# FREE EXERCISE AND THE PUBLIC INTEREST AFTER TANDON V. NEWSOM

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The Supreme Court's brief per curiam order in *Tandon v. Newsom*[1] is of disproportionately great and sustained interest. The order clarifies the Court's free exercise thinking in important respects. But in clarifying the Court's approach, the order evokes difficult questions, and motivates a broad critique of the Court's constitutional methodology.[2]

The regulation at issue in *Tandon*, adopted in response to the COVID-19 pandemic, limited all gatherings in private homes to the members of a maximum of three households.[3] This limitation applied to home gatherings for secular purposes, such as parties, and for religious purposes, such as for the study of religious text or group prayer.[4] The regulation was in this respect neutral as between religious and non-religious activities.[5]

On the other hand, shifting the focus of the comparison was thought by the *Tandon* majority to materially change the free exercise test, the case analysis, and the likely ultimate outcome. The Court majority in *Tandon*[6] compared the state's treatment of the plaintiff's activities with the state's less restrictive treatment of other activities where at least one of the more favorably treated, but equally risky, activities was secular in character. The logically relevant

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1. 141 S. Ct. 1294 (2021). Loosely relatedly, see Leila Miller, *California Lifts Capacity Limits on Places of Worship*, L.A. TIMES (Apr. 12, 2021, 5:54PM), https://www.latimes.com/california/story/2021-04-12/ca-lifts-capacity-limits-on-places-of-workshop [https://perma.cc/2GUV-9C3C].

2. This, despite the order's status as a temporary per curiam shadow docket order, by a bare voting majority, reviewing a lower court's denial of an injunction pending appeal. *See Tandon*, 141 S. Ct. at 1294. For a parallel discussion of the considerations involved in reviewing a denial of a preliminary injunction, based on free exercise of religion claims, in the context of COVID-19 public gathering restrictions, see Cassell v. Snyders, 990 F.3d 539, 548–51 (7th Cir. 2021). *See also* A.H. by & through Hester v. French, 985 F.3d 165, 175–79 (2d Cir. 2021) (discussing allegations of free exercise violations in the context of government benefits to religious versus public school students).

3. *See Tandon*, 141 S. Ct. at 1298 (Kagan, J., dissenting, with Breyer and Sotomayor, JJ.).

4. *See id.*

5. This was the finding of the Ninth Circuit Court of Appeals less than two weeks previously. *See* Tandon v. Newsom, 992 F.3d 916, 920 (9th Cir. 2021). The Ninth Circuit, on this basis, applied minimum scrutiny to the presumedly neutral rule of general applicability at issue, pursuant to Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993). *See Tandon*, 992 F.3d at 920.

6. *See Tandon*, 141 S. Ct. at 1294.

comparisons were thought by the majority to involve the relative riskiness of regulated and unregulated activities with respect specifically to the interest that was sought to be promoted by the government regulation in question.[7]

On this basis, the majority focused not solely on any differences in the riskiness of multi-household gatherings for religious purposes and multi-household gatherings for non-religious purposes, but on broader comparisons of the plaintiff's household circumstances with some non-household contexts.[8] The proper comparison was thus held to focus not solely on activities specifically in homes, but on the degree to which the compared activities implicated the government's specified regulatory interest.

Further, and with expansive leniency, the Court majority specified that strict scrutiny should be applied in free exercise cases whenever regulations "treat *any* comparable secular activity more favorably than religious exercise."[9] The majority then specified that "[i]t is no answer that a State treats some[10] comparable secular . . . activities as poorly as or even less favorably than the religious exercise at issue."[11] Thus strict scrutiny would be applied even where the state treats the plaintiff's activity substantially more favorably than most, but not all, comparable secular activities.

