No. 20-16169

IN THE 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; AARON FORD, in his official capacity as Attorney General of Nevada; FRANK HUNEWILL, in his official capacity as Sheriff of Lyon County,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Nevada
Civil Case No. 3:20-cv-00303-RFB-VCF
Hon. Richard F. Boulware, II

APPELLANT'S REPLY BRIEF

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INTRODUCTION

This is a straightforward case. "The Free Exercise Clause protects religious observers against unequal treatment." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (cleaned up). Under Directive 021, huge numbers of people—up to 50% fire-code capacity—can gather daily for hours in casinos, restaurants, bars, gyms, fitness centers, bowling alleys, indoor theme parks, and more. Addendum to Opening Brief ("A.") 11–17 (§§ 20–22, 25, 26, 28, 29). Yet the same directive prohibits religious organizations from holding gatherings of more than 50 people, no matter how big their facilities are or what safety measures they take. *Id.* at 8 (§ 11). So if a casino and a church both have capacity for 2,000, the casino can entertain 1,000 gamblers while the church can only host 50 of its faithful for worship. Such unequal treatment requires strict scrutiny, yet the Governor does not try to offer a compelling justification for the unequal treatment.

And this is not just a 14- or 30-day temporary, emergency measure. The Governor imposed the 50-person cap on religious gatherings in late May 2020 under Directive 021. A. 8 (§ 11). That was after more than two months of barring houses of worship from holding any indoor gatherings. ER 705 (Directive 003 (§ 1)). A month later, the Governor extended the 50-person limit for another month. CA9 ECF 23, Ex. 2 (Directive 026). And now, under the most recent directives,

Directives 029 and 030, the 50-person cap on religious gatherings "remain[s] in effect until terminated," as Nevada "mov[es] to a new normal."[1] Restricting religious gatherings for more than five months, with no end in sight, is not a rapidly changing, temporary measure that deserves substantial deference. It is government overreach in clear violation of constitutional principles.[2]

The "new normal" is, at best, a continued 50-person limit on religious gatherings. Unlike their secular comparators, houses of worship have no hope under the "new normal" of holding gatherings under the 50% rule, no matter what statewide or local COVID-19 metrics show. Instead, religious organizations live under the unending mandate of reduced service sizes, New Normal Plan 3–7, and even the threat of "re-clos[ure]," State Appellees Brief ("Nev.Br.") 2.

Rather than offer a compelling reason for the differential treatment of religious and secular assemblies, the Governor claims that the 50-person limit on religious gatherings would be constitutional even under "an ordinary exercise of [his] police power." Nev.Br. 12. That's

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[1] Governor Sisolak, COVID-19 Declaration of Emergency Directive 029 (July 31, 2020), https://bit.ly/2Qne2w6 (viewed Aug. 25, 2020); Governor Sisolak, COVID-19 Declaration of Emergency Directive 030 (Aug. 14, 2020), https://bit.ly/3j98Eck (viewed Aug. 25, 2020); *Road to Recovery: Moving to a New Normal* (Aug. 3, 2020) ("New Normal Plan"), https://bit.ly/2Ett9C3 (viewed Aug. 25, 2020).

[2] Even if the Governor were to lift the restriction, the Governor's past violation of Calvary Chapel's constitutional rights would require entry of a judgment with a nominal-damages award. *E.g.*, *Schneider v. Cty. of San Diego*, 285 F.3d 784, 794 (9th Cir. 2002) (collecting cases).

alarming. If the Governor believes the First Amendment does not prohibit him from limiting the size of religious gatherings under an ordinary exercise of police power, the implication of how he views his authority during a public health emergency is clear: It's absolute.

But of course, "a public health emergency does not give Governors and other public officials *carte blanche* to disregard the Constitution for as long as the medical problem persists." *Calvary Chapel Dayton Valley v. Sisolak*, ___ S. Ct. ___, 2020 WL 4251360, at *2 (July 24, 2020) (Alito, J., dissenting from denial of application for injunctive relief). And none of the authorities the Governor relies on says otherwise. That includes the Chief Justice's concurring opinion in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), and the Supreme Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

Equally astounding is the Governor's claim that allowing houses of worship to operate under the 50% rule would "hamstring" public health efforts. Nev.Br. 14. He leaves to imagination what "best currently available data" support that view. *Id.* at 3. A casino entertaining 1,000 gamblers has no impact on public health while Calvary Chapel increasing its service size from 50 people to 90 would cripple the State's health effort? The Governor does not even try to justify that position, because it defies reason. And the Constitution.

The Governor's differential treatment of religious gatherings and secular assemblies has little to do with an "assessment of risk." Nev.Br.

34. Instead, it has everything to do with Nevada's "person-based tourism economy." D.Nev. ECF 29 at 7. There's no dispute that the Governor is free to loosen his grip on the State's economy. "But there is no world in which the Constitution permits [him] to favor Caesars Palace over Calvary Chapel." *Calvary Chapel*, 2020 WL 4251360, at *6 (Gorsuch, J., dissenting from denial of application for injunctive relief).

