APP NO. 20A-_____

IN THE SUPREME COURT OF THE UNITED STATES

CALVARY CHAPEL DAYTON VALLEY,

Applicant,

v.

STEVE SISOLAK, in his official capacity as Governor of Nevada; et al.,

Respondents.

To the Honorable Elena Kagan,
Associate Justice of the United States Supreme Court
and Circuit Justice for the Ninth Circuit

EMERGENCY APPLICATION FOR AN INJUNCTION PENDING APPELLATE REVIEW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Calvary Chapel Dayton Valley states that it is a Nevada nonprofit corporation with no parent company or stock.

PARTIES TO THE PROCEEDING

The applicant (plaintiff-appellant below) is Calvary Chapel Dayton Valley, a church located in Dayton, Nevada.

The respondents (defendants-appellees below) are Steve Sisolak, in his official capacity as Governor of Nevada; Aaron Ford, in his official capacity as Attorney General of Nevada; and Frank Hunewill, in his official capacity as Sheriff of Lyon County.

LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Ninth Circuit, No. 20-16169, *Calvary Chapel Dayton Valley* v. *Sisolak*, order entered July 2, 2020.

U.S. District Court for the District of Nevada, No. 3:20-cv-00303, *Calvary Chapel Dayton Valley* v. *Sisolak*, orders entered June 11, 2020 and June 19, 2020.

DECISIONS BELOW

The district court's unreported order denying Calvary Chapel Dayton Valley's motion for a temporary restraining order or preliminary injunction is reprinted in Appendix ("App.") A. The district court's unreported order denying the church's motion for an injunction pending appeal is available at No. 3:20-cv-00303, 2020 WL 3404700 (D. Nev. June 19, 2020) and reprinted in App. B. The Ninth Circuit's

unreported order denying the church's motion for an injunction pending appeal is reprinted in App. C.

JURISDICTION

Calvary Chapel filed its verified amended complaint challenging Directive 021 under the First Amendment's Free Exercise, Free Speech, and Free Assembly Clauses on May 28, 2020. *Calvary Chapel Dayton Valley* v. *Sisolak*, No. 3:20-cv-00303 (D. Nev.), ECF 8. That same day the church filed an emergency motion for a temporary restraining order or preliminary injunction. *Id.*, ECF 9, 19. The district court had jurisdiction under 28 U.S.C. 1331 and 1343, and authority to issue declaratory and injunctive relief under 28 U.S.C. 1343 and 2201–02.

The United States District Court for the District of Nevada denied Calvary Chapel's motion on June 11, 2020. *Calvary Chapel Dayton Valley* v. *Sisolak*, No. 3:20-cv-00303 (D. Nev.), ECF 43 (App. A). On June 15, 2020, the church filed a timely notice of appeal, *id.*, ECF 46, and a motion for an injunction pending appeal in the district court, *id.*, ECF 47. The district court denied that motion on June 19, 2020. *Id.*, ECF 55 (App. B).

The United States Court of Appeals for the Ninth Circuit had jurisdiction over Calvary Chapel's interlocutory appeal under 28 U.S.C. 1292(a)(1). The church filed an emergency motion for an injunction pending appeal in the Ninth Circuit on June 22, 2020. *Calvary Chapel Dayton Valley* v. *Sisolak*, No. 20-16169 (9th Cir.), ECF 9. The Ninth Circuit denied that motion on July 2, 2020. *Id.*, ECF 20 (App. C).

This Court has jurisdiction under 28 U.S.C. 1651. Calvary Chapel's application is "in aid of [this Court's] jurisdiction," *id.*, because it will take several months to obtain a ruling from the Ninth Circuit on the church's preliminary-injunction appeal, by which time the legal landscape may have changed but the irreparable harm to the church's First Amendment rights will be irreversible.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

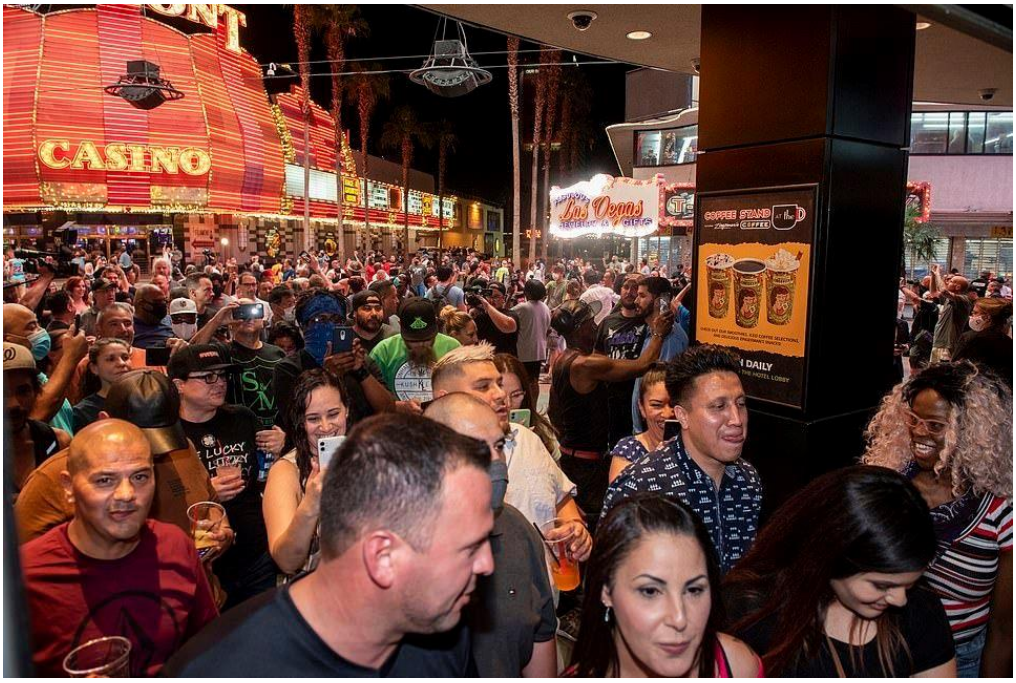
Statutes

Other Authorities

Rules

To the Honorable Elena Kagan, as Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

The Free Exercise Clause protects the exercise of religion. No constitutional provision protects the right to gamble at casinos, eat at restaurants, or frolic at indoor amusement parks. Accordingly, under this Court's Rules 20, 22, and 23, and 28 U.S.C. 1651, Applicant Calvary Chapel Dayton Valley respectfully requests an injunction pending appellate review allowing the church to hold in-person worship services on the same terms as comparable secular assemblies in keeping with its comprehensive health and safety plan. Calvary Chapel only seeks to host about 90 people at a socially-distanced church service, while the Governor allows hundreds to thousands of people to gamble and enjoy entertainment at casinos. Ninth Circuit Excerpts of Record ("ER") 83, 100, 166–70.



Las Vegas Image from June 4, 2020
ER 170

In fact, Governor Sisolak's Directive 021,[1] which has now been extended through July 31, 2020,[2] allows large groups to assemble in close quarters for unlimited periods at casinos, gyms, restaurants, bars, indoor amusements parks, bowling alleys, water parks, pools, arcades, and more subject only to a 50%-fire-code-capacity limit. But the directive limits gatherings at places of *worship* to 50 people max, no matter their facilities' size or the precautions they take.

Discriminating against religious assemblies and speech for no rational—let alone compelling—reason presents an "indisputably clear" violation of the First Amendment. *S. Bay United Pentecostal Church* v. *Newsom*, 140 S. Ct. 1613, 1614 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief). Calvary Chapel has voluntarily complied with the Governor's COVID-19-related orders, including mandatory face coverings and social distancing. All that Calvary Chapel requests is equal treatment, and for the Governor to stop discriminating against the church's gatherings based on its religious status. *Espinoza* v. *Mont. Dep't of Revenue*, No. 18-1195, 2020 WL 3518364, at *5 (S. Ct. 2020). Calvary Chapel has exhausted its lower-court options. Only this Court can halt Nevada from treating nearly every activity imaginable better than the exercise of religion.

