

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*

**BRIEF AMICI CURIAE
ISLAM AND RELIGIOUS FREEDOM
ACTION TEAM AND JEWISH COALITION
FOR RELIGIOUS LIBERTY
IN SUPPORT OF PETITIONER**

HUNTON ANDREWS KURTH LLP

ERICA N. PETERSON	ELBERT LIN
MICHAEL C. DINGMAN	<i>Counsel of Record</i>
2200 Pennsylvania Ave. NW	951 East Byrd Street
Washington, DC 20037	East Tower
epeterson@HuntonAK.com	Richmond, VA 23219
mdingman@HuntonAK.com	elin@HuntonAK.com
Phone: (202) 955-1500	Phone: (804) 788-8200

KATY BOATMAN
600 Travis, Suite 4200
Houston, Texas 77002
kboatman@HuntonAK.com
Phone: (713) 220-4200

Counsel for Amici Curiae

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTRODUCTION AND INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT.....	3
REASONS FOR GRANTING CERTIORARI	4
I. This Court’s Review Is Necessary to Ensure Religious Freedom for Americans of All Faiths.....	4
II. Nevada’s Directives Violate the Free Exercise Clause.....	16
A. Strict Scrutiny Analysis Applies to Nevada’s Directives.....	16
B. Nevada’s Directives Fail to Satisfy Strict Scrutiny.....	20
CONCLUSION	23

TABLE OF AUTHORITIES

	Page(s)
FEDERAL CASES	
<i>Agudath Israel of America v. Cuomo,</i> ____ S. Ct. ____ (Nov. 25, 2020)	19
<i>Calvary Chapel Dayton Valley v.</i> <i>Sisolak,</i> 591 U.S. ____ (Alito, J., dissenting)	22
<i>Church of the Lukumi Babalu Aye, Inc.</i> <i>v. Hialeah,</i> 508 U.S. 520 (1993).....	16, 20, 21
<i>Roman Catholic Diocese of Brooklyn v.</i> <i>Cuomo,</i> 592 U.S. ____ (2020)	<i>passim</i>
<i>The Florida Star v. B.J.F.</i> , 491 U.S. 524 (1989) (Scalia, J., concurring in part and concurring in judgment)	21
<i>Trinity Lutheran Church of Columbia,</i> <i>Inc. v. Comer,</i> 137 S. Ct. 2012 (2017)	18, 20
STATE STATUTES	
NRS 202.595	18
RULES	
Rule 37(a).....	1

OTHER AUTHORITIES

Abram Brown, <i>Virtual Prayer: How Synagogues Are Worshipping—And Conducting Funerals—In The Coronavirus Age</i> , Forbes (March 24, 2020), https://www.forbes.com/sites/abrambrown/2020/03/23/virtual-prayer-how-synagogues-are-worshipping-and-conducting-funerals-coronavirus-minyan/?sh=38ca3e053730	7
Baruch S. Davidson, <i>Will the synagogue ever go virtual? Why a Skype minyan is not okay</i> , https://www.chabad.org/library/article_cdo/aid/1783077/jewish/Will-the-Synagogue-Ever-Go-Virtual.htm	6
Brett Harvey & Howard Slugh, <i>Orthodox Jews face collateral damage from unbalanced COVID-19 measures</i> (July 10, 2020), https://religionnews.com/2020/07/10/orthodox-jews-face-collateral-damage-from-unbalanced-covid-19-measures/ (last visited Dec. 8, 2020).....	18

Chelcey Adami & Jenny Kane, <i>Worship during COVID-19: How Cheez-Its, ZOOM and blue tape are the new norms in faith</i> , Reno Gazette Journal (Aug. 13, 2020) https://www.rgj.com/story/news/2020/08/13/nevada-covid-19-impact-places-of-worship-online-church-services/5446856002/	13
Connor Smithee, <i>Religious organizations adapt to COVID restrictions</i> , Spartan News Room (Nov. 20, 2020), https://news.jrn.msu.edu/2020/11/religious-organizations-adapt-to-covid-restrictions/	10
<i>Coronavirus Preventing You From Saying Kaddish? We Can Help</i> , https://www.chabadofsummerlin.com/tools/feedback_cdo/aid/4677070/jewish/Coronavirus-Quarantine-Kaddish-Service.htm	7
Darul Qasim, <i>An Islamic Prescription For Holistically Treating A Global Pandemic Crisis</i> , https://darulqasim.org/medical-practitioner-statement/ (last visited Dec. 1, 2020)	8

