No. 20-639

In the Supreme Court of the United States

CALVARY CHAPEL DAYTON VALLEY,
Petitioner,

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,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF KENTUCKY, ALASKA, ARIZONA, ARKANSAS, GEORGIA, IDAHO, KANSAS, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

The *amici* States have an interest in protecting their citizens. This means not just guarding their citizens against threats to their physical or financial well-being, but also safeguarding their constitutional rights. And among the most sacred of those rights is the First Amendment right to free exercise of religion—"our first freedom." *Roman Catholic Diocese of Brooklyn v. Cuomo*, --- S. Ct. --- , 2020 WL 6948354, at *5 (Nov. 25, 2020) ("*Diocese*") (Gorsuch, J., concurring).

In question is an executive order issued by Nevada's Governor that severely curtails citizens' free exercise rights. Because a threat to First Amendment rights anywhere is a threat to First Amendment rights everywhere, the *amici* States desire to be heard to ensure that their citizens' rights are not endangered.

SUMMARY OF THE ARGUMENT

The First Amendment prohibits the government from imposing burdensome restrictions on religious exercise while extending more favorable treatment to nonreligious activity. This uniquely American promise requires—at the very least—equal treatment. That means that the government cannot treat secular organizations "less harshly" than religious institutions when regulating similar public-health problems. *See Diocese*, 2020 WL 6948354, at *2. Yet, that is precisely what Nevada has done here. By extending favorable

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[1] *Amici* have notified counsel for all parties of their intention to file this brief. Sup. Ct. Rules 37.2(a), 37.4.

treatment to nonreligious businesses like casinos and restaurants, Nevada has elevated the right to engage in secular conduct above the right to engage in the free exercise of religion. This manifest violation of the First Amendment must be remedied.

The foundations for the district court's ruling that allows Nevada's Governor to disfavor houses of worship were the Chief Justice's solo concurrence in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Mem.), and this Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). The district court erred in giving these decisions dispositive weight. *Diocese* makes this unmistakably clear. Whatever effect the Chief Justice's opinion in *South Bay* and *Jacobson* once had, *Diocese* now provides the applicable rule.

Finally, the Court should take the unusual step of granting certiorari before judgment here. The Court granted certiorari before judgment just last week in the materially identical case of *Harvest Rock Church v. Newsom*, 20A94. Moreover, this is precisely the kind of case in which this Court has expressed a willingness to grant a writ of certiorari before judgment. That is, this case involves restrictions on private rights in response to exigent circumstances, the questions at issue are of great public importance, and time is of the essence.

ARGUMENT

I. The district court's decision conflicts with this Court's Free Exercise Clause precedent.

The First Amendment prohibits the government from burdening the "free exercise" of religion. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). In doing so, it "protect[s] religious observers against unequal treatment." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, --- U.S. --- , 137 S. Ct. 2012, 2019 (2017) (citation omitted). That means the government generally cannot discriminate against religious exercise without satisfying the demands of strict scrutiny. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

"Faith-based discrimination can come in many forms." *Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020) (per curiam); *see also Lukumi*, 508 U.S. at 534. Even without evidence of animus or intentional discrimination, laws burdening the free exercise of religion must be both neutral and generally applicable. *See Emp't Div. v. Smith*, 494 U.S. 872, 884 (1990). The critical question is whether the state is regulating secular conduct "less harshly" than religious conduct, *Diocese*, 2020 WL 6948354, at *2, even though the secular conduct "endangers [the same state] interests." *Lukumi*, 508 U.S. at 543–44.

This legal framework is well-known to the Court, as it has been around for almost three decades. Yet, in denying injunctive relief below, the district court paid almost no mind to it. *See* Pet. App. 4a–9a. Had the

district court focused on *Smith* and its progeny, it would have granted the injunction in this otherwise "simple case." *See Calvary Chapel*, 140 S. Ct. at 2609 (Gorsuch, J., dissenting).

