

**LIMITING FREEDOM OF RELIGION IN A PANDEMIC:
THE CONSTITUTIONALITY OF RESTRICTIONS ON
RELIGIOUS GATHERINGS IN A RESPONSE TO COVID-19**

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Restrictions on religious gathering as a response to the COVID-19 pandemic are a contentious issue. This article surveys the measures restricting religious gatherings and the legal challenges to those measures. There are three principal arguments that restrictions on religious gatherings are unconstitutional: (1) they lack instrumental rationality; (2) they are discriminatory; and (3) their deleterious effects outweigh their salutary effects. While the restriction measures likely limit section 2(a) and potentially section 15(1) rights under the Charter, these limits are justified because less restrictive alternatives to the measures are not equally effective, the measures are non-discriminatory, and their contribution to protecting Canadians from illness and death outweigh their deleterious effects. The article concludes with recommendations for future government measures directed at religious gatherings.

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I. INTRODUCTION

To prevent the transmission of COVID-19, Canadian provinces and territories adopted public health measures that restricted public and social gatherings, including in-person religious gatherings. These measures variously prohibited religious gatherings or severely restricted the number of persons who could gather. Claimants in Quebec, Ontario, Manitoba, Alberta, and British Columbia challenged the constitutionality of the government measures under the *Canadian Charter of Rights and Freedoms*.¹ At the time of writing, five trial courts have ruled on motions for injunctive relief and two trial courts had rendered decisions on the merits.² The government measures were liberalized and in some cases repealed as the percentage of Canadians who have been double-vaccinated increased rapidly during 2021, though some provinces reimposed the measures in late 2021 and early 2022 in response to climbing cases and new variants. Other countries have seen similar restrictions and legal challenges, and the lawfulness of restrictions on religious gatherings during a public health emergency has emerged as a key issue in the study of law and religion.³

Litigants and scholars have raised three principal arguments against the measures' constitutionality: (1) they lack instrumental rationality; (2) they are discriminatory; and (3) their deleterious effects on the *Charter* right to religious freedom are not justified by corresponding public health benefits.⁴ Specifically, they have argued the restrictions are unjustified not only because less restrictive alternatives are available and the severe impact of the restrictions outweigh any marginal public health benefit they provide, but also because governments have allegedly imposed more onerous restrictions on religious gatherings than on comparable secular gatherings and activities.⁵

These three arguments merit distinct treatment. The instrumental rationality and deleterious effects arguments do not contest the even-handedness of government measures, but instead contend that these measures are not effective, are not properly tailored to achieve their objective, and impose deleterious effects on the exercise of religious freedom that outweigh any potential benefits. In contrast, the discrimination argument does not hinge on the efficacy or tailoring of the restrictions. Regardless of how effective and tailored the measures are at preventing the spread of COVID-19 at religious gatherings, on this view, the government measures are discriminatory because allegedly similarly situated secular gatherings are not subject to equally onerous restrictions.

Further, considering the constitutionality of the measures and evaluating the three arguments against their constitutionality would provide guidance to governments on how to

¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

² *Conseil des juifs hassidiques du Québec c Procureur général du Québec*, 2021 QCCS 281 [*Conseil des juifs*]; *Toronto International Celebration Church v Ontario (Attorney General)*, 2020 ONSC 8027 [*Celebration Church*]; *Springs of Living Water Centre Inc v The Government of Manitoba*, 2020 MBQB 185 [*Springs of Living Water*]; *Ingram v Alberta (Chief Medical Officer of Health)*, 2020 ABQB 806 [*Ingram*]; *Beaudoin v British Columbia*, 2021 BCSC 248 [*Beaudoin (Injunction)*]; *Beaudoin v British Columbia*, 2021 BCSC 512 [*Beaudoin (Merits)*]; *Gateway Bible Baptist Church v Manitoba*, 2021 MBQB 219 [*Gateway*].

³ Mark L. Movsesian, "Law, Religion, and the COVID-19 Crisis" (2022) 37:1 *JL & Religion* 9 at 9–10.

⁴ I subsequently refer to these concerns as the instrumental irrationality, discrimination, and deleterious effects arguments.

⁵ *Beaudoin (Merits)*, *supra* note 2 at paras 150, 189–90, 226–27, 232.

adopt *Charter*-compliant measures to prevent the transmission of COVID-19 at religious gatherings and to citizens on the lawfulness of such measures. While the measures were eased and in some cases eliminated altogether in summer 2021, some provinces reinstated the measures in modified form as new variants emerged and case counts climbed, and it is possible that other provinces could do the same in the future. Consideration of the constitutionality of the measures taken in response to COVID-19 could also provide useful guidance to legislators, policy-makers, and citizens evaluating responses to a future pandemic for *Charter*-compliance.⁶

This jurisprudential essay considers the instrumental rationality, deleterious effects, and discrimination arguments in light of *Charter* jurisprudence and concludes that the provincial measures restricting religious gatherings are justified limits on rights under section 1 of the *Charter*.⁷ The measures likely limit the right to freedom of religion guaranteed by section 2(a) of the *Charter* and may limit section 15(1) equality rights.⁸ However, the three arguments against the measures' constitutionality all fail in the section 1 analysis.

First, the instrumental rationality argument fails because less restrictive alternatives are not equally effective at preventing the spread of COVID-19. The measures serve the objective of protecting Canadians from illness, death, and consequent strain on the healthcare system arising from the transmission of COVID-19 at in-person religious gatherings. Provided that the restrictions are carefully tailored to contain exceptions for less risky activities such as outdoor worship, drive-in services, and private prayer, and allow for discretionary exceptions, the measures are likely minimally impairing. Less restrictive alternatives that would allow in-person religious gatherings beyond the exceptions mentioned above or increase the permitted size of those gatherings are unlikely to be equally effective at achieving the measures' objective, even if participants take proper precautions.

Second, the discrimination argument also fails. It is possible that a religious claimant might successfully demonstrate that the measures limit the section 15(1) *Charter* right to equality based on the admittedly significant adverse effects of the restrictions. But the measures still pass section 1 because the distinctions that governments have drawn between religious gatherings and certain secular activities are justified by the differential risk those activities pose. *Charter* jurisprudence does not require that religious gatherings be regulated the same as the least restricted secular activity, and lighter restrictions on secular activities that may pose an equivalent risk of transmission may be justified by the necessity of these activities in delivering essential services that Canadians depend on. Provincial and territorial governments have also reasonably concluded that religious gatherings pose a more severe risk of transmission than secular activities such as shopping, and imposing more severe restrictions on religious gatherings than on secular activities that do not pose a comparable risk is not objectionable. Indeed, many secular activities that do pose a similar risk of

⁶ Michael Penn, "Statistics Say Large Pandemics Are More Likely Than We Thought" (23 August 2021), online: *Duke Global Health Institute* <globalhealth.duke.edu/news/statistics-say-large-pandemics-are-more-likely-we-thought>; Michael Dulaney, "The Next Pandemic is Coming — and Sooner Than We Think, Thanks to Changes to the Environment," *ABC News* (6 June 2020), online: <www.abc.net.au/news/science/2020-06-07/a-matter-of-when-not-if-the-next-pandemic-is-around-the-corner/12313372>.

⁷ *Charter*, *supra* note 1, s 1.

⁸ *Ibid*, ss 2(a), 15.

transmission to religious gatherings, including indoor sporting events, music concerts, and movie theatres, were also closed or tightly restricted.

Third, the deleterious effects argument fails because the measures' contribution to the objective of protecting Canadians from illness, death, and consequent strain on the healthcare system arising from the transmission of COVID-19 at in-person religious gatherings outweighs their admittedly severe deleterious effects on religious freedom. The deleterious effects do strike at the core of freedom of religion by restricting or denying the right to worship in common, and could have significant negative impacts on the mental and psychological health of persons who wish to attend those gatherings. Yet, the potential salutary effects — saving the lives and preserving the health of Canadians and the closely related benefit of reducing strain on the healthcare system — ultimately weigh greater in the balance. Governments are entitled to impose restrictions to ensure that the exercise of religious freedom does not cause permanent and irreversible consequences to life and health.

The remainder of this essay is divided into six parts. Part II provides background on public health measures restricting religious gatherings in response to COVID-19 and the legal challenges to these measures, and explains why clear guidance on the constitutionality of these measures would be beneficial to governments and citizens going forward. Part III explains why challenges to religious gatherings should properly be understood as raising three distinct arguments: (1) that the measures lack instrumental rationality; (2) that the measures discriminate against religious adherents by subjecting similarly situated secular activities to less severe restrictions; and (3) that the measures' deleterious effects on the exercise of freedom of religion outweigh any benefits to public health. Part IV concludes that the measures limit section 2(a) rights and may limit section 15(1) rights. Part VI addresses the appropriate section 1 framework and concludes that the test from *R. v. Oakes* would apply,⁹ not the framework from *Doré v. Barreau du Québec*.¹⁰ Part VII concludes that the measures are justified limitations of sections 2(a) and 15 because the three arguments fail: (1) less restrictive alternatives are not equally effective; (2) religious gatherings pose a more severe risk of transmission than secular activities that are less heavily restricted; and (3) even a modest reduction in the risk of illness and death and consequent strain on the healthcare system outweighs the measures' admittedly severe deleterious effects on religious freedom. Part VIII concludes and outlines some potential lessons for responses to future pandemics.

II. BACKGROUND

A. MEASURES RESTRICTING RELIGIOUS GATHERINGS IN RESPONSE TO COVID-19

1. THE SPREAD OF COVID-19

COVID-19 is an infectious coronavirus disease that persons infected with the SARS-CoV-2 virus spread to others through respiratory droplets and aerosols.¹¹ The virus can be spread

⁹ [1986] 1 SCR 103 [*Oakes*].

¹⁰ 2012 SCC 12 [*Doré*].

¹¹ Canada, "COVID-19: Prevention and Risks," online: <www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/prevention-risks.html>.

by both symptomatic and asymptomatic persons,¹² and can cause severe illness or death.¹³ Following its discovery in late 2019 in Wuhan, China,¹⁴ the virus quickly spread to other countries. On 11 March 2020, the World Health Organization (WHO) declared a global pandemic.¹⁵ At the time of writing, more than 5.7 million people have died as a result of COVID-19.¹⁶ In Canada, there have been at least 3.9 million reported cases of COVID-19 and more than 41,000 people have died.¹⁷

2. MEASURES RESTRICTING IN-PERSON RELIGIOUS GATHERINGS

In response to COVID-19, governments adopted a wide range of measures to ensure physical distancing and reduce person-to-person contact. One of these measures was to restrict the size of or prohibit both indoor and outdoor gatherings, including religious gatherings.¹⁸ In keeping with this global trend, Canadian provinces similarly prohibited or severely restricted in-person gatherings in spring 2020, including religious gatherings.¹⁹ Some provinces prohibited in-person religious gatherings entirely.²⁰ Others imposed capacity limits of five persons,²¹ ten persons,²² 15 persons,²³ or 50 persons.²⁴ These restrictions were generally implemented by orders-in-council issued by the provincial cabinet under provincial

¹² *Ibid.*

¹³ World Health Organization, “Coronavirus Disease (COVID-19)” (13 May 2021), online: <www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/coronavirus-disease-covid-19>.

¹⁴ *Ibid.*

¹⁵ World Health Organization, “WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19 – 11 March 2020,” online: <www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19--11-march-2020>.

¹⁶ World Health Organization, “WHO Coronavirus (COVID-19 Dashboard),” online: <covid19.who.int/>.
¹⁷ “Tracking Coronavirus in Canada: Latest Map and Case Count,” *The New York Times*, online: <www.nytimes.com/interactive/2021/world/canada-covid-cases.html>.

¹⁸ Caroline Mala Corbin, “Religious Liberty in a Pandemic” (2020) 70:1 Duke LJ Online 1 at 2–3; Piotr Mazurkiewicz, “Religious Freedom in the Time of the Pandemic” (2021) 12:2 Religions 1 at 4–8.

¹⁹ See e.g. Colleen M Flood et al, “Overview of COVID-19: Old and New Vulnerabilities” in Colleen M Flood et al, eds, *Vulnerable: The Law, Policy and Ethics of COVID-19* (Ottawa: University of Ottawa Press, 2020) 1 at 7–9.

²⁰ Quebec, OC 222-2020, (2020) GOQ II, 771 A; Northwest Territories, *Public Health Order — COVID-19 Prohibition of Gatherings and Closures of Certain Business* (effective 11 April 2020), s 1, online: <www.hss.gov.nt.ca/sites/hss/files/resources/public-health-order-covid-19-prohibition-gatherings-closures-certain-business.pdf>.

²¹ Nova Scotia, *Order by the Medical Officer of Health under Section 32 of the Health Protection Act 2004, c. 4, s. 1* (2 April 2020), s 8, online: <nsfa-fane.ca/wp-content/uploads/2020/04/COVID-19-Global-Order-2020-04-02.pdf>; Ontario, *Order-in-Council 80/2020* (28 March 2020), s 3, online: <files.ontario.ca/solgen-oic-gatherings-events-2020-03-28.pdf>; Meagan Deuling, “Nunavut Revises COVID-19 Social Distancing Rules,” *Nunatsiaq News* (29 April 2020), online: <nunatsiaq.com/stories/article/89407/>.

²² Manitoba, *Order under The Public Health Act* (31 March 2021), s 1(1), online: <www.manitoba.ca/asset_library/en/proactive/2019_2020/orders-soe-03312020.pdf>; Saskatchewan, *Public Health Order: Control of Transmission of 2019 Novel Coronavirus* (26 March 2020), s (b), online: <publications.saskatchewan.ca/#/products/104652>; Yukon, *Civil Emergency Measures Health Protection (COVID-19) Order*, MO 2020/14 (2 April 2020), s 5, online: <legislation.yukon.ca/reg/mo2020_014.pdf>; Newfoundland and Labrador, *Special Measures Order (Revised Order)* (23 March 2020), s 4, online: <www.mfn.gov.ca/wp-content/uploads/2020/03/Special-Measures-Order-Updated-March-24-2020.pdf>; New Brunswick, Office of the Premier, “State of Emergency Declared in Response to COVID-19” (19 March 2020), online: <www2.gnb.ca/content/gnb/en/news/news_release.2020.03.0139.html>.

²³ Alberta, “Record of Decision: CMOH Order 07-2020” (27 March 2020), online: <open.alberta.ca/dataset/c02f3b06-9c37-4845-98ee-d07d805fdce1/resource/32f3367d-9a15-4aef-af6e-4e960891c14e/download/health-cmoh-record-of-decision-cmoh-07-2020.pdf> [Alberta, “CMOH Order 07-2020”].

²⁴ British Columbia, *Class Order (mass gatherings) re: COVID-19* (16 March 2020), online: <www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/covid-19/archived-docs/pho_order_mass_gatherings_march_16_2020.pdf>.

emergency legislation or orders issued by chief medical officers of health under provincial public health emergency legislation.²⁵ In this article, I refer to provincial restrictions on religious gatherings as the “Measures.”

The severity of the Measures has waxed and waned since spring 2020. In summer 2020, some Canadian provinces relaxed the Measures by increasing or eliminating attendance caps.²⁶ However, as cases began to increase in fall 2020 as part of the so-called second wave, governments responded by tightening restrictions on religious gatherings. For instance, British Columbia prohibited in-person religious services, but permitted drive-in services, private prayer, and subsequently outdoor worship to continue.²⁷ Manitoba and Quebec also prohibited in-person religious services.²⁸ Other provinces imposed attendance caps.²⁹ By summer 2021, however, provinces began to relax or eliminate restrictions on religious gatherings as the vaccination rate increased.³⁰ Certain provinces reimposed restrictions in response to the Omicron variant in late 2021 and early 2022 at a time when the majority of Canadians were not boosted.³¹

²⁵ Ontario, *Order-in-Council* 80/2020, *supra* note 21 (Order-in-Council issued under *Emergency Management and Civil Protection Act*, RSO 1990, c E.9); Alberta, “CMOH Order 07-2020,” *supra* note 23 (order by chief medical officer of health issued under emergency provisions of the *Public Health Act*, RSA 2000, c P-37).

²⁶ Quebec, *Ordering of measures to protect the health of the population amid the COVID-19 pandemic situation*, OC 817-2020, GOQ II, 2038A; Mickey Djuric & David Giles, “Saskatchewan Increases Gathering Size at Churches, Releases Graduation Ceremony Guidelines,” *Global News* (11 June 2020), online: <globalnews.ca/news/7055928/saskatchewan-coronavirus-gathering-churches-graduation-ceremony-guidelines/>; Brooklyn Neustaeter, “Emerging from Coronavirus: Reopening Plans Province-by-Province,” *CTV News* (27 April 2020), online: <www.ctvnews.ca/health/coronavirus/emerging-from-coronavirus-reopening-plans-province-by-province-1.4913652>.

²⁷ *Beaudoin* (Merits), *supra* note 2 at paras 38, 64.

²⁸ *Springs of Living Water*, *supra* note 2 at paras 12–14; Selena Ross, “After Meeting with Religious Leaders, Quebec Eases Rules for Houses of Worship Ahead of Schedule,” *CTV News* (22 January 2021), online: <montreal.ctvnews.ca/after-meeting-with-religious-leaders-quebec-eases-rules-for-houses-of-worship-ahead-of-schedule-1.5278880>.

²⁹ Dylan Short, “Edmonton Places of Worship Look to Online Services After Province Caps Capacity at 15 People Due to COVID-19,” *The Edmonton Journal* (6 May 2021), online: <edmontonjournal.com/news/local-news/edmonton-places-of-worship-look-to-online-services-after-province-caps-capacity-at-15-people-due-to-covid-19>; The Canadian Press, “Saskatchewan Restricts Group Sizes, Church Services to Tackle Surging COVID-19 Cases,” *National Post* (13 April 2021), online: <nationalpost.com/pmn/news-pmn/canada-news-pmn/saskatchewan-restricts-group-sizes-church-services-to-tackle-surging-covid-19-cases>; *Celebration Church*, *supra* note 2 at paras 3–4.

³⁰ Simon Little, “COVID-19: B.C. Allows Indoor Religious Gatherings of Up to 50 People to Resume,” *Global News* (27 May 2021), online: <globalnews.ca/news/7900117/bc-covid-indoor-religious-gatherings/>; Alberta, “Alberta Hits 70% Threshold Triggering Full Reopening on July 1” (18 June 2021), online: <www.alberta.ca/release.cfm?xID=7940144E074DD-E72F-4915-342DE21DB9377300>; Joe Lofaro, “Gatherings of Up to 250 People will be Allowed in Quebec Places of Worship as of Friday,” *CTV News* (25 March 2021), online: <montreal.ctvnews.ca/gatherings-of-up-to-250-people-will-be-allowed-in-quebec-places-of-worship-as-of-friday-1.5362471>. See also Canada, “COVID-19 Vaccination in Canada,” online: <health-infobase.canada.ca/covid-19/vaccination-coverage/> [Canada, “COVID-19 Vaccination”] (recording that 81.72 percent of Canadians were double-vaccinated and 48.6 percent were boosted as of 21 June 2022).

³¹ Ontario, “Ontario Temporarily Moving to Modified Step Two of the Roadmap to Reopen” (3 January 2022), online: <news.ontario.ca/en/release/1001394/ontario-temporarily-moving-to-modified-step-two-of-the-roadmap-to-reopen> [Ontario, “Step Two”]; Jason Magder, “Prioritize Reopening Religious Gathering Places, Group Says,” *Montreal Gazette* (22 January 2022), online: <montrealgazette.com/news/local-news/prioritize-reopening-religious-gathering-places-group-says>; Canada, “COVID-19 Vaccination,” *ibid* (noting that only 48.6 percent of Canadians were fully vaccinated and boosted as of 21 June 2022).

