**CALVARY CHAPEL DAYTON VALLEY V STEVE SISOLAK**

**Closed**

**United States, North America**

**MIXED OUTCOME**

**MODE OF EXPRESSION**

Public Assembly

**DATE OF DECISION**

July 24, 2020

**OUTCOME**

Application for Injunctive Relief Denied.

**CASE NUMBER**

 591 U. S. \_\_\_\_ (2020)

**JUDICIAL BODY**

Supreme Court (court of final appeal)

**TYPE OF LAW**

Constitutional Law

**THEMES**

Religious Expression

**TAGS**

Covid-19, Discrimination

**CASE ANALYSIS**

**Case Summary and Outcome**

The Supreme Court of the United States denied the injunctive relief sought against the enforcement of the directive on limit of gatherings at places of worshipto maximum of 50 people in the light of COVID-19 pandemic’s restrictions. The application which had been previously made before the United States Court of Appeals for the Ninth Circuit pending appeal from the District Court of Nevada but was denied, originally arose from the Order of the District Court by which it denied the Applicant’s Emergency Motion for Temporary Restraining Order and Emergency Motion for Preliminary Injunction. The decision by the apex court denying the injunctive relief was narrowly established in favour of the respondent by Chief Justice John Roberts’ opinion alongside the opinions of four other justices, as Justice Samuel Alito, Justice Clarence Thomas, Justice Brett Kavanaugh and Justice Neil Gorsuch remarkably dissented.

**Facts**

The Applicant who is the Calvary Chapel Dayton Valley is a Christian church located in Dayton, Nevada, United States. The first Respondent is Steve Sisolak in his official capacity as the Governor of Nevada. The second Respondent is Aaron Ford, in his official capacity as Attorney General of Nevada, while the third Respondent is Frank Hunewill, in his official capacity as Sheriff of Lyon County. After the state of Nevada had been locked down due to COVID-19 Pandemic, the Governor of the State announced that the state would re-open in phases. Upon the announcement of phase I of the re-opening of the state with emergency orders, the Applicant filed its initial complaint dated May 22, 2020 at the District Court of Nevada challenging the emergency orders of the Governor prohibiting churches and other places of worship from holding in-person worship services of ten or more people regardless of compliance with social distancing and public health guidelines, while restaurants and food establishments, nail care salons, hair salons, and barber shops were allowed to open and operate at 50% capacity. This was indeed after about two months of inability to hold in-person service which the Applicant considered discriminatory and was worsened by the fact that some members could not participate in the online service and that any other mode of service other than the physical assembly does not meet the requirement of their biblical belief. Four days after the filing of the complaint, the Governor announced that the state would be moving into the second phase of its re-opening plan on May 29, 2020 and that the following “non-essential” businesses can reopen in Phase II:

*“Gyms and fitness facilities, including group fitness classes, up to 50% building capacity;*

*Bars and taverns, up to 50% capacity;*

*Salons and other businesses that provide aesthetic or skin services, including facials, hair removal, tanning, eyelash services, eyebrow threading, and salt therapy;*

*Day and overnight spas*

*Massage services*

*Body art and piercing establishments*

*Aquatic facilities and swimming pools, up to 50% capacity*

*Water parks, up to 50% capacity*

*Museums, art galleries, zoos and aquariums, up to 50% capacity*

*Outdoor venues, like mini golf and amusement parks*

*Indoor venues, like movie theaters, bowling alleys, and indoor malls, up to 50% capacity; and*

*Casinos (starting June 4)”* (Pg. 2 of Verified First Amended Complaint)

Churches and places of worship were however prevented from congregating to a number of more than 50 people under any circumstance (the “Church Gathering Ban”). In response to this, the Applicant on May 28, 2020 filed its verified amended complaint challenging Directive 021 under the First Amendment’s Free Exercise, Free Speech and Public Assembly. On June 11, 2020 Judge Richard F. Boulware II denied the Plaintiff’s Emergency Motion for Temporary Restraining Order and Emergency Motion for Preliminary Injunction sought by the Applicant. Dissatisfied by the ruling, the Applicant applied to the United States Court of Appeals for the Ninth Circuit for a reversal of the ruling of the District Court and grant of its injunctive relief. On July 2, 2020, the Court of Appeals denied the injunctive relief sought by the Applicant, hence, application to the Supreme Court.

At the heart of the Applicant’s argument before the Supreme Court is that the Governor’s Directive is unjustifiably discriminatory to the Applicant’s right to Free Exercise, Free Speech and Public Assembly protected by the First Amendment. The Applicant argued that the Governor’s Directive prioritizes commercial over non-commercial religious speeches which are protected viewpoints and favour the secular gatherings against the religious gatherings. The Applicant expressly argued that *“the First Amendment strongly protects Calvary Chapel’s noncommercial, religious messages, whereas secular business’ commercial expression is “subject to greater governmental regulation.” Sorrell v. IMS Health, Inc., 564 U.S. 552, 579 (2011)”*  [Pg. 29 of the of the Applicant’s Brief].