- David A.M. Wilensky, *In-person Shabbat services? Some Conservative synagogues say yes*, The Jewish News of N. Calif. (Nov. 11, 2020), <https://www.jweekly.com/2020/11/11/in-person-shabbat-services-some-conservative-synagogues-say-yes/>.....15
- Eliza Griswold, *An Imam Leads His Congregation Through the Pandemic*, The New Yorker (Apr. 8, 2020)5, 10
- Faith Groups In St. Louis Region Continue Virtual And Social Distanced Services As COVID Cases Spike*, St. Louis Pub. Radio (Nov. 19, 2020), <https://news.stlpublicradio.org/2020-11-19/faith-groups-in-st-louis-region-continue-virtual-and-social-distanced-services-as-covid-cases-spike>5, 8, 11
- James Estrin, *Staying Apart, But Praying Together*, The New York Times (Nov. 15, 2020), <https://www.nytimes.com/2020/11/15/nyregion/nyc-coronavirus-religious-worship.html>.....9, 11, 14, 15
- John Przybys, *Las Vegas houses of worship adjust to latest COVID mandate*, Las Vegas Review-Journal (Nov. 26, 2020)12

Rabbi Daniel Kohn, <i>The Torah Service</i> , https://www.myjewishlearning.com/article/the-torah-service/	6
Rabbi Yirmiyahu Kaganoff, <i>Where Should I Pray?</i> , https://www.yeshiva.co/midrash/38708	6
Rose S. Aslan, <i>What is the Significance of Friday Prayers in Islam?</i> , The Conversation (Mar. 19, 2019), https://theconversation.com/what-is-the-significance-of-friday-prayers-in-islam-113702	5
Rules for Jummah at Masjid Ibrahim, <i>The Masjid Ibrahim</i> , https://www.themasjidibrahim.com/ (last visited Dec. 1, 2020).....	12
Safety Protocols, Chabad Central-Boca Raton, https://www.chabadcentralboca.com/templates/articlecco_cdo/aid/4917461/jewish/Safety-Protocols.htm (last visited Dec. 1, 2020)	14
<i>Shabbat</i> , CHABAD.ORG, https://www.chabad.org/library/article_cdo/aid/1159378/jewish/Electricity-on-Shabbat.htm	6

INTRODUCTION AND INTEREST OF *AMICI CURIAE*¹

Amici curiae are the Religious Freedom Institute’s Islam and Religious Freedom Action Team (“IRF”) and the Jewish Coalition for Religious Liberty (“JCRL”).

IRF amplifies Muslim voices on religious freedom, seeks a deeper understanding of the support for religious freedom inside the teachings of Islam, and protects the religious freedom of Muslims. IRF engages in research, education, and advocacy on core issues like religious freedom and the freedom to live out one’s faith. IRF translates Muslim resources on religious freedom, fosters inclusion of Muslims in religious freedom work both in places where Muslims are a majority and where they are a minority, and partners with the Religious Freedom Institute’s other teams in advocacy. IRF believes that the Islamic faith teaches Muslims to want for others what they want

¹ All parties, including counsel for Respondent, received timely notice of the intent to file this brief under Rule 37(a). All parties consented to the filing of this brief. This brief was not authored in whole or in part by counsel for any party. A party or a party’s counsel did not contribute money that was intended to fund preparing or submitting this brief. No person, other than *amici curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

for themselves, and that supporting Calvary Chapel in this case is in the interest of the common good.

JCRL is an incorporated group of rabbis, lawyers, and professionals who practice Judaism and are committed to defending religious liberty. JCRL aims to foster cooperation between Jewish and other faith communities in the public square. Representing members of the legal profession and as adherents of a minority religion, JCRL has a unique interest in ensuring that the First Amendment protects the diversity of religious viewpoints and practices in the United States.

As organizations dedicated to protecting religious freedom, *amici* have a significant interest in ensuring that States like Nevada are not able to use crisis conditions to impose unjustified differential treatment on houses of worship. Many synagogues, mosques, and other houses of worship have been subject to restrictions similar to those challenged here. *Amici* write to offer their perspective on the far-reaching consequences of the lower court's decision for people of all faiths and to urge this Court to ensure all Americans—including religious minorities—have the right to practice their religion free from discrimination.

Amici urge the Court to grant certiorari to make clear that even crisis conditions cannot justify such arbitrary and unequal treatment of religious institutions. *Amici* take no position on the wisdom of

the overall percentage restriction or any other COVID-prevention measure; *amici* seek only to ensure that, consistent with the Constitution, such measures are not applied unequally to houses of worship.

SUMMARY OF ARGUMENT

This Court's review is necessary to ensure that all Americans can practice their religion free from discrimination. If allowed to operate, Nevada's Directives will negatively affect houses of worship, including mosques and synagogues, in the same way that it has affected Calvary Chapel. Gathering with others for worship and prayer is important in many religions, including Islam and Judaism. Nevada's limitations on such gatherings will harm those communities.

