

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MAINE
Bangor Division**

CALVARY CHAPEL OF BANGOR,)	
)	
Plaintiff,)	
)	
v.)	Case No. <u>1:20-cv-00156-NT</u>
)	
JANET MILLS, in her)	
official capacity as Governor of the)	
State of Maine,)	
)	
Defendant.)	

**PLAINTIFF’S EMERGENCY MOTION FOR
INJUNCTION PENDING APPEAL AND SUPPORTING MEMORANDUM**

Pursuant to L. Civ. R. 7 and Fed. R. App. P. 8, Plaintiff, Calvary Chapel of Bangor, by and through the undersigned counsel, hereby moves this Court for an emergency injunction pending appeal (IPA) of this Court’s May 1, 2020 Order (dkt. 27) denying Calvary Chapel’s Motion for Temporary Restraining Order and Preliminary Injunction (dkt. 3), which order is the subject of Plaintiff’s Notice of Appeal to the United States Court of Appeals for the First Circuit. (Dkt. 28).

MEMORANDUM OF LAW

1. In its Order denying Calvary Chapel’s Motion for Temporary Restraining Order, this Court found that Calvary Chapel could still meet if it limited its worship service to less than 10 people. (Dkt. 27 at 16). But, respectfully, this is incorrect. Even under the aspirational Restarting Maine’s Economy plan, Calvary Chapel is not permitted to have **any in-person** gatherings. (V.Compl., dkt. 1, ¶ 48 (noting that the Restarting Maine’s Economy plan plainly indicates that Stage 1 only permits “drive-in, stay in your vehicle church services”). Moreover, under Executive Orders 28 and 49, “all persons living in the State of Maine are hereby ordered

. . . to stay in their homes or places of residence.” (V.Compl. ¶ 34, 41, EX. D, G). Thus, if all individuals in the State of Maine are required to stay in their homes, except for traveling to “essential” businesses, **a category that does not include religious gatherings**, then how can an individual leave their home to participate in a worship service at all, even with less than 10 people? They cannot. The Court’s error on this point also affects its analysis on irreparable harm.

2. Additionally, even under Governor Mill’s aspirational plan to Restart Maine’s Economy, which is subject to change at any time and for whatever reason, Executive Order 49 is still in effect and carries the force of law. (V.Compl. ¶ 42, EX. G). Indeed, Executive Order 49 explicitly states that Executive Order 28 was “extended through May 31, 2020.” (Dkt.. 1-7, V.Compl. EX. G, at 2). Thus, the operative Executive Order still maintains its stay at home prohibition with the exception of traveling to essential businesses, and thus **prohibits any gatherings of any kind at Calvary Chapel.**

3. But assuming *arguendo* that the Restarting Maine’s Economy plan has become operational, Calvary Chapel would only be permitted to host “drive-in, stay-in-your vehicle church services. (V.Compl. ¶ 49, EX. H). But, as the sworn testimony in this matter plainly demonstrates, Maine’s Restarting Economy plan is not yet operational (*see* dkt. 15, Declaration of Horatio G. Mihet, ¶ 4 ((noting that the Governor explicitly admitted there is no mechanism for Calvary Chapel to obtain permission to host religious gatherings under the Executive Orders or the Restarting Maine’s Economy plan (and not likely to be one soon)). **Thus, because the Restarting Maine’s Economy plan is not in effect yet, Calvary Chapel is not permitted to host in-person religious gatherings of any number, and under Executive Orders 28 and 49, cannot even hold drive-in religious gatherings.**

4. Calvary Chapel thus respectfully submits that this Court's denial of Calvary Chapel's TRO/PI was in error. While these assignments of error and others will be adjudicated in the First Circuit, Calvary Chapel respectfully requests that this Court at least grant an injunction pending the appeal.

5. Additionally, even assuming that the Restarting Maine's Economy plan is in effect, a point that is questionable at best (Dkt. 15, Mihet Decl. ¶ 4), it still imposes unequal treatment on Calvary Chapel compared to the requirements imposed on so-called "essential" businesses. Under the same Executive Order 28, if treated somewhat comparably with some non-religious "essential" entities, such as retail and "big box" stores, Calvary Chapel would at least be permitted to have an unlimited number of individuals on its premises "outside," as long as it would "enforce the six-foot separation requirement" and use "signage and ground lines designed to impose that distancing." (Dkt. 1-4, at 4). Yet, the Restarting Maine's Economy Plan requires that Calvary Chapel mandate all individuals at its religious gatherings stay in their vehicles, which is not imposed on similar non-religious gatherings in parking lots across Maine.