The Governor does not deny that large, close groups gather for hours at casinos and the many other facilities that Directives 021, 029, and 030 exempt from the 50-person gathering ban. Instead, he resorts to word play, claiming he treats all "mass gatherings" the same and "mass gatherings are different than commercial activities." Nev.Br. 7, 21. But a person feeding tokens into a slot machine, catching a dinner show at a casino restaurant, spinning on a stationary bike at the gym, or waiting to hop on a ride at an indoor amusement park doesn't make the hundreds or thousands of other people—doing the same thing, at the same time, at the same place, for long periods—vanish.

The State also misreads the record. For example, it has repeatedly claimed that the directives limit gatherings at movie theaters to 50 people. *E.g.*, Nev.Br. 7. But official Nevada guidance makes clear that the 50-person limit on theaters is a per-screen limit. Similarly, the State has represented several times that the directives prohibit spectators "entirely" at live entertainment events. *E.g.*, *id.* at 8. But the record shows otherwise:

Las Vegas lounge scene revived in COVID-19 reopening

ER 85; *see also id.* at 89–90 (live acts on the Midway).

The most logical reason for repeating those claims is that the Chief Justice's concurring opinion in *South Bay*—the opinion on which the State hangs its hat—recognizes that gatherings at movie theaters and live entertainment events are like gatherings at houses of worship; consequently, the state must treat them the same. *See S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring in the denial of application for injunctive relief). Treating movie theaters or live entertainment at casinos better than religious gatherings is indefensible. So the State keeps peddling the incorrect view that the directives treat those assemblies the same as or worse than religious gatherings.

The State goes beyond strained reasoning and facts in defending the Governor's unconstitutional treatment of houses of worship. It also misreads case authority (*e.g.*, *South Bay* and *Jacobson*) and conflates the high standard for obtaining an emergency injunction in the Supreme Court with the commonly applied and clearly established preliminary injunction standard this Court applies. But despite the State's efforts, it cannot escape the conclusion that the directives treat comparable secular assemblies better than religious gatherings.

The directives thus warrant strict scrutiny under the Free Exercise Clause. They also warrant strict scrutiny under the Free Speech Clause because they favor secular expression—*e.g.*, secular expression at mass protests and casino shows and calls to spend money on gambling and other entertainment—over religious expression in houses of worship. And upon recognizing that strict scrutiny applies, the Governor's 50-person limit on religious gatherings folds. And as for the other requirements for a preliminary injunction—irreparable harm, the balance of equities, and the public interest—the months' long deprivation of Calvary Chapel's fundamental rights easily meets those marks. Opening Brief ("Op.Br.") 51–52.

This Court should not flinch in reversing the district court. "There are certain constitutional red lines that a State may not cross even in a crisis." *Calvary Chapel*, 2020 WL 4251360, at *11 (Kavanaugh, J., dissenting from denial of application for injunctive relief). Those lines

include "religious discrimination[ ] and content-based suppression of speech." *Id*. The Governor's directives cross both.

The outbreak that the Governor relies on to justify his unequal treatment of religious gatherings and his preference for secular speech does not relieve a court of its responsibility to scrutinize the directives. In fact, government action during an emergency requires the closest of judicial scrutiny because it is during a crisis that even the most well-intentioned government is prone to violating fundamental rights. *See id.* ("This Court's history is littered with unfortunate examples of overly broad judicial deference to the government when the government has invoked emergency powers . . . .").

Here, the Governor's directives place religious gatherings and viewpoints on worse footing than their secular counterparts and do so without sufficient justification. These constitutional violations demand this Court's intervention.

ARGUMENT

The Governor has had months to refine the rules, including more than three months since Calvary Chapel sued and pointed out Directive 021's unequal treatment of religious gatherings and speech. But rather than fix their inequalities, the Governor has not only doubled down on the discrimination against religious organizations, as his answering brief tells, but has described this treatment as the "new normal" with no end date in sight.

All Calvary Chapel requests is the ability to meet under the 50% rule like the many other comparable secular gatherings that have been doing so for months. Stopping unequal treatment of religious gatherings and expression is not, as the Governor claims, "overly intrusive." Nev.Br. 32. Nor would granting Calvary Chapel's requested relief require any court to supervise the Governor's every move, as he portends.[3] *Id.* The church only requests equal treatment. The Governor need only give Calvary Chapel the same right to meet and proclaim its viewpoints that he extends to comparable secular gatherings. Yet he continues to defy those constitutional requirements.

Without judicial intervention, the Governor's unequal treatment of religious organizations "shall remain in effect" with no end date. Directive 029 (§ 8); Directive 030 (§ 14).

I. The Governor's answering brief confirms the free-exercise violation.

The Governor's answering brief proves that Nevada treats secular assemblies better than religious gatherings, that the Governor's oft-repeated "mass gathering" and "commerce" labels are meaningless, and that none of the State's justifications for disfavoring religion make

[3] Sheriff Hunewill opposes a preliminary injunction only if it would limit his ability "to address the specific needs of his community during the evolving Covid-19 situation." Hunewill Br. 6. Preliminarily enjoining the unconstitutional, 50-person limit on religious gatherings would not limit the Sheriff's ability. As the Sheriff requests, he would remain free "to enforce non-discriminatory, neutral measures . . . to protect the community." *Id.* at 5.

sense. Rather than dispel the free-exercise violation described in Calvary Chapel's opening brief, the Governor's answering brief amplifies it.

