

Article

# The Constitutionality of Providing Public Funds for U.S. Houses of Worship during the Coronavirus

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**Abstract:** U.S. constitutional jurisprudence precludes the direct government funding of religious activity. At the same time, the jurisprudence surrounding the U.S. First Amendment Religion Clauses has evolved to support the general inclusion of religious entities in programs through which a government advances some overarching public interest, such as health care or social services, but does not involve the Government in advancing religion per se. Moreover, the most recent U.S. Supreme Court cases hold that it is a violation of the First Amendment to exclude a religious actor, solely because it is religious, from a general public program and funding on equal terms with secular actors. Pandemic relief from the federal government has been made available to houses of worship (churches, mosques, synagogues, etc.) to mitigate the economic impact of government lockdown orders and public health restrictions on assembly, by offsetting loss of revenue and avoiding the suspension or termination of employees. The extension of such relief sits precisely at the crossroads of debated legal questions about whether such assistance is aid to religion—prohibited—or neutral disaster relief on equal terms with other community-serving entities—permitted. This article concludes that the inclusion of houses of worship is constitutional, given the trend and direction of U.S. law, although the matter will continue to be debated as the effects of the pandemic recede.



**Citation:** Chopko, Mark. 2021. The Constitutionality of Providing Public Funds for U.S. Houses of Worship during the Coronavirus. *Laws* 10: 8. <https://doi.org/10.3390/laws10010008>

**Keywords:** anti-establishment; free exercise; CARES Act; Payroll Protection Program; Religious Freedom Restoration Act; “Houses of Worship”

Received: 13 January 2021  
Accepted: 28 January 2021  
Published: 30 January 2021

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## 1. Introduction

The United States has been particularly hard hit by the Coronavirus. At the time of writing, more than 24 million people have been infected and nearly 410,000 have died.<sup>1</sup> Those numbers grow seemingly exponentially each day, such that, by the time this article is published, these numbers will be outstripped by the spreading infection. The government response has been uneven and lacks coordination, as is well documented in the international media.<sup>2</sup> At the beginning of the public health crisis spawned by the pandemic, one-by-one, each of the U.S. states went into some form of lockdown. The economic impact of the coronavirus was especially harsh on small businesses, shops, restaurants, service agencies, and other similar businesses on which communities rest for many services and commodities. Restrictions continue for attendance on indoor gatherings, including religious worship and education, and numerous other activities.

The charitable sector that serves communities has faced double challenges—asked to fill the void and respond to human needs in communities while they watched their sources of income wither.<sup>3</sup> The Nonprofit Times reported:

“96.5% of the survey respondents indicated they were negatively impacted. The top three indicators were: 67.9% report a decline in contributions, due to donors giving less

<sup>1</sup> <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last visited 21 January 2021).

<sup>2</sup> (Durkee 2020).

<sup>3</sup> (The NonProfit Times 2020).

and the inability to reach donors; 63% have experienced travel disruption, including cancellations and the inability to work effectively, including contacting clients, donors and recipients; and, 56.4% report an issue with client relations, leading to the inability to meet expectations of those they serve due to inefficiency or barriers to service, such as cancelled public events or face-to-face operations.”<sup>4</sup>

Religious charities are at least equally impacted. U.S. houses of worship—churches, mosques, synagogues, etc.—are almost exclusively dependent on weekly collections from worshippers. When worshippers cannot attend services, or can only attend remotely, those houses of worship struggle more than most.<sup>5</sup> For their members, houses of worship are their community centers, dispensing the key commodities of hope and resilience, along with prayer and other basic human needs, such as food, shelter, education, and social services. Although there are encouraging signs regarding increases in philanthropy, directed to relieving the human misery caused by the coronavirus,<sup>6</sup> the road for smaller charities, including houses of worship, has not been smooth.

Those charities serving the general public, sponsored by religions, have long been able to participate in public programs of social welfare on the same footing as their secular counterparts.<sup>7</sup> However, during the coronavirus lockdown, similar to many small community-serving charities, houses of worship have been deprived of their sources of donations and volunteer energy. The coronavirus has impacted their staff, volunteers, and donors, while escalating demands for services. When Americans were most challenged and everyone needed to rethink their basic human needs, Americans were locked down from their houses of worship, which, for many, compounded a sense of hopelessness and other impacts of the pandemic. Their houses of worship were deprived of donations and material support, because the places that many regarded as their “other home” were suddenly off limits. Restrictions on the right to worship and on other religious activities in the United States have been the subject of continuing and hotly contested litigation.<sup>8</sup> They have also been subject to academic critique from a variety of perspectives.<sup>9</sup> In an effort both to assist the development of the overall topic and offer views on an important aspect of the COVID responses by government, this essay will focus on a narrower topic: whether the provision of governmental pandemic relief to houses of worship accords with U.S. constitutional law and tradition.

