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

REPLY BRIEF OF PLAINTIFF–APPELLANT

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), Plaintiff–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: August 5, 2020

/s/ Roger K. Gannam
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INTRODUCTION

Plaintiff–Appellant, Calvary Chapel of Bangor, files this reply to the Brief of Governor Mills ("Gov.Br."). The Governor fails to overcome Calvary Chapel's entitlement to preliminary injunctive relief from the Governor's arbitrary and discriminatory COVID-19 Orders[1] imposing unique restrictions on religious worship that are not imposed on myriad "essential" activities. Nor do the Governor's evolving orders and continually shifting interpretations negate Calvary Chapel's likelihood of success or irreparable harm. The Court should reverse the district court's order denying preliminary injunctive relief.

ARGUMENT

I. ALL OF THE GOVERNOR'S ORDERS RESTRICTING WORSHIP ARE BEFORE THE COURT, REGARDLESS OF THE GOVERNOR'S CONTINUALLY SHIFTING INTERPRETATIONS AND DEFLECTIONS TO AVOID ACCOUNTABILITY.

A. The Governor Misrepresents What Her Orders Require and Deflects Blame to Calvary Chapel for Telling the Court What the Orders Say.

The Governor denigrates Calvary Chapel's challenges to the language of her Orders as "existing only in Calvary's imagination" (Gov.Br. 17) and insinuates Calvary Chapel would disregard the Governor's sanitization and distancing protocols during worship irrespective of the challenged numerical limitations

[1] Br. 3–7. Unless otherwise indicated, capitalized terms herein have the same meanings as in Calvary Chapel's Opening Brief.

(Gov.Br. 17.) But the Court should not countenance the Governor's bad faith deflections. Calvary Chapel's challenges are based on what the Governor's Orders actually say, and the Governor's contrived and belated interpretations only strengthen Calvary Chapel's case.

In its Brief, Calvary Chapel demonstrated the progression of the Governor's Orders, first limiting gatherings to 10 people in Order 14, including "faith-based events" (Br. 4); then ceasing most activities of all businesses and operations not defined to be "Essential Businesses and Operations" (EBOs) in Order 19, which necessarily included houses of worship because they were not defined to be EBOs (Br. 4–5); then requiring all Mainers to stay at home unless traveling for defined "Essential Activities" or doing work for EBOs (or limited approved work for non-EBOs) in Order 28, which necessarily prohibited travel to attend religious worship because it was not included in "Essential Activities" (Br. 6); then allowing non-EBOs to gradually and conditionally reopen upon application and approval from the state under Order 49 and the Restarting Plan, with churches only allowed to reopen for drive-in worship services under Stage 1 of the Restarting Plan (Br. 6–7).

After Calvary Chapel sued the Governor on May 5, 2020, to challenge the plain language of her restrictions on religious worship, the Governor began reinterpreting her Orders to partially relax the restrictions. Thus, on May 22 the State issued a religious worship guidance (Gov.Br. 8–9; *COVID19 Prevention Checklist*

Industry Guidance, Phase 1: Religious Gatherings, https://www.maine.gov/decd/checklists/religious-gatherings[2]) which stated, for the first time, that in-person worship services of up to 10 people were permissible—despite the plain language of Order 28's stay-at-home provisions and the Restarting Plan's drive-in-only permissions. The guidance also provided that in-person worship services of up to 50 people would be allowed as of May 29, two days before the June 1 effective date of Executive **Order 55** FY 19/20, which increased the statewide gathering restrictions of Order 14 from 10 to 50 persons. (Gov.Br. 7–8, n.7.)

Remarkably, despite the plain language of Order 19's non-EBOs closure provisions, Order 28's stay-at-home provisions, and the Restarting Plan's limiting church reopenings to drive-in services, the Governor has now twice advised the Court that she always interpreted Order 28's stay-at-home provisions to allow Mainers to leave their homes to attend religious worship services as "Essential Activities"—not because religious worship is among the "Essential Activities" identified in Order 28, but because the Governor represents that she interprets the "Essential Activities" of "seeking medical or behavioral health or emergency services" to include attending worship. (Gov.Br. 7.) This interpretation, however,

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[2] The Court may take judicial notice of information contained on the State's official website as such public information is "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2).

contravenes the plain language of Order 28 and the Restarting Plan, and is an obvious litigation contrivance to bolster the Governor's narrative that her Orders are not as bad as Calvary Chapel "imagines" they are. (Gov.Br. 17.)

