more restrictive than other regulations previously reviewed, and there was no evidence applicants contributed to the spread of the virus. *Id*. The Court further observed that other less restrictive measures could minimize the risk to those attending religious services, such as determining the maximum permissible attendance based on the size of the church. *Id*. While the Court acknowledged the judgment of public health experts should be respected, it stressed the Constitution cannot be ignored in times of crisis:

> [E]ven in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty.

Roman Catholic Diocese, 141 S.Ct. at 68.

Using the analytical framework provided by these cases, we must determine whether Orders 30 and 33 violated defendant's fundamental right to exercise religion by exempting comparable secular activities from the mandated restrictions. If so, the orders are subject to strict scrutiny, which requires the offensive provisions be narrowly tailored to achieve a compelling government interest. *See Tandon*, 141 S.Ct. at 1296, 1298; *Roman Catholic Diocese*, 141 S.Ct. at 66-67. If that standard is not satisfied, the provisions are unconstitutional. *Id*.

III. Review of Executive Orders 30 and 33

The executive orders identify the government interest as the protection of the public "from the threat of COVID-19." More specifically, the gathering limits were imposed "[i]n an effort to reduce and limit the spread of COVID-19 in Louisiana and to preserve the health and safety of all members of the public." Similarly, the stay-at-home order sought to "preserve the public health and safety, and to ensure the healthcare system is capable of serving all citizens in need." *See* 33 JBE 2020, Section 3. Both orders, however, have numerous exceptions to their mandatory provisions. Order 30, which prohibited gatherings of 50 or more people, imposed no

limitations whatsoever on "normal operations at locations like airports, medical facilities, shopping centers or malls, office buildings, factories or manufacturing facilities, or grocery or department stores." Order 33, which prohibited gatherings of 10 or more people, recognized most of the same exceptions in Order 30. The stay-at-home mandate incorporated pages of exceptions for "essential" job functions, numbering well over 100 and ranging from manufacturing animal bedding to working in a company cafeteria. More generally, and similar to the order in *Roman Catholic Diocese*, the list also includes all jobs supporting or enabling transportation functions, and all workers involved in chemical manufacturing and distribution.

We focus first on the exception for gatherings at "office buildings." The state has not demonstrated a material difference, nor can we discern any, between the risk of transmitting the virus in a gathering of people in an office building and a gathering of people in a church building. Both may involve prolonged gatherings of people in close proximity. Yet under both executive orders, an unlimited number of people were allowed to remain in a single conference room in an office building for an unlimited period of time, all in close proximity, talking, eating, and engaging in any other "normal operations" of the business. However, if ten of these individuals left the conference room, walked across the street to a church, and entered an otherwise empty sanctuary building for a worship service, they were subject to criminal prosecution for violating Order 33. Similarly, if their job was deemed "essential," their presence in the conference room would fall within an exception to the stay-at-home order; however, their presence in the sanctuary would be criminal. The same observations can be made for gatherings at other exempt venues, such as factories and manufacturing facilities, where people may gather in close proximity to work or socialize for extended periods of time; and airports, where people are funneled into crowded boarding gates where they can wait for hours for a flight.

The state argues the exempt businesses only involve "consumer interaction . . . of a transient, in-and-out nature, such as Walmart, Target and Home Depot, activities posing markedly different risks from the extended more densely packed environments of churches."[4] The state points to no evidence in the record proving that someone shopping in a crowded retail store for 45 minutes is less exposed to the virus than someone safely distanced, but attending church for the same amount of time. Even assuming that to be the case, there is nothing transitory about prolonged meetings in an office building, working a shift in a factory, or waiting on a flight in an airport.

The state points out the executive orders treat religious organizations more favorably than many similar secular businesses, such as restaurants and cafes, which were barred from allowing any on-premises consumption of food or beverages; and casinos, video poker establishments, movie theaters, bars, bowling alleys, and fitness centers, which were closed completely. However, "[i]t is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue." *Tandon*, 141 S.Ct. at 1296. Strict scrutiny applies when a government regulation treats *any* comparable secular activity more favorably than religious exercise. *See Tandon*, 141 S.Ct. at 1296; *Roman Catholic Diocese*, 141 S.Ct. at 67-68.