With the strict scrutiny test then requiring the government to show narrow regulatory tailoring to a compelling government interest,[12] the majority specified that "[w]here the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied."[13]

The Court majority then concluded that the injunction applicants "are likely to succeed on the merits of their free exercise claim; they are irreparably harmed by the loss of free exercise rights for even minimal periods of time; and the State has not shown that 'public health' would be imperiled by employing less restrictive measure."[14] The applicable strict scrutiny standard was thus clearly "not watered down; it really means what it says."[15]

Consider, now, a broader perspective. It is fair to say that at least since the time of Aristotle, it has been widely believed, with whatever degree of indeterminacy in practice, that moral actors, including governments, should judge and treat like cases alike, and unlike cases unlike.[16] This familiar general principle

7. *See id.*

8. *See id.*

9. *Id.* Here, 'religious activity' presumably refers to the plaintiff's own particular religious activity, rather than to religious activity in any more general sense.

10. Or, one would assume, most or nearly all comparable secular activities.

11. *See Tandon*, 141 S. Ct. at 1296.

12. *See id.* at 1298 (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993)). *See also* Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2260 (2020).

13. *Tandon*, 141 S. Ct. at 1297. 'Precautions' here likely refers to, e.g., legal requirements of masking or social distancing, as distinct from the actual practice of those precautions in religious and non-religious contexts.

14. *Id.* (internal quotation marks omitted).

15. *Id.* at 1298 (internal quotation marks omitted).

16. *See* ARISTOTLE, THE NICOMACHEAN ETHICS BOOK V, 111–14 (J.L. Ackrill & J.O. Urmson trans., 1980) (350 BCE). *See also* Kenneth I. Winston, *On Treating Like Cases Alike*, 62 CALIF. L. REV. 1 (1974)

plainly depends upon judgments of moral relevancy, and is not self-implementing.

Imagine, then, an extreme hypothetical case in which, in response to a pandemic, a government prohibits home gatherings of more than three families. The plaintiffs in the case believe on religious grounds that they must, in violation of the regulation, attend home worship meetings of more than three families. No alternative religious practices are believed substitutable. The penalty for even a blameless violation of this religious tenet is sincerely believed to be grave and eternal. Of course, the government prohibition of more than three families at a home gathering also applies to all secular activities. But in this hypothetical case, there are ready substitutes for all non-religious such gatherings. And in most instances, the prohibition of large in-home gatherings for non-religious purposes is, candidly, actually met with some degree of relief.

In this hypothetical case, the burden of the regulation falls equally on the religious plaintiffs and on the secular population. But the burden is, in some obvious sense, in practice also unequal, and is known by the regulating government to be in this sense unequal, at the time of enactment.

Crucially, though, the enacting government has also hypothetically exempted all gatherings outside of homes from any regulation. That is, all outdoor activities, and all business enterprises, stores, schools, and places of public accommodation, whether religious or secular in nature, are left unregulated.

The question then becomes whether the hypothetical religious plaintiffs should be judicially allowed to compare their treatment not only with the treatment of secular regulated household gatherings, but with the treatment of, in particular, relatively large, densely packed, sustained gatherings of families and unrelated persons in one or more secular public or commercial settings.

As it turns out, the government's justification for this hypothetical regulatory regime is neither illegitimate, nor capricious and irrational. Under the circumstances of the hypothetical pandemic in question, the government has sensibly placed some weight on broader issues of health and of inequality, including any significant adverse effects of restricting in-person business and economic activity in general; access to in-person education, medical care, and exercise facilities; and even to the general morale-building and other psychological effects of ordinary social and cultural interactions.

Assuming this hypothetical pandemic, the overall regulatory policy, however fairly debatable, clearly could not be said to be either illegitimate in its basic purposes, or irrational in the pursuit thereof. The regulatory scheme could thus pass classic minimum scrutiny review.

Whether the hypothetical regulatory scheme could also pass any more rigorous form of review, from the standpoint of plaintiffs religiously committed to

(discussing the work of H.L.A. Hart). *But see* Norman C. Gillespie, *On Treating Like Cases Differently*, 25 PHIL. Q. 151 (1975) (rejecting this principle while endorsing universalizability in ethics). In the present context, see Note, *Constitutional Constraints on Free Exercise Analogies*, 134 HARV. L. REV. 1782, 1783 (2021) (arguing against "ad hoc analogizing"). Whether the pursuit of logically and morally relevant analogies more generally can be bypassed is of course more doubtful.

in-home worship with more than three families, is more doubtful. This is especially true if the religious plaintiffs are allowed to compare their treatment not only with similarly restricted in-home secular activity, but with the more favorable treatment of the run of unregulated and largely secular public and commercial activities.