A. Nevada treats comparable secular assemblies better than religious gatherings.

The Governor claims that he treats gatherings at houses of worship the same as (or better than) "comparable mass gatherings." Nev.Br. 3. That argument is baffling until the Governor clarifies that "all mass gatherings," *id.* at 26, means only a tiny subset of large assemblies. What the Governor means by "mass gatherings generally," *id.* at 7, are the handful of assemblies that he has not exempted from Nevada's 50-person gathering cap. A. 8 (§ 10). So "mass gatherings" is just shorthand for "non-privileged assemblies."

The 50-person gathering ban is anything but a generally applicable rule that covers all comparable gatherings. Instead, the directives are rife with exempted gatherings. And "categories of selection"—not semantics—are of "paramount concern when a law . . . burden[s] religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993). Calvary Chapel's opening brief explains that overlooking the Governor's many explicit and real-life exemptions for large, close, and prolonged secular assemblies is irrational. Op.Br. 41–42.

The Governor next cites three types of secular assemblies that are (at least nominally) subject to a 50-person cap: (1) indoor movie theaters, A. 11 (§ 20); (2) museums, art galleries, zoos, and aquariums, *id.* at 17 (§ 30); and (3) trade schools and technical schools, *id.* at 18 (§ 32). Nev.Br. 7–8, 23. And to this list he adds two types of commercial assemblies that he claims the directives treat worse than religious gatherings: live entertainment and concert venues. *Id.* at 8, 22–23 (citing Directive 021 (§ 22)).

Even accepting the Governor's view that museums and the like are potential comparators to Calvary Chapel, that he treats these places the same as houses of worship means little since there are scores of other secular places where large groups can gather and remain in close proximity for long periods. *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring). The pertinent question, according to the *South Bay* concurrence, which the State so heavily leans on, is whether Nevada "exempts or treats more leniently only *dissimilar* activities." *Id.* (emphasis added). The State does not, as the directives' treatment of movie theaters and some entertainment venues proves—two types of assemblies that the State incorrectly claims the directives treat no better than religious gatherings.

For the fifth time, the Governor has claimed that movie theater attendance is limited to the lesser of 50% fire-code capacity or 50 people. Nev.Br. 7. He made the same claim twice in the district court

and once in this Court and the Supreme Court. *See* D.Nev. ECF 29 at 6; D.Nev. ECF 39 at 3; CA9 ECF 17-1 at 4; Resp. to Emerg. Motion at 5. The Governor has taken a similar approach with live entertainment venues, repeatedly representing that he "maintains stricter limits on live entertainment and concerts, *prohibiting* spectators entirely." Nev.Br. 8 (emphasis in original); *see also* D.Nev. ECF 29 at 6; D.Nev. ECF 39 at 3; CA9 ECF 17-1 at 5; Resp. to Emerg. Motion at 5.

No matter how many times the Governor repeats it, neither claim is consistent with the facts on the ground. Official Nevada guidance makes clear that the 50-person limit on movie theaters is a per-screen limit. Op.Br. 11, 31; ER 552. Thus, "[u]nder the Governor's edict[s], a 10-screen 'multiplex' may host 500 moviegoers at any time." *Calvary Chapel*, 2020 WL 4251360, at *6 (Gorsuch, J., dissenting). Meanwhile, his decrees restrict religious gatherings to 50 people at any time, no matter the number of large meeting rooms in a house of worship. Op.Br. 11, 31–32. So a 10-meeting-room house of worship with a screen in each room to show a live broadcast of the service can host at most—50 worshippers. As to the alleged prohibition on spectators at *all* live entertainment venues, casinos have been hosting live dinner shows and circus events—venues that operate under the 50% rule. Op.Br. 24; *supra* p. 5; ER 85, 87, 89–90. Even the Governor, as recently as August 29, 2020, has been a spectator of live entertainment:

Matthew Seeman, *Sisolak responds to video of him at Las Vegas restaurant with live music*, KSNV News (Aug. 31, 2020), https://bit.ly/2QNjY1C (viewed Sep. 1, 2020).[4]

In short, no matter how many times "Nevada reiterates that it has imposed similar or greater restrictions on . . . movie theaters . . . and all

[4] After learning of the video, the Governor claimed, "There is no prohibition on ambient background music, like what was playing at the restaurant—this has been allowed since the State entered Phase 2 [on May 29, 2020]." *Id.* Even assuming a live band—including a singer with a microphone—performing next to the Governor's table is "ambient music," there is no "ambient music" exception to the "limits on live entertainment" that allegedly "prohibit[ ] spectators entirely." Nev.Br. 8. That exception is not in Directive 021, 029, or 030; the *Roadmap to Recovery for Nevada: Phase 2*, https://bit.ly/3gNUHiK (viewed Sep. 1, 2020); or Nevada's industry-specific guidance, ER 520–69. Instead, under Phase 2, "musical performances . . . shall remain closed for public attendance." A. 12 (§ 22). But if Calvary Chapel is mistaken and live, "ambient music" at restaurants operating at 50% capacity is exempted under the Governor's directives, it's just another example among many of why the directives are not generally applicable.

spectator events," Nev.Br. 30, that doesn't make it so. The State has not *once* addressed Calvary Chapel's evidence.

