New ultra-right Supreme Court majority invokes religion to block COVID-19 safety measures

John Burton
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Using specious claims of religious liberty to trump scientifically based measures for protecting public health by limiting large, lengthy indoor gatherings, the United States Supreme Court ruled 5–4 shortly before midnight Wednesday that local authorities cannot prevent mass religious services in areas where COVID-19 transmissions are spiking.

The decision is the Supreme Court's first to curtail the power of local officials to enact public health measures to protect the population from the pandemic. It is also the first Supreme Court ruling to rest entirely on the new, ultra-reactionary five-justice majority created by the installation of Justice Amy Coney Barrett.

In response to a sharp upsurge in positive COVID-19 cases, last October New York Governor Andrew Cuomo issued an executive order that established a "red" zone in the area immediately around a documented severe infection cluster. Among the consequences, most lengthy indoor gatherings are banned. Religious gatherings in the red zone itself are limited to 10 people. Moving further away from the epicenter, in "orange" zones the limit increases to 25 people, and in "yellow" zones religious gatherings can be up to fifty percent of capacity.

The limitations on religious gatherings have a strong foundation in science. Large numbers arrive and leave services at the same time. Co-worshipers tend to physically greet one another, sit or stand close together in poorly ventilated indoor spaces for an hour or more, share or pass objects, and sing or chant in ways that promote airborne transmission of the virus.

It is no surprise that multiple religious gatherings have been identified as "superspreader" events traced earlier this year to hundreds of thousands of COVID-19 infections and tens of thousands of deaths. According to Stanford University research published in *Nature* magazine, religious aggregations, along with restaurants, gyms, and hotels "produced the largest predicted increases in infections when reopened."

Rather than using video and other technologies to protect public health—even Pope Francis has conducted mass online—the Roman Catholic Diocese of Brooklyn and two Orthodox Jewish synagogues in Queens sued New York to block enforcement of the executive order. Last summer, the Supreme Court turned down similar requests from Nevada and California.

Nothing has changed other than the court's composition, with Amy Coney Barrett, a reactionary professor from Notre Dame who belongs to an evangelical faction of Catholics, replacing the late Ruth Bader Ginsburg, leader of the court's moderate liberals, only a week before Trump's election defeat.

The ruling on the New York case is an unmistakable sign that for the foreseeable future the nine-member Supreme Court will be dominated by an aggressive five-justice, ultra-reactionary bloc of Clarence Thomas, Samuel Alito, and the three Trump appointees, Brett Kavanaugh, Neil Gorsuch and Barrett.

The political tensions within the court itself are demonstrated by the issuing of six separate opinions—the majority opinion, which appears to have been written by Barrett, a vitriolic concurrence by Gorsuch, another concurrence by Kavanaugh, and dissents by the conventionally conservative chief justice John Roberts, and by moderate liberals Stephen Breyer and Sonia Sotomayor. A seventh justice, the reactionary Samuel Alito, delivered a harshly right-wing speech earlier this month to the Federalist Society in which he portrayed all COVID-19 restrictions, not just the church limitations, as attacks on constitutional freedoms.

As a technical matter, the ruling was unnecessary

because the injunction was being sought to maintain the status quo while the case worked its way through the lower courts. A hearing is set in the Court of Appeals for early next month. In the meantime, the risk waned from "red" to "yellow," and the restrictions were lifted. The Supreme Court could have declined to act on the application for an immediate stay and nothing would have changed.

The majority opinion rests on the paranoid assertion that the restrictions "single out houses of worship for especially harsh treatment" in violation of the "minimum requirement of neutrality" under the Free Exercise Clause of the First Amendment.

The premise is nonsense. The only reason that religious facilities are mentioned in the order is to give them preferential treatment over comparable locations, such as restaurants and theaters, where throngs congregate inside for extended periods. Those places must close entirely.

Ducking this distinction, the majority cited provisions that allow certain stores and salons to remain open. The comparison to places of worship is invalid because those establishments do not attract the same density of crowds for the same extended periods of time, and the activity is less likely to spread the virus.

According to the Supreme Court majority, "the Governor has stated that factories and schools have contributed to the spread of COVID-19 ... but they are treated less harshly than" places of worship. That is absolutely correct, but the rational solution is to close those factories and schools too, not to increase the spread of the virus through additional vectors such as large religious gatherings.

The dissents by Breyer and Sotomayor highlight the horrific toll the pandemic has already exacted, particularly in the boroughs of New York City. "The nature of the epidemic, the spikes, the uncertainties, and the need for quick action, taken together, mean that the State has countervailing arguments based upon health, safety, and administrative considerations that must be balanced against the applicants' First Amendment challenges," Breyer wrote.

Sotomayor, whose dissent was joined by Justice Elena Kagan, added, "Amidst a pandemic that has already claimed over a quarter million American lives, the Court today enjoins one of New York's public health measures aimed at containing the spread of COVID-19 in areas facing the most severe outbreaks," an action that "will only exacerbate the Nation's suffering."

Commentators on the ruling have noted how Gorsuch's concurrence drips with sarcasm and directs venom at the dissenters. One example: "According to the Governor, it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians. Who knew public health would so perfectly align with secular convenience?"

In his dissent, Chief Justice Roberts answered with the obvious, that "it is a significant matter to override determinations made by public health officials concerning what is necessary for public safety in the midst of a deadly pandemic." With the case still working its way through the lower courts, Roberts said there was no reason to rule so long as the strict restrictions were not in effect.

"To be clear," Roberts wrote in direct response to Gorsuch's crude attack on the three moderate justices, "I do not regard my dissenting colleagues as 'cutting the Constitution loose during a pandemic,' yielding to 'a particular judicial impulse to stay out of the way in times of crisis,' or 'sheltering in place when the Constitution is under attack.' They simply view the matter differently after careful study and analysis reflecting their best efforts to fulfill their responsibility under the Constitution."

The ruling makes clear that the Supreme Court is entering a period of reaction reminiscent of the "Four Horsemen" era that ended during the Franklin Roosevelt administration, and even that of Chief Justice Roger Taney, which produced the decision in *Dred Scott v. Sanford*, the pro-slavery ruling that was among the triggers for the Civil War.

Today, it is all varieties of democratic rights, workers' rights, abortion rights, civil rights and environmental protections that are being queued up for the chopping block.