No. 20-1346

In The Supreme Court of the United States

CALVARY CHAPEL OF BANGOR,

Petitioner,

v.

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

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

AARON M. FREY
Attorney General for the State of Maine

CHRISTOPHER C. TAUB
Chief Deputy Attorney General
Counsel of Record
SARAH A. FORSTER
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
6 State House Station
Augusta, Maine 04333
(207) 626-8800
Christopher.C.Taub@maine.gov
Sarah.Forster@maine.gov

Counsel for Respondent Janet T. Mills

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

On May 5, 2020, petitioner, Calvary Chapel of Bangor ("Calvary"), filed a lawsuit challenging limits Maine's Governor imposed on gatherings to curb the spread of the COVID-19 virus. With its complaint, Calvary filed a motion seeking both a temporary restraining order and a preliminary injunction. Four days later, the district court denied the request for a temporary restraining order. Rather than proceeding in district court on its request for a preliminary injunction, Calvary immediately appealed to the First Circuit. On December 22, 2020, the First Circuit dismissed the appeal for lack of appellate jurisdiction and never reached the merits of Calvary's claims. There are currently no limits on gatherings, and there have been none since May 24, 2021. The questions presented are:

I. Whether the First Circuit properly dismissed for lack of appellate jurisdiction Calvary's interlocutory appeal from the district court's denial of Calvary's motion for a temporary restraining order.

II. Whether the lawsuit is moot inasmuch as the limit on gatherings challenged in the complaint was superseded over a year ago, there is no longer any limit on gatherings, and the state of emergency is over.

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STATEMENT OF THE CASE

A. Factual Background

On January 31, 2020, the United States Department of Health and Human Services determined that as of January 27, 2020, the COVID-19 virus constituted a nationwide public health emergency. Declaration of Nirav Shah (ECF Doc. 20), ¶ 10.[1] On March 15, 2020, in response to this pandemic, Maine's Governor proclaimed a State of Civil Emergency to Protect Public Health. Complaint, ¶ 24 (ECF Doc. 1) and Exhibit A thereto (ECF Doc. 1-1). The Proclamation allowed the Governor to issue "any and all oral and written directives that [the Governor], upon the advice of public health and other expert officials, reasonably deem[s] necessary to respond to and protect against the spread and impacts of COVID-19 in Maine." *Id*.; *see also* Me. Stat. tit. 37-B, § 742(C) (2021).[2]

Scientific evidence demonstrates that one method of controlling the virus is for people to keep appropriate

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[1] References to "ECF Doc." are references to the document numbers of filings made in the district court.

[2] The Governor issued proclamations renewing the State of Emergency every 30 days. *See* https://www.maine.gov/governor/mills/official_documents/proclamations. The final proclamation on June 11, 2021 terminated the State of Emergency effective June 30, 2021. https://www.maine.gov/governor/mills/sites/maine.gov.governor.mills/files/inline-files/Proclamation%20to%20Renew%20the%20State%20of%20Civil%20Emergency%20-%20June%2011%202021.pdf; *see also* EO 40 FY 20/21 (declaring that State of Emergency expired at midnight on June 30, 2021) (https://www.maine.gov/governor/mills/sites/maine.gov.governor.mills/files/inline-files/EO%2098%2040.pdf).

distance from each other and avoid gatherings. Shah Decl., ¶ 20. Accordingly, on March 18, 2020, the Governor issued Executive Order ("EO") 14 FY 19/20. Complaint, ¶ 26 and Exhibit B thereto (ECF Doc. 1-2). This order limited *all* gatherings, stating:

> WHEREAS, the immediate implementation of this Order is necessary to limit the number of common discretionary and primarily social gatherings of persons in numbers sufficiently large enough to pose a risk of transmission of COVID-19 due to their close proximity;
>
> * * *
>
> Gatherings of more than 10 people are prohibited throughout the State. Gatherings subject to this Order are those that are primarily social, personal, and discretionary events other than employment. Such gatherings include, without limitation, community, civic, public, leisure, and faith-based events; social clubs; sporting events with spectators; concerts, conventions, fundraisers, parades, fairs, and festivals; and any similar event or activity in a venue such as an auditorium, stadium, arena, large conference room, meeting hall, theatre, gymnasium, fitness center or private club.