Nevertheless, the Governor's dubious interpretation of Order 28 has dispositive implications that strengthen Calvary Chapel's case: If religious worship services are "Essential Activities" under the Governor's Orders, then churches must be EBOs under the Orders. Indeed, if attending religious worship services is "seeking medical or behavioral health or emergency services," then churches naturally fit within "behavioral health, health care . . . providers and organizations" or "other medical . . . facilities," which are expressly defined as EBOs in Order 19 and under Order 28.[3] And, if churches are EBOs under the Governor's Orders, then they are not subject to the numerical limitations of Order 14 (JA056) or Order 55 (Gov.Br. Add-002 to 003), and Calvary Chapel may conduct its worship services subject only to the sanitization and distancing requirements applicable to other EBOs. So, if the Governor now interprets EBOs to include houses of worship, she

[3] *See* Order 19, JA059; Order 28, JA074; EBOs Definitions, JA077 (issued under authority of Order 28); Br. 4–6.

should say so, and Calvary Chapel would welcome it.[4] But if the Governor intends to exclude houses of worship from EBOs, as she did when this litigation was commenced, then she cannot expect the Court to take seriously her unnatural interpretation of "Essential Activities"—as defined in her Orders—to include attending worship. Indeed, the Governor expressly declined to extend EBOs status or benefits to Calvary Chapel at the outset of this litigation (Decl. Horatio G. Mihet, Doc. 15, JA167–169), before cynically pivoting to her later interpretation of "Essential Activities" to include attending worship. The Governor's disingenuous interpretation was obviously contrived for purposes of litigation and avoiding accountability for banning travel for any religious worship under the plain language of Order 28.

In another deflection attempt, the Governor criticizes Calvary Chapel for stating to the Court what the Governor's Orders actually say about requiring businesses and operations to obtain government approval badges for reopening under the Restarting Plan. (Gov.Br. 1, 9.) But the Governor fails to inform the Court

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[4] Calvary Chapel certainly considers the assembled religious worship of its congregants to be essential, as a matter of spiritual health and obedience. (Br. 15.) *See* Judy Harrison, *Orrington pastor who sued Janet Mills says coming together 'a spiritual necessity' at illegal service* (May 10, 2020, 6:16 PM), Bangor Daily News, https://bangordailynews.com/2020/05/10/news/bangor/orrington-pastor-who-sued-janet-mills-says-coming-together-a-spiritual-necessity-at-illegal-service/ ("'It is a spiritual necessity, whether our governor thinks so or not,' pastor Ken Graves told the 75 or members of his flock who attended . . . .") (cited in Gov.Br. at 17).

that she moved the goalposts during this appeal. As shown in Calvary Chapel's Brief, the plain language of Order 49 and the Restarting Plan requires government approval and badging as conditions for non-EBOs to reopen. (Br. 7.) When Calvary Chapel filed its Motion for Injunction Pending Appeal (IPA) in this Court on May 19, there was no contrary order or guidance from the Governor. In the Governor's response to the IPA motion filed May 26, she stated in a footnote there is no badge requirement for religious worship services (Opp'n Mot. IPA 9 n.5), but did not cite to any order, guidance, or other document that would have informed the public that Order 49 and the Restarting Plan do not mean what they say. Thus, Calvary Chapel reiterated the plain requirements of Order 49 and the Restarting Plan in its Opening Brief. (Br. 7.)

In the Governor's Brief, she again states churches are not subject to a badge requirement, but for the first time cites to a state website to support her position. (Gov.Br. 9 (citing *COVID-19 Prevention Checklists*, https://www.maine.gov/decd/covid-19-prevention-checklists).) According to the website, the state will issue badges to reopened businesses to voluntarily display, but only if they have committed to complying with the State's conditions by submitting an online form. Thus, according to the website, reopening does not require a badge, but it does require satisfying the State's conditions.

Accompanying the link to the mandatory compliance form is a notation, "religious organizations and licensed health care providers are not required to use this form." But archived, earlier versions of the webpage, prior to May 26—the day the Governor filed her IPA opposition—do not include the exemption for religious organizations.[5] For example, the May 14 version of the webpage provided exemption only for "licensed health care providers." *COVID-19 Prevention Checklists*, Internet Archive WayBack Machine (May 14, 2020), http://web.archive.org/web/20200514120838/https://www.maine.gov/decd/covid-19-prevention-checklists.[6] Thus, there was no published exemption for churches when Calvary Chapel filed suit, filed this appeal, and filed its IPA motion; the church exemption was not published until the day the Governor filed her IPA opposition, where she first announced the exemption. The only reasonable inference is that the Governor contrived the exemption for litigation purposes and obscured the timing

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[5] Internet Archive WayBack Machine, http://web.archive.org/web/20201201000000*/https://www.maine.gov/decd/covid-19-prevention-checklists (last visited Aug. 5, 2020). Calvary Chapel requests that the Court take judicial notice of the archived versions of the State website. "Other courts have taken judicial notice of the contents of web pages available through the Wayback Machine as facts that can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Walsh v. Teltech Sys., Inc.*, CV 13-13064-RWZ, 2015 WL 12856456, at *2 (D. Mass. July 30, 2015) (citing Fed. R. Evid. 201, articles, and cases), *aff'd*, 821 F.3d 155 (1st Cir. 2016).

