No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

CALVARY CHAPEL OF BANGOR,

Petitioner

v.

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

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

As this Court has made plain, "**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) (emphasis added). As Justice Gorsuch succinctly 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 (Gorsuch, J., concurring) (emphasis added). Yet, despite that clear teaching, this Court has been forced to issue numerous injunctions and orders vacating decisions of lower courts refusing to follow that direction. *See, e.g.*, *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021); *Harvest Rock Church v. Newsom*, No. 20A137, 2021 WL 406257 (U.S. Feb. 5, 2021); *Gateway City Church v. Newsom*, No. 20A138, 2021 WL 753575 (U.S. Feb. 26, 2021); *Harvest Rock Church v. Newsom*, No. 20A94, 2020 WL 7061630 (U.S. Dec. 3, 2020); *High Plains Harvest Church v. Polis*, 141 S. Ct. 527 (2020); *Robinson v. Murphy*, No. 20A95, 2020 WL 7346601 (U.S. Dec. 15, 2020); *Gish v. Newsom*, No. 20A120, 2021 WL 422669 (U.S. Feb. 8, 2021).

The questions presented are:

(1) Whether the Free Exercise Clause of the First Amendment prohibits the government

from discriminating against houses of worship by restricting the size of religious gatherings while exempting or giving other preferential treatment to comparable nonreligious gatherings occurring inside the same houses of worship or to other comparable nonreligious gatherings occurring externally.

(2) Whether the Establishment Clause of the First Amendment and this Court's holding in *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947 that "[n]either a state nor the Federal Government . . . can force or influence a person to go to or remain away from church against his will" is violated when a State prohibits or forbids upon criminal penalty houses of worship from assembling regardless of the size of the house of worship or the religious doctrine or practice.

(3) Whether this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), is irreconcilable with the proper understanding of the Free Exercise Clause of the First Amendment and should be overturned.

(4) Whether this Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), issued decades before the First Amendment was incorporated against the States and 60 years before strict scrutiny would become the governing standard in First Amendment cases, dictates a separate standard for determining First Amendment liberties in times of declared crisis.

(5) Whether the First Circuit erred in finding that a denial of a request for temporary restraining order and preliminary injunction, which the District Court labeled as a denial of a temporary restraining order, but which addressed the merits of the First Amendment claim, and fully-briefed with sworn testimony from all parties, where all parties treated the matter as a preliminary injunction, and where the District Court and the First Circuit denied a preliminary injunction pending appeal, is not immediately appealable.

PARTIES

Petitioner is Calvary Chapel of Bangor, a nonprofit corporation incorporated under the laws of the State of Maine. Respondent is Hon. Janet Mills, in her official capacity as Governor of the State of Maine.

RULE 29 DISCLOSURE STATEMENT

Petitioner Calvary Chapel of Bangor hereby states that it is a nonprofit corporation incorporated under the laws of the State of Maine, does not issue stock, and has no parent corporations, and that no publicly held corporation owns 10% or more of its stock.

DIRECTLY RELATED PROCEEDINGS

CALVARY CHAPEL OF BANGOR v. JANET MILLS, in her official capacity as Governor of the State of Maine, Case No. 20-1507, Opinion and

Order dismissing appeal for lack of jurisdiction (1st Cir. Dec. 22, 2020).

CALVARY CHAPEL OF BANGOR v. JANET MILLS, in her official capacity as Governor of the State of Maine, Case No. 20-1507, Order denying Motion for Injunction Pending Appeal (1st Cir. June 2, 2020).

CALVARY CHAPEL OF BANGOR v. JANET MILLS, in her official capacity as Governor of the State of Maine, Case No. 1:20-cv-00156-NT, Order denying Motion for Temporary Restraining Order and Preliminary Injunction (D. Me. May 9, 2020).

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The First Circuit's decision dismissing Petitioners' appeal from the district court's denial of a temporary restraining order and preliminary injunction (App. Ex. A) is published at *Calvary Chapel of Bangor v. Mills*, 984 F.3d 21 (1st Cir. 2020).

The First Circuit's denial of Petitioner's motion for an emergency injunction pending appeal (App. Ex. B) is unreported and is available at *Calvary Chapel of Bangor v. Mills*, No. 20-1507, 2020 WL 3067488 (1st Cir. June 2, 2020).

The district court's denial of Petitioner's motion for temporary restraining order and preliminary injunction is published at *Calvary Chapel of Bangor v. Mills*, 459 F. Supp. 3d 273 (D. Me. 2020).

JURISDICTION

The First Circuit issued its decision refusing to enjoin the Governor's orders on December 22, 2020. This Court has jurisdiction over the instant matter pursuant to 28 U.S.C. §1254(1). The First Circuit had jurisdiction over Petitioner's appeal below pursuant to 28 U.S.C. §1292(a)(1). The district court had jurisdiction over Petitioner's claims pursuant to 28 U.S.C. §1331.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . or the right of the people peaceably to assemble." U.S. Const. amend I.

INTRODUCTION

The issues presented by the instant /Petition are of grave importance to "the Nation's essential commitment to religious freedom," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993), especially in the current times of pandemic and uncertainty. As this Court unequivocally held in an appeal of similar COVID-19 restrictions on religious gatherings, "even in a pandemic, **the Constitution cannot be put away and forgotten**." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (*Catholic Diocese*) (emphasis added). 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).

Yet, despite this Court's clear admonitions and instructions in several previous appeals and its unequivocal holding in *Catholic Diocese*, *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021), and *Harvest Rock Church v. Newsom*, No. 20A137, 2021 WL 406257 (U.S. Feb. 5, 2021), the Governor continues to impose discriminatory restrictions on religious worship services that are not imposed on similar nonreligious gatherings. Her discrimination must end. **Following the decisions of the Ninth Circuit and this Court in *South Bay* and *Harvest Rock,* striking down the numeric restrictions (Ninth Circuit) and the total ban (Supreme Court) on worship, Maine now has the dubious distinction of imposing the most severe restrictions in the nation on places of worship with its 50-person numerical cap notwithstanding the size of the facility.**

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Calvary Chapel and Its Religious Ministry.

