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**Admitted pro hac vice*

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CALVARY CHAPEL DAYTON VALLEY,

Plaintiff,

v.

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

Defendants.

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

PLAINTIFF'S SUPPLEMENT TO DEFENDANTS' RESPONSE TO EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

While Defendants argue that *Jacobson* and *South Bay* control, neither case grants state officials license to treat religious exercise unequally to comparable secular activities. In fact, Chief Justice Roberts' concurring opinion in *South Bay* reaffirms that the government cannot restrict church services while "exempt[ing] or treat[ing] more leniently" similar "secular gatherings" where "large groups of people gather in close proximity for extended periods of time." *South Bay United Pentecostal Church v. Newsom,* --- S. Ct. ----, 2020 WL 2813056 at *1 (U.S. May 29, 2020). Yet that is precisely what the Governor's Church Gathering Ban in Directive 021 (the Directive) does; it is packed with examples of the Governor's unequal treatment of houses of worship.

Remarkably, Defendants say *nothing* about the comparators the Church raises in its motion for preliminary injunction—casinos, restaurants, bars and taverns, gyms and fitness centers, aquatic facilities, swimming pools, water parks, indoor malls, bowling alleys, and arcades. Instead, Defendants create and then attempt to knock down an argument that the Church does not make: religious services are like point-of-sale retail transactions where people enter a building quickly and leave once they have completed their tasks. Defendants do so to benefit from the Chief Justice's suggestion that religious services may be unlike "operating grocery stores, banks, and laundromats, in which people neither congregate nor remain in close proximity for extended periods." *Id.* at *1.

But the Chief Justice said that religious services are comparable to secular gatherings "where large groups of people gather in close proximity for extended periods of time." *Id.* at *1 (Roberts, C.J.). It's no wonder then why Defendants have avoided any mention that the Directive allows casinos, restaurants, food establishments, bars, taverns, gyms, fitness centers, aquatic facilities, swimming pools, water parks, indoor malls, bowling alleys, and arcades to reopen at up to 50% of their official capacities. Meanwhile, the Directive's Church Gathering Ban

arbitrarily caps church attendance at 50 people regardless of the size of a church's facility and the congregants' ability to socially distance at church just like they do elsewhere.

Here, Calvary Chapel simply asks for the bare minimum required under the First Amendment: that its worship services be treated no worse than comparable secular activities.

A. The Directive Is Neither Neutral nor Generally Applicable; Strict Scrutiny Therefore Applies.

Defendants acknowledge that "[r]elevant evidence" of a law's general applicability or neutrality "can include a proscription of religious activity in a way not applied to comparable secular activity." R. 29, p. 13. "To be comparable," Defendants recognize, "the secular conduct must 'endanger the government's interests in a similar or greater degree than' the religious conduct." *Id.* at 14 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993)). But Defendants ignore the relevant secular conduct here.

1. The Directive is chalked full of examples of the Governor allowing groups of people to gather in close proximity for extended periods of time.

The Directive's unconstitutionality is perhaps most apparent when comparing the Church Gathering Ban to the Directive's treatment of gaming venues holding nonrestricted licenses (*e.g.*, casinos).[1] Under the Directive and related guidance, casinos can reopen at up to 50% official capacity. *See* Ex. 15, § 35;

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[1] There are two types of gaming establishments in Nevada: non-restricted and restricted. *See* Nev. Rev. Stat. §§ 463.0177, 463.0189. Nonrestricted licenses are issued to venues, like casinos, that operate 16 or more slot machines, or any number of slot machines together with any other game, including a table game, race book, or sports pool, at a single establishment. Restricted gaming is limited to 15 or fewer slot machines and no other games where gaming is incidental to the primary business (*e.g.*, a bar or convenience store).

Ex. 16.[2] They do not face an artificial hard cap of 50 people like churches. Were Calvary Chapel to be treated the same—up to 50% capacity, while observing proper social distancing—it could increase its service attendance by 80%, from 50 people per service to 90 people. *See* R. 9-1, Leist Declaration, ¶ 31.

