No. 20-1346

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.

Petitioner's Motion for Writ of Injunction, or Alternatively, Petition for Summary Reversal and Grant, Vacate, and Remand Order

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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, Case No. 20-1346, Petition for Writ of Certiorari, Order Granting Extension of Time to Respond to Petition to July 9, 2021.

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 B.

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 C.

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 D.

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"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]

INTRODUCTION

Pursuant to Sup. Ct. Rule 21, 28 U.S.C. §1651, and 28 U.S.C. §2101, Petitioner Calvary Chapel of Bangor ("Calvary Chapel"), herby files this Motion for Writ of Injunction Pending Disposition of Petition for Writ of Certiorari, or Alternatively, Petition for Summary Reversal and Grant, Vacate, and Remand Order. For **381 days**, 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. **Every religious worship gathering of Calvary Chapel from March 2020, to the present has been and is "illegal" under the Governor's Orders. Maine imposes the most severe restrictions in the country on churches and places of worship**. The issues presented by the instant Motion 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).

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

The issues presented in Calvary Chapel's Motion are now well known, and this Court has made it abundantly clear that discriminatory restrictions on religious worship services during COVID-19 are plainly unconstitutional under the First Amendment. Indeed, at least **10 times**, this Court has either issued an emergency writ of injunction or granted certiorari, vacated the lower court's erroneous denials of injunctive relief, and instructed courts to follow this Court's clear teachings. *See, e.g.*, *Catholic Diocese*, 141 S. Ct. 63; *Agudath Israel of Am. v. Cuomo*, 141 S. Ct. 889 (2020); *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 1289(2021); *Harvest Rock Church, Inc. v. Newsom,* 141 S. Ct. 889 (2020); *Gish v. Newsom*, 141 S. Ct. 1290 (2021); *High Plains Harvest Church v. Polis*, 141 S. Ct. 527 (2020); *Robinson v. Murphy*, 141 S. Ct. 972 (2020).

And, in *Tandon v. Newsom*, this Court noted that its precedent on COVID-19 restrictions on religious worship services "have made [four] points clear":

(1) government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise . . .

(2) whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue . . .

(3) the government has the burden to establish that the challenged law satisfies strict scrutiny. To do so in this context, it must do more than assert that certain risk factors "are always present in worship, or always absent from the other secular activities" the government may allow [and]

(4) even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case.

Tandon, 141 S. Ct. at 1296-97 (cleaned up).

Despite the abundant precedent from this Court, Maine has ignored it all and continues to impose discriminatory and unconstitutional restrictions on religious worship services. In fact, Maine now has the dubious distinction of imposing the most severe restrictions in the nation on worship with its 50-person numerical cap, or 5 people per 1,000 square feet, which is a 50-person cap for Calvary Chapel's religious worship.

URGENCIES JUSTIFYING INJUNCTIVE RELIEF

As this Court has made clear, where – as here – Petitioners "are likely to succeed on the merits of their free exercise claim; they are irreparably harmed by the loss of free exercise rights for even minimal periods of time; and the State has not shown that public health would be imperiled by employing less restrictive measures," *Tandon*, 141 S. Ct. at 1297, an injunction pending disposition of a Petition for

Certiorari is warranted. More fundamentally, any delay in adjudicating Calvary Chapel's request for injunctive relief would merely exacerbate the precise harm from which Calvary Chapel has been fighting for relief for **381 days**. Since March 2020, Calvary Chapel has been operating, and continues to operate, under threat of penalty of law, with the Governor having declared its religious services to be non-essential and illegal if they contain more people than she allows. But, as demonstrated most recently in Calvary Chapel's Chart of Current Restrictions (attached hereto as Addendum Chart), **the Governor continues to exempt numerous other sectors—including sectors that this Court has found comparable to religious gatherings**—from the restrictions she maintains on Calvary Chapel. (*Id.*)

No pastor, church, or parishioner in America should have to choose between worship and criminal sanction flowing from demonstrably discriminatory restrictions. As Justice Kavanaugh also recognized, "**[t]here 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). "**There can be no question that the challenged restrictions, if enforced, will cause irreparable harm**. The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Id.* at 67 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)) (emphasis added).