6. On May 5, 2020, Calvary Chapel initiated the above-captioned cause with its Verified Complaint (dkt. 1) and Motion for Temporary Restraining Order and Preliminary Injunction (dkt. 3). As the allegations of the Verified Complaint demonstrate, Calvary Chapel sought a temporary restraining order (TRO) and preliminary injunction restraining and enjoining Governor Mills and her designees from unconstitutionally enforcing and applying the various COVID-19 Executive Orders and other enforcement directives (collectively "GATHERING ORDERS") purporting to prohibit Calvary Chapel, on pain of criminal sanctions, from gathering for worship services at Calvary Chapel, regardless of whether Calvary Chapel meets or exceeds the social distancing, enhanced sanitization, and hygiene guidelines pursuant to which the

Commonwealth disparately and discriminatorily allows so-called “essential” commercial and non-religious entities (*e.g.*, beer, wine, and liquor stores, warehouse clubs, ‘big box’ and ‘supercenter’ stores) to accommodate gatherings, crowds, and masses without any numerical limitation. (Dkt. 1, V. Compl. ¶ 1).

7. As shown in the Verified Complaint, the GATHERING ORDERS have been interpreted, applied, and enforced, including against the Pastor of Calvary Chapel, such that police officers in the State of Maine have threatened to impose criminal sanctions against religious gatherings that include any number of individuals, regardless of whether appropriate and government-recommended social distancing, enhanced sanitization, and personal hygiene recommendations are practiced. (V. Compl. ¶ 2).

8. At around the same time as Governor Mills’ Executive Orders surrounding COVID-19 were being used to threaten to impose criminal sanctions on Calvary Chapel’s pastor, officials in other jurisdictions had similarly threatened to impose criminal sanctions on other religious gatherings. In Louisville, Kentucky, for example, the government threatened to use police to impose criminal sanctions on those individuals found in violation of similar COVID-19 orders and threatened to impose various sanctions on individuals found in violation of such orders. The United States District Court for the Western District of Kentucky found that the mere threat of such criminal sanction warranted a TRO. *See On Fire Christian Center, Inc. v. Fischer*, No. 3:20-cv-264-JRW, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020) [hereinafter *On Fire*]. The *On Fire* TRO enjoined the Mayor of Louisville from “**enforcing, attempting to enforce, threatening to enforce, or otherwise requiring compliance with any prohibition on drive-in church services at On Fire.**” *Id.* at *1 (emphasis added). (V. Compl. ¶ 3).

9. Additionally, the Governor of Kansas had imposed a virtually identical restriction on religious gatherings in Kansas, stating that “gatherings” of more than 10 individuals are prohibited, including religious gatherings. On April 18, 2020, the United States District Court for the District of Kansas issued a TRO enjoining Kansas officials from enforcing its discriminatory prohibition on religious gatherings and required the government to treat “religious” worship services the same as other similar gatherings that are permitted. *See First Baptist Church. v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021, *6–7 (D. Kan. Apr. 18, 2020) [hereinafter *First Baptist*]. The *First Baptist* TRO specifically stated that the government’s disparate treatment of religious gatherings was a violation of the Free Exercise Clause because it showed that “**religious activities were specifically targeted for more onerous restrictions than comparable secular activities,**” and that the churches had shown irreparable harm because they would “be prevented from gathering for worship at their churches” during the pendency of the executive order. *Id.* at *7–8 (emphasis added). In discussing the Kansas orders, which imposed a 10-person limit on in-person gatherings (which is 10 more than the zero-person limit imposed by Governor Mills, *see supra* paras. 1–2), the court said that specifically singling out religious gatherings for disparate treatment while permitting other non-religious activities “show[s] that these executive orders expressly target religious gatherings on a broad scale and are, therefore, not facially neutral,” *First Baptist*, 2020 WL 1910021, at *7, and—much like here—“churches and religious activities appear to have been singled out among essential functions for stricter treatment. **It appears to be the only essential function whose core purpose—association for the purpose of worship—had been basically eliminated.**” *Id.* (emphasis added). Thus, the court found that Kansas should be enjoined from enforcing their disparate terms against churches. (V. Compl. ¶ 6).

