APP NO. 19A1070

IN THE SUPREME COURT OF THE UNITED STATES

CALVARY CHAPEL DAYTON VALLEY,

Applicant,

v.

STEVE SISOLAK, in his official capacity as Governor of Nevada; et al.,

Respondents.

To the Honorable Elena Kagan,
Associate Justice of the United States Supreme Court
and Circuit Justice for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR AN INJUNCTION PENDING APPELLATE REVIEW

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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement in the application for an injunction pending appellate review remains unchanged.

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To the Honorable Elena Kagan, as Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

The State of Nevada does not dispute that it is treating casinos, gyms, restaurants, certain bars, indoor amusement parks, bowling alleys, water parks, pools, arcades, and more, better than places of worship. Nor could it. Governor Sisolak's Directive 021 subjects each of these secular businesses to only a 50%-fire-code-capacity limit while limiting gatherings at places of worship to no more than 50 people, regardless of their facilities' size or the precautions they take. By "exempt[ing] or treat[ing] more leniently" similar secular activities "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), the directive violates the Free Exercise Clause.

Nor do the Governor's reasons for favoring casinos remedy the "unequal treatment." *Espinoza* v. *Mont. Dep't of Revenue*, No. 18-1195, 2020 WL 3518364, at *5 (U.S. 2020). First, they say nothing about the Governor's better treatment of all the other secular comparators Calvary Chapel raised in its application. Second, Nevada's gaming regulation of casinos does not ward off any comparison to churches. To be sure, casinos—with their daily mix of shared handles, cards, tokens, tables, servers, drinks, restrooms, and seats by hundreds to thousands of people—face some regulations that others do not, but so do churches. Ninth Circuit Excerpts of Record ("ER") 546–47 (industry guidance for places of worship). What matters is that both

casinos and churches are places where "people gather in close proximity for extended periods of time." *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring). Yet the Governor allows hundreds to thousands to assemble in pursuit of financial fortunes but only 50 to gather in pursuit of spiritual ones. That is unconstitutional.

The Governor's newest directive fails to fix the unequal treatment. Shortly after Calvary Chapel filed its application with the Court, the Governor issued a directive closing bars in some—but not all—counties. *See* Governor Sisolak, COVID-19 Declaration of Emergency Directive 027 (July 10, 2020), https://bit.ly/2OgmFYC. The Governor is mandating bar closures only in those counties he claims have "Elevated Disease Transmission." Incredibly, the Governor has labeled Lyon County (the county where Calvary Chapel is located) as one such county, even though it has just 33 active cases out of roughly 57,000 people—an active infection rate of 0.058%.[1] The classification appears to be a litigation tactic that serves no valid public-health purpose. In fact, Lyon County is on the Governor's list because the Governor decided to punish the county for its *low* number of COVID-19 tests. Resp. Ex. 1 at 1–2. And even Lyon County's designation does not fix the unequal treatment Calvary Chapel faces next to the numerous other secular comparators that have not been closed.

Unable to seriously dispute his unequal treatment of churches, Governor Sisolak says that *South Bay* and *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905), write him a blank check to address the COVID-19 outbreak as he likes, however unequal.

[1] *See* Carson City Health & Human Servs., Lyon County COVID-19 Data (July 15, 2020), https://bit.ly/3ekOn0T; United States Census Bureau, Quick Facts, Lyon County, Nev. (July 12, 2020), https://bit.ly/2C715TE.

That is not true. And it is imperative for this Court to say so. *South Bay* did not involve an order like Nevada's that treats casinos, bars, gyms, fitness centers, amusement parks, water parks, bowling alleys, arcades, mass protests, and polls better than worship services. A crisis is no time for elected officials to survey the vast "crowd" of First-Amendment-protected activity and "pick[] out [their] friends." *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). Even during the COVID-19 outbreak, governors—like presidents—are "'of the people' and subject to the law." *Trump* v. *Vance*, No. 19-635, 2020 WL 3848062, at *5 (U.S. 2020) (quoting *United States* v. *Burr*, 25 F. Cas. 30, 34 (No. 14,692d) (CC Va. 1807)).

And far from being a temporary measure, the Governor's restrictions on houses of worship have spanned nearly four months, with no end in sight. Even the rosiest predictions are that a safe and effective vaccine will not be ready before next year.[2] That is—at least—five more months of assemblies and expression at casinos, restaurants and certain bars, indoor theme parks, bowling alleys, pools, and arcades thriving, while their religious counterparts wither. Neither Calvary Chapel nor the First Amendment can tolerate such religious discrimination. The church respectfully requests that this Court issue an injunction now.