The state nevertheless maintains the orders are neutral and generally applicable and that any holding to the contrary would allow the defendant to "become a law unto himself" through "professed doctrines of religious belief." The state relies on *Reynolds v. United States*, 98 U.S. 145, 166-67; 25 L.Ed. 244 (1878), where the Supreme Court held a criminal law barring polygamy did not violate the religious liberty of a party whose Mormon faith permitted such marriages. To allow

[4] In an *amicus curiae* brief, the governor makes a similar argument. For simplicity, the state and governor will be collectively referred to as the "state" when their arguments are detailed herein.

an exception to the blanket prohibition of polygamy, the Court reasoned, "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." *Reynolds*, 98 U.S. at 167. Similarly in *Yoder*, 406 U.S. at 215-16; 92 S.Ct. at 1533, the Supreme Court stated,"[T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." Citing these cases, the state contends the defendant and his church must comply with the executive orders "just as they must comply with the State's building, life-safety, and zoning laws."

The state's argument misses a crucial point. The defendant does not argue he is "a law unto himself" or the executive orders violate "his own standards." What defendant seeks--and what our Constitution ensures--is that his religious activities be treated *no differently* than comparable secular activities. Disparate treatment implicates the Free Exercise Clause. The state's example illustrates the point. While the defendant and his church must comply with building codes and zoning laws, those same laws apply equally to office buildings, factories, manufacturing facilities, and airports. Building codes and zoning laws, unlike the executive orders at issue, do not exclude secular facilities from regulation. We interpret Pastor Spell's request not as one for special treatment, but for equal treatment.

The multiple exemptions in the executive orders distinguish this case from *Reynolds* and similar cases applying blanket criminal prohibitions. As explained by one court:

> As a rule of thumb, the more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law. At some point, an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny.

Roberts v. Neace, 958 F.3d 409, 413-14 (6th Cir. 2020) (citations and internal quotation marks omitted).

Orders 30 and 33 contain exemptions allowing certain secular activities to proceed as normal without limiting the number of people permitted in a single space at the same time. In many of those gatherings, the risk of spreading the virus appears no less prevalent than at a comparable gathering in a church. At the very least, the state offered no evidence proving otherwise. The executive orders grant preferential treatment only to secular conduct. This disparate treatment "strike[s] at the very heart of the First Amendment's guarantee of religious liberty." *Roman Catholic Diocese*, 141 S.Ct. at 68. By granting preferential treatment for comparable secular activities, the provisions in Orders 30 and 33 prohibiting gatherings over a designated number of people and imposing a stay-at-home order, as applied in this case, violate the Free Exercise Clause and are subject to strict scrutiny. *See Tandon*, 141 S.Ct. at 1296; *Roman Catholic Diocese*, 141 S.Ct. at 67-68.

IV. Application of Strict Scrutiny Standard

Strict scrutiny is the most rigorous test for determining a law's constitutionality. *State v. Webb*, 13-1681 (La. 5/7/14), 144 So. 3d 971, 977-78. Government infringement of fundamental rights survives strict scrutiny only if the state proves its action (1) serves a compelling government interest, and (2) is narrowly tailored to serve that compelling interest. *Webb*, 144 So. 3d at 978; *State v. Draughter*, 13-0914 (La. 12/10/13), 130 So. 3d 855, 862; *In re Warner*, 05-1303 (La. 4/17/09), 21 So. 3d 218, 246.

Reducing the spread of COVID-19 is a compelling government interest. Nevertheless, the state must prove the prohibitions in Orders 30 and 33 are narrowly tailored to serve that compelling interest. To be narrowly tailored, the law must be the least restrictive means available to achieve the compelling state interest. *See Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666; 124 S.Ct. 2783,

2791; 159 L.Ed.2d 690 (2004); *In re Warner*, 21 So. 3d at 253. To meet this burden, the state must do more than assert that certain risk factors are always present in worship, or always absent from the permitted secular activities. *Tandon*, 141 S.Ct. at 1296. Instead, narrow tailoring requires the government to show measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID-19. *Tandon*, 141 S.Ct. at 1296-97. Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied. *Tandon*, 141 S.Ct. at 1297. Otherwise, precautions that suffice for other activities suffice for religious exercise too. *Id*.