There is no mystery why the Governor has claimed time and again that the directives cap movie theater attendance at 50 people and prohibit spectators at all live entertainment events. Chief Justice Roberts' concurring opinion in *South Bay* included gatherings at movie theaters and live entertainment venues in a non-exhaustive list of secular assemblies that are comparable to religious gatherings. *See S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (stating comparable secular gatherings "include[ ] lectures, concerts, movie showings, spectator sports, and theatrical performances"). Although the parties have different views on which secular assemblies are like religious gatherings for purposes of free-exercise analysis, they agree the comparators include movie theaters and live entertainment venues. Nev.Br. 22–23. The Free Exercise Clause thus demands that the Governor extend the same treatment to Calvary Chapel that he gives to those venues. *E.g. Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2254 (2020). But he refuses to do so.

That the Governor strives to convince this Court that he treats movie theaters and all live entertainment venues the same as or worse than he treats religious gatherings—when the record shows otherwise—dispels another myth: "mass gatherings are different than commercial activities." Nev.Br. 21. If the State believed this, it would have simply

pointed out that movie theaters and casino dinner shows engage in commerce. But "[t]he best currently available data," *id.* at 3, do not support the assertion that placing a dollar in the till lessens the risk of COVID-19 exposure while placing one in the collection plate increases the risk.

Calvary Chapel's comparators do not end with movie theaters, dinner shows, and circus acts. The Governor's explanations—or lack thereof—for treating other secular assemblies more favorably than religious gatherings are unconvincing.

1. Casinos

The Governor's justifications for excluding casinos as secular comparators are meritless. First, the right to hold a non-restricted gaming license may be "a privilege," Nev.Br. 8 n.10, with certain restrictions attached, *id.* at 8–9. But no state-licensed privilege compares to Calvary Chapel's fundamental right to the free exercise of religion. Op.Br. 38–39. Nevada cannot treat places of worship worse because religion is constitutionally protected (and subject to fewer restrictions), and gambling is not (and subject to greater control). That gets things backwards. *Id.*

The Free Exercise Clause does not call on courts to compare secular and religious assemblies' licensing or regulatory schemes. In *Lukumi*, the rules that governed killing an animal in public excluded kosher slaughter. 508 U.S. at 535–36. Kosher butchers are no doubt

subject to more regulation than houses of worship. But that didn't matter to the Supreme Court's free-exercise analysis. Instead, courts must examine whether the law fails to "prohibit nonreligious conduct that endangers [the state's] interests in a similar or greater degree than" the prohibited religious conduct. *Id.* at 543. Or as the Chief Justice framed the question in *South Bay* in the context of COVID-19: Whether the law "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." 140 S. Ct. at 1613 (Roberts, C.J., concurring). Thousands of people gambling at casinos fits that bill.

Second, the Governor says that casinos take more safety precautions. Nev.Br. 9–10. For example, he argues that casinos provide "masks for all guests" and require patrons to "wear face coverings at table and card games if there is no other barrier." *Id.* But nearly everyone must wear a face covering in public places, including casinos *and* places of worship. CA9 ECF 23, Ex. 1 (Directive 024). And Calvary Chapel also gives a mask to anyone entering its building who needs one. Op.Br. 9 n.2.

Then the Governor says that all casinos have locations for people to get COVID-19 tests. Nev.Br. 9; *see* ER 583. But the requirement to have testing sites applies only to casinos that are "a resort hotel" and those hotels' guests. ER 583. So it doesn't apply to the casino just down

the road from Calvary Chapel, Op.Br. 28, or to the scores of other casinos that are not "a resort hotel." Additionally, all the policy mandates is that casinos "provide a designated area within the resort where hotel guests may be tested for COVID-19, and where such hotel guests can safely wait for the test results." ER 583. It obliges no guest to take a COVID-19 test. A temperature screening *or* self-assessment is all that is required. *Id.* Places of worship are not hotels, so it makes sense that the State has not applied this rule to them.

Third, the Governor alleges that casinos face stiffer punishments and quicker shutdowns. Nev.Br. 8–9, 27–28. But he has never explained how any penalty levied by the Nevada Gaming Control Board is more serious than the potential shutdown of in-person worship and civil and criminal penalties that Calvary Chapel faces. And given that the Governor had no trouble closing down almost the entire state in a day last March, Op.Br. 41, his claim that regulatory oversight is necessary to realize an abrupt halt to casino operations is hard to swallow.

Fourth, the Governor claims "[t]here is no comparable basis on which non-compliance can effectively be enforced against a house of worship" because the directives are enforced "by local law enforcement, subject to their prioritization of resources." Nev.Br. 28 (emphasis

omitted).[5] But presumably the Governor expects religious organizations to adhere to his cap on religious gatherings. If he does not, that invites the question why he so vigorously defends the 50-person limit on religious gatherings or contends that allowing Calvary Chapel to increase service size from 50 people to 90 would "hamstring" public health efforts. *Id.* at 14.

