Because emergency measures such as curfews, mass gathering bans, and travel restrictions have the effect of infringing on constitutional rights, courts have noted the need to strike a balance between infringement of those rights and the legitimate needs of public officials to preserve order and protect public health and safety during an emergency.  Where the actions taken by government officials are reasonable in light of the circumstances, courts have generally upheld those actions even where they infringe on constitutional rights.  See, *Chalk*, 441 F.2d at 1283; see also, *Zemel v. Rusk*, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965).

Courts have held that emergency restrictions and prohibitions must be reasonably necessary to address the public health or safety need presented.  While the “reasonableness” standard is not as rigid as the “strict scrutiny” standard of review that courts employ when considering governmental infringements on constitutional rights in other circumstances, the “reasonableness” standard does require local officials to have some basis in fact for imposing the designated restrictions or prohibitions and that they take these actions in good faith and without pretextual motive.  See, *Chalk*, 441 F.2d 1277 (1971); *State v. Allred*, 21 N.C. App. 229, 204 S.E.2d 214 (1974); *State v. Dobbins*, 277 N.C. 484, 178 S.E.2d 449 (1971).

The reasonableness analysis includes review of the actual language used in imposing the designated restrictions or prohibitions. *The state of emergency declaration must describe the restrictions and prohibitions with enough specificity to put the public on notice of what is and is not prohibited and ensure uniform and non-discriminatory enforcement.*  This is especially important in that violations are punishable as a Class 2 misdemeanor.  Courts in other states have struck down restrictions or prohibitions that are vague or overbroad, or which are subject to arbitrary enforcement. For example, a curfew imposed from “dusk to dawn,” is vague and overbroad; a curfew imposed from “9:00p.m. to 7:00a.m.” is sufficiently clear.  See, *Ruff v. Marshall*, 438 F.Supp. 303 (1977) (curfew allowing “activity of necessity” held vague and overbroad); *Hayes v.* *Municipal Court of Oklahoma City*, 1971 OK CR 274, 487 P.2d 974 (1971) (curfew prohibiting “loitering and wandering” from “midnight to dawn” held vague and overbroad); *City of Portland v. James,* 251 Or. 8, 444 P.2d 554 (1968) (curfew prohibiting being on streets “without having and disclosing a lawful purpose” held vague and overbroad); *City of Seattle v. Drew,* 70 Wash.2d 405, 423 P.2d 522 (1967) (curfew prohibiting being “abroad under suspicious circumstances” held vague and overbroad); *Shreveport v. Brewer,*225 La. 93, 72 So.2d 308 (1954) (curfew requiring persons on streets to have a “satisfactory explanation” held vague and overbroad).

While the cases cited above involve curfew challenges, the legal principles articulated apply to any restrictions or prohibitions imposed under a state of emergency, and that same analysis also would apply to the First Amendment’s protections for free exercise of religion.

In general, the government may impose regulations that are not aimed at the promotion or restriction of religious beliefs, but that have the incidental effect of interfering with religious practices. The United States Supreme Court in *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 878–80 (1990), recognized that the State of Oregon could criminalize the use of peyote, even though its consumption was part of a sacramental rite of the Native American Church, and then deny unemployment benefits to persons who were fired for consuming peyote in such a ceremony.

The *Smith* Court declined to hold that when otherwise prohibitable conduct is accompanied by religious convictions, that conduct must be free from governmental regulation. Oregon’s drug law did not attempt to regulate religious beliefs, the communication of those beliefs, or the raising of one’s children in those beliefs. Instead, it regulated conduct.  And, the Court noted, “[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.” *Id.* at 879 (citing *Reynolds v. United States,* 98 U.S. 145 (1878) (rejecting the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice and noting that “[t]o permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”)). The Court recounted decisions consistently holding that the right of free exercise does not relieve an individual of the obligation to comply with a “‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’” *Id.* (internal quotations omitted).

The *Smith* Court distinguished circumstances in which the government sought to ban acts or abstentions only when engaged in for religious reasons or only because of the religious believes that they display.  *Id*. at 877. That, the court opined, ***would amount*** to prohibiting the free exercise of religion.

