Note

Freedom to Pray, Not to Protest

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INTRODUCTION

Since the first half of 2020, parallel fears of social unrest and viral contagion have motivated waves of restrictions on gatherings.[1] In just two years, the COVID-19 pandemic, which was first identified in the United States in January 2020, claimed the lives of nearly one million people in this country alone.[2] In the spring and summer of 2020, towns, cities, and states across the country imposed limits on public and private gatherings due to the public health emergency.[3] Less than three months into these new restrictions, a very different state of emergency prompted another kind of restriction: evening curfews imposed in the wake of the murder of George Floyd by former Minneapolis police officer Derek Chauvin on May 25th, 2020

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1. *See* discussion *infra* Part I.C (discussing curfews in 2020).

2. *COVID Data Tracker*, CDC, https://covid.cdc.gov/covid-data-tracker/#datatracker-home [https://perma.cc/2EKY-Q9K9].

3. *See infra* notes 111–17; *e.g.*, James Drew, *Large Gatherings Banned in Washington State's Puget Sound Region to Stem Coronavirus*, NEWS TRIB. (Mar. 11, 2020), https://www.thenewstribune.com/news/state/washington/article241092596.html [https://perma.cc/UV3T-KR2Q] (detailing the Washington Governor's actions banning public gatherings and events of more than 250 people).

and associated protests against police brutality.[4] This Note examines the difference in the rationales behind these two types of restrictions, how they were challenged by those they impacted, and how the judicial system responded to those challenges.

Floyd was just one of over 1,100 people killed by police in 2020, nearly twenty-five percent of whom were Black.[5] Though the scale of protest activity responding to Floyd's murder is relatively unmatched in recent history, the all-too-often frequency of police killings means that a similar instigating incident could happen any day.[6] Cities and states may look to 2020 as a model of how to handle future uprisings: more law enforcement, more curfews, and more crackdowns. This reality is deeply concerning; it is integral to identify legal strategies to preserve Americans' ability to protest injustices around us.

Curfews that target political protest disproportionately impact Black people in the United States.[7] They are just one of myriad ways in which the United States has perpetuated violence against Black people for centuries.[8] One major way this violence

4. *E.g.*, Christina Maxouris, Holly Yan & Ralph Ellis, *Cities Extend Curfews for Another Night in an Attempt to Avoid Violent Protests over George Floyd's Death*, CNN (May 31, 2020), https://www.cnn.com/2020/05/31/us/george-floyd-protests-sunday/index.html [https://perma.cc/56K2-ACWX]; Audra D. S. Burch, Weiyi Cai, Gabriel Gianordoli, Morrigan McCarthy & Jungal K. Patel, *How Black Lives Matter Reached Every Corner of America*, N.Y. TIMES (June 13, 2020), https://www.nytimes.com/interactive/2020/06/13/us/george-floyd-protests-cities-photos.html [https://perma.cc/YP63-8J2Z].

5. MAPPING POLICE VIOLENCE, https://mappingpoliceviolence.org [https://perma.cc/GMQ5-DG9Q].

6. Alex Altman, *Why the Killing of George Floyd Sparked an American Uprising*, TIME (June 4, 2020), https://time.com/5847967/george-floyd-protests-trump [https://perma.cc/S5VP-FN7P]. According to Mapping Police Violence, an organization that tracks data on violence by law enforcement officers in the U.S., "[p]olice killed 1,232 people in 2022," twenty-five percent of whom were Black. MAPPING POLICE VIOLENCE, *supra* note 5. This represents an increase compared to any other year in the last decade. *Id.*

7. *Infra* Part I.B.

8. *See* Elizabeth Hinton & Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. OF JUST. 2–3 (May 2018), https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf [https://perma.cc/K7NL-9SXM] (listing examples of officially imposed violence against Black people, including the Black Codes, vagrancy laws, and convict leasing). This violence is carried out through unceasing murders of Black people by law enforcement, systemic disenfranchisement of Black people and communities, government censorship of school curricula that teaches our country's racist past and present, and too

manifests is in the way government actors address protests, demonstrations, and other constitutionally-protected means of expression. These actions are generally organized by Black people and allies in opposition to oppression and subrogation.[9] Instead of answering calls for justice with policies that reverse discrimination, funding social programs that benefit predominately-Black communities, or attempting to rectify the legacies of legally-enforced racial hierarchy, governments all too often meet this activism with violence.[10] This should alarm any person who believes in upholding the fundamental protections the U.S. Constitution nominally grants to speech—particularly political speech.

The First Amendment prohibits the government from "prohibiting the free exercise" of religion or taking actions that "abridg[e] the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[11] Naturally, legal challenges were mounted to the 2020 politically-motivated curfews on First Amendment

many more injustices to count. *See Defending Our Right to Learn*, ACLU (Mar. 10, 2022), https://www.aclu.org/news/free-speech/defending-our-right-to-learn [https://perma.cc/MA3P-NJWS] (cataloguing dozens of proposed bills and at least ten enacted bills in 2021–22 restricting conversations about race in classrooms).

9. Kat Stafford, *Movement for Black Lives: Feds Targeted BLM Protestors*, AP NEWS (Aug. 18, 2021), https://apnews.com/article/joe-biden-death-of-george-floyd-health-race-and-ethnicity-racial-injustice-07a91fd5c210f8b809d019292c3ec0c0 [https://perma.cc/J6LQ-RFMS] (reporting allegations that "[t]he federal government deliberately targeted Black Lives Matter protesters via heavy-handed criminal prosecutions in an attempt to disrupt and discourage the global movement that swept the nation last summer in the wake of the Minneapolis police killing of George Floyd"); Karen J. Pita Loor, *When Protest Is the Disaster: Constitutional Implications of State and Local Emergency Power*, 43 SEATTLE U. L. REV. 1, 10–12 (2019) (detailing the official responses to demonstrations against the 2014 police killing of Michael Brown in Ferguson, Missouri, including a declared state of emergency, curfew orders, and mass arrests of demonstrators).

10. *E.g.*, Ali Watkins, *An Unprepared N.Y.P.D. Badly Mishandled Floyd Protests, Watchdog Says*, N.Y. TIMES (June 28, 2021), https://www.nytimes.com/2020/12/18/nyregion/nypd-george-floyd-protests.html [https://perma.cc/ZH3Z-UVZ9]; *Law Enforcement's Response to Nationwide Racial Justice Protests*, AM. OVERSIGHT (May 13, 2021), https://www.americanoversight.org/investigation/law-enforcements-response-to-nationwide-racial-justice-protests [https://perma.cc/967C-CLTF].

11. U.S. CONST. amends. I, XIV; VICTORIA L. KILLION, CONG. RSCH. SERV., LSB10451, FREEDOM OF ASSOCIATION IN THE WAKE OF CORONAVIRUS 1 (2020).

grounds.[12] The COVID-19 gathering restrictions also drew challenges in court, most significantly from religious groups opposing limits on congregating.[13] However, the markedly different outcomes experienced by the racial justice and religious freedom movements illuminate how the Court prioritizes potential infringements on the rights of largely white, Christian groups over similar infringements on the rights of Black people and their allies fighting against racial oppression. After the confirmation of Justice Amy Barrett to the Supreme Court in 2020 and its accompanying ideological shift further to the right,[14] religious groups won multiple injunctions and stays of COVID-19 restrictions.[15] However, the Court has yet to weigh in on the constitutionality of curfews that target politically motivated protest because such a case has never made its way to the highest level of the judiciary.[16] This is despite centuries of curfews specifically aimed at controlling Black peoples' organizing efforts under dubious justifications.[17]

The most significant of the COVID-19 cases, *Tandon v. Newsom*, went so far as to create new precedent on how the Court evaluates the constitutionality of government restrictions impacting religious expression.[18] Before *Tandon*, a content-neutral

12. *E.g.*, *Black Lives Matter* – Los Angeles v. Garcetti, ACLU S. CAL. (June 4, 2020), https://www.aclusocal.org/en/cases/black-lives-matter-los-angeles-v-garcetti [https://perma.cc/9EM9-SFZL].

13. *E.g.*, David Crary, *More US Churches Sue to Challenge COVID-19 Restrictions*, AP NEWS (Aug. 13, 2020), https://apnews.com/article/virus-outbreak-mn-state-wire-religion-ca-state-wire-lawsuits-7d2933ca919f33aa8c4c845e1d3febdc [https://perma.cc/M834-83XW].

14. Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html [https://perma.cc/8T9F-PWWR].

15. Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 65 (2020); Agudath Israel of America v. Cuomo, 141 S. Ct. 889, 889 (2020); S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716 (2021); Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021); *see also* Gateway City Church v. Newsom, 141 S. Ct. 1460, 1460 (2021).

16. *See, e.g.*, KILLION, *supra* note 11, at 2; David L. Hudson, Jr., *Curfews*, FIRST AMEND. ENCYCLOPEDIA (June 3, 2020), https://www.mtsu.edu/first-amendment/article/1206/curfews [https://perma.cc/4HCN-7QZX]; *infra* Part I.A (discussing the legal authority behind curfews).

17. *See infra* Part I.B.

18. *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 65; *Tandon*, 141 S. Ct. at 1296; Jim Oleske, Tandon *Steals* Fulton*'s Thunder: The Most Important Free Exercise Decision Since 1990*, SCOTUSBLOG (Apr. 15, 2021), https://www

regulation that had incidental impacts on religious activity, like a public health-motivated limit on indoor gatherings, was deemed acceptable, so long as activity treated more leniently was sufficiently dissimilar from the restricted religious activity.[19] In practice, this standard led the Court to uphold restrictions that limited occupancy in houses of worship, but not in other establishments, like grocery stores.[20] The justification is that people inside a house of worship are all in the same space for long periods of time and are likely speaking and singing, exposing the group to airborne pathogens, whereas people grocery shopping are moving quickly through the space.[21]

Post-*Tandon*, courts evaluating the constitutionality of these restrictions must now apply strict scrutiny to generally-applicable regulations with incidental impacts on religious activity.[22] Under *Tandon*'s strict scrutiny framework, courts must first judge whether impacted religious and secular activities are comparable against "the asserted government interest" justifying the regulation.[23] Next, the government must prove that its interest could not be accomplished with less restrictive measures.[24] Finally, and crucially, a termination or modification of the challenged regulation "does not necessarily moot the case," so long as "applicants 'remain under a constant threat'" of reinstated restrictions.[25] *Tandon* represents a major expansion of religious liberties. All the while, the Court has provided no recourse for groups protesting institutional racism and police brutality, whose First Amendment speech and assembly rights were massively curtailed.[26]

However, the *Tandon* framework, which broadens the application of strict scrutiny to government actions that impact religious activity, provides a potential path forward to push the

.scotusblog.com/2021/04/tandon-steals-fultons-thunder-the-most-important-free-exercise-decision-since-1990 [https://perma.cc/Z8P9-GDWL].

19. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2020–22 (2017).

20. *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613.

21. *Id*.

22. *Infra* Part III.B.1 (discussing challenges to COVID-19 restrictions).

23. *Tandon*, 141 S. Ct. at 1296 (citing *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 67); *infra* Part III.B.1.

24. *Tandon*, 141 S. Ct. at 1296–97; *infra* Part III.B.1.

25. *Tandon*, 141 S. Ct. at 1297 (citing *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 68); *infra* Part III.B.1.

26. *Supra* note 16 and accompanying text.

Court to bolster constitutional protections for political protestors. *Tandon* thus far has only been used in the religious context, but this Note proposes that a future challenger to a civil rights protest-related curfew could argue that the framework can and should be applied to other First-Amendment protected activity. If accepted, this new analysis may help overcome the roadblocks that consistently stymie attempts to strike down politically-motivated curfews.

In Part I, this Note will describe various dimensions of curfews, including legal justifications, historic usages, and modern examples, with a focus on nation-wide protests following the murder of George Floyd.[27] Part II turns to the other category of government restrictions that is a focus of this Note—public health-related regulations. It similarly situates this type of restriction within the legal backing and historical context, before addressing the place-based restrictions put in place to combat COVID-19. Part III will discuss why groups looking to challenge protest-related curfews have been unsuccessful thus far in American legal history. It will then provide an overview of legal challenges to politically-motivated curfews around the country. Part III will then contrast these unsuccessful legal challenges with an exploration of the judicial responses to religious groups' challenges of COVID-related restrictions on gathering. Part III will conclude by considering logical overlaps between the two categories of legal challenges and associated court decisions. Finally, in Part IV, this Note will conduct a theoretical application of the Supreme Court's new religious expression limitation test to a challenge mounted by a group that was impacted by a curfew targeting politically-motivated protest activity. With this exercise, this Note attempts to serve as a roadmap to be used by civil rights organizations and protesters whose First Amendment rights to protest are consistently limited.

