No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CALVARY CHAPEL OF BANGOR,

Applicant,

v.

JANET MILLS,
in her official capacity as Governor of the State of Maine,

Respondent.

To the Honorable Stephen Breyer,
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the First Circuit

Applicant's Emergency Application for Writ of Injunction, or Alternatively, Petition for Summary Reversal and Grant, Vacate, and Remand Order

---

Mathew D. Staver (Counsel of Record)
Anita L. Staver
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32853
(407) 875-1776
court@LC.org | hmihet@LC.org
rgannam@LC.org | dschmid@LC.org

Counsel for Applicants

QUESTIONS PRESENTED

(1) Whether the Free Exercise Clause of the First Amendment prohibits the government from discriminating against houses of worship by restricting the size of religious gatherings while exempting or giving other preferential treatment to comparable nonreligious gatherings occurring inside the same houses of worship or to other comparable nonreligious gatherings occurring externally.

(2) Whether the Establishment Clause of the First Amendment and this Court's holding in *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947) that "[n]either a state nor the Federal Government . . . can force or influence a person to go to or remain away from church against his will" is violated when a State prohibits or forbids upon criminal penalty houses of worship from assembling regardless of the size of the house of worship or the religious doctrine or practice.

(4) Whether the circuit court erred in finding that a denial of a temporary restraining order addressing the merits that all parties treated like a preliminary injunction, operated as a denial of a preliminary injunction, and was based solely on the likelihood of success is not immediately appealable when irreparable First Amendment injury is felt each day the challenged orders remain in place and where the First Circuit engaged in an analysis of the merits of Calvary Chapel's First Amendment challenge.

PARTIES

Applicant is Calvary Chapel of Bangor, a nonprofit corporation incorporated under the laws of the State of Maine. Respondent is Hon. Janet Mills, in her official capacity as Governor of the State of Maine.

RULE 29 DISCLOSURE STATEMENT

Applicant Calvary Chapel of Bangor hereby states that it is a nonprofit corporation incorporated under the laws of the State of Maine, does not issue stock, and has no parent corporations, and that no publicly held corporation owns 10% or more of its stock.

DIRECTLY RELATED PROCEEDINGS

CALVARY CHAPEL OF BANGOR v. JANET MILLS, in her official capacity as Governor of the State of Maine, Case No. 20-1507, Opinion and Order dismissing appeal for lack of jurisdiction (1st Cir. Dec. 22, 2020), reproduced in Appendix as Exhibit A.

CALVARY CHAPEL OF BANGOR v. JANET MILLS, in her official capacity as Governor of the State of Maine, Case No. 20-1507, Order denying Motion for Injunction Pending Appeal (1st Cir. June 2, 2020), reproduced in Appendix as Exhibit B.

CALVARY CHAPEL OF BANGOR v. JANET MILLS, in her official capacity as Governor of the State of Maine, Case No. 1:20-cv-00156-NT, Order denying Motion for Temporary Restraining Order and Preliminary Injunction (D. Me. May 9, 2020), reproduced in Appendix as Exhibit C.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER

"It is time—past time—to make plain that, while the pandemic poses many grave challenges, there is no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques."[1]

To the Honorable Stephen Breyer,
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the First Circuit

Pursuant to Sup. Ct. Rules 20, 22 and 23, 28 U.S.C. §1651, and 28 U.S.C. §2101, Applicant Calvary Chapel of Bangor ("Calvary Chapel"), herby files this Application for Writ of Injunction, or Alternatively, Petition for Summary Reversal and Grant, Vacate, and Remand Order. For over 10 months now, Respondent Governor Janet Mills ("the Governor") has been imposing unconstitutional restrictions on Calvary Chapel's religious worship services while exempting myriad other activities from similar restrictions. The issues presented by the instant Application/Petition are of grave importance to "the Nation's essential commitment to religious freedom," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993), especially in the current times of pandemic and uncertainty. As this Court unequivocally held in an appeal of similar COVID-19 restrictions on religious gatherings, "even in a pandemic, **the Constitution cannot be put away and forgotten**." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (*Catholic Diocese*) (emphasis added). Indeed, "[t]he restrictions at issue here, by effectively barring many from attending religious worship services, strike at the very heart of the First Amendment's guarantee of religious freedom." *Id.* And, as

[1] *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 72 (2020) (Gorsuch, J., concurring) (emphasis added).

Justice Gorsuch stated, "**[i]t is time—past time—to make plain that, while the pandemic poses many grave challenges, there is no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques**." *Id.* at 72 (emphasis added).

Yet, despite this Court's clear admonitions and instructions in several previous appeals and its unequivocal holding in *Catholic Diocese*, *South Bay United Pentecostal Church v. Newsom*, No. 20A136, 2021 WL 406258 (U.S. Feb. 5, 2021), and *Harvest Rock Church v. Newsom*, No. 20A137, 2021 WL 406257 (U.S. Feb. 5, 2021), the Governor continues to impose discriminatory restrictions on religious worship services that are not imposed on similar nonreligious gatherings. Her discriminatory reign of terror must end. **Following the decisions of the Ninth Circuit and the Supreme Court in *South Bay* and *Harvest Rock Church,* striking down the numeric restrictions (Ninth Circuit) and the total ban on worship (Supreme Court), Maine now has the dubious distinction of imposing the most severe restrictions in the nation on places of worship with its 50-person numerical cap notwithstanding the size of the facility.**

STATEMENT OF THE CASE AND FACTUAL BACKGROUND

A. Calvary Chapel and Its Religious Ministry.

Calvary Chapel is a Church in Bangor, Maine offering religious worship services and ministries to its members, congregants, and the community. (App. Ex. G, V. Compl. ¶17, 89.) Calvary Chapel has sincerely held religious beliefs, rooted in

Scripture's commands (*e.g.*, *Hebrews* 10:25), that followers of Jesus Christ are not to forsake the assembling of themselves together, and that they are to do so even more in times of peril and crisis. (App. Ex. G, V. Compl. ¶89.) Indeed, the entire purpose of the Church (in Greek "ekklesia," meaning "assembly") is to assemble together Christians to worship Almighty God. (*Id.*)

B. The Governor's Discriminatory Restrictions on Religious Worship Services.

Since March 15, 2020, the Governor has issued, modified, and extended a series of executive orders and pronouncements in response to COVID-19 (the "Orders"), extensively restricting when, where, and how Mainers may exercise their liberties, including gathering for religious worship, while exempting myriad businesses and non-religious activities from similar gathering restrictions. Most relevant to this Application/Petition are the following:

- **Proclamation** of March 15, 2020, declaring a state of emergency in Maine in response to COVID-19. (V. Compl. Ex. A.)
- Executive **Order 14** FY 19/20 **prohibits** "Gatherings of more than 10 people" that are "primarily social, personal, and discretionary events other than employment," including "**faith-based events**," and **closes** dine-in restaurant and bar facilities. (V. Compl. Ex. B.)
- Executive **Order 19** FY 19/20 continues the Order 14 restriction on faith-based and other gatherings, and enacts a comprehensive scheme of closures and exemptions for all businesses and other for-profit and non-profit entities in the state. (V. Compl. Ex. C). The scheme exempts so-called "Essential Businesses and

Operations" from closure and the numerical limits in Order 14 on employees or patrons, subject to implementing social distancing and sanitization guidelines to the "maximum extent practicable," or according to "best efforts." (V. Compl. Ex. C at 2-3.) The "Essential Businesses and Operations" are defined by incorporation of the U.S. Department of Homeland Security, Cybersecurity and Infrastructure Security Agency Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response (V. Compl. Ex. C at 5-13, "CISA Memo"), containing 19 expansive categories and subcategories of essential workers, and further defined by 21 additional or clarifying categories of essential businesses and operations supplied by the Governor. (V. Compl. Ex. C at 2; CISA Memo at 7-13.) These approximately **40 categories** of businesses and operations exempted from Order 14's gathering limits include, *inter alia*, "food processing" and packaging, "construction and maintenance of essential infrastructure," "homes and residential treatment facilities," "dentists," "grocery and household goods (including convenience stores)" and "essential home repair, hardware and auto repair" stores (including all of their "big-box" versions), "gas stations and laundromats," "industrial manufacturing," "post offices and shipping outlets," financial "payment, clearing, and settlement" operations, "banks and credit unions," "public transportation," including bus stations, train stations, and airports, "animal feed stores," "hotel and commercial lodging," and "legal, business, [and] professional" services. (V. Compl. Ex. C at 2; CISA Memo at 7-13.)