Calvary Chapel is a Church in Bangor, Maine offering religious worship services and ministries to its members, congregants, and the community. (App. Ex. G, V. Compl. ¶17, 89.) Calvary Chapel has sincerely held religious beliefs, rooted in Scripture's

commands (*e.g.*, *Hebrews* 10:25), that followers of Jesus Christ are not to forsake the assembling of themselves together, and that they are to do so even more in times of peril and crisis. (App. Ex. G, V. Compl. ¶89.) Indeed, the entire purpose of the Church (in Greek "ekklesia," meaning "assembly") is to assemble together Christians to worship Almighty God. (*Id.*)

B. The Governor's Discriminatory Restrictions on Religious Worship Services.

Since March 15, 2020, the Governor has issued, modified, and extended a series of executive orders and pronouncements in response to COVID-19 (the "Orders"), extensively restricting when, where, and how Mainers may exercise their liberties, including gathering for religious worship, while exempting myriad businesses and non-religious activities from similar gathering restrictions. Most relevant to this Petition are the following:

- Executive **Order 14** FY 19/20 **prohibits** "Gatherings of more than 10 people" that are "primarily social, personal, and discretionary events other than employment," including "**faith-based events**," and **closes** dine-in restaurant and bar facilities. (V. Compl. Ex. B.)

- Executive **Order 19** FY 19/20 continues the Order 14 restriction on faith-based

and other gatherings, and enacts a comprehensive scheme of closures and exemptions for all businesses and other for-profit and non-profit entities in the state. (V. Compl. Ex. C). The scheme exempts so-called "Essential Businesses and Operations" from closure and the numerical limits in Order 14 on employees or patrons, subject to implementing social distancing and sanitization guidelines to the "maximum extent practicable," or according to "best efforts." (V. Compl. Ex. C at 2-3.) The "Essential Businesses and Operations" are defined by incorporation of the U.S. Department of Homeland Security, Cybersecurity and Infrastructure Security Agency Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response (V. Compl. Ex. C at 5-13, "CISA Memo"), containing 19 expansive categories and subcategories of essential workers, and further defined by 21 additional or clarifying categories of essential businesses and operations supplied by the Governor. (V. Compl. Ex. C at 2; CISA Memo at 7-13.) These approximately **40 categories** of businesses and operations exempted from Order 14's gathering limits include, *inter alia*, "food processing" and packaging, "construction and maintenance of essential infrastructure," "homes and residential treatment facilities," "dentists," "grocery and household goods (including convenience stores)" and "essential home repair, hardware and auto repair" stores (including all of their "big-box" versions), "gas stations and laundromats," "industrial manufacturing," "post offices and shipping outlets," financial "payment, clearing, and settlement" operations, "banks and credit unions," "public

transportation," including bus stations, train stations, and airports, "animal feed stores," "hotel and commercial lodging," and "legal, business, [and] professional" services. (V. Compl. Ex. C at 2; CISA Memo at 7-13.)

- Executive **Order 28** FY 19/20 is a stay-at-home order, which required "All persons living in the State of Maine . . . to stay at their homes or places of residence," unless traveling in connection with defined "Essential Activities" or work for Essential and Non-Essential Businesses and Operations permitted under Order 19. (V. Compl. Ex. D at 2) Defining Essential and Non-Essential Businesses and Operations was delegated to the Maine Department of Economic and Community Development. (V. Compl. Ex. D at 4.) The "Essential Activities" defined by Order 28 do not include religious worship or any other exercise of religion. (V. Compl. Ex. D at 2-3). Order 28 thus **prohibits Mainers from leaving their homes to attend religious worship**, even if limited to 10 persons under Order 14, and thus **effects a total ban on religious worship services at Calvary Chapel**. Pursuant to Order 28 a new listing of Essential and Non-Essential Businesses and Operations was issued on April 3, expanding to **44 categories** of Essential Businesses and Operations, and at least **18 categories** of Non-Essential Businesses and Operations exempted from the numerical limits of Order 14 and the travel ban of Order 28. (V. Compl. Ex. E at 1.) Neither of the new Essential and Non-Essential lists includes churches or other houses of worship for purposes of worship.

- Executive **Order 49** FY 19/20 implements and gives legal effect to the *Together We Are Maine: Restarting Maine's Economy Plan* (the "**Restarting Plan**"), "as the deliberative process to identify how certain restrictions on businesses and activities can be safely and incrementally eased over time." (V. Compl. Ex. G at 1). The Restarting Plan "establishes four gradual stages of reopening" beginning on May 1 (V. Compl. Ex. G at 4), "focused on resuming business operations and activities which can be conducted in a safe manner" in the earliest stages, with "progression through the stages . . . planned month-by-month" (V. Compl. Ex. G at 6), unless "the COVID-19 situation worsens in Maine for any reason" in which case "the state will move quickly to either halt progress or return to an earlier stage." (V. Compl. Ex. G at 7.) Under the Restarting Plan, "[a]ll businesses in Maine are essential" (V. Compl. Ex. G at 9), but Stage 1 maintains a scheme of differential treatment, allowing previously open businesses to remain open, but subjecting others to limited and staged reopening, if at all. (V. Compl. Ex. G at 10-11.)

C. Current Restrictions on Indoor Religious Gatherings.

The basic framework of the Governor's discriminatory restrictions remains in place today. The Governor's Orders began with a total ban on all worship, modified to no more than 10-people, then 50, and, most recently, under Executive Order 16 FY

20//21[1],five people for 1,000 sq. ft with a maximum of 50—which for Calvary Chapel is still 50. **Executive Order 16 requires churches and religious worship services to adhere to a strict 50-person limit regardless of the size of the sanctuary or Church facility**. The Governor's agents at the Maine Department of Economic and Community Development confirm that religious gatherings are subject to the 50-person limit.[2]

Yet, as has been true since the beginning of the Governor's regime of restrictions on religious gatherings, myriad businesses and industries are wholly exempt from the 50-person limit, including transportation facilities, bus stations, train stations, airports, manufacturing facilities, gas stations and laundromats, industrial manufacturing, post offices and shipping outlets, financial payment, clearing, manufacturing, food packaging and processing, and legal, business, and professional services, and all such exemptions reflect the exemptions that have been in place from the beginning for favored businesses and industries. (V. Compl. Ex. E at 1.)

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[1] *See* Executive Order No. 16 FY 20//21 (Nov. 4, 2020), https://www.maine.gov/governor/mills/sites/maine.gov.governor.mills/files/inlinefiles/An%20Order%20to%20Revise%20Indoor%20Gathering%20Limits%2C%20Strengthen%20Face%20Covering%20Requirements%20and%20Delegate%20Certain%20Authority.pdf.

