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Facts or Philosophy: Which Should Drive Court Decisions?

Lawyers are fond of saying “bad facts make for bad law.” Presumably, therefore, good facts should make for good law. Putting aside the humble, tired cliché phrases, every experienced lawyer knows that ultimately philosophical prerogative is driven by factual underpinnings. At the very least, we should approach our cases as though the facts matter.

In the now much celebrated and talked about decision of *Roman Catholic Diocese of Brooklyn vs. Cuomo,* 2020 U.S. LEXIS 5708, the facts seem to be more important than acknowledged by all of the self-made commentators rushing to judgment.

The Supreme Court decision ruled upon an emergency application seeking relief from an Executive Order issued by the Governor of New York that imposed restrictions at religious services in areas classified as “red” or “orange” zones. In determining whether an emergency injunction was to be issued, the Court was positioned ultimately to speak to the merits of the case as the law requires in any evaluation of a request for emergency injunctive relief.

The *per curiam* opinion with concurrence by Justices Gorsuch and Kavanaugh and dissents by Roberts, Breyer, Sotomayor and Kagan, was based upon the following undisputed facts:

1) In red zones no more than 10 persons may attend a religious service;

2) In orange zones attendance was capped at 25;

3) The congregations had complied with all public health guidance, had implemented additional precautionary measures and had operated at 25% or 33% capacity “without a single outbreak”;

4) In red zones while a Synagogue or Church could not admit more than 10 persons, businesses categorized as “essential” could admit as many people as they wish;

5) Such “essential” businesses include acupuncture facilities, campgrounds, garages, plants manufacturing chemicals and microelectronics and all transportation facilities;

6) In orange zones houses of worship were limited to 25, but non-essential businesses could decide for themselves how many persons to admit;

7) By the time of the decision, the Governor reclassified the areas in question from orange to yellow which meant that applicants could hold services at 50% of their maximum occupancy;

8) There was no promise or guarantee that the areas in question would not be reclassified as red or orange;

9) The Governor had stated that in his judgment laundry and liquor, travel and tools are all “essential” while traditional religious services are not;

10) Restaurants, marijuana dispensaries, and casinos were given greater rights than churches, mosques, or temples;

11) None of the houses of worship, as of the time of the Court’s decision, were subject to any fixed numerical restrictions;

12) New York State treated more leniently “only dissimilar activities,” such as operating grocery stores, banks, and laundromats.

Certain principles of law were also clear:

1) The challenged restrictions were not “neutral” or “of general applicability”;

2) The restrictions must satisfy “strict scrutiny” and be “narrowly tailored” to serve a “compelling” state interest;

3) On an injunction, the Court does not make a final decision on the merits, but may grant temporary injunctive relief until the Court of Appeals can fully consider the merits.

Although the word “moot” never appears in any of the opinions, that was clearly the question. The reason why the dissenters did not cite mootness is because the doctrine only applies when the matter is not capable of rearing its ugly head once again. Since Covid-19 is ongoing, it does not appear that any of the Justices would disagree with the proposition that restrictions on worship might be reimposed.

The facts drove the majority to the conclusion that there can be no compelling reason to restrict religious services in the manner that Governor Cuomo did, absent problems of the disease in those congregations or an underlying predicate for the more harsh treatment of religion, thus far lacking in the record.

It would be more than a side note to appreciate, agree with him or not, the role taken by Justice Roberts. Although he was a dissenter, who also did not use the word mootness, but chose to stay out of the fracas in the hopes that the matter would be resolved at the Second Circuit level, he nevertheless spoke well of the intentions of his fellow Justices. Thus, he said of the dissenters: “They simply view the matter differently after careful study and analysis reflecting their best efforts to fulfill their responsibility under the **Constitution**.” At slip Opinion Page 27.

Such decorum, decency and thoughtfulness on the part of the Chief Justice augurs well for the future of the Supreme Court given the incredibly complex and controversial decisions which it must render.

There are those that are trumpeting this decision as a new herald of "religious rights." Hopefully, it is simply a recognition by a majority of the Court that civil rights in general should be given robust and respectful treatment in a society dependent upon fair and equal treatment for all. The religious as well as the irreligious should be uncomfortable when religious services are singled out as particularly egregious incubators for Covid-19.

Recently I stopped into a Lowe's Store to pick up some items for my home projects. The parking lot was packed. Many of the staff who worked there had their masks below their nose, which makes the mask basically worthless. Customers certainly were not always six feet apart and social distancing was a hit or miss proposition. I could not help but think to myself that there were a lot more people in that store than customarily go to religious services. Yet, there Lowe's is, doing a land-office business so that people like myself can keep busy at home.

Hopefully, the new found faith that many of our Judges and Justices have in the important component of equality for religion, will apply those same principles to the panoply of civil rights. Right now, I have a case sitting in the Fourth Circuit which was dismissed by the district court on a standing issue. Will recent political decisions on the lack of standing by the Republican Party or President Donald Trump help or hurt my civil rights litigants? Let us remember that all published court decisions have the potential to haunt those who celebrate specific rights they are comfortable with and excoriate those with whom they disagree. The ultimate issue is not going to be which issues are paramount, but whether the courts will give air to the grievances voiced by those whose power in society should be irrelevant to the ultimate determination.

I am one of those old-time lawyers who worry about eroding the Doctrine of Standing, but I celebrate our new found faith in the Equal Protection Clause. My liberal friends applaud the Trump decisions and hate the Supreme Court's Roman Catholic Church decision, while my conservative friends feel exactly the opposite. Those of us who are just trying to practice law every day, representing frequently innocent and sometimes very injured clients, simply want to see access to the courts unimpaired and decisions which recognize the individuality and dignity of all supplicants and their adversaries. A rather tall order to fill in contentious times.

CAR/srb