[6] The May 14 version of the webpage was the latest version available from the arvhive prior to the May 26 version.

of its publication from the Court to preserve the Governor's ruse that her Orders are not as bad as Calvary Chapel "imagines."[7] (Gov.Br. 17.)

In still another deflection attempt, the Governor insinuates Calvary Chapel disregarded the sanitization and distancing protocols applicable to EBOs when the church met for worship, outside, while seeking relief from the Governor's Orders. (Gov.Br. 17.) Specifically, the Governor describes a photograph purportedly accompanying a news report and showing "congregants gathered closely together, with few, if any, wearing face coverings." (*Id.* (citing Harrison, *supra* note 4).) But the Governor's Brief does not include a copy of the photograph, nor does the news story at the link provided. Because the photograph is not in the record, and the Governor's description is not judicially noticeable, there is no evidence from which to answer these critical questions: What congregants were "gathered closely together"—members of the same family? (*Cf.* May 22 worship guidance, *supra* p. 3 ("Those living in the **same household may sit together without distancing** . . . ."

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[7] To be sure, prior to the Governor's citing to the State website in her brief, Calvary Chapel had no reason to search the State's website for any reopening process at all, let alone a religious exemption, because the Governor's counsel advised Calvary Chapel's counsel on May 7 that "there is no mechanism or procedure under the [Restarting Plan] by which Calvary Chapel could seek or obtain any certification, permission, and/or exemption to permit parking lot, drive-in and/or in-person religious services," and that "there would not be such a mechanism or procedure available for Calvary Chapel during the pendency of Calvary Chapel's motion for a temporary restraining order or preliminary injunction." (Decl. Horatio G. Mihet, JA168.)

(emphasis added)).) And, were the congregants who were not wearing masks already seated? (*Cf. id.* ("Cloth face coverings must be worn by all attendees **when physical distancing is difficult to maintain, such as when coming and going** . . . ." (emphasis added)).) The answers to these questions are obviously important, and without them the Governor cannot succeed in her transparent attempt to insinuate wrongdoing by Calvary Chapel.

B. Neither the Governor's Shifting Interpretations nor Her Newer Orders Negate Calvary's Chapel's Likelihood of Success or Irreparable Harm.

Correctly characterizing the progression of the Governor's restrictions on religious worship, as Calvary Chapel did above, is critical to the injunctive relief Calvary Chapel seeks because Calvary Chapel's challenge to the Governor's earliest restrictions remains live even after the Governor issues shifting interpretations or new orders relaxing those restrictions. *See Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 345 (7th Cir. 2020) ("[W]e must address the merits of plaintiffs challenge to [the Illinoi's Governor's 10-person limit on religious worship] though it is no longer in effect."). Thus, the 10-person gathering limit of Order 14, the closure of non-EBOs under Order 19, the stay-at-home provisions of Order 28, and the reopening conditions under Order 49 and the Restarting Plan are all before the Court as proper subjects of Calvary Chapel's requested preliminary injunctive relief.

Moreover, Calvary Chapel's challenges to the Governor's Orders are not diminished in the least by the relaxing of the in-person worship restriction from 10 to 50 people under the May 22 worship guidance and Order 55 (Gov.Br. 8–9), because any numerical limitation which is not imposed on the myriad EBOs exempted from the Governor's Orders supplies grounds for relief in all of Calvary Chapel's claims. (V.Compl., JA050–051; Br. 14–50.) Indeed, Calvary Chapel is still permitted to provide material, non-religious social services in its building with unlimited numbers as an EBO, but is unable to preach a sermon to the same people assembled in the same building if their number is more than 50. (Br. 8.) Thus, the Court should reject the Governor's argument that Calvary Chapel is no longer suffering irreparable harm merely because it has to modify its worship less drastically now than it did when the limit was 10 people (or none at all). (Gov.Br. 2.)

> Sure, the Church might use Zoom services or the like, as so many places of worship have decided to do over the last two months. But who is to say that every member of the congregation has access to the necessary technology to make that work? Or to say that every member of the congregation must see it as an adequate substitute . . . or what it means when "not forsaking the assembling of ourselves together," Hebrews 10:25.
>
> [T]hat's exactly what the federal courts are not to judge—how individuals comply with their own faith as they see it.

Roberts v. Neace, 958 F.3d 409, 415 (6th Cir. 2020). (*Cf.* Br. 15 ("Calvary Chapel demonstrated below that it sincerely holds the religious belief, rooted in Scripture's commands (*e.g.*, *Hebrews* 10:25), that Christians are not to forsake assembling together . . . ." (citing V.Compl., JA032, 034, 039)).)