At any rate, whatever expectations the Governor may have about religious observers following his edicts or whichever state or local agency has responsibility to enforce the directives' many sections, the Attorney General has said houses of worship "can't spit . . . in the face of the law and not expect the law to respond." CA9 ECF 23, Ex. 9. There is no nuance to that statement: Houses of worship must submit or face the consequences. Nor is there any ambiguity in the Governor's July 27, 2020 statement: "To put it bluntly, the time for education is over. Businesses, Nevadans, and visitors should all be familiar with the expectations of reduced indoor capacity . . . . If people aren't following the rules to keep us safe, there needs to be consequences." Governor

[5] The Governor implies that only local law enforcement officials can enforce the 50-person limit against religious organizations. But the directives say nothing of the sort. Instead, they "authorize *all* local, city, and county governments, *and state agencies* to enforce [the] Directive[s]." A. 20 (§ 39) (emphasis added); Directive 029 (§ 6) (same); Directive 030 (§ 12) (same). The Office of the Attorney General and the Department of Public Safety are state agencies that the Governor controls.

Sisolak, July 27, 2020 Press Conference, https://bit.ly/3bb3qdH (video at 11:00– 11:28) (viewed Aug. 26, 2020).

So the fact that the Lyon County Sheriff is not making the 50-person cap on religious gatherings a law enforcement priority is of little comfort, Hunewill Br. 4, since "all . . . state agencies" also have the authority to enforce the directives, *supra* p. 17, n.5. And the alleged lack of enforcement is irrelevant in any event. Calvary Chapel seeks assurance in its pre-enforcement action that no government actor—state or otherwise—will enforce the unequal 50-person limit on religious gatherings.

2. Restaurants, Bars, Fitness Centers, Amusement Parks, Bowling Alleys, and Arcades

"Even if the State's special regulatory power over casinos could justify different rules for those facilities, the State would still have no explanation why facilities like" restaurants, bars, gyms, fitness centers, amusement parks, bowling alleys, arcades, and more "are also given the benefit of the 50% rule." *Calvary Chapel*, 2020 WL 4251360, at *3 (Alito, J., dissenting); *see* A. 11–17 (§§ 20–22, 25, 26, 28, 29). Rather than explain why these places are dissimilar from houses of worship, the Governor dismisses Calvary Chapel's arguments as "breezily offer[ing] its opinion" and feigns that the church should have presented "record evidence" on how these secular places work. Nev.Br. 26.

Everyone knows how restaurants, bars, gyms, bowling alleys, and amusement parks work. So the Governor's demand for "record evidence" showing the risks that these facilities pose under the 50% rule, Nev.Br. 26—a rule the Governor claims is driven by "[t]he best currently available data" and "an assessment of risk," *id.* at 3, 34—is just a distraction. If there were data showing, for example, that multiple groups of 50 sitting in a bowling alley's grandstands (ER 583) or multiple tables of six filled throughout a large casino restaurant (CA9 ECF 23, Ex. 3, p. 3) pose a lesser risk of COVID-19 exposure than a 45-minute, socially distanced service at Calvary Chapel, the Governor would have produced it.

Most important, it was the Governor, not Calvary Chapel, who needed to justify the burden placed on Calvary Chapel's free-exercise rights. "[I]n the First Amendment context," once the party moving for preliminary injunction "make[s] a colorable claim that its First Amendment rights have been infringed, . . . the burden shifts to the government to justify the restriction." *Doe v. Harris*, 772 F.3d 563, 570 (9th Cir. 2014). Calvary Chapel has, at a minimum, made a colorable claim of a free-exercise violation. *See Calvary Chapel*, 2020 WL 4251360, at *4 (Alito, J., dissenting) ("the directive blatantly discriminates against houses of worship"); *id.* at *6 (Gorsuch, J., dissenting) (stating this "simple case" involves "obvious discrimination against the exercise of religion."). Yet missing from the record are "the

best currently available data" that the Governor claims support his distinction between secular facilities where large groups gather in close proximity for extended periods and houses of worship.

The Governor mentions that in early July 2020, he designated Lyon County as having an elevated risk of COVID-19 transmission, which led to the temporary closure of bars, taverns, breweries, wineries, and distilleries in Lyon County. Nev.Br. 2, 6. This, he says, "belies Calvary's argument that the danger associated with COVID-19 is small in Lyon County." *Id.* at 6 n.11. First, the COVID-19 risk in Lyon County is *much* less than the risk in Nevada's two most populous counties—Clark County (Las Vegas) and Washoe County (Reno)—where the largest casinos are located and which were also on the Governor's elevated-risk list. CA9 ECF 23, Ex. 3, p. 10. Lyon County's case rate per 100,000 people (522.5) is almost three times less than Washoe County's (1,425.5) and nearly five times less than Clark County's (2,464.5). Nev. Dep't of Health & Human Serv., COVID-19 Statistics by County (Aug. 25, 2020), https://bit.ly/3llOPAz (viewed Aug. 26, 2020).

Second, Lyon County was added to the list not because it had elevated cases, but allegedly because the number of tests were too low. Op.Br. 29. Interestingly, this occurred shortly after Calvary Chapel filed its notice of appeal. And Lyon County came off the elevated-risk list a few weeks later. *See* Michelle Rindels, *Sisolak allows bars in three rural counties to reopen; more 'surgically' focused COVID-19 control*

plan coming next week, The Nevada Independent (July 27, 2020), https://bit.ly/2DiZLOc (viewed August 21, 2020). But Clark and Washoe Counties remain on the list. Megan Messerly, *Nevada delays rolling out mitigation measures for Nevada's 'elevated risk' COVID counties*, Northern Nevada Business Weekly (Aug. 17, 2020), https://bit.ly/2Qi7xe4 (viewed Aug. 22, 2020).

