

No. 20-16169

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**CALVARY CHAPEL DAYTON VALLEY,
Plaintiff-Appellant,**

v.

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

Appeal from the United States District Court
for the District of Nevada
Honorable Richard F. Boulware, II
(3:20-cv-00303-RFB-VCF)

**EMERGENCY MOTION FOR AN INJUNCTION PENDING
APPEAL UNDER CIRCUIT RULE 27-3
RELIEF REQUESTED BY JULY 5, 2020**

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CORPORATE DISCLOSURE STATEMENT

Calvary Chapel Dayton Valley is a Nevada nonprofit corporation with no parent company or stock.

CIRCUIT RULE 27-3 CERTIFICATE

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(ii) Facts showing the nature and existence of the emergency

Governor Sisolak's emergency directives have prevented Calvary Chapel Dayton Valley from holding anything approximating its normal religious services for 3 months regardless of its rural location and voluntary adoption of a rigorous health and safety plan. The Governor's latest directive limits its gatherings to 50 people, including church staff, greeters, musicians, and sound and video technicians. At the same time, the directive allows much larger groups in close quarters for unlimited periods of time at casinos, restaurants, gyms, bars, pools, and even indoor amusement parks. Calvary Chapel seeks an emergency injunction pending appeal giving it the same right to hold religious assemblies at 50% of fire-code-capacity (about 90 people) in keeping with social distancing and its comprehensive health and safety plan.

(iii) Why the motion could not have been filed earlier

The district court denied Calvary Chapel's motion for a temporary restraining order or preliminary injunction on June 11, 2020. Counsel worked through the weekend to prepare motions for injunctions pending appeal to be filed in the district court and this Court in accordance with Federal Rule of Appellate Procedure 8(a). The church filed its district court motion on June 16, 2020, and the district court denied that motion on June 19, 2020. Calvary Chapel filed this emergency motion one business day following this ruling.

(iv) Notice and service on the opposing parties' counsel

Calvary Chapel's notice of appeal, mediation questionnaire, and motion for an injunction pending appeal in the district court gave the opposing parties advance notice of this motion. The church's counsel will also email a PDF copy of this motion to the opposing parties' counsel immediately after it is filed.

(v) Whether relief was first sought in the district court

As explained in section iii above, Calvary Chapel first sought relief in the district court. The district court denied Calvary Chapel's motion for an injunction pending appeal on June 19, 2020.

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INTRODUCTION

Calvary Chapel Dayton Valley challenges Governor Steve Sisolak's discriminatory treatment of houses of worship. The Governor's latest emergency directive allows large groups to gamble at a casino, gather at a bar, take a fitness class, swim in a pool, or enjoy an indoor amusement park for unlimited periods of time in close proximity. All the state imposes is 50% of fire-code-capacity cap. But the state allows no more than 50 people to assemble at houses of worship whatever their buildings' size or the health and safety precautions they take. Excerpts of Record ("ER") 641–52.

The district court denied the injunction for one primary reason: casinos are generally more heavily regulated than churches. But only health and safety regulations matter. And the church is willing to adopt whatever neutral regulations apply to other gathering places. In its latest order, the district court cited an article on increased COVID-19 cases. ECF 55 at 4. But the court failed to mention that the county where the church is located currently has 0.7% (7/10ths of one percent) of the total cases and the two counties where the casinos are located are responsible for 96% of the total COVID-19 cases in the state.¹ So the court ruled against the church while citing data showing the increases are in the counties where the casinos are located.

¹ Nev. Dep't of Health & Human Services, COVID-19 Data, <https://bit.ly/2VaWbvs>.

Elected officials have discretion in responding to pandemics, but the Constitution does not “sleep through” them. *Roberts v. Neace*, 958 F.3d 409, 415 (6th Cir. 2020). Nevada’s “unequal treatment” of houses of worship is serious and glaring. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993). The Governor’s directive treats “comparable secular gatherings . . . more leniently” than houses of worship. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief). That violates the Free Exercise Clause.

