No. 20-1346

IN THE SUPREME COURT OF THE UNITED STATES

CALVARY CHAPEL OF BANGOR,

Applicant,

v.

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

Respondent.

Petitioner's Motion for Writ of Injunction Pending Disposition of Petition for Writ of Certiorari

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PARTIES

Applicant 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

Applicant 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. 21-1453, Order Denying Motion for Injunction Pending Disposition of Cert Petition and Injunction Pending Appeal (1st Cir. July 19, 2021), reproduced in Appendix as Exhibit 1.

Calvary Chapel of Bangor v. JANET MILLS, in her official capacity as Governor of the State of Maine, Order Denying Motion for Injunctive Relief Pending Appeal (D. Me. June 3, 2021), reproduced in Appendix as Exhibit 2.

CALVARY CHAPEL OF BANGOR v. JANET MILLS, Case No. 20-1346, Petition for Writ of Certiorari, Order Granting Extension of Time to Respond to Petition to July 9, 2021, Reproduced in Appendix to the Petition for Writ of Certiorari as Exhibit A

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), reproduced in Appendix to the Petition for Writ of Certiorari as Exhibit B.

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), reproduced in Appendix to the Petition for Writ of Certiorari as Exhibit C.

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), reproduced in Appendix to the Petition for Writ of Certiorari as Exhibit D.

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"It 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."[1]

INTRODUCTION

Pursuant to Sup. Ct. Rule 21, 28 U.S.C. §1651, and 28 U.S.C. §2101, Petitioner Calvary Chapel of Bangor ("Calvary Chapel"), herby files this Motion for Writ of Injunction Pending Disposition of Petition for Writ of Certiorari. For over twelve months, Respondent Governor Janet Mills ("the Governor") has been imposing or threatening to impose unconstitutional restrictions on Calvary Chapel's religious worship services while exempting myriad other activities from similar restrictions. The issues presented by the instant Application/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) (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**

[1] *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 72 (2020) (Gorsuch, J., concurring) (emphasis added).

no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques." *Id.* at 72 (emphasis added).

The issues presented in Calvary Chapel's Petition are now well known, and this Court has made it abundantly clear that discriminatory restrictions on religious worship services during COVID-19 are plainly unconstitutional under the First Amendment. Indeed, at least **10 times**, this Court has either issued an emergency writ of injunction or granted certiorari, vacated the lower court's erroneous denials of injunctive relief, and instructed courts to follow this Court's clear teachings. *See, e.g.*, *Catholic Diocese*, 141 S. Ct. 63; *Agudath Israel of Am. v. Cuomo*, 141 S. Ct. 889 (2020); *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 1289(2021); *Harvest Rock Church, Inc. v. Newsom,* 141 S. Ct. 889 (2020); *Gish v. Newsom*, 141 S. Ct. 1290 (2021); *High Plains Harvest Church v. Polis*, 141 S. Ct. 527 (2020); *Robinson v. Murphy*, 141 S. Ct. 972 (2020).

And, in *Tandon v. Newsom*, this Court noted that its precedent on COVID-19 restrictions on religious worship services "have made [four] points clear":

> (1) government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise . . .
>
> (2) whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue . . .

(3) the government has the burden to establish that the challenged law satisfies strict scrutiny. To do so in this context, it must do more than assert that certain risk factors "are always present in worship, or always absent from the other secular activities" the government may allow [and]

(4) even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case.

Tandon, 141 S. Ct. at 1296-97 (cleaned up).

Despite the abundant precedent from this Court, Maine ignored it all and continued to impose discriminatory and unconstitutional restrictions on religious worship services long after it became clear they were unconstitutional. In fact, even after all of the various restrictions had been enjoined or rescinded, Maine maintained the dubious distinction of imposing the most severe restrictions in the nation on places of worship.

URGENCIES JUSTIFYING INJUNCTIVE RELIEF

As this Court has made clear, where – as here – Petitioners "are likely to succeed on the merits of their free exercise claim; they are irreparably harmed by the loss of free exercise rights for even minimal periods of time; and the State has not shown that public health would be imperiled by employing less restrictive measures," *Tandon*, 141 S. Ct. at 1297, an injunction pending disposition of a Petition for Certiorari is warranted. More fundamentally, any delay in adjudicating Calvary Chapel's request for injunctive relief would merely exacerbate the precise harm from which Calvary Chapel has been fighting for relief for **over twelve months**. Calvary Chapel operated, and continues to operate, under threat of criminal penalty, that the

Governor – at any moment – declares, as she did in the past, religious services to be non-essential and illegal if they contain more people than she allows. But, as demonstrated most recently in Calvary Chapel's Chart of Maine's Covid Restrictions (attached hereto as Addendum Chart), **the Governor continued her unconstitutional regime of exempting numerous other sectors—including sectors that this Court has found comparable to religious gatherings**—from the capacity limits she imposed and continues to threaten on Calvary Chapel. (*Id.*)

