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COVID-19 and Religion: Supreme Court Declines to Enjoin California Limits on In-Person Worship

South Bay United Pentecostal Church v. Newsom, no. 19A1044, 590 US ___ 2020 (U.S. May 29, 2020).

A 5-4 Supreme Court majority has declined to enjoin Governor Gavin Newsom's Executive Order restricting in-person religious gatherings. In an apparent response to Justice Kavanaugh's dissent, Justice Roberts wrote a late-night individual concurrence, deferring to elected officials responsible for protecting the health of their constituents and citing the fact that California's limits on the size of in-person activities affect not only worship services but also secular groupings like concerts, lectures and sporting events.

Late Friday night, May 29, 2020, the Supreme Court denied a motion by Chula Vista's South Bay United Pentecostal Church (Church) to enjoin California Governor Newsom's Executive order (Order) limiting attendance at places of worship to 25% of the building occupancy or a maximum of 100 people.

On May 4, 2020, Governor Newsom had announced a group of activities that would move to Phase 2 of the state's reopening plan. Houses of worship were not included. The Church rapidly moved for a temporary restraining order in the Southern District of California. That motion was denied. On May 22, 2020, the Ninth Circuit denied the Church's motion for injunction in a 2-1 ruling (*South Bay United Pentecostal Church v. Newsom*, no. 20-55533 (9th Cir May 22, 2020)) in a brief opinion upholding the Order because churches are a "higher risk workplace" and because it was not targeting religious expression:

> Where state action does not 'infringe upon or restrict practices because of their religious motivation' and does not 'in a selective manner impose burdens only on conduct motivated by religious belief,' it does not violate the First Amendment.

The dissenting Ninth Circuit vote came come from Judge Daniel Collins, a May 2019 Trump appointee, in a scathing 18-page critique which asserted that the Order unambiguously targets religion.

The Church and Bishop Arthur Hodges III then sought relief at the Supreme Court, alleging that Governor Newsom and other state and local elected officials "intentionally denigrated California churches and pastors and people of faith by relegating them to third-class citizenship."

A 5-4 majority of the Court declined to intervene, without opinion. Presumably responding to Justice Kavanaugh's dissent, discussed below, Justice Roberts wrote a lone concurrence in support of Justices Kagan, Sotomayor, Ginsburg and Breyer, citing the heightened threshold required to enjoin an executive action: "Such a request demands a significantly higher justification than a request for a stay because, unlike a stay, an injunction does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts."

Roberts found that "Although California's guidelines place restrictions on places of worship, they appear to be consistent with the Free Exercise Clause of the First Amendment." The limitations were not aimed at religious expression but at a wide range of "comparable secular gatherings" (an implicit rebuttal to Kavanaugh's use of that phrase) where the public would come together for sustained timeframes:

> 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.

Roberts cited *Jacobson v. Massachusetts*, 197 U. S. 11 (1905) which upheld the right of that state's municipalities to mandate smallpox vaccinations for all persons over 21 years old. In that decision, Chief Justice John Marshall Harlan, writing for a 7-2 majority, articulated that individual freedoms in the Constitution are not absolute:

> [I]n 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 . . . 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.

(In his Ninth Circuit dissent, Trump appointee Collins had explicitly targeted *Jacobson*: "Even the most ardent proponent of a broad reading of *Jacobson* must pause at the astonishing breadth of this assertion of government power over the citizenry, which in terms of its scope, intrusiveness, and duration is without parallel in our constitutional tradition.")

Roberts acknowledged that 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." Given that the Constitution "principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect,'" the latitude of those officials "must be especially broad" when they act in matters "fraught with medical and scientific uncertainties" (citing *Marshall v. United States*, 414 U. S. 417 (1974)). And so long as those officials do not exceed the broad scope of their powers, "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." (referencing *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 545 (1985)).

Roberts cautioned that the power of the judiciary to enjoin such executive action is wielded solely where "the legal rights at issue are indisputably clear" and even then, "only in the most critical and exigent circumstances." Here, South Bay United Pentecostal Church had not made such a showing: "The notion that it is 'indisputably clear' that the Government's limitations are unconstitutional seems quite improbable."

