NO. 20-639

IN THE
Supreme Court of the United States

CALVARY CHAPEL DAYTON VALLEY,
Petitioner,

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,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement in the Petition for Writ of Certiorari remains unchanged.

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INTRODUCTION

This Court should grant the petition and issue a merits opinion before the end of the Term:

1. The petition is not moot and presents an issue of great importance: the proper comparators to use when assessing a government restriction on free-exercise rights. In applying *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63 (2020), the Ninth Circuit erroneously allowed Nevada to treat places of worship less favorably than many secular entities.

2. Although Nevada does not address it, the issue presented has divided the circuits. While the Sixth Circuit initially gave the same, cramped reading of *Catholic Diocese* as did the panel below, see *Kentucky ex rel. Danville Christian Acad.* v. *Beshear*, 981 F.3d 505 (6th Cir. 2020), that court has since joined the Second Circuit in construing *Catholic Diocese* as Petitioner urges here, see *Monclova Christian Acad.* v. *Toledo-Lucas Cnty. Health Dep't*, ___ F.3d ____, 2020 WL 7778170 (6th Cir. Dec. 31, 2020), and *Agudeth Israel of Am.* (and *Roman Catholic Diocese of Brooklyn*) v. *Cuomo*, 983 F.3d 620 (2d Cir. 2020).

3. This dispute does not require an evidentiary hearing before this Court acts. Nevada had ample opportunity to (and did) create an evidentiary record in the district court. And the question of appropriate comparators in a free-exercise challenge is legal.

4. Time is of the essence. Every day that passes without a definitive ruling from this Court will result in additional First Amendment violations.

For all these reasons, certiorari is warranted.

I. The petition presents a live controversy involving a legal question that has divided the circuits since *Catholic Diocese*.

A. The petition is not moot and presents a question of law.

Nevada says the petition is moot because Calvary Chapel has obtained the relief the petition seeks: "an order concluding that Governor Sisolak's favoring of secular over religious gatherings violates the First Amendment and enjoining Directive 021." Nev.Opp.11 (cleaned up). But a case "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin* v. *Chafin*, 568 U.S. 165, 172 (2013) (quotation omitted). And it is certainly possible for this Court to grant effectual relief here.

In its petition, Calvary Chapel asked this Court "to grant the petition and clarify for all that the First Amendment does not allow government officials to use COVID-19 as an excuse to treat churches and their worshippers worse than secular establishments and their patrons." Pet.39. That request, made before *Catholic Diocese* and the decision below, is just as justiciable today.[1]

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[1] Because the Ninth Circuit issued its opinion while the petition was pending, the higher standard for granting certiorari before judgment is inapplicable. Contra Nev.Opp.10-11 (quoting S. Ct. R. 11).

As Calvary Chapel explained in its Reply to Respondent Hunewill, the panel erred in two ways. First, the panel should have followed *Catholic Diocese* and entered a preliminary injunction that treats the church on equal terms with "essential" businesses, such as manufacturing facilities and professional offices, which have no capacity limit other than that effectively imposed by social distancing guidelines. Calvary Chapel Reply to Hunewill Filing (Reply) 2, 6–8. Second, the panel erred in establishing a 25% capacity limit, either under the Governor's previous edict, Directive 021, which allows casinos and museums to operate at 50% capacity, or under Directive 035, which allows retail establishments to operate at 50% capacity. *Id.* at 2, 3–5; see *Catholic Diocese*, 141 S. Ct. at 66 (activities at hardware, liquor and other retail stores were comparable to "attendance at houses of worship").

"[T]here is not the slightest doubt that," even after the Ninth Circuit's decision, "there continues to exist between the parties that concrete adverseness which sharpens the presentation of issues." *Chafin*, 568 U.S. at 173 (quotation omitted). By allowing Calvary Chapel to meet at only 25% fire-code capacity, App.11b, the panel overlooked or disregarded Nevada's "favored class of businesses" that operate with no capacity limit or at 50% capacity. *Catholic Diocese*, 141 S. Ct. at 73 (Kavanaugh, J., concurring). The lower court's limited view of the church's comparators—which led to only partial relief—constitutes error. See *Chafin*, 568 U.S. at 177 ("even the availability of a partial remedy is sufficient to prevent a case from being moot") (cleaned up).

