



TOURO COLLEGE
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

**Digital Commons @ Touro Law
Center**

Scholarly Works

Faculty Scholarship

2022

The Supreme Court's Hands-off Approach to Religious Questions in the Era of COVID-19 and Beyond

Samuel J. Levine
Touro Law Center, slevine@tourolaw.edu

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/scholarlyworks>



Part of the [Constitutional Law Commons](#), [Courts Commons](#), [First Amendment Commons](#), [Jurisprudence Commons](#), [Law and Society Commons](#), [Religion Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Samuel J. Levine, The Supreme Court's Hands-off Approach to Religious Questions in the Era of COVID-19 and Beyond, 24 U. Pa. J. Const. L. 276 (2022).

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Touro Law Center. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

THE SUPREME COURT'S HANDS-OFF APPROACH TO RELIGIOUS QUESTIONS IN THE ERA OF COVID-19 AND BEYOND

Samuel J. Levine*

INTRODUCTION

For decades, scholars have documented the United States Supreme Court's "hands-off approach" to questions of religious practice and belief, pursuant to which the Court has repeatedly declared that judges are precluded from making decisions that require evaluating and determining the substance of religious doctrine.¹ Although the Court's approach is based

* Professor of Law & Director of the Jewish Law Institute, Touro Law Center.

¹ See, e.g., Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?*, 84 NOTRE DAME L. REV. 807, 809 (2009); Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837, 837 (2009) [hereinafter Garnett, *A Hands-Off Approach*]; Richard W. Garnett, *Assimilation, Toleration, and the State's Interest in the Development of Religious Doctrine*, 51 UCLA L. REV. 1645, 1645 (2004); Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) like the Boy Scouts?*, 22 ST. JOHN'S J. LEGAL COMMENT. 515, 526 (2007); Frederick Mark Gedicks, *Towards a Defensible Free Exercise Doctrine*, 68 GEO. WASH. L. REV. 925, 942-43 (2000); Jared A. Goldstein, *Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 497-98 (2005); Kent Greenawalt, *Hands Off? Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1843 (1998) [hereinafter Greenawalt, *Religious Property*]; Kent Greenawalt, *Hands Off: When and About What*, 84 NOTRE DAME L. REV. 913, 913 (2009); Michael A. Helfand, *Between Law and Religion: Procedural Challenges to Religious Arbitration Awards*, 90 CHI.-KENT L. REV. 141, 144 (2015); Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493, 493-94 (2013) [hereinafter Helfand, *Litigating Religion*]; Michael A. Helfand & Barak D. Richman, *The Challenge of Co-Religionist Commerce*, 64 DUKE L.J. 769, 773-74 (2015); B. Jessie Hill, *Kingdom Without End? The Inevitable Expansion of Religious Sovereignty Claims*, 20 LEWIS & CLARK L. REV. 1177, 1177-78 (2017); Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. U. L. REV. 973, 979 (2012); Andrew Koppelman, *The Troublesome Religious Roots of Religious Neutrality*, 84 NOTRE DAME L. REV. 865, 865 (2009); Samuel J. Levine, *A Critique of Hobby Lobby and the Supreme Court's Hands-Off Approach to Religion*, 91 NOTRE DAME L. REV. ONLINE 26, 26 (2015) [hereinafter Levine, *A Critique of Hobby Lobby*]; Samuel J. Levine, *Hands-Off Religion in the Early Months of COVID-19* (Oct. 2, 2020), <https://ssrn.com/abstract=3708424> [hereinafter Levine, *Hands-Off Religion in the Early Months of COVID-19*]; Samuel J. Levine, *Hosanna-Tabor and Supreme Court Precedent: An Analysis of the Ministerial Exception in the Context of the Supreme Court's Hands-Off Approach to Religious Doctrine*, 106 NW. U. L. REV. COLLOQUY 120, 120-21 (2011) [hereinafter Levine, *Hosanna-Tabor and Supreme Court Precedent*]; Samuel J. Levine, *Recent Applications of the Supreme Court's Hands-Off Approach to Religious Doctrine: From Hosanna-Tabor and Holt to Hobby Lobby and Zubik*, in LAW, RELIGION, AND

in well-grounded prudential and jurisprudential concerns revolving around the role and capacity of judges to adjudicate religious issues,² the Court has expanded the contours of the hands-off approach to the point that some scholars have found parallels in the political question doctrine, accordingly dubbing the Court's approach the "religious question doctrine."³ Whatever

HEALTH IN THE UNITED STATES 75 (Holly Fernandez Lynch, I. Glenn Cohen & Elizabeth Sepper eds., Cambridge University Press 2017) [hereinafter Levine, *Recent Applications of the Supreme Court's Hands-Off Approach*]; Samuel J. Levine, *Rethinking the Supreme Court's Hands-Off Approach to Questions of Religious Practice and Belief*, 25 *FORDHAM URB. L.J.* 85, 85 (1997) [hereinafter Levine, *Rethinking the Supreme Court's Hands-Off Approach*]; Samuel J. Levine, *The Supreme Court's Hands-Off Approach to Religious Doctrine: An Introduction*, 84 *NOTRE DAME L. REV.* 793, 794 (2009) [hereinafter Levine, *The Supreme Court's Hands-Off Approach: An Introduction*]; Christopher C. Lund, *Rethinking the "Religious-Question" Doctrine*, 41 *PEPP. L. REV.* 1013, 1013 (2014); Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 *HARV. J.L. & GENDER* 35, 39 (2015); Edward C. Lyons, *Causation and Complicity: The HHS Contraceptive Mandate and Asymmetrical Burdens on Free Exercise*, 55 *S. TEX. L. REV.* 229, 232 (2013); William P. Marshall, *Bad Statutes Make Bad Law: Burwell v. Hobby Lobby*, 2014 *SUP. CT. REV.* 71, 99; William P. Marshall, Smith, Ballard, *and the Religious Inquiry Exception to the Criminal Law*, 44 *TEX. TECH L. REV.* 239, 241 (2011) [hereinafter Marshall, Smith, Ballard, *and the Religious Inquiry Exception*]; Bernadette Meyler, *Commerce in Religion*, 84 *NOTRE DAME L. REV.* 887, 887–88 (2009); Priscilla J. Smith, *Who Decides Conscience? RFRA's Catch-22*, 22 *J.L. & POL'Y* 727, 728 (2014) [hereinafter Smith, *Who Decides Conscience?*]; Nelson Tebbe, *Nonbelievers*, 97 *VA. L. REV.* 1111, 1159 (2011); *see also* Nat'l Spiritual Assembly of the Bahá'ís of the U.S. Under the Hereditary Guardianship, Inc. v. Nat'l Spiritual Assembly of the Bahá'ís of the U.S., Inc., 628 F.3d 837, 846 n.2 (7th Cir. 2010) (referring to "the so-called 'hands-off' doctrine in disputes over religious property") (citing Garnett, *A Hands-Off Approach*, *supra*; Greenawalt, *Religious Property*, *supra*; Levine, *Rethinking the Supreme Court's Hands-Off Approach*, *supra*); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1039 (7th Cir. 2006) (referring to "[t]he ministerial exception, and the hands-off approach more generally").

² *See, e.g.*, *Emp. Div. v. Smith*, 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 458 (1988) (interpreting the propriety of certain religious beliefs puts the Court "in a role that [it was] never intended to play"); *United States v. Lee*, 455 U.S. 252, 257 (1982) (refusing to assess the "proper interpretation of the Amish faith"); *Thomas v. Rev. Bd.*, 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 721 (1976) (noting the "error" of "delv[ing] into . . . church constitutional provisions"); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 451 (1969) (refusing to "engage in the forbidden process of interpreting . . . church doctrine"); *United States v. Ballard*, 322 U.S. 78, 87 (1944) (avoiding the "forbidden domain" of evaluating religious doctrine). *See generally* Levine, *Rethinking the Supreme Court's Hands-Off Approach*, *supra* note 1, at 85–86.

³ *See, e.g.*, Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 *WIS. L. REV.* 99, 132 ("The Court has developed a religion clause analogue to the political question doctrine that disposes of many of these cases."); Goldstein, *supra* note 1, at 499; Lund, *supra* note 1, at 1013. As yet another alternative, some scholars have referred to the "no religious decisions"

the title, the Court's expansion of the hands-off approach has prompted substantial scholarly criticism,⁴ as well as notable instances of dispute—if not disregard—by prominent judges, likewise on both prudential and jurisprudential grounds.⁵

Since the start of the COVID-19 pandemic, these issues have repeatedly been brought to the forefront of legal, political, and popular discourse, as courts across the United States, including the Supreme Court, have faced difficult and often unprecedented—and, heretofore unforeseeable—questions about the place of religion and religious practice in American law and society. Concomitant with disputes over limitations on religious gatherings due to the pandemic,⁶ in July of 2020, near the end of a term that was extended because of the virus, the Supreme Court decided two important cases turning on religious doctrine.⁷ More recently, confronted with cases of its own over religious gatherings amid the pandemic, rather than issuing decisions that provide clear guidance, the Supreme Court has produced contentious and fractured rulings that stand as but further illustrations of unsettled and unsettling aspects of these ongoing controversies.⁸

This Article suggests that, taken together, judicial rulings and rhetoric in these cases demonstrate that the hands-off approach remains, at once, both

principle.” See, e.g., Garnett, *A Hands-Off Approach*, *supra* note 1, at 845 n.59 (quoting EUGENE VOLOKH, *THE FIRST AMENDMENT* 853–63 (2d ed. 2005)).

4 See, e.g., Frederick Mark Gedicks, “Substantial” Burdens: *How Courts May (and Why They Must) Judge Burdens on Religion Under Rfra*, 85 GEO. WASH. L. REV. 94 (2017) [hereinafter Gedicks, “Substantial” Burdens]; Gedicks, *supra* note 1; Goldstein, *supra* note 1; Maxine D. Goodman, *Courts’ Failure to Use Religion Experts to Decide Difficult Fact Questions Concerning Who Is A Minister for the Ministerial Exception: A Holy Mess*, 72 BAYLOR L. REV. 1 (2020); Joseph Glyn, *Sincere Prisoners*, 10 RUTGERS J.L. & RELIGION 1 (2009); Helfand, *Litigating Religion*, *supra* note 1; Michael A. Helfand, *Implied Consent to Religious Institutions: A Primer and A Defense*, 50 CONN. L. REV. 877 (2018); Hill, *supra* note 1; Levine, *A Critique of Hobby Lobby*, *supra* note 1; Levine, *Rethinking the Supreme Court’s Hands-Off Approach*, *supra* note 1; Lund, *supra* note 1; Lupu, *supra* note 1; Caleb E. Mason, *What Is Truth? Setting the Bounds of Justiciability in Religiously-Inflated Fact Disputes*, 26 J.L. & RELIGION 91 (2011); Adeel Mohammadi, *Sincerity, Religious Questions, and the Accommodation Claims of Muslim Prisoners*, 129 Yale L.J. 1836 (2020); Smith, *Who Decides Conscience?*, *supra* note 1.

