No. 20-1507

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CALVARY CHAPEL OF BANGOR,

Plaintiff–Appellant

v.

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

Defendant–Appellee

On Appeal from the United States District Court
for the District of Maine
In Case No. 1:20-cv-00156 before The Honorable Nancy Torresen

PLAINTIFF-APPELLANT'S EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL AND TO EXPEDITE APPEAL

Mathew D. Staver, *Counsel of Record*
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776
court@LC.org
hmihet@LC.org
rgannam@LC.org
dschmid@LC.org
Attorneys for Plaintiff-Appellant

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), Appellant Calvary Chapel of Bangor is a non-profit corporation incorporated under the laws of the State of Maine and hereby states that it has no parent corporation or publicly held corporation that owns 10% or more of its stock.

Dated: May 19, 2020

/s/ Daniel J. Schmid
Mathew D. Staver, *Counsel of Record*
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776
court@LC.org
hmihet@LC.org
rgannam@LC.org
dschmid@LC.org
Attorneys for Plaintiff-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

RELIEF SOUGHT

Plaintiff-Appellant CALVARY CHAPEL OF BANGOR ("Calvary Chapel"), on an emergency basis, hereby moves the Court:

1. Pursuant to Fed. R. App. P. 8(a)(2) and 1st Cir. Local Rule 27.0(b), for an injunction pending appeal (IPA) of the district court's May 9, 2020 Order on Plaintiff's Motion for Temporary Restraining Order ("TRO Order," attached as Exhibit 1), which is the subject of Calvary Chapel's Notice of Appeal to this Court (attached as Exhibit 2), enjoining Defendant–Appellee, Janet Mills, in her official capacity as Governor of the State of Maine ("Governor Mills"), from enforcing and applying her COVID-19 executive orders ("Orders") purporting to prohibit Calvary Chapel, on pain of criminal sanctions, from gathering for worship services **of any number of people**, regardless of whether Calvary Chapel meets or exceeds the social distancing and hygiene guidelines pursuant to which the Governor discriminatorily allows other "essential" non-religious entities (*e.g.*, liquor stores, marijuana dispensaries, warehouse clubs, 'big box' and 'supercenter' stores) to accommodate gatherings without similar limitation; or in the alternative,

2. For an order expediting the briefing, oral argument, and ultimate disposition of Calvary Chapel's appeal, to remedy the irreparable harm being suffered by Calvary Chapel in having to conduct religious worship services each

Sunday and Wednesday under the continuing threat of unconstitutional enforcement actions against Calvary Chapel, its pastor, and all members/attendees.

JURISDICTION AND TIMING

On May 9, 2020, the district court denied Calvary Chapel's motion for temporary restraining order (TRO) and preliminary injunction (PI), holding that Calvary Chapel was unlikely to succeed on the merits of its challenge to the Orders. (TRO Order at 14). Because the district court denied Calvary Chapel's TRO motion based on the likelihood of success prong, the denial is effectively a denial of Calvary Chapel's PI motion, and is immediately appealable under 28 U.S.C. §1292(a)(1). *See Fideicomiso De La Tierra Del Cano Martin Pena v. Fortuno*, 582 F.3d 131, 133 (1st Cir. 2009) (denial of TRO is immediately appealable where, as here, "it has the practical effect of refusing an injunction [and] it might have serious, perhaps irreparable consequence.").

The same day, Calvary Chapel filed its Notice of Appeal (Ex. 2), and on May 13 (three business days later), pursuant to Fed. R. App. P. 8(a)(1)(C), moved for an emergency IPA in the district court. On May 15, by minute entry on the docket, the district court denied Calvary Chapel's IPA motion without explanation. (Notification of Docket Entry ("IPA Denial"), attached as Exhibit 3). By filing both the IPA Denial and the TRO Order, Calvary Chapel has satisfied the requirements for seeking an emergency IPA in this Court under Fed. R. App. P. 8(a)(2)(A)(ii). By

presenting the instant Emergency Motion for IPA with this Court on May 19, two business days after the district court's denial of an IPA, Calvary Chapel likewise presents this request "promptly" under 1st Cir. Local Rule 27.0(b).

