NO. _____

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

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

KRISTEN K. WAGGONER
JOHN J. BURSCH
ALLIANCE DEFENDING FREEDOM
440 First Street NW
Suite 600
Washington, DC 20001
(202) 393-8690
kwaggoner@ADFlegal.org
jbursch@ADFlegal.org

DAVID A. CORTMAN
Counsel of Record
RORY GRAY
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd.
NE, Suite D-1100
Lawrenceville, GA 30043
(770) 339-0774
dcortman@ADFlegal.org
rgray@ADFlegal.org

Counsel for Petitioner

(additional counsel listed on inside cover)

RYAN J. TUCKER
JEREMIAH J. GALUS
GREGG WALTERS
ALLIANCE DEFENDING
FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
rtucker@ADFlegal.org
jgalus@ADFlegal.org
gwalters@adflegal.org

JASON D. GUINASSO
500 Damonte Ranch Pkwy
Suite 980
Reno, NV 89521
(775) 853-8746
jguinasso@hutchlegal.com

Counsel for Petitioner

QUESTIONS PRESENTED

Attempting to combat the spread of COVID-19, Nevada Governor Steve Sisolak issued a series of executive orders that restrict personal liberties. The subject of this petition are the Governor's orders limiting church gatherings. For example, Directive 021 allowed large groups to assemble in close quarters for unlimited time-periods at casinos, restaurants, indoor amusements parks, bowling alleys, water parks, pools, arcades, and more, subject only to a 50%-fire-code-capacity limit. In contrast, the directive limited gatherings at places of worship to no more than 50 people, whatever their facilities' size or the precautions they take. So if a casino and a church both had capacity for 2,000 persons, the casino could entertain 1,000 gambling patrons while the church could only host 50 of its faithful for worship. Directive 033 has, for now, superseded Directive 021 but still treats places of worship less well than their secular counterparts. Such unequal treatment requires strict scrutiny, yet the Governor did not try to offer a compelling justification for the unequal treatment.

The Governor's disparate treatment of churches compared to secular venues violates this Court's First Amendment precedents and frames two issues of immense jurisprudential significance that will impact this case and many like it across the country:

1. Whether the Governor's favoring of secular over religious gatherings violates the Free Exercise Clause.

2. Whether the Governor's favoring of secular over religious gatherings violates the Free Speech and Assembly Clauses.

PARTIES TO THE PROCEEDING

Petitioner is Calvary Chapel Dayton Valley, a Christian church in Dayton, Nevada, an unincorporated region of Lyon County.

Respondents are Steve Sisolak, in his official capacity as Governor of Nevada; Aaron Ford, in his official capacity as Attorney General of Nevada; and Frank Hunewill, in his official capacity as the Sheriff of Lyon County.

LIST OF ALL PROCEEDINGS

U.S. Supreme Court, No. 19A1070, *Calvary Chapel Dayton Valley* v. *Sisolak*, application for an injunction pending appellate review denied July 24, 2020.

U.S. Court of Appeals for the Ninth Circuit, No. 20-16169, *Calvary Chapel Dayton Valley* v. *Sisolak*, motion for an injunction pending appeal denied July 2, 2020, and motion to dismiss the appeal as moot denied October 26, 2020.

U.S. District Court for the District of Nevada, No. 3:20-cv-00303, *Calvary Chapel Dayton Valley* v. *Sisolak*, order denying motion for preliminary injunction entered June 11, 2020, and motion for injunction pending appeal denied June 19, 2020.

TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

DECISIONS BELOW

The district court's June 11, 2020 unreported order denying Calvary Chapel Dayton Valley's motion for preliminary injunction is available at 2020 WL 4260438 and reprinted at App.1a–12a.

The district court's June 19, 2020 unreported order denying Calvary Chapel's motion for an injunction pending appeal is available at 2020 WL 3404700 and reprinted at App.13a–18a.

The Ninth Circuit's July 2, 2020 unreported order denying Calvary Chapel's motion for an injunction pending appeal is available at 2020 WL 4274901 and reprinted at App.46a.

This Court's July 24, 2020 decision denying Calvary Chapel's application for an injunction pending appellate review is reported at 140 S. Ct. 2603 and reprinted at App.19a–45a.

The Ninth Circuit's October 26, 2020 decision (clerk order) denying Respondents' motion to dismiss the appeal as moot is not reported but is printed at App.47a–48a.

STATEMENT OF JURISDICTION

Calvary Chapel Dayton Valley filed its verified amended complaint challenging Directive 021 under the First Amendment's Free Exercise, Free Speech, and Free Assembly Clauses on May 28, 2020. That same day, the church filed an emergency motion for a temporary restraining order or preliminary injunction. The district court had jurisdiction under 28 U.S.C. 1331 and 1343, and authority to issue declaratory and injunctive relief under 28 U.S.C. 1343 and 2201–02.

The United States District Court for the District of Nevada denied Calvary Chapel's motion on June 11, 2020. On June 15, 2020, the church filed a timely notice of appeal. The United States Court of Appeals for the Ninth Circuit had jurisdiction over Calvary Chapel's interlocutory appeal under 28 U.S.C. 1292(a)(1), and oral argument is scheduled for December 8, 2020.

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and 2101(e). Because this matter is time sensitive, Calvary Chapel files this petition before the Ninth Circuit has ruled. Calvary Chapel expects that by the time the Court considers the petition, the Ninth Circuit will have issued an opinion. Either way, as explained below, the petition warrants this Court's immediate review and resolution before the end of the Court's 2020 Term.

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The relevant constitutional provisions and gubernatorial executive orders appear at App.49a–104a.

INTRODUCTION

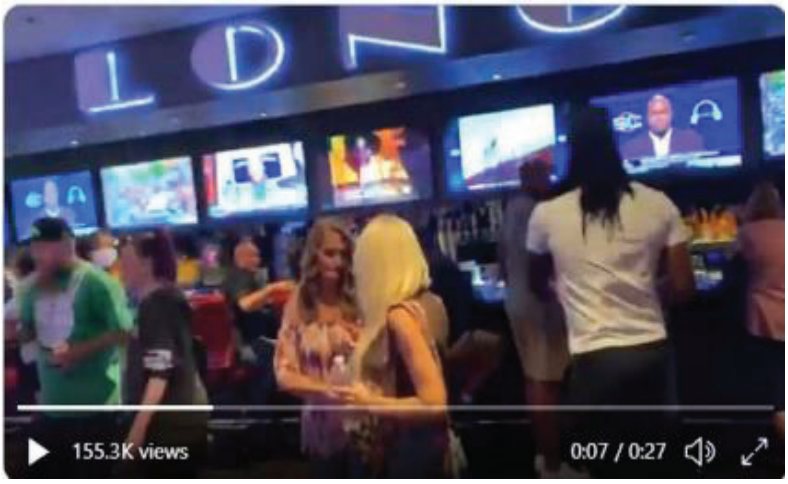
"The Constitution guarantees the free exercise of religion. It says nothing about the freedom to play craps or blackjack, to feed tokens into a slot machine, or to engage in any other game of chance." *Calvary Chapel Dayton Valley* v. *Sisolak*, 140 S. Ct. 2603, 2603–04 (2020) (Alito, J., dissenting from denial of appellate injunction). Yet Respondent Nevada Governor Sisolak has allowed large groups to assemble in close quarters for unlimited time-periods at casinos, indoor amusement parks, restaurants, arcades, and more, subject to a 50%-fire-code-capacity limit, all while limiting places of worship to no more than 50 people, whatever their facilities' size or the precautions they take.

The Free Exercise Clause subjects such discriminatory restrictions on religious exercise—indeed, even "subtle departures" from neutrality—to strict scrutiny. *Masterpiece Cakeshop, Ltd.* v. *Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) (quoting *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 534 (1993)). And here, "the departure is hardly subtle. The Governor's directive specifically treats worship services differently from other activities that involve extended, indoor gatherings of large groups of people." *Calvary Chapel*, 140 S. Ct. at 2605 (Alito, J., dissenting). Indeed, the Governor's better treatment of casinos—where "large groups of people gather in close proximity for extended periods of time," *S. Bay United Pentecostal Church* v. *Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in the denial of application for injunctive relief)—by itself shows that the directive is unconstitutional.

It's not as though casino patrons do a better job of social distancing than churchgoers. Just before casino doors reopened at midnight on June 4, 2020, the crowds looked like this [ER 170]:

Shortly after the doors opened, the scene looked like this [ER 168]:

And this [ER 166]:



"The idea that allowing Calvary Chapel to admit 90 worshippers presents a greater public health risk than allowing casinos to operate at 50% capacity is hard to swallow, and the State's efforts to justify the discrimination are feeble." *Calvary Chapel*, 140 S. Ct. at 2606 (Alito, J., dissenting). And the State's better treatment of secular assemblies reaches well beyond casinos to include restaurants, indoor amusement parks, bowling alleys, water parks, pools, arcades, and more. To top it off, state officials have also effectively exempted altogether mass protests and polling locations from the Governor's directive.

In short, the Governor's directive treats "comparable secular gatherings . . . more leniently" than houses of worship. *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring). This discrimination against religious assemblies and speech for no rational—let alone compelling—reason violates the First Amendment. See *Espinoza* v. *Mont. Dep't of Revenue*, 140 S. Ct.

2246, 2254 (2020) (the Free Exercise Clause "protects religious observers against unequal treatment") (citation omitted). If the Governor deems it acceptable for secular assemblies to occur at 50% capacity at casinos, restaurants, theme parks, and more, he must apply the same rule to constitutionally protected worship services too.

This case is an ideal vehicle to so hold. Governor Sisolak's directive "blatantly discriminates against houses of worship and thus warrants strict scrutiny under the Free Exercise Clause." *Calvary Chapel*, 140 S. Ct. at 2607 (Alito, J., dissenting). The directive "fares no better under the Free Speech Clause," given the Governor's restrictions on churches while giving free reign to favored public protestors. *Ibid.* And "Nevada does not even try to argue that the directive can withstand strict scrutiny." *Id.* at 2608. The Governor's violation of the First Amendment is plain. And the Court's holding here will guide lower courts in resolving many other cases in which government officials have treated churches worse than their comparable secular counterparts.

Time is of the essence. If the petition is not resolved by the end of the 2020 Term, churches and worshippers will continue to endure unconstitutional orders like Governor Sisolak's for a minimum of 15-18 months. That is why Calvary Chapel has filed this petition under Rule 11, before receiving a merits ruling from the Ninth Circuit. It is likely the Ninth Circuit will issue its opinion before this Court considers the petition at conference, given that the matter is scheduled for oral argument in the Ninth Circuit on December 8, 2020. Either way, the Court should not delay its consideration of the petition.

The need for review is enhanced by the fact that, in late September 2020, Governor Sisolak issued a new executive order, Directive 033, that allows places of worship to host the lesser of 250 people or 50% fire-code capacity. App.89a–90a. This new edict continues to disadvantage churches. Directive 033 allows even more secular venues, such as museums, art galleries, zoos, and aquariums, to assemble at 50% fire-code capacity with no hard cap. App.101a (§ 15). And it allows convention centers to host four times as many attendees—up to 1,000—as churches. So the Governor's preference for secular entities over religious entities remains. App.99a–101a (§ 13). What's more, the Governor is free to go back to the previous order at any time.

Ignoring these realities, the Governor moved to dismiss Calvary Chapel's appeal as moot. The Ninth Circuit quickly denied that gambit, holding that "'voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice' if the challenged practice is 'reasonably . . . expected to recur.'" App.47a (quoting *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). Additionally, the Ninth Circuit concluded, this is a case "capable of repetition, yet evading review." App.47a–48a (quoting *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969, 1976 (2016)).

In sum, Governor Sisolak has consistently doubled down on religious discrimination, and he and other government officials around the country will continue to do so until this Court intervenes. Certiorari is warranted.

STATEMENT OF THE CASE

A. Calvary Chapel Dayton Valley and its religious services

Calvary Chapel Dayton Valley is a Christian church in Dayton, Nevada, an unincorporated region of Lyon County. ER 659, 665–66. Since 2006, the church has sought to love, teach, and reach Dayton Valley for Christ. *Id.* at 653–55. Before the COVID-19 outbreak, Calvary Chapel held two Sunday services, each accommodating up to 200 people. *Id.* at 659, 669. But Governor Sisolak's directives have barred the church from holding anything resembling its normal religious gatherings for more than seven months. *Id.* at 658–59.

At the onset of the COVID-19 outbreak—before the Governor entered his March 24, 2020 directive capping gatherings at 10 people, ER 721–23—Calvary Chapel temporarily suspended in-person worship services in favor of streaming services online, *id.* at 656. But this emergency measure caused real spiritual harm. For example, some people who attend Calvary Chapel were unable to view online services, leaving them vulnerable and alone. *Id.* at 654.

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

That does not mean Calvary Chapel will put its flock or the public at risk. Because of COVID-19, the church developed a comprehensive health and safety plan that (1) limits in-person services to 50% of fire-code-capacity (roughly 90 people per service), (2) requires six feet of distance between members of different families and households, (3) restricts gatherings to only Sundays and Wednesdays, and (4) reduces the length of Sunday services from 90 to 45 minutes. ER 659–60, 669–70. Calvary Chapel's rigorous safety plan also called for:

- asking people to arrive no more than 25 minutes early;
- organizing parking attendants to direct cars;
- guiding attendees to a designated entrance;
- ensuring one-way traffic via a first-in-last-out model and placing signs on walls and floors;
- leaving a half-hour gap between services in which to clean and sanitize the sanctuary, hallways, bathrooms, and common surfaces;
- advising attendees of proper social-distancing methods;
- directing attendees to seating that provides at least six feet of separation between families and those in different households;
- making hand-sanitizer stations readily accessible;
- prohibiting handouts or passing other items between persons;
- stopping the service of coffee and snacks;

- limiting restroom use to one person at a time;
- using prepackaged Communion elements;
- directing attendees out of the building; and
- instructing people not to congregate in the building.

ER 659–60, 669–70.

After Governor Sisolak ignored Nevada churches' pleas for equal treatment, see ER 598–612, 614–29, Calvary Chapel sued, *id.* at 662–81. Even though the church voluntarily adopted rigorous safeguards and complied with the Governor's general safety mandates—including that people socially distance and wear a face covering in public spaces—Governor Sisolak refused to allow more than 50 people to attend Calvary Chapel's services. At the same time, the Governor exempted much larger secular assemblies where crowds gather in close proximity for extended periods at casinos, gyms, restaurants, certain bars, indoor amusements parks, bowling alleys, water parks, pools, and arcades, not to mention mass protests. App.64a–66a, 69a–76a (§§ 20–22, 25, 26, 28, 29); ER 160–64, 253–56.

B. Nevada's unequal treatment of churches

Governor Sisolak has treated houses of worship far worse than secular places where large, extended, and close gatherings occur day-in-and-day-out. Directive 021 ordered "[c]ommunities of worship and faith-based organizations" to limit "indoor in-person services . . . so that no more than fifty persons are gathered, and all social distancing requirements are satisfied." App.58a–59a (§ 11). The directive also ordered churches to "stagger services so that the

entrance and egress of congregants for different services [does] not result in a gathering greater than fifty persons." App.59a (§ 11(3)). Violating Directive 021 would have subjected Calvary Chapel to civil and criminal penalties. App.82a–83a (§ 39).

But the directive also allowed casinos and other gaming establishments to reopen under rules set by the Nevada Gaming Control Board. App.80a–81a (§ 35); see also ER 576–583 (gaming board rules). For five months, casinos have hosted hundreds to thousands of people at a time subject only to a 50% occupancy limit on each gaming area. ER 581. And on its face, Directive 021 allowed six *more* types of comparable secular assemblies to thrive at up to 50% capacity with no 50-person cap: (1) restaurants App.69a–70a (§ 25); ER 748 (§ 17); (2) amusement parks and theme parks, App.65a (§ 21); (3) bowling alleys and arcades, App.64a–65a (§ 20); (4) breweries, distilleries, and wineries, App.70a–71a (§ 26); (5) gyms, fitness facilities, and fitness studios, App.71a–73a (§ 28); and (6) water parks and other public aquatic venues, App.73a–74a (§ 29).

The Governor even treated cinemas more favorably than churches. Directive 021 allowed "indoor movie theaters" to host "the lesser of 50% of the listed fire code capacity or fifty persons" (§ 20). ER 646. But that's 50 persons "*per screen*." *Id.* at 552 (emphasis added). So a cinema with 18 screens can host 900 people while a church may only host up to 50, even if it has worship spaces and meeting rooms divided into 18 separate spaces, just like the cinema. That is because "the entrance and egress of congregants for different services [may] not result in a gathering greater than fifty persons." App.59a (§ 11(3)).

The Governor's Directive 033, replacing Directive 021, allowed churches to host more worshippers but still subject to a hard cap. At the same time, it expanded the list of better-treated comparators to include museums, art galleries, zoos, aquariums, and convention centers. App.99a–101a (§ 13).

The directives' real-life operation shows that Nevada allows still more large, close, and prolonged secular assemblies with no numerical limits. When hundreds of protesters gathered in throngs in late May 2020, see App.58a (§ 10), Governor Sisolak tweeted his support, telling the protestors, "We respect and defend your right to protest . . . ." ER 256. The next day, he retweeted a protest video [ER 254] that far exceeded his 50-person limit on gatherings:

And not only did the Governor tweet his support, he later personally participated in an unlawful protest and praised the gathering, saying, "'I think these are peaceful folks who are just speaking their mind . . . . It's encouraging to see the young generation participating so I'm thrilled to come and say hi to them.'"[1]

The Attorney General tweeted his support for the protests, too. *Id.* at 161–62, 164. Yet when a reporter asked about state officials' treatment of mass protests as compared to church services, the Attorney General responded that places of worship face punishment because "there was an advertisement that people are actually going to violate the governor's orders" and "You can't spit . . . in the face of law and expect law not to respond."[2] Such pronouncements did not stop the Governor from ignoring his own directive and participating in a mass protest—which was also presumably advertised ahead of time, given the Governor's and law enforcement officials' appearances. Penrose, *supra* p. 13, n.1.