- Executive **Order 28** FY 19/20 is a stay-at-home order, which required "All persons living in the State of Maine . . . to stay at their homes or places of

residence," unless traveling in connection with defined "Essential Activities" or work for Essential and Non-Essential Businesses and Operations permitted under Order 19. (V. Compl. Ex. D at 2) Defining Essential and Non-Essential Businesses and Operations was delegated to the Maine Department of Economic and Community Development. (V. Compl. Ex. D at 4.) The "Essential Activities" defined by Order 28 do not include religious worship or any other exercise of religion. (V. Compl. Ex. D at 2-3). Order 28 thus **prohibits Mainers from leaving their homes to attend religious worship**, even if limited to 10 persons under Order 14, and thus **effects a total ban on religious worship services at Calvary Chapel**.

Pursuant to Order 28 a new listing of Essential and Non-Essential Businesses and Operations was issued on April 3, expanding to **44 categories** of Essential Businesses and Operations, and at least **18 categories** of Non-Essential Businesses and Operations exempted from the numerical limits of Order 14 and the travel ban of Order 28. (V. Compl. Ex. E at 1.) Neither of the new Essential and Non-Essential lists includes churches or other houses of worship for purposes of worship.

- Executive **Order 49** FY 19/20 implements and gives legal effect to the *Together We Are Maine: Restarting Maine's Economy Plan* (the "**Restarting Plan**"), "as the deliberative process to identify how certain restrictions on businesses and activities can be safely and incrementally eased over time." (V. Compl. Ex. G at 1). The Restarting Plan "establishes four gradual stages of reopening" beginning on May 1 (V. Compl. Ex. G at 4), "focused on resuming business operations and activities which can be conducted in a safe manner" in the earliest stages, with "progression

through the stages . . . planned month-by-month" (V. Compl. Ex. G at 6), unless "the COVID-19 situation worsens in Maine for any reason" in which case "the state will move quickly to either halt progress or return to an earlier stage." (V. Compl. Ex. G at 7.) Under the Restarting Plan, "[a]ll businesses in Maine are essential" (V. Compl. Ex. G at 9), but Stage 1 maintains a scheme of differential treatment, allowing previously open businesses to remain open, but subjecting others to limited and staged reopening, if at all. (V. Compl. Ex. G at 10-11.)

- Furthermore, any entity wishing to "reopen" under the Restarting Plan must apply for and be granted a "badge" prior to reopening (V. Compl. Ex. G at 8), and the "conditional approval" represented by such a badge "**is subject to change** depending upon the demonstrated efficacy of the conditions imposed or the changing or general needs of public health," and "**subject to suspension or revocation** depending upon actual and consistent compliance with such conditions." (V. Compl. Ex. H at 2 (emphasis added).) Under Stage 1 of the Restarting Plan, churches like Calvary Chapel are subject to the badge requirement, but—though now "essential"—are allowed to "reopen" only for "[l]imited drive-in, stay-in-your-vehicle church services." (V. Compl. Ex. G at 11.)

C. Current Restrictions on Indoor Religious Gatherings.

The basic framework of the Governor's discriminatory restrictions remains in place today. Under the amended Executive Order 16 FY 20/21.[2] **Executive Order**

[2] *See* Executive Order No. 16 FY 20//21 (Nov. 4, 2020), *available at* https://www.maine.gov/governor/mills/sites/maine.gov.governor.mills/files/inlinefiles/An%20Order%20to%20Revise%20Indoor%20Gathering%20Limits%2C%20Strengthen%20Face%20Covering%20Requirements%20and%20Delegate%20Certain%20Authority.pdf.

16 now requires churches and religious worship services to adhere to a strict 50-person limit regardless of the size of the sanctuary or Church facility. The Governor's agents at the Maine Department of Economic and Community Development confirm that religious gatherings are subject to the 50-person limits set by executive orders.[3]

Yet, as has been true since the beginning of the Governor's regime of restrictions on religious gatherings, myriad businesses and industries are wholly exempt from the 50-person limit, including transportation facilities, bus stations, train stations, airports, manufacturing facilities, gas stations and laundromats, industrial manufacturing, post offices and shipping outlets, financial payment, clearing, manufacturing, food packaging and processing, and legal, business, and professional services, and all such exemptions reflect the exemptions that have been in place from the beginning for favored businesses and industries. (V. Compl. Ex. E at 1.)

D. The Governor's Discriminatory Restrictions on Calvary Chapel's Own Activities in the Same Building.

The Governor's Orders cooperate to make Calvary Chapel's church building useable, without the numerical limitations of the Orders, for Governor-approved purposes other than worship. Order 49 extended the provisions of Order 19, incorporating the activities of the CISA Memo essential workers as exempt from the

---

[3] *See* COVID19 Prevention Checklist, Religious Gatherings (Nov. 5, 2020), https://www.maine.gov/decd/checklists/religious-gatherings ("Gatherings . . . must not exceed the limits established by the Governor's Executive Order.")

Order 14 gathering limitations, and Order 28, allowing Mainers to leave home for such activities. (V. Compl. Ex. C at 2; V. Compl. Ex. D at 2; V. Compl. Ex. G at 2.) But Calvary Chapel's worship services are not exempted from Order 14's gathering restrictions by Order 19, or the travel ban of Order 28. As a result, the activities of "Workers who support food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise needy individuals, such as those residing in shelters" (V. Compl. Ex. C at 7 (CISA Memo)), and the activities of "Food Banks and Food Pantries" (V. Compl. Ex. E at 1), are allowed at Calvary Chapel's church building without numerical limits, and exempt from any travel ban. Thus, by operation of the Governor's Orders, Calvary Chapel's pastor, its members, and its volunteers are permitted to travel between their homes and the church to provide food, shelter, counseling, and other non-religious social services for those in need, with no numerical limit on workers, volunteers, or recipients, but **no one can travel to Calvary Chapel for, and Calvary Chapel cannot provide, religious worship services in the same building.**

Calvary Chapel has a robust residential treatment and rehabilitation program, Calvary Residential Discipleship, which is an on-site religious substance abuse and treatment program.[4] In that program, Calvary Chapel provides daily counseling to 24 men and 24 women, require the participants to live on-site, engage in daily Bible studies and worship services, work, and attend religious worship services with the congregants of Calvary Chapel on Sundays. As part of that program, Calvary Chapel

[4] *See* Calvary Residential Discipleship, https://www.facebook.com/crdmaine (last visited Feb. 11, 2021).

provides shelter for those in the program, physical food for the residents, and spiritual food in the form of drug counseling, social service counseling, and Biblical teaching and instruction. Under the Governor's Orders, that program is exempt from the discriminatory numerical restrictions, although all of it takes place in the same facility in which Calvary Chapel is prohibited from engaging in religious worship services with more than 50 people.

E. Enforcement of the Governor's Orders.

Order 19 provides that the Governor will enforce the order through "law enforcement if necessary." (V. Compl. Ex. C at 1.) Order 28 warns, more explicitly, that "this Order shall be enforced by law enforcement as necessary and violations are a class E crime subject to up to six months in jail and a $1,000 fine." (V. Compl. Ex. D at 6.) Also, the Maine State Police issued an "Enforcement Practices" memorandum detailing that it can and will issue criminal summonses and make physical arrests for violations of the Governor's Orders, if necessary. (V. Compl. Ex. I at 1.)