Under the strict scrutiny regime actually contemplated by the *Tandon* majority, the government would again have to show not only a compelling public interest furthered by the regulatory scheme, but, crucially, narrow tailoring as well. The government would bear the burden of showing that exempting the distinctively burdened in-home worshipers, as a group, would impair, to some unspecified degree, the complex function of interests and priorities sought to be promoted by the regulation at issue.

The crucial problem is that in our hypothetical case, and, more importantly, much more broadly, strict scrutiny evokes a variety of crucial questions: Assuming that strict scrutiny is to be applied, does it then matter for any purpose if there is no evidence of official animosity toward the plaintiff group? Does it matter if there is instead evidence of government respect and costly accommodation of that group in other contexts? Can a government interest qualify as compelling, and of overriding importance, if that interest is in fact a complex, unspecified, weighted function of various conflicting, overlapping, and only occasionally mutually supporting interests? Can such a complex interest even be meaningfully articulated, or objectively adjudicated? But aren't most important government regulatory policies precisely of this complex character?

We must then face the further question of the degree to which either a unitary or a multi-purpose government policy must be successful in order for the policy to be upheld under strict scrutiny. What if the policy, aimed largely at some presumably grave evil, is more or less unsuccessful, based on the available evidence? To what extent must the policy actually further the compelling interest, above and beyond some arguably less constitutionally burdensome policy? What if a more effective alternative policy would be either somewhat more constitutionally burdensome in general, or would shift the burden, to some degree, to historically disfavored groups?

More generally, what is the realistic likelihood of there being genuinely narrow tailoring in the case of any complex regulation that seeks to somehow optimally promote a variety of partially conflicting, unranked, and otherwise unprioritized interests? In judicial hindsight, won't it invariably appear that some degree of further tailoring, at one point or another, might have been possible? What if a significantly narrower, less restrictive regulation would likely have had some modest adverse impact on the degree to which the regulation achieved one of its goals? In the context of public health in particular, some limited exemptions for "free riders" may not substantially impair the vague goal of developing herd immunity. Is any degree of expected or actual furtherance of the assumedly compelling government interest sufficient? When are tradeoffs between degrees of regulatory effectiveness and regulatory burdensomeness allowed or required?

And then finally, we must ask about appropriate standards of proof in all such strict scrutiny cases. It is occasionally suggested in strict scrutiny cases that not only must the state interest must be compelling, but the evidentiary grounds "underlying the policy must be compelling, and not merely plausible,"[17] as well. But there are, in contrast, also strict scrutiny cases in which a mere preponderance of the evidence standard is applied,[18] regardless of the nature or weight of the adversely affected party's interests. How should a court best decide between these available alternative standards?

Thus the Court in *Tandon* prompts, but hardly addresses, let alone resolves, crucial questions in concluding that "narrow tailoring requires the government to show that measures less restrictive of First Amendment activity could not address its interest in reducing the spread of COVID."[19] Either preliminarily or on the merits, by what quantum of evidence? Is the relevant First Amendment activity only that of the plaintiffs, or also of those deemed similarly situated, or as well of others with diverging and perhaps conflicting First Amendment interests? How effective, in absolute terms or by comparison with the regulation in place, must some constitutionally less restrictive alternative policy be? Are the courts to look, in the case of enacted regulations, to the regulation's merely purported and predicted effects, or to the regulation's likely effects based on the available evidence, or to the regulation's actual effects as demonstrated in practice? Are tradeoffs at the margins permissible in such cases? If so, on what basis? And specifically, is the government interest in restricting free exercise in pandemic cases normally unitary and unmixed, and specifically a matter of reducing, to some utterly unspecified degree, either the incidence or else the gravity of various COVID-19 outcomes, either locally or else perhaps across some broader geographical context? Assuming this unitary government interest, where do the various sorts of important preexisting and policy-generated inequalities fit in?