DISSENT: Justice Kavanaugh dissented, in an opinion joined by Justices Thomas and Gorsuch (Justice Alito dissented, but did not join Kavanaugh).

Kavanaugh characterized the Order as restricting "one group" while commercial establishments were not limited by a similar occupancy cap: "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.' *Roberts v. Neace*, 958 F. 3d 409, 414 (CA6 2020) (per curiam)."

The Kavanaugh dissent made no mention of the comparators cited by Justice Roberts involving large groups in stationary contact for extended periods of time—concerts, lectures, sporting events, movies and the like. All of these activities would be subject to occupancy caps under the Order, similar to those imposed on in-person worship. Instead, Kavanaugh categorized churches with "comparable secular businesses" which had been allowed greater flexibility: "factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries." Given that the Church was willing to abide by the

Order's lesser restrictions that applied to these secular businesses, Kavanaugh posed questions including: "Assuming all of the same precautions are taken, why can someone safely walk down a grocery store aisle but not a pew?"

Having placed worship services and "comparable secular businesses" on the same plane (a transposition that may well have instigated Justice Roberts' concurrence), Kavanaugh found the Order unsustainable: "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. California has not shown such a justification."

LINK

Immunity: Michigan Officials Cannot Stay Depositions in Third Party Actions Based on Claims of Immunity

Waid v. Earley, no. 20-cv-1352 (6th Cir. June 2, 2020).

The Sixth Circuit denies efforts by Michigan's former governor and treasurer to avoid being deposed in a third-party action regarding the Flint water crisis by asserting that they are entitled to stay all discovery pending determination of their personal claims of immunity.

On April 25, 2014, former Mayor Dayne Walling flipped a switch, moving the Flint Michigan (City) water supply from Detroit to its own system, where the main water source was the Flint River. The result was catastrophic; lead and other pollutants infiltrated the City's water system and was ingested by the City's residents, particularly affecting its poor and minority communities. State and City officials repeatedly assured the public that the water was safe. It was not until October 2016 that the City officially switched back to using Detroit's water. Extensive litigation followed, including a class action in which residents claimed deliberate indifference by the City to their being poisoned. (A more extensive factual record is located at *Waid v. Snyder*, No. 19-1533 (6th Cir. 2020).

Defendants in the litigation included government officials from the State of Michigan, the City, and state agencies, as well as private engineering companies like French firm Veolia Environnement SA (Veolia), that faces claims of professional negligence for failing to explain the need to treat the water properly for corrosion and for lying to the public about the existence and extent of the crisis.

Veolia and other entities sought to depose former State of Michigan Governor Richard Dale Snyder (Snyder) and former State Treasurer Andy Dillon (Dillon). The two claimed

that they could not deposed as non-party fact witnesses with respect to claims against other defendants in the litigation stemming from the crisis, asserting that they were immune from "all discovery across the Flint Water Cases until their claims of immunity have been decided by this Court, the Sixth Circuit, and the United States Supreme Court, if necessary."

In response to notices on Snyder and Dillon for depositions, they moved for a protective order in the district court to stop the depositions from proceeding. The district court recognized that the state defendants must be treated as immune from the claims brought directly against them until they had exhausted their motions to dismiss based on immunity, meaning that discovery in those claims was stayed. But the court denied their motion for protective order as to the third-party witness depositions.

Various parties have noticed Snyder's deposition starting on June 25, 2020, and the Veolia defendants seek to depose Dillon starting on July 7, 2020. Snyder and Dillon appealed the district court's discovery order to the Sixth Circuit, seeking to stay the depositions until the Circuit resolved their appeal from the denial of the protective order.

The Sixth Circuit denied their request for stay and dismissed their appeal of the denial of a protective order for lack of jurisdiction.

In evaluating the merits for a stay, the Circuit examined now-familiar factors: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay."

As to the first point, the Circuit found: "Snyder and Dillon are not likely to succeed on appeal from the district court's order denying their request for a protective order. They claim that they cannot be deposed on any matter pending resolution of their qualified-immunity appeal. That is incorrect." Here, the district court had "carefully sculpted a discovery plan that afforded the state defendants their full entitlement to immunity, while permitting other parties to seek discovery from them as fact witnesses on wholly separate claims."