But the Governor unfairly prohibits the Church from doing so. And the disparity between how the Directive treats Calvary Chapel and other places of worship in comparison to casinos is stark. The Church modestly seeks to open its doors to up 90 worshippers for each socially distanced service. In contrast, when casinos opened their doors at 12:01 a.m. on June 4, the scene looked like this:

Ex. 39.

[2] The exhibits to this filing begin with Exhibit 15. Exhibits 1 through 14 are found at R. 8-2 through R. 8-15.

And this:

And this:

Exs. 40 and 41.[3]

[3] *See* https://twitter.com/mickakers/status/1268439955212079104. Video also available at https://vimeo.com/426060346/e11e5bb8b0.

And unlike Calvary Chapel, which has offered to strictly limit its socially distanced services to 45 minutes, *see* R. 9-1, ¶ 32, there is no limitation on a casino's hours of operation or on how long patrons may sit at a gaming table or slot machine. According to a survey by the Las Vegas Visitors and Convention Authority, 74% of visitors to Las Vegas in 2018 gambled, and on average those tourists who gambled spent 2.2 hours each day doing so. *Las Vegas Visitor Profile Study* 9, 41 (2018), attached as Ex. 19. With an average visit of nearly four and a half days, *id.* at 30, the average Las Vegas tourist in 2018 who gambled gathered with other patrons in a casino nearly 10 hours in less than a week. The 2018 numbers for Laughlin, Nevada, were even higher: 97.8% visitors gambled, they spent on average 5.1 hours gambling each day, and their average stay was 4.4 days. *Laughlin Visitor Profile Study* 29, 39 (2018), attached as Ex. 20; *see also Mesquite Visitor Profile Study* 26, 38 (2018) (75% visitors gambled, averaging 3.0 hours of gambling per day and a 2.8-day stay), attached as Ex. 21.

And there is no reason to think that hours-long gambling sessions have not recommenced now that, for example, MGM Resorts and Caesars Entertainment have collectively reopened six of their Strip resorts. *See* Howard Stutz, *Vegas Reopens: Big Events Key in Helping Strip Casinos 'Pivot to Prosperity*,' The Nevada Independent (June 1, 2020) (reporting MGM and Caesars are reopening six of 18 resorts), attached as Ex. 22. So one can now "[w]ander through a casino at almost any hour" and see patrons "transfixed before the machines" or sitting at gaming tables for hours at a time. John Rosengren, *How Casinos Enable Gambling Addicts*, The Atlantic 23 (Dec. 2016), attached as Ex. 23. Yet, under the Governor's Phase 2 edict, the same hypothetical observer cannot join 50 people at a church service irrespective of the church's physical size, its social distancing protocols, or the comparatively limited duration and infrequency of its gatherings.

The comparison of houses of worship to casinos alone shows that the Directive treats religious worship worse than comparable secular activities. But the comparators do not end there. Also operating at up to 50% capacity during Phase 2 are restaurants, bars, gyms, fitness centers, aquatic facilities, swimming pools, water parks, indoor malls, bowling alleys, and arcades. Ex. 15, §§ 17, 18, 20, 25, 26, 28, 29; *see also* R. 8-12, Ex. 12, § 17 (Directive 018 opening restaurants to 50% capacity). Those venues, like casinos, are also places "where large groups of people gather in close proximity for extended periods of time." *South Bay*, 2020 WL 2813056, at *1 (Roberts, C.J.).

Moreover, Defendants wrongly assert that all non-retail indoor venues—*e.g.*, movie theaters, bowling alleys, and arcades—are limited to the lesser of 50% of their official capacity or 50 people. *See* R. 29, p. 6. The Directive states otherwise. *See* Ex. 15, § 20. Of those businesses falling within the non-retail indoor category, only movie theaters are subject to the 50-person cap. *Id.* And even then, the movie-theater limit is 50 people *per screen*—another accommodation that the Governor has not afforded houses of worship even though they too can have multiple seating areas and rooms. *See* Ex. 18, p. 32. "All other" non-retail indoor venues, including bowling alleys and arcades, may operate up to 50% of their official capacity, so long as they follow social distancing protocols. *Id.*

Defendants fail to mention casinos, bars, taverns, restaurants, gyms, fitness centers, bowling alleys, arcades, and so on because they are undeniably places "where large groups of people gather in close proximity for extended periods of time." *South Bay*, 2020 WL 2813056, at *1 (Roberts, C.J.). They are also venues that Nevada undeniably treats better than houses of worship.