3. RISK OF TRANSMISSION FROM IN-PERSON RELIGIOUS GATHERINGS

In-person religious gatherings are associated with several factors that establish a heightened risk of COVID-19 transmission. Specifically, in-person religious gatherings generally involve five factors that establish a heightened risk of transmission: (1) enclosed spaces; (2) large groups; (3) close proximity to others; (4) long duration of exposure while staying in one place; and (5) loud talking and singing.³² Canadian courts, as well as courts and judges in other countries, have found that in-person religious gatherings pose a heightened risk of transmission because of this combination of factors.³³ In-person religious gatherings thus pose a similar risk of transmission to other high-risk activities, such as indoor concerts and sporting events.³⁴

In addition, there are demonstrated instances in many countries of COVID-19 transmission via religious gatherings. Several of these instances concerned mass religious gatherings of thousands of people, such as in South Korea and India.³⁵ Transmission also occurred at religious gatherings of a smaller size. In the United States, for instance, *The New York Times* reported as early as July 2020 that more than 650 coronavirus cases had been linked to nearly 40 churches and religious events in the United States,³⁶ and religious gatherings in multiple states had been documented as “superspreading events.”³⁷ In British Columbia, 48 places of worship were affected by COVID-19 between 15 March 2020 and 15 January 2021, with 180 associated COVID-19 cases.³⁸

At least one scientific study has demonstrated that religious gatherings can be a major cause of COVID-19 transmission. Specifically, a *Nature* study published in late 2020 evaluated the spread of COVID-19 in ten large US cities by feeding mobility information based on cell phone location data showing the movement of 98 million people to and from points of interest such as restaurants and religious institutions into an epidemiological model. The study (1) concluded that a small minority of points of interest accounted for the majority of infections between 1 March 2020 and 2 May 2020, and (2) simulated the risks of reopening different categories of places of interest starting on 1 May 2020 and the effect of reducing maximum occupancy limits on those risks.³⁹ That study concluded that religious organizations (1) were one of a “small fraction” of places of interest that were linked to “the

³² *Roman Catholic Diocese of Brooklyn v Cuomo*, 141 S Ct 63 (2020) (Brief amicus of the American Medical Association and the Medical Society of the State of New York) (18 November 2020) at 3–6, online: <www.supremecourt.gov/DocketPDF/20/20A87/161064/2021118104326342_20A87acAmericanMedicalAssociationAndMedicalSocietyOfTheStateOfNewYork.pdf> [AMA-MSSNY Brief].

³³ See e.g. *Celebration Church*, *supra* note 2 at para 19; *Beaudoin* (Merits), *supra* note 2 at para 226; *South Bay United Pentecostal Church v Newsom*, 141 S Ct 716 at 721 (2021), per Kagan J [*South Bay* (2021)]. AMA-MSSNY Brief, *supra* note 32 at 7.

³⁴ Danielle N Boaz, “Between ‘Essential Services’ and Culpable Homicide: State Responses to Religious Organizations and the Spread of the Novel Coronavirus in 2020” (2020) 8 *JL Religion & State* 129 at 131–32, 135–36.

³⁵ Kate Conger, Jack Healy & Lucy Tompkins, “Churches Were Eager to Reopen: Now They Are Confronting Coronavirus Cases,” *The New York Times* (8 July 2020), online: <www.nytimes.com/2020/07/08/us/coronavirus-churches-outbreaks.html>.

³⁶ Joseph O Baker et al., “Religion in the Age of Social Distancing: How COVID-19 Presents New Directions for Research,” (2020) 81:4 *Sociology Religion: Q Rev* 357 at 359–60.

³⁷ *Beaudoin* (Merits), *supra* note 2 at paras 15–18.

³⁸ Serina Chang et al., “Mobility Network Models of COVID-19 Explain Inequities and Inform Reopening” (2021) 589:7840 *Nature* 82 at 82–84.

majority of the predicted infections,⁴⁰ and (2) were one of six non-residential locations that “produced the largest predicted increases in infections when reopened.”⁴¹ The study predicted a heightened incidence of transmission because persons are likely to stay at in-person religious gatherings for longer periods of time and these gatherings involve greater densities of persons than other activities.⁴² The study also concluded that reducing the maximum capacity of religious organizations and other points of interest could “substantially reduc[e] the risk” of transmission by “disproportionately reducing visits ... during the high density-periods with the highest risk.”⁴³

B. LEGAL CHALLENGES TO THE MEASURES

1. CHALLENGES IN CANADA

While the initial wave of Measures did not spark legal challenges, that changed in the fall of 2020 and winter of 2021 as the second wave began and correspondingly tighter Measures followed. Some individual believers and religious communities sought judicial relief from the Measures, producing a wave of preliminary injunction decisions and two merits decisions. In Manitoba, Ontario, and Alberta, courts dismissed churches’ motions for preliminary injunctions against the Measures.⁴⁴ In Quebec, a court ruled that the province’s ten person capacity limit applied per room in a synagogue, not on a collective basis, but otherwise denied the Council of Hasidic Jews of Quebec’s request for a preliminary injunction against the ten person capacity limit.⁴⁵ And in British Columbia and Manitoba, courts issued merits decisions dismissing *Charter* challenges to the Measures.⁴⁶

2. CHALLENGES IN OTHER COUNTRIES

Restrictions on religious gatherings have also prompted constitutional and public law challenges in, among other countries, the US,⁴⁷ the United Kingdom,⁴⁸ France,⁴⁹ Germany,⁵⁰ and South Africa,⁵¹ leading to divergent results. These decisions are considered below where relevant to the *Charter* infringement and justification analysis.

⁴⁰ *Ibid* at 84, Extended Data Figure 1.

⁴¹ *Ibid* at 85.

⁴² *Ibid*.

⁴³ *Ibid*.

⁴⁴ *Springs of Living Water*, *supra* note 2; *Celebration Church*, *supra* note 2; *Ingram*, *supra* note 2.

⁴⁵ *Conseil des juifs*, *supra* note 2.

⁴⁶ *Beaudoin* (Merits), *supra* note 2 at paras 246–47.

⁴⁷ *South Bay* (2021), *supra* note 33; *South Bay United Pentecostal Church v Newsom*, 140 S Ct 1613 (2020) [*South Bay* (2020)]; *Roman Catholic Diocese of Brooklyn v Cuomo*, 141 S Ct 63 (2020) [*Roman Catholic Diocese*]; *Tandon v Newsom*, 141 S Ct 1294 (2021) [*Tandon*].

⁴⁸ *Hussain v Secretary of State for Health & Social Care*, [2020] EWHC 1392 (Admin) [*Hussain*]; *Philip for Judicial Review of the closure of places of worship in Scotland*, [2021] CSOH 32 [*Philip*].

⁴⁹ France, State Council, order, no 440366, no 440361-440511, no 440512, no 440519 (18 May 2020), online: <www.conseil-etat.fr/fr/arianeweb/CE/decision/2020-05-18/440361> [*State Council Order* (May 2020)]; France, State Council, order, *Association Civitas, Conférence des évêques de France, Mgr M., Association pour la messe*, nos 446930, 446941, 446968, 446975 (29 November 2020), online: <www.conseil-etat.fr/fr/arianeweb/CE/decision/2020-11-29/446930> [*State Council Order* (November 2020)].

⁵⁰ Federal Constitutional Court, 29 April 2020, *F* (1 BvQ 44/20) (Germany), online: <www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/04/qk20200429_1bvq004420.html> [*F*].

⁵¹ *Mohamed v President of the Republic of South Africa*, [2020] ZAGPPHC 120 at paras 68, 72, 74–75 [*Mohamed*].

C. BENEFITS OF LEGAL CLARITY ON THE MEASURES' CONSTITUTIONALITY

Providing legal clarity on the Measures' constitutionality would benefit governments who are seeking to respond effectively to the COVID-19 pandemic in a *Charter*-compliant manner and citizens evaluating the lawfulness of such responses. Canadian courts had never addressed the constitutionality of large-scale restrictions on religious gatherings for public health purposes prior to this pandemic. That created some legal uncertainty, and certain Canadian governments have cited the *Charter* to explain why they took less restrictive public health measures.⁵² Removing some of this uncertainty could help governments and citizens to understand both the restrictions the *Charter* imposes on the exercise of government powers and which uses of government power are *Charter*-compliant.⁵³ While provinces liberalized or eliminated the Measures starting in summer 2021 as vaccination rates increased, some provinces elected to reinstate or tighten the Measures later in 2021 and in early 2022 in response to an upswing in cases and new variants such as Omicron.⁵⁴

Further, even if the Measures do not reappear in a strict form, providing legal clarity on their constitutionality would prove beneficial to Canadian governments in a future pandemic. COVID-19 is likely not the last pandemic that Canadians will face, and some scientists have concluded that another large extreme pandemic like COVID-19 is likely to occur in many people's lifetimes.⁵⁵ Drawing on the lessons of this pandemic to provide clarity about whether and what kind of restrictions on religious gatherings pass constitutional muster would equip governments to respond effectively and appropriately in the event of another pandemic.

III. UNDERSTANDING RELIGIOUS FREEDOM CHALLENGES AS THREE DISTINCT ARGUMENTS

As explained in Part I, there are three principal arguments that restrictions on religious gatherings are unconstitutional: (1) lack of instrumental rationality; (2) discrimination; and (3) deleterious effects.

First, the lack of instrumental rationality argument contends that the Measures are not rationally connected or appropriately tailored to achieve their objective. It engages the rational connection and minimal impairment steps of the section 1 justification test, set out in *Oakes* and explained further below. Specifically, litigants have argued that the Measures are not "carefully tailored" as the minimal impairment step requires,⁵⁶ because less restrictive

⁵² Tyson Fedor, "Are Health Restrictions and Lockdowns a Violation of the Charter of Rights?" *CTV News* (25 November 2020), online: <calgary.ctvnews.ca/are-health-restrictions-and-lockdowns-a-violation-of-the-charter-of-rights-1.5204571>.

⁵³ Georges C Benjamin & Anthony D Moulton, "Public Health Legal Preparedness: A Framework for Action" (2008) Special Supplement *JL Med & Ethics* 13 at 14; Ontario, The SARS Commission, *Second Interim Report: SARS and Public Health Legislation*, vol 5 (5 April 2005) (Commissioner Campbell) at 346.

⁵⁴ Leyland Cecco, "Alberta Reverses Hands-Off Approach to Covid to Tackle 'Crisis of Unvaccinated,'" *The Guardian* (16 September 2021), online: <www.theguardian.com/world/2021/sep/16/alberta-covid-uturn-crisis-unvaccinated-icu-beds>; Ontario, "Step Two," *supra* note 31; Magder, *supra* note 31.

⁵⁵ Penn, *supra* note 6; Dulaney, *supra* note 6.

⁵⁶ *Frank v Canada (Attorney General)*, 2019 SCC 1 at para 66 [*Frank*].

measures such as safety precautions could be equally effective at reducing the risk of transmission.⁵⁷ Similarly, scholars have argued, and some US decisions have concluded, that governments have failed to show that such safety precautions would be ineffective.⁵⁸

Second, the discrimination argument focuses on the strictness of the regulation of religious gatherings relative to comparable secular activities that are permitted. As explained further below, it is relevant to both whether the Measures limit section 15(1) *Charter* rights and whether they are minimally impairing. In *Gateway*, the applicants made the discrimination argument at the section 15(1) infringement step, claiming that the Measures limited equality rights because they classified certain secular activities as “essential” but treated religious gatherings as “non-essential.”⁵⁹ In contrast, in *Beaudoin*, the applicants made the discrimination argument at the justification stage, arguing that the Measures were arbitrary because the government had adopted less restrictive measures to regulate secular activities that posed “obviously identical risks” to religious gatherings.⁶⁰ At least one Canadian scholar has argued that there is little evidence that religious gatherings are riskier than permitted activities and that the Measures may reflect insufficient appreciation of the importance of the *Charter* right to freedom of religion,⁶¹ and some US decisions ruled that state governments failed to show why less restrictive measures employed for permitted secular activities would be ineffective if applied to religious gatherings.⁶²

Third, the deleterious effects argument contends that the Measures fail the proportionality of effects step of the *Oakes* test because their severe impact on *Charter* rights outweighs any contribution they may make to reducing transmission risk. Canadian claimants have articulated two principal deleterious effects: (1) the deprivation or significant curtailment of the right to worship collectively; and (2) the consequent emotional and psychological harm and mental health issues that they allege are linked to the Measures.⁶³ They have also argued that these deleterious effects outweigh the Measures’ benefits because those benefits are uncertain at best and non-existent at worst.⁶⁴ Scholars have also argued that the Measures’ deleterious effects will intensify the longer the Measures are in place, eventually leading to judicial findings that the Measures’ salutary effects are not proportional to their deleterious effects,⁶⁵ as well as that public health officials have given insufficient weight to the severity of these effects.⁶⁶

⁵⁷ *Gateway*, *supra* note 2 at paras 286–88; *Beaudoin* (Merits), *supra* note 2 at para 150.

⁵⁸ Brian Bird, “The Ban on In-Person Worship Continues in B.C., Along with the Wait for a Compelling Reason Why,” *Vancouver Sun* (1 January 2021), online: <vancouver.sun.com/opinion/brian-bird-the-ban-on-in-person-worship-continues-in-b-c-along-with-the-wait-for-a-compelling-reason-why>; *Roman Catholic Diocese*, *supra* note 47 at 67; *South Bay* (2021), *supra* note 33 at 718–19, per Gorsuch J.

⁵⁹ *Gateway*, *supra* note 2 at para 269.

⁶⁰ *Beaudoin* (Merits), *supra* note 2 at paras 226–27.

⁶¹ Bird, *supra* note 58. Dwight Newman has also observed that differential regulation of religious gatherings relative to secular activities could suggest that policy-makers were “implicit[ly] devalu[ing] ... religion.” See Dwight Newman, “Reasonable Limits: How Far Does Religious Freedom Go in Canada?” (February 2022) at 21–22, online (pdf): <content.cardus.ca/documents/download/6601> [Newman, “Reasonable Limits”].

⁶² *Roman Catholic Diocese*, *supra* note 47 at 66–67; *South Bay* (2021), *supra* note 33 at 717–18, per Gorsuch J.

⁶³ *Gateway*, *supra* note 2 at paras 289, 319; *Beaudoin* (Merits), *supra* note 2 at para 154.

⁶⁴ *Gateway*, *ibid* at para 319 (argument that “lockdowns do not work”); *Beaudoin* (Merits), *ibid* at para 150 (argument that no evidence of “a causal link between restrictions on religious services and a corresponding reduction in COVID-19 transmission”).

⁶⁵ Kristopher EG Kinsinger, “Restricting Freedom of Peaceful Assembly During Public Health Emergencies” (2021) 30:1 Const Forum Const 19 at 27 [Kinsinger, “Restricting Freedom”].

⁶⁶ Bird, *supra* note 58.

The three arguments should be addressed distinctly because they make distinct claims. The lack of instrumental rationality argument asks whether the Measures are appropriately tailored to achieve their objective, and thus corresponds to the rational connection and minimal impairment steps of the *Oakes* test. The deleterious effects argument focuses on whether the Measures' costs outweigh their benefits, and thus corresponds to the last proportionality of effects step of the *Oakes* test. In contrast, the discrimination argument centres on unjustified differential treatment, and thus is relevant to both section 15(1) infringement and the minimal impairment step of the *Oakes* test, a step that has been used to smoke out discrimination.

IV. PRIMA FACIE BREACH: THE MEASURES LIMIT SECTION 2(A) RIGHTS AND MAY LIMIT SECTION 15(1) RIGHTS

A. CHARTER RIGHTS CONSIDERED

For the purposes of this article, I consider sections 2(a) and 15(1) religious freedom and equality rights claims. I selected section 2(a) because it is the most frequently invoked right in the Canadian challenges. I chose section 15(1) because it has also been advanced in the Canadian challenges,⁶⁷ and is a logical fit for the discrimination argument outlined above.

I acknowledge that claimants have invoked other *Charter* rights, including the section 7 right to life, liberty, and security of the person and sections 2(b)–(d) rights to freedom of expression, peaceful assembly, and association.⁶⁸ I excluded consideration of section 7 because this right has a distinct analytical framework that incorporates arbitrariness, overbreadth, and proportionality considerations that can mirror elements of section 1 analysis.⁶⁹ I further did not address sections 2(b)–(d) separately because, as explained below, section 2(a) incorporates protections for religious expression, assembly, and association.⁷⁰

B. THE MEASURES LIMIT SECTION 2(A) RIGHTS

Section 2(a) guarantees “freedom of conscience and religion” as a fundamental freedom.⁷¹ This guarantee includes “the right to manifest religious belief by worship, teaching, dissemination and religious practice,” including through “[t]he performance of religious rites.”⁷² The Supreme Court has endorsed a “subjective conception of freedom of religion, one that is integrally linked with an individual’s self-definition and fulfilment and is a function of personal autonomy and choice, elements which undergird the right.”⁷³ Accordingly, to demonstrate a limitation or prima facie breach of section 2(a), claimants must prove only two elements: (1) they sincerely believe in a practice or belief that has a

⁶⁷ *Conseil des juifs*, *supra* note 2 at paras 127–54; *Beaudoin* (Merits), *supra* note 2 at paras 188–97.

⁶⁸ *Beaudoin* (Merits), *ibid* at paras 169–87.

⁶⁹ *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 93–129.

⁷⁰ David Schneiderman, “Associational Rights, Religion, and the *Charter*” in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 65 at 79–80; Kristopher EG Kinsinger, “Positive Freedoms and Peaceful Assemblies: Reenvisioning Section 2(c) of the Charter” (2020) 98 SCLR (2d) 377 at 380 [Kinsinger, “Positive Freedoms”].

⁷¹ *Charter*, *supra* note 1, s 2(a).

⁷² *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 57.

⁷³ *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 42 [*Syndicat Northcrest*].

nexus with religion; and (2) a non-trivial or non-insubstantial state interference with their ability to conform to that practice or belief.⁷⁴

Claimants can almost certainly demonstrate that Measures limit section 2(a). Many religious adherents sincerely believe that attending in-person religious gatherings or worship ceremonies is required and contributes to their spiritual development.⁷⁵ As governments have conceded in multiple challenges, regulations that prohibit religious adherents from attending those in-person gatherings or ceremonies are non-trivial and non-insubstantial state inferences with religious practices.⁷⁶

C. THE MEASURES MAY LIMIT SECTION 15(1) RIGHTS

Section 15(1) of the *Charter* guarantees that “[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”⁷⁷ The purpose of section 15(1) is to protect substantive equality, an “animating norm” that emphasizes the “full context of the claimant’s group’s situation,” the “actual impact of the law on that situation,” and the “‘persistent systemic disadvantages [that] have operated to limit the opportunities available’ to that group’s members.”⁷⁸ Section 15(1) requires that claimants connect the law’s impact to a ground of discrimination that is either enumerated in section 15(1) or analogous to one of those grounds because it is “a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity.”⁷⁹ Specifically, the claimant must show: (1) that the law imposes differential treatment based on protected grounds, whether explicitly or through adverse impact; and (2) that the differential treatment has the effect of reinforcing, perpetuating, or exacerbating disadvantage.⁸⁰ These two steps are distinct, but there may be overlap between them, especially in adverse effects cases.⁸¹

It is possible, though by no means certain, that religious claimants could demonstrate that the Measures limit section 15(1) rights. At step one, the Measures likely impose differential treatment based on the enumerated ground of religion because they apply different rules to in-person religious gatherings than to certain other in-person gatherings. Even if this distinction is not sufficient, the adverse effects of the Measures on religious claimants may be sufficient to establish a distinction. And at step two, at least some claimants may be able to adduce sufficient evidence of social exclusion and psychological harm caused by the Measures to establish that they contribute to disadvantage.