5 See, e.g., Levine, *A Critique of Hobby Lobby*, *supra* note 1, at 43–44; Levine, *Recent Applications of the Supreme Court’s Hands-Off Approach*, *supra* note 1, at 83; Levine, *The Supreme Court’s Hands-Off Approach: An Introduction*, *supra* note 1, at 804 n. 16 (citing sources).

6 See *infra* Part III.

7 See *infra* Part II.

8 See *infra* Part III.

vibrant and vulnerable.⁹ Specifically, the Supreme Court's July 2020 decisions both reinforced and extended the scope and impact of the hands-off approach, elucidating the basic elements of the Court's approach while at the same time exemplifying some of the problems latent in judicial failure or refusal to decide issues of significant import. The religious gathering cases, in turn, offer a poignant example of the difficulties the hands-off approach imposes on judges when the proper resolution of a case seems to require, at least in part, a measure of inquiry into the substantive doctrine underlying a religious practice.

Part I of the Article briefly outlines the contours of the hands-off approach, highlighting the development and evolution of the doctrine and identifying some of the concerns, justifications, and critiques that have influenced and accompanied the Court's analysis. Part II of the Article turns to the two important Religion Clause cases the Court decided in July 2020, during the early months of the COVID-19 pandemic, demonstrating the continuing centrality of the hands-off approach, both enriching and complicating judicial decision making. Part III examines cases in which religious claimants challenged governmental limitations on religious gatherings, finding that differences in attitudes toward the hands-off approach and other forms of judicial deference may help explain stark differences in judicial rulings and judicial rhetoric. On the basis of these assessments, the Article concludes that taken together, these cases demonstrate the abiding relevance—and limitations—of the hands-off approach to questions of religious practice and belief, in both ordinary and extraordinary times. As such, the Article closes with the hope that the Supreme Court will closely examine the critiques, acknowledge the underlying problems, and consider some of the proposals that, for decades, scholars, dissenting justices, and others have offered, toward a more workable, more effective, and more uniting approach to questions of religious practice and belief.

I. THE SUPREME COURT'S HANDS-OFF APPROACH TO RELIGIOUS QUESTIONS: A BRIEF OVERVIEW

The Supreme Court's hands-off approach is premised on the notion that, as a matter of both constitutional principle and judicial prudence, courts

⁹ See Levine, *Hands-Off Religion in the Early Months of COVID-19*, *supra* note 1.

should not be in the position of resolving questions relating to the substantive nature of religious practice or belief. The precise contours of the hands-off approach are complex, and the development, evolution, and expansion of the hands-off approach have often prompted criticism and dissent.¹⁰

By definition, the Free Exercise Clause,¹¹ the Establishment Clause,¹² the Religious Freedom Restoration Act (RFRA),¹³ and the Religious Land Use and Institutionalized Persons Act (RLUIPA)¹⁴ apply only when the subject matter of a case involves religion.¹⁵ Therefore, as a threshold matter, before adjudicating a claim under these provisions, a court must first determine whether the claim should be categorized as based in religious practice or belief. Notably, however—and, it would seem, somewhat anomalously—the Supreme Court has not provided a definition of religion. While scholars have raised concerns over the absence of a guiding principle for understanding the

¹⁰ See *supra* notes 4 and 5.

¹¹ U.S. CONST. amend. 1 (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

¹² *Id.*

¹³ (a) In general

Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception

Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. §§ 2000bb-1(a)–(b).

¹⁴ (a) General rule

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) Scope of application

This section applies in any case in which—

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

42 U.S.C. §§ 2000cc-1(a)–(b).

¹⁵ See, e.g., *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (“[O]f course, a prisoner’s request for an accommodation must be sincerely based on a religious belief and not some other motivation.” (emphasis added) (citing *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774 n.28 (2014))).

very concept at the center of religious claims,¹⁶ and some have proposed working definitions for courts to adopt,¹⁷ others have argued that the Court has appropriately steered clear of a particularly controversial, perilous, and potentially problematic area of judicial involvement.¹⁸ Indeed, according to this view, which has apparently been adopted by the Supreme Court, regardless of the precise degree to which judges should or may evaluate religious doctrine, courts should maintain a hands-off approach to defining the fundamental question of what practices or beliefs qualify as religious.¹⁹

As a corollary to the axiomatic principle that the Religion Clauses and related legislation apply only to religious claims, even if courts refrain from offering a precise definition of religion, judges must determine whether the claimant is sincere in basing a claim in religious practice or belief. Therefore, the sincerity prong stands as one of the primary grounds upon which a judge may deny a religious argument—based not on finding that the belief is invalid or unreasonable, but upon finding the claimant to be insincere.²⁰

Pursuant to the hands-off approach, however, once a court finds a religious claimant has asserted a sincerely held religious belief, the claim falls under the protections of religious liberty regardless of how unfamiliar, unpopular, or distasteful—or seemingly outlandish or bizarre—the religious nature of the claim may be, when evaluated through the perspective of a judge, other religious believers, or broader societal viewpoints.²¹ Since at least as far back as the landmark 1944 case, *United States v. Ballard*,²² the Supreme Court has made clear that even if “[t]he religious views espoused

¹⁶ See, e.g., Levine, *A Critique of Hobby Lobby*, *supra* note 1, at 34 n.28 (citing sources); Courtney Miller, “*Spiritual but Not Religious*”: *Rethinking the Legal Definition of Religion*, 102 VA. L. REV. 833, 840 (2016).

¹⁷ See, e.g., Levine, *A Critique of Hobby Lobby*, *supra* note 1, at 34 n.28 (citing sources); Mark Strasser, *Free Exercise and the Definition of Religion: Confusion in the Federal Courts*, 53 HOUS. L. REV. 909 (2016) (suggesting that the Court clarify the “judgements courts are permitted to make when deciding whether particular beliefs count as religious”).

¹⁸ See, e.g., Eisgruber & Sager, *supra* note 1, at 808–09.

¹⁹ See *id.* at 834 (“We have tried here only to establish the existence of a morally attractive, textually plausible reading of the Constitution which not only does not require us to define ‘religion,’ but which treats the refusal to do so as a crucial virtue.”).

²⁰ See, e.g., *United States v. Ballard*, 322 U.S. 78, 84 (1944); Levine, *A Critique of Hobby Lobby*, *supra* note 1, at 34 n.28 (citing sources); Marshall, Smith, Ballard, and the *Religious Inquiry Exception*, *supra* note 1, at 254; John T. Noonan, Jr., *How Sincere Do You Have to Be to Be Religious?*, 1988 U. ILL. L. REV. 713 (describing *Ballard* and the sincerity element of the case.)

²¹ See, e.g., Levine, *A Critique of Hobby Lobby*, *supra* note 1, at 35 n.32 (citing sources).

²² *Ballard*, 322 U.S. at 87.

by respondents might seem incredible, if not preposterous, to most people [.]” nevertheless, “if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect.”²³ Accordingly, the Court declared, “[w]hen the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position.”²⁴ If nothing else, then, the Court’s hands-off approach to religion must ensure that judges will not be in a position of adjudicating the metaphysical truth or validity of religious practice or belief.²⁵

Later cases offer a somewhat similar but significantly expanded formulation of the hands-off approach initially set forth in *Ballard*, precluding

²³ *Id.*

²⁴ *Id.*

²⁵ Of course, judges, like everyone else, may be subject to degrees of various forms of bias, potentially resulting in an accordingly greater degree of skepticism toward unfamiliar or unpopular religious claims, possibly accounting for some of the challenges that have confronted claims of religious minorities. See, e.g., Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. UNIV. L. Q. 919, 965–66 (2004) (explaining that some commentators argue that judges are biased against members of minority religions); Amy Bowers & Kristen A. Carpenter, *Challenging the Narrative of Conquest: The Story of Lyng v. Northwest Indian Cemetery Protective Association*, in INDIAN LAW STORIES 489, 524 (Carole Goldberg, Kevin K. Washburn, & Philip P. Frickey eds., 2011) (arguing that the majority in *Lyng* effectively held that the Free Exercise Clause does not apply to the Native Americans’ religion); Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222, 234–35 (2003) (noting times when the Justices have revealed their religious biases); Samuel J. Levine, *The Challenges of Religious Neutrality*, 13 J.L. & RELIGION 531, 535 (1999) (reviewing FREDERICK MARK GEDICKS, *THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE* (1995)) (explaining that secular individuals and religious adherents have different perspectives on where the boundary lies between a neutral and religiously oppressive act); Samuel J. Levine, *Toward a Religious Minority Voice: A Look at Free Exercise Law Through a Religious Minority Perspective*, 5 WM. & MARY BILL RTS. J. 153, 154 (1996) (acknowledging that the law is written by judges and legislators who often hold the same biases maintained by other members of society); Samuel J. Levine, *A Look at the Establishment Clause Through the Prism of Religious Perspectives: Religious Majorities, Religious Minorities, and Nonbelievers*, 87 CHI.-KENT L. REV. 775, 780 (2012) (discussing the religious biases that contributed to upholding Sunday Closing Laws in *McGowan v. Maryland*, as well as other decisions, in disregard for the effect on religious minorities); Christopher C. Lund, *The New Victims of the Old Anti-Catholicism*, 44 CONN. L. REV. 1001 (2012) (arguing that present-day Catholics are still inhibited by legal doctrines that were once created to harm the Catholic minority); Suzanna Sherry, *Religion and the Public Square: Making Democracy Safe for Religious Minorities*, 47 DEPAUL L. REV. 499, 501–05 (1998) (noting the effects that allowing religion into the public square has on religious minorities).

In principle, however, a sincere religious claim is entitled to the same protection and consideration regardless of its seeming implausibility to others.

courts from adjudicating intrachurch or other disputed interpretations of religious doctrine.²⁶ As a result, judges may not evaluate the substantive accuracy of a religious claimant's belief when asserted to fall within the provisions of a particular religious system, even if the claim is disputed by other adherents to the same religious system, or if the claim seems mistaken or contradictory within the context of the claimant's other religious beliefs. In short, the Court's hands-off approach requires that judges accept at face value the descriptive accuracy of a claimant's sincerely held religious belief, thus entitling the religious claim to constitutional and statutory religious protections.

Of course, accepting a claim as falling within the protections of the Religion Clauses/RFRA/RLUIPA merely entails judicial adjudication of the merits of the claim under these provisions, without implying that the claimant will prevail. Put in extreme terms, the Free Exercise Clause has never been interpreted, for example, as a defense to murder.²⁷ Moreover, under the Court's current Free Exercise Clause jurisprudence, established in *Employment Division v. Smith*,²⁸ the Constitution does not protect religious freedom to violate a neutral and generally applicable governmental regulation. Even under the broader protections of RFRA/RLUIPA, an adherent whose claim is grounded in a sincere religious belief must show that the governmental restriction places a "substantial burden" on the exercise of religion—and even then, the government will prevail if it demonstrates that the restriction is "in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest."²⁹

Still, the likelihood that a religious claimant will succeed is greatly increased under RFRA/RLUIPA, owing in no small part to the Supreme Court's hands-off approach to the religious adherent's understanding and

²⁶ See, e.g., Levine, *A Critique of Hobby Lobby*, *supra* note 1, at 36 n.33 (citing sources) (listing several cases where the Supreme Court has explained its hands-off approach to adjudicating disputes over religious doctrine).