2. The selective enforcement of the ban on gatherings of more than 50 people further highlights the state's preferential treatment of similar secular conduct.

The evidence of the state's preferential treatment of comparable secular activity is not limited to the Directive. It also includes the Governor and Attorney General's selective enforcement of the Directive's 50-person-gathering ban and their promotion of activities that they know violate the ban. In response to the tragic killing of George Floyd, Nevadans gathered in the hundreds on Saturday, May 30, 2020. While the Church agrees that Nevadans should be free to exercise their First Amendment rights to peacefully assemble and protest, the Governor's Directive prohibits the "general public" from "gather[ing] in groups of more than 50 in any indoor or outdoor area . . . ." Ex. 15, § 10.

Rather than enforce (or even remind the public) of this prohibition, however, the Governor explicitly supported what the Directive declares unlawful:

See Ex. 24. And he retweeted a video supporting the hundreds of protesters that gathered closely together in violation of the Directive:

See Ex. 25.

The Governor is not alone in condoning violations of the Directive. Attorney General Ford has done so, too. In a June 3, 2020, Tweet in which he embedded a publication from his office about demonstrations and protests, the Attorney General reminded Nevadans of their important free-speech and assembly rights under the under the Constitution. *See* Exs. 42, 43. In inviting Nevadans to exercise their speech and assembly rights during this turbulent time, he only tepidly reminds them "to do your best to comply with #COVID19 guidelines with social distancing and wearing a mask." Ex. 42. And his Tweet and publication are noticeably silent about the Directive's 50-person-gathering ban, which does not call upon Nevadans to merely do "their best," but is a law that prohibits them from gathering in groups larger than 50.

Again, the Church supports Nevadans' First Amendment rights to peacefully assemble and protest. But the First Amendment also protects the right to worship. And it is a bedrock constitutional principle that the enforcement of the Directive's gathering ban cannot depend on the *reason* for the gathering. *See e.g.*, *Nat'l Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) ("content-based" regulations are "presumptively unconstitutional" because they violate the "fundamental principle that governments have no power to restrict expression because of its message, its ideas, its subject matter, or its content") (internal quotations omitted). Whether in the Governor's or Attorney General's eyes one person's cause for gathering is noble, while another person's cause is not, makes no difference under the Constitution.

3. Houses of worship are no more at risk for transmission of COVID-19 than casinos, restaurants, bars, gyms, and other similar venues.

The Governor supposedly believes that those who gather in houses of worship pose a unique threat of transmitting COVID-19. *See* R. 8-14, p. 13 (claiming that "houses of worship" are "hotspots for COVID-19 transmission"). The Governor is mistaken; churches do not deserve to be singled out. The media have reported on COVID-19 outbreaks and exposure in salons and barbershops, manufacturing facilities, food-processing plants, and farms, among other businesses. *See* Exs. 26-37. The fact is, when people gather—regardless of *where* they gather—there is a risk a person or persons are infected and will transmit COVID-19.

Not surprisingly, then, the Governor's demarcation between houses of worship and those venues like casinos that can operate up to 50% capacity has no scientific support. As noted by Timothy Flanigan, M.D., an expert in treating and fighting the spread of infectious diseases (including pandemic diseases) and who is

familiar with the novel coronavirus, SARS-CoV-2, "*any* social interaction between people necessarily subjects people to *some* risk of potential spread of SARS-CoV2 if one of the individuals is actively infected with COVID-19." Ex. 44, Flanigan Decl., ¶ 20 (emphasis in original). However, because the CDC's guidelines and protective measures "apply equally in all settings where multiple people are gathered or are in close proximity and contact," *id.* ¶ 25, Dr. Flanigan explains 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." *Id.* ¶ 27. Thus, so long as CDC guidelines are followed, there is no "scientific or medical reason to limit the number of persons" at Calvary Chapel's worship services "while not imposing the same restrictions" on the businesses and activities identified above. *Id.* ¶¶ 34, 35.

* * * *

Because the Directive is neither neutral nor generally applicable, strict scrutiny applies. And for the reasons in the Church's memorandum in support, *see* R. 9, pp. 17-19, the Church Gathering Ban fails strict scrutiny.