⁷⁴ *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 63 [*LSBC v TWU*]. I use the term prima facie breach instead of infringement because the Supreme Court recently clarified that “[a]n ‘infringement’ ... is a limit that is not justified”: *R v Brown*, 2022 SCC 18 at para 126.

⁷⁵ See e.g. *Celebration Church*, *supra* note 2 at para 23; *Beaudoin* (Merits), *supra* note 2 at para 45.

⁷⁶ *Beaudoin* (Merits), *ibid* at para 168; *Celebration Church*, *ibid* at para 16.

⁷⁷ *Charter*, *supra* note 1, s 15(1).

⁷⁸ *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 42 [*Fraser*].

⁷⁹ *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 13.

⁸⁰ *Fraser*, *supra* note 78 at para 81.

⁸¹ *Ibid* at para 82.

1. STEP ONE: DIFFERENTIAL TREATMENT

a. Direct Discrimination

At the first step, religious claimants could likely demonstrate that the Measures expressly impose differential treatment based on the enumerated ground of religion because by their very terms they apply different rules to in-person religious gatherings than to some other forms of in-person gatherings. Canadian provinces have not simply imposed one-size-fits-all rules on every activity. Instead, they have imposed rules regulating religious gatherings differently from certain other in-person social gatherings and activities. For instance, in Ontario, applicable regulations establish rules for religious gatherings that differ from the rules for some other organized public events and businesses, some of which were permitted to stay open with a higher capacity limit.⁸² Similarly, in British Columbia, Dr. Bonnie Henry specifically prohibited most in-person religious gatherings while permitting in-person gatherings at schools, gymnasiums, support groups, and restaurants, among other activities.⁸³ In *Roman Catholic Diocese of Brooklyn v. Cuomo* and *South Bay United Pentecostal Church v. Newsom*, the Supreme Court of the United States twice held that state-level COVID-19 restrictions imposed differential treatment because they explicitly subjected in-person religious gatherings to different and more restrictive rules than certain secular businesses.⁸⁴ While “merely including ‘worship services’ in a list of examples” of prohibited activities might not establish a distinction,⁸⁵ prohibiting in-person religious gatherings but permitting other forms of in-person gatherings can establish differential treatment.

It might be objected that the Measures do not draw an explicit distinction on the basis of religion because they treat religion similarly or more favourably than secular activities with a comparable risk profile. For instance, in *Roman Catholic Diocese of Brooklyn*, Justice Sotomayor reasoned that the fact that New York’s COVID-19 policy “refer[red] to religion on its face” did not effect differential treatment because that policy provided “preferential treatment” to religious gatherings as compared to secular gatherings.⁸⁶ Similarly, in *South Bay*, Justice Kagan reasoned that California’s COVID-19 regulations did not effect differential treatment because they regulated worship services the same as other activities that posed comparable levels of risk.⁸⁷ *Gateway* took a similar approach, reasoning that the regulations treated religious gatherings like “other venues that ... pose a higher risk.”⁸⁸

The substance of this objection is accurate, but it is best considered in the section 1 justification stage. The question of what constitutes a comparable secular activity in challenges to the Measures ultimately concerns the rationality or arbitrariness of the distinctions that government restrictions on in-person gatherings draw. It is designed to show,

⁸² *Rules for Areas in Shutdown Zone and at Step 1*, O Reg 82/20, Shutdown Zone, Schedule 4, r 1(1)(d); *Celebration Church*, *supra* note 2 at para 18.

⁸³ *Beaudoin* (Merits), *supra* note 2 at paras 112, 226.

⁸⁴ *Roman Catholic Diocese*, *supra* note 47 at 66–67; *South Bay* (2021), *supra* note 33 at 717, per Gorsuch J.

⁸⁵ Corbin, *supra* note 18 at 11.

⁸⁶ *Roman Catholic Diocese*, *supra* note 47 at 80, per Sotomayor J.

⁸⁷ *South Bay* (2021), *supra* note 33 at 721, per Kagan J.

⁸⁸ *Gateway*, *supra* note 2 at para 274; see also *Beaudoin* (Merits), *supra* note 2 at para 191 (determining that it was unnecessary to consider section 15(1) claim because “[t]he same activities are allowed and restricted for secular and religious people”).

as Justice Kagan put it, whether the government has failed to “treat like cases alike” or is instead entitled “to treat unlike cases” differently.⁸⁹ As explained below, I argue that the government is entitled to treat unlike cases differently because religious gatherings are riskier than permitted secular activities. But in Canadian section 15(1) jurisprudence, this question is reserved for section 1.⁹⁰ The first step of the section 15(1) test focuses on the “grounds of the distinction,” not its alleged discriminatory impact.⁹¹ Similarly, consideration of comparator groups has fallen into disfavour at the second step of the section 15(1) test. In *Withler v. Canada (Attorney General)*, the Supreme Court criticized the comparator group approach but still left the door open to that approach by accepting that at step two, “comparison may bolster the contextual understanding of a claimant’s place within the legislative scheme and society at large.”⁹² Since *Withler*, however, the Supreme Court has proven unwilling to use comparator groups at this step. In *Alliance*, the Supreme Court interpreted *Withler* as having “rejected” the comparator group analysis because it “may shortcut the second” step.⁹³ Similarly, the *Fraser* majority criticized the Federal Court and Court of Appeal for engaging in a “formalistic comparison” between the claimant employees who job-shared and the comparator group of employees on leave without pay.⁹⁴

2. ADVERSE IMPACT DISCRIMINATION

Even if courts decline to find a facial distinction, they might still conclude that the adverse impacts of the Measures cause a distinction because of their “disproportionate impact on members of a protected group.”⁹⁵ Specifically, courts look to evidence about the situation of the claimant group and the outcomes that the measure has produced.⁹⁶ The former factor “show[s] that membership in the claimant group is associated with certain characteristics that have disadvantaged members of the group,”⁹⁷ while the latter factor can “provide concrete proof that members of protected groups are being disproportionately impacted.”⁹⁸ Here, both factors may weigh in favour of a finding of disparate impact.

The situation of the claimant group could support a disproportionate impact finding because in-person religious gatherings are often fundamentally important to religious persons. As explored in detail below, these gatherings are not only in some cases a perceived spiritual obligation, but also a way to engage in activities essential to the exercise of religious freedom, and a source of security, meaning, and community. For instance, in *Ontario Human Rights Commission v. Simpsons-Sears*, the Supreme Court accepted that membership in the Seventh-Day Adventist Church was associated with an inability to work on Saturdays and that an employer’s requirement that all employees work on Saturdays thus constituted adverse effects discrimination against a Seventh-Day Adventist employee.⁹⁹ Similarly, the

⁸⁹ *South Bay* (2021), *supra* note 33 at 721, per Kagan J, quoting *Vacco v Quill*, 521 US 793 at 799 (1997).
⁹⁰ *Fraser*, *supra* note 78 at paras 79–80.

⁹¹ *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para 26 [*Alliance*] [emphasis in original].
⁹² 2011 SCC 12 at para 65 [*Withler*].

⁹³ *Alliance*, *supra* note 91 at para 27 [quotation omitted].

⁹⁴ *Fraser*, *supra* note 78 at paras 93–95.

⁹⁵ *Ibid* at para 52.

⁹⁶ *Ibid* at para 56.

⁹⁷ *Ibid* at para 57.

⁹⁸ *Ibid* at para 58.

⁹⁹ [1985] 2 SCR 536 at 539–40, 551–52.

evidence adduced by claimants who have challenged the Measures shows that membership in a religious group is associated with a perceived need to participate in in-person religious gatherings to fulfill spiritual obligations, experience communion with the divine and each other, and maintain spiritual and psychological well-being, such that claimants are especially disadvantaged by a prohibition on in-person gatherings. This may be particularly true for members of marginalized or racialized religious communities, such as the Hasidic Jewish community of Montreal considered in *Conseil des juifs*, as religious gatherings may be an important way to combat and cope with social exclusion and alienation.¹⁰⁰

The Measures' outcomes could also support a disproportionate impact finding because claimants have adduced evidence that the Measures cause psychological distress and social exclusion.¹⁰¹ Psychological distress and social exclusion may be particularly pronounced for the elderly, the low-income, and recent immigrants and refugees, as they may be less able to achieve a similar sense of community from a virtual service and in-person religious gatherings may be an important means for them to alleviate social exclusion.¹⁰²

It follows that restrictions on in-person social gatherings may have a disproportionate impact on members of religious groups sufficient to pass the first step. Even if, as Chief Justice Hinkson found in *Beaudoin*, the Measures restrict religious and secular activities alike,¹⁰³ facially neutral policies can still have “the effect of placing members of protected groups at a disadvantage.”¹⁰⁴ Because in-person religious gatherings are central to the lives and world views of many religious adherents, banning or restricting in-person gatherings can have a disproportionate impact on them. This impact likely “goes beyond mere loss of companionship” that might flow from cancellation of other in-person gatherings such as a lunch club, as a Scottish court found in *Philip*.¹⁰⁵ As the claimants submitted, and the Court found in *Conseil des juifs*, these measures may fundamentally disrupt the lives of religious believers, leaving a spiritual void in their lives and causing them to experience psychological distress, stress, exclusion, and alienation.¹⁰⁶

a. Step Two: Contribution to Disadvantage

At the second step of the test, courts consider whether the Measures “ha[ve] the effect of reinforcing, perpetuating, or exacerbating disadvantage,”¹⁰⁷ At this step, factors such as economic and social exclusion, psychological harms, or political exclusion may establish contribution to disadvantage.¹⁰⁸

The Measures could be found to contribute to disadvantage even if they reflect reasonable policy choices based on religious gatherings' risk profile rather, than prejudice or

¹⁰⁰ *Conseil des juifs*, *supra* note 2 at para 156.

¹⁰¹ *Ingram*, *supra* note 2 at paras 50, 52; *Conseil des juifs*, *ibid*; *Celebration Church*, *supra* note 2 at paras 23–25.

¹⁰² Canadian Civil Liberties Association, “CCLA Writes to BC Provincial Health Officer Regarding Religious Services” (17 December 2020), online: <ccla.org/ccla-to-bc-provincial-health-officer/>.

¹⁰³ *Beaudoin* (Merits), *supra* note 2 at para 191.

¹⁰⁴ *Fraser*, *supra* note 78 at para 53.

¹⁰⁵ *Philip*, *supra* note 48 at para 121.

¹⁰⁶ *Conseil des juifs*, *supra* note 2 at paras 156–57.

¹⁰⁷ *Fraser*, *supra* note 78 at para 81.

¹⁰⁸ *Ibid* at para 76.

stereotyping. Admittedly, in *Gateway*, Chief Justice Joyal dismissed the section 15(1) claim at this step because he applied *Alberta v. Hutterian Brethren of Wilson Colony* and concluded that the Measures were “not a demeaning stereotype, but rather, a neutral and rationally connected policy choice.”¹⁰⁹ Chief Justice Joyal’s resort to *Hutterian Brethren* was logical because it is one of the principal Supreme Court decisions considering a section 15(1) claim invoking the enumerated ground of religion.¹¹⁰ However, as *Fraser* illustrates, subsequent section 15(1) jurisprudence has overtaken the approach employed in *Hutterian Brethren*. Prejudice or stereotyping are no longer required,¹¹¹ and it is irrelevant at the prima facie breach stage whether the law serves a legitimate state objective or is not arbitrary.¹¹² Similarly, because the comparator group analysis has fallen out of favour,¹¹³ whether or not the restrictions treat religious and similar secular activities even-handedly is reserved for section 1.

Some claimants may be able to show that the Measures contribute to disadvantage at the second step, for many of the same reasons that they may be able to show an adverse effect at the first step. In *Fraser*, the majority recognized that the first and second steps may often overlap in adverse effect cases and should not be siloed.¹¹⁴ Two factors are particularly relevant: (1) social exclusion; and (2) psychological harm.¹¹⁵ As explained under step one, religious claimants have adduced evidence of both social exclusion and psychological harm flowing from restrictions on in-person religious gatherings.

Claimants belonging to religious groups that have experienced historical discrimination and disadvantage are more likely to be able to make the necessary showing at this step. True, the Supreme Court has accepted that even members of historically advantaged groups can be discriminated against on the basis of an enumerated ground.¹¹⁶ At the same time, the protection of historically disadvantaged groups is a central purpose of section 15(1),¹¹⁷ and the second step focuses on the “protection of groups that have experienced exclusionary disadvantage based on group characteristics.”¹¹⁸ For instance, in *Conseil des juifs*, the Court relied heavily on the marginalization of Montreal’s Hasidic Jewish community when it concluded that their section 15(1) claim was not doomed to fail.¹¹⁹ Indeed, the Court was particularly cognizant of the discrimination that Hasidic Jews had faced throughout history, the corresponding importance to Quebec’s Hasidic Jewish community of maintaining strong community bonds through religious gatherings, and the potential that the Measures would increase pre-existing feelings of social exclusion and alienation.¹²⁰ In contrast, groups that

¹⁰⁹ *Gateway*, *supra* note 2 at para 275, citing *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 108 [*Hutterian Brethren*].

¹¹⁰ Kristopher EG Kinsinger, “Unequal Religious Citizenship: Concurrent Claims Under Sections 2(a) and 15 of the Charter” at 22, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3335894>.

¹¹¹ *Fraser*, *supra* note 78 at para 78.

¹¹² *Ibid* at paras 78–80.

¹¹³ *Alliance*, *supra* note 91 at para 27; *Fraser*, *ibid* at paras 93–95.

¹¹⁴ *Fraser*, *ibid* at para 82.

¹¹⁵ *Ibid* at para 76.

¹¹⁶ *Trociuk v British Columbia (Attorney General)*, 2003 SCC 34 at paras 20, 24.

¹¹⁷ *Quebec (Attorney General) v A*, 2013 SCC 5 at para 332, per Abella J.

¹¹⁸ *Fraser*, *supra* note 78 at para 77.

¹¹⁹ *Conseil des juifs*, *supra* note 2 at para 150.

¹²⁰ *Ibid* at paras 2, 156.

have not experienced historical discrimination or disadvantage must rely more heavily on evidence of psychological harm and social exclusion.

V. THE *OAKES* STANDARD OF REVIEW APPLIES TO THE JUSTIFICATION ANALYSIS

Two potential standards of review could apply to determine whether the limits the Measures impose on *Charter* rights are justified under section 1 of the *Charter*: (1) the *Oakes* test; and (2) the *Doré* framework. *Oakes* applies to *Charter* challenges to “law[s] or other rule[s] of general application,”¹²¹ while *Doré* applies to “[d]iscretionary administrative decisions that engage the *Charter*.”¹²² Under *Oakes*, once the claimant demonstrates a prima facie breach of a *Charter* right, the government has the burden to demonstrate that the measure in question: (1) has a pressing and substantial objective; (2) is rationally connected to that objective; (3) minimally impairs the right in question; and (4) has effects that are proportional to the legislative objective.¹²³ Under *Doré*, the court must determine whether a decision “reflects a proportionate balancing of the *Charter* protection with the statutory mandate.”¹²⁴ The *Doré* framework is similar to the third and fourth steps of *Oakes*, since it requires the court to determine whether there were other reasonable less restrictive alternatives to the government’s chosen measure and to weigh the limit on the *Charter* right against the benefits of furthering the statutory objectives.¹²⁵ However, the *Doré* framework is “silent” on whether the onus of proof lies with the state or the claimant.¹²⁶ That silence could make *Doré* more government friendly.¹²⁷ So could the fact that *Doré* does not expressly require assessing the legitimacy of a measure’s objective.¹²⁸

I determine that the standard of review applicable to the Measures is *Oakes*, not *Doré*. First, *Oakes* likely applies to the Measures that governments implemented by issuing regulations. Multiple appellate courts have accepted that *Oakes* applies to challenges to regulations.¹²⁹ This conclusion is consistent with *Doré* because regulations are “rule[s] of general application,”¹³⁰ as the Supreme Court has accepted in the context of section 1’s “prescribed by law” requirement.¹³¹

¹²¹ *Doré*, *supra* note 10 at para 39.

¹²² *LSBC v TWU*, *supra* note 74 at para 57.

¹²³ *Frank*, *supra* note 56 at para 38.

¹²⁴ *LSBC v TWU*, *supra* note 74 at para 79.

¹²⁵ *Ibid* at paras 80–81.

¹²⁶ *Ibid* at para 312, per Brown & Côté JJ.

¹²⁷ See e.g., Christopher D Bredt & Ewa Krajewska, “*Doré*: All That Glitters is Not Gold” (2014) 67 SCLR (2d) 339 at 357, 359.

¹²⁸ Andy Yu, “Delegated Legislation and the *Charter*” (2020) 33 Can J Admin L & Prac 49 at 55.

¹²⁹ *Syndicat canadien de la fonction publique, section locale 1108 c CHU de Québec – Université Laval*, 2020 QCCA 857 at para 29; *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City)*, 2018 ABCA 154 at para 96; *Joanne Fraser, Allison Pilgrim, and Colleen Fox v Attorney General of Canada*, 2018 FCA 223 at para 30, *rev’d* on other grounds; *Fraser*, *supra* note 78.

¹³⁰ *Doré*, *supra* note 10 at para 39.

¹³¹ *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31 at para 53 [*Federation of Students*].

Second, *Oakes* likely applies to Measures implemented by administrative public health orders. The applicable standard of review for public health orders is a more difficult question because public health statutes can authorize both broad and specific orders,¹³² and orders have both legislative and administrative elements.¹³³ *Gateway* and *Beaudoin* split on this issue. *Gateway* ruled that *Oakes* applied because the orders were more “akin to legislative instruments of general application ... than an administrative decision that affects only particular individuals.”¹³⁴ In contrast, *Beaudoin* concluded that public health orders “are more akin to an administrative decision than a law of general application” because “they were made through a delegation of discretionary decision-making authority.”¹³⁵

Gateway’s conclusion that *Oakes* applies is likely correct because the public health orders implementing the Measures are not tailored to a specific individual or organization as in *Doré*, but instead are enacted pursuant to legislation that empowers public health authorities to take sweeping province-wide actions in response to infectious disease outbreaks.¹³⁶ The orders thus are more akin to rules of general application.¹³⁷ This conclusion is consistent with the Supreme Court’s recognition in the context of section 1’s “prescribed by law” requirement that “a binding rule adopted pursuant to a government entity’s statutory powers” that is “of general application” is “similar, in both form and substance, to statutes [and] regulations.”¹³⁸ It is also consistent with court decisions that have reviewed administrative policies under *Oakes* because those policies are “of general application.”¹³⁹ In contrast, applying *Doré* would elevate form over substance because administrative orders establishing rules of general application are substantially similar to statutes and regulations.

VI. THE MEASURES ARE JUSTIFIED LIMITS

A. TIMING ASSUMPTION FOR THE SECTION 1 ANALYSIS

For the purposes of the section 1 analysis, I assess the Measures’ constitutionality at a point in time before the vast majority of Canadians are fully vaccinated and boosted. I do not consider whether the Measures could be constitutionally applied to religious gatherings of fully vaccinated and boosted persons at a time when the vast majority of Canadians are fully vaccinated and boosted. I make this timing assumption because being fully vaccinated and boosted dramatically reduces the risk of death and serious illness as a result of COVID-19

¹³² *Gateway*, *supra* note 2 at para 35.

¹³³ See by analogy, Yu, *supra* note 128 at 61 (discussing hybrid nature of regulations).

¹³⁴ *Gateway*, *supra* note 2 at para 36.

¹³⁵ *Beaudoin* (Merits), *supra* note 2 at para 218.

¹³⁶ Barbara von Tigerstrom, “Public Health Law and Infectious Diseases” in Joanna N Erdman, Vanessa Gruben & Erin Nelson, eds, *Canadian Health Law and Policy*, 5th ed (Toronto: LexisNexis, 2017) 481 at 493–94.