Further, many mosques and synagogues have taken health and safety precautions similar to those taken at Calvary Chapel, demonstrating that appropriately conducted religious gatherings are no more dangerous than similar secular gatherings that Nevada has treated more favorably. In fact, religious gatherings are likely safer since social distancing is easier when sitting than when walking around a casino or gym.

Nevada's restrictions on religious gatherings violate the Free Exercise Clause. These Directives plainly favor secular institutions by allowing them to

admit up to 50% of capacity while limiting houses of worship to a hard cap that applies regardless of capacity. As such, the Directives are not neutral or generally applicable and must satisfy strict scrutiny. Although the government undoubtedly has an interest in preventing the spread of COVID-19, its Directives are not narrowly tailored to serve that interest. They impose absolute restrictions on houses of worship that do not depend on the size of the building or the health and safety measures taken to protect visitors. Meanwhile, they give favorable “soft cap” treatment to secular businesses where the spread of COVID-19 is just as likely, if not more so. The State’s actions are not tailored to serve the State’s interest.

REASONS FOR GRANTING CERTIORARI

I. This Court’s Review Is Necessary to Ensure Religious Freedom for Americans of All Faiths.

As the petition makes clear, discriminatory treatment of churches in COVID-19 orders is a nationwide problem. Pet. 38–39. The problem affects not only churches, but other houses of worship as well, including mosques and synagogues.

The petition explains how restrictions on gatherings have a significant effect on churches because of the importance that Christianity places on coming together for worship, prayer, and scriptural

teaching. Pet. 8. Gathering together for prayer and worship is also important in Islam and Judaism. “The Prophet Muhammad spoke of the value of praying in congregation rather than individually, promising spiritual rewards, such as answered prayers and forgiveness for one’s sins. Attending Friday prayers, the Prophet said, is equivalent to one entire year of praying and fasting alone.”² Ghazala Hayat, the chairperson of the public affairs committee for the Islamic Foundation of Greater St. Louis, explained that building community by gathering and praying is important in the Islamic faith.³ As Idris Abdul-Zahir, an imam at Masjidullah mosque in West Oak Lane, Philadelphia also explained, “[i]n Islam, it’s obligatory for men to gather on Friday to pray.”⁴

² Rose S. Aslan, *What is the Significance of Friday Prayers in Islam?*, The Conversation (Mar. 19, 2019), <https://theconversation.com/what-is-the-significance-of-friday-prayers-in-islam-113702>.

³ Marianne Lewis-Thompson, *Faith Groups In St. Louis Region Continue Virtual And Social Distanced Services As COVID Cases Spike*, St. Louis Pub. Radio (Nov. 19, 2020), <https://news.stlpublicradio.org/2020-11-19/faith-groups-in-st-louis-region-continue-virtual-and-social-distanced-services-as-covid-cases-spike>.

⁴ Eliza Griswold, *An Imam Leads His Congregation Through the Pandemic*, The New Yorker (Apr. 8, 2020), <https://www.newyorker.com/news/on-religion/an-imam-leads-his-congregation-through-the-coronavirus-pandemic>.

In-person worship is likewise important to many aspects of Judaism. During Shabbat services and holidays, many Jews read from both the Torah and the books of Prophets.⁵ Even if an online service could replace these rituals, Orthodox Jews do not use electricity on Shabbat.⁶

Jewish law also recognizes public prayer as an important part of the faith. “[T]he central and primary function of any synagogue is to facilitate communal prayer, with the accompanying Torah readings.”⁷ “The prayers of the community are always listened to. Even when there are sinners among them, the prayers of the community are never viewed by Hashem with disfavor. Therefore, a person should always join with the community, and he should not pray by himself any time that he can pray with the *tzibur* [community].”⁸

⁵ Rabbi Daniel Kohn, *The Torah Service*, <https://www.myjewishlearning.com/article/the-torah-service/>.

⁶ Aryeh Citron, *Electricity on Shabbat*, CHABAD.ORG, https://www.chabad.org/library/article_cdo/aid/1159378/jewish/Electricity-on-Shabbat.htm.

⁷ Baruch S. Davidson, *Will the synagogue ever go virtual? Why a Skype minyan is not okay*, https://www.chabad.org/library/article_cdo/aid/1783077/jewish/Will-the-Synagogue-Ever-Go-Virtual.htm.

⁸ Rabbi Yirmiyahu Kaganoff, *Where Should I Pray?*, <https://www.yeshiva.co/midrash/38708>.

