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

REPLY BRIEF FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement in the Petition for Writ of Certiorari remains unchanged.

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INTRODUCTION

Respondent Hunewill agrees that Calvary Chapel Dayton Valley's petition raises issues of national importance and should be granted. Hunewill Resp. 3, 8–11. As for Respondents Sisolak and Ford, they did not respond at all. They did not even file a waiver form, as is typical. See S. Ct. R. 15.5. Perhaps this was done in the hope that the Court would direct a response within 30 days, deferring a conference date until this case could not be heard during the 2020 Term. But given the exigent circumstances—and the many pending lower-court cases that a merits ruling will impact—it is entirely appropriate for this Court under Rule 16.1 to grant the petition now. *E.g.*, *Burnside* v. *Walters*, 569 U.S. 971 (2013) (memorandum order granting petition without having received a brief in opposition). Alternatively, the Court could direct a response within a couple of business days so that the petition can be considered again at one of the two remaining January conferences. The uncertain climate for religious rights during COVID-19 warrants immediate intervention and a merits opinion.

As the petition anticipated, Pet.6, the Ninth Circuit issued its opinion on December 15, 2020. App.1b–11b. And though the court of appeals did a commendable job applying *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, __ S. Ct. __, 2020 WL 6948354 (Nov. 25, 2020), this Court's review is still needed. After concluding that the Nevada Governor treats places of worship less favorably than many secular entities, the court of appeals granted a preliminary injunction allowing Calvary Chapel to meet at a 25% capacity limit, the same as casinos, museums, and some others in the Governor's most recent order. App.11b. That was error.

The panel should have instead followed *Catholic Diocese* and entered a preliminary injunction that treats Calvary Chapel no less well than businesses Nevada considers "essential," such as manufacturing facilities and professional offices, which have no capacity limit other than the effective limit caused by adhering to social distancing guidelines. *Catholic Diocese*, 2020 WL 6948354, at *2 (comparing 10-person limit for synagogues and churches with "essential" businesses in the red zone that could admit "as many people as they wish," including certain manufacturing plants and transportation facilities, and further comparing 25-person limits for places of worship with non-essential businesses in the orange zone, all of which could "decide for themselves how many persons to admit"). With no record evidence that places of worship are greater sources of COVID-19 spread than are manufacturing facilities and professional offices, the Governor treated places of worship less favorably and without trying less restrictive rules. That violates the Constitution.

The opinion also erred in establishing a 25% capacity cap. If the opinion was referring to the challenged Directive 021, the capacity limit should have been 50%, as for casinos, museums, restaurants, retail establishments, and other secular venues. App.10b. If it was the executive order currently in effect, Directive 035, the capacity limit still should have been 50%, since retail establishments have a 50% capacity limit under that directive. CA9 ECF 59 at 6 n.4. Either way, the preliminary injunction treats Calvary Chapel less well than even those businesses Nevada does not consider "essential."

Certiorari is warranted.

I. The relief the Ninth Circuit granted strays from the *Catholic Diocese* principle of equal treatment of religion.

Start with the narrower of the Ninth Circuit's mistakes. The panel rightly concluded that Directive 021 favors secular businesses and activities over places of worship. The court also correctly determined that this treatment warrants strict scrutiny, and that the directive collapses under that standard. But the relief that the Ninth Circuit ordered—allowing Calvary Chapel to meet at 25% fire-code capacity—cannot be squared with the *Catholic Diocese* principle that places of worship must, at a bare minimum, be treated no less favorably than their secular comparators. At bottom, whether under the challenged Directive 021, or the emergency directive currently in effect, Directive 035, Calvary Chapel's gathering limit should be at least 50% capacity.

The Ninth Circuit recognized that *Catholic Diocese* compelled reversal of the district court's denial of Calvary Chapel's motion for preliminary injunction. App.9b. "Just like the New York restrictions," the lower court recognized, "[Directive 021] treats numerous secular activities and entities significantly better than religious worship services" by allowing them to operate at 50% capacity while imposing a 50-person cap on places of worship. *Ibid.* That "disparate treatment" is "not neutral or generally applicable" and thus triggers strict scrutiny. *Id.* at 8b.

