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15 **Admitted pro hac vice*

16
17 **UNITED STATES DISTRICT COURT**
DISTRICT OF NEVADA

18 CALVARY CHAPEL DAYTON VALLEY,

19 *Plaintiff,*

20
21 v.

22 STEVE SISOLAK, in his official capacity as
Governor of Nevada; AARON FORD, in his
23 official capacity as Attorney General of
Nevada; FRANK HUNEWILL, in his official
24 capacity as Sheriff of Lyon County,

25 *Defendants.*
26

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

**PLAINTIFF'S EX PARTE
MOTION AND MEMORANDUM
IN SUPPORT FOR AN
INJUNCTION PENDING APPEAL**

Calvary Chapel Dayton Valley moves this Court ex parte¹ under Federal Rule of Appellate Procedure 8(a)(1)(C) and Federal Rule of Civil Procedure 62(d) for an injunction pending appeal from the Court’s June 11, 2020, Order denying its Emergency Motions for a Temporary Restraining Order and Preliminary Injunction. *See* ECF 43. Because the parties previously briefed Calvary Chapel’s motion for preliminary injunction, and the same standard applies to an injunction pending appeal, Calvary Chapel requests that the Court expeditiously rule on this motion without further briefing from the parties.

BACKGROUND AND ANALYSIS

Calvary Chapel has noticed an appeal to the United States Court of Appeals for the Ninth Circuit from this Court’s June 11, 2020, Order denying the Church’s Emergency Motions for Temporary Restraining Order and Preliminary Injunction. *See* ECF 45 (notice of appeal); ECF 43 (order); ECF 9, 19 (motions); *see also* 28 U.S.C. § 1292(a)(1) (order denying request for preliminary injunction appealable).

In evaluating a motion for an injunction pending appeal, the court considers whether the moving party has demonstrated that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Feldman v. Ariz. Sec’y of State’s Office*, 843 F.3d 366, 367 (9th Cir. 2016) (“The standard for evaluating an injunction pending appeal is similar to

¹ Calvary Chapel has filed this motion using the CM/ECF system, which will cause service of the motion on Defendants and therefore may not result in the motion being truly being “ex parte.” But the Church has labeled its motion “ex parte” because it seeks an expeditious ruling without additional briefing from either side.

1 that employed by district courts in deciding whether to grant a preliminary
2 injunction.”).

3 Although this Court denied Calvary Chapel’s request for a preliminary
4 injunction, the Church must first pursue an injunction pending appeal here before
5 it may request one on an emergency basis from the Ninth Circuit. *See* Fed. R. App.
6 P. 8(a)(1)(C); Ninth Circuit Rule 27-3(c)(v). The Church therefore incorporates its
7 legal arguments, reasoning, and exhibits from its prior submissions in support of
8 its request for a preliminary injunction. *See* ECF 8, 8-2 through 8-15, 9, 9-1, 9-2,
9 19, 19-1, 19-2, 38, 38-2 through 38-32, and 41-1 through 41-13. In sum, and without
10 waiving any specific arguments made in those filings:

11 1. Directive 021 is unconstitutional, both facially and as applied, because
12 it treats religious gatherings worse than similar secular gatherings, including
13 gatherings at casinos, restaurants, bars, taverns, gyms, fitness centers, bowling
14 alleys, and arcades. *See S. Bay United Pentecostal Church v. Newsom*, __ S. Ct. __,
15 No. 19A1044, 2020 WL 2813056, at *1 (May 29, 2020) (Roberts, C.J., concurring in
16 denial of application for injunctive relief); *Church of the Lukumi Babalu Aye, Inc. v.*
17 *City of Hialeah*, 508 U.S. 520, 543 (1993). Simply because the state gaming board
18 oversees casinos does not justify the Governor allowing them greater numbers of
19 people. People sitting in chairs for 45 minutes mostly listening to sermons can be
20 no worse than hundreds to thousands of people sitting near one another, mingling,
21 drinking, playing the slots, and exchanging cards or chips for hours on end.
22 Restaurants are also comparable to churches in that they host large gatherings of
23 people where individuals are in close proximity for extended periods of time, as are
24 many other secular venues the Governor subjects only to a 50% occupancy cap.