I. WHERE DO CURFEWS COME FROM AND HOW ARE THEY USED?

Courts have historically been unhelpful in fighting curfews. Municipalities can impose curfews fairly easily—they generally

27. *E.g.*, Press Release, ACLU of S. Cal., Black Lives Matter-L.A. Sue over Unlawful Curfews (June 3, 2020), https://www.aclusocal.org/en/press-releases/aclu-black-lives-matter-la-sue-over-unlawful-curfews [https://perma.cc/6S4W-CWC5].

must just declare they are doing so because of public safety concerns.[28] The legitimacy of those concerns may be debatable, but laws—and the courts who interpret them—generally give cities broad discretion in exercising this authority.[29] And legal challenges to curfews face significant obstacles—curfews and associated harms are almost always temporary, the alleged harms can be viewed as amorphous.[30] Further, where a harm can be established, it can be hard to definitively show whether the governmental motivation behind the curfew is legitimate or based in mere dislike of the targeted activity.[31]

This Part begins with an explanation of the police power, which provides the legal foundation allowing governments to impose curfews. It then proceeds with an examination of the particularly racialized character of curfews imposed throughout colonial and U.S. history. Finally, this Part spotlights the curfews imposed across the country in the wake of protests following George Floyd's murder.

A. THE LEGAL AUTHORITY BEHIND CURFEWS: THE CONSTITUTION AND THE POLICE POWER

Under the First and Fourteenth Amendments, federal, state, and local governments are prohibited from taking actions that "abridg[e] the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[32] The freedoms of speech and assembly intersect to specifically protect the right to gather in groups for the purposes of engaging in protected speech, like a group protesting a government action.[33] These rights, as interpreted by the Supreme Court, are not absolute, but government regulations restricting them are typically subject to heightened levels of scrutiny to ensure they are "appropriately tailored to achieve

28. *Infra* note 42.

29. Loor, *supra* note 9, at 6.

30. *Infra* Part III.A.

31. *Id*.

32. U.S. CONST. amends. I, XIV; U.S. CONST. amends. I, XIV; VICTORIA L. KILLION, CONG. RSCH. SERV., LSB10451, FREEDOM OF ASSOCIATION IN THE WAKE OF CORONAVIRUS 1 (2020).

33. KILLION, *supra* note 11, at 1–2.

a sufficiently important government interest."[34] Though government regulations often arise in the context of a declared emergency situation, like a crisis of public health or safety, "[e]mergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved" by the Constitution.[35] Rather, "emergency may furnish the occasion for the exercise of power" that already existed but was unused.[36]

Hidden amidst the enumerated powers in the U.S. Constitution exists the idea of the police power.[37] Courts and scholars have struggled to articulate a precise definition of this power.[38] However, the common, if inexact, understanding of police power encompasses the state's ability to take actions targeted at the general welfare of society, like regulating business health and sanitary standards, that are not preempted by powers exclusively allocated to the federal government, like the commerce power.[39] A state or local government's general authority to impose curfews comes from its police power.[40] Police power gives these units of government the ability to regulate their citizens

34. *Id.* at 2. The level of scrutiny applied to any given restriction would depend on the nature of the restriction. So-called "time, place, or manner" restrictions on speech must be content-neutral, "narrowly tailored to serve a significant governmental interest," and must still allow for alternate methods of communication. *Id.* at 3. Restrictions that make distinctions based on the content of the speech are reviewed under strict scrutiny, meaning they must be "'narrowly tailored' to serve a 'compelling' governmental interest." *Id.* at 4.

35. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425 (1934).

36. *Id.* at 426 (citing the example of the war power, which exists regardless of an extant state of war, but which is activated upon that emergent state).

37. MARKUS DIRK DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT 120–21 (2005).

38. *See, e.g.*, ERNST FREUND, THE POLICE POWER, PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 3 (1904) (attributing to police power the goal "to secure and promote the public welfare . . . by restraint and compulsion"); DUBBER, *supra* note 37 (describing the difficulty of defining "police power" and suggesting it may be alternatively defined by what it is not); Slaughter-House Cases, 83 U.S. 36, 62 (1873) ("This [police] power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property.").

39. FREUND, *supra* note 38; DUBBER, *supra* note 37, at 121.

40. United States v. Chalk, 441 F.2d 1277, 1280 (4th Cir. 1971).

based on considerations of safety, public health, or other important considerations.[41] Included in these regulations may be a set of specified powers, like imposition of curfews, after the government invokes a state of emergency.[42]

B. THE INHERENT HARM IN CURFEWS

Curfews have a long history in the United States. Governments imposed curfews in response to the 1992 Los Angeles riots, the civil rights movement of the 1950s and '60s, and the emancipation of enslaved people via sundown towns throughout the country during the Jim Crow era, for example.[43] In fact, race-based curfews, many of which could be found throughout the British colonies in North America, are older than the United States itself.[44] Even curfews that are nominally race-neutral, like those imposed on minors, have disproportionately negative impacts on young Black people and other people of color through selective enforcement and gang-related stereotypes.[45]

Curfews in the United States can be roughly divided into two categories: (1) general curfews that are imposed to target a group of people sharing one or more characteristic or trait, like race or age; and (2) event-specific curfews that are imposed in response to (or in anticipation of) specific and contemporaneous conduct by individuals or groups, often spurred by a singular and noteworthy event.[46] Both are methods of social control.[47] And

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41. 1 NICHOLS ON EMINENT DOMAIN § 1.42 (2022).

42. *See, e.g.*, *Chalk*, 441 F.2d at 1280 (giving an example of North Carolina's statute defining "state of emergency" and giving mayors the ability to impose curfews during such times).

43. Linda Poon, *The Racist History of Curfews in America*, BLOOMBERG CITYLAB (June 18, 2020), https://www.bloomberg.com/news/articles/2020-06-18/the-racist-history-of-curfews-in-america [https://perma.cc/74KD-U5QZ].

44. Christopher Petrella, *How Curfews Have Historically Been Used to Restrict the Physical and Political Movements of Black People in the U.S.*, WASH. POST (June 3, 2020), https://www.washingtonpost.com/nation/2020/06/03/how-curfews-have-historically-been-used-restrict-physical-political-movements-black-people-us [https://perma.cc/X5BG-TADZ].

45. Poon, *supra* note 43.

46. *See* Craig Hemmens & Katherine Bennett, *Out in the Street: Juvenile Crime, Juvenile Curfews, and the Constitution*, 34 GONZAGA L. REV. 267, 272 (1998) (alternatively grouping curfews into "emergency curfews and non-emergency, or blanket, curfews"). There is certainly some overlap between these two categories, but it is a helpful way to distinguish between curfews like those imposed in the wake of George Floyd's murder, and something like a juvenile curfew that is more widespread and consistent.

47. *Id.* at 279.

both have historically been created and enforced to control Black people and other people of color.[48] One of the earliest recorded curfews imposed in what is now the United States dates back to 1638 in Dutch colonial New Amsterdam (present day Manhattan, New York).[49] Concerned about drunkenness, prostitution, and other unsavory activities, the Dutch proto-government issued a decree requiring "[a]ll seafaring persons . . . to [return] before sunset to the ship or sloop to which they [were] assigned."[50] The decree also prohibited the presumably white, European seafarers from "adulterous intercourse with heathens, blacks, or other persons."[51] Other early versions of general curfews included restrictions on the movement of Black people before the Civil War,[52] though there are examples of free Black people mounting successful challenges in court.[53] Local governments continued to enact both de jure and de facto race-based curfews after the nominal end of American slavery.[54]

Since the late nineteenth and early twentieth centuries, the more commonly seen general curfews are those that dictate the movement of children within a city, or, less commonly, a state.[55] By the mid-1950s, juvenile curfews were enacted in more than

48. *Infra* text accompanying notes 52–54.

49. RUSSELL SHORTO, THE ISLAND AT THE CENTER OF THE WORLD 61–62 (2004).

50. *Id.*

51. *Id.* at 62.

52. Peter L. Scherr, Note, *The Juvenile Curfew Ordinance: In Search of a New Standard of Review*, 41 WASH. U. J. URB. & CONTEMP. L. 163, 164–65 (1992).

53. *E.g.*, Mayor v. Winfield, 27 Tenn. 707, 708–10 (1848) (striking down a curfew requiring the arrest of any free Black person "f[ou]nd out after ten o'clock" as "unnecessary and oppressive," though leaving the curfew in place as applied to enslaved people).

54. *E.g.*, C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 101 (3d ed. 1974) ("In 1909 Mobile [Alabama] passed a curfew law applying exclusively to Negroes and requiring them to be off the streets by 10 p.m.").

55. Hemmens & Bennet, *supra* note 46, at 272–73. It bears mentioning that, while juvenile curfews are the most commonly imposed type of de jure general curfews, de facto general curfews restricting Black people from entering certain areas, typically during nighttime hours, persisted well into the twentieth and even twenty-first centuries. *E.g.*, Erin Aubry Kaplan, *Sun Hasn't Set on 'Sundown Towns,'* L.A. TIMES (Jan 24, 2007), https://www.latimes.com/archives/la-xpm-2007-jan-24-oe-kaplan24-story.html [https://perma.cc/4G4M-9ARG] (describing a persistent "sense among black people of geographic vulnerability").

half of cities with a population of at least 100,000.[56] That figure rose to more than seventy percent in the 1990s.[57] These juvenile curfews have been repeatedly upheld as constitutional, even under strict scrutiny analyses, on the grounds that the curfews are narrowly tailored to "further[] a compelling state interest, i.e., protecting juveniles from crimes on the streets."[58]

In contrast to general curfews, the political and legal development of event-specific curfews has been relatively consistent throughout colonial and U.S. history. The 1638 New Amsterdam seafarer curfew can be considered an early example of this type.[59] This curfew was issued in response to specific types of behavior the colonial Dutch leaders wanted to curb, namely alcohol drinking and public rowdiness.[60] Arising hand in hand with the colonial-era general curfews for both enslaved and free Black people, colonies along the Atlantic imposed draconian slave codes in the early 1700s to address the white population's fears of racial uprisings and revolts.[61] In the twentieth century, curfews were used on multiple occasions to suppress dissent expressed by Black people defending their communities and asserting their own humanity.[62] During the Red Summer of 1919, Black veterans returned from service in World War I eager to fight for their rights at home.[63] White mobs in cities across the country responded with violence, attacking Black labor organizers and racial justice advocates.[64] In response, city officials imposed curfews that effectively quelled the underlying organizing.[65] In April 1968, oppressed Black communities across the

56. Andrew Middleman, Comment, *In the Street Tonight: An Equal Protection Analysis of Baltimore City's Juvenile Curfew*, 46 U. BALT. L.F. 10, 15 (2015).

57. *Id.*

58. Qutb v. Strauss, 11 F.3d 488, 496 (5th Cir. 1993).

59. SHORTO, *supra* note 49, at 62.

60. *Id.*

61. IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 76–77 (2016).

62. Poon, *supra* note 43.

63. *Lynching in America: Targeting Black Veterans*, EQUAL JUST. INITIATIVE 22 (2017), https://eji.org/wp-content/uploads/2019/10/lynching-in-america-targeting-black-veterans-web.pdf [https://perma.cc/JUW6-FNKL].

64. *Id.* at 22–23.

65. Petrella, *supra* note 44.

country responded to the assassination of the Reverend Dr. Martin Luther King, Jr., with mass protest actions.[66] These communities, already pushed to a breaking point,[67] sought an outlet in public demonstration, and, in some instances, property damage.[68] Government officials imposed curfews in response, with cities like Baltimore implementing nightly curfews in the days following King's assassination.[69]

It is important to note that while property damage is often used as a justification for the imposition of this kind of curfew, it is not a prerequisite. Through the police power, officials may enact curfews simply based on a fear of potential vandalism or violence, regardless of whether that belief is warranted.[70] Rather than curbing violence, these orders operate in clear opposition to a fundamental principle expressed by the First Amendment: that people have the right to express themselves, even—and perhaps especially—when the expression in question conveys that the status quo is unacceptable and must change.[71]

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66. Lorraine Boissoneault, *Martin Luther King Jr.'s Assassination Sparked Uprisings in Cities Across America*, SMITHSONIAN MAG. (Apr. 4, 2018), https://www.smithsonianmag.com/history/martin-luther-king-jrs-assassination-sparked-uprisings-cities-across-america-180968665 [https://perma.cc/K5Y9-GEBV].