B. *Jacobson* Does Not Give the Government License to Treat Churches Worse Than Casinos and Other Comparators.

Citing *Jacobson*, Defendants contend that strict scrutiny does not apply because the Directive is an exercise of the Governor's emergency police powers. R. 29, p. 9; *see also id.* at 8-12. But *Jacobson*—even assuming it applies outside the context of substantive due process—applies to a free-exercise claim only when the state's exercise of police powers is neutral and generally applicable.

In *Jacobson*, the Supreme Court affirmed a five-dollar criminal fine imposed on a Cambridge, Massachusetts resident who refused to comply with the city's mandatory vaccination regime, which was enacted in response to a smallpox

outbreak. 197 U.S. at 13, 39. The Court, in holding that the mandatory vaccination was within the state's police power, rejected Jacobson's claim that the Fourteenth Amendment's guarantee of "liberty" entitled him to an exemption that the law gave to no one else. *Id.* at 38. The Court explained, however, that there was a constitutional check on the state's police powers: "if a statute purporting to have been enacted to protect the public health, the public morals, or public safety, has no real or substantial relation to those objects, or is beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the court to so adjudge." *Id.* at 31. And under the Free Exercise Clause, the state's police powers do not give it license to permit "nonreligious conduct that endangers" the state's interest "in a similar or greater degree" as prohibited religious conduct. *Lukumi*, 508 U.S. at 543. "The Free Exercise Clause protects religious observers against unequal treatment." *Id.* (citation, quotation marks, and brackets omitted).

The Massachusetts statute and related Cambridge regulation mandating vaccination were neutral and generally applicable; the requirement applied to *all* adults. *Jacobson*, 197 U.S. at 12. Neither *Jacobson*, nor any court applying *Jacobson*, has held that a public health crisis or a state's police powers empowers the government to enact measures that treat religious and comparable secular conduct differently. Instead, the basic principle of *Jacobson* is that the government, using its police powers, may respond to emergencies so long as it acts reasonably and does not single out rights or persons for disfavored treatment.

The Chief Justice's concurring opinion in *South Bay* reinforces that principle. Indeed, even though the Chief Justice recognized the states' broad police powers, he still examined whether the California and county orders "exempt[ed] or treat[ed] more leniently" "comparable secular gatherings." 2020 WL 2813056, at *1. He therefore recognized that the critical question is whether the law treats

religious and comparable secular conduct equally. *See Lukumi*, 508 U.S. at 543. As detailed above, the Directive fails that basic test.

C. The Remaining Requirements for a Preliminary Injunction Favor the Church.

Defendants contend that there is no irreparable harm because "[s]imply doubling the number of existing church services would allow Calvary to conduct in-person church services for its entire congregation." R. 29, p. 18. But treating Calvary Chapel's worship services worse than gatherings at casinos and other secular businesses is a First Amendment violation. And "the deprivation of First Amendment freedoms . . . unquestionably constitute irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Moreover, Defendants have misread Pastor Leist's declaration. *See* R. 9-1, ¶ 27 (explaining that following the Directive's hard cap of 50 people would require as many as 10 to 13 Sunday services).

About the balance of equities, Defendants contend that Calvary Chapel "presumes it should be treated the same as businesses operating in commerce." R. 29, p. 18. If by "businesses operating in commerce" Defendants mean casinos, restaurants, bars, gyms, arcades, bowling alleys, and the like where people congregate for extended periods of time next to one another, they are correct. Placing a flat ban on churches that are adhering to the same social distancing protocols as these venues serves no legitimate government interest.

CONCLUSION

For these reasons and those in the Church's supporting memorandum, Plaintiff Calvary Chapel Dayton Valley requests that this Court grant the motion for preliminary injunction and allow the Church to resume in-person worship services, in compliance with appropriate social distancing and health guidelines.

Submitted this 4th day of June, 2020.

/s/ Ryan J. Tucker

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CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2020, I caused the foregoing Plaintiff's Supplement to Defendants' Response to Emergency Motion for Preliminary Injunction to be filed with the Clerk of the Court using the ECF system, which will provide electronic copies to counsel of record.

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