ECF Doc. 1-2, PageID # 47.

On March 24, 2020, the Governor issued EO 19 FY 19/20. Complaint, ¶ 27 and Exhibit C thereto (ECF Doc. 1-3). The Order stated:

> All Non-Essential Businesses and Operations must cease activities at sites that are public

> facing and thereby allow customer, vendor or other in-person contact; or are at sites that require more than 10 workers to convene in space where social distancing is not possible.

ECF Doc. 1-3, PageID # 51. The order permitted "Essential Businesses and Operations" to continue their activities, so long as they complied with specified social distancing requirements. PageID # 50. This order "renewed and extended" EO 14 FY 19/20 "to apply until April 8, 2020 unless otherwise extended." PageID # 51.[3] EO 19 FY 19/20 did *not* exempt Essential Businesses and Operations from occupancy limits, as Calvary claims. Pet. 5.

On March 31, 2020, the Governor issued EO 28 FY 19/20. Complaint, ¶ 32 and Exhibit D thereto (ECF Doc. 1-4). This order directed "[a]ll persons living in the State of Maine . . . to stay at their homes or places of residence," with certain exceptions for participating in "Essential Activities" and for workers at both "Essential Businesses and Operations" and "Non-Essential Businesses and Operations." ECF Doc. 1-4, PageID # 63. The order also established customer limits for stores, based on the stores' square footage. PageID # 65.[4] The order did not, as Calvary claims, "effect[] a

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[3] Subsequently, EO 19 FY 19/20 was extended to April 30, 2020 by Executive Order 19A FY 19/20.

[4] The customer limits were adjusted by EO 28-A FY 19/20, issued on April 10, 2020, and adjusted again by EO 28-A-2, issued on June 16, 2020. ECF Doc. 43-6 & 43-7. Under EO 28-A-2, stores were limited to five customers per 1,000 square feet of shopping space. ECF Doc. 43-7, PageID # 431.

total ban on religious worship services" by "prohibit[ing] Mainers from leaving their homes to attend religious worship services." Pet. 6. People were always free to travel to religious services so long as applicable gathering limits were not exceeded.

On April 28, 2020, Governor Mills issued the "Restarting Maine's Economy" plan (the "Restarting Plan"). Complaint, ¶ 44 and Exhibit H thereto (ECF Doc. 1-8). The Restarting Plan implemented a four-stage approach to reopening Maine's economy, and it abandoned the "essential v. non-essential designations." PageID # 82. The Plan noted that in Stage 2, starting in June 2020, the limit on gatherings would increase to 50 people. PageID # 85.

On April 29, 2020, the Governor issued EO 49 FY 19/20. Complaint, ¶ 41 and Exhibit G thereto (ECF Doc. 1-7). The order stated that the "[p]rotection of public health and [Maine's] health care delivery system shall remain the first priority," and it extended certain previous EOs through May 31, 2020. PageID # 71. The order further directed the Commissioner of the Maine Department of Economic and Community Development to implement the Governor's Restarting Plan. *Id*.

On May 29, 2020, the Governor issued EO 55 FY 19/20, which, effective June 1, 2020, increased the limit on gatherings from 10 to 50 people. ECF Doc. 43-2.

On October 6, 2020, the Governor issued EO 14 FY 20/21. ECF Doc. 43-4. For "establishments that provide and require seating for all invitees," the indoor gathering limit was set at "50% of the facility's permitted

occupancy limit or 100 persons, whichever is less." PageID # 423. For establishments that do not provide and require seating, the limit on indoor gatherings remained at fifty persons. *Id*. The order also announced implementation of the final phase of the Restarting Plan, PageID # 421, under which "[a]ll businesses are open and operating with appropriate safety modifications." PageID # 87. On November 4, 2020, the Governor issued EO 16 FY 20/21, returning the limit on indoor gatherings to fifty people. ECF Doc. 43-5, PageID # 427.

