**Conflicts Between Public Health Measures and Religious Freedom in a Period of Pandemic**

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In the United States of America, government responses to the COVID-19 pandemic have brought into focus conflicts between public health activities and religious liberty. State and local governments have utilized familiar and long-established public health measures to combat this pandemic, including surveillance, testing, reporting, contact tracing, sanitation, closure, isolation, quarantine, and social distancing.[2] Closure orders have had significant effects on religious believers and their places of worship. In addition to disrupting regular worship assemblies, public health orders also disrupted other important religious services, including baptisms and Eucharistic celebrations, weddings and funerals, last rites and pastoral counseling, religious education and charitable works.

Many jurisdictions enforced public health measures even-handedly against religious and secular institutions, and some governments displayed attentive sensitivity to the unique concerns of faith communities. In some instances, however, state and municipal governments adopted overly restrictive measures or enforced measures unequally against religious institutions. Litigation was instituted in many jurisdictions, with litigants bringing claims under federal and state law.[3] Courts, including the United States Supreme Court, have issued rulings in many cases.

This paper examines conflicts between public health orders and religious liberty that arose in the United States during the COVID-19 pandemic, and it argues that the strict-scrutiny standard, rather than the rational-basis standard or a comparable standard, is the appropriate standard to protect religious liberty from infringement by government orders in the current public health crisis. It explores these conflicts by considering several of the judicial rulings. However, before turning to these cases, this paper considers several constitutional background issues and the public health enterprise.

## Constitutional Background

Conflicts between public health measures and religious freedom are not new in America. Indeed, the design reflected in state constitutions assumes that such conflicts will arise. While state

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[2] *See* LAWRENCE O. GOSTIN & LINDSAY F. WILEY, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 391-433 (3d. ed. 2016).

[3] In addition to challenges claiming violations of religious liberty, challenges were also brought on other constitutional and statutory grounds. For instance, challenges were brought based upon separation of powers grounds. In Wisconsin, the state supreme court determined that the Secretary-designee of the state Department of Health Services exceed her lawful authority in making a generally applicable rule without following the statutorily mandated procedure. Wisconsin Legislature v. Palm, 942 N.W.2d 900 (Wis. 2020). In Michigan, the state supreme court determined that the governor lacked lawful authority to make emergency declarations after a date set by the legislature. In re Certified Questions from the United States District Court, __ N.W.2d __ (Mich. 2020). In Pennsylvania, the state supreme court determined that the governor had authority to issue an executive order, which was a proper exercise of police power and did not violate the doctrine of separation of powers. Friends of Danny DeVito v. Wolf, 227 A.3d 872 (Pa. 2020).

constitutions recognize that governments must secure the rights and liberties of the people, including religious freedom, they also declare that governments exist for the peace, safety, and wellbeing of the people. State governments thus possess the police power, which is the authority to provide for common goods like public health, safety, order, and morals. Consequently, government efforts to promote the public's health will generate conflicts with the rights and liberties of the people.

Conflict between a public health measure and personal liberty was evident over a century ago in the Supreme Court's decision in *Jacobson v. Massachusetts*. In that case, the Court considered Mr. Jacobson's challenge to a Massachusetts law that authorized municipalities to mandate smallpox vaccination. When the city of Cambridge acted under this statutory authority and required adults be vaccinated, Jacobson refused and was fined. He asserted a substantive due process claim, arguing that Massachusetts law violated liberty secured by the Constitution. The Court disagreed, determining that the local ordinance was a reasonable exercise of police power and that Jacobson's liberty was subjected to reasonable restraint for the common good.[4]

**The Public Health Enterprise**

Government in the United States grew in size and scope over the ensuing century following the *Jacobson* decision, and government now reaches into nearly every facet of life and society. This is evident in the proliferation of federal, state, and local administrative agencies that distribute benefits and regulate private activity, including activity affecting the public's health. During much of the twentieth century, the mission of public health was focused upon the control and prevention of disease and injury, and public health initiatives led to many significant achievements, including effective vaccinations, safer foods and vehicles, fluoridated drinking water, cleaner air and water, and safer workplaces. Conflicts between public health activities and religious liberty were limited and suitable for accommodation. For instance, many jurisdictions granted religious and philosophical exemptions to mandatory vaccinations to accommodate conscience concerns.

