

No. 20-639

In the
Supreme Court of the United States

CALVARY CHAPEL DAYTON VALLEY,
Petitioner,

v.

STEVE SISOLAK, GOVERNOR OF NEVADA, *et al.*,
Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

AARON D. FORD
Attorney General of Nevada
HEIDI PARRY STERN*
Solicitor General
CRAIG NEWBY
Deputy Solicitor General
JEFFREY M. CONNER
Deputy Solicitor General
100 North Carson Street
Carson City, NV 89701
(775) 684-1100
HStern@ag.nv.gov
** Counsel of Record*

Counsel for Respondents

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QUESTIONS PRESENTED

1. Whether Directive 021 violates the Free Exercise Clause.
2. Whether Directive 021 violates the Free Speech and Assembly Clauses.

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INTRODUCTION

Petitioner Calvary Chapel Dayton Valley (Calvary) preemptively sought the extraordinary remedy of a writ of certiorari before judgment on two broadly stated First Amendment questions, while challenging Directive 021. Pet. at i. This Court, in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (*Roman Catholic Diocese*), has since resolved one of those questions in Calvary’s favor and has remanded analogous cases to the district courts for further development. See *High Plains Harvest Church v. Polis*, 592 U.S. __ (Dec. 15, 2020); *Robinson v. Murphy*, 592 U.S. __ (Dec. 15, 2020); *Harvest Rock Church Inc. v. Newsom*, __ U.S. __, No. 20A94, 2020 WL 7061630 (Dec. 3, 2020).

Here, applying *Roman Catholic Diocese*, the Ninth Circuit reversed the district court’s order that denied Calvary’s motion for preliminary injunction. Pet. App. 1b-11b. Yet the Ninth Circuit did not stop there. Despite noting that the issue has not been addressed in the district court, the court of appeals granted Calvary specific injunctive relief, enjoining Nevada Governor Steve Sisolak “from imposing attendance limitations on in-person services in houses of worship that are less favorable than 25% of the fire-code capacity.” Pet. App. 11b; see also Pet. App. 2b n.1.

For these reasons, this case is now far removed from the questions presented in the petition. And the extraordinary remedy of a writ of certiorari before judgment is now unnecessary, if it was ever warranted at all.

Emboldened by the change in circumstances, however, Calvary has used its reply brief to suggest this Court should take up the Ninth Circuit's intervening opinion because, according to Calvary, the lower court did not go far enough in granting preliminary injunctive relief. That question, however, is not presented by the petition. Pet. at i. Even if it were, Calvary reads too much into *Roman Catholic Diocese*. This case is a poor vehicle for addressing questions beyond those the Ninth Circuit already resolved in Calvary's favor.

Calvary urges this Court to read *Roman Catholic Diocese* as holding that not treating houses of worship the same as their "best treated comparators" is unconstitutional *per se*. Reply at 6-8. Not so. This Court did not disavow application of the strict scrutiny standard; it applied that standard before concluding the petitioners there had shown a likelihood of success on the merits. *Roman Catholic Diocese*, 141 S. Ct. at 66-67.

This case also lacks the necessary evidentiary record to adequately address issues beyond those that the Ninth Circuit already resolved in Calvary's favor. First, despite this Court's recognition that New York's restrictions were "far more restrictive" than Directive 021, the Ninth Circuit did more than enjoin Directive 021. *Id.* at 67. It granted a prospective injunction that limits Nevada's ability to impose directives on attendance limits for religious services going forward, which the Ninth Circuit tied to Nevada's current limitations for comparable secular gatherings. Pet. App. 2b n.1, 11b. The scope of that injunction, which is

what Calvary now wishes to challenge, is reviewed for an abuse of discretion.

Recognizing the obvious need for more complete development of the record, the Ninth Circuit grabbed what it perceived to be the low-hanging fruit—*e.g.* that Nevada may not treat other gathering places more favorably than houses of worship—and remanded, expressly permitting the district court to modify the injunction within the parameters set by the court’s opinion and relevant equitable principles. Pet. App. 11b. The case-specific, fact-bound question of whether the Ninth Circuit abused its discretion does not warrant this Court’s review, particularly before the parties have an opportunity to develop the record. Pet. App. 11b.

Second, defining proper comparators is relevant to deciding whether a restriction is neutral and to applying strict scrutiny. *See Roman Catholic Diocese*, 141 S. Ct. at 66-67. Assuming, without conceding, the need to apply strict scrutiny in comparing indoor worship services to retail stores, manufacturing, and professional services, this Court has already held that addressing COVID-19 is a compelling government interest. *See Roman Catholic Diocese*, 141 S. Ct. at 67. This leaves the issue of narrow tailoring open in assessing whether Calvary can show a likelihood of success on the merits. Additionally, Calvary must establish irreparable harm and that the public interest favors their requested injunctive relief.