For example, certain portions of public prayer or communal reading of the Torah cannot occur without ten Jewish males over the age of 13, a *minyan*, present.⁹ One important prayer that cannot be recited without a *minyan* is the mourner's Kaddish, a prayer recited on behalf of close family members who have died. Because COVID-19 and government limitations are restricting public prayer, and preventing people from saying Kaddish for their loved ones in Nevada, Chabad of Desert Shores in Las Vegas offers to connect mourners with "people around the world" who can say Kaddish on their behalf while following "the guidelines of all health and rabbinic authorities."¹⁰

At the same time, both Islam and Judaism place importance on refraining from putting others at risk. In fact, religious leaders have been vocal about the need to take precautions to protect against the spread of the virus since the crisis began. In March, an organization of Muslim healthcare workers issued a

⁹ Rabbi Shmuel Kogan, *Why Are Ten Men Needed for a Minyan?*, CHABAD.ORG, <https://bit.ly/2YmhEUm>; Abram Brown, *Virtual Prayer: How Synagogues Are Worshipping—And Conducting Funerals—in The Coronavirus Age*, Forbes (March 24, 2020), <https://www.forbes.com/sites/abrambrown/2020/03/23/virtual-prayer-how-synagogues-are-worshipping-and-conducting-funerals-coronavirus-minyan/?sh=38ca3e053730>.

¹⁰ *Coronavirus Preventing You From Saying Kaddish? We Can Help*, https://www.chabadofsummerlin.com/tools/feedback_cdo/aid/4677070/jewish/Coronavirus-Quarantine-Kaddish-Service.htm.

statement about the need to apply both medical and religious knowledge to address the ongoing crisis.¹¹ Rabbi Feder of Temple Israel in St. Louis explained in reference to COVID-19 protections, “[a]s Jews or people of faith, our overarching priority is *pikuach nefesh*, which is the saving of life. We are going to do everything we can to make sure that every life is given value and every life is protected as much as possible.”¹² A leader at the Islamic Foundation of Greater St. Louis expressed a similar sentiment: “[w]e are commanded to take care of our health and listen to experts. And also most important, this way we are also protecting other people. That’s the basic tenet of our faith, that you have to protect other people. You cannot hurt anybody because of our actions.”¹³ The imam at the Dar Al-Dawah mosque in Queens

¹¹ Darul Qasim, *An Islamic Prescription For Holistically Treating A Global Pandemic Crisis*, <https://darulqasim.org/medical-practitioner-statement/> (last visited Dec. 1, 2020).

¹² Marianne Lewis-Thompson, *Faith Groups In St. Louis Region Continue Virtual And Social Distanced Services As COVID Cases Spike*, St. Louis Pub. Radio (Nov. 19, 2020), <https://news.stlpublicradio.org/2020-11-19/faith-groups-in-st-louis-region-continue-virtual-and-social-distanced-services-as-covid-cases-spike>.

¹³ Marianne Lewis-Thompson, *Faith Groups In St. Louis Region Continue Virtual And Social Distanced Services As COVID Cases Spike*, St. Louis Pub. Radio (Nov. 19, 2020), <https://news.stlpublicradio.org/2020-11-19/faith-groups-in-st-louis-region-continue-virtual-and-social-distanced-services-as-covid-cases-spike>.

explained the importance of these procedures, saying, “[i]n our religion, we have to keep our soul and our body healthy. We have to respect the religion and we have to respect our neighbors and keep them safe, whether they are Muslim or not.”¹⁴

The petition shows that many favored institutions under the Directives, however, are not taking precautions to prevent the spread of COVID-19, such as enforcing mask requirements. These precautions are perhaps by their nature more difficult to implement at these institutions than at houses of worship. After all, religious services typically involve stationary activities, such as quiet reflection, prayer, and sometimes bowing or kneeling. And churches can easily instruct households to space out in pews, synagogues can ensure distance between seats while refraining from singing, and mosques can place tape on the floor to space out prayer rugs. Similar precautions are more difficult to take when, for example, patrons are huddled around a blackjack table, drinking alcohol, or walking from machine to machine at a gym. But that is all the more reason that the Directives’ distinction between houses of worship and these secular institutions does not serve the goal of preventing the spread of COVID-19.

¹⁴ James Estrin, *Staying Apart, But Praying Together*, The New York Times (Nov. 15, 2020), <https://www.nytimes.com/2020/11/15/nyregion/nyc-coronavirus-religious-worship.html>.