In scrutinizing the Governor’s five reasons for the discriminatory directive, the Applicant identified and addressed the reasons for the directive. Firstly, the “Governor hints that religious gatherings are somehow riskier than the commercial assemblies that Directive 021 prefers” [Pg.20 of the Applicant’s Brief] Responding to this, the Applicant noted that it got an infectious disease expert to testify and did testify “[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.”[Pg.31] The disease expert further testified that the Applicant would conduct its religious activities to the guidelines laid down by the CDC or even more. The Applicant on this note submitted that the Governor failed to justify the discriminatory directive on this note. Secondly, the Governor stated that he treats all “mass gatherings equally” by which the Governor seeks to validate this discriminatory Directive by stating that the ban does not apply to the Applicant alone but to all religious gatherings. The Applicant however submitted that this reason also could not validate the ban as it violates Free Exercise clause of the First Amendment in that it amounted to subtle departure from neutrality on matters of religion *Masterpiece Cakeshop, Ltd*. v. *Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1731 (2018) (quoting *Lukumi*, 508 U.S. at 534). The Governor’s third reason was given as the fact that commerce is not worship in that worshippers congregate for an extended period unlike shopping. Contrary to this position, it is however the case that when people go to casinos, restaurants and bars, gyms and fitness facilities, theme parks, bowling alleys, and pools they congregate for extended periods. Fourthly, the Governor believed casinos and mass protests deserve to be treated better. This seems to be the flimsiest reason as the Governor advanced no explanation that made casinos and mass protests to be deserving of such place over and above religious gatherings.

Fifthly, the Governor did not only approve the protests but participated in them by which he believed and communicated his approval for the discriminatory directive.

On whether the Applicant meets the requirements for obtaining an injunction, the Applicant contests that the balance of equities weigh heavily in its favour as all the Applicant asks for is to be treated equally under the law, in particular, under the First Amendment. The Applicant in this regard argued that it is not asking for something that the State of Nevada had not given to others in fact, while the Governor’s Directive had denied the members of the Applicant had been denied the to gather at places of worship to engage in the constitutionally-protected free exercise of religion non-constitutionally-protected activities like casinos, restaurants and bars, theme parks, gyms, bowling alleys, arcades, and pools were allowed to open and operate to a degree the Applicant was not allowed. On whether the continued prevention of the Applicant’s members to congregate above 50 amounts to irreparable injury or harm, the Applicant argued that *“[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)* [Pg.37]. The Applicant finally asked the court to reverse the ruling of the Court of Appeals and grant its injunctive relief.

**Decision Overview**

The Supreme Court in a brief one-sentence order, rejected the applicant’s request for injunctive relief. Justices Samuel Alito, Brett Kavanaugh and Neil Gorsuch however impressively gave robust dissenting opinions amounting to 24 pages.

***Justice Alito***

Justice Alito opened his fiery dissent noting that while the *“Constitution guarantees the free exercise of religion it says nothing about the freedom to play craps or blackjack.”* [Pg.1]. To the learned justice of the apex court, the above opinion formed the basis of the injunctive relief sought by the Applicant. The Applicant had not approached the court for a gratuitous claim but one founded on the most important document-the constitution. While expressing the height of his disappointment in the majority decision of the Supreme Court in denying the injunctive relief sought by the Applicant which had allowed the disregard the Governor of Nevada extended to the Applicant’s First Amendment right to stand, Justice Alito bluntly stated that *“That Nevada would discriminate in favor of the powerful gaming industry and its employees that 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”* [Pg.1]. Justice Alito’s view as remarked above drives home the point that a First Amendment right is inalienable regardless of the situation.

In addressing the facts and substance of the case, Justice Alito lamented that he could not see the justification in the Governor of Nevada allowing casinos to operate at 50% capacity which represents much more than the 90 congregants gathering proposed by the Applicant. The learned justice considered the reasoning of the Governor to be incomprehensible. In the circumstance of the case, operating of Casinos at 50% is likely to mean thousands of people who often come from all over the world, visit Casinos in Las Vegas, standing close together and drinking alcohol, which act requires them to take off their masks. On the contrary, Applicant’s worshippers seek to congregate only to a maximum number of 90, using their masks and practicing social distancing, which is quite attainable.

Justice Alito noted that in presenting its defence, the state of Nevada essentially premised its action on Supreme Court’s decisions in *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905) and *South Bay United Pentecostal Church* v. *Newsom*, 590 U. S. \_\_\_ (2020). Relying on *Jacobson*, Justice Alito noted that the state of Nevada argued 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 [in-vasion] of rights secured by the fundamental law.’* [Pg.9]

To Justice Alito, the discriminatory directive would still likely fail for the reasons already explained earlier. Justice Alito also noted that the language of the court was quoted out of context. The learned Justice noted that noted that while the contest in *Jacobson* essentially bothered on a substantive due process challenge to a local legislation which require residents to be vaccinated for small pox, the challenge here by the Applicant involves protection of a First Amendment right from unjustifiable discrimination.

