tion strategy for diagnostic development resources at reasonable cost, under the DPA.

Third, we need to prioritize test distribution. Successful containment of Covid-19 requires a prioritization strategy for facilitating equitable access to tests according to need. In communities where the demand remains unmet, decision makers will have to redirect existing clinical grade testing to symptomatic people, contacts, and high-prevalence areas before spending resources on surveillance testing of low-risk persons. To enable a full economic reopening of the United States, non–clinical grade tools could be dedicated to surveillance and to identifying potential asymptomatic cases for clinical investigation. Simple PCR tests administered outside CLIA settings, and other easy-to-use surveillance tools such as loop-mediated isothermal amplification — a highly specific, cost-effective, rapid, and scalable technology — are currently being explored as potential alternatives.

An audio interview with Dr. Sabeti is available at NEJM.org

As we fight Covid-19 and prepare for new threats, including a potentially pandemic-level strain of influenza, we need to pave a better path. We believe that our leaders need to motivate and support a laboratory-based testing model that enables broad and distributed production capacity. We must build a national system that operates according to rapid regulatory processes with clear, rigorous standards, facilitates innovation and training, provides resources for ongoing test development, and prioritizes supplies on the basis of need. Before Covid-19, virologists predicted the emergence of a novel "Disease X." It's here now, and we still have not contained it. When "Disease Y" arrives, will we have learned?

Disclosure forms provided by the authors are available at NEJM.org.

From the Broad Institute of Harvard and MIT (Y.B.-L., P.S.) and the Center for Systems Biology, Department of Organismic and Evolutionary Biology, Harvard University (P.S.) — both in Cambridge, MA; the Microbiology Laboratories and the Division of Infectious Diseases, Department of Medicine, Massachusetts General Hospital (E.R.), the Department of Pathology, Harvard Medical School (E.R.), and the Department of Immunology and Infectious Diseases, Harvard T.H. Chan School of Public Health (P.S.) — all in Boston; and the Howard Hughes Medical Institute, Chevy Chase, MD (Y.B.-L., P.C.S.).

This article was published on January 16, 2021, at NEJM.org.

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DOI: 10.1056/NEJMp2025173

Roman Catholic Diocese of Brooklyn v. Cuomo — The Supreme Court and Pandemic Controls

Wendy E. Parmet, J.D.

On November 25, 2020, as Americans prepared to celebrate Thanksgiving during a pandemic, the U.S. Supreme Court, by a 5-to-4 vote, undermined states' ability to control that pandemic. In *Roman Catholic Diocese of Brooklyn v. Cuomo*,[1] the Court temporarily enjoined limits on in-person religious worship imposed by New York Governor Andrew Cuomo. Although the injunction will have little effect because the restrictions were no longer in place by the time of the ruling, the decision has the potential to upend public health law during the current pandemic and afterward.

Since March 2020, U.S. governors have placed numerous restrictions on public gatherings in an effort to reduce transmission of SARS-CoV-2. Many of these restrictions have been challenged in court as violating a broad array of constitutional rights, including free exercise of religion, freedom of speech, and the right to travel. Initially, most courts rejected these claims, citing the Supreme Court's 1905 decision in *Jacobson v. Massachusetts*, which upheld a Cambridge, Massachusetts, regulation

mandating smallpox vaccination during an outbreak.[2]

On May 29, the Supreme Court issued its first Covid-19–related decision in *South Bay United Pentecostal Church v. Newsom*.[3] In this case, the Court, by a 5-to-4 vote, declined to block California's limit on attendance at places of worship. Although the majority did not issue an opinion, Chief Justice John Roberts, in a concurring opinion, emphasized the heavy burden facing litigants who seek emergency relief from the Court. He further noted that the state had imposed similar restrictions on secular gatherings. Quoting *Jacobson*, he added that the Constitution "principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States." In his dissent, Justice Brett Kavanaugh argued that California's policy discriminated against religious services by treating them differently from many secular activities.

On July 24, the Court revisited Covid-19–related restrictions on religious worship in *Calvary Chapel Dayton Valley v. Sisolak*.[4] Once again, without an opinion, the Court denied an emergency petition by a 5-to-4 vote. In pointed dissents, Justices Samuel Alito, Neil Gorsuch, and Kavanaugh argued that the Nevada order in question discriminated against religion by treating casinos more favorably than places of worship. Alito also questioned *Jacobson*'s relevance to free-exercise claims, noting that it was not a First Amendment case.

By the time New York's restrictions came before the Court, its composition had changed. On September 18, Justice Ruth Bader Ginsburg died. The far more conservative Justice Amy Coney Barrett replaced her. With Barrett's ascension to the Court, there was now a 5-to-4 majority willing to block limits on religious services.

The orders at issue in *Roman Catholic Diocese* limited in-person worship in so-called red zones of Covid-19 transmission to no more than 10 people; only 25 people could attend services in orange zones. Many other activities, such as grocery shopping and education, faced no such caps. After the litigation began, Cuomo revised the designations so that the plaintiffs, the Roman Catholic Diocese of Brooklyn and Agudath Israel of America, could hold services in their facilities at up to 50% of capacity. To Roberts, who dissented from the ruling, this development meant that there was no longer any reason for the Court to intercede, even though he found New York's orders troubling.

