

No. 20-639

**In The
Supreme Court of the United States**

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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.

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**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

—◆—
**RESPONSE TO PETITION FOR A WRIT
OF CERTIORARI BEFORE JUDGMENT**

—◆—
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QUESTIONS PRESENTED

With respect to the State Respondents, Governor Sisolak and Attorney General Ford, Sheriff Hunewill agrees with the Questions Presented in Calvary Chapel Dayton Valley's Petition for a Writ of Certiorari Before Judgment. With respect to the Sheriff, the questions presented are as follows:

1. Whether the Sheriff of a small rural community has authority, if not the duty, to disregard statewide "directives" when: (1) the Sheriff's highest calling is to uphold the Constitution of the United States and the Constitution of the State of Nevada; (2) the Governor has continued to exercise emergency powers for over nine months; and (3) the directives in question violate "the minimum requirement of neutrality" that this Court enumerated in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, 113 S. Ct. 2217, 2226-27 (1993).

2. Whether injunctive relief should limit only Governor Sisolak and statewide measures where this Court has correctly recognized that health and safety are matters principally entrusted to the elected officials who are accountable to the people and most knowledgeable about the specific needs of their communities.

PARTIES TO THE PROCEEDINGS

The Petitioner, Calvary Chapel Dayton Valley (“Calvary”), is a Christian church in Dayton, Nevada, an incorporated region within Lyon County. Calvary initiated litigation in the United States District Court for the District of Nevada. Calvary is the appellant in the proceedings before the Court of Appeals for the Ninth Circuit.

Steve Sisolak and Aaron Ford (the “State Respondents”) are parties in their official capacities as, respectively, Governor and Attorney General for the state of Nevada. The State Respondents were named as defendants in the United States District Court for the District of Nevada and they are Respondents in the Court of Appeals for the Ninth Circuit.

Respondent Frank Hunewill (“Sheriff Hunewill” or “the Sheriff”) is a party in his capacity as Sheriff of Lyon County. Although very different from the State Respondents, Sheriff Hunewill was named as defendant in the United States District Court for the District of Nevada. He is also a Respondent in the proceedings before the Court of Appeals for the Ninth Circuit.

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OPINIONS BELOW

Sheriff Hunewill agrees with Calvary’s summary of previous decisions.



JURISDICTION

Sheriff Hunewill agrees with Calvary’s Statement of Jurisdiction. Because Sheriff Hunewill is not enforcing the directives in question, the matter is only exigent with respect to the State Respondents.



**CONSTITUTIONAL PROVISIONS
AND DIRECTIVES INVOLVED**

Sheriff Hunewill agrees with Calvary that the instant case implicates numerous constitutional provisions and concerns. The most crucial provisions are stated in the First Amendment to the United States Constitution – “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

Although technically outside the scope of Rule 14(1)(f), this case also centers on Governor Sisolak’s unilaterally-enacted Declaration of Emergency Directives 21, 33, and 35.



INTRODUCTION

In Nevada, the two most populous cities (Reno and Las Vegas) control the state. Indeed, while Nevada has sixteen counties and one independent city, the population of Clark County alone is three times that of the other counties combined. So, while the Governor is supposed to represent all Nevadans, he is not accountable to Nevadans in the rural counties. In fact, in the modern era of divisive politics, the Governor shows open disdain for Nevadans who live and work in the fourteen “red” rural counties.

By contrast, local officials like Sheriff Hunewill are personally involved in their communities. Unlike the Governor and other Nevada state officials, Sheriff Hunewill is accountable to the people of Lyon County on election day and every day thereafter. Sheriff Hunewill also understands firsthand the strengths and challenges that come with living in a rural community.

Given the tension between Nevada’s rural counties and state-level officials, the instant case puts Sheriff Hunewill in an unusual position. After all, Sheriff Hunewill is listed on the same side of the “v.” as Governor Sisolak, even though the Sheriff has steadfastly refused to enforce the Governor’s edicts. At the same time, Sheriff Hunewill is on the opposite side of the church that is part of his community even though the Sheriff believes that Calvary’s parishioners, when adhering to recommendations of the Center for Disease

Control (the “CDC”), can express their faith in a safe manner.