If treated like an Essential Business or Operation under the Governor's Orders for purposes of conducting religious worship services under distancing and sanitization guidelines (*i.e.*, to the "maximum extent practicable" or according to "best efforts" (V. Compl. Ex. C 2-3), Calvary Chapel practices stringent social distancing and personal hygiene protocols, including extensive and enhanced sanitizing of common surfaces in Calvary Chapel's building prior to every service, and requiring attendees to remain at least six feet apart and use hand sanitizer prior to entering and during movement inside Calvary Chapel's building. (V. Compl., ¶¶55-56.)

REASONS FOR GRANTING THE APPLICATION/PETITION

I. THIS COURT'S *CATHOLIC DIOCESE*, *SOUTH BAY* AND *HARVEST ROCK* DECISIONS AND THE DECISIONS OF EVERY OTHER CIRCUIT COURT TO ADDRESS COVID-19 REGULATIONS POST-*CATHOLIC DIOCESE* DEMONSTRATE THAT CALVARY CHAPEL HAS A CLEAR AND INDISPUTABLE RIGHT TO RELIEF.

A. The Governor's Discriminatory and Especially Harsh Treatment of Religious Worship Services Violates the First Amendment.

In *Catholic Diocese*, the Supreme Court noted that the treatment afforded to other nonreligious gatherings or so-called "essential" businesses mandated the application of strict scrutiny. The Court explicitly mentioned numerous examples of disparate treatment that are equally present here:

> In a red zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as "essential" may admit as many people as they wish. And the list of "essential" businesses includes things such as acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all **plants manufacturing chemicals and microelectronics and all transportation facilities**.

Catholic Diocese, 141 S. Ct. at 66 (emphasis added). Moreover, "[t]he disparate treatment is even more striking in an orange zone. While attendance at houses of worship is limited to 25 persons, even non-essential businesses may decide for themselves how many persons to admit." *Id.* "[A] large store in Brooklyn . . . could literally have hundreds of people shopping there on any given day. Yet a nearby church or synagogue would be prohibited from allowing more than 10 or 25 people inside for a worship service." *Id.* (cleaned up).

Justice Gorsuch elaborated further,

> the Governor has chosen to impose *no* capacity restrictions on certain businesses he considers "essential." And it turns out the businesses the Governor considers essential include **hardware stores, acupuncturists, and liquor stores. Bicycle repair shops, certain signage companies, accountants, lawyers, and insurance agents are all essential too**. So, at least according to the Governor, it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians.

Id. at 69 (bold emphasis added; italics original) (Gorsuch, J., concurring). Indeed, in New York, "People may gather inside for extended periods in bus stations and airports, in laundromats and banks, in hardware stores and liquor shops." *Id.*

Justice Kavanaugh similarly noted New York's disparate treatment of worship, which is equally present here:

> New York's restrictions on houses of worship not only are severe, but also are discriminatory. In red and orange zones, houses of worship must adhere to numerical caps of 10 and 25 people, respectively, but those caps do not apply to some secular buildings in the same neighborhoods. **In a red zone, for example, a church or synagogue must adhere to a 10-person attendance cap, while a grocery store, pet store, or big-box store down the street does not face the same restriction. In an orange zone, the discrimination against religion is even starker: Essential businesses and many non-essential businesses are subject to no attendance caps at all**.

Id. at 73 (emphasis added) (Kavanaugh, J., concurring).

In *South Bay United Pentecostal Church v. Newsom*, No. 20A136, 2021 WL 406258 (U.S. Feb. 5, 2021), this Court yet again faced a state's COVID-19 regime discriminating against religious worship services while exempting myriad other categories of business and sectors. There, like Maine did here in its previous orders, California imposed a total prohibition on religious worship services. 2021 WL 406258, *1. Based on *Catholic Diocese*, this Court issued an injunction pending appeal to the

Church prohibiting the Governor from enforcing his unconstitutional prohibitions on religious gatherings. *Id.* Chief Justice Roberts noted that while courts have generally been inclined to grant deference during a pandemic, "the State's present determination—that the maximum number of adherents who can safely worship in the most cavernous cathedral is zero—appears to reflect not expertise or discretion, but instead **insufficient appreciation or consideration of the interests at stake**." *Id.* at *1 (Roberts, C.J., concurring) (emphasis added).

As Justice Gorsuch noted in that matter, "[w]hen a State so obviously targets religion for differential treatment, our job becomes that much clearer." *Id.* at *2.

> Since the arrival of COVID–19, California has openly imposed more stringent regulations on religious institutions than on many businesses. The State's spreadsheet summarizing its pandemic rules even assigns places of worship their own row. . . . At "Tier 1," applicable today in most of the State, California forbids any kind of indoor worship. Meanwhile, the State allows most retail operations to proceed indoors with 25% occupancy, and other businesses to operate at 50% occupancy or more. . . . Apparently, California is the only State in the country that has gone so far as to ban *all* indoor religious services.

Id. (Gorsuch, J., statement). While it was true at the time, California is not the only state to have gone that far. Indeed, **Maine, too, imposed a total prohibition on religious worship services**. (V. Compl. Ex. D at 2-3.) And, despite what the purported experts opine concerning the "risks" of religious worship, "we may [not] abandon the field when government officials with experts in tow seek to infringe a constitutionally protected liberty." *Id.*

As is true here (V. Compl. Ex. E at 1), California "presumes that worship inherently involves a large number of people. Never mind that scores might pack into

train stations or wait in long checkout lines in the businesses the State allows to remain open." *Id.* Indeed, much like Maine here, "California does not limit its citizens to running in and out of other establishments; no one is barred from lingering in shopping malls, salons, or bus terminals." *Id.* at *3. Again, much like Maine here, "California singles out religion for worse treatment than many secular activities. At the same time, the State fails to explain why narrower options it finds sufficient in secular contexts do not satisfy its legitimate interests." *Id.* Based on *Catholic Diocese*, Justice Gorsuch pointed out – equally of import here – "**[t]oday's order should have been needless; the lower courts in these cases should have followed the extensive guidance this Court already gave**." *Id.* (emphasis added).

In *Harvest Rock Church v. Newsom*, No. 20A137, 2021 WL 406257 (U.S. Feb. 5, 2021), this Court yet again issued an injunction pending appeal against discriminatory COVID-19 restrictions in California. Based on its decisions in *Catholic Diocese* and *South Bay*, this Court again held that discriminatory restrictions against religious worship services that are not imposed on secular gatherings cannot withstand First Amendment scrutiny and must be enjoined. *Id.* at *1.

The Ninth Circuit, too, was faced with many of the identical discriminatory restrictions at issue here, and found them to mandate strict scrutiny. "Casinos, bowling alleys, retail businesses, restaurants, arcades, and other similar secular entities are limited to 50% of fire-code capacity, yet houses of worship are limited to fifty people regardless of their fire-code capacities." *Calvary Chapel Dayton Valley*,

982 F.3d at1233; *Calvary Chapel Lone Mountain v. Sisolak*, 831 F. App'x 317, 317 (9th Cir. 2020) (same).

And, when faced with numerical restrictions double and quadruple those of the Governor's 50-person limit here, the Ninth Circuit struck down such restrictions as unconstitutional under *Catholic Diocese*. *See South Bay United Pentecostal Church v. Newsom*, No. 20-56358, 2021 WL 222814 (9th Cir. Jan. 22, 2021) (enjoining 100 and 200 person restrictions on religious worship as unconstitutionally discriminatory); *Harvest Rock Church v. Newsom*, 985 F.3d 771 (9th Cir. 2021) (same). When discussing such restrictions, the Ninth Circuit held that 100 and 200 person limits on religious worship services were not narrowly tailored because "there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services," 2021 WL 222814, at *18 (quoting *Catholic Diocese*, 141 S. Ct. at 67), and violated the First Amendment because such discriminatory "numerical attendance caps will undeniably unconstitutionally deprive some of South Bay's worshippers of participation in its worship services, causing irreparable harm." *Id.* *See also Harvest Rock*, 985 F.3d at 771 (same). Indeed, as Judge O'Scannlain pointed out, under this Court's *Catholic Diocese* decision, "[w]e should have little trouble concluding that these severe measures violate the Free Exercise Clause of the First Amendment" because "**the controlling decisions also eliminate any notion that California's measures withstand such scrutiny**." *Harvest Rock*, 985 F.3d at 771 (O'Scannlain, J., concurring) (emphasis added).