GROUNDS FOR RELIEF

A. Introduction.

Good cause exists for the IPA, as supported by Calvary Chapel's Verified Complaint ("V.Compl.," attached as Exhibit 4), Calvary Chapel's Motion for Temporary Restraining Order and Preliminary Injunction ("TRO/PI Motion," attached as Exhibit 5), and the Declaration of Horatio G. Mihet providing the district court with supplemental information ("Mihet Decl.," attached as Exhibit 6).

This record demonstrates that Calvary Chapel is committed to protecting the well-being of its congregants, in both word and deed, as it seeks to avail itself of the same rights to gather together for its worship services in the same manner that Governor Mills has permitted other "essential" entities under her discriminatory Orders. The Orders' prohibition of Calvary Chapel's exercising its most cherished religious beliefs—*i.e.*, to communally worship God in obedience to and fulfillment of its *raison d'etre*—violates Calvary Chapel's constitutional rights, and inflicts irreparable harm on Calvary Chapel with each passing Sunday and Wednesday.

B. Factual Summary.[1]

The Orders issued by Governor Mills from March 15 to April 28, including the controlling Executive Order 49, prohibit the gathering of **any** number of individuals for religious or "faith-based" events. (V.Compl. ¶¶26, 41, Exs. B, G). Governor Mills' current Executive Order states that "[a]ll persons living in the State of Maine are hereby ordered . . . **to stay at their homes and places of residence**," unless such persons are traveling to or conducting "essential business." (V.Compl. ¶33, Ex. D). Though continuing the prohibition on "faith-based" gatherings (*i.e.*, church) of **any number of people**, Governor Mills carved out a massive exemption from such prohibitions for businesses deemed "essential" and other businesses deemed "non-essential." (V.Compl. ¶28, Ex. C). Governor Mills' "Essential Businesses and Operations List" **exempted 44 categories of businesses** as "essential" and permitted them to continue operating. (V.Compl. ¶37, Ex. E). Such "essential businesses" include *inter alia* "grocery and household goods" stores, gas stations, "home repair, hardware and auto repair" stores, "convenience stores," "big box," "Legal, Business, Environmental, Permitting and Insurance Services, "Marijuana dispensaries," and a host of others, which are permitted to continue operations without the restrictions placed on Calvary Chapel. (V. Compl., Ex. E).

[1] Calvary Chapel commends to the Court ¶¶1-82 of its Verified Complaint (and referenced exhibits) for a complete factual background.

Such so-called "essential" businesses were permitted to continue operations subject only to the requirement that – "to the maximum extent practicable" – they adhere to social distancing recommendations and certain numerical limitations based on building square footage. (V.Compl. ¶¶29, 34, Ex. D).

Because "faith-based" gatherings are not included as "essential," no "person living in the State of Maine" may leave their home to travel to or attend a religious worship service. **The Governor's orders therefore ban ALL parking lot and in-person services no matter the size.** (*Id.*) It was error for the district court to conclude that in-person religious services of up to ten people or drive-in services are permitted (TRO Order at 12), because, even though the Orders in other places purport to allow **some** gatherings of 10 or fewer persons, **those allowances are limited by the stay-home directives for anything but "essential" activities, which do not include religious worship**. (V.Compl. ¶32, 41, Exs. D, G). Thus, despite the Orders' permissive and trusting approach toward "essential" businesses, Calvary Chapel remains subject to the prohibition on a gathering of **any** number of individuals because its congregants cannot leave their home to attend church, regardless of whether social distancing or numerical limitation based upon square footage is followed. (V.Compl. ¶42).

In fact, under Governor Mills' Restarting Maine's Economy plan, any business or entity wishing to "reopen" must apply for and be granted "a badge to

post at their business, on their website, in their advertising, or on social media" indicating that Governor Mills has allowed them to "reopen," and that they are imbued with sufficient governmental imprimatur to have gatherings of any number. (V.Compl. Ex. H, at 8). As such, even if and when the current outright ban on communal religious worship in Maine is lifted, it will be subject to a requirement that churches obtain a "**badge**" from the State.

