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AMICUS CORNER

BY: AMANDA KARRAS,
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Supreme Court Update

By the time this article goes to print, the Supreme Court's docket will be mostly set for the 2020 October Term, which (if all goes according to plan) will end in June 2021. The Court typically adds cases to its docket for the current Term through the first couple of weeks of January and is about ten cases below its usual number, so we can expect a few more grants before all is said and done this Term. In the meantime, the Court has been busy, adding two new cases to its docket recently that are relevant to local governments and issuing a couple of COVID-19 related emergency decisions. This article summarizes those recent developments.

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Roman Catholic Diocese of Brooklyn v. Cuomo

The Court's first decision with Justice Barrett on the bench involving a Free Exercise challenge to public health restrictions came out differently than the last two decisions it rendered over the summer. In *Roman Catholic Diocese of Brooklyn v. Cuomo* in a per curiam (unsigned) 5-4 opinion, the Court enjoined New York from imposing its 10 and 25-person occupancy limits on religious institutions.[1] Specifically, New York imposed restrictions on attendance at religious services in areas classified as "red" or "orange" zones in the State. In red zones, no more than 10 persons could attend each religious service, and in orange zones, attendance was capped at 25. Religious entities in the state challenged the order, claiming it violated their First Amendment Free Exercise rights because it treated in-person gatherings at religious services less favorably than comparable secular activities. For example, acupuncturists, campgrounds, garages, certain manufacturing plants, liquor stores, and all transportation facilities were all exempt from the 10 and 25-person caps even if located in a red or orange zone.

The Supreme Court agreed with the challengers and issued a preliminary injunction in the case, pending appeal. The majority opinion explained that while "[s]temming the spread of COVID-19 is unquestionably a compelling governmental interest," New York's restrictions were too restrictive and not narrowly tailored. The majority noted:

> Members of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area. But even 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. Before allowing this to occur, we have a duty to conduct a serious examination of the need for such a drastic measure.

The majority rejected the dissenting opinions' arguments that the case was moot. At the time the Court issued its opinion, the 10 and 25-person caps no longer applied and instead the churches and synagogues challenging the order could hold services at 50% occupancy. The majority explained that the case was not moot because the Governor regularly changes classifications and the religious institutions could once again be subject to the 10 and 25-person caps, making them capable of repetition while evading review.

Justice Gorsuch wrote a separate concurrence taking aim at *Jacobson v. Massachusetts,* noting the case "hardly supports cutting the Constitution loose during a pandemic" particularly with regard to Free Exercise challenges which were not at play in *Jacobson.* He also sent critical barbs at his colleagues for wanting to "stay out of the way in times of crisis," explaining the Court cannot "shelter in place when the Constitution is under attack."

Justice Kavanaugh wrote a concurrence taking a more measured tone,

explaining the New York case was distinguishable from the Court's earlier decisions in *South Bay United Pentecostal Church v. Newsom*, 590 U. S. ___ (2020), and *Calvary Chapel Dayton Valley v. Sisolak*, 591 U. S. ___ (2020) because New York's restrictions were much more severe. Justice Kavanaugh also explained that, in his view:

> [T]he COVID–19 pandemic remains extraordinarily serious and deadly. And at least until vaccines are readily available, the situation may get worse in many parts of the United States. The Constitution "principally entrusts the safety and the health of the people to the politically accountable officials of the States." South Bay, 590 U. S., at ___ (ROBERTS, C. J., concurring in denial of application for injunctive relief) (slip op., at 2) (internal quotation marks and alteration omitted). Federal courts therefore must afford substantial deference to state and local authorities about how best to balance competing policy considerations during the pandemic. See ibid. But 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.

Chief Justice Roberts dissented and would not have granted the injunction, viewing the case as moot, though he did note that he viewed the restrictions as distinguishable (and more severe) than those in which the Court had previously denied injunctions in the *South Bay* and *Cavalry Chapel Dayton Valley* cases. Justice Breyer also dissented and was joined by Justices Sotomayor and Kagan and Justice Sotomayor penned a separate dissent, which Justice Kagan joined.

Following the Court's decision in *Roman Catholic Diocese*, it issued a short (two sentence) order remanding a different case by a church challenging California's restriction in light of *Roman Catholic Diocese*. The Ninth Circuit originally declined to issue an injunction in the case, *Harvest Rock Church v. Newsom,* concluding that under the Governor's order, secular and non-secular activities were treated the same even though in some counties, in-person worship was completely prohibited.[2] However, the dissenting judge at the Ninth Circuit noted that under California's order, someone could go to a nail or hair salon, but could not congregate in the same manner in a religious institution. The Ninth Circuit will now have an opportunity to review the request for an injunction in light of the Supreme Court's *Roman Catholic Diocese* decision.

COVID-19 public health orders are not the only issues on the Court's docket that are relevant to local governments. The Court recently granted certiorari in *Caniglia v. Strom,* a case involving the contours of the community caretaking exception to the Fourth Amendment's warrant requirement.

In this case, Kim Caniglia and her husband got into a fight during which he went and retrieved a gun, threw it on their dining room table and said something like "shoot me now and get it over with." She left the home as a result of the fight and stayed at a hotel. The next morning, she called the Cranston, Rhode Island non-emergency police line and asked law enforcement to accompany her to her residence, recounting the fight from the evening before and her concern about "what she would find" when she got home. The police accompanied her and spoke to her husband, Edward Caniglia, on the porch of their home. The ranking officer determined Edward was "imminently dangerous to himself and others" and convinced him to go to the hospital for a psychiatric evaluation. Edward claims the officers lied to him to induce him to go to the hospital by telling him that if he went, his firearms would not be confiscated.

