California’s quarantine orders need not exempt churches

Overview

Some churches have resisted California’s quarantine orders, even suing the state for exemptions. These churches argue that the religious liberty guarantees in the federal and state constitutions require California to accommodate them by allowing in-person religious services during the COVID-19 pandemic. That argument lacks merit. The state can limit otherwise sacrosanct constitutional rights when necessary to defend public health. In a pandemic, the federal constitution does not require the government to treat churches differently from other places where people might gather and spread contagion. The California constitution is even more restrictive, and generally prohibits the state from preferring churches over secular organizations. Religious exemptions to the statewide quarantine orders are required by neither the federal nor California constitutions.

Analysis

For this analysis, we use a hypothetical religious organization: the Church of Christ the Beekeeper, known as “Beezus” by its adherents. Beezus holds that bees are sacred and worshippers must conduct their services in person at a church. We assume, as courts must, that attending group religious services in person at a church is a key tenet of the Beezian faith.[1]

California has inherent police powers for emergency orders to combat a public health crisis.

The state’s police power pierces the shield of religious freedom because religious exceptions from the statewide quarantine order would undermine California’s pandemic response. The state’s response to an emergency can temporarily trump individual rights, and California’s police power authorizes the governor’s emergency stay-at-home order to fight COVID-19, which includes a restriction on mass gatherings.

The state of California has broad police powers under the Tenth Amendment to combat an epidemic. The police power enables states to enact laws that "protect the health, morals, and safety of their people,"[2] and public health measures to combat an epidemic are well-established, reasonable exercises of the police power.[3] That power justifies the COVID-19 stay-at-home order, because it is settled law that "quarantine laws [and] health laws of every description" are valid police power measures.[4] Even strict and severe state acts to "protect the public health and public safety" are lawful.[5] For example, courts have repeatedly upheld state disease abatement measures as "reasonable regulations" meant to "protect the public health and public safety."[6] And California courts have upheld disease abatement police power measures against claims that they violate constitutional rights.[7] The state is not required to prioritize individual rights at the people's expense.

In responding to a pandemic emergency, the state's police power extends to any aspect of society that affects public health, such as public gatherings at sporting events and places of worship. So long as the state's restrictions apply generally to the public and not just to churches, those restrictions are a valid exercise of state police power. Federal courts have recently struck down challenges by religious organizations to similar state quarantine orders. For example, on May 5 a federal judge rejected exactly the constitutional arguments Beezus would make. The court agreed with California's position that quarantine orders are necessary exercises of emergency police powers.[8] Because 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 bars exempting churches from quarantine orders

The state constitution's religion clauses do not help Beezus. The religion clauses in California's constitution require the strictest possible government restraint from any act that appears to favor religion — such as by exempting churches from quarantine orders. California constitution Article I, section 4 provides: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed." That provision requires California to maintain as neutral a stance as possible, accommodating religion only as required by federal law, and otherwise permitting

only generally available incidental benefits to accrue to religion.[9] The California Supreme Court has applied the no-preference clause to bar apparent favoritism toward religion. For example, in *Fox v. Los Angeles*, the court held that the illumination of a cross on the Los Angeles City Hall building showed an impermissible preference to Christianity, and ruled that preference "is forbidden even when there is no discrimination."[10] And in *Sands v. Morongo Unified Sch. Dist*. a plurality of the state high court found that government sponsorship of religious invocations at public school ceremonies "appears to take positions on religious questions," which violates the no preference clause.[11]

In the same way that illuminating a cross on City Hall promotes religion, so does exempting churches from quarantine orders. Both say to the public that the government favors religion. Exempting a church from general health laws is even more shocking than allowing a commencement prayer, because the exemption favors religious observance over the public good — to the detriment of everyone's health. Because the California religion clauses require stricter neutrality between believers and atheists, and prevent more than incidental benefits from accruing to religious organizations, the state constitution does not require exempting Beezus and other religious organizations from quarantine orders.

