

## Lessons From Justices' Evolving Approach To COVID Rulings

By **Akiva Shapiro** and **William Moccia** (November 28, 2022, 2:20 PM EST)

The COVID-19 pandemic affected just about every aspect of American society, and the U.S. Supreme Court was no exception.

Over the past three years, the court has had to deal with a high volume of pandemic-related litigation — often on a compressed timeline commensurate with the rapid pace of the pandemic's evolution.

Most of those cases came before the court on its emergency applications docket — a branch of the so-called shadow docket[1] — by which the court hears expedited requests for interim relief, typically stays or injunctions, while merits proceedings continue to unfold in the lower courts.

In some respects, the Supreme Court's approach to these cases evolved with the pandemic.

Initially, as federal and state officials struggled to understand the virus and develop policies to combat it, the court largely stayed out of the fray.

But as the pandemic dragged on and mitigation measures for COVID-19 improved, the court became less willing to tolerate restrictions that infringed upon religious freedom. And, as more time passed, the court began to turn its attention to instances of government overreach outside the religious-liberties context.

More recently, as the pandemic has receded and broad-brush mandates and shutdown orders have been replaced by narrower public health regulations, the court's approach appears to have come full circle, with the justices allowing those more targeted restrictions to remain in effect.

### Initial Deference to Elected Officials

For the first eight months of the pandemic in the U.S. following March 2020, as government officials played catch-up in response to the massive surge in hospitalizations and deaths, the Supreme Court largely avoided intervening in disputes over government-imposed restrictions designed to curb the spread of the virus.

When the court did intervene, it was to block lower-court rulings that would have disturbed the status



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quo by compelling government officials to change their behavior. A majority of the justices, it seemed, thought the judiciary was ill-suited to opine on the difficult policy choices being made in response to a rapidly evolving national and global crisis.

Most prominently during this period, the court declined to intervene in two cases raising First Amendment free exercise challenges to state COVID-19 restrictions.

In May 2020, in *South Bay United Pentecostal Church v. Newsom*, the court denied a request to block California's restrictions on church attendance — restrictions that the petitioner alleged were more burdensome than those imposed on comparable secular institutions.[2] Chief Justice John Roberts penned a concurring opinion in which he emphasized the need to give broad latitude to "politically accountable officials" to enable them to deal with the uncertainties of a public health crisis, free from second-guessing by the courts.

Two months later, the court denied emergency relief in a similar lawsuit filed by a church in Nevada.[3]

In other pandemic-related disputes, the court's approach was similarly deferential to government during this initial period. In a series of cases alleging that prisons lacked adequate safeguards against the virus, district courts had found Eighth Amendment violations and ordered prison officials to adopt additional safety measures.

In each instance, the Supreme Court either stayed those district court orders[4] or declined to lift stays imposed by the circuit courts[5] — thereby ensuring that government officials were not required to change their behavior while appeals remained pending. And in suits over the effect of COVID-19 on the 2020 census,[6] or state election procedures,[7] the court either intervened to stop district courts from altering the status quo[8] or declined to intervene if the appellate courts had already done so.[9]

### **Increased Protection of Religious Liberties**

The landscape shifted in November 2020. Government officials — and the nation as whole — had learned more about the virus and how to mitigate its risks. At the same time, it was becoming increasingly clear that the pandemic was not going to end any time soon, raising concerns that temporary emergency regulations might remain in place for the foreseeable future.

The makeup of the court had also changed, with Justice Amy Coney Barrett replacing Justice Ruth Bader Ginsburg. Against this evolving backdrop, the court began to take a more hands-on approach — beginning in cases involving infringements on religious freedom.

Thus, on Thanksgiving Eve 2020, the court for the first time granted affirmative injunctive relief to a party challenging pandemic regulations.

By a 5-4 vote in *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, the court enjoined New York State's fixed-capacity restrictions on houses of worship.[10] The court cautioned that, although judges are not public health experts, they nonetheless have a duty to ensure that government actors respect constitutional rights even in the midst of a global crisis.

Diocese sent a clear signal: The justices would respect the judgments of public health experts, but that respect did not afford government carte blanche to infringe upon core civil liberties without adequate justification.

It took some time before that message was heeded. In the first months of 2021, the court granted emergency injunctions in five cases challenging California regulations that placed greater restrictions on churches and religious gatherings than on secular businesses and activities.[11]

Summarizing those rulings in *Tandon v. Newsom*,[12] the court emphasized that government officials needed to provide compelling justifications to explain their differential treatment of houses of worship. Simply invoking the ongoing pandemic was no longer enough; instead, the burden fell to the government to demonstrate why burdening constitutional rights — and specifically, why burdening the right to free exercise of religion — was necessary to protect public health.