On February 12, 2021, the Governor issued EO 31 FY 20/21. ECF 51-7. For houses of worship only, the limit on indoor gatherings was increased to the greater of five persons per 1,000 square feet or fifty persons. PageID # 530-31. The limit on all other types of gatherings was not changed. In many cases, this treated religious gatherings more favorably than other kinds of gatherings and retail operations. For example, a 20,000 square foot house of worship could host 100 congregants while a 20,000 square foot social club could host only 50 people. And a 5,000 square foot house of worship could host 50 congregants while a 5,000 square foot store could host only 25 customers.

On March 5, 2021, the Governor issued EO 35 FY 20/21. ECF Doc. 51-8. Effective March 26, 2021, the indoor gathering limit and the store customer limit were increased to the greatest of 50% of permitted

occupancy, five persons per 1,000 square feet, or 50 persons. PageID # 533.[5]

On May 13, 2021, the Governor issued Executive Order 38 FY 20/21. https://www.maine.gov/governor/mills/sites/maine.gov.governor.mills/files/inline-files/EO%2096%2038.pdf. Effective May 24, 2021, it eliminated all gathering and store customer limits. *Id*. On June 30, 2021, the final order renewing the State of Emergency expired and the State of Emergency terminated. https://www.maine.gov/governor/mills/sites/maine.gov.governor.mills/files/inline-files/Proclamation%20to%20Renew%20the%20State%20of%20Civil%20Emergency%20-%20June%2011%202021.pdf.

B. Procedural History

On May 5, 2020, Calvary filed the present lawsuit in the United States District Court for the District of Maine, challenging on various grounds the ten-person limit on gatherings then in effect. App. Ex. G. Along

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[5] In its Petition, filed on March 22, 2021, Calvary claims that "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*." Pet. 3 (emphasis in original). In fact, as of February 12, the limit was the greater of five persons per 1,000 square feet or 50 persons. Calvary has a history of misrepresentation, including stating to the district court that it was subject to a 50-person limit when, in fact, it was no longer subject to any limits. The district court called Calvary out for its "false statement" and reminded Calvary's counsel "of their duty of candor to the Court and the requirements of Rule 11(b)(3) of the Federal Rules of Civil Procedure." ECF Doc. 69, PageID # 672 n.13.

with its complaint, Calvary filed a "Motion for Temporary Restraining Order and Preliminary Injunction," arguing that the limit violated the First Amendment. ECF Doc. 3. The court held a telephone conference with the parties' counsel on May 7, 2020 and directed the Governor to file a response by the end of the next day. On May 9, 2020, the district court issued an order denying the TRO motion, concluding that Calvary was not likely to prevail on the merits of its claims and that it failed to establish the other prerequisites for obtaining injunctive relief. App. Ex. C. Calvary immediately appealed to the United States Court of Appeals for the First Circuit. App. Ex. F. Subsequently, Calvary consented to the Governor's motion to stay further proceedings in the district court pending action by the First Circuit on Calvary's appeal. ECF Doc. 35.

On August 13, 2020, after briefing was complete, the First Circuit advised counsel to be prepared at oral argument to discuss whether the court had appellate jurisdiction over an interlocutory appeal from the denial of a TRO. At oral argument, both Calvary and the Governor contended that the court had jurisdiction over the appeal. Nevertheless, on December 22, 2020, the First Circuit dismissed the appeal without prejudice for lack of appellate jurisdiction. App. Ex. A, 3. The court recognized that "[t]he denial of a temporary restraining order is not ordinarily appealable, save for certain 'narrow exceptions.'" *Id*., 7. One exception is when the appellant "can make a three-part showing—demonstrating that the refusal of a temporary restraining order had the practical effect of denying