This is a straightforward case. If the Governor deems it acceptable for secular assemblies to occur at 50% capacity at casinos, restaurants, bars, gyms and fitness

[1] Governor Sisolak, COVID-19 Declaration of Emergency Directive 021 – Phase Two Reopening Plan (May 28, 2020), https://bit.ly/3eXRFYQ.
[2] Governor Sisolak, COVID-19 Declaration of Emergency Directive 026 (June 29, 2020), https://bit.ly/3dVW79o.

facilities, indoor and outdoor theme parks, bowling alleys, water parks, pools, arcades, and more, he *must* apply the same 50%-capacity rule to constitutionally-protected worship services. Nor may state officials encourage mass protests, or in the Governor's case *personally participate* in one, while limiting gatherings at places of worship to a strict numerical cap. Large crowds meeting for extended periods in close proximity are ubiquitous at all of these secular locations. Yet the district court held that state officials may discriminate against religious gatherings if they treat a few secular assemblies worse. And the Ninth Circuit agreed in a three-sentence order that merely cites *South Bay*. But that is not the law or what *South Bay* held. Unless this Court intervenes, lower courts will continue allowing the First Amendment to "sleep through" the COVID-19 outbreak, which now appears less like a temporary emergency than a new way of life. *Roberts* v. *Neace*, 958 F.3d 409, 415 (6th Cir. 2020).

STATEMENT OF THE CASE

A. Calvary Chapel Dayton Valley and its religious services

Calvary Chapel Dayton Valley is a Christian church located in Dayton, Nevada, an unincorporated region of Lyon County. Dayton is home to roughly 9,500 people. Since 2006, the church has sought to love, teach, and reach Dayton Valley for Christ. ER 653–55. Calvary Chapel routinely held two Sunday services capable of accommodating up to 200 people. But Governor Sisolak's directives have barred the church from holding anything resembling its normal religious gatherings for over 3 months.

During the COVID-19 outbreak, Calvary Chapel was determined to do its part and temporarily suspended in-person worship services in favor of streaming services online. ER 656. This emergency measure could not last because it caused real spiritual harm. Some people who attend Calvary Chapel are unable to view online services, leaving them vulnerable and alone. ER 654.

Nor does the church believe that virtual or drive-in services meet the Bible's command that Christians gather for corporate, prayer, worship, and scriptural teaching. ER 654. "Ekklesia," the Greek word in the New Testament translated as "church," means "assembly." ER 654. And Calvary Chapel views church gatherings as sacred assemblies that embody Christ on earth and are the best expression of "His image and likeness." ER 654. If a body of believers fails to hold in-person gatherings, Calvary Chapel views it as ceasing to be a church in the biblical sense.

That does not mean Calvary Chapel desires to put its flock or the public at risk. In light of the COVID-19 virus, the church developed a comprehensive health and safety plan that: (1) limits in-person services to 50% of fire-code-capacity (roughly 90 people per service), (2) requires six feet of distance between members of different families and households, (3) restricts gatherings to only Sundays and Wednesdays, and (4) reduces the length of Sunday services from 90 to 45 minutes. ER 659. Calvary Chapel's rigorous safety plan also called for:

- asking people to arrive no more than 25 minutes early;
- requiring those giving directions to wear face masks;
- organizing parking attendants to direct cars;

- guiding attendees to a designated entrance;
- ensuring one-way traffic via a first-in-last-out model and placing signs on walls and floors;
- leaving a half-hour gap between services in which to clean and sanitize the sanctuary, hallways, bathrooms, and common surfaces;
- advising attendees of proper social-distancing methods;
- directing attendees to seating that provides at least six feet of separation between families and those in different households;
- making hand-sanitizer stations readily available;
- prohibiting handouts or passing other items between persons;
- barring coffee or serving snacks;
- limiting restroom use to one person at a time;
- using prepackaged Communion elements;
- directing attendees out of the building; and
- instructing people not to congregate in the church.

ER 659–60.

Calvary Chapel filed suit in late May to begin in-person services. Yet even though the church voluntarily adopted rigorous safeguards, the number of active COVID-19 cases in Lyon County is small,[3] and the church has complied with the Governor's general safety mandates—including that most everyone wear a face

[3] Carson City Health & Human Servs., Quad-County COVID-19 Update (July 4, 2020), https://bit.ly/2ZJRtGd (listing 31 active COVID-19 cases in Lyon County).

covering in public spaces,[4] Governor Sisolak has refused to allow more than 50 people to attend Calvary Chapel's religious gatherings. Simultaneously, the Governor allows secular assemblies where large crowds gather in close proximity for extended periods at casinos, gyms, restaurants and bars, indoor amusements parks, bowling alleys, water parks, pools, and arcades—not to mention mass protests.

B. Governor Sisolak's directive

Governor Sisolak's directives treat houses of worship far worse than secular places where large, extended, and close gatherings occur day-in-and-day-out. ER 641–52. Directive 021, § 11, orders "[c]ommunities of worship and faith-based organizations" to limit "indoor in-person services . . . so that no more than fifty persons are gathered, and all social distancing requirements are satisfied." ER 644–45. The directive further stipulates that churches must "stagger services so that the entrance and egress of congregants for different services [does] not result in a gathering greater than fifty persons." ER 645. Violating Directive 021 would subject Calvary Chapel to potential civil and criminal penalties (§ 39). ER 652.

But, on its face, the Governor's directive allows six types of comparable secular assemblies to thrive at up to 50% capacity with no 50-person cap: (1) bowling alleys and arcades (§ 20); (2) miniature golf facilities, amusement parks, and theme parks (§ 21); (3) restaurants (§ 25 & ER 748); (4) breweries, distilleries, and wineries (§ 26); (5) gyms, fitness facilities, and fitness studies (§ 28), and (6) pools, water parks, and

[4] Governor Sisolak, COVID-19 Declaration of Emergency Directive 024 (June 24, 2020), https://bit.ly/3iuSvhR.

other public aquatic venues (§ 29). ER 646–50. Directive 021 also allows casinos and other gaming establishments to reopen under rules set by the Nevada Gaming Control Board (§ 35). ER 651. For over a month, casinos have hosted hundreds to thousands of people subject to a 50% occupancy limit on each gaming area. ER 581.

The Governor's directive even applies more favorable rules to cinemas than churches. Directive 021 allows "indoor movie theaters" to host "the lesser of 50% of the listed fire code capacity or fifty persons" (§ 20). ER 646. Official industry-specific guidance for movie theaters clarifies this means "50% of fire code occupancy or 50 people, whichever is lower, *per screen*." ER 552 (emphasis added). So while cinemas may run 18 separate movie theaters filled with 900 people total, places of worship may only host one gathering at a time, no matter how many large meeting rooms they have, because "the entrance and egress of congregants for different services [may] not result in a gathering greater than fifty persons" (§ 11(3)). ER 645.

Directive 021's real-life operation shows that Nevada allows still more large, close, and prolonged secular assemblies with no numerical limits. When hundreds of protestors gathered in packed throngs in violation of the directive (§ 10), not only did Governor Sisolak and Attorney General Ford tweet their support, ER 161–64, 254–56, but the Governor later *personally participated* in an unlawful protest and praised the gathering, saying: "'I think these are peaceful folks who are just speaking their

mind . . . . This is important to them. It's encouraging to see the young generation participating so I'm thrilled to come and say hi to them.'"[5]

Yet when a reporter asked a question regarding state officials' disparate treatment of mass protests and church services, the Attorney General responded that places of worship face punishment because "there was an advertisement that people are actually going to violate the governor's orders" and "You can't spit . . . in the face of law and expect law not to respond."[6] But that did not stop the Governor from ignoring his own directive and participating in a mass protest. *Supra* p. 8 n.5.

State officials approached Nevada's recent primary election the same way. Hundreds of people standing in close proximity for hours waiting to vote at a few in-person sites made national headlines. ER 68–72. Officials did nothing to limit groupings of voters to 50 people, enforce social-distancing rules, or make any effort to apply Directive 021 to the polling place. ER 77–79.

C. Lower court proceedings

Once the Governor issued Directive 021, Calvary Chapel amended its complaint to allege violations of the First Amendment's Free Exercise, Free Speech, and Free Assembly Clauses. ER 662–81. The church requested declaratory and injunctive relief, ER 679, and filed an emergency motion for a temporary restraining

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[5] Kelsey Penrose, *Gov. Sisolak makes appearance at Black Lives Matter Protest in Carson City*, Carson NOW.org (June 19, 2020), https://bit.ly/2VKTS2p.

