

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)

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

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INTRODUCTION

Not every COVID-19 order violates the First Amendment. But Governor Sisolak's Directive 021 does, and he has shown no interest in correcting it. Just this week the Governor extended his month-old order through the end of July 2020.¹ So this is not a case in which the Governor acted in the heat of the moment. State Defs.' Opp'n ("Opp'n") 26. His refusal to address Calvary Chapel Dayton Valley's First Amendment concerns is persistent and studied.

Three months into Nevada's state of emergency, COVID-19 regulations are looking less like a temporary, emergency measure, *id.* at 11, 23, and more like a way of life. Governor Sisolak frequently threatens to impose harsher restrictions on public gatherings like worship services. *Id.* at 4. Unless this Court intervenes, every indication is that the Governor will continue putting a thumb on the scales in favor of commercial activities and speech, and against free exercise.

This is deeply troubling because religious exercise is constitutionally protected, and the Governor's skepticism of people of faith is undeserved. *Cf. Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020) (per curiam). Calvary Chapel has every incentive to protect its flock and actively took measures to comply—without complaint—with

¹ Governor Sisolak, COVID-19 Declaration of Emergency Directive 026 (June 29, 2020), <https://bit.ly/3ePbl1c>.

the Governor’s face-covering, social-distancing, and other neutral health and safety rules.

All the church wants is the ability to meet at 50% fire-code-capacity like a host of secular gatherings the Governor freely permits, while adhering to its comprehensive health and safety plan. That request is imminently reasonable. It is even more so when one considers that Calvary Chapel is in Lyon County, which has a mere 27 active cases of COVID-19.² Practically all of the confirmed COVID-19 cases have occurred elsewhere; namely, Clark and Washoe County where most of the casinos are located and the population is largest.³

Yet, to hear the Governor tell it, granting the church’s request would uniquely put everyone’s health at risk. Opp’n 11. That is obviously not the case. But unless this Court says so, the Governor’s reflexive “distrust” of “religion or . . . its practices” will continue, *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993), and Calvary Chapel’s free-exercise rights will continue to suffer.

STANDARD OF REVIEW

The Governor claims this Court owes “deference” to the district court’s ruling. Opp’n 10. Not so. Where the “denial of a preliminary injunction motion rests solely on a premise of law and the facts are

² Carson City Health & Human Servs., Quad-County COVID-19 Update (June 29, 2020), <https://bit.ly/31xnS5C>.

³ Nev. Dep’t of Health & Human Servs., COVID-19 Data Dashboard, <https://bit.ly/3dNhh9u>.

either established or undisputed, [this Court's] review is *de novo*.” *Sanders Cty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 744 (9th Cir. 2012) (cleaned up). Under that standard, this Court “accords no deference to the trial court.” *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000).

ARGUMENT

I. Rather than dispelling the Free Exercise Clause violation the church raised, the Governor's response multiplies it.

The Governor's response proves four things: (1) Nevada treats secular assemblies better than religious gatherings, (2) the Governor's oft-repeated “commerce” label is meaningless, (3) the state wants to give churches the most-disfavored-secular-gathering treatment, and (4) none of the state's justifications for disfavoring religion make sense. So rather than dispel the free-exercise violation Calvary Chapel described in its motion, the Governor's response multiplies it.

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

The Governor claims that he does not “treat[] houses of worship differently than comparable mass gatherings.” Opp'n 1. But this is just semantics. What the Governor means by “mass gathering” are assemblies covered by Directive 021, § 10 because they do not receive specific treatment elsewhere. Yet it is impossible to ignore the rest of Directive 021, which treats casinos (§ 35), restaurants (§ 25), bars

(§ 26), fitness facilities (§ 28), bowling alleys (§ 20), indoor theme parks (§ 21), pools (§ 29), and movie theaters (§ 20), and more, better than worship services. Emergency Mot. for Inj. Pending Appeal (“Mot.”) 6–8.

B. Large, extended gatherings are comparable to church services regardless of labels like “commerce.”

The Governor’s response boils down to the mantra that commerce is different, so practically no business is comparable to a church. Opp’n 7–8, 15, 17, 19–20, 27. But this flips the First Amendment on its head, and no court has ever gone that far.