The federal constitution permits but does not require religious accommodations

Beezus claims that its free exercise rights under the federal constitution require exemption from the quarantine orders. Not so. Government favoritism towards religion is barred by the Establishment Clause.[12]

The government may facilitate religious practice without violating the Establishment Clause only when the government acts with the purpose of alleviating "exceptional government-created burdens on private religious exercise," such as in the military or in prisons.[13] Sailors on a submarine who require a priest to worship cannot simply surface to attend services, so the military has chaplains.[14] And prisons may employ chaplains, without violating the Establishment Clause, only because the Free Exercise Clause requires them to accommodate the burden that imprisonment places on inmates' rights to free exercise of their religion.[15] Incarceration

prevents religious prisoners from practicing their faith, so the First Amendment requires the government to intervene further and ensure that prisoners can worship.[16] These accommodations are permissible even if some advancement of religion results.[17]

Special consideration for religion is justified in those limited contexts because the prisoners and submariners would otherwise have no other worship opportunities — prisons and submerged vessels don't offer Zoom services. And unlike the general public (even under quarantine orders) prisoners and members of the military lack control over their activities throughout the day, which means that they may have little or no opportunity to engage in any religious practice without government intervention. Outside of these contexts, special accommodations for religion raises Establishment Clause concerns: if the state exempted churches from the quarantine order, then secular organizations could challenge that exemption as an Establishment Clause violation. Why, for example, is in-person contact more important for the religious adherent than for the non-religious sports player, thespian, or kindergartner? Because it is not, the federal constitution does not require religious exemptions from neutral laws of general application.

Quarantine orders and other neutral laws of general application are valid under the federal constitution even if they incidentally burden free exercise. In *Employment Division v. Smith*, the U.S. Supreme Court held that the right of free exercise "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability."[18] Under the First Amendment, "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest."[19] At the same time, the Court has emphasized that the Free Exercise Clause "guard[s] against the government's imposition of special disabilities on the basis of religious views or religious status."[20] *Smith* remains the standard for most state laws, and it applies here.[21]

The quarantine orders are valid as neutral government acts that apply to everyone, regardless of their religious beliefs. The stay-at-home order neither imposes any disability specific to churches, nor is there any evidence of masked governmental hostility to religion.[22] 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 Beezus specifically. A pandemic quarantine is not comparable to restrictions imposed by prisons or the military. Providing prison or military chaplains presents no risk to the rest of humanity, but plagues go everywhere, and exempting church services from a pandemic quarantine means that contagion will spread. The federal constitution should not be interpreted to require California to open a window and let contagion in.

Conclusion

Individual liberties are not absolutes, and they must in emergencies bow to the collective good. Ordinarily the Beezians have an undisputed right to practice their faith by attending church. But in a pandemic, when the government orders a quarantine to protect public health, that right does not require the state to allow the faithful to gather and spread contagion among each other, and then to the public. During the 1918 pandemic, a Red Cross officer in San Francisco wryly observed: "I wanted to be independent. I did not realize that the cost of such independence was the lives of others."[23] Now is a time to value the people and protect California, not for accommodating individuals.

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[1] The U.S. Supreme Court has repeatedly warned that courts cannot determine the plausibility of a religious claim. See, e.g., *Burwell v. Hobby Lobby Stores, Inc*. (2014) 573 U.S. 682, 724.

[2] See *Tenn. Wine & Spirits Retailers Assn. v. Thomas* (2019) 139 S. Ct. 2449, 2463–64.

[3] *Gibbons v. Ogden* (1824) 6 L.Ed. 23, 78 (it is well-established that "quarantine laws, health laws of every description" are valid exercises of inherent state power to protect public health); *Jacobson v. Massachusetts* (1905) 197 U.S. 11, 27 (upholding compulsory vaccination law enacted to halt the spread of smallpox as within the

police power); *Stanislaus County Dairymen's Protective Assn. v. Stanislaus County* (1937) 8 Cal.2d 378, 394 (emergency police power acts to destroy animals infected with virulent diseases are valid, even if they involve summary property destruction without compensation); *Graham v. Kingwell* (1933) 218 Cal. 658, 660 (such acts tend to promote the public welfare, and therefore constitute a proper police power exercise); *Patrick v. Riley* (1930) 209 Cal. 350, 354–355 ("even drastic measures for the elimination of disease, whether in human beings, crops, or cattle, in a general way are not affected by constitutional provisions, either of the state or national government.").