[6] Colton Lochhead, *Sisolak, elected Nevada officials discuss systemic racism, reform*, Law Vegas Review-Journal (June 5, 2020), https://bit.ly/31JhKHr; *see also* Jackie Valley & Riley Snyder, *Sisolak, elected officials pledge to address systemic racism and society's 'double standard' toward black* protestors, The Nev. Indep. (June 5, 2020), https://bit.ly/2Z6bBU5.

order and preliminary injunction, *Calvary Chapel Dayton Valley* v. *Sisolak*, No. 3:20-cv-00303 (D. Nev.), ECF 9, 19. The district court held a hearing, *id.*, ECF 45, and denied the motion, *id.*, ECF 43 (App. A).

The district court admitted that "a large number of people may remain in close proximity for an extended period of time" at both casinos and places of worship. App. A 6. Yet the court refused to regard them as comparable based on regulatory distinctions, such as state oversight of casinos' "financial" and "internal operations," that do not affect—let alone increase—public health and safety. *Ibid*. Despite the Governor applying "more lenient restrictions" to other "secular activities comparable to in-person church services," the district court held Directive 021 neutral and generally applicable. *Id.* at 7. It did so because the Governor imposed "more stringent restrictions" on a few types of secular assemblies, like concerts, sporting events, and musical performances (§ 22). *Ibid.* Because Calvary Chapel could not show that the Governor's directive *only* "specifically target[s] places of worship" for adverse treatment, the district court identified no free-exercise violation. *Ibid*.

As to Directive 021's real operation, the district court said that mass protests are not comparable to religious services. Equally applying the directive to mass protests "could result in greater harm than that sought to be avoided by the Directive," *id.* at 8, though (apparently) the directive's harm to free exercise was justified. The court required "more evidence" that Nevada was not imposing effective restrictions on "crowded casinos." *Id.* at 9. And the Court denied the church's motion for leave to file a post-argument brief addressing the recent election. *Id.* at 10.

Calvary Chapel filed a timely notice of appeal,[7] *Calvary Chapel Dayton Valley* v. *Sisolak*, No. 3:20-cv-00303 (D. Nev.), ECF 46, and motion for injunction pending appeal, *id.*, ECF 47. The district court denied the motion. *Id.*, ECF 55, App. B. It misconstrued the church's request as a motion for stay or reconsideration, App. B 1–2, and held that "Plaintiff ha[d] not demonstrated a strong showing of a likelihood of success on the merits" for the reasons it gave prior, *id.* at 2. The court also reasoned that Nevada had just required face coverings within 6 feet of some table and card games but not at places of worship, *id.* at 3, which is no longer true, *supra* p. 6 n.4. Further, it cited a record-breaking day of COVID-19 infections in Clark and Washoe Counties, the epicenters of Nevada's casinos, tourism, and population—not in rural Lyon County where Calvary Chapel's religious services take place. *Id.* at 4.

The church filed an emergency motion for an injunction pending appeal with the Ninth Circuit. *Calvary Chapel Dayton Valley* v. *Sisolak*, No. 20-16169 (9th Cir.), ECF 9. A two-judge panel denied the motion in a three-sentence order devoid of reasoning. *Id.*, ECF 20 (App. C). The panel merely cited *Hilton* v. *Braunskill*, 481 U.S. 770, 776 (1987), a habeas-corpus decision of no apparent relevance, and this Court's ruling in *South Bay*. App. C 1.

ARGUMENT

The All Writs Act, 28 U.S.C. 1651(a), authorizes an individual Justice or the Court to issue an injunction in "exigent circumstances" when the "legal rights at issue are indisputably clear" and injunctive relief is "necessary or appropriate in aid

[7] ER 64–66.

of the Court's jurisdiction." *Ohio Citizens for Responsible Energy, Inc.* v. *Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers) (cleaned up). But this Court's discretion is broad: it may issue an injunction pending appellate review "based on all the circumstances of the case [without] express[ing] . . . the Court's views on the merits." *Little Sisters of the Poor Home for the Aged, Denver* v. *Sebelius*, 134 S. Ct. 1022, 1022 (2014).

The Governor's violation of Calvary Chapel's First Amendment rights is not only grievously wrong but "indisputably clear." *S. Bay*, 140 S. Ct. at 1614 (Roberts, C.J., concurring). Even the district court admitted that Directive 021 treats comparable secular assemblies better than religious services. App. A 7. And no one disputes that state officials effectively exempted mass protests from the directive's restrictions. ER 161–64, 254–56. Nevada's "unequal treatment" of religious services is unmistakable. *Espinoza*, 2020 WL 3518364, at *5.

What's more, the state favors speaking a commercial message to live audiences over communicating religious expression. But states may not "afford[] a greater degree of protection to commercial than to noncommercial speech," *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 513 (1981) (plurality opinion), or prefer the transmission of secular over religious views, *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830–31 (1995). When state officials "exceed[]"

the "broad limits" of their discretion to such an extraordinary degree, an injunction should issue. *S. Bay*, 140 S. Ct. at 1614 (Roberts, C.J., concurring).[8]

I. The Governor's directive violates the Free Exercise Clause under *South Bay* and this Court's precedent.

Because the Governor's order "directly prohibit[s]" Calvary Chapel's desired "religious activity," it strongly implicates the Free Exercise Clause. *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2022 (2017) (quoting *McDaniel* v. *Paty*, 435 U.S. 618, 633 (1978) (Brennan, J., concurring in judgment)). Religious discrimination is "odious to our Constitution." *Id.* at 2025. Normally, that means "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." *McDaniel*, 435 U.S. at 639 (Brennan, J., concurring). The Free Exercise guarantees religious believers—at a bare minimum—"[ ]equal treatment." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 542 (1993).

South Bay questioned none of these principles. Members of this Court simply disagreed about whether California's unfavorable treatment of places of worship was based on their religious status or the nature of their gatherings. Some Justices viewed secular assemblies at supermarkets, factories, and offices as comparable to

[8] To the extent this Court considers whether "four Members of the Court will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction, *Lucas* v. *Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers), Justices Thomas, Alito, Gorsuch, and Kavanaugh would have granted the application for injunctive relief in *South Bay*, 140 S. Ct. at 1613, even though warehouse and retail facilities do not host large, extended, and close gatherings to the same degree as casinos, bars, gyms, amusement parks, bowling alleys, arcades, and pools.

religious gatherings at places of worship. *S. Bay*, 140 S. Ct. at 1615 (Kavanaugh, J., dissenting from denial of application for injunctive relief). The Chief Justice, and presumably other Justices, did not. In the Chief Justice's view, these particular secular gatherings were different in kind because "people neither congregate in large groups nor remain in close proximity for extended periods." *Id.* at 1613 (Roberts, C.J., concurring). Not so here.

Governor Sisolak's directive facially treats at least *seven* categories of secular assemblies "where large groups of people gather in close proximity for extended periods of time" better than religious services, *ibid.*; *supra* pp. 6–7, not to mention the effective exemptions state officials carved out for mass protests and polling locations. In short, no real argument exists that the Governor's restrictions on public gatherings are "neutral and of general applicability," *Lukumi*, 508 U.S. at 531, which means the directive must undergo "strict scrutiny," *id.* at 546. For brevity's sake, Calvary Chapel offers just six examples here.

A. Casinos

Governor's Sisolak's directive allowed Nevada's casinos to reopen on June 4, 2020. ER 651 (§ 35). Thousands of people swarmed around gaming tables and slot machines for long periods at 50% capacity.[9] ER 83, 100, 166–70.

But that's not all. Casinos also reopened their (1) live circus acts, ER 89–90; (2) indoor amusement parks, including Circus Circus' five-acre Adventuredome, ER

[9] Emily Rumball, *Crowds flock to Las Vegas casinos after reopening*, Daily Hive (June 10, 2020), https://bit.ly/2AyGSFL.

92–98; and (3) live dinner shows at 50% capacity, ER 85–87. The Governor allows this mix of shared handles, cards, tokens, tables, servers, drinks, restrooms, and seats by hundreds to thousands in casinos at 50% capacity, while forbidding more than 50 people to sit—masked, and socially distanced—in places of worship.

