COVID and the Courts

Obviously the outbreak of the coronavirus pandemic in March 2020 shook the United States and disrupted normal life. State, local, and national governments took actions designed to fight the burgeoning pandemic that severely limited public gatherings. Businesses, concert halls, and schools, among others, were largely shut down except for those deemed essential. Churches were not spared.

Most religious leaders cooperated with government in implementing these restrictions. After all, it was a public health emergency, and everyone was inclined to give the government the benefit of the doubt in its efforts to combat a new and frightening illness. However, as time passed, some churches noticed that more onerous restrictions had been imposed on them than on what they viewed as comparable places where people gathered. Thus, the churches challenged the restrictions in court. This led to a series of rulings by the Supreme Court that stretched from late May 2020 to the first months of 2021.[1] These rulings, in some sense, evolved as the pandemic unfolded, and they concluded with a strong affirmation of religious liberty even during a pandemic. One useful way to understand the issue is to focus on three seminal cases that one might say, stretch from South Bay, California, through Brooklyn, New York, and back to South Bay.

The first significant case decided by the Supreme Court was on May 29, 2020, during the first few months of the pandemic. It was South Bay United Pentecostal

1. I considered some of the first few cases in my Autumn 2020 Washington Insider column, but that was before the important cases I address in what follows, including the seemingly final position taken by the Court.

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Church v. Newsom (2020). In the case, a church sought to enjoin the enforcement of California Governor Gavin Newsom's restrictions. The Supreme Court declined to review the denial of an injunction to the church. It was a five-to-four vote, with Justices Samuel Alito, Clarence Thomas, Neil Gorsuch, and Brett Kavanaugh dissenting; in other words, those four wanted the Supreme Court to review the case and consider the arguments concerning a possible injunction.[2]

Since this was a denial of review, there was no requirement that a formal opinion be issued. However, Chief Justice John Roberts took the unusual step of publishing his concurrence in the denial of review. Roberts stated that deference was due to public authorities: "Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances. … And the [California governor's executive order] exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats."[3]

The dissenters sharply disagreed, pointing out that the First Amendment to the Constitution protects religion and religious worship: "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 [the same restrictions]. California has not shown such a justification."[4]

The generous deference of the Court to the government exemplified in *South Bay* (2020) continued throughout the summer even as jurisdictions eased some restrictions on arguably comparable gatherings. For instance, in midsummer the Court considered the appeal of a denial of an injunction for another church, this time located in Nevada. The governor there allowed casinos and movie theaters to reopen, but not churches. A church challenged the rule, but on July 28, the Court again chose not to review a lower court's denial of an injunction to a church. This prompted a strong and colorful dissent by Gorsuch, who said, "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 Caesar's Palace [casino] over Calvary Chapel [church]."[5]

However, this deferential behavior of the Court changed in November. It is no accident that between *South Bay* (2020) and November, Justice Ruth Ginsburg died, and Amy Barrett was confirmed to take her place.

On the day before Thanksgiving, the Court issued its decision in Roman Catholic Diocese of Brooklyn v. Cuomo. Governor Andrew Cuomo had issued severe regulations (absolute numerical limits on attendance) that applied to churches but not others. The Court granted the injunction to the churches, enjoining the governor from enforcing those or similar regulations:

> The regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment. …

2. South Bay United Pentecostal Church v. Newsom, 590 U.S. ___ (2020).
3. *South Bay*, 590 U.S., slip op. at 2 (Roberts, J., concurring).
4. *South Bay*, 590 U.S., slip op at 2 (Kavanaugh, J., dissenting).
5. Calvary Chapel Dayton Valley v. Sisolak, 591 U.S. ___ (2020), slip op. at 1 (Gorsuch, N., dissenting).

