



Superior Court of California
County of Kern

Date: 12/10/2020

Time: 8:00 AM - 5:00 PM

BCV-20-102267

FATHER TREVOR BURFITT VS GAVIN NEWSOM

Courtroom Staff

Honorable: Gregory Pulskamp

Clerk: Stephanie Lockhart

NATURE OF PROCEEDINGS: RULING

NATURE OF PROCEEDINGS: RULING ON PLAINTIFF FATHER TREVOR BURFITT'S MOTION FOR PRELIMINARY INJUNCTION; HERETOFORE SUBMITTED ON DECEMBER 10, 2020

RULING:

The Court grants Plaintiff Father Trevor Burfitt's Motion for Preliminary Injunction as to all Defendants.

DISCUSSION:

In this case, the Court is presented with issues involving two very important, but competing interests: public health and freedom of religion. Specifically, Plaintiff contends, inter alia, that the government Defendants' implementation of Covid-19 safety protocols unconstitutionally infringes on the free exercise of religion. The current motion, Plaintiff's Motion for a Preliminary Injunction, entails several complex factual and legal issues. Fortunately, the United States Supreme Court has very recently issued opinions in the case of Roman Catholic Diocese of Brooklyn v. Cuomo (2020) 592 U.S. ___, 2020 WL 6948354 (Roman Catholic Diocese) and Harvest Rock Church v. Newsom (2020) 592 U.S. ___, 2020 WL 7061630, which provide clear guidance on these issues. (See also, the subsequent orders from the U.S. Court of Appeals, Ninth Circuit, Harvest Rock Church v. Newsom, No. 20-55907, 2020 WL 7075072 and South Bay United Pentecostal Church v. Newsom, No. 20-55533, 2020 WL 7224194.) These opinions, as well as the relevant pre-existing body of law, lead this Court to conclude that Plaintiff's action has merit and that the issuance of a preliminary injunction is appropriate.

When deciding whether to issue a preliminary injunction, courts must evaluate 1) the likelihood that the plaintiff will prevail on the merits at trial and 2) the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the injunction were granted. (IT Corporation v. County of Imperial (1983) 35 Cal.3d 63, 70.) It is also clear that Plaintiff, as the moving party, has the burden to establish all the elements necessary to support the issuance of a preliminary injunction. (O'Connell v. Superior Court (2006) 141 Cal.App.4th 1452, 1481.)

In order to evaluate the likelihood of Plaintiff prevailing at trial, the Court must first determine which legal standard should be used to analyze the Covid-19 restrictions at issue. Although Defendants collectively advocate for the use of a "rational basis" standard, it is clear that when restrictions appear to treat religious activity less

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favorably than comparable secular activities, the restrictions are subject to "strict scrutiny." (Church of Lukumi v. Hialeah (1993) 508 U.S. 520, 533-38, 546, 113 S.Ct. 2217 (Lukumi).) In other words, as noted in Roman Catholic Diocese, when "the challenged restrictions are not 'neutral' and of 'general applicability,' they must satisfy 'strict scrutiny,' and this means that they must be 'narrowly tailored' to serve a 'compelling' state interest." (Roman Catholic Diocese, supra, at p. 3 [citations omitted].) In this case, the restrictions are not "neutral" and of "general applicability" because they assign entities into disparate classifications which results in religious activities being treated less favorably than comparable secular activities. For example, the "Purple Tier" of the "Blueprint for a Safer Economy," and the most recent "Regional Stay at Home Order," both impose a total ban on indoor religious services while simultaneously permitting a wide range of secular indoor activities to varying degrees. Entities permitted to engage in indoor activities - also known as "essential businesses" or "critical infrastructure" - include big-box retail stores, grocery stores, home improvement stores, hotels, airports, train stations, bus stations, movie production houses, warehouses, factories, schools, and a lengthy list of additional businesses. It is important to note that almost all of the entities that are allowed to host indoor operations do not engage in activity that is constitutionally protected, whereas houses of worship do. (Calvary Chapel Dayton Valley v. Sisolak (2020) 140 S.Ct. 2603, 2603-04 (diss. opn. of Alito, J.)) Therefore, strict scrutiny is the appropriate standard in this case.

In applying the strict scrutiny standard, Defendants are given the opportunity to justify why religious activity is treated less favorably than comparable secular activity. (Lukumi, supra, 508 U.S. 520 at pp. 533-39, 542-546.). In other words, Defendants must establish to a strict scrutiny standard why houses of worship are not treated like the favored class of entities. (Ibid. See also, Roman Catholic Diocese, supra, at p. 8 (conc. opn. of Kavanaugh, J.)) Stopping the spread of Covid-19 is undisputedly a "compelling state interest," so one element of the standard is satisfied. However, Defendants' efforts to distinguish the permitted secular activity from the prohibited religious activity are not persuasive. For example, Defendants contend that the congregations of shoppers in big-box stores, grocery stores, etc., are not comparable to religious services in terms of crowd size, proximity, and length of stay. To the contrary, based on the evidence presented (or lack thereof) and common knowledge, it appears that shoppers at a Costco, Walmart, Home Depot, etc. may - and frequently do - congregate in numbers, proximity, and duration that is very comparable to worshippers in houses of worship. Defendants have not convincingly established that the health risks associated with houses of worship would be any different than "essential businesses" or "critical infrastructure," assuming the same requirements of social distancing and the wearing of masks were applied across the board. As Justice Kavanaugh noted:

"Assuming all of the same precautions are taken, why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister? [citations omitted.] The Church and its congregants simply want to be treated equally to comparable secular businesses. California already trusts its residents and any number of businesses to adhere to proper social distancing and hygiene practices. The State cannot 'assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings.'" (South Bay United Pentecostal Church v. Newsom (2020) 140 S.Ct. 1613, 1615 (diss. opn. of Kavanaugh, J.))