²⁷ See, e.g., *Reynolds v. United States*, 98 U.S. 145, 161–67 (1878) (finding that a party's religious beliefs cannot be accepted as justification for the commission of an overt criminal act).

²⁸ See *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 878–79 (1990) (noting that Supreme Court decisions "have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)'" (quoting *United States v. Lee*, 455 U.S. 252, 263, n. 3 (1982)) (Stevens, J., concurring)).

²⁹ See 42 U.S.C. §§ 2000bb-1(a)-(b) (2012); 42 U.S.C. §§ 2000cc-1(a)-(b).

depiction of the religious practice in question. Under all accounts, the compelling governmental interest/least restrictive means test puts in place a rather high standard for governmental regulations to meet, imposing a form of strict scrutiny that may be difficult to satisfy.³⁰ Moreover, under the hands-off approach, the “substantial burden” requirement, which triggers the application of the compelling governmental interest/least restrictive means test, will likely be susceptible to an interpretation favorable to the religious adherent. After all, pursuant to the hands-off approach, the Supreme Court has eschewed an evaluation of the centrality of a religious practice or belief within the adherent’s religious system. Applying the hands-off approach to RFRA/RLUIPA may likewise mandate that judges defer to the claimant’s characterization of the burden imposed on the claimant’s exercise of religion as substantial.³¹

Perhaps not surprisingly, given the highly deferential and repeatedly expanded contours of the hands-off approach, scholars³² and judges³³ have offered various critiques of the doctrine. Indeed, whatever the justifications, the ramifications of the hands-off approach are significant and wide-ranging—and, arguably, problematic. For example, in some cases, the refusal to evaluate the substantive nature of a religious claim may prevent judges from protecting otherwise valid interests of less powerful groups or individuals. In deciding church property disputes or claims of employment discrimination, a court’s unwillingness to closely examine religious doctrine may result in maintaining the status quo, thereby allowing a powerful

³⁰ See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014) (stating that “[t]he least-restrictive-means standard is exceptionally demanding”).

³¹ See, e.g., Caroline Mala Corbin, *Deference to Claims of Substantial Religious Burden*, 2016 U. ILL. L. REV. ONLINE 10, 10 (explaining that, under RFRA, “religious objectors need not comply with any federal law that imposes a substantial religious burden, unless the government can demonstrate that the law passes strict scrutiny”); Marc O. DeGirolami, *Substantial Burdens Imply Central Beliefs*, 2016 U. ILL. L. REV. ONLINE 19; Gedicks, “Substantial” Burdens, *supra* note 1 (stating that “[c]ourts must defer to the claimant’s construction of her beliefs, however implausible it may appear to others”); Levine, *Recent Applications of the Supreme Court’s Hands-Off Approach*, *supra* note 1, at 83–86 (discussing the *Hobby Lobby* holding and the ongoing tension surrounding the application of RFRA in light of the hands-off approach to religious doctrine); Smith, *Who Decides Conscience?*, *supra* note 1 at 731–32 (expressing skepticism about “courts’ ability to apply a broad RFRA fairly”).

³² See *supra* note 4.

³³ See *supra* note 5.

segment of a divided church or a powerful religious employer to remain immune from potentially meritorious claims.³⁴

In other cases, the failure to take a close and nuanced look at a religious practice may lead judges to apply a binary analysis to free exercise and RFRA/RLUIPA claims, favoring either the religious claimant or the government regardless of the precise nature or significance of the religious practice at issue.³⁵ Conversely, in response to these and other potentially adverse consequences, judges—including, at times, Supreme Court Justices—may defy the hands-off approach altogether, substituting their own assessment of a religious practice or belief in place of that of a religious adherent.³⁶

II. THE HANDS-OFF APPROACH TO RELIGIOUS QUESTIONS IN THE ERA OF COVID-19

A number of cases decided since the start of the COVID-19 crisis appear to illustrate and amplify many of the problematic aspects of the Supreme Court's hands-off approach to questions of religious practice and belief. First, the hands-off approach played a central role in the Court's July 8, 2020 rulings on two of the most prominent and contentious cases of the term: *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*³⁷ and *Our Lady of Guadalupe School v. Morrissey-Berru (OLG)*.³⁸ Second, throughout the pandemic, courts across the country, including the Supreme Court, have been confronted with disputes over limitations on religious gatherings that may require a close examination of the substance and nature of religious practice, thereby implicating the hands-off approach. Notably, the disputes in both *Little Sisters* and *OLG* drew upon previous Supreme Court decisions that had

³⁴ See generally Levine, *Rethinking the Supreme Court's Hands-Off Approach*, *supra* note 1, at 86 (discussing how the Supreme Court's unwillingness to adjudicate disputes that deal with interpreting a religious practice may provide "unnecessary and improper protections and exemptions to professed adherents").

³⁵ See *id.* at 87 (discussing the problems that can occur when applying the Religions Clauses too broadly or narrowly and the results that can follow).

³⁶ See sources cited *supra* note 5; *infra* Parts II and III (discussing the application of the hands-off approach to *Hobby Lobby*).

³⁷ See 140 S. Ct. 2367, 2372 (2020) (deciding whether the government could create exemptions from the contraceptive requirements for employers with religious objections to them in the Patient Protection and Affordable Care Act of 2010).

³⁸ See 140 S. Ct. 2049, 2054–55 (2020) (deciding whether the First Amendment allows courts to adjudicate employment disputes that involve teachers at religious schools).

previously brought to the forefront—but had likewise failed to resolve—some of the central tensions and problems latent in the hands-off approach.

A. *Hobby Lobby, Zubik, and Little Sisters*

Little Sisters was a highly anticipated case, representing the culmination—or at least the latest chapter—in a closely watched, hotly contested, and ongoing litigation revolving around several areas of intense legal deliberation and public controversy: The Patient Protection and Affordable Care Act of 2010 (ACA), mandates for requiring organizations to provide coverage for contraceptive methods, and regulations exempting religious organizations from the contraceptive mandate. The Court had previously decided two important cases on these issues, *Burwell v. Hobby Lobby*³⁹ in 2014, and *Zubik v. Burwell*⁴⁰ in 2016. Significantly, *Hobby Lobby* stands as a stark illustration of the sharp divide the hands-off approach has engendered among Justices, while the surprising unanimity in *Zubik* seems to have merely masked the lingering and underlying tensions, which returned to the surface in *Little Sisters*. Indeed, the debate between Justice Alito and Justice Ginsburg in *Little Sisters* essentially replayed—and nearly replicated—their debate over the hands-off approach in *Hobby Lobby*.

In his majority opinion in *Hobby Lobby*, Justice Alito relied on the hands-off approach to preclude judicial evaluation of the substance of the plaintiffs' religious claims.⁴¹ According to the plaintiffs, providing employees with health insurance that included access to certain forms of contraception would impose a substantial burden on their religious practice, thereby triggering RFRA/RLUIPA protections.⁴² As Justice Alito framed the issue, “The Hahns and Greens believe that providing the coverage demanded by the

³⁹ See 573 U.S. 682, 688 (2014) (deciding whether the Religious Freedom Restoration Act allowed the Department of Health and Human Services to require that employers provide health insurance that covers contraception, even if employers objected to contraception on religious grounds).

⁴⁰ See 136 S. Ct. 1557, 1559 (2016) (per curiam) (deciding whether it was a substantial burden on employers' exercise of their religion to have to submit notice to their insurer or the federal government of their objections to providing contraceptive coverage).

⁴¹ See Levine, *A Critique of Hobby Lobby*, *supra* note 1, at 29 (describing Justice Alito's application of the hands-off approach); Levine, *Recent Applications of the Supreme Court's Hands-Off Approach*, *supra* note 1, at 81–82 (citing the deference that Justice Alito invoked in *Hobby Lobby*, which precluded the Court from deciding on the accuracy of the plaintiffs' understanding of their religion).

⁴² See *Hobby Lobby*, 573 U.S. at 688–90 (deciding whether the Religious Freedom Restoration Act allowed the Department of Health and Human Services to require that plaintiffs provide health insurance with coverage for contraception, in violation of their religious beliefs).

[Health and Human Services (HHS)] regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage.”⁴³

Because the government conceded the sincerity of the plaintiffs’ religious beliefs, Justice Alito proceeded with a seemingly straightforward—and, consequently, deferential—application of the hands-off approach, precluding the Court from inquiring into the accuracy or plausibility of the plaintiffs’ contention that complying with the ACA would impose a substantial burden on their religious practice. Relying on basic elements of the hands-off approach established in church property disputes and other Supreme Court cases,⁴⁴ Justice Alito found that “[a]rrogating the authority to provide a binding national answer to this religious and philosophical question” would “in effect tell the plaintiffs that their beliefs are flawed [, and f]or good reason, we have repeatedly refused to take such a step.”⁴⁵

Justice Alito further relied on the 1981 case *Thomas v. Review Board*,⁴⁶ which established one of the key components of the hands-off approach, precluding judicial evaluation of the substance of a religious claim even if the claimant’s religious interpretations seem unreasonable or inconsistent.⁴⁷ In *Thomas*, the claimant lost his job after objecting, on religious grounds, to participating in the manufacture of weapons, though he was willing to work on manufacturing the steel that was used in weapons.⁴⁸ The Supreme Court refused to question the logic of Thomas’s religious commitments, holding that “it is not for us to say that the line he drew was an unreasonable one.”⁴⁹

⁴³ *Id.* at 724.

⁴⁴ See Greenawalt, *Religious Property*, *supra* note 1 (explaining that the Supreme Court utilizes an approach of noninvolvement when resolving conflicts over religious property); Levine, *Rethinking the Supreme Court’s Hands-Off Approach*, *supra* note 1, at 88–90 (demonstrating the Court’s unwillingness to engage in interpretation of religious doctrine through examples of church property disputes).

⁴⁵ See *Hobby Lobby*, 573 U.S. at 724 (citing *Emp. Div., Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 887 (1990)); *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989) (emphasizing that judges should not question litigants’ religious beliefs); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 450 (1969) (stating that “the First Amendment forbids civil courts” from interpreting religious doctrine).

⁴⁶ See *Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div.*, 450 U.S. 707, 709 (1981).

⁴⁷ See Levine, *Rethinking the Supreme Court’s Hands-Off Approach*, *supra* note 1, at 92–101 (discussing the notion that “[c]ourts are not arbiters of religious interpretation”); Marshall, Smith, Ballard, and *the Religious Inquiry Exception*, at 247–53 (discussing the reasoning of *Thomas* and its implications for free exercise jurisprudence).

