Op-Ed Commentary

Roman Catholic Diocese of Brooklyn v Cuomo, 592 U.S. __,
(No. 20A87, November 25, 2020) (per curiam) *

As we saw throughout 2020, unusual times prompt unusual actions. States throughout America have imposed restrictions on travel, business, and gathering. The State of New York, acting through its governor, issued certain Executive Orders restricting the assembly of people. These orders not only impacted its businesses but also specifically regulated places of worship. They restricted attendance at services to ten persons in areas declared "red" zones, and to twenty-five if the zone was labeled "orange." Prior to these orders both the Diocese and the synagogue (in the consolidated case) had complied with all guidelines and operated at 25 to 33% capacity for months without an outbreak. The Diocese brought suit to enjoin the enforcement of these orders on the basis of the Free Exercise clause of the First Amendment: Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof.*

Their request for preliminary injunctive relief, meaning an injunction before trial, was denied in both the trial court and in the court of appeals. An emergency application for injunctive relief was sought in the Supreme Court. The Court accepted the application and issued a *per curiam* opinion granting the temporary injunction. A *per curiam* opinion is one that is issued by the Court in its own name, rather than by a particular jurist.

The Court found that the Diocese had met the necessary conditions. First, they were likely to prevail at trial. Second, they suffered an irreparable injury. That is, once a day of worship is past, that day cannot be brought back. Third, the relief they requested would not burden the public interest.

The orders were found to meet the threshold requirement of neutrality to religion. A regulation must apply to religious activity on an equal basis as it does to other activities or entities. These orders on their face, that is, in explicit terms, singled out houses of worship for treatment. Even within the most restrictive red zone, while churches were limited to an attendance capacity of ten, there was no limit on businesses and services which the government had deemed "essential." The evidence which had been produced showed that the convergence of people at factories and schools had contributed to the spread of the virus, yet these remained less restricted. (Remember, there had been no outbreaks attributable to worship services of the Diocese).

Because the order was not generally applicable to all and lacked neutrality, it would be examined under the standard of strict scrutiny. Strict scrutiny requires that restrictions must be narrowly tailored and also serve a compelling state interest. The Court found that the order was not narrowly tailored because a less restrictive alternative was available. "It is hard to believe that admitting more than 10 people to a 1,000 seat church … would create a more serious health risk than the State allows."

The State also argued that the case was moot, meaning there was nothing left to determine, since during the course of the litigation the zone of the Diocese had been re-categorized from "red" to "yellow," and 50% capacity was now permitted. However, the order itself remained in place, the zone of the Diocese's churches could be classified as "red" again, thereby reinstating the ten person limit. Thus the risk of imminent harm remained. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."

* Wording from the opinion has been used without further attribution or quotation.

Writing a separate concurring opinion, Justice Gorsuch provided insightful observations about the case and the holding. Government is not free to disregard the First Amendment in time of crisis. No apparent reason exists why people may not gather, subject to identical restrictions, in houses of worship, especially when the religious institutions have made plain they stand ready, willing, and able to follow all safety precautions of the "essential" businesses. The only explanation seems to be that religious places are not as essential as secular ones.

"Even if the Constitution can take a holiday during this pandemic, it cannot take a sabbatical." The willingness of the judicial branch to defer to the political branch of government in the early days of the pandemic are gone. Those early days referred to the Court's decision of May 30, 2020, *South Bay United Pentecostal v Newsome,* an appeal by a church in California concerning attendance restrictions imposed by Governor Newsome. *South Bay* was also an application for preliminary injunctive relief, after the injunction had been denied by the trial court and the court of appeals. The Supreme Court denied the application by order, so no opinion of the court was entered. However, Chief Justice Roberts filed a concerning opinion in the denial of the injunction.

In the present concurrence of Justice Gorsuch here, he finds that the reasoning in the *South Bay* concurrence was based largely on the case of *Jacobson v Massachusetts* (1905) concerning the smallpox pandemic of the time. While *Jacobson* concerned government actions during a pandemic, it was not a First Amendment case. It involved a different claimed right, a different standard of review, and a different restriction. A regulation at the time required citizens to receive the smallpox vaccination, or show that they qualified for certain exemptions, or pay a $5 fine. Mr. Jacobson argued that under Due Process of the Fourteenth Amendment he had a right of bodily integrity and could refuse the vaccine. Thus *Jacobson* did not involve religious liberties, nor did it invoke other First Amendment issues. Second, *Jacobson* was decided under a different and simpler standard: rational basis. The State was not held to the strict conditions, but only needed to show a rational basis for its regulation. Finally, the restriction was not a blanket one: Mr. Jacobson had a choice of three options: get the vaccine, show exemption, or pay the fine. Mr. Jacobson was arguing that he need not do any of the three. Therefore, while the *Jacobson* decision does address some of the government's authority to combat a pandemic, it is not a religious liberty case. In fact, the *Jacobson* opinion itself said that the challenged vaccine regulation withstood the challenge only because it did *not* contravene the Constitution or infringe on any right.