Furthermore, to the extent the Governor intends to suggest Calvary Chapel's claims are moot as a result of the relaxed restrictions in her newer Orders, she falls far short of carrying her burden. Under the voluntary cessation doctrine, taking jurisdiction from this Court would require the Governor to carry the formidable burden of proving she cannot revert back to her illegal policies upon conclusion of the litigation, which she has not attempted. *See Elim Romanian*, 962 F.3d at 345 ("Voluntary cessation of the contested conduct makes litigation moot only if it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.' . . . It follows that the dispute is not moot . . . ."); *see also Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc*., 528 U.S. 167, 189 (2000). In addition, the temporal nature of the COVID-19 pandemic and the timing of Governor's Orders in response fit this case "comfortably within the established exception to mootness for disputes capable of repetition, yet evading review." *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 462 (2007).

Indeed, the Governor's more recent Orders demonstrate the necessarily temporary nature of all her Orders, and her ability to reverse any earlier easing of

restrictions and reimpose or heighten restrictions at will. For example, although Order 55 relaxed the gathering restrictions of Order 14 from 10 to 50 persons, it continues the "distinction between essential and non-essential businesses" in Order 19 and the stay-at-home directive of Order 28, such that only businesses and activities deemed "essential" under Order 19 or otherwise approved under the Restarting Plan are permitted to open, and Mainers are only permitted to leave their homes to engage in such "essential" or approved businesses and activities. (Gov.Br. Add-002 to 004.) Then, on June 22, the Governor announced that the State was postponing the previously announced "reopening of indoor service at bars" under Stage 3 of the Restarting Plan.[8] Then, on July 8, 2020, the Governor issued Executive **Order 2** FY 20/21, hardening the mask requirements of Order 49 (Br. 6–7) and Order 55 (Gov.Br. Add-002 to 004) by requiring many establishments in Maine's more populous cities and coastal counties to enforce the mask requirements on pain of action against their licenses a permits.[9] Thus, the progression and frequency of

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[8] *To Protect Public Health, Mills Administration Postpones Reopening of Indoor Bar Service Across Maine* (June 22, 2020), https://www.maine.gov/governor/mills/news/protect-public-health-mills-administration-postpones-reopening-indoor-bar-service-across-maine. (*See supra* note 2.)

[9] Executive Order 2 FY 20/21, *An Order Strengthening the Use of Face Coverings* (July 8, 2020), https://www.maine.gov/governor/mills/sites/maine.gov.governor.mills/files/inline-files/An%20Order%20Strengthening%20the%20Use%20of%20Face%20Coverings.pdf. (*See supra* note 2.)

the Governor's COVID-19 Orders demonstrate both that the Governor is not inhibited in returning to more restrictive requirements (foreclosing voluntary cessation mootness), and that all of the COVID-19 Orders are inherently temporary (and therefore capable of repetition yet evading review).

II. THE GOVERNOR'S ARGUMENTS FAIL TO OVERCOME CALVARY CHAPEL'S LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS CONSTITUTIONAL CLAIMS.

A. This Court Should Follow the Analytical Line of Cases Holding That the Governor's Disparate Worship Restrictions Violate the First Amendment, and Reject the Deferential Line of Cases Relied on by the Governor to Avoid Strict Scrutiny of Her Discriminatory Orders.

Calvary Chapel's Brief demonstrates that two distinct lines of reasoning have emerged from the cases involving church challenges to COVID-19 worship restrictions: the **analytical** line, supporting Calvary Chapel, and the **deferential** line, which includes the district court's order. (Br. 21–38.) Not surprisingly, the Governor joined the district court below in relying heavily on the deferential line of cases, which in turn rely on the century-old *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), as providing a unique, "public health emergency" standard of constitutional analysis. (Gov.Br. 21–45.) This Court should avoid the Governor's (and the district court's) error and follow the better-reasoned analytical line to hold that the Governor's Orders arbitrarily and discriminatorily restrict worship services in violation of Calvary Chapel's free exercise rights.

The Governor's foundational, critical error is citing *Jacobson* for the proposition that "when a state is facing a public health emergency and enacts measures to protect its residents, the measures are afforded great deference and the usual constitutional analysis does not apply." (Gov.Br. 21.) **But *Jacobson* predated the incorporation of the First Amendment to the states, let alone the development of strict scrutiny**. (Br. 32–34.)

Then, the Governor compounds her error with the patently false statement that "[t]he Chief Justice of the Supreme Court has recognized that *Jacobson* supplies the correct standard for constitutional challenges to restrictions imposed to combat the spread of the COVID-19 virus." (Gov.Br. 24–25 (citing *South Bay United Pentecostal Church v Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring in 5-4 denial of application for emergency writ of injunction against California's COVID-19 worship restrictions)).) As shown in Calvary Chapel's Brief, the Chief Justice's lone concurrence in *South Bay* (joined by no other justice) focused primarily on the extremely high bar an applicant must reach to obtain emergency, interlocutory injunctive relief from the Supreme Court. (Br. 36–37.) He only cited *Jacobson* after his brief constitutional "observations," and then only for the general proposition that safety and health are the purview of state officials under the Constitution. 140 S. Ct. at 1613. Moreover, though equal in precedential value (*i.e.*, none, Br. 37 n.3), the Governor fails to mention the sharp and robust dissent of

