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

REPLY BRIEF OF PLAINTIFF–APPELLANT

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

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: November 15, 2021

/s/ Roger K. Gannam
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

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INTRODUCTION

The Governor hangs her entire defense on the contention that because her challenged orders have expired, there is nothing left for this Court to do, and the claims are moot. (Governor Br. 11–25). The distict court agreed. (Add. 18–33.) However, the expiration, modification, revocation, or amendment of the Governor's Orders does not moot Calvary Chapel's claims. The Supreme Court in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), and *Roman Catholic Dicoese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), ruled that easing challenged COVID-19 restrictions does not moot a plaintiff's claims if the governor retains the authority to reinstate the discriminatory restrictions at any time.

More fatal for the Governor is the fact that Calvary Chapel did not merely request declaratory and injunctive relief against the Orders as they existed at the time the Verified Complaint was filed, but also against: (1) "the GATHERING ORDERS **or any other order** to the extent any such order prohibits religious worship services at Calvary Chapel" (App. 052, V. Compl. 40 (emphasis added)); and (2) "**any future** modification, revision, or amendment of the GATHERING ORDERS or similar legal directive" (App. 054, V. Compl. 42 (emphasis added)). And Calvary Chapel specifically sought both preliminary and permanent injunctive relief against the Gathering Orders and any future iteration thereof in its prayer for relief. (App. 053, V. Compl. 41.)

The Governor retains the authority to reinstate her old restrictions at any time and impose new restrictions at any time. That retention of authority is fatal to her mootness defense. And, despite a Supreme Court decision on November 25, 2020, *see Roman Catholic Diocese*, 141 S. Ct. 63, the Governor maintained her discriminatory restrictions on religious worship for **another 6 months** (until May 13, 2021). (Gov. Br. 6.) And it was not just *Roman Catholic Diocese* that should have demonstrated to the Governor the constitutional error of her ways—from the time she issued her November 4 Order (App. 238–241), to the new order on February 12, 2021 (Gov. Br. 5), to the May 13, 2021 order where all restrictions were lifted, the Supreme Court issued no fewer than 10 decisions demonstrating that discriminatory restrictions on religious worship plainly violate the First Amendment. *See Roman 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); *Gish v. Newsom*, 141 S. Ct. 1290 (2021); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 889 (2020); *High Plains Harvest Church v. Polis*, 141 S. Ct. 527 (2020); *Robinson v. Murphy*, 141 S. Ct. 972 (2020). The latest of the decisions was issued on April 9, 2021. *See Tandon*, 141 S. Ct. 1294. It would be **another 34 days** before the Governor would drop her restrictions, all the while

stating that she retained the authority to reinstitute restrictions at any time based solely on her discretion. Yet the Governor now comes to this Court claiming Calvary Chapel's claims are moot because she learned the lesson from *Roman Catholic Diocese*. (Gov. Br. 18.)

The Court should reject the Governor's erroneous contentions. First, the Governor's contention that she learned her lesson from *Roman Catholic Diocese* (Gov. Br. 18) is belied by the fact that it took her **six months** after *Roman Catholic Diocese* (and nine more Supreme Court decisions) to remove her unconstitutional restrictions. The Governor has not changed her ways, and she retains the authority to reinstate her discriminatory restrictions at any time.

Second, it is notable what "lesson" the Governor claims she learned from *Roman Catholic Diocese*. The Governor does not contend that she will never reinstate discriminatory restrictions on religious worship services, or that *Roman Catholic Diocese* compels a finding that the First Amendment prohibits her from doing so. Rather, the Governor claims Calvary Chapel's claims are moot because she would never reinstate a "ten-person limit." (Gov. Br. 18.) Indeed, the only lesson the Governor claims to have learned from the Supreme Court's avalanche of precedent against discriminatory COVID-19 restrictions on religious worship was that she "recognized that a return to a ten-person limit, at least on religious gatherings, would raise constitutional concerns and might not survive a challenge."

(Gov. Br. 18 (citing App. 248–249).) But the Supreme Court precedent is NOT limited to a ten-person limit. Rather, the precedent prohibits discriminatory treatment of religious gatherings irrespective of numerical size. The Governor does not claim that she will never reinstate any restrictions, discriminatory or otherwise. Instead, she claims that Calvary Chapel's claims are moot because she would never reinstate a restriction of ten people.