Second, and on the same basis, Snyder and Dillon "will not suffer irreparable harm absent a stay." They may still file for a protective order in the district court if they object to the noticing parties' line of questioning; "[w]hat they cannot do is ask us to resolve a run-of-the-mill discovery dispute on an interlocutory appeal."

Third, the plaintiffs would be irreparably harmed by a stay. They are suffering very tangible and ongoing health consequences, and "the progress of the litigation has a real effect on plaintiffs' ability to secure a meaningful remedy."

The Circuit concluded that it did not have jurisdiction to entertain Snyder's and Dillon's appeal from the district court's order denying their request for a protective order. Section

1291 vests the Circuit with jurisdiction over appeals from "final decisions of the district courts." 28 U.S.C. § 1291. In order to fit within those parameters, Snyder and Dillon were essentially seeking to have the Circuit construe the district court's order denying their request for a protective order as an implicit order denying them qualified immunity. "We do not think that the collateral order doctrine stretches so far."

LINK

Immunity: No Qualified Immunity for Arrest Based on Failure to Produce Identification

Corona v. City of Clovis, No. 19-2147 (10th Cir. May 27, 2020).

Affirming the court below, the Tenth Circuit holds that arresting a person for failure to present identification, without articulable suspicion of some crime, violates the Fourth Amendment; a closely analogous precedent makes that deprivation clearly established for qualified immunity purposes.

On an early morning in August 2014, Clovis, New Mexico Police Officer Brent Aguilar (Aguilar) pulled a vehicle over for a traffic stop. Jorge Corona (Corona), a passenger in the back seat, asked Aguilar why they had been stopped. Aguilar replied "You're not driving, buddy. You got ID?" Corona replied "Nah" and again asked why the vehicle had been pulled over. He was again asked for ID but did not comply. Ultimately Aguilar said, "I'm going to ask you one more time, and then I'm going to place you under arrest." Corona was removed from the vehicle and handcuffed. Another officer arrived, and Aguilar told him that Corona was being arrested for concealing his identity. Corona objected, saying he had not concealed his identity, and had not even been asked his name. He was then thrown to the ground, whereupon Aguilar informed him "Now you are under arrest for resisting and evading too."

Aguilar subsequently charged Corona with (1) resisting, evading, or obstructing an officer and (2) concealing his identity. The district attorney's office dismissed the concealing identity charge, and a jury later acquitted Corona of the other charges. Corona sued Aguilar, the other officer, the City of Clovis and the Clovis Police Department for violations under 42 U.S.C. § 1983, including his Fourth Amendment right to be free from unlawful arrest without probable cause. Aguilar moved for partial summary judgment on the unlawful-arrest claim based on qualified immunity, but the district court denied his motion.

On appeal, Aguilar argued that Corona's § 1983 unlawful-arrest claim could not survive summary judgment because probable cause existed to arrest Corona. Furthermore, even if he had violated Corona's Fourth Amendment rights, qualified immunity applied

because the contours of the right at issue were not clearly established at the relevant time.

In New Mexico, it is a misdemeanor to "conceal[ ] one's true name or identity . . . with intent to obstruct the due execution of law or with intent to intimidate, hinder or interrupt any public officer . . . in a legal performance of his duty." N.M. Stat. Ann. § 30–22–3. "Section 30–22–3 requires a person to furnish identifying information immediately upon request or, if the person has reasonable concerns about the validity of the request, so soon thereafter as not to cause any 'substantial inconvenience or expense to the police.'"

The Fourth Amendment, however, does not permit an officer to arrest someone for concealing identity without "reasonable suspicion of some predicate, underlying crime." To be sure, Corona' s repeated questioning about why Aguilar stopped the vehicle could fairly be characterized as rude and insolent. But neither rudeness nor insolence constitutes resistance or abuse of an officer under N.M. Stat. Ann. § 30-22-1(D); the question was whether Corona had refused to obey a lawful police command.

The Tenth Circuit does permit a police officer to "ask for identification from passengers" in a lawfully stopped vehicle even without particularized suspicion the passenger has engaged in criminal activity. But an officer cannot, despite the legitimacy of his initial request, lawfully arrest the passenger for concealing identity based solely on his failure or refusal to identify himself. Corona thus carried his burden of showing that Aguilar violated his Fourth Amendment right to be free from unlawful arrest.