[2] COVID19 Prevention Checklist, Religious Gatherings (Nov. 5, 2020), https://www.maine.gov/decd/checklists/religious-gatherings ("Gatherings . . . must not exceed the limits established by the Governor's Executive Order.")

D. The Governor's Discriminatory Restrictions on Calvary Chapel's Own Activities in the Same Building.

Under the Governor's Orders, Calvary Chapel may have an unlimited number of people in its church building for non-religious meetings. Order 49 extended the provisions of Order 19, incorporating the activities of the CISA Memo essential workers as exempt from the Order 14 gathering limitations, and Order 28, allowing Mainers to leave home for such activities. (V. Compl. Ex. C at 2; V. Compl. Ex. D at 2; V. Compl. Ex. G at 2.) But Calvary Chapel's worship services are not exempted from Order 14's gathering restrictions by Order 19, or the travel ban of Order 28. As a result, the activities of "Workers who support food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise needy individuals, such as those residing in shelters" (V. Compl. Ex. C at 7 (CISA Memo)), and the activities of "Food Banks and Food Pantries" (V. Compl. Ex. E at 1), are allowed at Calvary Chapel's church building without numerical limits, and are exempt from any travel ban. Thus, Calvary Chapel's pastor, its members, and its volunteers are permitted to travel between their homes and the church to provide food, shelter, counseling, and other non-religious social services, with no numerical limit on workers, volunteers, or recipients, but **any religious gathering for worship at Calvary Chapel has either been**

totally banned or severely restricted in the same building.

Calvary Chapel has a robust residential treatment and rehabilitation program, Calvary Residential Discipleship, which is an on-site religious substance abuse and treatment ministry.[3] In that program, Calvary Chapel provides daily counseling to 24 men and 24 women, requires the participants to live on-site, engage in daily Bible studies and worship services, work, and attend religious worship services with the congregants of Calvary Chapel. As part of that program, Calvary Chapel provides shelter for those in the program, food for the residents, and spiritual nourishment in the form of substance abuse counseling, social service counseling, and Biblical teaching and instruction. Under the Governor's Orders, that program is exempt from the discriminatory numerical restrictions, although all of it takes place in the same facility in which Calvary Chapel has been totally prohibited from engaging in religious worship services, and now severely restricted to more than 50 people.

[3] *See* Calvary Residential Discipleship, https://www.facebook.com/crdmaine (last visited Mar. 19, 2021).

REASONS FOR GRANTING THE PETITION

I. THE LOWER COURT'S DECISION DIRECTLY CONFLICTS WITH THIS COURT'S DECISIONS IN *CATHOLIC DIOCESE*, *SOUTH BAY*, *HARVEST ROCK,* AND *GATEWAY CITY*.

The decision below is in direct conflict with this Court's decisions in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020); *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021), and *Harvest Rock Church v. Newsom*, No. 20A137, 2021 WL 406257 (U.S. Feb. 5, 2021); *Gateway City Church v. Newsom*, No. 20A138, 2021 WL 753575 (U.S. Feb. 26, 2021).

In *Catholic Diocese*, this 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. *See Catholic Diocese*, 141 S. Ct. at 66 ("acupuncture facilities, camp grounds, garages, as well as . . . **plants manufacturing chemicals and microelectronics and all transportation facilities**" (emphasis added)). *See also id.* at 69 (Gorsuch, J., concurring) (noting that "hardware stores, acupuncturists, and liquor stores. Bicycle repair shops, certain signage companies, accountants, lawyers, and insurance agents" are all exempt); *id.* at 73 (Kavanaugh, J., concurring)

(noting the exemptions for "grocery store, pet store, or big-box store).

In *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021), this Court again faced a state's COVID-19 regime discriminating against religious worship services while exempting myriad other categories of business and sectors. There, like Maine did here in its previous orders, California imposed a total prohibition on religious worship services. 141 S. Ct. at 716. Based on *Catholic Diocese*, this Court issued an injunction pending appeal to the Church prohibiting the Governor from enforcing his unconstitutional prohibitions on religious gatherings. *Id.* Chief Justice Roberts noted that while courts have generally been inclined to grant deference during a pandemic, "the State's present determination—that the maximum number of adherents who can safely worship in the most cavernous cathedral is zero—appears to reflect not expertise or discretion, but instead **insufficient appreciation or consideration of the interests at stake**." *Id.* at 717 (Roberts, C.J., concurring) (emphasis added).

As Justice Gorsuch noted in that matter, "[w]hen a State so obviously targets religion for differential treatment, our job becomes that much clearer." *Id.* at 717.

> Since the arrival of COVID–19, California has openly imposed more stringent regulations on religious institutions than on many businesses.

> The State's spreadsheet summarizing its pandemic rules even assigns places of worship their own row. . . . At "Tier 1," applicable today in most of the State, California forbids any kind of indoor worship. Meanwhile, the State allows most retail operations to proceed indoors with 25% occupancy, and other businesses to operate at 50% occupancy or more. . . . Apparently, California is the only State in the country that has gone so far as to ban *all* indoor religious services.

Id. (Gorsuch, J., statement). While it was true at the time, California is not the only state to have gone that far. Indeed, **Maine, too, imposed a total prohibition on religious worship services**. (V. Compl. Ex. D at 2-3.) And, despite what the purported experts opine concerning the "risks" of religious worship, "we may [not] abandon the field when government officials with experts in tow seek to infringe a constitutionally protected liberty." *Id.* at 718.

As is true here (V. Compl. Ex. E at 1), California "presumes that worship inherently involves a large number of people. Never mind that scores might pack into train stations or wait in long checkout lines in the businesses the State allows to remain open." *Id.* Indeed, much like Maine here, "California does not limit its citizens to running in and out of other establishments; no one is barred from lingering in shopping malls, salons, or bus

terminals." *Id.* at 719. Again, much like Maine here, "California singles out religion for worse treatment than many secular activities. At the same time, the State fails to explain why narrower options it finds sufficient in secular contexts do not satisfy its legitimate interests." *Id.* Based on *Catholic Diocese*, Justice Gorsuch pointed out, "**[t]oday's order should have been needless; the lower courts in these cases should have followed the extensive guidance this Court already gave**." *Id.* (emphasis added).