## 2. Overview of Assistance and Specific Issues for Religious Participation

Federal Government assistance to small businesses that have and are suffering the consequences of economic disruption on account of the coronavirus through the inability to generate revenue is intended to offset those consequences by sustaining the ability to retain staff and avoid or defer the impact of lost revenue. Legislative and regulatory initiatives to help these businesses mitigate the economic impacts of the coronavirus specifically including houses of worship. The Small Business Administration (“SBA”), whose mission is to sustain community-centered businesses, was tasked with administration of the program.

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<sup>4</sup> *Id.*

<sup>5</sup> (Boorstein 2020).

<sup>6</sup> (Darmiento 2020).

<sup>7</sup> *Bradfield v. Reynolds*, 175 U.S. 291, 299–300 (1899) (upholding grant for a quarantine building to a religious hospital, on the grounds that the purposes of the hospital were to promote health, not advance religion).

<sup>8</sup> Decided cases are too numerous to count and the number grows each day. There is no way to categorize the cases meaningfully in the course of this paper. Additionally the results divide—some restrictions upheld, some rejected, and some deferred. Compare *Delany v. Baker*, No. 20-11154 (D. Mass. 6 January 2021) (rejecting challenge to restrictions on worship attendance) [*Delaney v Baker* | Standing (Law) | Fourteenth Amendment To The United States Constitution ([scribd.com](https://www.scribd.com)) (last visited 20 January 2021)] with *Monclova Christian Academy v. Toledo-Lucas County Health Dep't.*, No. 20-4300 (6th Cir. 31 December 2020) (striking down restrictions on religious schools) [20a0392p-06.pdf ([uscourts.gov](https://uscourts.gov)) (last visited 20 January 2021)].

<sup>9</sup> For example, a series of papers addressing these restrictions and other challenges can be found here: Law, Religion, and Coronavirus in the United States: A Six-Month Assessment—Canopy Forum (last visited 20 January 2021).

The CARES Act<sup>10</sup>, authorized the PPP (Paycheck Protection Program)<sup>11</sup> loans, which are administered by the SBA under the U.S. Department of Treasury, for entities with less than 500 employees under qualified SBA industry codes. Unlike the Economic Injury Disaster Loans,<sup>12</sup> the PPP loan programs were made available to public nonprofit organizations, specifically including houses of worship, which is unusual for SBA loan programs, since the SBA mandate to support small business and economic development typically excludes nonprofits in general and religious organizations specifically.<sup>13</sup> As discussed below, not only were such loans provided through the SBA program, but SBA waived its affiliation rules, which require consolidating centrally controlled community organizations solely for religious organizations affiliated based on their religious theology or polity.<sup>14</sup>

The PPP loan program provided for low-interest and forgivable loans of up to USD 10 million, designed to subsidize payroll and prevent businesses from laying off workers. Eligible expenses included payroll (to include benefits, retirement contributions, etc.) as well as some basics, such as rent and utilities. If the loan recipient used loan proceeds primarily for payroll (defined as 75% of the loan amount) over a period ranging from 8 to 24 weeks (“covered period”), did not substantially reduce pay, and did not reduce employee headcount over the selected covered period, then it would be forgiven in its entirety.<sup>15</sup> If the house of worship did not meet the 75% payroll usage threshold, the non-payroll eligible part would be converted to a low (1%) interest loan. SBA guidance made clear that compliance with federal requirements including the anti-discrimination rules applied for as long as the federal financial assistance obligation existed, that is, for the duration of the loan (either until forgiveness or repayment).<sup>16</sup>

In December 2020, the Consolidated Appropriations Act<sup>17</sup> provided for a second draw on PPP loans for which houses of worship and other religious organizations are eligible. However, the second draw loans favor smaller-size employers (fewer than 300 employees) and documentation that would evidence that the recipient suffered a 25% reduction in revenue over the same period the prior year.

It should also be noted that houses of worship were eligible for Federal Emergency Management Agency (“FEMA”) disaster assistance. This was not part of the CARES legislation, but the result of legislative and regulatory changes in 2018 to permit FEMA assistance to qualifying nonprofits, including houses of worship.<sup>18</sup> Most FEMA assistance tied to COVID relief was limited to sanitation materials and services, but also could be applied to necessary construction/installation of protective features. Here, the duration of federal financial assistance was less clear, but FEMA funds could only be used to reimburse pre-existing purchases which (given the nature of consumable cleaning/Personal Protective Equipment) appeared to limit the time during which the assistance continued. In the end, the FEMA assistance overlapped with or was subsumed by the PPP loan period and received less attention.

One concern raised by some in the religious charitable community was the potential barrier posed by the SBA’s “consolidation” rules. The SBA focus is “small business,” and as noted SBA has rules that aggregate “small businesses” that are operated or controlled by a larger regional or national organization, essentially treating them as a single large

<sup>10</sup> Coronavirus Economic Stabilization Act, Public L. No. 116–136 §§ 1101–1114, 134 Stat. 281 (27 March 2020) (subsequently amended by Public L. No. 116–142, 134 Stat. 641 (June 5, 2020) and related appropriations laws passed on 27 April and on 27 December of 2020) (hereinafter *CARES Act*).

<sup>11</sup> *Id.* at § 1102. Paycheck Protection Program ([sba.gov](https://www.sba.gov)).