"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** because the 50-person cap precludes Calvary Chapel from offering religious worship services to anyone besides those enrolled in its Calvary Residential Discipleship program. (Exhibit I, Declaration of Ken Graves, dkt. 45-1, Graves Decl. ¶¶ 16-17.) 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 it has been suffering the unconscionable and unconstitutional injury of discriminatory worship prohibitions and restrictions for **381 days, and this Court's extension of time for Respondent to submit any response to Calvary Chapel's Petition for Writ of Certiorari guarantees that Calvary Chapel will be subject to discriminatory restrictions for many more months due to the Court's summer recess**. Petitioner filed its Petition for a Writ of Certiorari on March 22, 2021. After waiting the entire period for responding to the Petition, Respondent then waited to the last day to waive any response to the Petition on April 26, 2021. Once this Court requested a response from the Governor and set it for thirty more days to June 9, the Governor

then requested an additional thirty days. Because of that extension, Calvary Chapel's requested relief cannot be heard until months later.

Moreover, the district court has refused to provide injunctive relief despite this Court's clear teachings in *Tandon*, *Catholic Diocese*, *South Bay*, *Harvest Rock*, *Gateway City*, and the other numerous orders. Injunctive relief is needed now to prevent the unending injury from continuing for many more months. The district court has indicated to Calvary Chapel that it is inclined to delay any further consideration of Calvary Chapel's claims until this Court issues its decision on Calvary Chapel's Petition in this Court. Thus, Calvary Chapel will continue to suffer irreparable injury to its First Amendment liberties absent relief from this Court.

As the Supreme Court recognized in *Tandon*, the loss of religious worship services under discriminatory COVID-19 restrictions "for even minimal periods of time" is sufficient for injunctive relief. 141 S. Ct. at 1297. The constitutionally injurious minimal period of time has long since past, and the time has come for the Governor's unconstitutional reign of executive discrimination against religious worship service to meet its demise. Calvary Chapel has suffered unconstitutional injury for long enough, and this Court should bring its suffering to an end.

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).)

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] <u>**Executive Order 16 now requires churches and religious worship services to adhere to a strict 50-person limit**</u>. The Governor's agents at the Maine Department of Economic

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[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.

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, 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 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

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[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.")

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, requires 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 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, instruction, and religious worship. Under the Governor's Orders, the nonreligious gathering components of this program are exempt from the discriminatory numerical restrictions, but the religious gathering components and religious worship are not --

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[4] *See* Calvary Residential Discipleship, https://www.facebook.com/crdmaine (last visited May 20, 2021).

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. In other words, there are no numerical caps on the nonreligious gatherings of Calvary Chapel's drug rehab program, but the numerical caps apply as soon as the same meeting in the same church with the same people transitions to a religious service.

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 MOTION

I. THIS COURT'S *TANDON*, *CATHOLIC DIOCESE*, *SOUTH BAY*, *GATEWAY CITY*, 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 *Tandon*, this Court held that the violates the First Amendment "**whenever it treats *any* comparable activity more favorably than religious exercise**." 141 S. Ct. at 1296 (bold emphasis added). It also held that "**[i]t is no answer to say that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue**." *Id.* (emphasis added). And, in *Tandon*, California – much like Maine does here (*see* Addendum Chart) – violated this principle by many nonreligious activities and businesses more favorably than religious worship. *Id.* at 1297 (noting that "hair salons, retail stores, personal care services, movie theatres, private suites at sporting events and concerts" and others were given more favorable capacity and numerical restrictions than those imposed on churches). And, as is equally true here, this Court noted that "**[i]t is unsurprising that such litigants are entitled to relief. California's Blueprint System contains myriad exceptions and accommodations for comparable activities, thus requiring the application of strict scrutiny**." *Id.* at 1298 (emphasis added).