injunctive relief, will likely cause serious (if not irreparable) harm, and can only be effectually challenged by means of an immediate appeal." *Id*., 8. The First Circuit held that the first requirement was not met. It noted that an order has "the practical effect of denying injunctive relief either if it was issued after a full adversarial hearing or if no further interlocutory relief is available in the absence of immediate review." *Id*., 9. It concluded that the telephone conference with counsel did not constitute a "full adversarial hearing" and that "the sparseness of the record argues powerfully in favor of a finding that pathways for further interlocutory relief remained available in the district court." *Id*., 9-10. Because there were disputes as to "key factual questions" and gaps as to other facts, "a preliminary injunction hearing would not have been either a redundancy or an exercise in futility." *Id*., 11.

Calvary's "stumble[] at the first step of the tripartite inquiry [was] sufficient to defeat its claim of appellate jurisdiction." *Id*., 12. For "completeness," though, the court went on to address the remaining requirements and found that they had not been satisfied either.[6] In addressing the likelihood of serious harm, the court recognized that "public officials do not have free rein to curtail individual constitutional liberties during a public health emergency." *Id*., 13. Nevertheless, the public health emergency was a factor to be

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[6] In a concurring opinion, one judge stated that there was no need to address the remaining factors given the conclusion that the order at issue did not have the practical effect of denying a preliminary injunction motion. *Id*., 17 (Barron, J., concurring).

considered in assessing harm, and that, along with the fact that Calvary "retained other means to organize worship services for its congregants," warranted finding that Calvary was not facing serious harm. *Id*., 14.

With respect to the third requirement—a demonstration that the lower court's order can only be effectually challenged by means of an immediate appeal—the First Circuit distinguished the case from situations in which trade secrets would be revealed or a "tactical litigation advantage" would be lost. *Id*., 14–15. The district court's order did not "herald an irreversible or meaningful shift in the relationship between the parties" and was of "modest temporal duration." *Id*., 15. Moreover, Calvary could have sought a hearing on its preliminary injunction motion, and given how quickly the district court acted on the TRO, there was "every reason to believe . . . that such a hearing would have been held expeditiously."

The First Circuit concluded that while it "appreciate[d] the importance of the issues that [Calvary] seeks to raise, its appeal is premature, and there is no principled way for [the court] to reach the merits of the appeal." *Id*., 16.

On February 9, 2021, the Governor filed a motion to dismiss in district court, arguing that Calvary's lawsuit was moot inasmuch as its complaint challenged the ten-person gathering limit, it had never amended its complaint, and that limit had not been in effect for more than eight months. ECF Doc. 43. On February 18, 2021, Petitioner filed a preliminary injunction motion

in district court. ECF Doc. 45. On March 22, 2021, Petitioner filed its certiorari Petition, and, on June 1, 2021, it filed a motion in the district court seeking an injunction pending disposition of its Petition. ECF Doc. 68.

On June 4, 2021, the district court issued an order granting the Governor's motion to dismiss and denying Calvary's preliminary injunction motions. ECF 69. The court held that Calvary's claims were moot because none of the restrictions challenged in its complaint were still in effect—in fact, gatherings were no longer subject to any limits whatsoever. PageID # 675. There was thus no effective relief the court could grant. PageID # 679. The court rejected Calvary's argument that the "voluntary cessation" exception to mootness applied, concluding that the Governor had "demonstrated that it is absolutely clear that [she] cannot reasonably be expected to reinstate the [orders] that are identified in the Complaint." PageID # 687. The court also found that the "capable of repetition, yet evading review" exception did not apply because there was no "reasonable expectation" that Calvary would again be subject to the same restrictions. PageID # 689. Because the court granted the Governor's motion to dismiss, it denied as moot Calvary's motions for injunctive relief. PageID # 690-91. Calvary immediately appealed to the First Circuit. ECF Doc. 70.

