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Demands to Treat Churches and Casinos Equally May Be Asking Too Much and Not Enough

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As U.S. jurisdictions have struggled to contain the spread of COVID-19, laws designed to stem transmission of the virus have placed substantial restrictions on religious worship. Religious services and other settings that bring large numbers of people together in close contact have emerged as potent vehicles of virus spread, and even as states have proceeded with reopening plans, many continue to mandate limits on the numbers who can gather for in-person services.

Three weeks ago, in *Calvary Chapel Dayton Valley v. Sisolak*, the Supreme Court denied an application for emergency injunctive relief brought by a rural Nevada church challenging Nevada's rules in federal court. In May Nevada's governor issued Directive 021 beginning the state's Phase Two reopening. The directive caps indoor worship services at 50 persons but allows casinos, bars, bowling alleys, gyms, and a number of other commercial businesses to operate at 50 percent of fire code capacity regardless of the total number of persons assembled. (Since the church's lawsuit was filed, Nevada has tightened some of these rules in counties with elevated virus transmission and has recently issued a new plan that provides for additional restrictions based on local conditions.) Calvary Chapel does not dispute Nevada's authority to restrict the number of indoor worshippers during a pandemic. Rather, its chief claim is that the governor's directive discriminates against religion in violation of the Free Exercise Clause. Several strong dissents joined by four of the Court's conservatives condemned the "blatant"[1] and "overt"[2] discrimination in Nevada's rules. The decision of Justice Roberts to side with the majority has perplexed many observers and led some to question the extent of the Court's commitment to the equal treatment norms that have taken center stage in many of its recent free exercise decisions.

[1] Calvary Chapel Dayton Valley v. Sisolak, No. 19A1070, slip op. at 7 (Alito, J., dissenting from denial of application for injunctive relief).
[2] *Id.* slip op. at 1 (Kavanaugh, J., dissenting from denial of application for injunctive relief).

Calvary Chapel's loss may, however, be at once both less and more significant than it initially appears. On the one hand, an application to the Court for emergency injunctive relief faces a demanding standard of justification, and the facts of the case do not fit as neatly into the Court's prior precedents as the dissents suggest. Calvary Chapel may ultimately win its case, though doing so will require some doctrinal elaboration or expansion. Thus, Calvary Chapel's loss may be largely a function of the type and timing of the relief it sought.

However, Calvary Chapel's loss may also reflect an uncomfortable feature of its claim. The church asks for no more than the same treatment as casinos, bars, and restaurants, but at this point it is far from clear that the rules that apply to these entities are sufficiently protective of the public interest. By linking its free exercise claim to the state's treatment of secular businesses, the church demands a scope for freedom that could result in significant loss of life if maximized by churches across the board. Calvary Chapel plans to follow additional strict standards for social distancing and hygiene, but its equal treatment rule would not require all these precautions.

Indeed, equal treatment may not actually be what Calvary Chapel wants. It certainly would not be seeking equal treatment if Nevada's rules for secular businesses were so stringent as to leave the church with little room to meet in person. Equal treatment is an increasingly important principle in the Court's free exercise jurisprudence, but other principles are also in play here. Last month, in *Our Lady of Guadalupe School v. Morrissey-Berru*, the Court began laying the groundwork for a potentially robust doctrine of church autonomy in matters linked to religious mission. This term, in *Fulton v. City of Philadelphia*, the Court will also consider whether it should revive protections for religious exercise where burdens are the result of nondiscriminatory state action. Nondiscrimination is not the only—and perhaps not even the best—way to analyze this dispute.

I. Calvary Chapel's Claims and Existing Free Exercise Doctrine

The dissenters in *Calvary Chapel* describe the discrimination in the governor's directive as obvious and decisive. In-person worship services are no more likely to spread COVID-19 than casinos, bars, gyms, and other favored businesses. Two months ago when the Court denied a similar application for emergency injunctive relief in *South Bay United Pentecostal Church v. Newsom*, Justice Roberts argued that California's rules treated worship services at least as well as other gatherings involving large groups of people congregating closely together for prolonged periods. Only dissimilar activities with less risk were treated more leniently. By contrast, in Nevada's rules, many comparable gatherings are governed by more lenient rules.