B. Restaurants and Bars

Lower courts are in broad agreement that gatherings at restaurants are comparable to those at places of worship.[10] For months the Governor has allowed Nevada's restaurants to operate at 50% seating capacity. ER 648 (§ 25), 748 (§ 17). Tables and booths must be 6-feet apart, but members of different households are free to sit side-by-side or directly across from each other. Servers progress from table-to-table taking orders, delivering food and drinks, mopping up, and collecting dishes. All the while, diners share appetizers, pass and eat food, and talk freely across the table without face coverings.[11]

The risk of COVID-19 transmission is much greater at restaurants than at Calvary Chapel's worship gatherings, which are socially-distanced, eliminate coffee and snacks, exclude passing objects from person-to-person, and only rarely involve eating and drinking prepackaged Communion elements for a few seconds. ER 659–

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[10] *E.g.*, *Soos* v. *Cuomo*, No. 1:20-cv-651, 2020 WL 3488742, at *11 (N.D.N.Y. June 26, 2020); *Antietam Battlefield KOA* v. *Hogan*, No. 1:20-cv-01130, 2020 WL 2556496, at *9 (D. Md. May 20, 2020); *Calvary Chapel of Bangor* v. *Mills*, No. 1:20-cv-00156, 2020 WL 2310913, at *8 (D. Me. May 9, 2020); *Cross Culture Christian Ctr.* v. *Newsom*, No. 2:20-cv-00832, 2020 WL 2121111, at *6 (E.D. Cal. May 5, 2020); *Maryville Baptist Church* v. *Beshear*, No. 3:20-cv-278, 2020 WL 1909616, at *2 (W.D. Ky. Apr. 18, 2020).

[11] The Governor's face-covering order allows people to remove face masks "while . . . eating or drinking." Directive 024, § 7(6), *supra* p. 6 n.4.

60. Yet while the Governor allows restaurants to operate at 50% seating capacity, he restricts the church's gatherings to 50 people total—including clergy, staff, sound and video technicians, and others who serve and participate in worship.

Bars too may operate at 50% capacity, ER 648 (§§ 25–26), although experts agree that people drinking in bars run a high risk of contracting COVID-19.[12] That has not deterred Governor Sisolak from permitting mass gatherings at Nevada's bars, even though COVID-19 transmissions that "happen in Vegas, don't stay in Vegas" but travel elsewhere.

C. Amusement and Theme Parks

Indoor and outdoor amusement or theme parks in Nevada have now been open at 50% capacity with social distancing for over a month. ER 646–47 (§ 21). Of course, social distancing is easier to maintain in Calvary Chapel's sanctuary using prearranged seating than it is in long, fluctuating theme-park lines. And only a few people will sit in the same pew on a Sunday morning, whereas hundreds of people cycle through often partially-enclosed, theme-park cars. But the Governor sanctions boisterous crowds waiting for long periods to board popular theme-park rides, while talking loudly, at the same time he prohibits more than 50 people from (mainly) sitting quietly and socially-distanced at church.

[12] Will Stone, *Bars are reopening in some places and closing in others. If you go, know the risks*, NPR (July 3, 2020), https://n.pr/2O0Zhhk. Andy Meek, *Please avoid this activity right now above all others*, BGR.com (July 1, 2020), https://bit.ly/38A0fux.

D. Gyms and Fitness Facilities

Under the Governor's directive, gyms and fitness facilities may open—and hold large "[g]roup fitness classes"—at 50% capacity so long as there is at least six feet between equipment or people and various regulations (like sanitation protocols) are met. ER 648–49 (§ 28). The Governor earlier admitted that gyms are the sort of places "that promote extended periods of public interaction where the risk of transmission is high." ER 705 (§ 2). Yet he now treats assemblies of people exercising (which increases both breathing and sweating) and actively sharing machines, weights, and mats better than groups of people that share only their faith and wish (predominantly) to sit still and listen to clergy speak.

Risks of viral infection are high at fitness facilities. *E.g.*, *League of Indep. Fitness Facilities & Trainers, Inc.* v. *Whitmer*, No. 20-1581, 2020 WL 3468281, at *3 (6th Cir. June 24, 2020); Sukbin Jang et al., *Cluster of Coronavirus Disease Associated with Fitness Dance Classes, South Korea*, CDC Research Letter (August 2020), https://bit.ly/2O45Qjb. Any chance of transmission at worship services is lower, especially those with the wide-ranging precautions Calvary Chapel voluntarily agreed to undertake. ER 659–60. Nonetheless, the Governor sanctions fitness facilities welcoming crowds at 50%-capacity, while limiting all places of worship—no matter their size, locale, or precautions—to 50 people max.

E. Movie Theaters

The Chief Justice's *South Bay* concurrence recognizes that gatherings at "movie showings" and places of worship are comparable, 140 S. Ct. at 1613 (Roberts,

C.J., concurring), which is presumably why the Governor stressed below that he treats them equally. State Defs.' Opp'n to Emergency Mot. for an Inj. Pending Appeal 4, 17, *Calvary Chapel Dayton Valley* v. Sisolak, No. 20-16169 (9th Cir.), ECF 17 ("State Defs.' Opp'n"). But that isn't accurate. What Directive 021 means by limiting an "indoor movie theater[ ]" to "the lesser of 50% of the listed fire code capacity or fifty persons," ER 646 (§ 20), is not the entire cinema but "50 people . . . per screen" or individual theater, as industry guidance makes clear, ER 552.

So, the Governor allows multiplex cinemas to fill with *hundreds* of people (excluding employees), while restricting every place of worship in Nevada to no more than 50 persons, including those needed to run the service. In real terms, Calvary Chapel is limited to roughly 35-40 worshipers at a time no matter how many meeting rooms it has sitting empty because the Governor's directive stipulates that "congregants for different services [may] not result in a gathering greater than fifty persons." ER 645 (§ 11(3)). It is not equal to cap cinemas at 50 paying customers per room and places of worship at 50 people per complex.

F. Mass Protests

Hundreds of people in Nevada have stood shoulder-to-shoulder for long periods shouting or chanting slogans and holding signs.[13] ER 254. This violates the Governor's general directive that no more than 50 people congregate in or out of doors. ER 644 (§ 10). Yet instead of discouraging mass protests or threatening to

[13] Sabrina Schnur, *Juneteenth rally, march on Las Vegas Strip draw scores of protestors*, Las Vegas Review-Journal (June 19, 2020), https://bit.ly/2NZ9Mlm.

disperse them based on the public-health risk, Governor Sisolak and Attorney General Ford encouraged the protestors, ER 161–64, 254–56, while intimidating places of worship that might consider "violat[ing] the governor's orders" by hosting large worship gatherings, *supra* p. 8 & n.6. The Governor then *personally participated* in a protest that violated his own directive, *supra*, p. 8 n.5, placing Nevada's unequal treatment of places of worship beyond doubt.

In sum, Governor Sisolak "exempts or treats more leniently . . . [ ]similar activities [to religious services] in which people . . . congregate in large groups [and] remain in close proximity for extended periods." *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring). And he does so even though most large, secular assemblies occur in Clark and Washoe Counties—the epicenter of Nevada's casinos, tourism, and COVID-19 outbreak—not in rural Lyon County where Calvary Chapel is located and the number of COVID-19 cases is small.[14] This "unequal treatment" violates the Free Exercise Clause. *Espinoza*, 2020 WL 3518364, at *5.

II. The Governor's directive violates the Free Speech Clause by favoring commercial over-noncommercial speech and the communication of secular perspectives over religious views.

For the reasons described above, the Governor's directive violates the Free Speech Clause by privileging commercial over non-commercial, religious speech and favoring the communication of secular perspectives over religious views. *Supra* Part I.A–F. This Court has long held that commercial speech occupies a "subordinate

[14] Nevada Dep't of Health & Human Servs., COVID-19 Data Dashboard, https://bit.ly/31X6kQr.

position in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). By empowering businesses like casinos, movie theaters, fitness classes, bars, theme parks, and bowling alleys to express commercial messages to larger in-person audiences than places of worship are allowed to communicate noncommercial, religious messages, the Governor's directive simply turns the First Amendment on its head.

"[A] free-speech clause without religion would be Hamlet without the prince." *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 760 (1995) (plurality opinion). The First Amendment strongly protects Calvary Chapel's noncommercial, religious messages, whereas secular business' commercial expression is "subject to greater governmental regulation." *Sorrell* v. *IMS Health, Inc.*, 564 U.S. 552, 579 (2011). Yet the Governor "inverts this judgment" by affording many secular businesses "a greater degree of [freedom to express] commercial" messages to live audiences than he affords places of worship to convey religious speech. *Metromedia*, 453 U.S. at 513. In so doing, the Governor "conclude[d] that the communication of commercial information . . . is of greater value than the communication of noncommercial messages," a value judgment the Free Speech Clause does not permit. *Ibid.* The Constitution forbids the Governor from privileging commercial messages about gambling, fitness, entertainment, and liquor over Calvary Chapel's fully-protected religious speech.