¹³⁷ *Gateway*, *supra* note 2 at para 36.

¹³⁸ *Federation of Students*, *supra* note 131 at paras 58, 64.

¹³⁹ *The Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2018 ONSC 579 at para 58, aff’d 2019 ONCA 393.

transmission.¹⁴⁰ Large-scale vaccination and boosting would in turn significantly reduce the salutary effects of the measures by reducing the risk of death, illness, and consequent strain on the healthcare system arising from the transmission of COVID-19 at religious gatherings.

B. DEFINING THE MEASURES' OBJECTIVE

Precise definition of the Measures' objective matters because the definition of the objective can often determine the outcome of the section 1 analysis and an overbroad or unduly narrow definition of the objective will distort that analysis.¹⁴¹ For instance, in *Hutterian Brethren*, the majority upheld the constitutionality of a universal photo requirement that limited the section 2(a) rights of members of the Hutterian Brethren religious community in part because the majority defined that requirement's objective broadly. The majority's broad definition of the objective as "[m]aintaining the integrity of the driver's licensing system in a way that minimizes the risk of identity theft" drove conclusions that alternative measures would compromise the government's goal and that preserving the integrity of the system outweighed the deleterious effects on the claimants' rights.¹⁴²

However, the decisions in the Canadian challenges contain little discussion of how to identify the Measures' objective. The injunction decisions referred to the protection of public health as an important factor at the balance of convenience step of the preliminary injunction test, but did not identify the Measures' objective for section 1 purposes.¹⁴³ The first merits decision, *Beaudoin*, defined the Measures' objective as "[c]ontaining the spread of the Virus and the protection of public health."¹⁴⁴ However, this formulation appears to be based on the petitioners' concession "that public health is a sufficiently important objective,"¹⁴⁵ and the decision does not record any conflicting arguments about the Measures' objective or explanation as to why the Court selected that objective instead of a narrower formulation. The second merits decision, *Gateway*, adopted both the broad objective of "protect[ing] public health" and the somewhat narrower objective of "sav[ing] lives, prevent[ing] serious illness and stop[ping] the exponential growth of the virus from overwhelming ... [the] healthcare system."¹⁴⁶ The decision's discussion of why the Court selected these objectives was also brief, likely because the applicants conceded the pressing and substantial nature of the objectives.¹⁴⁷

¹⁴⁰ US, Centers for Disease Control and Prevention, *Effectiveness of a Third Dose of mRNA Vaccines Against COVID-19-Associated Emergency Department and Urgent Care Encounters and Hospitalizations Among Adults During Periods of Delta and Omicron Variant Predominance – VISION Network, 10 States, August 2021-January 2022*, 71:4 Morbidity & Mortality Weekly Report (28 January 2022); Nick Andrews et al., "Effectiveness of COVID-19 Booster Vaccines Against COVID-19 Related Symptoms, Hospitalization and Death in England" (2022) 28:4 Nature Medicine 831.

¹⁴¹ *Frank*, supra note 56 at para 46.

¹⁴² *Hutterian Brethren*, supra note 109 at paras 42, 59, 80–81.

¹⁴³ *Conseil des juifs*, supra note 2 at para 175; *Springs of Living Water*, supra note 2 at para 37; *Ingram*, supra note 2 at para 81; *Celebration Church*, supra note 2 at para 29.

¹⁴⁴ *Beaudoin* (Merits), supra note 2 at para 224.

¹⁴⁵ *Ibid* at para 222.

¹⁴⁶ *Gateway*, supra note 2 at para 293.

¹⁴⁷ *Ibid*.

I argue that the objective is best defined as protecting Canadians from illness, death, and consequent strain on the healthcare system arising from the transmission of COVID-19 at in-person religious gatherings. Supreme Court jurisprudence establishes that the relevant objective is that of the provision that imposes the limitation, not the legislative or regulatory scheme as a whole.¹⁴⁸ This formulation of the objective is consistent with that jurisprudence because it targets the specific objective of the Measures — protecting Canadians from the consequences of transmission at in-person religious gatherings — rather than the broader objective of the entire legislative and regulatory scheme governments adopted to prevent community transmission, generally. Court decisions considering other COVID-19 restrictions have similarly tailored the objective to the specific risk those restrictions address, such as in *Taylor v. Newfoundland and Labrador*, where the Court concluded that the objective of Newfoundland’s restrictions on interprovincial travel was to “protect [provincial residents] from illness and death arising from the importation and spread of COVID-19 by travelers.”¹⁴⁹

Consistent with *Gateway*, protecting Canadians from strain on the healthcare system should form part of the objective alongside protection from illness and death.¹⁵⁰ The pandemic has shown that ICU beds are a scarce commodity and that surges in cases threaten to overwhelm the critical care system’s capacity, which in turn endangers patients’ health.¹⁵¹ Rising cases increase the risk and strain on healthcare workers,¹⁵² and can also prevent the healthcare system from providing medical care unrelated to COVID-19 such as non-urgent surgeries.¹⁵³ For all those reasons, many provincial governments stated that they imposed the Measures to prevent the healthcare system from being overwhelmed.¹⁵⁴

Framing the objective more broadly as the protection of public health and protecting Canadians from illness and death caused by COVID-19 generally, as the *Beaudoin* and *Gateway* Courts did, overshoots the Measures’ specific objective of reducing the risk of transmission at religious gatherings. In the public health context of restrictions on tobacco advertising, the Supreme Court has consistently expressed a preference for a more narrowly stated objective that is tethered to the specific risks the measure targets. In *RJR-MacDonald Inc. v. Canada (Attorney General)*, for instance, the majority rejected the dissent’s proposed objective of “protecting public health by reducing tobacco consumption,”¹⁵⁵ and instead tethered the objective to the specific risks the measures targeted — “tobacco-associated

¹⁴⁸ *Fraser*, *supra* note 78 at para 125.

¹⁴⁹ *Taylor v Newfoundland and Labrador*, 2020 NLSC 125 at para 436 [*Taylor*].

¹⁵⁰ *Gateway*, *supra* note 2 at para 294.

¹⁵¹ Kali A Barrett et al., “Critical Care Capacity During the COVID-19 Pandemic,” Science Table COVID-19 Advisory for Ontario (30 November 2021), online: < covid19-sciencetable.ca/wp-content/uploads/2021/11/Critical-Care-Capacity-During-the-COVID-19-Pandemic_published_20211130.pdf>; *Taylor*, *supra* note 149 at para 96; *Gateway*, *ibid* at para 328.

¹⁵² James T Brophy et al., “Sacrificed: Ontario Healthcare Workers in the Time of COVID-19” (2021) 30:4 NEW SOLUTIONS 267.

¹⁵³ Muriel Draaisma, “Ontario Tells Hospitals to Stop Non-Urgent Surgeries, Procedures to Preserve Critical-Care Capacity,” *CBC News* (5 January 2022), online: < www.cbc.ca/news/canada/toronto/ontario-government-directive-pause-non-emergent-non-urgent-procedures-1.6305633>.

¹⁵⁴ Ontario, “Step Two,” *supra* note 31; Sabrina Jonas, “Quebec ‘Can’t Afford’ to Ease Public Health Measures, Even as COVID-19 Hospitalizations Plateau, Says Premier,” *CBC News* (20 January 2022), online: < www.cbc.ca/news/canada/montreal/quebec-legault-jan-20-2022-1.6321722>.

¹⁵⁵ *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 82 [*RJR-MacDonald*].

health risks” — and the means they employed to do so — “reducing advertising-related consumption and providing warnings of dangers.”¹⁵⁶ In *Canada (Attorney General) v. JTI-MacDonald Corp.*, the Supreme Court similarly reasoned that the objective of tobacco advertising restrictions was not “protecting the health of Canadians” generally, but instead should be defined “more narrowly” by reference “to the objective of the particular provisions at issue,” which targeted “protecting young persons and others from inducements” and “enhancing public awareness of health hazards.”¹⁵⁷ Consistent with *RJR-MacDonald* and *JTI-MacDonald*, broader “public health,”¹⁵⁸ or “sav[ing] lives [and] prevent[ing] serious illness” framings,¹⁵⁹ should be rejected because they are not narrowly tailored to the specific risks of COVID-19 transmission arising from religious gatherings that the Measures target.

At the same time, it would be unhelpful to narrow the objective by reference to an acceptable level of community transmission. Kristopher Kinsinger has observed that in certain provinces the objective of the restrictions might only be to prevent the transmission of COVID-19 above a level deemed unacceptable.¹⁶⁰ Kinsinger is right that the Measures are unlikely to fully protect Canadians from illness and death arising from the transmission of COVID-19 at in-person religious gatherings, and it would likely be impossible to prevent all risk of COVID-19 transmission.¹⁶¹ But the same could be said about other public health measures, such as the ban on tobacco information and brand-preference advertising that could be appealing to young people that the Supreme Court considered in *JTI-MacDonald*. The Supreme Court accepted that the purpose of this ban was to “preven[t]” youth from being tempted to take up tobacco use even though the ban would not eliminate all the possible ways in which youth could be tempted to use tobacco.¹⁶² Similarly, in *Philip*, despite accepting that it would be “impossible” to “eliminat[e] all death,” the Court accepted that the objective of Scotland’s restrictions was to “reduce risk by suppressing the virus to the lowest possible level.”¹⁶³

C. THE MEASURES ARE RATIONALLY CONNECTED TO THEIR OBJECTIVE

There is equally little doubt that the Provincial Religious Gathering Restrictions are rationally connected to the objective of protecting Canadians from illness, death, and consequent strain on the healthcare system arising from the transmission of COVID-19 at in-person religious gatherings. At this step, all that is required is the existence of a rational or logical causal connection between the measures and the objective.¹⁶⁴ As *Gateway* ruled and the Scottish Court also found in *Philip*, the closure of places of worship is rationally

¹⁵⁶ *Ibid* at para 146.

¹⁵⁷ *Canada (Attorney General) v. JTI-MacDonald Corp.*, 2007 SCC 30 at para 38 [*JTI-MacDonald*].

¹⁵⁸ *Beaudoin (Merits)*, *supra* note 2 at para 224.

¹⁵⁹ *Gateway*, *supra* note 2 at para 293.

¹⁶⁰ Kinsinger, “Restricting Freedom,” *supra* note 65 at 24.

¹⁶¹ *Philip*, *supra* note 48 at para 99.

¹⁶² *JTI-MacDonald*, *supra* note 157 at para 91.

¹⁶³ *Philip*, *supra* note 48 at para 99.

¹⁶⁴ *R v KRJ*, 2016 SCC 31 at para 68 [*KRJ*].

connected to the objective because, by reducing human interaction, it also reduces transmission.¹⁶⁵ By reducing transmission, it also reduces strain on the healthcare system.

**D. THE MEASURES PASS MINIMAL IMPAIRMENT
BECAUSE THEY ARE INSTRUMENTALLY
RATIONAL AND ARE NOT DISCRIMINATORY**

**1. MINIMAL IMPAIRMENT ENCOMPASSES BOTH INSTRUMENTAL
RATIONALITY CONCERNS AND POTENTIAL DISCRIMINATION
BETWEEN RELIGIOUS AND SECULAR ACTIVITIES**

I consider the lack of instrumental rationality and discrimination arguments at the minimal impairment step because it encompasses both arguments. Minimal impairment engages the lack of instrumental rationality argument because, if a less restrictive alternative would enable the government to “fully realiz[e]” its objective, then the Measures will fail minimal impairment.¹⁶⁶ On the lack of instrumental rationality argument, then, the government could have fully achieved its objective through more tailored means that impacted religious freedom less severely.

The minimal impairment step also engages the discrimination argument because it requires the Court to consider less restrictive alternatives governments have employed to regulate other activities. Specifically, a law may fail minimal impairment even if a less restrictive alternative is less effective than government’s chosen measure, as long as that alternative provides “sufficient protection” to the objective and allows the objective to be achieved in a “real and substantial manner.”¹⁶⁷ Under the “sufficient protection” formulation of the minimal impairment step, religious claimants could argue that, because governments have accepted that less restrictive alternatives are acceptable for other secular activities, those alternatives could also provide sufficient protection to the government’s objective if applied to religious gatherings.

Indeed, courts have previously used minimal impairment to sniff out discrimination. In *Multani v. Commission scolaire Marguerite-Bourgeois*, the Court reasoned that a student wearing a kirpan, a religious object that resembles a dagger and must be made out of metal, posed an equivalent or lesser safety risk than other objects permitted in schools.¹⁶⁸ Accordingly, the Court concluded that the school’s acceptance of these latter items but not the kirpan reflected a discriminatory value judgment that “the activities in which those objects are used to be important, while accommodating the religious beliefs of the appellant’s son is not.”¹⁶⁹ *Ontario (Attorney General) v. G* is similar. In that case, the Supreme Court held that Ontario’s sex offender registry regime unjustifiably limited section 15(1) *Charter*

¹⁶⁵ *Gateway*, *supra* note 2 at paras 296–97; *Philip*, *supra* note 48 at para 102.

¹⁶⁶ *KRJ*, *supra* note 164 at para 75.

¹⁶⁷ *Hutterian Brethren*, *supra* note 109 at para 55.

¹⁶⁸ *Multani v Commission scolaire Marguerite-Bourgeois*, 2006 SCC 6 at para 58 [*Multani*].

¹⁶⁹ *Ibid* at para 75.

rights by permitting exemptions from registration for offenders found guilty of sexual offences, but not for those found not criminally responsible by reason of mental disorder (NCRMD) of the same offences.¹⁷⁰ At the minimal impairment step of the *Oakes* test, the Supreme Court rejected the government's argument that risk assessments were not as effective as a mandatory registry for persons found NCRMD because "the same could be said for all those found guilty of sexual offences."¹⁷¹ In other words, having accepted that risk assessments were sufficient for persons convicted of sexual offences, the government could not discriminate on the basis of mental disability by imposing more onerous standards on persons found NCRMD of the same offences. In this way, the minimal impairment step can determine whether stricter regulation of religious gatherings is the product of what Cass Sunstein termed "selective sympathy and indifference" by the government or is instead justified by the special risks that religious gatherings places pose.¹⁷²

2. INSTRUMENTAL RATIONALITY: MEASURES THAT INCORPORATE CATEGORICAL AND DISCRETIONARY EXCEPTIONS ARE LIKELY PROPERLY TAILORED

a. Categorical and Discretionary Exceptions to the Measures Are Likely Required

As an initial matter, *Charter* jurisprudence likely requires any Measures to incorporate both categorical and discretionary exceptions to survive minimal impairment. These exceptions would account for the fact that the level of risk varies depending on the type of religious gathering, the environment it occurs in, and the activities engaged in. Indeed, the Supreme Court has previously found such context-specific considerations relevant in religious freedom cases. In *Multani*, for instance, the Supreme Court took a context-specific approach to restricting the wearing of a kirpan. The Supreme Court reasoned that a prohibition on a kirpan might be justified in an airport or a courtroom, but not in a school because it is easier to control the risk that a kirpan might be used as a weapon in the latter environment than in the former two environments.¹⁷³

i. *Categorical Exceptions for Outdoor and Drive-In Services and Private Prayer*

Charter jurisprudence and Canadian and international cases addressing COVID-19 related restrictions on religious gatherings suggest that at least three categorical exceptions are likely required to ensure *Charter* compliance: (1) outdoor services; (2) drive-in services; and (3) private prayer. These exceptions would apply in addition to online or virtual worship, which the Measures have never prohibited. Governments would struggle to justify refusing to

¹⁷⁰ *Ontario (Attorney General) v G*, 2020 SCC 38 at paras 52, 70, 76.

¹⁷¹ *Ibid* at para 75.

¹⁷² Cass R Sunstein, "Our Anti-Korematsu" (2021) 1 American JL & Equity 221 at 225–26. See also Newman, "Reasonable Limits," *supra* note 61 at 21.

¹⁷³ *Multani*, *supra* note 168 at paras 63–66.

provide these exceptions because each excepted activity is less risky than indoor in-person religious gatherings.

First, an exception for outdoor services is likely required because the risk of transmission is substantially reduced outdoors. Public health experts generally accept that the risk of transmission is reduced outdoors, and that conclusion is consistent with scientific studies to date.¹⁷⁴ British Columbia thus exempted certain religious communities' outdoor gatherings from the Measures, and *Beaudoin* found those exemptions weighed in favour of the Measures' constitutionality.¹⁷⁵ In *South Bay*, Justice Kagan similarly relied on California's permission of outdoor religious gatherings without attendance limits to conclude that California's restrictions on indoor religious gatherings do "not amount to a ban on the activity."¹⁷⁶ In contrast, it would be difficult to justify prohibiting outdoor gatherings. Because their outdoor nature already significantly reduces the risk of transmission, courts would likely conclude that permitting outdoor gatherings subject to additional safety precautions such as masking and social distancing would not significantly jeopardize the Measures' ability to realize their objective in a real and substantial manner.

Second, an exception for drive-in services is likely required because attendees can stay in their vehicles and thus are not in close proximity in an enclosed space. In *Beaudoin*, Chief Justice Hinkson relied on the exception for drive-in services to distinguish British Columbia's restrictions from an overbroad "absolute prohibition" on religious gatherings, and the *Gateway* Court reached a similar conclusion.¹⁷⁷ In contrast, governments would be hard-pressed to justify why they could not permit drive-in services as long as persons stay in their vehicles except to use washroom facilities and maintain social distancing whenever outside their vehicles, as British Columbia has done.¹⁷⁸ Since COVID-19 would only be transmitted if attendees left their cars, the less restrictive alternative of permitting drive-in services but requiring attendees to stay in their vehicles would seem to be equally effective. And to the extent that an exception permitting persons to exit their vehicles to use restrooms is unavoidable, requiring persons to maintain social distancing and to wear a mask while doing so would not significantly jeopardize the Measures' ability to realize their objective in a real and substantial manner.

¹⁷⁴ David Shukman, "Covid: Can You Catch the Virus Outside?," *BBC News* (22 April 2021), online: <www.bbc.com/news/explainers-55680305>; Tommaso Celeste Bulfone et al., "Outdoor Transmission of SARS-CoV-2 and Other Respiratory Viruses: A Systematic Review" (2021) 223:4 *J Infectious Diseases* 550; Benika C Dixon et al., "Contact and SARS-CoV-2 Infections Among College Football Athletes in the Southeastern Conference During the COVID-19 Pandemic" (2021) 4:10 *JAMA Network Open*.

¹⁷⁵ *Beaudoin* (Merits), *supra* note 2 at paras 64, 107, 245.

¹⁷⁶ *South Bay* (2021), *supra* note 33 at 721.

¹⁷⁷ *Beaudoin* (Merits), *supra* note 2 at para 192; *Gateway*, *supra* note 2 at para 303. Newman has also argued that restrictions on drive-in services are overbroad and do "not meet minimal-impairment." See Newman, "Reasonable Limits," *supra* note 61 at 21.

¹⁷⁸ *Springs of Living Water*, *supra* note 2 at paras 10-11, 15; *Beaudoin* (Injunction), *supra* note 2 at para 14. For instance, Manitoba "voluntarily reversed its ban on drive-in religious services" after failing to "produce any evidence that prohibiting drive-in religious services would, in fact, mitigate the risk of contact" in response to a court challenge in late 2020. See Justin Collings & Stephanie Hall Barclay, "Taking Justification Seriously: Proportionality, Strict Scrutiny, and the Substance of Religious Liberty" (2022) 63:2 *Boston College L Rev* 453 at 490-91.

Third, an exception for private prayer is also likely required. By private prayer, I mean a person attending a place of worship to engage in silent prayer or reflection in the following two scenarios: (1) when no other persons are present in the place of worship; or (2) when a small number of other persons, for example less than ten, are present, but without any verbal interaction with such other persons. Unlike group religious gatherings, private prayer does not involve large groups of persons in close proximity and does not involve loud singing and talking. Indeed, even governments that have prohibited private prayer, such as the Scottish government, have accepted that private prayer would pose only a minimal risk of transmission.¹⁷⁹ In *Beaudoin*, Chief Justice Hinkson relied on the exception for private prayer to conclude that British Columbia's restrictions on religious gatherings were minimally impairing.¹⁸⁰ In contrast, in *Philip* the Scottish Court found that the prohibition on private prayer could not even pass the lowest level of scrutiny because the admittedly marginal benefits were outweighed by the deleterious effects on the religious claimants.¹⁸¹ A Canadian court would likely reach the same conclusion.

ii. *Discretionary Exceptions*

Discretionary exceptions to the Measures are also likely required because the risk of transmission can vary depending on the nature and location of the contemplated religious activities. For instance, some religious communities may be willing to eliminate singing and have only a single person speak or pray out loud, perhaps even from a remote location inside a place of worship.¹⁸² Similarly, religious establishments vary in size and capacity, which could also affect the degree of proximity to others and thus the risk of transmission.¹⁸³ Discretionary exceptions provide flexibility for religious communities that are able to conduct religious gatherings in a way that minimizes the risk of transmission,¹⁸⁴ and could allow governments to adapt the Measures to new scientific evidence and best practices without having to amend the regulations or administrative orders that enacted the Measures.¹⁸⁵

Accordingly, courts have recognized that discretionary exceptions are a key factor supporting the constitutionality of COVID-19 prevention measures and that their absence weighs in favour of a finding of unconstitutionality. In *Beaudoin*, the Court found that the possibility of discretionary exceptions was the most important factor supporting the conclusion that British Columbia's restrictions were minimally impairing.¹⁸⁶ In the related context of travel restrictions, the Court in *Taylor* reached the same conclusion,¹⁸⁷ and Canadian courts have treated exceptions as an indicium of reasonableness when rejecting

¹⁷⁹ *Philip*, *supra* note 48 at paras 43, 47.

¹⁸⁰ *Beaudoin* (Merits), *supra* note 2 at paras 245–46.

¹⁸¹ *Philip*, *supra* note 48 at paras 112, 115, 126.

¹⁸² See e.g. *F*, *supra* note 50 at para 13; *South Bay* (2021), *supra* note 33 at 720, per Gorsuch J.

¹⁸³ *F*, *ibid*; *State Council Order* (November 2020), *supra* note 49.

¹⁸⁴ *F*, *ibid* at para 14.

¹⁸⁵ Colleen M Flood, Bryan Thomas & Dr. Kumanan Wilson, “Civil Liberties vs. Public Health” in Flood et al, *supra* note 19, 249 at 262 [Flood, Thomas & Wilson, “Civil Liberties”].

¹⁸⁶ *Beaudoin* (Merits), *supra* note 2 at paras 245–46.

¹⁸⁷ *Taylor*, *supra* note 149 at para 485.

administrative law challenges to other COVID-19 restrictions.¹⁸⁸ German and French courts have ruled also that blanket restrictions on religious gatherings that do not allow for any tailoring to specific circumstances reducing the risk of transmission are disproportionate.¹⁸⁹

In addition, *Charter* jurisprudence recognizes that exceptions to rules of general application may sometimes be required where a specific activity does not pose the same risk that the rule is designed to address. In *Multani*, for instance, the Supreme Court held that the *Charter* required exempting wearing a kirpan from the school code of conduct prohibiting the carrying of weapons because the student in question did not pose a risk of violence and the kirpan could be worn in a way that would make it difficult for other students to seize it.¹⁹⁰ While the Supreme Court subsequently distinguished *Multani* as hinging on a reasonable accommodation analysis instead of the minimal impairment test that applies to laws of general application,¹⁹¹ it is hard to see how a statute or regulation that prohibited the wearing of objects that could be used for violent purposes in schools without exceptions would have fared any better than the school policy and administrative decision at issue in *Multani*.

Additionally, governments would be hard-pressed to demonstrate why discretionary exceptions to the Measures are unworkable. True, the Supreme Court has cautioned that “laws of general application are not tailored to the unique needs of individual claimants” and that legislatures “cannot be expected to tailor a law to every possible future contingency.”¹⁹² Similarly, Canadian courts have sometimes found that exceptions are not reasonably available alternatives if they would significantly compromise achieving the government’s objective, as in *Hutterian Brethren*.¹⁹³ But it is difficult to see why discretionary exceptions would significantly compromise achieving the government’s objective because public health authorities could always deny an exception if they were not convinced that the contemplated religious activities would substantially eliminate the risk of transmission.¹⁹⁴ Moreover, while provincial legislatures themselves are perhaps ill-suited to tailor laws to specific circumstances, public health officers are equipped by training to do so, and are also statutorily empowered to do so in many provinces.¹⁹⁵

While certain courts have pointed to the difficulty of monitoring compliance or of administering an exception application system,¹⁹⁶ courts should only give this factor significant weight if the government adduces evidence substantiating such difficulties. In *Gateway*, for instance, the Court accepted Manitoba’s evidence that it would be impossible to effectively monitor safety precautions at hundreds of religious gatherings.¹⁹⁷ But mere

¹⁸⁸ *Schuyler Farms Ltd v Dr. Nesathurai*, 2020 ONSC 4711 at para 76 [*Schuyler Farms*]; *Sprague v Her Majesty the Queen in right of Ontario*, 2020 ONSC 2335 at para 49.

¹⁸⁹ *F*, *supra* note 50 at paras 14–16; *State Council Order* (November 2020), *supra* note 49.

¹⁹⁰ *Multani*, *supra* note 168 at para 57.

¹⁹¹ *Hutterian Brethren*, *supra* note 109 at paras 65–71.

¹⁹² *Ibid* at para 69.

¹⁹³ *Ibid* at paras 59–60.

¹⁹⁴ *F*, *supra* note 50 at para 14.

¹⁹⁵ *Beaudoin* (Merits), *supra* note 2 at paras 52, 61–62, citing *Public Health Act*, SBC 2008, c 28, s 43(1).

¹⁹⁶ *Mohamed*, *supra* note 51 at paras 68–69; *Taylor*, *supra* note 149 at para 475.

¹⁹⁷ *Gateway*, *supra* note 2 at para 305.

appeals to deference are unlikely to suffice because discretionary exceptions themselves allow for public health authorities to use their expertise to assess contemplated religious activities. Simply stating that governments have a margin of appreciation, as the English Court did in *Hussain* to reject the argument that discretionary exceptions are required,¹⁹⁸ does not explain why discretionary exceptions would be less effective as the minimal impairment step requires.

Further, discretionary exceptions could provide a meaningful safeguard for religious believers and communities because courts are well-equipped to assess the reasonableness of discretionary decisions to grant or deny an exception. Officials administering discretionary exceptions would be charged with assessing, to paraphrase the German Federal Constitutional Court, whether a religious community's precautionary measures might reliably negate the risk of infection associated with religious gatherings.¹⁹⁹ Claimants could propose, and administrators could consider, specific measures that might negate risk, such as Justice Gorsuch's example of singing a call to prayer from a remote location inside a mosque instead of in a location where droplets would be directed toward congregants.²⁰⁰ If a religious claimant challenged a decision denying such an exception on *Charter* grounds, it would be reviewed under the *Doré* standard of review, as in *Loyola High School v. Quebec (Attorney General)*, where a religious high school successfully challenged the denial of a statutory exemption from a mandatory regulatory scheme.²⁰¹ Challengers could also invoke, and courts could draw on, the rich administrative law jurisprudence regulating the exercise of administrative discretion,²⁰² as well as procedural fairness protections that apply to discretionary decisions affecting individual rights and interests.²⁰³ Under *Doré*, a court could determine in light of the evidence whether the denial of the request for an exception "demonstrabl[y] benefit[s] ... the furtherance of the state's objectives,"²⁰⁴ just as in a non-*Charter* administrative law challenge a court could ensure that the decision-maker "meaningfully grapple[d] with key issues or central arguments raised" by the challenger and considered and accounted for the evidence before it.²⁰⁵

b. Measures Likely to Pass Minimal Impairment

However, Measures that incorporate the categorical and discretionary exceptions described above would likely pass minimal impairment because they are instrumentally rational. While less restrictive alternatives are available, those alternatives would not allow governments to achieve the Measures' objective in a real and substantial manner.

¹⁹⁸ *Hussain*, *supra* note 48 at para 25.

¹⁹⁹ *F*, *supra* note 50 at para 14.

²⁰⁰ *South Bay* (2021), *supra* note 33 at 720, per Gorsuch J.

²⁰¹ 2015 SCC 12 at paras 34–35 [*Loyola*].

²⁰² *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 108 [*Vavilov*]; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 51–56 [*Baker*].

²⁰³ *Baker*, *ibid* at paras 20–28.

²⁰⁴ *Loyola*, *supra* note 201 at para 68.

²⁰⁵ *Vavilov*, *supra* note 202 at para 128.

First, in provinces like British Columbia and Manitoba that prohibited in-person religious services subject to categorical and discretionary exceptions, it is unlikely that less restrictive alternatives that allow a limited number of persons to attend in-person religious services would permit the achievement of the government's objective in a real and substantial manner. The principal proposed less restrictive alternative in permitting a limited number of persons to gather while following social distancing, sanitizing, and mask-wearing.²⁰⁶ These precautions are commendable and would reduce the risk, but they are not substantially as effective as a prohibition at achieving the objective of protecting Canadians from illness, death, and consequent strain on the healthcare system arising from the transmission of COVID-19 at in-person religious gatherings. Consider the example of a Christmas Eve service at a small Saskatchewan church that took place in 2020. Only 15 persons attended in a space that could fit 100, hand sanitizer was available, pews were blocked off to ensure social distancing, and no one sang. A dozen members of the small congregation nonetheless contracted the virus as a result of the services, and attendees may have exposed others in the community to COVID-19.²⁰⁷ Under British Columbia's restrictions in force during the same period, the service would not have occurred, 12 less people would have contracted COVID-19, and the possibility of community transmission would have been avoided. The *Gateway* Court adopted this reasoning, concluding that Manitoba had tried capacity limits and safety precautions, but that cases had continued to climb and the government had legitimately determined that stricter measures were necessary.²⁰⁸

Second, in provinces like Ontario and Quebec that have restricted services to a maximum number of participants, it is unlikely that less restrictive alternatives that would permit a greater number of attendees would be equally effective. The principal less restrictive alternative is permitting a greater number of attendees with similar social distancing, mask-wearing, and sanitation precautions. But this alternative necessarily increases the chances of COVID-19 transmission by: (1) increasing the chance that at least one attendee will be infectious with COVID-19; and (2) increasing the physical proximity of attendees. As the Saskatchewan example in the preceding paragraph illustrates, even permitting 15 people to attend a service following proper social distancing precautions can pose a significant risk of COVID-19 transmission. And in Alberta, religious gatherings of as few as 25 persons have given rise to "super spreader" events.²⁰⁹ Ultimately, permitting in-person services or permitting those services at a greater capacity would not fully achieve the government's objective and it is better to consider the issue of the restrictions' effectiveness at the proportionality of effects step.²¹⁰

²⁰⁶ Bird, *supra* note 58; see also *South Bay* (2021), *supra* note 33 at 718–20, per Gorsuch J; *Philip*, *supra* note 48 at paras 112, 125.

²⁰⁷ Justine Hunter & James Keller, "Pastors and Parishioners Test the Right to Congregate During the Pandemic," *The Globe and Mail* (21 February 2021), online: <www.theglobeandmail.com/canada/british-columbia/article-pastors-and-parishioners-test-the-right-to-congregate-during-the/>.

²⁰⁸ *Gateway*, *supra* note 2 at para 305.

²⁰⁹ Valerie Fortney, "'Super Spreader': Prayer Meeting in Northwest Linked to 34 COVID-19 Cases," *Calgary Herald* (24 March 2020), online: <calgaryherald.com/news/local-news/calgary-man-fights-for-his-life-as-family-quarantined-with-covid-19>.

²¹⁰ *KRJ*, *supra* note 164 at para 75.

The availability of discretionary exceptions confirms that the Measures would likely pass minimal impairment. Courts that have found restrictions overbroad have generally relied on the possibility that certain factors such as low occupant density, ventilation, and masking might reduce the risk.²¹¹ As stated above, it is unlikely that these Measures would be substantially as effective at reducing the risk as a prohibition or a maximum capacity limit. But to the extent that a particular religious community can show that its specific circumstances reliably negate an increased risk of infection, that community's specific circumstances can be addressed through the discretionary exception procedure.

3. DISCRIMINATION: REGULATING RELIGIOUS GATHERINGS
 MORE STRICTLY THAN CERTAIN SECULAR GATHERINGS
 LIKELY PASSES THE MINIMAL IMPAIRMENT TEST

At the minimal impairment step, governments can likely demonstrate that less restrictive alternatives employed to regulate certain secular activities would not provide sufficient protection to the government's objective of protecting Canadians from illness, death, and consequent strain on the healthcare system arising from the transmission of COVID-19 at in-person religious gatherings. Specifically, courts would likely reject the argument that the use of these less restrictive alternatives to regulate certain secular activities but not religious gatherings is discriminatory under the minimal impairment test, for at least three reasons. First, it is unlikely that the minimal impairment test requires governments to treat religious gatherings at least as well as the least regulated secular activity. Second, the minimal impairment test permits governments to regulate activities that pose a heightened risk of harm more stringently than other activities. Third, the minimal impairment test permits governments to regulate religious gatherings more stringently than permitted secular activities because religious gatherings are riskier than permitted secular activities. This section does not address whether the increased risk of transmission that religious gatherings pose outweighs the Measures' deleterious effects on religious freedom because that question concerns the proportionality of effects step, which I address further below.

a. Canadian Courts Are Unlikely to Adopt the
 Most Favoured Nation Theory of Freedom
 of Religion or Religious Equality

First, it is unlikely that the *Charter* requires governments to treat religious gatherings at least as well as the least regulated secular activity. This first question arises from US scholarship and jurisprudence. Specifically, some US scholars have proposed adopting a most-favoured nation theory of the First Amendment guarantee of freedom of religion.²¹² The

²¹¹ *Philip*, *supra* note 48 at para 112; *South Bay* (2021), *supra* note 33 at 718–19, per Gorsuch J; *State Council Order* (November 2020), *supra* note 49.

²¹² Douglas Laycock & Steven T Collis, "Generally Applicable Law and the Free Exercise of Religion" (2016) 95:1 *Neb L Rev* 1 at 22–23; Thomas C Berg, "Religious Liberty in America at the End of the Century" (2001) 16:2 *JL & Religion* 187 at 194–95; Douglas Laycock, "The Remnants of Free Exercise" (1990) *Sup Ct Rev* 1 at 49.

most-favoured nation doctrine of international trade law requires that if a member of a trading bloc offers a trading advantage to another member of the bloc, it must extend the same advantage to all members.²¹³ As applied to the First Amendment by some US scholars, the most-favoured nation theory would treat religious freedom as “a right to be treated like the most favored analogous secular conduct.”²¹⁴ Under the most-favoured nation theory, religious activities are presumptively entitled to be treated as equally important to any permitted secular activity, and regulation of religious activities is presumptively unconstitutional if the government has employed less restrictive alternatives to regulate secular activities.

Recent US Supreme Court cases have appeared to adopt a most-favoured nation theory of freedom of religion and applied that theory to enjoin government restrictions on religious gatherings in response to COVID-19. For instance, in *South Bay*, Justice Gorsuch concluded that any imposition of “more stringent regulations on religious institutions” than on secular businesses would be presumptively unconstitutional, triggering the strict scrutiny standard of review that is “rarely satisfied.”²¹⁵ And in *Tandon*, the majority expressly adopted this approach, reasoning that strict scrutiny would apply “whenever [government regulations] treat *any* comparable secular activity more favorably than religious exercise.”²¹⁶ Nor has the US Supreme Court been alone in this regard. In *Philip*, for instance, the Scottish Court reasoned that “as soon as [the Scottish government] allow[ed] some exceptions to the ‘stay at home’ rule,” it then had to “justify why other exceptions are not allowed.”²¹⁷

It is unlikely that Canadian courts would accept that the minimal impairment test presumptively requires that religious gatherings be treated at least as well as any other secular gathering. As an initial matter, this rule-like approach would interfere with the legislative function of balancing between the claims of competing groups. As *Gateway* recognized, that function is particularly important during a pandemic, because governments must make difficult decisions and balance competing interests to maintain the lives and health of persons and the functioning of society.²¹⁸

In making those decisions, governments are entitled to prioritize activities necessary to protect public health or provide basic goods and services. As one American jurist, Judge Easterbrook, reasoned, “it is hard to see how food production, care for the elderly, or the distribution of vital goods through warehouses could be halted,” and “[r]educing the rate of transmission would not be much use if people starved or could not get medicine.”²¹⁹ Determining which activities should be prioritized requires “difficult value judgments.”²²⁰ Governments and reviewing courts should be attentive to the impact of those judgments on

²¹³ See e.g. Jon R Johnson, *International Trade Law* (Toronto: Irwin Law, 1998) at 13.

²¹⁴ Laycock & Collis, *supra* note 212 at 22–23.

²¹⁵ *South Bay* (2021), *supra* note 33 at 717–18, per Gorsuch J.

²¹⁶ *Tandon*, *supra* note 47 at 1296 [emphasis in original].

²¹⁷ *Philip*, *supra* note 48 at para 114.

²¹⁸ *Gateway*, *supra* note 2 at para 300.

²¹⁹ *Elim Romanian Pentecostal Church v Pritzker*, 962 F (3d) 341 at 347 (7th Cir 2020).

²²⁰ *KRJ*, *supra* note 164 at para 79.

religious communities, especially at the proportionality of effects step where the court must take “full account of ‘the severity of the deleterious effects of a measure on individuals or groups.’”²²¹ But the legislature’s representative function and the legislature’s decision to empower provincial cabinets and chief medical officers of health with authority to impose emergency public health restrictions calls for deference. Such deference is especially appropriate because governments are “striking a balance between the claims of competing groups” at a time when it is clear that the burdens required to prevent transmission must be spread across many groups, and in a context where “[v]ulnerable groups [are] claim[ing] the need for protection.”²²²

However, establishing that the government is entitled to prioritize essential activities is only part of the puzzle because not all permitted activities, such as eating at a restaurant, are necessary to protect public health or provide basic goods and services. Accordingly, I next address whether the government can regulate religious gatherings more stringently than other gatherings because they pose a greater risk of transmission.

b. Governments Can Regulate Riskier Activities More Stringently

Second, the minimal impairment test permits governments to regulate activities that pose a heightened risk of harm more stringently than other activities. Specifically, risk-based regulation of religious gatherings is less vulnerable to a constitutional challenge on the basis that governments are deeming religious gatherings to be less “essential” than secular convenience activities.

Some jurists and scholars have argued that stricter regulation of religious gatherings is based on discriminatory government determinations that religion is less important than secular activities of convenience. As Justice Gorsuch put it in *Roman Catholic Diocese*, COVID-19 restrictions “privilege restaurants, marijuana dispensaries, and casinos over churches, mosques and temples,” demonstrating that religious “freedom has fallen on deaf ears” and that governments are privileging “secular convenience” over the constitutionally-protected freedom of religion.²²³ Similarly, in *Philip*, the Scottish Court concluded that the Scottish government was “under-playing ... the importance of the [religious freedom] right in comparison with other activities.”²²⁴ And in Canada, Brian Bird suggests that the Measures send the message that “religion is of little value to ... society” by regulating secular activities less strictly.²²⁵ In short, these jurists and scholars have taken the view that religious gatherings were unfairly excluded from the classes of permitted or less restricted activities because of discriminatory value judgments that religious gatherings were less important,²²⁶

²²¹ *Hutterian Brethren*, *supra* note 109 at para 76, quoting *Oakes*, *supra* note 9 at 140.

