No. 21-1453

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 DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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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: June 14, 2021

/s/ Daniel J. Schmid
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RELIEF SOUGHT

For **402 days**, Defendant Governor Janet Mills ("the Governor") imposed unconstitutional restrictions on Calvary Chapel's religious worship services while exempting myriad other activities from similar restrictions, has modified, revised, and reinstated restrictions at the flick of her pen, and continues to assert the absolute authority to reinstate such restrictions at any moment. **Every religious worship gathering of Calvary Chapel from March 2020 until May 23, 2021 was "illegal" under the Governor's Orders. After the Supreme Court's decisions concerning identical restrictions, Maine imposed the most severe restrictions in the country on churches and places of worship**. And, the Governor continues to claim unbridled discretion and authority to impose her unconstitutional restrictions at any moment.

As the Supreme Court unequivocally held, "even in a pandemic, **the Constitution cannot be put away and forgotten**." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (*Catholic Diocese*) (emphasis added). Indeed, "[t]he restrictions at issue here, by effectively barring many from attending religious worship services, strike at the very heart of the First Amendment's guarantee of religious freedom." *Id.* And, as 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 the Supreme Court has made it abundantly clear that discriminatory restrictions on religious worship services during COVID-19 are plainly unconstitutional. Indeed, at least **10 times**, the Supreme 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).

Despite the abundant precedent from the Supreme Court, the Governor continued to impose discriminatory and unconstitutional restrictions on religious worship services. In fact, after California's total ban on worship was enjoined by the Supreme Court, Maine held 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. *South Bay*, 141 S. Ct. at 717 (Gorsuch, J., Statement) (citing 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)).)

Since March 2020, Calvary Chapel was operating and continued to operate under the threat that the Governor, having declared its religious services to be non-essential and illegal if they contain more people than she allows, will impose criminal sanction for simply engaging religious worship services. And, Calvary Chapel continues to operate under the Sword of Damocles that the Governor will reinstate her prior restrictions at any moment.

No pastor, church, or parishioner in America should have to choose between worship and criminal sanction. As Justice Kavanaugh recognized, "**[t]here is also no good reason to delay issuance of the injunctions** [because] issuing the injunctions now [will] ensure that the applicants' constitutional rights are protected." *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**.'" *Id.* at 67 (emphasis added).

And, in each of its decisions regarding virtually identical matters, the Supreme Court still held that the plaintiffs' challenges justified injunctive relief despite the changed restrictions. *See, e.g.*, *Catholic Diocese*, 141 S. Ct. 68-69 (holding that injunctive relief was still appropriate despite the fact the Governor changed the restrictions during the pendency of the motion); *Augudath Israel*, 141 S. Ct. 8899 (same); *Tandon*, 141 S Ct. at 1297 (same); *South Bay*, 141 S. Ct. at 720 (Gorsuch, J., concurring); *Gateway City*, 141 S. Ct. 1460 (same). And, the district court in California entered a permanent injunction against restrictions that had also been revoked. *See Harvest Rock Church v. Newsom*, dkt. 95, No. 2:20-cv-6414 (C.D. Cal. May 14, 2021). **In each of these instances, the Supreme Court issued injunctive relief against the unconstitutional restrictions**.

For the reasons that follow, Calvary Chapel moves this Court for an injunction pending appeal and an injunction pending disposition of Calvary Chapel's currently pending Petition for Writ of Certiorari (No. 20-1346).

JURISDICTION

Calvary Chapel requested the injunction pending appeal and disposition of the petition for writ of certiorari prior to the instant motion, and the district court denied that relief on June 4, 2021. (*See* EXHIBIT A, Order Granting Motion to Dismiss and Denying Pending Motion for Injunctive Relief.) This Court has jurisdiction to enter the requested injunctive relief pursuant to Fed. R. App. P. 8.

LEGAL ARGUMENT

To obtain an injunction pending disposition of Calvary Chapel's Petition for Writ of Certiorari, 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). Calvary Chapel easily satisfies these requirements.

I. THE SUPREME COURT'S *TANDON*, *CATHOLIC DIOCESE*, *SOUTH BAY*, *GATEWAY CITY*, AND *HARVEST ROCK* DECISIONS 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*, the Supreme Court held that the government violates the First Amendment "**whenever it treats *any* comparable activity more favorably than religious exercise**." 141 S. Ct. at 1296 (bold emphasis added). "**[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 here – violated this principle by many nonreligious activities more favorably than religious worship. *Id.* at 1297 ("hair salons, retail stores, personal care services, movie theatres, private

suites at sporting events and concerts"). And, "**[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. *Catholic Diocese*, 141 S. Ct. at 66 ("acupuncture facilities, camp grounds, garages, as well as . . . plants manufacturing chemicals and microelectronics and all transportation facilities"); *id.* at 69 (Gorsuch, J.) ("hardware stores, acupuncturists, and liquor stores. Bicycle repair shops, certain signage companies, accountants, lawyers, and insurance agents"); *id.* at 73 (Kavanaugh, J) (grocery stores, pet stores, or big-box stores).