Calvary Chapel's claims are not moot. And, even if they were, they satisfy the exceptions to mootness because they are capable of repetition, yet evading review, and because the Governor does not make it absolutely clear that she will never reinstate discriminatory restrictions on Calvary Chapel's religious worship services. The district court should be reversed.

ARGUMENT

I. CALVARY CHAPEL'S CLAIMS ARE NOT MOOT, AND THE EXCEPTIONS TO MOOTNESS PLAINLY APPLY TO CALVARY CHAPEL'S CLAIMS.

A. The Governor Ignores the Supreme Court's Unequivocal Holdings That Her Changed Restrictions Do Not Moot a Claim if She Retains the Authority to Reinstate the Prior Restrictions.

The Governor's mootness defense rests on her contention that her restrictions have been lifted, and her endless declarations of emergency have temporarily ceased. (Gov. Br. 11–12.) This contention, however, ignores the unequivocal statements of the Supreme Court concerning similarly changed orders. In *Tandon*, the Supreme

Court declared that "even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case." 141 S. Ct. 1294, 1297 (2020) (emphasis added). "And, so long as a case is not moot, litigants otherwise entitled to emergency injunctive relief remain entitled to such relief where applicants '**remain under a constant threat**' that government officials will use their power to reinstate the challenged restrictions." *Id.* (emphasis added) (quoting *Roman Catholic Diocese*, 141 S. Ct. at 68).

The reason for this is simple: "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." *South Bay United Pentecostal Church*, 141 S. Ct. at 720 (Gorsuch, J., statement). Indeed, "officials with a track record of moving the goalposts retain authority to reinstate those heightened restrictions at any time." *Tandon*, 141 S. Ct. at 1297.

Thus, despite her contentions that the expiration of her Orders moots Calvary Chapel's claims, the Governor misses the point that she retains the authority to reinstate them at any time, and she has clearly stated she may reimpose restrictions in her discretion. Put simply, the Supreme Court has recognized that given the ever-changing nature of COVID-19 restrictions on religious worship services, "there is no reason why [churches] should bear the risk of suffering further irreparable harm in the event of another reclassification." *Roman Catholic Diocese*, 141 S. Ct. at 68–

69 (emphasis added). And, because the Governor moved the goalposts at every turn, Calvary Chapel did not have sufficient time to fully litigate its constitutional claims through the court system. The Governor's continual moving of the goalposts, her retention of authority to reimpose those restrictions, and her statement that she may reimpose restrictions in her discretion permits Calvary Chapel to continue its claims for permanent injunctive relief and declaratory relief.

B. The Governor Fails to Address Precedent Demonstrating That Her Orders Were Too Short in Duration to Be Fully Adjudicated.

The Governor's treatment of Calvary Chapel's "capable of repetition yet evading review" contentions demonstrates her inability to overcome that exception to mootness. (Gov. Br. 22–23.) The Governor claims that her restrictions were not too short in duration to be fully adjudicated, and seeks refuge in the fact that the district court initially ruled on the preliminary injunction within four days of the Complaint being filed. (*Id.* at 23.) This is a non sequitur. The capable of repetition, yet evading review standard applies where "(1) the challenged action is in its duration too short to be **fully litigated** prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 463 (2007) (emphasis added) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)).

1. A matter is not "fully litigated" unless there is time for appellate and Supreme Court review.

First, the ability of a trial court to determine a motion for a preliminary injunction is not the relevant inquiry. Under the Supreme Court's test, a matter is not "fully litigated" unless complete review of the merits can be had by a trial court, appellate court, and the Supreme Court. Indeed, "fully litigated" means that the merits of the matter make their way "through the state courts (and arrive here) prior to its expiration." *Turner v. Rogers*, 564 U.S. 431, 440 (2011). As the Ninth Circuit has recognized, "[a]n action is 'fully litigated' if it is reviewed by this Court and the Supreme Court." *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1287 (9th Cir. 2013).

