

## The Coronavirus Pandemic and Restrictions on Churches: Evaluating the Christian Legal Movement's Role in Polarizing Religious Freedom

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During the earliest days of the 2020 coronavirus pandemic in the United States, the various levels of government enacted restrictions on large gatherings in an effort to slow the spread of the virus. Restaurants were closed, concerts and sporting events canceled, store capacities limited, and religious services halted. It was a sudden and seismic shift in the American way of life.

Religious Americans generally complied with orders pertaining to worship services, but many also expressed concerns about this regulation of religious life. Across several national surveys, white evangelicals were more likely than others to support churches defying government restrictions.<sup>1</sup> Moreover, there were clear partisan gaps coinciding with support or opposition to these restrictions.<sup>2</sup> And another study connected defiance to trust in Fox News.<sup>3</sup> In general, the politics of COVID-19 restrictions on churches reflect the growing polarization of religious freedom,<sup>4</sup> one that is poised to play a major role in future—and, in many ways, current—culture wars.<sup>5</sup> As such, there are two, often simultaneous conversations going on, one legal and one political.

While most places of worship transitioned—some easily, some with greater difficulty—to online or distanced outdoor meetings to meet the requirements of local ordinances and recommendations,<sup>6</sup> others fought back. Some argued that these orders violated their rights under the First Amendment. Some went so far as saying that these orders were evidence of persecution toward people of faith and ought to be opposed not just for legal reasons, but also for moral and theological ones. The details constituting these legal fights are different across venues, but the houses of worship at the center of these disputes tend to make a similar argument, that state orders regulating places of worship differently than other entities—or even regulating them at all—run afoul of the First Amendment.

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<sup>1</sup> Paul Djupe, “Survey Numbers Chart Evangelical Defiance against the States,” Religion News Service, April 17, 2020, <https://religionnews.com/2020/04/17/survey-numbers-chart-evangelical-defiance-against-the-states/>.

<sup>2</sup> “Americans Oppose Religious Exemptions From Coronavirus-Related Restrictions,” Pew Research Center’s Religion & Public Life Project, August 7, 2020, <https://www.pewforum.org/2020/08/07/americans-oppose-religious-exemptions-from-coronavirus-related-restrictions/>.

<sup>3</sup> “Vast Majority of Americans Stayed Home for Easter, Oppose Religious Exemptions to Stay-at-Home Orders,” Public Religion Research Institute, April 15, 2020, <https://www.prrri.org/research/vast-majority-of-americans-stayed-home-for-easter-oppose-religious-exemptions-to-stay-at-home-orders/>.

<sup>4</sup> Andrew R. Lewis, *The Rights Turn in Conservative Christian Politics: How Abortion Transformed the Culture Wars* (New York, NY: Cambridge University Press, 2017), <https://doi.org/10.1017/9781108278171>.

<sup>5</sup> Jeremiah Castle, “New Fronts in the Culture Wars? Religion, Partisanship, and Polarization on Religious Liberty and Transgender Rights in the United States,” *American Politics Research* 47, no. 3 (2019): 650–79.

<sup>6</sup> Daniel A. Cox, Karlyn Bowman, and Jacqueline Clemence, “Fear, Frustration, and Faith: Americans Respond to the Coronavirus Outbreak,” AEI, April 2, 2020, <https://www.aei.org/research-products/report/fear-frustration-and-faith-americans-respond-to-the-coronavirus-outbreak/>.

This is an argument the Christian legal movement (CLM) is more than happy to make, in its lawsuits on behalf of churches and other houses of worship and in related amicus briefs. At the same time, the CLM often stokes the fears of culture wars over religious freedom when appealing to a broader audience. This two-pronged dialogue has in-group advantages, to be sure, but it may also hamper efforts to build useful (and necessary) coalitions and vouchsafe stable religious liberty jurisprudence in the years to come.