In *Harvest Rock Church v. Newsom*, No. 20A137, 2021 WL 406257 (U.S. Feb. 5, 2021), this Court yet again issued an injunction pending appeal against discriminatory COVID-19 restrictions in California. Based on its decisions in *Catholic Diocese* and *South Bay*, this Court again held that discriminatory restrictions against religious worship services that are not imposed on secular gatherings cannot withstand First Amendment scrutiny and must be enjoined. *Id.* at *1.

Though the restrictions are largely the same 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, the First Circuit nevertheless concluded that such restrictions would survive scrutiny. (App. Ex. A, 012-13.) Beginning March 24, 2020, the Governor first exempted an expansive list of activities that were not subject to the strict numerical caps placed on religious worship services. Those exemptions

included **22 sectors and industries and 40 categories,** including "food processing," "grocery and household goods (including convenience stores)," such as WalMart and Target; "essential home repair, hardware and auto repair," such as Home Depot, Lowe's, and other "big-box" stores; "gas stations and laundromats;" "industrial manufacturing;" "transportation centers," such as bus stations, train stations, and airports, marijuana dispensaries, and "legal, business, professional, environmental permitting and insurance services." (V. Compl. Ex. C at 2; CISA Memo at 7-13.)

On March 31, 2020, the Governor expanded that list to include **44 categories of businesses**, including *inter alia* "Marijuana Dispensaries," "Hotel and Commercial Lodging," "Real Estate Activities," and several other categories. (V. Compl. Ex. D at 1.) In addition to the added "Essential Businesses and Operations," the Governor exempted certain "Non-Essential Businesses and Operations," including "Shopping Malls," Spas," "Hair Salons," "Tattoo Parlors," and other entities. (V. Compl. Ex. D at 1.) Yet, again, however, Calvary Chapel's religious worship services were not included on the list of either "Essential" or "Non-Essential" businesses that were permitted to operate with the gathering of individuals.

Thus, the Governor's Orders restrict Calvary Chapel to 50 people while permitting similar congregate activity in nonreligious gatherings—many of which were specifically mentioned as comparators in *Catholic Diocese*, *South Bay*, *Harvest*

Rock, and *Gateway City*. Examples include: food packaging and processing, laundromats, warehouses, grocery stores, liquor stores, retail stores, malls, transportation facilities, bus stations, train stations, airports, gambling centers, acupuncture facilities, garages, plants manufacturing chemicals and microelectronics, hardware stores, repair shops, signage companies, accountants, lawyers, insurance agents, pet stores, film production facilities, and more. *See, e.g., Catholic Diocese*, 141 S. Ct. at 66; *id*. at 69 (Gorsuch, J., concurring); *id*. (Kavanaugh, J., concurring).

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 First Circuit should have noted that 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.

> 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)). "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.*

And, there is no world in which 44 categories of exempt business sectors creating hundreds of subcategories of exempt secular activities and facilities—all of which were present in *Catholic Diocese*, *South Bay*, *Harvest Rock*, *Calvary Chapel Dayton Valley*, *Calvary Chapel Lone Mountain*, *Agudath Israel*, and *Monclova Christian*—can be the least restrictive means available. "[T]here is no world in which the Constitution tolerates color-coded executive edicts that open liquor stores and bike shops [and hundreds of other essential businesses] but shutter churches, synagogues, and mosques." 141 S. Ct. at 72 (Gorsuch, J., concurring).

Yet, despite the mountain of precedent from this Court laying out the proper conclusion, the First

Circuit below concluded that the Governor's 50-person numerical cap – **which is currently the most restrictive in the nation** – would survive *Catholic Diocese* because it imposed no harm on Petitioner's Church. (App. Ex. A at 13.) That decision cannot be reconciled with *Catholic Diocese*, *Harvest Rock*, *South Bay*, or *Gateway City*, and certiorari is warranted to align the lower court's decision to this Court's clear teachings.

II. THE DECISION BELOW DIRECTLY CONFLICTS WITH DECISIONS OF THE SECOND, FIFTH, SIXTH, AND NINTH CIRCUITS CONCERNING THE CONSTITUTIONALITY OF DISCRIMINATORY RESTRICTIONS ON RELIGIOUS GATHERINGS DURING THE COVID-19 ERA.

A. The Second, Fifth, Sixth, and Ninth Circuits Have All Held that Discriminatory Restrictions on Religious Gatherings Violate the First Amendment.

When faced with an identical 50-person discriminatory restriction imposed solely on religious gatherings, the Ninth Circuit found – based on *Catholic Diocese* – that such discrimination violated the First Amendment. *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228 (9th Cir.

2020); *Calvary Chapel Lone Mountain v. Sisolak*, 831 F. App'x 317, 317 (9th Cir. 2020). There, though religious gatherings were limited to a strict 50-person cap, myriad nonreligious gatherings were not so restricted.

> Just like the New York restrictions, the Directive treats numerous secular activities and entities significantly better than religious worship services. Casinos, bowling alleys, retail businesses, restaurants, arcades, and other similar secular entities are limited to 50% of fire-code capacity, yet houses of worship are limited to fifty people regardless of their fire-code capacities. As a result, the restrictions in the Directive, although not identical to New York's, require attendance limitations that create the same "disparate treatment" of religion. Because "disparate treatment" of religion triggers strict scrutiny review—as it did in *Roman Catholic Diocese*—we will review the restrictions in the Directive under strict scrutiny.

Calvary Chapel Dayton Valley, 982 F.3d at 1233; *Calvary Chapel Lone Mountain*, 831 F. App'x at 317 (same). The Ninth Circuit held (twice) that exempting such nonreligious gatherings while restricting religious gatherings could not pass constitutional muster. Indeed, the Ninth Circuit

held that *Catholic Diocese* "represented a seismic shift in Free Exercise law," 982 F.3d at 1232, and compelled the court to issue an injunction against such discriminatory restrictions. *Id.*

The Ninth Circuit's reasoning was simple: because Nevada's restriction "treats numerous secular activities and entities significantly better than religious worship services," it "create[d] the same 'disparate treatment' of religion" this Court held unconstitutional in *Catholic Diocese*. *Id.* at 1233 (quoting *Catholic Diocese*, 141 S. Ct. at 66). In fact, "although less restrictive in some respects than the New York regulations reviewed in *Catholic Diocese*," the restrictions was still not narrowly tailored because it treated religious worship services worse than other nonreligious gatherings. *Id.* The court concluded: "We respectfully join the Supreme Court in saying that . . . 'even in a pandemic, the Constitution cannot be put away and forgotten.'" *Id.* at 1233 n.3 (quoting *Catholic Diocese*, 141 S. Ct. at 68). Thus, when faced with an identical restriction of 50-people, the Ninth Circuit reached a conclusion directly opposite that of the panel below. And, it did so twice. *See also Calvary Chapel Lone Mountain*, 831 F. App'x at 318.