That a matter is not fully litigated unless there is time for appellate and Supreme Court review is universally recognized. *See, e.g., Alcoa, Inc. v. Bonneville Power Admin.*, 698 F.3d 774, 787 (9th Cir. 2012) ("We have recognized that evading review means that the underlying action is almost certain to run its course before either this court or the Supreme Court can give the case full consideration." (cleaned up)); *Marshall v. Local Union 20, Int'l Broth. of Teamsters*, 611 F.2d 645, 648 (6th Cir. 1979) (matter is too short in duration to be fully litgated if "unlikely under these circumstances that this court could hear and decide an appeal"); *Cedar Coal Co. v. United Mine Workers of Am.*, 560 F.2d 1153, 1165 (4th Cir. 1977) (fully litigated includes appeals of the underlying action); *Praxis Prop., Inc. v. Colonial Sav. Bank,*

S.L.A., 947 F.2d 49, 61 (3d Cir. 1991) ("fully litigated" requires enough time for an "appellate court to complete its review"); *id.* at 62 ("90-day automatic stay provision was too short in duration to ever be fully litigated and appealed"); *Video Tutorial Servs., Inc. v. MCI Tele. Corp.*, 79 F.3d 3, 6 (2d Cir. 1996) (matter too short in duration if it cannot be "effectively appealed before it expired").

Here, there is no question that the challenged Orders were always going to be too short to be fully litigated prior to cessation or expiration. Indeed, Executive Order 14 FY 19/20 was issued on March 18, 2020 (App. 021, V. Compl. ¶ 26), was superseded by Executive Order 19 after just 6 days on March 24 (App. 021, V. Compl. ¶ 27), amended again after 7 days on March 31 by Executive Order 28 (App. 022, V. Compl. ¶ 32), clarified again with the Governor's Essential Business List on April 3 (App. 023, V. Compl. ¶ 37), renewed again 11 days later on April 14 (App. 023, V. Compl. ¶ 40), further amended again 15 days later on April 29 with Executive Order 49 (App. 023, V. Compl. ¶ 41), and has continued to be amended, revised, and reissued month after month ever since. (*See* Add. at 2–16.) It appears that the life span of the Orders runs from 6 days or less to 30 days.

Though the Governor takes issue with these calculations, and claims that at least one order was in place for "eight months" (Gov. Br. 23), even that period of time is insufficient to permit a claim to be fully litigated on the merits up to the

Supreme Court. As such, Calvary Chapel's claims are capable of repetition, yet evading review, and the district court's decision was in error.

2. The Governor's lengthiest order was not in place long enough to be fully litigated.

Even assuming the Governor's contention that her longest order was in place for "eight months" (Gov. Br. 23), that is still insufficient time to fully litigate a matter. The Supreme Court has found that litigation involving challenges that cannot be reviewed in two years are too short in duration to be fully litigated. *See*, *e.g.*, *Kingdomware Tech., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (two years is too short); *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911) (same). It has also found that 12- and 18-month periods are too short to be fully litigated. *See Turner v. Rogers*, 564 U.S. 431, 440 (2011) (12 months is too short); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978) (18 months is too short).

This Court, too, has issued numerous decisions demonstrating that the average lifespan of the Governor's orders is too short to be fully litigated. *See*, *e.g.*, *Arnold v. Panora*, 593 F.2d 161, 164 (1st Cir. 1979) (period of less than one year too short); *United States v. Chin*, 913 F.3d 251, 257 (1st Cir. 2019) (3 months too short); *Becker v. Fed. Elec. Comm'n*, 230 F.3d 381, 389 (1st Cir. 2000) (short length of campaign season, which only lasts a couple of months, too short to be fully litigated).

3. Government action that is inherently temporary necessarily meets the capable of repetition, yet evading review exception.

The capable of repetition, yet evading review exception "normally arises where the underlying facts are inherently temporary such that they will predictably have changed and foreclosed meaningful relief by the time the case has worked its way through the legal system." *Horizon Bank & Trust Co. v. Massachusetts*, 391 F.3d 48, 54 (1st Cir. 2004); *see also Marek v. Rhode Island*, 702 F.3d 650, 655 (1st Cir. 2012) (noting that challenged action that is "inherently transitory" meets the requirements for capable of repetition, yet evading review); *Cruz v. Farquharson*, 252 F.3d 530, 535 (1st Cir. 2001) (same).