Justice Kavanaugh (joined by two other justices) in which he explained convincingly why restrictions such as Governor Mills' "indisputably discriminate[] against religion, and such discrimination violates the First Amendment." 140 S. Ct. at 1615. (Br. 37–38.) But, like the Chief Justice, Justice Kavanaugh did not cite *Jacobson* as providing a separate constitutional test—indeed, Justice Kavanaugh did not cite *Jacobson* at all. (Br. 38.) To be sure, courts reviewing COVID-19 orders are "tasked with identifying precedent in **unprecedented times**," *Tabernacle Baptist Church, Inc. v. Beshear*, 3:20-CV-00033-GFVT, 2020 WL 2305307, at *4 (E.D. Ky. May 8, 2020) (emphasis added), but "'**even under *Jacobson*, constitutional rights still exist**.'" *Id.* (emphasis added) (quoting *On Fire Christian Ctr., Inc. v. Fischer*, No. 3:20-cv-264-JRW, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020)).

The Governor, not surprisingly, also relies heavily on the Seventh Circuit's decision in *Elim Romanian* (Gov.Br. 29–31), which epitomizes the deferential line of cases this Court should reject (Br. 32.) But the Governor glossed over the Seventh Circuit's obvious error, which places the *Elim Romanian* decision in direct conflict with the Supreme Court's binding decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). As shown in Calvary Chapel's Brief, *Lukumi* holds that a law restricting religious conduct "fall[s] well below the minimum standard necessary to protect First Amendment rights" when the government "**fail[s] to prohibit nonreligious conduct that endangers [the**

government's] interests in a similar or greater degree" than the prohibited religious conduct. 508 U.S. at 543. (Br. 19.) The *Elim Romanian* court, however, expressly acknowledged "that warehouse workers and people who assist the poor or elderly"—exempt EBOs under Governor Mills' Orders (Br. 4–6)—"may be at much the same risk as people who gather for large, in-person religious worship." 962 F.3d at 347. Under *Lukumi*, this acknowledgement required the *Elim Romanian* court to find that the worship restrictions at issue were not generally applicable, and to hold them unconstitutional unless they could satisfy strict scrutiny. This Court should not follow *Elim Romanian* into conflict with binding Supreme Court precedent.

The *Elim Romanian* court also violated the strict scrutiny principles of *Lukumi* by imposing its own value judgments on the importance of worship to the plaintiffs. As shown above, the court agreed that the Illinois numerical limitations exempted some "Essential Activities" meeting material needs, but involving similar risks of COVID-19 spread as worship services, but the court nonetheless approved the disparate treatment because it assigned a lower value to spiritual needs met by in-person worship. *See* 962 F.3d at 347 ("Feeding the body requires teams of people to work together in physical spaces, but churches can feed the spirit in other ways."). (*Cf.* Gov.Br. 31.) But such line drawing based on the court's view of the value of a

religious activity, rather than the risk of the activity to the claimed governmental interest, is precisely what the Free Exercise Clause forbids.[10]

It is surprising that the Governor also follows the district court in relying on *Cassell v. Snyders*, No. 20 C 50153, 2020 WL 2112374 (N.D. Ill. May 3, 2020) (Gov.Br. 31–32), because, as shown in Calvary Chapel's Brief, the *Cassell* court inexplicably attributed to *Jacobson* purportedly quoted language that did not appear in *Jacobson*, and the district court below approvingly quoted *Cassell*'s false quote. (Br. 33.) This Court should reject *Cassell* and any line of cases exhibiting such weak—indeed, false—analysis, and should reject the Governor's analysis for the same reasons.

Ultimately, the Governor labors in vain to criticize the analytical line of cases relied on by Calvary Chapel (Gov.Br. 35–44; Br. 21–38) which were faithful to *Lukumi*'s reality-based risk analysis, unlike the deferential line of cases relied on by the Governor which assign increased risk to worship services based on

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[10] Distinguishing between material and spiritual needs is fraught with theological implications, and therefore not religiously neutral. In the biblical account of *Matthew*, the devil tempted Jesus to command stones to become bread, to satisfy his physical hunger, but Jesus rebuked the devil by answering, "It is written, Man shall not live by bread alone, but by every word that comes from the mouth of God." *Matthew* 4:3–4 (ESV) (internal quotation marks omitted); *cf. Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d at 610, 614 (6th Cir. 2020) ("But the orders do not permit soul-sustaining group services of faith organizations, even if the groups adhere to all the public health guidelines required of essential services . . . .").

unsupportable assumptions that it will be business-as-usual inside houses of worship even though the same people are assumed to alter their conduct everywhere else. As shown below, this Court should not join in these false assumptions.

B. The Comparisons Used by the Governor in an Attempt to Avoid Strict Scrutiny Are Fraught With False and Unreasonable Assumptions Not Supported by the Record.