Under *South Bay*, any place in which people “congregate in large groups [and] remain in close proximity for extended periods” is comparable to a house of worship. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief). All of the examples the Chief Justice gave, on both sides of the comparator line, are commercial. *Id.* So the right commerce counts, and the Governor’s argument falls flat.

What matters is an assembly’s size, individual proximity, and how long they gather. The proof Calvary Chapel offered of Nevada treating secular assemblies better *all* involved large, extended gatherings. Mot. 11–14. That makes them valid comparators under *South Bay*.

Because the church never argued that worship is like shopping, general commerce, or picking up groceries, the Governor’s attack on that straw-man argument fails. Opp’n 17, 19–20. The Governor

contends that this case is *South Bay* redux. Opp’n 15–16. But the Governor’s directives are not like the orders challenged in *South Bay* and Calvary Chapel has raised an entirely different set of secular comparators: casinos, restaurants, bars, gyms, and theme parks. These are a far cry from most retail or warehouse facilities.

Nor does it matter *why* large, extended gatherings happen, as the Governor suggests. *Id.* at 18. “Risks of contagion turn on social interaction in close quarters; the virus does not care why they are there.” *Roberts*, 958 F.3d at 416. COVID-19 has no special affinity for the religious. ER 106–08.

C. Treating churches the same as disfavored-secular gatherings violates the Free Exercise Clause.

The Governor maintains that there is no First Amendment violation so long as he treats at least one secular gathering as poorly as he treats churches. Opp’n 4–7, 17. He is wrong.

Free exercise is a fundamental right that demands enhanced protection. *League of Indep. Fitness Facilities & Trainers v. Whitmer*, ___ F.3d ___, No. 20-1581, 2020 WL 3468281, at *1 (6th Cir. June 24, 2020). By the Governor’s logic, he could shut down every religious service in Nevada as long as a single form of disfavored-secular assembly (say, live theater performance) is banned. That simply is not correct.

“The Free Exercise Clause, which applies to the States under the Fourteenth Amendment, protects religious observers against unequal

treatment” *Espinoza v. Mont. Dep’t of Revenue*, __ S. Ct. __, No. 18-1195, 2020 WL 3518364, at *5 (S. Ct. June 30, 2020) (cleaned up). *South Bay* clarifies that “[s]imilar or more severe restrictions [must] apply to [all] comparable secular gatherings.” 140 S. Ct. at 1613. The Governor cannot “treat[] more leniently . . . []similar activities . . . in which people . . . congregate in large groups []or remain in close proximity for extended periods.” *Id.* By doing just that, Mot. 6–8, 11–14, he violated the First Amendment.

D. The Governor’s excuses for giving preferential treatment to secular assemblies fail.

None of the Governor’s excuses for treating secular assemblies better than religious gatherings pass muster. They amount only to the offensive claim that for-profit assemblies are important and religious gatherings are not. *E.g.*, Opp’n 1 (citing “economic sacrifices”); *id.* at 3 (describing the “significant loss of life and business”); *id.* at 5 (labeling gaming Nevada’s “most recognizable industry” and “vital” to the “State’s economy”). And that just “devalues religious reasons for [congregating] by judging them to be of lesser import than nonreligious reasons,” *Lukumi*, 508 U.S. at 537, in violation of the Free Exercise Clause.

Casinos

The Governor wields the overall regulation of casinos as a talisman that is supposed to ward off any church comparison. Opp’n 6–7, 22. But that charm does not work. The state cannot cite a single

health and safety regulation that makes casinos safer than houses of worship for a simple reason: none exists. *Id.* at 7. True, the Nevada Gaming Control Board belatedly required some people at or within 6 feet of gaming tables to wear face coverings. *Id.* at 6–7. Yet Nevada’s face-covering requirement now extends to *everyone* in public spaces, including churches.⁴ So that is not a relevant distinction. Other “regulatory control[s]” that have nothing to do with preventing COVID-19 infections are neither here nor there. *Id.* at 22.

Moreover, the Governor does not ban “any events with live performances.” Opp’n 17. Calvary Chapel has shown that live performances are happening at casinos right now. ER 84–90. The Governor cannot erase this compelling evidence with *ipse dixit*.