Over the last few decades, however, public health advocates have sought to expand the scope of the public health mission. The "new public health" movement points to various social, economic, and environmental factors, and it urges that the reach of public health includes addressing these social "determinants" of health by, among other things, combatting poverty, expanding educational and economic opportunities, ameliorating racial and gender inequalities, and confronting crime, violence, and social disorder. These advocates resist the core ideals of classical liberalism (e.g., individualism, freedom, self-discipline, personal responsibility, and limited government) and emphasize instead collective interests, social accountability, and government intervention. And even as they pit the public's health against the individual and her rights, including religious liberty, they contend that science and the public good support the expanded reach of public health and their more robust undertaking.[5]

[4] Jacobson v. Massachusetts, 197 U.S. 11 (1905).

[5] For a thoughtful examination of the "new public health" movement, see Lindsay F. Wiley, *Rethinking the New Public Health*, 69 Wash. & Lee L. Rev. 207 (2012).

The proponents of the new public health thus seek to advance an agenda that goes beyond the traditional public health mission and measures, and they urge courts to apply deferential standards (like the reasonableness standard applied by the Court in *Jacobson*) rather than stricter standards applied when suspect classifications and fundamental rights are involved.[6] Furthermore, as became evident in its defense of various public health initiatives over the last decade and a half, the new public health movement advocates weakened versions of the rights of individuals and corporate bodies whether the freedom of speech, the right to bear arms, or the freedom of religion.[7] Accordingly, the freedom of religious believers and institutions is at best a minor concern for the new public health.[8]

**Conflicts with Religious Liberty**

The cause of the current health crisis is the spread of an infectious disease. Consequently, this pandemic fits well within the traditional scope of the public health enterprise. Government in the United States thus rightly responded to the pandemic with long-established public health measures, but these measures nonetheless precipitated wide-scale conflicts with religious freedom and other rights. Indoor religious services (and even outdoor services in some jurisdictions) were prohibited. When permitted to meet indoors, occupancy was limited, masks and social distancing were required, singing was banned, and government agents were present to monitor. Even though government-mandated closures and government-imposed conditions on reopening restrained the free exercise of religion, religious believers and institutions exhibited considerable deference and respect, and they largely complied with government orders and guidance.

However, these conflicts between public health measures and religious freedom spawned litigation in those jurisdictions in the United States that adopted overly restrictive measures or enforced measures unequally against religious institutions. Claims based on religious freedom were raised under both the First Amendment to the United States Constitution and the federal Religious Freedom Restoration Act (RFRA). The First Amendment bars federal, state, and local governments from prohibiting the free exercise of religion. Because the Supreme Court's decision in *Employment Division v. Smith* permits government to apply neutral laws of general applicability that burden the free exercise of religion,[9] First Amendment challenges to coronavirus-related measures have focused on unequal treatment and the targeting of religion based upon regulations that allowed some businesses to operate and some public gatherings to occur while churches were restricted from doing the same.[10]

Several cases reached the United States Supreme Court, and the first three of these will be considered here. Each involved state government restrictions on worship during the pandemic. In

[6] *See, e.g.*, Michael R. Ulrich, *A Public Health Law Path for Second Amendment Jurisprudence*, 71 HASTINGS L.J. 1053, 1070-84 (2020).

[7] *See, e.g.*, Elizabeth Sepper, *Introduction*, 50 WASH. U. J. L. & POL'Y 1, 1-3 (2016) and the articles published in Volume 50 of the journal (symposium entitled "Toward a Healthy First Amendment").

[8] *See, e.g.*, B. Jessie Hill, *The First Amendment and the Politics of Reproductive Health Care*, 50 WASH. U. J. L. & POL'Y 103, 116-17 (2016).

[9] Employment Division v. Smith, 494 U.S. 872 (1990).