[2] Lauran Neergaard, *First COVID-19 vaccine tested in US poised for final testing*, AP News (July 14, 2020), https://bit.ly/2CHgMAR.

ARGUMENT

Not every COVID-19 order violates the First Amendment. But Governor Sisolak's Directive 021 palpably does, and this is not a case in which he acted hurriedly. The Governor has had nearly four months to refine the rules, including almost two months after Calvary Chapel filed suit and clarified the First Amendment violation. But rather than fix inequalities, the Governor has consistently doubled down on the discrimination against places of worship, as his response tells.

All Calvary Chapel requests is the ability to meet at 50% fire-code capacity like the secular assemblies the Governor has freely permitted for almost two months. Ordering "'equal treatment'" of religious gatherings and expression is not intrusive or outside the Court's scope. *Espinoza*, 2020 WL 3518364, at *5 (quoting *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2021 (2017)). It just prevents the Governor from discriminating against religion, as the Constitution demands.

Nothing about Calvary Chapel's requested order would require this Court to supervise the Governor's every move, as he portends. Resp. 22. The church only requests equal treatment. The Governor simply needs to give Calvary Chapel the same right to meet he extends to comparative secular gatherings. Yet the Governor continues to resist that common-sense requirement.

I. The Governor's response confirms the Free Exercise violation.

The Governor's response proves that Nevada treats secular assemblies better than religious gatherings, that the Governor's oft-repeated "commerce" label is

meaningless, and that none of the state's justifications for disfavoring religion make sense. Rather than dispel the free-exercise violation described in Calvary Chapel's application, the Governor's response amplifies it.

A. Nevada treats comparable secular assemblies better than Calvary Chapel's religious gatherings.

The Governor claims that he treats houses of worship the same as "comparable mass gatherings." Resp. 2. That argument is baffling until the Governor clarifies that "*all* mass gatherings," *id.* at 17, is actually a tiny *subset* of large assemblies. What the Governor means by "mass gatherings generally," *id.* at 7, are assemblies covered under Directive 021, § 10's catch-all—*not* the secular assemblies addressed in other portions of the directive. Calvary Chapel's application explains that overlooking the directive's many explicit and real-life exemptions for large, close, and prolonged secular assemblies is "irrational." Application 21. Yet the Governor rehashes this sleight of hand.

The Governor next cites three types of secular assemblies that are (at least nominally) subject to a 50-person cap: (1) movie theaters (§ 20), (2) museums, art galleries, zoos, and aquariums (§ 30), and (3) trade schools and technical schools (§ 32). Resp. 5, 15. But he never explains how it is equal to allow 50 customers *per room* in a multiplex cinema and 50 people *total* in a place of worship, no matter how many separate rooms could be used for worship without any contact between people in different spaces. Application 16–17. Nor does the Governor give any reason why museums and trade schools, in which people regularly move back and forth in tight

spaces, are comparable to places of worship, where people usually remain seated—and socially distanced—in large rooms.

The Governor also claims that he treats places of worship better than "musical performances, live entertainment, concerts . . . and any events with live performances." Resp. 14. But Calvary Chapel already proved that people have been attending live circus acts and musical shows at casinos for a month. Application 13. The Governor does not refute this evidence. And in any event, the Governor is wrong to contend that there is no First Amendment violation if he treats at least one secular gathering worse than or as poorly as he treats places of worship. Free exercise is a fundamental right that demands enhanced protection. By the Governor's logic, he could shut down every religious service in Nevada if a single form of disfavored-secular assembly (say, concerts) is banned. That is wrong.

The Governor's explanations—or lack thereof—for treating secular comparators more favorably than he treats places of worship are equally unconvincing:

Casinos

The Governor's justifications for excluding casinos as secular comparators are meritless. First, the right to hold a non-restricted gaming license may be "a privilege," Resp. 5 n.10, with certain restrictions attached, Resp. 5. But no state-licensed privilege compares to Calvary Chapel's fundamental right to the free exercise of religion. Nevada cannot treat places of worship worse because religion is

constitutionally protected (and subject to fewer restrictions), and gambling is not (and subject to greater control). That gets things precisely backwards.