A few examples illustrate that houses of worship nationwide are in fact taking precautions to prevent the spread of COVID-19 that favored secular facilities in Nevada are not. For example, in Philadelphia, Masjidullah mosque's large space allows it to maintain at least six feet between congregants.¹⁵ The mosque also advises congregants to take their temperature before attending prayer, disperse right away after prayers, avoid handshakes and hugs, and stay home in favor of watching a livestream if they are sick.¹⁶ The Islamic Society of Greater Lansing implemented contract tracing, social distancing, and temperature checks when it reopened as of November 20, 2020.¹⁷

The Dar Al-Dawah mosque in Queens has voluntarily limited the number of people in attendance to allow social distancing, and attendees

¹⁵ Eliza Griswold, *An Imam Leads His Congregation Through the Pandemic*, The New Yorker (Apr. 8, 2020), <https://www.newyorker.com/news/on-religion/an-imam-leads-his-congregation-through-the-coronavirus-pandemic>.

¹⁶ Eliza Griswold, *An Imam Leads His Congregation Through the Pandemic*, The New Yorker (Apr. 8, 2020), <https://www.newyorker.com/news/on-religion/an-imam-leads-his-congregation-through-the-coronavirus-pandemic>.

¹⁷ Connor Smithee, *Religious organizations adapt to COVID restrictions*, Spartan News Room (Nov. 20, 2020), <https://news.jrn.msu.edu/2020/11/religious-organizations-adapt-to-covid-restrictions/>.

bring their own prayer rugs that they set up in designated spots, six feet apart. Since June, the mosque has added extra sessions of Friday prayers, called *jummah*, so that all who want to pray can do so in person without too many people congregating at one time. The mosque also requires masks, checks temperatures at the door, and dispenses hand sanitizer.¹⁸

The Islamic Foundation of Greater St. Louis, which operates the Daar-ul-Islam and Masjid Bilal mosques, has implemented temperature checks, mask requirements, and social distancing at *jummah*. Attendees must bring their own prayer rug and are encouraged not to attend if they are older than 65 or experiencing symptoms.¹⁹

Nevada mosques that have continued to operate under the fifty-person cap have adopted similar health and safety protocols. Due to the Governor's Directives, Masjid Ibrahim in Las Vegas may allow

¹⁸ James Estrin, *Staying Apart, But Praying Together*, The New York Times (Nov. 15, 2020), <https://www.nytimes.com/2020/11/15/nyregion/nyc-coronavirus-religious-worship.html>.

¹⁹ Marianne Lewis-Thompson, *Faith Groups In St. Louis Region Continue Virtual And Social Distanced Services As COVID Cases Spike*, St. Louis Pub. Radio (Nov. 19, 2020), <https://news.stlpublicradio.org/2020-11-19/faith-groups-in-st-louis-region-continue-virtual-and-social-distanced-services-as-covid-cases-spike>.

only fifty individuals to attend Friday *jummah* services even though it can accommodate just over 100 people while maintaining social distancing and regularly hosts hundreds more outside of pandemic conditions.²⁰ The mosque states on its website that visitors must provide their contact information upon entry and wear a mask at all times while inside. Once inside, each person will be directed to a designated and pre-marked spot inside the prayer hall where he or she is to remain during services.²¹ The mosque has also discontinued service of food and beverages.²²

The Northern Nevada Muslim Center too has altered its traditional practices in order to protect the health of its attendees. The mosque requires attendees to bring their own mask and prayer rug and takes attendees' temperatures before entry. The mosque also distances those who are praying. It has discontinued its usual practice of having people pray "shoulder to shoulder and foot to foot," and has used

²⁰ Rules for Jummah at Masjid Ibrahim, The Masjid Ibrahim, <https://www.themasjidibrahim.com/> (last visited Dec. 1, 2020); John Przybys, *Las Vegas houses of worship adjust to latest COVID mandate*, Las Vegas Review-Journal (Nov. 26, 2020), <https://www.reviewjournal.com/life/religion/las-vegas-houses-of-worship-adjust-to-latest-covid-mandate-2191746/>.

²¹ Rules for Jummah at Masjid Ibrahim, The Masjid Ibrahim, <https://www.themasjidibrahim.com/> (last visited Dec. 1, 2020).