Contrary to the record evidence, the district court suggested that Calvary Chapel was permitted to host "drive-in" worship services under Restarting Maine's Economy plan. (TRO Order at 12). But, as the sworn testimony before the district court demonstrated, Calvary Chapel had reached out to Governor Mills to inquire as to whether there was any mechanism for it to obtain such exception under the Restarting Maine's Economy plan, and it was informed that "**there is no mechanism or procedure under the Restarting Maine's Economy plan by which Calvary Chapel could seek or obtain certification, permission, and/or exemption to permit parking lot, drive-in and/or in-person religious services**." (Mihet Decl. ¶4 (emphasis added)). Thus, despite the aspirational Restarting Maine's Economy plan, which says that when Stage 1 begins, Calvary Chapel will be limited to "drive-in stay-in-your vehicle church services" (V.Compl. ¶48, Ex. H), Calvary Chapel is **still** not permitted to host in-person gatherings of any number of individuals and cannot host parking lot worship services without certification from a system the

Governor admits is not in place and will not be in place during the pendency of Calvary Chapel's appeal. (Mihet Decl. ¶4).

The Orders' restrictions on "faith-based" gatherings of any number of people are enforceable by state and local police. (V.Compl. ¶36 (noting that violation of the Orders results in a class E crime subject to six months in jail or $1,000 fine)). The Maine State Police has issued enforcement guidance concerning the Orders, noting that the Orders may be enforced by "issuing summons or making physical arrests." (V.Compl. ¶52, Ex. I). On May 6, 2020, Governor Mills noted that state and local law enforcement are already enforcing the Orders. *See* Maine Coronavirus COVID-19 Briefing (May 6, 2020), *available at* https://www.youtube.com/watch?v=dbB1yDLQva4 (last visited May 18, 2020). In her statements, the Governor made clear that no additional enforcement plans were necessary because "the orders stand on their own merits . . . a violation of any of those orders is a misdemeanor **crime** punishable by up to six months and a large fine." *Id.* (emphasis added). These Orders remain operative at least until May 31, and under the aspirational Restarting Maine's Economy plan will likely extend in some fashion until **after August**.

LEGAL ARGUMENT

To issue an IPA, this Court looks to "(1) whether the applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant

will be irreparably injured absent relief; (3) whether issuance of relief will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Respect Maine PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010). However, "[t]he first two factors are the most critical. Both require a showing of more than mere possibility." *Id.* Calvary Chapel satisfies these requirements.

I. CALVARY CHAPEL IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIMS THAT THE ORDERS VIOLATE THE FREE EXERCISE CLAUSE.

A. A Surge of Precedents Hold COVID-19 Executive Orders Imposing Restrictions on Churches While Exempting Other "Essential" Activities Violate Free Exercise Rights.

1. The Sixth Circuit Has *TWICE* Held Similar Orders Violate The Free Exercise Clause.

Twice in two weeks the Sixth Circuit has enjoined enforcement of executive orders like Governor Mills', determining that restrictions on drive-in **and in-person** worship services violate the First Amendment. *See Roberts v. Neace*, No. 20-5465, 2020 WL 2316679 (6th Cir. May 9, 2020) (**in-person** worship services); *Maryville Baptist Church, Inc. v. Beshear*, No. 20-5427, 2020 WL 2111316 (6th Cir. May 2, 2020) (plaintiffs likely to succeed on merits of Free Exercise claims for both drive-in and **in-person** services).

In *Roberts*, the Sixth Circuit granted an IPA enjoining the Kentucky Governor from treating religious gatherings differently from those of exempt essential entities, concluding the prohibitions on religious gatherings "likely fall on the prohibited side

of the line" drawn by the Free Exercise Clause. 2020 WL 2316679, at *2. 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.* at *3.

Just as here, the *Roberts* plaintiffs merely sought to be treated equally with exempted non-religious gatherings:

> Keep in mind that the Church and its congregants just want to be treated equally. . . . They are willing to practice social distancing. They are willing to follow any hygiene requirements. . . . **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**.
>
> 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.**

2020 WL 2316679, at *3 (emphasis added).

2. Other Federal Courts Have Likewise Enjoined Prohibitions on Religious Gatherings, Even Those Less Onerous Than Governor Mills' Orders.