That is in large part because no one disputes that the State of Nevada has singled out religious institutions—in this case, houses of worship—for particularly burdensome treatment. *See* Pet. App. at 3a (explaining that "[c]ommunities of worship and faith-based organizations are allowed to conduct in-person services so long as no more than fifty people are gathered," while casinos may "reopen at 50% their capacity"). And no one disputes that these restrictions burden the sincerely held beliefs of Calvary Chapel and any number of other religious institutions as well. *Id.* at 2a.

This kind of disparate treatment takes Nevada's restrictions outside the realm of a neutral and generally applicable law. The State, of course, has a significant interest in safeguarding "public health." *See Lukumi*, 508 U.S. at 544. But that interest does not give a State cover for violating the Free Exercise Clause through "underinclusive" laws that fail to promote the State's interest in equal force with respect to nonreligious activity. *Id.* A law is subject to strict scrutiny when it burdens religious exercise through regulating a legitimate state interest while failing to impose the same kinds of burdens on secular conduct that "endangers [the same] interest." *Id.* at 543.

And that is precisely what Nevada's gathering restrictions do. If the State's interest is in limiting the number of individuals gathering together indoors, that

interest is just as applicable in a casino as it is a church or synagogue. More to the point: COVID-19 "does not care why" people gather together. *See Maryville Baptist Church v. Beshear*, 567 F.3d 610, 615 (6th Cir. 2020) (per curiam). A neutral and generally applicable law would thus treat all indoor gatherings the same—with capacity restrictions or durational restrictions—without respect to the reason that people have gathered. Yet, Nevada draws lines, not based on the risks of gathering indoors, but based on the reason people are there. In doing so, the State imposes restrictions on secular activities that are "less harsh[]" than those imposed on religious institutions—even though the risk of spreading COVID-19 remain the same. *See Diocese*, 2020 WL 6948354, at *2. Under a straightforward application of *Lukumi*, this takes the law outside the bounds of general applicability and requires the state to "run the gauntlet of strict scrutiny." *See Maryville Baptist Church*, 567 F.3d at 614.

This Court's recent decision in *Diocese* cleared the field of any contrary approach to resolving Free Exercise Claims arising from COVID-19 restrictions. The facts of *Diocese* bear a remarkable resemblance to those here. Like Nevada, the State of New York imposed capacity limits on houses of worship that were more restrictive than those placed upon secular indoor gatherings. *See Diocese*, 2020 WL 6948354, at *1–2. And, like Nevada, the State of New York defended that decision by pointing to other comparable and secular activities that were treated the same, or even worse, than houses of worship. *Id.* at *8 (Kavanaugh, J., concurring) ("The State argues that it has not

impermissibly discriminated against religion because some secular businesses such as movie theaters must remain closed and are thus treated less favorably than houses of worship."). Yet, this Court held that the Applications in *Diocese* were likely to succeed on their Free Exercise Claim because of the "troubling" way in which many (and comparably risky) secular activities were "treated less harshly" than religious organizations. *Id.* at *2. It did not matter that "some secular" activities received the same treatment. *Id.* at *8 (Kavanaugh, J., concurring). What mattered was that the state had extended favorable treatment to a certain class of nonreligious activity and had refused to do the same for religious exercise.

Diocese simply applied the framework from *Smith* and *Lukumi* to facts that arose because of the COVID-19 pandemic. *See id.* at *4 (Gorsuch, J., concurring) ("[C]ourts must resume applying the Free Exercise Clause. Today, a majority of the Court makes this plain."). Before COVID-19, it would have been unthinkable that a State could make attendance at a worship service more difficult than attendance at a casino without overcoming strict scrutiny. *See Lukumi*, 508 U.S. at 544–45 (rejecting the city's rationale for enacting underinclusive public-health regulations). As *Diocese* now makes clear, it remains unthinkable. When a law burdens religious exercise in the name of promoting public health, it must apply with equal force to secular conduct raising similar public-health concerns. Or, as Justice Kavanaugh explained, "once a State creates a favored class of businesses, . . . the State must justify why houses of worship are excluded

from that favored class." *Diocese*, 2020 WL 6948354, at *8 (Kavanaugh, J., concurring).