<sup>12</sup> *Id.* at § 1110.

<sup>13</sup> 13 C.F.R. § 120.110 (a), (k) (2020) (excluding non-profit businesses and those “principally engaged in teaching, instructing, counseling, or indoctrinating religion or religious beliefs”).

<sup>14</sup> 13 C.F.R. pt. 121.103(b)(10) (2020). FAQ Regarding Participation of Faith-Based Organizations in PPP and EIDL ([sba.gov](https://www.sba.gov)).

<sup>15</sup> CARES Act at §1106.

<sup>16</sup> Small Business Administration, Faith-Based Organization FAQ, Question #5 (3 April 2020).

<sup>17</sup> Consolidated Appropriations Act, 2021, Public L. No. 116–260, § 311 (27 December 2020) (Government Publishing Office publication pending).

<sup>18</sup> 42 U.S.C. § 5322 (2018); 44 C.F.R. § 434(a)(2) (2018).

enterprise, even though it is operating at the community level through smaller entities.<sup>19</sup> Religious denominations often seem to function through common “control” provided by the governing religious law or policy, a polity that, in fact, unites these separate actors into a communion of faith. Applying the Religious Freedom Restoration Act,<sup>20</sup> the SBA decided that it would waive the consolidation rules where “common control” is required by religious precept and where, in fact, the individual religious actors at the community level enjoy legitimate autonomy even if they are not recognized and organized corporately under the civil law.<sup>21</sup> Houses of worship have received considerable assistance under the program.<sup>22</sup>

To date, no legal challenges have contested the constitutionality of these assistance mechanisms,<sup>23</sup> although the subject has been raised in academic and public commentary.<sup>24</sup> For some, as long as the assistance to houses of worship is provided on the same terms and conditions, as it is to secular “small businesses,” there is no constitutional issue. For others, the exception to the consolidation rules by the SBA raised concerns, and for still others, there are concerns that, notwithstanding the exceptionalism of the current pandemic, the U.S. has taken another step towards the government funding of religious organizations.<sup>25</sup> For houses of worship, there are concerns that being treated similar to secular domestic charities risks losing other forms of religious exceptionalism, as it concerns regulation and the ability to adhere to religious norms. For example, the acceptance of public funds triggers the application of federal anti-discrimination rules at a time when some religious organizations protest their applicability generally if religious norms conflict with secular legal norms.<sup>26</sup> These issues are all complex and no attempt will be made here to chase every facet of the subject. Rather, the purpose here is narrower; namely, to illustrate the competing values at stake and how, in times of crisis, we sometimes bend.

### 3. Jurisprudential Analysis

For background purposes, the U.S. Constitution contains a First Amendment provision barring governmental actions “respecting an Establishment of Religion” and “prohibiting the Free Exercise” of Religion.<sup>27</sup> For shorthand, they will be referred to as the “anti-establishment” and “free exercise” provisions or clauses. Government funding directed towards religious activities or entities normally is tested by the anti-establishment provision. However, governmental refusal to allow participation in religious activities and entities on the same terms as secular agencies has recently been ruled a violation of the free exercise clause.<sup>28</sup> The focus here is about funding for houses of worship given the unique way in which they have been treated in U.S. constitutional law—generally so exceptional that they cannot be assisted or regulated with regard to their religious affairs.

Federal funding in the pandemic to houses of worship raises concerns in at least these ways. First, there is a form of direct funding for religious agencies to keep them operating through forgivable loans. Second, to facilitate the participation of religious

<sup>19</sup> 13 C.F.R. pt. 121.103(b)(10) (2020).

<sup>20</sup> 42 U.S.C. §§ 2000bb-2000bb-4 (2020).

<sup>21</sup> 85 Fed. Reg. 20817-01 (15 April 2020). FAQ Regarding Participation of Faith-Based Organizations in PPP and EIDL ([sba.gov](https://www.sba.gov)).

<sup>22</sup> <https://www.npr.org/sections/coronavirus-live-updates/2020/08/03/898753550/religious-groups-received-6-10-billion-in-covid-19-relief-funds-hope-for-more> (last visited 10 January 2021).

<sup>23</sup> On January 20, 2021, the presidential administration changed in the United States. Whether the new Biden Administration will continue the scope of religious accommodations exhibited by the Trump Administration remains to be seen as of this date. In anticipation of the change, litigation has been filed to challenge at least one of the Trump Administration’s actions for religious organizations. Religion Clause: Suit Challenges Trump Administration’s Loosening of Limits On Faith-Based Federally Funded Programs (last visited 21 January 2021).

<sup>24</sup> (Seidel 2020).

<sup>25</sup> Nelson Tebbe writing in the Washington Post—(Tebbe et al. 2020).

<sup>26</sup> Small Business Administration, Faith-Based Organization FAQ, Question #5 (3 April 2020).

