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December 2, 2020

Via CM/ECF

Molly C. Dwyer, Clerk
United States Court of Appeals for the Ninth Circuit
95 7th Street
San Francisco, CA 94103

Re: Calvary Chapel Dayton Valley v. Steve Sisolak, et al.
Ninth Circuit Case No. 20-16169
Our File No. 11779-164

Dear Ms. Dwyer:

Please allow this letter to serve as Frank Hunewill's Supplemental Letter Brief per the Court's Order filed on November 27, 2020.

I. INTRODUCTION

In *Roman Catholic Diocese of Brooklyn, New York v. Andrew M. Cuomo, Governor of New York*, the Supreme Court of the United States granted injunctive relief on behalf of two religious institutions that challenged state executive orders that were unduly burdensome on places of worship. *See* No. 20A87, 592 U.S. ___, ___ (Nov. 25, 2020). In doing so, the Supreme Court held 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 (1993)). Further, the Supreme 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 (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. Accordingly, the purpose of the instant supplemental brief is to address the impact of the Supreme Court's recent decision on Calvary Chapel Dayton Valley ("Calvary")'s appeal from the District Court's order denying a preliminary injunction.

As explained in more detail below, Frank Hunewill, the Sheriff for Lyon County, Nevada ("the Sheriff"), believes that the recent decision in *Roman*

Catholic Diocese of Brooklyn supports his decision not to enforce Governor Sisolak's unilaterally-enacted, one-size-fits-all "Directives." Although the Sheriff opposes injunctive relief that would limit his ability to enforce neutral, county-specific measures that may become necessary at a future date, the Sheriff believes that *Roman Catholic Diocese of Brooklyn* is instructive in assessing the propriety of the current state-wide measures, including Governor Sisolak's Directive 21 and the recently-announced Directive 35.[1]

II. THE FACTS NOTED IN *ROMAN CATHOLIC DIOCESE OF BROOKLYN* ARE NEARLY IDENTICAL TO THE FACTS IN THIS CASE.

In his concurring opinion, Justice Gorsuch cited to *Calvary Chapel Dayton Valley v. Sisolak*, for the proposition that Governor Cuomo's discriminatory edicts are not an isolated incident. *See Roman Catholic Diocese of Brooklyn*, *supra*, at ___ (slip op. concurrence at 2) (citing No. 19A1070, 591 U. S. ___, ___, 2020 WL 4251360 (July 24, 2020)). Although some of the limitations in New York are more

[1] Section 7 of the 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." *See* https://gov.nv.gov/News/Emergency_Orders/2020/2020-11-24_-_COVID19_Emergency_Declaration_Directive_035/ (last visited Nov. 28, 2020).

severe than the current, though ever-changing restrictions imposed by Governor Sisolak, the Sheriff agrees that the similarities are remarkable:

- Both cases involve Governors who have used their emergency powers for over eight months to unilaterally impose statewide executive orders / directives.
- Both cases involve restrictions based on "zones" or "stages" that regularly change without notice.
- Both Governors divided businesses into favored (essential) and disfavored (non-essential) categories.
- Both Governors identify religious worship as a "non-essential," disfavored business that is subject to "strict and inflexible numerical caps."
- In both states, massive gatherings are allowed and even encouraged if the objective of the gathering aligns with the Governors' interests.

There is, however, one important difference that the Court should keep in mind. In *Roman Catholic Diocese of Brooklyn*, the Petitioners sought relief against only the Governor who imposed state-wide edicts. In this case, by contrast,

Calvary seeks injunctive relief against ***both*** the Governor and a local Sheriff, even though Sheriff Hunewill has done nothing to enforce the Governor's edicts.