These are all inherently fact-bound questions. Just as this Court has accorded California, Colorado, and New Jersey, an opportunity to further develop the

record on similar issues in light of *Roman Catholic Diocese*, it should do the same for Nevada. This Court should deny the petition.¹

STATEMENT OF THE CASE

Relying upon Chief Justice Roberts' concurring opinion in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), the district court denied a preliminary injunction without prejudice, concluding that Directive 021 was neutral and generally applicable. Pet. App. 1a-12a. Calvary appealed, and unsuccessfully sought injunctive relief pending the outcome of the appeal from the Ninth Circuit and this Court. Pet. App. 19a-46a.

Undeterred, Calvary filed its petition for writ of certiorari before judgment the first week of November. Now, more than two months removed from Calvary filing its petition, the relevant legal landscape and the procedural posture of this case have changed materially.

¹ Like California, Nevada is facing challenges with hospital capacity as a result of a recent COVID-19 surge. Associated Press, *Las Vegas Hospital in Capacity Crisis as COVID-19 Cases Soar*, U.S. News, Jan. 13, 2021, <https://www.usnews.com/news/best-states/nevada/articles/2021-01-13/las-vegas-hospital-in-capacity-crisis-as-covid-19-cases-soar>. And the issue has impacted rural parts of the state too. *See* Sam Metz, *Virus is pushing rural Nevada hospitals to the brink*, Las Vegas Sun, Dec. 17, 2020, <https://lasvegassun.com/news/2020/dec/17/virus-is-pushing-rural-nevada-hospitals-to-the-bri/>.

This Court’s Opinion in *Roman Catholic Diocese*

On the eve of Thanksgiving, this Court issued a per curiam opinion in *Roman Catholic Diocese*. There, this Court specifically recognized that the New York directives considered in that case were “far more restrictive” of religious worship than the Nevada directive Calvary challenges here. *Id.* at 4;² *cf. Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020). New York’s emergency orders restricted in-person religious services to 10- and 25-person occupancy limits in areas classified as “red” or “orange” zones for COVID-19 spread. *Roman Catholic Diocese*, 141 S. Ct. at 65-66.

In *Roman Catholic Diocese*, this Court based its ruling on the factual record, created in an evidentiary hearing in the district court. 141 S. Ct. at 66. Crucially, that hearing provided a factual basis for this Court to fully consider the factors required for issuing injunctive relief under *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). *Id.* at 66-69. The evidentiary record in *Roman Catholic Diocese* showed that petitioner churches had an excellent safety record

² Justice Kavanaugh, in his concurrence, specifically emphasized that the New York order is “much more severe than most other States’ restrictions, including the California and Nevada limits at issue in *South Bay United Pentecostal Church v. Newsom*, 590 U.S. ___ (2020) and *Calvary Chapel Dayton Valley v. Sisolak*, 591 U.S. ___ (2020).” *Roman Catholic Diocese*. 141 S. Ct. at 72-74 (Kavanaugh, J., concurring) (emphasis added). Chief Justice Roberts, in his dissent, notes his agreement that the New York order “is distinguishable from those we considered in [*South Bay* and *Calvary Chapel*].” *Id.* at 75 (Roberts, C.J., dissenting) (emphasis added).

and were following social distancing guidelines. *Id.* at 67. It also revealed insufficient evidentiary support for the severe limits placed on houses of worship as opposed to other entities in the red and orange zones. *Id.* at 67. The factual record was critical to the examination of the most recent scientific and medical evidence pertaining to the transmission of COVID-19. *Id.* at 66-67; *see also id.* at 76-78, (Breyer, J., dissenting); *id.* at 79-80 (Sotomayor, J., dissenting).

Additionally, this Court zeroed in on a single decisive factor in concluding that the petitioners had shown a likelihood of success on the merits: that “the maximum attendance at a religious service could be tied to the size of the church or synagogue.” *Roman Catholic Diocese*, 141 S. Ct. at 67. By failing to account for the size of a particular house of worship in limiting attendance for religious services, this Court concluded that New York had not narrowly tailored its restrictions. *Id.*

The Ninth Circuit’s Opinion in *Calvary Chapel*

Three weeks after *Roman Catholic Diocese*, the Ninth Circuit issued its opinion and preliminary injunction in this case. The court had sought supplemental briefing on the effect of *Roman Catholic Diocese* prior to oral argument. And the court applied *Roman Catholic Diocese* before reversing the district court’s decision denying injunctive relief without prejudice. Pet. App. 7b-10b. Additionally, it awarded Calvary prospective injunctive relief, limiting any emergency restriction on attendance of religious services to no less than 25% occupancy, before

remanding for further development consistent with its opinion. Pet. App. 7b.