In this article we examine the CLM's response to COVID-19-related regulations on places of worship in the United States. We argue that while these church-state conflicts are perfectly suited to draw Christian legal groups into battle, there is a good deal of diversity within the CLM in terms of groups' responses to regulations stemming from the pandemic. At the same time, we suggest that this movement's public arguments have the potential to exacerbate culture wars rhetoric over religious freedom, continuing to polarize this topic with damaging consequences not only for public health, but also for the prospect of robust protections for free exercise in the years to come.

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The CLM advocates for issues important to (conservative) Christians, in the United States and around the world.<sup>7</sup> Following other scholarship, we define the CLM as legal advocacy organizations that are distinctively Christian and exist to litigate primarily on behalf of Christians. These include groups like Alliance Defending Freedom, the Thomas Moore Law Center, First Liberty, and Liberty Counsel, among others. This definition excludes organizations like Becket, one of the most successful legal groups focused on religious freedom issues, as it is explicitly *not* a Christian organization (Becket was founded by a Catholic, but its mission and record extends beyond Christianity).

The CLM is generally focused on issues aligned with conservative Christians, supporting a robust understanding of religious freedom, promoting traditional conceptions of sexuality, gender, and the family, and opposing legal abortion in the name of defending the sanctity of human life. This movement is composed of legal interest groups, yes, but also of law schools and legal training programs, all with the purpose of building a support structure for the movement as a whole.<sup>8</sup>

There is a great deal of diversity within the CLM in terms of activity, funding, and professionalism. While Alliance Defending Freedom boasts an eight-figure budget, dozens of staff attorneys, and multiple victories before the U.S. Supreme Court, the Thomas More Law

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<sup>7</sup> Daniel Bennett, *Defending Faith: The Politics of the Christian Conservative Legal Movement* (Lawrence, KS: University Press of Kansas, 2017).

<sup>8</sup> Amanda Hollis-Brusky and Joshua C. Wilson, *Separate but Faithful: The Christian Right's Radical Struggle to Transform Law & Legal Culture* (New York, NY: Oxford University Press, 2020).

Center runs a much smaller ship and makes headlines for combating Islam in the public square.<sup>9</sup> Though groups in the CLM tend to share a general set of goals, establishing a niche in that movement and actually enacting those goals exposes rifts among them.<sup>10</sup>

Even though groups like Alliance Defending Freedom and Becket get the lion's share of attention and do the heaviest lifting in court, one must also pay attention to the CLM as a whole to understand how the rhetoric from this movement shapes ongoing culture wars controversies. For example, it was the relatively minor organization Liberty Counsel that drew national attention (and the attention of future Republican presidential candidates) for its defense of Kentucky clerk Kim Davis, who refused to issue marriage licenses following *Obergefell v. Hodges*.<sup>11</sup> Liberty Counsel and groups like it may not have the pedigree or credibility of larger, more successful organizations, but they can shape the cultural narrative nonetheless. And given the competition for limited resources among like-minded interest groups, it is only natural for smaller, less influential organizations to sometimes make more hyperbolic and outlandish arguments in order to secure attention and support.<sup>12</sup>

Perhaps as a result of the desire to carve out a niche in an otherwise crowded community, several Christian legal groups have been active in litigation on behalf of churches challenging pandemic regulations. Liberty Counsel was involved in one of the country's first lawsuits on these questions, jumping to the defense of a Virginia pastor who faced penalties for continuing to hold in-person church gatherings in violation of state orders.<sup>13</sup> Alliance Defending Freedom represented two churches who sued Oregon's governor for maintaining restrictions on churches,<sup>14</sup> and has since defended a church challenging Nevada's person limit on attendance.<sup>15</sup> First Liberty Institute won a restraining order against a Kentucky policy limiting in-person services.<sup>16</sup> And the Thomas More Society touted its efforts defending California pastor

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<sup>9</sup> "Thomas More Uncovers Islamic Propaganda Forced on Teachers," Thomas More Law Center, August 22, 2019, <https://www.thomasmore.org/news/thomas-more-law-center-uncovers-taxpayer-funded-islamic-propaganda-forced-on-teachers-a-special-investigative-report/>.