---

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

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

State officials approached Nevada's primary election the same way. Hundreds of people standing in close proximity for hours waiting to vote at a few in-person sites made national headlines:

ER 68–72. Officials did nothing to limit groupings of voters to 50 people, enforce social-distancing rules, or aim to apply the Governor's directive to polling places, although these gatherings were state-run. *Id.* at 74–79. Had the polling places instead been houses of worship, the people standing in long lines would have risked criminal and civil penalties. App.82a–83a (§ 39).

C. Proceedings

Once the Governor issued Directive 021, Calvary Chapel amended its complaint and alleged violations of the First Amendment's Free Exercise, Free Speech,

and Free Assembly Clauses.[3] ER 662–81. The church requested declaratory and injunctive relief, *id.* at 679, and it filed an emergency motion for a temporary restraining order or preliminary injunction, ECF 9, 19. The district court denied the motion, ER 1–10. And although the court addressed the church's free-exercise claim, *id.* at 3–9, its order was silent about Calvary Chapel's speech and assembly claims.

The district court admitted that "a large number of people may remain in close proximity for an extended period of time" at both casinos and places of worship. ER 6. Yet the court disregarded them as comparable based on regulatory distinctions, such as state oversight of casinos' "financial" and "internal operations," *ibid.*, that do not affect—let alone increase—public health and safety. Despite the Governor applying "more lenient restrictions" to other "secular activities comparable to in-person church services," the district court held Directive 021 neutral and generally applicable. *Id.* at 7. It did so because the Governor imposed "more stringent restrictions" on a few types of secular assemblies, like concerts, sporting events, and musical performances. *Ibid.*; see App.60a (§ 22). Because Calvary Chapel could not show that the Governor's directive only "specifically target[s] places of worship" for adverse treatment, the district court identified no free-exercise violation. ER 7.

---

[3] The original complaint challenged Directive 018, which limited gatherings in houses of worship to 10 people while allowing restaurants, for example, to reopen at 50% capacity. ER 748 (§ 17).

As to Directive 021's real operation, the district court said that mass protests are unlike religious services. Equally applying the directive to mass protests, the court said, "could result in greater harm than that sought to be avoided by the Directive." ER 8. The court required "more evidence" that Nevada was not imposing effective restrictions on "crowded casinos." *Id.* at 9. And the court denied the church's motion for leave to file a post-argument brief addressing the recent election. ECF 41; ER 10.

The church filed an emergency motion for an injunction pending appeal with the district court, which the court denied. ECF 55. A two-judge Ninth Circuit panel likewise denied Calvary Chapel's injunction-pending-appeal request in a brief order. CA9 ECF 20.

Calvary Chapel filed an application in this Court on July 8, 2020, seeking an injunction pending appeal. The Court denied that application on July 24, 2020. Four Justices penned three dissents, explaining that on the merits, Calvary Chapel demonstrated that Governor Sisolak's actions violated the First Amendment, and the question was not a close one. *Calvary Chapel*, 140 S. Ct. at 2603, 2604 (Alito, J., joined by Thomas, J., and Kavanaugh, J., dissenting) ("[T]his Court's willingness to allow such discrimination is disappointing. We have a duty to defend the Constitution, and even a public health emergency does not absolve us of that responsibility."); *id.* at 2609 (Gorsuch, J., dissenting) ("This is a simple case."); *id.* at 2609, 2615 (Kavanaugh, J., dissenting) ("Nevada is discriminating against religion.").

Back in the Ninth Circuit, the Governor moved to dismiss the appeal as moot based on his newly issued Directive 033, which increased the house-of-worship occupancy cap to 250. But the new directive adds museums, art galleries, zoos, aquariums, and other secular organizations to the list of venues that can hold assemblies at 50% fire-code capacity with no hard cap, and it allows convention centers (previously closed) to host four times as many attendees—up to 1,000—as churches. App.99a–101a (§§ 13, 15).

The Ninth Circuit denied the Governor's motion, holding that "'voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice' if the challenged practice is 'reasonably . . . expected to recur,' as here" App.47a (quoting *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). What's more, the Ninth Circuit concluded, this is a case "capable of repetition, yet evading review." App.47a–48a (quoting *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969, 1976 (2016)). Accordingly, the appeal continues, and oral argument is scheduled for December 8, 2020.

REASONS FOR GRANTING THE WRIT

Four Justices have already concluded that Governor Sisolak's Directive 021 unconstitutionally discriminated against churches and worshippers. It is not clear whether additional Justices' votes were motivated by the merits or the high standard for an appellate injunction. What is clear is that government officials continue to invite lower courts to *interpret* this Court's denial of Calvary Chapel's application for an appellate injunction as a signal that they, too, should allow government officials to treat churches unequally. Given the straightforward nature of the constitutional violations, the severity of the injury to religious worship, the widespread nature of the problem, and the duration of COVID-19, only this Court can intervene and restore churches' First Amendment rights.

I. The district court's ruling is manifestly wrong.

A. The district court's ruling is in direct conflict with multiple facets of this Court's Free Exercise jurisprudence.

Because Directive 021 "directly prohibit[ed]" Calvary Chapel's desired "religious activity," it strongly implicates the Free Exercise Clause. *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2022 (2017) (quotation omitted). Religious discrimination is "odious to our Constitution." *Id.* at 2025. And the Free Exercise guarantees religious believers—at a bare minimum—"[ ]equal treatment." *Lukumi*, 508 U.S. at 542.

To determine whether a law treats religious believers and their practices equally, this Court directs courts to "survey meticulously" the law's text and "real operation." *Lukumi*, 508 U.S. at 531, 534–35. A law that is not both neutral and generally applicable faces strict scrutiny. *Id.* at 531.

A law is not neutral if it treats the same conduct as lawful when undertaken for secular reasons but unlawful when undertaken for religious reasons, singles out religious conduct for adverse treatment, or "visits gratuitous restrictions on religious conduct." *Id.* at 533–35, 538 (cleaned up). A law fails the general applicability requirement if it does not "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 then-Judge Alito explained, a law is not generally applicable "if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated." *Blackhawk* v. *Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (Alito, J.).

South Bay upheld these principles. The Chief Justice and dissenting Justices simply disagreed about whether California's unfavorable treatment of places of worship depended on their religious status or the nature of their gatherings. Some Justices viewed secular assemblies at supermarkets, factories, and offices as comparable to religious gatherings at churches. *S. Bay*, 140 S. Ct. at 1615 (Kavanaugh, J., dissenting from denial of application for injunctive relief). The Chief Justice did not.

In the Chief Justice's view, these particular commercial gatherings were different in kind because "people neither congregate in large groups nor remain in close proximity for extended periods." *Id.* at 1613 (Roberts, C.J., concurring). But the exact opposite is true here. A meticulous survey, see *Lukumi*, 508 U.S. at 534, isn't even necessary to see that Directive 021 treats comparable secular assemblies more leniently.

Governor Sisolak's directive facially treated better than religious services at least *seven* categories of secular assemblies "where large groups of people gather in close proximity for extended periods of time," *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring), not to mention the effective exemptions state officials carved out for mass protests and polling locations. And Directive 033 doubles down and adds several more. In short, no real argument exists that the Governor's restrictions on public gatherings are "neutral and of general applicability," *Lukumi*, 508 U.S. at 531, which means the directive must undergo "strict scrutiny," *id.* at 546. For brevity's sake, Calvary Chapel offers just six examples here.

Casinos

Governor's Sisolak's directive allowed Nevada's casinos to reopen on June 4, 2020. App.80a–81a (§ 35). Thousands of people swarmed around gaming tables and slot machines for long periods at 50% capacity. ER 83, 100, 166–70. But that's not all. Casinos also reopened their (1) live circus acts, ER 89–90; (2) indoor amusement parks, including Circus Circus's five-acre Adventuredome, *id.* 92–98; and (3) live dinner shows at 50% capacity, *id.* 85–87. Directive 021 allowed this daily mix of shared handles, cards, tokens, tables, servers, drinks,

restrooms, and seats by hundreds to thousands in casinos at 50% capacity, while barring more than 50 people to sit—masked and socially distanced—in places of worship once or twice a week.

The disparity is stark. When casinos opened their doors on June 4, they began serving thousands of patrons spending multiple hours gambling. In contrast, Directive 021 barred the church from opening its doors for a 45-minute, Sunday service to about 90 worshippers—Nevadans who live and work in or near the rural community of Dayton. *Id.* at 653, 659.

The Governor has a legitimate interest in "allow[ing] [Nevada's] person-based tourism economy to recover and succeed again." ECF 29 at 7 (state defendants' response to motion for preliminary injunction).[4] But that interest is not weightier than Calvary Chapel's First Amendment right to free exercise. By excepting casinos from a 50-person cap on gatherings, the directive "exempts . . . a substantial category" of secular conduct "that undermines the purposes of the [directive] to at least the same degree as the covered conduct that is religiously motivated." *Blackhawk*, 381 F.3d at 209 (Alito, J.).

---

[4] Calvary Chapel uses the page numbers at the bottom of ECF 29 for pinpoint citations to that filing.

Restaurants and Bars

Lower courts broadly agree that gatherings at restaurants are comparable to religious gatherings.[5] For nearly six months the Governor has allowed Nevada's restaurants to operate at 50% seating capacity. App.69a–70a (§ 25); ER 748 (§ 17). While tables must be six-feet apart, members of different households may sit side-by-side or directly across from each other. Servers deliver food and drinks, mop up, and collect dishes. Diners share appetizers, pass and eat food, and talk freely across the table without masks.[6]

The risk of COVID-19 transmission is much greater at restaurants than at Calvary Chapel's worship gatherings, which are socially-distanced, eliminate coffee and snacks, and exclude passing

---

[5] *E.g.*, *Soos* v. *Cuomo*, ___ F. Supp. 3d ____, 2020 WL 3488742, at *11 (N.D.N.Y. June 26, 2020), *appeal pending*, Nos. 20-2414, 20-2418 (2d Cir.); *Antietam Battlefield KOA* v. *Hogan*, No. 1:20-cv-01130, 2020 WL 2556496, at *9 (D. Md. May 20, 2020), *appeal pending*, No. 20-1579 (4th Cir.); *Calvary Chapel of Bangor* v. *Mills*, 459 F. Supp. 3d 273, 286 (D. Me. 2020), *injunction pending appeal denied*, No. 20-1507, 2020 WL 3067488 (1st Cir. June 2, 2020); *Cross Culture Christian Ctr.* v. *Newsom*, No. 2:20-cv-00832, 2020 WL 2121111, at *6 (E.D. Cal. May 5, 2020).

[6] The Governor's face-covering directive allows people to remove face masks "while . . . eating or drinking." Directive 024 (§ 7(6)), CA9 ECF 23, Ex. 1. This summer, the Governor announced new restrictions for restaurants that remains in effect: six people to a table, max. Directive 027 (§ 5), CA9 ECF 23, Ex. 3; Directive 033 (§ 12), App.97a–99a. But restaurants' ability to host secular gatherings at 50% of seating capacity statewide remains unchanged. Directive 033 (§ 12), App.97a–99a.

objects from person-to-person.[7] ER 659–60, 669–70; see also *id.* at 108 (¶ 40) (expert declaration) (the church's "precautionary measures" mean it "likely presents a lower risk of SARS-coV-2 transmission than individuals face in other allowed activities"). Yet while the Governor allows indoor restaurants to operate at 50% seating capacity, he restricted the church's gatherings to 50 people total—including clergy, staff, sound and video technicians, and others who serve and participate in worship.

For months, Governor Sisolak has allowed most bars to operate at 50% capacity too, App.69a–71a (§§ 25, 26), even though it takes little imagination to envision how reduced inhibitions could lead to decreased social-distancing and loud voices. Health experts agree that the risks of contracting COVID-19 while drinking in bars is severe.[8] Although the Governor's Mitigation Task Force has the power to close bars in counties that have elevated virus metrics, the Governor's directives still allow restaurants and casinos in those counties to continue serving alcohol to groups seated at restaurant and casino tables.[9] And, of course, the Governor's edicts

---

[7] Calvary Chapel's services only rarely involve Communion. And even when they do, the church uses prepackaged elements. ER 660, 670.

[8] Carla K. Johnson, *Closing bars to stop coronavirus spread is backed by science*, AP News (July 2, 2020), https://bit.ly/2W3qswn.

[9] Directive 027 (§§ 5, 6), CA9 ECF 23, Ex. 3; Directive 030 (§ 11), CA9 ECF 44, Ex. 15; Directive 033 (§ 6), App.88a; see also Nevada Health Response, *COVD-19 Mitigation & Management Task Force adjusts criteria used to monitor elevated risk of transmission of COVID-19 in Nevada counties* (Oct. 8, 2020),

still allows mass gatherings at 50% capacity at all casinos regardless of county metrics, including the Carson Plains Casino in Dayton Valley—about a four-mile drive from Calvary Chapel on U.S. Route 50.[10]

Amusement and Theme Parks

Indoor and outdoor amusement or theme parks in Nevada have now been open at 50% capacity with social distancing for more than five months. App.65a (§ 21). Social distancing is easier to maintain in Calvary Chapel's sanctuary using prearranged seating than in long, fluctuating theme-park lines. And only a few people will sit in the same chair on a Sunday morning, while hundreds of people daily cycle through often partially-enclosed, theme-park rides. But the Governor sanctioned boisterous crowds waiting for long periods to board popular theme-park attractions, while talking loudly, at the same time he prohibited more than 50 people from (mainly) sitting quietly and socially-distanced at church.

Gyms and Fitness Facilities

Under Directive 021, gyms and fitness facilities could open—and hold large "[g]roup fitness classes"—at 50% capacity if there is at least six feet between equipment or people and various regulations (like sanitation protocols) are met. App.71a–73a (§ 28). The Governor admitted that gyms are precisely the sort of places "that promote extended periods of public

---

https://bit.ly/3jPaKy7; Shannon Miller, *Nevada COVID-19 Task Force says Clark County bars must remain closed*, Fox 5 News (Aug. 20, 2020), https://bit.ly/3eqJDs7.

[10] Carson Plains Casino, https://carsonplainscasino.net; MapQuest, http://mapq.st/3iXbkuo.

interaction where the risk of transmission is high." ER 705 (§ 2). Yet he treated assemblies of people exercising (which increases both breathing and sweating) and actively sharing machines, weights, and mats better than groups of people that share only their faith and wish (predominantly) to sit still and listen to clergy speak.

Any chance of transmission at worship services is lower, especially those with the wide-ranging precautions Calvary Chapel voluntarily agreed to undertake. ER 659–60, 669–70. Even so, the Governor sanctioned fitness facilities welcoming crowds at 50%-capacity, while limiting all places of worship—no matter their size, locale, or precautions—to 50 people max.

Movie Theaters

Gatherings at "movie showings" and places of worship are comparable, *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring), yet the Governor treated them unequally. What Directive 021 meant by limiting an "indoor movie theater[ ]" to "the lesser of 50% of the listed fire code capacity or fifty persons," App.64 –65a (§ 20), is not the entire cinema, but "50 people . . . per screen," as industry guidance makes clear, ER 552.

So the Governor allowed multiplex cinemas to fill with hundreds of people (excluding employees), while restricting every place of worship in Nevada to no more than 50 persons, including those needed to run the service. This is so even if the church, like the multiplex, has multiple separate spaces that could be used simultaneously for worship without any contact between worshippers in different spaces. In real

terms, the Governor limited Calvary Chapel to roughly 35-40 worshippers at a time—no matter how many meeting rooms it has—because the Governor's directive stipulated that "congregants for different services [may] not result in a gathering greater than fifty persons." App.59a (§ 11(3)); ER 658. It is not equal to allow cinemas 50 paying customers *per screen* but cap places of worship at 50 people *per complex*.

Mass Protests

This summer, hundreds of people in Nevada stood shoulder-to-shoulder for long periods shouting or chanting slogans and holding signs.[11] ER 254–56. This violated the Governor's general directive that no more than 50 people congregate in or out of doors. App.58a (§ 10). Yet rather than discourage mass protests or threaten to disperse them, the Governor and Attorney General encouraged the gatherings. ER 161–64, 254–56. "[T]he effect of the [directive] in its real operation is strong evidence of its object." *Lukumi*, 508 U.S. at 535. More than 50 people could gather to lift their voices and plea for justice—but only if their prayers and petitions were directed toward their government, not God. This "unequal treatment" violates the Free Exercise Clause. *Espinoza*, 140 S. Ct. at 2254. The state's value judgment in effectively exempting secular protests from the 50-person cap while not exempting Calvary Chapel's religious activities reveals that Nevada's actions are neither religion-neutral nor generally applicable.

---

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

And if Nevada's unequal treatment of places of worship needed an exclamation mark, the Governor provided it by personally participating in a protest that violated his own directive. Penrose *supra* p. 13 n.1. As this Court held in *Lukumi*, a "prohibition that society is prepared to impose upon [religious worshippers] but not upon itself" is not generally applicable. *Lukumi*, 508 U.S. at 545 (citation omitted).

"In sum, the directive blatantly discriminates against houses of worship and thus warrants strict scrutiny under the Free Exercise Clause." *Calvary Chapel*, 140 S. Ct. at 2607 (Alito, J., dissenting).

B. The district court's ruling conflicts with this Court's free-speech and free-assembly precedents, which bar favoring secular views and gatherings over religious ones.

Directive 021 "fares no better" under this Court's precedents interpreting the Free Speech Clause. *Calvary Chapel*, 140 S. Ct. at 2607 (Alito, J., dissenting). The district court's denial of Calvary Chapel's request for injunction allows Nevada to privilege commercial over non-commercial, religious speech and to favor the communication of secular perspectives over religious views. Yet commercial speech occupies a "subordinate position in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Ass'n,* 436 U.S. 447, 456 (1978).

Directive 021 turned the First Amendment on its head by empowering businesses like casinos, movie theaters, live dinner shows and circus acts, fitness classes, certain bars, theme parks, and bowling alleys

to express commercial messages to larger in-person audiences than places of worship communicating their religious messages.

"[A] free-speech clause without religion would be Hamlet without the prince." *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 760 (1995) (plurality opinion). The First Amendment emphatically protects Calvary Chapel's noncommercial, religious messages, while secular businesses' commercial expression is "subject to greater governmental regulation." *Sorrell* v. *IMS Health, Inc.*, 564 U.S. 552, 579 (2011). Yet the Governor "invert[ed] this judgment" by affording many secular businesses "a greater degree of [freedom to express] commercial" messages to live audiences than he afford[ed] places of worship to convey religious speech. *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 513 (1981). In so doing, the Governor "conclude[d] that the communication of commercial information . . . is of greater value than the communication of noncommercial messages," a value judgment the Free Speech Clause does not permit. *Ibid.* The Constitution forbids the Governor from privileging commercial messages about gambling, fitness, entertainment, and liquor over Calvary Chapel's fully-protected religious speech.