Further, the Ninth Circuit's error doesn't raise simply a "case-specific, fact-bound question of whether the Ninth Circuit abused its discretion." Contra Nev.Opp.3. It raises a legal question: Which secular entities are comparable to religious organizations when a State, like Nevada, "divv[ies] up organizations into a favored or exempt category and a disfavored or non-exempt category." *Calvary Chapel Dayton Valley* v. *Sisolak*, 140 S. Ct. 2603, 2611–12 (2020) (Kavanaugh, J., dissenting); accord *Catholic Diocese*, 141 S. Ct. at 73 (Kavanaugh, J., concurring). Inherent in that question are two issues only this Court may resolve: When a State excludes religious organizations from the favored category, (1) must the State, as part of its burden under strict scrutiny, provide a compelling justification for placing religious organizations in the non-favored category, or (2) must a religious organization first demonstrate that it is comparable to those organizations that the State has placed in the preferred category? See *ibid.* (stating the State has the burden of justifying such classifications); see also *S. Bay United Pentecostal Church* v. *Newsom*, 140 S. Ct. 1613, 1615 (2020) (Kavanaugh, J., dissenting) (same).

Catholic Diocese seemed to have answered that question. This Court, in determining that New York's order failed the neutrality requirement, did not require the applicant houses of worship to first prove that their activities created no greater health risk than those occurring at the better treated comparators. 141 S. Ct. at 66–67. Instead, the Court held that the challenged order was not neutral and generally applicable because the order on its face treated those secular venues more favorably than houses of worship. *Ibid.*

That's why Calvary Chapel, in a letter brief regarding *Catholic Diocese* filed in the Ninth Circuit just before oral argument, argued that the 50% fire-code capacity limit enjoyed by some comparators under the present Nevada order was the "bare minimum" relief required, and that the Constitution and *Catholic Diocese* required a preliminary injunction that treated Calvary Chapel comparably to retail businesses, such as big box stores, manufacturers, professional offices, and financial institutions. CA9 ECF 59 at 10.

Yet the Ninth Circuit limited Calvary Chapel's comparators to less-favorably-treated commercial entities. App.2b–3b n.1, 11b. In doing so, the Ninth Circuit only required Nevada to treat religious organizations like these lesser-treated secular comparators rather than the most-favored secular comparators. *Catholic Diocese* is to the contrary, as it rejected New York's attempt to draw similar categorizations around some secular activities that New York argued were more comparable to places of worship than others. 141 S. Ct. at 73 (Kavanaugh, J., concurring) ("[I]t does not suffice for a State to point out that, as compared to houses of worship, *some* secular businesses are subject to similarly severe or even more severe restrictions."). In other words, *Catholic Diocese* did not limit its analysis to only secular activities that mirrored worship services when it held that New York's regulations must survive strict scrutiny. *Id.* at 66–67.

The Ninth Circuit's decision conflicts with *Catholic Diocese* and, as discussed below, creates a circuit split.

B. There is already a circuit split over *Catholic Diocese.*

The Ninth Circuit is not the first court to apply a cramped view of religious organizations' comparators following *Catholic Diocese*. The Sixth Circuit did the same in *Kentucky ex rel. Danville Christian Academy* v. *Beshear*, 981 F.3d 505 (6th Cir. 2020). That case involved the Kentucky Governor's shutdown of all in-person instruction at K-12 schools. Religious schools objected and filed suit.

The Sixth Circuit held that the school-closure order was neutral and generally applicable by comparing the private schools to secular private schools and public schools only. *Id.* at 509. The court did so even though the Governor allowed a host of secular, non-school activities. *Id.* at 509–10. This limited view of comparators—even with the benefit of *Catholic Diocese*—drew sharp criticism from two Members of this Court. *Danville Christian Acad.* v. *Beshear*, 141 S. Ct. 527, 528–29 (2020) (Gorsuch, J., dissenting).

A subsequent Sixth Circuit panel took a different view of proper comparators in *Monclova Christian Academy* v. *Toledo-Lucas County Health Department*, ___ F.3d ____, 2020 WL 7778170 (6th Cir. Dec. 31, 2020), another school-closure case. That panel granted injunctive relief, holding that the order was not generally applicable and could not survive strict scrutiny. *Id.* at *2–*4.

"A rule of general application," the court said, "is one that restricts religious conduct the same way that 'analogous non-religious conduct' is restricted." *Id.* at *2 (quoting *Church of the Lukumi Babalu, Inc.* v. *City of Hialeah*, 508 U.S. 520, 546 (1993)). The panel held that the challenged order was not generally applicable because it treated "office buildings," among other facilities, better than the private religious schools. *Id.* at *3. *Catholic Diocese*, the court observed, "makes clear that those secular facilities are 'comparable' for purposes of spreading COVID-19." *Ibid.* (citing *Catholic Diocese*, 141 S. Ct. at 66).