In *Agudath Israel of Am. v. Cuomo*, the Second Circuit similarly noted that while worship services were restricted to 10 or 25 people, other so-called "essential businesses" were permitted without similar restrictions, including grocery stores, hospitals, liquor stores, pet shops, financial institutions, news media, certain retail stores, and construction. 983 F.3d 620, at 626, 631-32 (9th Cir. 2020).

In *Monclova Christian Acad. v. Tuledo-Lucas Cnty. Health Dep't*, the Sixth Circuit also noted that certain religious schools were prohibited from gathering for in-person instruction while other nonreligious gatherings were not so restricted, including "gyms, tanning salons, office buildings, and the Hollywood Casino." 984 F.3d 477, 82 (6th Cir. Dec. 31, 2020).

The same is true here, where the Governor has permitted myriad exempt entities to operate without numerical restriction or more favorable limitations than that imposed on religious worship services. Beginning March 24, 2020, the Governor first exempted an expansive list of activities that were not subject to the strict numerical caps placed on religious worship services. Those exemptions included **22 sectors and industries and 40 categories,** including "food processing," "grocery and household goods (including convenience stores)," such as WalMart and Target; "essential home repair, hardware and auto repair," such as Home Depot, Lowe's, and other "big-box" stores; "gas stations and laundromats;" "industrial manufacturing;" "transportation centers," such as bus stations, train stations, and airports, marijuana dispensaries, and "legal, business, professional, environmental permitting and insurance services." (V. Compl. Ex. C at 2; CISA Memo at 7-13.)

On March 31, 2020, the Governor expanded that list to include **44 categories of businesses**, including *inter alia* "Marijuana Dispensaries," "Hotel and Commercial Lodging," "Real Estate Activities," and several other categories. (V. Compl. Ex. D at 1.) In addition to the added "Essential Businesses and Operations," the Governor exempted certain "Non-Essential Businesses and Operations," including "Shopping Malls," Spas," "Hair Salons," "Tattoo Parlors," and other entities. (V. Compl. Ex. D at 1.) Yet, again, however, Calvary Chapel's religious worship services were not included on the list of either "Essential" or "Non-Essential" businesses that were permitted to operate with the gathering of individuals.

Thus, the Governor's Orders restrict Calvary Chapel to 50 people while permitting similar congregate activity in nonreligious gatherings—many of which were specifically mentioned as comparables in *Catholic Diocese*, *South Bay*, *Harvest Rock*, and the decisions Second, Sixth, and Ninth Circuits. Examples include: food packaging and processing, laundromats, warehouses, grocery stores, liquor stores, retail stores, malls, transportation facilities, bus stations, train stations, airports, gambling centers, acupuncture facilities, garages, plants manufacturing chemicals and microelectronics, hardware stores, repair shops, signage companies, accountants, lawyers, insurance agents, pet stores, film production facilities, and more. *See, e.g., Catholic Diocese*, 141 S. Ct. at 66; *id*. at 69 (Gorsuch, J., concurring); *id*. (Kavanaugh, J., concurring); *Calvary Chapel*, 982 F.3d at 1233; *Agudath Israel*, 983 F.3d at 632; *Harvest Rock Church v. Newsom*, 977 F.3d 771, 731 (9th Cir. 2020) (O'Scannlain, J., dissenting).

The litany of exemptions compared to the 50-person limit on religious assemblies "cannot be viewed as neutral because they single out houses of worship for especially harsh treatment." *Catholic Diocese,* 141 S. Ct. at 66. When compared with the restrictions of 10 or 25 people at issue in *Catholic Diocese*, the Governor's Orders violate the First Amendment because a 50-person cap is still

> far more restrictive than any COVID-related regulations that have previously come before the Court, much tighter than those adopted by many other jurisdictions hard hit by the pandemic, and far more severe than has been shown to be required to prevent the spread of the virus at the applicant's services.

Id. at 67; *Calvary Chapel Dayton Valley*, 982 F.3d at 1233 (same).

The fact that some retailers and other gatherings are subject to similar restrictions is wholly irrelevant because not all of them are. The fact remains that some gatherings are exempt, but places of worship are not. "**[U]nder this Court's precedents, it 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**." *Catholic Diocese*, 141 S. Ct. at 73 (Kavanaugh, J., concurring) (bold emphasis added)). "Rather, once a State has created a favored class of businesses"—which the Governor's Orders do—"the State must justify why houses of worship are excluded from the favored class." *Id.* When faced with an identical numerical cap of 50-persons, the Ninth Circuit held that Nevada's COVID-19 restrictions on religious worship services could not survive *Catholic Diocese*. 982 F.3d at 1233 ("**The Supreme Court's decision in *Roman***

***Catholic Diocese* compels us to reverse the district court**." (emphasis added)). Indeed,

> Just like the New York restrictions, the Directive treats numerous secular activities and entities significantly better than religious worship services. Casinos, bowling alleys, retail businesses, restaurants, arcades, and other similar secular entities are limited to 50% of fire-code capacity, yet houses of worship are limited to fifty people regardless of their fire-code capacities. As a result, the restrictions in the Directive, although not identical to New York's, require attendance limitations that create the same "disparate treatment" of religion. Because "disparate treatment" of religion triggers strict scrutiny review—as it did in *Roman Catholic Diocese*—we will review the restrictions in the Directive under strict scrutiny.

Id. (citation omitted); *Calvary Chapel Lone Mountain*, 831 F. App'x at 317 (same).

And, there is no world in which 44 categories of exempt business sectors creating hundreds of subcategories of exempt secular activities and facilities—all of which were present in *Catholic Diocese*, *South Bay*, *Harvest Rock*, *Calvary Chapel Dayton Valley*, *Calvary Chapel Lone Mountain*, *Agudath Israel*, and *Monclova Christian*—can be the least restrictive means available. "[T]here is no world in which the Constitution tolerates color-coded executive edicts that open liquor stores and bike shops [and hundreds of other essential businesses] but shutter churches, synagogues, and mosques." 141 S. Ct. at 72 (Gorsuch, J., concurring)

B. Under *Catholic Diocese*, *South Bay*, and *Harvest Rock* the Governor's Discriminatory Restrictions on Religious Worship Services Cannot Survive Strict Scrutiny.

1. The Governor's Orders Substantially Burden Calvary Chapel's Sincerely Held Religious Beliefs.

Calvary Chapel has and exercises sincere religious beliefs, rooted in biblical commands (*e.g.*, *Hebrews* 10:25), that Christians are not to forsake assembling

together, and that they are to do so even more in times of peril and crisis. (V. Compl., ¶89.) "[T]he Greek work translated church . . . literally means **assembly**." *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 912 (W.D. Ky. Apr. 11, 2020) (cleaned up) (emphasis added). Though the Governor might not view church worship services and gathering as fundamental to religious exercise—or "Essential" like 'big box' and warehouse store shopping, or more important than mass protest gatherings—"religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Rev. Bd. of Ind. Emp. Security Div.*, 450 U.S. 707, 714 (1981). The Governor's Orders numerically restricting Calvary Chapel's religious worship services inside its Church, on pain of criminal sanctions, unquestionably and substantially burdens Calvary Chapel's exercise of religion according to its sincerely held beliefs. "The Governor's actions substantially burden the congregants' sincerely held religious practices—**and plainly so**. Religion motivates the worship services." *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 613 (6th Cir. 2020) (emphasis added).

2. Because the Governor's Orders Impose Discriminatory Numerical Caps on Calvary Chapel's Religious Worship Services While Leaving Scores of Nonreligious Gatherings Exempt From Such Harsh Restrictions, They Are Not Narrowly Tailored or the Least Restrictive Means.