Nevada currently imposes the 25% occupancy limit on every place of gathering, including casinos, restaurants, bars, amusement and theme parks, gyms and fitness facilities, and movie theaters. Pet. App. 2b n.1. This limit also applies to general gatherings and gatherings at private residences. The 25% occupancy limit encompasses every gathering Calvary identified as “comparable” in its petition. Pet. 20-27.³

No evidentiary hearing has yet taken place in the district court and no further factual development has taken place since this Court’s prior denial of Calvary’s request for an injunction pending appeal. The parties have since agreed to stay proceedings in the district court pending resolution of this petition. Order at 5, *Calvary Chapel Dayton Valley v. Sisolak*, No. 3:20-cv-00303-RFB-VCF (Jan. 5, 2021) (ECF No. 65).

This Court’s Subsequent Orders Regarding Similar Occupancy Restrictions

This Court’s orders, and subsequent orders from the courts of appeal, examining state emergency directives on religious services after *Roman Catholic Diocese*

³ In the reply, Calvary cites Directive 003 for purposes of identifying “essential” and “non-essential” businesses in Nevada. Reply at 6-7. Although Directive 021, which issued in May, maintained the “essential” vs. “non-essential” dichotomy; Nevada stopped distinguishing between “essential” and “non-essential” businesses in Directive 033 beginning in September. That remains true for Directive 035. Those directives are available at https://gov.nv.gov/News/Emergency_Orders/Emergency_Orders/.

recognize the need for an adequate factual record. For example, after *Roman Catholic Diocese*, this Court issued a companion order in a second suit challenging New York State's religious attendance restrictions. See *Agudath Israel v. Cuomo*, No. 20A90, __ U.S. __, 2020 WL 6954120 (Nov. 25, 2020). Upon further consideration by the Second Circuit, that case has been remanded for further consideration of an injunction against enforcement of differing capacity percentage limits. *Agudath Israel v. Cuomo*, Docket Nos. 20-3572, 20-3590, __ F.3d __, 2020 WL 7691715 (2d Cir. Dec. 28, 2020).

This Court has also considered three applications for injunctive relief brought by churches challenging COVID restrictions on attendance of worship services since deciding *Roman Catholic Diocese*. *High Plains Harvest Church*, 592 U.S. at __; *Robinson*, 592 U.S. at __; *Harvest Rock Church*, No. 20A94, 2020 WL 7061630. In all of these cases, this Court converted the application into a petition for writ of certiorari before judgment, vacated the judgment from below, and remanded for further consideration by the district courts. None of the cases has resulted in this Court issuing prospective injunctive relief before remanding for further consideration in the district court.

Harvest Rock sought injunctive relief on California's COVID restrictions on religious services, including no indoor worship services for Tier 1 counties, which constituted most California residents. Rather than grant injunctive relief, this Court granted certiorari prior to judgment for purposes of remanding this case to the district court's consideration of *Roman Catholic*

Diocese. Harvest Rock Church, No. 20A94, 2020 WL 7061630. In *High Plains* and *Robinson*, this Court considered applications challenging COVID restrictions from Colorado and New Jersey. Again, in both cases, this Court granted certiorari prior to judgment for purposes of remanding to the district courts for consideration of the *Roman Catholic Diocese* opinion. *High Plains Harvest Church*, 592 U.S. at __; *Robinson*, 592 U.S. at __.

What has since occurred in *Harvest Rock* demonstrates the need for further factual development here. There, California has been able to establish a record showing how COVID-19 is transmitted and important factors to be considered in seeking to reduce the risk of transmission: (1) the number of participants to an activity, (2) the nature of the activity, and (3) the location of the activity. Opposition to Emergency Application for Writ of Injunction at 3-5, *Gish v. Newsom*, No. 20A120 (Jan. 14, 2021) (summarizing the evidentiary record developed in *Harvest Rock*). And they have then been able to place those considerations in context with the nature of their restrictions and the dire public health crisis that California is currently facing, while addressing them within the framework required by *Roman Catholic Diocese. Id.* at 6-17, 23-25, 30-46.