The Ninth Circuit also concluded correctly that, like the New York order in *Catholic Diocese*, Directive 021 is not narrowly tailored to serve a compelling state interest. App.10b. "[I]nstead of a fifty-person cap," the court of appeals observed, "the Directive

could have . . . imposed a limitation of 50% of fire-code capacity on houses of worship, like the limitation it imposed on retail stores and restaurants, and like the limitation the Nevada Gaming Control Board imposed on casinos." *Ibid.*

But in reversing and remanding the case to the district court, the court of appeals directed the lower court to "preliminarily enjoin the State from imposing attendance limitations on in-person services in houses of worship that are less favorable *than 25% of the fire-code capacity*," App.11b (emphasis added), instead of the 50% limit that so many secular venues enjoy under Directive 021, and that retail stores continue to enjoy under Nevada's most recent edict, Directive 035. App.2b n.1. So while the Ninth Circuit correctly held that Directive 021 fails the minimum requirement of neutrality to religion and wilts under strict scrutiny, the court's allowing places of worship to meet at only 25% capacity continues Nevada's disparate treatment of places of worship.

In the court of appeals' defense, the Governor's directives and guidance have been ever-changing. By the time the Ninth Circuit heard oral argument on December 8, 2020, regarding Directive 021, the Governor had issued 14 more directives, and Directive 035 was in effect. App.2b n.1; see Directive 035, CA9 ECF 59 at 13–20. Under that directive, churches are limited to the lesser of 25% capacity or 50 persons, while "commercial entities such as casinos; bowling alleys, arcades, miniature golf facilities, amusement parks, and theme parks; restaurants, food establishments, breweries, distilleries, and wineries; museums, art galleries, zoos, and aquariums; and gyms, fitness facilities, and fitness studios" are limited to

25% capacity with no hard cap. App.2b n.1. It thus appears the court of appeals tailored the injunctive relief to the present order, Directive 035, instead of the challenged Directive 021.

Tailoring the relief to Directive 035, by itself, is not a problem since Nevada's disparate treatment of religion "persist[s] in Directive 035." App.2b n.1. In short, Nevada's disparate treatment of religion permeates many of its emergency orders, including Directives 021 and 035. The problem with the ordered relief is that it does not adhere to the principle of equal treatment that the Free Exercise Clause and *Catholic Diocese* demand. Under both Directives 021 and 035, retail establishments—venues that *Catholic Diocese* recognizes cannot be treated better than places of worship without triggering strict scrutiny—operate at 50% fire-code capacity with no hard cap. See *Catholic Diocese*, 2020 WL 6948354, at *2; see also CA9 ECF 59 at 6 n.4 (letter brief addressing 50%-treatment of retail businesses under Directive 035); Nev. Health Response, *Statewide Pause* (Nov. 24, 2020), https://bit.ly/33C18la (last viewed Dec. 17, 2020) (specifying retail businesses may operate at 50% fire-code capacity under Directive 035).

Thus, *if* Calvary Chapel's comparators were limited only to "[c]asinos, bowling alleys, *retail businesses*, restaurants, arcades, and other similar secular entities," App.9b (emphasis added), the Free Exercise Clause still requires that Calvary Chapel's gathering limit be at least 50% capacity under Directive 021 *and* Directive 035. But, as Calvary Chapel explains in Section II, the comparators are not so limited. Neither is the relief that *Catholic Diocese* and the Free Exercise Clause require.

II. This Court should make clear what *Catholic Diocese* all but states: The Free Exercise Clause requires that places of worship be treated no harsher than their best treated comparators.

Even an order allowing Calvary Chapel to meet at 50% capacity would not have gone far enough. The Free Exercise Clause and *Catholic Diocese* demand more: Places of worship must be treated no worse than their best treated comparators. And here, Calvary Chapel's best treated comparators—*e.g.*, professional offices and manufacturers—have no capacity limit beyond the limit that naturally results from the neutral requirement of social distancing.

In concluding that the challenged New York order violated the minimum requirement of neutrality to religion, *Catholic Diocese* observed that the order imposed no capacity restrictions on many so-called "essential" businesses in a "red zone," but restricted places of worship to 10 persons. 2020 WL 6948354, at *2. The "disparate treatment" was "even more striking in an orange zone," where "non-essential businesses" could "decide for themselves how many persons to admit," while churches, synagogues, and mosques were restricted to 25 persons. *Ibid.* The order's failure to meet the minimum and most basic requirement of neutrality to religion, along with the order's failure to meet the strict scrutiny that such disparate treatment demands, led this Court to enjoin those restrictions on religious services.