The state's evidence in this case is minimal. It introduced the bills of information for the criminal charges, the relevant executive orders, and a copy of a federal district court opinion in a civil proceeding filed by the defendant against the governor. No witnesses testified. This evidence fails to establish that measures less restrictive of the First Amendment activity could not address the state's interest in reducing the spread of COVID-19. Specifically, the state did not show the religious exercise at issue is more dangerous than the activities allowed by the executive orders. *See Tandon*, 141 S.Ct. at 1297.

The state does not dispute this lack of evidence. Instead, it maintains a lesser standard of scrutiny or proof should apply given the dire and uncertain circumstances when Orders 30 and 33 were issued. The state emphasizes the orders were promulgated "when the pandemic was . . . in its earliest, most uncertain stages, [and] Louisiana was one of the virus hotspots." At that time, "there was no known cure, no universal or even widely-accepted effective treatment, and no vaccine for COVID-19." As a consequence, the state argues "greater leniency and deference" should be afforded to state officials in the early stages of the pandemic. On this basis, the state distinguishes the present case from *Tandon* and *Roman Catholic*

Diocese, which were decided "many months after [the defendant] was served the misdemeanor summons" and allegedly under "[v]astly different circumstances."

The state relies on language in a dissent by Justice Alito from a writ denial in *Calvary Chapel Dayton Valley v. Sisolak*, ___ U.S.___; 140 S.Ct. 2603; 207 L.Ed.2d 1129 (2020), which was handed down before *Tandon* and *Roman Catholic Diocese* were decided. In *Calvary Chapel*, a church challenged an executive order issued by the governor of Nevada that limited church attendance more severely than admission to casinos. The lower courts initially denied injunctive relief, and the Supreme Court denied plaintiff's writ application.

In a six-page dissent from the writ denial, Justice Alito concluded the plaintiff was likely to succeed and was entitled to an injunction pending the appeal. In reaching this conclusion, Justice Alito noted the order at issue was promulgated four months into the pandemic, not at the beginning of the crises when state officials faced uncertain circumstances and were often forced to adopt "blunt rules." Justice Alito explained:

> For months now, States and their subdivisions have responded to the pandemic by imposing unprecedented restrictions on personal liberty, including the free exercise of religion. This initial response was understandable. In times of crisis, public officials must respond quickly and decisively to evolving and uncertain situations. At the dawn of an emergency--and the opening days of the COVID–19 outbreak plainly qualify--public officials may not be able to craft precisely tailored rules. Time, information, and expertise may be in short supply, and those responsible for enforcement may lack the resources needed to administer rules that draw fine distinctions. Thus, at the outset of an emergency, it may be appropriate for courts to tolerate very blunt rules. In general, that is what has happened thus far during the COVID–19 pandemic.
>
> But a public health emergency does not give Governors and other public officials *carte blanche* to disregard the Constitution for as long as the medical problem persists. As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights.

Calvary Chapel, 140 S.Ct. at 2604-05 (Alito, J., dissenting from writ denial, joined by Thomas, J. and Kavanaugh, J.).

To be clear, Justice Alito made these observations while concluding the order at issue likely violated the plaintiff's religious liberties. Notably, on remand and after *Roman Catholic Diocese* was decided, the court of appeal also concluded the plaintiff would likely succeed on its claim, reversed the district court, and granted injunctive relief to the plaintiff. *See Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1234 (9th Cir. 2020).

We agree that state officials acting on limited information early in the pandemic may have instituted "blunt rules" that were not "precisely tailored" or failed to "draw fine distinctions." *Calvary Chapel*, 140 S.Ct. at 2605. The application of such blunt measures, although later shown to be overly broad as more expertise is gained, should be judged by the information available to state officials when the orders were issued. Reasonable reliance on an initial scientific consensus, even if later proved to be incorrect, can be relevant in determining whether the government action was "narrowly tailored" based on the information available at the time.