REASONS TO DENY THE PETITION

I. The Only Reviewable Issue is Whether the First Circuit Correctly Dismissed Calvary's Appeal for Lack of Jurisdiction.

Calvary asks this Court to review issues relating to the extent to which the First Amendment prohibits the government from imposing limits on the size of gatherings at houses of worship, whether the Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990) should be overruled, and whether the Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) has ongoing vitality. Pet. i–ii. None of these issues, though, was reached by the First Circuit. In fact, the First Circuit did not address the merits of any of Calvary's claims.[7] Rather, because Calvary was appealing from the denial of a temporary restraining order, which the First Circuit found was not the functional equivalent of a denial of a preliminary injunction, the court dismissed the appeal without prejudice. "This Court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court." *Patrick v. Burget*, 486

[7] Calvary claims that the First Circuit "concluded that the Governor's 50-person numerical cap . . . would survive *Catholic Diocese* because it imposed no harm on Petitioner's Church." Pet. 17–18. This is not what the First Circuit concluded. Rather, it cited *Catholic Diocese* for the proposition that "public officials do not have free rein to curtail individual constitutional liberties during a public health emergency." App. Ex. A, 13. And this was not in the context of addressing the merits of Calvary's claims (which the First Circuit never reached) but in considering whether not allowing Calvary to immediately appeal would cause serious harm. *Id*.

U.S. 94, 99 n.5 (1988); *see also Perez v. Florida*, 137 S. Ct. 853, 854 (2017) (Sotomayor, J., concurring in denial of certiorari).

While the district court did discuss the merits of some of Calvary's claims, it did so only in the context of ruling on a temporary restraining order, where the court was assessing Calvary's likelihood of ultimately prevailing on its claims. Moreover, at the time the court issued its ruling, it did not have the benefit of this Court's decisions in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam) and *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam), where the Court addressed constitutional limitations on states' ability to limit the size of gatherings at houses of worship. This Court should not weigh in on the issues here without first allowing the lower courts to consider them on a fully developed factual record and with the benefit of relevant precedent.

Calvary could have litigated below the merits of its claims but chose not to. Rather than continuing on in district court, where the parties could have fleshed out the facts and fully briefed the issues, Calvary chose to immediately appeal the denial of its motion for a temporary restraining order while also consenting to a stay of further district court proceedings. When the First Circuit dismissed Calvary's appeal for lack of appellate jurisdiction, Calvary could have returned to district court for proceedings on the merits. Instead, it filed a Petition for a Writ of Certiorari. Because of the manner in which Calvary has litigated this matter, the only viable issue on which this Court could grant

certiorari is the First Circuit's dismissal for lack of appellate jurisdiction.[8]

II. The First Circuit's Dismissal for Lack of Appellate Jurisdiction Does Not Merit Supreme Court Review.

It is well settled that courts of appeals generally do not have jurisdiction over orders on temporary restraining motions. Courts of appeals have jurisdictions over appeals from "final judgments" of district courts. 28 U.S.C. § 1291. While there is an exception for "interlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions," there is no exception for orders denying temporary restraining orders. Thus, such orders are not appealable, and this Court has recognized as much. *Abbott v. Perez*, 138 S. Ct. 2305, 2320 (2018); *see also Off. of Pers. Mgmt. v. Am. Fed'n of Gov't Emps.,*

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[8] In an effort to gin up a basis for the Court to grant review, Calvary claims that the First Circuit's decision is in direct conflict with various cases from this Court and other courts of appeals. Pet. 11–26 (citing, inter alia, *Roman Catholic Diocese*, 141 S. Ct. 63; *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021); *Harvest Rock Church v. Newsom*, 141 S. Ct. 1289 (2021); *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021); *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228 (9th Cir. 2020); *First Pentecostal Church v. City of Holly Springs*, *Miss.*, 959 F.3d 669 (5th Cir. 2020); *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620 (2d Cir. 2020); *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020)). There is no conflict, though, because in all of the cited cases the courts addressed the merits of claims that state limits on gatherings at houses of worship violated the First Amendment. Here, the First Circuit never reached the merits.