As to its reliance on *South Bay United Pentecostal Church* v. *Newsom* which the state relied on where the Supreme Court refused to issue a temporary injunction against a California law that limited number of persons allowed to congregate in a church service. Justice Alito noted that he dissented in the judgment. He however posed that, in any case, the situation in *South Bay United Pentecostal Church*’s case is different from the Applicant’s case. In *South Bay*, the church had instituted an action for injunction based less favourable treatment than certain other facilities, such as factories, offices, supermarkets, restaurants, and retail stores. The law was defended on the ground that in these facilities, unlike in religious houses, *“people neither congregate in large groups nor remain in close proximity for extended periods.*” [Pg.10]This is not case in Nevada where people visit and stay close to each other in large numbers in Casinos and other facilities for a long period.

In issuing an injunction in favour of the Applicant, Justice Alito noted that the Applicant’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”* [Pg.11]. The learned Justice therefore granted an injunction in favour of the Applicant pending appeal to allow its members congregate in accordance with the proposed plan and general face mask requirement and consequently dissented from the majority decision of the court.

***Justice Gorsuch***

In a separate one page dissent filed by Justice Neil Gorsuch the learned Justice described the dispute as a simple one. To Justice Gorsuch, the crux of the case is that the state of Nevada has unjustifiably normalized discrimination between religion and entertainment to the disadvantage of religion regardless of its constitutional protection. In very instructive and thought-provoking words of Justice Gorsuch, the learned Justice stated that “*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”* [Pg.1]

***Justice Kavanaugh***

Justice Kavanugh’s dissenting opinion was captured in a 12 page ruling. The learned Justice by started by stating that “Religion cases are among the most sensitive and challenging in American law” He noted profoundly that there is always disagreement when it comes to religion cases. Justice Kavanaugh identified and categorized laws dealing with religion as follows *“(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”* [Pg.3] Justice Kavanaugh noted that the Nevada’s case falls into the fourth category. He further noted that the court’s precedents do *not* require that religious organizations be treated more favorablythan all secular organizations, but that it is an issue of First Amendment which clearly requires that religious organizations be treated equallyto the favored or exempt secular organizations, unless the State can sufficiently justify the .

At the very heart of his dissent, Justice Kavanaugh noted that the risk of COVID-19 transmission is as high at restaurants, bars, casinos and gyms as it is at religious centres. The learned Justice further noted that while the state can subject religious organizations to the same restrictions as secular organizations when dealing with COVID-19, the state cannot however impose strict limits on places of religious centres and looser limits on restaurants, bars, casinos, and gyms without sufficient justification for such differential treatment – this is what the state has failed to do.

**DECISION DIRECTION**

**Mixed Outcome**

Although the Supreme Court of the United States limited the expression of the Calvary Chapel Dayton Valley when it denied it the injunctive relief sought to allow its members congregate to a number of up to 90 as opposed to maximum of 50 members allowed by the Governor of Nevada, the dissenting opinions of the four other justices of the court provide a window of opportunities to develop the jurisprudence on the extent of protection of public assembly of a religious organization under the First Amendment particularly against discrimination.

It is clear that the denial of the injunctive relief was narrowly established. The decision was splintered among the 9 judges and the majority ruling was indeed narrowly obtained by 5 opinions against 4, this therefore shows promises of the court taking the path of the conservative four justices in the future to enforce public assembly under the First Amendment.

**GLOBAL PERSPECTIVE**

**National standards, Laws or Jurisprudence**

US, Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U. S. 520, 531 (1993)

US, Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n, 584 U. S. (2018) (slip op., at 17)

US, Iancu v. Brunetti, 588 U. S. \_\_\_, \_\_\_–\_\_\_ (2019)

US, Rosenberger v. Rector and Visitors of Univ. of Va., 515 U. S. 819, 831 (1995)

US, Jacobson v. Massachusetts, 197 U. S. 11 (1905)

US, South Bay United Pentecostal Church v. Newsom, 590 U. S. \_\_\_ (2020)

US, Turner Broadcasting System, Inc. v. FCC, 507 U. S. 1301, 1303 (1993)

US, Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U. S. \_\_\_ (2017)

US, Good News Club v. Milford Central School, 533 U. S. 98 (2001)

US, Rosen-berger v. Rector and Visitors of Univ. of Va., 515 U. S. 819 (1995)

US, Larson v. Valente, 456 U. S. 228 (1982)

US, Walz v. Tax Comm’n of City of New York, 397 U. S. 664 (1970)

US, Gillette v. United States, 401 U. S. 437 (1971)

US, American Legion v. American Humanist Assn., 588 U. S. (2019)

US, Gonzales v. O Centro Es-pírita Beneficente União do Vegetal, 546 U. S. 418 (2006)

 US, Texas Monthly, Inc. v. Bullock, 489 U. S. 1, 14 (1989)

US, Concerned Citizens of Carderock v. Hubbard, 84 F. Supp. 2d 668 (Md. 2000)

US, Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U. S. 872 (1990)

**CASE SIGNIFICANCE**

The decision establishes binding or persuasive precedent within its jurisdiction.

**OFFICIAL CASE DOCUMENTS**

Supreme Court’s Ruling

Emergency Application for Injunction

Reply Brief

Denial Order of the Court of Appeal