

ALITO, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 19A1070

CALVARY CHAPEL DAYTON VALLEY *v.* STEVE
SISOLAK, GOVERNOR OF NEVADA, ET AL.

ON APPLICATION FOR INJUNCTIVE RELIEF

[July 24, 2020]

The application for injunctive relief presented to JUSTICE KAGAN and by her referred to the Court is denied.

JUSTICE ALITO, with whom JUSTICE THOMAS and JUSTICE KAVANAUGH join, dissenting from denial of application for injunctive relief.

The Constitution guarantees the free exercise of religion. It says nothing about the freedom to play craps or blackjack, to feed tokens into a slot machine, or to engage in any other game of chance. But the Governor of Nevada apparently has different priorities. Claiming virtually unbounded power to restrict constitutional rights during the COVID–19 pandemic, he has issued a directive that severely limits attendance at religious services. A church, synagogue, or mosque, regardless of its size, may not admit more than 50 persons, but casinos and certain other favored facilities may admit 50% of their maximum occupancy—and in the case of gigantic Las Vegas casinos, this means that thousands of patrons are allowed.

That Nevada would discriminate in favor of the powerful gaming industry and its employees 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.

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I

Calvary Chapel Dayton Valley is a church located in rural Nevada. It wishes to host worship services for about 90 congregants, a figure that amounts to 50% of its fire-code capacity. In conducting these services, Calvary Chapel plans to take many precautions that go beyond anything that the State requires. In addition to asking congregants to adhere to proper social distancing protocols, it intends to cut the length of services in half. It also plans to require six feet of separation between families seated in the pews, to prohibit items from being passed among the congregation, to guide congregants to designated doorways along one-way paths, and to leave sufficient time between services so that the church can be sanitized. According to an infectious disease expert, these measures are “equal to or more extensive than those recommended by the CDC.” Electronic Court Filing in No. 3:20–CV–00303, Doc. 38–31 (D Nev., June 4, 2020), p. 6 (ECF).

Yet hosting even this type of service would violate Directive 21, Nevada Governor Steve Sisolak’s phase-two reopening plan, which limits indoor worship services to “no more than fifty persons.” ECF Doc. 38–2, §11. Meanwhile, the directive caps a variety of secular gatherings at 50% of their operating capacity, meaning that they are welcome to exceed, and in some cases far exceed, the 50-person limit imposed on places of worship.

Citing this disparate treatment, Calvary Chapel brought suit in Federal District Court and sought an injunction allowing it to conduct services, in accordance with its plan, for up to 50% of maximum occupancy. The District Court refused to grant relief, the Ninth Circuit denied Calvary Chapel’s application for an injunction pending appeal, and now this Court likewise denies relief.

I would grant an injunction pending appeal. Calvary Chapel is very likely to succeed on its claim that the di-

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rective's discriminatory treatment of houses of worship violates the First Amendment. In addition, unconstitutionally preventing attendance at worship services inflicts irreparable harm on Calvary Chapel and its congregants, and the State has made no effort to show that conducting services in accordance with Calvary Chapel's plan would pose any greater risk to public health than many other activities that the directive allows, such as going to the gym. The State certainly has not shown that church attendance under Calvary Chapel's plan is riskier than what goes on in casinos.

For months now, States and their subdivisions have responded to the pandemic by imposing unprecedented restrictions on personal liberty, including the free exercise of religion. This initial response was understandable. In times of crisis, public officials must respond quickly and decisively to evolving and uncertain situations. At the dawn of an emergency—and the opening days of the COVID-19 outbreak plainly qualify—public officials may not be able to craft precisely tailored rules. Time, information, and expertise may be in short supply, and those responsible for enforcement may lack the resources needed to administer rules that draw fine distinctions. Thus, at the outset of an emergency, it may be appropriate for courts to tolerate very blunt rules. In general, that is what has happened thus far during the COVID-19 pandemic.

But a public health emergency does not give Governors and other public officials *carte blanche* to disregard the Constitution for as long as the medical problem persists. As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights. Governor Sisolak issued the directive in question on May 28, more than two months after declaring a state of emergency on March 12. Now four months have passed since the original declaration. The problem is no longer one of exigency, but one of considered

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yet discriminatory treatment of places of worship.

II

Calvary Chapel argues that the Governor’s directive violates both the Free Exercise Clause and the Free Speech Clause of the First Amendment, and I agree that Calvary Chapel has a very high likelihood of success on these claims.

A

Under the Free Exercise Clause, restrictions on religious exercise that are not “neutral and of general applicability” must survive strict scrutiny. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 531 (1993). “[T]he minimum requirement of neutrality is that a law not discriminate on its face,” *id.*, at 533, and “[t]he Free Exercise Clause bars even ‘subtle departures from neutrality’ on matters of religion.” *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 584 U. S. ___, ___ (2018) (slip op., at 17) (quoting *Church of Lukumi*, 508 U. S., at 534). Here, the departure is hardly subtle. The Governor’s directive specifically treats worship services differently from other activities that involve extended, indoor gatherings of large groups of people.

The face of the directive provides many examples. While “houses of worship” may admit “no more than fifty persons,” ECF Doc. 38–2, §11, many favored facilities that host indoor activities may operate at 50% capacity. Privileged facilities include bowling alleys, §20, breweries, §26, fitness facilities, §28, and most notably, casinos, which have operated at 50% capacity for over a month, §35; ECF Doc. 38–3, p. 5, sometimes featuring not only gambling but live circus acts and shows.

For Las Vegas casinos, 50% capacity often means thousands of patrons, and the activities that occur in casinos frequently involve far less physical distancing and other

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safety measures than the worship services that Calvary Chapel proposes to conduct. Patrons at a craps or blackjack table do not customarily stay six feet apart. Casinos are permitted to serve alcohol, which is well known to induce risk taking, and drinking generally requires at least the temporary removal of masks. Casinos attract patrons from all over the country. In anticipation of reopening, one casino owner gave away 2,000 one-way airline tickets to Las Vegas. ECF Doc. 38–9, p. 4. And when the Governor announced that casinos would be permitted to reopen, he invited visitors to come to the State.¹ The average visitor to Las Vegas visits more than six different casinos, potentially gathering with far more than 50 persons in each one. ECF Doc. 38–6, p. 44. Visitors to Las Vegas who gamble do so for more than two hours per day on average, *id.*, at 43, and gamblers in a casino often move from one spot to another, trying their luck at different games or at least at different slot machines.

Houses of worship can—and have—adopted rules that provide far more protection. Family groups can be given places in the pews that are more than six feet away from others. Worshippers can be required to wear masks throughout the service or for all but a very brief time. Worshippers do not customarily travel from distant spots to attend a particular church; nor do they generally hop from church to church to sample different services on any given Sunday. Few worship services last two hours. (Calvary Chapel now limits its services to 45 minutes.) And worshippers do not generally mill around the church while a service is in progress.

The idea that allowing Calvary Chapel to admit 90 worshippers presents a greater public health risk than allowing

¹ See Jones, Nevada Governor Green-Lights June 4 Reopening of Casinos; Las Vegas Gets Ready, L. A. Times (May 26, 2020), www.latimes.com/travel/story/2020-05-26/nevada-governor-oks-reopening-vegas-prepares.



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