⁴⁸ See *Thomas*, 450 U.S. at 710.

⁴⁹ *Id.* at 715.

Likewise, Justice Alito found in *Hobby Lobby*, “the Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial.”⁵⁰ Rather, he explained, “our ‘narrow function . . . in this context is to determine’ whether the line drawn reflects ‘an honest conviction,’ and there is no dispute that it does.”⁵¹ Finally, having agreed with the plaintiffs that under RFRA the governmental regulation impermissibly imposed a substantial burden on their religious practice, Justice Alito also found that the regulation did not constitute the least restrictive means of furthering a compelling governmental interest.⁵²

Justice Ginsburg’s dissent, joined by three other Justices, offered a sharply contrasting view, highlighting the contentious character of the case and, more broadly, many of the debatable elements of the Court’s hands-off approach.⁵³ According to Justice Ginsburg, the Court should have rejected the plaintiffs’ assertion that providing coverage would place a substantial burden on their exercise of religion, based on her finding that the plaintiffs’ connection to the use of contraceptives by their employees was too attenuated to trigger an exemption from the requirement that they provide such coverage.⁵⁴

To be sure, Justice Ginsburg agreed—as did the government—that the plaintiffs expressed sincerely held religious beliefs,⁵⁵ and further acknowledged that “courts are not to question where an individual ‘dr[aws] the line’ in defining which practices run afoul of her religious beliefs[.]”⁵⁶ Nevertheless, Justice Ginsburg departed from the majority position—and, seemingly, from the hands-off approach—in questioning the plaintiffs’ designation of the regulation as placing a substantial burden on their religious exercise. Instead, Justice Ginsburg insisted, the plaintiffs’ beliefs, “however

⁵⁰ *Hobby Lobby*, 573 U.S. at 725.

⁵¹ *Id.* (quoting *Thomas*, 450 U.S. at 716).

⁵² *See id.* at 728 (stating that “[t]he least-restrictive-means standard is exceptionally demanding . . . and it is not satisfied here”).

⁵³ *See Levine, A Critique of Hobby Lobby*, *supra* note 1, at 29 (describing the differences between Justice Alito’s and Justice Ginsburg’s views); Levine, *Recent Applications of the Supreme Court’s Hands-Off Approach*, *supra* note 1 at 82–83 (highlighting the practical and policy concerns Justice Ginsburg raised about the majority’s acceptance of the hands-off approach).

⁵⁴ *Hobby Lobby*, 573 U.S. at 760 (Ginsburg, J., dissenting).

⁵⁵ *Id.* at 758.

⁵⁶ *Id.* (quoting *Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div.*, 450 U.S. 707, 715).

deeply held, do not suffice to sustain a RFRA claim.”⁵⁷ As Justice Ginsburg continued, “RFRA, properly understood, distinguishes between ‘factual allegations that [plaintiffs’] beliefs are sincere and of a religious nature,’ which a court must accept as true, and the ‘legal conclusion . . . that [plaintiffs’] religious exercise is substantially burdened,’ an inquiry the court must undertake.”⁵⁸

Therefore, expressly “[u]ndertaking the inquiry that the Court forgoes,” Justice Ginsburg “conclude[d] that the connection between the families’ religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial.”⁵⁹ Justice Ginsburg based this conclusion on the reasoning that “[a]ny decision to use contraceptives made by a woman covered under Hobby Lobby’s or Conestoga’s plan will not be propelled by the Government, it will be the woman’s autonomous choice, informed by the physician she consults.”⁶⁰ Thus, rejecting the majority’s somewhat routine application of the hands-off approach, Justice Ginsburg seemed to allow—or require—a measure of judicial evaluation of the cogency of the adherent’s characterization of a religious belief.⁶¹

The stark differences in the opinions in *Hobby Lobby* reflected and expanded divisions among the Justices over both the specific issues in the case and the contours of the hands-off approach more generally. As a result, the decision left a number of unresolved issues that arose again, just two years later, in *Zubik v. Burwell*.⁶² Surprisingly, however, rather than seizing the opportunity to resolve some of these contentious and complex issues, and instead of continuing the debate that played out in *Hobby Lobby*, the Court in *Zubik* issued an unusual unanimous opinion, per curiam, instructing the parties to attempt to find a resolution of their own.⁶³

⁵⁷ *Id.* at 758–59.

⁵⁸ *Id.* at 759 (quoting *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (DC Cir. 2008)).

⁵⁹ *Id.* at 760.

⁶⁰ *Id.* at 760–61.

⁶¹ See Levine, *A Critique of Hobby Lobby*, *supra* note 1, at 45 (suggesting that Justice Ginsburg’s dissent is a reformulation of the Supreme Court’s hands-off approach); Levine, *Recent Applications of the Supreme Court’s Hands-Off Approach*, *supra* note 1, at 82–83 (stating that Justice Ginsburg dissented because her understanding and application of the hands-off approach was more limited than that of the majority).

⁶² 136 S. Ct. 1557 (2016).

⁶³ See Levine, *Hosanna-Tabor and Supreme Court Precedent*, *supra* note 1; Levine, *Recent Applications of the Supreme Court’s Hands-Off Approach*, *supra* note 1, at 85–86 (discussing the unanimous, per curiam decision in *Zubik*).

Not surprisingly, though, the unanimity of the opinion masked fundamental differences among the Justices, reflected, in part, in Justice Sotomayor's concurring opinion—joined by Justice Ginsburg—emphasizing that the Court's opinion “expresses no view on ‘the merits of the cases,’ ‘whether petitioners’ religious exercise has been substantially burdened,’ or ‘whether the current regulations are the least restrictive means of serving’ a compelling governmental interest.”⁶⁴ While these issues, deeply implicating the Court's hands-off approach, were thus deferred, the divisions among the Justices remained and would emerge in full force four years later in *Little Sisters*,⁶⁵ decided on July 8, 2020, amidst the first summer of the COVID-19 pandemic.

Little Sisters focused, most narrowly, on whether the government lawfully exempted certain employers with religious and conscientious objections to the contraception mandate, which required some employers to provide contraceptive coverage to their employees.⁶⁶ In an opinion written by Justice Thomas, the Court held that the exemptions were valid, primarily on the basis of statutory and procedural justifications.⁶⁷ Additionally, the majority noted that the exemption was consistent with the provisions of RFRA, and the opinion closed with the declaration that the Little Sisters “have had to fight for the ability to continue in their noble work without violating their sincerely held religious beliefs” and that “the Federal Government has arrived at a solution that exempts the Little Sisters from the source of their complicity-based concerns[.]”⁶⁸

Unlike the majority opinion, which acknowledged—but did not focus on—the implications of the case for the application of RFRA and the impact of the decision on the plaintiffs' exercise of their sincerely held religious beliefs, the concurring and dissenting opinions addressed the religious practices directly, in many ways reiterating the debate over the hands-off approach that had divided the Court six years earlier in *Hobby Lobby*.

Justice Alito issued a concurring opinion, joined by Justice Gorsuch, drawing heavily from the RFRA analysis in Justice Alito's majority opinion in *Hobby Lobby*, including a hands-off approach that entails judicial deference

⁶⁴ *Zubik*, 136 S. Ct. at 1561 (Sotomayor, J., concurring).

⁶⁵ *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).

⁶⁶ *Id.* at 2372–73.

⁶⁷ *Id.* at 2373.

⁶⁸ *Id.* at 2386.

to the adherents' understanding of their own religious beliefs. As the concurrence framed the issue, in evaluating a religious claim under the substantial burden prong of RFRA, a court must ask a basic and straightforward factual question: "[W]ould compliance cause the objecting party to violate its religious beliefs, *as it sincerely understands them*?"⁶⁹ If so, as the Court concluded in *Hobby Lobby*, "federal courts have no business addressing . . . whether the religious belief asserted in a RFRA case is reasonable."⁷⁰

Therefore, according to Justice Alito, "[i]f an employer has a religious objection to the use of a covered contraceptive, and if the employer has a sincere religious belief that compliance with the mandate makes it complicit in that conduct, then RFRA requires that the belief be honored."⁷¹ In this context, the "function" of a court is "narrow": "to determine" whether the line drawn reflects "an honest conviction."⁷² Thus, here too, Justice Alito applied a hands-off approach to require judicial acceptance of the religious adherent's characterization of a religious belief. In short, "it is not for us to say that their religious beliefs are mistaken or insubstantial."⁷³

In further reliance on the analysis in *Hobby Lobby*, Justice Alito also cited extensively from *Thomas v. Review Board*.⁷⁴ Applied to the Little Sisters, the concurrence found that "[t]heir situation was the same as that of the conscientious objector in *Thomas*, who refused to participate in the manufacture of tanks but did not object to assisting in the production of steel used to make the tanks."⁷⁵ Yet again, "[w]here to draw the line in a chain of causation that leads to objectionable conduct is a difficult moral question, and our cases have made it clear that courts cannot override the sincere religious beliefs of an objecting party on that question."⁷⁶

In what was to be her final opinion—perhaps fittingly, dissenting on an issue relating to reproductive rights—Justice Ginsburg responded forcefully

69 *Id.* at 2389 (Alito, J., concurring) (emphasis in original).

70 *Id.* at 2390 (quoting *Burwell v. Hobby Lobby*, 573 U.S. 682, 724 (2014)).

71 *Id.* (citing *Hobby Lobby*, 573 U.S. at 724–25).

72 *Id.* (quoting *Hobby Lobby*, 573 U.S. at 725 (quoting *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 716 (1981))).

73 *Id.* (quoting *Hobby Lobby*, 573 U.S. at 725).

74 450 U.S. at 716 (emphasizing that it is not within the judicial function to override parties' sincere religious beliefs).

75 *Little Sisters*, 140 S. Ct. at 2391 (Alito, J., concurring) (citing *Thomas*, 450 U.S. at 715).

76 *Id.* (citing *Hobby Lobby*, 573 U.S. at 723–26; *Thomas*, 450 U.S. at 715–16).

to both the majority's holding and Justice Alito's RFRA analysis.⁷⁷ In fact, like Justice Alito, Justice Ginsburg relied upon her own opinion in *Hobby Lobby*, again disputing Justice Alito's application of both RFRA and the hands-off approach. In sharp contrast to the majority opinion and Justice Alito's concurrence, Justice Ginsburg found that "[t]oday, for the first time, the Court casts totally aside countervailing rights and interests in its zeal to secure religious rights to the *n*th degree."⁷⁸ Specifically, Justice Ginsburg noted, "[t]he expansive religious exemption at issue here imposes significant burdens on women employees."⁷⁹ Moreover, Justice Ginsburg insisted that under RFRA, "the [previously incorporated self-certification] accommodation does not substantially burden objectors' religious exercise."⁸⁰

Justice Ginsburg reasoned that "[u]nder the self-certification accommodation . . . the objecting employer is absolved of any obligation to provide the contraceptive coverage to which it objects; that obligation is transferred to the insurer."⁸¹ Accordingly, she concluded, "[t]his arrangement 'further[s] the Government's interest [in women's health] but does not impinge on the [employer's] religious beliefs.'"⁸² Of course, as Justice Alito emphasized, this reasoning was contrary to the sincerely held religious beliefs of the plaintiffs. Thus, as in her dissent in *Hobby Lobby*, out of concern for the burdens placed on others, Justice Ginsburg seemed to defy the hands-off approach, demonstrating a willingness to second-guess religious adherents' characterizations of the impact of a law on their own religious practice and belief.