The instant Response to Calvary’s Petition for a Writ of Certiorari Before Judgment thus is atypical because Sheriff Hunewill believes that this Court should grant Calvary’s Petition. Sheriff Hunewill felt compelled to file a Response, however, to make sure that the Court understands the significant differences between the Respondents. More importantly, Sheriff Hunewill wants to ensure that any relief granted will not unduly restrict his ability to enforce neutral county-specific measures that may become necessary at a future date.

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STATEMENT OF THE CASE

Sheriff Hunewill takes no issue with Calvary’s statement of the relevant facts and procedural history.

In the month since Calvary filed its Petition, Governor Sisolak has once again imposed “emergency” restrictions in response to a purported uptick in COVID-19 cases.¹ Section 7 of the Governor’s November 24, 2020 “emergency directive” provides that occupancy in houses of worship “shall not exceed the lesser of 25% of the listed fire code capacity or 50 persons,” provided that “all social distancing requirements are satisfied.”

¹ “Cases” is the operative word. Though it is unclear what measures inform the Governor’s directives, “cases” appear to be based on “positive” test results.

See https://gov.nv.gov/News/Emergency_Orders/2020/2020-11-24_-_COVID19_Emergency_Declaration_Directive_035/ (last visited Dec. 7, 2020). As in previous directives, Directive 35 does not distinguish between megachurches that resemble a football stadium and a one-room chapel. Meanwhile, under Sections 10 and 13 of Directive 35, arcades, bowling alleys, casinos and other recreational activities are limited to 25% of the listed fire code capacity. *Id.* Under Section 11, “retail and grocery stores with over 50,000 square feet in retail floor area” are not subject to a capacity limitation. *Id.* So, unlike places of worship, secular businesses are limited, if at all, exclusively by their size.

Importantly, Sheriff Hunewill does not plan to enforce Directive 35. As with all of Governor Sisolak’s previous directives/edicts, the Sheriff is not going to use his limited law enforcement resources to monitor church attendance or otherwise micromanage religious institutions that are wholly capable of making sound decisions for the health and safety of their parishioners. Sheriff Hunewill has stated as much throughout all of his filings in the District Court, the Ninth Circuit Court of Appeals, and this Court.



**ARGUMENTS REGARDING CALVARY'S
PETITION FOR A WRIT OF CERTIORARI**

A. This Court Should be Cautious to Distinguish Sheriff Hunewill from the State Respondents.

Sheriff Hunewill acknowledges that government officials may need to make difficult decisions when faced with a public health crisis. *See, e.g., Roman Catholic Diocese of Brooklyn, New York v. Andrew M. Cuomo, Governor of New York*, No. 20A87, 592 U.S. ___, ___ (Nov. 25, 2020) (slip op. at 4-5). But, since the onset of COVID-19 concerns in early 2020, the Sheriff has steadfastly refused to enforce Governor Sisolak's "directives" for three important reasons.

First, the directives in question are facially unconstitutional. Sheriff Hunewill is not convinced that the governor of Nevada has unilateral authority to impose restrictions nine months into an "emergency" situation. But, aside from Governor Sisolak's seemingly limitless emergency powers, the open discrimination against places of worship and those who assemble to exercise their faith raises "a serious First Amendment issue." *Roman Catholic Diocese of Brooklyn*, 592 U.S. at ___ (slip op., Kavanaugh, J., concurrence at 2). While the Sheriff understands that gatherings are a concern when trying to stop the spread of a virus, the rights guaranteed in the Constitution are far from "non-essential." The severe restrictions on places of worship also do not pass muster given the lesser restrictions on businesses unilaterally deemed "essential" by edict of the Governor – such as casinos and marijuana

dispensaries. So, at least according to the State Respondents, it may be unsafe to go to church, but it is fine pick up a Schedule I drug and spend the afternoon at the poker table. “Who knew public health would so perfectly align with secular convenience?” *Roman Catholic Diocese of Brooklyn*, 592 U.S. at ___ (slip op., Gorsuch, J., concurrence at 2); *see also Calvary Chapel Dayton Valley v. Sisolak, et al.*, 591 U.S. ___, App. No. 19A1070, 2020 WL 4251360 (U.S. July 24, 2020) (Alito, J., dissenting).