AFL-CIO, 473 U.S. 1301, 1303–04 (1985) ("[T]he established rule is that denials of temporary restraining orders are ordinarily not appealable.") (Burger, C.J., in chambers). Legal scholars recognize this. 11A Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc. Civ*. § 2962 (3d ed. 1998) ("[A]lthough preliminary injunctions are appealable under [28 U.S.C. § 1292(a)(1)], it generally has been held that temporary restraining orders are not."). And the courts of appeals are in universal accord that orders on temporary restraining motions are generally not appealable. *Uniformed Fire Officers Ass'n v. de Blasio*, 973 F.3d 41, 46 (2d Cir. 2020); *Robinson v. Lehman*, 771 F.2d 772, 782 (3d Cir. 1985); *Com. of Va. v. Tenneco, Inc*., 538 F.2d 1026, 1029–1030 (4th Cir. 1976); *Faulder v. Johnson*, 178 F.3d 741, 742 (5th Cir. 1999); *Overstreet v. Lexington-Fayette Urb. Cty. Gov't*, 305 F.3d 566, 572 (6th Cir. 2002); *Cty., Mun. Employees' Supervisors' & Foremen's Union Loc. 1001 (Chicago Illinois) v. Laborers' Int'l Union of N. Am.*, 365 F.3d 576, 578 (7th Cir. 2004); *In re Champion*, 895 F.2d 490, 492 (8th Cir. 1990) (per curiam); *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 659–660 (9th Cir. 2021); *Populist Party v. Herschler*, 746 F.2d 656, 661 n.2 (10th Cir. 1984); *Cuban Am. Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412, 1421 (11th Cir. 1995); *United States v. Hubbard*, 650 F.2d 293, 314 n.73 (D.C. Cir. 1980); *Nikken USA, Inc. v. Robinson-May, Inc.*, 217 F.3d 857 (Fed. Cir. 1999) (table).

There are exceptions, including when denial of a temporary restraining order has the "practical effect" of denying an injunction. *Abbot*, 138 S. Ct. at 2319–2320;

see also Carson v. Am. Brands, Inc., 450 U.S. 79, 84 (1981). Here, the First Circuit concluded that the order did not have the practical effect of denying an injunction because there was not a full adversarial hearing and the district court expressly limited its order to Calvary's motion for a temporary restraining order and not to its motion for a preliminary injunction. The First Circuit found that it was "manifest" that the proceedings below "d[id] not display the criteria that we previously have identified as characterizing a de facto denial of injunctive relief." App. Ex. A, 11.

Calvary does not seem to dispute that a denial of a motion for a temporary restraining order is appealable only if it is "tantamount to the denial of a preliminary injunction motion." Pet. 37. Calvary's complaint is that the First Circuit erred in concluding that the order at issue did not have the practical effect of denying an injunction. *Id*. That, though, is a case-specific inquiry. Even if the First Circuit erred, correcting that error would be of little value in future cases in other courts. Moreover, Calvary's primary argument that the district court's denial of a temporary restraining order was tantamount to denial of an injunction is that Calvary has been unable to seek a preliminary injunction for over a year. *Id*., 37–38. But this is purely the result of Calvary's litigation tactic of immediately appealing rather than pressing forward with its preliminary injunction motion and then not returning to district court promptly after the First Circuit dismissed its appeal.

III. If the Court Granted Certiorari, It Would Not Reach the Merits Because the Matter is Moot.

1. "Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies." *Lewis v. Cont'l Bank Corp*., 494 U.S. 472, 477 (1990); *see also Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013). "To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (cleaned up). The Court has "no power to issue advisory opinions," and "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (per curiam). This Court is "not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong." *Spencer v. Kemna*, 523 U.S. 1, 18 (1998). So, "[i]f an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013) (quoting *Lewis v. Continental Bank Corp*., 494 U.S. 472, 477–478 (1990)). "No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute 'is no longer embedded in any actual controversy about the plaintiffs' particular legal rights.' " *Already, LLC*, 568 U.S. at

91 (quoting *Alvarez v. Smith*, 558 U.S. 87, 93 (2009)). Dismissal on mootness grounds is permissible only when "'it is impossible for a court to grant any effectual relief whatever'" to the plaintiff. *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019) (quoting *Chafin v. Chafin*, 568 U.S. 165, 172 (2013)).