Religion is also a protected "viewpoint," *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 112 n.4 (2001), which the Governor treats worse than businesses'

commercial advertising and mass protestors' non-commercial standpoints. When state officials "favor[ ] some speakers over others [based on] a content preference," strict scrutiny applies. *Reed* v. *Town of Gilbert*, 576 U.S. 155, 170 (2015). Nevada officials blatantly demonstrated a preference for secular viewpoints here: they allow many businesses' for-profit inducements to thrive and applaud, encourage, and even participate in unlawful mass protests, all while threatening places of worship who refuse to play by their lopsided rules. *Supra* pp. 6–8 & nn.5–6.

Under the Free Speech Clause, state officials may not pick and choose what views are worth hearing in person, nor may they "select the permissible [standpoints] for public" discussion or "control [individuals'] search for . . . truth." *City of Ladue* v. *Gilleo*, 512 U.S. 43, 51 (1994) (cleaned up). Governor Sisolak cannot decide that proliferating commercial speech and secular protests is worth the cost and then deem communicating religious ideas less valuable or worthwhile. His discrimination against Calvary Chapel's broadcast of religious views palpably violates the First Amendment. *Rosenberger*, 515 U.S. at 830–31.

III. The Governor's reasons for treating secular assemblies and speech better than Calvary Chapel's religious gatherings cannot pass muster and amplify the violation of our fundamental law.

The Governor gave five main reasons for discriminating against Calvary Chapel's religious gatherings and speech below. All fail inspection and many amplify the Governor's violation of the First Amendment.

First, the Governor hints that religious gatherings are somehow riskier than the commercial assemblies that Directive 021 prefers. State Defs.' Opp'n 20. Not so.

An expert in infectious diseases testified on Calvary Chapel's behalf that "[t]here is no scientific or medical reason that a religious service that follows the guidelines issued by the CDC would pose a more significant risk of spreading SARS-CoV-2 than gatherings or interactions at other establishments or institutions." ER 105. He further testified that Calvary Chapel "intends to conduct its religious activities with precautions equal to or more extensive than those recommend by the CDC" and that "there is no scientific or medical reason to limit or restrict [the church']s religious activities but not similarly limit other gatherings or activities." ER 107. The Governor suggested Nevada's public health officials think differently, but gave no reason why. State Defs.' Opp'n 22. Nor could he after previously admitting that secular places like "gyms" and "fitness establishments," which now operate at 50% capacity, are exactly the sort of facilities that "promote extended periods of public interaction where the risk of transmission is high." ER 705 (§ 2).

Second, the Governor says he treats all "comparable mass gatherings" the same. State Defs.' Opp'n 1. What the Governor means is that Directive 021, § 10 limits all public gatherings to a maximum of 50 people if they are not specifically mentioned elsewhere. ER 644. Ignoring the directive's myriad exceptions for large, close, and prolonged secular assemblies—not to mention officials' effective exemption of mass protests—is irrational.

So the Governor backtracks to the argument that he treats a couple of comparable secular assemblies the same, and a few worse. State Defs.' Opp'n 4–5, 7, 17. By this logic the Governor could shut down every worship gathering in the state

as long as he barred live audiences at some disfavored secular assemblies (say, theater performances and concerts). That is plainly wrong. "[C]ategories of selection are of paramount concern when a law . . . burden[s] religious practice." *Lukumi*, 508 U.S. at 542. Directive 021 is "underinclusive" to a "substantial" degree, *id.* at 543, because it fails to impose a 50-person limit on a wide range of comparable-nonreligious assemblies "that endanger[ ] [the state's] interests in a similar or greater degree than" Calvary's Chapel's religious gatherings, *ibid*. That violates the Free Exercise Clause, which "bars even 'subtle departures from neutrality on matters of religion.'" *Masterpiece Cakeshop, Ltd*. v. *Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) (quoting *Lukumi*, 508 U.S. at 534).

Third, the Governor contends that commerce is different from worship. State Defs.' Opp'n 15, 18–20, 27. But in contending that religious services are not like "general commerce," "picking up groceries," or other "short [commercial] activities," *id.* at 1, 17, 19, the Governor attacks a straw man. None of Calvary Chapel's secular comparators focus on general shopping, during which the Governor claims "people do not congregate or remain for extended periods." *Id.* at 20. People in casinos, restaurants and bars, gyms and fitness facilities, theme parks, bowling alleys, and pools do congregate in large numbers, close together, for extended periods.

Nevada's focus on commerce is both typical and revealing. The Governor has stalwartly defended treating moneymaking better than faith. After lamenting Nevada's "economic sacrifices," State Defs.' Opp'n 1, and the state's "significant loss of life and business, *id.* at 3, lionizing gaming as "Nevada's most recognizable

industry," *id.* at 5, and declaring it "vital [to the] State's economy," the real logic behind Directive 021 is clear: State officials believe that for-profit assemblies are important and religious gatherings are not. But this just "devalues religious reasons for [congregating] by judging them to be of lesser import than nonreligious reasons" in violation of the Free Exercise Clause. *Lukumi*, 508 U.S. at 537.

Fourth, the Governor defends treating casinos and mass protests better than religious services. This argument is self-defeating. If it is worth allowing crowds to gather in close proximity for long periods for gaming and protests, it is worth permitting them to meet—socially distanced and faces covered—at Calvary's Chapel's religious services. The Governor cites the overall regulation of casinos as a talisman intended to ward off any comparison to churches. State Defs.' Opp'n 6–7, 22. Yet this token fails: the Governor did not cite any health and safety regulations that even purport to make casinos safer than places of worship. *Id.* at 7. General "regulatory control[s]" that bear no relation to preventing COVID-19 infections are beside the point. *Id.* at 22.

Fifth, Calvary Chapel's argument regarding mass protests is not based merely on state officials' "refusal to arrest protestors." State Defs.' Opp'n 24. The Governor and Attorney General could easily have agreed with protestors' message while discouraging their mass gatherings and non-social-distanced behavior. *Spell* v. *Edwards*, __ F.3d __, No. 20-30358, 2020 WL 3287239, at *4–5 (June 18, 2020) (Ho, J., concurring) (explaining the difference between tolerance and support); *Soos* v. *Cuomo*, No. 1:20-cv-651, 2020 WL 3488742, at *12 (N.D.N.Y. June 26, 2020)

(same). But they did no such thing. Governor Sisolak and Attorney General Ford did not just tolerate mass protests, they actively encouraged them, ER 161–64, 254–56, and in the Governor's case *personally participated* in one, *supra* p. 8 n.5, all while knowing that (1) such gatherings violate Directive 021, § 10 (ER 644), and (2) mass protestors do not socially distance or take many other recommended health precautions (ER 254).

When the government makes exemptions for secular reasons, it may not refuse an exemption "to cases of religious hardship without compelling reason." *Lukumi*, 508 U.S. at 537. "If protest are exempt from [strict numerical caps], then worship must be too." *Spell*, 2020 WL 3287239, at *5 (Ho, J., concurring). Governor Sisolak and Attorney General Ford cannot lawfully declare that "mass protests are deserving of preferential treatment." *Soos*, 2020 WL 3488742, at *12. Doing so "passes judgment upon or presupposes the illegitimacy of [Calvary Chapel's] religious beliefs and practices." *Masterpiece*, 138 S. Ct. at 1731.

Neither may state officials deem applying the directive to mass protests "not worth it" based on a comparative-harm analysis and then choose to apply the directive in full force to places of worship. App. A 8. The Governor's numerical limits severely harm Calvary Chapel's First Amendment rights. And state officials may not "devalue[ ]" or discount this religious harm as unimportant, while accommodating protestors' secular concerns. *Lukumi*, 508 U.S. at 537. "In these troubled times, nothing should unify the American people more than the principle

that freedom for me, but not for thee, has no place under our Constitution." *Spell*, 2020 WL 3287239, at *6 (Ho, J., concurring).

IV. *Jacobson* does not change the outcome.

The Governor asked lower courts to overlook his blatant First Amendment violation under *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905). Yet *Jacobson* does not change the constitutional analysis. *Spell*, 2020 WL 3287239, at *4 (Ho, J., concurring); *S. Bay United Pentecostal Church* v. *Newsom*, 959 F.3d 938, 942–43 (9th Cir. 2020) (Collins, J., dissenting). The Chief Justice's *South Bay* concurrence states well-trod, free-exercise rules. *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring). Only after applying those established principles did the Chief Justice cite *Jacobson* for the proposition that the "Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States." *Ibid.* (cleaned up).

