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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

CALVARY CHAPEL DAYTON VALLEY

Case No. 3:20-cv-00303-RFB-VCF

Plaintiff,

vs.

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

Defendants.

**RESPONSE TO PLAINTIFFS'
SUPPLEMENT**

Pursuant to this Court's minute order (ECF No. 33), Defendants Steve Sisolak, in his official capacity as the Governor of Nevada and Aaron D. Ford, in his official capacity as Attorney General of Nevada (collectively "Defendants") hereby submit the following response to Plaintiff Calvary Chapel Dayton Valley's ("Plaintiff" or "Calvary") June 4, 2020 supplement.

This response is made and based upon all matters of record herein, the Memorandum of Points and Authorities submitted herewith, and upon such oral arguments as the court may allow at the time of hearing of this matter

DATED this 7th day of June, 2020.

AARON D. FORD
Attorney General

By: /s/ Craig A. Newby
CRAIG A. NEWBY (Bar No. 8591)
Deputy Solicitor General

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Court issued the following Order following the filings of Defendants' opposition to the emergency motion for temporary restraining order and preliminary injunction:

If the Plaintiff is seeking *alternative or modified relief beyond that requested in its Emergency Motion for Temporary Restraining Order and Preliminary Injunction* (ECF No. 19). IT IS ORDERED that the Plaintiff must file a supplement to the Motion by June 3, 2020.

ECF No. 33 (emphasis added).

Calvary's "supplement" does not identify "alternative or modified relief." Instead, following an extension for a medical emergency, Calvary submitted a reply brief that submits *thirty-one* new exhibits, including a declaration that seeks to opine on medical and scientific issues. This is improper for a reply brief, much less one that seeks emergency injunctive relief.

In any event, Calvary's supplement does not change the neutral and generally applicability of the emergency directives to similar mass gatherings. It is not the place of Calvary, its counsel, or this Court, to second guess the emergency decisions empowered to the State's elected leaders during this crisis.

Because Calvary has not met its high burden for obtaining injunctive relief, its emergency motion should be denied.

II. THE DIRECTIVES ARE NEUTRAL AND GENERALLY APPLICABLE

The United States Supreme Court upheld California's temporary restrictions on the number of attendees at religious services. *See South Bay United Pentecostal Church, et al. v. Newsom, et al.* Case No. 19A1044, 2020 WL 2813056 at *1 (May 29, 2020), attached to the Opposition as **Exhibit B**. When doing so, the Court noted that California's temporary restrictions "apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. *Id.*"

1 Here, Nevada has temporary emergency restrictions on comparable secular
2 gatherings, each implemented *prior to* the Supreme Court’s recent decision. Public
3 attendance is *prohibited* for all musical performances, live entertainment, concerts,
4 competitions, sporting events, and any events with live performances. **Ex. A** to the Opp.
5 at § 22. In short, religious services are being *treated better* than “lectures, concerts, ...
6 spectator sports, and theatrical performances.” “Movie showings,” the last comparable
7 gathering identified by the Supreme Court, are limited to no more than 50 people, no better
8 than religious services. *Id.* at § 20. Similar restrictions to the lesser of 50 people or 50%
9 occupancy exist for museums, art galleries, zoos, aquariums, trade schools, and technical
10 schools to the lesser of 50 people or 50% occupancy. *Id.* at §§ 30, 32. Good cause exists for
11 the distinction: mass gatherings have a higher risk of COVID-19 transmission than general
12 commerce.

13 Rather than acknowledge the similarities between the activities identified as
14 comparable by the Supreme Court, Calvary belatedly attempts to do two things in its
15 supplement that are outside the scope of what this Court requested. First, Calvary
16 attempts to argue it should be treated the same as non-restricted gaming licensees or
17 outraged protestors of George Floyd’s death. This is mistaken, as Nevada has rational
18 reasons for reopening its most highly-regulated industry and for how to address public
19 unrest.