67. The 1967 Kerner Report detailed the systematized racism, housing discrimination, and poverty plaguing these communities leading up to King's assassination. *Id.*

68. *Id.*

69. Michael Yockel, *100 Years: The Riots of 1968*, BALT. MAG. (May 2007), https://www.baltimoremagazine.com/section/community/100-years-the-riots-of-1968 [https://perma.cc/6UF5-KNYX].

70. *E.g.*, Vivian Ho, *Anger Mounts over Selective US Curfew Rules: 'A License to Decide Who to Arrest,'* GUARDIAN (June 5, 2020), https://www.theguardian.com/us-news/2020/jun/05/george-floyd-protests-curfew-rules-arrests [https://perma.cc/978B-BJ2M] (noting that during the George Floyd protest curfews, the California areas of "Palo Alto and San Mateo county had enacted a curfew but hadn't experienced any sort of vandalism or looting"). Further, there is a noted discrepancy between heavy crackdowns on Black-led protest movements and the leniency afforded to white-instigated rioting. *E.g.*, Brakkton Booker, *Protests in White and Black, and the Different Response of Law Enforcement*, NPR (Jan. 7, 2021), https://www.npr.org/2021/01/07/954568499/protests-in-white-and-black-and-the-different-response-of-law-enforcement [https://perma.cc/DN39-XB5A].

71. Terminiello v. Chicago, 337 U.S. 1, 4 (1948) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech . . . may strike

C. CURFEWS IN 2020: MODERN INHERITORS OF A HISTORIC PRACTICE

In May of 2020, Derek Chauvin, a Minneapolis police officer, murdered George Floyd.[72] In response, protests against police brutality and institutional racism sprang up across the country.[73] Some of those protests included elements of property damage and violence,[74] which governments sought to control.[75] Minnesota was the first state to announce a curfew, which targeted Minneapolis and Saint Paul from 8:00 PM to 6:00 AM, beginning on May 29th.[76] The curfew was ultimately extended until June 5th.[77] Minnesota was already under a state of emergency due to COVID-19, but Governor Tim Walz declared a further emergency in Minneapolis, Saint Paul, and surrounding communities, allowing him to impose the curfew.[78] Walz specifically identified arson, looting, and other property-related crimes as the

at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.").

72. Burch et al., *supra* note 4; Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021), https://www.nytimes.com/article/george-floyd-protests-timeline.html [https://perma.cc/9V8H-ZYSB].

73. Burch et al., *supra* note 4.

74. Taylor, *supra* note 72. While some of the property damage can be attributed to people participating in the protests, actions have also been attributed to people who sought to disrupt the demonstrations. Much of the personal violence, including firearm fatalities, has been attributed to the latter group as well. *Cf.* Phil McCausland, *Minn. Governor Fully Mobilizing National Guard, Blames Out-of-State Protesters for Violence*, NBC NEWS (May 30, 2020), https://www.nbcnews.com/news/us-news/minn-governor-fully-mobilizing-full-national-guard-blames-out-state-n1219601 [https://perma.cc/79RU-UV9F].

75. Maxouris et al., *supra* note 4.

76. Katie Warren & Joey Hadden, *How All 50 States Are Responding to the George Floyd Protests, from Imposing Curfews to Calling in the National Guard*, BUS. INSIDER (June 4, 2020), https://www.businessinsider.com/us-states-response-george-floyd-protests-curfews-national-guard-2020-6 [https://perma.cc/VX5E-F7TL].

77. *Id.*

78. STATE OF MINN. EXEC. DEP'T, EMERGENCY EXEC. ORDER 20-64 (May 28, 2020), https://mn.gov/governor/assets/EO%2020-64%20Final_tcm1055-433855.pdf [https://perma.cc/9VHX-C9FN].

primary justification for the emergency declaration.[79] Other restrictions soon followed, with curfews imposed in over 200 cities in more than half of U.S. states.[80]

While some of these curfews spanned defined durations and expired accordingly,[81] many others were open-ended from the start, with curfews put in place "until further notice."[82] Some began with definitive end dates but were extended either to a new end date or indefinitely.[83] The curfews varied in specifics, but most contained a list of exceptions for categories of activities and people who were (at least technically)[84] permitted to be out in

79. *Id.* ("Unfortunately, some individuals have engaged in unlawful and dangerous activity, including arson, rioting, looting, and damaging public and private property. These activities threaten the safety of lawful demonstrators and other Minnesotans, and both first responders and demonstrators have already been injured. Many businesses, including businesses owned by people of color, have suffered damage as a result of this unlawful activity."). There is a sad irony to a state of emergency that is justified by property "violence" occurring during demonstrations, and not the very human violence that prompted the demonstrations in the first place.

80. Warren & Hadden, *supra* note 76.

81. *E.g.*, Press Release, Off. of the Governor, Governor Doug Ducey for the State of Ariz., Emergency Declaration, Curfew in Place (May 31, 2020), https://web.archive.org/web/20200817134659/https://azgovernor.gov/governor/news/2020/05/governor-ducey-issues-statewide-declaration-emergency-curfew-beginning-tonight [https://perma.cc/6GER-EZG5].

82. *E.g.*, Press Release, Birmingham City Council, Mayor Woodfin Issues a State of Emergency and Curfew for Birmingham (June 1, 2020), https://www.birminghamal.gov/2020/06/01/mayor-woodfin-issues-a-state-of-emergency-and-curfew-for-birmingham [https://perma.cc/FN6T-SSRF]; Kelly Bauer & Bob Chiarito, *Chicago Curfew Set at 9 P.M. Amid Protests for George Floyd*, BLOCK CLUB CHI. (May 30, 2020), https://blockclubchicago.org/2020/05/30/chicago-curfew-set-at-9-p-m-amid-protests-for-george-floyd [https://perma.cc/L6CY-YSLW]; CITY OF MIA., EXEC. ORDER NO. 20-13, LOCAL EMERGENCY MEASURES IMPLEMENTED BY THE CITY MANAGER OF THE CITY OF MIAMI, FLORIDA (May 30, 2020), https://www.miamigov.com/files/sharedassets/public/news/2020/20-13-local-er-measure-curfew.pdf [https://perma.cc/L5EJ-EPFM].

83. *E.g.*, *Amended Declaration of State of Local Emergency (Civil Unrest)*, CITY OF WEST PALM BEACH (June 1, 2020), https://www.wpb.org/home/showdocument?id=1189 [https://perma.cc/SLN2-Y6DT]; Tim Herrera, *New York City's Curfew: What You Need to Know*, N.Y. TIMES (June 3, 2020), https://www.nytimes.com/article/nyc-curfew.html [https://perma.cc/MJ3H-PN6Z]; *Civil Emergency Order*, CITY OF SEATTLE (June 2, 2020), https://durkan.seattle.gov/wp-content/uploads/sites/9/2020/06/Curfew-Order-Extension-6.2.2020.pdf [https://perma.cc/7N3J-GHKE].

84. Despite exceptions, there were multiple documented instances of people engaging in supposedly excepted activities that were nevertheless caught up in curfew arrests. *E.g.*, *George Floyd Protests: Food Delivery Worker Arrest Amid*

the streets during the restricted hours, like law enforcement, emergency personnel, members of the press, and people traveling to or from their places of work.[85] Notably, some curfews included explicit exceptions for religious activity, generally permitting people to be out in the streets during the restricted hours if they were traveling to or from religious services.[86] Curfews were imposed for anywhere up to two weeks, and several included clear indications that curfews could be reimposed during the

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NYC Protests Raises Concern About NYPD Tactics, ABC NEWS (June 5, 2020), https://abc7ny.com/food-delivery-essential-workers-arrest-protesters-defy-curfew/6232911 [https://perma.cc/QZ3V-B3BK].

85. *E.g.*, Press Release, Birmingham City Council, *supra* note 82 (exempting "[p]eople seeking medical assistance," people returning to their homes or jobs, "city law enforcement officers, firefighters, . . . [d]octors, nurses," and on-duty military personnel, public utilities employees, and press); Bauer & Chiarito, *supra* note 82 (exempting "essential workers"); *Executive Order of the Chair of the County of Los Angeles Board of Supervisors Following Proclamation of Existence of a Local Emergency Due to Civil Unrest*, L.A. BD. OF SUPERVISORS (May 31, 2020), https://ci.san-fernando.ca.us/wp-content/uploads/2020/05/LA-Co-Curfew-order-5-31-20.pdf [https://perma.cc/2NM4-GT3G] (exempting "peace officers, firefighters, . . . military personnel," people traveling to or from work, unhoused people, and people seeking medical treatment); Bill Dentzer, *Reno Curfew in Effect Until Further Notice After George Floyd Protests*, LAS VEGAS REV.-J. (June 2, 2020), https://www.reviewjournal.com/news/politics-and-government/nevada/reno-curfew-in-effect-until-further-notice-after-george-floyd-protests-2043746 [https://perma.cc/GY2X-WC8C] (exempting "law enforcement, military and emergency response personnel, government officials and authorized media," along with people who have an "essential reason" to be in the streets); *State of Emergency, Curfew Declared in Omaha; National Guard Deployed Following Two Nights of Protests*, KETV OMAHA (May 31, 2020), https://www.ketv.com/article/omaha-police-to-hold-news-conference-following-two-nights-of-violent-protests/32722394# [https://perma.cc/6E86-ZVH5] (exempting people waiting for transportation, "engaging in recreational activities at a usual and customary place . . . [l]aw enforcement personnel, fire and medical personal," press, people going to or from work, emergency medical workers, and people who are unhoused).

86. *E.g.*, Press Release, Off. of the Governor, Governor Doug Ducey for the State of Ariz., *supra* note 81 (exempting persons "attending religious services" from the curfew); CITY OF SAN BERNARDINO, EXEC. ORDER NO. 2020-04 (June 1, 2020), https://twitter.com/sbcitygov/status/1267902550059057152/photo/4 [https://perma.cc/ZXX4-XVXQ] ("This curfew shall not apply to . . . persons travelling to or from work or religious meetings."); OFF. OF THE MAYOR, LOUISVILLE, KY., EXEC. ORDER NO. 2020-007, (June 1, 2020), https://louisvilleky.gov/city/document/eo2020-007executed1pdf [https://perma.cc/6XNL-8ARW?type=standard] (exempting "[i]ndividuals commuting to and from a house of worship to attend services" from the curfew); *Cities, Towns Issue Curfews After Night of Unrest*, NBC 10 NEWS (June 2, 2020), https://turnto10.com/news/local/cities-towns-issue-curfews-after-night-of-unrest [https://perma.cc/48MG-E9EK].

state of emergency.[87] In the two weeks following George Floyd's murder, police arrested over 17,000 people in conjunction with anti-police brutality protests, of which a significant majority were charged with curfew violations.[88]

The curfews targeting protests of police brutality following the murder of George Floyd are far from unprecedented. They are just among the most recent in a centuries-long history of curfews aimed to suppress Black-led organizing efforts. By invoking states of emergency, governments are emboldened to make decisions that actively curtail peoples' fundamental political rights, with scant justification. But, as Parts II and III will address, the judicial response to limitations on these rights is vastly different than the response to alleged limitations on religious rights.

II. THE POLITICAL ORIGINS OF AND RESPONSES TO COVID-19

Restrictions on gathering imposed in response to the dangers of COVID-19 share a basic legal justification with curfews, but their historical development took a much different path. This Part begins with a brief examination of government restrictions imposed during the 1918 Influenza, as a historical analogue to COVID-19, to underscore how the government actions to restrict gathering in 2020 are not without precedent. This Part then delves into the COVID-19 restrictions and previews the legal pushback from religious groups that prompted the Supreme Court to strike down certain public health measures.

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87. *E.g.*, Press Release, Off. of the Governor, Governor Doug Ducey for the State of Ariz., *supra* note 81.

88. *See* Meryl Kornfield, Austin R. Ramsey, Jacob Wallace, Christopher Casey & Verónica Del Valle, *Swept up by Police*, WASH. POST (Oct. 23, 2020), https://www.washingtonpost.com/graphics/2020/investigations/george-floyd-protesters-arrests [https://perma.cc/DM6C-M9PJ] (describing an investigation and analysis of 2,652 protest arrests in fifteen cities, of which 2,059 were for "nonviolent misdemeanors, most on charges of violating curfew or emergency orders"); Anita Snow, *AP Tally: Arrests at Widespread US Protests Hit 10,000*, AP NEWS (June 4, 2020), https://apnews.com/article/american-protests-us-news-arrests-minnesota-burglary-bb2404f9b13c8b53b94c73f818f6a0b7 [https://perma.cc/CRV8-L98N] (citing Los Angeles Police Chief's report to the city's Police Commission that about 2,500 of the 3,000 people arrested in demonstration were charged with "failure to disburse or curfew violations"). Most of these charges were ultimately dropped, some due to counter or insufficient evidence, prosecutorial discretion, or other considerations. Neil MacFarquhar, *Why Charges Against Protesters Are Being Dismissed by the Thousands*, N.Y. TIMES (Nov. 19, 2020), https://www.nytimes.com/2020/11/19/us/protests-lawsuits-arrests.html [https://perma.cc/J2ZY-KM6K].