Nevada's restrictions on houses of worship do not survive this standard. In concluding otherwise, the district court's decision violated *Smith*, violated *Lukumi*, and now violates *Diocese*. The Court should grant the petition to reverse this otherwise unthinkable restriction on religious worship.

II. The district court's single-minded reliance on *South Bay* and *Jacobson* cannot stand.

In ruling against Calvary Chapel on its Free Exercise claim, the district court relied almost entirely on two decisions: Chief Justice Roberts's concurring opinion in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Mem.), and *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). Although the district court erred in this regard, when the court ruled, it did not have the benefit of *Diocese*. *Diocese* now shows just how profoundly the district court erred by giving dispositive weight to *South Bay* and *Jacobson*.

The extent of the district court's reliance on the Chief Justice's *South Bay* concurrence cannot be overstated. The district court summarized the Chief Justice's views from *South Bay* and then summarily concluded that "the holding in *South Bay* [is] applicable to this case" and that "[c]onsequently, the Court finds that [Calvary Chapel] has not demonstrated a likelihood of success on the merits of its claim." Pet. App. 6a. This conclusion reads far too much into the Chief Justice's *South Bay* opinion.

South Bay came before this Court in May. "At that time, COVID had been with us, in earnest, for just three months." *Diocese*, 2020 WL 6948354, at *5 (Gorsuch, J., concurring). Months have now passed. "As more medical and scientific evidence [has] become[] available, and as States have [had] time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights." *Sisolak*, 140 S. Ct. at 2605 (2020) (Mem.) (Alito, J., dissenting). Courts must now insist on "precisely tailored rules," rather than "very blunt" ones, *see id.*, given that we are "round[ing] out 2020 and face the prospect of entering a second calendar year living in the pandemic's shadow." *Diocese*, 2020 WL 6948354, at *5 (Gorsuch, J., concurring).

This Court's decision in *Diocese* can be read no other way. As Justice Gorsuch summarized in his concurrence in *Diocese*, "[r]ather than apply a nonbinding and expired concurrence from *South Bay*, courts must resume applying the Free Exercise Clause. Today, a majority of the Court makes this plain." *Id.* On this point, *Diocese* instructed: "[E]ven in a pandemic, the Constitution cannot be put away and forgotten." *Id.* at *3; *see also id.* at *9 (Roberts, C.J., dissenting) ("[T]he challenged restrictions raise serious concerns under the Constitution . . . ."). The Court continued: Allowing the States to "effectively bar[] many from attending religious services[] strike[s] at the very heart of the First Amendment's guarantee of religious liberty." *Id.* at *3. The First Amendment accordingly requires the judiciary to "conduct a *serious examination* of the need for such a drastic measure." *Id.* (emphasis added). So whatever effect the Chief

Justice's concurrence in *South Bay* may have once had, it must now yield to *Diocese*.[2]

The district court also invoked this Court's century-old decision in *Jacobson* to justify its holding. *See Calvary Chapel*, 2020 WL 4260438, at *2 (citing *Jacobson* for the proposition that "[t]he Constitution principally entrusts 'the safety and the health of the people' to the politically accountable officials of the States 'to guard and protect'"). The district court was not alone in leaning into *Jacobson* to grant the States especially broad leeway in responding to COVID-19. Since April, nearly 200 judicial decisions have cited *Jacobson*. Far too many of these courts, however, have taken *Jacobson* as a "towering authority that overshadows the Constitution during a pandemic." *Diocese*, 2020 WL 6948354, at *6 (Gorsuch, J., concurring).