[10] The church autonomy doctrine under the First Amendment and equal protection under the Fourteenth Amendment should also provide viable avenues for pressing constitutional claims, but they are not explored here.

two of the three cases, the Court denied church applications to enjoin harsh restrictions on worship. In the third case, the Court granted injunctions in favor of a Catholic diocese and an Orthodox Jewish synagogue. As the cases reached the Court over a period of several months, the Court gradually awakened from a posture of wooden deference to state public health officials to a more enlightened awareness that the interests of religiously scrupulous people and religious institutions can co-exist with health and safety measures.

In none of these cases did the Court resolve the latent tension in its Free Exercise jurisprudence between the deferential neutrality standard of *Employment Division v. Smith*[11] and the strict-scrutiny standard of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[12] Under *Lukumi*, when government discriminates against or targets religion and thus violates the minimum requirement of neutrality, it must satisfy strict scrutiny. In such a case, the regulation must be "narrowly tailored" using the least restrictive means to serve a "compelling" government interest, which is an interest of the highest order.[13]

In the first case to reach the Court, *South Bay United Pentecostal Church v. Newsom*, the Court denied an application for injunctive relief against California's restrictions on public gatherings that limited attendance at places of worship.[14] In his concurring opinion, Chief Justice Roberts argued that California's occupancy cap did not appear to offend free exercise, for it treated places of worship comparably to similar secular gatherings where people congregate in close quarters for extended periods and differently from dissimilar activities where people do not congregate in large groups or remain in close proximity for extended periods.[15] He further argued that courts should grant broad deference to executive officials who must nimbly respond to changing conditions and changing scientific revelations in their attempt to protect the public's health. For Roberts, the bottom line was that changing facts (i.e., changing infection and death rates) plus changing science (i.e., changing information regarding viral spread and virulence) equals the widest berth in favor of executive officials, especially when injunction relief is sought at a preliminary stage of litigation.[16]

In his dissenting opinion, Justice Kavanaugh showed the importance of identifying the proper comparator for determining the applicable standard and evaluating the government's treatment. In Kavanaugh's view, California imposed an occupancy cap on places of worship that it did not imposed on comparable secular businesses. This discrimination against places of worship led him to analyze California's regulation under the strict-scrutiny standard of *Lukumi* instead of the neutrality standard of *Smith*.[17] Kavanaugh did not deny that California has a compelling interest in protecting the public from COVID-19, but he argued that the state must provide compelling justification for subjecting houses of worship to a tight occupancy limit but not subjecting comparable secular businesses such as supermarkets, restaurants, factories, and offices to any

[11] *See supra* note 9 and accompanying text.
[12] Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533 (1993).
[13] *Id.* at 546.
[14] South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (mem.).
[15] *Id.* at 1613.
[16] *Id.* at 1613-14.
[17] *Id.* at 1614.

occupancy limit. California, he concluded, failed to provide compelling justification for its discrimination against religion.[18]

In *Calvary Chapel Dayton Valley v. Sisolak*, the Court denied a church's application for injunctive relief against Nevada's less favorable treatment of religious services than secular services at casinos, bowling alleys, and other favored establishments.[19] Justice Alito (joined by Thomas and Kavanaugh) dissented from the Court's denial of injunctive relief, concluding that the church was likely to succeed on its free exercise and free speech claims.[20] In Alito's view, the state's differential treatment of religious services warranted strict-scrutiny analysis under *Lukumi*,[21] and its favoring of secular expression over religious expression was anathema to the First Amendment.[22] In addition to determining that Nevada's regulation could not withstand strict-scrutiny analysis, Alito explained that the *Jacobson* decision should not be read to establish the test for constitutional provisions not at issue in that case.[23] In a separate dissenting opinion, Justice Gorsuch observed that the First Amendment prohibits discriminatory treatment that restricts religious organizations to fifty worshippers but that does not place a similar cap on entertainment venues.[24]

In his separate dissenting opinion, Kavanaugh found that Nevada treated religious organizations equally with some secular organizations but worse than other secular organizations.[25] He argued that "the government must articulate a sufficient justification for treating some secular organizations or individuals more favorably than religious organizations or individuals."[26] He was not persuaded by Nevada's proffered reasons for different treatment. First, the state did not demonstrate that public health justifies a looser limit at casinos and gyms but a stricter limit at places of worship, especially considering that people at casinos and gyms will congregate in large groups and remain in close proximity for extended periods.[27] Second, the state's claim of economic justification was unacceptable because it may not favor businesses because they generate economic benefits but discriminate against religious organizations because they do not generate the same benefits.[28] He observed that among the red lines that government may not cross even in a crisis are racial discrimination, religious discrimination, and content-based suppression of speech.[29]

