

SECOND CIRCUIT REVIEW

Expert Analysis

SCOTUS Overrules Second Circuit on COVID-19 and Religious Worship

Last month, the U.S. Supreme Court enjoined Gov. Andrew Cuomo from enforcing portions of his executive order addressing COVID-19 “hot spots” in New York state. The ruling came less than three weeks after the Second Circuit declined to block the order, holding that it most likely did not infringe upon the First Amendment rights of religious worshippers. The Supreme Court disagreed, holding 5-4 that the attendance limits imposed by Governor Cuomo likely violated the First Amendment by “singling out houses of worship for especially harsh treatment.” Although Governor Cuomo had already lifted the restrictions in question when the Supreme Court injunction issued, the decision has important implications for future cases. This month’s column com-



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pares and contrasts the different approaches of the Second Circuit and Supreme Court in *Roman Catholic Diocese of Brooklyn v. Cuomo*, and discusses the implications of the Supreme Court’s decision.

New Cluster Initiative and Executive Order 202.68

On Oct. 6, 2020, Gov. Andrew M. Cuomo announced a “new cluster action initiative” to address certain COVID-19 “hot spots” identified in New York state. As codified in Executive Order (EO) 202.68, the initiative directed the New York State Department of Health (the DOH) to identify yellow, orange, and red “zones” based on the severity of outbreaks and imposed correspondingly severe restrictions within each type of zone. The

following chart provides a high-level summary of the restrictions imposed upon regions designated red, orange, or yellow by the DOH (*See Chart 1 below*).

The five counties initially identified by the DOH for advanced restrictions—Kings (Brooklyn), Queens, Broome, Orange and Rockland—are home to large Orthodox Jewish populations. In a television interview, Governor Cuomo acknowledged that “the cluster is a predominantly ultra-orthodox cluster” and that “Catholic schools are closed because they happen to be in that cluster, but the issue is with that ultra-orthodox community.” CNN, *Audio & Rush Transcript: Governor Cuomo Is a Guest on CNN Newsroom with Poppy Harlow and Jim Sciutto* (Oct. 9, 2020).

Second Circuit Decision

In early October 2020, two religious organizations—Agudath Israel of America and affiliated entities (collectively, Agudath Israel) and the Roman Catholic Diocese of Brooklyn, N.Y. (the Diocese)—asked the U.S. District

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Court for the Eastern District of New York to issue preliminary injunctions blocking EO 202.68, which they argued violated the Free Exercise Clause of the First Amendment. Both were denied. *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20-CV-4844, 2020 WL 6120167 at *4, 11 (E.D.N.Y. Oct. 16, 2020). While their appeals were pending, the organizations asked the Second Circuit to grant them emergency relief in the form of an injunction pending appeal. After hearing the cases in tandem, the Second Circuit denied the request for emergency relief, but agreed to expedite the underlying appeal. *Agudath Isreal of Am. v. Cuomo*, Nos. 20-3572-cv; 20-3590-cv, 2020 WL 6750495 (2d Cir. Nov. 9, 2020). The decision was 2-1, with Judge Park dissenting.

In the Second Circuit, the central issue was whether EO 202.68 was required to pass “strict scrutiny,” meaning the attendance limits would have to be narrowly tailored to a compelling state interest. In practice, laws subject to strict scrutiny are almost always struck down. Ultimately, the Second Circuit determined that strict scrutiny was not required; EO 202.68 was subject to a more lenient standard. Relying on the Chief Justice’s opinion in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020)—a case decided before the recent change in the Supreme Court’s composition—the Second Circuit determined that strict scrutiny should not apply because

	Essential Gatherings/ Businesses	Non-Essential Gatherings	Non-Essential Businesses	Houses of Worship	Restaurants & Bars	Schools
Red	No limits	None permitted	No in-person workforce	Fewer of 25% max. occupancy or 10 people	Takeout or delivery only	No in-person instruction
Orange	No limits	10 people max.	No in-person workforce for select businesses	Fewer of 33% max. occupancy or 25 people	Outdoor dining allowed	No in-person instruction
Yellow	No limits	25 people max.	No limits	50% max. occupancy	Indoor dining allowed w. restrictions	Open with restrictions