That stops with *Diocese*. The majority did not even cite *Jacobson*. Justice Gorsuch's concurring opinion explained why. *Jacobson*, he summarized, "involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction." *Id.* at *5. *Jacobson* "essentially applied" rational-basis review to a state law that required individuals to take a vaccine, pay a fine, or prove their right to an exemption. *Id.* *Jacobson* did not consider "the textually explicit right to religious exercise." *Id.* Nor

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[2] Justice Sotomayor's *Diocese* dissent acknowledged that the Chief Justice's *South Bay* concurrence no longer supplies a governing rule. *Diocese*, 2020 WL 6948354, at *12 (Sotomayor, J., dissenting) ("I see no justification for the Court's change of heart" from *South Bay* and *Calvary Chapel* to *Diocese*).

did it involve "serious and long-lasting intrusions into settled constitutional rights." *Id.* at *6; *see also Calvary Chapel*, 140 S. Ct. at 2608 (Alito, J., dissenting) ("[I]t is a mistake to take language in *Jacobson* as the last word on what the Constitution allows public officials to do during the COVID-19 pandemic.").

For all of these reasons, "*Jacobson* hardly supports cutting the Constitution loose during a pandemic." *Id.* at *5 (Gorsuch, J., concurring); *see also id.* at *8 (Kavanaugh, J., concurring) ("But judicial deference in an emergency or a crisis does not mean wholesale judicial abdication, especially when important questions of religious discrimination, racial discrimination, free speech, or the like are raised."). None of the *Diocese* dissenters challenged Justice Gorsuch's reading of *Jacobson*. *Id.* at *6 (Gorsuch, J., concurring) ("Tellingly no Justice now disputes any of these points."). In fact, Chief Justice Roberts's *Diocese* dissent emphasized the limited nature of his reliance on *Jacobson* in his *South Bay* concurrence. *Id.* at *9 (Roberts, C.J., dissenting) (stating that the "actual proposition" for which his *South Bay* opinion relied on *Jacobson* "should be uncontroversial"); *see also id.* at *6 (Gorsuch, J., concurring) ("In fact, today the author of the *South Bay* concurrence even downplays the relevance of *Jacobson* for cases like the one before us."). Thus, especially after *Diocese*, the district court's reliance on *Jacobson* can no longer stand.

In summary, although the district court's refusal to grant injunctive relief to Calvary Church was wrong from the start, *Diocese* hollowed out the heart of the

court's reasoning. The Court should not allow this to stand given "the burden on the faithful who have lived for months under [Nevada's] unconstitutional regime unable to attend religious services." *See id.* at *7.

III. This is an appropriate case for certiorari before judgment.

This Court rarely grants a writ of certiorari before judgment, but it should do so here. In fact, it did so just one week ago in the materially identical case of *Harvest Rock Church v. Newsom*, 20A94 (Dec. 3, 2020).

Harvest Rock Church involves a challenge to the constitutionality of the California Governor's COVID-related restrictions on religious worship. *See Harvest Rock Church, Inc. v. Newsom*, 977 F.3d 728 (9th Cir. 2020) (order). On December 3, this Court granted a petition for a writ of certiorari before judgment and remanded the case to the Ninth Circuit "with instructions to remand to the District Court for further consideration in light of *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. --- (2020)." *Harvest Rock Church v. Newsom*, --- S. Ct. --- , 2020 WL 7061630 (Dec. 3, 2020); *see also Harvest Rock Church, Inc. v. Newsom*, --- F.3d ---, 2020 WL 7075072 (9th Cir. Dec. 3, 2020). For the sake of consistency, there is no reason why the Court should not also grant certiorari before judgment in this case.

Moreover, even setting *Harvest Rock Church* aside, this is precisely the kind of case in which this Court has expressed a willingness to grant a writ of certiorari before judgment. Historically, the Court has often granted certiorari before judgment to resolve questions

regarding the government's power to curtail private rights during emergencies and other exigent circumstances.

For example, in *Ex parte Quirin*, the Court granted certiorari before judgment to address the President's wartime power to try foreign saboteurs by military tribunal. 317 U.S. 1, 7–8 (1942). The Court explained that certiorari was appropriate because "of the public importance of the questions raised . . . and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty," *id.* at 6, and because "the public interest required that we consider and decide those questions without any avoidable delay," *id.* at 7.