Calvary Chapel questions no reasonable safety measures and voluntarily adopted procedures that exceed the CDC’s guidelines. All Calvary Chapel wants is equal, nondiscriminatory treatment. But, unless this Court intervenes, Nevada will continue putting a thumb on the scales against the free exercise of religion. Under FRAP 8(a)(2) and Circuit Rule 27-3, Calvary Chapel requests an order enjoining the Governor from applying more restrictive rules to churches than casinos, bars, restaurants, gyms, pools, movie theaters, and amusement parks.

FRAP 8(A)(2) REQUIREMENTS

Calvary Chapel moved the district court for an injunction pending appeal. The district court denied that motion for essentially the same reasons it denied the church’s motion for temporary restraining order or preliminary injunction. *Infra* pp. 9–10. The church’s counsel gave advance notice of this motion to the opposing parties’ counsel through

its district court and appellate court filings and will email a PDF copy of this motion to opposing counsel immediately after it is filed.

BACKGROUND

Nevada has been in a state of emergency for over 3 months. Two months ago the Governor declared the COVID-19 curve “flattened,” Governor Sisolak (@GovSisolak), Twitter (April 21, 2020, 11:44 pm), <https://bit.ly/3fhBHIW>, and created a four-phase plan to reopen the state—the Nevada United Roadmap to Recovery.² During Phase 1 the Governor permitted outdoor spaces, small businesses, and select retail to open but prohibited other gatherings over 10 people. ER 742–50. Now Governor Sisolak has advanced the state to Phase 2, which involves a broader opening of commerce, retail stores, and public life. ER 641–52.

All of the Governor’s directives are statewide and take no account of local conditions. The directives are the same whether residents live in Las Vegas (population 662,000) or Puckerbrush (population 28). But the risk of contracting COVID-19 is significantly reduced in rural locations. The vast majority of infections occur in Clark and Washoe Counties where the population, gambling, and tourism is greatest. In Lyon County, where Calvary Chapel is located, there were only 24 active COVID-19 cases on June 20, 2020, roughly 0.042% of the population.³

² Governor Sisolak, Nevada United Roadmap to Recovery (Apr. 30, 2020), <https://bit.ly/3cW3LzZ>; ER 763–64.

³ Carson City HHS, COVID-19 Update (June 20, 2020), <https://bit.ly/3hNZqCx>.

A. Calvary Chapel Dayton Valley

Calvary Chapel Dayton Valley is a Christian church located northeast of Carson City. Nestled in an unincorporated region of Lyon County, Dayton is home to roughly 9,500 people. Since 2006 the church has sought to love, teach, and reach Dayton Valley for Christ. ER 653–55. Usually, the church would hold two Sunday services capable of accommodating up to 200 people each. But the Governor’s directives have prevented Calvary Chapel from holding anything approximating its normal religious gatherings for 3 months.

Determined to do its part during the COVID-19 outbreak, Calvary Chapel temporarily suspended in-person worship services in March and began streaming services online. ER 656. This temporary measure caused real spiritual harm. Some of the church’s attendees cannot view online services, leaving them vulnerable and alone. ER 654. Nor does the church believe that online or drive-in services comply with the Bible’s command that Christians meet regularly for corporate prayer, worship, and scriptural teaching. ER 654.

Calvary Chapel gatherings are not a luxury, they are essential: “ekklesia,” the Greek word translated as “church” in the New Testament means “assembly.” ER 654. So the church is—by definition—a sacred assembly that Calvary Chapel views as “the embodiment of Christ on earth” and the means through which Christians “best express His image and likeness.” ER 654. The church building is just a place to

meet. As Calvary Chapel sees it, if a body of believers fails to gather regularly, it ceases to be a church in the biblical sense.

Calvary Chapel desires to meet in person without putting its flock in jeopardy. The church has developed a comprehensive health and safety plan in light of the COVID-19 virus that involves: (1) limiting in-person services to 50% of fire-code-capacity (about 90 people per service), (2) maintaining at least six feet of social distancing between different families and households, (3) gathering only on Sundays and Wednesdays, and (4) reducing Sunday services from 90 to 45 minutes.