Religion is also a protected "viewpoint," *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 112 n.4 (2001), which the Governor treated worse than businesses' commercial advertising and mass protesters' non-commercial standpoints. When state officials "favor[ ] some speakers over others [based on] a content preference," strict scrutiny applies. *Reed* v. *Town of Gilbert*, 576 U.S. 155, 170 (2015). Nevada

officials have demonstrated a clear preference for secular viewpoints here: they allow many businesses' for-profit inducements to thrive and applaud, encourage, and even participate in mass protests that violate the Governor's directive.

Under the Free Speech Clause, state officials may not pick and choose which views are worth hearing in person, nor may they "select the permissible [standpoints] for public" discussion or "control [individuals'] search for . . . truth." *City of Ladue* v. *Gilleo*, 512 U.S. 43, 51 (1994) (cleaned up). Governor Sisolak cannot decide that proliferating commercial speech and secular protests is worth the cost and then deem communicating religious ideas less valuable or worthwhile. His discrimination against Calvary Chapel's broadcast of religious views palpably violates this Court's precedent, *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830–31 (1995), as "favoring one viewpoint over others is anathema to the First Amendment." *Calvary Chapel*, 140 S. Ct. at 2608 (Alito, J., dissenting).

The Governor has suggested that multiple small services, along with streaming capabilities, are good enough for churches. ECF 39 at 7. But this Court has repeatedly recognized "the close nexus between the freedoms of speech and assembly." *NAACP* v. *Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958) (citations omitted). The restriction of one necessarily restricts the other. Cf. *Whitney* v. *California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("without free speech and assembly discussion would be futile").

The Governor's personal appearance at a protest highlights how the free speech and assembly rights work in tandem. Penrose, *supra* p. 13 n.1. He could

have depended on tweets (ER 254, 256) or press conferences (*supra* p. 13 n.2) to greet and encourage protesters. But that would not have been nearly as meaningful to the protesters since "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," *Patterson*, 357 U.S. at 460—not to mention the presence of the state's chief executive.

It is no answer to tell Calvary Chapel that it "is only limited on the size of any service, rather than the number of services and [has] the ability to communicate in multiple ways." ECF 39 at 7. The Governor does not advise casinos that selling virtual vacations and gambling is good enough to entice patrons to part with their money from afar, or encourage protesters to hold multiple, small protests to effect social change. The inequality is blatant.

"The gathering of a large number of people to show support for a cause undeniably attracts public attention and can be an extremely effective way of promoting the group's message." *S. Or. Barter Fair* v. *Jackson Cnty.,* 372 F.3d 1128, 1136 (9th Cir. 2004). It also has religious significance. ER 653–54. For those reasons, Calvary Chapel sought to convey its message to a larger group of worshippers because its message stands on at least an equal constitutional rung as the protesters'. And the church's message stands on a much higher one than the commercial speech of casinos, theme parks, bowling alleys, and other businesses.

C. The Governor's justifications for his discrimination do not withstand scrutiny. Some amplify the constitutional violation.

1. *Gaming licenses*. The Governor attempted to justify the disparate treatment by saying casinos are "privileged licensees." ECF 39 at 4–6. He reasoned that because casinos are licensees subject to regulatory oversight and enforcement, the state can readily shut casinos down or otherwise discipline them if they don't comply. *Ibid.* The district court agreed. ER 7. These greater restrictions, the court noted, include "training of the employees, financial operations and other internal operations of casinos." *Id.* at 6. But this holding turns First Amendment jurisprudence on its head, elevating a state-granted *privilege* over a *fundamental right* to excuse more favorable treatment of casinos. And accepting it would render it impossible to show that any business is comparable to a place or worship, since nearly every Nevada business—if not all of them—is a privileged licensee and therefore subject to regulatory oversight.

Neither *Lukumi* nor the Chief Justice's concurrence in *South Bay* established such a rule. The relevant question is 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. *Lukumi*, 508 U.S. at 543. And the Governor's failure to impose a 50-person cap at comparable secular establishments shows that the Governor treats secular assemblies "more leniently" than churches.

Unable to deny that casinos involve large groups gathered together in close proximity for extended periods, the Governor cited regulating casinos as a talisman intended to ward off any comparison to churches. ECF 39 at 4–5. This token fails. The Governor identified no health or safety regulations that purport to make casinos safer than places of worship, *id.*, nor could he.

2. *All mass gatherings treated "equally."* The Governor said that Directive 021 treated all mass gatherings equally and is therefore neutral and generally applicable. ECF 29 at 5–6, 12–14, 16; ECF 39 at 3. That argument is no longer valid after Directive 033 and is semantics in any event. What he meant is that Directive 021 limits all public gatherings to no more than 50 people if the type of gathering is not specifically mentioned elsewhere. App.58a (§ 10). Ignoring the directive's abundant exceptions for large, close, and prolonged secular assemblies—not to mention officials' effective exemption of mass protests—is irrational.

So the Governor backpedaled, saying that he treats some comparable secular assemblies the same as religious gatherings, some worse. ECF 29 at 13–14; ECF 39 at 3. By this logic, the Governor could shut down every worship gathering in the state if he barred live audiences at some disfavored secular assemblies, say, theater performances and concerts. That is not the law. The Free Exercise Clause, "bars even 'subtle departures from neutrality' on matters of religion." *Masterpiece Cakeshop,* 138 S. Ct. at 1731 (quoting *Lukumi*, 508 U.S. at 534); *Calvary Chapel*, 140 S. Ct. at 2613 (Kavanaugh, J., dissenting) ("In seeking to justify the differential treatment" in cases where a

religious organization is treated less favorably than other entities, "it is not enough for the government to point out that other secular organizations or individuals are also treated *unfavorably*").

3. *Commerce is different*. The Governor says that commerce differs from worship. ECF 29 at 7, 10–12, 14–16. True. Unlike commercial gatherings, the rights to religious exercise, speech, and assembly are "enshrined explicitly in the Constitution." *Espinoza*, 140 S. Ct. at 2267 (Thomas, J., concurring). The Governor's failure to treat places of worship at least as well as casinos, restaurants, theme parks, and pools "devalues religious reasons for [congregating] by judging them to be of lesser import than nonreligious reasons" in violation of the First Amendment. *Lukumi*, 508 U.S. at 537.

4. *"Risky" religious gatherings*. The Governor contended that religious gatherings are somehow riskier than the secular assemblies that Directive 021 prefers. ECF 39 at 7–8. As support, he offered the bald statement of Dr. Azzam, Nevada's Chief Medical Officer, that "[i]n-person worship services pose specific risks for disease transmission." *Id.* at 7 (quoting ER 770 (¶ 22)). But the doctor notably refrained from claiming that those "specific risks" are unique to in-person worship services. See generally ER 766–70. Instead, he asserted that "[i]ndividuals *attending large gatherings*, including but not limited to the types of events where there have been prior instances of COVID-19 spreading, would be at increased risk of disease and could be expected to increase the spread of COVID-19 in their communities and any other communities they visit."

Id. at 769–70 (¶ 19) (emphasis added). This, too, highlights the Governor's disfavoring of worship.

The record does not support this different treatment. An expert in infectious diseases testified on Calvary Chapel's behalf that "[t]here is no scientific or medical reason that a religious service that follows the guidelines issued by the CDC would pose a more significant risk of spreading SARS-CoV-2 than gatherings or interactions at other establishments or institutions." ER 105 (¶ 27). He also testified that the health precautions Calvary Chapel adopted for its in-person services are "equal to or more extensive than those recommend by the CDC" and that "there is no scientific or medical reason to limit or restrict [the church']s religious activities but not similarly limit other gatherings or activities." *Id.* at 107 (¶¶ 35, 36). And the Governor previously admitted that secular places like "gyms" and "fitness establishments"—which operate at 50% capacity under his directive—are exactly the sort of facilities that "promote extended periods of public interaction where the risk of transmission is high." ER 705 (§ 2).

5. *Protests problem*. The Governor says that Calvary Chapel's argument about mass protests is based on state officials' "inability to prevent spontaneous protests or to force local law enforcement to arrest all those who violated Directive 021." ECF 39 at 6. Not so. The Governor and Attorney General could have agreed with the protesters' message while discouraging their mass gatherings and non-social-distanced behavior. *Spell* v. *Edwards*, 962 F.3d 175, 181–82 (5th Cir. 2020) (Ho, J., concurring) (explaining the difference between tolerance and support); *Soos* v. *Cuomo*, ___ F. Supp. 3d ____, 2020 WL 3488742, at

*12 (N.D.N.Y. June 26, 2020), *appeal pending*, Nos. 20-2414, 20-2418 (2d Cir.). But state officials did no such thing. Instead, they encouraged mass protests and participated in them. ER 161–64, 254–56; Penrose *supra* p. 13 n.1.

Neither may state officials deem applying the directive to mass protests "not worth it" based on a comparative-harm analysis while applying the directive in full force to places of worship. ER 8. "The protections of the Free Exercise Clause do not depend on a 'judgment-by-judgment analysis' regarding whether discrimination against religious adherents would somehow serve ill-defined interests." *Espinoza*, 140 S. Ct. at 2260 (cleaned up).

6. *Jacobson*. The Governor asked the lower court to overlook his First Amendment violations under *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905). ECF 29 at 9–11, 17–18; ECF 39 at 8. Yet *Jacobson* does not change the constitutional analysis. *Spell*, 962 F.3d at 181 (Ho, J., concurring); *S. Bay United Pentecostal Church* v. *Newsom*, 959 F.3d 938, 942–43 (9th Cir. 2020) (Collins, J., dissenting).

In *Jacobson*, this Court affirmed a five-dollar criminal fine imposed on a Cambridge, Massachusetts resident who refused to comply with the city's mandatory vaccination regime, enacted in response to a smallpox outbreak and which applied to everyone equally. 197 U.S. at 13, 39. The Court rejected Jacobson's claim that the Fourteenth Amendment's guarantee of "liberty" entitled him to an exemption that the law gave to no one else. *Id.* at 38; see *Cruzan* v. *Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990) (*Jacobson* "balanced an individual's liberty interest in

declining an unwanted smallpox vaccine against the State's interest in preventing disease").

But even under *Jacboson*'s test, Directive 021 "would likely fail" because of its discriminatory treatment of religion. *Calvary Chapel*, 140 S. Ct. at 2608 (Alito, J., dissenting). And it's not even clear *Jacobson* would apply to the circumstances here. "*Jacobson* primarily involved a substantive due process challenge to a local ordinance requiring residents to be vaccinated for small pox. It is a considerable stretch to read the decision 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." *Ibid. Jacobson* does not justify Nevada's disparate treatment of churches and people of faith.

D. Directive 021 does not satisfy this Court's requirements for strict scrutiny.

Strict scrutiny applies because Directive 021 discriminated against religious gatherings and favored secular speech and viewpoints over religious speech and viewpoints. But the state cannot "prove that [its] restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 576 U.S. at 171 (cleaned up). In fact, "Nevada does not even try to argue that the directive can withstand strict scrutiny." *Calvary Chapel*, 140 S. Ct. at 2608 (Alito, J., dissenting).

E. Calvary Chapel satisfies the other preliminary-injunction requirements.

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

The balance of equities also weighs heavily in Calvary Chapel's favor. If it is worth allowing large crowds to gather in close proximity for extended periods to enjoy non-constitutionally-protected activities at secular establishments, it is worth allowing people to gather at places of worship to engage in the constitutionally-protected free exercise of religion.

Last, when it comes to public interest, "there is the highest public interest in the due observance of all the constitutional guarantees," *United States* v. *Raines*, 362 U.S. 17, 27 (1960), including the free exercise of religion, which "the text of the First Amendment itself . . . gives special solicitude," *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *E.E.O.C.*, 565 U.S. 171, 189 (2012).

II. This case is an ideal vehicle to solve the nationwide problem of government discrimination against churches in ad hoc COVID-19 orders.

Governor Sisolak's discriminatory treatment of churches is so stark that four Justices would have granted Calvary Chapel an injunction pending appeal. Yet five Justices' denial of such an injunction—presumably under the high standard of review—has extended the incursion on Calvary Chapel's free exercise and speech rights and has resulted in conflicting lower-court decisions, some denying churches equal treatment, *e.g.*, *Elim Romanian Pentecostal Church* v. *Pritzer*, 962 F.3d 341 (7th Cir. 2020) (pending in this Court as Case No. 20-569) (allowing only small gatherings in churches but large gatherings in restaurants and warehouses); *Harvest Rock Church, Inc.* v. *Newsom*, __ F.3d __, 2020 WL 5835219 (9th Cir. Oct. 1, 2020) (injunction pending appeal) (limiting in-person worship services but treating more leniently, for example, attending college classes); *id.* at *5 (O'Scannlain, J., dissenting), and others vindicating church equality, *e.g.*, *Roberts* v. *Neace*, 958 F.3d 409, 414 (6th Cir. 2020) (per curiam) (striking down Kentucky executive order that placed harsher restrictions on churches than law firms, laundromats, liquor stores, gun shops, airlines, mining operations, funeral homes, and landscaping businesses). Many more cases remain pending.[12] The

---

[12] *E.g.*, *Calvary Chapel of Bangor* v. *Mills*, 459 F. Supp. 3d 273 (D. Me. 2020), *injunction pending appeal denied*, No. 20-1507, 2020 WL 3067488 (1st Cir. June 2, 2020); *Soos* v. *Cuomo*, ___ F. Supp. 3d ____, 2020 WL 3488742 (N.D.N.Y. June 26, 2020), *appeal pending*, Nos. 20-2414 & 20-2418 (2d Cir.); *Cassell* v. *Snyders*, 458 F. Supp. 3d 981 (N.D. Ill. 2020), *appeal pending*,

Court should use this opportunity to grant the petition and clarify for all that the First Amendment does not allow government officials to use COVID-19 as an excuse to treat churches and their worshippers worse than secular establishments and their patrons.

As noted at the outset, time is of the essence. If the Court does not grant the petition by its last January conference, it is a practical impossibility that oral argument will be heard and an opinion issued before the end of the 2020 Term. Any delay will cause historically severe damage to First Amendment rights: "[p]reventing congregants from worshipping will cause irreparable harm." *Calvary Chapel*, 140 S. Ct. at 2609 (Alito, J., dissenting); see also *Food & Drug Admin.* v. *Am. Coll. of Obstetricians & Gynecologists*, ___ S. Ct. ____, 2020 WL 5951467, at *1 (Oct. 8, 2020) (Alito, J., dissenting from holding injunction application in abeyance) ("The free exercise of religion . . . has suffered previously unimaginable restraints [under COVID-19 executive orders].").

Certiorari is warranted, whether now or after any adverse Ninth Circuit issues ruling on the merits of Calvary Chapel's preliminary-injunction appeal.

No. 20-1757 (CA7): *Legacy Church, Inc.* v. *Kunkel*, ___ F. Supp. 3d ____, 2020 WL 3963764 (D.N.M. July 13, 2020), *appeal pending*, No. 20-2117 (10th Cir.); *High Plains Harvest Church* v. *Polis*, 2020 WL 4582720 (D. Colo. Aug. 10, 2020), *appeal pending*, No. 20-1280 (10th Cir.).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KRISTEN K. WAGGONER
JOHN J. BURSCH
ALLIANCE DEFENDING FREEDOM
440 First Street NW
Suite 600
Washington, DC 20001
(202) 393-8690
kwaggoner@ADFlegal.org
jbursch@ADFlegal.org

RYAN J. TUCKER
JEREMIAH J. GALUS
GREGG WALTERS
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
rtucker@ADFlegal.org
jgalus@ADFlegal.org
gwalters@adflegal.org

DAVID A. CORTMAN
Counsel of Record
RORY GRAY
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd.
NE, Suite D-1100
Lawrenceville, GA 30043
(770) 339-0774
dcortman@ADFlegal.org
rgray@ADFlegal.org

JASON D. GUINASSO
500 Damonte Ranch Pkwy
Suite 980
Reno, NV 89521
(775) 853-8746
jguinasso@hutchlegal.com

NOVEMBER 2020

APPENDIX

APPENDIX TABLE OF CONTENTS

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

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

I. INTRODUCTION

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

II. PROCEDURAL BACKGROUND

Plaintiff brought its initial complaint on May 22, 2020 and filed the operative amended complaint on May 28, 2020. ECF Nos. 1, 8. The complaint brought facial and as-applied First and Fourteenth Amendment challenges to Governor Sisolak's emergency directives in response to the COVID-19 pandemic. Id. Plaintiff filed a motion for a temporary

restraining order and preliminary injunction on May 28 and May 29, 2020. ECF Nos. 9, 19. The Court denied Plaintiff's motion to consider the motions on an expedited basis. ECF Nos. 16, 23. Defendant Steve Sisolak responded to the motions on June 2, 2020. ECF Nos. 9, 19. Defendant Frank Hunewill joined Defendant Sisolak's response on that same date. ECF No. 32. Plaintiff filed a supplement to its motion on June 4, 2020 and Defendant Sisolak responded on June 7, 2020. ECF Nos. 38, 39. The Court held a hearing on the motions on June 9, 2020. This written order now follows.

III. FACTUAL BACKGROUND

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

On May 26, 2020, Defendant Governor Sisolak announced that Nevada would enter "Phase Two" of its reopening. To that end, he issued Emergency Directive 021 on May 28, 2020 (hereinafter the "Emergency Directive" or "Directive"). The

Emergency Directive permits several categories of business and social activity to resume, subject to different restrictions. For example, Section 10 of the directive prohibits gatherings in groups of more than fifty people in any indoor or outdoor areas. Emergency Directive 021, § 10. Communities of worship and faith-based organizations are allowed to conduct in-person services so long as no more than fifty people are gathered, while respecting social distancing requirements. Id. at § 11. Section 20 similarly limits movie theaters to a maximum of fifty people. Id. at §20. Section 35 of the Emergency Directive allows casinos to reopen at 50% their capacity and subject to further regulations promulgated by the Nevada Gaming Control Board. Id. at § 35.