20 Second, Calvary attempts to substitute its scientific judgment for Nevada’s Chief
21 Medical Officer, through the submission of a medical declaration Calvary could have
22 submitted when filing its request for emergency relief. The Supreme Court recognizes that
23 it is not the place of a court to substitute its policy determinations for those of the elected
24 leaders of Nevada, who are empowered to make difficult, emergency decisions regarding
25 public safety and are subject to democratic accountability if the People ultimately disagree
26 with those decisions. *South Bay*, 2020 WL 2813056 at *1. There is a scientific basis for
27 Nevada’s staged efforts at reopening; Calvary is not entitled to substitute its judgment for
28 Nevada’s elected leaders.

1 For the foregoing reasons, this motion should still be denied.

2 **A. Nevada Gaming Establishments, as Privileged Licensees, are Subject**
 3 **to Heightened Regulation and Discipline, Justifying Different**
 4 **Treatment than Faith-Based Organizations**

5 Calvary argues that casinos are being treated better than churches. Supp. at
 6 2:19-20. Gaming, as the most highly-regulated business industry within Nevada, are being
 7 treated differently than churches. And for good reason. The right to hold a non-restricted
 8 gaming license is a privilege. NRS 463.0129(2). Nevada has “strict regulation” of, inter
 9 alia, persons “related to the operation of licensed gaming establishments...” NRS
 10 463.0129(1)(c). All places where gaming is conducted are to be “assisted to protect the
 11 public health, safety, morals, good order and general welfare of the inhabitants of the
 12 State...” NRS 463.0129(1)(e). Nevada’s legislature described the vital role that gaming
 13 plays in our State’s economy and to the welfare of its citizens. NRS 463.0129(1)(a).

14 Nevada’s legislature created the Commission and the GCB. NRS 463.022, 030. The
 15 Commission and the GCB are to administer the provisions of the Nevada Gaming Control
 16 Act to protect the public interest consistent with Nevada policy. NRS 463.140(1). The GCB
 17 has “full and absolute power” to recommend to the Commission that a finding of suitability
 18 be revoked. NRS 463.1405(3). This Commission “has full and absolute power and
 19 authority” to revoke a finding of suitability. NRS 463.1405(4). This “full and absolute
 20 power and authority” includes “pursuing disciplinary action to limit, condition, suspend,
 21 and/or revoke a license, and/or impose a monetary fine against a licensee in accordance
 22 with the Gaming Control Act” for violation of Directive 021. **Ex. A** to the Opp. at § 35.

23 Here, to reopen, non-restricted licensees were required to submit detailed reopening
 24 plans for review and approval by the Nevada Gaming Control Board. *See* Health and Safety
 25 Policies for Resumption of Gaming Operations – Nonrestricted Licensees (May 27, 2020) at
 26 2, attached hereto as **Exhibit D**. “Nevada Gaming Control Board Agents may be present
 27 to observe some or all of these procedures.” Policy Memorandum – Procedures for
 28 Reopening after Temporary Closure due to COVID-19 (Apr. 21, 2020) at 6, attached hereto
 as **Exhibit E**. More importantly, the Nevada Gaming Commission has full authority to

1 enforce the required reopening plans and related health requirements with its existing
2 enforcement personnel.¹ See Directive 021 (**Ex. A** to the Opp.) at § 35.

3 In contrast, because religion is a fundamental right, not a privilege, its facilities are
4 not subject to heightened regulation and enforcement. There is no such corresponding
5 regulatory agency for religious-specific facilities that can be immediately repurposed
6 towards enforcing emergency health directives in this context. This is a good thing and
7 something on which the parties likely agree.