²² Rules for Jummah at Masjid Ibrahim, The Masjid Ibrahim, <https://www.themasjidibrahim.com/> (last visited Dec. 1, 2020).

blue tape to space people who are praying six feet apart. The imam also delivers his prayers and sermons from behind a plastic face shield. And those who attend are asked to wash at home since Muslims are supposed to wash before praying.²³

Synagogues have taken many of these same precautions. Young Israel Aish Las Vegas, the largest Orthodox synagogue in Nevada, has cut its service times in half, opens windows and doors during services, hosts drive-through instead of in-person social events on weekdays, and requires attendees to wear masks unless distanced from others.²⁴ Chabad of Desert Shores in Las Vegas requires masks and social distancing during services, even at reduced capacity.²⁵

The Jewish Center in Manhattan allows only 60 people inside its sanctuary that ordinarily accommodates more than 500 people. Attendees also

²³ Chelcey Adami & Jenny Kane, *Worship during COVID-19: How Cheez-Its, ZOOM and blue tape are the new norms in faith*, Reno Gazette Journal (Aug. 13, 2020) <https://www.rgj.com/story/news/2020/08/13/nevada-covid-19-impact-places-of-worship-online-church-services/5446856002/>.

²⁴ Rabbi Yitz Wyne, Young Israel Aish Las Vegas, <https://www.yiaishlv.org/>.

²⁵ Chabad of Summerlin, Schedule of Synagogue Services (last accessed Dec. 9, 2020), https://www.chabadofsummerlin.com/templates/articlecco_cdo/article_id/248218/jewish/Schedule-of-Synagogue-Services.htm.

must preregister online, answer a coronavirus exposure survey, and have their temperature taken at the door. The synagogue also moves its shortened services outside when the weather permits.²⁶ For Rosh Hashanah, Boca Beach Chabad in Florida planned to hold its services at a local cultural center so that it could practice social distancing with people sitting six feet apart. Chabad of Central Boca Raton's safety protocols include requiring those in attendance to wear masks, advising those who are sick or have health conditions that put them at greater risk to stay home, having attendees sit six feet apart, and requiring attendees to register before attending.²⁷

Many Jewish congregations in northern California have been holding outdoor services while implementing social distancing and other safety precautions. In early November, Beth Sholom in San Francisco started holding one-hour services outside. Attendees were required to register before attending, wear masks, affirm that they had no COVID-19 symptoms, and have their temperature taken upon

²⁶ James Estrin, *Staying Apart, But Praying Together*, The New York Times (Nov. 15, 2020), <https://www.nytimes.com/2020/11/15/nyregion/nyc-coronavirus-religious-worship.html>.

²⁷ Safety Protocols, Chabad Central-Boca Raton, https://www.chabadcentralboca.com/templates/articlecco_edo/aid/4917461/jewish/Safety-Protocols.htm (last visited Dec. 1, 2020).

entry. Chairs for the 30 people who attended were set up far apart from one another. Congregation B'nai Shalom in Walnut Creek and Temple Beth Abraham in Oakland have held services with similar precautions.²⁸

Newspaper reports indicate that other religious institutions take similar precautions. According to the New York Times, the Hindu Temple Society of North America, also known as Ganesh Temple, in Queens continues to perform services with its priests wearing surgical masks and plastic face guards. Worshipers are screened at the door by a wall-mounted infrared scanner that checks their temperature and whether they are wearing a mask. They are no longer allowed to touch the shrines of deities or hand offerings directly to the priest.²⁹

Some mosques and synagogues have decided to remain closed during the pandemic and opted instead for virtual services or other online outreach. And some parishioners will choose to stay home even if their

²⁸ David A.M. Wilensky, *In-person Shabbat services? Some Conservative synagogues say yes*, The Jewish News of N. Calif. (Nov. 11, 2020), <https://www.jweekly.com/2020/11/11/in-person-shabbat-services-some-conservative-synagogues-say-yes/>.

²⁹ James Estrin, *Staying Apart, But Praying Together*, The New York Times (Nov. 15, 2020), <https://www.nytimes.com/2020/11/15/nyregion/nyc-coronavirus-religious-worship.html>.

house of worship is open because of age, health conditions, or personal preference. But even those who choose not to worship communally during this time have an interest in ensuring that houses of worship are not subject to disfavored treatment on the basis of religion. Government discrimination against religion in one area tends to provide cover for discrimination in other areas that affect all religious adherents. If crisis conditions can justify arbitrary restrictions on religion, it opens the door to arbitrary restrictions when there is no crisis. Further, Islam and Judaism emphasize the need to protect the common good, and the protection of constitutional rights even in times of crisis serves the common good.

II. Nevada's Directives Violate the Free Exercise Clause.

A. Strict Scrutiny Analysis Applies to Nevada's Directives.

Even during “times of crisis,” the First Amendment guarantees, “[a]t a minimum,” that government officials cannot treat the exercise of religion worse than analogous secular activities, unless that treatment is narrowly tailored to serve a compelling government interest. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. ___, 1 (2020) (Gorsuch, J. concurring) (citing *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993)). Although courts “should respect the judgment of those with special expertise and responsibility,” that does

not eliminate the need for “a serious examination” of conduct which “strike[s] at the very heart of the First Amendment’s guarantee of religious liberty.” *Roman Catholic Diocese*, 592 U.S. at 5–6 (2020). In short, government actions cannot be neutral if they “single out houses of worship for especially harsh treatment.” *Id.*, 592 U.S. at 2–3.