Since the inception of this litigation, the Governor has claimed that her orders restricting the constitutional freedoms of Mainers have been "temporary," which squarely implicates this Court's "inherently transitory" standard. In her Brief, the timeline articulated by the Governor makes plain that each Order was inherently temporary and transitory—"The Governor issued proclamations renewing states of emergency every 30 days." (Gov. Br. 2 n.1.) And, with that inherently temporary state of emergency, the Governor's orders changed with great frequency. (*See, e.g.* Gov. Br. 2–6 (noting the short duration of each Order imposing COVID-19 restrictions in Maine).) Something that, under Maine law, can only be operative for 30 days is necessarily temporary and transitory.

4. Decisions on preliminary injunctions are not full litigation of the merits, so the Governor's contentions otherwise are incorrect.

Finally, where—as here—"there is a realistic possibility that no trial court ever will have enough time to decide the underlying issues," *Cruz*, 252 F.3d at 535, the claims are too short in duration to ever be fully adjudicated. The Governor's contention that the district court issued a decision in four days on Calvary Chapel's motion for preliminary injunction (Gov. Br. 23) misses the mark. The relevant inquiry is whether Calvary Chapel's claims can be "fully litigated," *Wis. Right to Life*, 551 U.S. at 463, not whether a preliminary injunction or other interlocutory decision can be reached. Indeed, "there is, of course, an important distinction between a decision at the preliminary injunction stage and a final decision on the merits," *Ryan v. U.S. Immigration & Customs Enforcement*, 974 F.3d 9, 18 (1st Cir. 2020), where the claims are at "an embryonic stage in the litigation," and decisions "are to be understood as statements of probable outcomes." *Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 6 (1st Cir. 1991). That a preliminary decision can be made quickly has no bearing on the question of whether Calvary Chapel had enough time to have its claims fully litigated before the trial court, this Court, and the Supreme Court. As the procedural history of the instant litigation bears out, it takes more than the average 30-day lifecycle of the Governor's orders to adjudicate

Calvary Chapel's claims. The claims are thus capable of repetition, yet evading review.

C. The Governor Fails to Satisfy Her Burden Under the Voluntary Cessation Exception to Mootness.

1. Even the Governor's Brief fails to demonstrate it is "absolutely clear" that she will never again reinstate discriminatory restrictions on Calvary Chapel's religious worship services.

In her Brief, the Governor fails to meet the requisite standard. She "has not carried the 'heavy burden' of making 'absolutely clear' that [she] could not revert to [her] policy" of imposing unique and discriminatory numerical limits and restrictions on religious worship services, because her change in policy is neither permanent nor irrevocable. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017); *see also City of L.A. v. Lyons*, 461 U.S. 95, 101 (1983). The Governor does not make it "absolutely clear" that she will not return to her old ways, but merely says it is "highly unlikely." (App. 248, Reid Decl. ¶ 11 ("it is highly unlikely that the Governor will ever reimpose the 10-person limit on gatherings").) The Governor's own contentions fail the applicable standard. Moreover, the issue is **not** whether it is "highly unlikely" (a far cry from never) the Governor will reimpose the "10-person limit on gatherings" but, rather, whether she will **never** reimpose discriminatory restrictions on religious gatherings. The Governor refuses to cabin her discretionary authority within the parameters set forth by the Supreme Court.

The Governor has "neither asserted nor demonstrated that [she] will **never** resume the complained of conduct." *Norman-Bloodsaw v. Lawrence Berkely Lab.*, 135 F.3d 1260, 1274 (9th Cir 1998) (emphasis added). Rather, the Governor has laid the groundwork for imposing more, not fewer, restrictions going forward. Indeed, she has already reversed course several times. As detailed above, the Governor's Restarting Maine's Economy Plan specifically contemplated the ability of the Governor to "move quickly to either halt progress **or return to an earlier stage**." (App. 092 (emphasis added).) Thus, not only has the Governor not disavowed reinstatement of her restrictions on religious worship, she has expressly reserved and pursued her desire to do so. This hedging precludes any mootness argument. *Cf. United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 n.* (2018) (holding, where intent to reinstate is present, "the rescission of the policy does not render this case moot"); *Pierce v. Ducey*, No. CV-16-01538-PHX-NVW, 2019 WL 4750138, at *1 (D. Ariz. Sept. 30, 2019) ("A voluntary cessation joined with a threat to do it again is the paradigm of unsuccessful blunting of power to adjudicate . . . ."), *id* at *5–6 ("The Court is not fooled."), *rev'd on other grounds*, 965 F.3d 1085 (9th Cir. 2020)

2. The Governor continued to impose her restrictions long after it became clear that they were unconstitutional under unequivocal supreme court precedent.