The Governor feigns incredulity at Calvary Chapel's disregard for the Governor's self-labeled, "uncontroverted evidence." (Gov.Br. 18.) But the Governor's so-called "evidence" is nothing more than rank speculation and inadmissible *ipse dixit* from executive branch officials, undeserving of this Court's attention.

The Declaration of Nirav Dinesh Shah, M.D., J.D. (JA172–178, the "Shah Declaration") provides no "uncontroverted evidence" to support the Governor's disparate treatment of religious worship, as compared to exempt EBOs where large numbers of people are permitted without limit, subject only to distancing and sanitization guidelines to the "maximum extent practicable," or according to "best efforts." (Order 19, JA059–060). Not a single material statement in the Shah

Declaration is supported by a study, report, or other authority, which relegates her statements to the inadmissible categories of speculation and *ipse dixit*.[11]

For example, Dr. Shah baldly declares, "Gatherings in houses of worship present a greater risk to the public health than shopping at a grocery store or other retail outlet" (JA175), without citing any support whatsoever other than her own speculation about what shoppers "may" do in a store—assuming COVID-19 protocols are in place—compared to what worshippers "may" do in church—assuming **no** COVID-19 protocols are in place (JA175–176). *Cf. Tabernacle Baptist*, 2020 WL 2305307, at *5 (E.D. Ky. May 8, 2020) ("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**." (emphasis added)). Thus, not only are Dr. Shah's factual assumptions unsupported and unrealistic, but her purported comparison of risk between worship and patronizing EBOs is illogical and false.

Moreover, Dr. Shah also purported to invoke studies linking churches to the spread of COVID-19, but did not cite to a single one. (JA176.) Nor did Dr. Shah attempt to explain or describe what sanitization and distancing protocols, if any,

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[11] The Declaration of Derek P. Langhauser (JA179–188), Judge Mills' Chief Legal Counsel, consists entirely of legal argument based on hearsay, and deserves no evidentiary weight whatsoever.

were observed at the churches purportedly linked to COVID-19 spread. Furthermore, as shown in Part II.C, *infra*, the studies she likely refers to are wholly inapposite to the realities of Calvary Chapel and its willingness and ability to engage in responsible, sanitized, and distanced worship.

Regarding opinion testimony like Dr. Shah's, the Supreme Court has explained:

> [N]othing in either *Daubert [v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)] or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data **only by the *ipse dixit* of the expert**. A court may conclude that **there is simply too great an analytical gap between the data and the opinion proffered**.

Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997) (emphasis added). Under this binding precedent, Dr. Shah's intellectually unrigorous, *ipse dixit* testimony, unsupported by any authorities whatsoever, deserves no weight. Moreover, the comparisons used by the Governor throughout her brief to obscure the arbitrary and discriminatory application of her Orders, in reliance on Dr. Shah's empty testimony and the deferential line of cases (*see supra* Part II.A), are fraught with false and unreasonable assumptions that contradict reality and the record.

For example, relying on Dr. Shah, the Governor makes pre-pandemic, business-as-usual assumptions about worship—that all "[r]eligious services . . . involve large numbers of individuals in close proximity to each other, personal

interaction . . . sharing of objects, and personal contact." (Gov.Br. 27–28.) But the record evidence shows Calvary Chapel "can and would practice stringent social distancing and personal hygiene protocols, including extensive and enhanced sanitizing of common surfaces in Calvary Chapel's building prior to the service . . . ." (V.Compl., JA022–023.) Thus, Calvary Chapel's actual approach to worship demonstrates its services would not involve the "close proximity" of "large numbers of individuals" and "personal contact" the Governor falsely assumes to justify her Orders.

Moreover, the Governor has effectively provided **no evidence** to support her illogical assumptions that visits to laundromats and Walmarts are materially shorter, or that patrons of such venues are speechless, or that patrons "have little, if any personal interaction" with employees or managers or other patrons prior to checking out. (Gov.Br. 27.) The Governor certainly has not banned speech and direct engagement at any EBOs. And the Governor has said nothing about the **full workdays** and **workweeks** spent by "large numbers" of employees in myriad EBOs, like Walmart, necessarily involving "personal interaction" within varying proximities "for extended periods." (Gov.Br. 27–29.) Nor has the Governor said anything about the practical reality that all of Calvary Chapel's worshippers enter a sanitized building, and occupy distanced and sanitized spaces within the building, every time they worship (V.Compl., JA022–023); whereas, patrons of EBOs enter

buildings and move about throughout their interior spaces, coming into contact with numerous surfaces touched—and air breathed—by potentially hundreds or thousands of others since the last sanitization.