8 Instead, as described in some detail by the Lyon County Sheriff's joinder,
9 enforcement of Directive 021 is generally left to *local law enforcement*, subject to their
10 prioritization of resources. As set forth by the Lyon County Sheriff's joinder, enforcement
11 of Directive 021 is prioritized similarly to other complaints received by citizens for other
12 alleged incidents. Prioritization of limited resources by law enforcement has led to an
13 emphasis in certain Nevada jurisdictions on protests against the killing of George Floyd.
14 Choosing to reopen a highly regulated industry, that is subject to significant regulatory
15 control that allows for a rapid shutdown if a second COVID-19 outbreak arises, makes
16 sense. This policy determination warrants deference from a court, as "[o]ur Constitution
17 principally entrusts '[t]he safety and the health of the people' to the politically accountable
18 officials of the States 'to guard and protect.'" *South Bay*, 2020 WL 2813056 at *1 (quoting
19 *Jacobson*, 197 U.S. at 38).

20 Further, Calvary speculates on the nature of gaming activity today versus what it
21 was prior to COVID-19, relative to its plan for larger church services. Supp. at 5:1–26. It
22 ignores the establishment-specific plans each has that has been reviewed and approved by
23 existing regulatory bodies. It also ignores the lack of time limitation that a religious service
24 may continue. It also ignores the difference between congregating together with active,

25
26 ¹ It also ignores Lyon County, instead relying on pictures of Fremont Street
27 Experience and a downtown casino. There, the Carson Plains Casino plans on reopening
28 Saturday, June 6 at 9 a.m. See <https://carsonplainscasino.net/> (last accessed June 5, 2020).
In any event, regulatory authority over the pictured establishments lies with the Nevada
Gaming Commission and it would be inappropriate for Defendants to comment on whether
or what discipline may occur premised on the pictures.

shared communication, versus gaming activities, which now often involve sitting at a socially-distant gaming machine.² Here, where “officials ‘undertake [] to act in areas fraught with medical and scientific uncertainties,’ their latitude ‘must be especially broad.’” *South Bay*, 2020 WL 2813056 at *1 (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974)). “Where those broad limits are not exceeded, they should not be subject to second-guessing by an ‘unelected federal judiciary,’ which lacks the background, competence, and expertise to assess public health and is not accountable to the people.” *Id.* (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545 (1985)).

Under these temporary circumstances, Nevada is entitled to deference on its regulated, limited reopening of non-restricted gaming establishments.

B. Calvary’s Policing Priorities are Misplaced and Not Subject to Court Review

Here, Calvary takes issue with Defendants’ approach to protests arising from the tragic killing of George Floyd. Supp. at 7:1–8:27. These are spontaneous, peaceful protests arising from the public’s outrage at George Floyd’s killing by a police officer, as seen on video. Without dispute, these events have raised serious discussions pertaining to policing and race. In addition to these peaceful protests, others have attempted to co-opt these peaceful protests with acts of violence. A Las Vegas Metropolitan Police officer has been seriously wounded. In Reno, to disperse looting, police were required to use tear gas and other non-lethal methods.

It is in this context that Calvary argues that Defendants’ inability to prevent spontaneous protests or to force local law enforcement to arrest all those who violated Directive 021 implies that Defendants are favoring protestors over church services. Supp. at 9:1–11. This is ridiculous. Defendants, as elected leaders, are attempting to address important community issues while also calming a volatile situation. As noted by the Lyon

² Defendants have already addressed the difference between mass gatherings most similar to religious gatherings versus commerce, including indoor malls and restaurants, which already have some distancing between groups of people already included. They will not repeat themselves here.

County Sheriff, local law enforcement has the right to prioritize how it enforces laws. Here, rather than potentially begetting more protest and potential violence by using police officers to engage in mass enforcement of Directive 021, local law enforcement is emphasizing preserving public safety. Making efforts to maintain a safe community is not a restriction on the content of anyone's expression. Further, as noted in Defendants' opposition, there has been no limitation on Calvary's ability to express its beliefs to its members and through the world. Calvary is only limited on the size of any service, rather than the number of services and the ability to communicate in multiple ways.

In short, the purported refusal to arrest protestors does not constitute a violation of Calvary's First Amendment rights.

