

TUESDAY, MAY 19, 2020

PERSPECTIVE

When public health and individual liberties collide

By David A. Carrillo
and Brandon V. Stracener

Some churches have resisted California's quarantine orders, and have even sued the state for exemptions. Those claims should fail because the religious liberty guarantees in the federal and state constitutions do not require California to accommodate churches by allowing in-person religious services during the COVID-19 pandemic. The state can limit otherwise sacrosanct constitutional rights when necessary to defend public health. And in a pandemic, the federal Constitution does not require the government to treat churches differently from other places where people might gather and infect each other. The California Constitution is even more restrictive, and prohibits the state from preferring churches over secular organizations.

Until public safety is restored, individual civil liberties — such as the freedom to meet as a group for religious services — yield to California's inherent police powers to combat a pandemic. Under the Tenth Amendment, it is settled that "quarantine laws [and] health laws of every description" are valid state police power measures. *Gibbons v. Ogden*; *Farmers Ins. Exchange v. California*. Even severe state acts like compulsory adult vaccination are lawful. *Jacobson v. Massachusetts*. And California courts have relied on the state's police power to uphold disease abatement measures against claims that they violate constitutional rights. See *Patrick v. Riley*; *Stanislaus Dairymen's Protective Assn. v. Stanislaus County*.

In responding to a pandemic emergency, the state's police power extends to any aspect of society that affects public health — including gatherings at sporting events and places of worship. If the state's restrictions apply generally to the public (and not just to churches), those restrictions are presumptively valid. That's why a federal court recently rejected arguments that California's stay-at-home

order violates a constitutional right to in-person church services. *Cross Culture Christian Center v. Newsom*. So long as California's stay-at-home orders are facially neutral and evenly applied, other courts will likely reject similar challenges on religious liberty grounds under either the federal or state constitutions.

The state constitution's religion clauses require the government to avoid any act that appears to favor religion — like exempting churches from quarantine orders. Article I, section 4 guarantees "[f]ree exercise and enjoyment of religion without discrimination or preference." This requires California to remain as neutral as possible and to accommodate religion only as required by federal law, and otherwise permits churches to receive only generally available incidental benefits. The California Supreme Court has applied the no-preference clause to bar even the appearance of favoritism toward religion. *Fox v. City of Los Angeles*. Because the California Constitution requires stricter neutrality than the federal Constitution, it provides no basis to exempt religious organizations from statewide quarantine orders.

Churches have claimed that their free exercise rights under the U.S. Constitution require exemption from the quarantine orders. But the federal constitution does not require religious exemptions from neutral laws of general application. *Employment Div. v. Smith*. *Smith* is the standard for most state laws, and here it means that facially neutral public health orders are valid under the federal Constitution even if they incidentally burden free exercise. California's quarantine orders are neutral government acts that apply to everyone regardless of their religious belief. Under *Smith*, a facially neutral stay-at-home order is a lawful exercise of state police power that does not implicate the First Amendment — even if it imposes some incidental burdens on religion in general, or on a specific church that wants to hold in-person services.

If California exempted churches from the quarantine order, then secular organizations could challenge that exemption as an establishment clause violation. The First Amendment's establishment clause bars government favoritism toward religion. *County of Allegheny v. ACLU*. The government may facilitate religious practice without violating the establishment clause only when it acts with the purpose of alleviating "exceptional government-created burdens on private religious exercise," such as by providing chaplains in the military or in prisons. *Cutter v. Wilkinson*; *Salazar v. Buono*. Sailors on a submarine and prisoners would have no other worship opportunities without access to government chaplains — prisons and submerged vessels don't offer Zoom services. And unlike the general public (even under quarantine orders), prisoners and service members lack control over their activities throughout the day, which means that they have little or no opportunity to engage in any religious practice without government intervention. California churchgoers have other options, including live video meetings and listening to radio services.

A pandemic quarantine is not comparable to restrictions imposed by prisons or the military, and outside

those contexts, special accommodations for religion raise establishment clause concerns. Exempting churches from quarantine orders would appear to favor religion even more than allowing a commencement prayer at public school ceremonies, which the California Supreme Court disapproved in *Sands v. Morongo Unified School District*. More importantly, exempting churches could compromise the quarantine's public health purpose. Providing prison or military chaplains presents no health risk to the rest of humanity — but plagues go everywhere, and exempting church services from broad restrictions on mass gatherings means that disease will spread. The federal Constitution does not require California to open a window and let contagion in.

Individual liberties are not absolutes, and in emergencies citizens must defer to the collective good. Ordinarily, Californians have an undisputed right to practice their faith by attending church services. But in a pandemic, when the government orders a quarantine to protect public health, that right does not require the state to allow religious gatherings that would spread the virus among the faithful, and then to the public. Right now the greater need is to protect California. ■

David A. Carrillo, left, is executive director of and Brandon V. Stracener is a senior research fellow at the California Constitution Center.