EO 202.68 treated places of worship on par with or more favorably than comparable secular gatherings, such as those within schools and restaurants. The Second Circuit held that shopping at large stores deemed essential was not meaningfully comparable to religious gatherings, because it did not involve “a community of

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adherents arriving and leaving at the same time and interacting and praying together over an extended period of time.” *Agudath Israel of Am.*, 2020 WL 6750495, at *3. As such, Governor Cuomo’s differential treatment of religious services and essential business activities—which garnered no enhanced restrictions under the executive order—was unproblematic. As a result, Agudath Israel and the

Diocese were unable to show that an injunction pending appeal was warranted. Judge Park, on the other hand, found it highly problematic that the Governor “selected some businesses (such as news media, financial services, certain retail stores, and construction) for favorable treatment, calling them ‘essential,’ while imposing greater restrictions on ‘non-essential’ activities and religious worship.” *Id.*, 2020 WL 6750495, at *5 (Park, J., dissenting).

U.S. Supreme Court Decision

Following the Second Circuit’s decision, Agudath Israel and the Diocese filed emergency applications for injunctions with the U.S. Supreme Court. The Supreme Court granted the injunctions on Nov. 25, 2020. *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87. In a 5-4 per curiam opinion, the court enjoined Governor Cuomo from enforcing the 10- and 25-person occupancy limits on houses of worship within red and orange zones during the pendency of the Second Circuit

appeal and the disposition of any petition for a writ of certiorari subsequently filed. Contrary to the Second Circuit's decision, the Supreme Court held that EO 202.68 singled out houses of worship for "especially harsh treatment," and, as such, was subject to strict scrutiny. *Id.*, slip op. at 3. Concurring opinions were filed by Justice Gorsuch and Justice Kavanaugh, and dissenting opinions were filed by Chief Justice Roberts, Justice Breyer, and Justice Sotomayor.

The Supreme Court's decision reflected an underlying disagreement with the Second Circuit regarding which secular activities were comparable to religious services. The Second Circuit viewed religious services as comparable to schools and restaurants, and did not view them as comparable to activities deemed "essential," such as shopping. The Supreme Court, on the other hand, questioned Governor Cuomo's line drawing between essential and non-essential activities. The Governor's list of "essential" businesses—which the court noted encompassed acupuncture facilities, campgrounds, and garages—was, in the Supreme Court's view, skewed. "Who knew public health would so perfectly align with secular convenience?" Justice Gorsuch echoed in his concurring opinion. *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87, slip op. at 2 (U.S. Nov. 25, 2020) (Gorsuch, J., concurring). The court also viewed Governor Cuomo's differential treatment of

essential and religious activity as too stark. For example, it found it troubling that in a red zone, "while a synagogue or church may not admit more than 10 persons, businesses categorized as 'essential' may admit as many people as they wish." *Roman Catholic Diocese of Brooklyn*, slip op. at 3. Because, in the court's view, the order treated secular activities more favorably than religious one, it was subject to strict scrutiny.

The Supreme Court then concluded that the attendance limits could not survive strict scrutiny because they were "far more severe than has been shown to be required to prevent the spread of the virus at the applicants' services." *Id.*, slip op. at 4. Moreover, it saw no evidence that Agudath Israel nor the Diocese had contributed to the spread of COVID-19. Rather than set inflexible attendance limits, the court suggested, limits should be tied to the church or synagogue's maximum occupancy. Although courts should respect the judgment of public health experts, the Court explained, they are required by the Constitution to "conduct a serious examination of the need for such [] drastic measure[s]." *Id.*, slip op. at 5-6.

Conclusion

Following a change in the composition of the court, the decision in *Roman Catholic Diocese v. Cuomo* signals, at a minimum, a shift in the approach of the majority of

the court to COVID-related state actions that impact individual rights. In light of this decision, we expect to see a similar shift in approach by lower courts, including the Second Circuit, in future decisions. If the Second Circuit is again called upon to consider whether a state's COVID-related actions infringe upon constitutional rights, we may see a greater level of scrutiny and less deference to states. More broadly, we can expect the new Supreme Court majority to act on any perceived infringement of constitutional rights, such as freedom of expression and freedom of religion.