The standard articulated in *Smith* (that the government may impose regulations that are not aimed at the promotion or restriction of religious beliefs, but that have the incidental effect of interfering with religious practices) is consistent with a holding the previous year in *Moorhead v. Farrelly,* 723 F. Supp. 1109 (D.V.I. 1989). In this case, a defendant challenged the constitutionality of a curfew imposed on the island of St. Croix in the aftermath of Hurricane Hugo, alleging among other claims a violation of his right of free exercise of religion (at the time of his arrest for violating the curfew, the defendant claimed he was traveling to his grandmother’s house to pray with her). In upholding the constitutionality of the curfew, the court noted that

While first amendment rights are accorded special protection, they are not absolute. See *Konigsberg v. State Bar of California*, 366 U.S. 36, 49–51, 81 S.Ct. 997, 1005–07, 6 L.Ed.2d 105 (1961). The statute here permits a limitation on the exercise of such rights only in very unusual circumstances where extreme action is necessary to protect the public from immediate and grave danger. The statute is not designed to regulate in any way, nor does it have the effect of regulating, the content of speech or other form of expression. Rather, it is a regulation of conduct that is not designed to limit or control the expression of ideas but that unfortunately has an incidental impact on the exercise of first amendment rights. Likewise, freedom to travel may be subject to reasonable limitations as to time and place, and under appropriate circumstances a nocturnal curfew may be a lawful and effective means of controlling or preventing imminent civil disorder. *United States v. Cha*lk, 441 F.2d 1277, 1283 (4th Cir.), cert. denied, 404 U.S. 943, 92 S.Ct. 294, 30 L.Ed.2d 258 (1971); *American Civil Liberties Union v. Chandler*, 458 F.Supp. 456, 458 (W.D.Tenn.1978). The court, therefore, finds it unlikely that plaintiff will prevail on a claim that the statutes authorizing the curfew violate either his first amendment rights or his right to travel under the commerce clause.

*Id.* at1112–13.

At the end of the day, whether emergency restrictions imposed by a county or city during COVID-19 are reasonably necessary to address the threat presented will be a question of fact. In my view, so long as the county or city has a legitimate basis for the restrictions and those restrictions are not subject to arbitrary enforcement, the caselaw appears to support the County’s actions even where those actions temporarily infringe on constitutionally protected rights.  In the case of emergency restrictions that impede in-person attendance at a church service, whether that restriction unconstitutionally infringes on the parishioners’ 1st Amendment rights will turn on whether the restriction is reasonably necessary. If so, the case law supports the constitutionality of the restriction as “a regulation of conduct that is not designed to limit or control the expression of ideas but that unfortunately has an incidental impact on the exercise of first amendment rights.” *Id.*

County and city emergency mass gathering restrictions are not aimed at restricting religious beliefs, but instead regulate conduct in a manner reasonably necessary to mitigate against the spread of COVID-19. Restrictions on in-person gatherings at worship services are not targeted specifically at expressions of religion but instead apply broadly to in-person gatherings in general. Nor do these restrictions prevent the exercise of religious expressions in other ways. Citizens may still read their religious texts, pray alone or with family members, sing hymns, participate in online worship services, and engage with fellow believers through social media. They may still seek spiritual guidance from their religious leaders (pastor, priest, minister, rabbi, imam, etc.) on the phone or through social media. They still may tithe to their houses of worship through online payment services. In short, religious beliefs themselves are not restricted, only a specific form of conduct is.

In addition, emergency restrictions cannot be vague or overbroad or subject to arbitrary enforcement (see line of cases involving vague and overbroad curfew language discussed above). In considering whether an emergency restriction is enforced in a nonarbitrary fashion (i.e., in a nondiscriminatory fashion), it is important to note that the cases in which this standard has been articulated almost universally involved curfew arrests of African Americans. Thus, I interpret the “nondiscriminatory” requirement to primarily speak to prohibiting discrimination against a constitutionally protected class.  I do not think a distinction between restrictions on in-person church services compared with allowing up to 25 persons attend a funeral service rises to the level of a discriminatory action as that is contemplated in the case law. The analysis might be different if one religious denomination was restricted more severely than others, such as allowing Christian and Jewish in-person religious services but prohibiting those of the Muslim faith, but this is not the case with any of the mass gathering restrictions currently in place.  In addition, if the county has a legitimate basis for distinguishing between these two types of services (church versus funerals), such as an increased likelihood of violating social distancing requirements or difficulties in maintaining public safety at large church parking lot services, in my opinion these considerations form a legitimate basis for the distinction. The same holds true in comparing restrictions on in-person worship services and exercise of 1st Amendment rights by the media. The media is subject to the same mass gathering restrictions as all other groups.