That is undoubtedly true. Calvary Chapel agrees that Governor Sisolak has broad discretion to address the COVID-19 outbreak. He may constitutionally establish all manner of *evenhanded* limits on public gatherings. After all, *Jacobson* concerned a neutral, across-the-board vaccination requirement. 197 U.S. at 12–13. But what the Governor may not do is favor secular assemblies in COVID-19-ridden, urban areas by allowing many—if not most—of them to occur at 50% of building capacity, while sharply limiting gatherings at places of worship in rural counties with a small number of COVID-19 infections to 50 people max. That kind of measure "has no real or substantial relation to [public health], or is, beyond all

question, a plain, palpable invasion of rights secured by the fundamental law," in which case *Jacobson* held a regulation must fall under this Court's review. *Id.* at 31.

V. The Governor's directive fails strict scrutiny.

Because the Governor's Directive 021 discriminates against religious gatherings, promotes commercial over fully-protected religious speech, and favors the broadcast of secular over religious viewpoints, it must undergo strict scrutiny. The state must "prove that [its] restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed* v. *Town of Gilbert*, 576 U.S. 155, 171 (2015) (cleaned up). It cannot do so.

Nevada has no compelling interest in allowing 50%-occupancy assemblies at casinos, restaurants, bars, theme parks, and gyms (and no numerical limits on protests), but restricting gatherings at places of worship to 50 people. *S. Bay*, 140 S. Ct. at 1615 (Kavanaugh, J., dissenting from denial of application for injunctive relief). In fact, the state has given no sensible explanation for that disparity at all. A law "cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (cleaned up).

More narrowly-tailored means of furthering the state's legitimate public-health interests abound. Adopting a 50% occupancy rule for places of worship would burden religion to a far lesser degree. Or Nevada could evenhandedly place a numerical limit on all public assemblies. But whatever the state does, "the Constitution imposes one key restriction on that line-drawing: The State may not

discriminate against religion," *S. Bay*, 140 S. Ct. at 1615 (Kavanaugh, J., dissenting), by allowing secular assemblies and speech to "proliferat[e] . . . while strictly limiting" religious gatherings and expression, *Reed*, 576 U.S. at 172. The Governor "cannot claim that placing strict limits on [religious gatherings] is necessary to [protect the public health] while at the same time allowing [larger secular gatherings] that create the same problem." *Ibid.*

VI. Calvary Chapel meets all of the requirements for an injunction.

Because the Governor forbids Calvary Chapel from holding religious services "in a way that comparable secular businesses and persons can conduct their activities," Directive 021 harms the church's free-exercise and free-speech rights. *S. Bay*, 140 S. Ct. at 1615 (Kavanaugh, J., dissenting). And "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparably injury." *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976).

The balance of equities weighs heavily in Calvary Chapel's favor. If it is worth allowing large crowds to gather in close proximity for extended periods to enjoy non-constitutionally-protected activities at casinos, restaurants and bars, theme parks, gyms, bowling alleys, arcades, and pools, it is worth allowing people to gather at places of worship to engage in the constitutionally-protected free exercise of religion. Calvary Chapel asks for nothing the state does not already give to many for-profit businesses. It asks for no special favors and just "want[s] to be treated equally." *S. Bay*, 140 S. Ct. at 1615 (Kavanaugh, J., dissenting).

When it comes to the public interest, treating similarly situated secular and religious gatherings "in comparable ways serves public health interests at the same time it preserves bedrock free-exercise guarantees." *Roberts*, 958 F.3d at 416. Equal treatment is all that Calvary Chapel requests. So the public interest also weighs in the church's favor.

CONCLUSION

Calvary Chapel respectfully requests that this Court issue an injunction pending appellate review that allows the church to host religious gatherings on the same terms as comparable secular assemblies (at present, 50% fire-code capacity), with social distancing, face coverings, and other neutral and generally-applicable precautions in keeping with the church's comprehensive health and safety plan.

Respectfully submitted.

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CERTIFICATE OF SERVICE

A copy of this application was served by email and U.S. mail to the counsel listed below in accordance with Supreme Court Rule 22.2 and 29.3:

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APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

CALVARY CHAPEL DAYTON VALLEY Plaintiff(s), v. STEVE SISOLAK AARON FORD FRANK HUNEWILL Defendant(s).	Case No. 3:20-cv-00303-RFB-VCF **ORDER**

I. INTRODUCTION

Before the Court are Plaintiff Calvary Chapel Dayton Valley's ("Calvary" or "Plaintiff") Emergency Motions for a Temporary Restraining Order and Preliminary Injunction. ECF Nos. 9, 19. For the following reasons, the Court denies both motions without prejudice.

II. PROCEDURAL BACKGROUND

Plaintiff brought its initial complaint on May 22, 2020 and filed the operative amended complaint on May 28, 2020. ECF Nos. 1, 8. The complaint brought facial and as-applied First and Fourteenth Amendment challenges to Governor Sisolak's emergency directives in response to the COVID-19 pandemic. Id. Plaintiff filed a motion for a temporary restraining order and preliminary injunction on May 28 and May 29, 2020. ECF Nos. 9, 19. The Court denied Plaintiff's motion to consider the motions on an expedited basis. ECF Nos. 16, 23. Defendant Steve Sisolak responded to the motions on June 2, 2020. ECF Nos. 9, 19. Defendant Frank Hunewill joined Defendant Sisolak's response on that same date. ECF No. 32. Plaintiff filed a supplement to its motion on

June 4, 2020 and Defendant Sisolak responded on June 7, 2020. ECF Nos. 38, 39. The Court held a hearing on the motions on June 9, 2020. This written order now follows.

III. FACTUAL BACKGROUND

The Court makes the following findings of fact. Calvary Chapel Dayton Valley is a Christian church in Dayton, Nevada that has operated since February 5, 2006. Calvary believes that the Bible commands Christians to gather together in person for corporate prayer and worship. On March 16, 2020, in response to the ongoing coronavirus pandemic, Calvary suspended in-person worship services. However, Calvary sincerely believes that online services and drive-in services thwart the Bible's requirement of in-person services for corporate worship, and some church attendees do not have internet access and therefore are not able to participate in online services. Calvary therefore wishes to resume in-person services.

On May 26, 2020, Defendant Governor Sisolak announced that Nevada would enter "Phase Two" of its reopening. To that end, he issued Emergency Directive 021 on May 28, 2020 (hereinafter the "Emergency Directive" or "Directive"). The Emergency Directive permits several categories of business and social activity to resume, subject to different restrictions. For example, Section 10 of the directive prohibits gatherings in groups of more than fifty people in any indoor or outdoor areas. Emergency Directive 021, § 10. Communities of worship and faith-based organizations are allowed to conduct in-person services so long as no more than fifty people are gathered, while respecting social distancing requirements. Id. at § 11. Section 20 similarly limits movie theaters to a maximum of fifty people. Id. at §20. Section 35 of the Emergency Directive allows casinos to reopen at 50% their capacity and subject to further regulations promulgated by the Nevada Gaming Control Board. Id. at § 35.

IV. LEGAL STANDARD

The analysis for a temporary restraining order is "substantially identical" to that of a preliminary injunction. Stuhlbarg Intern. Sales Co, Inc. v. John D. Brush & Co., Inc., 240 F.3d 832, 839 n.7 (9th Cir. 2001). A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008). To obtain a preliminary injunction, a plaintiff must establish four elements: "(1) a likelihood of success on the merits, (2) that the plaintiff will likely suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in its favor, and (4) that the public interest favors an injunction." Wells Fargo & Co. v. ABD Ins. & Fin. Servs., Inc., 758 F.3d 1069, 1071 (9th Cir. 2014), as amended (Mar. 11, 2014) (citing Winter, 555 U.S. 7, 20 (2008)). A preliminary injunction may also issue under the "serious questions" test. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134 (9th Cir. 2011) (affirming the continued viability of this doctrine post-Winter). According to this test, a plaintiff can obtain a preliminary injunction by demonstrating "that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor," in addition to the other Winter elements. Id. at 1134-35 (citation omitted).