The Governor attempts to diminish the unquestionable import of *Roman Catholic Diocese* and *Tandon* by suggesting that the time frame was different. (Gov.

Br. 21.) But, this ignores the salient point of those decisions: that the Governor's continued authority (and, in this case, actual exercise of that authority) to impose discriminatory restrictions on religious worship services irrespective of a 10-person numerical restriction demonstrates that Calvary Chapel's claims are not moot. As the Supreme Court noted, plaintiffs "otherwise entitled to emergency injunctive relief remain entitled to such relief where applicants '**remain under a constant threat**' that government officials will use their power to reinstate the challenged restrictions." *Tandon*, 141 S. Ct. at 11297 (emphasis added) (quoting *Roman Catholic Diocese*, 141 S. Ct. at 68).

Here, the Governor claims that it is "highly unlikely" that she would ever reinstate her prior 10-person restriction. (Gov. Br. 16 (citing App. 248).) And, her claim is based on the notion that the Governor understood the import of *Roman Catholic Diocese* on her ability to impose discriminatory restrictions on religious worship services. (Gov. Br. 18) Despite an unequivocal decision from the Supreme Court on November 25, 2020, *see Roman Catholic Diocese*, 141 S. Ct. 63, the Governor maintained her discriminatory restrictions on religious worship for **another 6 months** (until May 13, 2021). (*See* Gov. Br. 6.) And it was not just *Roman Catholic Diocese* that should have demonstrated to the Governor the constitutional error of her ways—from the time she issued her November 4 Order (App. 238–241), to the new order on February 12, 2021 (Gov. Br. 5), to the May 13, 2021 order where

all restrictions were lifted, the Supreme Court issued no fewer than 10 decisions demonstrating that discriminatory restrictions on religious worship plainly violate the First Amendment. *See Roman 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); *Gish v. Newsom*, 141 S. Ct. 1290 (2021); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 889 (2020); *High Plains Harvest Church v. Polis*, 141 S. Ct. 527 (2020); *Robinson v. Murphy*, 141 S. Ct. 972 (2020). The latest of the decisions was issued on April 9, 2021. *See Tandon*, 141 S. Ct. 1294. It would be **another 34 days** before the Governor would drop her restrictions, all the while stating that she retained the authority to reinstitute restrictions at any time based solely on her discretion. Yet, the Governor now comes to this Court saying Calvary Chapel's claims are moot because she learned the lesson from the 2020 *Roman Catholic Diocese* decision. (Gov. Br. 18.) But all the Governor can muster is that it is "highly unlikely" she will reimpose a 10-person restriction. The Governor has obviously not learned anything from the numerous Supreme Court decisions that are directly on point regarding discriminatory restrictions on religious gatherings.

Her contentions are erroneous and should be rejected. First, the Governor's contention that she learned her lesson from *Roman Catholic Diocese* is belied by the

fact that it took her **six months** after *Roman Catholic Diocese* to remove her unconstitutional restrictions, and she still continued to issue new discriminatory restrictions after *Roman Catholic Diocese*. Moreover, had she learned her lesson from *Roman Catholic Diocese*, why did it take her **34 days** after the Supreme Court had already issued **ten more decisions** showing discriminatory restrictions on religious worship were unconstitutional for her to change her ways? The Supreme Court's decisions were not limited to a 10-person capacity restriction. The fact is, the Governor has not changed her ways, and she admittedly retains the authority to reinstate any restrictions at any time.

