Supreme Court Addresses Constitutional Challenges to the Application of COVID-19 Restrictions to Churches: *South Bay United Pentecostal Church et al. v. Newsom 590 U.S. _____ (2020)*

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On March 4, 2020, California Governor Gavin Newsom proclaimed a State of Emergency as a result of the threat posed by COVID-19. Two weeks later, on March 19, 2020, the Governor issued Executive Order N-33-20, which required "all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors." Executive Order N-33-20 gave some Californians the right to leave their residence, including clergy who were holding services "through streaming or other technologies that support physical distancing and state public health guidelines."

Seven weeks later the pandemic had, in the Governor's words, "stabilized." As a result, on May 7, 2020, the Governor published his four-stage "California Reopening Plan," with each stage increasing those persons permitted to leave their residence. At Stage 1, only "critical infrastructure" was exempted. At Stage 2, "lower risk workplaces" like curbside retail and additional factories making previously non-essential "things like toys, clothing . . . and furniture" would be permitted to reopen. Stage 2 entities also included ones that would reopen at a later date within that stage, such as schools, childcare, dine-in restaurants, outdoor museums, "destination retail, including shopping malls and swap meets," and office-based businesses where telework is not possible. At Stage 3, "higher risk workplaces" like churches could reopen, along with bars, movie theaters, hair salons, and "hospitality services. According to California's Public Health Officer, Stage 3 is for "things like getting your hair cut, getting your nails done, doing anything that has very close inherent relationships with other people, where the proximity is very close." The Governor's Order places temporary numerical restrictions on public gatherings to address this extraordinary health emergency. State guidelines currently limit attendance at places of worship to 25% of building capacity or a maximum of 100 attendees. At Stage 4, concerts, conventions, and spectator sports could reopen. The Governor predicted that while Phase 2 would begin in "weeks, not months," Phase 3 would begin in "months, not weeks."

On May 8, a church sued the Governor and several other state and local officers (collectively, "the State") in federal court claiming that the Reopening Plan's decision to place churches within Stage 3 instead of stage 2 violated the Free Exercise of Religion Clause of the First Amendment. The church asked the court to grant an injunction requiring the State to once again allow churches to conduct in-person services. The court refused, and a federal appeals court concurred with this disposition. The church appealed to the United States Supreme Court.

the Supreme Court's opinion

A deeply divided Court (5-4) rejected the church's request for an injunction, with Chief Justice John Roberts siding with the Court's four liberal Justices to form a majority. Only Chief Justice Roberts wrote an opinion which was not joined by any other Justice, meaning that the opinion's rationale has no binding effect. So, while we know the result of the Court's decision, we do not know the Court's rationale with certainty.

The Court concluded:

> Although California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise [of religion] Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.
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> The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson v. Massachusetts, 197 U. S. 11, 38 (1905).* When those officials "undertake to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall v. United States, 414 U. S. 417, 427 (1974)*. Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people.

the dissenting opinion

Justice Kavanaugh, writing for the Court's four dissenting Justices, began his opinion by noting:

> I would grant the church's requested temporary injunction because California's latest safety guidelines discriminate against places of worship and in favor of comparable secular businesses. Such discrimination violates the First Amendment.
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> In response to the COVID–19 health crisis, California has now limited attendance at religious worship services to 25% of building capacity or 100 attendees, whichever is lower. The basic constitutional problem is that comparable secular businesses are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries. [The church] has applied for temporary injunctive relief from California's 25% occupancy cap on religious worship services. Importantly, the church is willing to abide by the State's rules that apply to comparable secular businesses, including the rules regarding social distancing and hygiene. But the church objects to a 25% occupancy cap that is imposed on religious worship services but not imposed on those comparable secular businesses.

Justice Kavanaugh noted that to justify its discriminatory treatment of religious worship services, California must show that its rules are "justified by a compelling governmental interest" and "narrowly tailored to advance that interest." California "undoubtedly has a compelling interest in combating the spread of COVID–19 and protecting the health of its citizens. But restrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom." What California needs is "a compelling justification for distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subject to an occupancy cap."

Justice Kavanaugh concluded:

> The church and its congregants simply want to be treated equally to comparable secular businesses. California already trusts its residents and any number of businesses to adhere to proper social distancing and hygiene practices. The State cannot "assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings."
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> California has ample options that would allow it to combat the spread of COVID–19 without discriminating against religion. The State could insist that the congregants adhere to social-distancing and other health requirements and leave it at that—just as the Governor has done for comparable secular activities." Alternatively, the State could impose reasonable occupancy caps across the board. But absent a compelling justification (which the State has not offered), the State may not take a looser approach with, say, supermarkets, restaurants, factories, and offices while imposing stricter requirements on places of worship. . . . In sum, California's 25% occupancy cap on religious worship services indisputably discriminates against religion, and such discrimination violates the First Amendment.

what this means?

What is the practical relevance of this case to churches? Consider the following points:

First, the Court's decision means that churches may not be able to look to the courts for assistance when confronted by a state or local law restricting their ability to conduct worship services.