Restaurants and Bars

Restaurants in Nevada have long operated at 50% of seating capacity. ER 648, 748. And the “governing consensus,” Opp’n 21, is that assemblies at restaurants are comparable to gatherings at churches, Mot. 12 & n.8; *Soos v. Cuomo*, No. 1:20-cv-651, 2020 WL 3488742, at *11 (N.D.N.Y. June 26, 2020). Yet the Governor fails to address restaurants, other than by dismissing Calvary Chapel’s study of Directive 021’s text as “breezily offer[ing] its opinion.” Opp’n 22.

⁴ Governor Sisolak, COVID-19 Declaration of Emergency Directive 024 (June 24, 2020), <https://bit.ly/2Vuj5xS>.

Ad hominins cannot substitute for the Governor's failure to offer a compelling justification for treating restaurants better than churches. And it is the Governor's burden to do so. *Doe v. Harris*, 772 F.3d 563, 570 (9th Cir. 2014). The difference is stark: Directive 024, § 7(6) allows face coverings to be removed at restaurants "while [people] are eating or drinking" and chatting up to 50% capacity, while limiting church gatherings to 50 people even though they are socially-distanced, mostly listening, and worshipers only rarely eat or drink. Mot. 12.

The Governor likewise allows bars to operate at 50% capacity, Directive 021, § 26, even though Dr. Anthony Fauci has categorized drinking in bars as "bad news" and something that "[w]e really got to stop."⁵ Meanwhile, he limits houses of worship to 50-people max.

Amusement and Theme Parks

The Governor offers no excuses for treating amusement and theme parks more favorably than churches. He just loosely cites "Nevada's public health officials" unstated rationale, Opp'n 22, while hinting that revenue is the state's real concern, *id.* at 1, 3, 5. But it defies reason to claim that filling indoor theme parks at 50% capacity is perfectly tolerable, while allowing churches to host worship gatherings at 50% capacity is not. Mot. 13.

⁵ Hilar Brueck, *Dr. Fauci says drinking inside bars is one of the most dangerous things you can do right now*, Business Insider (June 30, 2020), <https://bit.ly/3gn0MCZ>.

Gyms and Fitness Facilities

Nor can the Governor refute his own admission that the risk of COVID-19 transmission at gyms and fitness facilities is high. Mot. 13. So he simply ignores it. But the health risks are obviously greater at gyms and fitness facilities than churches. *E.g.*, *League of Indep. Fitness Facilities*, 2020 WL 3468281, at *3; Sukbin Jan et al., *Cluster of Coronavirus Disease Associated with Fitness Dance Classes, South Korea*, CDC Research Letter (August 2020), <https://bit.ly/2BgrBd9>. Nonetheless, the Governor allows gyms and fitness facilities to operate at 50% capacity while relegating churches to 50 people max. Mot. 13.

Movie Theaters

The Governor's claim that movie theaters and churches are treated equally is false. Opp'n 4, 17. Nevada's industry-specific guidance reveals that movie theaters are limited to "50 people . . . per screen." ER 552. Yet one cinema may have dozens of screens and hundreds of people inside. Meanwhile, houses of worship are capped at 50 people in the entire building; as Directive 021, § 11 makes plain, "congregants for different services [may] not result in a gathering greater than fifty persons," even if multiple meeting rooms exist.

Mass Protests

When it comes to mass protests, the Governor asserts that he cannot be faulted for "refus[ing] to arrest protestors." Opp'n 24. But the unequal treatment of hundreds to thousands of people at mass protests

and much fewer, socially-distanced people at houses of worship (Calvary Chapel asks only for roughly 90-person gatherings) goes much deeper than that. Not only have the Governor and Attorney General refused to apply emergency directives to mass protests, they have also actively encouraged the protests, ER 164, 254–56, while threatening churches and others that violate the rules.⁶ The Governor even *personally participated* in an illegal protest. Mot. 8 & n.7.

Governor Sisolak and Attorney General Ford could have discouraged protests, short of condemning their message, in the name of public health and exercised discretion to suspend enforcement for public safety reasons instead of encouraging what they knew was a flagrant disregard of the outdoor limits and social distancing rules. They could have also been silent. But by acting as they did, [Governor Sisolak and Attorney General Ford] sent a clear message that mass protests are deserving of preferential treatment.