Twice in April and three times in the last two weeks federal district courts have also enjoined disparate COVID-19 prohibitions on religious worship. On April 11, the Western District of Kentucky issued a TRO enjoining enforcement of

Kentucky executive orders prohibiting drive-in church services. *On Fire Christian Ctr., Inc. v. Fisher*, No. 3:20-CV-264-JRW, 2020 WL 1820249, at *1 (W.D. Ky. Apr. 11, 2020) [*On Fire*]. The Louisville Mayor had threatened Easter churchgoers with criminal enforcement. *Id.* at *4–5. The court held such threats and actions unconstitutional because the government "**may not ban its citizens from worshipping**." *Id.* at *8 (emphasis added).

On April 18, 2020, the District of Kansas issued a TRO enjoining enforcement of a restriction on religious gatherings of more than 10 people, and requiring the state to treat worship services the same as exempted "essential" gatherings. *See First Baptist Church. v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021, *6–7 (D. Kan. Apr. 18, 2020) [*First Baptist*]. *First Baptist* held that the government's disparate treatment of religious gatherings violated the Free Exercise Clause because it showed that "**religious activities were specifically targeted for more onerous restrictions than comparable secular activities**." *Id.* at *7 (emphasis added). The court concluded that banning religious gatherings 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," *id.*, 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).

On May 8, 2020, the Eastern and Western Districts of Kentucky held that prohibitions on in-person religious gatherings violate the First Amendment. *See Maryville Baptist Church, Inc. v. Beshear*, No. 3:20-cv-278-DJH-RSE, 2020 WL 2393359 (W.D. Ky. May 8, 2020) [*Maryville* W.D. Ky.]; *Tabernacle Baptist Church, Inc. v. Beshear*, No. 3:20-cv-00033-GFVT, 2020 WL 2305307 (E.D. Ky. May 8, 2020).

In *Maryville* W.D. Ky., the district court granted an IPA and PI enjoining enforcement of Kentucky's orders against in-person worship services. 2020 WL 2393359, at *1, 3. The court had previously denied a TRO, 2020 WL 1909616 (W.D. Ky. April 18, 2020), but ruled for the plaintiffs after finding the Governor failed to meet his burden to prove narrow tailoring under the strict scrutiny standard. 2020 WL 2393359, at *2–3 ("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.'").

In *Tabernacle*, the district court issued a statewide TRO enjoining Kentucky from enforcing its prohibition on in-person religious gatherings. 2020 WL 2305307,

at *1, 6. The court observed that the First Amendment does not "mean something different because society is desperate for a cure or prescription." *Id.* at *1. The court acknowledged that it was tasked with "identifying precedent in unprecedented times," *id.* at *4, but concluded, "'**even under *Jacobson [v. Massachusetts,* 197 U.S. 11 (1905)], constitutional rights still exist**.'" *Id.* at *4 (quoting *On Fire*, 2020 WL 1820248, *15 (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**.'" 2020 WL 2305307, at *4 (quoting *Jacobson*, 197 U.S. at 28 (emphasis added)).

> It follows that the prohibition on **in-person** services should be enjoined . . . . 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**.

2020 WL 2305307, at *5 (emphasis added).

On May 16, 2020, the Eastern District of North Carolina issued a TRO enjoining the Governor from enforcing gathering restrictions on religious worship because they violated the Free Exercise Clause. *See Berean Baptist Church v. Cooper*, No. 4:20-cv-81-D (E.D.N.C. May 16, 2020) [*Berean Baptist*] (attached as

Exhibit 7). The governor's orders prohibited religious in-person gatherings of more than 10 people if such services were held indoors, unless it was "impossible" for the church to hold services outdoors.[2] *Berean Baptist* at 1. Granting the TRO, the court noted that "**[t]here is no pandemic exception to the Constitution of the United States or the Free Exercise Clause of the First Amendment**." *Id.* at 2 (emphasis added). It found that restrictions on religious worship that treat non-religious assemblies differently were "precisely the sort of subtle departures from neutrality that the Free Exercise Clause is designed to prevent." *Id.* at 12. Indeed, the "**glaring inconsistencies** between the treatment or religious entities and individuals and non-religious entities and individuals take EO 138 outside 'the safe harbor for generally applicable laws.'" *Id.* at 14 (quoting *Roberts*, 2020 WL 2316679, *3) (emphasis added). As is equally true here, the *Berean Baptist* court noted that,

> Eleven men and women can stand side by side working indoors Monday through Friday at a hospital, at a plant, or at a package distribution center and be trusted to follow social distancing and hygiene guidance, but those same eleven men and women cannot be trusted to do the same when they worship inside together on Saturday or Sunday. "The distinction defies explanation."