²²² *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 993 [*Irwin Toy*]; see *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at para 94 [*Chaoulli*]; *Gateway*, *supra* note 2 at para 300.

²²³ *Roman Catholic Diocese*, *supra* note 47 at 69–70, per Gorsuch J.

²²⁴ *Philip*, *supra* note 48 at para 126.

²²⁵ Bird, *supra* note 58. See also Newman, “Reasonable Limits,” *supra* note 61 at 21–22.

²²⁶ Movsesian, *supra* note 3 at 10–11.

and thus deserved a lower rank on what one scholar termed the “hierarchy within the goods subordinated to public health.”²²⁷

Canadian law would likely prohibit restrictions that are based on, in Justice Gorsuch’s words, discriminatory “judgment[s] that what happens [in religious places] just isn’t as ‘essential’ as what happens in secular spaces” such as restaurants and alcohol stores.²²⁸ *Multani* is instructive. The Supreme Court found that prohibiting kirpans in schools was not minimally impairing because the school permitted other potentially dangerous objects such as scissors that were used for secular educational purposes. The Supreme Court rejected the school’s apparent position that “the activities in which those objects are used to be important, while accommodating the religious beliefs of the [Sikh student] is not” as discriminatory.²²⁹

In contrast, the Supreme Court has accepted that it is legitimate to regulate different environments differently by considering each environment’s “unique characteristics,” including the level of risk.²³⁰ In *Multani*, for instance, the Supreme Court contemplated that prohibiting the wearing of kirpans might be justified on airplanes because airplanes involve transitory populations who cannot be easily assessed for safety, and medical and police assistance is inaccessible on airplanes.²³¹ In contrast, a prohibition on wearing kirpans was not justified in a school environment because relationships between students and staff make it possible to control risk and assess the individual circumstances of the student seeking an accommodation.²³² Similarly, in *KRJ*, the Supreme Court upheld the constitutionality of a statutory provision that retroactively prevented persons who had committed sexual offences against children from using the Internet or other digital networks, reasoning that the statutory provision was responsive to technological change that elevated “both the *degree* and *nature* of the risk” of sexual violence against children and youth.²³³ Underlining the significance of a change in risk, the Supreme Court struck down another statutory provision that retroactively prevented offenders from moving about physical public and private spaces where children were present because there was no evidence that the risks to children in those spaces had changed.²³⁴

Risk-based regulation tailored to the risks that religious gatherings pose relative to other activities likely passes the minimal impairment step because it does not rest on discriminatory judgments of the sort criticized in *Roman Catholic Diocese, Philip*, and *Multani*. Specifically, if the government can show that religious gatherings are riskier than permitted in-person secular gatherings, then the government’s choice to impose stricter regulations on religious gatherings does not evidence a discriminatory value judgment that “religion is of little value to ... society.”²³⁵ Instead, it represents a determination that,

²²⁷ Mazurkiewicz, *supra* note 18 at 11.

²²⁸ *Roman Catholic Diocese, supra* note 47 at 69, per Gorsuch J.

²²⁹ *Multani, supra* note 168 at para 75.

²³⁰ *Ibid* at para 66.

²³¹ *Ibid* at paras 62–63.

²³² *Ibid* at paras 63, 65.

²³³ *KRJ, supra* note 164 at para 101 [emphasis in original].

²³⁴ *Ibid* at para 89.

²³⁵ Bird, *supra* note 58.

notwithstanding their importance and constitutional protection, religious gatherings pose a higher risk of COVID-19 transmission than certain secular activities and thus should be subject to correspondingly greater regulation to protect Canadians from illness, death, and consequent strain on the healthcare system arising from the transmission of COVID-19. Whether the benefits of addressing that increased risk of transmission outweighs the Measures' deleterious effects on religious freedom is a question for the proportionality of effects step, not for minimal impairment.

Indeed, both Canadian and foreign courts have accepted arguments that risk-based regulation of religious gatherings to prevent COVID-19 transmission is permissible and does not involve making discriminatory judgments about religion's importance relative to secular activities. The *Gateway* Court rejected the applicants' argument that Manitoba made a discriminatory determination that retail stores were more "essential" than religious gatherings. Instead, the Court found that the stricter regulation of religious gatherings was "based solely on the level of risk" they posed and was "not because religious services are viewed as inessential or less important."²³⁶ Similarly, the English Court ruled in *Hussain* that the government had regulated religious gatherings more strictly than garden centres because the former were riskier than the latter, not because religion was less "important" or not a "moral equivalent."²³⁷

c. Religious Gatherings Are Riskier Than Secular Activities Subject to Less Stringent Regulation

Third, Canadian courts will likely find that imposing more onerous restrictions on religious services than certain other secular activities passes constitutional muster because religious gatherings pose a greater risk of transmission than secular activities subject to less stringent regulation.

As an initial matter, religious gatherings pose a heightened risk of transmission because, as discussed earlier, they generally involve five risk factors: (1) enclosed spaces; (2) large groups; (3) close proximity to others; (4) long duration of exposure and staying in one place; and (5) loud talking and singing.²³⁸ Religious communities can and have taken steps to mitigate those risks, but those steps are not likely to be as effective as governments' chosen Measures of prohibiting in-person religious gatherings or restricting capacity. In addition, governments can likely show that in-person religious gatherings pose a greater level of risk than permitted secular activities. There is at least some scientific evidence demonstrating that in-person religious gatherings are one of a handful of activities that produce one of the largest increases in infections upon reopening. For instance, the *Nature* study discussed previously concluded that religious organizations were one of a small group of non-

²³⁶ *Gateway*, *supra* note 2 at paras 273–74.

²³⁷ *Hussain*, *supra* note 48 at paras 22–23.

²³⁸ AMA-MSSNY Brief, *supra* note 32 at 3–6. See also *South Bay* (2021), *supra* note 33 at 721, per Kagan J; *Celebration Church*, *supra* note 2 at para 19; *Beaudoin* (Merits), *supra* note 2 at para 226; *Hussain*, *ibid* at paras 19, 23.

residential locations that both contributed to the majority of predicted infections during the first two months of the pandemic and produced the largest predicted increases in infections when reopened.²³⁹ Courts would likely find that these five risk factors and the scientific evidence of transmission constitutes a reasonable basis for concluding that religious gatherings pose a high risk of transmission.

Governments could also likely show that they were regulating secular activities with similar characteristics and that posed similar risks similarly, such as concerts, film screenings, indoor spectator sports, and theatre productions.²⁴⁰ The Measures are thus distinguishable from *Multani*. While in *Multani* the school prohibited wearing a kirpan but allowed objects that could be more easily used for violent purposes,²⁴¹ *Gateway* found that Manitoba's Measures restricting religious gatherings equally restricted other similar mass gatherings that pose a similar or greater risk of transmission.²⁴² Indeed, Canadian critics do not fault the Measures for treating religious gatherings differently from other mass gatherings, but instead point to shopping, dining out, and fitness as less stringently regulated comparator activities.²⁴³

Applying the differential risk-based regulation approach likely demonstrates that regulating religious services more strictly than activities such as shopping, going to a bank, picking up takeout food, or even outdoor dining, is justified. In *Roman Catholic Diocese*, Justice Gorsuch criticized New York State's COVID-19 restrictions for privileging buying wine, bike shopping, or acupuncture over religion.²⁴⁴ But all those secular activities are likely less risky than attending an in-person religious gathering. Meeting in an enclosed space for an extended period of time is likely riskier than a transitory brief contact with another shopper or cashier at a shopping centre, as shopping usually involves less close proximity with others and for less time than indoor worship.²⁴⁵ Nor do any of these secular activities usually involve significant amounts of verbal interaction, unlike in-person religious services. In short, these and other similar activities "lack one or more of the risk factors associated with religious services."²⁴⁶

Governments can also likely show that less stringent regulation of higher risk activities such as indoor dining and indoor gymnasiums is justified. These activities are riskier than shopping or going to a bank: the *Nature* study that found that reopening religious organizations produced large increases in infections reached the same conclusions about reopening restaurants and gyms.²⁴⁷ Nonetheless, governments can likely show relevant

²³⁹ Chang et al, *supra* note 39 at 85.

²⁴⁰ *South Bay* (2020), *supra* note 47 at 1613, per Roberts CJ.

²⁴¹ *Multani*, *supra* note 168 at paras 58, 74–75.

²⁴² *Gateway*, *supra* note 2 at para 274.

²⁴³ Bird, *supra* note 58.

²⁴⁴ *Roman Catholic Diocese*, *supra* note 47 at 69, per Gorsuch J.

²⁴⁵ *Gateway*, *supra* note 2 at para 274; *Hussain*, *supra* note 48 at para 23; *South Bay* (2021), *supra* note 33 at 721–22, per Kagan J; *South Bay* (2020), *supra* note 47 at 1613, per Roberts CJ; *Roman Catholic Diocese*, *ibid* at 79, per Sotomayor J; *F*, *supra* note 50 at para 11.

²⁴⁶ AMA-MSSNY Brief, *supra* note 32 at 7.

²⁴⁷ Chang et al, *supra* note 39 at 85.

distinctions. Going to an indoor gym, for instance, likely involves less verbal interaction and close contact with other persons than an in-person religious gathering. Even indoor dining may be less likely to involve close contact with diners outside one's party or loud verbal interaction. As Chief Justice Hinkson reasoned in *Beaudoin*, equating religious gatherings to gymnasiums and restaurants is "simplistic" and "fails to account for the key distinguishing factors," including "the intimate setting of religious gatherings, and the presence of communal singing or chanting."²⁴⁸

Because governments can likely demonstrate that religious gatherings pose a differential risk that justifies differential regulation, courts would likely accept that regulating in-person religious gatherings more stringently than less risky secular activities is permissible. Even if government regulation of those secular activities is more permissive than public health guidance might suggest is wise, courts are likely to give governments a margin of deference. As *Gateway* held, pandemic management is complex, and governments can legitimately consider interests beyond public health.²⁴⁹ Specifically, governments must consider social and economic policy, along with pragmatic considerations such as the likelihood of compliance.²⁵⁰ Restricting and reopening activities also poses a polycentric problem in which governments have to balance not only between public health and other societal considerations, but must also balance the competing demands of persons and groups that would all prefer to reopen their activities with less restrictions. As *Gateway* ruled and Supreme Court jurisprudence confirms, this decision thus calls for a degree of deference.²⁵¹ As the English Court recognized in *Hussain*, this decision does not lend itself to a "single right answer" and instead requires "complex political assessments."²⁵² And the fact that governments are "tackling [such] a complex social problem" does counsel in favour of deference.²⁵³

The institutional competence of governments and chief medical officers of health also weighs in favour of deference to differential regulation, provided that the government can point to evidence that demonstrates a differential risk. While in *South Bay* Justice Gorsuch cautioned against blindly deferring to "government officials with experts in tow,"²⁵⁴ it is appropriate for courts to recognize the limits of their own institutional competence when it comes to reviewing the reasonableness of public health policy during a pandemic. After all, a public health measure's necessity is a "judgment call,"²⁵⁵ one that public health officials and governments are likely better equipped to make than courts. Further, section 1 jurisprudence is sensitive to government's superior expertise at assessing conflicting scientific evidence and incomplete information when it comes to the protection of vulnerable

²⁴⁸ *Beaudoin* (Merits), *supra* note 2 at para 226.

²⁴⁹ *Gateway*, *supra* note 2 at para 300.

²⁵⁰ *Hussain*, *supra* note 48 at para 21.

²⁵¹ *Gateway*, *supra* note 2 at para 300, quoting *Irwin Toy*, *supra* note 222 at 993–94. See also *Chaoulli*, *supra* note 222 at para 94.

²⁵² *Hussain*, *supra* note 48 at paras 21–22.

²⁵³ *JTI-MacDonald*, *supra* note 157 at para 43.

²⁵⁴ *South Bay* (2021), *supra* note 33 at 718, per Gorsuch J.

²⁵⁵ *Movsesian*, *supra* note 3 at 7.

groups.²⁵⁶ In both *Taylor* and *Beaudoin*, the courts accordingly recognized the need for deference to the scientific expertise of the chief medical officer of health in a context of significant uncertainty.²⁵⁷

E. THE MEASURES STRIKE A PROPORTIONATE BALANCE

The Measures are also likely to pass the proportionality of effects step, and courts would likely reject the deleterious effects argument at this step. At the proportionality of effects step, the focus of the section 1 analysis shifts from the instrumental rationality of the relationship between the objective and the means used to pursue it to the fundamentally normative question of “the law’s impact on Canada’s free and democratic society.”²⁵⁸ By allowing the court to weigh the importance of attaining the objective against the impact of the limit on the right,²⁵⁹ this step permits courts to fully account for the severity of the effects that government measures have on rights-holders.²⁶⁰ The proportionality of effects step thus necessarily requires “difficult value judgments.”²⁶¹ Comparing the salutary effects of the law against the salutary effects of any less restrictive alternatives can allow the court to determine whether the “margin of improvement” that the government’s chosen measure provides over the less restrictive alternative outweighs the deleterious effects on rights-holders.²⁶²

I. SALUTARY EFFECTS: PROTECTION FROM ILLNESS, DEATH, AND CONSEQUENT STRAIN ON THE HEALTHCARE SYSTEM

Here, the salutary effects of the Measures can best be defined as the additional contribution to the objective of protecting Canadians from illness, death, and consequent strain on the healthcare system arising from the transmission of COVID-19 at in-person religious gatherings that either prohibiting in-person religious services subject to the categorical and discretionary exemptions described above or permitting them only at reduced capacity provide over the less restrictive alternative of permitting those services to proceed at greater capacity limits. The degree of additional protection is admittedly difficult to quantify, owing to the limited research about COVID-19 transmission in religious gatherings.²⁶³ Nonetheless, as discussed above in the minimal impairment analysis, it is likely to be significant. A prohibition will eliminate the risk of transmission that exists at non-insignificant levels even at indoor religious services subject to strict capacity limits where practitioners adhere to proper social distancing, mask-wearing, and sanitation. The *Nature* study also suggests that capacity limits are a “precise interventio[n]” that “substantially

²⁵⁶ *Irwin Toy*, *supra* note 222 at 993; *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877 at para 42.

²⁵⁷ *Taylor*, *supra* note 149 at para 464; *Beaudoin* (Merits), *supra* note 2 at para 244.

²⁵⁸ *KRJ*, *supra* note 164 at para 79.

²⁵⁹ *JTI-MacDonald*, *supra* note 157 at para 46.

²⁶⁰ *Hutterian Brethren*, *supra* note 109 at para 76.

²⁶¹ *KRJ*, *supra* note 164 at para 79; *Hutterian Brethren*, *ibid* at para 81.

²⁶² Denise Réaume, “Limitations on Constitutional Rights: The Logic of Proportionality” (2009) Oxford Legal Studies Research Paper No 26/2009 at 25.

²⁶³ *Celebration Church*, *supra* note 2 at para 20.

reduce[s] the risk [of transmission] without sharply reducing overall mobility.”²⁶⁴ Increasing the maximum capacity necessarily reduces the effectiveness of this intervention.

Because the objective is to protect Canadians from illness and death arising from the transmission of COVID-19 at in-person religious gatherings, the salutary effects are normatively significant. It would be difficult to think of a government interest more important than protecting human life from the spread of a contagious disease that has already caused the deaths of 34,000 Canadians and caused serious illness to countless more. Indeed, in the context of tobacco regulation, the Supreme Court of Canada has accepted that even a modest contribution to preventing death and illness is normatively significant, reasoning that “[e]ven a small reduction in tobacco use may work a significant benefit to the health of Canadians.”²⁶⁵ Just like the ban on false promotion of tobacco products that the Supreme Court considered in *JTI-MacDonald*, preventing the transmission of COVID-19 at in-person religious gatherings is “nothing less than a matter of life or death” for both the persons who would otherwise attend those gatherings and those exposed to community transmission from attendees.²⁶⁶ Furthermore, the purpose and effect of the Measures is to protect persons who are especially vulnerable to COVID-19, whether due to age, socio-economic status, or racialization.²⁶⁷ And as Chief Justice Dickson reasoned more than thirty years ago, courts should be wary of the use of the *Charter* as a tool to effect the “roll back [of measures] which have as [their] object the improvement of the condition of less advantaged persons.”²⁶⁸

The protection of Canadians from consequent strain on the healthcare system arising from the transmission of COVID-19 at in-person religious gatherings is also normatively significant because it is closely linked to the protection of life and health. If there are not enough ICU beds and healthcare staff to care for COVID-19 patients, more of those patients may die and healthcare staff may be forced to make tragic decisions to “triage” care when there are insufficient resources to provide care for all.²⁶⁹ Further, persons with other medical needs may be unable to access healthcare in a timely manner, which may jeopardize their health. Healthcare staff may also become exhausted due to stress and strain.²⁷⁰

Some commentators and jurists have argued that the salutary effects of prohibiting or restricting in-person religious gatherings are likely minimal due to an alleged lack of evidence that such gatherings contribute significantly to community transmission. For instance, in *Roman Catholic Diocese*, the majority discounted the salutary effects of New York’s restrictions on religious gatherings by suggesting that certain religious communities

²⁶⁴ Chang et al, *supra* note 39 at 85.

²⁶⁵ *RJR-MacDonald*, *supra* note 155 at para 146; see also *JTI-MacDonald*, *supra* note 157 at paras 134–36, 139.

²⁶⁶ *JTI-MacDonald*, *ibid* at para 68.

²⁶⁷ *Taylor*, *supra* note 149 at paras 412–13; *Gateway*, *supra* note 2 at paras 308–11, 327.

²⁶⁸ *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713 at 779 [*Edwards Books*]. See also *Chaoulli*, *supra* note 222 at para 274, per Binnie & LeBel JJ (applying this statement to healthcare context); *Ross v New Brunswick School District No 15*, [1996] 1 SCR 825 at para 86 (applying this statement to uphold limit on freedom of religion).

²⁶⁹ *Gateway*, *supra* note 2 at paras 70–71.

²⁷⁰ *Ibid*.

had “admirable safety records” and that there was no evidence that they had contributed to the spread of COVID-19.²⁷¹ Likewise, Bird has suggested that religious gatherings pose only a low-risk of transmission.²⁷²

For several reasons, it is unlikely that these arguments will cause courts to downgrade the salutary effects of restrictions on religious services. First, *Hutterian Brethren* and other cases establish that governments are not required to wait for a risk to materialize before acting. While more than mere speculation is required,²⁷³ evidence of actual harm having materialized is not. As long as the existence of concerns related to public health and safety is clearly established,²⁷⁴ governments can regulate a matter prospectively without having to “await proof positive that the benefits would in fact be realized.”²⁷⁵ This standard is met because, as explained above, the evidence demonstrates that in-person religious gatherings generally involve five factors that establish a heightened risk of transmission.

Second, the principle that governments can regulate prospectively without having to wait for a risk to materialize should carry particular weight in the COVID-19 context. Interventions in response to epidemic diseases such as COVID-19 are more likely to be effective if they are adopted rapidly.²⁷⁶ That reality implicates the precautionary principle, namely “that measures should be taken to protect against a risk even if there is uncertainty over the benefit of the measures or the level of risk.”²⁷⁷ This principle originated in the environmental protection context,²⁷⁸ but was soon applied to public health in Canada following the 1997 Commission of Inquiry on the Blood System in Canada.²⁷⁹ Ontario’s SARS Commission described the need to embrace and enforce the precautionary principle as the “one single take-home message” from its report analyzing Ontario’s failure to respond effectively to SARS.²⁸⁰ As *Taylor* held, the precautionary principle should guide responses to COVID-19 because the consequences of underestimating the risk would be severe.²⁸¹ Indeed, Canadian courts have repeatedly employed the precautionary principle in *Charter* and administrative law challenges to COVID-19 related public health restrictions because the deadly consequences of COVID-19 transmission leaves little margin of error.²⁸² So have

²⁷¹ *Roman Catholic Diocese*, *supra* note 47 at 67.