Governor Sisolak’s Directives do exactly that. Directive 021 limited religious communities to fifty persons for all indoor services. Pet. at 58a. Meanwhile, secular institutions such as casinos, amusement parks, gyms, and water parks could host 50% of occupancy limits. Pet. at 80a–81a. Directive 033 replaced Directive 021 and allowed places of worship to host the lesser of 250 people or 50% occupancy limit, Pet. at 99a–101a, while not imposing any hard cap on secular facilities. Directive 035, which controls at the time of this filing, reduced the allowable numbers again—houses of worship are now limited to the lesser of fifty people or 25% occupancy. State of Nevada Executive Department, Declaration of Emergency for Directive 035 (Nov. 23, 2020), at § 7. In other words, no matter how large the house of worship is or what precautions it takes, under the current Directive it is prohibited from hosting services for more than fifty people. Although the precise numbers have fluctuated, the flagrant and unequal treatment of religious institutions remains. And these limitations only apply to “services”—a word with clear religious import—meaning the houses of worship could exceed

those occupancy limits when they host other, non-religious activities.

Non-compliance with the Governor’s Directives brings a risk of criminal prosecution. See State of Nevada Executive Department, Declaration of Emergency for Directive 003 (Mar. 20, 2020). A violator can be charged with performing an act in willful or wanton disregard of safety under NRS 202.595—up to a Class C felony accompanied by up to five years in prison or a \$10,000 fine—or with violating “any other applicable statute, ordinance, or regulation.” All law enforcement agencies are authorized to enforce the Directives, and the Nevada Attorney General is given concurrent jurisdiction to prosecute violations. See *ibid.*

Direct criminalization of worship almost always violates the Free Exercise Clause. *Cf. Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017) (holding that Missouri had violated the Free Exercise Clause even though “the Department has not criminalized the way Trinity Lutheran worships”).

Religious minorities are particularly at risk of unequal treatment during a crisis.³⁰ These

³⁰ See, e.g., Brett Harvey & Howard Slugh, *Orthodox Jews face collateral damage from unbalanced COVID-19 measures* (July 10, 2020), <https://religionnews.com/2020/07/10/orthodox-jews-face-collateral-damage-from-unbalanced-covid-19-measures/>

communities are vulnerable to scapegoating and abuse in times of fear and uncertainty. See Brief of the Muslim Public Affairs Council, et al. as *Amici Curiae* Supporting Applicants at 3–9, *Agudath Israel of America v. Cuomo*, __ S. Ct. __ (Nov. 25, 2020) (recounting episodes of scapegoating and violence targeted at religious minorities in the United States, including Muslims, Jews, Sikhs, and Jehovah’s Witnesses). Even when the immediate crisis has abated, resultant discrimination may continue for years. See *id.* at 8.

As this Court recently held, it is “troubling” when “hundreds of people” may congregate in a secular building while “a nearby church[,] synagogue[,”] or mosque is limited to 10 or 25 people regardless of its capacity. *Roman Catholic Diocese*, 592 U.S. at 3 (quotations omitted). Although not as draconian as New York’s restrictions, Nevada’s Directives nonetheless “single out houses of worship for especially harsh treatment.” *Id.* at 2–3. A casino that normally hosts 1,000 people is limited to 500. A synagogue down the street that normally hosts 1,000 people is limited to 250. That difference cannot be explained by the health and safety measures each institution employs. *Compare supra* at I with Pet. at 4–5.

(last visited Dec. 8, 2020) (describing how Jewish Americans “have faced a slew of anti-Semitic attacks”).

It is often said that unequal restrictions on the houses of worship are justified by the nature of the prayer services themselves, i.e., “large groups of people gathering, speaking, and singing in close proximity indoors for extended periods of time.” *Roman Catholic Diocese*, 592 U.S. at 30 (Sotomayor, J. dissenting). One need not, however, be a casino habitué to know that players, often with the aid of alcohol, regularly exclaim in joy or in sorrow after a hand of poker or a spin of the roulette wheel. Even assuming that all houses of worship engage in “speaking, and singing in close proximity indoors for extended periods of time,” *ibid.*, rather than silent prayer and quiet reflection, such behavior simply does not justify worse treatment than Nevada’s casinos. Furthermore, as discussed *supra*, houses of worship have implemented measures to ensure attendees do not spend any time “in close proximity” to one another.