And there lies the problem: Though bars remain closed in Clark and Washoe Counties, their restaurants, gyms, fitness centers, amusement parks, bowling alleys, and arcades still operate under the 50% rule. As do their casinos. Yet Calvary Chapel still cannot have more than 50 worshippers at a service.[6]

And even the "record evidence" that the Governor demands dooms his preferential treatment of restaurants, bars (in non-elevated risk counties), amusement parks, bowling alleys, and more. This Court can start—and end—with the State's expert testimony. Nevada's Chief Medical Officer testified, "By gathering in large groups, and in close

[6] The State also claims in passing that "larger, in-person religious services are a major source of COVID-19 infections." Nev.Br. 2 & n.5. The State omits mentioning that "[t]he number of visitors to Nevada who have tested positive for COVID-19 since casinos reopened almost tripled [in July]." Michael Scott Davidson, *New data shows jump in COVID cases for visitors to Nevada*, Las Vegas Review-Journal (Aug. 7, 2020), https://bit.ly/3gtcL1c (viewed Aug. 24, 2020). Nor does the State address the Governor's earlier proclamation that fitness centers "promote extended periods of public interaction where the risk of transmission is high." Op.Br. 30. Yet fitness facilities now operate under the 50% rule.

proximity to others, individuals put themselves and others at risk. The risk appears to be increased where groups are in close proximity for extended period[s]." ER 769 (¶ 18).

The Governor does not plausibly deny that such gatherings occur in places like restaurants, bars, gyms, fitness centers, amusement parks, bowling alleys, and arcades. And he hasn't refuted the testimony of Calvary Chapel's infectious disease expert that "[t]here is no scientific or medical reason that a religious service that follows the guidelines issued by the CDC would pose more significant risk of spreading [the COVID-19 virus] than gatherings or interactions at other establishments or institutions." ER 105 (¶ 27). Calvary Chapel's rigorous health and safety precautions are "equal to or more extensive than those recommended by the CDC." ER 107 (¶35); *see* Op.Br. 7–8.

Simply put, the State offers no explanation why the Governor's preferred, commercial mass gatherings that operate under the 50% rule do not "endanger[ ] [the state's] interests in a similar or greater degree than" religious gatherings operating under the same rule. *Lukumi*, 508 U.S. at 543.

3. Mass Protests and Election Polls

The Governor argues that mass protests are distinct from worship services, Nev.Br. 28–29, but the only differences he notes are: (1) protesters raising serious discussions about policing and race, (2) the cost "of enforcement of social distancing," and (3) state officials

"attempting to address important community issues." *Id.* These justifications do not address the fact that mass protests qualify as "large groups . . . in close proximity for extended periods," *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring). They also fail under scrutiny.

Religious gatherings, too, address policing and race issues and their impact on society. Deena Yellin, *Americans want faith leaders to stand against racism. Here's how NJ clergy have responded*, NorthJersey.com (June 26, 2020), https://njersy.co/2DbzT6Y (viewed Aug. 28, 2020). Yet those who speak and pray about such issues from a pulpit, bimah, or minbar may reach only 49 people at a time, while those who address crowds at mass protests have no limits at all.

Nor does it make sense for the Governor to encourage mass protests when he admits they do not involve social distancing (thus the need for "enforcement of social distancing"), Nev.Br. 29, over Calvary Chapel's worship services, which meet or exceed CDC guidelines, ER 107 (¶35). Speakers who abide by social-distancing and face-covering rules should be allowed to host larger gatherings, not smaller ones.

Finally, the Governor suggests that he can decide what is an "important community issue[ ]" and what is not. Nev.Br. 29. The clear assumption is that the intersection of race and policing is vital, but religion falls short, even when addressing race and policing. But that sort of value judgment violates the First Amendment. State officials cannot devalue religious reasons for speaking to large, in-person groups

or pick and choose what viewpoints merit public debate. Op.Br. 32–33, 35–37; *see Spell v. Edwards*, 962 F.3d 175, 182 (5th Cir. 2020) (Ho, J., concurring) ("If protests are exempt from social distancing requirements" and gathering restrictions, "then worship must be too.").

When it comes to election polls, the Governor relegates his argument to a footnote: Calvary Chapel "ignore[s] Nevada's significant efforts to reduce in-person voting in light of COVID-19." Nev.Br. 29 n.25. But maximizing mail-in ballots has nothing to do with the lack of safety precautions at the polls. It is not as if the Governor shut down all in-person voting sites or even limited them to 50 people at a time. He knew large crowds would come. And crowds waiting in meandering lines for hours to vote at state-sponsored locations, ER 68–79, qualify as "large groups . . . in close proximity for extended periods," *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring). Yet the Governor exempted polls from the directives wholesale and treated them "more leniently" than places of worship that are subject to a 50-person cap. *Id.*

B. The difference between how Nevada and California treat religious gatherings is irrelevant.

The Governor offers that he "has not yet had to re-close all worship services, as California has in many counties." Nev.Br. 2. But he does not bother to examine whether those California counties, like Nevada, are treating comparable secular assemblies better than religious gatherings. And even assuming they do, California's

constitutional deficiencies are not a shield that Nevada can use to defend its own violations of the First Amendment.

