SMITH & ASSOCIATES

Analysis of the Archdiocese/Agudath Israel ("Aguda") United States Supreme Court Decision

(592 U.S. _____ (2020), No. 20A87)

Bottom Line Up Front: The Supreme Court delivers a stunning defeat to liberty.

What you are being told happened: High Court Victory for religious rights, landmark vindication of religious rights. Supreme Court strikes down New York limitations on religious gatherings.

What actually happened: Temporary relief in a narrow issue with many statements that defer to the power of the government to restrict liberties. See detailed analysis below.

What did not happen: The parties did not challenge the validity of the emergency and did not challenge the Government's use of emergency powers to destroy the ability to make a living and the rights of the people to exercise their rights. The parties did not challenge the entire red/yellow/green zone tyranny.

What the decision actually means: A government can imprison[1] the entire population as long as one form of activity is not treated disparately from other forms of activity.

What is this comparable to: "A victory for prisoners! The Archdiocese/Aguda has achieved a major victory in having the court rule that religious prisoners can have at least as many assemble for prayer as can assemble for a game of soccer. However, the Archdiocese/Aguda agrees that everyone can and should remain in prison without asking who built the prison, why are the people in prison at all, and who gave the prison warden the ability to imprison the prisoners."

Detailed Analysis:

- In a temporary ruling, pending further lower court proceedings, the Supreme Court agreed that the restrictions on religious gatherings cannot be more stringent or onerous than those on other types of activity. The Supreme Court abdicated its responsibility to challenge the Executive Branch by stating "We are not public health experts, and we should respect [read "abdicate to"] the judgment of those [in the Executive Branch] with special expertise and responsibility in this area."[2] This is an expansion of the fundamental problem that the cult of expertise demands that only "experts", and only certain experts at that, have the authority to speak on subjects and all people, including rabbis, priests, judges, government leaders and the people must defer to them. In fact, the

[1] A reviewer objected to the use of the word "imprison." My response: If the population can't go to school, can't go to work, can't go to pray, and are only allowed out at certain hours for certain government approved activities then what imprisoning is left to do?

[2] Page 5 of the Decision.

majority is very much like the dissent which holds that the court should not interfere at all with public health authorities. The difference is the dissent says there should be no checks and balances on the public health authorities, while the majority says they will step in if the public health authorities are uneven in their decrees, that is if the decrees are not "neutral."

- "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."[3] This sounds like it is defending religious rights but it is an illusory statement. The truth is the restriction on any business strikes at the heart of liberty and any restriction on the religious gatherings strikes at the very heart of the First Amendment guarantee of religious liberty, regardless of whether or not the restriction is more or less burdensome that the restrictions on other activity. The Court leaves untouched the 50% restriction on attendance in "Yellow Zones" and in red and orange zones would allow a restriction to 10 people in synagogues if there was a similar restriction in acupuncture facilities.
- "The applicants have made a strong showing that the challenged restrictions violate "the minimum requirement of neutrality" to religion." If it was neutral and all gatherings and facilities were equally restricted, the decrees would pass this test. That's not good for liberty.
- "[S]tatements made in connection with the challenged rules can be viewed as targeting the "'ultra-Orthodox [Jewish] community."[4] What about everyone else who is devastated from the closure of their business, their schools and restrictions on family gatherings!
- On page 3 of the Decision, the Supreme Court seemingly accepts the essential/non-essential distinction without question. This acquiescence to such a grading of people and their activities in making a living and providing goods and services to other is unacceptable.
- On page 3 of the Decision, the Supreme Court endorses the public health standard of grading people's activities by stating that the plaintiffs have "admirable safety records."
- "Stemming the spread of COVID–19 is unquestionably a compelling interest…"[5] Perhaps the Supreme Court picked up this attitude from the plaintiffs' briefs, but it is false to claim that a government activity is "unquestionably a compelling interest" and close the door on the most obvious question of all. This refuses to even ask the questions that many have raised about the need to even stem the spread of COVID-19 or treat it any differently than other even more dangerous medical conditions.
- "Among other things, the maximum attendance at a religious service could be tied to the size of the church or synagogue." The Supreme Court offers its own helpful suggestions to those seeking tyranny on how to make the partial shutdown of houses of worship more palatable to the court and in keeping with the court's jurisprudence.

[3] Page 5 of the Decision.
[4] Page 2 of the Decision.
[5] Page 4 of the Decision.