In *United States v. United Mine Workers*, the Court granted certiorari before judgment to review the President's authority to seize coal mines during World War II, observing that "[p]rompt settlement of this case [is] in the public interest. 330 U.S. 258, 269 (1947). And, in *Youngstown Sheet & Tube Co. v. Sawyer*, the Court also granted certiorari before judgment to consider the President's ability to seize steel mills during the Korean War, "[d]eeming it best that the issues raised be promptly decided by this Court." 343 U.S. 579, 584 (1952).

In *Kinsella v. Krueger*, the Court granted certiorari before judgment to address whether the spouse of a high-ranking Army officer could be tried by court martial after she murdered her husband in their Army quarters during the Korean War. 351 U.S. 470 (1956). The Court granted the writ "because of the serious

constitutional question presented and its far-reaching importance to our Armed Forces stationed in some sixty-three different countries throughout the world." *Id.* at 473.

This case fits the same mold as those cases—it involves a government's attempt to affect private rights in response to exigent circumstances. And, like those cases, this one also involves a matter of great public importance. Indeed, it would be hard to imagine a question of greater public importance than whether citizens can keep exercising their rights to religious worship during a pandemic, or whether a pandemic gives the government the authority to subject religious practice to burdensome restrictions that do not apply to similar secular activities.

This is also a matter in which time is of the essence. Citizens are experiencing unprecedented restrictions on their rights to free exercise of religion. This is a matter not only of the utmost importance, but also of the most *urgent* importance because any impairment of the right to free exercise is an irreparable injury. *Diocese*, 2020 WL 6948354, at *3 (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)). As Justice Gorsuch emphasized in *Diocese*, "none of us are rabbis wondering whether future services will be disrupted as the High Holy Days were, or priests preparing for Christmas. Nor may we discount the burdens on the faithful who have lived for months under [an] unconstitutional regime unable to attend religious services." *Id.* at *7 (Gorsuch, J., concurring).

The sad reality is that the right to worship as one sees fit is currently dependent on geography. In states

like Nevada and California, citizens are unduly hampered in their abilities to worship according to the dictates of their consciences, while states like South Dakota and Tennessee have not imposed material burdens on religious worship. This is unacceptable. "In far too many places, for far too long, our first freedom has fallen on deaf ears." *Id.* at *5. It is time to remedy this. The freedom to worship should be equally available to citizens in every state. The Court should grant a writ of certiorari before judgment here to ensure that this is so.

But the Court should not simply grant the writ, vacate the district court's judgment, and remand the matter for consideration in light of *Diocese*—as it did in *Harvest Rock Church*. Experience has already shown that lower courts are prone to misapply the principles set forth in *Diocese*. In *Commonwealth of Kentucky v. Beshear*, --- F.3d ---, 2020 WL 7017858 (6th Cir. Nov. 29, 2020), the Sixth Circuit stayed a district court's injunction against an executive order from Kentucky's Governor that shut down private religious schools but allowed the continuation of secular activities that involved comparable public-health risks. The Sixth Circuit had the benefit of *Diocese*, but missed the mark in applying it. Rather than asking whether the Governor's order treated religious schools more harshly than some secular activities that involved comparable health risks, the Sixth Circuit simply concluded that the order is likely constitutional because it closed both public and private schools. *See id.* at *2–3. Thus, in Kentucky, families cannot now practice their faith by sending their children to religious schools with fellow believers, but they can gather in groups at all manner

of secular establishments, like movie theaters, shopping malls, and other commercial venues. This is inconsistent with *Diocese*. To help ensure that other lower courts do not make similar mistakes, this Court should grant a writ of certiorari here so that it can reiterate that "courts must resume applying the Free Exercise Clause." *Diocese*, 2020 WL 6948354, at *5 (Gorsuch, J., concurring).

CONCLUSION

The Court should grant a writ of certiorari before judgment.

Respectfully submitted,

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