However, it is not as clear as the dissenters suggest that this disparate treatment violates established free exercise doctrine. Under the Court's precedents, laws burdening religious practice that are not neutral or generally applicable are subject to the strictest of scrutiny. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court clarified the meaning of neutrality and general applicability. Laws are not neutral when they target religious practice. They are not generally applicable when the state pursues public purposes only against religious entities or leaves unregulated substantial secular conduct that endangers its interests to an equal or greater degree. Justice Alito argues that the governor's directive is not neutral because it discriminates on its face. However, Nevada's rules are not designed to target and suppress religious practice like the laws in *Lukumi*. Justice Alito takes a step in *Calvary Chapel* that goes beyond settled doctrine.

It takes another step to conclude that Nevada's rules fail *Lukumi*'s standard of general applicability. The laws in *Lukumi* did not explicitly refer to religious practice but had the effect of enforcing the city's animal cruelty rules only against the animal sacrifice of the Santeria faith. Lower courts have frequently applied *Lukumi* to cases where the government makes secular exceptions to its rules but not exemptions for religious conduct that is no more of a threat to the state's interest. Writing for the Third Circuit in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, then-Judge Alito concluded that even a single exception for comparable secular conduct is enough to trigger strict scrutiny.

Here, though, Nevada has detailed a series of rules that apply a range of restrictions to many different kinds of activities that can transmit COVID-19. Varying occupancy limits are just part of these rules. For example, the commercial businesses that Nevada permits to operate at 50 percent capacity must comply with additional restrictions, some of which are carefully tailored to the nature of the enterprise. Casinos, in particular, must abide by reopening plans that include a variety of safety measures subject to government oversight. This is not the typical case of general rules with secular but not religious exemptions. Nor is it a case where the standard for equal treatment is clear. Perhaps none of this matters. The effect of the governor's directive is to allow many secular gatherings to open more fully than religious services even though worship need not pose greater health risks.

More difficult is the application of strict scrutiny in *Calvary Chapel*. In *Lukumi* the Court held that when laws that are not neutral or generally applicable burden religion, the state must justify its rules as the least restrictive means of achieving an interest of the highest order. Secular exceptions to the state's rules cut against any claim that the laws serve a compelling interest. For Alito, the fact that Nevada treats comparable secular gatherings more leniently—even "allow[ing] thousands to gather in casinos"—is dispositive.[3] A state's interest cannot be compelling "when it leaves appreciable damage to [its] interest unprohibited," Justice Alito quotes from *Lukumi*.[4] However, if a law fails strict scrutiny anytime it is substantially underinclusive, the application of heightened scrutiny would be superfluous. In this case, the decision to allow so many to gather together in casinos may reflect more of an economic calculus than a judgment about the level of public health risk involved. Steeply rising infections in Nevada in the weeks following the reopening of casinos seem to bear this out. Justice Kavanaugh changes the question: Nevada must show that it has a sufficient justification for treating churches differently, not that it has a compelling interest in its restrictions. However, this is a doctrinal shift, not settled law.

Evaluating whether Nevada's rules are the least restrictive means of achieving its interests is also complicated. As Justice Roberts argued in *South Bay*, and the dissenters in *Calvary Chapel* do not dispute, substantial deference should be extended to the political branches of government when they are responding to a public health emergency in conditions of medical and scientific uncertainty. Directive 021 seems blunt. It limits even mega-church services to 50 persons, and it fails to require the type of mitigation measures that would allow for greater occupancy in smaller buildings, such as social distancing and sanitation rules. However, in *South Bay*, Justice Roberts worried about judicial second-guessing when an applicant seeks emergency interlocutory relief in a context where scientific

[3] *Id.* slip op. at 9 (Alito, J., dissenting from denial of application for injunctive relief).
[4] *Id.* (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993)).

understanding is evolving and state officials are continually reshaping responses. Justice Roberts's vote with the majority in *Calvary Chapel* may have reflected this same caution. Perhaps Justice Roberts was too cautious, but evaluating whether public health measures are sufficiently tailored to the state's interests during a pandemic raises new and complex issues for the Court in the free exercise context. For a party to prevail in an application for emergency relief to the Court, the constitutional issues should be clear, and they were not.

II. Equal Treatment with Casinos: Too Much and Not Enough

The principle that government may not discriminate against religion is a longstanding and integral part of the Court's First Amendment jurisprudence, and this principle has played an increasingly important role in the Court's recent cases construing the Free Exercise Clause. In June in *Espinoza v. Montana Department of Revenue*, the Court affirmed that governments cannot deny public benefits to religious institutions solely because of their religious character without satisfying the strictest scrutiny. As discussed above, the Court applies the same scrutiny to discriminatory burdens on religion. Prior to the Court's landmark decision in *Employment Division v. Smith* in 1990, the Court applied strict scrutiny any time a law placed a substantial burden on religious exercise, but now religious plaintiffs must show that the law is not neutral or generally applicable. The current state of the Court's free exercise jurisprudence places a premium on demonstrating discriminatory treatment. Religious believers argue that laws fail the standards of neutrality or general applicability whenever they can, and some of the strongest defenders of religious liberty in the academy and on the bench (including Justice Alito) have pushed for expansive understandings of this threshold.