> Because the challenged restrictions are not "neutral" and of "general applicability," they must satisfy "strict scrutiny," and this means that they must be "narrowly tailored" to serve a "compelling" state interest. Stemming the spread of COVID-19 is unquestionably a compelling interest, but it is hard to see how the challenged regulations can be regarded as "narrowly tailored." …
>
> Not only is there no evidence that the applicants have contributed to the spread of COVID-19 but there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services.[6]

In concurring, Gorsuch emphasized the point of the rule: "Government is not free to disregard the First Amendment in times of crisis."[7] Churches are not the same as other gatherings. Furthermore, the designation of *essential* was being denied to churches by those hostile to the First Amendment:

> The only explanation for treating religious places differently seems to be a judgment that what happens there just isn't as "essential" as what happens in secular spaces. Indeed, the Governor is remarkably frank about this: In his judgment laundry and liquor, travel and tools, are all "essential" while traditional religious exercises are not. *That* is exactly the kind of discrimination the First Amendment forbids. …
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> In far too many places, for far too long, our first freedom has fallen on deaf ears. …
>
> Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical.[8]

Nonetheless, four justices, led by the Chief Justice, dissented.[9] Hope for a favorable outcome in subsequent cases seems to have motivated other governors to continue to discriminate against churches, as we will see.

In February 2021, the Court, in South Bay United Pentecostal Church v. Newson (2021), emphasized that the rule from *Diocese of Brooklyn* would be applied in all subsequent cases. This time even the Chief Justice joined the majority, noting, "Deference, though broad, has its limits."[10]

The case, brought by the same plaintiff as in *South Bay* (2020), concerned California's ban on indoor worship services, targeting churches alone (that is, differently from secular institutions) and triggering strict scrutiny. This time the church won. As Gorsuch noted in a statement joined on this point by all justices in the majority except Roberts,

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6 Roman Catholic Diocese of Brooklyn v. Cuomo, 592 U.S. ___, 2–4 (2020).

7. *Diocese of Brooklyn*, 592 U.S., slip op. at 1 (Gorsuch, N., concurring).

8. *Diocese of Brooklyn*, 592 U.S., slip op. at 2–3 (Gorsuch, N., concurring), emphasis original.

9. While it is true that genuinely "neutral" and "generally applicable" regulations are constitutional even when applied to churches, the dissent by Justices Sonia Sotomayor and Elena Kagan astonishingly is willing to find that Cuomo's actions meet that test. This stretches deference beyond coherence, as Gorsuch notes, so that churches are treated *less* favorably than secular enterprises. The dissenters in this and other cases seem willing to defer to government even when its position is based on assertion, not evidence, though Roberts broke ranks with the others in subsequent cases, as we will see.

10. South Bay United Pentecostal Church v. Newsom, 592. U.S. ___ (2021), sip op. at 2 (Roberts, J., concurring).

> Recently, this Court made it abundantly clear that edicts like California's fail strict scrutiny and violate the Constitution. [See *Diocese of Brooklyn.*] Today's order should have been needless; the lower courts in these cases should have followed the extensive guidance this Court already gave. . . .
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> No doubt, California will argue on remand, as it has before, that its prohibitions are merely temporary because vaccinations are underway. But the State's "temporary" ban on indoor worship has been in place since August 2020.[11]

The Supreme Court held this line in subsequent cases, as when Santa Clara County, California, asserted that despite the ruling in *South Bay* (2021), it could ban church services![12]

Interestingly, just before Holy Week, the District of Columbia became the last jurisdiction in America to stop enforcing strict numerical limits on church attendance (despite the Supreme Court's decision in *Diocese of Brookly*n). On March 25, 2021, the federal district court of the District of Columbia, relying on both the First Amendment and the Religious Freedom Restoration Act (RFRA), struck down such limits, noting, "The District has permitted essential businesses to stay open (often with less-onerous restrictions) because the public's need for those things apparently outweighs the risk. On the other hand, the District's restrictions have not recognized religious exercise as essential in the same way."[13]

The March for Life

The March for Life this year was very different from last year for two rather obvious reasons: one, COVID restrictions were in force; two, Joe Biden, an avowed supporter of abortion, defeated Donald Trump, a strong pro-life supporter, in the presidential election. Furthermore, the demonstration on January 6 in support of Trump's claims that the election had been fraudulent led to the invasion of the Capitol by a few hundred protestors. This, in turn, led to the deployment of over twenty thousand National Guard troops in Washington, DC. In addition, fencing, much of it with razor wire at the top, was erected throughout the city.