Having concluded Corona satisfied the first step of qualified immunity inquiry, the Circuit considered whether that right was clearly established in August 2014. "A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" Mullenix v. Luna, 136 S. Ct. 305, 308 (2015). To be clearly established, ordinarily "a preexisting Supreme Court or Tenth Circuit decision, or the weight of authority from other circuits, must make it apparent to a reasonable officer that the nature of his conduct is unlawful."

Here, Corona identified such a precedent. In *Keylon v. City of Albuquerque*, 535 F.3d 1210 (10th Cir. 2008), the plaintiff, Bertha Keylon, was approached by a police officer outside her home as he investigated her son for committing a felony. He asked for her son's birth date and address, which she said she did not know. He then asked for her identification. She refused to provide it, saying "Well, I'll get my ID when I'm ready." The officer arrested her for concealing identity in violation of N.M. Stat. Ann. § 30–22–3. Id. In the § 1983 action that followed, he attempted to justify his conduct by claiming probable cause existed to suspect Ms. Keylon of violating N.M. Stat. Ann. § 30–22–1(D), "resisting, evading, or obstructing an officer." Because she neither physically resisted the officer nor uttered any fighting words prior to her arrest, the Circuit concluded the officer lacked probable cause to believe she had violated § 30–22–1(D) and could not arrest her for concealing identity. The *Keylon* court held that the officer was not entitled to qualified immunity because "New Mexico law is clear—no

reasonable person in [the arresting officer's] position could have thought he had probable cause to arrest Ms. Keylon."

The circumstances in *Keylon* were closely analogous to Corona's situation. There was no resistance or fighting words—nothing that would either constitute "resisting, evading, or obstructing" law enforcement or could justify a warrantless arrest for concealing identity. "*Keylon* thus places the constitutional question regarding the illegality of Defendant Aguilar's conduct 'beyond debate.'"

Aguilar attempted to distinguish *Keylon*, contending that there, the plaintiff did not actively obstruct the officer's investigation, while Corona "rudely and insolently attempted to interfere with . . . the lawful discharge of [the officer's] duties." But Corona did not interrupt Aguilar or the driver during their interactions, use a combative tone or abusive speech, or physically resist in any way. The Circuit also rejected Aguilar's attempt to distinguish the warrantless arrest in *Keylon* because it occurred on the sidewalk, whereas Corona was a passenger in a lawfully stopped vehicle. "We decline to cabin *Keylon* so narrowly." Aguilar had not explained how Corona's status as a passenger in a vehicle could obviate the threshold inquiry under *Keylon* into the arresting officer's reasonable suspicion of another, predicate offense. This was a distinction without difference for purposes of the Circuit's clearly-established-law analysis.

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Reproductive Rights: Requiring Additional Procedure Before Second-trimester Abortions is Unduly Burdensome

EMW Women's Surgical Center v. Friedlander, No. 19-5516 (6th Cir. June 2, 2020).

Affirming the district court, the Sixth Circuit permanently enjoins a Kentucky law requiring patients to undergo an additional "fetal demise" procedure before they may receive an abortion performed through dilation and evacuation.

In the first trimester of pregnancy, a physician may effectively perform an abortion in the initial weeks of pregnancy by offering medication or performing a surgical abortion. Around fifteen weeks of pregnancy, physicians must use the dilation and evacuation (D&E) method, which is the standard method used in the second trimester. To perform a D&E, a physician first dilates the patient's cervix and then uses instruments and suction to remove the contents of the uterus.

Kentucky's House Bill 454 provides: "No person shall intentionally perform or induce or attempt to perform or induce an abortion . . . [t]hat will result in the bodily dismemberment, crushing, or human vivisection of the unborn child . . . [w]hen the probable post-fertilization age of the unborn child is eleven (11) weeks or greater." H.B. 454 forbids D&E abortions on "living unborn" fetuses or prior to "fetal demise." H.B. 454 does not discuss any procedures for inducing fetal demise. H.B. 454's only exception to physicians performing a D&E prior to fetal demise is for a "medical emergency."