Still, not all religious-liberties applicants prevailed. Just weeks after *Diocese*, for instance, the court turned away a challenge to a Kentucky executive order prohibiting in-person learning at all K-12 schools, including religious schools.[13]

The court based its ruling in part on the impending expiration of the order. In so doing, the court signaled that the justices were carefully considering the equities of individual cases and exercising caution before weighing in — even if, overall, they appeared less deferential to government actors than they had in earlier stages of the pandemic.

### **Broader Scrutiny of Government Overreach**

In the spring of 2021, the nation entered the pandemic's second year and was increasingly well-equipped to handle the virus, including because the emergence of COVID-19 vaccines helped diminish the severity of the threat. The initial wave of government restrictions on gatherings and building occupancy faded away, but other pandemic-related programs and restrictions remained or took their place.

Those policies by and large respected religious liberties; it appears the message the court was sending had finally been received by state and local governments. But some of these programs faced challenges arising out of other constitutional provisions or doctrines limiting the government's powers.

The focus of the court's emergency docket shifted accordingly. In this stage, the court for the first time began to grant emergency relief in challenges to pandemic policies, even outside the religious-liberties context, when it concluded that government officials had overreached and disregarded the limits on their authority.

The court previewed this increased willingness to intervene in late June 2021, when it declined to act in a suit challenging the federal Centers for Disease Control and Prevention's nationwide eviction moratorium.[14] Despite the result, five justices signaled that they believed the moratorium exceeded the CDC's statutory authority. The request for injunctive relief was nevertheless denied by a 5-4 vote that turned on a narrow, case-specific concurrence penned by Justice Brett Kavanaugh, who concluded that the equities did not favor judicial intervention "[b]ecause the CDC plans to end the moratorium in only a few weeks."

Then, in August 2021, the court granted an emergency injunction in *Chrysafis v. Marks*, a procedural due process challenge to New York's residential eviction moratorium.[15] That ruling marked a notable shift in the court's approach to pandemic-era regulation.

According to data published by Reuters, Chrysfafis was the first case since the start of the pandemic in which the court granted emergency injunctive relief to private litigants outside the religious-liberties context, with nearly 100 prior applications having been turned away.[16]

Just two weeks later, the court enjoined the CDC moratorium as well, after the Biden administration attempted to extend it. The court's order in that case, *Alabama Association of Realtors v. U.S. Department of Health and Human Services*, emphasized that the "strong [public] interest in combating the spread" of COVID-19 did not authorize government "to act unlawfully even in pursuit of desirable ends." [17]

A similar focus on policing the bounds of government authority — with results sometimes favoring challengers and other times the government — was evident as the court confronted a new tranche of cases: those dealing with vaccine mandates.

In *NFIB v. OSHA*, decided in January 2022, the court blocked a federal vaccine mandate that applied to workers at any employer with at least 100 employees, finding that the mandate exceeded the Occupational Safety and Health Administration's authority.[18]

In *Biden v. Missouri*, by contrast, the court left intact a federal vaccine mandate for health care workers at facilities funded by Medicare or Medicaid, concluding that the Department of Health and Human Services did possess the requisite authority to implement such a mandate.[19]

As the court explained in *NFIB*, its role was not to "weigh [the] tradeoffs" between the economic costs and public-health benefits of a vaccine mandate. Instead, the court's role was to police the legal limits on governmental authority.

Even as the court increased its substantive engagement on these issues, the justices began to display a more cautious procedural approach to these emergency applications. For instance, in a suit challenging a Maine vaccine mandate that offered medical — but not religious — exemptions, the court declined to issue an emergency injunction.[20]

Concurring in that denial, Justice Barrett, joined by Justice Kavanaugh, suggested that applicants seeking emergency relief should be required to establish not just that their underlying claims were meritorious, but also that the case was one in which certiorari was likely to be granted.

Otherwise, Justice Barrett cautioned, "applicants could use the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take — and to do so on a short fuse without benefit of full briefing and oral argument."

And, in the two federal vaccine mandate cases, the court did, in fact, hear oral argument on the applications, rather than deciding them on the written submissions alone.

### **Coming Full Circle to a New Normal**

More recently, as the pandemic entered its third year and the nation gradually settled into a new normal, so, too, did the court.