REASONS FOR DENYING THE PETITION

A remand to the district court is necessary before any decision by this Court will be helpful or appropriate to establish precedent for other cases. The Ninth Circuit already ordered a remand that provides an opportunity for further factual development. But it also exercised its discretion to grant Calvary interim relief: a preliminary injunction that, consistent with *Roman Catholic Diocese*, precludes (1) Nevada from imposing numerical caps on worship services that are untethered to the size of a particular house of worship, and (2) Nevada from imposing an attendance limitation of less than 25% of fire-code capacity, which is comparable to current Nevada limitations for comparable secular gathering locations.

This case otherwise lacks the necessary evidentiary record for proper resolution of questions beyond those the Ninth Circuit already decided in Calvary's favor. For these reasons, this Court should deny the petition.

I. The Petition Is Moot Because Calvary Already Received the Relief it Sought Through the Petition.

Challenging the district court's denial of a preliminary injunction, the Petition presents broadsided, facial attacks on Directive 021, asserting that the directive is unconstitutional under the Free Exercise, Free Speech, and Assembly clauses of the First Amendment. Pet. at i. But "a petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the

case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court.” Supreme Court Rule 11 (emphasis added)

This Court has since resolved the relevant Free Exercise question. *See Roman Catholic Diocese*, 141 S. Ct. at 65-69. And the Ninth Circuit, applying the principles this Court established in *Roman Catholic Diocese*, enjoined enforcement of Directive 021. Pet. App. 11b. For those reasons, Calvary’s petition is moot; Calvary has already obtained the relief it sought through the petition—an order concluding that Governor Sisolak’s “favoring of secular over religious gatherings” violates the First Amendment and enjoining Directive 021. *High Plains Harvest*, 592 U.S. at __ (Kagan, J., dissenting) (slip op. at 1); *see also* Pet. App. 1b-11b.

II. This Court’s Decision in *Roman Catholic Diocese* Does Not Displace Application of the Strict Scrutiny Standard.

In its reply, Calvary departs from the focus its questions presented placed on various “gatherings.” *Compare* Pet. at i, 20-26; *with* Reply at 6-8. Emboldened by changing circumstances, Calvary has pivoted to challenging the Ninth Circuit’s decision, asserting that the Free Exercise Clause and this Court’s decision in *Roman Catholic Diocese* demand that “[p]laces of worship must be treated no worse than their best treated comparators,” as if to suggest that restrictions that even slightly depart from any sense of neutrality are per se unconstitutional. Reply at 6-8. Not so.

Ascertaining whether a restriction is neutral and generally applicable determines the appropriate level of scrutiny applied to a restriction, not its constitutionality. *Roman Catholic Diocese*, 141 S. Ct. at 66. The brief per curiam opinion in *Roman Catholic Diocese*, which merely granted an injunction pending appeal, does not displace the principle that restrictions that “are not ‘neutral’ and of ‘general applicability’” still pass constitutional muster if they meet strict scrutiny. *Id.* at 66-67. This Court recognized that principle before conducting a strict scrutiny analysis in *Roman Catholic Diocese*, which then led to this Court concluding that the petitioners had shown a sufficient likelihood of success on the merits to obtain injunctive relief in that case. *Id.*

The decisive factor this Court identified as undermining New York’s ability to satisfy strict scrutiny: “the maximum attendance at a religious service could be tied to the size of the church or synagogue.” *Id.* at 67. As this Court noted, New York’s restrictions limited attendance to 10 people in “a 1,000-seat church or 400-seat synagogue” *Id.* The Ninth Circuit’s rule, by contrast, would allow the same church to admit 250 people and the same synagogue to admit 100 people. And the Ninth Circuit’s limits are proportionate to existing limits for comparable secular gatherings in Nevada. Pet. App. 2b n.1.

Other than its overly expansive reading of *Roman Catholic Diocese*, Calvary does not present any argument supporting such a radical departure from firmly rooted First Amendment doctrine. Reply at 6-8.

III. The Ninth Circuit Granted Appropriate Injunctive Relief but Recognized the Need for Further Factual Development.

Since deciding *Roman Catholic Diocese*, this Court has been vacating lower court decisions that denied preliminary injunctions and remanding for further consideration. *High Plains Harvest Church*, 592 U.S. at __; *Robinson*, 592 U.S. at __; *Harvest Rock Church*, No. 20A94, 2020 WL 7061630. Here, the Ninth Circuit followed this Court’s lead, concluding that Directive 021 must survive review under strict scrutiny because “the Directive treats numerous secular activities and entities significantly better than religious worship services.” Pet. App. 9b. Despite this Court’s indication that the restrictions in *Roman Catholic Diocese* were “far more restrictive” than Directive 021, the Ninth Circuit still reached the conclusion that strict scrutiny applies because the Directive held many businesses to “50% of fire-code capacity, yet houses of worship are limited to fifty people regardless of their fire-code capacities.” Pet. App. 9b; *see also Roman Catholic Diocese*, 141 S. Ct. at 67.

