Across the nation, religious institutions are challenging COVID-19-related restrictions on religious worship. There are too many cases to note. We recently posted about the U.S. Supreme Court’s (SCOTUS) decision denying an application for injunctive relief filed by South Bay United Pentecostal Church challenging California Governor Gavin Newsom’s Stay-At-Home order and 4-stage reopening plan which restricted religious worship gatherings. We also posted about district court cases from Kentucky and North Carolina where executive orders in those states were found to violate the Free Exercise Clause of the First Amendment. On May 30, the Third Circuit Court of Appeals, in a one-line order, uphold a decision by the District Court for the District of Delaware that declined a church’s request for a temporary restraining order against enforcement of Delaware Governor John Carney’s COVID-19 emergency orders.

Earlier this month, while evaluating Kentucky Governor Beshear’s COVID-19 executive orders, the Sixth Circuit answered several lower courts’ direct pleas to resolve “the constitutionality of these governmental actions ... at the appellate level,” in Roberts v. Neace. (A week prior to the decision in Neace, the Sixth Circuit applied Kentucky’s Religious Freedom Restoration Act in Maryville Baptist Church, Inc. v. Beshear, to enjoin enforcement of the Governor’s orders in a manner that would ban drive-in worship services.) The court reviewed two orders, the first of which prohibited all mass gatherings “including, but not limited to, community, civic, public, leisure, faith-based, or sporting events.” The second order permitted
“life-sustaining” businesses to operate within the state but did not count religious services as “life-sustaining.” The court in this case issued an injunction against the Governor’s order after finding that the order was not neutral and generally applicable. “As a rule of thumb,” the court reasoned, “the more exceptions to a prohibition, the less likely it will count as a generally applicable, nondiscriminatory law.” Businesses permitted to operate as “life-sustaining” included law firms, laundromats, liquor stores, gun shops, airlines, mining-operations, funeral homes, and landscaping businesses if social-distancing and other health related precautions were followed. Since the orders were not neutral and generally applicable, they were subject to “strict scrutiny” review. Although the Sixth Circuit found that the Governor’s orders were supported by a compelling interest, they were not narrowly tailored to control the spread of COVID-19. The orders could have instead limited the number of people who could attend services at one time.

So, we ask, after the SCOTUS South Bay case, are these district court and circuit court cases still “good law”? How can courts consider similar governmental orders that result in similar burdens to religious exercise, but arrive at such different results?

The answer might lie in Chief Justice John Robert’s philosophy of judicial restraint. He wrote in the South Bay majority opinion that “[t]he 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.” Therefore, Roberts reasoned, when the health and safety of the public is at issue, those who are politically accountable should have broader authority to draw the line between public safety and the exercise of constitutional rights. In comparison, both the Sixth Circuit’s decision in Roberts v. Neace, the dissenting opinion in the Third Circuit’s Bullock v. Carney case, and Justice Kavanaugh’s dissent in South Bay applied strict scrutiny review and determined that the executive orders were not narrowly tailored enough to protect religious exercise. These opinions took a closer look at comparable secular activities and found that religious entities were impermissibly regulated more strictly.

Unprecedented weeks have merged into months and we have all heard the sentiment that we are living in a “new normal.” What does the new normal mean for the First Amendment and our other constitutional protections? The constitutional test that has been engrained in our jurisprudence for decades is unlikely to change. (When laws that impact free exercise are not neutral and generally applicable, they must be justified by a compelling governmental interest and narrowly tailored to advance that interest.) Is the lens courts use to view that test shifting in a time of crisis? Or is the apparent restraint exhibited in South Bay merely a result of the case’s procedural posture? Roberts’s concurrence merely declined to overturn the Ninth Circuit’s decision that refused to enjoin the enforcement of the executive order. Time will tell.

Copyright © 2020 Robinson & Cole LLP. All rights reserved.