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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 the Nevada Attorney General; FRANK HUNEWILL, in his official capacity as Sheriff of Lyon County, Defendants-Appellees.	No. 20-16169 D.C. No. 3:20-cv-00303-RFB-VCF OPINION

Appeal from the United States District Court
for the District of Nevada
Richard F. Boulware II, District Judge, Presiding

Argued and Submitted December 8, 2020
San Francisco, California

Before: DANNY J. BOGGS,* MILAN D. SMITH, JR., and MARK J. BENNETT, Circuit Judges.

Opinion by Judge Milan D. Smith, Jr.

M. SMITH, Circuit Judge:

Calvary Chapel Dayton Valley (Calvary Chapel) challenges Nevada

* The Honorable Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

Governor Steve Sisolak's Directive 021 (the Directive) as a violation of the Free Exercise Clause of the First Amendment to the United States Constitution. The district court denied the church's request for a preliminary injunction barring enforcement of the Directive against houses of worship. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

On March 12, 2020, Nevada Governor Steve Sisolak declared a state of emergency in Nevada because of the spread of COVID-19, and issued emergency directives aimed at limiting the spread of the virus. The specific emergency directive challenged here is Directive 021, which Governor Sisolak issued on May 28, 2020.[1]

The Directive "strongly encourage[s]" all Nevadans to stay at home "to the

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[1] Although the Directive is no longer in effect, we held in an order denying the State's motion to dismiss that Calvary Chapel's case is not moot. Governor Sisolak could restore the Directive's restrictions just as easily as he replaced them, or impose even more severe restrictions. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000); *see also Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 344–45 (7th Cir. 2020). In fact, Governor Sisolak has issued numerous emergency directives after Directive 021. For example, Directive 035, which is currently in effect, limits houses of worship to "the lesser of 25% of the listed fire code capacity or 50 persons." In contrast, it imposes only a 25% limit on commercial entities such as casinos; bowling alleys, arcades, miniature golf facilities, amusement parks, and theme parks; restaurants, food establishments, breweries, distilleries, and wineries; museums, art galleries, zoos, and aquariums; and gyms, fitness facilities, and fitness studios. **Declaration of Emergency for Directive 035, https://gov.nv.gov/News/Emergency_Orders/2020/2020-11-24_-_COVID19_Emergency_Declaration_Directive_035**. Although the only directive before us today is the Directive, we emphasize that all subsequent directives are subject to the same principles outlined in this opinion, and that many of the issues we identify in the Directive persist in Directive 035.

greatest extent possible." In general, it prohibits gatherings of more than fifty people "in any indoor or outdoor area[.]" More specifically, the Directive imposes limits of the lesser of 50% of fire-code capacity or 50 people in movie theaters (per screen), museums, art galleries, zoos, aquariums, trade schools, and technical schools. It prohibits public attendance at musical performances, live entertainment, concerts, competitions, sporting events, and any events with live performances. Retail businesses, bowling alleys, arcades, non-retail outdoor venues, gyms, fitness facilities, restaurants, breweries, distilleries, wineries, and body-art and piercing facilities must cap attendance at 50% of their fire-code capacities. The Directive delegates the power to regulate casino occupancy to the Nevada Gaming Control Board, which ultimately imposed an occupancy cap of 50% of fire-code capacity, in addition to a wide variety of other restrictions and requirements.

Calvary Chapel challenges § 11 of the Directive, which imposes a fifty-person cap on "indoor in-person services" at "houses of worship." The church alleges that gathering its members in one building "is central to [its] expression of [its] faith in Jesus Christ," and the Directive unconstitutionally burdens this religious expression. Calvary Chapel further argues that the Directive is not neutral or generally applicable because it targets, discriminates against, and shows hostility toward houses of

worship.[2]

The district court denied Calvary Chapel's motion for injunctive relief. The court concluded that the church did not demonstrate a likelihood of success on its Free Exercise claim, relying heavily on Chief Justice Roberts's concurrence in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (mem.). Like the Chief Justice in *South Bay*, the district court found that the State treated similar secular activities and entities—including lectures, museums, movie theaters, trade and technical schools, nightclubs, and concerts—the same as or worse than church services. Accordingly, the court concluded that the Directive was neutral and generally applicable.

After appealing the district court's order, Calvary Chapel filed an emergency motion with our court for an injunction pending appeal. A two-judge panel of our court denied the church's motion. *See Calvary Chapel Dayton Valley v. Sisolak*, No. 20-16169, 2020 WL 4274901, at *1 (9th Cir. July 2, 2020). The church next turned to the Supreme Court, filing an application seeking injunctive relief pending appeal. The Supreme Court denied that application. *See Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020) (mem.). Calvary Chapel then filed a petition for a

[2] Calvary Chapel included an as-applied challenge to the Directive in its First Amended Complaint. The district court found that Calvary Chapel did not provide a sufficient factual basis for this claim. Calvary Chapel did not appeal this ruling of the district court.

writ of certiorari before judgment with the Supreme Court, *see* Sup. Ct. R. 11, and that petition remains pending while we consider the church's merits appeal to our court.

In this appeal, Calvary Chapel contends that § 11 of the Directive is not neutral and generally applicable because it expressly treats at least six categories of secular assemblies better than it treats religious services. These categories include casinos, restaurants and bars, amusement and theme parks, gyms and fitness centers, movie theaters, and mass protests. Because of these facial defects, Calvary Chapel seeks to apply strict scrutiny review to the Directive, and contends that the State has failed to demonstrate that it has a compelling interest, or that the Directive is narrowly tailored.

In response, the State argues that *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), provides the proper framework governing a state's authority during a public health crisis. The State further argues that even if *Jacobson* does not apply, the Directive does not violate the Free Exercise Clause because it is a neutral and generally applicable law—it imposes "[s]imilar or more severe restrictions . . . to comparable secular gatherings." *South Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring).

We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), and we reverse.

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