ER 659. On top of that, Calvary Chapel's plan requires (ER 659–70):

- Asking attendees to arrive no more than 25 minutes early;
- Requiring those directing attendees to wear face coverings;
- Encouraging attendees to wear face coverings;
- Having parking attendants direct cars to designated areas;
- Directing attendees to a designated entrance;
- Using a “first in, last out” model to ensure one-way traffic;
- A half hour gap between services to clean and sanitize the sanctuary, hallways, bathrooms, and common surfaces;
- Placing signs on walls and floors to help direct traffic;
- Advising attendees of proper social-distancing protocols;
- Directing attendees to seating that provides six feet of separation between families and those in different households;
- Making hand-sanitizer stations easily accessible;

- Prohibiting any handouts or passing of items to attendees;
- Barring the service of coffee or snacks;
- Posting signs that limit restroom use to one person at a time;
- Using prepackaged Communion elements;
- Directing attendees out of the building at the end of each service;
- Instructing attendees not to congregate in the building.

The church sued the Governor in late May to begin in-person religious services—in a rural county where the risk of COVID-19 transmission is low—with all of these rigorous protections in place. But its pleas fell on deaf ears. The Governor refused to permit anything approximating Calvary Chapel’s normal religious gatherings. At the same time, the Governor sanctions much larger secular gatherings—in close proximity for extended periods—at casinos, restaurants, gyms, pools, amusement and water parks, and bars.

B. The Governor’s directives

On its face, the Governor’s Emergency Directive 021 treats houses of worship considerably worse than secular places where people meet in close proximity for extended periods. ER 641–52. The directive imposes a 50-person limit on religious gatherings whatever their facilities’ size, location, or the precautionary measures they take (§ 11). And it instructs houses of worship alone to “stagger services so that the entrance and egress of congregants for different services do not result in a gathering greater than fifty persons” (§ 11). Simply put, churches may

hold only one, 50-person gathering at a time. Violating the directive would subject the church to possible civil and criminal penalties (§ 39).

But the Governor has long permitted restaurants to host onsite-dining gatherings of up to 50% of their maximum seating capacity. ER 748. Directive 021 maintains that preference (§ 25) and authorizes the following secular gatherings subject only to normal safety precautions—like social distancing—and a 50% of fire-code-capacity cap: (1) bowling alleys and arcades (§ 20); (2) miniature golf facilities, amusement parks, and theme parks (§ 21); (3) breweries, distilleries, and wineries (§ 26); (4) gyms, fitness facilities, and fitness studios (§ 28); and (5) pools, water parks, and other public aquatic venues (§ 29). ER 646–50.

What’s more, Directive 021 allows casinos and other gaming establishments to reopen subject to rules set by the Nevada Gaming Control Board (“NGCB”) (§ 35). Nevada’s casinos have hosted crowds of hundreds to thousands for over two weeks subject to a 50% occupancy limit on individual gaming areas.⁴ Late in the day, NGCB required face coverings at some table/card games where patrons are within 6 feet.⁵ The Governor allows cinemas to host a maximum of 50% of the fire-code capacity or 50 persons per movie theater, though they may have 18

⁴ NGCB, Health & Safety Policies for Resumption of Gaming Operations, Nonrestricted Licenses (May 27, 2020), <https://bit.ly/2C7RITH>.

⁵ NGCB, Updated Health & Safety Policies (June 17, 2020), <https://bit.ly/3eqfIVO>.

theaters and 900 people in the facility. (§ 20). In contrast, churches are limited to 50 people overall. (§ 11).

The directive's real operation also shows the Governor approves other large, close, and prolonged secular assemblies. When hundreds of protestors gathered in packed throngs in blatant violation of the directive's ban on gatherings over 50 (§ 10), the Governor and Attorney General tweeted their support.⁶ ER 164. The Governor then took part in a protest that violated his own directive.⁷ They took no action to impose the directive or enforce social-distancing rules. Calvary Chapel supports protestors' right to free speech; it just wants to live by the same rules.

Much the same occurred when Nevada recently held its primary. Hundreds of people stood in close proximity for hours waiting to vote at a few in-person voting sites. ER 77–79. Long lines of people standing for hours made national news. ER 68–72. But the Governor did nothing to limit groupings to 50 people, enforce social distancing rules, or take any other steps to apply his directive to the polling place. Of course, voting is a constitutional right, but so is the free exercise of religion.