Id. (quoting *Roberts*, 2020 WL 2316679, *3).

---

[2] Because outdoor services were permitted, and because of the "impossibility" exception allowing even indoor services, the North Carolina restrictions were **significantly** narrower than Maine's.

B. The Orders Burden Calvary Chapel's Free Exercise Rights.

Calvary Chapel demonstrated below that it has sincerely held religious beliefs, rooted in Scripture's commands (*e.g.*, *Hebrews* 10:25), that Christians are not to forsake the assembling of themselves together, and that they are to assemble for worship even more in times of peril and crisis. (V.Compl. ¶¶ 89, 173, 213). Indeed, the *On Fire* court explained, "the Greek work translated church . . . literally means **assembly**." 2020 WL 1820249, at *8 (cleaned up) (emphasis added). Governor Mills' threatened enforcement of her Orders substantially burdens Calvary Chapel's religious practice of assembling together for worship, according to its sincerely held beliefs, in violation of the First Amendment.

"[R]eligious 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). Prohibiting church services while allowing other "essential" entities to gather "**violat[es] the Free Exercise Clause beyond all question**." *On Fire*, 2020 WL 1820249, at *6 (emphasis added). Even in a time of crisis or disease, *see Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the First Amendment does not evaporate. Indeed, "even under *Jacobson*, constitutional rights still exist. Among them is the freedom to worship as we choose." *On Fire*, 2020 WL 1820249, at *8. *See also Berean Baptist* at 2 ("There

is no pandemic exception to the Constitution of the United States or the Free Exercise Clause of the First Amendment.").

As shown in the Grounds for Relief (*supra* pp. 3-7), Governor Mills and the state police, under the authority of the Orders, have threatened criminal sanctions for conducting worship services of any number of people, even if socially distanced. Such threatened sanctions substantially burden Calvary Chapel's religious exercise, triggering First Amendment protections.

C. The Orders' Substantial Burdens On Calvary Chapel's Religious Beliefs Are Subject to Strict Scrutiny Under the First Amendment.

Under the First Amendment, the Orders must be subjected to strict scrutiny because they are not neutral or generally applicable, and therefore "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993).

"Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.* at 531. A law is not neutral "if the object of the law is to infringe upon or restrict practices because of their religious motivation." *Id.* at 533. Courts first look to the text, but "facial neutrality is not determinative. The Free Exercise Clause . . . extends beyond facial discrimination [and] forbids subtle departures from neutrality." *Id.* at 533–34. The First Amendment prohibits hostility that is "masked, as well as overt."

Id. "The constitutional benchmark is government *neutrality*, **not government avoidance of bigotry**." *Roberts*¸ 2020 WL 2316679, at *4 (emphasis added). The Orders are not facially neutral, but even if so, they covertly depart from neutrality by treating religious worship differently from a host of exempted "essential" entities' gatherings.

Similarly, to determine general applicability courts focus on disparate treatment of similar conduct. *Lukumi*, 508 U.S. at 542. A law is not generally applicable where "inequality results" from the government's "decid[ing] that the governmental interests it seeks to advance are worthy of being pursued only against conduct with religious motivation." *Id.* at 543. A law "fall[s] well below the minimum standard necessary to protect First Amendment rights" when the government "**fail[s] to prohibit nonreligious conduct that endangers these interests in a similar or greater degree**" than the prohibited religious conduct. *Id.* (emphasis added).

The Orders fail both tests. They expressly target "religious" or "faith-based" gatherings for disparate treatment. (V.Compl. ¶ 26, Exs. B, C.) Yet, in the very same text, businesses such as liquor stores, warehouse clubs, supercenter stores, marijuana dispensaries, and even "non-essential" stores are exempted from the broad prohibitions. (V.Compl. ¶¶ 28, 38, Ex. E.) When the government "has targeted religious worship" for disparate treatment—such as attending religious worship

services—while "not prohibit[ing] parking in parking lots more broadly—including, again, the parking lots of liquor stores," the restriction is not neutral. *On Fire*, 2020 WL 1820249, at *6.