Soos, 2020 WL 3488742, at *12. Once state officials make a secular exemption for mass protests, they must extend the same exemption to “cases of religious hardship.” *Lukumi*, 508 U.S. at 537. The Governor’s favoring of protests over church services violates the First Amendment.

II. The Governor’s free-speech violation is blatant.

Directive 021 allows businesses, such as movie theaters, entertainment venues, and fitness classes, to express all manner of

⁶ Directive 024, § 9; Colton Lochhead, *Sisolak, elected Nevada officials discuss systemic racism, reform*, Las Vegas Review Journal (June 5, 2020), <https://bit.ly/2COWWno>.

commercial messages to large crowds. And, in practice, state officials give mass protestors the unlimited opportunity to speak. Yet the Governor sharply limits churches' ability to express religious, non-commercial messages to a live audience. The free-speech violation is unmistakable whatever the Governor feigns. Opp'n 24.

When "laws 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's preference for commercial and protest messages is evident, and that bias violates the First Amendment.

The Governor may not "afford[] a greater degree of protection to commercial than to noncommercial speech." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1981) (plurality opinion). State officials must treat religious, noncommercial speech better. Yet commercial messages about gambling, fitness, entertainment, food, liquor, and movies thrive, while faith-based messages in Nevada suffer.

Religion is also a protected "viewpoint." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 n.4 (2001). The Governor may not favor the propagation of business' commercial or protestors' non-commercial, secular viewpoints over the broadcast of Calvary Chapel's religious views. But state officials have done much to "silenc[e] religious perspectives" and bolster secular views, which is classic viewpoint discrimination. *Tucker v. Cal. Dep't of Educ.*, 97 F.3d 1204, 1216 (9th Cir. 1996).

By transgressing these basic free-speech principles, the Governor also violated the First Amendment.

III. Sheriff Hunewill’s pleas for different and special treatment are either mistaken or beside the point.

Sheriff Hunewill asks this Court to “distinguish” him from the state defendants and grant him unfettered discretion “to address the specific needs of his community during the evolving Covid-19 situation.” Frank Hunewill’s Resp. 4. But his pleas are wrong or beside the point.

First, the Sheriff pretends as if Directive 021 has nothing to do with him. *Id.* at 2–3. That is simply false. Section 39 specifically authorizes Sheriff Hunewill “to enforce th[e] Directive and regulations promulgated thereunder.” ER 652. And the Sheriff has consistently promised in his submissions to “investigate[]” and make an “appropriate response” if “there is a call, complaint or issue reported” to him. Def. Frank Hunewill’s Limited Opp’n to. Pl.’s Ex Parte Mot., ECF 51, at 3; Limited Joinder of Sheriff Frank Hunewill, ECF 32, at 2–3.

Second, the Sheriff’s concerns are hypothetical or illegitimate. The church is only asking for equal treatment with comparable secular gatherings. So if this Court grants an injunction pending appeal, the Sheriff’s ability to “enforce non-discriminatory, neutral measures” will remain untouched. Frank Hunewill’s Resp. 3. The church’s motion does not put any neutral future measures at risk.

Third, the Sheriff's plea for local deference does not add up. The Free Exercise and Free Speech Clauses apply equally to state and local officials. *ACLU of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1098 n.5 (9th Cir. 2003). The Sheriff is no exception. *E.g.*, *Bible Believers v. Wayne Cty.*, 805 F.3d 228 (6th Cir. 2015) (en banc). Sheriff Hunewill "has no 'discretion' to violate the Federal Constitution." *Owen v. City of Independence*, 445 U.S. 622, 649 (1980). "The protections of the Free Exercise Clause do not depend on a 'judgment-by-judgment analysis' [by courts or local officials] regarding whether discrimination against religious adherents would somehow serve ill-defined interests." *Espinoza*, 2020 WL 3518364, at *10. And the Sheriff's suggestion that it would be "suicid[al]" to treat comparable religious and secular gatherings equally is just plain wrong and lacks any evidentiary support. Frank Hunewill's Resp. 3.

CONCLUSION

For these reasons and those stated in Calvary Chapel's motion, the church requests an injunction pending appeal allowing it to meet at 50% occupancy with face masks, social distancing and other health and safety precautions that apply equally to comparable, secular gatherings.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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/s/ David A. Cortman _____

David A. Cortman