In *Calvary Chapel*, however, equal treatment seems to be evolving into something very close to a bright line rule, and the church's loss may reflect, in part, the hesitancy of a majority of justices to go that far. Calvary Chapel argues that all it wants is equal treatment with casinos and many other for-profit businesses permitted to operate at 50 percent capacity. Justice Gorsuch agrees that this is "a simple case": "there is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel."[5] "If it is worth allowing large crowds to gather in close proximity for extended periods to enjoy non-constitutionally-protected activities at casinos, restaurants and bars, … it is worth allowing people to gather at places of worship to engage in the constitutionally-protected free exercise of religion," Calvary Chapel writes in its brief.[6] But worth what? The unstated value in the balance is human life. Justice Kavanaugh is more explicit about the trade-off, but discrimination is a "red line."[7]

However, Calvary Chapel is not, in fact, asking for equal treatment. It wants to operate at 50 percent of building capacity like casinos, but it also pledges to follow detailed safety precautions covering everything from arrivals and departures, parking, sanitation, social distancing, food consumption, and restroom use. What the congregation really wants is to operate according to carefully tailored rules that maximize its ability to meet safely in person. It wants the state to recognize the value of religious exercise just as it recognizes the value of economic activity. Applying strict scrutiny to discriminatory burdens on religious exercise forces the state to take the value of religious exercise into account. In this case, there was much more that Nevada could have done to facilitate in-person worship, and the additional restrictions that it applied to businesses allowed to operate at 50 percent

[5] *Id.* slip op. at 1 (Gorsuch, J., dissenting from denial of application for injunctive relief).
[6] Brief for Applicant at 27, Calvary Chapel Dayton Valley v. Sisolak, No. 19A1070 (2020).
[7] *Calvary Chapel*, slip op. at 10 (Kavanaugh, J., dissenting from denial of application for injunctive relief).

capacity provided some possibilities. So does the plan that Calvary Chapel wishes to follow. Justice Alito wisely worried about poorly tailored restrictions of indefinite duration. However, strict scrutiny does not necessarily require the same rules for churches and casinos. This is especially so where the state has adopted a complex system of regulation with different rules for a variety of secular entities. What Calvary wants, and should receive, is to be at least as much of a priority as Nevada's casinos. Being such a priority is not inconsistent with rules that are more protective of human life if they are narrowly tailored; indeed, this is the approach of Calvary Chapel's own safety plan.

While equal treatment provides an important baseline for securing religious exercise, protections under the Free Exercise Clause should not be limited to that principle. If Nevada had a conservative approach to the pandemic with strict limits on secular gatherings, equal treatment would offer little relief. Current free exercise doctrine ties protections for religious exercise to the treatment of comparable secular entities, but a constitutional provision that bars government from "prohibiting the free exercise" of religion places an independent value on religious practice. This term, in *Fulton*, the Court will be revisiting its decision in *Smith*, and the Court should return to a framework that requires states to minimize burdens on religious practice regardless of the weight it gives to secular concerns. Nevada's restrictions on religious worship should be narrowly tailored even if it keeps casinos and other for-profit businesses shuttered.

The focus on equal treatment in *Calvary Chapel* also misses one of the most salient features of this dispute. Nevada's rules, like others around the country, severely impinge upon one of the most essential activities of religious institutions. They restrict the ability of religious believers to come together for worship. In its emerging doctrine of church autonomy, the Court has identified church government as an area so closely linked with a group's religious mission that the Constitution prohibits interference even when the state acts pursuant to neutral, generally applicable laws. In *Guadalupe* this meant exempting the relationship between a religious school and its teachers of religion from employment discrimination laws. Religious worship is also closely linked with religious mission. Of course, there must be some limits to church autonomy, especially when the health of third parties is at stake. However, building upon the distinctive foundation of institutional religious freedom may ultimately offer the strongest and most appropriately tailored protections in cases like *Calvary Chapel*.

The issues in *Calvary Chapel* are complex, and at a later date or in a different case, the Court is likely to explore them in greater depth. Equal treatment is certainly a relevant value, but it is not the only one and perhaps not the most important. By insisting on being treated just like casinos, Calvary Chapel may be asking both too much and not enough.

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