Additionally, when faced with numerical restrictions double and quadruple those of the Governor's 50-person limit here, the Ninth Circuit struck down such restrictions as unconstitutional under *Catholic Diocese*. *See South Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128 (9th Cir. 2021) (enjoining 100 and 200 person restrictions

on religious worship as unconstitutionally discriminatory); *Harvest Rock Church v. Newsom*, 985 F.3d 771 (9th Cir. 2021) (same). The Ninth Circuit held that 100 and 200 person limits on religious worship services were not narrowly tailored because "there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services," *South Bay*, 985 F.3d at 1151 (quoting *Catholic Diocese*, 141 S. Ct. at 67), and violated the First Amendment because such discriminatory "numerical attendance caps will undeniably unconstitutionally deprive some of South Bay's worshippers of participation in its worship services, causing irreparable harm." *Id.* As Judge O'Scannlain pointed out, after *Catholic Diocese*, "[w]e should have little trouble concluding that these severe measures violate the Free Exercise Clause of the First Amendment" because "**the controlling decisions also eliminate any notion that California's measures withstand such scrutiny**." *Harvest Rock*, 985 F.3d at 771 (O'Scannlain, J., concurring) (emphasis added). Thus, even when faced with restriction double and quadruple those at issue here, the Ninth Circuit reached the opposite conclusion from the First Circuit below, creating a direct conflict among the circuits.

The Second Circuit, too, has held that discriminatory restrictions imposed solely on religious gatherings cannot survive First Amendment scrutiny. *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620 (2d Cir. 2020). There, the Second Circuit similarly noted that while worship

services were restricted to 10 or 25 people, other so-called "essential businesses" were permitted without similar restrictions, including grocery stores, hospitals, liquor stores, pet shops, financial institutions, news media, certain retail stores, and construction. *Id.* at 626, 631-32. The Second Circuit enjoined those discriminatory restrictions because such "limits are 'far more severe than has been shown to be required to prevent the spread of the virus at Appellants' services,' particularly because the Governor has pointed to no evidence of any outbreaks related to Appellants' churches and synagogues." *Id.* at 633 (quoting *Catholic Diocese*, 141 S. Ct. at 67). Because the restrictions singled out houses of worship while exempting myriad nonreligious activities of like kind, the Second Circuit noted that "the government must demonstrate that its policies are narrowly tailored." *Id.* at 636. "The Governor has failed to do that in this case," and thus the Second Circuit enjoined the discriminatory restrictions. *Id.*

Likewise, when faced with discriminatory restrictions imposed on religious gatherings in Kentucky, the Sixth Circuit twice enjoined such restrictions. *See Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020) (**in-person** worship services); *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020) (drive-in and **in-person** services). In *Roberts*, the Sixth Circuit granted an injunction enjoining the Kentucky Governor from enforcing executive orders prohibiting a church's in-person worship services when "serial exemptions for secular

activities pose comparable public health risks." 958 F.3d at 414.

In determining the plaintiffs' likely success on the merits of their free exercise claims, the court recognized, where "a law that discriminates against religious practices usually will be invalidated because it is the rare law that can be 'justified by a compelling interest and is narrowly tailored to advance that interest.'" *Id.* (quoting *Lukumi*, 508 U.S. at 553).

> **Do the four pages of exceptions in the orders, and the kinds of group activities allowed, remove them from the safe harbor for generally applicable laws? We think so.** As a rule of thumb, the more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law. At some point, **an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny**.

Id. at 413–14 (cleaned up) (emphasis added).

"Assuming all of the same precautions are taken, why can someone safely walk down a grocery

store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister? The Commonwealth has no good answers." *Id.* at 414. Thus, the court rejected the suggestion "that the explanation for these groups of people to be in the same area—intentional worship—creates greater risks of contagion than groups of people, say, in an office setting or an airport," *id.* at 416, explaining,

> the reason a group of people go to one place has nothing to do with it. Risks of contagion turn on social interaction in close quarters; the virus does not care why they are there. So long as that is the case, why do the orders permit people who practice social distancing and good hygiene in one place but not another for similar lengths of time? It's not as if law firm office meetings and gatherings at airport terminals always take less time than worship services.

Id.

As to the appropriate comparisons and disparate treatment:

> Keep in mind that the Church and its congregants just want to be treated equally. . . . They are willing to practice social distancing. They are willing to follow any hygiene requirements. . . . **The Governor has offered no good**

> **reason for refusing to trust the congregants who promise to use care in worship in just the same way it trusts accountants, lawyers, and laundromat workers to do the same**.
>
> Come to think of it, aren't the two groups of people often the *same people*—going to work on one day and going to worship on another? **How can the same person be trusted to comply with social-distancing and other health guidelines in secular settings but not be trusted to do the same in religious settings? The distinction defies explanation, or at least the Governor has not provided one.**

Id. at 414 (emphasis added)

Finally, the Fifth Circuit has enjoined discriminatory restrictions imposed solely on religious gatherings that were not similarly imposed on nonreligious gatherings of like kind. *See First Pentecostal Church v. City of Holly Springs, Miss.*, 959 F.3d 669 (5th Cir. 2020). In *First Pentecostal*, the Fifth Circuit issued an IPA against similar COVID-19 prohibitions on religious worship services. 959 F.3d at 670. Though the per curiam opinion was short, Judge Willett's concurrence expounded: "Singling out houses of worship—and *only* houses of worship, it seems—**cannot possibly be squared**

with the First Amendment." *Id.* at 670–71 (Willett, J., concurring) (bold emphasis added).

B. The Seventh Circuit Upheld Discriminatory Restrictions Imposed on Religious Gatherings As Permissible in a Perceived Emergency.

In direct conflict with *Catholic Diocese* and the above decisions of the Second, Fifth, Sixth, and Ninth Circuits, the Seventh Circuit upheld discriminatory restrictions imposed solely on religious gatherings. *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020); *Cassell v. Snyders*, No. 20-1757, 2021 WL 852227 (7th Cir. Mar. 8, 2021).