C. Houses of Worship, as a Mass Gathering, Have Higher Risks

Belatedly, Calvary submits a declaration asserting that there 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 [COVID-19] than gatherings or interactions at other establishments or institutions." Supp. at 10:6–13. Dr. Flanagan, among his other activities, is a permanent Catholic deacon. See **Ex. 44** to the Supp. at p. 14; see also Smith, Peter Jesser, *Doctor: Keep Calm and Take Practical, Prayerful Action Amid Coronavirus*, NATIONAL CATHOLIC REGISTER (Mar. 4, 2020), a true and correct copy of which is attached hereto as **Exhibit F**.

Nevada's Chief Medical Officer respectfully disagrees, believing that "[i]n-person worship services pose specific risks for disease transmission." Decl. of Ihsan Azzam, Ph.D, M.D., M.P.H., Chief Medical Officer for Nevada (June 7, 2020) at ¶ 22, attached hereto as **Exhibit G** hereto. As stated previously:

When it comes to gatherings, the risk is not just based on how many people there are, but rather *how closely they are gathered and how they are interacting with each other*. The risk does not disappear in smaller gatherings. It's the distance and precautions that will make the difference.

See Social Distancing (last accessed May 27, 2020);

<https://nvhealthresponse.nv.gov/info/event-organizers/> (emphasis added).

1 In any event, Calvary, its counsel, and this Court are not allowed to substitute their
2 policy judgment for that of elected Nevada officials during this public health emergency.
3 *South Bay*, 2020 WL 2813056 at *1. Because there is a public health justification for
4 Directive 021 during this emergency, the Court should reject Calvary's efforts to substitute
5 their own policy judgment here.

6 **III. JACOBSON PROVIDES DISCRETION FOR EXERCISING EMERGENCY POWERS**

7 Calvary attempts to distinguish *Jacobson*, without addressing any of the cases faced
8 by courts throughout the United States affirming its viability to the same issue before this
9 Court. Supp. at 10:18–12:2. Only in passing does Calvary attempt to rewrite Chief Justice
10 Roberts' opinion in *South Bay* to be more to its liking, by contorting the comparison between
11 comparable secular activities for the proposition that it must “not single out rights or
12 persons for disfavored treatment.” Supp. at 11:19–12:2. *Jacobson*, as recognized by the
13 Supreme Court in *South Bay*, is the acknowledgement that power to address public health
14 emergencies lies with state elected officials, not litigants and courts, and that there is
15 additional deference to state elected officials while addressing these public health
16 emergencies. *South Bay*, 2020 WL 2813056 at *1.

17 Here, on a rational basis, Nevada has treated mass gatherings differently than
18 commerce, including gaming. Under such circumstances, the motion should be denied.

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1 **IV. CONCLUSION**

2 Following scientific evidence and federal guidelines, Nevada has implemented social
3 distancing to protect Nevadans from COVID-19 to mitigate the risk of exposure and spread.
4 There is a rational basis for treating religious services the same as other mass gatherings
5 and differently than commercial activities on a temporary basis.

6 Accordingly, the motion should be denied.

7 Dated: June 7th, 2020.

8 AARON D. FORD
9 Attorney General

10 By: /s/ Craig A. Newby
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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 7th day of June, 2020, I electronically filed the foregoing document, **RESPONSE TO PLAINTIFF'S SUPPLEMENT**, with the Clerk of the Court by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Kristalei Wolfe
Kristalei Wolfe
State of Nevada,
Office of the Attorney General

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EXHIBIT G

**Declaration of Ihsan
Azzam, Ph.D, M.D., Chief
Medical Officer for Nevada**

EXHIBIT G

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CALVARY CHAPEL DAYTON VALLEY

Plaintiff,

vs.

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

Defendants.

Case No. 3:20-cv-00303-RFB-VCF

**DECLARATION OF IHSAN AZZAM,
PH.D, M.D., M.P.H., CHIEF MEDICAL
OFFICER FOR THE STATE OF
NEVADA, IN SUPPORT OF STATE
DEFENDANTS' RESPONSE TO
PLAINTIFF'S SUPPLEMENT**

I, IHSAN AZZAM, PhD, M.D., M.P.H., declare as follows:

1. I am over the age of 18 and a United States citizen. I know the following facts of my own personal knowledge, and if called upon as a witness, I could and would testify competently thereto.