The dissents in *Calvary Chapel* are noteworthy for two additional reasons. First, they highlight the hypocrisy of government authorities narrowly restricting religious services conducted under mask and distancing protocols while allowing non-religious services under conditions posing greater risks. Second, they underscore the time element. The exigency that existed at the onset of

[18] *Id.* at 1615.
[19] Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020) (mem.).
[20] *Id.* at 2605.
[21] *Id.* at 2605-07.
[22] *Id.* at 2607-08.
[23] *Id.* at 2608.
[24] *Id.* at 2609.
[25] *Id.* at 2611-12.
[26] *Id.* at 2613.
[27] *Id.* at 2613-14.
[28] *Id.* at 2614.
[29] *Id.* at 2614-15.

the pandemic had passed, and the four months that had transpired gave the state ample time to craft policy and calibrate restrictions to accommodate constitutional rights.

In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Court granted injunctive relief against New York's occupancy limits on attendance at religious services.[30] The religious organizations claimed that the severe restrictions violated the First Amendment by targeting the Orthodox Jewish community and treating houses of worship more harshly than comparable secular businesses (like acupuncturists, liquor stores, and bicycle repair shops) that were deemed essential and subjected to no capacity restrictions. The Court determined that the restrictions were not neutral and generally applicable and thus that the strict-scrutiny standard of *Lukumi* applied.[31] In addition to concluding that the restrictions were not narrowly tailored,[32] the Court observed that, "even in a pandemic, the Constitution cannot be put away and forgotten."[33] Thus, the Court showed greater concern about disparate treatment of religious organizations by executive officials in the *Diocese of Brooklyn* case than it had in the two previous cases.[34]

In his concurring opinion, Justice Gorsuch criticized the Roberts concurrence in *South Bay* for relying on the Court's earlier decision in *Jacobson* and for suggesting slack enforcement of constitutional liberties during a pandemic.[35] Gorsuch observed that the rational-basis mode of analysis in *Jacobson* is the test normally applied under the Fourteenth Amendment when no suspect classification or fundamental right is involved. Accordingly, he thought, *Jacobson* teaches that courts do not "depart from normal legal rules during a pandemic," and thus the Court should apply the "normal" test in this First Amendment case, which is strict scrutiny under *Lukumi* because of the government's discriminatory treatment of religious exercise.[36] Additionally, Gorsuch noted that entirely different rights were at issue in *Jacobson* and *Diocese of Brooklyn*. *Jacobson* involved an implied substantive due process right to "bodily integrity," but the *Diocese of Brooklyn* case involved a textually explicit right to practice religion.[37] Gorsuch also found the restrictions in *Jacobson* and *Diocese of Brooklyn* to differ in nature. In *Jacobson*, the vaccination law allowed individuals to "opt-out" by paying a fine or claiming an exemption and thereby avoid the intrusion upon "bodily integrity." Given the opt-out and exemption provisions, Gorsuch thought, Massachusetts's turn-of-the-century law may have been capable of surviving strict-scrutiny analysis. However, in *Diocese of Brooklyn*, New York afforded houses of worship no comparable exemption scheme. In a "red" or "orange" zone, New York permitted no traditional forms of worship when the Governor so ordered and for as long as he ordered.[38]

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[30] Roman Catholic Diocese of Brooklyn, New York v. Cuomo, __ S. Ct. __ (2020) (per curiam).

[31] *Id.* at __.

[32] *Id.* at __.

[33] *Id.* at __.

[34] Justice Amy Coney Barrett's appointment to the Court undoubtedly contributed to an outcome in this case that differed from *South Bay* and *Calvary Chapel*.

[35] *Id.* at __.

[36] *Id.* at __.

[37] *Id.* at __.

[38] *Id.* at __.