And the Governor has utterly failed to show any difference between church congregants and grocery or liquor shoppers, or patrons of any EBOs, in terms of how they "'enter a building quickly . . . and leave once the task is complete.'" (Gov.Br. 32 (quoting *Cassell*, 2020 WL 2112374, at *9).) It strains credulity to differentiate churches from other buildings on this point. At all EBOs patrons are free to enter slowly, linger, speak directly with any number of employees and other patrons, and touch as many items as they desire, including items touched by unknown numbers of others with no sanitization in between. Ultimately, the Governor cannot reasonably impute voluntary COVID-19 conscientiousness and virtuousness to patrons and operators of EBOs while assuming the worst about worshippers, as if they necessarily revert to pre-pandemic, business-as-usual practices once through the church doors:

> **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.**

Roberts, 958 F.3d at 414 (bold emphasis added).

The Court should reject the Governor's false and unfair comparisons, and instead credit the record evidence showing Calvary Chapel is willing and able to engage in responsible, sanitized, and distanced worship (Br. 9) which cannot be shown to be different in danger from the myriad exempted EBOs. Thus, the Governor's restrictions on Calvary Chapel's worship "fall well below the minimum standard necessary to protect First Amendment rights" because they "**fail to prohibit nonreligious conduct that endangers [the Governor's] interests in a similar or greater degree**" than the prohibited religious conduct. *Lukumi*, 508 U.S. at 543 (emphasis added).

C. The Governor's Inapposite, Anecdotal Accounts of Church Gatherings Do Not Advance His Burden to Justify His Worship Restrictions.

As shown in Calvary Chapel's Brief (Br. 41), it is the Governor's burden to prove the constitutionality of her numerical restrictions on worship services under strict scrutiny. The Governor's factually deficient, anecdotal accounts of far-flung church gatherings do not satisfy the constitutional standard. *See, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (government "must demonstrate that the recited harms are real, not merely conjectural"); *Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (alleged harm cannot be "mere speculation or conjecture").

For example, the church choir practice near Seattle, repeatedly referenced by the Governor (and Dr. Shah) (Gov.Br. 11, 32 n.12, 37–38), is inapposite. The choir

met on **March 17**—ancient history on the COVID-19 timeline—for 2 1/2 hours of singing practice, which included "members sitting close to one another, sharing snacks, and stacking chairs at the end of practice." Lea Hamner, MPH, et al., *High SARS-CoV-2 Attack Rate Following Exposure at a Choir Practice—Skagit County, Washington, March 2020*, 69(19) MMWR 606, 606 (May 15, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6919e6-H.pdf. Indeed, [m]embers had an **intense and prolonged exposure, singing while sitting 6–10 inches from one another**." *Id.* at 609 (emphasis added). Moreover, one attendee "**was known to be symptomatic**." *Id.* at 606 (emphasis added). At the time of the practice, "[t]here were no closures of schools, restaurants, churches, bowling alleys, banks, libraries, theaters, or any other businesses," and "[t]he advice from the State of Washington was to limit gatherings to 250 people." Skagit Valley Chorale, *Statement re: COVID-19*, skagitvalleychorale.org (Mar. 23, 2019), https://9b3c1cdb-8ac7-42d9-bccf-4c2d13847f41.filesusr.com/ugd/3e7440_635a114fead240e1a02bc2c872a852de.pdf. Thus, the choir practice was nothing like the services desired by Calvary Chapel. (Br. 9–12.) And, with respect to singing, the CDC concluded only that "[t]he act of singing, itself, **might** have contributed to transmission." Hamner, *supra*, at 606 (emphasis added).

As another example, the Arkansas CDC report the Governor references (Gov.Br. 11–12) notes that the alleged events at the church took place on March 6–

8, which was 8 days prior to the CDC's issuing social distancing guidelines, and 7 days before the Governor declared an emergency in Maine (JA055), and included two people who were **symptomatic** and likely responsible for the subsequent spread. *See* Allison James, DVM, PhD, et al., *High COVID-19 Attack Rate Among Attendees at Events at a Church—Arkansas, March 2020*, 69(20) MMWR 632 (May 22, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6920e2-H.pdf. A repeat of such events this far into the pandemic is highly unlikely, especially where congregations like Calvary Chapel are observing sanitization and distancing.

Another oft-cited example from South Korea is even less apposite. (*See* Gov.Br. 32 n.12.) A "cluster" of COVID-19 infections originated with a church congregant around **February 18**, 2020, when there were **only 39 known cases in the country**. Youjin Shin, Bonnie Berkowitz, Min Joo-Kim, *How a South Korean church helped fuel the spread of the coronarvirus*, The Washington Post (Mar. 25, 2020), https://www.washingtonpost.com/graphics/2020/world/coronavirus-south-korea-church/. The government did not deploy testing and closures until after the church cluster emerged. *Id.*

It is disingenuous even to suggest that the earliest COVID-19 cases involving churches—before any standardized or widespread social distancing and sanitization protocols had taken effect in Maine or anywhere else—have any bearing on worship

services today, attended by the same people expected to observe these protocols literally everywhere else they are allowed to go.