Here, the state has not identified any such information, or lack thereof, bearing on the decision to grant preferential treatment to secular gatherings while denying that treatment to religious gatherings. Orders 30 and 33 expressly recognize the "ability" and "propensity" of "the COVID-19 virus to spread via personal interactions." The risk of spreading the virus from personal interactions, as the orders confirm, was well known at that time. The evidentiary record is devoid of proof that in March of 2020 public health officials had information indicating unlimited personal interactions at gatherings in secular venues like office buildings and airports created less risk of virus transmission than such interactions at gatherings in a church building. In fact, the orders do not prohibit the continuation of a pre-

pandemic routine of an unlimited number of co-workers gathering around a conference table in an office building for prayer, Bible study, and worship. Those religious exercises are prohibited only if they occur in a church building. Order 33 also allows unlimited persons to be transported to and from church but prohibits unlimited attendance and gathering at church. The state's disparate treatment of religious gatherings is simply not supported by any evidence.

It is also difficult to characterize these orders, one that allows for over 100 exemptions, as "blunt" or lacking "fine distinctions." Both orders crafted exemptions for a multitude of secular activities. While every exempt job is important, the state offers no explanation for attributing less importance to the fundamental right to exercise one's religion. Our fundamental constitutional rights are not so numerous to prevent their consideration when constructing restrictions. The state must be sensitive to their possible infringement.

We further agree that early in this pandemic, state officials had to respond quickly and decisively to an evolving and uncertain situation. In those early weeks, authorities did not have the luxury of waiting for therapeutics, vaccines, or additional expertise gathered from comprehensive studies or revealed by the passage of time. It was an emergency. State officials had to act quickly and did so in an effort to curtail one of the greatest public health emergencies ever confronted. We do not minimize the magnitude of that challenge; nor, with the benefit of hindsight, do we judge the effectiveness of measures undertaken early in the crisis.

Rather, we are called upon to determine whether some of those actions violated a party's fundamental constitutional right. "[E]ven in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese*, 141 S.Ct. at 68. "Government is not free to disregard the First Amendment in times of crisis." *Roman Catholic Diocese*, 141 S.Ct. at 63 (Gorsuch, J., concurring). We reject any contention that early in a crisis, the Constitution's protection of fundamental rights

must always yield to the needs of the state to respond to the crisis. A public health emergency does not relegate the First Amendment to a proposition or allow violations thereof to be judged on a sliding scale of constitutionality. The infringement of the fundamental right of the free exercise of religion, whether in times of crisis or calm, must always be strictly scrutinized by our courts. *See Tandon*, 141 S.Ct. at 1296-98; *Roman Catholic Diocese*, 141 S.Ct. at 68.

Pandemic or not, this court cannot look the other way when the state infringes upon a citizen's fundamental right to exercise his religion. "All government originates with the people, is founded on their will alone and is instituted to protect the rights of the individual and for the good of the whole." La. Const. art. I, §1. In granting power to the government, our citizens not only reserved the right to freely exercise religion, they instructed this right "be preserved inviolate by the state." La. Const. art. I, §1. As judges, we have no more solemn duty than to protect the fundamental rights reserved by the people from government overreach. The prohibitions in the executive orders at issue violate defendant's fundamental right to exercise religion. They do not survive strict scrutiny based on the limited evidence in the record. They are unconstitutional as applied to defendant.

CONCLUSION

The limits on gatherings in executive order 30 JBE 2020, Section 1; and the limits on gatherings and the stay-at-home mandate in executive order 33 JBE 2020, Sections 2, 3, and 5 are unconstitutional as applied to the defendant. The trial court erred in denying the motion to quash. The trial court's judgment is reversed, and the motion to quash is granted.

TRIAL COURT JUDGMENT REVERSED; MOTION TO QUASH GRANTED.

SUPREME COURT OF LOUISIANA

No. 2021-KK-00876

STATE OF LOUISIANA

VS.