In *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021), the Supreme Court again faced a state's COVID-19 regime discriminating against religious worship services while exempting myriad other business. *See id.* at 718-19 (Gorsuch, J.) (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*, the 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. 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**. (EXHIBIT B, V. Compl. Ex. D at 2-3.) And, "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). *See also Harvest Rock Church v. Newsom*, 141 S. Ct. 1289, 1289-90 (2021) (enjoining California's discriminatory total prohibition on religious worship).

Numerous circuits, too, have been 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 restriction, 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). *See also Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 626, 631-32 (2d Cir. 2020) (10 and 25-person restrictions on religious gatherings while grocery stores, hospitals, liquor stores, pet shops, financial institutions, news media, certain retail stores, and construction were exempt).

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 subject to much harsher and discriminatory restrictions.

Thus, the Governor's Orders restricted 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 of the 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. *Compare 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), *with* (Addendum 1, Chart of Most Recent Restrictions and Exemptions.)

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)). *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 *Tandon*, *Catholic Diocese*, *South Bay*, *Harvest Rock*, *Calvary Chapel Dayton Valley*, *Calvary Chapel Lone Mountain*, and *Agudath Israel*—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 as fundamental to religious exercise—or "Essential" like 'big box' and warehouse store shopping—"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 burdened Calvary Chapel's exercise of religion. "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 defend her orders as 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 **402 days** 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*, the Supreme Court was presented with amicus noting the remaining states with strict numerical caps on religious worship services. But, after the Supreme Court struck down California's total prohibition on worship services, **Maine became 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 became the most restrictive)).

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 restrictions 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 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, **402 days actual or threatened discriminatory restrictions cannot stand**.

> 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, 141 S. Ct. at 719 (Gorsuch, J., Statement).

And, if any doubt could have remained, the Supreme 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. And, in *Gateway City Church v. Newsom*, the Supreme Court held that failure to enjoin discriminatory restrictions was plainly "erroneous." 141 S. Ct. 1460, 1460 (2021). 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 court nor the Governor have followed that extensive guidance.

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

The Governor started with a total prohibition on religious worship, progressed to a 10-person limit, and ended with the 50-people, or no more than 5 people for every 10,000 sq. feet (which is 50 people for Calvary Chapel). While Calvary Chapel was restricted to a 50-person cap for indoor religious worship services (*see* Addendum Chart), it could 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. (V. Compl. Ex. C at 7.) This internal discrimination has been present in every order since the original Stay at Home Order of March 24, 2020 (V. Compl. Ex. C).

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)).

Here, that internal discrimination has real-world consequences for Calvary Chapel. As part of its Calvary Residential Discipleship program (CRD), Calvary Chapel provides drug, alcohol, and other counseling to 48 residents each day, requiring attendance at religious worship services, fellowship with Calvary Chapel's members during religious worship, and other Bible study activities. (*See* Exhibit B dkt. 45-1, Declaration of Ken Graves, ¶¶3-15.) And, that program – though exempt under the Governor's Orders – precludes Calvary Chapel from fulfilling that mission with its counseling program because the 50-person cap prohibited Calvary Chapel from conducting worship with the CRD residents because the group with the pastors exceed the 50-person cap. And no member or guest of Calvary Chapel who is not a

resident of the CRD program may attend religious worship services with the residents. Bible study and worship is essential to the CRD program, and this includes worshipping with Believers who are not part of the program. (*Id.*, ¶¶16-23.) Micromanaging the affairs of Calvary Chapel and precluding it from offering religious worship services to its members and their Brothers and Sisters in the Residential program imposes unconscionable internal discrimination upon Calvary Chapel. (*Id.* ¶17.)

II. 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 by the mere threat of Governor's discriminatory Orders. As Justice Kavanaugh recognized, "**[t]here is also no good reason to delay issuance of the injunctions** [because] issuing the injunctions now [will] ensure that the applicants' constitutional rights are protected." *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 under the Governor's 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 for **402 days.** 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).

III. *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 Calvary Chapel's irreparable loss of First Amendment freedoms 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)

CONCLUSION

For the foregoing reasons and because Calvary Chapel remains under a constant threat of reinstated restrictions on their cherished religious liberties, this Court should grant an injunction pending appeal and/or disposition of the Petition for Writ of Certiorari.

Respectfully submitted,

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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.

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