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*, 141 S. Ct. 716 (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. *See id.* at 718-19 (Gorsuch, J.) (noting the more favorable treatment of train stations, hairstylists, manicurists, buses, bus terminals, shopping malls, salons) There, like Maine did here in its previous orders, California imposed a total prohibition on religious worship services. 141 S. Ct. at 716. 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 716-17 (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 717.

> 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.* at 718. Indeed, "**[e]ven in times of crisis—perhaps *especially* in times of crisis—we have a duty to hold governments to the Constitution**." *Id.* (bold emphasis added).

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.* at 718. 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 719. 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*, 141 S. Ct. 1289 (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 1289-90.

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 v. Sisolak*, 982 F.3d 1228, 1233 (9th Cir. 2020); *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*, 985 F.3d 1128 (9th Cir. 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," 985 F.3d at 1151 (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, 626, 631-32 (2d Cir. 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.

Even today, though the Governor has removed some entities and sectors from the exempt list, there remain a number of entities that have no capacity or numerical restrictions whatsoever – and many of those are identical to the ones this Court has not as constitutionally comparable. (*See* Addendum Chart noting that food processing and agriculture, industrial manufacturing, warehousing, legal, business, professional, and environmental permitting, insurance services, food banks and food pantries, laundromats, and public transportation are all **exempt** from any restrictions).

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 comparable 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)). *See also Tandon*, 141 S. Ct. at 1296 ("It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue.").

"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. See also Tandon*, 141 S. Ct. at 1296-97 ("the government has the burden to establish that the challenged law satisfies strict scrutiny. To do so in this context, it must do more than assert that certain risk factors "are always present in worship, or always absent from the other secular activities the government may allow. . . . Instead, narrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID." (cleaned up)). Indeed, "**[w]here the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious exercise too**." *Id.* at 1297 (emphasis added).

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 *Tandon*, *Catholic Diocese*, *South Bay*, *Harvest Rock*, and *Gateway City* 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) Indeed, as this Court said in *Tandon*, "**[t]hat standard is not watered down; it really means what it says**." 141 S. Ct. at 1298 (emphasis added) (cleaned up). And, that test 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 **<u>381 days</u>** as of the filing of this Motion. 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*, 141 S. Ct. at 717 (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*, 985 F.3d 1128 (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).

If there is one lesson from this Court's *Tandon*, *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, **381 days of discriminatory restrictions cannot stand**. As Justice Gorsuch noted,

> 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.

South Bay, 2021 WL 406258, *4 (Gorsuch, J., Statement) (emphasis added).

And, if any doubt could have remained, this Court cleared it up by noting that "[t]his is the fifth time the Court has summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious worship." *Tandon*, 141 S. Ct. at 1297. Indeed, as Justice Gorsuch noted, "[t]oday's orders should have been needless; the lower courts in these cases should have followed the extensive guidance this Court already gave." *South Bay*, 141 S. Ct. at 719 (Gorsuch, J.). Unfortunately, neither the lower courts in this matter nor the Governor have followed that extensive guidance. 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 **381 days. Whether the former restriction was no worship, 10-people, or the current 50-people, or no more than 5 people for every 10,000 sq. feet (which is 50-people for Calvary Chapel), every religious worship meeting of the 48-residents with the pastoral staff of the Calvary Residential Disciple program has been and is now "illegal." The same people can meet for nonreligious purposes with no numerical limits, but as soon as the gathering transitions to religious worship, the numerical caps apply. And, when adding members of Calvary Chapel who are not residents of the CRD ministry, the gathering far exceeds the 50-person limit on religious gatherings. The threat of criminal sanctions has been hanging over the heads of every pastor and parishioner since March 2020, simply for assembling to worship.**

As Justice Gorsuch noted, "**[a]s 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**." *South Bay*, 141 S. Ct. at 720 (emphasis added).

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. ALTERNATIVELY, BECAUSE THE COURTS BELOW IGNORED THIS COURT'S EXTENSIVE TEACHINGS IN *TANDON*, *SOUTH BAY*, *HARVEST ROCK*, *CATHOLIC DIOCESE*, AND *GATEWAY CITY*, 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.