To be sure, if such anecdotal reports justified numerical limits on worship in churches, then all EBOs should be subject to the same limitations, for similarly anecdotal reports abound of significant infections originating at EBOs, such as Walmart stores and warehouses. *See, e.g.*, NBC News Channel, *Two Illinois Walmart employees die days apart from COVID-19*, WOAI News 4 San Antonio (Apr. 4, 2020), https://news4sanantonio.com/news/nation-world/two-illinois-walmart-employees-die-days-apart-from-covid-19; Pamela Johnson, *Loveland Walmart Distribution Center has COVID-19 outbreak*, Loveland Reporter-Herald (May 20, 2020, 7:52 PM), https://www.reporterherald.com/2020/05/20/loveland-walmart-distribution-center-has-covid-19-outbreak/; Sonia Gutierrez, Zack Newman, *King Soopers, Walmart, City Market and Mi Pueblo Market are among the grocery stores with COVID-19 outbreaks*, KUSA-TV 9 News (May 16, 2020, 12:30 PM), https://www.9news.com/article/news/health/coronavirus/costco-walmart-among-grocery-store-covid-19-outbreaks/73-bde0be4d-e1e3-41f1-a56d-8cf2356d6dde; Jeremy C. Fox, *Worcester Walmart shuttered by coronavirus outbreak*, Boston Globe (Apr. 30, 2020, 12:01 AM), https://www.bostonglobe.com/2020/04/30/nation/worcester-walmart-shuttered-by-coronavirus-outbreak/; Tony Keith, Lindsey Grewe, Aurora Walmart reopens

following deadly COVID-19 outbreak linked to store, KKTV 11 News (Apr. 27, 2020, 10:30 AM), https://www.kktv.com/content/news/3-COVID-19-deaths-connected-to-a-Colorado-Walmart-store-closes-temporarily-in-Aurora-569911821.html.

D. The Governor's Orders Violate the Establishment Clause Under the *Lemon* Test.

Contrary to the Governor's arguments (Gov.Br. 45–47), the Governor's Orders violate the Establishment Clause under each of the familiar three prongs of *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). First, there can be no secular purpose in religious worship limitations that are not imposed on myriad activities of similar or greater risk. Indeed, the Governor has a low view of worship, counting it among unimportant events "primarily social, personal, and discretionary" in Order 14's gathering ban (JA056), and criticizing worshippers for not doing more than even her Orders require. (*See supra* Part I.A.) This barely masked disdain for responsibly practiced and sincerely held beliefs on the critical importance of in-person worship reveals that any neutrality towards religious worship ostensibly reflected in the Orders was, constitutionally, a sham from the start. *See McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 864 (2005). Such hostility also smacks of the "clear and impermissible hostility toward . . . sincere religious beliefs" rightfully censured by the Supreme Court in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018).

Second, the Orders' numerical limitations clearly inhibit religion for all persons, including Calvary Chapel and its congregants, who value in-person worship as a matter of sincerely held belief. Third and finally, the Orders foster excessive government entanglement with religion by prescribing the Governor's preferences for how Churches should worship (*e.g.*, online and drive-in services) and delegating to law enforcement officials the authority to conduct headcounts and sanction violators. Thus, the Governor's Orders violate Calvary Chapel's Establishment Clause rights under *Lemon*.

"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). To be sure, regardless of whether the Orders' hostility and micromanagement specifically violate the Establishment Clause or the Free Exercise Clause, they violate the First Amendment and should be enjoined.

III. THE GOVERNOR'S ARGUMENTS DO NOT SHIFT THE BALANCE OF THE REMAINING PRELIMINARY INJUNCTION FACTORS.

The Governor has not overcome Calvary Chapel's irreparable harm because she has not overcome Calvary Chapel's likelihood of success:

> In the First Amendment context, the likelihood of success on the merits is the linchpin of the preliminary injunction analysis. As the Supreme Court has explained, the loss

> of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. Accordingly, irreparable injury is presumed upon a determination that the movants are likely to prevail on their First Amendment claim.

Sindicato Puertorriqueno de Trabajadores v. Fortuno, 699 F.3d 1, 10–11 (1st Cir. 2012) (cleaned up) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). None of the Governor's arguments overcome Calvary Chapel's likelihood of success or irreparable harm.

The Governor's argument on the other factors—balancing harms and the public interest—depends entirely on the premise that "undisputed evidence" supports the Governor's disparate treatment of religious worship. (Gov Br. 50–51.) As shown above and in Calvary Chapel's Opening Brief, this premise is surely false. Thus, all factors support Calvary Chapel's requested preliminary injunctive relief.

CONCLUSION

For all of the foregoing reasons, and the reasons in Calvary Chapel's Opening Brief, the district court's order should be reversed, and the case remanded to the district court with instructions to preliminarily enjoin enforcement of the Governors' Orders.

Respectfully submitted,

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I hereby certify that on this August 5, 2020 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.

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