Like New York, Nevada has placed the favored "essential" label on a host of venues and activities, and has done so since March 2020. See Directive 003 (ER 702–07), §§ 4, 6, 7 (declaring which businesses

are essential); Nev. Admin. Code § 414.XXX(1) (emergency regulation) (same); Nev. Health Response, Gov. Sisolak Guidance: *Directive 003–Essential Businesses*, https://bit.ly/37kagfm (last viewed Dec. 17, 2020) (same). Nevada's list of favored "[e]ssential businesses" includes, for instance, "essential infrastructure," such as manufacturers; shipping and delivery businesses; financial institutions; auto supply and repair shops; laundromats; warehouses; transportation services; mail and shipping services; and professional and technical services. *Ibid.* Compare to *Catholic Diocese*, 2020 WL 2020 WL 6948354, at *2 ("the list of 'essential' businesses includes things such as acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities"); *id.* at *4 (Gorsuch, J., concurring) ("And it turns out the businesses the Governor considers essential include hardware stores, acupuncturists, and liquor stores. Bicycle repair shops, certain signage companies, accountants, lawyers, and insurance agents are all essential too.").

And many of these "essential" Nevada businesses operate with *no capacity limitation*. Take, for example, non-retail businesses like legal, accounting, financial, and real estate firms. The Governor has at most "encouraged" those businesses to permit employees to work from home "to the greatest extent practicable." Directive 021, § 4. But the Governor has not imposed a capacity limit on those businesses, other than social distancing requirements. Professional and financial entities get to decide for themselves at what capacity they operate. Nev.

Health Response, *Roadmap to Recovery for Nevada (Industry Specific Guidance for Phases 1 & 2)* 4, 9, 15–16 (May 29, 2020), https://bit.ly/37oprnv (last viewed Dec. 17, 2020). As for manufacturers, financial institutions, auto supply and repair shops, warehouses, transportation services, and mail and shipping services, Calvary Chapel has yet to discover any order or official state guidance limiting those facilities' capacities, beyond requiring that they meet certain safety and health protocols like social distancing.

That professional offices, financial institutions, manufacturers, warehouses, transportation services, and so on are limited only by the neutral and generally applicable requirement of social distancing invites the question why places of worship do not receive the same treatment. *Catholic Diocese* seemed to have answered that question—there is no good reason—but apparently not clearly enough given that Calvary Chapel is still treated more harshly than their best treated comparators under the Ninth Circuit's order. That is why Calvary Chapel, in a letter brief regarding *Catholic Diocese* submitted six days before oral argument, said that a 50% fire-code capacity limit was the "bare minimum" relief required, and that the Constitution and *Catholic Diocese* required a preliminary injunction that treated Calvary Chapel comparably to manufacturers and professional offices. CA9 ECF 59 at 10.

That does not mean Calvary Chapel would have no capacity limits. After all, social distancing alone results in an *effective* 50% capacity limit. It means that Nevada cannot impose a 25% capacity cap on a church while placing no cap at all on other entities.

* * *

State and county executives continue to issue edicts drawing lines between essential and non-essential businesses, crafting zone-by-zone or county-by-county restrictions and grouping religious assemblies—protected by our nation's first right—with venues and activities that have no constitutional protection whatsoever. It is apparent that those officials—and the courts that are called to uphold the Constitution—need a clarion standard by which to operate: "[O]nce a State creates a favored class of businesses, . . . the State must justify why houses of worship are excluded from that favored class." *Catholic Diocese*, 2020 WL 6948354, at *8 (Kavanaugh, J., concurring). This case is an ideal vehicle for this Court to so hold in a full merits opinion, clarifying that the Free Exercise Clause demands nothing less in times of public tumult than in times of tranquility.

Time is still of the essence. If the Court does not grant the petition by its last January conference, federal, state, and local officials will not have the benefit of this Court's definitive guidance until the end of 2021 or early 2022 at the earliest. Pet.39. Such delay "will cause irreparable harm" to Calvary Chapel and its congregants and to thousands more across the country. *Calvary Chapel Dayton Valley* v. *Sisolak*, 140 S. Ct. 2603, 2609 (2020) (Alito, J., dissenting). Certiorari is warranted promptly.