Because the Governor's Orders are neither neutral nor generally applicable, they must satisfy strict scrutiny, meaning the restrictions must be supported by a compelling interest and narrowly tailored. *Catholic Diocese*, 141 S. Ct. at 67; *Calvary Chapel Dayton Valley*, 982 F.3d at 1233 ("disparate treatment of religion triggers

strict scrutiny"). This is "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 US. 507, 534 (1997), which is rarely passed. *See Burson v. Freeman*, 504 U.S. 191, 200 (1992) ("[W]e readily acknowledge that a law rarely survives such scrutiny . . . ."). This is not that rare case.

Whatever interest the Governor claims, she cannot show the orders are the least restrictive means of protecting that interest. And it is the Governor's burden to make the showing because "the burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). "As the Government bears the burden of proof on the ultimate question of . . . constitutionality, **[Calvary Chapel] must be deemed likely to prevail unless the Government has shown** that [their] proposed less restrictive alternatives are less effective than [the orders]." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (emphasis added). Under that standard, "[n]arrow tailoring requires the government to demonstrate that a policy is the 'least restrictive means' of achieving its objectives." *Agudath Israel*, 983 F.3d at 633 (quoting *Thomas*, 450 U.S. at 718).

To meet this burden, the government must show it "**seriously** undertook to address the problem with less intrusive tools readily available to it," meaning that it "**considered different methods that other jurisdictions have found effective**." *McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014) (emphasis added). *See also Agudath Israel*, 983 F.3d at 633 (same). And the Governor must "show either that **substantially less-restrictive alternatives were tried and failed**, or that the **alternatives were closely examined and ruled out for good reason**," *Bruni*

v. City of Pittsburgh, 824 F.3d 353, 370 (3d Cir. 2016) (emphasis added), and that "imposing lesser burdens on religious liberty 'would fail to achieve the government's interest, not simply that the chosen route was easier.'" *Agudath Israel*, 983 F.3d at 633 (quoting *McCullen*, 134 S. Ct. at 495).

Since March 18, 2020, continuing through today, **the government has imposed discriminatory restrictions on indoor religious worship services**—a total of **332 days** as of the filing of this Application. The Governor tried nothing else and has been continuing this unconstitutional reign of executive fiat for almost a year now. That plainly fails the *McCullen* standard.

In *Harvest Rock* and *South Bay*, this Court was presented with amicus noting the remaining states with strict numerical caps on religious worship services. As Judge Gorsuch noted, "California is the only state in the country that has gone so far as to ban *all* indoor worship services." *South Bay*, 2021 WL 406258, at *2 (Gorsuch, J., Statement) (citing Brief for Becket Fund for Religious Liberty, at 5-6). But, after this Court struck down California's total prohibition on worship services, **Maine is now the most restrictive state with a 50-person numerical cap for religious worship services**. (*See* Case No. 20A136 &20A137, *Harvest Rock Church v. Newsom* & *South Bay United Pentecostal Church v. Newsom*, Brief of Becket Fund for Religious Liberty at 6 (noting that "[o]f the remaining states with numerical caps, Maine limits in-person worship to 50 persons," which is the most restrictive now)).

Additionally, *Catholic Diocese* and *Calvary Chapel Dayton Valley* demonstrate that the Governor cannot satisfy her burden here. In *Catholic Diocese*, this Court held

that it was "hard to see how the challenged regulations can be regarded as narrowly tailored" because limits of 10 and 25 people were "far more restrictive than any COVID-related regulations that have previously come before the Court, much tighter than those adopted by many other jurisdictions hard-hit by the pandemic, and far more severe than has been shown to be required to prevent the spread of the virus at the applicant's services." 141 S. Ct. at 67. If restrictions of 10 and 25 (*Catholic Diocese*), 50 (*Calvary Chapel Dayton Valley)*, and the 100 and 200 (*South Bay* and *Harvest Rock*) person numerical cap were not narrowly tailored, then **Maine's 50-person numerical cap is not narrowly tailored**.

Indeed, when the Ninth Circuit was presented with a 50-person restriction on religious worship services in *Calvary Chapel Dayton Valley*, and it similarly held that such a discriminatory restriction imposed on Churches, but not other nonreligious gatherings was not narrowly tailored. 982 F.3d at 1234. Specifically, the Ninth Circuit held that "although less restrictive in some respects than the New York regulations reviewed in *Roman Catholic Diocese*," the 50-person cap disparately imposed on only religious worship services "is not narrowly tailored" because other gatherings were not subject to the same restriction. *Id. See also Calvary Chapel Lone Mountain*, 831 F. App'x at 318 (same).

More fatally for the Governor's 50-person cap, however, is the fact that even 100 and 200 person limits on religious worship services have been held unconstitutional under *Catholic Diocese*. *See, e.g.*, *South Bay*, 20201 WL 222814, at *18 (enjoining 100 and 200 person caps because they "will undeniably

unconstitutionally deprive some of South Bay's worshippers of participation in its worship services, causing irreparable harm."); *Harvest Rock*, 985 F.3d at 771 (same). And, this Court's "**controlling decisions also eliminate any notion that [Maine's] measures withstand such scrutiny**." *Harvest Rock*, 985 F.3d at 771 (O'Scannlain, J., concurring) (emphasis added).

If there is one lesson from this Court's *Catholic Diocese*, *South Bay*, and *Harvest Rock* decisions, discriminatory numerical caps that are only applied to religious gatherings cannot withstand First Amendment scrutiny. Indeed, despite the Governor's unending recitation that her measures are temporary, **332 days of discriminatory restrictions cannot stand**. As Justice Gorsuch noted,

> one could be forgiven for doubting its asserted timeline. Government actors have been moving the goalposts on pandemic-related sacrifices for months, adopting new benchmarks that always seem to put restoration of liberty just around the corner. As this crisis enters its second year—and hovers over a second Lent, a second Passover, and a second Ramadan—it is too late for the State to defend extreme measures with claims of temporary exigency, if it ever could. Drafting narrowly tailored regulations can be difficult. But if Hollywood may host a studio audience or film a singing competition while not a single soul may enter California's churches, synagogues, and mosques, something has gone seriously awry.

South Bay, 2021 WL 406258, *4 (Gorsuch, J., Statement) (emphasis added). The Governor's restrictions should be enjoined.

C. The Governor's Orders Continue to Impose Internal Discrimination on the Services and Activities Calvary Chapel Provides in Its Own Building.

While Calvary Chapel is limited to a strict 50-person cap for indoor religious worship services (*supra* Section II.A-B), it may gather in the same buildings with an

unlimited number of people to provide social services or "necessities of life" to feed, shelter, or counsel people. (*See* V. Compl. Ex. C at 7.) This internal discrimination has been present since the original Stay at Home Order of March 24, 2020 (V. Compl. Ex. C), and it remains true today. As Judge O'Scannlain pointed out previously in *Harvest Rock*, "even non-worship activities conducted by or within a place of worship are not subject to the attendance parameters" otherwise applicable to places of worship. *Harvest Rock*, 977 F.3d at 734 (O'Scannlain, J., dissenting). Such internal micromanagement of the affairs of Calvary Chapel's religious activities is plainly unconstitutional. *See Our Lady of Guadalupe Sch. v. Morrisey-Berru*, 140 S. Ct. 2049, 2055 (2020) ("**State interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion. The First Amendment outlaws such intrusion**." (emphasis added)).

II. CALVARY CHAPEL HAS A CLEAR AND INDISPUTABLE RIGHT TO RELIEF UNDER THIS COURT'S ESTABLISHMENT CLAUSE PRECEDENT BECAUSE THE GOVERNOR'S ORDERS DISCRIMINATORILY RESTRICT PEOPLE FROM ATTENDING RELIGIOUS WORSHIP SERVICES.

Calvary Chapel also has a clear and indisputable right to relief for its Establishment Clause claims because the Governor's Orders have been discriminatorily and disparately restricting religious worship services while exempting myriad other nonreligious gatherings. This display of overt hostility towards religious gatherings cannot suffice under the First Amendment. And, a

pandemic or an emergency does not change that fact. Indeed, as Justice Gorsuch pointed out, "[e]ven if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical" because "[i]n far too many places, for far too long, our first freedom has fallen on deaf ears." *Catholic Diocese*, 141 S. Ct. at 70 (Gorsuch, J., concurring). That is certainly true of Calvary Chapel here.