10. Here, just as the government in Louisville threatened to do, Governor Mills has threatened to impose criminal sanctions on Calvary Chapel pursuant to Governor Mills' Executive Order prohibiting the in-person gathering of any number of individuals. Additionally, the Maine State Police—acting under the direction of Governor Mills' orders—have publicly declared that they would enforce the Governor's orders and have threatened to impose criminal sanctions on those found in violation of them. Absent emergency relief from this Court, Calvary Chapel, its pastor, and all members and/or attendees will suffer immediate and irreparable injury, including this Sunday, from the threat of criminal prosecution for the mere act of engaging in the free exercise of religion and going to church. (V. Compl. ¶ 4).

11. Additionally, the Sixth Circuit—the highest court to consider similar COVID-19 restrictions—has twice rejected the Governor's arguments and enjoined such restrictions, conclusively determining that restrictions on drive-in **and in-person** worship services violate the First Amendment. *See Roberts v. Neace*, No. 20-5465, slip op. (6th Cir. May 9, 2020) (enjoining enforcement of COVID-19 restrictions on **in-person** worship services) (attached here to as **EXHIBIT A**); *Maryville Baptist Church, Inc.*, No. 20-5427, 2020 WL 2111316 (6th Cir. May 2, 2020) (enjoining enforcement of COVID-19 restrictions on drive-in worship services).

12. In *Roberts*, the Sixth Circuit **granted an injunction pending appeal prohibiting the Governor of Kentucky from treating religious gatherings—including in-person worship services—differently from other so-called “essential” businesses**. The court noted that the Kentucky COVID-19 executive orders prohibiting religious gatherings “likely fall on the prohibited side of the line” that the Free Exercise Clause draws. *Roberts*, slip op. at 5. Indeed, “[a]s a rule of thumb, the more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law.” *Id.* As such, the Sixth Circuit held that the COVID-19 orders,

similar to those at issue in the instant litigation, likely violate the First Amendment, and should be enjoined.

13. Just as Calvary Chapel has requested here, the Kentucky church merely sought to be treated equally with similar non-religious gatherings that are not subject to the same outright prohibition on gatherings of more than 10 people—under threat of criminal sanction—as that imposed on churches. As the Sixth Circuit noted,

Keep in mind that the Church and its congregants just want to be treated equally. They don't seek to insulate themselves from the Commonwealth's general public health guidelines. They simply wish to incorporate them into their worship services. They are willing to practice social distancing. They are willing to follow any hygiene requirements. They do not ask to share a chalice. **The Governor has offered no good reason for refusing to trust the congregants who promise to use care in worship in just the same way it trusts accountants, lawyers, and laundromat workers to do the same.**

Roberts, slip op. at 6 (emphasis added).

Come to think of it, aren't the two groups of people often the *same people*—going to work on one day and going to worship on another? **How can the same person be trusted to comply with social-distancing and other health guidelines in secular settings but not be trusted to do the same in religious settings? The distinction defies explanation, or at least the Governor has not provided one.**

Id. (bold emphasis added).

14. Though Governor Mills asserts she is not hostile towards religious gatherings, her self-serving statements are irrelevant. “The constitutional benchmark is government *neutrality*, **not government avoidance of bigotry.**” *Roberts*, slip op. at 7 (emphasis added) (internal quotation marks omitted). In so holding, the Sixth Circuit found that COVID-19 orders, virtually identical to those here, simply fail the constitutional standard. It therefore enjoined the Commonwealth of Kentucky from enforcing the discriminatory prohibitions against religious gatherings. *Id.*

15. Furthermore, On May 8, 2020, the United States District Courts for both the Eastern and Western Districts of Kentucky held that prohibitions on religious gatherings (whether drive-in or in-person) simply do not pass muster under the First Amendment. See *Maryville Baptist Church, Inc. v. Beshear*, No. 3:20-cv-278-DJH-RSE, slip op. (W.D. Ky. May 8, 2020) [hereinafter *Maryville W.D. Ky.*] (attached hereto as **EXHIBIT B**); *Tabernacle Baptist Church, Inc. v. Beshear*, No. 3:20-cv-00033-GFVT, slip op. (E.D. Ky. May 8, 2020) (attached hereto as **EXHIBIT C**).

16. In the case consolidated with *Roberts* before the Sixth Circuit, *Maryville Baptist Church, Inc. v. Beshear*, the Western District of Kentucky entered an order Friday granting an injunction pending appeal and a preliminary injunction prohibiting the enforcement of Kentucky's COVID-19 orders against in-person worship services. *Maryville W.D. Ky.*, slip op. at 1, 6. The district court had previously denied the plaintiffs' motion for temporary restraining order, 2020 WL 1909616 (W.D. Ky. April 18, 2020), but ruled for the plaintiffs Friday after finding the Kentucky Governor failed to meet his burden to prove narrow tailoring under the strict scrutiny standard. *Id.* at 4–6 (“The Governor fails, however, to present any evidence or even argument that there was no other, less restrictive, way to achieve the same goals.”) (“He still ‘has offered no good reason . . . for refusing to trust the congregants who promise to use care in worship in just the same way [he] trusts accountants, lawyers, and laundromat workers to do the same.’”).