This Court in *South Bay* did not compare secular and religious assemblies' licensing regimes. If it had, this Court likely would not have deemed *any* secular businesses comparable to places of worship. But that is not what transpired. *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (discussing businesses on both sides of the comparability line). The Chief Justice asked whether the state "exempts or treats more leniently . . . [ ]similar activities [to religious services] in which people . . . congregate in large groups [and] remain in close proximity for extended periods." *Ibid*. Thousands of people gambling and enjoying entertainment at casinos fit that bill.

Second, the Governor says that casinos take more safety precautions. Resp. 6. For example, the Governor argues that casinos provide "masks for all guests" and require patrons to "wear face coverings at table and card games if there is no other barrier." Resp. 6–7. But nearly everyone must wear a face covering in public places, including casinos and places of worship.[3] And Calvary Chapel also gives a mask to anyone entering its building who needs one.

Then the Governor says that all casinos have locations for people to get COVID-19 tests. Resp. 6 (citing Exhibit 2). But that requirement applies only to casinos that are "a resort hotel" and their "hotel guests." Resp. Ex. 2 at 7. And all the policy mandates is that hotels "provide a designated area within the resort where

[3] Governor Sisolak, COVID-19 Declaration of Emergency Directive 024 (June 24, 2020), https://bit.ly/32p7PXU.

hotel guests *may* be tested for COVID-19, and where such hotel guests can safely wait for the test results." Resp. Ex. 2 at 7 (emphasis added). It obliges no hotel guest to take a COVID-19 test: a temperature screening *or* self-assessment is all that is required. Resp. Ex. 2 at 7. Places of worship are not hotels, so it makes sense that the state has not applied this rule to them.

Third, the Governor alleges that casinos face stiffer punishments and quicker shutdowns. Resp. 18. But he has never explained how any penalty levied by the Nevada Gaming Control Board could be more serious than the potential shutdown of in-person worship, and civil and criminal penalties that Calvary Chapel faces. And given that the Governor had no trouble closing down almost the *entire state* in less than 24 hours last March, his claim that regulatory oversight is necessary to realize an abrupt halt if a second outbreak happens is hard to take seriously.

Restaurants and Bars, Amusement Parks, and Fitness Facilities

The Governor ignores Calvary's Chapel's comparisons to restaurants and bars, amusement and theme parks, and gyms and fitness facilities. Because people obviously "congregate in large groups [and] remain in close proximity for extended periods" in these secular locations, *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring), the Governor essentially refuses to address them. He simply dismisses Calvary Chapel's arguments as "breezily offer[ing] its opinion" and feigns that the church should have presented evidence in the district court on how restaurants, theme parks, and fitness facilities work. Resp. 17–18.

But Nevada bears the burden of "justify[ing its] inroad on religious liberty." *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981). Nor has any court awaited—let alone required—record evidence of such well-known facts about how people interact in restaurants and bars, amusement parks, and fitness facilities. "Judges, unlike ostriches, are not required to bury their heads periodically in the sand." *N. Heel Corp.* v. *Compo Indus.*, 851 F.2d 456, 473 (1st Cir. 1988).

The Governor does briefly mention that, one business day before Calvary Chapel's Ninth Circuit opening brief was due, he ordered new restrictions on restaurants and certain bars. Resp. 1, 4. Yet restaurants' and bars' base ability to operate at 50% capacity remains unchanged. Application 14–15. Restaurants must simply limit each party to six people.[4] And bars and bar tops must close only if they are in a county the Governor brands as at risk of "Elevated Disease Transmission." This label does not mean that the rate of COVID-19 infections is high. Based on the Governor's odd criteria, it could signify only that the county (1) averages what the Governor deems to be too few COVID-19 tests per day, and (2) has a case rate higher than 25 and a test positive rate—no matter how few tests are performed—higher than 7%. Resp. Ex. 1 at 1–2.

To that point, the Governor just last week labeled Lyon County—where Calvary Chapel is located—as at risk of "Elevated Disease Transmission." Resp. Ex. 1 at 2. But this seems to be a litigation tactic that serves no valid public-health

[4] Governor Sisolak, COVID-19 Declaration of Emergency Directive 027, § 4–6 (July 10, 2020), https://bit.ly/2B7lF64.

purpose. Resp. 4, 8. Lyon County has just 33 active cases out of roughly 57,000 people—an active infection rate of only 0.058%.[5] It is on the Governor's list simply because he chose to punish Lyon County for its *low* number of COVID-19 tests. Resp. Ex. 1 at 1–2. The actual COVID-19 hotspots are Clark and Washoe County, where most of Nevada's casinos, tourism, and population is located: those two counties collectively account for 96.25% of all confirmed cases in the state.[6] So the argument that Lyon County is a dangerous locale cannot be taken seriously. Resp. 4 n.8.