In his separate concurring opinion, Kavanaugh highlighted the severely restrictive and discriminatory nature of New York's regulations.[39] In his view, New York had neither justified excluding houses of worship from treatment extended to secular businesses it favored nor tailored its restrictions.[40]

In his dissenting opinion, Chief Justice Roberts expressed concern that New York's numerical limits seemed unduly restrictive and raised serious constitutional questions, but he thought the requested relief was not needed because New York had adjusted its restrictions.[41] Justice Breyer issued a separate dissenting opinion that Justices Sotomayor and Kagan joined,[42] and Sotomayor issued a separate dissenting opinion that Kagan joined.[43] They believed that the extraordinary remedy of an immediate injunction was not needed at that time because the applicants were not then subject to the fixed-capacity limits, and they contended that government officials should have broad discretion to address the public's health needs.[44] Sotomayor and Kagan also thought that *South Bay* and *Calvary Chapel* provided a workable rule allowing restrictions on attendance at religious services "so long as comparable secular institutions face restrictions that are at least equally as strict."[45]

In *Capitol Hill Baptist Church v. Bowser*, a lower federal court considered a church's challenge to restrictions imposed by Mayor Muriel Bowser and the District of Columbia.[46] The church claimed that the District's restrictions violated the federal RFRA, which requires governmental actions that substantially burden religious exercise to satisfy the strict-scrutiny standard.[47] In *Bowser*, the federal court determined that the District's order prohibiting the church from holding outdoor worship services (even with appropriate mask and distancing precautions) failed under the strict-scrutiny standard, and it granted the church injunctive relief.[48]

In reaching this conclusion, the court observed that the District substantially burdened the church's religious exercise by prohibiting the church from meeting together as a congregation as its faith requires.[49] The court found that the District failed to demonstrate a compelling interest in banning the church from gathering for religious worship outdoors with appropriate safeguards,[50] and it found that less restrictive but equally effective alternatives were available.[51] In its reasoning, the court concluded that the less demanding standard of *Jacobson* was not the appropriate standard.[52] The court also observed that the District significantly undercut its

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[39] *Id.* at __.
[40] *Id.* at __.
[41] *Id.* at __.
[42] *Id.* at __.
[43] *Id.* at __.
[44] *Id.* at __.
[45] *Id.* at __.
[46] Capitol Hill Baptist Church v. Bowser, __ F.Supp.3d __ (D.D.C. 2020).
[47] *Id.* at __ (citing Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb et seq.). The federal RFRA applies to the federal government, the District of Columbia, and federal territories, but not the states.
[48] *Id.* at __.
[49] *Id.* at __.
[50] *Id.* at __.
[51] *Id.* at __.
[52] *Id.* at __.

position when Mayor Bowser encouraged mass gatherings for purposes of peaceful protests[53] and when the District allowed dining establishments to serve meals outdoors with no restrictions.[54]

Litigation and demand letters also presented claims under state RFRAs and other state laws against public health orders restricting religious services. In a number of jurisdictions, state and local officials adjusted restrictions in response to litigation or demand letters from legal counsel.[55] In Kentucky, Maryville Baptist Church challenged two orders of Governor Andy Beshear under the state RFRA and the First Amendment.[56] The Sixth Circuit enjoined the enforcement of these orders against the church.[57] The court found that the church was likely to succeed on its state RFRA claim that the governor's orders substantially burdened sincerely held religious practices (i.e., conducting drive-in worship gatherings) and that the orders were not the least restrictive means of achieving the government's compelling interest.[58] The court also determined that the church was likely to succeed on its First Amendment claim because the orders failed strict-scrutiny analysis by prohibiting religious activity while creating exceptions for comparable secular activities.[59]

Some of the current conflicts between public health measures and religious liberty should resolve as effective vaccines and therapeutics become available. However, additional conflicts will emerge as public health authorities consider mandating COVID-19 and flu vaccinations for health care workers and first responders, as well as vulnerable populations, school children, and even the general population.[60] These conflicts will pit governments and the communities they represent against individuals who object to mandated vaccinations on religious and other grounds. Additionally, if public health advocates and authorities find opportunity in the present

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[53] *Id.* at __. In defending her favoring of mass protests over religious worship, Mayor Bowser asserted that "First Amendment protests and large gatherings are not the same" because, "in the United States of America, people can protest." Michelle Boorstein, *Prominent Evangelical Church Is the First to Sue D.C. over COVID-19 Worship Limits*, WASHINGTON POST (Sept. 22, 2020).