The Governor's point seems to be that he is more solicitous toward religion than various California officials are, so his restriction on religious gatherings is fine. But this Court "does not look away from a government restriction on the people's liberty just because the state did not impose a full-tilt limitation on a fundamental and enumerated right." *Duncan v. Becerra*, ___ F.3d ___, 2020 WL 4730668, at *17 (9th Cir. Aug. 14, 2020). What matters is that Nevada treats a substantial swath of comparable secular assemblies better than religious gatherings.

The State trotting out—and implicitly threatening—that the Governor "has not yet re-closed all worship services" under Nevada's "new normal" comes as little surprise. After all, the Governor believes he has power to restrict religious gatherings, while treating comparable secular assemblies more leniently, even under "an ordinary exercise of the State's police power." Nev.Br. 21. But the Free Exercise Clause says otherwise. *Trinity Lutheran*, 137 S. Ct. at 2019.

II. The *South Bay* decisions, extra-circuit decision of *Elim Romanian*, and Supreme Court's decision in *Jacobson* do not aid the Governor's defense.

The Governor proclaims that "[t]he Supreme Court and most other courts have rejected public health free exercise challenges." Nev.Br. 24. In support, he offers (1) the Supreme Court's denial of emergency

injunctive relief in *South Bay*; (2) this Court's *South Bay* decision denying an injunction pending appeal, *see S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938 (9th Cir. 2020); and (3) the Seventh Circuit's decision in *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020). He also relies on the Supreme Court's decision in *Jacobson* in pleading for judicial deference.

None of these cases helps the Governor's defense. The facts in *South Bay* and *Elim Romanian* are materially distinct from the facts here. Additionally, the Chief Justice's concurring opinion in *South Bay*, where he asked whether "only dissimilar activities" were treated more leniently than religious gatherings, 140 S. Ct. at 1613 (Roberts, C.J., concurring), bodes poorly for the Governor's singling out religious gatherings for worse treatment. As for *Jacobson*, it does not inform First Amendment analysis or give a State freedom to treat religious gatherings worse than secular assemblies.

The *South Bay* decisions and *Elim Romanian* collectively addressed two executive orders that, unlike Nevada's directives, did not exempt a broad swath of comparable secular gatherings from their gathering restrictions. For that reason alone they do not inform the outcome of this case. In *Elim Romanian*, the Illinois church offered as comparators grocery shopping, warehouses, soup kitchens, and offices. 962 F.3d at 346–47. And in *South Bay*, the California church offered "only dissimilar activities, such as operating grocery stores, banks, and

laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods." *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring). In contrast, Calvary Chapel offers as comparators places where people congregate in large numbers, close together, and for extended periods. *Id.*; *see supra* pp. 9–24.

The Governor's reliance on the *South Bay* decisions runs into other problems too. As *Elim Romanian* recognized, "the Ninth Circuit's panel did not provide much analysis when denying a motion for an injunction [pending appeal]." 962 F.3d at 346. As for the Supreme Court's denial of emergency relief in *South Bay*, the Governor does not acknowledge that the bar for this relief is extremely high. The Supreme Court uses its emergency injunctive power only "where the legal rights at issue are indisputably clear and, even then, sparingly and only in the most critical and exigent circumstances." *S. Bay*, 140 S. Ct. at 1613 (citation and internal quotation marks omitted). Instead, the Governor intermixes the standard for emergency injunctive relief in the Supreme Court with the well-established test for a preliminary injunction. Nev.Br. 4.

Unlike emergency injunctive relief in the Supreme Court, a legal right need not be "indisputably clear" for a preliminary injunction to issue. Nor is a preliminary injunction reserved for only "the most critical or exigent circumstances." Instead, for a preliminary injunction, a plaintiff must only establish: "(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) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). A preliminary injunction may also issue under the "serious questions" test. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (affirming the viability of this doctrine post-*Winter*). Under that test, a plaintiff can obtain a preliminary injunction by showing "that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor," along with the other *Winter* elements. *Id.* at 1134–35 (citation omitted).

Relatedly, the Governor also claims that Calvary Chapel must meet "extraordinary standards" to obtain a preliminary injunction. Nev.Br. 16. Although an injunction is an "extraordinary [equitable] remedy," *Winter*, 555 U.S. at 24, there is nothing "extraordinary" about the well-trod standards a moving party must meet to obtain a preliminary injunction. Federal courts have a commission to stop unconstitutional actions by state officials. And this Court has a monopoly on the legal power to do so since the Governor will not relent. Denying Calvary Chapel a preliminary injunction would only further legitimize the Governor's unequal treatment of religion.