Amidst all this, it would have been understandable if the organizers of the march had cancelled it. But they chose not to do so. Instead, they held a march that consisted of a few hundred invited marchers, while encouraging everyone else to join virtually. As one who participated virtually, I can attest that the march and its surrounding events (including the Rose Dinner that recognized the irreplaceable

11. *South Bay*, 592. U.S, slip op., 4,6, (Gorsuch, N., statement). There was a second issue in the case concerning bans on singing. The justices in the majority disagreed on whether the state had met its burden in justifying this or whether additional information was needed.
12. Gateway City Church v. Newsom, 592 U.S. ___ (2021). It was another six-to-three ruling (with Kagan, Sotomayor, and Stephen Breyer in dissent). In a subsequent case, Tandom v. Newson, 593 U.S. ___ (2021), decided on April 9, the Court again held the line. (The decision was decided five-to-four with Roberts in dissent.)
13. Roman Catholic Archbishop of Washington v. Muriel Bowser, case no. 20-cv-03625 (TNM), 40 (D.D.C. 2021).

contributions of retiring Grand Knight of the Knights of Columbus Carl Anderson) were a great success and a powerful witness to the right to life.

The Biden Administration

The Biden administration is avowedly in favor of so-called abortion rights. It has so stated, and has so acted, in many areas already: it continues to roll back pro-life policies Trump put in place, it has nominated dedicated abortion proponents (such as Xavier Becerra as secretary of the US Department of Health and Human Services), and it supports the Equality Act in Congress (which would obligate religious organizations to hire and fire contrary to their religious convictions).[14] It is obvious that more anti-life, anti-religious-freedom policies will be rolled out as the weeks pass. The only possible limits to what it can do (given Democratic control of the Congress) are (1) the Supreme Court and the lower courts and (2) the possible negative consequences for "swing state" Democrats. Even with the prospect of losing one or both houses of Congress in the midterm elections, President Biden and his allies have two years during which they can accomplish much. This starkly underlines the absolute necessity of pro-life Americans' electing pro-life representatives and insisting that they put aside petty bickering and pass pro-life laws and policies when they regain political power.

International Developments

One of the first things Biden did after having been sworn into office was revoke the Mexico City Policy that Trump (and previous pro-life presidents since Ronald Reagan) had put in place. The Mexico City Policy forbids US tax dollars from supporting organizations that promote or perform abortions abroad. That restriction no longer applies.[15]

Biden also withdrew American participation in the pro-life Geneva Consensus Declaration and partnership,[16] which had been achieved by the Trump administration, after years of work, on October 22, 2020.[17] The declaration and the partnership prove once again that claims to an international consensus in favor of abortion—one that binds all countries—are nonsense. The leadership of the partnership now

14. Equality Act, H.R. 5, 117th Cong., §1107. The Equality Act specifically says it is not subject to the Religious Freedom Restoration Act, the federal law that otherwise requires every statute to satisfy the strict scrutiny test, that is, that any restriction on religious freedom is for a compelling reason and pursuant to the least restrictive means.
15. Joseph R. Biden, Jr., Memorandum on Protecting Women's Health at Home and Abroad (January 28, 2021). Archbishop Joseph Naumann, chair of the United States Conference of Catholic Bishops, Committee on Pro-life Activities, said, "It is grievous that one of President Biden's first official acts actively promotes the destruction of human lives in developing nations" (US Conference of Catholic Bishops, "Bishops Decry Executive Order That Promotes Abortion Overseas," news release, January 28, 2021, https://www.usccb.org/news/2021/bishops-decry-executive-order-promotes-abortion-overseas).
16. US Mission to the United Nations et al., Geneva Consensus Declaration on Promoting Women's Health and Strengthening the Family (November 11, 2020), https://www.hhs.gov/sites/default/files/geneva-consensus-declaration-english.pdf.
17. Biden, Memorandum on Women's Health.