In *Elim*, the Seventh Circuit held that comparisons of religious worship services to "grocery shopping, warehouses, soup kitchens" and the host of the comparisons this Court said how discrimination under the First Amendment were inappropriate. 962 F.3d at 347. It said, "[i]t would be foolish to pretend that worship services are exactly like any of the possible comparisons, but they seem most like other congregate functions that occur in auditoriums." *Id.* at 346. Specifically, the Seventh Circuit held that it "line[d] up with Chief Justice Roberts" in his sole concurrence in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020). *Id.*

Contrary to *Catholic Diocese,* the Seventh Circuit stated:

> It is not clear to us that warehouse workers engage in the sort of speech or singing that elevates the risk of transmitting the virus, or that they remain close to one another for extended periods, but some workplaces present both risks. Meatpacking plants and nursing homes come to mind, and they have been centers of COVID-19 outbreaks. But it is hard to see how food production, care for the elderly, or the distribution of vital goods through warehouses could be halted.
>
> Reducing the rate of transmission would not be much use if people starved or could not get medicine. That's also why soup kitchens and housing for the homeless have been treated as essential. **Those activities *must* be carried on in person**, while concerts can be replaced by recorded music, movie-going by streaming video, and **large in-person worship services by smaller gatherings, radio and TV worship services, drive-in worship services, and the Internet. Feeding the body requires teams of people to work together in physical spaces, but churches can feed the spirit in other ways.**

Id. at 347 (bold emphasis added).

In *Cassell*, the Seventh Circuit noted that *Catholic Diocese* "[i]ntervening authority from the Supreme Court offers plaintiffs a greater prospect for success on the merits of their First Amendment claim than either the district court or we had expected," 2021 WL 852227, at *2 (citing *Catholic Diocese*, 141 S. Ct. 63), but nevertheless the Seventh Circuit still held that – despite *Catholic Diocese*'s clear holding – "equitable considerations weigh against granting a preliminary injunction at the time." *Id.* Further, it held that injunctive relief was not warranted, again in direct contradiction to *Catholic Diocese*, because "the interests of people who are not parties to this case ('the public interest' in the preliminary injunction balancing) weigh substantially against injunctive relief." *Id.* And, despite recognizing that *Catholic Diocese* changed "the legal landscape" of discriminatory restrictions on religious gatherings, the Seventh Circuit still held that "[o]n balance, we find that Judge Lee did not abuse his discretion" in denying Plaintiffs' request for a preliminary injunction.

Thus, the Seventh Circuit's holdings in *Elim* and in *Cassell* are directly contrary to the holding of this Court in *Catholic Diocese*, *South Bay*, *Harvest Rock*, and exacerbate the conflict among the decisions by directly conflicting with the decisions of the Second, Fifth, Sixth, and Ninth Circuits.

C. The Decision Below Exacerbates the Direct Conflict among the Circuits by Opining that Discriminatory Restrictions on Religious Gatherings are Permissible Because of a Perceived Emergency.

Despite that fact 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.). That scenario, which should have resulted in the conclusion compelled by *Catholic Diocese*, was largely ignored by the panel below.

In its decision, the First Circuit held that "the harm of which the Chapel complains has its origins in the extraordinary epidemiological crisis that has engulfed Maine and every other part of the United States." (App. Ex. A at 12.) And, because of that conclusion, the panel held that "the encroachment on the rights of the Chapel and its members . . . the gathering restrictions would not inflict irreparable harm." (App. Ex. A, at 13.)

That conclusion reaches back to the rationale of this Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), which itself is a significant contributing factor to the direct and substantial conflict among the circuit and district courts reviewing COVID-19 restrictions. Can it be that a 115-year-old due process opinion, with minimal progeny and substantial jurisprudential developments since its issuance, provides any rule of decision in a contemporary First Amendment case? It is a question of exceptional importance that only this Court can answer.

Importantly, the *Jacobson* standard, which has created the circuit split, was articulated long before the First Amendment even applied to the States and decades before this Court would introduce tiers of scrutiny. Indeed, it would not be until 1940 that this Court would first articulate the notion that "[t]he fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)

(incorporating the Free Exercise Clause). *See also Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the Free Speech Clause); *Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, 16 (1947) (incorporating the Establishment Clause)

Importantly, it would not be for another quarter century that "exacting judicial scrutiny" would even enter the First Amendment lexicon in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938), another 50 years before the phrase "compelling interest" would be introduced to First Amendment jurisprudence in Justice Frankfurter's concurrence in *Sweezy v. New Hampshire*, 354 U.S. 234, 65 (1957) (Frankfurter, J., concurring), and another 60 years before strict scrutiny would be applied in its current form in *Sherbert v. Verner*, 374 U.S. 398 (1963). *See also* Stephen Siegel, *The Origins of the Compelling State Interest Test and Strict Scrutiny*, 48 Am. J. Legal History 355 (2008).

Jacobson preceded these developments, did not involve the First Amendment, and could not foresee that First Amendment jurisprudence would require that restrictions on religious exercise survive "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 US. 507, 534 (1997). *Jacobson*, on the other hand, involved the extraordinarily deferential standard that state regulations during an emergency must be "beyond all question, a plain, palpable invasion of rights." 197 U.S. at 31. *Jacobson* cannot be reconciled with First Amendment jurisprudence. The frequency of courts' citation to *Jacobson* in

COVID-19 litigation has created a circuit split worthy of certiorari.

The First Circuit's conclusion is in direct conflict with *Catholic Diocese*, *South Bay*, *Harvest Rock*, *Gateway City*, and the decisions of the Second, Fifth, Sixth, and Ninth Circuits.

III. THE DECISION CONFLICTS WITH THIS COURT'S PRECEDENT ON A QUESTION OF EXCEPTIONAL IMPORTANCE CONCERNING WHETHER THE ESTABLISHMENT CLAUSE PERMITS THE GOVERNMENT TO PROHIBIT PEOPLE FROM ATTENDING CHURCH.

In its Verified Complaint and motion for preliminary injunction challenging the Governor's Orders, Petitioners challenged the discriminatory restrictions on religious worship as a violation the Establishment Clause. (V. Compl. ¶¶133-148). The district court addressed the merits of the claim, but held that Petitioner has no likelihood of success on its Establishment Clause claim because the Governor does not impose discriminatory restrictions on religious worship. (App. Ex. C at 20-21.) Though given a full presentation of the issues and merits of Petitioner's claim, the First Circuit below ignored the issue.