2. This Declaration is in support of the State Defendants' Response to Plaintiffs' Supplement and is attached thereto as **Exhibit G**.

3. I am the Chief Medical Officer for the State of Nevada.

4. As the Chief Medical Officer, I lead and coordinate Nevada's epidemiologic response to disease outbreaks and emergency health threats.

5. Previously, I served as the State Epidemiologist for nearly fourteen years.

1 6. I earned my medical degree from Cluj University of Medicine in Romania in
2 1982 and completed my OBGYN residency in 1986. I also hold a Centers for Disease Control
3 and Prevention (CDC) Graduate Certificate in Epidemiology, Biostatistics and
4 Demography from the University of Seattle School of Public Health and Community
5 Medicine, and a CDC Chronic Disease Epidemiology Certificate from the Penn State
6 College of Medicine. At the University of Nevada, Reno, I completed my MPH in 2002 and
7 PhD in 2010. I have been the recipient of several awards, including the 2011 National
8 Sheppard Award for Excellence in Epidemiology.

9 7. I work for the Division of Public and Behavioral Health (“DPBH”), which is
10 part of Nevada’s Department of Health and Human Services (“DHHS”). Nevada
11 Department of Health and Human Services Health (DHHS)

12 8. I have been intimately involved with the statewide COVID-19 response. My
13 role is to oversee analysis of statewide data on COVID-19 cases and trends in disease in
14 disease morbidity and mortality. I am familiar with the Governor’s emergency declaration
15 and subsequent emergency directives.

16 9. The virus that causes COVID-19 is thought to spread mainly from person to
17 person, mainly through respiratory droplets produced when an infected person—even one
18 who exhibits no symptoms—speaks, coughs or sneezes. These droplets can land in the
19 mouths or noses of people who are nearby or possibly be inhaled into the lungs. The role of
20 other transmission pathways such as through aerosols that may travel long distances or
21 through contaminated surfaces has been suggested and is still being researched.

22 10. One of the aspects of COVID-19 that makes it difficult to prevent spread is
23 that it can be transmitted by a person who is asymptomatic.

24 11. COVID-19 can spread quickly. A person with COVID-19, on average, infects
25 approximately two to three people. Unchecked, COVID-19 spreads exponentially and over
26 10 transmission cycles, one person could be responsible for 1,024 other people contracting
27 the virus. Physical distancing interventions have been successful in reducing the number
28 of persons infected by each case and changing the exponential pattern of case increases.

1 That is why these interventions are so important for controlling COVID-19 in Nevada.
2 Physical distancing measures include staying home except for needing to address
3 important things such as picking up medications; and staying at least six feet away from
4 others when outside the home.

5 12. Spread is more likely when people are in close contact with one another
6 (within about six feet). COVID-19 is currently spreading in the community (community
7 spread) in many affected geographic areas. An area is experiencing community spread
8 when residents are becoming infected with the virus in community settings, and it is not
9 possible to identify the source of exposure in some cases.

10 13. In light of evidence of widespread COVID-19 transmission in communities
11 across the country, CDC recommends that people wear a cloth face covering to cover their
12 nose and mouth in the community setting. This is an additional public health measure
13 people should take to reduce the spread of COVID-19 in addition to, not instead of, physical
14 distancing, frequent hand cleaning, and other everyday preventive actions. A cloth face
15 covering is not intended to protect the wearer but may prevent the spread of virus from the
16 wearer to others. This would be especially important in the event that someone is infected
17 but is not aware of their illness and is not self-isolating. A cloth face covering should be
18 worn when people must go into public settings and especially if they expect to have
19 difficulty maintaining physical distancing, such as when going to the grocery store.
20 However, wearing a mask or frequently washing one's hands, will not prevent completely
21 the spread of the disease. Each of these measures contributes to reducing the risk of
22 transmission.