The Ninth Circuit's decision here aligns with *Danville Christian* but conflicts with *Monclova* and the Second Circuit's decision on remand in *Agudeth Israel of America* (and *Roman Catholic Diocese of Brooklyn*) v. *Cuomo*, 983 F.3d 620, 2020 WL 7691715 (2d Cir. 2020). The Second Circuit held that the challenged New York order was non-neutral because it imposed restrictions on houses of worship that were "inapplicable to secular activities." *Id.* at *7. As for general applicability, the court noted that "the Governor has selected some businesses (such as news media, financial services, and certain retail stores) for favorable treatment, calling them 'essential,' while imposing greater restrictions on 'non-essential' activities and religious worship." *Ibid.*

In sum, less than two months after *Catholic Diocese*, the circuits are already split over comparators. Those views include the Sixth Circuit's myopic view in *Danville Christian*, the less restrictive (but still limited) view of the Ninth Circuit here, and the more generous (and correct) view of the Sixth and Second Circuits in *Monclova* and *Agudeth Israel*.

"[P]erhaps" the circuits' differing views of *Catholic Diocese* are "understandable," given that the "rules about how to determine when laws are 'neutral' and 'generally applicable' have long proved perplexing." *Danville Christian*, 141 S. Ct. at 529 (Gorsuch, J., dissenting) (citations omitted). Regardless, the rapid development of the split requires this Court to explicitly hold what *Catholic Diocese* implies: "[O]nce a State creates a favored class of businesses, . . . the State must justify why houses of worship are excluded from that favored class." *Catholic Diocese*, 141 S. Ct. at 73 (Kavanaugh, J., concurring); see also *Calvary Chapel*, 140 S. Ct. at 2611–12 (Kavanaugh, J., dissenting) (same).

The Ninth Circuit's error on this critical point sets the parameters in which district courts will operate unless this Court intervenes. Here, for example, the district court can modify the preliminary injunction only if such modification is "consistent with" the Ninth Circuit's opinion. App.11b. It is inevitable that the district court will erroneously omit as Calvary Chapel's secular comparators those that the Ninth Circuit erroneously omitted from *its* analysis—"essential businesses" and retail venues. This Court's intervention is required.

C. An evidentiary hearing without the proper legal standard would be nonsensical.

Nevada says the record is not adequately developed for this Court to grant review. *E.g.*, Nev.Opp.2, 5, 7, 10, 15, 16. Not so. The record is substantially developed and includes hundreds of pages of evidence in the form of documents, affidavits, and expert opinions on both sides. Nevada omits any explanation of what is lacking, or what it could not have added in the many months this case has been ongoing.

Beginning in March 2020 through today, Nevada has favored secular businesses and activities over the fundamental right of free exercise of religion. Reply 6–7. So, for nearly 10 months, Nevada has had numerous opportunities to explain what evidence it has that supports the Governor's disparate treatment of religion.

The evidence includes, among other materials: the verified complaint, CA9 Excerpts of Record (ER.) 662–81; the pastor's declaration describing Calvary Chapel's health and safety precautions, ER.653–61; many articles reporting on COVID-19 outbreak at secular establishments, ER.171–252; and documents like Tweets from the Governor and Attorney General showing their preference for secular assemblies and speech over religious gatherings and speech, *e.g.*, ER.164, 254, 256.

Calvary Chapel also offered the declaration of Dr. Timothy Flanigan, a board-certified infectious disease doctor, who testified:

> [S]o long as the CDC guidelines are followed, there is no scientific or medical reason to limit the number of persons at a religious gathering while not imposing the same restrictions on *shopping malls*, *big box stores*, restaurants or bars, gyms or fitness centers, barbershops or hair salons, movie theaters, museums, water parks, *offices*, *workplace meetings*, gambling casinos, *factories*, supermarkets, farmer's markets, *retail stores*, demonstrations, or *other places where individuals interact, gather, or share space*. [ER.107, ¶ 34 (emphasis added)]

See also ER.102–09 (declaration); ER.111–59 (Flanigan CV).