That decision is in conflict with this Court's Establishment Clause decisions. Most notably, in

Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 15 (1947), this Court unequivocally held that **"[t]he 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 remain away from church against his will**." *Id.* at 15 (emphasis added). Also, this Court's precedents make clear that "[a]n attack founded on disparate treatment of religious claims invokes what is perhaps the central purpose of the Establishment Clause—the purpose of ensuring government neutrality in matters of religion." *Gillette v. United States*, 401 U.S. 437, 449 (1971). Finally, in *Lynch v. Donnelly*, this Court held that the Establishment Clause "affirmatively mandates accommodation, not merely tolerance, of all religions, **and forbids hostility towards any**. 465 U.S. 668, 674 (1984) (emphasis added).

The requirement of neutrality was found to have been violated in *Catholic Diocese*, *South Bay*, and *Harvest Rock*. *See, e.g.*, *Catholic Diocese*, 141 S. Ct. at 66 ("The applicants have made a strong showing that the challenged restrictions violate 'the minimum requirement of neutrality' to religion." (citing *Lukumi*, 508 U.S. at 533)); *South Bay*, 141 S. Ct. at 717 (Gorsuch, J.) (noting that California's Blueprint fails the fundamental requirement of neutrality because "[s]ince the arrival of COVID–19, California has openly imposed more stringent regulations on religious institutions than on many businesses."); *id.* at 719 ("**California singles out religion for worse treatment than many**

secular activities. At the same time, the State fails to explain why narrower options it finds sufficient in secular contexts do not satisfy its legitimate interests. Recently, this Court made it abundantly clear that edicts like California's fail strict scrutiny and violate the Constitution."); *Harvest Rock*, 2021 WL 406257, at *1 (enjoining California's discriminatory total prohibition for the same reasons as *South Bay*).

Because "[a] proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of **neutrality** toward religion," *Comm. for Public Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 772 (1973), transgression into hostility towards religious worship plainly violates the Establishment Clause. Indeed, "[a] central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995). Because the Supreme Court has already found that discriminatory restrictions against religious worship services fail the minimum requirement of neutrality, *South Bay*, 141 S. Ct. at 717 (Gorsuch, J.), the Governor's discriminatory restrictions necessarily violate the Establishment Clause.

The district court's conclusion that the Governor's Orders are not discriminatory because they apply to "both secular and religious," and did so mainly "to slow the spread of COVID-19" (App. Ex. C at 20-21), is contrary to this Court's holdings. The

Everson, *Gillette*, and *Lynch* triumvirate dictate that the Governor's disparate treatment of religious worship services as compared to nonreligious gatherings at myriad other locations or nonreligious gatherings in Petitioner's own Churches violates the Establishment Clause, and the decision below is in direct conflict with this Court's decisions, and certiorari is warranted to correct.

IV. THE FIRST CIRCUIT'S JURISDICTIONAL DECISION ALSO CONFLICTS WITH THIS COURT'S PRECEDENT ON A QUESTION OF EXCEPTIONAL IMPORTANCE CONCERNING THE IMPOSITION OF IRREPARABLE HARM.

The First Circuit evaded consideration of a question this Court has already unequivocally answered by creating a jurisdictional problem where none existed. In its decision below, which continues to deny Calvary Chapel the immediate injunctive relief it has been seeking for over almost a year, the First Circuit held that it lacked jurisdiction over the appeal because it was merely from a denial of a temporary restraining order rather than a preliminary injunction. (App. Ex. A at 3.) However, the decision below is incorrect as a matter of fact and law. And, "**[t]oday's [Petition] should have been needless; the lower courts in these cases should have followed the extensive guidance this Court already gave**." *South Bay*, 2021 WL 406258, at *3 (Gorsuch, J., Statement) (emphasis

added). Unfortunately, the First Circuit has ignored this Court's instructions.

In the district court, Calvary Chapel moved for a temporary restraining order **and** preliminary injunction. (V. Compl. at 40-44.) Both parties submitted evidence concerning the motion in the form of a Verified Complaint from Calvary Chapel and sworn testimony from the Governor's health officials from the Governor. (App. Ex. C at 3-12.) And, after conducting a telephonic hearing with the parties, the district court issued a 23-page opinion based entirely upon the likelihood of success prong for a preliminary injunction. (App. Ex. C at 13-21.) As several courts did prior to this Court's *Catholic Diocese* decision, the district court held that substantial deference was due to the government under *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (App. Ex. C. at 14-15) and found that Calvary Chapel had no likelihood of success on the merits of its claims. (App. Ex. C at 13-21.) Though, in form, the district court denied only a temporary restraining order, in substance and practical effect the court denied all preliminary injunctive relief. That Calvary Chapel had no further recourse in the district court was borne out by the district court's subsequent denial of Calvary Chapel's request for an injunction pending appeal. (App. Ex. D.)

When a district court refuses injunctive relief, interlocutory appeals are permissible. *See* 28 U.S.C. §1292(a)(1) (granting immediate appeals from orders "granting, continuing, modifying, **refusing**, or dissolving injunctions" (emphasis added)). And,

the First Circuit's decision below failing to recognize that immediate appealability is in direct conflict with the decisions of other circuits. *Fideicomiso De La Tierra Del Cano Martin Pena v. Fortuno*, 582 F.3d 131, 133 (1st Cir. 2009) ("it has the practical effect of refusing an injunction," "might have serious, perhaps irreparable consequences," and "can only be effectively challenged by immediate appeal."); *Religious Tech. Ctr., Church of Scientology Int'l, Inc. v. Scott*, 869 F.2d 1306, 1308 (9th Cir. 1989) (where "the circumstances render the denial tantamount to the denial of a preliminary injunction," an immediate appeal may be taken to preserve the movants' cherished rights).

That is precisely of the district court's opinion denial in this matter. It precluded Calvary Chapel from seeking additional injunctive relief because the district court had already concluded that Calvary Chapel had no likelihood of success on the merits of its Free Exercise and other claims (App. Ex. C at 13-21), and then further denied them injunctive relief pending appeal (App. Ex D), which is based on the same standard as a preliminary injunction. *See, e.g.*, *Respect Maine PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010). Thus, consideration of Calvary Chapel's motion for TRO and preliminary injunction certainly had the practical effect of denying them any injunctive relief and was tantamount to the denial of a preliminary injunction. One need look no further than the fact that the district court's denial has effectively denied Calvary Chapel injunctive relief – and thus imposed irreparable injury on them – since May 9, 2020, almost an entire year ago. If such an

extended period of time crying out for relief does not demonstrate that the district court's order was tantamount to the denial of a preliminary injunction and precluding any further options for injunctive relief, nothing ever could.