Second, the statewide measures are incompatible with COVID-19 guidance from the CDC. The CDC recognizes that the impact of COVID-19 is different in rural counties compared to population-dense cities. *See* <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/other-at-risk-populations/rural-communities.html> (last visited Nov. 28, 2020). Accordingly, the CDC recommends that “[e]ach rural community should assess their unique susceptibility and social vulnerability to COVID-19.” *Id.* Consistent with the CDC’s guidance, the Sheriff and Lyon County officials regularly evaluate responsive measures that are tailored to the unique population and rural environment in Lyon County. This approach is also consistent with legal authorities which recognize that the “question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement.” *See South Bay United Pentecostal Church, et al. v. Newsom, et al.*, No. 19A1044, 591 U.S. ___, ___, 2020 WL 2813056 at *2 (May 29, 2020); *see also Calvary Chapel*

Dayton Valley, 2020 WL 4251360, at *11 (Kavanaugh, J., dissenting). By contrast, the Governor’s sweeping statewide directives leave no room for disagreement or community-specific plans.

Third, and relatedly, it is well-established that the Constitution principally entrusts the health and safety of communities to the elected officials who are most accountable to the people and most knowledgeable about the needs of their communities. *See Marshall v. United States*, 414 U.S. 417, 427, 94 S. Ct. 700, 706 (1974); *Jacobson v. Massachusetts*, 197 U.S. 11, 38, 25 S. Ct. 358, 366 (1905).² Although the Constitution still should not go on a sabbatical during times of crisis, it makes sense to afford local officials with discretion and “a little practical wisdom,” *Terminiello v. City of Chicago*, 337 U.S. 1, 37, 68 S. Ct. 894, 911 (1949) (Jackson, J., dissenting), to address the needs of their communities. So, while Lyon County may enact neutral, narrowly-tailored public health measures *if necessary*, the Governor’s broad directives lack legitimacy because, among other things, Governor Sisolak is simply not accountable to the rural populations that realistically can do nothing to check his (mis)use of authority.

² In his concurrence, Justice Gorsuch opined that “*Jacobson* hardly supports cutting the Constitution loose during a pandemic,” as many Governors seem to suggest. *Roman Catholic Diocese of Brooklyn, supra*, at ___ (slip op. concurrence at 3-4). Although the situation in *Jacobson* was markedly different than the COVID-19 crisis, the Sheriff maintains that community-specific, public health measures are permissible when officials adhere to the Constitution and other legal authorities.

Thus, to summarize, Sheriff Hunewill wholly understands the compelling reasons that Calvary seeks a writ from this Court to halt the Governor’s unconstitutional edicts. Because Sheriff Hunewill has stood by his oath to uphold the Constitution and has done nothing to enforce the “emergency directives,” this Court should be cautious to distinguish the State Respondents from the Sheriff.

B. Calvary’s Petition for Certiorari Raises Issues of Nationwide Importance

In *Roman Catholic Diocese of Brooklyn*, this Court granted injunctive relief on behalf of two religious institutions that challenged state executive orders that were unduly burdensome on places of worship. *See* 592 U.S. ___, ___ (slip op. at 2-6). In doing so, the Court held that the applicants were likely to prevail on the merits because Governor Cuomo’s edicts violate “the minimum requirement of neutrality” and are unable to satisfy strict scrutiny. *Id.* at ___ (slip op. at 2-4) (discussing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, 113 S. Ct. 2217, 2226-7 (1993)). Further, the Court determined that the challenged restrictions, if enforced, would cause irreparable harm because “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Id.* at ___ (slip op. at 5) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2689 (1976) (plurality opinion)). Finally, while the Court acknowledged the seriousness of COVID-19, it found that granting injunctive relief which vindicates the

First Amendment's guarantee of religious liberty would not harm the public interest. *Id.* at ___ (slip op. at 6).

The facts and applicable law in *Roman Catholic Diocese of Brooklyn* are remarkably similar to the matter currently before this Court, at least with respect to the State Respondents. *Roman Catholic Diocese of Brooklyn* differs from the instant case, however, because the petitioners there sought relief only against the state governor.

The inclusion of Sheriff Hunewill in this case raises interesting and important issues regarding the respective roles of state and local officials during a public health crisis. In an ideal world, state and local officials would work together in their spheres of governance for the betterment of their constituents. *See, e.g., Helvering v. Gerhardt*, 304 U.S. 405, 427, 58 S. Ct. 969, 978 (1938) (“The genius of our government provides that, within the sphere of constitutional action, the people – acting not through the courts but through their elected legislative representatives – have the power to determine as conditions demand, what services and functions the public welfare requires.”). But, in the modern era of divisive politics, conflict between state officials and local communities are at an all time high. As the recent election demonstrates, the political leanings and very way of life in rural communities and low-population areas is markedly different from metropolitan areas and big cities.