[54] *Bowser*, __ F.Supp.3d at __. After the Roman Catholic Archdiocese of Washington, D.C. filed a separate lawsuit against the District in December of 2020, Mayor Bowser modified her order, increasing the capacity for in-person worship to 25% of the building capacity or 250 total persons, whichever is smaller. *See* District of Columbia, Mayor's Order 2020-126 (Dec. 16, 2020) <https://coronavirus.dc.gov/sites/default/files/dc/sites/coronavirus/page_content/attachments/Mayor%27s%20Order%202020-126%20%2011-16-2020.pdf>. *See also* Karl A. Racine, Statement on Settlement with Catholic Archdiocese of Washington (Dec. 22, 2020) <https://oag.dc.gov/release/statement-ag-racine-settlement-catholic> (stating that the Archdiocese would comply with the District's December 16, 2020 order).

[55] *See, e.g.*, Letter from The Becket Fund for Religious Liberty to Governor Tim Walz and Attorney General Keith Ellison May 20, 2020 <https://s3.amazonaws.com/becketnewsite/Becket-Letter-to-Governor-Walz.pdf>; Letter from Sidley Austin LLP et al. to County Executive Joseph T. Parisi et al. (June 3, 2020) <https://s3.amazonaws.com/becketnewsite/Diocese-of-Madison-Letter-to-County-City-and-PHMDC-with-Attachment.pdf>.

[56] Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610, 611 (6th. Cir. 2020) (per curium).

[57] *Id.* at 616.

[58] *Id.* at 612-13.

[59] *Id.* at 614-15.

[60] *See* Stephanie Desmon, *Could COVID-19 Vaccines Become Mandatory in the U.S.?* (Nov. 20, 2020) <https://hub.jhu.edu/2020/11/20/could-coronavirus-vaccines-become-mandatory/>. Employers are also considering mandating the COVID-19 vaccine. *See* Andrea Hsu, *As COVID-19 Vaccine Nears, Employers Consider Making It Mandatory* (Nov. 25, 2020) <https://www.npr.org/2020/11/25/937240137/as-covid-19-vaccine-nears-employers-consider-making-it-mandatory>.

public health crisis to advance the broader agenda of the new public health, additional conflicts will arise. However, at least as far as religious freedom is concerned, the strict-scrutiny standard should impel officials to more carefully calibrate restrictions and grant exemptions that strike the appropriate balance.

## Conclusion

The coronavirus pandemic required governmental response, and executive officials and public health authorities throughout the United States have taken decisive and urgent action to protect their communities. However, governmental intervention, even in the interest of achieving public goods, is a double-edged sword, and its impact on the religious liberty of individuals and institutions should not be minimized. As *The Williamsburg Charter*, adopted in commemoration of the 200th anniversary of Virginia's call for the federal Bill of Rights, explains: "Less dramatic but also lethal to freedom and the chief menace to religious liberty today is the expanding power of government control over personal behavior and the institutions of society, when the government acts not so much in deliberate hostility to, but in reckless disregard of, communal belief and personal conscience."[61]

During the coronavirus pandemic, Americans have witnessed both deliberate hostility to and reckless disregard of communal belief and personal conscience by government. But they have also witnessed examples of governmental sensitivity to and respect for faith communities and religious believers. Those Americans who are most concerned with religious liberty must remain attentive to government interventions, even when such interventions are in the name of public health, for the encroachment of public health activities on religious liberty may be too readily justified, too easily implemented, and too long endured. Given the persistent threat government interventions pose to religious liberty, the strict-scrutiny standard, as recognized in First Amendment jurisprudence and approved in the federal and state RFRAS and other state laws, helps to ensure that government strikes the right balance, and it does so by encouraging government officials to consult faith leaders and narrowly tailor any measure intended to protect public health so as not to unduly burden religious freedom.

[61] The Williamsburg Charter (1988), reprinted in 8 J.L. & RELIGION 5, 9 (1990).