IV. LEGAL STANDARD

The analysis for a temporary restraining order is "substantially identical" to that of a preliminary injunction. Stuhlbarg Intern. Sales Co, Inc. v. John D. Brush & Co., Inc., 240 F.3d 832, 839 n.7 (9th Cir. 2001). A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008). To obtain a preliminary injunction, a plaintiff must establish four elements: "(1) a likelihood of success on the merits, (2) that the plaintiff will likely suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in its favor, and (4) that the public interest favors an injunction." Wells Fargo & Co. v. ABD Ins. & Fin. Servs., Inc., 758 F.3d 1069, 1071 (9th Cir. 2014), as amended (Mar. 11, 2014) (citing Winter, 555 U.S. 7, 20 (2008)). A preliminary injunction may

also issue under the "serious questions" test. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134 (9th Cir. 2011) (affirming the continued viability of this doctrine post-Winter). According to this test, a plaintiff can obtain a preliminary injunction by demonstrating "that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor," in addition to the other Winter elements. Id. at 1134-35 (citation omitted).

V. DISCUSSION

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

a. Facial Challenge

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

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

The Supreme Court examined the relationship between COVID-19 related executive orders and the Free Exercise Clause in its recent order in South Bay United Pentecostal Church v. Newsom, No. 19A1044, 2020 WL 2813056 (May 29, 2020). In South Bay, the Supreme Court denied an application for injunctive relief enjoining enforcement of a portion of the California governor's executive order to limit the spread of COVID-19. Id. The order limited attendance at places of worship to 25% of building capacity or a maximum of 100 attendees. Id. at 1. The Supreme Court found that the restrictions appeared consistent with the Free Exercise Clause of the First Amendment. Id. Chief Justice Roberts first noted that "[s]imilar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time." Id. Chief Justice Roberts then explained that the "[o]rder exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks or laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods." Id. Finally, Chief

Justice Roberts concluded that, "[t]he precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement," and that when elected officials "act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." Id. (internal citations omitted). "When those broad limits are not exceeded, they should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence and expertise to assess public health and is not accountable to the people." Id. (internal citations omitted).

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

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

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

The Court agrees that church services may in some respects be similar to casinos, in that both are indoor locations in which a large number of people may remain in close proximity for an extended period of time. The Court, however, disagrees that casinos are actually treated more favorably than places of worship. During this phased reopening of Nevada by the Governor, casinos are subject to substantial restrictions and limitations required by the Nevada Gaming Control Board which exist *in addition* to and in conjunction with the requirements and oversight provided by the Emergency Directive. See Emergency Directive, § 35; Addendum to April 21, 2020 Policy Memorandum posted May 29, 2020; 2020-30 Updated Health and Safety Policies for Reopening after Temporary Closure posted May 27, 2020; Health and Safety Policy for the Resumption of Gaming Operations Nonrestricted Licensees posted May 27, 2020; Procedures for Reopening after Temporary Closure Due to COVID-19 posted April 21, 2020, Gaming Control Board. Such additional regulatory policies set forth requirements related not only to the social distancing and placement of table games or slot machines in the casino, for example, but they also set forth requirements regarding training of the employees, financial operations and other internal

operations of casinos. Id. These casinos are also subject to regular and explicit inspection of all aspects of the respective casino's reopening plan. Id. Indeed, gaming companies are one of the few categories of organizations in which the directive specifically discusses enforcement and punishment alternatives for violating the directive and concomitant promulgated regulations. Emergency Directive, §35. Casinos are therefore subject to heightened regulation and scrutiny under these guidelines in comparison to churches, regardless of the difference in occupancy cap. The Court finds that while Calvary focuses on the fifty-person cap, it fails to consider the totality of restrictions placed upon casinos in their comparative analysis. Thus, even if the Court were to accept casinos as the nearest point of comparison for its analysis of similar activities and their related restrictions imposed by the Governor, the Court would nonetheless find that casinos are subject to much greater restrictions on their operations and oversight of their entire operations than places of worship.

The Court also finds that other secular entities and activities similar in nature to church services have been subject to similar or more restrictive limitations on their operations. The Court notes that church services consist of activities, such as sermons and corporate worship, that are comparable in terms of large numbers of people gathering for an extend period of time to lectures, museums, movie theaters, specified trade/technical schools, nightclubs and concerts. All of these latter activities are also subject to the fifty-person cap or remain banned altogether under Emergency Directive. See Emergency

Directive, §§ 20, 22, 27, 30, 32. Given that there are some secular activities comparable to in-person church services that are subject to more lenient restrictions, and yet other activities arguably comparable to in-person church services that are subject to more stringent restrictions, the Court cannot find that the Emergency Directive is an implicit or explicit attempt to specifically target places of worship. Lukumi, 508 U.S. at 534 (striking down city council ordinance that specifically targeted and forbid animal sacrifices made by a particular religious group). Additionally, whether a church is more like a casino or more like a concert or lecture hall for purposes of assessing risk of COVID-19 transmission is precisely the sort of "dynamic and fact-intensive" decision-making "subject to reasonable disagreement," that the Court should refrain from engaging in. South Bay, 2020 WL 2813056, at * 1. As the Court finds that the Emergency Directive is neutral and generally applicable, there is no facial Free Exercise challenge, and Calvary has therefore not demonstrated a likelihood of success on the merits of this claim.

b. As-Applied Free Exercise Challenge: Selective Enforcement

In its briefing Calvary also brings an as-applied challenge selective enforcement claim. Specifically, Calvary points to statements made by the Governor and the Attorney General regarding recent protests to argue that the section of the Emergency Directive banning more than fifty people from gathering, whether inside or outside, is not being enforced against secular activity. Calvary also includes photographs from casinos which appear to indicate

violations of the social distancing requirements of the Directive and photos from Fremont Street in downtown Las Vegas in which it appears that far more than fifty people have gathered.

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

Moreover, the Court finds that Calvary has not provided a sufficient evidentiary basis for its as-applied challenge. For a selective enforcement claim, it is not enough for Calvary to demonstrate that the directive is intermittently not being enforced against secular activities. Calvary must also demonstrate that Defendants are *only enforcing* the directive against places of worship. See Stormans, Inc v. Wiseman, 794 F.3d 1064, 1083 (9th Cir. 2015) (finding no evidence of selective enforcement against religiously affiliated pharmacies in enforcement of drug delivery rules). The Plaintiffs have not presented evidence of such a pattern of selective enforcement. While images of crowded casinos attached to its submission may raise a potential future issue of selective enforcement, the Court must

have more evidence than this to find a likelihood of success on the merits of a selective enforcement claim.

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

/ / /

VI. CONCLUSION

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

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

DATED June 11, 2020.

RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

CALVARY CHAPEL DAYTON VALLEY, Plaintiff(s), v. STEVE SISOLAK, in his official capacity as Governor of Nevada; AARON FORD, in his official capacity as Attorney General of Nevada; and FRANK HUNEWILL, in his official capacity as Sheriff of Lyon County, Defendant(s).	Case No. 3:20-cv-00303-RFB-VCF **ORDER**

Plaintiff Calvary Chapel Dayton Valley moves this Court to stay the effect of its June 11, 2020 Order denying Plaintiff's Emergency Motions for a Temporary Restraining Order and Preliminary Injunction pursuant to Federal Rule of Appellate Procedure 8(a)(1) and Federal Rule of Civil Procedure 62(d). Fed. R. App. P. 8(a)(1); Fed. R. Civ. P. 62(d). Plaintiff has appealed the Court's Order, but also requests that the Court reconsider its prior denial of the Motion and issue an injunction. Ordinarily,

"[w]hen a notice of appeal is filed, jurisdiction over the matters being appealed . . . transfers from the district court to the appeals court." Mayweathers v. Newland, 258 F.3d 930, 935 (9th Cir. 2001). Rule 62(d) however, provides an exception that allows parties who wish to stay or otherwise modify the effect of an injunction that is being appealed to move the district court to stay the effect of the judgment or order pending that appeal. Fed. R. Civ. P. 62(d); Mayweathers, 258 F.3d at 935.

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

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

the case, then it possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient.")(internal citations omitted).

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

Moreover, the Court takes judicial notice[1] of recent developments and makes additional findings that further indicate that Plaintiff cannot demonstrate a strong showing of likelihood of success on the merits. First, much of Plaintiff's argument has focused on Defendants' treatment of casinos, which Plaintiff argues are not subject to the fifty-person cap, in an example of preferential treatment given to secular spaces over religious ones. But, as the Court stated in its prior Order, the regulatory regime to which casinos are subject is much more intrusive and expansive—and subject to sudden modification—than the regulatory regime applied to places of worship. To this point, just two days ago, on June 17, 2020, the

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

Nevada Gaming Control Board issued Notice # 2020-43, which, among other changes, now requires *all patrons of casinos to wear face coverings at table and card games* if there is no barrier, partition, or shield between the dealer and each player or other person within six feet of the table. See Updated Health and Safety Policies for Reopening After Temporary Closure, Nevada Gaming Control Board, https://gaming.nv.gov/modules/showdocument.aspx?documentid=16837 (last accessed June 18, 2020). This updated regulation will result in a substantial number of patrons at gaming establishments having to wear face coverings while in the common gaming area of such establishments. The Governor did not modify his prior Emergency Directive to require face coverings for individuals who go to places of worship and participate in religious services. Thus, the Court finds that casinos are now subject to some more severe restrictions on their activities than are places of worship. Moreover, the Court reiterates the point that the Court made in its prior Order—that "while Calvary focuses on the fifty-person cap, it fails to consider the totality of restrictions placed upon casinos [and other entities] in [its] comparative analysis." Order Dated June 11, 2020, ECF No. 43, at 7. That the Nevada Gaming Control Board suddenly changed its regulations is also another example of the dynamic nature of public health regulations during this time period and the need for the Court to exercise restraint. The Court emphasizes that the Emergency Directive must be considered in light of the various measures it imposes and all the various social activities that it covers.

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

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

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

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

For all of the reasons stated,

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

DATED: June 19, 2020.

RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE

SUPREME COURT OF THE UNITED STATES

No. 19A1070

CALVARY CHAPEL DAYTON VALLEY *v.* STEVE SISOLAK, GOVERNOR OF NEVADA, ET AL.

ON APPLICATION FOR INJUNCTIVE RELIEF

[July 24, 2020]

The application for injunctive relief presented to JUSTICE KAGAN and by her referred to the Court is denied.

JUSTICE ALITO, with whom JUSTICE THOMAS and JUSTICE KAVANAUGH join, dissenting from denial of application for injunctive relief.

The Constitution guarantees the free exercise of religion. It says nothing about the freedom to play craps or black-jack, to feed tokens into a slot machine, or to engage in any other game of chance. But the Governor of Nevada apparently has different priorities. Claiming virtually un-bounded power to restrict constitutional rights during the COVID–19 pandemic, he has issued a directive that severely limits attendance at religious services. A church, synagogue, or mosque, regardless of its size, may not admit more than 50 persons, but casinos and certain other favored facilities may admit 50% of their maximum occupancy—and in the case of gigantic Las

Vegas casinos, this means that thousands of patrons are allowed.

That Nevada would discriminate in favor of the powerful gaming industry and its employees may not come as a surprise, but this Court's willingness to allow such discrimination is disappointing. We have a duty to defend the Constitution, and even a public health emergency does not absolve us of that responsibility.

I

Calvary Chapel Dayton Valley is a church located in rural Nevada. It wishes to host worship services for about 90 congregants, a figure that amounts to 50% of its fire-code capacity. In conducting these services, Calvary Chapel plans to take many precautions that go beyond anything that the State requires. In addition to asking congregants to adhere to proper social distancing protocols, it intends to cut the length of services in half. It also plans to require six feet of separation between families seated in the pews, to prohibit items from being passed among the congregation, to guide congregants to designated doorways along one-way paths, and to leave sufficient time between services so that the church can be sanitized. According to an infectious disease expert, these measures are "equal to or more extensive than those recommended by the CDC." Electronic Court Filing in No. 3:20–CV–00303, Doc. 38–31 (D Nev., June 4, 2020), p. 6 (ECF).

Yet hosting even this type of service would violate Directive 21, Nevada Governor Steve Sisolak's phase-two reopening plan, which limits indoor worship services to "no more than fifty persons." ECF Doc. 38–

2, §11. Meanwhile, the directive caps a variety of secular gatherings at 50% of their operating capacity, meaning that they are welcome to exceed, and in some cases far exceed, the 50-person limit imposed on places of worship.

Citing this disparate treatment, Calvary Chapel brought suit in Federal District Court and sought an injunction allowing it to conduct services, in accordance with its plan, for up to 50% of maximum occupancy. The District Court refused to grant relief, the Ninth Circuit denied Calvary Chapel's application for an injunction pending appeal, and now this Court likewise denies relief.

I would grant an injunction pending appeal. Calvary Chapel is very likely to succeed on its claim that the directive's discriminatory treatment of houses of worship violates the First Amendment. In addition, unconstitutionally preventing attendance at worship services inflicts irreparable harm on Calvary Chapel and its congregants, and the State has made no effort to show that conducting services in accordance with Calvary Chapel's plan would pose any greater risk to public health than many other activities that the directive allows, such as going to the gym. The State certainly has not shown that church attendance under Calvary Chapel's plan is riskier than what goes on in casinos.

For months now, States and their subdivisions have responded to the pandemic by imposing unprecedented restrictions on personal liberty, including the free exercise of religion. This initial response was understandable. In times of crisis, public officials must respond quickly and decisively to

evolving and uncertain situations. At the dawn of an emergency—and the opening days of the COVID–19 outbreak plainly qualify—public officials may not be able to craft precisely tailored rules. Time, information, and expertise may be in short supply, and those responsible for enforcement may lack the resources needed to administer rules that draw fine distinctions. Thus, at the outset of an emergency, it may be appropriate for courts to tolerate very blunt rules. In general, that is what has happened thus far during the COVID–19 pandemic.

But 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. As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights. Governor Sisolak issued the directive in question on May 28, more than two months after declaring a state of emergency on March 12. Now four months have passed since the original declaration. The problem is no longer one of exigency, but one of considered yet discriminatory treatment of places of worship.

II

Calvary Chapel argues that the Governor's directive violates both the Free Exercise Clause and the Free Speech Clause of the First Amendment, and I agree that Calvary Chapel has a very high likelihood of success on these claims.

A

Under the Free Exercise Clause, restrictions on religious exercise that are not "neutral and of general applicability" must survive strict scrutiny. *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 531 (1993). "[T]he minimum requirement of neutrality is that a law not discriminate on its face," *id.*, at 533, and "[t]he Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion." *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 584 U. S. ___, ___ (2018) (slip op., at 17) (quoting *Church of Lukumi*, 508 U. S., at 534). Here, the departure is hardly subtle. The Governor's directive specifically treats worship services differently from other activities that involve extended, indoor gatherings of large groups of people.

The face of the directive provides many examples. While "houses of worship" may admit "no more than fifty persons," ECF Doc. 38–2, §11, many favored facilities that host indoor activities may operate at 50% capacity. Privileged facilities include bowling alleys, §20, breweries, §26, fitness facilities, §28, and most notably, casinos, which have operated at 50% capacity for over a month, §35; ECF Doc. 38–3, p. 5, sometimes featuring not only gambling but live circus acts and shows.

For Las Vegas casinos, 50% capacity often means thousands of patrons, and the activities that occur in casinos frequently involve far less physical distancing and other safety measures than the worship services that Calvary Chapel proposes to conduct. Patrons at a craps or blackjack table do not customarily stay six feet apart. Casinos are permitted to serve alcohol,

which is well known to induce risk taking, and drinking generally requires at least the temporary removal of masks. Casinos attract patrons from all over the country. In anticipation of reopening, one casino owner gave away 2,000 one-way airline tickets to Las Vegas. ECF Doc. 38–9, p. 4. And when the Governor announced that casinos would be permitted to reopen, he invited visitors to come to the State.[1] The average visitor to Las Vegas visits more than six different casinos, potentially gathering with far more than 50 persons in each one. ECF Doc. 38–6, p. 44. Visitors to Las Vegas who gamble do so for more than two hours per day on average, *id.*, at 43, and gamblers in a casino often move from one spot to another, trying their luck at different games or at least at different slot machines.

Houses of worship can—and have—adopted rules that provide far more protection. Family groups can be given places in the pews that are more than six feet away from others. Worshippers can be required to wear masks throughout the service or for all but a very brief time. Worshippers do not customarily travel from distant spots to attend a particular church; nor do they generally hop from church to church to sample different services on any given Sunday. Few worship services last two hours. (Calvary Chapel now limits its services to 45 minutes.) And worshippers do not generally mill around the church while a service is in progress.

---

[1] See Jones, Nevada Governor Green-Lights June 4 Reopening of Casinos; Las Vegas Gets Ready, L. A. Times (May 26, 2020), www.latimes.com/travel/story/2020-05-26/nevada-governor-oks-reopening-vegas-prepares.

The idea that allowing Calvary Chapel to admit 90 worshippers presents a greater public health risk than allowing casinos to operate at 50% capacity is hard to swallow, and the State's efforts to justify the discrimination are feeble. It notes that patrons at gaming tables are supposed to wear masks and that the service of food at casinos is now limited, but congregants in houses of worship are also required to wear masks, and they do not consume meals during services.

The State notes that facilities other than houses of worship, such as museums, art galleries, zoos, aquariums, trade schools, and technical schools, are also treated less favorably than casinos, but obviously that does not justify preferential treatment for casinos.

Finally, the State argues that preferential treatment for casinos is justified because the State is in a better position to enforce compliance by casinos, which are under close supervision by state officials and subject to penalties if they violate state rules. By contrast, the State notes, rules for houses of worship must be enforced by local authorities.

This argument might make some sense if enforcing the 50% capacity rule were materially harder than enforcing a flat 50-person rule. But there is no reason to think that is so, let alone that it would be compelling enough to justify differential treatment of religion. Local officials responsible for enforcing maximum occupancy limits during normal times presumably know or can easily ascertain the limit for particular churches, and the State does not claim that these officials have any trouble enforcing those limits.

In many jurisdictions, buildings that host gatherings are required to post their maximum occupancy figure in a prominent location. Enforcing a 50% limit would not require local officials to do anything more than divide that figure in half, and there is no reason to think that enforcing that limit would be any harder than enforcing a 50-person maximum.