A. THE 1918 INFLUENZA: A COVID-19 PRECURSOR

In addition to empowering states to impose curfews, the police power is also the source of a government's authority to impose restrictions on gathering due to a public health crisis, like COVID-19.[89] The closest historical analogue to the COVID-19 pandemic in the United States, with government restrictions approaching a similar scale, occurred in 1918.[90] The 1918 influenza pandemic killed tens of millions of people across the world, including nearly 700,000 in the United States.[91] State and local governments imposed restrictions on places of gathering, with the intention of stemming the havoc the 1918 influenza was wreaking on the country.[92] Most would likely not seem out of place to the average person who lived through the first two years of the COVID-19 pandemic. Multiple cities ordered theater and saloon closures and imposed mask mandates, and a few closed down their school systems.[93] Cities with more robust crowd control measures had demonstrably better health outcomes than those that were more lax about large groups.[94]

Houses of worship were not spared closure orders during the 1918 influenza. Though some cities merely suggested occupancy

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89. *Two Centuries of Law Guide Legal Approach to Modern Pandemic*, A.B.A. (Apr. 2020), https://www.americanbar.org/news/abanews/publications/youraba/2020/youraba-april-2020/law-guides-legal-approach-to-pandemic [https://perma.cc/PCN9-T4DE].

90. J. Alexander Navarro & Howard Markel, *Politics, Pushback, and Pandemics: Challenges to Public Health Orders in the 1918 Influenza Pandemic*, 111 AM. J. PUB. HEALTH 416, 420–21 (2021).

91. William A. Foley, Jr., *Developing a Systematic Pandemic Influenza Program for Preparing a State*, *in* PANDEMIC PLANNING 65, 68 (J. Eric Dietz & David R. Black eds., 2012). Like COVID-19, the 1918 influenza struck the country in multiple waves, each one with different characteristics necessitating different responses. *Id.*

92. *See infra* notes 93–94.

93. Navarro & Markel, *supra* note 90, at 416–18. Certain responses to these restrictions would also not seem out of place in the first two years of the COVID-19 pandemic, with transportation operators in 1918 fearful of enforcing mask mandates, and groups protesting such mandates as "autocratic and unconstitutional." *Id.*

94. Nina Strochlic & Riley D. Champine, *How Some Cities 'Flattened the Curve' During the 1918 Flu Pandemic*, NAT'L GEOGRAPHIC (Mar. 27, 2020), https://www.nationalgeographic.com/history/article/how-cities-flattened-curve-1918-spanish-flu-pandemic-coronavirus [https://perma.cc/2RK7-RFGM] (comparing influenza death tolls in cities with stricter limits on gathering to those in cities that allowed major gatherings, like Philadelphia, which permitted a parade attended by 200,000 people).

limitations for these institutions, others, like Los Angeles, Cleveland, and Charleston, included houses of worship in their bans on gathering.[95] Clergy were generally supportive at first, understanding that limits on gathering were some of the most important and effective tools to combat the spread of the deadly influenza.[96] However, as the pandemic continued to rage with no end in sight and restrictions remained in place longer than expected, clergy protested the inability to gather their congregations in prayer.[97] Using a line of argument that would resonate with their twenty-first century compatriots, some faith leaders decried the bans affecting religious institutions, while other businesses, including saloons, saw restrictions loosened.[98] Religious opposition mostly acknowledged the seriousness of the influenza and the importance of maintaining some safeguards.[99] However, some faith leaders took affirmative actions to oppose gathering restrictions, and others resorted to misinformation and hyperbole to make their case that houses of worship should

95. Navarro & Markel, *supra* note 90, at 418.

96. *Id.*

97. John S. Lightbourn, Letter to the Editor, *Wants Churches Open: Georgetown Minister Question Policy Now Being Followed*, NEWS & COURIER, Oct. 26, 1918, at 6 ("The chief expedient most rigorously applied is the prohibition of public gatherings . . . but . . . there is room . . . for the exercise of balanced judgment. . . . [I]s it the least bit necessary or wise that public worship should be prohibited? Surely, if there ever was a time when the churches should be open . . . now is the time.").

98. *E.g.*, *id.* ("[B]usiness must not be hindered . . . [but] the sole and only business that can exalt a nation and deliver it from gross materialism . . . must be side-tracked in the presence of national calamity."); James E. Cassidy, Letter to the Editor, *Shut the Saloons, Says Mgr. Cassidy*, FALL RIVER EVENING NEWS, Sept. 28, 1918, at 1 ("What's the matter with the saloons? Why are they not ordered closed? . . . Are not the motley gatherings of the 'great unwashed,' assembling in these unclean places . . . a thousand times a greater threat than the congregations of our churches?"); *Pastors Protest Church Closings*, PHILA. INQUIRER, Oct. 18, 1918, at 15 (describing a resolution passed by Episcopal clergy criticizing the inconsistency of "clos[ing] the churches and yet allow[ing] people to crowd in cars and stores on the plea that 'business must go on'").

99. *E.g.*, Peter Fagan, *Churches Are Refused Permission to Open*, DETROIT NEWS, Oct. 31, 1918, at 17 (recounting the story of a Bishop who sought to persuade authorities to permit church services by offering to fumigate the buildings, shorten services, require masks, and eject any people who coughed).

have no restrictions at all.[100] Despite opposition, very few religious groups are documented as having mounted legal challenges to such restrictions.

However, one religious group in California did take its case to court. On October 11, 1918, the city of Los Angeles passed an ordinance that "required the closure of public spaces including theaters, churches and schools," though this did not extend to "un-essential" businesses.[101] Soon after the ordinance passed, Christian Science churches in the area planned a test case: they "notified local police departments that they intended to hold services . . . while the closure order was in effect," as a constitutional challenge.[102] Five participants in the illicit church service were arrested in Los Angeles and "charged with violating health ordinances by holding a service Sunday."[103] The Christian Scientists petitioned the Second Appellate District of the California District Court of Appeal to order one of the confined men freed on a writ of habeas corpus on the grounds that the ordinance under which he was arrested was "'unconstitutional, invalid and void' and [was] 'an unwarranted exercise of the police power' of the city."[104] The court held the arrest was proper and that "the ordinance [was] a legal emergency measure."[105]

After an appeal by the Christian Scientists' attorney, the California Supreme Court followed in declining to issue a writ of habeas corpus.[106] In announcing the decision, the court "stated that, while it would be the usual thing to grant the petition, in this case to do so might cast 'suspicion on an ordinance which would make its enforcement difficult.'"[107] The court essentially

100. *E.g.*, *Minister Says Ban No Help to Flu Situation*, OMAHA DAILY BEE, Dec. 16, 1918, at 3 (recounting a minister's statements to his congregation misstating health measures taken in some cities and suggesting that church attendance prevents disease).

101. Jennifer King, *What Did We Learn from the California Courts' Response to the Influenza Epidemic of 1918–1919?*, CAL. SUP. CT. HIST. SOC'Y REV., Spring/Summer 2021, at 2, 6, 8.

102. *Id.* at 8.

103. *Writ Denied in Test of Health Ordinance*, S.F. CALL, Nov. 5, 1918, at 2.

104. *Flu Closing Order Is Upheld*, L.A. TIMES, Nov. 5, 1918, at 6–7; see also *Appeal to Constitution*, L.A. TIMES, Nov. 13, 1918, at 5, for first-hand views of the involved parties. Unsuccessful attempts were made to confirm the underlying constitutional claims centered religion. However, this was likely the case.

105. *Flu Closing Order Is Upheld*, *supra* note 104.

106. *Scientist Churches Closed Tomorrow: Next Step in Test Case Uncertain*, L.A. TIMES, Nov. 9, 1918 at II1.

107. *Id.*

validated the pro-public health justifications underlying widely applicable gathering bans intended to combat deadly pandemics.

This case demonstrates the high degree of importance some courts placed on these kinds of restrictions, even where they had the effect of curtailing religious activity. Another California suit brought by Christian Scientists succeeded on procedural, rather than constitutional grounds, and another test case by the sect was continued indefinitely after two successive judges assigned to the case and the prosecutor contracted influenza.[108] Thus the prevailing judicial view was established: if based in legitimate, public health rationales, government-imposed restrictions on gathering that impact houses of worship do not violate the Constitution.

B. COVID-19 GUIDELINES, ORDERS, AND BANS

The initial spread of COVID-19 in 2020 presented a major opportunity for local and state governments to draw on more than a century of legal precedent in exercising their police power to restrict peoples' movements. The crisis prompted hundreds of stay-at-home orders, gathering limitations, and other public health measures, many of which impacted religious activity.[109]

Since the emergence of COVID-19 in December of 2019, the United States has undergone a whirlwind series of actions to monitor, study, treat, and combat the virus.[110] Government restrictions on the size of gatherings began in mid-March of 2020, first with relatively conservative limits, allowing all but very large groups, but becoming stricter as the virus spread.[111] Federal suggestions to restrict gatherings began on March 15th,

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108. King, *supra* note 101, at 8.

109. *See infra* text accompanying notes 111–17; Nikki C. Day, Jennifer R. Cowan & Noah M. Daiker, *Governing Through the "New Normal": COVID-19 Lessons Learned on Local Government Law, the Constitution, and Balancing Rights in Times of Crisis*, 50 STETSON L. REV. 547, 551–55 (2021).

110. *CDC Museum COVID-19 Timeline*, CDC (Aug. 16, 2022), https://www.cdc.gov/museum/timeline/covid19.html [https://perma.cc/Q43A-A5DY?type=standard].

111. *E.g.*, *Order of the Health Officer of the County of Santa Clara Imposing a Countywide Moratorium on Mass Gatherings of 1,000 or More Persons to Mitigate the Spread of COVID-19*, CNTY. OF SANTA CLARA PUB. HEALTH DEP'T (Mar. 9, 2020), https://covid19.sccgov.org/sites/g/files/exjcpb766/files/03-09-20-Health-Officer-Order.pdf [https://perma.cc/3U2V-3JSB]; *Ohio Barbershops, Hair and Nail Salons Ordered to Close Amid Coronavirus Concerns*, 10TV WBNS (Mar. 18, 2020), https://web.archive.org/web/20200318232922/https://

when the Centers for Disease Control (CDC) recommended an eight-week prohibition on events with fifty or more people.[112] This was followed the next day by guidelines from the Trump administration that recommended temporarily limiting groups to no more than ten people.[113] Seven California counties announced shelter-in-place orders, directing residents "to stay home except for essential reasons," like purchasing food and limited outdoor activities.[114] That same day, New York City shut down its public school system of over 1,800 schools serving 1.1 million children, following multiple public school systems closures in smaller districts across the country.[115] Then, on March 19, 2020, California became the first state to issue a "stay at home order," ordering all residents to "stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors."[116] Though this order contained few specifics, it was a sign of the numerous,

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www.10tv.com/article/ohio-barbershops-hair-and-nail-salons-ordered-close-amid-coronavirus-concerns-2020-mar [https://perma.cc/PAF2-L37B] (detailing Ohio Governor's decisions to ban gatherings of more than 100 people on March 12, 2020, and subsequent orders); Jeff Williamson, *15 New Coronavirus Cases in Virginia, Now 67 Total Cases*, WSLS 10 NEWS (Mar. 17, 2020), https://web.archive.org/web/20200318041135/https://www.wsls.com/news/virginia/2020/03/17/15-new-coronavirus-cases-in-virginia-now-67-total-cases [https://perma.cc/CLS3-VDUU] (reporting a Virginia ban on gatherings of more than ten people).

112. *C.D.C Gives New Guidelines, New York to Close Restaurants and Schools and Italian Deaths Rise*, N.Y. TIMES (Mar. 15, 2020), https://www.nytimes.com/2020/03/15/world/coronavirus-live.html [https://perma.cc/BXR5-Q3NH].