falls to Brazil, which is a solidly pro-life country (both houses of its congress and its president are pro-life). Sadly, the economic force and leadership of the United States will now fall in with abortion promotion, placing great pressure on developing countries that are not pro-abortion. It will be a very difficult time for pro-life nations at the United Nations while Biden is president.

Internationally, there were at least two notable pro-life developments. First, the Polish Constitutional Tribunal's decision that eugenic abortions are illegal under Poland's pro-life constitution (and that the government is obligated to assist in the care of severely handicapped children) went into legal effect on January 27, 2021.[18] Second, Honduras changed its laws to require a three-fourths vote of its congress to amend its constitutional provision providing protection for unborn human life.[19]

The Supreme Court

As noted above, Notre Dame law professor Amy Barrett joined the Supreme Court in October, replacing Ruth Ginsburg who had died. She is a pro-life Catholic, while Ginsburg was a staunch defender of Roe v. Wade. Her nomination came just before the November national elections. For these reasons, it was subject to intense political grandstanding. However, it was not accompanied by the social turmoil that came with the Kavanaugh nomination.

Barrett, whose judicial philosophy is the originalism that a majority of the Court espouses, was extraordinarily well qualified, as attested to by a perhaps unexpected source, Harvard Law School professor Noah Feldman. He had clerked on the Supreme Court at the same time she did (but for different justices). Feldman is a political and judicial liberal and favors abortion rights. Yet on the cusp of her nomination, he had the integrity to write the following:

> Like many other liberals, I'm devastated by Justice Ruth Bader Ginsburg's death. … Regardless of what you or I may think of the circumstances of this nomination, Barrett is highly qualified to serve on the Supreme Court.
>
> I disagree with much of her judicial philosophy and expect to disagree with many, maybe even most, of her future votes and opinions. Yet despite this disagreement, I know her to be a brilliant and conscientious lawyer who will analyze and decide cases in good faith, applying the jurisprudential principles to which she is committed. Those are the basic criteria for being a good justice. Barrett meets and exceeds them.[20]

18. Grégor Puppinck, "Poland: The End of Eugenic Abortion," European Centre for Law and Justice, October 22, 2020, https://eclj.org/eugenics/eu/pologne--le-tribunal-constitutionnel-abroge-lavortement-eugenique. The actual decision was on October 22, but it is effective only upon publication.
19. Isa Ryan, "Honduras Moves to 'Set in Stone' the Constitutional Human Rights of the Unborn," January 27, 2021, https://www.standingforfreedom.com/2021/01/27/honduras-moves-to-set-in-stone-the-constitutional-human-rights-of-the-unborn/.
20. Noah Feldmen, "Amy Coney Barrett Deserves to Be on the Supreme Court," Bloomberg News, September 26, 2020, https://www.bloomberg.com/opinion/articles/2020-09-26/amy-coney-barrett-deserves-to-be-on-the-supreme-court.

Barrett was confirmed on October 26, 2020, by the Senate in a fifty-two-to-forty-eight vote, with all Senate Republicans (except Susan Collins) voting for her and all Senate Democrats voting against.[21]