Second, it is notable what "lesson" the Governor claims she learned from *Roman Catholic Diocese*. The Governor does not contend that she will never reinstate discriminatory restrictions on religious worship services, or that *Roman Catholic Diocese* compels a finding that the First Amendment prohibits her from doing so. Rather, the Governor claims Calvary Chapel's claims are moot because she would never reinstate a "ten-person limit." (Gov. Br. 18.) In fact, the Governor's only refuge for claiming it is "highly unlikely" she would reinstate prior restrictions (a refuge that completely ignores the relevant standard, *infra* Section I.C) is not because she understands discriminatory restrictions on religious worship services are unconstitutional. Indeed, the only lesson the Governor claims to have learned from the Supreme Court's avalanche of precedent against discriminatory COVID-19

restrictions on religious worship was that she "recognized that a return to a *ten-person limit*, at least on religious gatherings, would raise constitutional concerns and *might not survive a challenge*." (Gov. Br. 18 (citing App. 248–249) (emphasis added).) The Governor does not claim that she will never reinstate any restrictions, discriminatory or otherwise. Instead, she claims that Calvary Chapel's claims are moot because she would never reinstate a restriction of ten people.

3. The Governor's continued defense of her unconstitutional restrictions after the Supreme Court's decisions demonstrates that there is a reasonable chance Calvary Chapel can again be subject to the restrictions.

A case is not moot where, as here, the Governor "did not voluntarily cease the challenged activity because he felt [it] was improper," and "has at all times continued to argue vigorously that his actions were lawful." *Olagues v. Russoniello*, 770 F.2d 791, 795 (9th Cir. 1985); *Pierce*, 2019 WL 4750138, at *5 ("[W]hen the government ceases a challenged policy without renouncing it, the voluntary cessation is less likely to moot the case."). As noted above, *Roman Catholic Diocese* was decided on November 25, 2020. *See* 141 S. Ct. 63. Moreover, on February 5, 2021, the Supreme Court released two other decisions after *Roman Catholic Diocese* that made clear the Court found blatant constitutional infirmity in discriminatory restrictions on religious worship services. *See, e.g., South Bay*, 141 S. Ct. 716; *Harvest Rock Church, Inc.*, 141 S. Ct. 1289. And, as demonstrated *supra*, there would be a total of

10 decisions from the Supreme Court before the Governor changed her restrictions. Despite the above Supreme Court decisions, Maine continued to retain the most restrictive orders on religious gatherings in the country. And, even after those decisions, the Governor continued to argue in defense of her authority to impose restrictions on religious worship services. (App. 225, Mot. Dismiss 11 n.8.) The Governor's defense of her unconstitutional actions—and her conduct of continuing such discriminatory restrictions for months after the Supreme Court made it clear that such restrictions were unconstitutional—undermines any claim that she has made it absolutely clear that she will not reinstate any prior restrictions. As the Seventh Circuit made plain in *Milwaukee Police Ass'n v. Jones*, it is "easy to deny mootness [when] [a]t no time has [the government] conceded that [prior] directives were unconstitutional." 192 F.3d 742, 747 (7th Cir. 1999).

II. CALVARY CHAPEL'S AS-APPLIED CHALLENGES AND CLAIMS FOR A PERMANENT INJUNCTION SURVIVE MOOTNESS.

A. Calvary Chapel's As-Applied Challenges Are Necessarily Backward Looking at the Governor's Past Unconstitutional Actions.

The Governor contends that Calvary Chapel's as-applied challenges are moot because there can be no relief obtained from the Governor's past conduct. (Gov. Br. 24–25.) This is incorrect. As this Court held in *McGuire v. Reilly*, an "as-applied challenge, must, logically be aimed at past conduct." 386 F.3d 45, 64 (1st Cir. 2004). And, there need not be any pending enforcement actions against Calvary Chapel for

them to have standing to maintain an as-applied challenge under the First Amendment. *Id.* at 59 (when plaintiffs have alleged "they have been chilled in the exercise of their [First Amendment] rights . . . we have no doubt that plaintiffs have standing under the First Amendment doctrine for equitable relief."). Indeed, even in the context of an amendment to a challenged restriction, while the amendment or modification may moot a facial challenge, "whether the statute as applied to appellant" was a violation of the First Amendment is still justiciable and "of greater moment" in that context. *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975); *see also Massachusetts v. Oakes*, 491 U.S. 576, 587 (1989) (Scalia, J., concurring) (even where change to statute rendered facial challenge "moot for the future," matter is not moot where "the issues involved in the as-applied challenge were of continuing importance"); *id.* (noting that *Bigelow* decided the as-applied challenge despite the previous revision to the statute that rendered the facial challenge otherwise moot).