[4] *Gibbons v. Ogden* (1824) 6 L.Ed. 23, 78; *Farmers Ins. Exchange v. California* (1985) 175 Cal.App.3d 494, 501 (for a government action to be upheld as a valid exercise of police power, it need only be "reasonably necessary to protect the order, safety, health, morals, and general welfare of society.").

[5] *Jacobson v. Massachusetts* (1905) 197 U.S. 11, 25.

[6] See, e.g., *Jacobson v. Massachusetts* (1905) 197 U.S. 11, 25.

[7] See., e.g., *Stanislaus County Dairymen's Protective Assn. v. Stanislaus County* (1937) 8 Cal.2d 378, 394 (emergency police power acts to destroy animals infected with virulent diseases are valid, even if they involve summary property destruction without compensation); *Graham v. Kingwell* (1933) 218 Cal. 658, 660 (such acts tend to promote the public welfare, and therefore constitute a proper police power exercise); *Patrick v. Riley* (1930) 209 Cal. 350, 354–355 ("even drastic measures for the elimination of disease, whether in human beings, crops, or cattle, in a general way are not affected by constitutional provisions, either of the state or national government.").

[8] *Cross Culture Christian Center v. Newsom* (E.D. Cal., May 5, 2020) 2020 WL 2121111.

[9] David A. Carrillo and Shane G. Smith, California Constitutional Law: The Religion Clauses (2011) 45 USF.L.Rev. 689, 736.

[10] *Fox v. City of Los Angeles* (1978) 22 Cal.3d 792, 796.

[11] While the separation that the establishment clause commands between religion and government manifests and promotes respect for religious pluralism and should not be perceived as hostility or indifference to religion, the government cannot pass laws that aid one religion, aid all religions, or prefer one religion over another. *Sands v. Morongo Unified School Dist*. (1991) 53 Cal.3d 863, 870–71.

[12] *Sands v. Morongo Unified School Dist*. (1991) 53 Cal.3d 863, 876.

[13] *Cutter v. Wilkinson* (2005) 544 U.S. 709, 720; *Salazar v. Buono* (2010) 130 S.Ct. 1803, 1818–19.

[14] *McCreary County, Ky. v. American Civil Liberties Union of Ky*. (2005) 545 U.S. 844, 875 ("spending government money on the clergy looks like establishing religion, but if the government cannot pay for military chaplains a good many soldiers and sailors would be kept from the opportunity to exercise their chosen religions.").

[15] *Cutter v. Wilkinson* (2005) 544 U.S. 709, 719–20; *Johnson-Bey v. Lane* (7th Cir. 1988) 863 F.2d 1308, 1312 ("prisons are entitled to employ chaplains"); *Theriault v. Silber* (5th Cir. 1977) 547 F.2d 1279 (federal prison chaplains do not violate the establishment clause).

[16] *Cutter* at 724–25.

[17] *Lynch v. Donnelly* (1984) 465 U.S. 668, 683.

[18] (1990) 494 U.S. 872, 879 (quotations omitted).

[19] *City of Boerne v. Flores* (1997) 521 U.S. 507, 514. Congress later required the federal government to apply strict scrutiny to such laws. *Id.* at 533–34 (RFRA). And Congress also required the states to apply strict scrutiny to prison and land use regulations. *Cutter* at 715–16 (RLUIPA). But outside those contexts — for all other state police power acts including quarantine orders — *Smith*'s rule of neutral laws still applies.

[20] *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017) 137 S.Ct. 2012, 2021 (quoting *Smith)*.

[21] See *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017) 137 S.Ct. 2012, 2021 (the Free Exercise Clause does not entitle church members to a special dispensation from the general criminal laws on account of their religion) citing *Smith*; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993) 508 U.S. 520, 531 (citing *Smith*: "our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.").

[22] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993) 508 U.S. 520, 533–34 (if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral).

[23] Peter Hartlaub, Anti-Mask League, San Francisco Chronicle May 8, 2020.