CONCLUSION

For the foregoing reasons, and those discussed in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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DECEMBER 2020

APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 15 2020

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

CALVARY CHAPEL DAYTON VALLEY,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

No. 20-16169

D.C. No. 3:20-cv-00303-RFB-VCF

OPINION

Appeal from the United States District Court
for the District of Nevada
Richard F. Boulware II, District Judge, Presiding

Argued and Submitted December 8, 2020
San Francisco, California

Before: DANNY J. BOGGS*, MILAN D. SMITH, JR., and MARK J. BENNETT, Circuit Judges.

Opinion by Judge Milan D. Smith, Jr.

M. SMITH, Circuit Judge:

Calvary Chapel Dayton Valley (Calvary Chapel) challenges Nevada Governor Steve Sisolak's Directive 021 (the Directive) as a violation of the Free Exercise Clause of the First Amendment to the United States Constitution. The district court denied the church's request for a preliminary injunction barring enforcement of the Directive against houses of worship. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

On March 12, 2020, Nevada Governor Steve Sisolak declared a state of emergency in Nevada because of the spread of COVID-19, and issued emergency directives aimed at limiting the spread of the virus. The specific emergency directive challenged here is Directive 021, which Governor Sisolak issued on May 28, 2020.[1]

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* The Honorable Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

[1] Although the Directive is no longer in effect, we held in an order denying the State's motion to dismiss that Calvary Chapel's case is not moot. Governor Sisolak could restore the Directive's restrictions just as easily as he replaced them, or impose even more severe restrictions. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000); *see also Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 344–45 (7th Cir. 2020). In fact, Governor Sisolak has issued

The Directive "strongly encourage[s]" all Nevadans to stay at home "to the greatest extent possible." In general, it prohibits gatherings of more than fifty people "in any indoor or outdoor area[.]" More specifically, the Directive imposes limits of the lesser of 50% of fire-code capacity or 50 people in movie theaters (per screen), museums, art galleries, zoos, aquariums, trade schools, and technical schools. It prohibits public attendance at musical performances, live entertainment, concerts, competitions, sporting events, and any events with live performances. Retail businesses, bowling alleys, arcades, non-retail outdoor venues, gyms, fitness facilities, restaurants, breweries, distilleries, wineries, and body-art and piercing facilities must cap attendance at 50% of their fire-code capacities. The Directive delegates the power to regulate casino occupancy to the Nevada Gaming Control Board, which ultimately imposed an occupancy cap of 50% of fire-code capacity,

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numerous emergency directives after Directive 021. For example, Directive 035, which is currently in effect, limits houses of worship to "the lesser of 25% of the listed fire code capacity or 50 persons." In contrast, it imposes only a 25% limit on commercial entities such as casinos; bowling alleys, arcades, miniature golf facilities, amusement parks, and theme parks; restaurants, food establishments, breweries, distilleries, and wineries; museums, art galleries, zoos, and aquariums; and gyms, fitness facilities, and fitness studios. **Declaration of Emergency for Directive 035**, https://gov.nv.gov/News/Emergency_Orders/2020/2020-11-24_-_COVID19_Emergency_Declaration_Directive_035. Although the only directive before us today is the Directive, we emphasize that all subsequent directives are subject to the same principles outlined in this opinion, and that many of the issues we identify in the Directive persist in Directive 035.

in addition to a wide variety of other restrictions and requirements.

Calvary Chapel challenges § 11 of the Directive, which imposes a fifty-person cap on "indoor in-person services" at "houses of worship." The church alleges that gathering its members in one building "is central to [its] expression of [its] faith in Jesus Christ," and the Directive unconstitutionally burdens this religious expression. Calvary Chapel further argues that the Directive is not neutral or generally applicable because it targets, discriminates against, and shows hostility toward houses of worship.[2]

The district court denied Calvary Chapel's motion for injunctive relief. The court concluded that the church did not demonstrate a likelihood of success on its Free Exercise claim, relying heavily on Chief Justice Roberts's concurrence in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (mem.). Like the Chief Justice in *South Bay*, the district court found that the State treated similar secular activities and entities—including lectures, museums, movie theaters, trade and technical schools, nightclubs, and concerts—the same as or worse than church services. Accordingly, the court concluded that the Directive was neutral and generally applicable.

