AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Individual Rights/Religion/Free Exercise

**Roberts v. Neace, No. 20-5465 (6th Cir. 2020)**

*In the spring of 2020, the novel coronavirus, later designated COVID-19, jumped from animals to humans. A global pandemic began in China and quickly swept through much of the rest of the world. COVID-19 had various unusual and significant features, including that humans had no natural immunity to it, many infectious carriers were asymptomatic, and many of those who would become symptomatic were infectious for up to two weeks before their symptoms became apparent. The virus was relatively easy to transmit and was fatal in a relatively high number of cases, particularly among the elderly. There was no immediate vaccine or effective treatment, and tests to detect the virus had to be newly developed, manufactured and distributed. Public health experts recommended that the most effective means of slowing transmission were frequent hand washing, the use of masks that covered the nose and mouth, and maintaining a physical distance of six feet or more between individuals.*

*Governors across the country declared public health emergencies and made use of preexisting statutory authority to slow the spread of infection. Because of prevalence of infectious asymptomatic carriers and limiting testing capacity, the infectious could not be easily identified and quarantined as in traditional epidemics. As a result, many governors took the unprecedented step of issuing wide-ranging “lockdown” orders that imposed generalized restrictions on ordinary life of most of the general public.*

*On March 19, Kentucky Governor Andrew Beshear issued an order prohibiting all “mass gatherings,” including “community, civic, public, leisure, faith-based, or sporting events.” The order made exceptions for airports, bus and train stations, shopping malls, and “typical office environments . . . where large numbers of people are present, but maintain appropriate social distancing.” On March 25, the governor ordered that organizations that were not “life-sustaining” must immediately close. Organizations ranging from grocery stores to laundromats were allowed to stay open, but religious organizations were not categorized as “life-sustaining,” except to the extent that they were providing food, shelter, and social services. On April 12, Maryville Baptist Church held Easter service, with some congregants gathering inside the church and others remaining in their cars in the parking lot and listening to the service over loudspeakers. The Kentucky state police issued notices to all those attending directing them to self-quarantine for fourteen days.*

*A group of congregants filed suit in federal district court seeking an injunction preventing the state government from enforcing the governor’s orders against gatherings for church services. The district judge denied relief (other district judges did grant preliminary injunctions in similar cases). They appealed to the federal circuit court, which granted a preliminary injunction pending the results of the appeal.*

PER CURIAM

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*Likelihood of success.* The Governor’s restriction on in-person worship services likely “prohibits the free exercise” of “religion” in violation of the First and Fourteenth Amendments. On one side of the line, a generally applicable law that incidentally burdens religious practices usually will be upheld. *Employment Division v. Smith* (1990). On the other side of the line, a law that discriminates against religious practices usually will be invalidated because it is the rare law that can be “justified by a compelling interest and is narrowly tailored to advance that interest.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993).

These orders likely fall on the prohibited side of the line. Faith-based discrimination can come in many forms. A law might be motivated by animus toward people of faith in general or one faith in particular. A law might single out religious activity alone for regulation. Or a law might appear to be generally applicable on the surface but not be so in practice due to exceptions for comparable secular activities.

Were the Governor’s orders motivated by animus toward people of faith? We don’t think so. The initial enforcement of the orders at Maryville Baptist Church no doubt seemed discriminatory to the congregants. But we don’t think it’s fair at this point and on this record to say that the orders or their manner of enforcement turned on faith-based animus.

Do the orders single out faith-based practices for special treatment? We don’t think so. It’s true that they prohibit “faith-based” mass gatherings by name. But this does not suffice by itself to show that the Governor singled out faith groups for disparate treatment. The order lists many other group activities, and we accept the Governor’s submission that he needed to mention worship services by name because there are many of them, they meet regularly, and their ubiquity poses material risks of contagion.

Do the four pages of exceptions in the orders, and the kinds of group activities allowed, remove them from the safe harbor for generally applicable laws? We think so. As a rule of thumb, the more exceptions to a prohibition, the less likely it will count as a generally applicable, nondiscriminatory law. *Ward* *v. Polite* (6th Cir. 2012). “At some point, an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny.”