Nevada's restaurants and many bars continue to operate at 50% capacity. Even where bars and bar tops are closed, restaurants and casinos may continue to serve alcohol to groups seated at restaurant and gaming tables.[7] And large secular assemblies continue to occur at casinos like the Carson Plains Casino in Dayton Valley, which is only about a four-mile drive from Calvary Chapel on U.S. route 50.[8]

Mass Protests

The Governor argues that mass protests are distinct from worship services, Resp. 19, but the only differences he notes are: (1) protestors raising serious discussions about policing and race, (2) the cost "of enforcement of social distancing," and (3) state officials "attempting to address important community issues." Resp. 19.

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[5] *See* Carson City Health & Human Servs., Lyon County COVID-19 Data (July 15, 2020), https://bit.ly/3ekOn0T; United States Census Bureau, Quick Facts, Lyon County, Nev. (July 12, 2020), https://bit.ly/2C715TE.
[6] Nev. Dep't of Health & Human Servs., COVID-19 Dashboard (July 15, 2020), https://bit.ly/3j5kBAK.
[7] Directive 024, § 5–6, *supra* p. 7 n.3.
[8] Carson Plains Casino, https://carsonplainscasino.net; MapQuest, http://mapq.st/3iXbkuo.

It should be self-evident that religious gatherings can address policing and race too: Reverend Martin Luther King was a minister after all. Yet those who speak and pray from the pulpit may reach only 49 people at a time, whereas those who address crowds at mass protests have no limits.

Nor does it make sense for the Governor to encourage mass protests when *he admits* they do not involve social distancing (hence the need for "enforcement of social distancing"), Resp. 19, over Calvary Chapel's worship services, which comply with or exceed CDC guidelines, ER 107. Speakers who abide by the Governor's social-distancing and face-covering rules (like Calvary Chapel) should be allowed to host larger gatherings, not smaller ones.

When it comes to Governor Sisolak's *personal participation* in a mass protest, he cannot have his cake and eat it too. Application 23–24. The Governor admits that mass protests are not socially distanced and then claims the one he participated in did not violate any rules. Resp. 19 & n.20. But photographs make clear that Governor Sisolak did not socially distance at the protest.[9] Unless mass gatherings under Directive 021, § 10 are not subject to the same social-distancing requirements that worship gatherings are under § 11, the Governor violated his own directive. And if the Governor holds worship services to social-distancing requirements from which he exempts general mass gatherings, that discriminatory treatment violates *even his* narrow construction of *South Bay*. Resp. 2, 7, 17.

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

Last but not least, the Governor suggests that he can decide what is an "important community issue[ ]" and what is not. Resp. 19. The clear assumption is that the intersection of race and policing is vital, and religion falls short. But that sort of value judgment violates the First Amendment. State officials cannot devalue religious reasons for speaking to large groups or pick and choose what subjects are worthy of public debate. Application 19–20, 23–25.

Election Polls

When it comes to election polls, the Governor's only argument is that Calvary Chapel "ignore[s] Nevada's significant efforts to reduce in-person voting." Resp. 19 n.21. But maximizing mail-in ballots has nothing to do with the lack of safety precautions at the polls. It is not as if the Governor shut down all in-person voting sites. He knew large crowds would come.

Crowds waiting in meandering lines for hours to vote at a few state-sponsored voting locations, ER 68–72, qualify as "large groups . . . in close proximity for extended periods." *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring). Yet the Governor exempted polls from the directive wholesale and treated them far "more leniently" than places of worship that are subject to a 50-person cap. *Ibid.*

B. The Governor's claim that commercial assemblies and worship gatherings are never comparable fails.

One of the Governor's primary themes is that "mass gatherings are different than commercial activities." Resp. 13. He faults Calvary Chapel for "presum[ing] that it should be treated the same as a business," Resp. 23, and cites *South Bay* as

confirming the "difference between mass gatherings and commercial activities," Resp. 12. But the Chief Justice's concurrence in *South Bay* said nothing of the sort.