²⁷² Bird, *supra* note 58.

²⁷³ *KRJ*, *supra* note 164 at para 92.

²⁷⁴ *Multani*, *supra* note 168 at para 67.

²⁷⁵ *Hutterian Brethren*, *supra* note 109 at para 85; see also *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2019 ONCA 393 at para 125 [CMDS].

²⁷⁶ Amir Attaran & Kumanan Wilson, “A Legal and Epidemiological Justification for Federal Authority in Public Health Emergencies” (2007) 52:2 McGill LJ 381 at 397.

²⁷⁷ Flood, Thomas & Wilson, “Civil Liberties,” *supra* note 185 at 253.

²⁷⁸ *114957 Canada Ltée (Spraytech, Société d’arrosage) v Hudson (Town)*, 2001 SCC 40 at paras 31–32.

²⁷⁹ Flood, Thomas & Wilson, “Civil Liberties,” *supra* note 185 at 253–54.

²⁸⁰ Ontario, The SARS Commission, *Spring of Fear: Executive Summary*, vol 1 (December 2006) (Commissioner Campbell) at 13.

²⁸¹ *Taylor*, *supra* note 149 at para 468; see also Flood, Thomas & Wilson, “Civil Liberties,” *supra* note 185 at 253–56.

²⁸² *Taylor*, *ibid* at paras 467–68; *Barbara Spencer, Sabry Belhouchet, Blain Gowing, Dennis Ward, Reid Nehring, Cindy Crane, Denise Thomson, Norman Thomson, and Michel Lafontaine v The Attorney General of Canada*, 2021 FC 361 at paras 113–14, 119 [Spencer]; *Schuyler Farms*, *supra* note 188 at paras 108–10; *Canadian Constitution Foundation v Attorney General of Canada*, 2021 ONSC 2117 at paras 54, 67.

courts in other jurisdictions.²⁸³ Because the pandemic has rapidly evolved and new variants continue to emerge, one Canadian Court recently rejected the argument that the precautionary principle no longer applied because the government had acquired sufficient evidence in the first year of addressing COVID-19.²⁸⁴

Third, as explained previously, the particular context of public health regulation calls for a degree of deference to the judgments of provincial chief medical officers of health who are experts in combatting infectious disease.²⁸⁵

Fourth, while some scholars have criticized *Hutterian Brethren* and other decisions for accepting government assertions of harm that the government failed to quantify or substantiate,²⁸⁶ there is no shortage of such evidence substantiating the risk of transmission and demonstrating actual transmission here. As explained above, the *Nature* study predicted that religious organizations were one of a “small fraction” of non-residential locations that were linked to both “the majority of the [predicted] infections” and “produced the largest predicted increases in infections when reopened” on 1 May 2020 in ten major US cities.²⁸⁷ And there is evidence demonstrating that actual transmission at religious gatherings has occurred in Canada. *Beaudoin* found that between 15 March 2020 to 15 January 2021, 48 places of worship in British Columbia were affected by COVID-19, with 180 associated COVID-19 cases, and *Gateway* also found that “clusters and outbreaks of COVID-19 at faith-based gatherings in Manitoba” had occurred.²⁸⁸ There is also evidence of COVID-19 transmission linked to in-person religious gatherings in other Canadian provinces, even, as in the Saskatchewan example discussed previously, where the gathering is relatively small and proper precautions are followed.²⁸⁹ Moreover, the data of infections linked to religious gatherings is likely understated because it excludes persons infected through community transmission by persons who attend religious services.²⁹⁰

Finally, it is unlikely that the passage of time since the start of the pandemic would change these conclusions because the Measures appear to be consistent with scientific evidence and public health consensus. Scholars have suggested that courts should be less deferential under section 1 once measures have been in place for some time and more evidence about their effects is available,²⁹¹ including in the context of COVID-19 prevention measures.²⁹² These scholars may be correct, although to date, courts have rejected arguments that the precautionary principle does not apply due to the passage of time since the pandemic

²⁸³ *Hussain*, *supra* note 48 at para 22.

²⁸⁴ *Spencer*, *supra* note 282 at paras 103, 113.

²⁸⁵ *Taylor*, *supra* note 149 at para 464; *Beaudoin* (Merits), *supra* note 2 at para 244.

²⁸⁶ Errol P Mendes, “Section 1 of the *Charter* after 30 Years: The Soul or the Dagger at its Heart?” (2013) 61 SCLR (2d) 293 at para 71.

²⁸⁷ Chang et al, *supra* note 39 at 84–85.

²⁸⁸ *Beaudoin* (Merits), *supra* note 2 at paras 15–18; *Gateway*, *supra* note 2 at para 264.

²⁸⁹ *Celebration Church*, *supra* note 2 at para 19; Hunter & Keller, *supra* note 207.

²⁹⁰ *Celebration Church*, *ibid.*

²⁹¹ Julia Hughes & Vanessa MacDonnell, “Social Science Evidence in Constitutional Rights Cases in Germany and Canada: Some Comparative Observations” (2013) 32:1 NJCL 23 at 55.

²⁹² Flood, Thomas & Wilson, “Civil Liberties,” *supra* note 185 at 264; Kinsinger, “Restricting Freedom,” *supra* note 65 at 26–27.

began.²⁹³ But the result would likely be the same even if courts took a more demanding approach because, as detailed above, the available scientific evidence and public health consensus supports the constitutionality of the Measures. *Gateway* confirms this conclusion. The Court heard the application more than a year into the pandemic in May 2021, the parties presented numerous expert reports, and those experts testified and were cross-examined over several days.²⁹⁴ Relying on that evidence, the Court found that Manitoba’s Measures were consistent with “the public health consensus and approach followed across most of Canada and the world,”²⁹⁵ that there was no “convincing evidence of any obvious or definitively faulty science being applied by Manitoba,”²⁹⁶ and that the applicants’ evidence “represent[ed] at best ... a contrary if not contrarian scientific point of view.”²⁹⁷

2. THE MEASURES’ DELETERIOUS EFFECTS ARE SEVERE

At the same time, the deleterious effects of the Measures are undeniably severe and strike at the core of the constitutional guarantee of religious freedom. These deleterious effects should be fully, fairly, and frankly acknowledged, in keeping with recent scholarship urging courts to fully appreciate the deleterious effects of limits on religious freedom from the perspective of religious claimants and criticizing the majority decision in *Hutterian Brethren* for failing to do so.²⁹⁸ Specifically, these deleterious effects engage both the individual and communitarian dimensions of religious freedom.²⁹⁹

a. Individual Dimension

The Supreme Court has stressed that religious freedom is closely connected to individual autonomy. In *R. v. Big M Drug Mart Ltd.*, Chief Justice Dickson linked freedom of religion to “the centrality of individual conscience” and “the valuation of human dignity.”³⁰⁰ In subsequent cases, the Supreme Court endorsed a subjective approach to freedom of religion linked to personal autonomy and choice,³⁰¹ accepting that religious beliefs are “profoundly personal” and govern believers’ self-perception, their perception of relationships with society, nature, and the divine, and their conduct and practice.³⁰² As the Court of Appeal for

²⁹³ *Spencer*, *supra* note 282 at paras 103, 113–14 (rejecting the argument that the government cannot rely on the precautionary principle because it has had “more than a year of dealing with COVID-19”).

²⁹⁴ *Gateway*, *supra* note 2 at paras 6, 15.

²⁹⁵ *Ibid* at para 200.

²⁹⁶ *Ibid*.

²⁹⁷ *Ibid* at para 198.

²⁹⁸ Howard Kislowicz, Richard Haigh & Adrienne Ng, “Calculations of Conscience: The Costs and Benefits of Religious and Conscientious Freedom” (2011) 48:3 *Alta L Rev* 679 at 700, 702; Dwight Newman, “Judicial Method on Rights Conflicts in the Context of Religious Identity” in Iain T Benson & Barry W Bussey, eds, *Religion, Liberty and the Jurisdictional Limits of Law* (Toronto: LexisNexis Canada, 2017) 245 at 257–58 [Newman, “Judicial Method”]; José Woehrling, “Quand la Cour suprême s’applique à restreindre la portée de la liberté de religion: L’arrêt *Alberta c. Hutterian Brethren of Wilson Colony* (2009)” (2011) 45:1 *RJT* 7 at 27–28; Benjamin L Berger, “Section 1, Constitutional Reasoning and Cultural Difference: Assessing the Impacts of *Alberta v. Hutterian Brethren of Wilson Colony*” (2010) 51 *SCLR* (2d) 25 at paras 25–31.

²⁹⁹ See *LSBC v TWU*, *supra* note 74 at para 63.

³⁰⁰ [1985] 1 *SCR* 295 at 346 [*Big M*].

³⁰¹ *Syndicat Northcrest*, *supra* note 73 at paras 40–42.

³⁰² *Edwards Books*, *supra* note 268 at 759.

Ontario recognized, “[f]or many believers, their relationship with God or creation is central to all their activities” and “founds the distinction between right and wrong.”³⁰³

For many religious adherents, coming together with fellow believers for in-person religious gatherings and worship is one of the most important religious choices they make. As Chief Justice Dickson reasoned in *Big M*, the very “essence” of freedom of religion “is the right to declare religious beliefs openly ... and the right to manifest religious belief by worship and practice or by teaching and dissemination.”³⁰⁴ As Justice LeBel observed, the existence of a physical place of worship that can host in-person gatherings is “an integral part” of freedom of religion precisely because it allows religious adherents to engage in these same essential activities.³⁰⁵ Similarly, the Supreme Court has determined that performing religious ceremonies “is a fundamental aspect of religious practice.”³⁰⁶ It is also a fundamental expressive activity, so it is unsurprising that *Gateway* found that the Measures infringed section 2(b) in addition to section 2(a).³⁰⁷

Moreover, restrictions on religious gatherings can have damaging effects on individuals’ psychological health. Religious claimants have adduced evidence that preventing in-person religious gatherings would have serious negative impacts on their mental and psychological health, and civil liberties associations have raised similar concerns.³⁰⁸ These concerns are consistent with reports about the negative effects of social isolation on psychological health during the pandemic,³⁰⁹ as well as Chief Justice Dickson’s recognition in *Big M* that, for many religious adherents, communal worship can provide “security and meaning” to believers by giving them “an opportunity ... to be in communion [with each other] and with God.”³¹⁰ Indeed, the Supreme Court has accepted that interfering with religious adherents’ ability to conduct worship and religious celebrations can “subjectively lead to extreme distress.”³¹¹ Even if there is no evidence that these restrictions threaten the right to life or caused suicides, as *Beaudoin* and *Gateway* found, the impact on psychological health is still significant.³¹²

The Measures’ interference with the exercise of the right to come together for in-person religious gatherings and worship is correspondingly severe. The Supreme Court has suggested that it can be useful to distinguish between religious practices that are “optional or a matter of personal choice” and practices that are “so sacred that any significant limit

³⁰³ *McKitty v Hayani*, 2019 ONCA 805 at para 62 [*McKitty*], quoting *Christian Education South Africa v Minister of Education*, [2000] ZACC 11 at para 36.

³⁰⁴ *Big M*, *supra* note 300 at 336.

³⁰⁵ *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48 at para 73 [*Lafontaine*].

³⁰⁶ *Reference re Same-Sex Marriage*, *supra* note 72 at para 57.

³⁰⁷ *Gateway*, *supra* note 2 at para 209.

³⁰⁸ *Conseil des juifs*, *supra* note 2 at para 156; *Beaudoin (Merits)*, *supra* note 2 at paras 181–82; *Gateway*, *ibid* at paras 238, 289; Canadian Civil Liberties Association, *supra* note 102.

³⁰⁹ See e.g. Tzung-Jeng Hwang et al, “Loneliness and Social Isolation During the COVID-19 Pandemic” (2020) 32:10 *International Psychogeriatrics* 1217.

³¹⁰ *Big M*, *supra* note 300 at 350–51.

³¹¹ *Syndicat Northcrest*, *supra* note 73 at para 75.

³¹² *Beaudoin (Merits)*, *supra* note 2 at para 185; *Gateway*, *supra* note 2 at para 332.

verges on forced apostasy.”³¹³ The Supreme Court classified “prayers and the basic sacraments” are an example of the latter.³¹⁴ It follows that restricting religious adherents from participating in in-person religious gatherings that they subjectively believe they are required to attend is severe. Indeed, many religious claimants gave evidence that they subjectively believed that their religion required them to gather in-person for worship.³¹⁵ This is not a case where, to quote the Supreme Court, the religious practice is “not absolutely required” and is “preferred (rather than necessary) for their spiritual growth.”³¹⁶

Moreover, to the extent that it is useful to distinguish between expressions of religion in the private and public sphere, in-person religious gatherings are an activity traditionally regarded as private and thus enjoys strong constitutional protection. There have been suggestions in the jurisprudence that “[t]he freedom to hold beliefs is broader than the freedom to act on them,”³¹⁷ a distinction that led Richard Moon to suggest that in religious freedom cases courts distinguish between activities in the public sphere that are relatively unprotected and activities in the private sphere that enjoy strong constitutional protection.³¹⁸ Consistent with Moon’s observation, the Supreme Court has endorsed the view that “the practice of religion and the choices it implies ... relate more to individuals’ private lives or to voluntary associations.”³¹⁹ This distinction between the public and private spheres is open to criticism because religion can impact all aspects of life and make claims on public actions as well as private beliefs and practice.³²⁰ But to the extent that the distinction is recognized in the jurisprudence, gathering together with fellow religious adherents for in-person religious gatherings and communal worship is generally considered a private activity or voluntary association. It is thus likely to enjoy greater protection under the Supreme Court’s freedom of religion jurisprudence than activities considered to be in the public sphere such as marriage commissioners refusing to solemnize same-sex marriages,³²¹ or physicians with religious objections to participating in medical assistance in dying and abortion.³²²

b. Collective Dimension

The Supreme Court has also recognized the collective or communal dimension of religious freedom. As Justice LeBel reasoned in *Hutterian Brethren*, religion is about “religious relationships” and the existence of “communit[ies] that shar[e] a common faith and a way of life.”³²³ Section 2(a) thus recognizes that religious belief is “socially embedded” and

³¹³ *LSBC v TWU*, *supra* note 74 at para 88, quoting *Hutterian Brethren*, *supra* note 109 at para 89 [emphasis omitted].

³¹⁴ *Ibid.*

³¹⁵ *Beaudoin* (Injunction), *supra* note 2 at para 15; *Ingram*, *supra* note 2 at para 51; *Celebration Church*, *supra* note 2 at para 23.

³¹⁶ *LSBC v TWU*, *supra* note 74 at paras 87–88.

³¹⁷ *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 at para 36.

³¹⁸ Richard Moon, *Freedom of Conscience and Religion* (Toronto: Irwin Law, 2014) at 133.

³¹⁹ *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at para 71, quoting *Lafontaine*, *supra* note 305 at para 67 [emphasis omitted].

³²⁰ Patrick Macklem, “Freedom of Conscience and Religion in Canada,” (1984) 42 UT Fac L Rev 50 at 73.

³²¹ *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3.

³²² *CMDS*, *supra* note 275.

³²³ *Hutterian Brethren*, *supra* note 109 at para 182.

“manifest[ed] through communal institutions and traditions.”³²⁴ This collective dimension, including the links between freedom of religion and the freedoms of association and assembly, has frequently been noted in the scholarship.³²⁵

Prohibiting in-person religious gatherings severely interferes with what the Supreme Court termed “the ability of religious adherents to come together and create cohesive communities of belief and practice.”³²⁶ As Justice LeBel reasoned, for many believers it is “impossible to practise their religion” without a physical place of communal worship.³²⁷ For instance, in *Celebration Church*, Justice Davies accepted the evidence of the church’s members about the importance of in-person prayer and fellowship to their religious practice and found that they would suffer irreparable harm if Ontario’s restriction of in-person services to 10 members continued.³²⁸ Other injunction decisions made similar findings.³²⁹

c. Alternatives to Indoor In-Person Religious Gatherings May Not Be a Meaningful Substitute for Many Religious Adherents

In weighing the deleterious effects, jurists should also be sensitive to the fact that, for many religious believers, alternatives to indoor in-person religious gatherings may not be a meaningful substitute. This is particularly true of virtual religious gatherings. Some religious believers may see online services as a meaningful substitute.³³⁰ However, for many religious adherents, watching a service on YouTube is, as the Scottish Court held in *Philip*, “an alternative to, not a substitute for, [in-person] worship” because, among other reasons, “certain aspects of certain faiths simply cannot take place [virtually], at all.”³³¹ Not only may an online service fail to fulfill religious adherents’ spiritual needs and enable them to meet their spiritual obligations, but it also does not provide them in-person community support that can strengthen their mental and psychological health.³³² Additionally, it may not be feasible for vulnerable populations such as the elderly, recent immigrants, and refugees, or those with limited access to the Internet, to achieve the same sense of community via an online service.³³³ Jurists should respect these sincerely-held beliefs when assessing the deleterious effects of the Measures because, as the Court of Appeal for Ontario recently reasoned, jurists need to “accurately describe the religious practices and beliefs of parties from the point of

³²⁴ *LSBC v TWU*, *supra* note 74 at para 64, quoting *Loyola*, *supra* note 201 at para 60.

³²⁵ Schneiderman, *supra* note 70 at 79–80; Kinsinger, “Positive Freedoms,” *supra* note 70 at 380.

³²⁶ *LSBC v TWU*, *supra* note 74 at para 64.

³²⁷ *Lafontaine*, *supra* note 305 at paras 68, 79.

³²⁸ *Celebration Church*, *supra* note 2 at para 23.

³²⁹ *Ingram*, *supra* note 2 at paras 51–53; *Conseil des juifs*, *supra* note 2 at paras 156–57.

³³⁰ *Movsesian*, *supra* note 3 at 7–8.

³³¹ *Philip*, *supra* note 48 at para 121. See also *Gateway*, *supra* note 2 at para 305 (noting that communion is often one of the “integral parts of [religious] services”).

³³² *Beaudoin* (Merits), *supra* note 2 at para 154.

³³³ Canadian Civil Liberties Association, *supra* note 102.

view of the people whose beliefs they are.”³³⁴ Recent scholarship has also emphasized this theme.³³⁵

Outdoor and drive-in services and private prayer may also be impractical or an imperfect substitute. Given Canada’s cold climate, outdoor services may be impractical for much of the year and wholly inaccessible to populations like the elderly for whom it would be dangerous to brave the cold. Drive-in services can be conducted during colder weather and may offer a greater sense of community than online worship.³³⁶ However, they are unlikely to foster the same sense of community as indoor or outdoor in-person worship, religious communities may lack the necessary infrastructure or parking space, and they are inaccessible to persons who do not have access to a car. Similarly, private prayer is unlikely to substitute for in-person religious gatherings. Private prayer may exclude the performance of ceremonies that are integral to certain religious traditions, and it also restricts the expressive and communal dimensions of religious freedom.

3. OVERALL BALANCING: PROTECTING CANADIANS FROM DEATH AND PERMANENT INJURY OUTWEIGHS SEVERE BUT TEMPORARY RESTRICTIONS ON RELIGIOUS GATHERINGS

In the final balance, courts would likely conclude that the government’s strong interest in protecting Canadians from illness, death, and consequent strain on the healthcare system arising from the transmission of COVID-19 at in-person religious gatherings outweighs the undeniably severe deleterious effects on the religious freedom of religious believers and communities. I reach this conclusion for three reasons: (1) the importance of the government’s interest in protecting Canadians from illness, death, and consequent strain on the healthcare system arising from COVID-19 transmission at religious gatherings; (2) the legal principle that governments may legitimately restrict the exercise of freedom of religion when it would cause injury to others; and (3) the fact that, while the restrictions are temporary and geographically limited, the consequences that they seek to prevent can be permanent and irreversible.