The Governor insists at the outset that there are “no exceptions.” But that is word play. The orders allow “life-sustaining” operations and don’t include worship services in the definition. And many of the serial exemptions for secular activities pose comparable public health risks to worship services. For example: The exception for “life sustaining” businesses allows law firms, laundromats, liquor stores, gun shops, airlines, mining operations, funeral homes, and landscaping businesses to continue to operate so long as they follow social-distancing and other health-related precautions. But the orders do not permit soul-sustaining group services of faith organizations, even if the groups adhere to all the public health guidelines required of the other services.

Keep in mind that the Church and its congregants just want to be treated equally. They don’t seek to insulate themselves from the Commonwealth’s general public health guidelines. They simply wish to incorporate them into their worship services. They are willing to practice social distancing. They are willing to follow any hygiene requirements. They do not ask to share a chalice. The Governor has offered no good reason for refusing to trust the congregants who promise to use care in worship in just the same way it trusts accountants, lawyers, and laundromat workers to do the same.

Come to think of it, aren’t the two groups of people often the *same people*—going to work on one day and going to worship on another? How can the same person be trusted to comply with social-distancing and other health guidelines in secular settings but not be trusted to do the same in religious settings? The distinction defies explanation, or at least the Governor has not provided one.

No doubt, some groups in some settings will fail to comply with social-distancing rules. If so, the Governor is free to enforce the social-distancing rules against them for that reason and in that setting, whether a worship setting or not. What he can’t do is assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings. . . .

We don’t doubt the Governor’s sincerity in trying to do his level best to lessen the spread of the virus or his authority to protect the Commonwealth’s citizens. *See Jacobson v.* *Massachusetts* (1905). And we agree that no one, whether a person of faith or not, has a right “to expose the community . . . to communicable disease.” *Prince v. Massachusetts* (1944). But restrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom. Assuming all of the same precautions are taken, why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister? The Commonwealth has no good answers. While the law may take periodic naps during a pandemic, we will not let it sleep through one.

Nor does it make a difference that faith-based bigotry did not motivate the orders. The constitutional benchmark is “government *neutrality*,” not “governmental avoidance of bigotry.” . . .

All of this requires the orders to satisfy the strictures of strict scrutiny. They cannot. No one contests that the orders burden sincere faith practices. Faith plainly motivates the worship services. And no one disputes the Church’s sincerity. Orders prohibiting religious gatherings, enforced by police officers telling congregants they violated a criminal law and by officers taking down license plate numbers, will chill worship gatherings.

At the same time, no one contests that the Governor has a compelling interest in preventing the spread of a novel, highly contagious, sometimes fatal virus. The Governor has plenty of reasons to try to limit this contagion, and we have no doubt he is trying to do just that.

The question is whether the orders amount to “the least restrictive means” of serving these laudable goals. That’s a difficult hill to climb, and it was never meant to be anything less. There are plenty of less restrictive ways to address these public-health issues. Why not insist that the congregants adhere to social-distancing and other health requirements and leave it at that—just as the Governor has done for comparable secular activities? Or perhaps cap the number of congregants coming together at one time? If the Commonwealth trusts its people to innovate around a crisis in their professional lives, surely it can trust the same people to do the same things in the exercise of their faith. . . .

Sure, the Church might use Zoom services or the like, as so many places of worship have decided to do over the last two months. But who is to say that every member of the congregation has access to the necessary technology to make that work? Or to say that every member of the congregation must see it as an adequate substitute for what it means when “two or three gather in my Name,” Matthew 18:20, or what it means when “not forsaking the assembling of ourselves together,” Hebrews 10:25. . . .

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*Other factors.* Preliminary injunctions in constitutional cases often turn on likelihood of success on the merits, usually making it unnecessary to dwell on the remaining three factors. . . . Just so here. . .

. . . . As before, the Commonwealth remains free to enforce its orders against all who refuse to comply with social-distancing and other generally applicable public health imperatives. All this preliminary injunction does is allow people—often the same people—to seek spiritual relief subject to the same precautions as when they seek employment, groceries, laundry, firearms, and liquor. . . .

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