MARK ANTHONY SPELL

On Supervisory Writ to the 19th Judicial District Court,
Parish of East Baton Rouge

WEIMER, C.J., dissenting.

Cases such as this provoke discussion of the ever-evolving convergence of law, politics, policy, science, societal interests, and competing constitutional considerations.[1] As a result, such cases can and often do resonate as matters of broader significance and sweep than the narrow facts and circumstances under which the cases arise, with multiple outside interests weighing in on the issues presented, each side vying to be declared the victor in a contest of competing societal concerns. In this maelstrom of competing interests, the role of the court must be kept in mind. That role is not to declare a "winner" or "loser," but to make reasoned, unbiased decisions based on the application of the law to the facts before the court. Cases do not arise and are not decided in a vacuum. Each case must be decided on the unique facts presented. While in the process of deciding cases, courts must weigh various considerations dictated by competing constitutional or statutory provisions; that weighing does not occur in the absence of a factual record informing those considerations. Such a factual record is missing in this case.

In the district court, the parties relied on legal arguments mostly devoid of a factual context and did not submit evidence. The factual context is crucial here, as

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[1] *Cf.* **Cassell v. Snyders**, 990 F.3d 539, 550 (7th Cir. 2021).

this case, at its core, is really about one individual's refusal to comply with an order that did not allow religious services to be conducted in an *unlimited* capacity in an indoor setting, at the very beginning of a global pandemic when, as suggested in brief, contagion was running rampant and the number of infected individuals was threatening to overwhelm the state's healthcare system.

When the contested orders were issued, the record does not reflect (1) whether or not there was a cure, a viable treatment, or a vaccination for the virus, (2) how contagious the virus was, (3) who was impacted, (4) how lethal the virus was, or (5) exactly how the virus was transmitted from one individual to another. The record does not indicate whether indoor attendance at a church service put congregants and others at risk of getting the virus and, in turn, spreading the virus beyond the congregation. There is no evidence regarding the size or dimensions of the place of worship involved. Also missing from the record is evidence as to whether the order was necessary to protect not only the congregants, but others beyond the congregation. Additionally, the record is devoid of evidence regarding whether religious services could easily be held outside the church or whether doing so would reduce the risk of infection and the subsequent spread of the virus to others beyond the congregation. The record also does not reflect whether the order actually impacts the establishment of religion or the exercise thereof or whether other religions promptly pivoted to services outside of gathering congregations inside churches. There is no record evidence indicating whether religious services and religious beliefs were actually impacted or whether the sites were regulated solely to suppress the disease that was spreading unabated in "super spreader events" and "community spread events" (language first heard during the pandemic).

As a court of record, this court does not evaluate witnesses live and is limited to reviewing the record created in the trial court through testimony and the introduction of evidence.[2]

Timing and context are key to weighing and assessing the emergency orders contested in this case, for as several justices of the United States Supreme Court have cautioned, at the outset of an emergency, when time, information and expertise are in short supply, those public officials responsible for responding to the emergency may lack the resources needed to craft rules that draw fine distinctions, and, as a result, it may be appropriate for courts to tolerate blunt rules of temporary duration. **Calvary Chapel Dayton Valley v. Sisolak**, 140 S.Ct. 2603, 2604-05 (2020) (Alito, J., dissenting from writ denial, joined by Thomas, J. and Kavanaugh, J.). Here, rather than introduce evidence as to the timing, conditions, and circumstances that informed the emergency orders, the parties relied on newspaper accounts referenced in briefs.[3]

In the absence of an evidentiary record, the majority opinion takes the position that if *any* exceptions whatsoever were carved out from the orders, then strict scrutiny is warranted, and it was the State's burden to establish that the orders were narrowly tailored. However, this position ignores the circumstances under which the orders were issued and, instead, holds the emergency orders to a standard of scrutiny that has thus far only been applied by the Supreme Court at a much later stage in the pandemic and at a time with much greater evidentiary knowledge. See and compare, **Tandon**