Adding to the Governor's confusing reliance on *South Bay*, the Governor claims that the Supreme Court "up[held] the applicability of *South Bay* and *Jacobson*" when it denied Calvary Chapel's motion for emergency injunctive relief. Nev.Br. 13. But the *Calvary Chapel* majority didn't cite anything—*South Bay*, *Jacobson*, or otherwise. The five members of the majority—like four of the members of the *South Bay* majority—were silent. Yet under the Governor's reasoning, this Court should take cues from judicial silence. The fallacy of that approach is apparent: No one but the silent members can say why they voted to deny emergency relief in *Calvary Chapel* (or *South Bay*). But whatever their reasons, the high standard for obtaining emergency injunctive relief from the Supreme Court doesn't apply here. *Cf. Wilson v. Sellers*, 138 S. Ct. 1188, 1196 (2018) ("a silent decision" does not create "precedent that [can] be read as binding throughout the circuit"); *Himes v. Thomson*, 336 F.3d 848, 853 n.3 (9th Cir. 2003) ("we cannot attribute reason to a silent [agency] opinion").

Of course, the Chief Justice was not silent in *South Bay*. For all the Governor's talk about the Chief Justice's concurring opinion, the opinion highlights the free-exercise problem with Nevada's directives. Comparable secular gatherings, the Chief Justice wrote, are those "where large groups of people gather in close proximity for extended periods of time." 140 S. Ct. at 1613 (Roberts, C.J., concurring). But because the executive order in *South Bay* "exempt[ed] or treat[ed] more

leniently only dissimilar activities . . . in which people neither congregate in large groups nor remain in close proximity for extended periods," the Chief Justice concluded that the order "appear[ed] consistent with the Free Exercise Clause." *Id.*

The exact opposite is true about the Governor's directives. It is undisputed that his orders allow many preferred secular facilities to hold large, close, and prolonged gatherings under the 50% rule, and for mass protest groups to gather under no rules at all.

As for the Supreme Court's decision in *Jacobson*, the Governor repeatedly waives it as a talisman to ward off judicial scrutiny. *E.g.*, Nev.Br. 3, 13, 17–21, 27, 31. But neither *Jacobson* nor any other case allows a State to favor secular assemblies over religious gatherings during an emergency. Even when the "constituted authorities" seek to protect "the welfare, comfort, and safety of the many" during a crisis, *Jacobson*, 197 U.S. at 29, their rules cannot "contravene the Constitution of the United States . . . ." *id.* at 25.

The Governor makes no effort to address Calvary Chapel's arguments that *Jacobson*, a substantive due process decision, does not displace the Supreme Court's well-established standards for reviewing First Amendment claims. Op.Br. 48–50. "It is a considerable stretch to read [*Jacobson*] as establishing the test to be applied when statewide measures of indefinite duration are challenged under the First

Amendment or other provisions not at issue in that case." *Calvary Chapel*, 2020 WL 4251360, at *5 (Alito, J., dissenting).

The Governor says the church is asking this Court to "substitute its judgment on public health . . . for that of Nevada's officials responsible for public health." Nev.Br. 32. Not so. The church is asking this Court to act "by force of [its] commissions." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1940). Even though courts may have "modest estimates of [their] competence in such specialties as public [health]," they cannot "withhold the judgment that history authenticates as [their] function . . . when liberty is infringed." *Id.*

III. The Governor's own words prove that he favors secular over religious speech.

The Governor claims that he does not prefer "commercial speech [over] religious speech" or regulate on a "viewpoint basis." Nev.Br. 30–31. But his words betray him.

The Governor's position tilts to extremes, claiming that the church has not suffered true harm because for five months it could: (1) hold outdoor services (in 100-degree summer temperatures) "with no limits on the number of congregants who may gather,"[7] (2) offer additional in-person services (which it already does), (3) stream services (that do not

[7] The Governor cites Directive 016 to support his claim that houses of worship can hold outdoor services with "no limits on the number of congregants who may gather." Nev.Br. 11. But these "no limits" services are "in-car or drive-in" only. ER 739 (§ 10).

satisfy its religious beliefs or meet its members' spiritual needs), or (4) begin drive-in services (that also do no satisfy its beliefs or meet its members' spiritual needs). Nev.Br. 11, 16, 33.

The Governor's treatment of commercial businesses and secular protests is miles away. Not once has the Governor suggested that casinos, restaurants, fitness facilities, arcades, or movie theaters move their expression online. Indeed, the Governor would hardly allow these assemblies to operate under the 50% rule if he regarded that alternative as sufficient. The Governor also did not demand that protesters hold multiple protests or engage in public debate from their cars or over the internet. Because "[e]ffective advocacy of both public and private points of view . . . is undeniably enhanced by group association," *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958), Calvary Chapel should be allowed to assemble in person to the same extent as the Governor's preferred assemblies.

State officials cannot reserve free speech for commercial businesses and private citizens whose views they champion. The First Amendment extends the same protection to Calvary Chapel's religious messages as it does to secular protests. And the church's expression stands on a much higher constitutional rung than the commercial speech of casinos and other businesses that the directives promote. Op.Br. 33–37.

CONCLUSION

Calvary Chapel respectfully requests that this Court reverse the district court's denial of a preliminary injunction and remand with instructions to enter a preliminary injunction that allows the church to host religious gatherings on the same terms as comparable secular assemblies (50% fire-code capacity), with social distancing, face coverings, and other neutral and generally-applicable precautions in keeping with the church's health and safety plan.

Date: September 2, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

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