Moreover, both the district court and the First Circuit below also considered and denied Calvary Chapel's requests for an injunctions pending appeal, wherein both courts apply the preliminary injunction factors of *Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008). The district court denied it without any discussion whatsoever (App. Ex. D), and the First Circuit likewise denied the motion for injunction pending appeal. (App. Ex. B.) Notably, **the First Circuit had no problem with the non-existent jurisdictional issues when considering the injunction pending appeal**.

And, **all parties to the proceeding treated the district court's order as a denial of a preliminary injunction, treated the denial as one of a preliminary injunction**, and **consented to the fact that an appeal was proper because it was tantamount to a denial of a preliminary injunction**. During oral argument, the Attorney General's Office representing the Governor told the panel "this is probably the only thing that the parties can agree upon in this case which is that we think this order is appealable." (App. Ex. I, Oral Argument Transcript at 18.) Indeed, the Governor's counsel told the court that "**for all intents and purposes, this case proceeded just like a host of other cases that are resolved on PI motions**

. . . from our perspective, you know, we assumed that we were briefing a PI motion [and] we understood that this was a PI motion." (App. Ex. I at 19 (emphasis added).) Yet, the panel below created the jurisdictional problem where none existed, and denied Calvary Chapel's requests for injunctive relief.

Finally, the First Circuit's decision below also belies a jurisdiction issue by explicitly opining on the merits of Calvary Chapel's request for a preliminary injunction. Despite claiming that it had no jurisdiction to consider the merits of Calvary Chapel's appeal, the First Circuit nevertheless opined that it did "not believe that the lack of immediate appealability can be said to cause serious harm." (App. Ex. A at 12.) Its rationale for such an astounding proposition was that "the harm of which the Chapel complains has its origin in the extraordinary epidemiological crisis that has engulfed Maine and every other part of the country." (App. Ex. A at 12.) Not content with this conclusion on its own, the panel went further positing that denying injunctive relief "**will not cause serious harm**." (App. Ex. A at 13 (emphasis added).) This statement stands in stark contrast to the unequivocal holding of this Court in *Catholic Diocese* that "**[t]here can be no question that he challenged restrictions, if enforced, will cause irreparable harm**." *Catholic Diocese*, 141 S. Ct. at 67 (emphasis added). The reason for that is simple, "**by effectively barring many from attending religious services**," as the Governor's restrictions due here, the Governor's Orders "strike at the very

heart of the First Amendment's guarantee of religious liberty." *Id.*

The First Circuit's decision below – blatantly ignores the fundamental teachings and mandates of *Catholic Diocese* cannot be reconciled with this Court's precedent, and created a circuit split on the immediate appealability of Petitioner's claims.

Going even further, the panel concluded – again, in direct contradiction to this Court's holding in *Catholic Diocese* – that Calvary Chapel would suffer no harm by the discriminatory restrictions on religious worship services because "the Chapel has retained other means to organize worship services for its congregants, including the sponsorship of online worship services, the holding of drive-in services, and the hosting of gatherings of ten or fewer." (App. Ex. A at 14.) Because of that, the panel concluded that "their availability mitigated the harm to the Chapel and its worship community." (*Id.*) This cannot be reconciled with *Catholic Diocese*. Indeed,

> **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. And while those who are shut out may in some instances be able to watch services on television, such remote viewing is not the same as personal attendance**. Catholics who watch a

> Mass at home cannot receive communion, and there are important religious traditions in the Orthodox Jewish faith that require personal attendance.

Catholic Diocese, 141 S. Ct. at 67-68 (emphasis added). Simply put, because Calvary Chapel's religious beliefs compel it to gather together for religious worship services (V. Compl. ¶89), prohibiting them from doing so is irreparable harm.

What Justice Gorsuch pointed out in *South Bay* is equally applicable here:

> [T]he State tells us that worshippers are sure to seek close physical interactions. It touts its mild climate, too, suggesting that worshippers might enjoy more space outdoors. Yet, California is not as concerned with the close physical proximity of hairstylists or manicurists to their customers, whom they touch and remain near for extended periods. The State does not force them or retailers to do all their business in parking lots and parks. And California allows people to sit in relatively close proximity inside buses too. Nor, again, does California explain why the narrower options it thinks adequate in many secular settings—such as social distancing requirements, masks, cleaning, plexiglass barriers,

> and the like—cannot suffice here. Especially when those measures are in routine use in religious services across the country today.

South Bay, 141 S. Ct. at 718-19 (Gorsuch, J., Statement).

And, while exempting myriad other activities, the Governor continues to argue – and the First Circuit lent credence to it – that Calvary Chapel can simply go outside to worship or worship online. A critical distinction between *South Bay* and the instant petition bears noting. If the "mild climate" of California is an insufficient basis for permitting the Governor to force worshippers outside, then it is much more so the case in Maine where there is no such mild climate this time of year. In a country where religious exercise is a fundamental constitutional right, can the First Amendment really be thought to countenance the notion that religious congregants must brave freezing temperatures and driving snow to engage in that constitutional right? Surely not. The First Circuit's decision telling Calvary Chapel to take its religious freedom outside has – quite literally – left them out in the cold in direct conflict with the decisions of this Court.

As the Sixth Circuit recognized last year,

> 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 for what it means when "two or three gather in my Name," Matthew 18:20, or what it means when "not forsaking the assembling of ourselves together," Hebrews 10:25.

Roberts v. Neace, 958 F.3d 409, 415 (6th Cir. 2020).

The offensive and legally incorrect statements of the First Circuit below cannot be reconciled with this Court's decisions in *Catholic Diocese*, *South Bay*, or *Harvest Rock*, and certiorari is warranted.

CONCLUSION

Because the decision below directly conflicts with this Court's decisions in *Catholic Diocese*, *South Bay*, *Harvest Rock,* and *Gateway City*, as well as the decisions of the Second, Fifth, Sixth, and Ninth Circuits on a question of exceptional importance, certiorari should be granted.

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