For example, in March, the court stayed a U.S. District Court for the Northern District of Texas ruling in *Austin v. U.S. Navy Seals* that had barred the Navy from considering vaccination status when making

operational decisions.[21]

Not long afterward, in *Dunn v. Austin*, the court summarily denied an application by an Air Force Reserve officer who sought to stop the military from disciplining him for refusing vaccination.[22] Although three justices dissented, neither they nor the majority wrote to explain their views.

Overall, the court's involvement with COVID-19 regulation seems to have died down, with fewer such cases being brought to the court, and no pandemic-related policies being enjoined or found to be unlawful since the *NFIB* decision in early 2022. One could say that the court has come full circle, once again largely removed from the fray surrounding the pandemic-related policies that remain.

While it may be too soon to measure the full effect of the court's COVID-19-era rulings, a few takeaways are clear.

First, for better or worse, these cases have drawn increased attention to the emergency applications docket itself — from academics, practitioners, politicians and the public alike.

Second, the decisions confirm that the current court is committed to the robust protection of religious liberties and private property rights, as well as to enforcing statutory and constitutional limits on government regulation.

Third, although technically nonprecedential, these decisions provided guidance to the lower courts, both in addressing a once-in-a-generation public health emergency, and more broadly. The decisions have been cited hundreds of times in precedential opinions by courts at every level, including the Supreme Court itself.

Finally, the Supreme Court's response to the pandemic offers a guidepost for lower courts faced with future national emergencies: Although judges should be careful not to overstep in second-guessing the policy judgments of elected officials tasked with protecting the public in times of crisis, the judiciary must always remain a steadfast defender of constitutional rights and our system of limited government.

Or, as the court put it in *Diocese*, "even in a pandemic, the Constitution cannot be put away and forgotten."

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***Disclosure: Shapiro and Moccia were counsel to the plaintiffs in Roman Catholic Diocese of Brooklyn v. Cuomo; and Shapiro, Moccia and Ben Dor were counsel to plaintiffs in Chrysafis v. Marks.***

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[1] William Baude, Foreword: The Supreme Court's Shadow Docket, 9 N.Y.U. J.L. & Liberty 1 (2015),

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[2] *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (mem.), available at [https://www.supremecourt.gov/opinions/19pdf/19a1044\\_pok0.pdf](https://www.supremecourt.gov/opinions/19pdf/19a1044_pok0.pdf).

[3] *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020) (mem.), available at [https://www.supremecourt.gov/opinions/19pdf/19a1070\\_08l1.pdf](https://www.supremecourt.gov/opinions/19pdf/19a1070_08l1.pdf).

[4] *Barnes v. Ahlman*, 140 S. Ct. 2620 (2020) (mem.), available at [https://www.supremecourt.gov/opinions/19pdf/20a19\\_k537.pdf](https://www.supremecourt.gov/opinions/19pdf/20a19_k537.pdf).

[5] *Valentine v. Collier*, 141 S. Ct. 57 (2020) (mem.), available at [https://www.supremecourt.gov/opinions/20pdf/20a70\\_new\\_086c.pdf](https://www.supremecourt.gov/opinions/20pdf/20a70_new_086c.pdf).

[6] *Ross v. Nat'l Urb. League*, 141 S. Ct. 18 (2020) (mem.), available at [https://www.supremecourt.gov/opinions/20pdf/20a62\\_n7ip.pdf](https://www.supremecourt.gov/opinions/20pdf/20a62_n7ip.pdf).

[7] *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020) (mem.), available at [https://www.supremecourt.gov/opinions/19pdf/20a18\\_f2qg.pdf](https://www.supremecourt.gov/opinions/19pdf/20a18_f2qg.pdf); *Andino v. Middleton*, 141 S. Ct. 9 (2020) (mem.), available at [https://www.supremecourt.gov/opinions/20pdf/20a55\\_dc8e.pdf](https://www.supremecourt.gov/opinions/20pdf/20a55_dc8e.pdf).

[8] *Merrill v. People First of Ala.*, 141 S. Ct. 25 (2020) (mem.), available at [https://www.supremecourt.gov/opinions/20pdf/20a67\\_3e04.pdf](https://www.supremecourt.gov/opinions/20pdf/20a67_3e04.pdf).

[9] *Democratic Nat'l Comm. v. Wis. State Leg.*, 141 S. Ct. 28 (2020) (mem.), available at [https://www.supremecourt.gov/opinions/20pdf/20a66\\_new\\_m6io.pdf](https://www.supremecourt.gov/opinions/20pdf/20a66_new_m6io.pdf).