Just what is the scope of the *Diocese of Brooklyn* decision? Only time will fully tell. Its procedural posture is quite unusual. The Supreme Court issued a pre-judgment injunction. That means that the litigation pending in the trial court had not been concluded. Why is that significant? Because in the ordinary course of things the trial court might reach a different judgment after all the evidence has been gathered and all the witnesses heard. It is also significant because although an appeal on the issue of the early injunctive relief had been taken to the Court of Appeals, that court had not completed a full review of the case because the case was still being tried. Final judgment on all matters had not been entered. As Justice Kavanaugh wrote in his concurring opinion: the Court's orders today are not final decisions on the merits.

The trial court had not finished its work, the appellate court had not finished its work, yet the Supreme Court still took the case. The Court found that the Diocese was likely to succeed on its claim, and that the order was not narrowly tailored. Neither the trial court nor the appellate court reached this conclusion. How could both courts miss the ball? This strongly suggests that the Supreme Court saw something new about the essence of the Free Exercise clause: that the inability to meet for worship fell squarely within

the scope of the protections of the First Amendment. Unlike *Jacobson*, this involved a "textually explicit right." There may and will be differing views on the outer boundaries of the exercise of religion. But if it does not include meeting for worship, what does it mean, if anything?

"The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty."

The kernel of this decision might be condensed as being a reminder that while the Constitution does not say everything it means, it means everything that it says.

Although *Diocese of Brooklyn* is not a decision on the merits, the Court has shown that it does have significance, and has used it numerous times to reverse other religious liberty cases for reconsideration. Three of them are helpful in understanding the scope of *Diocese of Brooklyn.*

The case of *South Bay Pentecostal Church* had again made its way to the Supreme Court, and was reversed and remanded for reconsideration. This indicates that *Diocese of Brooklyn,* not the May 30th *South Bay* decision, should be looked to as the guiding, if not controlling, authority. The *South Bay* case has already been reheard in the trial court and on appeal, and another application for injunction relief is presently pending in the Supreme Court. The outcome in *South Bay III* will likely elucidate the contours of *Diocese of Brooklyn.*

Second, two days after granting the injunction in *Diocese of Brooklyn,* the Court declined to intervene in a case concerning a church in Louisiana, *Spell v Edwards* (November 27, 2020). Reverend Spell had been arrested for allegedly violating the state stay-at-home order, and, it is claimed, held services with more than 500 and 1,200 worshippers. The case was dismissed as moot as the order had been lifted. One should not overlook, however, the background factor that the violations of the stay-at-home order in *Spell* were not minimal. This is in sharp contrast to the diligent observation of safety factors by the Diocese of Brooklyn. It should be a reminder that the Free Exercise clause is more of a shield against undue government interference, restriction, or oppression, then it is a sword to use as a trump card to do as one pleases under the mantle of religious liberty.

Third, the Court also declined to intervene in the government's closure of a parochial school in Kentucky in *Danville Christian Academy v Beshear*, (December 17, 2020). At issue was the governor's order closing all schools: public, private, and parochial. The Court denied the application because the governor's closure order was to expire the next day, and schools were scheduled to adjourn for the Christmas recess, effectively making the matter moot. That may be all there is to glean from this case. One should be cognizant, however, that the order and issue here were different. First, the order applied to all schools. Schools were the unified category, and parochial schools had the same treatment as the others. It is logical to treat schools differently than business because they generally involve the gathering of children. There would be a good basis for this order to pass the test of neutrality towards religious activity. Second, temporary closure of a parochial school does not infringe on religious exercise in the same way nor to the same degree that the closure or severe restriction of worship does. All congregations must meet for worship. The church is known when it gathers around Word and Sacrament. Yet not all churches operate or participate in a parochial school.

The Free Exercise clause is still alive and viable. But congregations would be well advised to analyze their particular situations. Is the law or regulation applied to religious institutions in a particular manner? Does it impact the essence of being the Church? The more attenuated it is, the less likely it violates Free Exercise. Finally, is one complying with the state regulations to the fullest extent that one can, or is one defying the regulations because one thinks or claims that he can? Both the Christian and the Holy Church live and exist in the two kingdoms, right-hand and left. The pandemic will end, but that struggle of duality will remain. And the Holy Church and the Word of God will endure until Christ's return.

Editorial Note: On Friday, February 5, 2021, a divided United States Supreme Court enjoined California's total ban on indoor worship services while allowing secular gatherings of comparable size and density. *South Bay United Pentecostal Church, ET AL, v. Gavin Newsom, Governor of California,* 502 U.S. _____ (2021). The injunction was denied with respect to percentage capacity limitations and with respect to "...singing and chanting during indoor services..." and the order is without prejudice to South Bay presenting new evidence to the District Court that California is not applying the percentage capacity limitations or the prohibition on singing and chanting in a generally applicable manner.

In the May 2021 edition of the *Clarion* the Editorial Group anticipates publishing an editorial on the *South Bay United Pentecostal Church* Supreme Court decision. This case may well be back before the Supreme Court. Our readers can read the full decision by searching the internet for the case name and United States Supreme Court.