- "As noted, the State has not claimed that attendance at the applicants' services has resulted in the spread of the disease."[6] Again, this statement just primes the pump to abdicate to the State if the State were to claim that normal human activities cause "the spread of the disease."
- "And injunctive relief is still called for because the applicants remain under a constant threat that the area in question will be reclassified as red or orange." This gives a green light to the State's classification of "Yellow Zones."[7]

The Aguda itself confirms our analysis of significance the defeat for liberty by stating in its press release: The Court's ruling is important because it will allow individuals of all faiths in New York to immediately pray *utilizing the same occupancy restrictions and safety procedures that govern similar secular activities.*

In its court papers, the Aguda says that it is otherwise in full compliance with the Governor's decrees and that it is voluntarily limiting religious participation to 25% to 33% capacity[8], meaning that the Aguda is championing the restrictions, just quibbling with the degree and unevenness of the restrictions. In fact, the Aguda made and makes no objection to "Yellow Zone" restrictions to 50% capacity![9]

In other words, the Aguda accepts both the limitation on the people as a whole and the limitations on prayer.

Constitutional Rating:

On a scale of -10 to +10 with -10 being a defeat for the Founders intention of a Constitution that establishes a government that secures the rights of the people and a +10 being a victory for the Founder's intention.

Rating: -9.

Winner: The public health tyranny.

Loser: the People

[6] Page 5 of the Decision.
[7] While it is true that a court will usually confine itself to the issues presented, the Court could have referred to objectionable matters outside the scope of the limited matters before it.
[8] See page 2 of the decision.

[9] See page 6 of the decision, "this change means that the applicants may hold services at 50% of their maximum occupancy."

Other relevant quotes:

Governor Cuomo: "It is irrelevant from a practical impact…" not just because the relevant zip codes are no longer red/orange but because the Governor recognizes that his fundamental power grab is unchallenged, that he can do whatever he wants going forward without challenge, so long as he makes equal restrictions on the entire population.

Justice Gorsuch: "It is time—past time—to make plain that, while the pandemic poses many grave challenges, there is no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques." *Translation:* color coding the people is fine and restricting their liberties is fine, just don't make less restrictions on liquor stores and bike shops than on churches, synagogues and mosques.

Rabbi Zwiebel: "This is an historic victory," said Rabbi Chaim Dovid Zwiebel, Executive Vice President of Agudath Israel, "This landmark decision will ensure that religious practices and religious institutions will be protected from government edicts that do not treat religion with the respect demanded by the Constitution." *Translation:* the standard of respect sought is not an absolute respect but rather merely not less favorable respect than that afforded other activities.

Shlomo Werdiger, chairman of Agudath Israel's Board of Trustees: "The Agudah has prioritized health since the onset of this pandemic, and we continue to encourage sound health practices. With the legal parameters clarified, we look forward to continuing to work hand in hand with our elected officials to ensure the well-being of our community with a single standard of safety for religious and secular activities." *Translation:* as long as there is a "single standard" we do not oppose tyranny over the children and the synagogues and will, in fact, "work hand in hand" with the people who seek to impose tyranny to ensure that there is an even-handed equal opportunity tyranny. Lockdowns, voluntary and involuntary, will continue just as long as we don't get treated more poorly than anyone else, ie. we all suffer equally.

Wall Street Journal Editorial: "Americans should welcome the Supreme Court back at the ramparts as a defender of liberty." Their celebration is missing the points outlined in this briefing.

Comment by Austin Lowrie on the Wall Street Journal Editorial: "Guess the temp got turned down on the frog boiling in the pot, for a little while…."

Bottom line:

Question: Does the Court ruling meet the Declaration of Independence's standard of a government being formed by the people so as to **secure the inalienable rights of the People,** namely *all* the inalienable rights, which include but are not limited to Life, Liberty and the pursuit of Happiness?

Answer: No. The Supreme Court decision ratifies actions of the Government of New York which are destructive of these ends, meaning that the Supreme Court decision is also destructive of these ends. It is clear that the Supreme Court's jurisprudence and standards of review of government action are not capable of securing the inalienable rights of the People.

Solution and Call to Action:

1. Read the Declaration of Independence and understand your G-d given inalienable rights. "Inalienable" means rights that cannot be taken away and which you cannot surrender.
2. Read the Bill of Rights and understand that it does not grant you any rights. It merely, warns the government not to restrict any of your rights, including, but not limited to, the few that Bill of Rights mentions.
3. Read the actual court decisions and don't assume that the court decisions actually mean what the media tells you it means.
4. Open your businesses, gather your family, provide value to society, turn down offers of free money, food and rent, travel freely whenever it suits you, gather in prayer.
5. File new litigations that challenge the proof of the emergency and the government's power at its core. Speak to us if you are ready to be a plaintiff.
6. Support the Legal Defense fund that does not mince words and is not afraid to stand up for liberty and oppose tyranny, the Lifeline Legal Defense Fund.

If you disagree with me or think I have missed something, let me know!

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