Nevada had ample opportunity to create its own record, and it did. In addition to directives, articles, and affidavits, it submitted an expert declaration from the State's Chief Medial Officer who opined that "[i]n-person worship services pose specific risks for disease transmission," ER.770; see generally ER.766–70. Nevada chose *not* to offer any evidence supporting that conclusory opinion, nor evidence showing that worship services pose more specific risks for disease transmission than other social interactions.

As a result, any lack of record evidence that Nevada now claims is not due to insufficient opportunity; it was a strategic choice. Throughout this case, Nevada has relied on two arguments to support the Governor's disfavoring of religion: (1) the Governor's directives are entitled to deferential review under *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905); and (2) the directives are neutral and generally applicable, and thus subject to rational basis review, because they treat all comparable secular organizations and

activities the same as religious organizations. *E.g.*, Nev. Answering Br., CA9 ECF 29. It is only now—on the brink of Supreme Court review—that Nevada changes tack. Even in its letter brief filed in the Ninth Circuit after *Catholic Diocese*, Nevada could not bring itself to use terms like "strict scrutiny," "compelling government interest," and "narrowly tailored." Nev. Letter Br., CA9 ECF 61. This also proves that it is a legal question at issue here, not any shortage of facts or evidence.

And that's the key point: it makes no sense to hold an evidentiary hearing without establishing the correct legal standard. If the district court reviews *more* evidence, then grants a limited injunction based on the Ninth Circuit's cramped reading of *Catholic Diocese*'s comparators discussion, then Calvary Chapel will have to again appeal. And if this Court issues a merits opinion siding with the Second and Sixth Circuits' view of *Catholic Diocese*, the case will have to be remanded for a third submission of evidence, with yet another set of comparators.

It is the Ninth Circuit's critical legal error that distinguishes this case from the various others this Court has GVR'd in recent days. Nev.Opp.1, 8–9, 13 (citing cases). Each of those matters came to this Court in an emergency posture where the lower courts had no chance to evaluate the record after *Catholic Diocese*. The opposite is true here. There is no need for an evidentiary hearing.

II. Nevada's arguments against certiorari are unfounded.

Nevada offers two more arguments. First, Nevada says that it stopped drawing its essential/non-essential distinction when the Governor issued Directive 033. Nev.Opp.7 n.3. And according to Nevada, "[t]hat remains true" for the present emergency directive, Directive 035. *Ibid.* But no directive states that. Neither Directives 033 nor 035 purports to abandon the essential/non-essential line, and both say that any issue they do not address remains in force as provided by previous directives or regulations. Dir. 033, § 1; Dir. 035, § 1.

More important, Nevada does not deny that manufacturers, financial institutions, auto supply and repair shops, warehouses, transportation services, mail and shipping services, and professional offices, for example, are not subject to any capacity limit other than the limit implicit in social distancing requirements. See Reply 6–7. And retail businesses are still allowed at 50%. *Id.* at 4.

Alternatively, Nevada urges the Court to deny the petition because Calvary Chapel purportedly reads *Catholic Diocese* as having "disavow[ed] application of the strict scrutiny standard." Nev.Opp.2, 11–12. Not so. Calvary Chapel embraces the "strict scrutiny" standard. Reply 3–6. Calvary Chapel's request is simple: the Court should provide a clarion standard by which state actors must operate: "[O]nce a State creates a favored class of businesses, . . . the State must justify why houses of worship are excluded from that favored class." *Catholic Diocese*, 141 S. Ct. at 73 (Kavanaugh, J., concurring).

III. This case is an ideal vehicle for this Court to decide the free-exercise comparators question in a full, merits opinion.

Respondent Hunewill agrees that the Court should grant the petition. And time is of the essence. This petition is the Court's last opportunity to issue a merits opinion this Term settling how lower courts analyze the interplay between COVID-19 emergency orders and free-exercise rights.

Such clarification is crucial. Free-exercise violations "cause irreparable harm" to churches and congregants. *Calvary Chapel*, 140 S. Ct. at 2609 (Alito, J., dissenting). And despite the development of a vaccine, COVID-19 is not going away soon, nor are the emergency orders that accompany it.[2]

It is critical for this Court to explain in a fully briefed and argued case the correct First Amendment analysis. Certiorari is warranted.

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[2] Post-injunction, Nevada *still* insists on a 50-person cap on worship gatherings. See Nevada Health Response, Current Status: Mitigation Measures, https://perma.cc/M3PS-7FVA (under "public gatherings").

CONCLUSION

For the foregoing reasons, and those discussed in the petition for a writ of certiorari and Calvary Chapel's earlier reply, the petition should be granted.

Respectfully submitted,

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