B. *Hosanna-Tabor and Our Lady of Guadalupe*

A similar dynamic played out in *Our Lady of Guadalupe School v. Morrissey-Berru (OLG)*,⁸³ decided on the same day as *Little Sisters*. As in *Little Sisters*, in *OLG*, the Court returned to issues addressed in a previous decision, this time the 2012 case *Hosanna-Tabor v. EEOC*.⁸⁴ As in *Hobby Lobby*, the holding in

⁷⁷ *Id.* at 2400 (Ginsburg, J., dissenting).

⁷⁸ *Id.*

⁷⁹ *Id.* at 2408.

⁸⁰ *Id.* at 2409.

⁸¹ *Id.* at 2410.

⁸² *Id.* at 2410–11 (quoting *Hobby Lobby*, 573 U.S. at 738) (Kennedy, J., concurring).

⁸³ 140 S. Ct. 2049 (2020).

⁸⁴ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).

Hosanna-Tabor incorporated the Court's hands-off approach to religious questions, while like *Zubik*, the decision in *Hosanna-Tabor* was issued unanimously. In yet another parallel to *Zubik*, however, the unanimity that was achieved in *Hosanna-Tabor* may have masked an underlying divide among the Justices,⁸⁵ which would later reemerge in *OLG*, revolving around the contours of the Court's hands-off approach.

In *Hosanna-Tabor*, for the first time, the Supreme Court formally recognized the ministerial exception, holding that, “[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.”⁸⁶ Specifically, “[b]y imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments.”⁸⁷ Furthermore, “[a]ccording the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.”⁸⁸ The Court’s analysis thus turned on an application of the hands-off approach to questions of religious practice and belief: to the extent that a religious group’s employment decisions are based in religious doctrine, judges may not examine those decisions.

In so holding, the Court relied on its landmark church property decisions, which established the principle precluding judicial evaluation of theological determinations issued by ecclesiastical tribunals.⁸⁹ Similarly, according to the Court, “it is impermissible for the government to contradict a church’s determination of who can act as its ministers.”⁹⁰ Moreover, the Court took the application of the hands-off approach even further, holding that “[w]hen

⁸⁵ See Levine, *Hosanna-Tabor and Supreme Court Precedent*, *supra* note 1 (discussing the variety of options the Supreme Court would have to decide *Hosanna-Tabor*); Levine, *Recent Applications of the Supreme Court’s Hands-Off Approach*, *supra* note 1, at 79–81 (arguing that the *Hosanna-Tabor* Court achieved unanimity by sidestepping some complex issues and, in the process, left a number of difficult questions unanswered).

⁸⁶ *Hosanna-Tabor*, 565 U.S. at 181.

⁸⁷ *Id.* at 188.

⁸⁸ *Id.* at 188–89.

⁸⁹ See Greenawalt, *Religious Property*, *supra* note 1, at 1858–60 (discussing two major cases involving how civil courts approach church property disputes); Levine, *Rethinking the Supreme Court’s Hands-Off Approach*, *supra* note 1, at 88–90 (detailing *Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, an early and important case showing the Court’s unwillingness to interpret religious beliefs in church property disputes).

⁹⁰ *Hosanna-Tabor*, 565 U.S. at 185.

a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us.”⁹¹ Thus, judges must maintain a hands-off attitude not only with respect to the substance of a church’s theological interpretations, but also with respect to the substance of a minister’s claims of employment discrimination.

Finally, based on a number of “considerations—the formal title given [to the employee] by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church,” the Court unanimously found that the employee in *Hosanna-Tabor* qualified as a minister for the purposes of the ministerial exception.⁹² Notably, however, the Court did not provide a working standard or definition to apply in future cases. To address this issue, three of the Justices who joined the Opinion of the Court found it necessary to add concurring opinions, both of which incorporated, to varying degrees, a hands-off approach to this question as well.

Justice Alito, in an opinion joined by Justice Kagan, again offered a seemingly straightforward application of the hands-off approach, maintaining that “religious groups must be free to choose the personnel who are essential to the performance of [key religious] functions[,]” and “[i]f a religious group believes that the ability of such an employee to perform these key functions has been compromised, then the constitutional guarantee of religious freedom protects the group’s right to remove the employee from his or her position.”⁹³ As the opinion acknowledged, though, the employee in *Hosanna-Tabor* argued that the church dismissed her for reasons that were not related to religious doctrine and therefore should not be entitled to judicial deference.⁹⁴

Nevertheless, Justice Alito continued to apply an expanded hands-off approach, because “[t]he credibility of Hosanna-Tabor’s asserted reason for terminating respondent’s employment could not be assessed without taking into account both the importance that the Lutheran Church attaches to the doctrine of internal dispute resolution and the degree to which that tenet compromised respondent’s religious function.”⁹⁵ According to Justice Alito,

⁹¹ *Id.* at 196.

⁹² *Id.* at 192.

⁹³ *Id.* at 199 (Alito, J., concurring).

⁹⁴ *Id.* at 204–05.

⁹⁵ *Id.* at 205.

“the mere adjudication of such questions would pose grave problems for religious autonomy: It would require calling witnesses to testify about the importance and priority of the religious doctrine in question, with a civil factfinder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church’s overall mission.”⁹⁶ In sum, applying a deferential hands-off approach to the religious employer’s understanding of its own doctrine, Justice Alito concluded that “[w]hat matters in the present case is that Hosanna-Tabor believes that the religious function that respondent performed made it essential that she abide by the doctrine of internal dispute resolution; and the civil courts are in no position to second-guess that assessment.”⁹⁷

Adding a brief concurrence, Justice Thomas seemed to find this analysis unnecessary, invoking a fully deferential hands-off approach to the question of who qualifies as a minister under the ministerial exception: “[I]n my view, the Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization’s good-faith understanding of who qualifies as its minister.”⁹⁸ Specifically, “[a]s the Court explains, the Religion Clauses guarantee religious organizations autonomy in matters of internal governance, including the selection of those who will minister the faith.”⁹⁹ However, “[a] religious organization’s right to choose its ministers would be hollow . . . if secular courts could second-guess the organization’s sincere determination that a given employee is a ‘minister’ under the organization’s theological tenets.”¹⁰⁰

More than eight years later, in *OLG*, the Court returned to the question of whether employment discrimination claims against a religious organization should be subject to judicial review.¹⁰¹ This time, differing views over the question of who qualifies as a minister for the purposes of the ministerial exception were no longer confined to brief discussions in the

⁹⁶ *Id.* at 205–06.

⁹⁷ *Id.* at 206. *But see, e.g.*, Jessie Hill, *Ties That Bind? The Questionable Consent Justification for Hosanna-Tabor*, 109 NW. U. L. REV. 563 (2015) (questioning another scholar’s favorable analysis of *Hosanna-Tabor*); Levine, *Hosanna-Tabor and Supreme Court Precedent*, *supra* note 1, at 135–37 (arguing that the Court’s analysis in *Hosanna-Tabor* illustrates some of the problematic aspects of the hands-off approach).

⁹⁸ *Hosanna-Tabor*, 565 U.S. at 196 (Thomas, J., concurring).

⁹⁹ *Id.* at 196–97.

¹⁰⁰ *Id.* at 197.

¹⁰¹ *Our Lady of Guadalupe School v. Morrissey-Berru (OLG)*, 140 S. Ct. 2049 (2020).

majority and concurring opinions. Here, the dispute over the definition of a minister rose to the forefront of the divides between: the majority opinion, another concurring opinion by Justice Thomas, now joined by Justice Gorsuch, and a dissent by Justice Sotomayor, joined by Justice Ginsburg—collectively illustrating the fault lines around the contours and application of the hands-off approach to questions of religious practice and belief.

Writing for the majority in *OLG*, Justice Alito applied the same hands-off approach that the Court had invoked in *Hosanna-Tabor*, stating unequivocally that “[t]he religious education and formation of students is the very reason for the existence of most private religious schools, and therefore the selection and supervision of the teachers upon whom the schools rely to do this work lie at the core of their mission.”¹⁰² Consequently, “[j]udicial review of the way in which religious schools discharge those responsibilities would undermine the independence of religious institutions in a way that the First Amendment does not tolerate.”¹⁰³

In support of this analysis, the Court once again cited the line of cases that established the hands-off approach to matters of church doctrine, such as disputes over church property and other questions of religious practice and belief.¹⁰⁴ In further reliance on *Hosanna-Tabor*, the majority opinion resisted the call to “adopt a ‘rigid formula’” to identify which employees qualify under the ministerial exception, sufficing instead with the finding that “[w]hen a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school’s independence in a way that the First Amendment does not allow.”¹⁰⁵

Reiterating the highly deferential hands-off approach he propounded in his concurrence in *Hosanna-Tabor*, Justice Thomas again both joined the majority opinion and wrote a separate concurring opinion, joined now by

¹⁰² *Id.* at 2055.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 2063 n.10 (first quoting *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969) (“First Amendment values are plainly jeopardized when . . . litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice”); then quoting *Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696, 715 n.8 (1976) (“It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own”); and then citing *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714–716 (1981)).

¹⁰⁵ *Id.* at 2069.

Justice Gorsuch. Justice Thomas agreed with the majority’s holding that “‘judges have no warrant to second-guess [the schools’] judgment’ of who should hold such a position” of “‘carry[ing] out [the religious] mission’” of the school, repeating his view that “the Religion Clauses require civil courts to defer to religious organizations’ good-faith claims that a certain employee’s position is ‘ministerial.’”¹⁰⁶

In reaching this position, Justice Thomas cited many of the principles that have served as the basis for the Court’s hands-off approach to questions of religious practice and belief. He explained, for example, that “[t]his deference is necessary because, as the Court rightly observes, judges lack the requisite ‘understanding and appreciation of the role played by every person who performs a particular role in every religious tradition.’”¹⁰⁷ Indeed, “[w]hat qualifies as ‘ministerial’ is an inherently theological question,” and therefore “cannot be resolved by civil courts through legal analysis.”¹⁰⁸ Instead, judges must “heed the First Amendment, which ‘commands civil courts to decide [legal] disputes without resolving underlying controversies over religious doctrine.’”¹⁰⁹

Justice Thomas further characterized the majority opinion as “a step in the right direction” for “properly declin[ing] to consider whether an employee shares the religious organization’s beliefs when determining whether that employee’s position falls within the ‘ministerial exception,’” because “determin[ing] whether a person is a ‘co-religionist’ . . . would risk judicial entanglement in religious issues.”¹¹⁰ However, Justice Thomas contended, “these concerns of entanglement have not prevented the Court from weighing in on the theological questions of which positions qualify as ‘ministerial.’”¹¹¹ In his view, “[t]o avoid such interference, we should defer to these groups’ good-faith understandings of which individuals are charged with carrying out the organizations’ religious missions.”¹¹²

¹⁰⁶ *Id.* at 2069–70 (Thomas, J., concurring) (first quoting *OLG*, 140 S. Ct. at 2066, 2068; and then citing *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 196 (2012) (Thomas, J., concurring)).