After appealing the district court's order, Calvary Chapel filed an emergency motion with our court for

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[2] Calvary Chapel included an as-applied challenge to the Directive in its First Amended Complaint. The district court found that Calvary Chapel did not provide a sufficient factual basis for this claim. Calvary Chapel did not appeal this ruling of the district court.

an injunction pending appeal. A two-judge panel of our court denied the church's motion. *See Calvary Chapel Dayton Valley v. Sisolak*, No. 20-16169, 2020 WL 4274901, at *1 (9th Cir. July 2, 2020). The church next turned to the Supreme Court, filing an application seeking injunctive relief pending appeal. The Supreme Court denied that application. *See Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020) (mem.). Calvary Chapel then filed a petition for a writ of certiorari before judgment with the Supreme Court, *see* Sup. Ct. R. 11, and that petition remains pending while we consider the church's merits appeal to our court.

In this appeal, Calvary Chapel contends that § 11 of the Directive is not neutral and generally applicable because it expressly treats at least six categories of secular assemblies better than it treats religious services. These categories include casinos, restaurants and bars, amusement and theme parks, gyms and fitness centers, movie theaters, and mass protests. Because of these facial defects, Calvary Chapel seeks to apply strict scrutiny review to the Directive, and contends that the State has failed to demonstrate that it has a compelling interest, or that the Directive is narrowly tailored.

In response, the State argues that *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), provides the proper framework governing a state's authority during a public health crisis. The State further argues that even if *Jacobson* does not apply, the Directive does not violate the Free Exercise Clause because it is a neutral and generally applicable law—it imposes "[s]imilar or more severe restrictions . . . to compa-

rable secular gatherings." *South Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring).

We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), and we reverse.

STANDARD OF REVIEW

We review "the district court's decision to grant or deny a preliminary injunction for abuse of discretion." *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (per curiam). "Within this inquiry, [this court] review[s] the district court's legal conclusions de novo and its factual findings for clear error." *Ramos v. Wolf*, 975 F.3d 872, 888 (9th Cir. 2020) (citing *Hernandez v. Sessions*, 872 F.3d 976, 987 (9th Cir. 2017)).

ANALYSIS

"The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into the Fourteenth Amendment . . . provides that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]'" *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 876–77 (1990) (internal citations and emphasis omitted). In determining whether a law prohibits the free exercise of religion, courts ask whether the law "is neutral and of general applicability." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citing *Smith*, 494 U.S. at 879). If it is, then the law need only survive rational basis review—even if it "has the incidental effect of burdening a particular religious practice." *Id.* If it is not neutral and

generally applicable, the law must survive strict scrutiny review. *Id.* at 546.

The Supreme Court's recent decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, --- S. Ct. ----, 2020 WL 6948354 (2020) (per curiam), arguably represented a seismic shift in Free Exercise law, and compels the result in this case.[3] In *Roman Catholic Diocese*, two houses of worship sought an injunction pending their appeal in the Second Circuit from the Supreme Court, seeking relief from an Executive Order issued by the Governor of New York that addressed the spread of COVID-19 in the state. That order imposed "restrictions on attendance at religious services in areas classified as 'red' or 'orange' zones." *Id.* at *1. In red zones, religious service attendance was capped at 10 people, and in orange zones, it was capped at 25. *Id.* In both zones, however, the order provided that essential businesses could "admit as many people as they wish[ed]." *Id.* at *2. The Court did not provide an exhaustive list of businesses deemed "essential," but did note that "acupuncture facilities, camp grounds, garages, . . . plants manufacturing chemicals and microelectronics[,] and all transportation facilities" were included. *Id.* Moreover,

[3] We respectfully join the Supreme Court in saying that members of our court "are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area. But even in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty. Before allowing this to occur, we have a duty to conduct a serious examination of the need for such a drastic measure." *Roman Catholic Diocese*, 2020 WL 6948354, at *3.

in orange zones, even "non-essential businesses [could] decide for themselves how many persons to admit." *Id.*

The Court ultimately concluded that the houses of worship had shown a likelihood of success on the merits. *Id.* at *1. The challenged executive order, the Court held, "violate[d] 'the minimum requirement of neutrality' to religion." *Id.* (quoting *Church of Lukumi*, 508 U.S. at 533). Under the Court's reasoning, the New York order was not neutral because it "single[d] out houses of worship for especially harsh treatment." *Id.* For example, "a large store in Brooklyn . . . could literally have hundreds of people shopping there on any given day," whereas "a nearby church or synagogue would be prohibited from allowing more than 10 or 25 people inside for worship service." *Id.* at *2 (internal quotations omitted). The Court held that this "disparate treatment" of religion rendered the COVID-19 restrictions in the order not neutral or generally applicable. *Id. But see Church of Lukumi*, 508 U.S. at 533; *Smith*, 494 U.S. at 878.