In light of these important and mutually compounding complications, perhaps the courts should consider taking a step back in the free exercise cases, in pandemic contexts and elsewhere. The Court's historical track record in constitutional cases in times of perceived crisis is mixed.[20] On the one hand, the Court has recently said that "[e]ven in times of crisis--perhaps especially in times of crisis--we have a duty to hold governments to the Constitution."[21] But it has also

17. Am. Amusement Machine Ass'n v. Kendrick, 244 F.3d 572, 576 (7th Cir. 2001) (Posner, J.) (entertainment video game free speech case).

18. *See, e.g.*, Fulton v. City of Philadelphia, 922 F.3d 140, 162 (3d Cir. 2019), cert. granted, 140 S. Ct. 1104 (2020) (religious free exercise case in the context of same-sex foster care placements) (applying a preponderance of the evidence standard in the strict scrutiny analysis mandated by the Pennsylvania Religious Freedom Protection Act, 71 PA. CONS. STAT. § 2404 (2002)).

19. *Tandon*, 141 S. Ct. at 1297. For a thoughtful extended analysis, *see* Caroline Mala Corbin, *Religious Liberty in a Pandemic*, 70 DUKE L.J. ONLINE 1 (2020). Professor Corbin observes that "[e]valuating tailoring is more of an art than a science." *Id.* at 27.

20. Contrast, e.g., the creditable devotion to separation of powers principles in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) with the undue judicial deference, at best, on display in the Japanese exclusion case of Korematsu v. United States, 323 U.S. 214 (1944).

21. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 718 (2021) (statement of Gorsuch, J., joined by Thomas & Alito, JJ.).

been suggested that the combination of the importance of specialized scientific and technical expertise, along with the substantial uncertainties and risks of any regulatory or deregulatory course, suggest a role for judicial epistemic humility, and for judicial deference to regulatory authorities.[22]

The immediate problem is that important, and sometimes nearly unbounded, uncertainties attend any imaginable regulatory or deregulatory response to the pandemic. Adverse unintended consequences are not confined solely to the regulatory policies one happens to disfavor. At an early stage, the relatively pure science runs out, and the policymaking increasingly requires normatively contested moral and political judgments. And those normative judgments must be made in the context of a culture that has been increasingly fracturing, if not fragmenting, on relevant moral and political issues, for decades.[23] Where the broader culture does not permit anything remotely like any consensual resolution, a divided Court cannot engineer such a consensus through per curiam opinions.

Perhaps some minimal progress could be made if the Court were to acknowledge the substantial indeterminacies and subjectivities involved in deciding to apply, and then applying in practice, its own jurisprudence of strict scrutiny.[24] The Court might then devote greater attention to a holistic inquiry into whether a regulation that adversely affects a particular religious activity nevertheless reflects the regulator's fundamental respect for the parties involved. In some cases, particularly those involving unfamiliar or non-mainstream religious groups, the attitude of the policymakers may be one not of hostility or animus, but of objectionable ignorance, or of sheer indifference. Any such latter regulatory state of mind should at least be judicially exposed, even if not also judicially remedied.

22. Note in particular the thoughtful observations of Judge David Hamilton in Cassell v. Snyders, 990 F.3d 539, 549–50 (7th Cir. 2021).

23. *See generally* EZRA KLEIN, WHY WE'RE POLARIZED (2020); LILLIANA MASON, UNCIVIL AGREEMENTS: HOW POLITICS BECAME OUR IDENTITY (2018); KEVIN VALLIER, TRUST IN A POLARIZED AGE (2021); Jack Citrin & Laura Stoker, *Political Trust in a Cynical Age*, 21 ANN. REV. POL. SCI. 49 (2018).

24. For background, see Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007). For a critique of strict scrutiny, and more broadly of the Court's evolving levels of scrutiny jurisprudence, see R. George Wright, *What If All the Levels of Constitutional Scrutiny Were Abandoned?*, 45 U. MEMPHIS L. REV. 165 (2014).