2. This lawsuit is moot because there is no longer a live controversy and there is no effective relief the Court could grant to Calvary. Calvary challenges a ten-person limit on gatherings that was rescinded over a year ago. A declaration that the limit was unconstitutional would be purely advisory and would not provide any meaningful relief to Calvary. The same is true even if Calvary's complaint could be broadly construed as challenging any restrictions on gatherings that the Governor imposed during the pendency of the litigation (and despite that in the fourteen months since Calvary filed this lawsuit, it never sought to amend the complaint). Calvary is not subject to any restrictions and the State of Emergency has been terminated. There is no longer any controversy and the matter is moot.

2a. It is true that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). The exception "traces to the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior." *City News & Novelty, Inc. v. City of*

Waukesha, 531 U.S. 278, 284 n.1 (2001). The standard "for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: 'A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203 (1968)). The party asserting mootness must demonstrate "that the challenged conduct cannot reasonably be expected to start up again." *Id.*; *see also Already, LLC*, 568 U.S. at 92 (defendant must establish that it cannot "reasonably be expected" that it will resume the challenged conduct); *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953) (same).

Here, there is no reasonable expectation that the Governor will again impose restrictions on gatherings, much less the ten-person limit that Calvary is challenging. First, the record demonstrates that the Governor's relaxation of restrictions had nothing to do with Calvary's lawsuit. As explained above, before Calvary filed the lawsuit, the Governor had announced that she would be increasing the limit from ten to 50 people and abandoning the distinction between "essential" and "non-essential" designations. There is nothing in the record suggesting that the subsequent easing of limits had anything to do with this lawsuit. Rather, the record demonstrates that when the Governor eliminated altogether the restriction on gatherings, it was based on the Maine Center for Disease

Control's determination that such a restriction was "no longer necessary to protect the public health" "in light of decreasing COVID-19 case counts and positivity rates, and increasing rates of vaccination in Maine and nationally." https://www.maine.gov/governor/mills/sites/maine.gov.governor.mills/files/inline-files/EO%2096%2038.pdf.

Second, by words and actions, the Governor has made clear that there is no reasonable expectation of a return to the challenged restrictions. The Governor's Chief Legal Counsel has declared that it is "highly unlikely" that the Governor will reimpose a ten-person limit on gatherings, at least with respect to religious gatherings. Declaration of Gerald Reid (ECF Doc. 44), ¶ 11. He notes that the ten-person limit "was issued at the very beginning of the pandemic when far less was known about the COVID-19 virus than is known now, and the State properly took an extremely cautious approach with respect to activities that could pose risks of transmitting the virus." *Id*., ¶ 3. Subsequently, the Governor announced a process to determine how restrictions on businesses and activities could be safely eased. *Id*., ¶ 4. This process resulted in the gathering limit being increased from ten to 50 persons. *Id*., ¶ 5. This limit remained in place even while COVID-19 cases in Maine were dramatically increasing. *Id*., ¶¶ 7-8 (stating that until mid-October 2020, there were rarely more than 30 new cases per day, but the rate then steadily increased, peaking at 823 new cases on January 15, 2021). New cases are now on the decline

and Mainers are receiving vaccines. *Id*., ¶¶ 7, 11.[9] If the Governor did not return to the old gathering limit when cases were increasing and there was no vaccine, it is difficult to see why the Governor would do so now.

Third, on November 25, 2020, the United States Supreme Court held that houses of worship were likely to prevail on their constitutional challenges to an Executive Order issued by New York's Governor limiting attendance at religious services to either ten or 25 persons. *Roman Catholic Diocese*, 141 S. Ct. 63.[10] Given this holding, the Governor's Chief Legal Counsel recognized that a return to a ten-person limit, at least on religious gatherings, would raise constitutional concerns and might not survive a challenge. Reid Decl., ¶¶ 9, 12.