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[2] "Appellate courts are courts of record and may not review evidence that is not in the appellate record, or receive new evidence." **Denoux v. Vessel Mgmt. Servs., Inc.**, 07-2143 (La. 5/21/08), 983 So.2d 84, 88. Evidence not properly offered cannot be considered even if it were physically placed in the record. See ***id.***

[3] During oral argument, the attorneys were asked if they would be willing to jointly stipulate to the validity and efficacy of the newspaper articles. That query provoked smiles, but no stipulations were forthcoming.

v. Newsom, 141 S.Ct. 1294 (2021); **Roman Catholic Diocese of Brooklyn, New York v. Cuomo**, 141 S.Ct. 63 (2020).[4]

Such strict scrutiny is, in my view, not warranted here, especially when there is no evidence establishing whether religious worship, religious practices, and the exercise thereof were actually impacted if moved to either virtual or outdoors services, as other churches did.

Similarly, in furtherance of the argument that the emergency orders were not neutral and of general applicability so as to require a strict scrutiny analysis, no evidence as to the capacity of the defendant's church and the particular activities conducted therein and as to the capacities and activities permitted at the essential businesses that were excluded from the emergency orders was introduced. Rather, arguments that secular activities were treated more favorably was just that–arguments void of any factual support.[5]

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[4] The emergency orders at issue in his case were issued in March of 2020. By contrast, the challenged order in **Roman Catholic Diocese** was issued in October 2020, and an extensive evidentiary record was developed in that case. **Roman Catholic Diocese of Brooklyn, New York v. Cuomo**, 495 F.Supp.3d 118 (E.D. NY 10/16/20). Similarly, the orders in **Tandon** arose during the "third wave" of Covid to hit California, and the challenge lodged was to portions of orders in effect as of March 30, 2021. **Tandon v. Newsom**, 517 F.Supp.3d 922 (N.D. Cal. 2/5/21).

[5] The primary function of government is to provide for the general welfare and protection of its citizens. Freedoms related to religion, speech, press, assembly, and to petition the government for redress of grievances are enshrined in the very first amendment to the United State Constitution (see U.S. Const. amend. I) and are precious and fundamental to the foundation and continued viability of this nation. The Louisiana Constitution has similar protections. See La. Const. art. I, §§ 7-9. The preamble of the Louisiana Constitution recognizes:

> We, the people of Louisiana, grateful ... for the ... religious liberties we enjoy, and desiring to protect individual rights to life, liberty, and property ... [and] promote the health, safety, education, and welfare of the people ....

Therefore, the government is charged with balancing the need to protect the general welfare and health of citizens, while preserving those precious freedoms addressed in this case. However, constitutional rights are not absolute, as indicated by U.S. Supreme Court Justice Oliver Wendell Homes, Jr., who stated: "free speech would not protect a man falsely shouting fire in a theater and causing a panic." **Schenck v. U.S.**, 249 U.S. 47, 52 (1919). A similar adage reflects that constitutional rights are not absolute: "Your liberty to swing your fist ends just where my nose begins." The fact the virus is spread through respiratory droplets that enter the body when breathing, makes the quote particularly apropos. Although variously attributed to "quote magnets" such as

As demonstrated, the proper application of the law is contingent on facts that are missing from this record, necessitating, in the interests of justice, a remand to allow the parties to develop a factual record in the district court. Until the facts are developed, the law cannot be accurately applied.

In sum, the resolution of this matter transcends the case immediately before the court and requires the difficult balancing of the authority of the executive branch to take steps to protect the public at the outset of an unpredictable and novel virus that quickly spread throughout the world, causing death and disability, against the impact on religious freedom to gather inside a church for services. In striking this balance, all relevant facts as existed at that time must be evaluated, without the clarity that hindsight and present-day circumstances provide.

Thus, I very respectfully dissent and would remand this matter to the district court for the introduction of evidence.

Holmes, John Stuart Mill, or Abraham Lincoln, others attribute the quote to those promoting Prohibition. See quoteinvestigator.com. Although citizens are generally free to live as they please, their actions cannot adversely impact others.

