

Right-wing US Supreme Court majority again exempts large religious gatherings from COVID-19 safety measures

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Late Friday night, the right-wing Supreme Court majority enjoined California from prohibiting indoor church services in “Tier 1” counties where coronavirus infection rates and COVID-19 deaths are highest. The fractured 6–3 ruling expands the exception from public health measures first carved out for religious services last November.

The ruling comes just as California hospitals are beginning to recover from the holiday surge that caused emergency rooms and intensive care units to overflow, along with morgues, throughout the state. If California were a nation, its nearly 45,000 COVID-19 deaths would rank 15th in the world.

Under the ruling, California can continue to bar large, prolonged indoor gatherings such as sporting events, lectures and political meetings, but must allow indoor religious services up to 25 percent of capacity. A prohibition against singing remains in place for the time being.

Based on scientific studies and the advice of public health and epidemiological experts, California implemented complex, evolving regulations to restrict activities based on relative risks of transmitting COVID-19 and the resulting toll on the health care system. Since August, all large indoor gatherings have been prohibited within the most at-risk regions. Anticipating “free exercise” challenges, California explicitly provided for unlimited attendance at outdoor religious services and deemed faith-based streaming services “essential.”

Nevertheless, a Pentecostal denomination headquartered in San Diego County challenged the regulations, claiming that the regulations prohibiting large indoor gatherings and singing violated the First Amendment when applied to religious services. After the lower courts upheld the

state regulations, the Supreme Court declined the church’s request for an injunction last May, with Chief Justice John Roberts casting the decisive vote in favor of the health measures over the dissent of right-wing Associate Justices Clarence Thomas, Samuel Alito and Trump appointees Brett Kavanaugh and Neil Gorsuch.

Roberts wrote at the time, “Although California’s guidelines place restrictions on places of worship,...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.”

The same 5–4 majority upheld public health regulations against free exercise of religion challenges in several other states, including Nevada and Illinois.

After Associate Justice Ruth Bader Ginsberg died last September, the Trump administration rammed through right-wing extremist Amy Coney Barrett. No longer needing Roberts’s vote, the new majority issued a late-night order the Wednesday before Thanksgiving, ruling 5–4 that New York’s public health regulations “singled out houses of worship for especially harsh treatment” and violated the “minimum requirement of neutrality” under the Free Exercise Clause.

Aligned with the three remaining moderate associate justices, Stephen Breyer, Sonia Sotomayor and Elena Kagan, Roberts dissented from the New York decision, writing, “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.”

A renewed challenge to the California regulations proved Roberts’s support of science to be short-lived. Voting with the majority last week to strike down California’s prohibition of large indoor gatherings, the chief justice showed no reticence in substituting his judgment for that of public health officials, explained his flip-flop: “The State’s present determination—that the maximum number of adherents who can safely worship in the most cavernous cathedral is zero—appears to reflect not expertise or discretion, but instead insufficient appreciation or consideration of the interests at stake.”

Roberts’s argument is *reductio ad absurdum*. Of course, a few people can sit far apart in a cathedral without posing any health risk. His ruling, however, allows services with up to one-quarter of capacity in facilities that are not necessarily “cavernous.”

Barrett’s single-paragraph concurrence, joined by Kavanaugh, her first signed opinion as a justice of the Supreme Court, upheld the “prohibition on singing and chanting during indoor services,” but only because the church and its pastor did not meet “the burden of establishing their entitlement to relief from the singing ban.”

Gorsuch’s opinion, joined by Thomas and Alito, is replete with the rhetoric of the right-wing political commentators that provided cover for Trump’s January 6 coup attempt, complaining that public health officials “have been moving the goalposts on pandemic-related sacrifices for months, adopting new bench-marks that always seem to put restoration of liberty just around the corner.”

Basing his analysis on a paranoid, fabricated premise that California was “impermissibly targeting” religion, Gorsuch characterized the health regulations as a “demand that individual right give way to collective interests.”

“Of course we are not scientists,” Gorsuch continued, “but neither may we abandon the field when government officials with experts in tow seek to infringe a constitutionally protected liberty.”

After bashing science, Gorsuch aimed at another perennial right-wing target, “California’s powerful entertainment industry,” which supposedly benefits from “a State playing favorites during a pandemic...while denying similar largesse to its faithful.”

“But if Hollywood may host a studio audience or film a singing competition while not a single soul may enter California’s churches, synagogues, and mosques,

something has gone seriously awry,” Gorsuch wrote.

Associate Justice Elena Kagan dissented, joined by the two remaining moderates, Stephen Breyer and Sonia Sotomayor. “The Court orders California to weaken its restrictions on public gatherings by making a special exception for worship services. The majority does so even though the State’s policies treat worship just as favorably as secular activities (including political assemblies) that, according to medical evidence, pose the same risk of COVID transmission,” she wrote.

“The State is desperately trying to slow the spread of a deadly disease,” Kagan continued. “It has concluded, based on essentially undisputed epidemiological findings, that congregating together indoors poses a special threat of contagion. So it has devised regulations to curb attendance at those assemblies and—in the worst times—to force them outdoors. Crucially, California has applied each of those rules equivalently to religious activities and to secular activities, including some with First Amendment protection of their own.”

Kagan concluded with an emotional appeal. “I fervently hope that the Court’s intervention will not worsen the Nation’s COVID crisis. But if this decision causes suffering, we will not pay. Our marble halls are now closed to the public, and our life tenure forever insulates us from responsibility for our errors. That would seem good reason to avoid disrupting a State’s pandemic response. But the Court forges ahead regardless, insisting that science-based policy yield to judicial edict.”

Americans United for Separation of Church and State said in a statement that “The Supreme Court has misconstrued religious freedom to mean religious privilege and placed the health of the American people in jeopardy.”

San Diego County, the home of the plaintiff church, recently announced its youngest COVID-19 victim, a 10-year-old boy, along with its oldest, a 106-year-old man. The Supreme Court’s ruling will lead to many more such tragedies in the coming months.



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