Though the Governor has modified, amended, changed, and suspended her unconstitutional orders at numerous points throughout the year, she has "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*, 141 S. Ct. at 720 (Gorsuch, J.). And, Calvary Chapel "remains under a constant threat" that the Governor will reinstate her unconstitutional restrictions at any time. *Catholic Diocese*, 141 S. Ct. at 68. Indeed, the so-called Delta variant of the coronavirus and "the threat of an unconstitutionally-motivated [restriction] still hangs over [Calvary Chapel's] head like a sword of Damocles." *Rafeedie v. INS*, 880 F.2d 506, 530 n.8 (D.C. Cir. 1989). **Indeed, from March 14, 2020 until May 24, 2021, every religious worship service at Calvary Chapel was illegal under the Governor's Orders. The Governor began with a total prohibition on religious worship, modified it to no more than 10 people, then 50, and, most recently, no more than 5 people per 1,000 square feet, which for Calvary Chapel was 50**. And the threat of that recurring is impending every day.

Although Gov. Mills suspended the worst of her unconstitutional orders on May 24, 2021, her own public health officials' statements are raising concerns over the 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."[2] 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."[3] And, the purported Delta variant, which one commentator has said is "now king in COVID America,"[4] is also already the source of fresh lockdown restrictions on gatherings throughout the world.[5]

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.[6] Thus, the continuing threat posed to Calvary

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[2] 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.

[3] 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/2021/07/11/testing-suggests-delta-variant-may-be-more-widespread-in-maine/ (same).

[4] Erika Fry & Nicolas Rapp, *The Delta variant causes 83% of U.S. COVID cases. See the states where its most prevalent* Fortune (July 21, 2021), https://fortune.com/2021/07/21/delta-variant-covid-cases-states-where-its-most-prevalent/.

[5] *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").

[6] *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.

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 her continued power to reinstate her prior restrictions at any time demonstrates the continuing need for injunctive relief from this Court.

No pastor, church, or parishioner in America should have to choose between worship and criminal sanction flowing from demonstrably discriminatory restrictions. As Justice Kavanaugh also recognized,

> **There is also no good reason to delay issuance of the injunctions** . . . issuing the injunctions now . . . will not only ensure that the applicants' constitutional rights are protected, but also will provide some needed clarity for the State and religious organizations.

Catholic Diocese, 141 S. Ct. at 74 (Kavanaugh, J., concurring) (emphasis added). "**There can be no question that the challenged restrictions, if enforced, will cause irreparable harm**. The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Id.* at 67 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)) (emphasis added).

"If only 10 people are admitted to each service, the great majority of those who wish to attend Mass on Sunday or services in a synagogue on Shabbat will be barred." *Id.* at 67-68. That alone was sufficient for this Court to find irreparable harm, and it is also true here where Calvary Chapel remains true today. Unlike in *Catholic Diocese* where only "the great majority" of attendees and congregants would be barred, here, **every single attendee has been prohibited from attending worship** because the Governor's 50-person cap precluded Calvary Chapel from offering religious worship services to anyone besides those enrolled in its Calvary Residential

Discipleship program. (Declaration of Ken Graves, dkt. 45-1, Graves Decl. ¶¶ 16-17.) And, in *Catholic Diocese*, the Court found that 13 and 7 days was too long to suffer irreparable harm without injunctive relief. *Id.* at 68.

And, with the Delta variant threatening a new wave of unconstitutional restrictions, Justice Gorsuch's statement rings even more true. "As this crisis enters its second year—and hover[ed] over a second Lent, a second Passover, and a second Ramadan—it is too late for the State to defend extreme measures with claims of temporary exigency, if it ever could." *South Bay*, 141 S. Ct. at 720 (Gorsuch, J.). The time has come to put an end to the ever-present threat of restrictions to constitutionally protected religious liberty.

Here, for the duration of the Governor's 14 month reign of terror and continuing under the constant threat from the Delta variant, Calvary Chapel's injury is worse, as it has been suffering unconscionable and unconstitutional injury of discriminatory worship prohibitions and restrictions and the threat of the same over a year**, and this Court will not consider Calvary Chapel's Petition for Writ of Certiorari until September 27, 2021, many months away**. Because of the threat imposed upon Calvary Chapel each day, Calvary Chapel's requested relief cannot wait until consideration of the merits of its Petition. Relief is needed now to prevent the Governor from imposing her unconstitutional restrictions at a whim.

Moreover, the district court has refused to provide injunctive relief despite this Court's clear teachings in *Tandon*, *Catholic Diocese*, *South Bay*, *Harvest Rock*, *Gateway City*, and the other numerous orders. (*See* Exhibit 1.) And, the First Circuit

has refused to provide effective relief against the Governor's unending threat of unconstitutional restrictions by denying a request for an injunction pending disposition of Calvary Chapel's Petition. Injunctive relief is needed now to prevent the unending injury from continuing for many more months, and Calvary Chapel will continue to suffer irreparable injury to its cherished First Amendment liberties absent relief from this Court.