SUPREME COURT OF LOUISIANA

No. 2021-KK-00876

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Crichton, J., additionally concurs and assigns reasons:

I agree with the majority finding that the emergency proclamations were not narrowly tailored sufficient to survive the strict scrutiny standard applicable to the state's restrictions on defendant's free exercise of religion. I write separately to highlight that while the issue presented is substantial and thus warrants this Court's attention, a better-developed record would have aided our review of this matter significantly. Instead, the Court was required to take judicial notice of key issues before us, including whether the state's interest was compelling. *Weaver v. United States*, 298 F.2d 496, 498 (5th Cir. 1962) ("Judicial notice may be taken of facts known at once with certainty by all the reasonably intelligent people in the community without the need of resorting to any evidential data at all. Judicial notice may be taken without request by a party of such facts as are so generally known or of such common notoriety within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.").

To be clear, both issues of law and fact are appropriate for a district court's review of a motion to quash. La. C.Cr.P. art. 537 ("All issues, whether of law ***or fact***, that arise on a motion to quash shall be tried by the court without a jury.") (emphasis added). Where the constitutionality of a statute is challenged in a motion to quash, the parties may be required, as here, to present evidence to challenge or

defend its validity. The state failed to meet its burden in this case, which was recently enunciated by the Supreme Court in a matter involving restrictions on religious exercise related to the COVID-19 pandemic as follows:

> [T]he government has the burden to establish that the challenged law satisfies strict scrutiny. To do so in this context, it must do more than assert that certain risk factors "are always present in worship, or always absent from the other secular activities" the government may allow. *South Bay United Pentecostal Church* v. *Newsom*, 592 U. S. —— —, ——, 141 S.Ct. 716, 718, —— L.Ed.2d —— (2021) (statement of GORSUCH, J.); *id.*, at ——, 141 S.Ct., at 717(BARRETT, J., concurring). Instead, ***narrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID***. Where the government permits other activities to proceed with precautions, ***it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious exercise too***. *Roman Catholic Diocese*, 592 U. S., at ——– – ––, 141 S.Ct., at 69-70; *South Bay*, 592 U. S., at ——, 141 S.Ct., at 719 (statement of GORSUCH, J.)

Tandon v. Newsom, 141 S. Ct. 1294, 1296–97, 209 L. Ed. 2d 355 (2021) (emphasis added). Not only did the state fail to meet this burden, but the Supreme Court has explained that there are "many other less restrictive rules" than restrictions where, as here, the government limits the number of persons who may worship without consideration of the space in which they gather:

> [T]here are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services. ***Among other things, the maximum attendance at a religious service could be tied to the size of the church or synagogue.*** Almost all of the 26 Diocese churches immediately affected by the Executive Order can seat at least 500 people, about 14 can accommodate at least 700, and 2 can seat over 1,000. Similarly, Agudath Israel of Kew Garden Hills can seat up to 400. It is hard to believe that admitting more than 10 people to a 1,000–seat church or 400–seat synagogue would create a more serious health risk than the many other activities that the State allows.

Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67, 208 L. Ed. 2d 206 (2020) (emphasis added). It is undisputed (and, again, judicial notice may be taken of the fact) that the capacity of defendant's church permits hundreds of people to gather outside of the pandemic restrictions. The state has failed to show that its

compelling interest to be achieved through the emergency orders, which limit gatherings to 10 or 50, respectively, could not be achieved through less restrictive means such as tying the gathering limitations to defendant's church capacity.

Lawyers in every case should take extra care in perfecting and protecting the trial court record, regardless of the pre-trial posture of a certain motion, with competent evidence and documents identified, introduced, and admitted by the trial court. An appellate court is a court of record; the lawyers should develop the factual record at the trial level such that the appellate court, which is not an evidence taking court, has all that it needs to make a meaningful decision. As correctly reasoned by the majority, it was the State's burden to prove the constitutionality of the Governor's orders. While I note the foregoing concerns respecting the failure of both parties' counsel to develop the record, I agree the state ultimately failed to meet its burden to prove the emergency proclamations infringed on defendant's religious liberty with the least restrictive means. Accordingly, I additionally concur in the reversal of the lower courts' rulings.