C. The district court proceedings

After the Governor issued Directive 021, Calvary Chapel filed an amended complaint that alleged the directive violates its rights under

⁶ Governor Sisolak (@GovSisolak), Twitter (May 30, 2020 4:49 pm), <https://bit.ly/37vVEZN>; ER 164.

⁷ Kelsey Penrose, *Gov. Sisolak makes appearance at Black Lives Matter Protest in Carson City*, Carson NOW.org (June 19, 2020), <https://bit.ly/3fIEE5z>.

the Free Exercise, Free Speech, and Free Assembly Clauses, and requested declaratory and injunctive relief. ER 662–81. The church filed an emergency motion for a temporary restraining order and preliminary injunction. ECF 9, 19. The district court denied both requests, ER 1–10, after a hearing, ER 11–63.

Even though the court acknowledged that the Governor’s directive allows large secular assemblies comparable to religious services, it held that order “neutral and generally applicable.” ER 5. It recognized “a large number of people may remain in close proximity for an extended period of time” at both casinos and churches. ER 6. But the court then held that the Governor could allow larger casino gatherings because the state regulates them in other ways, such as their “financial” and “other internal operations,” and they are subject to state inspections and unique punishments. ER 6.

The court then ruled that Calvary Chapel could only prevail on its free-exercise claim by showing that the Governor’s directive “specifically target[s] places of worship.” ER 7. Because “there are some secular activities comparable to in-person church services that are subject to more lenient restrictions, and yet other activities arguably comparable . . . that are subject to more stringent restrictions,” the church could not show targeting to this extreme degree. ER 7.

Nor could Calvary Chapel prevail on its as-applied challenge because the court misconstrued it as a “selective enforcement claim.”

ER 8. The court viewed protests as different than church services because “greater harm” could result from enforcement than nonenforcement. ER 8. And the court required “more evidence” that Nevada was not imposing effective rules at “crowded casinos.” ER 9. The court also denied Calvary Chapel’s motion for leave to file a post-argument brief addressing the recent election. ER 10.

Calvary Chapel filed a notice of appeal, ER 64–66, and motion for an injunction pending appeal, ECF 47. But the district court denied the motion for essentially the same reasons it rejected the church’s motion for a temporary restraining order or preliminary injunction. ECF 55.

ARGUMENT

I. Treating secular assemblies better than comparable religious gatherings violates the Free Exercise Clause under *South Bay* and *Lukumi*.

Under *South Bay*, the free-exercise test is clear: does the Governor’s directive favor *any* comparable secular assemblies over religious gatherings? The answer is plainly yes. And that means the directive must withstand strict scrutiny. *South Bay* and *Lukumi* reject the Governor’s and district court’s justifications for holding otherwise.

A. The Governor’s directive violates the free-exercise standard laid down in Chief Justice Roberts’ *South Bay* concurrence.

Chief Justice Roberts cast the deciding vote in *South Bay*. The free-exercise standard he applied to emergency restrictions on in-person

church gatherings is straightforward and controlling: the Governor may “exempt[] or treat[] more leniently only dissimilar activities . . . in which people neither congregate in large groups nor remain in close proximity for extended periods.” *S. Bay*, 140 S. Ct. at 1613.

Yet the Governor’s directive—on its face—treats at least *seven* categories of large assemblies in which people remain close to each other for extended periods markedly better than religious services. *Supra* pp. 6–8. And the directive’s real operation shows that protests and polls are treated better too. For brevity’s sake, Calvary Chapel highlights just five examples of unequal treatment here.

Casinos

Thousands swarmed around gaming tables and slot machines when Nevada’s casinos reopened on June 4, 2020. ER 83, 100, 166–70.



And this is perfectly lawful under the Governor’s directive, which leaves rules, safeguards and enforcement entirely to the NGCB’s discretion. ER 651 (§ 35). Casinos have also opened dinner shows and indoor amusement parks at 50% capacity. ER 85–98. The Governor sanctions this mix of shared handles, cards, tokens, tables, servers,

drinks, and seats by milling crowds. Yet he refuses to allow more than 50 people to sit—still and socially distanced—in houses of worship.

