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Gibson Dunn Secures Landmark Supreme Court Decision Enjoining COVID-19 Restrictions On Houses of Worship

***Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, No. 20A87**

Decided November 25, 2020

On Wednesday, November 25, 2020, the Supreme Court ruled in favor of Gibson Dunn client The Roman Catholic Diocese of Brooklyn, New York, holding that provisions of a New York Executive Order that imposed "severe" fixed-capacity restrictions on attendance at religious services likely violate the Free Exercise Clause of the First Amendment, were causing irreparable harm, and must be enjoined pending appeal.

Background:

New York Governor Andrew Cuomo's Executive Order 202.68 was issued on October 6, 2020, in response to localized upticks in COVID-19 cases. The Executive Order imposes 10- and 25-person fixed-capacity caps on "house of worship" attendance in so called "red" and "orange" zones throughout New York State.

On October 8, The Roman Catholic Diocese of Brooklyn, New York (the "Diocese"), represented by Gibson Dunn partners **Randy M. Mastro** and **Akiva Shapiro**, filed suit in the U.S. District Court for the Eastern District of New York. The Diocese alleged that the fixed-capacity restrictions—which applied to "houses of worship" alone, while many secular businesses in those same "zones" remained free to operate without restriction—violated the Free Exercise Clause as applied.

Despite finding that the Diocese had adequately alleged irreparable harm, the district court declined to enter a preliminary injunction. A divided Second Circuit panel denied the Diocese's motion for an injunction pending appeal, along with a parallel motion brought by an Orthodox Jewish organization and synagogues. Among other

"[E]ven in a pandemic, the Constitution cannot be put away and forgotten. 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."

Per Curiam Opinion of the Court

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things, the lower courts held that the Executive Order was facially neutral because some secular businesses were shut down entirely, and that the State's interest in combating the pandemic outweighed any harm to religious organizations and their congregants.

Issue:

Whether the provisions of Executive Order 202.68 that limit in-person "house of worship" attendance to 10 or 25 people, but allow numerous secular businesses to operate without capacity restrictions, violate the First Amendment's Free Exercise Clause and should be enjoined on an emergency basis pending appeal.

Court's Holding:

Yes. The Diocese made a strong showing that the challenged restrictions likely violate the First Amendment because they single out houses of worship for especially harsh treatment. And denying emergency relief would cause irreparable injury, while granting such relief would not harm the public interest, justifying the issuance of an injunction pending appeal. In a companion order, the Court granted the same relief to the synagogues.

What It Means:

- Executive Order 202.68's 10- and 25-person fixed-capacity caps cannot be enforced during the pendency of appellate proceedings, allowing New Yorkers to prudently attend services in churches, synagogues, and other houses of worship, while complying with all social distancing, mask-wearing and other safety protocols, as well as generally applicable percentage-capacity restrictions.

- The five-Justice majority held that strict scrutiny applies where restrictions "single out houses of worship for especially harsh treatment." Slip. op. 3. Under the Executive Order, for example, while churches in a red zone may not admit more than 10 persons, businesses "such as acupuncture facilities, camp grounds, garages, as well . . . all plants manufacturing chemicals and microelectronics and all transportation facilities" may "admit as many people as they wish." *Ibid*. And because the restrictions are "far more severe than has been shown to be required to prevent the spread of the virus" at religious services, they likely violate the First Amendment. Slip. op. 4 (internal quotation marks omitted).

- The majority rejected the dissenting Justices' view that emergency relief was unwarranted simply because the restrictions had been modified during the litigation to temporarily allow gatherings at the affected churches and synagogues. As the Court explained, "injunctive relief is still called for because the applicants remain under a constant threat that the area in question will be reclassified as red or orange." Slip. op. 6.

- In a concurring opinion, Justice Gorsuch took issue with Chief Justice Roberts's May 2020 concurrence in *South Bay Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), which has been cited by a number lower courts around the country as affording blanket deference to state-imposed restrictions on religious worship during the COVID-19 pandemic. Justice Gorsuch cautioned that, "[r]ather than apply a nonbinding and expired concurrence from *South Bay*, courts must resume applying the Free Exercise Clause," and that "[e]ven if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical." Slip. op. at 3 (Gorsuch, J., concurring).

- Justice Kavanaugh also concurred, acknowledging the seriousness of the pandemic but concluding that the Governor's "restrictions on houses of worship are not tailored to the circumstances given the First Amendment interests at stake." Slip. op. 3 (Kavanaugh, J., concurring). Like Justice Gorsuch, Justice Kavanaugh cautioned that "judicial deference in an emergency or a crisis does not mean wholesale judicial abdication, especially when important questions of religious discrimination, racial discrimination, free speech, or the like are raised." *Ibid.*

- Chief Justice Roberts dissented solely on the procedural ground that the applicants' houses of worship are not presently in "red" and "orange" zones, but agreed that the fixed-capacity caps "seem unduly restrictive" and "raise serious concerns under the Constitution." Slip. op. 1-2 (Roberts, C.J., dissenting).

- Justice Breyer, with whom Justices Sotomayor and Kagan joined, issued a separate dissent, and Justice Sotomayor issued a separate dissent joined by Justice Kagan. These dissenters would have denied the injunction on procedural and substantive grounds.

The Court's opinion is available here.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact **Randy M. Mastro** (+1 212.351.3825, rmastro@gibsondunn.com) or **Akiva Shapiro** (+1 212.351.3830, ashapiro@gibsondunn.com), the Gibson Dunn partners representing the Diocese, or the following practice leaders:

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