In addition, the restrictions at issue in this case are not "narrowly tailored" because the occupancy limits imposed on places of worship by the Purple Tier of the Blueprint for a Safer Economy and the Regional Stay at Home Order are zero - a total and complete ban of indoor religious services. These restrictions are arguably harsher than any other set of restrictions considered by the courts in all of the cases cited by the parties in this action. In Roman Catholic Diocese, the court considered New York's religious services occupancy limits of 10 persons in "Red Zones" and 25 persons in "orange zones" to be "very severe restrictions" and "far more restrictive than any Covid-related regulations that have previously come before the Court [footnote omitted], much tighter than those adopted by many other jurisdictions hard-hit by the pandemic, and far more severe than has been shown to be required to prevent the spread of the virus at the applicants' services." (Roman Catholic Diocese, supra, at p. 1, 2.) What then should the courts think of California's total ban on indoor services? "Narrowly tailored" regulations mean "the

least restrictive means available" and may potentially include a variety of less draconian measures such as "social distancing, wearing masks, leaving doors and windows open, forgoing singing, and disinfecting spaces between services." (Roman Catholic Diocese, supra, at p. 4 (conc. opn. of Gorsuch, J.)) Therefore, it seems highly probable that Plaintiffs will prevail in this case should the matter proceed to trial.

In terms of evaluating, or balancing, the interim harm to the parties, "[t]here can be no question that the challenged restrictions, if enforced, will cause irreparable harm [as] [t]he loss of First Amendment freedoms, for even minimal periods of time unquestionably constitutes irreparable injury." (Roman Catholic Diocese, supra, at p. 3.) Although Plaintiff's action does not allege violations of the First Amendment, it does allege violations of Article I, Section 4, of the California Constitution which is at least as protective of religious liberties as the First Amendment (Catholic Charities of Sacramento v. Superior Court (2004) 32 Cal.4th 527, 562.) At the time of this writing (12/10/20), California does not permit indoor religious services in the four counties in which Plaintiff operates. In fact, between the Blueprint for a Safer Economy and the Regional Stay at Home Order, the State does not currently permit indoor religious services anywhere in the entire state. The harm to Plaintiff is self-evident. On the other hand, Defendants have not shown that adding religious organizations to the long list of entities that are permitted indoor operations would negatively impact public health, assuming the same healthcare precautions were implemented. Defendants' contention that the permissibility of outdoor religious services negates Plaintiff's claims is not well received because, as noted above, several less burdensome means are available to advance the goals of public health and safety. Similarly, Defendants' protestations that religious services may still be offered through means of modern telecommunication, such as TV or web-based platforms, seem specious because, as noted in Roman Catholic Diocese, "such remote viewing is not the same as personal attendance." (Roman Catholic Diocese, supra, at p. 3.) Therefore, the interim harm to Plaintiff if the Motion for Preliminary Injunction were denied, would significantly outweigh the interim harm to Defendants if the motion were granted.

In closing, this Court wholeheartedly agrees with the following sentiment:

"Members of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area. But even in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty. Before allowing this to occur, we have a duty to conduct a serious examination of the need for such a drastic measure." (Roman Catholic Diocese, supra, at p. 3.)

The free exercise of religion clause in the California Constitution prohibits Defendants from treating religious activities worse than comparable secular activities. California's current Covid-related restrictions do exactly that. This Court is not in a position to rewrite the restrictions or dictate to Defendants specifically how the restrictions may be cured. However, the Court is in a position to prohibit enforcement of the restrictions against Plaintiff pending trial, and rules accordingly. The Court makes no rulings at this time with respect to Plaintiff's separation of powers claim. The Court also does not make any rulings with respect to Defendants' Covid-related restrictions that were created at the city and county levels, except that those restrictions are also not enforceable against Plaintiff to the extent that they incorporate the State of California's restrictions.

DISPOSITION:

Pending a full trial on the merits, Defendants, their agents, and representatives, are hereby enjoined from enforcing against Plaintiff the provisions of the Blueprint for a Safer Economy, the Regional Stay at Home Order, and all Covid-19 restrictions that fail to treat houses of worship equal to the favored class of entities.

Plaintiff will prepare an order consistent with this ruling for the court's signature pursuant to California Rule of Court 3.1312.

Copy of minutes mailed to all parties as stated on the attached certificate of mailing.

FUTURE HEARINGS:

March 29, 2021 8:30 AM Case Management Conference
Bakersfield Division H
Pulskamp, Gregory

CERTIFICATE OF MAILING

The undersigned, of said Kern County, certify: That I am a Deputy Clerk of the Superior Court of the State of California, in and for the County of Kern, that I am a citizen of the United States, over 18 years of age, I reside in or am employed in the County of Kern, and not a party to the within action, that I served the *Minutes dated December 10, 2020* attached hereto on all interested parties and any respective counsel of record in the within action by depositing true copies thereof, enclosed in a sealed envelope(s) with postage fully prepaid and placed for collection and mailing on this date, following standard Court practices, in the United States mail at Bakersfield California addressed as indicated on the attached mailing list.

Date of Mailing: December 10, 2020

Place of Mailing: Bakersfield, CA

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Tamarah Harber-Pickens
CLERK OF THE SUPERIOR COURT

Date: December 10, 2020

By: Stephanie Lockhart
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