25 That the Governor and Attorney General have allowed and encouraged
26 protests where hundreds or thousands of people have gathered also proves the
27 unequal treatment. That protests may be important or are difficult to address is no
28

1 reason to treat religious worship as less vital. Any public-health danger is much
2 more pronounced when thousands of people gather to protest shoulder to shoulder
3 for hours at a time shouting or chanting their desired message than it is when
4 people sit calmly, socially distanced at church.

5 This Court’s order also did not appreciate that an as-applied challenge does
6 not depend on a law’s enforcement now or in the future. All that differs from a
7 facial challenge is the scope of the relief—*i.e.*, the regulation would be enjoined
8 solely as to Calvary Chapel and not to all places of worship. Calvary Chapel’s
9 comprehensive health and safety plan—and location in a rural area in which the
10 number of COVID-19 cases is extremely low—justify this targeted relief.

11 Because the Directive is neither neutral nor generally applicable, strict
12 scrutiny applies. And the flat ban of no more than 50 people per religious service no
13 matter the size of Calvary Chapel’s building or the safety precautions it takes fails
14 strict scrutiny. If it is worth allowing casinos, bars, restaurants, theme parks, and
15 gyms to operate at 50% occupancy with social distancing, it is worth allowing
16 churches to operate at 50% occupancy with social distancing too.

17 2. The deprivation of the Church’s First Amendment freedoms
18 “unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373-
19 74 (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)).

20 3. Finally, by establishing the likelihood that the Directive violates the
21 First Amendment, the Church has also established that both the balance of
22 equities and public interest favor injunctive relief. “It is clear that it would not be
23 equitable or in the public’s interest” to permit the State of Nevada “to violate the
24 requirements of federal law, especially when there are no adequate remedies
25 available.” *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013)
26 (citation and brackets omitted). The state, in contrast, “suffers no harm from an
27 injunction that merely ends unconstitutional practices and/or ensures that
28

constitutional standards are implemented.” *Jane Doe, #1 v. Kelly*, 878 F.3d 710, (9th Cir. 2017) (citation omitted).

CONCLUSION

For these reasons and those in the Church’s previous submissions, Calvary Chapel Dayton Valley requests that this Court grant this motion for injunction pending appeal and allow the Church to resume in-person worship services at 50% capacity in compliance with social distancing and its comprehensive health and safety plan.

Submitted this 15th day of June, 2020.

/s/ Ryan J. Tucker

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CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2020, I caused the foregoing Plaintiff's Motion for An Injunction Pending Appeal to be filed with the Clerk of the Court using the ECF system, which will provide electronic copies to counsel of record.

/s/ Ryan J. Tucker
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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CALVARY CHAPEL DAYTON VALLEY,

Plaintiff,

v.

STEVE SISOLAK, in his official capacity as
Governor of Nevada; AARON FORD, in his
official capacity as Attorney General of
Nevada; FRANK HUNEWILL, in his official
capacity as Sheriff of Lyon County,

Defendants.

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

**[PROPOSED]
ORDER**

Upon consideration of Plaintiff's Ex Parte Motion for An Injunction Pending Appeal:

IT IS HEREBY ORDERED that Plaintiff's motion is GRANTED because (1) Plaintiff is likely to succeed on the merits of its claims alleging violations of the First Amendment; (2) in the absence of injunctive relief pending appeal, Plaintiff is likely to suffer irreparable harm in the form of denial of its constitutional rights; (3) the balance of equities tips in Plaintiff's favor; and (4) an injunction pending appeal is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (setting forth the elements required for preliminary injunctive relief).

IT IS FURTHER ORDERED that an injunction pending appeal is entered against Defendants.

IT IS FURTHER ORDERED that during the pendency of the appeal, Defendants are enjoined and ordered to refrain from enforcing those portions of the

Governor's orders that limit in-person church services to 50 or fewer persons, thereby allowing Plaintiff and its congregants to resume in-person worship services at 50% capacity in compliance with social distancing and its comprehensive health and safety plan.

SO ORDERED.

DATED: June __, 2020

RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE