No. 20-1346

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Governor contends that this Court should deny Calvary Chapel's Petition for Writ of Certiorari because the case is moot. (Brief in Opposition to Petition for Writ of Certiorari. ("Opp'n," at 16-23.) The Governor only basis for making such a claim is that she has modified, changed, and ultimately paused her restrictions on Calvary Chapel's religious worship services. (*Id.*) Her other argument – which is contrary to the position she has taken throughout this litigation – is that Calvary Chapel seeks review of an unreviewable order. However, at the First Circuit, the Governor argued that the district court's order was a denial of a preliminary injunction, that all parties briefed and understood it to be so, and all parties were in agreement that the matter before the Court of Appeals was a denial of a preliminary injunction, and thus the matter was reviewable. The First Circuit even noted this was the Governor's position. (App., Ex. A at 7 ("The parties – who agree on little else – urge us to find that the district court's denial of a temporary restraining order qualifies under [an] exception. In other words, **they stand united in asking us to hold that we have appellate jurisdiction**." (emphasis added)).) Yet, now, when she seeks to evade this Court's review of her unconstitutional orders, the Governor is pretextually "singing a different tune in a different key." *Chen v. Slattery*, 862 F. Supp. 814, 821 (E.D.N.Y. 1994). None of the Governor's positions are merited, and her retention of authority to reinstate her restrictions at any time

makes this Court's review necessary to protect Calvary Chapel's cherished constitutional freedoms.

LEGAL ARGUMENT

I. THE DECISIONS OF THIS COURT AND EVERY OTHER CIRCUIT COURT TO ADDRESS THE ISSUE DEMONSTRATE THAT THE GOVERNOR'S MOOTNESS CONTENTIONS ARE WITHOUT MERIT.

A. This Court's Decisions in *Tandon*, *South Bay*, And *Catholic Diocese* Confirm that Calvary Chapel's Claims are Not Moot Because the Governor Retains the Power to Reinstate Her Unconstitutional Orders at Any Time.

The Governor contends Calvary Chapel's claims are moot and thus no effective relief can be granted. (Opp'n at 16-23.) This Court's decisions plainly hold otherwise. Put simply: "**even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case."** *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (emphasis added). "Government actors have been moving the goalposts on pandemic-related sacrifices for months, adopting new benchmarks that always seem to put restoration of liberty just around the corner," *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 716 (2021) (Gorsuch, J., statement). Indeed, "officials with a track record of moving the goalposts

retain authority to reinstate those heightened restrictions at any time." *Tandon*, 141 S. Ct. at 1297 (emphasis added). **The Governor's retention of authority negates mootness** – despite temporarily modifying or suspending her unconstitutional regime. Litigants entitled to injunctive relief from unconstitutional restrictions on their cherished constitutional freedoms "**remain entitled to such relief where the applicants remain under a constant threat that government officials will use their power to reinstate the challenged restrictions**." *Id.* (emphasis added).

This Court's decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) makes this abundantly clear. In addition to invalidating the Governor's discriminatory COVID restrictions, *Catholic Diocese* also compels the conclusion that the issues raised in this lawsuit are not moot, regardless of the fact that the Governor has changed her COVID restrictions. There, the dissenting Justices requested that the Court stay its hand because the Governor of New York had changed his restrictions. 141 S. Ct. at 68 ("The dissenting opinions argue that we should withhold relief because the relevant circumstances have changed [because] the Governor reclassified the areas in question."). This is precisely what the Governor argues here. (Opp'n at 18-19.)

This Court plainly rejected the Governor's arguments. "**There is no justification for that proposed course of action**," because **"[i]t is clear**

the matter is not moot." *Id.* (emphasis added). Here, as in *Catholic Diocese*, "injunctive relief is still called for because the applicants remain under a constant threat that the area in question will be reclassified." *Id.* Much like here, *Catholic Diocese* noted that "[t]he Governor regularly changes the classification of particular areas without prior notice," which this Court noted would harm the applicants "before judicial relief can be obtained." *Id.* Put simply, this Court held that given the ever-changing nature of COVID-19 restrictions on religious worship services, "**there is no reason why [Churches] should bear the risk of suffering further irreparable harm in the event of another reclassification**." *Id.* at 68-69 (emphasis added).

Justice Gorsuch further noted:

> Even if the churches and synagogues before us have been subject to unconstitutional restrictions for months, it is no matter because, just the other day, the Governor changed his color code for Brooklyn and Queens where the plaintiffs are located. Now those regions are "yellow zones" and the challenged restrictions on worship associated with "orange" and "red zones" do not apply. **So, the reasoning goes, we should send the plaintiffs home with an invitation to return later if need be.**

> **To my mind, this reply only advances the case for intervention**. It has taken weeks for the plaintiffs to work their way through the judicial system and bring their case to us. During all this time, they were subject to unconstitutional restrictions. Now, just as this Court was preparing to act on their applications, the Governor loosened his restrictions, all while continuing to assert the power to tighten them again anytime as conditions warrant. **So if we dismissed this case, nothing would prevent the Governor from reinstating the challenged restrictions tomorrow. And by the time a new challenge might work its way to us, he could just change them again. The Governor has fought this case at every step of the way. To turn away religious leaders bringing meritorious claims just because the Governor decided to hit the "off" switch in the shadow of our review would be, in my view, just another sacrifice of fundamental rights in the name of judicial modesty.**

Id. at 71-72 (Gorsuch, J., concurring) (emphasis added).

"It is easy enough to say it would be a small thing to require the parties to refile their applications later." *Id.* at 72. "But none of us are rabbis wondering whether future services will be disrupted as the High Holy Days were, or priests preparing for Christmas. **Nor may we discount the burden on the faithful who have lived for months under New York's unconstitutional regime unable to attend religious services.**" *Id.* (emphasis added). It was for that reason Justice Gorsuch thought a finding of mootness would impose the precise harm from which the Churches were seeking relief. Justice Kavanaugh elaborated even further, succinctly stating that "**[t]here is no good reason to delay issuance of the injunctions**" **despite the changed restrictions**. *Id.* at 74 (Kavanaugh, J., concurring) (emphasis added).

From the beginning of the Governor's unconstitutional regime, she has retained the sole authority to impose whatever restrictions she deems fit and her Restarting Maine's Economy Plan unquestionably shows that she retains the authority to reinstate her restrictions at any time. Governor Mills stated she may "move quickly to either halt progress **or return to an earlier stage**." (App. Ex G, V. Compl. Ex.H, at 7 (emphasis added).) The criteria for moving back includes "case trends and hospitalization rates," "health care readiness and capacity," the "trajectory of influenza-like illnesses and COVID-like syndromic cases," "trajectory of documents cases and newly hospitalized patients," and "capacity of Maine's hospital systems to treat all patients without crises care." (V. Compl., Ex. H at 7.)

Indeed, the Governor even admits that she maintains authority to return Maine to any prior restrictions at any time. (Opp'n at 19-20.) Thus, under *Tandon*, *South Bay*, and *Catholic Diocese* the Governor's retention of authority to reinstate unconstitutional restrictions negates mootness

B. The Decisions of the Circuit Courts Confirm that Calvary Chapel's Claims are Not Moot.

If this Court's binding decisions did not overwhelmingly dictate the outcome of the Governor's erroneous contentions, which they do, the universal decisions of every circuit to address this issue bolsters the conclusion that Calvary Chapel's claims are not moot. *See, e.g.*, *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1230 n.1 (9th Cir. 2020) ("Although the Directive is no longer in effect . . . Calvary Chapel's case is not moot [because] "**Governor Sisolak could restore the Directive's restrictions just as easily as he replaced them**." (emphasis added)); *Calvary Chapel Lone Mountain v. Sisolak*, 831 F. App'x 317, 318 n.2 (9th Cir. 2020) (same); *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 631 n.16 (2d Cir. 2020) (noting of the Governor's mootness contentions, "[t]he Supreme Court squarely rejected that argument, as do we."); *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 345 (7th Cir. 2020) (holding that because "the Governor could restore the approach of Executive Order 2020-32 as easily as he replaced it—and that the Restore Illinois plan

(May 5, 2020) reserves the option of doing just this if conditions deteriorate. . . . **It follows that the dispute is not moot . . . even though it is no longer in** effect." (emphasis added)). In each of those cases, though the challenged restrictions had been changed or even revoked altogether, the courts held that such challenges were not moot because the Governors retained authority to reinstate prior restrictions.

Moreover, when faced with the precise executive orders at issue in the instant Petition, the First Circuit itself has held that a plaintiff's claims are not moot merely because the Governor has modified, changed, or rescinded prior orders. *See Bayley's Campground, Inc. v. Mills*, 985 F.3d 153 (1st Cir. 2021). There, as here, plaintiffs requested injunctive relief against the Governor's COVID-19 executive orders, which were subsequently superseded by a different order. *Id.* at 157 ("The plaintiffs contend that, even though EO 34 has been superseded by EO 57, their request for injunctive relief from the self-quarantine requirement is not moot because it pertains to an executive action that the Governor voluntarily rescinded and could unilaterally reimpose. . . . **We agree**." (emphasis added)). "The Governor has not denied that a spike in the spread of the virus in Maine could lead her to impose a self-quarantine requirement just as strict as EO 34's." *Id.* The same is true here. The Governor does not make it "absolutely clear" that she will not return to her old ways, but merely says that it is "highly unlikely." (*See* Opp'n at 19 (citing dkt. 44, Declaration of Gerald D. Reid, "Reid Decl.," ¶11 ("it

is highly unlikely that the Governor will ever reimpose the 10-person limit on gatherings").) That is not the same standard. The explicit retention of authority for the Governor to return to her old ways under the Restarting Maine's Economy Plan and under Maine's statutory scheme for executive orders demonstrates it is not absolutely clear she will not.

Thus, given that the Governor retains the authority to reinstate her prior restrictions at any time and Restarting Maine's Economy plan's explicit grant of authority to do so, the Governor has not and cannot demonstrate that the matter is moot, particularly given their recent statements about a potential surge in the purportedly new variant. *See infra* Section I.C.

And, even a complete revocation of challenged restrictions has been found insufficient to prevent the entrance of a permanent injunction. In *Harvest Rock Church v. Newsom*, dkt. 95, No. 2:20-cv-6414 (C.D. Cal. May 14, 2021), the district court entered a permanent injunction against restrictions that had been removed.

C. The Governor's Own Statements Concerning the Ongoing Threat of COVID-19 and its Variants Demonstrates the Threat Remains Against Calvary Chapel.

Calvary Chapel's claims are also not moot because the impending threat that the so-called Delta variant poses to Calvary Chapel's religious

assembly. The Governor contends that Calvary Chapel's claims are moot because there are no longer any restrictions in Maine. (Opp'n at 17.) The Governor's own public health officials' statements tell a different story. Indeed, the Governor's public health officials are already raising concerns over the purported Delta variant of the coronavirus and its potential to impact Maine. Her officials have stated that the Delta variant "is likely to be become much more common here in the next month or two [and] "[i]t's only a matter of time before it takes greater hold here in Maine."[1] Indeed, Dr. Nirav Shah, the Governor's chief public health official has stated that he "expects the delta variant's impact to grow in the coming weeks."[2] And, the purported Delta variant is

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[1] Charlie Eichacker, *Maine CDC: Delta Variant Of Coronavirus Will Be More Dangerous for Unvaccinated* (June 23, 2021), https://www.mainepublic.org/health/2021-06-23/maine-cdc-delta-variant-of-coronavirus-will-be-more-dangerous-for-unvaccinated

[2] Colin Woodward, *New tests suggests dangerous delta variant more widespread in Maine, sending most COVID inpatients into ICU*, Portland Press Herald (July 14, 2021), https://www.pressherald.com/2021/07/11/new-tests-suggest-dangerous-delta-variant-more-widespread-in-maine-sending-most-covid-inpatients-into-icu/ (last visited July 20, 2021). *See also* Associated Press, *Testing suggests delta variant may be more widespread in Maine* Boston.com (July 11, 2021), https://www.boston.com/news/coronavirus/2021/07/

also already the source of fresh lockdown protocols and restrictions on gatherings throughout the world.[3]

In fact, on July 20, 2021, the United States once again renewed the declaration of a public health emergency (**for the sixth time**), adding yet another 90 days to the continuing emergency posture.[4] Thus, the continuing threat posed to Calvary Chapel's cherished constitutional liberties remains omnipresent and seemingly unending. The fact that the Governor is already raising the alarm over the new variants and the continued power to reinstate her prior restrictions at any time prevents this case from becoming moot at the Governor's

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11/testing-suggests-delta-variant-may-be-more-widespread-in-maine/ (same).

[3] *See* Woodward *supra* n. 2 (noting that the Delta variant is "a virulent form of the disease first detected in India whose rapid spread forced the United Kingdom, Australia, and other countries into fresh lockdowns last month").

[4] *See* Jacqueline Howard, *US renews 'public health emergency' declaration due to Covid-19 pandemic* (July 20, 2021), https://www.cnn.com/2021/07/20/health/covid-19-public-health-emergency-renewal-bn/index.html; Greg Norman, *Biden administration renews COVID-19 public health emergency declaration* (July 20, 2021), https://www.foxnews.com/health/biden-renews-covid-19-emergency.

whim. Her contentions to the contrary are without merit.

II. THIS COURT SHOULD REJECT THE GOVERNOR'S NEW JURISDICTIONAL ARGUMENT PROFERRED SOLELY TO EVADE REVIEW.

In her continuing effort to evade review of her blatantly unconstitutional restrictions on Calvary Chapel's religious worship services, the Governor now attempts to reframe the entire course of the proceedings below as being Calvary Chapel's fault and that had it only litigated the merits of its claims, the First Circuit would not have issued its jurisdictional decision. (Opp'n at 13-14.) This is incorrect, and it represents nothing more than litigation-driven legerdemain. In fact, for the first time in the course of the entire litigation, the Governor now contends that Calvary Chapel never pursued a request for a preliminary injunction. (Opp'n at 15.)

First, Calvary Chapel has now sought at least **six** preliminary injunctions in this litigation. It sought its first one in its request for a temporary restraining order and preliminary injunction (App., Ex. G.) The district court denied that motion. (App., Ex. C.) Calvary Chapel then requested a preliminary injunction pending appeal, which the district court denied on May 15, 2020. (App., Ex. D.) Calvary Chapel then moved for a preliminary injunction pending appeal at the First Circuit, which it denied on June 2, 2020. (App., Ex. B.) Calvary Chapel also

filed a renewed motion for preliminary injunction after the First Circuit's decision below, which the district court also denied. *See Calvary Chapel of Bangor v. Mills*, No. 1:20-cv-156-NT, 2021 WL 2292795 (D. Me. June 4, 2021). And, Calvary Chapel requested a preliminary injunction pending appeal of the denial of that renewed motion, which the district court also denied. *Id.* Calvary Chapel has also moved for an injunction pending appeal on its renewed appeal, which the First Circuit denied on July 19, 2021.

And, at each step of the way, the Governor agreed that each of Calvary Chapel's requests were for a preliminary injunction of some kind. Indeed, even on appeal below, the Governor conceded that the district court's decision was a denial of a preliminary injunction that was immediately appealable. Until the Governor's response here, **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 agreed 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).) And, the First Circuit decision below explicitly recognized that "[t]he parties – who agree on little else – urge us to find that the district court's denial of a temporary restraining order in this case qualifies" as a preliminary injunction case. (App., Ex. A at 7.)

Thus, the Governor efforts to now disclaim all her prior treatment of the litigation below as dealing with the denial of a preliminary injunction is disingenuous and represents little more than a pretextual effort to evade this Court's review of her constitutionally invalid invasion of Calvary Chapel's religious liberty.

As the record makes plain, the panel below created the jurisdictional problem where none existed and denied Calvary Chapel's requests for injunctive relief on numerous occasions. The decision below is in error, and Calvary Chapel's Petition should be granted.

CONCLUSION

Because the First Circuit's decision below is irreconcilable with this Court's decisions in *Tandon*, *South Bay*, *Harvest Rock*, and *Catholic Diocese*, the Petition should be granted.

Respectfully submitted,

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