<sup>10</sup> Daniel Bennett, "The Rise of Christian Conservative Legal Organizations," Religion and Politics, June 10, 2015, <http://religionandpolitics.org/2015/06/10/the-rise-of-christian-conservative-legal-organizations/>.

<sup>11</sup> German Lopez, "Meet the Little-Known Christian Law Firm behind the New Wave of Anti-LGBTQ Bills," Vox, November 23, 2015, <https://www.vox.com/2015/11/23/9770610/liberty-counsel-mat-staver-kim-davis>.

<sup>12</sup> See, for example, John D. McCarthy and Mayer N. Zald, "Resource Mobilization and Social Movements: A Partial Theory," *American Journal of Sociology* 82, no. 6 (1977): 1212–41.

<sup>13</sup> "Criminal Charges Against VA Pastor Dropped," Liberty Counsel, July 14, 2020, <https://lc.org/newsroom/details/071420-criminal-charges-against-va-pastor-dropped>.

<sup>14</sup> "Oregon Governor Sued over COVID-19 Order That Allows Numerous Gatherings, Restricts Churches," Alliance Defending Freedom, May 26, 2020, <http://www.adfmedia.org/News/PRDetail/11001>.

<sup>15</sup> "ADF to 9th Circuit: Strike down NV Governor's Rule Treating Churches Worse than Casinos," Alliance Defending Freedom, December 7, 2020, <http://www.adfmedia.org/News/PRDetail/11145>.

<sup>16</sup> "Breaking: Judge Grants Restraining Order Against Kentucky Governor in Dispute Over In-Person Religious Gatherings," First Liberty, May 8, 2020, <https://firstliberty.org/media/breaking-judge-grants-restraining-order-against-kentucky-governor-in-dispute-over-in-person-religious-gatherings/>.

John MacArthur, whose church fought virtually all of California's restrictions against in-person gatherings.<sup>17</sup>

One of the earliest legal challenges to pandemic-related restrictions took place in Virginia, after the pastor of Lighthouse Fellowship was cited for holding an in-person service with 16 people, exceeding the 10-person limit set by the commonwealth.<sup>18</sup> Liberty Counsel represented the church, focusing its arguments on the religious freedom rights of the church and the pastor. Core to the legal argument was that Virginia exempted "essential retail businesses" from the 10-person limitation, but did not do so for religious gatherings. Requiring church meetings to abide by the 10-person limitation resulted in "discriminatory restrictions on religious worship services."<sup>19</sup>

At the same time, Liberty Counsel's legal approach stoked anger over perceived government persecution of churches. Appearing before the Fourth Circuit Court of Appeals, Liberty Counsel argued that Virginia's governor "continu[ed] to place his thumb on houses of worship."<sup>20</sup> Liberty Counsel also praised the Trump administration for the Department of Justice's involvement, as well as Vice President Pence's statements of support, elevating the administration's support for religious freedom in the face of discrimination, "It is reassuring," declared Mat Staver, the founder of Liberty Counsel, "to have an administration that supports religious freedom."<sup>21</sup>

This pattern of coupling legal defense with culture war politics was present among other Christian legal groups. In the spring, First Liberty Institute defended churches in Kentucky opposing Governor Andy Beshear's restrictions. The lawsuit emphasized the churches' religious freedom and assembly rights under federal and state constitutions. Simultaneously, First Liberty used the events to elevate religious freedom threats and polarize conservatives against liberals.<sup>22</sup> Debates over public health restrictions on churches were described as an "all-out war on faith,"<sup>23</sup> and the group claimed to have exposed the "real agenda of our opponents: to keep

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<sup>17</sup> "Pastor John MacArthur Files Declaration Against LA County's Repeated Attacks to Shut Down Church," Thomas More Society, August 24, 2020, <https://www.thomasmoresociety.org/pastor-john-macarthur-files-declaration-against-la-countys-repeated-attacks-to-shut-down-church/>.

<sup>18</sup> Justin Jouvenal, "DOJ Claims Virginia Governor Is Violating Religious Freedom with Pandemic Order," Washington Post, May 4, 2020, [https://www.washingtonpost.com/local/legal-issues/doj-claims-virginia-governor-is-violating-religious-freedom-with-pandemic-order/2020/05/04/2c083b18-8e35-11ea-9e23-6914ee410a5f\\_story.html](https://www.washingtonpost.com/local/legal-issues/doj-claims-virginia-governor-is-violating-religious-freedom-with-pandemic-order/2020/05/04/2c083b18-8e35-11ea-9e23-6914ee410a5f_story.html).

<sup>19</sup> "VA Church Goes to Appeals Court," Liberty Counsel, June 29, 2020, <https://lc.org/newsroom/details/062920-va-church-goes-to-appeals-court-1>.

<sup>20</sup> "VA Church Goes to Appeals Court."

<sup>21</sup> "VP Pence Supports VA Church Case," Liberty Counsel, May 7, 2020, <https://lc.org/newsroom/details/050720-vp-pence-supports-va-church-case>.

<sup>22</sup> "FLI Sues Kentucky Governor on Behalf of Church," First Liberty, May 6, 2020, <https://firstliberty.org/covid-19-fli-sues-kentucky-governor-fb/>.

<sup>23</sup> Jorge Gomez, "All Out War on Faith: Opponents Use COVID-19 Crisis to Launch Attacks on Religious Freedom," First Liberty, April 3, 2020, <https://firstliberty.org/news/covid-19-religious-liberty-attacks/>.

our churches shut down indefinitely and attack religious freedom in America.”<sup>24</sup> The American Center for Law and Justice, meanwhile, also emphasized the polarization of religious freedom to promote its work, arguing that “extremists on the Left are using the Coronavirus as an excuse to attack Christians.”<sup>25</sup>

Such polarizing claims did not necessarily originate with the CLM, but they did find favor with Republican leadership. Though the CDC issued measured guidance for churches considering holding in-person services, President Trump emphasized political division, leveraging religious freedom rhetoric for political gain. On May 22, President Trump mirrored the arguments of Christian legal groups about churches being excluded from essential status, declaring that if governors did not allow churches to open immediately, he would “override the governors.”<sup>26</sup> In August, Trump told the Catholic cable network EWTN that Democrats are using coronavirus to “put the churches out of business.”<sup>27</sup> And at the Republican National Convention, Donald Trump Jr. echoed this argument, citing recent protests over racial injustice: “People of faith are under attack. You’re not allowed to go to church, but mass chaos in the streets gets a pass.”<sup>28</sup>

There are consequences to this rhetoric. One recent survey experiment asked participants whether they agreed with a generic, positive statement about religious freedom, varying the identity of the speaker as either President Trump or then-candidate Joe Biden.<sup>29</sup> Interestingly, when the statement was attributed to President Trump, support for the statement observably declined. If support for a constitutional protection like religious freedom is conditional on partisanship or support for individual candidates, this is concerning indeed.

Polarizing religious freedom comes at a cost. For one thing, while the public was predictably divided over these issues, legal actions and rhetoric in some cases have obscured legitimate concerns where religious congregations were over-burdened. The rhetoric made divisions divisive. For example, earlier this summer a Nevada church challenged state restrictions limiting indoor church gatherings to 50 persons, while restricting much larger venues (such as casinos)

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<sup>24</sup> Jorge Gomez, “Opponents of Freedom Use COVID to Attack and Destroy the Religious Freedom Restoration Act,” First Liberty, September 11, 2020, <https://firstliberty.org/news/opponents-use-covid-to-attack/>.

<sup>25</sup> Jordan Sekulow, “The Radical Left Continues to Use the Coronavirus Crisis to Attack Faith and Conservative Values | American Center for Law and Justice,” American Center for Law and Justice, April 2020, <https://aclj.org/radical-left/the-radical-left-continues-to-use-the-coronavirus-crisis-to-attack-faith-and-conservative-values>.

