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December 2, 2020

CLIENT ALERT

U.S. Supreme Court Tightens Scrutiny on Regulations Impacting Religion

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Just before midnight on the night before Thanksgiving, the United States Supreme Court temporarily enjoined New York State from enforcing COVID-related restrictions against houses of worship, finding that the restrictions violated the Free Exercise Clause of the First Amendment. *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, No. 20A87, 2020 WL 6948354 (U.S. Sup. Ct., Nov. 25, 2020). The decision has implications not only for COVID-related restrictions but also for other government regulations and requirements impacting houses of worship and religious activities.

Background

From the outset of the COVID-19 pandemic, federal and state courts around the country have heard and decided generally two types of challenges to COVID-19 restrictions. The first type has involved challenges to the authority of state and local governments, particularly governors, to impose restrictions on residents and businesses such as stay-at-home orders and other gathering limitations. In Illinois, as we have previously reported, virtually all of these "authority" challenges have failed. *See Fox Fire Tavern v. Pritzker*, 2020 IL App (2d) 200623 (Nov. 13, 2020) (finding that the Governor's various executive orders and disaster proclamations were authorized under the Illinois Emergency Management Act).

The second type of litigation has involved constitutional challenges based on the extent to which COVID restrictions affect the rights of equal protection, freedom of speech, liberty, and religious expression. Until recently, courts have generally upheld public health orders designed to thwart the spread of the pandemic despite the unavoidable interferences with the constitutionally-protected personal freedoms we normally enjoy regarding speech, liberty, travel, and religious exercise.

In May, a divided U.S. Supreme Court (by a vote of 5-4) rejected a challenge brought by a California church to Governor Newsom's stay-at-home order that restricted in-person religious gatherings through a 25 percent occupancy limitation. *See South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1603 (2020). In that case, Chief Justice Roberts wrote a concurring opinion in which he concluded that the restrictions were consistent with the Free Exercise Clause of the First Amendment because religious gatherings were treated the same as comparable secular gatherings such as lectures, concerts, movie theaters, spectator sports and theatrical

performances, and different from dissimilar locations such as grocery stories, banks, and laundromats. Justices Thomas, Alito, Gorsuch, and Kavanaugh dissented.

In June, relying on the *South Bay* case, the 7th Circuit Court of Appeals in Chicago affirmed Governor Pritzker's executive order that limited religious services to no more than 10 people. Despite the fact that the Governor had softened this restriction into a recommendation prior to the court's ruling, the court proceeded to rule that the Governor's restrictions were content-neutral and sufficiently justified in the face of the public health crisis and given the risk of transmission during indoor services (which are, for instance, more akin to banned concerts than exempt warehouse operations).

And in July, the Supreme Court, by the same 5-4 vote that prevailed in the *South Bay* case, upheld Nevada Governor Sisolak's partial re-opening restrictions capping religious services at 50 attendees while allowing casinos to re-open at 50 percent capacity. The Court rejected a church's claim that Governor Sisolak's order violated the First Amendment Equal Protection Clause. *See Calvary Chapel Dayton Valley v. Sisolak*, 140 S.Ct. 2603 (2020).

However, in a public speech that perhaps foreshadowed a shift in how the Supreme Court would view these types of cases going forward, Justice Alito stated in early November that the coronavirus pandemic had resulted in previously "unimaginable" restrictions on individual liberty, and that "[t]he COVID crisis has served as sort of a constitutional stress test."

The Latest Supreme Court Decision

New York Executive Order 202.68 imposed capacity limits of 10- and 25-people on "houses of worship" within 'red' and 'orange' zones of COVID-19 infection, respectively. Within those zones, the Order required certain businesses that involve large, prolonged gatherings to close entirely (such as movie theaters and concert venues) but did not impose capacity limits on certain "essential businesses" (such as grocery stores and banks).

Agudath Israel of America (representing multiple synagogues) and the Roman Catholic Diocese of Brooklyn brought separate actions under Section 1983 of the Civil Rights Act but were denied various motions for injunctions by a US District Court and the Second Circuit Court of Appeals. Although Governor Cuomo downgraded the zones that included the plaintiffs' houses of worship to 'yellow' (allowing them to operate at 50 percent capacity) two days before the Supreme Court issued its injunction, the Court proceeded to rule for both plaintiffs given the possibility that the designations might revert.

The Court (by a 5 to 4 vote) declared that Governor Cuomo unconstitutionally discriminated against the exercise of religion by placing greater limits on religious organizations than comparable secular businesses. The Court's opinion was supported by Justices Gorsuch, Thomas,

Alito, Kavanaugh and Barrett (who had, subsequent to the *South Bay* and *Calvary Chapel* decisions, filled the seat of the late Justice Ginsburg). Chief Justice Roberts, and Justices Breyer, Sotomayor, and Kagan dissented. The decision enjoins New York from enforcing its 10- and 25-person caps until the Second Circuit enters a full ruling on the case (oral augment is scheduled for December 18), which *itself* could be appealed back to the Supreme Court. Significantly, the Court's opinion does not directly impact Governor Pritzker's existing executive orders which generally exempt religious services from gathering limitations.

The critical aspect of the opinion and its broad potential impact is how the Court determines the level of scrutiny that will apply to the challenged restrictions. In prior opinions, the Court has held that generally applicable regulations deemed neutral with regard to religious exercise will withstand challenge so long as they are rationally related to a legitimate state interest. Regulations that are not deemed neutral to the exercise of religious exercise will be subject to "strict scrutiny" and will only be upheld if they serve a compelling state interest and use the least restrictive means available. *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 533 (1993). The strict scrutiny standard is extremely difficult to overcome.

The Court here applied strict scrutiny as it found that the New York COVID restrictions at issue were not neutral because "they single out houses of worship for especially harsh treatment." The Court pointed to the fact that although a synagogue or a church in a red zone is limited to 10 people at a service, there are no limits on how many people a nearby "essential" business – which can include acupuncture or a camp ground – can admit. And in the orange zone the Court found the disparate treatment even more pronounced because there even non-essential businesses could decide for themselves how many people to admit.

The Court also rejected New York's assertion that the regulations were not discriminatory because movie theaters (which must remain completely closed) and some other secular businesses are treated less favorably than houses of worship. The Court held that the fact that some secular businesses are subject to similarly severe or even more severe restrictions is not determinative. The test that guided the Court in this case and that will apply in other cases involving government regulations impacting religious exercise is whether, once a state creates a favored class of businesses, there is a justification for that classification. The majority opinion in this case strongly suggests that a law will be suspect if a court can find *any* example of a secular institution that is treated more favorably than a religious institution.

It should be noted that Chief Justice Roberts dissented primarily because he thought there was no need to decide the case since the attendance limits no longer applied to the challengers. However, Justice Roberts explained that the regulations at issue "do seem unduly restrictive" and "it may well be that such restrictions violate the Free Exercise Clause." Thus, a solid 6 – 3 majority of the Court now seems to support tightening the limits and increasing the level of scrutiny on government regulations that impact houses of worship and religious activities.