Furthermore, here, as in *First Baptist*, the "orders begin with a broad prohibition against mass gatherings [but] proceed to carve out broad exemptions for a host of secular activities, **many of which bear similarities to the sort of personal contact that will occur during in-person religious services**." 2020 WL 1910021, at *5 (emphasis added). In *Maryville Baptist*, too, the Sixth Circuit stated that such a system of exemptions for all gatherings but religious gatherings fails the neutrality test because "restrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom." 2020 WL 2111316 at *4. Governor Mills expressly targeted churches, threatening criminal prosecution. At the same time, no similar action is directed towards people in liquor stores, in Walmart, in marijuana dispensaries, or even in "non-essential" businesses. The Orders are not neutral.

D. The Orders Fail Strict Scrutiny.

Because the Orders trigger strict scrutiny (*see supra* Sections I.A-C), they are subject to "the most demanding test known to constitutional law," *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1050 (6th Cir. 2015), which is rarely passed. *See Burson v. Freeman*, 504 U.S. 191, 200 (1992) ("we readily acknowledge that a law

rarely survives such scrutiny"). "**Strict-scrutiny review is strict in theory but usually fatal in fact**." *Bernal v. Fainter*, 467 U.S. 216, 219 n.6 (1984) (emphasis added). This is not that rare case.

To be sure, efforts to contain the spread of a deadly disease are "compelling interests of the highest order." *On Fire*, 2020 WL 1820249, at *7. But where the State permits regular large gatherings of persons for commercial and non-religious purposes, while expressly prohibiting religious gatherings of any number of people, the State's assertions of a compelling interest are substantially diminished. Indeed, the Orders "cannot be regarded as protecting an interest of the highest order . . . **when [they leave] appreciable damage to that supposedly vital interest unprohibited**." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (emphasis added).

Whatever interest Governor Mills has in combatting a pandemic, however, she cannot show the Orders are the least restrictive means of protecting that interest. And it is the State'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 [its] proposed less restrictive alternatives are less

effective than [the Orders]." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (emphasis added).

Governor Mills cannot carry her burden because she cannot demonstrate that she seriously undertook to consider other, less-restrictive alternatives and ruled them out for good reason. To meet this burden, Governor Mills must show that she "**seriously** undertook to address the problem with less intrusive tools readily available to [her]," meaning that she "**considered different methods that other jurisdictions have found effective**." *McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014) (emphasis added). And the Governor cannot meet her burden by showing "simply that the chosen route is easier." *Id.* at 2540. Thus, the Governor "would have to 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). Furthermore, "[i]t is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

Governor Mills' Orders fail the test. She considered nothing but a complete prohibition on religious worship, while expansively exempting numerous other "essential" businesses and non-religious entities, such as liquor, warehouse, and supercenter stores, and marijuana dispensaries. (V.Compl. ¶¶ 39–43, Ex. H.) The

Governor has not and cannot state why or how gatherings of persons at a warehouse or supercenter store, where distancing and hygiene are only required "to the maximum extent practicable" are any less "dangerous" to public health than a responsibly distanced and sanitized worship service, yet the Governor exempted the non-religious gatherings and prohibited Calvary Chapel's services.

Examples abound of less restrictive approaches that Governor Mills neither tried nor considered, such as in Arizona, Florida, Indiana, Ohio, and Texas, where religious worship is designated essential (V.Compl. ¶¶ 65–67, 71, 72, Exs. J– M, Q, R), or as in Alabama, Arkansas, and Connecticut, where religious worship is allowed subject to distancing and sanitization practices (V.Compl. ¶¶68-70, Exs. O-Q). Calvary Chapel has demonstrated it already meets or exceeds the distancing and hygiene requirements Governor Mills deems sufficient for other commercial and non-religious "essential" entities. (V.Compl. ¶¶55-56). There is no justification for depriving Calvary Chapel of the same consideration or benefit.

Indeed, as the *On Fire* court reasoned, Governor Mills is unlikely to be able to demonstrate that she deployed the least restrictive means because her Orders,

> are **"underinclusive"** ***and*** **"overbroad."** They're underinclusive because they don't prohibit a host of equally dangerous (or equally harmless) activities that the Commonwealth has permitted . . . . Those . . . activities include driving through a liquor store's pick-up window, parking in a liquor store's parking lot, or walking into a liquor store where other customers are shopping. The Court does not mean to impugn the perfectly legal

> business of selling alcohol, nor the legal and widely enjoyed activity of drinking it. But if beer is "essential," **so is [church]**.