<sup>26</sup> Anne Gearan et al., “Trump Tells States to Let Houses of Worship Open, Sparking Cultural and Political Fight over Pandemic Restrictions,” Washington Post, May 22, 2020, [https://www.washingtonpost.com/politics/trump-tells-states-to-let-houses-of-worship-open-sparking-cultural-and-political-fight-over-pandemic-restrictions/2020/05/22/1ab1c160-9c57-11ea-ad09-8da7ec214672\\_story.html](https://www.washingtonpost.com/politics/trump-tells-states-to-let-houses-of-worship-open-sparking-cultural-and-political-fight-over-pandemic-restrictions/2020/05/22/1ab1c160-9c57-11ea-ad09-8da7ec214672_story.html).

<sup>27</sup> Emily Czachor, “Trump Warns Catholic Voters Democrats Want Them ‘out of Business,’ Says He ‘Saved the Second Amendment,’” Newsweek, August 5, 2020, <https://www.newsweek.com/trump-warns-catholic-voters-democrats-want-them-out-business-says-he-saved-second-amendment-1523089>.

<sup>28</sup> Jack Jenkins, “At Republican Convention, a Vision of Faith under Fire,” Religion News Service, August 29, 2020, <https://religionnews.com/2020/08/29/at-republican-convention-a-partisan-vision-of-faith-god-gop/>.

<sup>29</sup> Andrew R. Lewis, “Donald Trump Hurts Public Support for Religious Freedom,” Religion in Public, November 2, 2020, <https://religioninpublic.blog/2020/11/02/donald-trump-hurts-public-support-for-religious-freedom/>.

to 50 percent capacity.<sup>30</sup> Though the Supreme Court denied injunctive relief, the Nevada church has a far better legal argument than, say, John MacArthur's California megachurch, which refused to abide by virtually any pandemic regulation, including those related to gathering size, mask wearing, and social distancing.<sup>31</sup>

Not surprisingly, this polarization of religious freedom threatened to diminish the stark reality of the pandemic, potentially leading people of faith to downplay just how serious the health crisis was at its apex. MacArthur himself repeatedly cast doubt on the seriousness of the situation, telling congregants in an August sermon that the numbers of COVID deaths were inflated before concluding, "There is no pandemic."<sup>32</sup> Additionally, research highlighted a growing divide over the reasonableness of restrictions on churches during the pandemic, with partisanship and support for the prosperity gospel among the key drivers of this divide.<sup>33</sup> The marriage of religious freedom polarization and COVID-denialism threatened to unnecessarily exacerbate the crisis during the winter months, just ahead of the release of vaccines to the public.

These tensions only amplified as the pandemic raged on. Late in 2020, the Supreme Court weighed in on New York's restrictions on in-person worship, enjoining the 10- and 25-person limits on attendance and finding that these restrictions are likely to be unconstitutional upon closer review.<sup>34</sup> "Even in a pandemic," reads the Court's per curiam opinion, "the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty." And though the dissenting justices argued that the Court's decision was both ignoring the government's concern for public health and unnecessary given recent changes to the policy, Justice Gorsuch memorably wrote that the restrictions treat houses of worship different from their nonsectarian counterparts. "Who knew," Gorsuch facetiously asked, "public health would so perfectly align with secular convenience?"

Notably, Washington University's John Inazu agreed with the Court's decision yet played down its widespread importance, referring to it as "fairly fact-specific injunctive relief" before adding, "It's hard to generalize much from this decision, and I'm concerned that public messaging about

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<sup>30</sup> Adam Liptak, "Supreme Court Rejects Nevada Church's Challenge to Coronavirus Shutdown Restrictions," *The New York Times*, July 24, 2020, <https://www.nytimes.com/2020/07/24/us/supreme-court-nevada-church-coronavirus.html>.