¹⁰⁷ *Id.* at 2070 (quoting *OLG*, 140 S. Ct. at 2066).

¹⁰⁸ *Id.* (Thomas, J., concurring) (citing *Hosanna-Tabor*, 565 U.S. at 197).

¹⁰⁹ *Id.* (quoting *Presbyterian Church in U. S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969)).

¹¹⁰ *Id.* (quoting *OLG*, 140 S. Ct. at 2068–69).

¹¹¹ *Id.* at 2071.

¹¹² *Id.*

In a sharply worded dissent, Justice Sotomayor, joined by Justice Ginsburg, faulted the majority and Justice Thomas for advancing a hands-off approach that “trade[s] legal analysis for a rubber stamp” of the claims of religious employers, thereby “all but abandon[ing] judicial review.”¹¹³ In no uncertain terms, the dissent declared—disapprovingly but largely descriptively—that, under the majority’s analysis, an employee can “be fired for any reason, whether religious or nonreligious, benign or bigoted, without legal recourse[,]” based on “a single consideration: whether a church thinks its employees play an important religious role.”¹¹⁴ Thus, Justice Sotomayor criticized the *OLG* majority for “jettisoning most of *Hosanna-Tabor*’s majority opinion” in favor of Justice Alito’s highly deferential concurrence in *Hosanna-Tabor*.¹¹⁵ In fact, Justice Sotomayor declared, “the Court renders almost all of the Court’s opinion in *Hosanna-Tabor* irrelevant” and “reframes the ministerial exception as broadly as it can. . . .”¹¹⁶ In short, according to Justice Sotomayor, “the Court’s apparent deference here threatens to make nearly anyone whom the schools might hire ‘ministers’ unprotected from discrimination in the hiring process[,]” which, she asserted “cannot be right.”¹¹⁷

Whatever the merits of Justice Sotomayor’s comparisons to *Hosanna-Tabor*, and notwithstanding the cogency of her concern that the Court’s holding “risks upending antidiscrimination protections for many employees of religious entities,”¹¹⁸ at base, Justice Sotomayor’s position calls into question the contours of the hands-off approach as understood and articulated by the majority and Justice Thomas. In Justice Sotomayor’s view, the Court’s decision “permit[s] religious entities to discriminate widely and with impunity for reasons wholly divorced from religious beliefs.”¹¹⁹ Diametrically opposed to the majority and Justice Thomas, who characterized the Court’s holding as an appropriate—if not relatively understated—exercise in judicial deference to the employers’ understanding

¹¹³ *Id.* at 2076 (Sotomayor, J., dissenting).

¹¹⁴ *Id.* at 2071–72.

¹¹⁵ *Id.* at 2073 n.1.

¹¹⁶ *Id.* at 2076.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 2082.

¹¹⁹ *Id.*

of their own religious practice and belief, Justice Sotomayor found that the Court's decision constituted nothing less than "judicial abdication."¹²⁰

Thus, the sharp differences between the opinions in *OLG* exemplify the ongoing debate over the contours of the hands-off approach. To some, a broadly conceived hands-off approach represents a constitutionally mandated and prudentially informed application of judicial deference in response to questions of religious practice and belief, while to others, broad acceptance of the claims of religious believers renders courts ineffective in protecting important countervailing interests of justice and fairness.

III. THE HANDS-OFF APPROACH TO RELIGIOUS GATHERINGS IN THE ERA OF COVID-19

Against this backdrop—indeed, during the time that *Little Sisters* and *OLG* were being briefed, argued, and decided—courts across the nation were confronted with litigation over the new legal, political, and social landscape brought about by the COVID-19 pandemic, including cases in which religious claimants challenged governmental limitations on religious gatherings. Over the course of the pandemic, these ongoing controversies have been heard by numerous courts, including the United States Supreme Court.¹²¹ Although resolution of these cases invariably requires a careful balancing of the interests of religious liberty against the interests of public health and safety, different attitudes toward the hands-off approach to questions of religious practice and belief may play a central role in judicial decision making. In particular, two cases from the early months of the pandemic illustrate ways in which differences in judicial application of the hands-off approach may help explain stark differences in judicial rulings and judicial rhetoric.

In June 2020, the United States Court of Appeals for the Seventh Circuit decided *Elim Romanian Pentecostal Church v. Pritzker*,¹²² involving a challenge two churches brought against an executive order limiting the size of public

¹²⁰ *Id.* at 2076.

¹²¹ See, e.g., Caroline Mala Corbin, *Religious Liberty in a Pandemic*, 70 DUKE L.J. ONLINE 1, 4 (2020) (evaluating the constitutionality of bans on large gatherings, including religious services); Brian J. Buchanan, *Covid-19 and the First Amendment: A Running Report (Feb. 9)*, THE FREE SPEECH CTR. (Feb. 5, 2021), <https://www.mtsu.edu/first-amendment/post/613/covid-19-and-the-first-amendment-a-running-report-may-21> [<https://perma.cc/FQ37-4J7J>].

¹²² *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020).

assemblies to ten persons. Writing for the court, Judge Easterbrook noted the plaintiffs' claim that "a limit of ten persons effectively forecloses their in-person religious services"—notwithstanding that "they are free to hold multiple ten-person services every week"—and their further claim that "the Governor's proposed alternatives—services over the Internet or in parking lots while worshipers remain in cars—are inadequate for them."¹²³ Moreover, the plaintiffs argued that "the ten-person cap disfavors religious services compared with, say, grocery shopping (more than ten people at a time may be in a store) or warehouses (where a substantial staff may congregate to prepare and deliver the goods that retail shops sell)."¹²⁴ As such, they maintained, "[i]f those businesses, and other essential functions such as feeding and housing the poor . . . , may place ten unrelated persons in close contact, it amounts to disparate treatment that a religious service cannot do so as well."¹²⁵ In response, the government countered that although worship services were, indeed, subjected to a size limit, other activities, such as concerts, movies, and similar events, were altogether forbidden.¹²⁶

Like many courts tasked with resolving these difficult controversies while considering competing interests and perspectives, Judge Easterbrook framed the issue as posing a basic question: "So what is the right comparison group: grocery shopping, warehouses, and soup kitchens, as plaintiffs contend, or concerts and lectures, as Illinois maintains?"¹²⁷ Acknowledging that "[i]t would be foolish to pretend that worship services are exactly like any of the possible comparisons," Judge Easterbrook found that "they seem most like other congregate functions that occur in auditoriums, such as concerts and movies."¹²⁸ In addition, Judge Easterbrook cited a Supreme Court case that, while leaving unresolved the overall issue of limitations on church gatherings, included Chief Justice Roberts's concurring opinion observing that unlike churches and concerts, businesses that remained open to larger gatherings

¹²³ *Id.* at 342–43.

¹²⁴ *Id.* at 346.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

were those “in which people neither congregate in large groups nor remain in close proximity for extended periods.”¹²⁹

Judge Easterbrook further acknowledged, however, that some businesses remained open to large gatherings even though they placed risks similar to those posed by large church gatherings, and some workplaces, such as meatpacking plants, nursing homes, and others, were sources of significant COVID-19 outbreaks.¹³⁰ Still, Judge Easterbrook distinguished between these businesses and churches as well, through an examination of the relative necessity of a large gathering for each to function. Here, Judge Easterbrook appears to have crossed the line drawn by the Supreme Court’s hands-off approach, evaluating the theological substance of the plaintiffs’ free exercise claim.

As Judge Easterbrook pointed out, “soup kitchens and housing for the homeless have been treated as essential [because t]hose activities *must* be carried on in person, while concerts can be replaced by recorded music [and] movie-going by streaming video.”¹³¹ Although this distinction, such as it is, seems reasonable and justifiable—if not demonstrably correct—Justice Easterbrook included prayer gatherings within the latter category, declaring that “large in-person worship services [can be replaced] by smaller gatherings, radio and TV worship services, drive-in worship services, and the Internet.”¹³² In short, Judge Easterbrook found that “[f]eeding the body requires teams of people to work together in physical spaces,” but he insisted that “churches can feed the spirit in other ways.”¹³³

On one level, Judge Easterbrook’s analysis appears to have flatly defied the Supreme Court’s hands-off approach to questions of religious practice and belief. After all, the claimants who challenged the restrictions on religious gatherings as violating their free exercise rights surely did not consider Judge Easterbrook’s blithe assessment of their religious commitments to present an accurate portrayal of their religious beliefs. Instead, Judge Easterbrook seemed to impose on religious adherents his own understanding of the burden they faced, rather than accepting their

¹²⁹ *Id.* at 347 (Roberts, C.J., concurring) (quoting *S. Bay United Pentecostal Church v. Newsom* (I), 140 S. Ct. 1613 (2020)).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

characterization of the necessities of their own religious practice, which could not simply be “replaced” by “feed[ing] the spirit in other ways.”¹³⁴

On another level, though, Judge Easterbrook’s analysis—somewhat characteristically—laid bare some of the underlying tensions and problems latent in the Supreme Court’s hands-off approach, issues that would soon reemerge in the Court’s decisions in July 2020¹³⁵ and that would continue to serve as a subtext—if not an express focus—of the ongoing debates over religious liberty and COVID-19.¹³⁶ One of the primary critiques of the hands-off approach is premised on the concern that if judges prove too deferential to religious claimants’ depictions of their religious practices and beliefs, the resulting decisions will prove too burdensome on society as a whole.¹³⁷ To be sure, crediting the substantive accuracy of a religious claim need not determine the outcome of a case; even under a strict scrutiny standard, a court will balance the exercise of religion against governmental and societal needs.¹³⁸ Nevertheless, the potential remains for deference to the religious substance of a claim to yield a similar deference to the legal merit of the claim. Accordingly, it seems, notwithstanding the Court’s hands-off approach, Judge Easterbrook found that a careful consideration of the legal merits of the plaintiffs’ claim required a similarly careful evaluation of the religious substance of the claim.

Notably, Judge Easterbrook’s analysis was not adopted by other courts that have considered challenges to limitations imposed on religious gatherings during the COVID-19 crisis, including several courts that have upheld governmental restrictions in the face of free exercise challenges.¹³⁹ In

¹³⁴ *Id.*

¹³⁵ *See supra* Part II.