17. In *Tabernacle*, the Eastern District of Kentucky issued a temporary restraining order enjoining Kentucky from enforcing its COVID-19 orders prohibiting religious gatherings. Slip op. at 12. In that order, the court noted that—even in times of emergency—the First Amendment does not “mean something different because society is desperate for a cure or prescription.” *Id.* at 1. There, the court noted that it was tasked with “identifying precedent in

unprecedented times,” *id.* at 7, and that COVID-19 was a different yard stick. *Id.* However, the court noted precisely what Lighthouse pointed out in its TRO motion here, that “**even under Jacobsen, constitutional rights still exist.**” *Id.* at 8 (quoting *On Fire Christian Ctr, Inc v. Fischer*, No. 3:20-cv-264-JRW, 2020 WL 1820248, *15 (W.D. Ky. Apr. 11, 2020) (emphasis added)). In fact, “while courts should refrain from second-guessing the efficacy of a state’s chosen protective measures” a government very well may “go so far beyond what was reasonably required for the safety of the public as to authorize or **compel the courts to interfere.**” *Id.* (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905) (emphasis added)). **The Governor’s actions here have transgressed that line.** Indeed,

It follows that the prohibition on in-person services should be enjoined as well. . . . There is ample scientific evidence that COVID-19 is exceptionally contagious. But evidence that the risk of contagion is heightened in a religious setting any more than a secular one is lacking. **If social distancing is good enough for Home Depot and Kroger, it is good enough for in-person religious services, which, unlike the foregoing, benefit from constitutional protection.**

Id. at 10 (emphasis added).

18. Calvary Chapel prayed unto this Court to issue a TRO and preliminary injunction restraining and enjoining Governor Mills from similarly enforcing, attempting to enforce, threatening to enforce, or otherwise requiring compliance with any prohibition on religious gatherings of any number of individuals, as against Calvary Chapel.

19. On May 9, 2020, this Court issued its Order denying Calvary Chapel’s request for a TRO and a preliminary injunction. (Dkt. 27). In that Order, this Court held that Calvary Chapel was not likely to succeed on the merits, that it did not demonstrate irreparable harm, that the balance of the equities did not favor injunctive relief, and that the public interest did not favor a preliminary injunction. (Dkt. 27 at 33).

20. The standards for granting an IPA are the same as for granting a preliminary injunction, *Respect Maine PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010), which in turn are identical to the standards for granting a TRO. *See Bourgion v. Sebelius*, 928 F. Supp. 2d 258, 267 (D. Me. 2013). Though this Court has already determined that Calvary Chapel's motion for TRO and preliminary injunction fails the relevant test, Calvary Chapel is nonetheless required by Fed. R. App. P. 8(a)(1)(C) to seek an IPA in this Court before seeking such relief from the First Circuit, where the appeal of this Court's order is currently pending. Accordingly, Calvary Chapel incorporates herein its reasons and legal arguments in its Motion for Temporary Restraining Order and Preliminary Injunction (dkt. 3), as if fully set forth herein.

21. With each passing Sunday, and—indeed—each day, Calvary Chapel is suffering under the yoke of Governor Mills' unconstitutional orders prohibiting Calvary Chapel, its Pastor, and its congregants from gathering together to exercise their sincerely held religious belief of assembling themselves together to worship the Lord. Irreparable injury is imposed on Calvary Chapel each and every day this Court withholds the requested relief.

22. As such, an IPA is warranted and should be granted immediately. Failing that, this Court should issue its order on this instant motion with all deliberate speed to facilitate Calvary Chapel's satisfying its requirements under Fed. R. App. 8 and expeditiously requesting such relief from the First Circuit.

CONCLUSION

For the foregoing reasons, Calvary Chapel respectfully requests that this Court enter the requested injunction pending appeal or, in the alternative, expeditiously issue its order concerning such motion to permit Calvary Chapel to pursue alternative relief from the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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*Pro hac vice applications granted

Attorneys for Calvary Chapel of Bangor

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of May, 2020, I caused a true and correct copy of the foregoing to be electronically filed with this Court. Service will be effectuated via this Court's ECF/electronic notification system.

/s/Daniel J. Schmid
Daniel J. Schmid