113. *Gatherings Should Be Limited to 10 People, Trump Says*, N.Y. TIMES (Mar. 16, 2020), https://www.nytimes.com/2020/03/16/world/live-coronavirus-news-updates.html [https://perma.cc/XX2B-MKPC].

114. Tim Arango, Thomas Fuller, John Eligon & Conor Dougherty, *To Battle Virus, 7 California Counties Order Everyone to Stay Home*, N.Y. TIMES (Mar. 16, 2020), https://www.nytimes.com/2020/03/16/us/california-covid-19.html [https://perma.cc/5T7T-DE2N].

115. Eliza Shapiro, *New York City Public Schools to Close to Slow Spread of Coronavirus*, N.Y. TIMES (Mar. 15, 2020), https://www.nytimes.com/2020/03/15/nyregion/nyc-schools-closed.html [https://perma.cc/VJ9B-6PSA].

116. EXEC. ODER NO. 33-20, EXEC. DEP'T, STATE OF CAL. (Mar. 19, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf [https://perma.cc/7NEZ-E9VU]; Tim Arango & Jill Cowan, *Gov. Gavin Newsom of California Orders Californians to Stay at Home*, N.Y. TIMES (Mar. 19, 2020), https://www.nytimes.com/2020/03/19/us/California-stay-at-home-order-virus.html [https://perma.cc/TS8G-YWDZ].

similar orders to come from states and cities across the country.[117]

Some types of restrictions specifically distinguished between their targets, like mandatory business closures that nevertheless allowed essential businesses to continue operating.[118] But gathering limits for indoor facilities, including houses of worship, were typically content-neutral.[119] This meant they were applied based on occupancy, rather than on the kinds of activities intended to be hosted there.[120] Some orders initially exempted houses of worship from group bans, and then subsequently included them after some churches became loci for infections.[121] But despite the known risks church attendance posed for spreading the virus,[122] some congregations defied gathering bans and continued to hold services.[123]

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117. *See, e.g.*, Minyvonne Burke, *Coronavirus: Illinois Issues Stay-at-Home Order for 13 Million Residents*, NBC NEWS (Mar. 20, 2020), https://www.nbcnews.com/news/us-news/coronavirus-illinois-issue-stay-home-order-13-million-residents-california-n1164901 [https://perma.cc/XLJ2-NLBE]; EXEC. ORDER NO. 20-12, OFF. OF THE GOVERNOR, STATE OF OR. (Mar. 23, 2020) [hereinafter OR. EXEC. ORDER], https://govsite-assets.s3.amazonaws.com/jkAULYKcSh6DoDF8wBM0_EO%2020-12.pdf [https://perma.cc/R4L6-MF5M] (ordering residents to stay at home, banning "[n]on-essential social and recreational gatherings . . . outside of a home" where social distancing is not possible, and establishing multiple additional guidelines for employers and individuals).

118. OR. EXEC. ORDER, *supra* note 117.

119. *Cf.* Niraj Warikoo, *Whitmer Exempts Michigan Churches from Penalties for 50+ Gatherings*, DETROIT FREE PRESS (Mar. 21, 2020), https://www.freep.com/story/news/local/michigan/2020/03/21/coronavirus-whitmer-updates-order-assemblies-exempt-churches-penalty/2885395001 [https://perma.cc/LS8C-UHBP] (reporting on a Michigan order that imposed penalties on fifty-plus gatherings held in violation of a ban, but was updated to include places of worship in an exemption that originally included "health care centers, workplaces, the state legislature and mass transit").

120. *Id.*

121. *E.g.*, Mike Stunson, *Kentucky Church Held Services Against Governor's Warning. Visitor Now Has Coronavirus*, LEXINGTON HERALD LEADER (Mar. 20, 2020), https://www.kentucky.com/news/coronavirus/article241366951.html [https://perma.cc/F2RV-8K5T]; Kate Conger, Jack Healy & Lucy Tompkins, *Churches Were Eager to Reopen. Now They Are Confronting Coronavirus Cases*, N.Y. TIMES (July 8, 2020), https://www.nytimes.com/2020/07/08/us/coronavirus-churches-outbreaks.html [https://perma.cc/KRJ5-F8T7].

122. Conger et al., *supra* note 121.

123. *E.g.*, Zack Budryk, *Louisiana Church Defies Coronavirus Recommendations to Hold Service for 300*, HILL (Mar. 18, 2020), https://thehill.com/policy/healthcare/488318-louisiana-church-defies-coronavirus-recommendations-to-hold-service-for-300 [https://perma.cc/99JP-CM46].

As infections started to wane from earlier heights in late spring and summer of 2020, states began phased re-openings of different facets of their economies, like non-essential retail businesses, indoor dining at restaurants, and recreational facilities.[124] But capacity restrictions remained for many indoor venues, including both general occupancy limits and some specific to places of worship.[125] This set the stage for legal challenges by religious groups that would make their way up to the Supreme Court. Part III will expand upon the next phase for gathering bans: their treatment in various courts. It builds on the work of Parts I and II of examining the divergent histories of two types of restrictions: those imposed in reaction to political activity and those imposed in response to public health crises. It assesses how those divergent histories translate into disparate treatment of legal challenges to those restrictions.

III. COMPLICATIONS AND SUCCESSES OF LEGAL CHALLENGES TO GATHERING RESTRICTIONS

As discussed, the police power gives state and local governments broad authority to impose regulatory measures restricting peoples' behaviors.[126] But in 2021 the Supreme Court pulled back this broad authority in several cases challenging restrictions that impacted religious activity. This Part explores the difficulties facing potential challenges to curfews targeting political activity. It then delves into the environment surrounding ultimately successful legal challenges to COVID-19 gathering restrictions. This Part concludes with a clear articulation of the Court's new framework for determining the constitutionality of government actions impacting religious activity and suggests how this framework could be applied beyond just religious activity.

A. THE CHALLENGE OF CHALLENGING CURFEWS

Politically-motivated curfews, those that are enacted either in whole or in part to curb constitutionally protected political

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124. *E.g.*, Michael Gold & Matt Stevens, *What Restrictions on Reopening Remain in New York?*, N.Y. TIMES (May 1, 2021), https://www.nytimes.com/article/new-york-phase-reopening.html [https://perma.cc/XT44-2WZA] (detailing New York State's four-phase reopening plan, with restrictions loosening progressively with each, subsequent phase).

125. *Id.* ("Indoor religious gatherings can operate at 33 percent of maximum capacity, up from 25 percent.").

126. *Supra* Part I.A.

speech, cause harm.[127] They create a pretense for arresting people engaging in otherwise legal activity, whose only crime is being out in public after an arbitrarily set time that may not be enforced consistently.[128] Where people defying curfews are participating in unlawful activity as a form of civil disobedience, like those blocking traffic during a protest, the imposition of a curfew creates another layer of legal charges to ensnare those advocating for change. History has shown that city officials are quicker to call for curfews when the people called to the streets in protest are Black.[129] This creates harm not just through the abridgment of rights, but through the disparities in how Black and non-Black people are treated in the United States.

However, curfews present a particular problem for those who seek to challenge them on constitutional or other grounds: their temporary nature. This can raise an issue of mootness.[130] The doctrine of mootness limits a court's ability to hear a case where the alleged harm has ended, reflecting the idea that "federal courts are without power to decide question that cannot affect the rights of litigants in the case before them."[131] Thus, if a curfew has ended by the time a challenge actually reaches a court, a judge may easily dismiss the case for mootness.[132] Because of this, little precedent can be developed on the actual merits of the curfew. The kinds of legal challenges coming out of curfew- or protest-related situations that are successful are more

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127. Ho, *supra* note 70.

128. *Id.* ("The Los Angeles sheriff, Alex Villanueva, described the curfew as an 'advantage' for law enforcement because 'anyone who is present we have the probable cause to arrest, and we are making arrests by the hundreds.'").

129. *Id.* (noting that in San Francisco, curfews were imposed after Martin Luther King, Jr. was assassinated and after the verdict in the 1992 Rodney King case, but never between; not even after the assassination of Harvey Milk and George Moscone, both white men, or after people celebrating the San Francisco Giants' 2012 world series win "destroyed much of the city and set a municipal bus on fire").

130. *E.g.*, *New York Judge Dismisses Curfew Challenge from Erie County Restaurant Owners*, WGRZ (Apr. 17, 2021), https://www.wgrz.com/article/money/business/new-york-state-judge-dismisses-curfew-court-challenge-from-erie-county-restaurant-owners/71-d1f4436a-dbc0-41d1-b64c-bbf5528490c6 [https://perma.cc/E8UD-HZCG] ("'[T]he judge dismissed our action stating it was moot because the laws we were challenging no longer existed.' [attorney Corey] Hogan said.").

131. 15 MOORE'S FEDERAL PRACTICE–CIVIL § 101.91 (2023) (quoting North Carolina v. Rice, 404 U.S. 244, 246 (1971)).

132. *E.g.*, *New York Judge Dismisses Curfew Challenge from Erie County Restaurant Owners*, *supra* note 130.

commonly those involving other state actions taken against the backdrop of curfews or protests.[133] In these cases, the application, rather than the rule, is challenged.

Protest-related arrests in 2020 and their legal aftermath did not break the mold. Multiple individuals and groups across the country filed lawsuits during and after the protests following George Floyd's murder.[134] The lawsuits generally fell under two categories: (1) those targeting specific instances of law enforcement violence or wrongful action during the protests, and (2) those challenging the constitutionality of the curfews themselves. An early example of the first category is a lawsuit filed against the City of Minneapolis and a Minneapolis police officer by Annette Williams stemming from an incident on May 28, 2020.[135] Ms. Williams alleged that while she was "peacefully protesting," a Minneapolis police officer pepper sprayed Ms. Williams and her daughter, which "discourag[ed] protestors from exercising their constitutionally protected rights to free speech."[136]

Most lawsuits that followed took similar approaches. Many challenged police use of chemical weapons and projectiles, claiming use of the weapons constituted "excessive and unconstitutional force to restrict the constitutional rights of protesters."[137] These suits sought injunctive relief to stop law enforcement agencies and personnel from using those violent methods against peaceful protestors.[138] Though some lawsuits questioned the need for curfews, they generally did not attack their underlying legality, preferring instead to limit claims to actions taken

133. *E.g.*, Collins v. Jordan, 110 F.3d 1363, 1374 (9th Cir. 1996) (finding no "reasonable official could have believed . . . a total ban on demonstrations was lawful," in response to protesters during daytime challenging an emergency order granting arresting authorization while "[a]ssuming the legality of'" a nighttime curfew that had also been imposed).

134. *E.g.*, Press Release, ACLU of S. Cal., *supra* note 27.

135. Class Action Complaint at 1, Williams v. Minneapolis, No. 20-cv-1303 (D. Minn. June 2, 2020).

136. *Id.* at 1–2.

137. Class Action Complaint and Demand for a Jury Trial at 1–2, Abay v. Denver, No. 20-cv-01616 (D. Colo. June 4, 2020).

138. *Id.*; *see, e.g.*, Complaint for Declaratory and Injunctive Relief and Individual Damages at 1–2, Indy 10 Black Lives Matter v. City of Indianapolis, No. 20-cv-1660 (S.D. Ind. June 18, 2020).

by law enforcement officers.[139] This is understandable, given courts' histories of dismissing facial challenges of curfews, and some litigants have been relatively successful in their lawsuits.[140] However, such lawsuits fall short of presenting opportunities for courts to grapple with the constitutionality of a government action that unilaterally stymies protected rights to free assembly and speech in an explicitly political context.

The temporal limitations of pursuing a facial challenge to curfews are demonstrated most clearly where groups have tried and failed. A California resident challenged curfews in Burbank and Los Angeles County on constitutional grounds, but the court handily dismissed the claims as moot because the curfew in question had expired.[141] The court considered whether an exception to the mootness doctrine, "the exception for controversies that are 'capable of repetition yet evading review,'" would apply in the case.[142] The exception is applicable in cases that "involve[] circumstances that exist for only a short, fixed time period and that may be over by the time the litigation reaches the Supreme

139. *See, e.g.*, Ally Schweitzer, *Federal Judge Tosses Lawsuit Filed by George Floyd Protesters Against D.C. Police*, NPR (Mar. 30, 2022), https://www.npr.org/local/305/2022/03/30/1089664954/federal-judge-tosses-lawsuit-filed-by-george-floyd-protesters-against-d-c-police [https://perma.cc/LM9G-HETG] (reporting on a dismissed lawsuit that challenged police actions during a Washington, D.C. curfew in June of 2020); *see also* Press Release, ACLU D.C., ACLU-DC Statement on Curfew and Deployment of D.C. National Guard (May 31, 2020), https://www.acludc.org/en/press-releases/aclu-dc-statement-curfew-and-deployment-dc-national-guard [https://perma.cc/JR7E-SZPS] (detailing additional concerns regarding police actions during the 2020 D.C. curfew).