Moreover, 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 bowling alleys, arcades, and fitness centers are also given the benefit of the 50% rule. And while the State suggests that it strictly enforces the rules applicable to casinos, photos and videos taken in casinos after they were allowed to reopen show widespread and blatant safety violations. Patrons without masks are seen at close quarters, and the State has not brought to our attention any evidence that it has cracked down on non-complying casinos. The sharp spike in COVID–19 cases since the casinos reopened belies the State's strict enforcement claims.

While the directive's treatment of casinos stands out, other facilities are also given more favorable treatment than houses of worship. Take the example of bowling alleys. Some Las Vegas bowling alleys where tournaments are held can seat hundreds of spectators, and under the directive, these facilities may admit up to 50% of capacity. Not only that, the State tolerates seating arrangements at these facilities that pose far more danger than the plan Calvary Chapel proposes. An official state guidance document states that groups of up to 50 people may sit together in the grandstands of a bowling alley

provided that they maintain social distancing from other groups. ECF Doc. 38–5, p. 9. Thus, while Calvary Chapel cannot admit more than 50 congregants even if families sit six feet apart, spectators at a bowling tournament can *sit together in groups of 50* provided that each group maintains social distancing *from other groups*.

In sum, the directive blatantly discriminates against houses of worship and thus warrants strict scrutiny under the Free Exercise Clause.

B

The directive fares no better under the Free Speech Clause. Laws that restrict speech based on the viewpoint it expresses are presumptively unconstitutional, see, *e.g.*, *Iancu* v. *Brunetti*, 588 U. S. ___, ___–___ (2019) (slip op., at 4–5), and under our cases religion counts as a viewpoint, *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 831 (1995). Here, the Directive plainly discriminates on the basis of viewpoint. Compare the directive's treatment of casino entertainment and church services. Both involve expression, but the directive favors the secular expression in casino shows over the religious expression in houses of worship.

Calvary Chapel has also brought to our attention evidence that the Governor has favored certain speakers over others. When large numbers of protesters openly violated provisions of the Directive, such as the rule against groups of more than 50 people, the Governor not only declined to enforce the directive but publicly supported and participated in a protest. Cf. *Masterpiece Cakeshop*, 584 U. S., at ___–___ (slip op., at 14–16). He even shared a video of

protesters standing shoulder to shoulder. The State's response to news that churches might violate the directive was quite different. The attorney general of Nevada is reported to have said, " 'You can't spit . . . in the face of law and not expect law to respond.' "[2]

Public protests, of course, are themselves protected by the First Amendment, and any efforts to restrict them would be subject to judicial review. But respecting some First Amendment rights is not a shield for violating others. The State defends the Governor on the ground that the protests expressed a viewpoint on important issues, and that is undoubtedly true, but favoring one viewpoint over others is anathema to the First Amendment.

C

Once it is recognized that the directive's treatment of houses of worship must satisfy strict scrutiny, it is apparent that this discriminatory treatment cannot survive. Indeed, Nevada does not even try to argue that the directive can withstand strict scrutiny.

Having allowed thousands to gather in casinos, the State cannot claim to have a compelling interest in limiting religious gatherings to 50 people—regardless of the size of the facility and the measures adopted to prevent the spread of the virus. "[A] law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage

---

[2] Application 8, and n. 6 (quoting Lochhead, Sisolak, Elected Nevada Officials Discuss Systemic Racism, Reform, Las Vegas Review-Journal (June 5, 2020), www.reviewjournal.com/news/politics-and-government/nevada/sisolak-elected-nevada-officials-discuss-systemic-racism-reform-2045833/).

to that supposedly vital interest unprohibited." *Church of Lukumi*, 508 U. S., at 547 (internal quotation marks omitted). And even if the 50-person limit served a compelling interest, the State has not shown that public safety could not be protected at least as well by measures such as those Calvary Chapel proposes to implement.

D

The State's primary defense of the directive's treatment of houses of worship is based on two decisions of this Court. Quoting certain language in *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905), Nevada argues that "when a state exercises emergency police powers to enact an emergency public health measure, courts will uphold it unless (1) there is no real or substantial relation to public health, or (2) the measures are 'beyond all question' a 'plain[,] palpable [invasion] of rights secured by the fundamental law.' " Response to Application 11 (quoting *Jacobson*, 197 U. S., at 31).

Even under this test, the directive's discriminatory treatment would likely fail for the reasons already explained. And in any event, it 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. Language in *Jacobson* must be read in context, and it is important to keep in mind that *Jacobson* primarily involved a substantive due process challenge to a local ordinance requiring residents to be vaccinated for small pox.[3] It

[3] The Court brushed aside Jacobson's claims that the challenged law violated the Preamble and the spirit of the Constitution. *Jacobson*, 197 U. S., at 22. His claim under the

is a considerable stretch to read the decision 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.

The State also points to the Court's recent refusal to issue a temporary injunction against enforcement of a California law that limited the number of persons allowed to attend church services. See *South Bay United Pentecostal Church* v. *Newsom*, 590 U. S. ___ (2020). I dissented from that decision, see *ibid.*; see also *id.*, at ___ (KAVANAUGH, J., dissenting), but even if it is accepted, that case is different from the one now before us. In *South Bay*, a church relied on the fact that the California law treated churches less favorably than certain other facilities, such as factories, offices, supermarkets, restaurants, and retail stores. But the law was defended on the ground that in these facilities, unlike in houses of worship, "people neither congregate in large groups nor remain in close proximity for extended periods." *Id.*, at ___ (ROBERTS, C. J., concurring) (slip op., at 2). That cannot be said about the facilities favored in Nevada. In casinos and other facilities granted preferential treatment under the directive, people congregate in

---

Privileges or Immunities Clause of the Fourteenth Amendment was doomed by the *Slaughter-House Cases*, 16 Wall. 36, 76–80 (1873), and was not addressed by the Court. Finally, the Court quickly rejected his equal protection claim, *Jacobson*, 197 U. S., at 30, which was based on the law's exemption for children and persons under guardianship, see *Commonwealth* v. *Jacobson*, decided with *Commonwealth* v. *Pear*, 183 Mass. 242, 248, 66 N. E. 719, 722 (1903).

large groups and remain in close proximity for extended periods.

E

An injunction pending appeal is warranted in this case. Calvary Chapel's First Amendment claims are very likely to succeed. Indeed, it can be said that its "legal rights . . . are indisputably clear," *Turner Broadcasting System, Inc.* v. *FCC*, 507 U. S. 1301, 1303 (1993) (Rehnquist, C. J., in chambers) (internal quotation marks omitted), and the equities also favor Calvary Chapel. Preventing congregants from worshipping will cause irreparable harm, and the State has made no effort to show that Calvary Chapel's plans would create a serious public health risk.

* * *

I would issue an injunction barring the State, pending appeal, from interfering with worship services conducted at Calvary Chapel in accordance with its stated plan and the general facemask requirement. I therefore respectfully dissent.

GORSUCH, J., dissenting

JUSTICE GORSUCH, dissenting from denial of application for injunctive relief.

This is a simple case. Under the Governor's edict, a 10-screen "multiplex" may host 500 moviegoers at any time. A casino, too, may cater to hundreds at once, with perhaps six people huddled at each craps table here and a similar number gathered around every roulette wheel there. Large numbers and close quarters are fine in such places. But churches,

synagogues, and mosques are banned from admitting more than 50 worshippers—no matter how large the building, how distant the individuals, how many wear face masks, no matter the precautions at all. In Nevada, it seems, it is better to be in entertainment than religion. Maybe that is nothing new. But the First Amendment prohibits such obvious discrimination against the exercise of religion. The world we inhabit today, with a pandemic upon us, poses unusual challenges. But there is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel.

KAVANAUGH, J., dissenting

JUSTICE KAVANAUGH, dissenting from denial of application for injunctive relief.

I join JUSTICE ALITO's dissent in full and respectfully add these further comments.

Under its current reopening plan, Nevada allows restaurants, bars, casinos, and gyms to grant entrance to up to 50% of their total occupancy limit—no matter how many people that may be. For example, a casino with a 500-person occupancy limit may let in up to 250 people. By contrast, places of worship may only take in a maximum of 50 people, without exception, regardless of the occupancy cap. So unlike a casino next door, a church with a 500-person occupancy limit may let in only 50 people, not 250 people. Nevada has offered no persuasive justification for that overt discrimination against places of worship. The risk of COVID–19 transmission is at least as high at restaurants, bars, casinos, and gyms as it is at religious services. Indeed, people congrega-

ting in restaurants, bars, casinos, and gyms often linger at least as long as they do at religious services. And given the safety measures that Calvary Chapel and other places of worship are following—including social distancing, mask wearing, and certain additional voluntary measures—it is evident that people interact with others at restaurants, bars, casinos, and gyms at least as closely as they do at religious services.

In my view, Nevada's discrimination against religious services violates the Constitution. To be clear, a State's closing or reopening plan may subject religious organizations to the *same* limits as secular organizations. And in light of the devastating COVID–19 pandemic, those limits may be very strict. But a State may not impose strict limits on places of worship and looser limits on restaurants, bars, casinos, and gyms, at least without sufficient justification for the differential treatment of religion. As I will explain, Nevada has thus far failed to provide a sufficient justification, and its current reopening plan therefore violates the First Amendment.

In Part I, I will explain how this case fits into the Court's broader religion jurisprudence. In Part II, I will explain why Nevada's treatment of religious organizations is unconstitutional under the Court's precedents.

I

Religion cases are among the most sensitive and challenging in American law. Difficulties can arise at the outset because the litigants in religion cases often disagree about how to characterize a law. They may disagree about whether a law favors religion or

discriminates against religion. They may disagree about whether a law treats religion equally or treats religion differently. They may disagree about what it means for a law to be neutral toward religion.

The definitional battles over what constitutes favoritism, discrimination, equality, or neutrality can influence, if not decide, the outcomes of religion cases. But the parties to religion cases and the judges deciding those cases often do not share a common vocabulary or common background principles. And that disconnect can muddy the analysis, build resentment, and lead to litigants and judges talking past one another.

In my view, some of the confusion and disagreement can be averted by first identifying and distinguishing four categories of laws: (1) laws that expressly discriminate against religious organizations; (2) laws that expressly favor religious organizations; (3) laws that do not classify on the basis of religion but apply to secular and religious organizations alike; and (4) laws that expressly treat religious organizations equally to some secular organizations but better or worse than other secular organizations. As I will explain, this case involving Nevada's reopening plan falls into the fourth category.

First are laws that expressly discriminate against religious organizations because of religion. The recent *Espinoza* case fell into that category. *Espinoza* v. *Montana Dept. of Revenue*, *ante*, p. ___. The State of Montana provided tax credits to those who contributed to private school scholarship organizations. But there was a significant catch: Families

eligible for scholarship funds could use those funds only at secular private schools, not religious private schools. Cases like that are straightforward examples of religious discrimination. And as a general rule, laws that discriminate against religion are, in the Court's words, "odious to our Constitution." *Espinoza*, *ante*, at 22 (internal quotation marks omitted); see *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U. S. ___ (2017); *Good News Club* v. *Milford Central School*, 533 U. S. 98 (2001); *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995); *Larson* v. *Valente*, 456 U. S. 228 (1982); *McDaniel* v. *Paty*, 435 U. S. 618, 629 (1978) (Brennan, J., concurring in judgment); see also *Murphy* v. *Collier*, 587 U. S. ___ (2019) (KAVANAUGH, J., concurring in grant of application for stay); cf. *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520 (1993).

Second are laws that expressly favor religious organizations over secular organizations. Examples include cases where a legislature affords religious organizations certain accommodations, exemptions, or benefits that are not available to secular organizations. The legislature might, for example, grant religious organizations a property tax exemption that is not available to secular organizations. Cf. *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664 (1970). Or the legislature might authorize accommodations for certain religious individuals (but not secular individuals) that relieve them from the burdens of otherwise-applicable laws, such as the draft. See *Gillette* v. *United States*, 401 U. S. 437 (1971). Those kinds of accommodations or exemptions can sometimes trigger Establishment

Clause challenges because of the apparent favoritism of religion. See generally *American Legion* v. *American Humanist Assn.*, 588 U. S. ___, ___ (2019) (KAVANAUGH, J., concurring); see also *Cutter* v. *Wilkinson*, 544 U. S. 709 (2005); *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet*, 512 U. S. 687, 722 (1994) (Kennedy, J., concurring in judgment); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327 (1987).

Third are laws that apply to religious and secular organizations alike without making any classification on the basis of religion. For example, a city fire code may require sprinklers in all buildings that can hold more than 100 people. A law like that would cover buildings owned by religious organizations and buildings owned by secular organizations. Those kinds of laws on their face present no impermissible discrimination or favoritism.

To be sure, those kinds of laws, although not differentiating between religious and secular organizations, can still sometimes impose substantial burdens on religious exercise. If so, a religious organization may seek an exemption in court (if not also in the legislature) to the extent available under federal or state law and permissible under the Establishment Clause. See, *e.g.*, *Our Lady of Guadalupe School* v. *Morrissey-Berru*, *ante*, p. ___; *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U. S. 418 (2006). Or a religious organization may contend that the facially neutral law was actually motivated by animus against religion and is unconstitutional on that ground. See *Lukumi*, 508 U. S. 520.

Fourth are laws—like Nevada's in this case—that supply no criteria for government benefits or action, but rather divvy up organizations into a favored or exempt category and a disfavored or non-exempt category. Those laws provide benefits only to organizations in the favored or exempt category and not to organizations in the disfavored or non-exempt category.

For example, consider a zoning law that places some secular organizations (apartment buildings, small retail businesses, restaurants, banks, etc.) in a favored or exempt zoning category, and places some secular organizations (office buildings, large retail businesses, movie theaters, music venues, etc.) in a disfavored or non-exempt zoning category. Suppose that religious properties arguably could be considered similar to some of the secular properties in *both* categories. What, then, are the constitutional limits and requirements with respect to how the legislature may categorize religious organizations?

In those circumstances, the Court's precedents make clear that the legislature *may* place religious organizations in the favored or exempt category rather than in the disfavored or non-exempt category without causing an Establishment Clause problem. See, *e.g.*, *Walz*, 397 U. S., at 696 (opinion of Harlan, J.) ("[T]he critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter"); *Texas Monthly, Inc.* v. *Bullock*, 489 U. S. 1, 14 (1989) (plurality opinion) (expressing approval of subsidies "conferred upon a wide array of nonsectarian groups as well as religious organiza-

tions in pursuit of some legitimate secular end"); *Concerned Citizens of Carderock* v. *Hubbard*, 84 F. Supp. 2d 668 (Md. 2000) (State may place religious organizations in favored zoning category along with some secular organizations).

The converse free-exercise or equal-treatment question is whether the legislature is *required* to place religious organizations in the favored or exempt category rather than in the disfavored or non-exempt category. The Court's free-exercise and equal-treatment precedents also supply an answer to that question: Unless the State provides a sufficient justification otherwise, it must place religious organizations in the favored or exempt category. See Laycock, The Remnants of Free Exercise, 1990 S. Ct. Rev. 1, 49–50 (explaining how this Court's precedents grant "something analogous to most-favored nation status" to religious organizations).

In *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), for example, the Court explained that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship *without compelling reason*." *Id.*, at 884 (internal quotation marks omitted; emphasis added); see also *Lukumi*, 508 U. S., at 537–538. Likewise, then-Judge Alito stated that the First Amendment required a police department to exempt Sunni Muslims from its no-beard policy because the police department made "exemptions from its policy for secular reasons and has not offered *any substantial justification* for refusing to provide similar treatment for officers who are required to wear beards for religious reasons." *Fraternal Order of Police Newark Lodge No. 12* v.

Newark, 170 F. 3d 359, 360 (CA3 1999) (emphasis added).

Put simply, under the Court's religion precedents, when a law on its face favors or exempts some secular organizations as opposed to religious organizations, a court entertaining a constitutional challenge by the religious organizations must determine whether the State has sufficiently justified the basis for the distinction.

To be clear, the Court's precedents do not require that religious organizations be treated *more favorably* than all secular organizations. Rather, the First Amendment requires that religious organizations be treated *equally* to the favored or exempt secular organizations, unless the State can sufficiently justify the differentiation.

Stated otherwise, in these kinds of cases, the Court's religion precedents require a basic two-step inquiry. First, does the law create a favored or exempt class of organizations and, if so, do religious organizations fall outside of that class? That threshold question does not require judges to decide whether a church is more akin to a factory or more like a museum, for example. Rather, the only question at the start is whether a given law on its face favors certain organizations and, if so, whether religious organizations are part of that favored group. If the religious organizations are not, the second question is whether the government has provided a sufficient justification for the differential treatment and disfavoring of religion. Cf. *Smith*, 494 U. S., at 884.

In seeking to justify the differential treatment in those kinds of cases, it is not enough for the govern-

ment to point out that other secular organizations or individuals are also treated *unfavorably*. The point "is not whether one or a few secular analogs are regulated. The question is whether a single secular analog is *not* regulated." Laycock & Collis, Generally Applicable Law and the Free Exercise of Religion, 95 Neb. L. Rev. 1, 22 (2016). To that end, the government must articulate a sufficient justification for treating some secular organizations or individuals *more favorably* than religious organizations or individuals. See *Smith*, 494 U. S., at 884. That point is subtle but absolutely critical. And if that point is not fully understood, then cases of this kind will be wrongly decided.

II

I turn then to analyzing Nevada's rules under the Court's precedents. As JUSTICE ALITO explains in his dissent, Nevada has now had more than four months to respond to the initial COVID–19 crisis and adjust its line-drawing as circumstances change. Yet Nevada is still discriminating against religion. Nevada applies a strict 50-person attendance cap to religious worship services, but applies a looser 50% occupancy cap to secular organizations like restaurants, bars, casinos, and gyms.

Nevada has gestured at two possible justifications for that discrimination: public health and the economy. But neither argument is persuasive on this record.

First is the State's public health rationale. Nevada undoubtedly has a compelling interest in combating the spread of COVID–19 and protecting the health of its citizens. But it does not have a

persuasive public health reason for treating churches differently from restaurants, bars, casinos, and gyms. Calvary Chapel is happy to abide by the same 50% occupancy cap or some stricter across-the-board standard, as the State sees fit, so long as the same standard applies to those secular businesses. And the Church has committed to social distancing, mask requirements, and certain voluntary safety measures.