Hostility towards and disparate treatment of religious worship services plainly violates the Establishment Clause. "**If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein**." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (emphasis added). Where, as here, Calvary Chapel seeks to be free from disparate treatment by the State, the very core of the Establishment Clause is at issue. "An attack founded on disparate treatment of "religious" claims invokes what is perhaps the central purpose of the Establishment Clause—**the purpose of ensuring governmental neutrality in matters of religion**." *Gillette v. United States*, 401 U.S. 437, 449 (1971) (emphasis added). Indeed, the Establishment Clause "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). That mandate of preventing hostility towards religions is equally present in times of exigent circumstances, such as COVID-19. For, as "[a]n instrument of social peace, the Establishment Clause does not become less so when social rancor runs exceptionally high." *Lund v. Rowan Cnty.*, 863 F.3d 268, 275

(4th Cir. 2017) (emphasis added). "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. . . . **Neither can force nor influence a person to go to or to remain away from church against his will**." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947) (emphasis added). The Governor's Orders run roughshod over the triumvirate of this Court's *Everson*, *Lynch*, and *Gillette* precedent. Calvary Chapel has a clear and indisputable right to relief under the Establishment Clause.

Moreover, gathering together for religious worship services is a matter of faith and doctrine, and the First Amendment prohibits infringement into such matters. "The First Amendment protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government **as well as those of faith and doctrine**.'" *Our Lady of Guadalupe Sch. v. Morrisey-Berru*, 140 S. Ct. 2049, 2055 (2020) (emphasis added) (quoting *Kedroff v. Saint Nicholas Cathedral of Russion Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)). Indeed, "among other things, the Religion Clauses protect the right of churches and other religious institutions to decide matters of faith and doctrine without government intrusion." *Id.* at 2060 (cleaned up) (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 186 (2012)). "**State interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion. The First Amendment outlaws such intrusion**." *Id.* (emphasis added).

The Governor has no authority to dictate the proper manner of religious worship or gathering for such worship. Indeed,

> **In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all.** The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.

Watson v. Jones, 80 U.S. 679, 728 (1871) (emphasis added). The Governor's callous indifference to the constitutional infirmity of restricting a deeply-held religious practice of gathering for worship services is wholly foreign to the First Amendment.

III. THIS COURT'S *CATHOLIC DIOCESE* DECISION MANDATES A FINDING THAT CALVARY CHAPEL IS SUFFERING IRREPARABLE HARM ABSENT INJUNCTIVE RELIEF AGAINST THE GOVERNOR'S DISCRIMINATORY ORDERS.

Catholic Diocese also compels a finding that Calvary Chapel is suffering irreparable harm as a matter of law each day the Governor's discriminatory Orders remain in place. No pastor, church, or parishioner in America should have to choose between worship and criminal sanction. As Justice Kavanaugh also recognized,

> **There is also no good reason to delay issuance of the injunctions** . . . issuing the injunctions now . . . will not only ensure that the applicants' constitutional rights are protected, but also will provide some needed clarity for the State and religious organizations.

Catholic Diocese, 141 S. Ct. at 74 (Kavanaugh, J., concurring) (emphasis added). Indeed, "[t]here can be no question that the challenged restrictions, if enforced, will cause irreparable harm," *Id.* at 67, because "'[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

"If only 10 people are admitted to each service, the great majority of those who wish to attend Mass on Sunday or services in a synagogue on Shabbat will be barred." *Id.* at 67-68. That alone was sufficient for this Court to find irreparable harm, and it is also true here where Calvary Chapel is subject to a 50-person cap. Unlike in *Catholic Diocese* where only "the great majority" of attendees and congregants would be barred, here, **every single attendee is prohibited from attending worship**. And, in *Catholic Diocese*, the Court found that 13 and 7 days was too long to suffer irreparable harm without injunctive relief. *Id.* at 68. Here, Calvary Chapel's injury is worse, as they have been suffering the unconscionable and unconstitutional injury of discriminatory worship prohibitions and restrictions for **332 days.**

IV. *CATHOLIC DIOCESE* ALSO COMPELS A FINDING THAT INJUNCTIVE RELIEF IS IN THE PUBLIC INTEREST.

As *Catholic Diocese* unequivocally held, where nonreligious gatherings are subject to less restrictive measures than those impose on religious worship services, courts "have a duty to conduct a serious examination of the need for such a drastic measure." 141 S. Ct. at 68. And, as here, "it has not been shown that granting the applications will harm the public." *Id.* Indeed, the State "is in no way harmed by the issuance of an injunction that prevents the state from enforcing unconstitutional restrictions." *Legend Night Club v. Miller*, 637 F.3d 291, 302–03 (4th Cir. 2011). But, for Calvary Chapel, even minimal infringements upon First Amendment values constitute irreparable injury sufficient to justify injunctive relief. *Catholic Diocese*, 141 S. Ct. at 67; *see also Calvary Chapel Dayton Valley*, 982 F.3d a 1234 (same). As such, there is no comparison between the irreparable loss of First Amendment

freedoms suffered by Calvary Chapel and the non-existent interest the Governor has in enforcing unconstitutional orders. Absent a preliminary injunction, Appellants "face an impossible choice: skip [church] service[s] in violation of their sincere religious beliefs, or risk arrest, mandatory quarantine, or some other enforcement action for practicing those sincere religious beliefs." *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 914 (W.D. Ky. 2020).

And, the public interest is best served by enjoining the government from enforcing its discriminatory and unconstitutional restrictions against religious worship services. *Catholic Diocese*, 141 S. Ct. at 68 (holding that the public interest is best served by preserving constitutional rights because "even in a pandemic, the Constitution cannot be put away and forgotten"); *Calvary Chapel Dayton Valley*, 982 F.3d at 1232 n.3 (same); *id.* at 1234; *Calvary Chapel Lone Mountain*, 831 F. App'x at 318 (same). The same is true here, and the public interest is best served by protecting the rights of Appellants to engage in their constitutionally protected free exercise of religion. **"[T]he public has a profound interest in men and women of faith worshipping together [in church] in a manner consistent with their conscience**." *On Fire*, 453 F. Supp. 3d at 914 (emphasis added).

V. THE FIRST CIRCUIT'S JURISDICTIONAL DECISION IMPOSES THE PRECISE IRREPARABLE HARM FROM WHICH CALVARY CHAPEL HAS SOUGHT RELIEF FOR NINE MONTHS.

The First Circuit evaded consideration of a question this Court has already unequivocally answered by creating a jurisdictional problem where none existed. In its decision below, which continues to deny Calvary Chapel the immediate injunctive

relief it has been seeking for over almost a year, the First Circuit held that it lacked jurisdiction over the appeal because it was merely from a denial of a temporary restraining order rather than a preliminary injunction. (App. Ex. A at 3.) However, the decision below is incorrect as a matter of fact and law. And, "**[t]oday's [Application] should have been needless; the lower courts in these cases should have followed the extensive guidance this Court already gave**." *South Bay*, 2021 WL 406258, at *3 (Gorsuch, J., Statement) (emphasis added). Unfortunately, the First Circuit has ignored this Court's instructions.

In the district court, Calvary Chapel moved for a temporary restraining order **and** preliminary injunction. (V. Compl. at 40-44.) Both parties submitted evidence concerning the motion in the form of a Verified Complaint from Calvary Chapel and sworn testimony from the State's medical officers from the Governor. (App. Ex. C at 3-12.) And, after conducting a telephonic hearing with the parties, the district court issued a 23-page opinion based entirely upon the likelihood of success prong for a preliminary injunction. (App. Ex. C at 13-21.) As several courts did prior to this Court's *Catholic Diocese* decision, the district court held that substantial deference was due to the government under *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905) (App. Ex. C. at 14-15) and found that Calvary Chapel had no likelihood of success on the merits of its claims. (App. Ex. C at 13-21.) Though the district court styled its decision as limited to the temporary restraining order only, that was not dispositive because its actual opinion belied a contrary conclusion. And, its conclusion was dispositive of any chance Calvary Chapel had of obtaining any injunctive relief. That was borne out

by the fact that the district court refused to grant further injunctive relief in its denial of Calvary Chapel's request for an injunction pending appeal. (App. Ex. D.)