140. *E.g.*, *Legal Settlement: Lawsuit of* Annette Williams v. City of Minneapolis *(2021-00476)*, MINNEAPOLIS (May 8, 2021), https://lims.minneapolismn.gov/File/2021-00476 [https://perma.cc/8UTL-6C2D] (showing a settlement reached in Ms. Williams's case for $2,500); Olivia Covington, *IMPD, BLM Reach Settlement on Tear Gas Use Against Protestors*, IND. LAW. (Oct. 29, 2020), https://www.theindianalawyer.com/articles/impd-blm-reach-settlement-on-tear-gas-use-against-protestors [https://perma.cc/LA59-NY63]. *But cf.* Amelia Pak-Harvey, *What IMPD's New Use-of-Force Policy Says*, INDYSTAR (July 29, 2020), https://www.indystar.com/story/news/local/indianapolis/2020/07/29/indianapolis-police-announce-new-use-force-policies/5535422002 [https://perma.cc/D3M9-3HJD] (detailing some critiques of an earlier, related change in IMPD use-of-force guidelines).

141. Price v. County of Los Angeles, 504 F. Supp. 3d 1099, 1104 (C.D. Cal. 2020).

142. *Id.*

Court."[143] This seems like a natural fit for a challenge to a time-fixed curfew. However, as demonstrated in the California case and others, courts do not agree.[144]

Other cases never even make it to court because challengers voluntarily end their claims rather than attempt to make the case that a terminated curfew is not moot. On June 3, 2020, while curfews were still in place in jurisdictions across the region, the ACLU Foundation of Southern California filed a lawsuit challenging "the draconian curfews imposed throughout Southern California to crack down on widespread protests against systemic police violence towards Black people."[145] But the ACLU voluntarily dismissed their complaint a month after filing, "citing the fact that the city had rescinded the curfews already and not attempted to reinstate them."[146] This is exemplary of how the mootness doctrine serves to stymie curfew challenges: it is not just a judicially-imposed limit, but one imposed by litigants themselves. On the other side of the country, three protesters filed an action against former New York City Mayor Bill de Blasio and former New York Governor Andrew Cuomo challenging a curfew implemented and enforced from June 1st to June 7th,of 2020. They asserted, among other charges, that the curfew "was constitutionally unnecessary and unjustified . . . , not narrowly or rationally tailored . . . , and overly restrictive and harsh when balanced against the dangers they were purportedly designed to prevent."[147] Interestingly, though the challenge was mounted after the New York City curfew had already

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143. Stephen Wermiel, *SCOTUS for Law Students: Battling over Mootness*, SCOTUSBLOG (Aug. 29, 2019), https://www.scotusblog.com/2019/08/scotus-for-law-students-battling-over-mootness [https://perma.cc/2L5Y-GGMS]. This exception is used in cases like those involving pregnancy or abortion where "for example, a woman will almost certainly have either terminated the pregnancy or delivered a baby well before the dispute can reach the appellate stages." *Id.*

144. *Price*, 504 F. Supp. 3d at 1104–05; *see also* Hearn v. Hudson, 549 F. Supp. 949, 953 & n.6 (W.D. Va. 1982) ("Repeal obviously ensures that enforcement of the ordinance here challenged will not be a matter capable of repetition yet evading review.").

145. Press Release, ACLU of S. Cal., *supra* note 27.

146. Jack Hibbard, *Case:* Black Lives Matter–Los Angeles v. Garcetti, C.R. LITIG. CLEARINGHOUSE (July 7, 2020), https://www.clearinghouse.net/detail.php?id=17613 [https://perma.cc/RJ43-BKU7].

147. Proposed Class Action Complaint at 2, Jeffery v. City of New York, No. 20-cv-02843 (E.D.N.Y. June 26, 2020). Plaintiffs note that this curfew was the first of its kind to be imposed in New York City "in over 75 years," despite "incidents of political, social, or racial unrest in the City over that time." *Id.* at 6.

been lifted, the court considered the substance of the complaint. The court ultimately dismissed the complaint, finding "that the curfew was a valid content-neutral restriction on the time, place, and manner of Plaintiffs' expression."[148] Though the curfew was upheld, cases where mootness did not pose an issue may have a better chance of success. Developments in the Supreme Court's approach to evaluating government restrictions, as discussed in the next section, should provide reason for potential curfew challengers to see their cases through to the end, rather than voluntarily dismissing them after restrictions expire.[149]

B. CHALLENGES TO COVID-19 GATHERING RESTRICTIONS AND RESULTING COURT DECISIONS

In contrast to actions challenging the constitutionality of politically-motivated curfews, which proliferated in lower courts, challenges to COVID-related restrictions on gathering reached the Supreme Court relatively quickly. The speed was generally accomplished through the use of the "shadow docket," a term coined in 2015 by William Baude to describe the Court's "orders docket [which] includes nearly everything else the [C]ourt must decide—which cases to hear, procedural matters in pending cases, and whether to grant a stay or injunction."[150] The cases the Court selects each year for full hearings include "extensive

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Notably, that earlier curfew, which was set by Mayor Fiorello La Guardia in August of 1943, was imposed in the wake of "a white NYPD officer sho[oting] a black U.S. Army soldier," and covered only the historically Black Harlem neighborhood. Reed Dunlea, *New York City's Last Curfew: Harlem in 1943*, ROLLING STONE (June 2, 2020), https://www.rollingstone.com/politics/politics-news/new-york-curfew-harlem-1943-1009272 [https://perma.cc/ZUQ6-XS46].

148. Memorandum & Order at 14, Jeffery v. City of New York, No. 20-cv-02843 (E.D.N.Y. Jan. 24, 2022).

149. Jeffery v. The City of New York *(1:20-cv-02843)*, CT. LISTENER (Feb. 10, 2023), https://www.courtlistener.com/docket/17298837/jeffery-v-the-city-of-new-york [https://perma.cc/3FBC-JVHN]. According to some reports, the June 7th lifting of the curfew was instrumental in staving off threatened lawsuits by groups such as the New York Civil Liberties Union and the Center for Constitutional Rights. Jason Rogovich, *NYC Mayor Lifts Curfew Before Legal Challenges*, N.Y. L. SCH.: CITYLAND (June 11, 2020), https://www.citylandnyc.org/nyc-mayor-lifts-curfew-before-legal-challenges [https://perma.cc/HMA9-2RVU].

150. William Baude, Opinion, *The Supreme Court's Secret Decisions*, N.Y. TIMES (Feb. 3, 2015), https://www.nytimes.com/2015/02/03/opinion/the-supreme-courts-secret-decisions.html [https://perma.cc/3SDU-ZRCL].

briefing, oral argument and . . . substantial written opinion[s]."[151] But there are "no oral arguments" in shadow docket cases, and "they are often decided with no explanation," meaning they can be decided more quickly.[152] However, they are still decisions of the Court and may still have precedential effect, especially, as is seen with several COVID-related decisions, where they are accompanied by an opinion or explanation from the Court.[153] Together, the precedential weight of these decisions and the fast pace at which they are considered means that the governing law on state regulation of personal behavior has changed rapidly.

The earliest COVID-related case to reach the Court via the shadow docket was brought by a national political party seeking an extension of the deadline to return absentee ballots in Wisconsin's presidential primaries.[154] The district court agreed to the extension, and the Seventh Circuit declined to modify the deadline.[155] But the Court ultimately decided to stay the district court's order and maintain the original deadline.[156] Perhaps reflecting the very early state of the public understanding of COVID-19, the Court was clear that this decision "should not be viewed as expressing an opinion on the broader question of whether . . . other reforms or modifications in election procedures in light of COVID-19 are appropriate. That point cannot

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151. *Id.*

152. *Id.*

153. *See* Samantha O'Connell, *Supreme Court "Shadow Docket" Under Review by U.S. House of Representatives*, A.B.A. (Apr. 14, 2021), https://www.americanbar.org/groups/committees/death_penalty_representation/publications/project_blog/scotus-shadow-docket-under-review-by-house-reps [https://perma.cc/L8CA-BTL6] ("These shadow docket orders often do not include information about how each Justice voted or why the majority came to a certain conclusion, potentially leaving lower courts in the dark about how to apply Supreme Court precedent moving forward.").

154. Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020). The respondents, who were successful at the District Court and Court of Appeals, cited the massive surge in absentee ballot requests due to concerns about gathering in-person to vote, and argued that the backlog in requests meant that many voters would not even receive an absentee ballot until after the deadline to return them, despite making a timely request. *Id.* at 1208–10 (Ginsburg, J., dissenting).

155. *Id.* at 1208 (Ginsburg, J., dissenting).

156. *Id.* at 1206 (per curiam), 1210 (Ginsburg, J., dissenting). The per curium opinion included Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Kavanaugh. *Id.* at 1206. Justice Ginsburg authored the dissent, which was joined by Justices Breyer, Sotomayor, and Kagan. *Id.* at 1208.

be stressed enough."[157] It subsequently grouped the decision in with other cases to illustrate the principle "that federal courts ordinarily should not alter state election laws in the period close to an election."[158]

After *Republican National Committee*, the Court's docket shifted increasingly more towards cases brought by religious groups challenging government-imposed gathering limits. In two other cases heard during the summer of 2020, *South Bay United Pentecostal Church v. Newsom* and *Calvary Chapel Dayton Valley v. Sisolak*, the Court considered and denied applications for emergency, injunctive relief brought by churches.[159] Both decisions were not accompanied by written opinions, meaning there was limited insight to be gleaned for the purposes of evaluating their effect on precedent.[160] Chief Justice Roberts's concurrence in *South Bay United Pentecostal Church* explained that California's restrictions appeared "consistent within the Free Exercise Clause of the First Amendment."[161] These restrictions "appl[ied] to comparable secular gatherings . . . where large groups of people gather in close proximity for extended periods of time," and "exempt[ed] or treat[ed] more leniently only dissimilar activities."[162]

However, the dissents in both cases portended a shift in the Court's attitude towards restrictions impacting religious activity. Two factors contributed to the Court's change in how these cases were considered and adjudicated: (1) as the pandemic pro-

157. *Id.* at 1208.

158. *E.g.*, Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 30 (2020). This Note does not assume the correctness of this decision. It is useful in understanding how the precedential weight of Court decision-making on COVID-related cases shifted during 2020 and 2021. See *id.* at 40–46 (Kagan, J., dissenting) for the opposing view in the case.

159. S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (upholding a California Executive Order that, among other restrictions "limit[ed] attendance at places of worship to 25% of building capacity or a maximum of 100 attendees"); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2603 (2020) (upholding a Nevada directive capping attendance at places of public worship at fifty people).

160. *See* cases cited *supra* note 159.

161. *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613.

162. *Id.*

gressed, the Court's understanding of it shifted more from a temporary public health emergency to a semi-permanent state;[163] and (2) the ideological balance of the Court changed with the death of Justice Ginsburg and subsequent confirmation of Justice Barrett.[164] Early signs of the Court's shift are detectable in dissents in *South Bay United Pentecostal Church* and *Calvary Chapel*.[165] But the Court may have continued on with the status quo—allowing widespread gathering restrictions with impacts on religious gatherings—without another change to the bench during Donald Trump's presidency.[166] On September 18, 2020, Justice Ruth Bader Ginsburg died after twenty-seven years on the Court.[167] The next month, the Senate confirmed Amy Barrett, a noted social conservative, to replace the late "liberal icon" on the bench.[168]

163. Roman Catholic Diocese v. Cuomo, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring) ("What could justify so radical a departure from the First Amendment's terms and long-settled rules about its application? . . . Initially, . . . the Chief Justice expressed willingness to defer to executive orders in the pandemic's early stages based on the newness of the emergency. . . . Now, . . . that rationale has expired according to its own terms. Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical.").

164. Fandos, *supra* note 14.

165. *S. Bay United Pentecostal Church*, 140 S. Ct. at 1615 (Kavanaugh, J., dissenting) ("What California needs is a compelling justification for distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subject to an occupancy cap."); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2605 (Alito, J., dissenting) ("[A]t the outset of an emergency, it may be appropriate for courts to tolerate very blunt rules. . . . But a public health emergency does not give Governors and other public officials *carte blanche* to disregard the Constitution for as long as the medical problem persists."); *Calvary Chapel*, 140 S. Ct. at 2611–12 (Kavanaugh, J., dissenting) (arguing that where a law that divides "organizations into a favored or exempt category and a disfavored or non-exempt category . . . [and] provide[s] benefits only to organizations in the favored or exempt category and not to organizations in the disfavored or non-exempt category . . . it must place religious organizations in the favored or exempt category," absent "a sufficient justification otherwise").