The State has not explained why a 50% occupancy cap is good enough for secular businesses where people congregate in large groups or remain in close proximity for extended periods—such as at restaurants, bars, casinos, and gyms—but is not good enough for places of worship. Again, it does not suffice to point out that *some* secular businesses, such as movie theaters, are subject to the lesser of a 50-person or 50% occupancy cap. The legal question is not whether religious worship services are all alone in a disfavored category, but why they are in the disfavored category to begin with. See *Smith*, 494 U. S., at 884. And Nevada has not advanced a sufficient public health rationale for that decision. To reiterate, the State has substantial room to draw lines, especially in an emergency or crisis. But Nevada has not demonstrated that public health justifies taking a looser approach with restaurants, bars, casinos, and gyms and a stricter approach with places of worship.

Second is the State's economic rationale. The State wants to jump-start business activity and preserve the economic well-being of its citizens. The State has loosened restrictions on restaurants, bars, casinos, and gyms in part because many Nevada jobs and livelihoods, as well as other connected Nevada

businesses, depend on those restaurants, bars, casinos, and gyms being open and busy. It is understandable for the State to balance public health concerns against individual economic hardship. Almost every State and municipality in America is struggling with that balance. After all, if preventing transmission of COVID–19 were the *sole* concern, a State would presumably order almost all of its businesses to stay closed indefinitely. But the economic devastation and the economic, physical, intellectual, and psychological harm to families and individuals that would ensue (and has already ensued, to some extent) requires States to make tradeoffs that can be unpleasant to openly discuss.

With respect to those tradeoffs, however, no precedent suggests that a State may discriminate against religion simply because a religious organization does not generate the economic benefits that a restaurant, bar, casino, or gym might provide. Nevada's rules reflect an implicit judgment that for-profit assemblies are important and religious gatherings are less so; that moneymaking is more important than faith during the pandemic. But that rationale "devalues religious reasons" for congregating "by judging them to be of lesser import than nonreligious reasons," in violation of the Constitution. *Lukumi*, 508 U. S., at 537–538. The Constitution does not tolerate discrimination against religion merely because religious services do not yield a profit.

More broadly, the State insists that it is in the midst of an emergency and that it should receive deference from the courts and not be bogged down in litigation. If the courts simply enforce the constitutional prohibition against religious discrimination,

however, the floodgates will not open. I agree that courts should be very deferential to the States' line-drawing in opening businesses and allowing certain activities during the pandemic. For example, courts should be extremely deferential to the States when considering a substantive due process claim by a secular business that it is being treated worse than another business. Cf. *Jacobson* v. *Massachusetts*, 197 U. S. 11, 25–28 (1905). Under the Constitution, state and local governments, not the federal courts, have the primary responsibility for addressing COVID–19 matters such as quarantine requirements, testing plans, mask mandates, phased reopenings, school closures, sports rules, adjustment of voting and election procedures, state court and correctional institution practices, and the like.

But COVID–19 is not a blank check for a State to discriminate against religious people, religious organizations, and religious services. There are certain constitutional red lines that a State may not cross even in a crisis. Those red lines include racial discrimination, religious discrimination, and content-based suppression of speech. This Court's history is littered with unfortunate examples of overly broad judicial deference to the government when the government has invoked emergency powers and asserted crisis circumstances to override equal-treatment and free-speech principles. The court of history has rejected those jurisprudential mistakes and cautions us against an unduly deferential judicial approach, especially when questions of racial discrimination, religious discrimination, or free speech are at stake.

Finally, the State relies on the Court's recent temporary injunction decision in *South Bay United Pentecostal Church* v. *Newsom*, 590 U. S. ___ (2020). There, the Court considered a California limitation on crowd size at religious services. California treated religious organizations better than some secular organizations, like movie theaters, but worse than other secular organizations, such as restaurants, supermarkets, retail stores, pharmacies, hair salons, offices, factories, and the like. In my view, the State of California's explanation, at least on that record, did not persuasively distinguish religious services from several of the favored secular organizations, particularly restaurants and supermarkets. But the Court ultimately denied the church's request for an emergency injunction. In his concurrence, THE CHIEF JUSTICE appropriately emphasized both the high standard for obtaining injunctive relief in this Court and the ongoing and rapidly changing public health emergency. THE CHIEF JUSTICE also noted that the favored secular activities did not involve people who "congregate in large groups" or "remain in close proximity for extended periods." *Id.*, at ___ (opinion concurring in denial of application for injunctive relief) (slip op., at 2).

I continue to think that the restaurants and supermarkets at issue in *South Bay* (and especially the restaurants) pose similar health risks to socially distanced religious services in terms of proximity to others and duration of visit. I suspect that many who have frequented all three kinds of establishments in recent weeks and months would agree. So I continue to respectfully disagree with *South Bay*.

But accepting *South Bay* as a precedent, this case is much different because it involves bars, casinos, and gyms. Nevada's COVID–19-based health distinction between (i) bars, casinos, and gyms on the one hand, and (ii) religious services on the other hand, defies common sense. As I see it, the State cannot plausibly maintain that those large secular businesses are categorically safer than religious services, or that only religious services—and not bars, casinos, and gyms—entail people congregating in large groups or remaining in close proximity for extended periods of time. In any event, the State has not yet supplied a sufficient justification for its counterintuitive distinction.

* * *

The Constitution "protects religious observers against unequal treatment." *Trinity Lutheran*, 582 U. S., at ___ (slip op., at 6) (internal quotation marks and alterations omitted). Nevada's 50-person attendance cap on religious worship services puts praying at churches, synagogues, temples, and mosques on worse footing than eating at restaurants, drinking at bars, gambling at casinos, or biking at gyms. In other words, Nevada is discriminating against religion. And because the State has not offered a sufficient justification for doing so, that discrimination violates the First Amendment. I would grant the Church's application for a temporary injunction. I respectfully dissent.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 2 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; et al., Defendants-Appellees.	No. 20-16169 D.C. No. 3:20-cv-00303-RFB-VCF District of Nevada, Reno ORDER

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

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

The previously established briefing schedule remains in effect.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 26 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; et al., Defendants-Appellees.	No. 20-16169 D.C. No. 3:20-cv-00303-RFB-VCF District of Nevada, Reno ORDER

Appellees Aaron Ford and Steve Sisolak's Motion to Dismiss Appeal (Dkt. No. 50) is DENIED. A party's "voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice" if the challenged practice is "reasonably . . . expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (internal quotations and citations omitted). Furthermore, a court may exercise jurisdiction over cases that are "capable of repetition,

yet evading review." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (internal quotations and citations omitted).

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Omar Cubillos
Deputy Clerk
Ninth Circuit Rule 27-7

U.S. Constitution Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Constitution Amendment XIV § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Declaration of Emergency Directive 021 – Phase Two Reopening Plan

WHEREAS, in late 2019, the United States Centers for Disease Control and Prevention began monitoring an outbreak of respiratory illness caused by a novel coronavirus first identified in Wuhan, Hubei Province, China; and

WHEREAS, on February 11, 2020, the International Committee on Taxonomy of Viruses named this novel coronavirus "severe acute respiratory syndrome coronavirus 2 (SARS-Co V-2);" and

WHEREAS, on February 11, 2020, the World Health Organization named the disease caused by SARS-CoV-2, "COVID-19:" and

WHEREAS, the World Health Organization advises that the novel coronavirus that causes COVID-19 virus is highly contagious, and spreads through respiratory transmission, and direct and indirect contact with infected persons and surfaces; and

WHEREAS, the World Health Organization advises that respiratory transmission occurs through both droplet and airborne transmission, where droplet transmission occurs when a person is within 6 feet of someone who has respiratory symptoms like coughing or sneezing, and airborne transmission may occur when aerosolized particles remain suspended in the air and is inhaled; and

WHEREAS, the World Health Organization advises that contact transmission occurs by direct contact with infected people or indirect contact with surfaces contaminated by the novel coronavirus; and

WHEREAS, some persons with COVID-19 may exhibit no symptoms but remain highly infectious; and

WHEREAS, on March 5, 2020, Clark County and Washoe County both reported the first known cases of COVID-19 in the State of Nevada; and

WHEREAS, on March 11, 2020, the World Health Organization declared COVID-19 a pandemic; and

WHEREAS, on March 12, 2020, I, Steve Sisolak, Governor of the State of Nevada issued a Declaration of Emergency to facilitate the State's response to the COVID-19 pandemic; and

WHEREAS, on March 13, 2020, Donald J. Trump, President of the United States declared a nationwide emergency pursuant to Sec. 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121-5207 (the "Stafford Act"); and

WHEREAS, on March 14, 2020, I formed a medical advisory team to provide medical guidance and scientifically based recommendations on measures Nevada could implement to better contain and mitigate the spread of COVID-19; and

WHEREAS, infectious disease and public health experts advised that minimizing interpersonal contact slows the rate at which the disease spreads, and is necessary to avoid overwhelming healthcare systems, commonly referred to as "flattening the curve"; and

WHEREAS, since the March 12, 2020 Declaration of Emergency, I have issued 20 Directives pursuant to that order to provide for the safety, wellbeing, and

public health of Nevadans and the administration of the State of Nevada; and

WHEREAS, these Directives were promulgated to reduce interpersonal contact and promote social distancing to flatten the curve; and

WHEREAS, data showed that Nevada was one of the top five states in the United States for social distancing; and

WHEREAS, Nevada's medical experts indicate that the rate at which COVID-19 is spreading in the State of Nevada has effectively slowed to a level that does not jeopardize the state's healthcare system due, in part, to Nevadans following strict social distancing measures individually and pursuant to Directives I issued pursuant to the March 12, 2020, Declaration of Emergency; and

WHEREAS, although the danger to Nevadans from the COVID-19 disease has abated, the disease has not been eliminated and measures that protect safety, wellbeing, and public health of Nevadans must remain in effect; and

WHEREAS, on April 21, 2020, the National Governors Association issued guidance for a staged reopening that protects the public's health while laying a strong foundation for long-term economic recovery; and

WHEREAS, on April 30, 2020, I introduced the *Nevada United: Roadmap to Recovery* plan that outlined a phased approach to reopening Nevada businesses and industry; and

WHEREAS, the *Nevada United: Roadmap to Recovery* plan set forth a collaborative partnership

between state and local governments that included the formation of the Local Empowerment Advisory Panel ("LEAP") to serve as a resource to local governments and local communities; and

WHEREAS, on May 9, 2020, the State of Nevada entered Phase One of the *Nevada United: Roadmap to Recovery* plan; and

WHEREAS, in the 19 days since Nevada entered Phase One, our state has experienced a consistent and sustainable downward trajectory in the percentage of positive COVID-19 cases, a decrease in the trend of COVID-19 hospitalizations, and a decline in our cumulative test positivity rate from a maximum rate of 12.2% on April 24, 2020 to 6.3% on May 27, 2020 with a 33-day downward trend; and

WHEREAS, the LEAP develops statewide guidelines for social distancing and phased reopening in consultation with local health authorities and other subject matter experts; and

WHEREAS, NRS 414.060 outlines powers and duties delegated to the Governor during the existence of a state of emergency, including without limitation, directing and controlling the conduct of the general public and the movement and cessation of movement of pedestrians and vehicular traffic during, before and after exercises or an emergency or disaster, public meetings or gatherings; and

WHEREAS, NRS 414.070 outlines additional powers delegated to the Governor during the existence of a state of emergency, including without limitation, enforcing all laws and regulations relating to emergency management and assuming direct

operational control of any or all forces, including, without limitation, volunteers and auxiliary staff for emergency management in the State; providing for and compelling the evacuation of all or part of the population from any stricken or threatened area or areas within the State and to take such steps as are necessary for the receipt and care of those persons; and performing and exercising such other functions, powers and duties as are necessary to promote and secure the safety and protection of the civilian population; and

WHEREAS, the Nevada Attorney General opined in Opinion Number 95-03 that in times of emergency when the Governor's authority under Nevada Revised Statutes Chapter 414 is in effect, the powers of political subdivisions to control business activity is limited; and

WHEREAS, NRS 414.060(3)(f) provides that the administrative authority vested to the Governor in times of emergency may be delegated; and

WHEREAS, Article 5, Section 1 of the Nevada Constitution provides: "The supreme executive power of this State, shall be vested in a Chief Magistrate who shall be Governor of the State of Nevada;" and

NOW, THEREFORE, by the authority vested in me as Governor by the Constitution and the laws of the State of Nevada and the United States, and pursuant to the March 12, 2020, Emergency Declaration,

IT IS HEREBY ORDERED THAT:

SECTION 1:	To the extent this Directive conflicts with earlier Directives or regulations promulgated pursuant to the March 12, 2020 Declaration of Emergency, the provisions of this Directive shall prevail.
SECTION 2:	Consistent with the *Nevada United: Roadmap to Recovery* plan for a federally supported, state managed, and locally executed reopening approach, county governments are hereby delegated the authority to impose additional COVID-19 related restrictions on businesses and public activities. Restrictions imposed by county government may exceed the standards imposed by Declaration of Emergency Directives or set forth under the LEAP guidelines, but in no case shall county-guidelines be more permissive than the provisions of this Directive.
SECTION 3:	Businesses may adopt practices that exceed the standards imposed by Declaration of Emergency Directives, guidelines promulgated by the Nevada State Occupational Safety and Health Administration (NV OSHA) or LEAP guidelines, but in no case shall business practices be more permissive than the provisions of this Directive or those imposed by NV OSHA and the LEAP.

SECTION 4:	Businesses performing non-retail services, including without limitation, legal services, accounting services, or real estate services, are encouraged to conduct business telephonically or virtually to the greatest extent practicable. These businesses are encouraged to permit employees to work from home to the greatest extent practicable.
SECTION 5:	For the purposes of this Directive, "vulnerable persons" are defined as those who are at heightened risk of complications from COVID-19 disease, and include: 1. Individuals who are 65 years of age and older; 2. Individuals with chronic lung disease or moderate to severe asthma; 3. Individuals who have serious heart conditions; 4. Individuals who are immunocompromised; 5. Pregnant women; or 6. Individuals determined to be high risk by a licensed healthcare provider.
SECTION 6:	All vulnerable persons are strongly encouraged to stay at home to the greatest extent possible, except when necessary to provide, support, perform, or operate necessary activities, minimum basic operations,

	critical government functions, necessary travel, or essential businesses.
SECTION 7:	The phrase "social distancing" references guidance promulgated by the United States Centers for Disease Control and Prevention, including without limitation, maintaining at least six feet of physical distancing from other individuals. The phrase "sanitation requirements," "sanitation measures," and "sanitation guidelines" includes without limitation, washing hands with soap and water for at least twenty seconds as frequently as possible, using hand sanitizer, covering coughs or sneezes (into the sleeve or elbow, not hands), regularly cleaning high-touch surfaces, and not shaking hands.
SECTION 8:	All Nevadans are strongly encouraged to stay in their residences to the greatest extent possible. Recognizing that COVID-19 is still present in Nevada and highly contagious, Nevadans are advised that they are safer at home and should avoid interpersonal contact with persons not residing in their households to the extent practicable. Nevadans are urged to avoid travel to the greatest extent practicable. To reduce the spread of COVID-19 via respiratory transmission, the Nevada public

	should utilize face coverings in public spaces.
SECTION 9:	Pursuant to NRS 441A.180, persons testing positive for COVID-19 shall stay at home and "self quarantine" for a minimum of two weeks, except as necessary to care for themselves or seek medical care. Persons determined to be in contact with an individual who tested positive for COVID-19 must quarantine and stay at home for two weeks, or until a negative test result has been received.
SECTION 10:	Section 1 of Directive 007 is hereby further amended to provide that effective 12:01 am on May 29, 2020, the Nevada general public shall not gather in groups of more than fifty in any indoor or outdoor area subject to the limitations of this section, whether publicly owned or privately owned where the public has access by right or invitation, express or implied, whether by payment of money or not. Section 3 of Directive 007 shall remain in force.
SECTION 11:	Communities of worship and faith-based organizations, including without limitation, churches, synagogues, mosques, and temples, are strongly encouraged to offer online and drive-up services to the greatest extent possible. Effective

	12:01 am on May 29, 2020, consistent with other Directives on public gatherings, houses of worship may conduct indoor in-person services in a manner so that no more than fifty persons are gathered, and all social distancing requirements are satisfied. This limitation shall not apply to houses of worship offering drive-up services pursuant to Section 10 of Directive 016. Houses of worship offering indoor, in-person services are encouraged to follow the guidelines promulgated by the LEAP, as well as the following provisions that are consistent with other Directives on public gatherings: 1. Seating must be arranged to ensure a minimum of six feet of separation between congregants who do not reside in the same household. 2. Participants, including leaders and staff, are encouraged to utilize face coverings to the greatest extent practicable. 3. Houses of worship are encouraged to stagger services so that the entrance and egress of congregants for different services do not result in a gathering greater than fifty persons, and to provide proper sanitation between services.

SECTION 12:	All employers must take proactive measures to ensure compliance with the social distancing and sanitation guidelines. All employers shall continue to require employees who interact with the public to wear face coverings, to the maximum extent possible, and shall abide by all other guidelines promulgated by NV OSHA.
SECTION 13:	All businesses must adopt measures that meet or exceed the standards promulgated by NV OSHA to minimize the risk of spread of COVID-19. All businesses are encouraged to permit their employees to work from home to the maximum extent practicable. NV OSHA shall continue to ensure that businesses reopened pursuant to this Directive or otherwise operating during the state of emergency provide adequate protections to their workers and adopt sanitation protocols that minimize the risk of spread of COVID-19 among their workforce. NV OSHA shall enforce all violations of its guidance, protocols, and regulations.
SECTION 14:	All employers are encouraged to consult guidelines issued by the LEAP for industry-specific information for operating in the phased reopening under the *Nevada United: Roadmap to Recovery* plan.