Then, acknowledging that the district court had not previously addressed the question whether Directive 021 survives strict scrutiny, the court set aside the general practice of refraining from ruling on issues not first passed upon by the district court. Pet. App. 9b-10b. The Court ultimately concluded that, as a matter of law, Directive 021 did not satisfy strict scrutiny because the State could have used percentages of fire-code capacity to limit attendance of in-person worship

services, like it had with various secular businesses. Pet. App. 10b-11b.

Unlike this Court's practice of merely vacating denials of preliminary injunctions and remanding for consideration under *Roman Catholic Diocese*, however, the Ninth Circuit did not stop there. Recognizing that a new directive is in place, which limits a laundry list of locations for secular gatherings from exceeding 25% of their fire-code capacity, the Ninth Circuit exercised its discretion to enjoin Nevada from imposing limits on attendance of in-person worship services that are less favorable than 25% of fire-code capacity. Pet. App. 2b n.1, 11b. Additionally, the Ninth Circuit indicated it was leaving the district court with the authority to modify that injunction, while encouraging the district court to expedite any necessary proceedings for purposes of addressing the scope of the preliminary injunction. Pet. App. 11b.

Whether to grant a preliminary injunction is an equitable decision within the court's sound discretion. *Winter*, 555 U.S. at 376-77. The Ninth Circuit's application of *Roman Catholic Diocese* and its discretionary decision to grant injunctive relief does not warrant this Court's review. Noting (1) that judicial officers are not public health experts, and (2) the issue had not been developed below due to the district court applying only a rational basis standard, the Ninth Circuit grabbed the low-hanging fruit that it could decide without the need for further factual development. Pet. App. 76 n.3, 9b-10b. The Ninth Circuit thus held that *Roman Catholic Diocese* requires states to treat in-person religious services to

comparable secular gatherings and institutions, including prohibiting the use of hard numerical caps on attendance limits that are untethered to the size of a particular house of worship. Pet App. 9b-11b.

The Ninth Circuit, however, appropriately left the district court with the authority to provide for further record development and modify the injunction as appropriate. Pet. App. 11b. This point is critical. Now that it has prevailed in the Ninth Circuit, Calvary wants this Court to treat at least all retail stores, but also manufacturing and professional offices, as like comparators to houses of worship. But neither party has had an opportunity to develop a proper evidentiary record for review of those issues.

Since this Court decided *Roman Catholic Diocese*, Calvary has not produced evidence showing that retail stores, manufacturing facilities, and professional offices are sufficiently like comparators to indoor in-person worship services, nor has Nevada been given an opportunity to develop a proper record on whether it can justify any disparate treatment that places a substantial burden on the right to Free Exercise and requires review under a strict scrutiny standard.

The Ninth Circuit, as this Court has in three analogous cases, left the district court to sort out those more fact-specific issues. Calvary has not shown that the Ninth Circuit abused its discretion in leaving the district court with authority to allow for further development of the record and modify the injunction as appropriate.

IV. This Case Is not a Proper Vehicle for Reviewing Issues the Ninth Circuit did not Already Resolve in Calvary's Favor.

No evidentiary hearing has yet been conducted to properly evaluate Directive 021, or any other Nevada restrictions, beyond the straightforward legal issues the Ninth Circuit already resolved by enjoining Directive 021 and granting prospective injunctive relief. The district court originally heard argument and denied injunctive relief without prejudice in June 2020. Since then, the parties have been entrenched in appellate proceedings, which has not allowed for development of a record addressing the evidentiary burdens for injunctive relief under the guidance of *Roman Catholic Diocese*.

Additionally, as the Ninth Circuit recognized, changes to Nevada's circumstances, which have evolved significantly since Directive 021 issued in May, compels a remand to allow for proper development of the record. Pet. App. 2b n.1, 11b. Stated differently, unless this Court is prepared to presume, without record evidence, that a State can never establish proof that the public interest in saving lives permits temporary numerical limitations for attending in-person religious services, granting certiorari here would not resolve this case.

Similar to what this Court has done in other cases, this Court should allow the district court to resolve issues beyond those the Ninth Circuit already resolved in Calvary's favor.

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

AARON D. FORD

*Attorney General of
Nevada*

HEIDI PARRY STERN*

Solicitor General

CRAIG NEWBY

Deputy Solicitor General

JEFFREY M. CONNER

Deputy Solicitor General

100 North Carson Street

Carson City, NV 89701

(775) 684-1100

HStern@ag.nv.gov

** Counsel of Record*

Counsel for Respondents

January 19, 2021