V. DISCUSSION

The Court denies the motions because it finds that Plaintiff has not demonstrated a likelihood of success on its First Amendment Free Exercise claim. The Court examines both the facial and as-applied challenges to the Emergency Directive. The Court incorporates by reference its findings made on the record, which shall be construed consistent with this written ruling.

a. Facial Challenge

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." Am. Family Ass'n, Inc v. City & Cty. of San Francisco, 277 F.3d 1114, 1123 (9th Cir. 2002) (citing U.S. Const. amend. I). A regulation or law violates the Free Exercise clause when it is neither neutral nor generally applicable, substantially burdens a religious practice, and is not justified by a substantial state interest or narrowly tailored to achieve that interest. Id. (citing Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 531 – 32 (1993)).

The Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." Jacobson v. Massachusetts, 197 U. S. 11, 38 (1905). When state officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." Marshall v. United States, 414 U. S. 417, 427 (1974).

The Supreme Court examined the relationship between COVID-19 related executive orders and the Free Exercise Clause in its recent order in South Bay United Pentecostal Church v. Newsom, No. 19A1044, 2020 WL 2813056 (May 29, 2020). In South Bay, the Supreme Court denied an application for injunctive relief enjoining enforcement of a portion of the California governor's executive order to limit the spread of COVID-19. Id. The order limited attendance at places of worship to 25% of building capacity or a maximum of 100 attendees. Id. at 1. The Supreme Court found that the restrictions appeared consistent with the Free Exercise Clause of the First Amendment. Id. Chief Justice Roberts first noted that "[s]imilar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for

extended periods of time." Id. Chief Justice Roberts then explained that the "[o]rder exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks or laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods." Id. Finally, Chief Justice Roberts concluded 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," and that when elected officials "act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." Id. (internal citations omitted). "When those broad limits are not exceeded, they should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence and expertise to assess public health and is not accountable to the people." Id. (internal citations omitted).

The Court finds the holding in South Bay applicable to this case and holds that the Emergency Directive is neutral and generally applicable and does not burden Plaintiff's First Amendment right to free exercise. Consequently, the Court finds that Plaintiff has not demonstrated a likelihood of success on the merits of its claim.

Calvary argues that the Defendants in this case, based upon the plain language of the Emergency Directive, have violated the First Amendment by 'exceeding the limits' of their authority during a public health crisis. Calvary bases its argument on alleged differential treatment between itself and other secular organizations/activities. Calvary points to several secular businesses that it insists engage in comparable activity in which people gather in large groups and remain in close proximity for large periods of time, including casinos, restaurants, nail salons, massage centers, bars, gyms, bowling alleys and arcades, all of which are allowed to operate at 50% of official fire code capacity. Calvary specifically focuses on casinos and includes photos in

its briefing of crowded casino gaming centers, after the state reopened them on June 4. Given that any social behavior increases the risk of covid-19 transmission, Calvary argues, there is no scientific or medical reason to distinguish between places of worship and other comparable activities.

The Court agrees that church services may in some respects be similar to casinos, in that both are indoor locations in which a large number of people may remain in close proximity for an extended period of time. The Court, however, disagrees that casinos are actually treated more favorably than places of worship. During this phased reopening of Nevada by the Governor, casinos are subject to substantial restrictions and limitations required by the Nevada Gaming Control Board which exist *in addition* to and in conjunction with the requirements and oversight provided by the Emergency Directive. See Emergency Directive, § 35; Addendum to April 21, 2020 Policy Memorandum posted May 29, 2020; 2020-30 Updated Health and Safety Policies for Reopening after Temporary Closure posted May 27, 2020; Health and Safety Policy for the Resumption of Gaming Operations Nonrestricted Licensees posted May 27, 2020; Procedures for Reopening after Temporary Closure Due to COVID-19 posted April 21, 2020, Gaming Control Board. Such additional regulatory policies set forth requirements related not only to the social distancing and placement of table games or slot machines in the casino, for example, but they also set forth requirements regarding training of the employees, financial operations and other internal operations of casinos. Id. These casinos are also subject to regular and explicit inspection of all aspects of the respective casino's reopening plan. Id. Indeed, gaming companies are one of the few categories of organizations in which the directive specifically discusses enforcement and punishment alternatives for violating the directive and concomitant promulgated regulations. Emergency Directive, §35. Casinos are therefore subject to heightened regulation and scrutiny

under these guidelines in comparison to churches, regardless of the difference in occupancy cap. The Court finds that while Calvary focuses on the fifty-person cap, it fails to consider the totality of restrictions placed upon casinos in their comparative analysis. Thus, even if the Court were to accept casinos as the nearest point of comparison for its analysis of similar activities and their related restrictions imposed by the Governor, the Court would nonetheless find that casinos are subject to much greater restrictions on their operations and oversight of their entire operations than places of worship.

The Court also finds that other secular entities and activities similar in nature to church services have been subject to similar or more restrictive limitations on their operations. The Court notes that church services consist of activities, such as sermons and corporate worship, that are comparable in terms of large numbers of people gathering for an extend period of time to lectures, museums, movie theaters, specified trade/technical schools, nightclubs and concerts. All of these latter activities are also subject to the fifty-person cap or remain banned altogether under Emergency Directive. See Emergency Directive, §§ 20, 22, 27, 30, 32. Given that there are some secular activities comparable to in-person church services that are subject to more lenient restrictions, and yet other activities arguably comparable to in-person church services that are subject to more stringent restrictions, the Court cannot find that the Emergency Directive is an implicit or explicit attempt to specifically target places of worship. Lukumi, 508 U.S. at 534 (striking down city council ordinance that specifically targeted and forbid animal sacrifices made by a particular religious group). Additionally, whether a church is more like a casino or more like a concert or lecture hall for purposes of assessing risk of COVID-19 transmission is precisely the sort of "dynamic and fact-intensive" decision-making "subject to reasonable disagreement," that the Court should refrain from engaging in. South Bay, 2020 WL 2813056, at * 1. As the Court

finds that the Emergency Directive is neutral and generally applicable, there is no facial Free Exercise challenge, and Calvary has therefore not demonstrated a likelihood of success on the merits of this claim.

b. As-Applied Free Exercise Challenge: Selective Enforcement

In its briefing Calvary also brings an as-applied challenge selective enforcement claim. Specifically, Calvary points to statements made by the Governor and the Attorney General regarding recent protests to argue that the section of the Emergency Directive banning more than fifty people from gathering, whether inside or outside, is not being enforced against secular activity. Calvary also includes photographs from casinos which appear to indicate violations of the social distancing requirements of the Directive and photos from Fremont Street in downtown Las Vegas in which it appears that far more than fifty people have gathered.

First, the Court is not persuaded that outdoor protest activity is similar to places of worship in terms of the nature of the activity and its ability to be regulated. Outdoor protests involve dynamic large interactions where state officials must also consider the public safety implications of enforcement of social distancing. That is to say that such enforcement could result in greater harm than that sought to be avoided by the Directive. The choice between which regulations or laws shall be enforced in social settings is a choice allocated generally to the executive, *not* the judiciary, absent clear patterns of unconstitutional selective enforcement.

Moreover, the Court finds that Calvary has not provided a sufficient evidentiary basis for its as-applied challenge. For a selective enforcement claim, it is not enough for Calvary to demonstrate that the directive is intermittently not being enforced against secular activities. Calvary must also demonstrate that Defendants are *only enforcing* the directive against places of worship. See Stormans, Inc v. Wiseman, 794 F.3d 1064, 1083 (9th Cir. 2015) (finding no evidence

of selective enforcement against religiously affiliated pharmacies in enforcement of drug delivery rules). The Plaintiffs have not presented evidence of such a pattern of selective enforcement. While images of crowded casinos attached to its submission may raise a potential future issue of selective enforcement, the Court must have more evidence than this to find a likelihood of success on the merits of a selective enforcement claim.

The Plaintiff's selective enforcement claim is premature. The story of the enforcement of these directives has yet to be written. Indeed, the primary official tasked with enforcing the Emergency Directive in Lyon County is the Lyon County Sheriff. Defendant Sheriff Frank Hunewill has indicated through counsel that he has no intention of using limited law enforcement resources to enforce the directive against Calvary or other places of worship. Calvary has presented no evidence indicating that it has been subject to actual enforcement by the Sheriff or any other law enforcement officer. Calvary therefore has not demonstrated a likelihood of success on the merits of its selective enforcement claim. If Calvary does in fact have evidence of selective enforcement against it, nothing in this order shall prohibit it from returning to the Court with that evidence and filing a new motion for a preliminary injunction.