23 14. People with COVID-19 have had a wide range of symptoms reported – ranging
24 from mild symptoms to severe illness. A large number of people with COVID-19 have no
25 symptoms. People who have no symptoms can, however, still spread COVID-19. COVID-19
26 can cause severe disease, including death. Older adults and people of any age who have
27 serious underlying medical conditions are at higher risk for severe illness from COVID-19.
28

1 15. The purpose of the state's current health and safety rules is to protect
2 vulnerable people from infection with the coronavirus that causes COVID-19 (SARS-CoV-
3 2) and to reduce the spread of that virus in the community. By reducing community spread,
4 we can protect persons at increased risk of severe disease and prevent critical
5 infrastructure, particularly health care facilities, from being overwhelmed. As geographical
6 areas become less susceptible to being overwhelmed by a potential increase in community
7 spread and areas demonstrate the ability to test and trace consistent with relevant
8 guidelines, other health and safety rules may be promulgated to allow more sectors of the
9 economy to operate, based on risk factors those sectors pose to public health and safety.

10 16. Whenever a number of people interact outside the home, there is an increased
11 risk that COVID-19 may be transmitted. There have been multiple reports of sizable to
12 large gatherings such as sport events, concerts, religious services, choir practices, funerals,
13 and parties resulting in significant spread of COVID-19.

14 17. Based on my experience with infectious disease prevention, measures that
15 depend on individual behavior, such as mask wearing, are difficult to sustain and less
16 effective than systematic measures, such as canceling gatherings and curtailing activities
17 that increase the risk of transmission. I believe that in gatherings of large numbers of
18 people, it may be very hard to maintain physical distancing.

19 18. As noted earlier, the virus can be spread by people who are not showing
20 symptoms. Thus, people who gather in groups or near others (other than those with whom
21 they live) will not be able to know whether other individuals who are in close proximity are
22 carrying the virus. By gathering in large groups, and in close proximity to others,
23 individuals put themselves and others at risk. The risk appears to be increased where
24 groups of individuals are in close proximity for extended period.

25 19. Individuals attending large gatherings, including but not limited to the types
26 of events where there have prior instances of COVID-19 spreading, would be at increased
27 risk of disease and could be expected to increase the spread of COVID-19 in their
28 communities and any other communities they visit. When an individual is exposed to and

contracts the novel coronavirus at a large gathering, there is a high likelihood that he or she will spread COVID-19 to other individuals in his/her community, and in some cases perpetuate the infection rates across county lines. This spread could fan out into different parts of the state, jeopardizing the hard work to contain COVID-19 that is going on in many communities and placing a further strain on hospitals and other resources across the state.

20. While keeping six feet of separation and wearing masks can reduce the risk of disease transmission, any gathering poses some risk. Asymptomatic and presymptomatic patients can spread COVID-19 more than 6 feet (up to 12 feet) through coughing and sneezing. Additionally, the virus can survive for significant time in the environment. This is why the CDC recommends that large gatherings be cancelled.

21. Operations at work places pose a lower risk of transmission than in large gatherings that have the purpose of engaging in a shared communal experience. In work places workers often work independently or on small teams most of the time, social interactions are typically brief and ancillary, precautions can be mandated easily because of the employer/employee relationship, and contact tracing can be easier to carry out in the case of an outbreak. Furthermore, places like restaurants are subject to stringent health and safety guidelines that can mitigate transmission.

22. In-person worship services pose specific risks for disease transmission. Statewide guidance has been issued regarding ways to reduce those risks. In addition, the COVID-19 situation varies by locality in Nevada. The ability to reduce the risk of in-person worship will depend on whether localities have attained sufficient testing, tracking, hospital capacity, and infection rates that indicate epidemiological stability and an ability to contain outbreaks if they occur.

I declare under the penalty of perjury under the laws of the United States that the foregoing is true and correct to my personal knowledge.

DATED June 7, 2020

/s/ Ihsan Azzam
 IHSAN AZZAM, Ph.D, M.D., M.P.H.
 CHIEF MEDICAL OFFICER FOR THE STATE OF NEVADA