<sup>27</sup> The First Amendment to the U.S. Constitution begins—“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”

<sup>28</sup> *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017).

organizations, the government made special exception to the consolidation rules under the federal SBA. Each raises a number of First Amendment problems. On each issue, the jurisprudence continues to evolve and the result, in a specific challenge to such funding, will depend on how matters are characterized: can a house of worship for these purposes be properly characterized as a community small business and the pastor and ministry staff as “employees” for the purposes of avoiding the constitutional barrier on government assistance to religion? Thus, the extension of funding implicates issues on which courts have been divided for many years. Given the extraordinary circumstances of the current pandemic, it is likely that if a case were filed, the provision of assistance would be upheld as constitutional. There also would not be exceptions made to the conditions, such as the application of anti-discrimination rules. Usually the maxim is “With the King’s coin, comes with the King.”<sup>29</sup> There have been notable exceptions, however, and the one drawing the most attention from a constitutional perspective is the waiving of SBA consolidation rules to facilitate participation. Whether that is seen as a “preference” or an “accommodation” will be outcome determinative, should the matter be challenged. In the sections to follow, these issues are analyzed and organized under a set of black-letter rules.

A. It is constitutional to allow religious citizens to participate in public programs in a neutral and non-discriminatory fashion.

From the time of *Everson v. Board of Education*,<sup>30</sup> it is settled law that citizens are not precluded from participating in general public welfare programs, even if, as a result, the citizen privately uses the benefit to engage in a religious activity. In *Everson*, the program provided reimbursement for transportation expenses, the cost of bus fare for families that sent their children to public or religious schools in a New Jersey township. The township board reasoned that the provision of transportation assistance allowed parents to make safe transportation choices for their children to and from school.<sup>31</sup> It was not intended as assistance to religion, but instead assistance to families. The Supreme Court in 1947 agreed, although in a sharply divided 5-4 opinion that framed the issue for discussion even today. After acknowledging a general barrier to governmental aid to religion, the Court ruled that the program was not about religion, but about public safety.<sup>32</sup> Citizens could not be deprived of public programs designed to advance a state interest because of religion. If the transportation reimbursement were struck down, it might also signal general hostility towards religion and possibly open the door to undermining the provision of other public services related to public protection to religious entities in the community.<sup>33</sup>

Decades later in *Mueller v. Allen*,<sup>34</sup> involving the provision of tax credits for educational expenses to all parents, the Court found that the program was neutral, non-discriminatory, available to all parents without regard to their religion, and did not encourage religious choices. The anti-establishment clause did not bar “the sort of attenuated financial benefit, ultimately controlled by private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case.”<sup>35</sup> The Court expanded upon that reasoning twenty years later in *Zelman v. Simmons-Harris*, upholding the inclusion of religious schools in a program that offered parents general educational vouchers towards educational expenses.<sup>36</sup> The program was neutrally available to all eligible parents and supported public, charter, magnet and religious schools serving the City of Cleveland, Ohio. Again, the Court emphasized the fact that the program, which

<sup>29</sup> The author notes he first heard this maxim repeated by the late Rev. Dean M. Kelley, director of religious liberty issues for the U.S. National Council of Churches and widely regarded as an expert in church-state law.

<sup>30</sup> 330 U.S. 1 (1947).

<sup>31</sup> *Id.* at 7.

<sup>32</sup> *Id.* at 17–18.

<sup>33</sup> *Id.*

<sup>34</sup> 463 U.S. 388 (1983).

<sup>35</sup> *Id.* at 400.

<sup>36</sup> 536 U.S. 639 (2002).

is neutral and operated in a non-discriminatory fashion, did not define its beneficiaries with respect to religion.<sup>37</sup> Proper design, in effect, shielded the program from a finding of unconstitutionality, even if most of the participating parents made choices of religious schools for their children.<sup>38</sup>

Not only is it clear that the accommodation of private religious choices in a public benefit program is not forbidden under the anti-establishment clause, but recent jurisprudence from the Supreme Court has indicated that it may be unconstitutional under the free exercise clause to *exclude* religious actors based on their status as religious people or programs.<sup>39</sup> More will be developed on this point below, but the opinions raise important points for the legal issue under review here, whether pandemic relief is a form of general public assistance for the economic disruption or has the primary effect of advancing religion.

B. Although religious organizations cannot be excluded solely because of their religious character, the general rule still bars the extension of funds in support of religious exercises.

Nearly a century ago, the Supreme Court upheld the rights of parents to choose religious schools for the education of their children.<sup>40</sup> In the course of this litigation, as well as the public policy debates that followed, it was generally recognized that religious schools both satisfy a state's legitimate interest in the education of children, and advance the parents' choice to provide, through those same schools, for the faith formation of their children.<sup>41</sup> The dual missions of religious schools, therefore, has presented a conundrum for courts and policy makers. Although the state has an interest in ensuring the adequacy of general education, the state is constitutionally barred from promoting or financing such schools because of their sponsorship by houses of worship or by the fear that a state may become too entangled in their oversight, thus implicating religious authority.<sup>42</sup> The Supreme Court recognized that a state can advance its interest in seeing that the secular education meets quality standards through such "neutral" and "secular" programs as the loan of textbooks,<sup>43</sup> which is seen as providing assistance to students, but it had no role in assisting<sup>44</sup> or regulating<sup>45</sup> the religious aspects of the school, including its teaching personnel. Teachers were viewed as essential to the success of the faith formation role of religious schools<sup>46</sup> and public assistance to assure teaching staff were properly compensated (and thus up to the task of assuring an adequate secular education) was unconstitutional.<sup>47</sup> Likewise, the converse is true: the Court has barred the states from applying even neutral non-discrimination rules to disciplined and discharged teaching staff of parochial schools because of their important ministry role.<sup>48</sup>