Second, churches can challenge restrictions on attendance that are stricter than those that apply to comparable secular organizations. Comparable organizations would include those that have similar numbers in attendance for similar periods of duration each week, with similar physical interactions. But churches can be subjected to more stringent limitations on attendance if the totality of their interactions with the public are greater than those of other organizations. In this regard, the Court noted: "The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement."

Third, the Court stressed that "[our] Constitution principally entrusts the safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson v. Massachusetts, 197 U. S. 11, 38 (1905).* When those officials "undertake to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad," and "where those broad limits are not exceeded, they should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health and is not accountable to the people."

Fourth, the Court mentioned the *Jacobson* case in support of its decision. In *Jacobson* (1905), the United States Supreme Court rejected a citizen's claim that his liberty was invaded "when the State subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination, and that a compulsory vaccination law is unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short

of an assault upon his person." The Court held that "in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand" and that "real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others." This case suggests, though not conclusively, that safety and health regulations, such as compulsory vaccinations, supersede religious liberty.

Fifth, church leaders that continue to hold worship services in contravention of state or local restrictions, must understand that in doing so they are exposing their congregation to possible risks and liability should one or more persons become infected with the COVID-19 virus. These risks include:

- Personal liability of church board members if their decision to ignore government mandates and recommendations is deemed to constitute gross negligence. Most states have enacted laws limiting the liability of church officers and directors. The most common type of statute immunizes *uncompensated* directors and officers from legal liability for their *ordinary* negligence committed within the scope of their official duties. These statutes generally provide no protection for "willful and wanton" conduct or "gross negligence"--the same standard typically used as a basis for punitive damages.

- Punitive damages are monetary damages that a jury can award when a defendant's conduct is grossly negligent or reckless. This does not necessarily mean intentional misconduct. Punitive damages often are associated with reckless conduct or conduct creating a high risk of harm. The United States Supreme Court has noted that the goal of punitive damages is "deterrence and retribution," that is, "to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition." *State Farm Mutual Automobile Insurance Company v. Campbell, 538 U.S. 408 (2003).*

- It is important for church leaders to understand that reckless inattention to risks can lead to punitive damages, and that such damages ordinarily are not covered by a church's liability insurance policy. This means that a jury award of punitive damages represents a potentially uninsured risk. As a result, church leaders should understand the basis for punitive damages, and avoid behavior which might be viewed as grossly negligent.

Supreme Court Again Rules that Safety and Health Regulations Defeat Religious Freedom: *Calvary Chapel v. Sisolak, 590 U.S. _____ (2020)*

by Richard Hammar

For the second time this year the United States Supreme Court has denied a church's request for an exemption from a state mandate limiting the size of worship services.

A church (Calvary Chapel) in Nevada wanted to host worship services for about 90 congregants, or some 50% of its fire-code capacity. In conducting these services the church planned to take several precautions going beyond anything that the State requires. In addition to asking congregants to adhere to proper social distancing protocols, it intended to cut the length of services in half. It also planned to require six feet of separation between families seated in the pews, to prohibit items from being passed among the congregation, to guide congregants to designated doorways along one-way paths, and to leave sufficient time between services so that the church could be sanitized.

According to an infectious disease expert, these measures were "equal to or more extensive than those recommended by the CDC." Yet hosting even this type of service would violate "Directive 21," Nevada Governor Steve Sisolak's reopening plan, which limits indoor worship services to "no more than fifty persons." Meanwhile, the directive caps a variety of secular gatherings at 50% of their operating capacity, meaning that they are welcome to exceed, and in some cases far exceed, the 50-person limit imposed on places of worship. While "houses of worship" may admit "no more than fifty persons," many favored facilities that host indoor activities may operate at 50% capacity. Privileged facilities include bowling alleys, breweries, fitness facilities, and most notably, casinos, which have operated at 50% capacity for over a month.

Citing this unequal treatment, Calvary Chapel brought suit in federal district court seeking an injunction allowing it to conduct services for up to 50% of maximum occupancy. The district court refused to grant relief, and a federal appeals court affirmed the district court's ruling. Calvary Church appealed to the United States Supreme Court for an order barring enforcement of the governor's restrictions on worship services. But in a one sentence opinion without any explanation or analysis the Court simply said "the application for injunctive relief . . . is denied." The ruling was a split 5-4 decision, with Chief Justice John Roberts siding with the four liberal justices in denying the relief sought by the church.

Justice Alito's dissent

Justice Alito filed a dissenting opinion that was joined by Justices Thomas and Kavanaugh. He observed:

> Activities that occur in casinos frequently involve far less physical distancing and other safety measures than the worship services that Calvary Chapel proposes to conduct. Patrons at a craps or blackjack table do not customarily stay six feet apart. Casinos are permitted to serve alcohol, which is well known to induce risk taking, and drinking generally requires at least the temporary removal of masks. Casinos attract patrons from all over the country. In anticipation of reopening, one casino owner gave away 2,000 one-way airline tickets to Las Vegas. And when the Governor announced that casinos would be permitted to reopen, he invited visitors to come to the State. The average visitor to Las Vegas visits more than six different casinos, potentially gathering with far more than 50 persons in each one. Visitors to Las Vegas who gamble do so for more than two hours per day on average, and