After Edward went to the hospital, police seized his firearms. Although there are factual disputes surrounding whether the officers had the wife's permission to seize the guns, the parties agree that Edward objected to their confiscation.

Edward sued, claiming that he and his guns were unconstitutionally seized without a warrant in violation of the Fourth Amendment. The City claimed the seizures were valid pursuant to the community caretaking function exception to the warrant requirement. The Supreme Court has never extended the "community caretaking exception" beyond the context of cars. In 1973, in *Cady v. Dombrowski,* the Supreme Court concluded that police did not violate the Fourth Amendment's warrant requirement when they conducted a "caretaking search" of a vehicle for a gun they reasonably believed was in the car's trunk.[3] The Court in *Cady* explained that the community caretaking function occurs when police action is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."[4]

On these facts, the First Circuit found no Fourth Amendment violation, extending the community caretaking function beyond the context of motor vehicles and into the home. The court explained that "a police officer — over and above his weighty responsibilities for enforcing the criminal law — must act as a master of all emergencies, who is expected to aid those in distress, combat actual hazards, prevent potential hazards from materializing, and provide an infinite variety of services to preserve and protect community safety."[5] Furthermore, the court explained, "threats to individual and community safety are not confined to the highways."[6]
Applying those principles to this case, the court held that sending Edward for a psychiatric evaluation fell within the community caretaker exception because "no rational factfinder could deem unreasonable the officers' conclusion that the plaintiff presented an imminent risk of harming himself or others."[7] In terms

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of the warrantless entry into Edwards home and seizure of the firearms, the First Circuit also concluded the seizure fell within the community caretaker exception. "We conclude that the officers could reasonably have believed, based on the facts known to them at the time, that leaving the guns in the plaintiff›s home, accessible to him, posed a serious threat of immediate harm."[8] In coming to this conclusion, the court reasoned that police officers must "be granted some measure of discretion when taking plausible steps to protect public safety, particularly when human life may be at stake and the margin for error is slight."

The Supreme Court granted certiorari on the question of whether the "community caretaking" exception to the Fourth Amendment's warrant requirement extends to the home. This case will present an intersecting push/pull for the more traditionally conservative Justices who tend to be more pro-police, but also tend to be protective of individuals' privacy rights in their homes. After all, Blackstone's Commentaries, which are often referred to in Fourth Amendment search cases, tell us "every man's house is looked upon by the law to be his castle."[10]

That said, local governments have both fiscal and public safety reasons to support the City and police officers in this case and IMLA intends on filing an amicus brief on their behalf. First, to the extent the community caretaker exception limits Fourth Amendment liability we are in favor of it as it will reduce litigation against local governments and provide a defense to potential claims under Section 1983. In addition to helping prevent Section 1983 lawsuits, the community caretaking function is necessary as a matter of public safety, for example, when police are asked to do wellness checks when a neighbor or family member expresses concern about a person's safety or health. This is a regular occurrence where families are geographically spread out and adult children, for instance, may ask police to check on an elderly parent living alone who has not been heard from. Similarly, as here, assuring that there is a pause in what could become a more volatile and violent situation by acting to buffer both the cause and the means from potential victims is reasonable. As a society we want agencies of government whether police, fire, or social services to be able to act as community servants in protecting lives, safety, the health and welfare of members of the community.

As of this writing, the Supreme Court has not yet set oral argument in this case, but we can expect it to be argued this Term and we should have a decision before the end of June 2021.

Cedar Point Nursery v. Hassid

Another recent grant involves an important Takings issue. *Cedar Point Nursery v. Hassid* involves the California Agriculture Labor Relations Act (ALRA), which allows union organizers access to agricultural employees at employer worksites. The union organizers, under the Act, are given access to employer worksites for certain specified amounts of time during non-working hours. The Act requires that union organizers provide notice to employers if/when they plan to access the property. The employers brought a claim against the California agency in charge of administering the ALRA claiming, among other things, that the Act amounted to an uncompensated per se physical Taking under the Fifth Amendment to the U.S. Constitution.

The issue in the case before the Court is whether the uncompensated appropriation of an easement that is limited in time effects a per se physical taking under the Fifth Amendment. IMLA's interest in this case is not in defending the specific law in question (particularly given the unique nature of the law), but instead, in ensuring that any decision the Court renders, takes into account the fact that local governments conduct all kinds of inspections and investigations involving temporarily accessing private property and such access should not be considered a Taking. For example, local governments access private property for inspections related to child abuse and neglect, schools, restaurants, hospitals, animal cruelty, and tenant issues (health and safety) to name just a few. Additionally, in highly regulated industries like nuclear power and meat processing plants, there may be government inspectors on site regularly. Then, there is also the issue of police investigations. It cannot be that the government has "taken" someone's property within the meaning of the Fifth Amendment when a police officer enters that property in hot pursuit of a suspect or to extract a hostage. IMLA plans to submit an amicus brief in this case highlighting these issues to ensure any holding would not create onerous and expansive constitutional challenges for local governments in their day-to-day work.

As with the *Strom* case, *Cedar Point Nursery* has not yet been set for oral argument, but it will be argued this Term with a decision issued before the end of June. **ML**

Notes

1. 592 U. S. ____ (2020), available at: https://www.supremecourt.gov/opinions/20pdf/20a87_4g15.pdf
2. Harvest Rock Church, Inc. v. Newsom, 977 F.3d 728, 731 (9th Cir. 2020) (O'Scannlain, J., dissenting).
3. 413 U.S. 433, 447-48 (1973)
4. *Id.* at 441.
5. Caniglia v. Strom, 953 F.3d 112, 124 (1st Cir. 2020)
6. *Id.*
7. *Id.* at 133.
8. *Id.* at 131.
9. *Id.* at 132.
10. 3 W. Blackstone, Commentaries on the Laws of England 288 (1768).