When a district court refuses injunctive relief, interlocutory appeals are permissible. *See* 28 U.S.C. §1292(a)(1) (granting immediate appeals from orders "granting, continuing, modifying, **refusing**, or dissolving injunctions" (emphasis added)). While a district court's order denying a temporary restraining order is not ordinarily immediately appealable, it is immediately appealable where – as here – "it has the practical effect of refusing an injunction," "might have serious, perhaps irreparable consequences," and "can only be effectively challenged by immediate appeal." *Fideicomiso De La Tierra Del Cano Martin Pena v. Fortuno*, 582 F.3d 131, 133 (1st Cir. 2009). Indeed, where "the circumstances render the denial tantamount to the denial of a preliminary injunction," an immediate appeal may be taken to preserve the movants' cherished rights. *Religious Tech. Ctr., Church of Scientology Int'l, Inc. v. Scott*, 869 F.2d 1306, 1308 (9th Cir. 1989).

That is precisely what the district court's opinion did in this matter. It precluded Calvary Chapel from seeking additional injunctive relief because the district court had already concluded that Calvary Chapel had no likelihood of success on the merits of its Free Exercise and other claims (App. Ex. C at 13-21), and then further denied them injunctive relief pending appeal (App. Ex D), which is based on the same standard as a preliminary injunction. *See, e.g.*, *Respect Maine PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010). Thus, consideration of Calvary Chapel's motion for TRO and preliminary injunction certainly had the practical effect of

denying them any injunctive relief and was tantamount to the denial of a preliminary injunction. One need look no further than the fact that the district court's denial has effectively denied Calvary Chapel injunctive relief – and thus imposed irreparable injury on them – since May 9, 2020. That is a total of **328 days**. If such an extended period of time crying out for relief does not demonstrate that the district court's order was tantamount to the denial of a preliminary injunction and precluding any further options for injunctive relief, nothing ever could.

Moreover, both the district court and the First Circuit below also considered and denied Calvary Chapel's requests for a preliminary injunctions pending appeal, which required both to analyze such claims under the preliminary injunction factors of *Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008). The district court denied it without any discussion whatsoever (App. Ex. D), and the First Circuit likewise denied the motion for injunction pending appeal. (App. Ex. B.) Notably, **the First Circuit had no problem with the non-existent jurisdictional issues when considering the injunction pending appeal**.

And, **all parties to the proceeding treated the district court's order as a denial of a preliminary injunction, treated the denial as one of a preliminary injunction**, and **consented to the fact that an appeal was proper because it was tantamount to a denial of a preliminary injunction**. During oral argument, the Attorney General's Office representing the Governor told the panel "this is probably the only thing that the parties can agree upon in this case which is that we think this order is appealable." (App. Ex. I, Oral Argument

Transcript at 18.) Indeed, the Governor's counsel told the court that "**for all intents and purposes, this case proceeded just like a host of other cases that are resolved on PI motions . . . from our perspective, you know, we assumed that we were briefing a PI motion [and] we understood that this was a PI motion.**" (App. Ex. I at 19 (emphasis added).) Yet, the panel below created the jurisdictional problem where none existed at the merits stage, and denied Calvary Chapel's requests for injunctive relief.

Finally, the First Circuit's decision below also belies a jurisdiction issue by explicitly opining on the merits of Calvary Chapel's requests for a preliminary injunction. Despite claiming that it had no jurisdiction to consider the merits of Calvary Chapel's appeal, the First Circuit nevertheless opined that it did "not believe that the lack of immediate appealability can be said to cause serious harm." (App. Ex. A at 12.) Its rationale for such an astounding proposition was that "the harm of which the Chapel complains has its origin in the extraordinary epidemiological crisis that has engulfed Maine and every other part of the country." (App. Ex. A at 12.) Not content with this conclusion on its own, the panel went further saying that denying injunctive relief "**will not cause serious harm**." (App. Ex. A at 13 (emphasis added).) This statement stands in stark contrast to the unequivocal holding of this Court in *Catholic Diocese* that "**[t]here can be no question that he challenged restrictions, if enforced, will cause irreparable harm**." *Catholic Diocese*, 141 S. Ct. at 67 (emphasis added). The reason for that is simple, "**by effectively barring many from attending religious services**," as the Governor's restrictions due here,

the Governor's Orders "strike at the very heart of the First Amendment's guarantee of religious liberty." *Id.* The First Circuit's decision below – blatantly ignoring the fundamental teachings and mandates of *Catholic Diocese* cannot be allowed to stand, should be vacated, and Calvary Chapel granted its requested injunction.

Going even further, the panel concluded – again, in direct contradiction to this Court's holding in *Catholic Diocese* – that Calvary Chapel would suffer no harm by the discriminatory restrictions on religious worship services because "the Chapel has retained other means to organize worship services for its congregants, including the sponsorship of online worship services, the holding of drive-in services, and the hosting of gatherings of ten or fewer." (App. Ex. A at 14.) Because of that, the panel concluded that "their availability mitigated the harm to the Chapel and its worship community." (*Id.*) This cannot be reconciled with *Catholic Diocese*. Indeed,

> **If only 10 people are admitted to each service, the great majority of those who wish to attend Mass on Sunday or services in a synagogue on Shabbat will be barred. And while those who are shut out may in some instances be able to watch services on television, such remote viewing is not the same as personal attendance**. Catholics who watch a Mass at home cannot receive communion, and there are important religious traditions in the Orthodox Jewish faith that require personal attendance.

Catholic Diocese, 141 S. Ct. at 67-68 (emphasis added). Simply put, because Calvary Chapel's religious beliefs compel it to gather together for religious worship services (V. Compl. ¶89), prohibiting them from doing so is irreparable harm.

What Justice Gorsuch pointed out in *South Bay* is equally applicable here:

> the State tells us that worshippers are sure to seek close physical interactions. It touts its mild climate, too, suggesting that worshippers might enjoy more space outdoors. Yet, California is not as concerned

> with the close physical proximity of hairstylists or manicurists to their customers, whom they touch and remain near for extended periods. The State does not force them or retailers to do all their business in parking lots and parks. And California allows people to sit in relatively close proximity inside buses too. Nor, again, does California explain why the narrower options it thinks adequate in many secular settings—such as social distancing requirements, masks, cleaning, plexiglass barriers, and the like—cannot suffice here. Especially when those measures are in routine use in religious services across the country today.

South Bay, 2021 WL 406258, *3 (Gorsuch, J., Statement) (emphasis added).

And, while exempting myriad other activities, the Governor continues to argue – and the First Circuit lent credence to it – that Calvary Chapel can simply go outside to worship or worship online. There is one critical distinction between *South Bay* and the instant application, and it bears noting. If the "mild climate" of California is an insufficient basis for permitting the Governor to force worshippers outside, then how much more so is that the case in Maine, which has no such mild climate this time of year. In a country where religious exercise is a fundamental constitutional right, can the First Amendment really be thought to countenance the notion that religious congregants must brave freezing temperatures and driving snow to engage in that constitutional right? Surely not. The First Circuit's decision telling Calvary Chapel to take its religious freedom outside has – quite literally – left them out in the cold. The First Amendment demands more. As the Sixth Circuit recognized last year,

> Sure, the Church might use Zoom services or the like, as so many places of worship have decided to do over the last two months. But who is to say that every member of the congregation has access to the necessary technology to make that work? Or to say that every member of the congregation must see it as an adequate substitute for what it means when "two or three gather in my Name," Matthew 18:20, or what it means when "not forsaking the assembling of ourselves together," Hebrews 10:25.

Roberts v. Neace, 958 F.3d 409, 415 (6th Cir. 2020).