Between 1971 and 1985,<sup>49</sup> only one public assistance program for religious schools was ruled constitutional by the Supreme Court, and that involved the reimbursement of religious schools for the expense of administering and correcting state-required examinations

<sup>37</sup> *Id.* at 653–54.

<sup>38</sup> In fact, the Cleveland voucher program aimed at equivalence between parents who chose to maintain their children in public schools (but with tutor assistance) and parents that opted for a religious school through a voucher. The voucher did not cover the full cost of tuition. Participating schools had to agree to a list of conditions, including the application of non-discrimination laws. *See id.* at 663–64.

<sup>39</sup> *Trinity*, 137 S. Ct. at 2024.

<sup>40</sup> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

<sup>41</sup> *Id.* at 534. *See Board of Education v. Allen*, 392 U.S. 236, 247–48 (1968); *Everson*, 330 U.S. at 18.

<sup>42</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 620–22 (1971) and its progeny.

<sup>43</sup> *Allen*, 392 U.S. at 247–48.

<sup>44</sup> *Lemon*, 403 U.S. at 613.

<sup>45</sup> *National Labor Relations Board v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979).

<sup>46</sup> *Lemon*, 403 U.S. at 618.

<sup>47</sup> *Id.*

<sup>48</sup> *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2069 (2020).

<sup>49</sup> The line begins with *Lemon* and ends with *Aguilar v. Felton*, 473 U.S. 402 (1985).

to the student body.<sup>50</sup> Frustrated with attempts to tease out the religious from the secular in religious schools, the Court adopted the shorthand rubric that such religious primary and secondary schools were “pervasively sectarian,” and therefore any direct assistance that might flow to them was presumptively unconstitutional.<sup>51</sup>

Although religious schools are easily seen as extensions of the sponsoring house of worship, the same concerns have not surrounded the participation of religious agencies in public welfare programs. There was a notable exception, which acknowledged the same doctrinal tension. In *Bowen v. Kendrick*,<sup>52</sup> although the Supreme Court ultimately upheld the involvement of religious social services agencies in a public program promoting abstinence among teenagers, the Court recognized that there may be some sectarian programs for which it may not be possible to be sure that public funds would not be used to advance a particular religious point of view.<sup>53</sup> In a separate opinion, Justices Kennedy and Scalia, concurring in the result, said that what mattered for an anti-establishment analysis was not the religious character of the institution, but the actual use of the funds.<sup>54</sup> That distinction proves critical to understand the reasoning of later decisions by the Court.

In 1997, in *Agostini v. Felton*,<sup>55</sup> the Court reversed its 1985 decision in *Aguilar*<sup>56</sup> and upheld the constitutionality of a federal remedial education program, which provided for extra instruction in mathematics and language arts, provided by public employees on the premises of their schools (without regard to whether they were religious or secular). Students were eligible for such assistance if they were educationally behind their classmates and lived in an area that was less wealthy. The aid was characterized as the assistance to students, and not assistance to schools.<sup>57</sup> Although the Court had enjoined the program from the premises of religious schools in 1985 on the grounds that the program supervisors could not be certain that the public employees in fact did not advance religion in the remedial education program, the Court reversed course twelve years later. In the 1997 decision, the Court noted that its anti-establishment doctrine had evolved and that its prior cases relied on a number of presumptions about the motivations of government and the character of schools and teachers that were no longer part of its jurisprudence.<sup>58</sup>

In 2000, in *Mitchell v. Helms*, the Court upheld a parallel program which allowed for computers and other teaching aids to be loaned to schools serving those same students.<sup>59</sup> That program was often seen as providing material assistance to schools, but it was held to be fulfilling a larger public purpose of advancing the quality of education by assuring that needy students were properly educated. The use of the equipment was subject to rigorous conditions that barred its use to advance religion through any form of religious instruction or proselytization.<sup>60</sup> The deciding vote for the decision was cast by Justice Sandra Day O'Connor who, in concurring separately, cited the above-referenced opinion of Justices Kennedy and Scalia in *Kendrick*,<sup>61</sup> that what mattered for the constitutional question was not the character the institution, but rather the use of the assistance.

In some ways, this distinction between religious character and religious use was reflected in the disposition of *Locke v. Davey*, in which a student was denied state assistance

<sup>50</sup> *Committee for Public Education v. Regan*, 444 U.S. 646, 657 (1979).

<sup>51</sup> See *Wolman v. Walter*, 433 U.S. 229, 247, 250 (1977) (citations omitted).

<sup>52</sup> 487 U.S. 589 (1988).