	The LEAP guidelines will be posted on the Nevada Health Response website at https://nvhealthresponse.nv.gov/.
SECTION 15:	To the maximum extent practicable, employers and employees are strongly encouraged to incorporate the following protocols into their business operations: 1. Encourage customers to wear face coverings 2. Continue to encourage telework, whenever possible and feasible with business operations 3. Return to work in phases 4. Close common areas where personnel are likely to congregate and interact, or enforce strict social distancing protocols 5. Strongly consider special accommodations for personnel who are members of a vulnerable population 6. Encourage employees to do a self-assessment each day in order to check if they have any COVID-19 type symptoms, for example, fever, cough or shortness of breath 7. Practice hand hygiene

	8. Perform frequent enhanced environmental cleaning of commonly touched surfaces 9. Implement separate operating hours for vulnerable populations 10. Provide signage advising the public of appropriate social distancing within the facility, including six feet of social distancing from other individuals; and 11. Provide readily available hand sanitizer or other sanitizing products for employees and customers
SECTION 16:	All employers operating under Phase Two are encouraged to accommodate vulnerable persons and workers caring for a child whose school or place of care is closed, or childcare provider is unavailable, for reasons related to COVID-19, by promoting telecommuting or other remote work options, flexible schedules, or other means. To the greatest extent possible, employers should extend similar accommodations to workers who live in the same household as a vulnerable person. Upon request, all employers covered by the Families First Coronavirus Response Act ("FFCRA") must provide leave to eligible employees as provided by the

	Act. Employers covered by the FFCRA must notify covered employees seeking accommodations of their eligibility. The provisions of this Section shall be in effect for the duration that the March 12, 2020 Declaration of Emergency shall be in effect, unless specifically terminated by a subsequent Directive.
SECTION 17:	All businesses that engage in retail sales may continue to provide retail sales on a curbside or home delivery basis, or allow onsite customer access, with a maximum occupancy of 50% based on listed fire code capacity. Businesses are strongly encouraged to promote home delivery, curbside delivery, walk-up, drive-through, or window service whenever possible. Businesses must adopt measures promulgated by NV OSHA to minimize the risk of spread of COVID-19 including social distancing and sanitation measures, and abide by all other guidance promulgated pursuant to this and other Directives. To the maximum extent practicable, businesses must provide services in a manner disallowing the formation of queues whereby persons congregate in a manner that violates the social distancing guidelines above. All businesses are encouraged to permit their employees to work from home to

	the maximum extent practicable. Retail businesses operating in open-air malls or strip malls are expressly permitted to operate under the conditions set forth in this Directive.
SECTION 18:	Effective 12:01 am on May 29, 2020, indoor malls may open to the public, and allow retail businesses to operate. Businesses engaged in retail sales at indoor malls are subject to the same restrictions as retail businesses operating at other locations, as provided in Section 17 of this Directive. Mall operators shall discourage the public from congregating by removing or prohibiting access to indoor and outdoor seating, except at food courts. Food courts may reopen to customers, but must abide by all restrictions imposed on restaurants pursuant to Section 25 of this Directive, including without limitation, sanitation protocols, and social distancing seating requirements.
SECTION 19:	The limitations imposed on drive-in movie theaters in Section 14 of Directive 018 are hereby amended to provide that concession stands may serve food and drinks on a prepackaged basis only.
SECTION 20:	Effective 12:01 am on May 29, 2020, non-retail indoor venues, including without limitation, indoor movie

	theaters, bowling alleys, or arcades may reopen to the public. Indoor movie theaters operating pursuant to this section must ensure that occupancy shall not exceed the lesser of 50% of the listed fire code capacity or fifty persons, and implement measures to ensure that all social distancing requirements are satisfied. All other businesses operating pursuant to this section must ensure that occupancy shall not exceed 50% of the listed fire code capacity, and implement measures to ensure that all social distancing requirements are satisfied. Businesses operating pursuant to this Section shall limit food and beverage sales to prepackaged products only.
SECTION 21:	Effective 12:01 am on May 29, 2020, non-retail outdoor venues, including without limitation, miniature golf facilities, amusement parks, theme parks may reopen to the public. Businesses operating pursuant to this section must ensure that occupancy shall not exceed 50% of the listed fire code capacity, and implement measures to ensure that all social distancing requirements are satisfied.
SECTION 22:	Effective 12:01 am on May 29, 2020, musical performances, live entertainment, concerts, competitions, sporting events, and any events with live

	performances may resume, but shall remain closed for public attendance. Events held pursuant to this section may be recorded, filmed, streamed or broadcast to the public. Live events ordinarily regulated by the Nevada Athletic Commission or the Nevada Gaming Control Board must be approved by the applicable board prior to the event. All other live events under this Section must be approved by the Nevada Department of Business & Industry, Division of Industrial Relations prior to the event. Events held pursuant to this Section must additionally comply with all guidance promulgated by NV OSHA.
SECTION 23:	Nail care salons and hair salons licensed by the Nevada Board of Cosmetology and barber shops licensed by the State Barber's Health and Sanitation shall continue to operate under the Phase One conditions set forth in Section 16 of Directive 018.
SECTION 24:	Effective 12:01 am on May 29, 2020, estheticians and salons or businesses that provide aesthetic skin services, including without limitation, facials, hair removal, tanning, eyelash services, professional make-up artist services, eyebrow threading, and salt therapy, may reopen to the public

	pursuant to all protocols and guidelines promulgated by the Nevada State Board of Cosmetology and LEAP, as well as the following provisions: 1. Partitions or walls between each chair or workstation are strongly encouraged. 2. Establishments with walls or partitions between stations or chairs may utilize all stations, but under no circumstances may more than one customer or client be seated at any given station or chair. 3. Establishments without walls or partitions between stations must only seat customers or clients at every other station or chair, or arrange stations or chairs so that a minimum of 6 feet of separation between customers is maintained. 4. Establishments must not accept customers or clients on a walk-in basis, and estheticians and technicians must not serve or accept appointments for more than one customer at any given time. 5. Customers waiting for appointments must wait outside the facility and must practice social distancing by

	maintaining a minimum of 6 feet of separation between customers not residing in the same household. 6. Make-up application services must use disposable tools or sanitize tools between customers. 7. Estheticians, technicians, and other employees must wear face coverings while interacting with customers and clients. Customers and clients should wear face coverings to the extent practicable. 8. These businesses must follow the Enhanced Sanitation Guidelines for Salons in Response to COVID-19 issued by the Nevada State Board of Cosmetology. The Board is directed to take action, including the closure of salons and businesses, for all actions by licensees not in compliance with these Guidelines for Response to COVID-19. 9. With the exception of pool usage pursuant to Section 29 of this Directive, steam rooms, saunas, portable saunas, vapor baths, salt therapy rooms, hot tubs, and other communal

	facilities shall remain closed to the public.
SECTION 25:	Restaurants and food establishments shall continue to operate under the Phase One conditions set forth in Section 17 of Directive 018, but may additionally utilize tables and serve food within the bar area. Establishments operating under this provision shall abide by the following provisions: 1. Establishments shall require employees to wear face coverings, and should encourage customers to wear face coverings to the maximum extent practicable. 2. Areas within establishments that promote congregation, including without limitation, dance floors, arcade areas, billiards, and similar activities shall remain closed to the public. 3. Customers may sit at and be served at bar tops only if bar top seating is limited such that barstools are spaced a minimum of six feet apart from other barstools of other customers not in the same party. 4. Buffets, cafeterias, and self-serve dining facilities shall

	remain closed until further notice.
SECTION 26:	Section 18 of Directive 018 is hereby amended to provide that effective 12:01 am on May 29, 2020, breweries, distilleries, and wineries not licensed to serve food may open to the public subject to the following provisions: 1. Bartenders, waitresses, and other employees must wear face coverings. 2. The maximum occupancy of these establishments during Phase Two shall not exceed 50% of the listed fire code capacity. 3. Tables, booths, or seats must be spaced, or customers seated a minimum of 6 feet apart from other customers not in the same party. Customers sitting at a table or booth must only be served via table service and may not order from the bar top area. 4. Customers may sit at and be served at bar tops only if bar top seating is limited such that barstools are spaced a minimum of six feet apart from other barstools of other customers not in the same party.

	5. Customers waiting to dine onsite must wait outside the establishment until they can be seated and must practice social distancing by maintaining a minimum of 6 feet of separation between customers not residing in the same household or in the same party. 6. Breweries, distilleries, and wineries must continue to operate in a manner consistent with worker safety guidelines promulgated by the NV OSHA.
SECTION 27:	The following non-essential businesses shall remain closed during Phase Two of the *Nevada United: Roadmap to Recovery* plan: 1. Nightclubs 2. Day clubs 3. Brothels 4. Adult entertainment facilities
SECTION 28:	Effective 12:01 am on May 29, 2020, gyms, fitness facilities, and fitness studios, including but not limited to dance and yoga studios, may reopen to the public. Gyms, fitness facilities, and fitness studios that provide services to ten or fewer people at a time may reopen only if they are able to provide services in a manner that does not violate social distancing protocols. Establishments providing services to more than ten patrons at a

	time shall limit customer access so as not to exceed a maximum occupancy of 50% based on listed fire code capacity. All gyms, fitness facilities, and fitness studios must, without exception, abide by all protocols promulgated by NV OSHA, including sanitation protocols. In addition to the protocols promulgated by NV OSHA and the LEAP, all gyms, fitness facilities, and fitness studios must abide by the following provisions: 1. Employees, trainers, and instructors must wear face coverings to the maximum extent practicable, and facilities should encourage patrons to wear face coverings to the maximum extent practicable. 2. Regardless of listed fire code capacity, facilities must limit access to patrons to ensure that occupancy at any given time does not become sufficiently dense so as to violate social distancing protocols. 3. Equipment must be regulated to ensure a minimum of six feet of social distancing between users, and equipment should be moved, designated inoperable, or turned off to

	ensure that social distancing standards are maintained. 4. Group fitness classes must be limited to ensure at least six feet of separation between participants. 5. Contact sports, including without limitation, martial arts, basketball, wrestling, and boxing may only be offered in a manner where participants do not physically contact other participants, or activities that require participants to perform within six feet of each other. 6. Locker rooms, showers, steam rooms, saunas, portable saunas, vapor baths, salt therapy rooms, hot tubs, and other communal facilities, not to include restrooms, shall remain closed to the public. 7. Pools may open to patrons, but all pool usage is subject to the provisions of Section 29 of this Directive. 8. Child care facilities in gyms must remain closed.
SECTION 29:	Effective 12:01 am on May 29, 2020, all public aquatic venues, may reopen to the public. For the purposes of this Directive, "public aquatic venues" shall include without limitation venues operated and managed by city

	and county governments; apartment complexes; home owners associations (HOAs); membership clubs including gyms or other privately owned aquatic centers accessible to the public through paid memberships or fees; schools; and hotels, motels, resorts, time-shares, and other guest lodging facilities. Facilities reopening pursuant to this section must abide by the following provisions: 1. Capacity at all public aquatic venues shall be limited to a maximum occupancy of 50% based on listed fire code capacity. 2. A minimum of six feet of social distancing between users is required in the pool, the pool deck, and any other areas at the facility. This limitation shall not apply to persons residing in the same household. 3. Hot tubs shall remain closed to the public. 4. Attendees should be encouraged to bring their own towels, equipment, and arrive and minimize the time spent in the facility by arriving and leaving wearing their swimsuit. 5. Public aquatic venues with locker rooms shall limit access

	to lockers and locker rooms, but should maintain public restrooms and shower facilities and limit the number of users at any one time. 6. Deck layouts and furniture in standing and seating areas must be arranged to maintain social distancing standards of at least six feet of separation between persons. This requirement shall not apply to persons residing in the same household. 7. In addition to the provisions above, aquatic schools offering swim lessons must require instructors to wear face coverings to the maximum extent practicable, and limit access to one parent or guardian per student. 8. Water parks shall control access to the public to ensure that the occupancy does not exceed 50% capacity based on applicable fire code or is sufficiently high that social distancing standards are violated. Water parks shall limit locker room access to restroom usage only. All employees must wear face coverings to the maximum

	extent practicable. Concession sales at water parks must be limited to prepackaged foods only. 9. In addition to the provisions above, all public aquatic venues are encouraged to abide by all other guidelines promulgated by the LEAP.
SECTION 30:	Effective 12:01 am on May 29, 2020, museums, art galleries, zoos, and aquariums may reopen to the public. Capacity at these facilities shall be limited to the lesser of 50% based on listed fire code capacity or fifty persons. Interactive exhibits which encourage touching must remain closed and inaccessible to the public. Facilities operating pursuant to this Section must ensure that employees wear face coverings and shall abide by all other guidelines promulgated by NV OSHA.
SECTION 31:	Effective 12:01 am on May 29, 2020, body art and piercing facilities may reopen to the public, subject to the following provisions: 1. Capacity at these facilities shall be limited to a maximum occupancy of 50% based on listed fire code capacity. 2. Partitions or walls between each workstation are strongly encouraged.

	3. Establishments with walls or partitions between workstations may utilize all stations, but under no circumstances may more than one customer or client be seated at any given station or chair. 4. Establishments without walls or partitions between stations must ensure that a minimum of 6 feet of separation between customers is maintained. 5. Establishments must not accept customers or clients on a walk-in basis, and artists must not serve or accept appointments for more than one customer at any given time. 6. Customers waiting for appointments must wait outside the facility and must practice social distancing by maintaining a minimum of 6 feet of separation between customers not residing in the same household. 7. Artists, employees, and customers must wear face coverings at all times. Body art and piercings that require mask removal, including without limitation, work

	around the mouth and nose are prohibited. 8. Access must be limited to customers only; persons accompanying customers must not be inside the facility while services are performed. 9. Artists and facilities operating pursuant to this section must abide by all sanitation and other guidelines promulgated by NV OSHA.
SECTION 32:	Effective 12:01 am on May 29, 2020, trade schools and technical schools may reopen to the public. Occupancy in classrooms and instructional areas at schools operating pursuant to this Section shall be limited to the lesser of 50% of maximum occupancy of based on listed fire code capacity or fifty persons, and must abide by all guidelines promulgated by NV OSHA. These provisions shall not be construed to limit the reopening plans of Nevada System of Higher Education institutions, schools under county school districts, charter schools, and the University School for Profoundly Gifted Students.
SECTION 33:	Summer camps may continue to operate pursuant to all applicable licensure, regulatory, and statutory requirements and are encouraged to

	following guidelines issued by the LEAP.
SECTION 34:	Effective 12:01 am on May 29, 2020, massage therapists, massage establishments, and other professionals licensed by the Nevada State Board of Massage Therapy may reopen to the public subject to the following provisions: 1. Massage establishments must follow all NV OSHA and Nevada State Board of Massage Therapy sanitization guidelines. 2. Massage therapists, masseuses, and other employees must wear face coverings at all times. Establishments should strongly encourage customers to wear face coverings to the maximum extent practicable. 3. Massage therapists and massage establishments must not accept customers or clients on a walk-in basis, and must not serve or accept appointments for more than one customer at any given time. 4. Customers waiting for appointments must wait outside the facility and must practice social distancing by

	maintaining a minimum of 6 feet of separation between customers not residing in the same household. 5. Out-call or in-home service are permitted, subject to all sanitation protocols and face covering requirements provided in this section. 6. Establishments, including day and overnight spas, may reopen for massage services as allowed in the Phase 2 Directive. Spas or other establishments that open in Phase 2 must close and prohibit use of steam rooms, saunas, portable saunas, vapor baths, salt therapy rooms, hot tubs, and any other communal facilities (except for pools as allowed in the Phase 2 Directive). 7. Persons licensed by the Nevada State Board of Massage Therapy must abide by all guidelines promulgated by the Board. The Board is directed to impose disciplinary measures against licensees who violate this provision.
SECTION 35:	Directive 002 and Section 021 of Directive 018 are hereby terminated. The Nevada Gaming Control Board

	shall promulgate requirements for a phased and incremental resumption of gaming operations, with openings commencing no sooner than 12:01 am June 4, 2020. Failure of a gaming licensee to comply with any such requirements shall be considered injurious to the public health, safety, morals, good order and general welfare of the inhabitants of the State, and constitute a failure to comply with this Directive. The Nevada Gaming Control Board is hereby authorized to enforce this Directive as necessary, including, but without limitation, pursuing disciplinary action to limit, condition, suspend, and/or revoke a license, and/or impose a monetary fine against a licensee in accordance with the Gaming Control Act.
SECTION 36:	Cannabis dispensaries shall continue to operate under the Phase One conditions set forth in Section 22 of Directive 018.
SECTION 37:	Previous Directives not specifically referenced herein remain in effect for the duration specified in those specific Directives or subsequent extensions, unless specifically terminated or extended renewed by subsequent Directive. Directive 018 and all Directives incorporated by reference within Directive 018 with

	specific expiration dates are extended until June 30, 2020.
SECTION 38:	Pursuant to NRS 414.060(3)(f), I hereby delegate to state agencies, and each county of this state, to include the consolidated municipality of Carson City, and local municipalities, the authority to adopt additional protective measures intended to combat the spread of COVID-19, including without limitation, stay at home and face covering orders, so long as those measures are at least as restrictive as those imposed by all Directives promulgated pursuant to the Declaration of Emergency for COVID-19 issued on March 12, 2020. Additional restrictive measures adopted by counties and municipalities may be implemented without additional approval by the State.
SECTION 39:	Pursuant to NRS 414.060(3)(f), I hereby authorize all local, city, and county governments, and state agencies to enforce this Directive and regulations promulgated thereunder, including but not limited to, suspending licenses, revoking licenses, or issuing penalties for violating business, professional, liquor, tobacco, or gaming licenses issued by the local jurisdiction for actions that jeopardize the health,

	safety, or welfare of the public; conduct which may injuriously affect the public health, safety, or welfare; conduct that may be detrimental to the public peace, health, or morals; or any other applicable ordinance or requirement for such a license.
SECTION 40:	The State of Nevada shall retain all authority vested in the Governor pursuant to NRS Chapter 414.
SECTION 41:	This Directive shall remain in effect through June 30, 2020, unless terminated or extended by a subsequent Directive promulgated pursuant to the March 12, 2020 Declaration of Emergency to facilitate the State's response to the COVID-19 pandemic.

COVID-19 EMERGENCY DIRECTIVE 021 ORDERS

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Nevada to be affixed at the State Capitol in Carson City, this 28th day of May, in the year two thousand twenty.