Applying strict scrutiny review to the New York order, the Court held that "[s]temming the spread of COVID-19 is unquestionably a compelling interest," but concluded the challenged order was not narrowly tailored. *Roman Catholic Diocese*, 2020 WL 6948354, at *2. The Court reasoned that "[n]ot only is there no evidence that the [two houses of worship] have contributed to the spread of COVID-19[,] but there were many other less restrictive rules that could be adopted to minimize the risk to those attending religious services," emphasizing that the New York restrictions are "far more severe than has been shown to be required to prevent the spread of the virus." *Id.*

For example, New York could have tied maximum attendance at a religious service "to the size of the church or synagogue." *Id.* Because the COVID-19 restrictions in the order did not survive strict scrutiny—and the houses of worship satisfied the other *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), factors—the Court preliminarily enjoined the "enforcement of the Governor's severe restrictions on the [houses of worship's] religious services." *Id.* at *4.

The Supreme Court's decision in *Roman Catholic Diocese* compels us to reverse the district court. Just like the New York restrictions, the Directive treats numerous secular activities and entities significantly better than religious worship services. Casinos, bowling alleys, retail businesses, restaurants, arcades, and other similar secular entities are limited to 50% of fire-code capacity, yet houses of worship are limited to fifty people regardless of their fire-code capacities. As a result, the restrictions in the Directive, although not identical to New York's, require attendance limitations that create the same "disparate treatment" of religion. *Id.* at *2. Because "disparate treatment" of religion triggers strict scrutiny review—as it did in *Roman Catholic Diocese*—we will review the restrictions in the Directive under strict scrutiny. *Id.*

The district court never reached the question of whether the Directive survives strict scrutiny review because it thought that then-current law required only rational basis review. Although, "[a]s a general rule," we do "not consider an issue not passed upon below," we have discretion to decide "a purely legal" question where "resolution of the issue is clear

and . . . injustice might otherwise result." *Quinn v. Robinson*, 783 F.2d 776, 814 (9th Cir. 1986). We find it necessary to exercise our discretion here, just as the Supreme Court did in *Roman Catholic Diocese*, when it enjoined certain features of an order that had already been replaced.[4]

To survive strict scrutiny review, the Directive "must be 'narrowly tailored' to serve a 'compelling' state interest." *Roman Catholic Diocese*, 2020 WL 6948354, at *2 (quoting *Church of Lukumi*, 508 U.S. at 546). The Directive—although less restrictive in some respects than the New York regulations reviewed in *Roman Catholic Diocese*—is not narrowly tailored because, for example, "maximum attendance at a religious service could be tied to the size of the [house of worship]." *Id.* In other words, instead of a fifty-person cap, the Directive could have, for example, imposed a limitation of 50% of fire-code capacity on houses of worship, like the limitation it imposed on retail stores and restaurants, and like the limitation the Nevada Gaming Control Board imposed on casinos. Therefore, though slowing the spread of COVID-19 is a compelling interest, the Directive is not narrowly tailored to serve that interest. *See id.*

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[4] The Supreme Court concluded that "injunctive relief [wa]s still called for because the applicants remain[ed] under a constant threat that the area in question [would] be reclassified as red or orange . . . . If that occur[red] again, the reclassification [would] almost certainly bar individuals in the affected area from attending services before judicial relief [could] be obtained." *Roman Catholic Diocese*, 2020 WL 6948354, at *3 (internal citation omitted).

For these reasons, Calvary Chapel has demonstrated a likelihood of success on the merits of its Free Exercise claim. It has also established that the occupancy limitations contained in the Directive—if enforced—will cause irreparable harm, and that the issuance of an injunction is in the public interest. *See id.* at *3; *Winter*, 555 U.S. at 20. Accordingly, we reverse the district court, instruct the district court to employ strict scrutiny review to its analysis of the Directive, and preliminarily enjoin the State from imposing attendance limitations on in-person services in houses of worship that are less favorable than 25% of the fire-code capacity. The district court may modify this preliminary injunctive relief, consistent with this opinion and general equitable principles. *See Winter*, 555 U.S. at 20. We encourage the district court to act expeditiously in connection with any such modification.

CONCLUSION

For the reasons above, we reverse the district court and remand for further proceedings. This order shall act as and for the mandate of this court.

REVERSED AND REMANDED.