III. THE PROCEDURAL POSTURE IN *ROMAN CATHOLIC DIOCESE OF BROOKLYN* IS INSTRUCTIVE.

In *Roman Catholic Diocese of Brooklyn*, the Supreme Court granted the petitioners an emergency injunction pending appeal. *See* 592 U.S. at ____ (slip op. at 1). Usually, the Supreme Court uses its authority to issue such injunctions "sparingly." *See Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1403, 133 S. Ct. 641, 642 (2012) (Sotomayor, J., in chambers) (citing 28 U.S.C. § 1651(a) and *Turner Broadcasting System, Inc. v. FCC,* 507 U.S. 1301, 1303, 113 S. Ct. 1806, 123 L.Ed.2d 642 (1993) (Rehnquist, C. J., in chambers)); *see also Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1312, 107 S. Ct. 682, 683 (1986) (Scalia, J., in chambers). Accordingly, injunctive relief pending appeal issues only in critical, exigent circumstances, when "the legal rights at issue are indisputably clear." *Wisconsin Right to Life, Inc. v. Federal Election Comm'n,* 542 U.S. 1305, 1306, 125 S. Ct. 2, 159 L.Ed.2d 805 (2004) (Rehnquist, C.J., in chambers) (internal quotation marks omitted); *see*

also Fishman v. Schaffer, 429 U.S. 1325, 1326, 97 S. Ct. 14, 15, 50 L.Ed.2d 56 (1976) (Marshall, J., in chambers).

In this case, the standard of review is less vigorous because Calvary challenges the District Court order denying a preliminary injunction. *See*, *e.g.*, *Earth Island Inst. v. Carlton*, 626 F.3d 462, 468 (9th Cir. 2010) (reviewing denial of a preliminary injunction for an abuse of discretion). Although District Court's decision is still subject to fact-specific considerations, it follows from *Roman Catholic Diocese of Brooklyn* that "the legal rights at issue [in this case] are indisputably clear."

IV. LEGAL ARGUMENT

As the Sheriff has consistently noted in his filings, Governor Sisolak and the Sheriff have little in common. Although both are listed as defendants / appellees in this matter, the Sheriff supports Calvary and the members of his community who wish to assemble and express their faith in a safe manner.

The Sheriff 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*, 592 U.S. at ____ (slip op. at 4-5). But, since the

onset of the COVID-19 crisis 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. The Sheriff is not convinced that the governor of Nevada has unilateral authority to impose restrictions nine months into an "emergency" situation. But, aside from the Governor'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 deemed "essential" – such as casinos and marijuana dispensaries. So, at least according to the Governor, it may be unsafe to go to church, but it is fine pick up your favorite edible 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., Gosuch, 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, statewide measures are incompatible with COVID-19 guidance from the Centers for Disease Control (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 (1974); *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (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 (1949) (Jackson, J., dissenting), to address the needs of their communities. Here, the Sheriff believes that while Lyon County may enact neutral, narrowly-tailored public health measures *if necessary*, the Governor's

[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.

directives lack legitimacy because Governor Sisolak is not accountable to the rural populations that realistically can do nothing to check his (mis)use of authority.[3]

V. CONCLUSION

In summation, the recent decision in *Roman Catholic Diocese of Brooklyn* further supports the Sheriff's opposition to statewide directives that are not narrowly tailored. Given the similarities between Governor Cuomo's executive orders and Governor Sisolak's directives, this Court was certainly justified in requesting supplemental briefing regarding *Roman Catholic Diocese of Brooklyn*. But, while *Roman Catholic Diocese of Brooklyn* likely supports injunctive relief against the State Appellees, this Court should still exercise caution to ensure that

[3] As previously noted, the population of Clark County is three times the population of all other Nevada counties *combined*. So, while the Governor should represent all Nevadans, the Governor is focused on Las Vegas. In the modern era of divisive politics, the Governor also shows disdain for Nevadans who live in the fifteen "red" rural counties. And, as such has directed his edicts to address the issues facing only the two largest counties in Nevada – to the detriment of the other fifteen rural counties.

Sheriff Hunewill is not unduly restricted should Lyon County officials determine that local measures are necessary to protect the residents of Lyon County.

Sincerely,

MARQUIS AURBACH COFFING

By: */s/ Brian R. Hardy*
Brian R. Hardy, Esq.
Counsel for Frank Hunewill,
in his capacity as Sheriff of Lyon County

BRH:kaw
cc: All Counsel of Record via CM/ECF

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