The offensive and legally incorrect statements of the First Circuit below cannot be reconciled with this Court's decisions in *Catholic Diocese*, *South Bay*, or *Harvest Rock*, and this Court should grant the application, vacate the orders below, remand the matter for reconsideration in light of this Court's COVID-19 decisions, and grant an injunction pending appeal for Calvary Chapel. They have been left out in the cold for far too long. It is time to bring them inside.

VI. BECAUSE THE FIRST CIRCUIT BELOW IGNORED *CATHOLIC DIOCESE*, SUMMARY REVERSAL IS APPROPRIATE.

This Court has a long history of summarily reversing decisions of lower courts where – as here – the court "egregiously misapplied settled law." *Weary v. Cain*, 136 S. Ct. 1002, 1007 (2016) (citing *Mullenix v. Luna*, 577 U.S. 7, 16 (2015); *Stanton v. Sims*, 571 U.S. 3 (2013); *Parker v. Matthews*, 567 U.S. 37 (2012); *Coleman v. Johnson*, 566 U.S. 650 (2012); *Wetzel v. Lambert*, 565 U.S. 520 (2012); *Ryburn v. Huff*, 565 U.S. 469 (2012); and *Sears v. Upton*, 561 U.S. 945 (2010)). Indeed, when a decision of the lower court "disregard[s] our other constitutional decisions," summary reversal is appropriate. *See, e.g.*, *Friedman v. City of Highland Park*, 577 U.S. 1039, 136 U.S. 447, 449-50 (2015) (Scalia, J., dissenting). In fact, this Court's practice of summarily reversing clearly erroneous decisions that misapply this Court's binding precedent applies even when such inquiries involve "intensely factual questions without full briefing and argument," *Weary*, 136 S. Ct. at 1007, and where the decision below is

"understandable" but "runs directly counter to our precedents." *Martinez v. Illinois*, 572 U.S. 833, 843 (2014).

This is precisely such a case. There is no breathing room left for discriminatory COVID-19 restrictions, such as the Governor's Orders here, after *Catholic Diocese*, *South Bay,* and *Harvest Rock*. Indeed, as this Court unequivocally held in *Catholic Diocese*: "**even in a pandemic, the Constitution cannot be put away and forgotten**." 141 S. Ct. at 68 (emphasis added). Where – as here – government regulations "single out houses of worship for especially harsh treatment," Calvary Chapel must be deemed to "have clearly established [its] entitlement to relief." *Id.* at 66. And, the reason for this is simple: "there is no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques." *Id.* at 72 (Gorsuch, J., concurring).

Yet, despite this clear and unequivocal holding, the First Circuit claimed wiggle room to allow what this Court has prohibited. In fact, while noting that *Catholic Diocese* prohibits government officials from "curtail[ing] individual constitutional liberties during a public health emergency, (App. at 013), the court nevertheless reached back to Chief Justice Roberts' concurrence in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) to claim that the Governor "be afforded considerable latitude" in curtailing such rights. (App. at 013.) But, this is plainly erroneous in light of the binding decision of the majority of this Court in *Catholic Diocese*. As the majority held, "[t]he restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of

the First Amendment's guarantee of religious liberty." 141 S. Ct. at 68. And, "we have a duty to conduct a serious examination of the need for such a drastic measure." *Id.* The First Circuit's reliance on expired and inapposite concurrences ignores *Catholic Diocese*, egregiously misapplies its holding, and must be summarily reversed.

If there was any doubt as to the egregious error of the court below, Justice Gorsuch's concurrence lays it to rest. In discussing Chief Justice Roberts' *South Bay* concurrence, Justice Gorsuch noted

> At that time, COVID had been with us, in earnest, for just three months. Now, as we round out 2020 and face the prospect of entering a second calendar year living in the pandemic's shadow, that rationale has expired according to its own terms. Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical. **Rather than apply a nonbinding and expired concurrence from *South Bay*, courts must resume applying the Free Exercise Clause. Today, a majority of the Court makes this plain.**

Id. at 70 (Gorsuch, J., concurring) (emphasis added). Yet, relying on the nonbinding and expired concurrence from *South Bay* and ignoring *Catholic Diocese*'s demands is precisely what the First Circuit did below.

And, if there was any doubt as to the expiration of Chief Justice Roberts' *South Bay* concurrence, even the Chief Justice suggests that his concurrence was limited to the time frame in which it was issued because in *Catholic Diocese*, even the Chief Justice suggested discriminatory numerical caps – such as those at issue here – "do seem unduly restrictive," that "it may well be that such restrictions violate the Free Exercise Clause," and that "the challenged restrictions raise serious concerns under the Constitution." *Id.* at 75 (Roberts, J., concurring).

Yet, despite *Catholic Diocese* clear holding and the "seismic shift" it represented in COVID-19 free exercise litigation, *Calvary Chapel Dayton Valley*, 982 F.3d at 1232, the First Circuit ignored its commands and reached back to a relic of constitutional history that "runs directly counter to our precedents." *Martinez*, 572 U.S. at 843. Indeed, as Justice Gorsuch noted in *Danville Christian Academy v. Beshear*, "**this Court made clear that it would no longer tolerate such departures from the Constitution**." 141 S. Ct. 527, 530 (2020) (Gorsuch, J., dissenting) (emphasis added). Because the First Circuit ignored that plain instruction, summary reversal is appropriate.

VII. AT MINIMUM, THIS COURT SHOULD ISSUE A GRANT, VACATE, AND REMAND ORDER AS IT HAS DONE IN NUMEROUS CHALLENGED TO COVID-19 RESTRICTIONS ON RELIGIOUS SERVICES POST-*CATHOLIC DIOCESE*.

At minimum, should this Court not find summary reversal appropriate in the instant matter, this Court should do as it has done with every other application presented to it since *Catholic Diocese* and issue a grant, vacate, and remand order as to the lower court's denials of injunctive relief here. In every instance where a Church has challenged denials of injunctive relief post-*Catholic Diocese*, this Court has issued GVR Orders requiring the lower courts to reconsider their previous denials of injunctive relief in light of the binding and unequivocal holdings of *Catholic Diocese*. *See, e.g.*, *Harvest Rock Church v. Newsom*, No. 20A94, 2020 WL 7061630 (U.S. Dec. 3, 2020) (granting a petition for certiorari before judgment, vacating the district court and Ninth Circuit's denials of injunctive relief, and remanding for consideration in light of *Catholic Diocese*); *High Plains Harvest Church v. Polis*, 141 S. Ct. 527 (2020)

(same); *Robinson v. Murphy*, No. 20A95, 2020 WL 7346601 (U.S. Dec. 15, 2020) (same); *Gish v. Newsom*, No. 20A120, 2021 WL 422669 (U.S. Feb. 8, 2021) (same). The same relief is warranted here. This Court should grant the application, vacate the decisions of the lower courts, and remand the matter for reconsideration in light of *Catholic Diocese*, *South Bay*, and *Harvest Rock*.

And, here, that is also necessary because of the plainly erroneous findings of the lower courts in this matter. Plainly contrary to *Catholic Diocese*, the district court held that Calvary Chapel suffers no injury because "churches remain free to conduct drive-in services, online programs, and in-person assemblies of up to ten people." (App. Ex. C at 17.) In fact, the district court held that restricting churches while exempting "liquor stores, warehouse clubs, supercenter stores, and marijuana dispensaries" poses no constitutional problem because that are not comparable. (*Id.*) But, as discussed *supra* Section II, there is no way that holding can be reconciled with *Catholic Diocese*, *South Bay*, or *Harvest Rock*. The lower court's opinions should be vacated and the matter remanded for reconsideration in light of this Court's clear teachings in *Catholic Diocese*.

CONCLUSION

For the foregoing reasons, the Application should be granted, the Governor enjoined from enforcing her unconstitutional restrictions on religious worship services, and the lower court's orders vacated and remanded for reconsideration in light of *Catholic Diocese*.

Dated this February 11, 2021.

Respectfully submitted,

Mathew D. Staver (Counsel of Record)
Anita L. Staver
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32853
(407) 875-1776
court@LC.org | hmihet@LC.org
rgannam@LC.org | dschmid@LC.org

Counsel for Applicants