166. Chief Justice Roberts joined the Court's liberal wing in both *S. Bay United Pentecostal Church* and *Calvary Chapel*. *S. Bay United Pentecostal*, 140 S. Ct. at 1613–14 (Roberts, C.J., concurring in denial of application for injunctive relief); *Calvary Chapel*, 140 S. Ct. at 2603.

167. Nina Totenberg, *Justice Ruth Bader Ginsburg, Champion of Gender Equality, Dies at 87*, NPR (Sept. 18, 2020), https://www.npr.org/2020/09/18/100306972/justice-ruth-bader-ginsburg-champion-of-gender-equality-dies-at-87 [https://perma.cc/5BLJ-E5HT].

168. Fandos, *supra* note 14.

The impact of this change was clearly seen in the next COVID-19 restriction case the Court considered. In *Roman Catholic Diocese v. Cuomo*—another application for emergency relief—the Court enjoined New York State from enforcing attendance caps on houses of worship.[169] Categorizing the restrictions as "not 'neutral' and of 'general applicability,'" the Court found that they were not sufficiently narrowly tailored to "serve a 'compelling' state interest" and survive a constitutional attack.[170] Further, the Court issued its decision despite the fact that after the houses of worship in question filed their applications, New York changed its restrictions to remove the attendance cap.[171] The Court explicitly denied the case was moot "because the applicants remain[ed] under a constant threat" that the regulation could be reinstated.[172] With this case, the Court established itself as open to religious attacks on COVID-19 restrictions, even where the restrictions themselves had already ended.

The full implication of this new attitude was realized months later in *Tandon v. Newsom*, in which Appellants, who were seeking to hold "in-home Bible studies and communal worship," challenged California restrictions limiting private indoor gatherings to no more than three households.[173] Unlike the earlier cases, *Tandon* articulates a clear and novel, multi-step standard for judicial evaluation of COVID-19-related government restrictions that impact religious activity in any form. Though the new standard seemingly fell within the traditional scope of a strict scrutiny analysis, it actually transformed the required test for government impositions on religious activity[174]

169. Roman Catholic Diocese v. Cuomo, 141 S. Ct. 63, 65–66 (2020).

170. *Id.* at 67. This decision contained an early form of the new standard the Court would establish several months later to evaluate government restrictions that impact religious activity. *See* Tandon v. Newsom, 141 S. Ct. 1294 (2021).

171. *Roman Catholic Diocese*, 141 S. Ct. at 75 (Roberts, C.J., dissenting) (citing this fact in his dissent that granting injunctive relief was unnecessary in this case).

172. *Id.* at 68.

173. Tandon v. Newsom, 992 F.3d 916, 919 (9th Cir. 2021). Other appellants in the case sought to hold campaign events and other public events, but at the Supreme Court, the focus was on the religious gatherings. *See Tandon*, 141 S. Ct. at 1296–98.

174. *See, e.g.*, Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661, 684–85 (2010) ("[B]ecause the university singled out religious organizations for disadvantageous treatment, we subjected the university's regulation to strict scrutiny.").

by expanding the kinds of government actions that would fall under the analysis. The following section examines each of the steps in the new standard and assesses the change from earlier religious freedom jurisprudence.

C. BREAKING DOWN THE *TANDON* STANDARD

Tandon calls for an analysis of government actions impacting religious activity in four steps: (1) applying strict scrutiny to generally-applicable regulations with incidental impacts on religious activity;[175] (2) judging whether impacted religious and secular activities are comparable against "the asserted government interest" justifying the regulation;[176] (3) assessing government proof that its interest could not be accomplished with less restrictive measures;[177] and (4) in cases where the regulation has been modified or terminated, determining whether "applicants 're-main under a constant threat'" of reinstated restrictions.[178]

First, *Tandon* holds that government regulations "trigger strict scrutiny . . . whenever they treat any comparable secular activity more favorably than religious exercise."[179] Strict scrutiny means that "the restriction must be narrowly tailored to serve a compelling government interest . . . ."[180] It also generally involves an investigation as to whether the restriction is the "'least restrictive means' of achieving the government's interest 'among available, effective alternatives.'"[181] Applying strict scrutiny to government actions that impact religious activity is not a new practice.[182] But what is new is the way the Court described how regulations trigger strict scrutiny. For at least the past two decades the Court has applied strict scrutiny to "laws imposing

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175. *See infra* Part III.B.1.

176. *Tandon*, 141 S. Ct. at 1296 (citing *Roman Catholic Diocese*, 141 S. Ct. at 67); *infra* Part III.B.1.

177. *Infra* Part III.B.1.

178. *Tandon*, 141 S. Ct. at 1297 (citing *Roman Catholic Diocese*, 141 S. Ct. at 67–68); *infra* Part III.B.1.

179. *Id.* at 1296.

180. Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009).

181. U.S. CONST. amends. I, XIV; U.S. CONST. amends. I, XIV; VICTORIA L. KILLION, CONG. RSCH. SERV., LSB10451, FREEDOM OF ASSOCIATION IN THE WAKE OF CORONAVIRUS 4 (2020).

182. *See, e.g.*, Wendy K. Mariner, *Shifting Standards of Judicial Review During the Coronavirus Pandemic in the United States*, 22 GERMAN L.J. 1039, 1043 (2021) (stating that strict scrutiny analysis is used for religious claims).

'special disabilities on the basis of . . . religious status . . . .'"[183] Prior decisions applied this standard of review to regulations that "single out the religious for disfavored treatment," distinguishing them from "neutral laws of general applicability" that impact both religious and secular activity.[184] For example, the Court struck down "a Tennessee statute disqualifying ministers from serving as delegates to the State's constitutional convention" for singling out a religious practitioner.[185] A notorious example of a supposedly neutral law upheld by the Court involved drug laws in Oregon that denied unemployment benefits to members of a Native American Church who had ingested peyote as a part of their religious practice.[186] The Court's new standard of review expands the net of strict scrutiny to include two types of regulations: (1) those that target religious activity, and (2) those intended to be generally-applicable, but with incidental impacts on religious activity.

Second, the Court must weigh "whether two activities are comparable for purposes of the Free Exercise Clause" against "the asserted government interest that justifies the regulation at issue."[187] The Court did not articulate a clear definition of comparability for the purpose of this examination. However, the examples of secular activities listed as comparable to gathering for religious observance, including "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants," are not closely related.[188] This suggests "comparability" should be broadly interpreted.[189]

Third, the government "has the burden to establish that the challenged law satisfies strict scrutiny" by showing that "measures less restrictive on the First Amendment activity could

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

184. *Id.*

185. *Id.* at 2020.

186. *Id.* at 2020–21.

187. Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (citing Roman Catholic Diocese v. Cuomo, 141 S. Ct. 63, 67 (2020)).

188. *Id.* at 1297.

189. *Id.* at 1296–97 ("California treats some comparable secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time.").

not address" its legitimate interest.[190] On its face, this factor is a straightforward application of strict scrutiny analysis.[191] But the Court's application provides insight into how it would assess whether less restrictive measures are available.[192] The Court's analysis emphasizes the relative danger of the activity, rather than the appropriateness of the restriction.[193] This means that, for example, a court would assess whether attending a church service is inherently more dangerous than shopping in a grocery store, rather than assessing whether the same regulation would be appropriately applied to both churches and grocery stores.

Fourth, *Tandon* holds that a challenge to a restriction is not necessarily moot, "even if the government withdraws or modifies" that restriction before the case reaches a court.[194] This standard for mootness allows litigants to "remain entitled to [emergency] relief where [they] 'remain under a constant threat' that government officials will . . . reinstate the challenged restrictions."[195] This last step of the analysis is critical. Here, the Court essentially negates a typical requirement of a lawsuit: a live controversy a lack of mootness. *Tandon* firmly establishes that the end of a particular restriction does not necessitate the end of an underlying lawsuit challenging the restriction. This removes a temporal aspect that has stymied opponents of public health and safety-related temporary restrictions. Suddenly, the fact that the restriction is no longer in effect is irrelevant for the purposes of evaluating the merits of the case. It is sufficient that there is the potential for the restriction to be reinstated. And the Court's reference to government "officials with a track record of 'moving the goalposts'" suggests that a future court may interpret this liberally.[196]

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190. *Id.* at 1296–97 (citing *Roman Catholic Diocese*, 141 S. Ct. at 69; S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 719 (2021)).

191. *See supra* text accompanying notes 180–81.

192. *See Tandon*, 141 S. Ct. at 1296–97 ("Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied.").

193. *Id.*

194. *Id.* at 1297 (citing *Roman Catholic Diocese*, 141 S. Ct. at 68).

195. *Id.* (quoting *Roman Catholic Diocese*, 141 S. Ct. at 68); *see* Oleske, *supra* note 18 (discussing the holding in *Tandon*).

196. *Tandon*, 141 S. Ct. at 1297 (quoting S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 720 (2021) (statement of Gorsuch, J.)).

Tandon's precedential impact has so far been largely limited to other COVID-related regulations.[197] Because of this, religious groups looking to challenge a wide range of government regulations have a new opportunity. Historically, and especially in the past couple of decades, religious groups have manipulated constitutional protections for religious expression to limit the rights of others.[198] But *Tandon* could be applied to expand rights other than free exercise. Ultimately, *Tandon* presents an opportunity for groups to challenge curfews and other restrictions imposed to limit politically-motivated First Amendment activity on the grounds that they impermissibly restrict constitutionally protected activity.

IV. EXPANDING *TANDON* TO INVALIDATE CURFEWS

This Part applies the *Tandon* framework to a theoretical challenge mounted by a group impacted by a curfew targeting a politically-motivated protest. The purpose of this exercise is to take the case law that emerged out of successful efforts to take down COVID-19-related restrictions and explore how it could be

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197. *See, e.g.*, Boston Bit Labs, Inc. v. Baker, 11 F.4th 3, 9 (1st Cir. 2021) (rejecting a challenge to a Massachusetts COVID-19-related executive order, and citing *Tandon* for the premise that "[E]ven if the government withdraws or modifies a COVID restriction in the course of litigation, . . . that does not necessarily moot the case") (alteration in original); Weisshaus v. Hochul, No. 21-64-cv, 2022 U.S. App. LEXIS 32794, at *2–3 (rejecting a challenge to a New York COVID-19-related executive order, and citing *Tandon* for the premise that "when a challenged regulation expires or is rescinded during litigation, 'that does not necessarily moot the case'"); Kane v. De Blasio, 19 F.4th 152, 158–59 (2d Cir. 2021) (upholding an as-applied challenge to a New York City COVID-19 vaccine mandate and rejecting a facial challenge of the same); Doe v. San Diego Unified Sch. Dist., 19 F.4th 1173, 1181 (distinguishing the effects of a San Diego vaccine requirement for schools from the restrictions considered in *Tandon*); c*f.* Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J.L. & PUB. POL'Y 827, 843–72 (2021) (analyzing Supreme Court stays and their varying precedential value). *But see* Altman v. County of Santa Clara, No. 21-15602, 2023 U.S. App. LEXIS 91, at *3–5 (9th Cir. Jan. 4, 2023) (holding firearm vendors' claims that they were "essential businesses" exempt from Covid restrictions moot, in light of county governments' track record of not "moving the goalposts" (citing *Tandon*, 141 S. Ct. at 1297)).

198. *E.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 688–91 (2014) (holding that the First Amendment protected a private entity from complying with a female contraceptive mandate); Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2373 (2020) (holding that the First Amendment protectes religious nonprofits from complying with a female contraceptive mandate).

utilized for a different purpose. As discussed, opponents of curfews that target political activity have significant difficulties bringing successful cases in court,[199] so this analysis serves as a future roadmap for a new strategy. This exercise begins by establishing a shared set of characteristics between the COVID-19 restriction and protest-related restrictions to create a strong foundation for an argument that *Tandon*'s framework can be expanded. It then proceeds with the actual application.

For the purposes of this hypothetical, the future curfew resembles not only those following George Floyd's murder,[200] but also those that have been used throughout the country's history to limit behaviors deemed undesirable.[201] The curfew starts with a motivating event that demands public outcry and prompts people to gather for public protest. Public officials, responding to either real or disingenuous concerns about public safety, then impose a curfew that directly limits the public protests, thereby targeting legitimate, politically protected activity, along with any actual or imagined violence. As a direct result of the curfew, potential protesters are harmed, not just by any use of state force, but solely by the curtailment of their protected activity.