[10] *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam), available at [https://www.supremecourt.gov/opinions/20pdf/20a87\\_4g15.pdf](https://www.supremecourt.gov/opinions/20pdf/20a87_4g15.pdf).

[11] *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) (mem.), available at [https://www.supremecourt.gov/opinions/20pdf/20a136\\_bq7c.pdf](https://www.supremecourt.gov/opinions/20pdf/20a136_bq7c.pdf); *Harvest Rock Church v. Newsom*, 141 S. Ct. 1289 (2021) (mem.), available at [https://www.supremecourt.gov/orders/courtorders/020521zr\\_q8l1.pdf](https://www.supremecourt.gov/orders/courtorders/020521zr_q8l1.pdf); *Gish v. Newsom*, 141 S. Ct. 1290 (2021) (mem.), available at [https://www.supremecourt.gov/orders/courtorders/020821zr\\_h3dj.pdf](https://www.supremecourt.gov/orders/courtorders/020821zr_h3dj.pdf); *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021) (mem.), available at [https://www.supremecourt.gov/orders/courtorders/022621zr\\_1bo2.pdf](https://www.supremecourt.gov/orders/courtorders/022621zr_1bo2.pdf); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam), available at [https://www.supremecourt.gov/opinions/20pdf/20a151\\_4g15.pdf](https://www.supremecourt.gov/opinions/20pdf/20a151_4g15.pdf).

[12] *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam), available at [https://www.supremecourt.gov/opinions/20pdf/20a151\\_4g15.pdf](https://www.supremecourt.gov/opinions/20pdf/20a151_4g15.pdf).

[13] *Danville Christian Acad. v. Beshear*, 141 S. Ct. 527 (2020) (per curiam), available at [https://www.supremecourt.gov/opinions/20pdf/20a96\\_e29g.pdf](https://www.supremecourt.gov/opinions/20pdf/20a96_e29g.pdf).

[14] Alabama Association of Realtors v. Department of Health and Human Services, 141 S. Ct. 2320 (2021) (mem.), available at [https://www.supremecourt.gov/opinions/20pdf/20a169\\_4f15.pdf](https://www.supremecourt.gov/opinions/20pdf/20a169_4f15.pdf).

[15] Chrysfafis v. Marks, 141 S. Ct. 2482 (2021) (per curiam), available at [https://www.supremecourt.gov/opinions/20pdf/21a8\\_3fb4.pdf](https://www.supremecourt.gov/opinions/20pdf/21a8_3fb4.pdf).

[16] Lawrence Hurley & Andrew Chung, Analysis: U.S. Supreme Court's 'Shadow Docket' Favored Religion and Trump, Reuters (July 28, 2021), <https://www.reuters.com/legal/government/us-supreme-courts-shadow-docket-favored-religion-trump-2021-07-28/>.

[17] Alabama Association of Realtors v. Department of Health and Human Services, 141 S. Ct. 2485 (2021) (per curiam), available at [https://www.supremecourt.gov/opinions/20pdf/21a23\\_ap6c.pdf](https://www.supremecourt.gov/opinions/20pdf/21a23_ap6c.pdf).

[18] NFIB v. OSHA, 142 S. Ct. 661 (2022) (per curiam), available at [https://www.supremecourt.gov/opinions/21pdf/21a244\\_hgci.pdf](https://www.supremecourt.gov/opinions/21pdf/21a244_hgci.pdf).

[19] Biden v. Missouri, 142 S. Ct. 647 (2022) (per curiam), available at [https://www.supremecourt.gov/opinions/21pdf/21a240\\_d18e.pdf](https://www.supremecourt.gov/opinions/21pdf/21a240_d18e.pdf).

[20] Does 1-3 v. Mills, 142 S. Ct. 17 (2022) (mem.), available at [https://www.supremecourt.gov/opinions/21pdf/21a90\\_6j37.pdf](https://www.supremecourt.gov/opinions/21pdf/21a90_6j37.pdf).

[21] Austin v. U.S. Navy Seals 1-26, 142 S. Ct. 1301 (2022) (mem.), available at [https://www.supremecourt.gov/opinions/21pdf/21a477\\_1bo2.pdf](https://www.supremecourt.gov/opinions/21pdf/21a477_1bo2.pdf).

[22] Dunn v. Austin, 142 S. Ct. 1707 (2022) (mem.), available at [https://www.supremecourt.gov/orders/courtorders/041822zr\\_11o2.pdf](https://www.supremecourt.gov/orders/courtorders/041822zr_11o2.pdf).