Where the Governor discovers such a categorical rule is never explained. Chief Justice Robert's concurrence states that some commercial gatherings like "movie showings" are comparable to religious services, whereas other commercial assemblies like "grocery stores" are not. *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring). So commerce was not the deciding factor. The size, proximity, and duration of the secular assembly is what mattered. *Ibid.*

For all the Governor's talk about *South Bay*, Resp. 2, 7, 13–15, 17, he overlooks what Chief Justice Roberts' brief concurrence said: because California "exempt[ed] or treat[ed] more leniently *only dissimilar activities* . . . in which people neither congregate[d] in large groups nor remain[ed] in close proximity for extended periods" of time, the Chief Justice detected no free-exercise violation. *South Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (emphasis added). In contrast here, the Governor favors a vast array of large, close, and extended secular assemblies over places of worship, including those at casinos, restaurants and certain bars, amusement and theme parks, gyms and fitness facilities, bowling alleys, pools, arcades, movie theaters, mass protests, polls and more. The Governor holds only places of worship to a 50-person cap. And that is not equal under any definition of the term. In short, the Governor's directive is nothing like "California's order . . . in *South Bay*." Contra Resp. 13.

Another claim the Governor briefly repeats is that religious services are different than "general commerce," Resp. 15, or "shopping, in which people do not congregate or remain for extended periods," Resp. 16 (quotation omitted). But none of Calvary Chapel's secular comparators emphasize shopping or general commerce, so this assertion is beside the point, as the application explains. Application 22.

C. The Governor's own response eliminates any suggestion that places of worship pose a unique risk.

In a few sentences, Nevada implies that places of worship pose some kind of unique health risk. Resp. 1–2, 18 n.18. But the state's own response proves that is false. The Governor's "assessment of risk," Resp. 23, is that "COVID-19 is most effectively spread through interpersonal interaction with an infected person . . . particularly over an extended period of time," Resp. 1. This risk is inherent in all "mass gatherings, which carry higher risks for COVID-19 transmission." Resp. 21.

That is all Nevada's Chief Medical Officer said. After distinguishing gatherings like religious services from "important things such as picking up medications," Resp. Ex. 4 at 3, the Chief Medical Officer's declaration states that "[i]ndividuals *attending large gatherings*, including but not limited to the types of events where there have 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." Resp. Ex. 4 at 4 (emphasis added). These concerns apply equally to secular assemblies at casinos, restaurants and bars, theme parks, fitness facilities, mass protests, and polls, as they do religious gatherings at places of worship. No evidence supports uniquely impeding worship.

On the contrary, 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).

Nevada's Chief Medical Officer may say he disagrees with these expert conclusions. Resp. 18 n.18. But he never offered a reason why, and the substance of his declaration is consistent with Calvary Chapel's infectious-disease expert's testimony.

II. The Governor's own words prove that he favors secular over religious speech.

The Governor claims that he does not prefer "commercial speech [over] religious speech" or regulate on a "viewpoint basis." Resp. 20. But his own words prove that is not true. Indeed, the Governor's position tilts to extremes, claiming that the church has not even suffered true free-exercise harm because it may hold: (1) outdoor services (in nearly 100 degree summer temperatures),[10] (2) offer

[10] Notably, Directive 016, § 10 did not allow the faithful to gather for unlimited outdoor religious services, as the Governor claims. Resp. 7. It simply allowed places of worship to hold drive-in services, which the Governor previously banned in Directive 013, § 4. Governor Sisolak, COVID-19 Declaration of Emergency Directive

additional in-person services (which it already does) or (3) begin drive-in services (that do not satisfy its religious beliefs or meet its members' spiritual needs). Resp. 10, 22.

Governor Sisolak's treatment of commercial businesses and secular protests is miles away. Not once has the Governor suggested that casinos, restaurants, fitness facilities, arcades, protests, or elections move their expression online. Indeed, the Governor would hardly allow these secular assemblies at 50% capacity (or no limits) if he regarded these alternatives as sufficient.

The freedoms of speech and assembly are closely joined, *NAACP* v. *Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958) (citation omitted), which is why the Governor made a personal appearance at a mass protest, rather than expressing his support merely through tweets, ER 254, 256, or press conferences.[11] But what is good for the goose is good for the gander. Governor Sisolak did not tell casinos that online gambling is good enough to entice patrons to part with their money from afar, or encourage protestors to hold multiple, small protests to effect social change. So he has no right to tell places of worship to hold more services or stream online to convey their religious messages. The inequality is blatant and wrong.

State officials cannot reserve free speech for themselves, commercial businesses, and private citizens whose views they champion. Calvary Chapel's

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013 (Apr. 8, 2020), https://bit.ly/2ChHujR; Governor Sisolak, COVID-19 Declaration of Emergency Directive 016 (Apr. 29, 2020), https://bit.ly/2B5eivX.