A. COVID-19 RESTRICTIONS AND PROTEST-RELATED CURFEWS ARE ANALOGOUS EVENTS

Before applying the *Tandon* framework to a curfew that impacts protest activity, this section compares COVID-19 restrictions to protest-related curfews. Applying the Court's treatment of COVID-19 restrictions to protest-related curfews is only plausible if the two kinds of regulations are reasonably analogous. This section establishes that there are enough underlying similarities between COVID-19 restrictions and curfews to support this exercise.

Though this application is hypothetical, it is grounded in characteristics of curfews that were actually implemented during the spring and summer of 2020. First, the restrictions occurred under states of emergency. Though the underlying emergencies were not the same (one being a public health crisis and the other being a concern for public safety), they both activated

199. *See supra* Part III.A.
200. *See supra* Part I.C .
201. *See supra* Part I.B.

the same kinds of power to restrict movement granted to governments under their police powers.[202] Second, in both instances, behavior protected by the First Amendment was impacted.[203] COVID-related restrictions prevented certain in-person gatherings, including, but not limited to, those convened for the purpose of religious worship.[204] The protest curfews limited peoples' rights to free speech, to assemble, and to petition the government.[205] Finally, the restrictions were temporary in nature. COVID-19 guidance and directives have constantly evolved since early 2020. None of the regulations at issue in *Tandon* or the other cases previously discussed are still in place.[206] And in some cases, the rules had already ended by the time the challenges made their way to the Court.[207] Similarly, protest-related curfews are typically imposed for limited amounts of time, tied to the heavy protest activity.[208] The curfews enacted in the wake of George Floyd's murder fit this pattern.

The underlying similarities between COVID-related gathering restrictions and protest curfews suggests a viable path forward for a curfew challenger to make the case that a court should apply *Tandon*'s framework in assessing the constitutionality of the protest curfew. Though *Tandon* specifically focuses on religious activity, protections for speech share characteristics with those for religious expression.[209]

202. *See supra* Parts I.A & II.A.

203. U.S. CONST. amend. I.

204. *Id.*

205. *Id.*

206. *See* Jenny Rough & Andy Markowitz, *List of Coronavirus-Related Restrictions in Every State*, AARP (Apr. 1, 2022), https://www.aarp.org/politics-society/government-elections/info-2020/coronavirus-state-restrictions.html [https://perma.cc/5GGY-D9ZE] (cataloguing existing COVID-related restrictions in U.S. states, which are predominantly limited to vaccine and mask mandates, rather than gathering restrictions imposed earlier on in the pandemic that were the subject of legal challenges discussed in this Note).

207. *See* Roman Catholic Diocese v. Cuomo, 141 S. Ct. 63, 68 (2020) (noting that the original executive order contested had changed at the time of the Court's ruling).

208. *See, e.g.*, *supra* notes 81–83 for examples of George Floyd protest curfews.

209. *See* Reed v. Town of Gilbert, 576 U.S. 155, 172 (2015) (holding speech-related signage restrictions violated the First Amendment).

B. APPLYING *TANDON* TO A CURFEW CHALLENGE

This section modifies the *Tandon* standard to demonstrate how it could be broadened to encompass protections for more than just religious activity to include constitutional rights like those to speech, assembly, and petition the government.

Following *Tandon*, the first step is to determine whether the curfew in question must be assessed under a strict scrutiny framework. Government regulations "trigger strict scrutiny . . . whenever they treat any comparable [non-protected] activity more favorably than . . . [the] exercise" of a protected right.[210] As with religious exercise, laws that burden other "fundamental rights" are already assessed under a strict scrutiny analysis.[211] "A 'fundamental right' is one guaranteed by the Constitution," which would include any of the rights articulated in the First Amendment.[212] In-person protests for racial justice inherently involve exercising multiple fundamental rights: speech, assembly, and petitioning the government. A non-protected activity comparable to gathering in public for political protest could include activities like using a public sidewalk to commute to work or to obtain medical assistance, both of which were carved out in some protest curfews.[213] Curfews that curtail protest activity while allowing other kinds of activities that are not considered fundamental rights should therefore easily clear this first step.

Intertwined with the first step is then the question of whether the restricted fundamental right is comparable to other activities that may still be permitted under the curfew. The Court must judge "whether two activities are comparable for purposes of the [First Amendment]" against "the asserted government interest that justifies the regulation at issue."[214] As discussed, comparability is a broad concept that does not require inherent identicalness between two activities.[215] For instance, the Court has indicated shopping in a retail store is comparable

210. Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (citing *Roman Catholic Diocese*, 141 S. Ct. at 67).

211. Amy B. Gendleman, Comment, *The Equal Protection Clause, the Free Exercise Clause and Religion-Based Preemptory Challenges*, 63 U. CHI. L. REV. 1639, 1652–53 (1996).

212. *Id.*

213. *See supra* notes 85–86

214. *Tandon*, 141 S. Ct. at 1296 (citing *Roman Catholic Diocese*, 141 S. Ct. at 67, 79).

215. *See supra* text accommodating notes 187–89.

to indoor religious worship.[216] Applying similar logic, public protest activity prohibited by government curfews is comparable to other activity that may be explicitly exempted from a curfew, like traveling to and from work, engaging in recreational activities, or media reporting.[217] These activities are routinely carved out of curfews, while engaging in legitimate, political protest remain under regulation, which propels the analysis to the third step.

The government "has the burden to establish that the challenged law satisfies strict scrutiny" by showing that "measures less restrictive on the First Amendment activity could not address" its legitimate interest.[218] As soon as a court identifies comparable activities that are regulated in a curfew with less restrictive measures, which is likely to be the case based on prior curfews, the next step clearly follows. The government would have to first establish a legitimate interest and then show that there are no less restrictive actions it could possibly take to meet that interest.[219] Without an exception, a curfew is a total ban during (typically) evening hours on all protest activity. This is a heavy-handed step that significantly curtails fundamental constitutional rights, meaning that it should be difficult for a government to justify.[220] Of course, there will be situations where governments can successfully make the case that a curfew is the least restrictive measure it could take to reasonably protect peoples' safety during civil unrest. Some might point to the Minneapolis curfew this Note opens with as one such example. But the curfew imposed in Minneapolis after George Floyd's murder was just one of hundreds across the country.[221] Further, the Minneapolis curfew was likely prompted by the most significant displays of civil unrest, compared to other cities that imposed curfews after more minimal activity or even preemptively, rather

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216. *Tandon*, 141 S. Ct. at 1297.

217. *See supra* notes 85–86, 88.

218. *Tandon*, 141 S. Ct. at 1296–97 (citing *Roman Catholic Diocese of Brooklyn*, 141 S. Ct at 69–70; S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 718 (2021)).

219. *See supra* notes 85–86 (highlighting various curfew orders).

220. See Epps v. City & County of Denver, F. Supp. 3d 1164, 1171–74 (D. Colo. 2022) for an example of how a court can find a protest-related curfew was not the least restrictive action a government could have taken to satisfy its interest.

221. Warren & Hadden, *supra* note 76.

than responsively.[222] The appropriateness of one curfew should not guarantee the immediate sanctioning of others, even if the underlying justification is the same. A court must hear the case in full on the merits, rather than making blanket decisions.

Finally, a challenge to a curfew still needs to meet the more basic aspects of justiciability, including that the underlying case not be moot.[223] The fourth and final *Tandon* element crucially resolves one of the biggest roadblocks to a successful challenge of a curfew: it essentially renders the mootness issue irrelevant. A court must consider that "even if the government withdraws or modifies . . . a restriction in the course of litigation, that does not necessarily moot the case," meaning "litigants otherwise entitled to emergency injunctive relief remain entitled to such relief where the applicants 'remain under a constant threat' that government officials will . . . reinstate the challenged restrictions."[224] This element explicitly contemplates a government restriction that has ended by the time a challenge makes it to a court and allows the challenge to proceed regardless, without requiring a robust demonstration of what could constitute such "constant threat."[225] Recent curfews impacting protected activity can easily meet this requirement. City officials have imposed open-ended curfews; reinstated curfews that had defined endpoints; and explicitly announced the possibility of reinstating

222. *Cf. id.* (listing the large number of cities and states in the United States that implemented curfew orders).

223. *E.g.*, Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 677–78 (1990). Though note that many legal scholars, including Chemerinsky, critique the current u.nderstanding (or lack thereof) of the justiciability doctrines. *Id.*

224. Tandon v. Newsom, 141 S. Ct. 1294, 1297 (2021) (citing Roman Catholic Diocese v. Cuomo, 141 S. Ct. 63, 68 (2020)). *Tandon v. Newsom* has generated significant attention for its apparent adoption of the "most favored nation" interpretation of the Free Exercise Clause. *See, e.g.*, Stephen I. Vladeck, Opinion, *The Supreme Court Is Making New Law in the Shadows*, N.Y. TIMES (Apr. 15, 2021), https://www.nytimes.com/2021/04/15/opinion/supreme-court-religion-orders.html [https://perma.cc/N7AV-PTG7] (quoting Noah Feldman, Opinion, *Houses of Worship Shouldn't be Treated Like Bars, Gyms*, MERCURY NEWS (Dec. 6, 2020), https://www.mercurynews.com/2020/12/06/opinion-houses-of-worship-shouldnt-be-treated-like-bars-gyms [https://perma.cc/XZ2A-LXGP]); Oleske, *supra* note 18.

225. *Tandon*, 141 S. Ct. at 1297 (citing "officials with a track record of 'moving the goalposts'" who still "retain authority to reinstate those heightened restrictions at any time").

expired curfews depending on the circumstances.[226] As long as the state of emergency persists, the threat of a curfew remains.

This hypothetical exercise shows that a reasonable case can be made for expanding *Tandon*'s higher standard of review for government restrictions impacting religious activity to other kinds of activity protected by the First Amendment, such as political speech and assembly. The fact that *Tandon* provides a relatively broad opportunity to avoid a mootness challenge is significant for a class of restrictions that is so temporary in nature, like curfews. A government may still plausibly make a successful case that an individual curfew was the least restrictive measure possible to further the interest in question. But the possibility of a post-*Tandon* success should give pause to any groups challenging curfews considering abandoning their causes prematurely for fear of their case being found moot.

CONCLUSION

The curfews states and cities put in place to target political activity protesting the taking of Black lives after George Floyd was murdered are just the latest mass state action in a series of official efforts to undermine efforts to advance racial justice and resist oppression. Curfews are the descendants of centuries of anti-Black policies that prioritize racial hierarchies at the expense of millions of people, and if the past is any indication, this practice is not going away. Though event-specific curfews are typically temporary in nature, lasting days or at most a couple of weeks,[227] that does not negate the harm caused by the forced cessation of public demonstration. Again and again, the pattern repeats: an incident of anti-Black violence occurs; people react in protest; cities impose curfews, largely due to property damage during these demonstrations;[228] and the curfews, supposedly meant to protect people and property, are instead used as tools

226. *See, e.g.*, notes 82–83 for durational examples of George Floyd protest curfews.

227. *See supra* notes 81–83.

228. *E.g.*, STATE OF MINN. EXEC. DEP'T, EMERGENCY EXEC. ORDER 20-64 (May 28, 2020), https://mn.gov/governor/assets/EO%2020-64%20Final_tcm1055-433855.pdf [https://perma.cc/37PC-SEL7] ("Unfortunately, some individuals have engaged in unlawful and dangerous activity, including arson, rioting, looting, and damaging public and private property. These activities threaten the safety of lawful demonstrators and other Minnesotans, and both first responders and demonstrators have already been injured. Many businesses, including businesses owned by people of color, have suffered damage as a result of this unlawful activity.").

to arrest and incarcerate the protesters.[229] This cycle will not change without any kind of definitive reckoning with the constitutionality of government efforts to quell political speech.

Tandon presents a chance to break that cycle. The decision as it was handed down focuses on an expanded use of strict scrutiny analysis to invalidate a restriction impacting religious activity. But the parallels between religious activity and other activity protected by the First Amendment suggests *Tandon*'s framework is well-suited to challenge government curfews that restrict political speech, assembly, and petitioning the government.

229. *See* Tasnim Motala, *"Foreseeable Violence" & Black Lives Matter: How* Mckesson *Can Stifle a Movement*, 73 STAN. L. REV. ONLINE 61, 67–70 (2020) (discussing how states reacted to racial justice protests with proposed legislation to make arresting and incarcerating protesters easier).