These facts distinguish this case from ones where courts found that cases were not moot despite that the restrictions to protect against COVID-19 had been eased. For example, in *Roman Catholic Diocese*, New York's governor had changed the limits only a few days earlier, after the religious organizations sought relief from this Court. 141 S. Ct. at 68. Further, the Governor was "regularly chang[ing]" the limits and had made

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[9] As of July 1, 2021, over 66% of Mainers were fully vaccinated against COVID-19. https://www.maine.gov/covid19/vaccines/dashboard. And only 24 new cases were reported for June 30. https://www.maine.gov/dhhs/mecdc/infectious-disease/epi/airborne/coronavirus/data.shtml.

[10] The Court noted that these limits were "far more restrictive" than the limits the Court had previously reviewed, including one that limited attendance at worship services to fifty people. *Id*., at 67 & n.2.

changes eight times in the preceding five weeks. *Id*. Here, the relaxation of gathering limits began over a year ago, limits have now been completely eliminated, and the State of Emergency has been lifted. So while on "anyone's account" it was "inevitable" in *Roman Catholic Diocese* that the Court would need to address the matter at some point, *id*., at 72 (Gorsuch, J., concurring), that is simply not the case here.

In *Tandon*, 141 S. Ct. at 1294, the Court held that the case was not moot where "California officials changed the challenged policy shortly after [the] application was filed, the previous restrictions remain[ed] in place [for six more days], and officials with a track record of 'moving the goalposts' retain authority to reinstate those heightened restrictions at any time." Here, the challenged restrictions expired over a year ago, there is nothing to suggest the Governor has changed the restrictions as a litigation strategy, and the State of Emergency is over.

2b. Another exception to mootness applies for cases that are "capable of repetition, yet evading review." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016). This exception "applies only in exceptional situations where the following two circumstances are simultaneously present: (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." *Spencer*, 523 U.S. at 17 (cleaned up); *see also Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam).

Calvary bears the burden of making a "reasonable showing" that it will again be subject to the challenged restrictions. *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983). Calvary cannot make this showing. The district court ruled on Calvary's motion for a temporary restraining order within four days. Calvary could have continued to litigate the ten-person restriction but instead chose to appeal and agreed to stay further district court proceedings. It never amended its complaint to challenge the 50-person limit, which was in effect for over eight months. It is Calvary's litigation tactics—not the duration of the restrictions—that prevented full litigation. Nor can Calvary reasonably be expected to again be subject to the challenged restrictions. The ten-person limit expired in June 2020, the restrictions were consistently eased since then until they were eliminated altogether over a month ago, and the State of Emergency is over.

2c. Calvary makes a claim for nominal damages, and such claims can sometimes keep alive an otherwise moot case. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021). Here, though, the claim does not save the case because the Governor is immune. The Governor is being sued only in her official capacity and the lawsuit is thus against the state. *Hafer v. Melo*, 502 U.S. 21, 25 (1991); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). A state is immune from suit in federal court unless the state expressly consented to suit or Congress has explicitly abrogated the state's immunity in those circumstances where such abrogation is effective. *See, e.g.*, *Seminole Tribe of*

Florida v. Florida, 517 U.S. 44, 54–58 (1996); *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 99-100 (1984). Maine has not consented to suit, and neither of the federal statutes under which Calvary asserts claims—42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc–2000cc-5—effectively abrogate the states' sovereign immunity. *Sossamon v. Texas*, 563 U.S. 277, 293 (2011); *Quern v. Jordan*, 440 U.S. 332, 345 (1979).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

AARON M. FREY
Attorney General for
the State of Maine

CHRISTOPHER C. TAUB
Chief Deputy Attorney General
Counsel of Record
SARAH A. FORSTER
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
6 State House Station
Augusta, Maine 04333
(207) 626-8800
Christopher.C.Taub@maine.gov
Sarah.Forster@maine.gov

Counsel for Respondent
Janet T. Mills