<sup>53</sup> *Id.* at 607, 609, 616, 620.

<sup>54</sup> *Id.* at 624–25 (Kennedy & Scalia, JJ., concurring).

<sup>55</sup> 521 U.S. 203, 234–35 (1997).

<sup>56</sup> 473 U.S. 402.

<sup>57</sup> 521 U.S. at 228.

<sup>58</sup> *Id.* at 224.

<sup>59</sup> *Mitchell v. Helms*, 530 U.S. 793, 835 (2000) (plurality).

<sup>60</sup> *Id.* at 829–30.

<sup>61</sup> *Id.* at 841. She did not join that concurring opinion in *Kendrick* and in *Mitchell* did not cite to her own concurrence, just Justice Kennedy's, which she did not join at the time of that decision.

to attend a school to prepare him to be a minister.<sup>62</sup> Washington State had a scholarship program that offered educational assistance to all students who qualified academically and agreed to attend college in Washington. The program paid any and all educational assistance without limitation, except for theology students. It was undisputed that Davey could have studied religion as philosophy, art, history or anything else and received the scholarship. That is, except to study religion as “truth.” Washington had a “Blaine Amendment” in its state constitution<sup>63</sup> that barred any assistance to religion, direct or indirect. In rejecting a free exercise challenge to the Blaine Amendment, the Court made clear that the First Amendment was historically motivated to negate state assistance to the formation and training of clergy provided for the Established Church.<sup>64</sup> In some measure, the line drawn in this case again reflects the Kennedy–Scalia opinion in *Kendrick*, even though it was not cited. In this case, the ultimate use of the state scholarship to prepare for the ministry was material to the determination.

The two religion clauses are not co-extensive. Free Exercise does not begin where anti-Establishment ends. The Court has said there is “room for play in the joints” between the clauses where a State might extend assistance or lift a burden even though not required.<sup>65</sup> Based on that space to regulate and following *Locke v. Davey*, it seemed settled that a state had the discretion to choose to extend a benefit or an exemption to a class of religious actors even though such extension or exemption was not constitutionally required. The 2017 opinion for the Court in *Trinity Lutheran Church v. Comer* raises substantial doubt whether and to what extent the Court would sustain that distinction but rather might, in the right circumstances, mandate the inclusion of religious actors in state programs or even reverse its ban on the direct funding of religious schools dating nearly a half century to *Lemon*.

In *Trinity Lutheran*, a Missouri church which operated a preschool was denied a resurfacing grant to refurbish its playground, specifically because of the state’s Blaine Amendment.<sup>66</sup> The majority made plain that it was deciding the case based on the specific facts before it and specifically upheld the rule in *Locke v. Davey*.<sup>67</sup> However, the Court also found that an exclusion of religious actors, solely because they are religious, violated the Free Exercise Clause.<sup>68</sup> In July 2020, *Locke* was again reaffirmed in *Espinoza v. Montana*.<sup>69</sup> In *Espinoza*, the Montana legislature permitted tax deductions for donations to scholarships for children attending schools of their choice. Recognizing the limits of its Blaine Amendment, the Montana revenue department promulgated a rule, excluding contributions to scholarships to attend religious schools. The Montana Supreme Court noted the restriction of the Blaine Amendment and that excluding only religious uses was problematic under *Trinity Lutheran*; seeing no way forward, it struck down the entire statute.<sup>70</sup> The U.S. Supreme Court reversed and, in the process, expressed substantial doubt about the constitutionality of Blaine Amendments that proactively deny participation to religious actors in public programs.<sup>71</sup> But it further affirmed and distinguished *Locke*, noting the difference between religious “character” and religious “uses.”<sup>72</sup> What is prohibited is funding for “religious use.” The religious character of the actor is no longer presumptively disqualifying.

What does this mean for assistance programs under pandemic relief? It means that houses of worship could not be excluded per se from participation in relief programs

<sup>62</sup> 540 U.S. 712 (2004).

<sup>63</sup> Wash. Const. art. IX, § 4.

<sup>64</sup> *Locke*, 540 U.S. at 722.

<sup>65</sup> *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970).

<sup>66</sup> 137 S. Ct. at 2018.

<sup>67</sup> *Id.* at 2023.

<sup>68</sup> *Id.* at 2024 n. 4.

<sup>69</sup> 140 S. Ct. 2246 (2020).

<sup>70</sup> *Id.* at 2253 (citing *Espinoza v. Montana Dep’t of Revenue*, 435 P.3d 603, 613–14 (Mont. 2018)).

<sup>71</sup> *Id.* at 2262–63.