First, it is difficult to overstate the importance of the government’s interest in protecting Canadians from illness, death, and consequent strain on the healthcare system arising from the transmission of COVID-19 at in-person religious gatherings. There are many cases where the government objective is of a lesser order and should not justify limiting the fundamental freedoms of the *Charter*.³³⁷ This is not one of those cases. As Justice Burrage reasoned in

³³⁴ *McKitty*, *supra* note 303 at para 71.

³³⁵ *Ibid*, citing Newman, “Judicial Method,” *supra* note 298 at 257; Benjamin L. Berger, *Law’s Religion: Religious Difference and the Claim of Constitutionalism* (Toronto: University of Toronto Press, 2015); Howard Kislowicz, “Faithful Translations?: Cross-Cultural Communication in Canadian Religious Freedom Litigation” (2014) 52:1 Osgoode Hall LJ 141.

³³⁶ See also Allison Hurst, “Drive-in Church: Reverend Tries New Way to Worship During the Pandemic,” *CTV News* (19 December 2020), online: <bc.ctvnews.ca/drive-in-church-reverend-tries-new-way-to-worship-during-the-pandemic-1.5239058>.

³³⁷ See e.g. *Hutterian Brethren*, *supra* note 109 at paras 174–76, per Abella J; *Multani*, *supra* note 168 at paras 67, 79.

Taylor in the context of mobility rights, effectively responding to the deadly and contagious COVID-19 pandemic requires that the “collective benefit to the population as a whole must prevail,”³³⁸ just as in *Gateway* Chief Justice Joyal determined that the deleterious effects were “outweighed by the greater good.”³³⁹ Chief Justice Hinkson reached the same conclusion in *Beaudoin*, recognizing the “constitutional importance” of preventing COVID-19 transmission.³⁴⁰ Similarly, all four Canadian courts that have rejected religious claimants’ preliminary injunction motions reasoned at the balance of convenience step that the Measures’ objective of protecting Canadians from illness and death outweighed the admittedly severe deleterious effects on freedom of religion.³⁴¹

Courts would likely give this interest significant weight even if the margin by which the Measures reduced overall COVID-19 transmission was unclear. In *Gateway*, for instance, the Court found that the Measures were grounded in scientific evidence about the risk of transmission and made a contribution to preventing death and illness arising from COVID-19 transmission at religious gatherings that was “neither disproportionately minimal nor insignificant,” even though the precise extent of that contribution was unclear.³⁴² In contrast, in *Philip* the Scottish Court discounted the salutary effects of Scotland’s prohibition of in-person religious gatherings because only a small percentage of the population regularly attended religious gatherings and there was a “relatively low number of instances of persons with Covid-19 known to have attended a place of worship (in comparison with other activities).”³⁴³ But such a quantitative focus obscures the qualitative significance of the injuries that the Measures seek to prevent, namely death and severe illness. In *RJR-MacDonald*, for instance, the Supreme Court recognized that “[e]ven a small reduction in tobacco use may work a significant benefit to the health of Canadians and justify a properly proportioned limitation of right of free expression.”³⁴⁴ Similarly, even a small reduction in the transmission of COVID-19 may work a significant benefit by preventing some persons from becoming ill or dying and reducing the strain on an already strained healthcare system, and may thus justify limiting the right of religious freedom.

Second, the legal principle that governments may legitimately restrict freedom of religion when its exercise would cause injury to others weighs in favour of upholding the Measures. Precisely because proportionality of effects requires a “normative” determination that “entails difficult value judgments,”³⁴⁵ courts should consider the normative principles that the Supreme Court has articulated about the exercise of a particular right. One such principle is that freedom of religion can be “subject[ed] to such limitations as are necessary to protect

³³⁸ *Taylor*, *supra* note 149 at para 492.

³³⁹ *Gateway*, *supra* note 2 at para 327.

³⁴⁰ *Beaudoin* (Merits), *supra* note 2 at paras 224, 247.

³⁴¹ *Ingram*, *supra* note 2 at para 85; *Springs of Living Water*, *supra* note 2 at para 37; *Celebration Church*, *supra* note 2 at paras 31–33; *Conseil des juifs*, *supra* note 2 at paras 171–73, 176.

³⁴² *Gateway*, *supra* note 2 at para 324.

³⁴³ *Philip*, *supra* note 48 at para 119; see also *ibid* at para 113.

³⁴⁴ *RJR-MacDonald*, *supra* note 155 at para 146.

³⁴⁵ *KRJ*, *supra* note 164 at para 79.

... health” and can be limited when its “manifestations ... injure [one’s] neighbours.”³⁴⁶ Accordingly, courts have upheld government measures that limit the exercise of religious practices that could injure others, including in a healthcare or public health context.³⁴⁷ For instance, the Supreme Court has held “that parents may not, in the exercise of their rights to nurture their children, refuse them medical treatment that is necessary.”³⁴⁸ Likewise, the Court of Appeal for Ontario upheld measures that required physicians with religious or conscientious objections to certain medical procedures to provide an effective referral to a non-objecting physician, reasoning that “patients should not bear the burden of managing the consequences of physicians’ religious objections.”³⁴⁹ The *Gateway* Court applied this principle at the proportionality of effects step and concluded that the Measures were necessary to “take the general well-being of others into account” and ensure that religious gatherings did not “put the health and lives of others at risk.”³⁵⁰

Of course, many religious believers and communities have taken numerous precautions and may reasonably believe that those precautions significantly reduce the risk of transmission.³⁵¹ But without questioning the sincerity of those beliefs or the considerable efforts undertaken to conduct safe religious gatherings, governments are entitled to conclude that those precautions are inadequate and that religious gatherings still pose a significant risk of injury.

For that reason, as *Gateway* concluded, it is legitimate for governments to temporarily restrict the exercise of freedom of religion to prevent injury to Canadians from community transmission flowing from religious services.³⁵² As Justice Kagan observed in *South Bay*, the risk of transmission of COVID-19 at in-person religious gatherings “extends not only to the participants themselves, but to everyone they associate with in a community.”³⁵³ Even if that were not the case, COVID-19 transmission that is entirely localized within a religious community could still cause injury to others by increasing the strain on the healthcare system, forcing the government to ration scarce healthcare resources such as ICU beds, and preventing patients with COVID-19 and other ailments from receiving timely treatment.³⁵⁴ Governments can thus reasonably regulate the exercise of religious freedom so that it does not cause a significant risk of COVID-19 transmission that endangers the health and lives of others in the community. As the US Supreme Court once put it in rejecting a religious liberty challenge to a child welfare statute, “[t]he right to practice religion freely does not include liberty to expose the community ... to communicable disease.”³⁵⁵

³⁴⁶ *Big M*, *supra* note 300 at 337, 346. For a more detailed discussion of third-party harms in freedom of religion cases, see Mike Madden, “Equal, but only Conceptually: Explaining the Phenomenon of Religious Losses in Contemporary Canadian Constitutional Cases Involving Conflicting Rights” (2021) 44:2 Dal LJ 1 at 29–35.

³⁴⁷ *B (R) v Children’s Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at para 107 [*B (R)*]; *LSBC v TWU*, *supra* note 74 at paras 101, 103.

³⁴⁸ *B (R)*, *ibid* at para 114, per La Forest J.

³⁴⁹ *CMDS*, *supra* note 275 at para 185.

³⁵⁰ *Gateway*, *supra* note 2 at paras 325–26.

³⁵¹ See e.g. *Beaudoin* (Merits), *supra* note 2 at paras 156–60.

³⁵² *Gateway*, *supra* note 2 at paras 325–26.

³⁵³ *South Bay* (2021), *supra* note 33 at 721, per Kagan J.

³⁵⁴ *Taylor*, *supra* note 149 at para 96; *Gateway*, *supra* note 2 at para 328.

³⁵⁵ *Prince v Massachusetts*, 321 US 158 at 166–67 (1944), quoted in Corbin, *supra* note 18 at 28.

Third, the temporal and, in some cases, geographical restrictions on the Measures temper their severity, as *Gateway* and *Celebration Church* both found.³⁵⁶ For instance, Ontario tailored the Measures to the level of risk that a particular zone poses and the most severe restrictions only apply when a region is in the highest risk zone.³⁵⁷ Further, as described above, many provinces relaxed or eliminated the Measures once vaccination rates increased. In addition, even though outdoor services may be not always be feasible and online or drive-in services and personal prayer may not be a meaningful substitute for in-person religious gatherings, they may still provide some spiritual nourishment and comfort.

In contrast to the geographically and temporally limited nature of the Measures, the consequences that they seek to prevent can be permanent and irreversible. When vaccines were deployed across Canada, the Measures were liberalized or eliminated altogether, permitting persons to once again come together in-person for religious gatherings and communal worship. While some provinces reimposed the Measures in response to new variants, the ongoing rollout of booster shots that provide even more effective protection against the variants promises to permit liberalization or elimination of the Measures in the future. Deaths caused by COVID-19, of course, are irreversible. And even some survivors of COVID-19 will suffer long-term side effects.³⁵⁸ Those permanent and irreversible consequences likely outweigh the Measures' temporally limited deleterious effects, even if those deleterious effects become more pronounced over time.³⁵⁹ In these circumstances, as one South African Court reasoned, the government can legitimately impose even severe restrictions on religious gatherings to prevent death or long-term health consequences caused by transmission at those gatherings.³⁶⁰

VII. CONCLUSION AND LESSONS FOR THE FUTURE

The COVID-19 pandemic has challenged Canadians to reconcile the constitutional commitment to respecting the fundamental freedoms enshrined in the *Charter*, including freedom of religion, with the corresponding need to temporarily restrict the exercise of those freedoms to protect public health. Future pandemics will pose similar challenges. Unquestioning deference to government is not the answer. But courts can and should uphold public health measures that are non-discriminatory, evidence-based, and demonstrably more effective at preventing transmission than any less restrictive alternatives.

If coupled with appropriate categorical and discretionary exceptions, as in British Columbia, the Measures satisfy all those criteria, and should be given a clean constitutional bill of health. They are grounded in evidence demonstrating a heightened risk of transmission from in-person religious gatherings and are demonstrably more effective than posited

³⁵⁶ *Gateway*, *supra* note 2 at para 328; *Celebration Church*, *supra* note 2 at para 32.

³⁵⁷ *Celebration Church*, *ibid.*

³⁵⁸ Centers for Disease Control and Prevention, "Long COVID or Post-COVID Conditions," online: <www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html>.

³⁵⁹ Kinsinger, "Restricting Freedom," *supra* note 65 at 27.

³⁶⁰ *Mohamed*, *supra* note 51 at para 75.

alternatives such as allowing higher maximum capacity limits. Nor are these Measures discriminatory. *Charter* jurisprudence does not require governments to treat religious activities just as well as secular activities regardless of the risk they pose but instead permits the government to regulate activities differentially based on their relative risk. The Measures meet that standard. Governments may appropriately subject religious gatherings to stricter regulations than certain secular activities precisely because religious gatherings pose risks that are different in degree and kind than those secular activities. And finally, while the Measures' deleterious effects on freedom of religion are undoubtedly severe, governments may require persons wishing to come together indoors in-person to worship to temporarily forgo that particular means of exercising freedom of religion in order to safeguard Canadians from the permanent and irreparable risk of death, the possibility of serious illness and continuing physical injury, and the closely related injuries flowing from a strained healthcare system.

This analysis of the Measures' constitutionality and consideration of the three contrary arguments may also provide some lessons for the remainder of the COVID-19 pandemic, as well as to legislators, policy-makers, and citizens considering whether responses to a future pandemic are *Charter*-compliant. First, governments that determine that Measures restricting religious gatherings are in the public interest in response to the current pandemic or a future pandemic should be confident that those Measures will be upheld if challenged in court. There was understandably legal uncertainty at the start of the pandemic, but subsequent court decisions have largely removed that uncertainty and determined that the Measures are lawful if appropriately tailored. The *Charter* leaves elected officials and the public health officials they appoint with considerable room for manoeuvre to restrict in-person religious gatherings to prevent death, illness, and strain to the healthcare system arising from COVID-19 transmission. Governments should continue to consider the impact of their decisions on *Charter* rights and carefully weigh the Measures' expected benefits against their deleterious effects, but legal uncertainty is no longer a particularly compelling reason to not impose or to delay imposing properly tailored Measures.

Second, governments should ensure that they tailor the Measures by providing for categorical exceptions and considering the creation of discretionary exceptions, and citizens should press governments to justify any decision not to include such exceptions. There is little reason to prohibit low-risk forms of worship such as outdoor and drive-in services and private prayer. Governments should also give greater attention to providing discretionary exceptions for religious gatherings and, if they decide against doing so, should be prepared to explain why monitoring compliance or administering an exception system would be unworkable. Discretionary exceptions are desirable because religious establishments vary in size and capacity, religious gatherings are not one-size-fits-all affairs and can vary in their risk profile, and religious communities may be willing to adapt gatherings to try to minimize the risk of transmission. The possibility of such exceptions could also foster more collaborative partnerships between religious communities and public health officials to minimize risk while permitting indoor in-person religious gatherings to occur. For instance, Newman has argued that greater direct engagement between public officials and faith

communities could foster “creative alternative approaches” to regulating religious gatherings that have “fewer adverse effects on religious freedom.”³⁶¹

Third, governments should convey that they understand the importance of religious freedom and equality, recognize the Measures’ severe impact, and have seriously grappled with whether the Measures’ benefits outweigh their deleterious effects. It is evident from the legal challenges and public commentary that many religious believers determined that governments did not appreciate the Measures’ severe impact on their *Charter* rights; lives; and emotional, psychological, and spiritual well-being — that, in Bird’s words, the Measures reflect the “view that religion is of little value.”³⁶² As I have argued, the Measures are likely justified under section 1 of the *Charter* notwithstanding those severe impacts. But frank acknowledgment by government officials of the severity of the deleterious effects would go at least some way to address the perception that governments are devaluing religion or do not appreciate what is at stake for believers. Where administrative decision-makers are involved, such frank acknowledgment would also be consistent with the Supreme Court’s direction to “grapple with” a decision’s “particularly severe or harsh” consequences.³⁶³ For instance, Dr. Henry’s formal recognition in the preamble to a public health order restricting religious gatherings that such restrictions cause “hardships” and restrict *Charter* rights is a positive step in this direction, and other government officials should follow suit.³⁶⁴

Fourth, governments should publicly explain why they are restricting religious gatherings more strictly than certain secular activities. It is evident from the challenges that some religious believers determined that the Measures devalue religious gatherings as “non-essential,” while deeming secular activities of convenience to be “essential.”³⁶⁵ I have argued that this perception is inaccurate, and that stricter regulation of religious gatherings is justified by those gatherings’ greater risk relative to permitted secular activities. But greater transparency from governments as to the basis for regulating religious gatherings more strictly than secular activities would go at least some way to address the perception that governments are, in Justice Gorsuch’s words, “privilege[ing] restaurants, marijuana dispensaries, and casinos over churches, mosques, and temples.”³⁶⁶

VIII. POSTSCRIPT

While this article was in its final publication stage, the Ontario Superior Court of Justice issued its opinion in *Ontario v. Trinity Bible Chapel*, in which it upheld Ontario’s Measures against a *Charter* challenge.³⁶⁷ Justice Pomerance’s nuanced and thoughtful decision has several points of convergence with the approach this article advocates.

³⁶¹ Newman, “Reasonable Limits,” *supra* note 61 at 26.

³⁶² Bird, *supra* note 58.

³⁶³ Vavilov, *supra* note 202 at para 134.

³⁶⁴ Beaudoin (Merits), *supra* note 2 at para 56.

³⁶⁵ Gateway, *supra* note 2 at para 272.

³⁶⁶ Roman Catholic Diocese, *supra* note 47 at 69–70, per Gorsuch J.

³⁶⁷ 2022 ONSC 1344 [*Trinity Bible*].

The section 1 analysis in *Trinity Bible* exhibited close parallels with the approach this article has proposed. The Court incorporated preventing strain on the healthcare system into the definition of the objective.³⁶⁸ At the minimal impairment stage, the Court relied on the precautionary principle and held that Ontario was entitled to regulate prospectively without taking a “‘wait and see’ approach” that would permit risks to materialize.³⁶⁹ Similarly, the court rejected the claimants’ argument that regulating retail settings less stringently than religious gatherings was discriminatory because the latter exhibited several risk factors for COVID-19 transmission that the former did not.³⁷⁰ Likewise, at the proportionality of effects stage, the Court gave considerable weight to the Measures’ salutary effects because of the normative significance of “[t]he sanctity of human life,” even though the Measures’ precise contribution to protecting life and health could not be quantified.³⁷¹ The Court relied on potential injury to other persons in the community from COVID-19 transmission at religious gatherings to find that the Measures’ salutary effects outweighed their deleterious effects, consistent with the principle that governments may legitimately restrict freedom of religion where its exercise would injure others.³⁷² Further, the Court stressed that the geographically and temporally restricted nature of the Measures, as well as the exceptions for outdoor, virtual, and drive-in services, lessened the Measures’ deleterious effects.³⁷³

Consistent with the approach this article has proposed, *Trinity Bible* was also sensitive to both the social and public health context of the Measures and their impact on religious believers and communities. The Court took a deferential approach for many of the same reasons that the article has advocated for, including that the Measures were enacted to protect vulnerable communities, the imperfect information on which Ontario had to make decisions, and the polycentric nature of deciding which restrictions to impose and when and how to lift them.³⁷⁴ At the same time, the Court was also sensitive to the Measures’ impact on claimants, as this article has proposed. The Court affirmed the need to “pay deference to the claimants’ account of the resulting detrimental effects” because of the “profoundly personal” nature of religious belief.³⁷⁵ The Court proceeded to apply that principle to reject Ontario’s argument that the Measures did not limit section 2(a) because they permitted churches to hold multiple services to accommodate all parishioners.³⁷⁶ The Court correctly recognized that Ontario’s argument was inconsistent with both the claimants’ belief that there was a “qualitative difference between a small and a large religious service,”³⁷⁷ and Supreme Court jurisprudence affirming the collective dimension of freedom of religion.³⁷⁸

³⁶⁸ *Ibid* at paras 131–32.

³⁶⁹ *Ibid* at paras 144–46.

³⁷⁰ *Ibid* at paras 153–54.

³⁷¹ *Ibid* at para 164; see also *ibid* at paras 160–63.

³⁷² *Ibid* at para 160.

³⁷³ *Ibid* at paras 155–56, 167–69.

³⁷⁴ *Ibid* at paras 127–29, 142–47.

³⁷⁵ *Ibid* at para 6.

³⁷⁶ *Ibid* at para 95.

³⁷⁷ *Ibid* at paras 95, 104.

³⁷⁸ *Ibid* at paras 100–102.

The principal point of divergence is the Court's decision to uphold the Measures' restrictions on outdoor religious gatherings, which the article argued are not minimally impairing.³⁷⁹ Ontario's Measures included restrictions on outdoor services for brief periods, and the Court upheld these restrictions despite recognizing that "the risk of transmission is far lower in outdoor settings."³⁸⁰ But the Court's decision was based on the fact that Ontario only imposed outdoor limits when the healthcare system was so close to "breaking point ... that even a small number of infections could have dire consequences."³⁸¹ By recognizing that restrictions on outdoor gatherings should be an exceptional response to a severely strained healthcare system, the decision suggests that such restrictions are not normally justified.

³⁷⁹ The Court did not discuss discretionary exceptions to the Measures, likely because claimants do not appear to have raised this argument. *See ibid* at para 119 (summarizing claimants' arguments).

³⁸⁰ *Ibid* at para 148.

³⁸¹ *Ibid* at para 150.

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