On the day H.B. 454 was signed, Kentucky's only abortion clinic, EMW Women's Surgical Center (EMW) and two of its doctors (collectively, Plaintiffs) brought suit to challenge it. Plaintiffs argued that H.B. 454 violates patients' constitutional right to abortion access prior to fetal viability because the burdens the law imposes significantly outweigh its benefits. Then-Secretary of Kentucky's Cabinet for Health and Family Services, Adam Meier, and Commonwealth Attorney Thomas B. Wine argued that H.B. 454 did not ban D&E abortions but required individuals seeking a D&E abortion after thirteen weeks to first undergo a procedure to induce fetal demise. They identified three possible methods of inducing fetal demise; the Plaintiffs responded that none of the procedures was likely to work around H.B. 454. The district court entered judgment for Plaintiffs and an order permanently enjoined the enforcement of H.B. 454. The court found that H.B. 454 imposed an undue burden on one's right to elect an abortion prior to viability, in violation of the Fourteenth Amendment. The court concluded that none of the three identified procedures was a feasible option for inducing fetal demise; therefore, H.B. 454 effectively banned D&E abortions. The case was appealed. Due to a subsequent change in administration, Eric Friedlander (Secretary) replaced Meier.

The Sixth Circuit affirmed the district court's judgment.

On appeal, the issue was whether H.B. 454 imposes an undue burden. The Court of Appeals, like the district court, applied the *Hellerstedt* test to weigh "the burdens a law imposes on abortion access together with the benefits those law confers." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016).

The Secretary argued that H.B. 454 does not ban D&Es because physicians may lawfully administer D&Es if they first induce fetal demise through one of three methods: digoxin injection, potassium chloride injection, or umbilical cord transection. The Secretary asserted that the Commonwealth may constitutionally require individuals to undergo procedures because they are "reasonable alternative[s] to a standard D&E." The Court noted that fetal-demise procedures are not alternative procedures, but in fact, additional procedures. The Court found that H.B. 454 conditions an individual's right to choose on her willingness to submit herself to an additional painful, risky, and invasive procedure. The requirement will become burdensome and substantially deter individuals from seeking an abortion, making it an undue burden. The Court concluded that H.B. 454 unduly burdens an individual's right to elect to have an abortion prior to viability and violates the Fourteenth Amendment, because the burdens imposed by H.B. 454 dramatically outweigh any benefit it provides.

Plaintiffs sought, and the district court granted, facial relief in the form of a declaration that H.B. 454 is unconstitutional and a permanent injunction against the enforcement of H.B. 454. Facial relief is available when a challenged law places a substantial obstacle in the path of an individual's access to abortion prior viability in "a large fraction of cases in which [the provision at issue] is relevant." *Hellerstadt*, 136 S. Ct. at 2320. The district court found that 100% of the relevant population would be unduly burdened by the law, because all individuals who seek D&E abortions in the second trimester must undergo a fetal-demise procedure. The Circuit agreed. Defendant argued that the court should have reviewed Plaintiff's claims through as-applied challenges. The Court disagreed and found the set of circumstances was not "discrete and well-defined," because individuals could not anticipate whether they would suffer from side effects or failed injections. The court concluded that H.B. 454 imposed an undue burden on all individuals it restricts, and so facial relief was appropriate.

DISSENT: Justice John K. Bush rejected that the Plaintiffs have third-party standing in the outset of the case, because "Plaintiffs have not shown that they satisfy the closeness requirement in this case." A third party cannot rest its claim to relief on the legal rights or interest of other parties, unless it shows that the third party has "a close relationship with the person who possesses the right, and there is a "hindrance to the possessor's ability to protect his own interests." Justice Bush said Plaintiffs did not invoke a specific patient's right, and, instead, relied on their relationship with unascertained patients. Justice Bush also said that Plaintiffs have interests that do not align with women who want fetal demise before D&E [based on circumstantial evidence]; for example, EMW's physicians do not want to receive the training needed to give the injections, training to perform the procedure is available, and such injections are within the reasonable medical scope of care. Justice Bush concluded that the proof at trial reflects a potential conflict between the interests of the EMW physicians and some of the patients [the same unascertained patients the judge referred to] that they seek to represent.

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