US Supreme Court again exempts religious gatherings from COVID-19 regulations

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The US Supreme Court has for the fourth time barred local authorities from requiring religious gatherings to abide by the same general COVID-19 mitigation measures that apply to everyone else, having reversed course after the rushed confirmation of Associate Justice Amy Coney Barrett last October that solidified a new five-vote, extreme right-wing majority.

Indoor religious gatherings are among the most serious COVID-19 "superspreader" events, as crowds from different households greet each other and then sit close together for an extended period, often in poor ventilation, and sometimes singing or chanting.

Before the death of Ruth Bader Ginsburg last September, the four moderate justices, joined by Chief Justice John Roberts, a conservative, twice declined to exempt indoor church services from broad regulations enacted to curtail the pandemic, which also limited theaters, sporting venues, nightclubs, concert halls and similar locations.

Starting in November, however, by votes of 5-4 or 6-3 (with Roberts sometimes joining the extreme right) the Supreme Court has issued four extraordinary late-night injunctions exempting religious gathering public health measures in New York and California, the most recent coming shortly before midnight last Friday.

California, which alone has recorded more total COVID-19 deaths than all but 12 nations, began enacting statewide regulations during mid-March 2020, after Governor Gavin Newsom declared a national emergency, ordering all but essential workers to stay home. For the most part, public health officials have regularly updated and revised statewide regulations, which delineate various tiers for different counties, as the pandemic has waxed and waned.

Among other measures, California has restricted gatherings inside private homes to members of three households, both to minimize the opportunity for infections to spread and to facilitate contact tracing when they do, although no meaningful contact tracing has taken place. This three-household rule is a guideline that depends on voluntary compliance because enforcement is largely impracticable.

The challenged home regulation does not single out religious activity in any manner. The three-household limitation applies equally to birthday and holiday gatherings, social and political events, and any other activity that might bring people together inside a private home. In short, secular and religious gatherings are treated exactly the same.

Rather than simply ignore the guideline by discretely inviting eight to 12 people, which would have gone unnoticed, the petitioners filed suit last October, seeking an injunction barring the enforcement of the three-household limit for their in-home Bible study sessions, on First Amendment grounds, as an infringement of free exercise of religion. The federal district court, in a thorough analysis, denied the injunction two months ago, as California was deep in the throes of the post-holidays third wave of COVID-19 cases, when hospital intensive care units—and morgues—were quickly filling beyond capacity.

Claiming that their Bible studies were being treated more harshly than businesses such as stores, restaurants, nail salons and tattoo parlors, although the same as comparable in-home activities, the petitioners asked for an injunction in the Ninth Circuit Court of Appeals, which covers the western United States. Two conservative judges, one appointed by George W. Bush and the other by Donald Trump, again denied an injunction, explaining that business premises open to the public are fundamentally different than private

homes, and are significantly regulated by California in other ways, such as limitations on occupancy, distancing requirements, hand sanitizers and medical quality personal protection equipment. A third judge, also a Trump appointment, dissented, and would have issued the pro-religion injunction.

On April 2 the petitioners sought an injunction from the Supreme Court, procedurally a highly extraordinary request, theoretically reserved to address only the most critical threats of irreparable injury.

California's opposition brief, filed last Thursday, April 8, pointed out that "the challenged policy will be significantly modified on April 15, one week from today," because "in light of improvements in the rates of infection, hospitalization, and death, as well the growing number of vaccinated individuals, the State will be substantially relaxing its restrictions on multiple household gatherings. Under the new policy, plaintiffs will be able to hold the types of gatherings referenced in their emergency application."

Under traditional notions of judicial restraint, that change in the regulation alone, set to take effect in less than a week, should have resolved the matter. The rule barring certain in-home gatherings had been in effect for more than six months, and a few more days would make no difference. Nevertheless, the next day, shortly before midnight April 9, the Supreme Court issued an unsigned ruling over the dissent of Chief Justice Roberts and the three moderates.

The right-wing majority acknowledged that "California officials changed the challenged policy," but because "the previous restrictions remain in place until April 15th, and officials with a track record of 'moving the goalposts' retain authority to reinstate those heightened restrictions at any time," the court nevertheless issued the injunction.

Justice Elena Kagan penned a brief dissent, joined by Justices Stephen Breyer and Sonia Sotomayor. "California limits religious gatherings in homes to three households. If the State also limits all secular gatherings in homes to three households, it has complied with the First Amendment. And the State does exactly that," Kagan wrote.

The Supreme Court majority, "once more commands California to ignore its experts' scientific findings, thus impairing the State's effort to address a public health emergency," she concluded.

In a related development, earlier last Friday President Joe Biden issued an executive order to establish a commission to study and report back on possible changes in the Supreme Court, including measures to expand the number of justices, which is set by Congress rather than the Constitution. Such an increase would allow him to nominate additional members of the high court and shift its political balance.

Comprised of 36 law professors, lawyers and retired judges, the co-chairs are Bob Bauer, an NYU law professor who served as White House counsel to President Barack Obama, and Cristina Rodríguez, a Yale Law School professor who served as a deputy assistant attorney general during the Obama administration. A report is due in 180 days.