Restaurants

The Governor's directive endorses people dining together at restaurants for hours at a time up to 50% of seating capacity. ER 648, 748. Tables or booths must be 6-feet apart, but members of different households may sit side-by-side or right across from each other. Servers progress table-to-table getting close enough to take each diner's order, deliver food and drinks, mop up spills, and collect dirty dishes.

Meanwhile, diners pass and eat food, and converse freely.

The risk of COVID-19 exposure is greater at a restaurant than it is at a house of worship like Calvary Chapel that practices social distancing, eliminates coffee and snacks, and passes nothing person-to-person. Courts agree that assemblies at restaurants and houses of worship are comparable.⁸ Yet the Governor's directive limits *all* religious gatherings to 50 people regardless of seating capacity, social distancing, or any other pertinent factor.

⁸ *E.g.*, *Antietam Battlefield KOA v. Hogan*, No. 1:20-cv-01130, 2020 WL 2556496, at *9 (D. Md. May 20, 2020); *Calvary Chapel of Bangor v. Mills*, No. 1:20-cv-00156, 2020 WL 2310913, at *8 (D. Me. May 9, 2020); *Cross Culture Christian Ctr. v. Newsom*, No. 2:20-cv-00832, 2020 WL 2121111, at *6 (E.D. Cal. May 5, 2020); *Maryville Baptist Church v. Beshear*, No. 3:20-cv-278, 2020 WL 1909616, at *2 (W.D. Ky. Apr. 18, 2020).

Amusement and Theme Parks

For over two weeks, the Governor has permitted amusement and theme parks—indoor or outdoor—to open at 50% occupancy, as long as they implemented social-distancing. ER 646–47. But six feet of separation is much easier to maintain in a house of worship while sitting still in prearranged chairs than it is in long, fluctuating theme-park lines. And only a couple of people will sit in the same sanctuary seat, whereas hundreds cycle through partially-enclosed, theme-park cars. Nonetheless, the Governor sanctions meandering lines of hundreds talking loudly and waiting to board theme-park rides, while barring more than 50 people from sitting, socially-distanced in church.

Gyms and Fitness Facilities

The Governor’s directive allows gyms and other fitness facilities to open—and hold large group classes—at 50% capacity as long as there is a minimum of six feet between equipment or people, and various regulations like sanitation protocols are met. ER 648–49. Before the Governor admitted that gyms are exactly the sort of places “that promote extended periods of public interaction where the risk of transmission is high.” ER 705. Yet he now permits dozens of socially-distanced people to exercise (which increases breathing and sweat) in confined spaces while sharing weights and exercise machines subject only to a 50% occupancy cap. But no more than 50 people may (predominantly) sit and listen to clergy speak at church.

Mass Protests

Hundreds of people in Nevada have repeatedly stood shoulder-to-shoulder exercising their First Amendment rights by shouting or chanting slogans and holding signs on the street.⁹ ER 254. Instead of shutting these protests down based on the public-health risk, the Governor has not just encouraged but *personally participated* in the protests in blatant violation of his own directive. But the Governor continues to bar over 50 socially-distanced people from worship.

Nevada may not treat comparable secular gatherings “more leniently” than religious services, *S. Bay*, 140 S. Ct. at 1613. The Governor has done exactly that: he approves large, secular groups congregating for extended periods in close proximity subject only to a 50% occupancy cap, while limiting worship services to 50 people regardless of circumstances. And that violates the Free Exercise Clause: “[i]f protests are exempt from [the directive’s] requirements, then worship must be too.” *Spell v. Edwards*, No. 20-30358, 2020 WL 3287239, at *5–*6 (5th Cir. June 18, 2020), (Ho, J., concurring).

B. *South Bay* and *Lukumi* foreclose the Governor’s and district court’s excuses for treating secular gatherings better than their religious counterparts.