¹³⁶ *Cf.* Josh Blackmun, *Judge Easterbrook Admits What Was Implicit in Chief Justice Robert’s South Bay Decision*, REASON: THE VOLOKH CONSPIRACY (June 17, 2020, 5:22 PM), <https://reason.com/volokh/2020/06/17/judge-easterbrook-admits-what-was-implicit-in-chief-justice-roberts-south-bay-decision/> [<https://perma.cc/XJ4S-Y7FW>] (critiquing Judge Easterbrook’s opinion in *Elim Romanian Pentecostal Church*).

¹³⁷ *See supra* Part I.

¹³⁸ *See supra* Part I.

¹³⁹ *See, e.g.*, *Agudath Israel of Am. v. Cuomo*, 980 F.3d 222 (2d Cir. 2020); *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938 (9th Cir. 2020); *Calvary Chapel of Bangor v. Mills*, 459 F. Supp. 3d 273 (D. Me.), *appeal dismissed*, 984 F.3d 21 (1st Cir. 2020); *Calvary Chapel Dayton Valley v. Sisolak*, No. 320-00303, 2020 WL 4260438, at *3 (D. Nev. June 11, 2020), *rev’d and remanded*, 982 F.3d 1228 (9th Cir. 2020); *Cassell v. Snyders*, 458 F. Supp. 3d 981 (N.D. Ill. 2020); *Lawrence v. Colorado*, 455 F. Supp. 3d 1063 (D. Colo. 2020); *Roman Catholic Diocese of Brooklyn, N.Y. v.*

particular, Judge Easterbrook's disregard for the Supreme Court's hands-off approach to questions of religious practice and belief poses a striking contrast to the analysis in *Roberts v. Neace*¹⁴⁰ and *Maryville Baptist Church, Inc. v. Beshear*,¹⁴¹ decided by the United States Court of Appeals for the Sixth Circuit just one month earlier.

Unlike Judge Easterbrook, the Sixth Circuit held that restrictions imposed by the Governor of Kentucky, as applied to religious gatherings, should be reviewed under a strict scrutiny standard.¹⁴² More to the point, the Sixth Circuit faithfully applied the hands-off approach, refusing to allow the government's—or its own—understanding of the necessities of religious worship to supplant the religious beliefs asserted by the claimants. As the Sixth Circuit acknowledged, “[s]ure, the Church might use Zoom services or the like, as so many places of worship have decided to do over the last two months.”¹⁴³ However, in addition to noting potential technological burdens, the court rhetorically asked the fundamental question underlying the hands-off approach: “[W]ho is . . . to say that every member of the congregation must see it as an adequate substitute for what it means when ‘two or three gather in my Name,’ or what it means when ‘not forsaking the assembling of ourselves together.’ [?]”¹⁴⁴

In fact, the judges who issued the Sixth Circuit's *per curiam* opinions expressed “[a]s individuals, . . . some sympathy for Governor DeWine's approach—to allow places of worship in Ohio to hold services but then to admonish all of them (we assume) that it's ‘not Christian’ to hold in-person services during a pandemic.”¹⁴⁵ As the same judges emphasized, however, “the Free Exercise Clause does not protect sympathetic religious practices alone.”¹⁴⁶ Expressing a basic tenet of the hands-off approach, the court

Cuomo, No. 20-48442020, WL 6120167, at *5 (E.D.N.Y. Oct. 16, 2020), *rev'd and remanded sub nom.* Agudath Israel of Am. v. Cuomo, 983 F.3d 620 (2d Cir. 2020); Roman Catholic Diocese of Brooklyn, N.Y. v. Cuomo, No. 20-4844, 2020 WL 5994954, at *1 (E.D.N.Y. Oct. 9, 2020).

¹⁴⁰ *Roberts v. Neace*, 958 F.3d 409, 415–416 (6th Cir. 2020).

¹⁴¹ *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020).

¹⁴² *Id.* at 614.

¹⁴³ *Id.* at 615.

¹⁴⁴ *Id.*; *Neace*, 958 F.3d at 415–416 (citation omitted) (quoting *Matthew* 18:20).

¹⁴⁵ *Beshear*, 957 F.3d at 615; *Neace*, 958 F.3d at 415.

¹⁴⁶ *Neace*, 958 F.3d at 416.

concluded: “And that’s exactly what the federal courts are not to judge—how individuals comply with their own faith as they see it.”¹⁴⁷

When challenges to limitations on religious gatherings have reached the Supreme Court, cases have revealed a heavily fractured Court, issuing sharply divided—if not unclear—decisions. Although the hands-off approach has not appeared as prominently in these cases, abiding concerns over the contours and content of the hands-off approach may have played an implicit and underlying role in producing these largely unsatisfying results. At the same time, somewhat ironically, the cases often turned on divisions among the Justices over a different form of judicial deference, pursuant to which courts may be deemed precluded from second-guessing government officials’ determinations over matters of health and safety, particularly amidst a medical emergency.

Like the lower court rulings, the Supreme Court decisions in these cases have typically centered on balancing the free exercise of religion against safety concerns amid the COVID-19 pandemic, which has entailed drawing comparisons and contrasts between religious worship and other activities. For example, in *South Bay United Pentecostal Church v. Newsom (I)*,¹⁴⁸ decided at the end of May 2020, the majority denied an application for injunctive relief against a California limitation on the size of a gathering.

¹⁴⁷ See *id.*; see also *Beshear*, 957 F.3d at 615 (citing *Emp. Div., Dep’t of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 886–87 (1990)). See also *Capitol Hill Baptist Church v. Bowser*, No. 20-02710, 2020 WL 5995126, at *5 (D.D.C. Oct. 9, 2020) (rejecting government’s argument that “the Church has nonetheless failed to prove that the District’s restrictions have substantially burdened the Church’s religious exercise—particularly where there are other ‘methods’ of worship available” because it “ignores the Church’s sincerely held (and undisputed) belief about the theological importance of gathering in person as a full congregation” and finding that the government “may think that its proposed alternatives are sensible substitutes. And for many churches they may be. But ‘it is not for [the District] to say that [the Church’s] religious beliefs’ about the need to meet together as one corporal body ‘are mistaken or insubstantial’” (quoting *Burwell v. Hobby Lobby*, 573 U.S. 682, 725 (2014)); *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 911 (W.D. Ky. 2020) (rejecting government’s argument that church members “could participate in an online service and thus satisfy their longing for communal celebration” because “the Free Exercise Clause protects their right to worship as their conscience commands them [and] it is not the role of a court to tell religious believers what is and isn’t important to their religion, so long as their belief in the religious importance is sincere” and “[t]he Free Exercise [C]lause protects sincerely held religious beliefs that are at times not ‘acceptable, logical, consistent, or comprehensible to others’”) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (quoting *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 714 (1981))).

¹⁴⁸ 140 S. Ct. 1613 (2020).

Chief Justice Roberts concurred in the denial of the application, observing that “[s]imilar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances” and that “the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats”¹⁴⁹ The concurrence also emphasized that “[t]he precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement[.]” entrusted primarily to “the politically accountable officials of the States[.]” which generally “should not be subject to second-guessing by an ‘unelected federal judiciary[.]’”¹⁵⁰ Thus, while the Court’s hands-off approach to religious questions did not arise in the concurrence, Chief Justice Roberts adopted, as it were, a different hands-off approach, to the decision making of government officials. Four Justices dissented from the majority’s denial of the application, with Justice Kavanaugh issuing a dissent joined by Justices Thomas and Gorsuch. In response to Chief Justice Roberts’s concurrence, the dissent found that “absent a compelling justification (which the State has not offered), the State may not take a looser approach with, say, supermarkets, restaurants, factories, and offices while imposing stricter requirements on places of worship.”¹⁵¹

Likewise, in *Calvary Chapel Dayton Valley v. Sisolak*,¹⁵² decided near the end of July 2020, the Court denied an application for injunctive relief challenging a Nevada limitation on the size of religious gatherings, with the same four Justices dissenting. Justice Alito, in a dissent joined by Justices Thomas and Kavanaugh, emphasized at some length the contrast to more permissive rules governing other places of public activity, including—but not limited to—casinos.¹⁵³ As Justice Alito put it: “While the directive’s treatment of casinos stands out, other facilities are also given more favorable treatment than houses of worship. Take the example of bowling alleys.”¹⁵⁴ Justice Gorsuch

¹⁴⁹ *Id.* at 1613 (Roberts, C.J., concurring).

¹⁵⁰ *Id.* at 1613–14.

¹⁵¹ *Id.* at 1615 (Kavanaugh, J., dissenting).

¹⁵² 140 S. Ct. 2603 (2020).

¹⁵³ *Id.* at 2605–07 (Alito, J., dissenting) (citing several examples of how “[t]he Governor’s directive treats worship services differently from other activities that involve extended, indoor gatherings of large groups of people”).

¹⁵⁴ *Id.* at 2607.

raised a similar point, in a brief but strongly worded dissent, suggesting that “[i]n Nevada, it seems, it is better to be in entertainment than religion. Maybe that is nothing new.”¹⁵⁵ However, he declared, “the First Amendment prohibits such obvious discrimination against the exercise of religion [T]here is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel.”¹⁵⁶

Justice Kavanaugh issued an additional dissent of his own, viewing the different treatment of religious gatherings and other public activities through the lens of an extensive analysis of both the Free Exercise Clause and the Establishment Clause. According to Justice Kavanaugh, “Nevada’s 50-person attendance cap on religious worship services puts praying at churches, synagogues, temples, and mosques on worse footing than eating at restaurants, drinking at bars, gambling at casinos, or biking at gyms. In other words, Nevada is discriminating against religion.”¹⁵⁷

As to the need for judicial deference to the government’s decisions over public health and safety, Justice Kavanaugh acknowledged broad governmental authority to address “COVID-19 matters such as quarantine requirements, testing plans, mask mandates, phased reopenings, school closures, sports rules, adjustment of voting and election procedures, state court and correctional institution practices, and the like.”¹⁵⁸ Nevertheless, Justice Kavanaugh insisted that “[t]here are certain constitutional red lines that a State may not cross even in a crisis.”¹⁵⁹ Finding that “[t]his Court’s history is littered with unfortunate examples of overly broad judicial deference to the government when the government has invoked emergency powers and asserted crisis circumstances to override equal-treatment and free-speech principles,”¹⁶⁰ Justice Kavanaugh resorted to “[t]he court of history” to “reject[] those jurisprudential mistakes and caution[] against an unduly deferential judicial approach, especially when questions of racial discrimination, religious discrimination, or free speech are at stake.”¹⁶¹

The Supreme Court’s rulings took a sudden change of direction, in both rhetoric and result, late in the fall of 2020, through a decision handed down

¹⁵⁵ *Id.* at 2609 (Gorsuch, J., dissenting).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 2615 (Kavanaugh, J., dissenting).

¹⁵⁸ *Id.* at 2614.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 2615.

¹⁶¹ *Id.*

just before midnight on the eve of Thanksgiving. In *Roman Catholic Diocese of Brooklyn v. Cuomo*,¹⁶² the Court issued a per curiam majority opinion granting injunctive relief to a church and a synagogue that challenged the New York Governor's restrictions on occupancy limits. The majority opinion prompted no fewer than five other opinions—two concurring and three dissenting—illustrating the extent to which the Justices remain divided on urgent issues of both short-term and long-term importance.