The majority disagreed. In an unsigned per curiam opinion, it held that the plaintiffs' rights to free exercise were most likely violated because the governor's orders "single out houses of worship for especially harsh treatment" that was not imposed on stores, factories, and schools. Because of such discrimination, the majority concluded, the orders were subject to strict scrutiny. Hence, they could survive judicial review only if they were "narrowly tailored" to address a "compelling" state interest. Although the Court accepted that controlling Covid-19 was a compelling state interest, it found that the orders were not narrowly tailored because they were tighter than those imposed by other states and because no outbreaks had been associated with the plaintiffs' houses of worship. The Court added, "Even in a pandemic, the Constitution cannot be put away and forgotten."

The concurring opinions were more pointed. Gorsuch derided New York and other unnamed states for treating religious worship more harshly than other activities. He also criticized Roberts's *South Bay* opinion for relying on *Jacobson*, which he called a "modest" decision. Gorsuch added, "things never go well" when the Court tries to "stay out of the way in times of crisis."

In his dissent, Justice Stephen Breyer pointed to epidemiologic evidence that in-person worship may pose a greater risk than shopping and other activities that were less stringently regulated to argue that the Court should defer to state officials. In her dissent, Justice Sonia Sotomayor argued that New York had not discriminated against religious institutions because it treated worship more favorably than many secular activities. She added, "Justices of this Court play a deadly game in second guessing the expert judgment of health officials."

The injunction ordered by the Court will have little direct effect because the relevant caps on attendance were no longer in place when the ruling was issued. Moreover, the majority appeared open to restrictions that treat religious services identically to comparable secular activities. Nevertheless, the Court's eagerness to intervene even though New York's orders were no longer in effect and its failure to consider epidemiologic evidence in determining which activities are comparable to worship will serve as a warning that state orders that impose tighter measures on worship than on some secular activities will face the strictest of scrutiny. Further-

more, the Court's finding that New York's restrictions were not narrowly tailored because there was no evidence of viral transmission in the petitioners' houses of worship and because other states had looser regulations suggests that states will not be able to act before super-spreader events occur or as long as other states take a more lax approach.

This development presents states with a dilemma. In the absence of a national pandemic policy or sufficient stimulus support, many governors have responded to the new surge in Covid-19 cases by imposing fine-tuned restrictions in an attempt to protect health without decimating the economy. Some of these measures have affected religious liberty in troubling ways; others are epidemiologically questionable.[5] For example, Rhode Island has banned all social gatherings in homes while allowing catered events.[5]

Unquestionably, courts must ensure that such measures do not serve as a pretext for discriminating against vulnerable people or quashing protected liberties. Nevertheless, the Court's approach in *Roman Catholic Diocese* devalues federalism and public health, making it difficult for states to rely on science and craft fine-tuned measures in response to local conditions. Although courts should not abdicate their role during a pandemic, they also should not rush to assume an expertise they lack.

Already, the case's effects have been felt. In December, the Court ordered a lower court to reconsider its rejection of a challenge to a California regulation that affects in-person worship. Beyond the pandemic, *Roman Catholic Diocese*'s most important legacy may be the dethroning of *Jacobson*. Gorsuch is correct that *Jacobson* was not a free-exercise case and does not control such claims. Still, for more than 115 years, *Jacobson* has been the key precedent supporting vaccine mandates and other public health laws. It has also served as a reminder of the importance of public health evidence and the fact that "real liberty" cannot exist in the absence of reasonable restraints to protect the public's health. With *Jacobson* apparently sidelined, the future of many public health laws, including and especially vaccine mandates, appears perilous.

Disclosure forms provided by the author are available at NEJM.org.

From the Center for Health Policy and Law, Northeastern University School of Law, Boston.

This article was published on December 16, 2020, at NEJM.org.

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DOI: 10.1056/NEJMp2034280

Incarceration and Social Death — Restoring Humanity in the Clinical Encounter

Bisan A. Salhi, M.D., Ph.D., and Anwar D. Osborne, M.D., M.P.M.

Mr. S., a 28-year-old Black man, arrived at our emergency department (ED) by ambulance after exhibiting altered mental status and agitation in jail. While in solitary confinement for 4 days, he repeatedly and unsuccessfully sought the attention of the medical staff. He was brought to the ED after the jail staff noted that he was confused.

Mr. S.'s breathing was agonal, so he was intubated. He had a core body temperature of 26.8°C, multiple sacral decubitus ulcers, and sequelae of severe hypothermia. He was resuscitated, actively rewarmed, and admitted to the intensive care unit (ICU).

Mr. S.'s medical records documented previous ED visits for "medical clearance" after injuries sustained during multiple arrests: closed head injuries, contusions, abrasions, and Taser injuries. He was noted to be "belligerent" and "uncooperative" with police officers and ED staff. Some clinicians had speculated about possible substance use or underlying psychiatric diagnoses, though neither was confirmed by the patient or elsewhere in his record. Each time, he was deemed "safe for discharge" to jail. No further