B. If Preliminary Injunctive Relief Is Still Permissible for Modified Restrictions, Which It Is Under Tandon, Then Claims for Permanent Injunctive Relief Must Necessarily Remain Justiciable Where the Governor Retains the Authority to Reinstate Past Restrictions.

As *Tandon* and *Roman Catholic Diocese* make plain, a party who remains under the threat that prior restrictions can be reinstated at any time remains entitled to injunctive relief. *Tandon*, 141 S. Ct. at 1297, (holding that plaintiffs are still entitled to injunctive relief "where the applicants 'remain under a constant threat that

government officials will use their powers to reinstate the challenged restrictions") (quoting *Roman Catholic Diocese*, 141 S. Ct. at 68). And, if that statement is true in the context of a preliminary injunction, then it is necessarily true in the context of a permanent injunction because the standards for the issuance of both are the same. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success." (quoting *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987)); *Largess v. Supreme Judicial Court for State of Mass.*, 373 F.3d 219, 223 n.2 (1st Cir. 2004) (same). And, here, there can be no question that the Supreme Court has determined that claims for discriminatory restrictions on religious worship services violated the First Amendment. Indeed, at least 10 times, the Court has either issued an emergency writ of injunction, or has granted certiorari, vacated the lower court's erroneous denial of injunctive relief, and instructed the court to follow the Supreme Court's clear teachings. *See, e.g., Roman 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).

The Governor's past discriminatory restrictions were not limited to a 10-person restriction. The Governor's restrictions began with NO worship, then no more than ten people, then no more then 50, and finally no more than five people per 1,000 square feet, which, for Calvary Chapel continued to remain at no more than 50 people.

From the beginning, no matter the numerical size, the restrictions discriminated between *religious* and *non-religious* gatherings in the same church with the same people. Every time the 48 residents of Calvary Chapel's Discipleship Program met in the church for worship with the pastoral staff from March 2020 to May 13, 2021, the meetings were in violation of the Governor's orders. The same people could meet in the same church without any capacity restrictions IF the meetings were for non-religious purposes, such as counseling for drug and alcohol addiction or co-dependency. But each time the meetings included *religious worship*, the meetings ran up against the Governor's discriminatory religious vs. non-religious restrictions no matter the numerical restriction.

Claims for a permanent injunction are not moot where—as here—"prior patterns of contradictory behavior left the court with no assurances that the alleged constitutional violations would not recur." *Brown v. Colegio De Abagados de Puerto*

Rico, 613 F.3d 44, 48 (1st Cir. 2010). This Court "may consider how easily former practices might be resumed at any time in determining the appropriateness of injunctive relief." *United Air Lines, Inc. v. Air Line Pilots Ass'n Int'l.*, 563 F.3d 257, 275 (7th Cir. 2009). *See also* Wright & Miller, 13A Fed. Prac. & Procedure Juris. 2d §3533.7 (1984) ("It is equally easy to deny mootness if officials who have changed their practices warn that former practices may be resumed at any time.") This is precisely what is at issue here. Nothing prevents the Governor from reinstating any of her past restrictions on Calvary Chapel's religious worship services, and for 18 months the Governor continued to maintain that "[i]f the COVID-19 situation worsens in Maine for any reason, the state will move quickly to either halt progress or return to an earlier stage." (App. 092.)

CONCLUSION

Because the district court's conclusion that Calvary Chapel's claims are moot was plainly erroneous in contravention of numerous precedents, its order dismissing Calvary Chapel's Verified Complaint as moot should be reversed.

Respectfully submitted,

/s/ Roger K. Gannam
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

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/s/ Roger K. Gannam
Roger K. Gannam
Attorney for Plaintiff–Appellant

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I hereby certify that on this November 16, 2021 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/ Roger K. Gannam
Roger K. Gannam
Attorney for Plaintiff–Appellant