The Governor and the district court gave a litany of excuses for treating secular assemblies better than religious gatherings. None pass

⁹ Sabrina Schnur, *Juneteenth rally, march on Las Vegas Strip draw scores of protestors*, Las Vegas Review-Journal (June 19, 2020), <https://bit.ly/2V2djmZ>.

muster. Primarily, the Governor argues that religious gatherings are different than “commerce.” But such labels are beside the point. The Governor admits that what matters is people’s proximity, how they interact, and what kind of precautions they take. Opp’n to Pl.’s Emergency Mot. for Prelim. Inj., ECF 29, at 4. Large groups of people gathered closely together for extended periods at casinos, restaurants, amusement parks, gyms, and mass protests endanger Nevada’s public-health interests “in a similar or greater degree than” church services, *Lukumi*, 508 U.S. at 543, especially when social distancing is mandated at churches the same as everywhere else. ER 644–45; *see also* ER 106–08 (worship services that follow CDC guidelines pose no special risk).

Nor is it credible for the Governor to suggest that secular assemblies are more important than worship services because casinos play a “vital role” in Nevada’s economy, Resp. to Pl.’s Supplement, ECF 39, 4, or that secular gatherings are necessary to keep the state’s “person-based tourism economy” afloat, Opp’n to MPI, ECF 29, 7. All this does is “devalue[] religious reasons for [gathering] by judging them to be of lesser import than nonreligious reasons,” *Lukumi*, 508 U.S. at 537, like businesses’ desire to make money.

What’s more, the regulatory distinctions between casinos and churches are a red herring. Gyms, restaurants, HOA pools, and more are not as heavily regulated as casinos, but they equally enjoy a 50% occupancy cap. *Supra* pages 6–8. The directive’s “unequal treatment” of

religious gatherings, *Lukumi*, 508 U.S. at 542, has nothing to do with casino's finances or training practices, ER 6. Different types of uses require different types of safety regulations. But high risks associated with hundreds of people passing cards, chips, or drinks or touching handles, chairs, or slots are nothing like the low risks associated with sitting, praying, briefly singing, and listening to a sermon at church.

Apart from casinos, the district court conceded that the Governor's directive treats "some secular activities comparable to in-person church services . . . more lenient[ly]." ER 7. Nothing more is required to prove a free-exercise violation under *South Bay* and *Lukumi*, which bans *all* "categories of selection" that subject "religious observers [to] unequal treatment." 508 U.S. at 542. The district court cast *South Bay* aside and held that *Lukumi* bars only government edicts that "specifically target places of worship." ER 7. But no proof of targeting or hostility is needed to violate the Free Exercise Clause: a single, better-treated secular comparator will suffice.

The record shows the Governor's devaluing of religious exercise and that is unconstitutional. How the directive operates in real operation is key evidence of its object. *Lukumi*, 508 U.S. at 535. And the Governor has allowed, encouraged, and *participated in* mass protests, while sharply limiting socially-distanced, in-person worship services that represent *much* less of a health risk. The Governor cannot exempt mass protests from the directive wholesale and then refuse to extend a

meager exemption from the directive's 50-person cap to "cases of religious hardship." *Id.* at 537.

Of course, mass protests are different from church services, ER 8, but not in ways that help the Governor's case. The public health risk is greater when crowds are standing shoulder-to-shoulder for hours engaging in vigorous protest than it is when people sit 6-feet apart for a 45-minute church service.

It is no answer to say that protests are unique because the benefits of applying the directive are outweighed by the costs. ER 8. All this does is subject peaceful worshipers to "discriminatory treatment" and "devalue[] [their] religious reasons" for gathering in large—socially distanced groups—to exercise their First Amendment rights. *Lukumi*, 508 U.S. at 537. The Governor may think protest is more important than worship, but the Free Exercise Clause bars him from officially disfavoring those who "believe in a divine creator" and that nothing dwarfs their efforts to follow "divine law." *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 736 (2014) (Kennedy, J., concurring).

II. The Governor's directive violates the Free Speech Clause.

Nevada privileges business' promotion of commercial speech over churches' ability to convey non-commercial, religious messages. That violates the Free Speech Clause, *Berger v. City of Seattle*, 569 F.3d 1029, 1055 (9th Cir. 2009), and discriminates against religious viewpoints, *Prince v. Jacoby*, 303 F.3d 1074, 1092 (9th Cir. 2002).