On Fire, 2020 WL 1820249, at *7 (emphasis added) (footnote omitted); *see also First Baptist*, 2020 WL 1910021, at *7 (D. Kan. Apr. 18, 2020).

The Governor's failure to tailor her Orders to closely fit the safety ends she espouses, and her failure to try other, less restrictive alternatives that have worked and are working in other jurisdictions across the country, demonstrate that the Governor cannot satisfy her burden to prove narrow tailoring. Thus, the Orders fail strict scrutiny, and the IPA is warranted.

II. CALVARY CHAPEL HAS SUFFERED, IS SUFFERING, AND WILL CONTINUE TO SUFFER IRREPARALE INJURY ABSENT AN IPA.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also* 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice & Procedure* §2948.1 (2d ed. 1995) ("When an alleged constitutional right is involved, most courts hold that **no further showing of irreparable injury is necessary**." (emphasis added)). Thus, demonstrating irreparable injury in this matter "**is not difficult. Protecting religious freedom was a vital part of our nation's founding, and it remains crucial today**." *On Fire*, 2020 WL 1820249, at *9 (emphasis added). With each passing Sunday and Wednesday, Calvary Chapel is suffering under the yoke of the Governor's

unconstitutional orders prohibiting it from assembling together to exercise its sincerely held religious beliefs of assembling themselves together to worship God.

III. THE REMAINING FACTORS WARRANT AN IPA.

An IPA enjoining enforcement of the Orders on Calvary Chapel's responsibly conducted worship services will impose no harm on Maine. "[T]here can be no harm to [the government] when it is prevented from enforcing an unconstitutional statute . . . ." *Joelner v. Vill. of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004). But for Calvary Chapel, "even minimal infringements upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief." *Jones v. Caruso*, 569 F.3d 258, 277 (6th Cir. 2009). Indeed, absent an IPA, Calvary Chapel "face[s] an impossible choice: skip [church] service[s] in violation of [its] sincere religious beliefs, or risk arrest . . . or some other enforcement action for practicing those sincere religious beliefs." *On Fire*, 2020 WL 1820249, at *9.

An IPA is in the public interest, too. Contrary to the district court's contention to the contrary, "[i]njunctions protecting First Amendment freedoms are **always in the public interest**." *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 590 (7th Cir. 2012) (emphasis added). "First Amendment rights are not private rights of the appellants so much as they are rights of the general public. Those guarantees [are] for the benefit of all of us." *Machesky v. Bizzell*, 414 F.2d 283, 288–90 (5th Cir. 1969) (cleaned up). Indeed, worship is ultimately submission, not selfishness, *see, e.g.*,

Bronx Household of Faith v. Bd. of Educ. of City of N.Y., 650 F.3d 30, 37 n.8 (2d Cir. 2011), and "**the public has a profound interest in men and women of faith worshipping together [in church] in a manner consistent with their conscience**." *On Fire*, 2020 WL 1820249, at *9 (emphasis added). Thus, the balance of the equities tips decidedly in Churches' favor, and an IPA is in the public interest.

CONCLUSION

For all of the foregoing reasons, Calvary Chapel respectfully requests that the Court (1) issue the requested IPA, and, or in the alternative, (2) order expedited briefing, oral argument, and ultimate disposition of this appeal.

Respectfully submitted,

Dated: May 19, 2020

/s/ Daniel J. Schmid
Mathew D. Staver, *Counsel of Record*
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776
court@LC.org
hmihet@LC.org
rgannam@LC.org
dschmid@LC.org
Attorneys for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPE-FACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). Not counting the items excluded from the length by Fed. R. App. P. 32(f), this document contains 5,191 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). This document has been prepared using Microsoft Word in 14-point Times New Roman font.

/s/ Daniel J. Schmid
Daniel J. Schmid
Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed via the Court's ECF filing system and therefore service will be effectuated by the Court's electronic notification system upon all counsel or parties of record.

/s/ Daniel J. Schmid
Daniel J. Schmid
Attorney for Plaintiff-Appellant