Barrett's confirmation is commonly understood to create a conservative five-to-four majority of herself, Gorsuch, Alito, Thomas, and Kavanaugh. However, this can be misleading, as Kavanaugh and Roberts often have very similar views, for example, on the religious liberty cases discussed above. Roberts frequently, but not always, joins the three liberals—Sonia Sotomayor, Elena Kagan, and Stephen Breyer—on social issues. Those social issues will be coming to the Court. For instance, the state of Mississippi is asking the Court to review its fifteen-week abortion ban.[22] Whether the Court decides to do so, it is certain that challenges to laws limiting or abolishing abortion will rise up through the lower courts to the Supreme Court. These laws invariably raise the question of overturning, or revising, the Court's abortion jurisprudence.[23] An essay by the legal philosopher John Finnis in *First Things* has renewed debate among pro-lifers as to whether the Fourteenth Amendment requires not only that the Court's abortion jurisprudence be overturned but also that legal protection be extended to the unborn. Finnis argues that the "original public meaning" of the amendment requires just that.[24]

Religious liberty is also a central issue in a case currently pending before the Court. That case is Fulton v. City of Philadelphia. It concerns whether it is a violation of religious liberty rights for Philadelphia to exclude Catholic Charities from the city's foster parent services because the organization does not support same sex marriage. A related question is, What standard should be applied to judge whether Catholic Charities' religious rights were violated? Is it the current standard that came from Employment Division v. Smith (Is the law neutral and generally applicable?), or is it the pre-*Smith* standard (restrictions on religion must be pursuant to a compelling reason and be the least restrictive means)?[25] Many Court watchers expect the Court to overturn *Smith* and reinstate the strict scrutiny standard, which is believed to better protect religious liberty. However, others argue that the Court should decide the issue narrowly and can overturn the Philadelphia rule under the *Smith* standard. If the Court does as it usually does and leaves controversial cases until the end of its term in June, we will not know until then.

The fact that cases on religious liberty and abortion are coming to the Court has caused many on the political Left to argue that the number of justices on the Court should be expanded. Presumably, Democratic control of the Congress and the

21. Clare Foran and Ted Barrett, "Senate Confirms Trump's Supreme Court Nominee a Week ahead of Election Day," CNN, updated October 26, 2020, https://www.cnn.com/2020/10/26/politics/senate-confirmation-vote-supreme-court-amy-coney-barrett/index.html.
22. Kate Smith, "Mississippi Asks Supreme Court Again to Review Its 15-Week Abortion Ban," CBS News, updated October 29, 2020, https://www.cbsnews.com/news/misisissippi-abortion-ban-supreme-court-considering-review/.
23. That is, Roe v. Wade, Doe v. Bolton, Planned Parenthood v. Casey, and other cases.
24. John Finnis, "Abortion is Unconstitutional," *First Things*, April 2021, https://www.firstthings.com/article/2021/04/abortion-is-unconstitutional.
25. See Employment Division v. Smith, 494 U.S. 872 (1990).

White House would allow both the expansion of the number of Court seats and the filling of those seats with justices who would support abortion and limit religious freedom. However, opponents charge that this is court-packing, something that has never been popular with the American public (as President Franklin Roosevelt learned to his chagrin). Some liberals, such as Feldman, also oppose, from a liberal perspective, changing the number of Supreme Court seats.[26]

In a significant decision, the Court, on December 10, decided unanimously that damages under the RFRA include monetary damages against government officials in their individual capacities.[27] This is important because the possibility of such damages encourages plaintiffs to pursue redress when their religious liberty rights are violated.

On January 13, the Court reinstated US Food and Drug Administration restrictions on the use of RU-486. These restrictions had been enjoined by a lower court, saying that because of the COVID pandemic, they imposed an undue burden on women.[28]

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26. Noah Feldmen, "The Supreme Court Doesn't Need to Be Reformed," Bloomberg News, October 23, 2020, https://www.bloomberg.com/opinion/articles/2020-10-23/the-supreme-court-doesn-t-need-to-be-reformed. "In … the almost 90 years since Franklin Delano Roosevelt became president, the Supreme Court has been better for liberals than for conservatives."
27. Tanzin v. Tanvir, 592 U.S. ___ (2020).
28. Food and Drug Administration v. American College of Obstetricians and Gynecologists, 592 U.S. ___ (2021).