> gamblers in a casino often move from one spot to another, trying their luck at different games or at least at different slot machines.
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> Houses of worship can—and have—adopted rules that provide far more protection. Family groups can be given places in the pews that are more than six feet away from others. Worshippers can be required to wear masks throughout the service or for all but a very brief time. Worshippers do not customarily travel from distant spots to attend a particular church; nor do they generally hop from church to church to sample different services on any given Sunday. Few worship services last two hours. (Calvary Chapel now limits its services to 45 minutes.) And worshippers do not generally mill around the church while a service is in progress. The idea that allowing Calvary Chapel to admit 90 worshippers presents a greater public health risk than allowing casinos to operate at 50% capacity is hard to swallow, and the State's efforts to justify the discrimination are feeble. . . . In sum, the directive blatantly discriminates against houses of worship and thus warrants strict scrutiny under the Free Exercise Clause.

The State of Nevada attempted to defend the Governor's order by relying on the Supreme Court's recent refusal to issue a temporary injunction against enforcement of a California law that limited the number of persons allowed to attend church services. *South Bay United Pentecostal Church v. Newsom, 590 U. S. ___ (2020).* But Justice Alito noted that the prior case "is different from the one now before us. In *South Bay*, a church relied on the fact that the California law treated churches less favorably than certain other facilities, such as factories, offices, supermarkets, restaurants, and retail stores. But the law was defended on the ground that in these facilities, unlike in houses of worship, people neither congregate in large groups nor remain in close proximity for extended periods. That cannot be said about the facilities favored in Nevada. In casinos and other facilities granted preferential treatment under the directive, people congregate in large groups and remain in close proximity for extended periods."

"The world we inhabit today, with a pandemic upon us, poses unusual challenges. But there is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel." [Dissenting opinion of Justice Gorsuch]

Justice Kavanaugh's dissent

Justice Kavanaugh began his dissenting opinion by noting:

> To be clear, a State's closing or reopening plan may subject religious organizations to the *same* limits as secular organizations. And in light of the devastating COVID–19 pandemic, those limits may be very strict. But a State may not impose strict limits on places of worship and looser limits on restaurants, bars, casinos, and gyms, at least without sufficient justification for the differential treatment of religion. . . . Nevada has thus far failed to provide a sufficient justification, and its current reopening plan therefore violates the First Amendment.

Justice Kavanaugh ended his opinion with these words:

> The Constitution protects religious observers against unequal treatment. Nevada's 50-person attendance cap on religious worship services puts praying at churches, synagogues, temples, and mosques on worse footing than eating at restaurants,

drinking at bars, gambling at casinos, or biking at gyms. In other words, Nevada is discriminating against religion. And because the State has not offered a sufficient justification for doing so, that discrimination violates the First Amendment. I would grant the Church's application for a temporary injunction. I respectfully dissent.

what this means?

What is the practical relevance of this case to churches? Consider the following points:

First, the Court's decision means that churches may not be able to look to the courts for assistance when confronted by a state or local law restricting their ability to conduct worship services. This conclusion is underscored by the fact that this is the second time this year that the Supreme Court has rejected a religious liberty challenge to restrictions on worship services.

Second, the Supreme Court, in its previous COVID-19 ruling (*South Bay)* stressed that churches can challenge restrictions on attendance that are *stricter than those that apply to comparable secular organizations*. Comparable organizations would include those that have similar numbers in attendance for similar periods of duration each week, with similar physical interactions. But churches can be subjected to more stringent limitations on attendance if the totality of their interactions with the public are greater than those of other organizations. The Governor's order in Nevada provided more favorable treatment to several secular organizations, including bowling alleys, breweries, fitness facilities, and casinos. The Court did not explain why these secular organizations were not "comparable secular organizations" that were being treated more favorably than religious congregations. But the Court's ruling in *South Bay* that churches cannot be treated less favorably than comparable secular organizations remains a valid defense to restrictions on worship services.

Third, church leaders who continue to hold worship services in contravention of state or local restrictions, must understand that in doing so they are exposing their congregation to possible risks and liability should one or more persons become infected with the COVID-19 virus. These risks include:

- Potential personal liability of church board members if their decision to ignore government mandates and recommendations is deemed to constitute *gross negligence*. Most states have enacted laws limiting the personal liability of church officers and directors. The most common type of statute immunizes *uncompensated* directors and officers from legal liability for their *ordinary* negligence committed within the scope of their official duties. These statutes generally provide no protection for "willful and wanton" conduct or "gross negligence"--the same standard typically used as a basis for punitive damages (below). A decision by a church board to continue holding worship services in disregard of government restrictions may constitute gross negligence subjecting board members who participated in the decision to personal liability.

- Reckless inattention to risks can lead to punitive damages, and such damages ordinarily are not covered by a church's liability insurance policy. This means that a jury award of punitive damages represents a potentially uninsured risk. As a result, church leaders should understand the basis for punitive damages, and avoid behavior which might be viewed as grossly negligent. A decision by a

church's leadership to continue holding worship services in disregard of government restrictions may constitute gross negligence subjecting the church to punitive damages.