<sup>72</sup> *Id.* at 2257–59.

simply because they are religious. Whether some litigant, somewhere, might be able to successfully argue that the principal purpose of houses of worship is religious and that clergy and ministry staff are not like other employees has not been litigated and may never be. It is also not likely to be a narrow question given the historical way in which houses of worship have functioned in communities. The business of religion extends beyond active worship and evangelization into community assistance, counseling, education, food pantries, homeless shelters and clinics. To attempt to draw and defend an exclusion of uniquely religious activities from demonstrably public assistance activities would be constitutionally daunting, as the Court in the older “aid-to-religion” cases recognized.<sup>73</sup> The solution is unlikely to be a blanket exclusion. On the contrary, the Supreme Court likely might hold that the participation by houses of worship is not only permitted but may, in light of *Trinity* and *Espinoza*, be constitutionally required.<sup>74</sup> Certainly, the successful appeal of the Diocese of Brooklyn and Agudath Israel to block the New York State restrictions that seemed to target religious activity more stringently than commercial activity bears out the application of this line of cases in the specific context of the pandemic.<sup>75</sup>

C. Any federal program that might limit the participation of religious organizations in pandemic relief could be subject to strict scrutiny under the Religious Freedom Restoration Act.

In 1990, the U.S. Supreme Court rewrote its free exercise jurisprudence to provide that burdens on religious persons and agencies that arose under a neutral and generally applicable law did not have to be subjected to strict scrutiny analysis.<sup>76</sup> Rather, the religious adherent would have to show why the burden on her religious practice is unreasonable under the circumstances. The only continuing justifications for strict scrutiny under the federal free exercise analysis would be if there were a discriminatory intent or action (thus rendering the law neither neutral nor generally applicable),<sup>77</sup> the infringement included another separate constitutional right which would create a hybrid situation, or the matter invaded the legitimate autonomy of religious institutions.<sup>78</sup> Three years later, the nearly unanimous U.S. Congress passed the Religious Freedom Restoration Act (“RFRA”)<sup>79</sup> seeking to overturn that decision across the board, and require strict scrutiny analysis. The Supreme Court ruled that RFRA was unconstitutional, as applied to the States in 1997,<sup>80</sup> but the RFRA continues to be applicable to the federal government with important implications for actual cases, including this one.<sup>81</sup>

If RFRA applies, once a religious claimant shows that a law or government action creates a substantial burden to him, the government which must prove that the restriction

<sup>73</sup> It would also excessively entangle a court in parsing the religious from the secular. How is a court to say that a homeless shelter is or is not a religious activity, not unlike worship? As a maxim attributed to Francis of Assisi states: “preach the Gospel always, use words if necessary.”

<sup>74</sup> Over the past year, the Supreme Court has issued a number of orders, some denying relief and some granting relief from governmental COVID-19 restrictions. In July, 2020, three Justices dissented from the denial of an injunction that the dissenters viewed as more restrictive on the rights of churches than casinos. *Calvary Christian Dayton Valley v. Sisolak*, 140 S.Ct. 2603 (2020). In dissent from the injunction, Justice Kavanaugh outlined four different ways in which to categorize restrictions on religion, demonstrating that the Court may give additional guidance in light of *Espinoza* and the series of cases related to COVID-19: “(1) laws that expressly discriminate against religious organizations; (2) laws that expressly favor religious organizations; (3) laws that do not classify on the basis of religion but apply to secular and religious organizations alike; (4) laws that expressly treat religious organizations equally to some secular organizations but better or worse than other secular organizations.” 140 S.Ct. at 2610 (Kavanaugh, J., dissenting). In this case, the Nevada restriction fell into the fourth category, requiring additional analysis to determine its validity.

<sup>75</sup> *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (NY restrictions far more restrictive than those found in other cases to come before the Court). The addition of Justice Barrett in October 2020 strengthened the majority view that the restrictions violated the Free Exercise rights of the religious challengers.

<sup>76</sup> *Employment Division v. Smith*, 494 U.S. 872, 885 (1990).

<sup>77</sup> *Church of Lukumi Babulu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

<sup>78</sup> *Smith*, 494 U.S. at 877, 881.

<sup>79</sup> 42 U.S.C. §§2000bb, et seq.

<sup>80</sup> *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

<sup>81</sup> In November 2020, the Court heard argument in *Fulton v. City of Philadelphia*, in which a Catholic adoption program was excluded from the city’s foster parent program because it did not place children with same sex couples. <https://www.scotusblog.com/case-files/cases/fulton-v-city-of-philadelphia-pennsylvania/> (last visited 10 January 2021). Some have argued that the pandemic illustrates that a *Smith*-sanctioned neutral rule lacks the nuance to account for the ways in which religious observance is distinctive and worthy of special protection (See 2020).

is the narrowest way to achieve a truly compelling interest.<sup>82</sup> The statutory frame raised the hurdle for a state to survive a strict scrutiny analysis in an important way. Under RFRA, the compelling interest analysis has to be specific to the act and/or actor in question. It cannot be some general compelling interest even in an overarching issue, such as the criminalization of certain drugs.<sup>83</sup> RFRA demands more. To prevail, the state must justify the restriction on the specific activity burdened, not a general interest in avoiding an Establishment Clause issue. That provision has been a game-changer for religious persons and organizations seeking relief from the federal government. As Justice Scalia stated for the majority in *Smith*, a truly strict scrutiny analysis would almost always be fatal to challenged state action.<sup>84</sup>