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.

VI. 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*, 141 S. Ct. 972 (2020) (same); *Gish v. Newsom*, 141 S. Ct. 527 (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 Motion should be granted and the Governor enjoined from enforcing her unconstitutional restrictions pending this Court's disposition of Calvary Chapel's Petition for Certiorari. Alternatively, this Court should grant Calvary Chapel's Petition, vacate the lower court orders ignoring this Court's clear teachings, and remand with instructions to follow *Tandon*, *South Bay, Harvest Rock*, *Catholic Diocese*, and *Gateway City*.

Dated this May 21, 2021.

Respectfully submitted,

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ADDENDUM CHART

SECTOR	RESTRICTIONS	AUTHORITIES HOLDING THAT SECTOR IS COMPARABLE TO RELIGIOUS GATHERINGS, WHICH CANNOT BE TREATED LESS FAVORABLY
Religious Gatherings	No more than 50 persons indoors or 5 persons per 1000 square feet, and no more than 100 persons outdoors	N/A
Calvary Chapel Residential Discipleship Program for drug and alcohol rehabilitation	No restrictions or capacity limitations, *unless the gathering includes a religious worship service, in which case the 50-person or 5-person per 1000 square feet applies indoors and 100-person limit applies outdoors*	*Harvest Rock Church v. Newsom*, 977 F.3d 728, 734 (9th Cir. 2020) (O'Scannlain, J., dissenting), vacated *Harvest Rock Church v. Newsom*, 141 S. Ct. 889 (2020)
Food processing and Agriculture	No restrictions or capacity limitations[5]	*Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (manufacturing and chemical plants)

[5] This industry was designated as "Essential" under Executive Order 28 (dkt. 1, V. Compl. ¶32 and Ex. D), and was therefore exempt from numerical or capacity restrictions. (*See also* dkt. 1-5, V. Compl. Ex. E.) Under Maine's current framework, those businesses that previously enjoyed higher capacity limits than those permitted by current capacity restrictions outlined in industry checklists are permitted to maintain the more favorable treatment that does not impose any capacity limits, *see* Restarting Maine's Economy FAQs (Mar. 10, 2021), https://www.maine.gov/decd/restarting-maines-economy-faqs (last visited May 13, 2021), unless a Checklist has been issued for the specific industry sector. For this sector, there has been no specific industry checklist. https://www.maine.gov/decd/covid-19-prevention-checklists.

Industrial Manufacturing	No restrictions or capacity limitations[6]	*Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (manufacturing and chemical plants)
Warehousing	No restrictions or capacity limitations[7]	*Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (manufacturing and chemical plants)
Legal, Business, Professional, Environmental Permitting, and Insurance Services	No restrictions or capacity limitations[8]	*Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring) (accountants, lawyers, and insurance agents)
Food Banks and Food Pantries	No restrictions or capacity limitations[9]	*Harvest Rock Church v. Newsom*, 977 F.3d 728, 734 (9th Cir. 2020) (O'Scannlain, J., dissenting), vacated *Harvest Rock Church v. Newsom*, 141 S. Ct. 889 (2020)

[6] *See supra* n.1.

[7] *See supra* n.1.

[8] *See supra* n.1.

[9] *See supra* n.1.

Public Transportation	No restrictions or capacity limitations[10]	*Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69 (2020) (bus stations and airports); *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 718 (2021) (train stations, bus terminals); *Harvest Rock Church v. Newsom*, 141 S. Ct. 1289, 1290 (2021) (same)
Residential Treatment Programs	No restrictions or capacity limitations[11]	*Harvest Rock Church v. Newsom*, 977 F.3d 728, 734 (9th Cir. 2020) (O'Scannlain, J., dissenting), vacated *Harvest Rock Church v. Newsom*, 141 S. Ct. 889 (2020)
Laundromats	No restrictions or capacity limitations[12]	*Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69 (2020) (laundromats)

[10] *See supra* n.1.

[11] *See supra* n.1.

[12] *See supra* n.1.