To put the matter plainly: if these houses of worship renounced their faiths and hosted self-help seminars instead of services, their attendance could multiply. That is far from neutral treatment. *Cf. Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017).

B. Nevada’s Directives Fail to Satisfy Strict Scrutiny.

When a regulation is not neutral and generally applicable, it “must be justified by a compelling governmental interest and must be narrowly tailored

to advance that interest.” *Church of the Lukumi Babalu Aye*, 508 U.S. at 531–32. “[S]temming the spread of COVID-19 is unquestionably a compelling interest.” *Roman Catholic Diocese*, 592 U.S. at 4.

But Nevada’s Directives are “underinclusive for those ends,” which demonstrates that they are not narrowly tailored. *Church of the Lukumi Babalu Aye*, 508 U.S. at 547 (quoting *The Florida Star v. B.J.F.*, 491 U.S. 524, 545 (1989) (Scalia, J., concurring in part and concurring in judgment)). If stemming the spread of COVID-19 is the goal, then the Directives should be equally concerned with “other conduct producing substantial harm or alleged harm of the same sort,” *id.* at 546–47, like large gatherings at casinos and gyms. That they are not undermines Nevada’s claim that these measures are narrowly tailored to serve a compelling interest.

Nevada’s Directives are also underenforced against secular businesses, further demonstrating that the State’s unequal treatment of churches is not narrowly tailored to combat the spread of COVID-19. Directive 024 imposes a state-wide mask mandate unless an individual is seated and actually eating or drinking. State of Nevada Executive Department, Declaration of Emergency for Directive 024 (June 24, 2020), at § 5. But photos from the casinos show people not sitting, not eating, not drinking, not wearing masks, and certainly not distancing. Pet. at 4–5. Meanwhile, Directive 035 reiterates that all participants at houses of worship must wear masks,

even with capacity restrictions and social distancing between households. Declaration of Emergency for Directive 035, at § 7. The State appears to find its own interest less compelling when enforcing its Directives on commercial institutions.

To be clear, *amici* take no position as to the wisdom of various measures to stem the spread of the virus. But, because the State allows thousands to congregate in secular facilities without enforcing mask-wearing or social distancing, it cannot now claim “a compelling interest in limiting religious gatherings” without regard for “the size of the facility and the measures adopted to prevent the spread of the virus.” *Calvary Chapel Dayton Valley v. Sisolak*, 591 U.S. ___, at 9 (Alito, J., dissenting). Nevada has failed to show that its limitations on religious services are seriously aimed at combating the spread of COVID-19, particularly in light of its failure to enforce a less restrictive and neutral method of doing so against favored secular gatherings.

In addition, the Directives are “far more restrictive” than regulations in other jurisdictions. *Roman Catholic Diocese*, 592 U.S. at 4. Utah and Arizona, for example, have exempted houses of worship from their public health orders altogether, while encouraging them to “implement protocols to mitigate the spread of COVID-19.” Utah Department of Health, Executive Director’s Office, State Public Health Order 2020-22: Temporary Statewide Covid-19 Restrictions (2020), at § 5; Arizona Department of

Health Services, *Guidelines for Places of Worship*. Louisiana limits restaurants to 50% capacity while allowing churches to fill to 75% capacity “or the number of people who can physically distance with at least six feet between each immediate household.” State of Louisiana Executive Department, Proclamation No. 168 JBE 2020: COVID-19 Public Health Emergency Phase 2 (2020), at § 2(D)(4).

Even attendance restrictions may be narrowly tailored if “tied to the size of the church[,] synagogue[,]” or mosque. *Roman Catholic Diocese*, 592 U.S. at 4. But Nevada’s insistence on arbitrary hard limits on houses of worship, regardless of the size of the house or the measures taken to mitigate the spread of COVID-19, while it allows throngs of gamblers to enter casinos unmasked, indicates that Nevada’s Directives are unconstitutional discrimination against religion.

CONCLUSION

The Petition should be granted.

Respectfully submitted,
HUNTON ANDREWS KURTH LLP
ELBERT LIN
Counsel of Record
951 East Byrd Street, East Tower
Richmond, Virginia 23219
elin@HuntonAK.com
Phone: (804) 788-8200

KATY BOATMAN
600 Travis, Suite 4200
Houston, Texas 77002
kboatman@HuntonAK.com
Phone: (713) 220-4200

ERICA N. PETERSON
MICHAEL C. DINGMAN
2200 Pennsylvania Ave. NW
Washington, DC 20037
epeterson@HuntonAK.com
mdingman@HuntonAK.com
Phone: (202) 955-1500

December 10, 2020 Counsel for *Amici Curiae*