/ / /

VI. CONCLUSION

IT IS THEREFORE ORDERED that Plaintiff's Emergency Motion for Temporary Restraining Order and Emergency Motion for Preliminary Injunction (ECF Nos. 9, 19) are DENIED.

IT IS FURTHER ORDERED that the Motion for Leave (ECF No. 41) is DENIED without prejudice. The Court does grant Plaintiff leave to file a new subsequent motion for injunctive relief in which it may provide more evidence for an as-applied challenge to the Emergency Directive. The Court finds that full briefing would be appropriate for consideration of any additional evidence presented by any party.

DATED June 11, 2020.

RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

CALVARY CHAPEL DAYTON VALLEY,

Plaintiff(s),

v.

STEVE SISOLAK, in his official capacity as Governor of Nevada;
AARON FORD, in his official capacity as Attorney General of Nevada; and
FRANK HUNEWILL, in his official capacity as Sheriff of Lyon County,

Defendant(s).

Case No. 3:20-cv-00303-RFB-VCF

ORDER

Plaintiff Calvary Chapel Dayton Valley moves this Court to stay the effect of its June 11, 2020 Order denying Plaintiff's Emergency Motions for a Temporary Restraining Order and Preliminary Injunction pursuant to Federal Rule of Appellate Procedure 8(a)(1) and Federal Rule of Civil Procedure 62(d). Fed. R. App. P. 8(a)(1); Fed. R. Civ. P. 62(d). Plaintiff has appealed the Court's Order, but also requests that the Court reconsider its prior denial of the Motion and issue an injunction. Ordinarily, "[w]hen a notice of appeal is filed, jurisdiction over the matters being appealed . . . transfers from the district court to the appeals court." Mayweathers v. Newland, 258 F.3d 930, 935 (9th Cir. 2001). Rule 62(d) however, provides an exception that allows parties who wish to stay or otherwise modify the effect of an injunction that is being appealed to move the district court to stay the effect of the judgment or order pending that appeal. Fed. R. Civ. P. 62(d); Mayweathers, 258 F.3d at 935.

The issuance of a stay is "an exercise of discretion" and not a "matter of right." Nken v. Holder, 556 U.S. 418, 433 – 34 (2009). "The party requesting the stay bears the burden of showing that the circumstances justify an exercise of that discretion." Id. at 434. In considering whether to grant a stay, the Court must consider "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Id. The first two factors are the most critical. Id.

The Court first notes that Plaintiff's motion should actually be construed as a motion for reconsideration. As the Court has not issued an injunction or otherwise ordered any particular action by any party, there is no conduct or action to be 'stayed.' And, as an appeal has been filed, it would not be appropriate for the Court to reconsider its order after the filing of the appeal, which divests this Court of jurisdiction. See City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper, 254 F.3d 882, 885 (9th Cir. 2001) ("As long as a district court has jurisdiction over the case, then it possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient.")(internal citations omitted).

However, even applying the stay analysis standard, the Court nevertheless denies Plaintiff's motion because Plaintiff has not demonstrated a strong showing of a likelihood of success on the merits of its claims. As the Court determined in its June 11, 2020 Order, Plaintiff has failed to demonstrate that the Emergency Directive with which it takes issue violates Plaintiff's First Amendment rights. Rather than repeat in detail that reasoning here, the Court simply incorporates by reference its June 11, 2020. Order Dated June 11, 2020, ECF No. 43, 4 – 9.

Moreover, the Court takes judicial notice[1] of recent developments and makes additional findings that further indicate that Plaintiff cannot demonstrate a strong showing of likelihood of success on the merits. First, much of Plaintiff's argument has focused on Defendants' treatment of casinos, which Plaintiff argues are not subject to the fifty-person cap, in an example of preferential treatment given to secular spaces over religious ones. But, as the Court stated in its prior Order, the regulatory regime to which casinos are subject is much more intrusive and expansive—and subject to sudden modification—than the regulatory regime applied to places of worship. To this point, just two days ago, on June 17, 2020, the Nevada Gaming Control Board issued Notice # 2020-43, which, among other changes, now requires *all patrons of casinos to wear face coverings at table and card games* if there is no barrier, partition, or shield between the dealer and each player or other person within six feet of the table. See Updated Health and Safety Policies for Reopening After Temporary Closure, Nevada Gaming Control Board, https://gaming.nv.gov/modules/showdocument.aspx?documentid=16837 (last accessed June 18, 2020). This updated regulation will result in a substantial number of patrons at gaming establishments having to wear face coverings while in the common gaming area of such establishments. The Governor did not modify his prior Emergency Directive to require face coverings for individuals who go to places of worship and participate in religious services. Thus, the Court finds that casinos are now subject to some more severe restrictions on their activities than are places of worship. Moreover, the Court reiterates the point that the Court made in its prior Order—that "while Calvary focuses on the fifty-person cap, it fails to consider the totality of restrictions placed upon casinos [and other entities] in [its] comparative analysis." Order Dated

[1] See Fed. R. Evid. 201(b); (d) (court may, at any stage of the proceeding, judicially notice facts not subject to reasonable dispute if those facts are not subject to reasonable dispute and from sources whose accuracy cannot reasonably be questioned).

June 11, 2020, ECF No. 43, at 7. That the Nevada Gaming Control Board suddenly changed its regulations is also another example of the dynamic nature of public health regulations during this time period and the need for the Court to exercise restraint. The Court emphasizes that the Emergency Directive must be considered in light of the various measures it imposes and all the various social activities that it covers.

The Court also takes judicial notice of the fact that Nevada just yesterday experienced a record-breaking day of increased viral infections. See Mike Brunker, Nevada Adds 410 New COVID-19 Cases, Clark County More Than 300,(June 19, 2020, 8:22 AM) https://www.reviewjournal.com/news/politics-and-government/clark-county/nevada-adds-410-new-covid-19-cases-clark-county-more-than-300-2056621/ (last accessed June 19, 2020). As the Court previously found and continues to find, Plaintiff's requested relief would require the Court to engage in potentially daily or weekly decisions about public health measures that have traditionally been left to state officials and state agencies with expertise in this area. The Plaintiff asks to the Court to intercede as to one measure, yet this one measure is part of a whole scheme of regulations imposed and monitored by state officials. The Court does not find a basis to do so at this point. See generally, Armstrong v. Davis, 275 F.3d 849, 872 (9th Cir. 2001)(noting that courts should be cautious about imposing injunctive relief that requires the "continuous supervision" of state officials) abrogated on other grounds by Johnson v. California, 543 U.S. 499 (2005).

Additionally, the recent update in the regulations regarding casinos also undercuts Plaintiff's as-applied challenge. No similar additional regulations have been placed on places of worship. It is difficult to establish a pattern of selective enforcement directed towards places of worship when new, more restrictive measures have been imposed against secular activities and no similar restrictions were imposed on religious activities.

The Court further does not find that Plaintiff has established irreparable injury if the stay is not granted. Although a constitutional violation is an irreparable injury, Plaintiff has not demonstrated that its constitutional rights have been violated. Furthermore, as the Court already discussed in its prior Order, Plaintiff has submitted no evidence of enforcement of the ordinance against it with regard to its as-applied challenge.

Finally, the Court finds that the public interest and the harm to the opposing party weigh in favor of allowing the Court's order to proceed. There is a strong public interest in Defendants enforcing their regulations regarding the COVID-19 pandemic, and absent a showing that doing so violates a person's rights, Defendants should be allowed to proceed unimpeded.

For all of the reasons stated,

IT IS THEREFORE ORDERED that Plaintiff's Motion for An Injunction (ECF No. 47) is DENIED.

DATED: June 19, 2020.

RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE

APPENDIX C

FILED

JUL 2 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CALVARY CHAPEL DAYTON VALLEY, Plaintiff-Appellant, v. STEVE SISOLAK, in his official capacity as Governor of Nevada; et al., Defendants-Appellees.	No. 20-16169 D.C. No. 3:20-cv-00303-RFB-VCF District of Nevada, Reno ORDER

Before: THOMAS, Chief Judge, and SCHROEDER, Circuit Judge.

Appellant's emergency motion for injunctive relief pending appeal (Docket Entry No. 9) is denied. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *see also South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020).

The previously established briefing schedule remains in effect.

DA/MOATT