[11] Jackie Valley & Riley Snyder, *Sisolak, elected official pledge to address systemic racism and society's 'double standard' toward black protestors*, The Nev. Indep. (June 5, 2020), https://bit.ly/32qAVq2.

religious messages stand on an equal constitutional rung as the protesters' message. And the church's religious expression stands on a much higher plane than the commercial speech of casinos, theme parks, bowling alleys, and other businesses that Directive 021 promotes and allows to flourish. Application 18–20.

III. The Governor misreads *South Bay* and *Jacobson* as granting him a blank check.

Much of Nevada's brief is dedicated to the argument that the extraordinary facts of this case make no difference because *South Bay* and *Jacobson* write the Governor a blank check to address the COVID-19 outbreak as he likes. But those cases could hardly be more different.

The Governor repeatedly urges this Court to just cite *South Bay* and deny the application, as did the Ninth Circuit. Resp. 2, 7, 14–15, 17. But *South Bay*'s facts were nothing like those here. The primary comparators in that case were warehouses and retail stores. Not only were the number of potential secular comparators far more limited, but their similarities to religious services were much less clear. Nothing in *South Bay* indicates this Court would regard casinos, restaurants and certain bars, theme parks, pools, bowling alleys, arcades, mass protests, and polling places the same way. Based on the Chief Justice's concurrence, the opposite is true. *Supra* p.11–12.

Once more, the Governor errs by claiming that *South Bay* reaffirmed *Jacobson*. This Court did not say so explicitly, nor should it. *Jacobson* issued before the Court applied the First Amendment to the states. *E.g.*, *Cantwell* v. *Connecticut*, 310 U.S.

296, 303 (1940). It is a shaky foundation on which to ground any merits analysis 115 years later, let alone review under the First Amendment.

What's more, *Jacobson* involved a five-dollar criminal fine that Cambridge, Massachusetts imposed on a resident who refused to comply with the city's mandatory and universal vaccination regime during a local smallpox outbreak. 197 U.S. 13. Jacobson's only claim was that the Fourteenth Amendment's liberty guarantee entitled him to an exemption that the city offered no one else. *Id.* at 38; *accord Cruzan* v. *Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990) (*Jacobson* "balanced an individual's liberty interests in declining an unwanted smallpox vaccine against the State's interesting in preventing disease").

This Court held that even when it came to a universally-required vaccine, the mandate would be invalid if it had "no real or substantial relation to [the] object" of protecting public health or safety "or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Jacobson*, 197 U.S. at 31. And the *Jacobson* Court further stressed that "no [emergency health] rule prescribed by a state . . . shall contravene the Constitution of the United States, nor infringe any rights granted or secured by that instrument." *Id.* at 25.

So *Jacobson* does not displace normal constitutional standards, as Judge Collins proved. *S. Bay United Pentecostal Church* v. *Newsom*, 959 F.3d 938, 941–43 (9th Cir. 2020) (Collins, J., dissenting). It just "rejected . . . a 'substantive due process' challenge to a compulsory vaccination requirement, holding that such a mandate 'was

within the State's police power.'" *Id.* at 942 (quoting *Phillips* v. *City of New York*, 775 F.3d 538, 542 (2d Cir. 2015)).

Nothing in *South Bay* or *Jacobson* supports the Governor's expansive claim that "emergency public health decisions are left by the Constitution to a State's elected officials" alone. Resp. 18. Chief Justice Roberts' concurrence indicates that the Constitution "*principally* entrusts" these matters to elected officials and that they have "broad" discretion in devising solutions. *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (emphasis added). But the Chief Justice recognized that even "those broad limits [can be] exceeded," *id.* at 1614, as is the case here.

Unless this Court intervenes, Nevada and other states will continue misjudging this Court's precedent and using *South Bay* and *Jacobson* to trample on delicate First Amendment rights. Granting Calvary Chapel's application would benefit not just the church but go a long way towards helping courts properly navigate these difficult issues.

CONCLUSION

Calvary Chapel respectfully requests that this Court issue an injunction pending appellate review that allow the church to host religious gatherings on the same terms as comparable secular assemblies (at present, 50% fire-code capacity), with social distancing, face coverings, and other neutral and generally-applicable precautions in keeping with the church's comprehensive health and safety plan.

Respectfully submitted.

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CERTIFICATE OF SERVICE

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