Among a variety of complex substantive, procedural, and policy considerations, the Court's opinion included a broad application of the hands-off approach to questions of religious practice and belief, diametrically opposed to Judge Easterbrook's analysis in *Elim Romanian Pentecostal Church v. Pritsker*.¹⁶³ As the Court noted, "[i]f only 10 people are admitted to each service, the great majority of those who wish to attend Mass on Sunday or services in a synagogue on Shabbat will be barred."¹⁶⁴ Moreover, the Court explained, "[W]hile those who are shut out may in some instances be able to watch services on television, such remote viewing is not the same as personal attendance. Catholics who watch a Mass at home cannot receive communion, and there are important religious traditions in the Orthodox Jewish faith that require personal attendance."¹⁶⁵ Thus, the Court deferred to the claimants' understanding of their own religious practices and beliefs, rather than relying on the Court's judgment as to possible—and, perhaps, seemingly reasonable—substitute or alternative forms of religious observance.

Returning to the central themes—if not the tone—of his dissent in *Calvary Chapel*, Justice Gorsuch offered a concurring opinion stating, rather caustically, that "according to the Governor, it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians. Who knew public health would so perfectly align with secular convenience?"¹⁶⁶ Here too, Justice Gorsuch observed that support for the restrictions appeared to be based in a different form of judicial deference, "a particular judicial

¹⁶² 141 S. Ct. 63, 67 (2020) ("[W]e hold that enforcement of the Governor's severe restrictions on the applicants' religious services must be enjoined.").

¹⁶³ 962 F.3d 341 (7th Cir. 2020) (affirming trial court's denial of churches' motion for an injunction of Illinois executive order limiting the size of public assemblies including religious services).

¹⁶⁴ *Roman Catholic Diocese*, 141 S. Ct. at 67–68.

¹⁶⁵ *Id.* at 68.

¹⁶⁶ *Id.* at 69 (Gorsuch, J., concurring).

impulse to stay out of the way in times of crisis.”¹⁶⁷ He responded, however, that “if that impulse may be understandable or even admirable in other circumstances, we may not shelter in place when the Constitution is under attack. Things never go well when we do.”¹⁶⁸ On a similar note, Justice Kavanaugh’s concurrence returned, almost verbatim, to the main thrust of his *Calvary Chapel* dissent, acknowledging that courts “must afford substantial deference to state and local authorities about how best to balance competing policy considerations during the pandemic[,]”¹⁶⁹ but emphasizing that “judicial deference in an emergency or a crisis does not mean wholesale judicial abdication, especially when important questions of religious discrimination, racial discrimination, free speech, or the like are raised.”¹⁷⁰

With the outcome of the cases reversed, the Justices underwent a role reversal as well, as the Justices who were part of the majority in *South Bay* and *Calvary Chapel* now found themselves dissenting, while reasserting and defending their own deferential approach—not the hands-off approach to religious questions, but the deference they had shown to the government’s safety determinations. For example, Chief Justice Roberts responded directly to Justice Gorsuch, countering that “[t]o be clear, I do not regard my dissenting colleagues as ‘cutting the Constitution loose during a pandemic,’ yielding to ‘a particular judicial impulse to stay out of the way in times of crisis,’ or ‘shelter[ing] in place when the Constitution is under attack.’”¹⁷¹ Rather, he argued, “[t]hey simply view the matter differently after careful study and analysis reflecting their best efforts to fulfill their responsibility under the Constitution.”¹⁷² For his part, Justice Breyer, joined by Justices Sotomayor and Kagan, emphasized procedural grounds for denying the application, while adding quotations from Chief Justice Roberts’s *South Bay* concurrence in support of judicial deference to the discretion of elected officials.¹⁷³ Finally, Justice Sotomayor, in a dissent joined by Justice Kagan, found that the case was similar enough to *South Bay* and *Calvary Chapel*—in fact, she wrote, “easier” than those cases—and,

¹⁶⁷ *Id.* at 71.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 74 (Kavanaugh, J., concurring).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 75 (Roberts, C.J., dissenting) (quoting Roman Catholic Diocese, 141 S. Ct. at 70, 71 (Gorsuch, J., concurring)).

¹⁷² *Id.*

¹⁷³ *Id.* at 76–78 (Breyer, J., dissenting).

therefore, should yield a similar result.¹⁷⁴ Echoing the other dissenters who argued in favor of deference to the state officials, she warned that “Justices of this Court play a deadly game in second guessing the expert judgment of health officials about the environments in which a contagious virus, now infecting a million Americans each week, spreads most easily.”¹⁷⁵

Months later, in February 2021, the Supreme Court revisited and redecided the case of *South Bay United Pentecostal Church v. Newsom (II)*.¹⁷⁶ This time, the Court seemed more fractured than ever: the Court granted the application for an injunction in part; Justices Thomas and Gorsuch would have granted the application in full; Justice Alito would have granted the application in part, in a way that differed from the majority’s ruling; Chief Justice Roberts wrote a concurring opinion; Justice Barrett, joined by Justice Kavanaugh, wrote a concurring opinion; Justice Gorsuch wrote a Statement, joined by Justices Thomas and Alito; and Justice Kagan, joined by Justices Breyer and Sotomayor, wrote a dissenting opinion. Yet again, disputes over the appropriate form and degree of judicial deference loomed large in the differing views of the increasingly divided Court.

Chief Justice Roberts, whose concurrence in *South Bay (I)*¹⁷⁷ had figured so centrally in earlier calls for deference to the judgment of state officials, now second-guessed their determination “that the maximum number of adherents who can safely worship in the most cavernous cathedral is zero” as “reflect[ing] not expertise or discretion, but instead insufficient appreciation or consideration of the interests at stake.”¹⁷⁸ In short, “[d]eference, though broad, has its limits.”¹⁷⁹ While Justice Barrett offered a brief—and somewhat cautious—concurrence, Justice Gorsuch returned to both the substance and the harsh tones of his previous opinions. First, he emphasized that “[i]t has never been enough for the State to insist on deference or demand that individual rights give way to collective interests.”¹⁸⁰ Therefore, while acknowledging that, “[o]f course we are not

¹⁷⁴ *Id.* at 79 (Sotomayor, J., dissenting).

¹⁷⁵ *Id.*

¹⁷⁶ 141 S. Ct. 716 (2021).

¹⁷⁷ *S. Bay United Pentecostal Church v. Newsom (I)*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) (noting the broad deference given to elected officials acting in areas of scientific and medical uncertainty).

¹⁷⁸ *South Bay (II)*, 141 S. Ct. at 717 (Roberts, C.J., concurring).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 718 (statement of Gorsuch, J.).

scientists,” he insisted that “neither may we abandon the field when government officials with experts in tow seek to infringe a constitutionally protected liberty.”¹⁸¹ Moreover, he declared, “[i]t seems California’s powerful entertainment industry has won an exemption. So, once more, we appear to have a State playing favorites during a pandemic, expending considerable effort to protect lucrative industries (casinos in Nevada; movie studios in California) while denying similar largesse to its faithful.”¹⁸² In a closing shot, Justice Gorsuch added that “it is too late for the State to defend extreme measures with claims of temporary exigency, if it ever could. Drafting narrowly tailored regulations can be difficult.”¹⁸³ Still, “if Hollywood may host a studio audience or film a singing competition while not a single soul may enter California’s churches, synagogues, and mosques, something has gone seriously awry.”¹⁸⁴

Finally, Justice Kagan dissented, mounting yet a further call for deference to governmental decisions in response to the COVID-19 virus. Throughout her dissent, Justice Kagan criticized the majority for defying a hands-off approach to the judgment of medical experts and state officials: “Justices of this Court are not scientists. Nor do we know much about public health policy. Yet today the Court displaces the judgments of experts about how to respond to a raging pandemic.”¹⁸⁵ Along these lines, she continued, “[t]o state the obvious, judges do not know what scientists and public health experts do.”¹⁸⁶ Therefore, while “I am sure that, in deciding this case, every Justice carefully examined the briefs and read the decisions below[,] . . . I cannot imagine that any of us delved into the scientific research on how COVID spreads, or studied the strategies for containing it.”¹⁸⁷ Accordingly, she found it “alarming that the Court second-guesses the judgments of expert officials, and displaces their conclusions with its own.”¹⁸⁸

If Justice Gorsuch concluded his Statement caustically, Justice Kagan ended her dissent ominously, warning that “[i]n the worst public health crisis in a century, this foray into armchair epidemiology cannot end well. . . . The

181 *Id.*

182 *Id.* at 719.

183 *Id.* at 720.

184 *Id.*

185 *Id.* (Kagan, J., dissenting).

186 *Id.* at 723.

187 *Id.*

188 *Id.*

Court injects uncertainty into an area where uncertainty has human costs.”¹⁸⁹ Adding a closing shot of her own, Justice Kagan declared:

I fervently hope that the Court’s intervention will not worsen the Nation’s COVID crisis. But if this decision causes suffering, we will not pay. Our marble halls are now closed to the public, and our life tenure forever insulates us from responsibility for our errors. That would seem good reason to avoid disrupting a State’s pandemic response. But the Court forges ahead regardless, insisting that science-based policy yield to judicial edict.¹⁹⁰

CONCLUSION

In a time of crisis, underlying, unaddressed, and unremedied problems often rise to the surface. Amidst the COVID-19 pandemic, the United States has undergone such a crisis, unlike any other in recent memory. The nation has been hurting, having experienced a prolonged and collective period of physical, political, and emotional turmoil and uncertainty, during which words and actions among the executive and legislative branches of government have, all-too-often, served to exacerbate harmful divisions, both preexisting and emerging. At such a time, it might be hoped that the judicial branch, most prominently the United States Supreme Court, would offer a measure of stability and healing, serving as a uniting force for the county.

Unfortunately, however, among courts as well, differences over fundamental elements of Religion Clause jurisprudence have risen to the surface, resulting in a continuing and growing sense of division and discord. Of course, differences in opinion, among the public, politicians, and judges, are to be expected and embraced, expressing the diversity of perspectives contributing to public discourse and policy. Still, the widening gap in attitudes among courts across the country, including an increasingly fractured Supreme Court, in addressing vital matters of religious practice during the COVID-19 crisis, may be reason for concern.

As in the past, along with other factors, the current divisions among the courts, both doctrinal and rhetorical, have often turned on attitudes toward the hands-off approach to questions of religious practice and belief. Thus, these cases demonstrate the abiding relevance—and limitations—of the hands-off approach, in both ordinary and extraordinary times. Looking

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

forward, it can only be hoped that the Supreme Court will closely examine the critiques, acknowledge the underlying problems, and consider some of the proposals that, for decades, scholars, dissenting justices, and others have offered, toward a more workable, more effective, and more uniting approach to questions of religious practice and belief.