Applying RFRA, the Supreme Court has held that private corporations cannot be forced to violate the consciences of their owners in providing employee benefits.<sup>85</sup> That these were private, for-profit agencies did not disqualify them from the protection of the RFRA. The federal government used concerns about violating RFRA as part of its decision to exempt religious and other entities from certain provisions of the Affordable Care Act. The current version of the rules included more agencies than religiously affiliated actors. In July 2020, the Supreme Court upheld that broad religious and moral exemption to providing contraceptive services under federal health care legislation. In the process, the Court indicated that avoiding a violation of RFRA was a legitimate concern on which the federal government could act.<sup>86</sup>

In the implementation of the PPP loan program, the SBA invoked RFRA specifically to avoid burdening religious rights.<sup>87</sup> It expanded the eligibility of the PPP and waived its affiliation rules for local religious entities that were subject to a hierarchical control and even those that lacked a separate and unique civil structure when also the result of religiously motivated choices.<sup>88</sup> As noted above, the SBA rules are designed to serve small for-profit businesses in communities. To prevent larger regional or national enterprises from accessing SBA funds and programs through numerous local operating entities, SBA affiliation rules aggregate local entities subject to regional or national control to be part of a common enterprise.<sup>89</sup> The SBA, responding to objections from religious organizations as the pandemic relief was being designed, decided that applying those rules to entities whose common control or lack of structure at the community level was a result of religious polity or theology (for example, Catholic parishes being subject to a Bishop) could burden religious beliefs and trigger a violation of RFRA.<sup>90</sup> In so doing, SBA facilitated the participation of houses of worship in pandemic relief programs.

Whether that exemption is an unconstitutional religious preference or an abuse of RFRA might be subject to debate among academics and public policy analysts. But no litigation has been filed, and none is expected. Given the way that the Supreme Court analyzed the RFRA issue in its most recent opinions, it is reasonable to assume that the Court would similarly affirm the SBA analysis in validating the program.<sup>91</sup> To involve the SBA or any government agency in deciding among the variety of religious polities would create confusion and arguably result in line-drawing among religious actors.

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<sup>82</sup> 42 U.S.C.A. § 2000bb-1.

<sup>83</sup> *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–32 (2006).

<sup>84</sup> 494 U.S. at 888.

<sup>85</sup> *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014).

<sup>86</sup> *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383–84, 2386 (2020).

<sup>87</sup> 85 Fed. Reg. 20817-01 (15 April 2020).

<sup>88</sup> *Id.* at 20819. In the most recent SBA guidance, the same accommodation is provided. *See* Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act ([sba.gov](https://www.sba.gov)) (last visited 10 January 2021). Rule Text at pp. 29–30, and 77.

<sup>89</sup> 13 C.F.R. pt. 121.103(b)(10) (2020).

<sup>90</sup> 85 Fed. Reg. at 20820.

<sup>91</sup> *See Little Sisters of the Poor*, 140 S. Ct. at 2383–84.

#### 4. Conclusions

The pandemic has disrupted the normal operation of institutions, great and small, all around the world. Attempts to provide relief for the economic consequences of the pandemic have been creative and designed around bridging these organizations to a future time when their work might again attract financial support. Including religious houses of worship in U.S. relief mechanisms can be squared with the requirements of the First Amendment. The most recent jurisprudence would seem to require their inclusion on equal terms with their secular counterparts to avoid a free exercise issue.<sup>92</sup> Because the discussion is about federal programs, their inclusion in the relief program would also be seen as required to avoid a violation of RFRA.<sup>93</sup>

Indeed, a premise of the lawsuit filed by the Roman Catholic Diocese of Brooklyn and Agudath Israel against the New York governor's redlining of certain districts to restrict religious worship is that religious institutions were being treated worse than commercial actors, such as grocery stores and shops.<sup>94</sup> Should they now be regulated in the same way? Treating local houses of worship like any other charity without regard to their mission and their pastor and ministers as an executive director and staff could have wider implications for the regulation of these institutions in the future. It seems doubtful, for example, that a house of worship would waive its constitutional right to resist the application of the anti-discrimination rules by a terminated pastor. We are not at the end of the pandemic as these articles are written and the full consequences of U.S. governmental relief programs have not been measured against the requirements of the Constitution. However, these are hard times, and those times require that the body politic find solutions that are not only workable, but constitutional. Weighing the facts and circumstances, the provision of pandemic assistance to houses of worship accords with the U.S. First Amendment Religion Clauses.

**Funding:** This research received no funding.

**Institutional Review Board Statement:** Not Applicable.

**Informed Consent Statement:** Not applicable.

**Data Availability Statement:** Not Applicable.

**Acknowledgments:** The author thanks his colleagues Jennifer Gniady and Bridget Giroud for their review and comments on earlier versions of this paper.

**Conflicts of Interest:** The author has no conflict of interest.

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<sup>92</sup> *Espinoza*, 140 S. Ct. at 2261.

<sup>93</sup> See *Little Sisters of the Poor*, 140 S. Ct. at 2383–84.

<sup>94</sup> See *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 66. See also *Calvary Chapel*, *supra* n.74.

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