III. The Governor’s directive fails strict scrutiny.

The Governor’s order disfavors religious assemblies, is not neutral or generally applicable, and demands strict scrutiny. Under that taxing standard, the government must “prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.” *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015) (cleaned up).

Nevada has no compelling interest in allowing 50%-occupancy gatherings at casinos, restaurants, theme parks, and gyms (and no numerical limits on protests)—but only 50 people at houses of worship. An interest in protecting health cannot be “of the highest order” when the state freely permits “appreciable damage” to it. *Lukumi*, 508 U.S. at 547. Nor is the Governor’s directive narrowly tailored. More favorable (50%-occupancy) rules apply to “analogous nonreligious conduct,” and Nevada’s health interests “could be achieved by” adopting an identical rule for churches that burdens religion “to a far lesser degree.” *Id.*

IV. *Jacobson* does not alter the analysis.

Because the Governor’s unequal treatment of religious gatherings makes no practical sense, he resorts to lofty demands for deference. Yet *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), does not help him for the reasons Judge Collins explained at length, *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 942–43 (9th Cir. 2020) (Collins, J., dissenting). Even applying *Jacobson*, which addressed a neutral across-the-board vaccination requirement, the Governor’s discriminatory

treatment of constitutionally-protected worship services “has no real or substantial relation to [public health], or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law.” *Jacobson*, 197 U.S. at 31. Restrictions “inexplicably applied to one group and exempted from another do little to further [health] goals,” although they “do much to burden religious freedom.” *Roberts*, 958 F.3d at 414.

V. Calvary Chapel meets all of the requirements for an injunction pending appeal.

To obtain an injunction pending appeal, a party must show “that they are likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in their favor, and that an injunction is in the public interest.” *S. Bay*, 959 F.3d at 939. Under this Court’s sliding-scale approach, “a stronger showing of one element may offset a weaker showing of another.” *hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985, 992 (9th Cir. 2019). In this case, each of the three elements tip sharply in Calvary Chapel’s favor.

First, Calvary Chapel must only show “a colorable First Amendment claim” to establish an “irreparable injury.” *Warsoldier v. Woodford*, 418 F.3d 989, 1001 (9th Cir. 2005) (cleaned up). But, as explained above, the church did not stop there: it proved a blatant free-exercise violation. “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Second, the equities weigh heavily in Calvary Chapel’s favor. If it is worth allowing large crowds to assemble in close proximity for extended periods to enjoy non-constitutionally-protected activities at casinos, restaurants, theme parks, and gyms, it is worth allowing people to gather at houses of worship to enjoy speech and religious activities the First Amendment strongly protects. The church asks for no special favors. It just desires to hold gatherings at 50% capacity with social distancing and safety precautions the same as many businesses where large groups gather in close proximity for extended periods of time. Nevada gets things backwards by privileging commercial activities over religious exercise. But the Governor’s order “cannot co-exist with a society that places religious freedom in a place of honor in the Bill of Rights: the First Amendment.” *Roberts*, 958 F.3d at 416.

Third, when it comes to the public interest, “treatment of similarly situated entities in comparable ways serves public health interests at the same time it preserves bedrock free-exercise guarantees.” *Id.* And equal treatment is all that Calvary Chapel requests.

CONCLUSION

For these reasons, Calvary Chapel asks this Court to grant an injunction pending appeal allowing Calvary Chapel to meet at 50% occupancy with social distancing and other health and safety precautions that apply equally to comparable, secular gatherings.

Respectfully submitted,

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June 22, 2020

CERTIFICATE OF COMPLIANCE

This motion complies with the requirements of Fed. R. App. P. 27(d) and 9th Circuit Rule 27-1(1)(d) because the motion does not exceed 20 pages.

This motion also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

/s/ David A. Cortman

David A. Cortman

Dated: June 22, 2020

CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2020, the foregoing emergency motion for an injunction pending appeal was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit through the Court's CM/ECF system. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system and that a PDF copy of this motion will be emailed to opposing counsel immediately after it is filed.

/s/ David A. Cortman
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