Because counties and municipal entities derive their authority from the state, *see, e.g., United Bldg. &*

Const. Trades Council of Camden Cty. & Vicinity v. Mayor & Council of City of Camden, 465 U.S. 208, 215, 104 S. Ct. 1020, 1026 (1984), local officials like Sheriff Hunewill are caught in the middle of the conflict between the constituents that they serve and the far-away, disinterested state officials who serve only the major population centers of their states. Such tensions are particularly problematic in the midst of a pandemic since power-seeking officials will not let a good crisis go to waste.

The instant case is further proof that “[i]n far too many places, for far too long, our first freedom has fallen on deaf ears.” See *Roman Catholic Diocese of Brooklyn, supra*, at ___ (slip op., Gorsuch, J., concurring at 3). Like many other law enforcement officials who uphold the Constitution as the supreme law of the land,³ Sheriff Hunewill firmly believes that “we may

³ As Justice Gorsuch correctly noted, the serious concerns in *Roman Catholic Diocese of Brooklyn* and the instant case are far from isolated. Though a comprehensive discussion is beyond the scope of the instant Response, sheriffs across the country are combatting the problem of unconstitutional governmental overreach. See, e.g., *California Sheriff Blasts ‘Extremely Hypocritical’ Gov. Newsom Over ‘Ridiculous’ Stay-at-Home Order*, NEWSWEEK, Dec. 7, 2020, <https://www.newsweek.com/california-sheriffs-against-gavin-newsom-covid-order-1552765>; *Who’s Coming to Thanksgiving? N.Y. Sheriffs Say It’s Not Their Business*, NEW YORK TIMES, Nov. 17, 2020, <https://www.nytimes.com/2020/11/17/nyregion/private-gatherings-sheriffs-backlash.html>; *US Sheriffs Rebel Against State Mask Orders Even as Covid-19 Spreads*, The Guardian, July 31, 2020, <https://www.theguardian.com/us-news/2020/jul/31/us-sheriffs-mask-orders-covid-19-blm>; *Why ‘Constitutionalist Sheriffs’ Won’t Enforce Coronavirus Restrictions*, WASHINGTON POST, Apr. 23, 2020, <https://www.washingtonpost.com/politics/>

not shelter in place when the Constitution is under attack.” (slip op., Gorsuch, J., concurring at 6). But, as this Court’s recent decisions confirm, defense of the Constitution is seemingly an uphill battle.

Sheriff Hunewill thus agrees with Calvary that certiorari should be granted so that this Court can further confirm that the Constitution and the precious rights contained therein are no less important in the midst of public health concerns. In light of the growing tensions between state and local officials, Sheriff Hunewill also submits that the instant case presents an excellent opportunity to uphold the authority of local officials and law enforcement to follow the Constitution, even when doing so is contrary to the edicts of state officials.

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CONCLUSION

In summation, the recent decision in *Roman Catholic Diocese of Brooklyn* further supports Sheriff Hunewill’s opposition to statewide directives that are neither neutral nor narrowly tailored. Given the similarities between Governor Cuomo’s executive orders and Governor Sisolak’s directives, this Court also has

2020/04/23/why-constitutional-sheriffs-wont-enforce-coronavirus-restrictions/; *Washington Sheriff Refuses to Enforce Governor’s Stay-at-Home Order, Says He’s ‘Worried About the Economy,’* NEWSWEEK, Apr. 22, 2020, <https://www.newsweek.com/washington-sheriff-refuses-enforce-governors-stay-home-order-says-hes-worried-about-economy-1499643>.

ample grounds to consider and grant the relief that Calvary requests.

That being said, this Court should exercise caution to ensure that Sheriff Hunewill is not unduly restricted should Lyon County officials determine that local measures are necessary to protect the residents of Lyon County. Further, because of the tensions between the State Respondents and the Sheriff, this Court should use the instant case as an opportunity to confirm that adherence to the Constitution is proper even in the face of state officials who want to retire the Constitution and its important principles.

Respectfully submitted,

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