<sup>31</sup> Yonat Shimron, "John MacArthur Claimed There Is 'no Pandemic.' He Was Politicizing Science, Experts Say," *Religion News Service*, September 1, 2020, <https://religionnews.com/2020/09/01/john-macarthur-claimed-there-no-pandemic-he-was-politicizing-the-science/>.

<sup>32</sup> Mark Wingfield, "MacArthur Asserts 'There Is No Pandemic,'" *Baptist News Global*, September 3, 2020, <https://baptistnews.com/article/macarthur-asserts-there-is-no-pandemic/>.

<sup>33</sup> Paul Djupe and Ryan Burge, "Church Defiance to Covid-19 Restrictions Is Growing," *Religion in Public*, November 17, 2020, <https://religioninpublic.blog/2020/11/17/church-defiance-to-covid-19-restrictions-is-growing/>.

<sup>34</sup> *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. \_\_\_\_ (2020).

it will fuel a broader culture wars narrative.”<sup>35</sup> But that’s precisely what happened. Following the decision, Alliance Defending Freedom declared, “The Constitution forbids government officials from treating religious Americans like second-class citizens,”<sup>36</sup> while First Liberty Institute added, “Government officials may not abuse their emergency powers to discriminate against Americans of faith.”<sup>37</sup>

On the other side, though, *New York Times* columnist Paul Krugman tweeted, “The first major decision of the Trump packed court - and naturally it will kill people,”<sup>38</sup> while New York Governor Andrew Cuomo dismissed the Court’s ruling because of Trump’s Supreme Court’s appointments and the majority’s conservative ideology.<sup>39</sup> Rather than interpreting the decision as a limited defense of the First Amendment in the midst of an unprecedented health crisis, both sides of the divide sought to capitalize on the most extreme readings of the decision, and to use it as an example of why “the other side” must be defeated at all costs. As we have suggested in this article, this is a problem for the future of religious freedom in the United States.

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When houses of worship and Christian legal groups challenge reasonable restrictions and link their efforts to partisan politics and cultural polarization, they hamper efforts to vouchsafe religious freedom writ large and build support for the broader cause. Legitimate questions are not only dwarfed by the propensity by some churches and advocacy groups to rebuff *any* government regulation, but such actions inhibit broader political support for religious freedom. And limited political support will, in time, diminish legal protections. Moreover, even when courts invalidate problematic restrictions, advancing a culture war narrative connected to religious freedom only furthers this problematic divide.

The polarization of religious freedom did not begin with the arrival of COVID-19, but it certainly did not diminish during the pandemic, either. The CLM may win smaller battles and garner immediate political support by fighting tooth and nail against even the most minute public health regulation, but this strategy does little to win the larger war for expanded religious freedom protections for all.

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<sup>35</sup> John Inazu, “SCOTUS Gets It Right on Religious Liberty: Church IS Essential,” *Christianity Today*, November 26, 2020, <https://www.christianitytoday.com/edstetzer/2020/november/scotus-gets-it-right-religious-liberty-church-is-essential.html>.

<sup>36</sup> “US Supreme Court Halts NY Governor’s Rules That Treat Churches, Synagogues Worse than Businesses,” Alliance Defending Freedom, November 26, 2020, <http://www.adfmedia.org/News/PRDetail/11140>.

<sup>37</sup> “U.S. Supreme Court Protects Places of Worship from NY Governor Cuomo’s Order,” First Liberty, November 26, 2020, <https://firstliberty.org/media/u-s-supreme-court-protects-places-of-worship-from-ny-governor-cuomos-order/>.

<sup>38</sup> Paul Krugman, “The First Major Decision from the Trump-Packed Court — and, Naturally, It Will Kill People,” @paulkrugman (blog), November 26, 2020, <https://twitter.com/paulkrugman/status/1331974982704967681>.

<sup>39</sup> Jesse McKinley and Liam Stack, “Cuomo Attacks Supreme Court, but Virus Ruling Is Warning to Governors,” *The New York Times*, November 26, 2020, <https://www.nytimes.com/2020/11/26/nyregion/supreme-court-churches-religious-gatherings.html>.

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