Governor of the State of Nevada

Barbara K. Cegavske
Secretary of State

Deputy Secretary of State

Declaration of Emergency Directive 033

WHEREAS,in late 2019, the United States Centers for Disease Control and Prevention began monitoring an outbreak of respiratory illness caused by a novel coronavirus first identified in Wuhan, Hubei Province, China; and

WHEREAS, on February 11, 2020, the International Committee on Taxonomy of Viruses named this novel coronavirus "severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2);" and

WHEREAS, on February 11, 2020, the World Health Organization named the disease caused by SARS-CoV-2, "COVID-19:" and

WHEREAS, the World Health Organization advises that the novel coronavirus that causes COVID-19 virus is highly contagious, and spreads through respiratory transmission, and direct and indirect contact with infected persons and surfaces; and

WHEREAS, the World Health Organization advises that transmission occurs through both droplet and airborne transmission, where droplet transmission occurs when a person is in close proximity to someone who is infected with COVID-19; and

WHEREAS, the World Health Organization advises that contact transmission occurs by direct contact with infected people or indirect contact with surfaces contaminated by the novel coronavirus; and

WHEREAS, on March 5, 2020, Clark County and Washoe County both reported the first known cases of COVID-19 in the State of Nevada; and

WHEREAS, on March 11, 2020, the World Health Organization declared COVID-19 a pandemic; and

WHEREAS, on March 12, 2020, I, Steve Sisolak, Governor of the State of Nevada issued a Declaration of Emergency to facilitate the State's response to the COVID-19 pandemic; and

WHEREAS, on March 13, 2020, Donald J. Trump, President of the United States declared a nationwide emergency pursuant to Sec. 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121-5207 (the "Stafford Act"); and

WHEREAS, on March 14, 2020, I formed a medical advisory team to provide medical guidance and scientifically based recommendations on measures Nevada could implement to better contain and mitigate the spread of COVID-19; and

WHEREAS, infectious disease and public health experts advised that minimizing interpersonal contact slows the rate at which the disease spreads, and is necessary to avoid overwhelming healthcare systems, commonly referred to as "flattening the curve"; and

WHEREAS, since the March 12, 2020 Declaration of Emergency, I have issued 32 Directives pursuant to that order to provide for the safety, wellbeing, and public health of Nevadans and the administration of the State of Nevada; and

WHEREAS, these Directives were promulgated to reduce interpersonal contact and promote social distancing to flatten the curve; and

WHEREAS, Nevada's hospitalization rate for suspected and confirmed COVID-19 cases has trended downward since the beginning of August 2020; and

WHEREAS, NRS 414.060 outlines powers and duties delegated to the Governor during the existence of a state of emergency, including without limitation, directing and controlling the conduct of the general public and the movement and cessation of movement of pedestrians and vehicular traffic during, before and after exercises or an emergency or disaster, public meetings or gatherings; and

WHEREAS, NRS 414.070 outlines additional powers delegated to the Governor during the existence of a state of emergency, including without limitation, enforcing all laws and regulations relating to emergency management and assuming direct operational control of any or all forces, including, without limitation, volunteers and auxiliary staff for emergency management in the State; providing for and compelling the evacuation of all or part of the population from any stricken or threatened area or areas within the State and to take such steps as are necessary for the receipt and care of those persons; and performing and exercising such other functions, powers and duties as are necessary to promote and secure the safety and protection of the civilian population; and

WHEREAS, NRS 414.060(3)(f) provides the administrative authority vested to the Governor in times of emergency may be delegated; and

WHEREAS, Article 5, Section 1 of the Nevada Constitution provides: "The supreme executive power

of this State, shall be vested in a Chief Magistrate who shall be Governor of the State of Nevada;" and

NOW, ***THEREFORE***, by the authority vested in me as Governor by the Constitution and the laws of the State of Nevada and the United States, and pursuant to the March 12, 2020, Emergency Declaration,

IT IS HEREBY ORDERED THAT:

SECTION 1:	The limitations imposed by previous Directives or regulations are hereby superseded by the explicit provisions of this Directive. Any provisions not addressed by this Directive shall remain in force as provided by previous Directives or regulations promulgated pursuant to the March 12, 2020 Declaration of Emergency.
SECTION 2:	For the purposes of this Directive and enforcement thereof, a gathering shall be defined as an activity that draws persons to (1) the same space, (2) at the same time, (3) for the same purpose, and (4) for the same duration.
SECTION 3:	For the purposes of this Directive and enforcement thereof, a gathering space shall be defined as a discrete area with defined boundaries separate and apart from adjacent spaces. Such boundaries shall be characterized by rigid wall structures, separate ownership or property interests, separate ventilation systems, or sufficient distance between adjacent occupied spaces that precludes the

	intermingling of users in a manner that exceeds the gathering limits in this Directive. A unique indoor gathering space shall additionally be defined by its listed fire code capacity. Spaces lacking a unique maximum capacity may not be deemed a distinct gathering space.
SECTION 4:	The phrase "social distancing" references guidance promulgated by the United States Centers for Disease Control and Prevention, including without limitation, maintaining at least six feet of physical distancing from other individuals.
SECTION 5:	Effective 12:01 am on October 1, 2020, capacity limitations at venues and events shall not include staff, workers, performers, broadcast personnel, or other personnel necessary to conduct business, perform services, or host events.
SECTION 6:	All restrictions imposed by this and any other Directive still in effect shall be deemed statewide baseline mitigation standards. The COVID-19 Mitigation and Management Task Force ("Mitigation Task Force") established by Directive 030 may continue to impose additional restrictions on counties with elevated COVID-19 risks pursuant to Directive 030.

SECTION 7:	Section 11 of Directive 021 is hereby terminated. Effective 12:01 am on October 1, 2020, houses of worship, including without limitation, churches, synagogues, mosques, and temples, may conduct indoor in-person services in a manner so that occupancy shall not exceed the lesser of 50% of the listed fire code capacity or 250 persons, and all social distancing requirements are satisfied. This limitation shall not apply to houses of worship offering drive-up services pursuant to Section 10 of Directive 016 which imposes no limitations on number of participants. Houses of worship offering indoor, in-person services are encouraged to follow the guidelines promulgated by the Nevada Department of Business and Industry or its constituent agencies, as well as the following provisions that are consistent with other Directives on public gatherings: 1. Seating must be arranged to ensure a minimum of six feet of separation between congregants who do not reside in the same household. 2. Participants, including leaders and staff, must wear face coverings as required by Directive 024.

	3. Houses of worship are encouraged to stagger services so that the entrance and egress of congregants for different services do not result in a gathering exceeding the lesser of 250 persons or 50% of the listed fire code capacity, and to provide proper sanitation between services. 4. Houses of worship are strongly encouraged to offer online and drive-up services to the greatest extent possible. Houses of worship with a listed fire code capacity of fewer than 100 persons may conduct indoor services for up to 50 persons if they are able to do so in a manner consistent with social distancing guidelines promulgated by the Nevada Department of Business and Industry, but in no instance may houses of worship exceed their listed fire code capacity.
SECTION 8:	Effective 12:01 a.m. on October 5, 2020, all businesses and venues subject to capacity limitations shall post signs at public entrances identifying their COVID-19-adjusted capacity based on the occupancy limitations imposed by this and other Directives. These signs shall conform to guidelines which shall be promul-

	gated by the Nevada Department of Business and Industry or its constituent agencies.
SECTION 9:	Section 1 of Directive 007, Section 7 of Directive 018, and Section 10 of Directive 021 are hereby terminated. Effective 12:01 a.m. on October 1, 2020, unless otherwise provided by other Sections of this Directive, public gatherings are restricted to the lesser of 250 persons, or 50% of the listed fire code capacity of the area in which such gathering shall occur. This restriction shall not apply to any area with a listed fire code capacity of less than 100 persons, which may allow up to 50 persons to gather, provided that this may occur without violating social distancing requirements. This provision shall apply to any area, whether publicly owned or privately owned where the public has access by right or invitation, express or implied, whether by payment of money or not, including without limitation, parks, basketball courts, volleyball courts, baseball fields, football fields, rivers, lakes, beaches, streets, convention centers, libraries, parking lots, and private clubs. This provision shall not be construed to apply to the gathering of persons working at or patronizing businesses operating pursuant to this

	Directive or providing emergency or medical services to the public.
SECTION 10:	Section 20 and Section 21 of Directive 021 are hereby terminated. Effective 12:01 a.m. on October 1, 2020, non-retail indoor and outdoor venues, including without limitation, bowling alleys, arcades, miniature golf facilities, amusement parks, and theme parks may allow access to the public so that occupancy shall not exceed 50% of the listed fire code capacity, and all social distancing requirements are satisfied. Businesses operating pursuant to this Section shall limit food and beverage sales to prepackaged products only. Businesses operating pursuant to this Section with a listed fire code capacity of fewer than 100 persons may allow access to up to 50 persons if they are able to do so in a manner consistent with social distancing guidelines promulgated by the Nevada Department of Business and Industry or its constituent agencies, but in no instance may they exceed their listed fire code capacity.
SECTION 11:	Section 22 of Directive 021 is hereby terminated. Effective 12:01 a.m. on October 1, 2020, musical performances, live entertainment, concerts, competitions, sporting events, and any

	events with live performances may permit public attendance subject to the provisions of this Directive. For the purposes of this Directive, fixed seating capacity shall be defined as seats which are not portable or stackable, but which are secured to the floor in some fashion, such as by bolts. Facilities with fixed seating without dividing arms shall calculate seating capacity based on occupant load, but in no instance shall such calculation be based on less than one person for each 18 inches (457 mm) of seating length. Venues with fixed seating capacity of 2,500 or greater may permit public attendance at live events subject to the following provisions: 1. Attendance by the public may not exceed 10% of fixed seating capacity. 2. All attendees must be assigned seats pursuant to the other provisions of this section. "Standing room only" and "general admission" attendance is prohibited. 3. Venues must clearly delineate discrete sections and assign seating so that the number of attendees in that section do not exceed the lesser of 250

	attendees, or 50% of that section's total seating capacity. 4. Event staff may not provide services to more than one section delineated pursuant to subsection 3, above. 5. Each section must be separated from adjacent sections by a minimum of 25 feet. 6. All social distancing requirements shall be maintained. This provision shall not apply to attendees within a single party. No more than six persons may be seated together in a single party. 7. To the greatest extent practicable, attendees in each section should be isolated from attendees in other sections by utilizing separate entrances, exits, and facilities, or staggering entrance and egress by section. 8. Plans for events at facilities regulated by the Gaming Control Board ("GCB") must be submitted to and approved by the GCB prior to the event, pursuant to guidelines that shall be promulgated by the GCB. Prior to submission, plans must be reviewed by the local health authority for confirma-

	tion that it complies with all applicable health and safety standards and will not place an unacceptable burden on the local health infrastructure. 9. Plans for events regulated by the Nevada State Athletic Commission ("NSAC") must be submitted to and approved by the NSAC prior to the event, pursuant to guidelines that shall be promulgated by the NSAC. Prior to submission, plans must be reviewed by the applicable local health authority for confirmation that it complies with all applicable health and safety standards and will not place an unacceptable burden on the local health infrastructure. 10. All other events at venues with fixed seating capacity of 2,500 or greater must be submitted to and approved by the Nevada Division of Business and Industry ("B&I") prior to the event, pursuant to guidelines that shall be promulgated by the Division. Prior to submission to the Division, plans must be reviewed by the applicable local health authority for confirmation that it complies

	with all applicable health and safety standards and will not place an unacceptable burden on the local health infrastructure. Venues with a listed fire code capacity of fewer than 2,500 may permit public attendance at live events subject to the following provisions: 1. Attendance by the public may not exceed the lesser of 250 attendees or 50% of that gathering space's listed fire code capacity. 2. Attendance by the public at live entertainment performances shall require all attendees to be seated. "Standing room only" attendance is prohibited. Venues hosting live entertainment performances shall maintain a minimum separation of at least 25 feet between the artists and the audience. This provision is applicable to performances subject to live entertainment taxes pursuant to NRS 368A and shall not extend to ambient music to create or enhance a mood or atmosphere that is incidental or ancillary to the activity or location.

	3. For all other events other than live entertainment performances, seating is not required, but social distancing requirements must be maintained at all times.
SECTION 12:	Section 10 and Section 11 of Directive 30 are hereby terminated. Effective 12:01 a.m. on October 1, 2020, restaurants, food establishments, breweries, distilleries, and wineries may utilize tables and serve patrons within the bar area. Establishments operating under this provision shall abide by the following provisions: 1. The maximum occupancy of these establishments shall not exceed 50% of the listed fire code capacity at any given time. 2. Tables, booths, or seats must be spaced, or customers seated a minimum of six feet apart from other customers not in the same party. Parties larger than six persons may not be seated together for onsite dining. 3. All standing and open congregation areas that are not necessary for the preparation and service of food or beverages shall be closed, including but not limited to billiards, card playing, pinball games, arcade

	games, darts, dancing, and standing. 4. Customers sitting at a table or booth must only be served via table service and may not order from the bar top area. 5. Customers may sit at and be served at bar tops only if bar top seating is limited such that barstools are spaced a minimum of six feet apart from other barstools of other customers not in the same party. Establishments are encouraged to limit bar top parties to no more than two persons per party. 6. Customers waiting to dine onsite must wait outside the establishment until they can be seated and must practice social distancing by maintaining a minimum of six feet of separation between customers not residing in the same household or in the same party. 7. Establishments shall require employees to wear face coverings and abide by all other face covering provisions of Directive 024. Patrons must wear face coverings when not seated at tables, booths, or bar tops.

	8. Buffets, cafeterias, and self-serve dining facilities shall remain closed until further notice.
SECTION 13:	Effective 12:01 a.m. on October 1, 2020, conventions, trade shows, conferences, professional or educational seminars, large business meetings or corporate retreats, and other similar event activities may resume, subject to the limitations of this Section. Events pursuant to this Section are limited to no more than 1,000 attendees per venue or site. Events with greater than 250 attendees are subject to the following additional provisions: 1. Events hosting greater than 250 attendees must provide distinct gathering spaces whereby the occupancy per gathering space shall not exceed the lesser of 250 attendees or 50% of that gathering space's listed fire code capacity. 2. Event planners hosting events at facilities regulated by the Gaming Control Board ("GCB") must submit Preparedness and Safety plans to the GCB for approval prior to the event, pursuant to guidelines and criteria that shall be promulgated by the GCB. Prior to

	submission to the GCB, plans must be reviewed by the applicable local health authority for confirmation that it complies with all applicable health and safety standards and will not place an unacceptable burden on the local health infra-structure. 3. Event planners hosting events at facilities not regulated by the GCB must submit Preparedness and Safety plans to the Nevada Department of Business and Industry ("B&I") for approval prior to the event, pursuant to guidelines and criteria that shall be promulgated by B&I. Prior to submission to B&I, plans must be reviewed by the applicable local health authority for confirmation that it complies with all applicable health and safety standards and will not place an unacceptable burden on the local health infra-structure. 4. The guidelines promulgated by the GCB and B&I shall include, at minimum, protocols for arrival procedures, floor plan restrictions, food and beverage limitations, staffing procedures, sanitation procedures, face

	covering requirements, and signage requirements.
SECTION 14:	Section 32 of Directive 021 is hereby terminated. Effective 12:01 a.m. on October 1, 2020, occupancy in classrooms and instructional areas at trade schools, and technical schools operating pursuant to this Section shall be limited to the lesser of 250 persons or 50% of maximum occupancy of based on listed fire code capacity and must abide by all guidelines promulgated by the Nevada Division of Business and Industry or its constituent agencies. These provisions shall not be construed to limit the operation plans of Nevada System of Higher Education institutions, schools under county school districts, charter schools, and the University School for Profoundly Gifted Students.
SECTION 15:	Section 32 of Directive 021 is hereby terminated. Effective 12:01 a.m. on October 1, 2020, museums, art galleries, zoos, and aquariums operating pursuant to this Section shall be subjects to the limitations provided in Section 10 of this Directive. Interactive exhibits which encourage touching must remain closed and inaccessible to the public.
SECTION 16:	Section 33 of Directive 021 is hereby terminated.

SECTION 17:	Section 7 of Directive 30 is hereby amended to strike the provision that the Mitigation Task Force meet on a weekly basis. Effective 12:01 a.m. on October 1, 2020, the Mitigation Task Force shall meet at the call of the Chair. All other duties charged to the Mitigation Task Force shall remain in effect as provided by this Directive and by Directive 030.
SECTION 18:	Section 3 of Directive 007 is hereby terminated. Effective 12:01 a.m. on October 1, 2020, local governments may allow public access to playground equipment if, in consultation with their local health authority, they determine it is safe to do so.
SECTION 19:	Section 6 of Directive 013 is hereby terminated. Effective 12:01 a.m. on October 1, 2020, in person showings and open houses of single family and multi-family residences currently occupied and on the market for sale, may resume, subject to the limitations set forth in this Section: 1. Showings and open houses of properties may not take place with the occupant present. 2. Showings of properties are limited to one prospective buyer and one real estate professional for both the seller and prospective buyer at a time. For the purposes of this provision, "a

	prospective buyer" includes the buyer and the buyer's spouse, domestic partner, business partner, or family members. 3. Sellers conducting an open house are responsible for ensuring that there will not be more than one prospective buyer viewing a property at any given time. This may require having an individual present to properly meter prospective buyers entering an open house. 4. Sellers are encouraged to utilize appointments for in-person showings and open houses to the greatest extent practicable. 5. Real estate professionals are encouraged to utilize three-dimensional interactive property scans, virtual tours, and virtual staging to the greatest extent possible. 6. Real estate professionals are encouraged to avoid in-person transactions and services to the greatest extent practicable. 7. Real estate professionals must require all participants at in-person showings and open houses to wear face coverings at all times pursuant to Directive 024 and must follow CDC

	guidelines for in-person showings and open houses.
SECTION 20:	This Directive shall remain in effect until terminated by a subsequent Directive promulgated pursuant to the March 12, 2020 Declaration of Emergency to facilitate the State's response to the COVID-19 pandemic or upon dissolution or lifting of the Declaration of Emergency.

EMERGENCY DIRECTIVE 033 HEREBY ORDERS THAT:

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Nevada to be affixed at the State Capitol in Carson City, this 30th day of September, in the year two thousand twenty.

Governor of the State of Nevada

Barbara K. Cegavske
Secretary of State

Deputy Secretary of State