As this Court recognized in *Tandon*, the loss of religious worship services under discriminatory COVID-19 restrictions "for even minimal periods of time" is sufficient for injunctive relief. 141 S. Ct. at 1297. The constitutionally injurious minimal period of time has long since past, and the time has come for the Governor's unconstitutional reign of executive discrimination against religious worship service to meet its demise. Calvary Chapel has suffered unconstitutional injury for long enough, and this Court should bring its suffering to an end.

STATEMENT OF THE CASE AND 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. (Appendix to Petition for Writ of Certiorari, "Pet. 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. (Pet. 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 Application/Petition are the following:

- **Proclamation** of March 15, 2020, declaring a state of emergency in Maine in response to COVID-19. (V. Compl. Ex. A.)

- 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 continued the Order 14 restriction on faith-based and other gatherings, and enactedd 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.)

- Furthermore, any entity wishing to "reopen" under the Restarting Plan must apply for and be granted a "badge" prior to reopening (V. Compl. Ex. G at 8), and the "conditional approval" represented by such a badge "**is subject to change** depending upon the demonstrated efficacy of the conditions imposed or the changing or general needs of public health," and "**subject to suspension or revocation** depending upon actual and consistent compliance with such conditions." (V. Compl. Ex. H at 2 (emphasis added).)

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

The Governor's Orders cooperate to make Calvary Chapel's church building useable, without the numerical limitations of the Orders, for Governor-approved purposes other than worship. 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 exempt from any travel ban. **Thus, by operation of the Governor's Orders, Calvary Chapel's pastor, its members, and its volunteers suffered under a regime of being permitted to travel between their homes and the church to provide food, shelter, counseling, and other non-religious social services for those in need, with no numerical limit on workers, volunteers, or recipients, but no one could travel to Calvary Chapel for, and Calvary Chapel cannot provide, religious worship services in the same building with the same people.**

Calvary Chapel has a robust residential treatment and rehabilitation program, Calvary Residential Discipleship, which is an on-site religious substance abuse and treatment program.[7] In that program, Calvary Chapel provides daily counseling to 24 men and 24 women, require 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 on Sundays. As part of that program, Calvary Chapel provides shelter for those in the program, physical food for the residents, and spiritual food in the form of drug counseling, social service counseling, and Biblical teaching and instruction. Under the Governor's Orders, that program was exempt from the discriminatory numerical restrictions, although all of it takes place in the same

[7] *See* Calvary Residential Discipleship, https://www.facebook.com/crdmaine (last visited July 21, 2021).

facility in which Calvary Chapel is prohibited from engaging in religious worship services with more than 50 people.

D. Enforcement of the Governor's Orders.

Order 19 provides that the Governor will enforce the order through "law enforcement if necessary." (V. Compl. Ex. C at 1.) Order 28 warns, more explicitly, that "this Order shall be enforced by law enforcement as necessary and violations are a class E crime subject to up to six months in jail and a $1,000 fine." (V. Compl. Ex. D at 6.) Also, the Maine State Police issued an "Enforcement Practices" memorandum detailing that it can and will issue criminal summonses and make physical arrests for violations of the Governor's Orders, if necessary. (V. Compl. Ex. I at 1.)

If treated like an Essential Business or Operation under the Governor's Orders for purposes of conducting religious worship services under distancing and sanitization guidelines (*i.e.*, to the "maximum extent practicable" or according to "best efforts" (V. Compl. Ex. C 2-3), Calvary Chapel practices stringent social distancing and personal hygiene protocols, including extensive and enhanced sanitizing of common surfaces in Calvary Chapel's building prior to every service, and requiring attendees to remain at least six feet apart and use hand sanitizer prior to entering and during movement inside Calvary Chapel's building. (V. Compl., ¶¶55-56.)

REASONS FOR GRANTING THE MOTION

I. THIS COURT'S *TANDON*, *CATHOLIC DIOCESE*, *SOUTH BAY*, *GATEWAY CITY*, AND *HARVEST ROCK* DECISIONS AND THE DECISIONS OF EVERY OTHER CIRCUIT COURT TO ADDRESS COVID-19 REGULATIONS POST-*CATHOLIC DIOCESE* DEMONSTRATE THAT CALVARY CHAPEL HAS A CLEAR AND INDISPUTABLE RIGHT TO RELIEF.

A. The Governor's Discriminatory and Especially Harsh Treatment of Religious Worship Services Violates the First Amendment.

In *Tandon*, this Court held that the violates the First Amendment "**whenever it treats *any* comparable activity more favorably than religious exercise**." 141 S. Ct. at 1296 (bold emphasis added). It also held that "**[i]t is no answer to say that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue**." *Id.* (emphasis added). And, in *Tandon*, California – much like Maine does here (*see* Addendum Chart) – violated this principle by many nonreligious activities and businesses more favorably than religious worship. *Id.* at 1297 (noting that "hair salons, retail stores, personal care services, movie theatres, private suites at sporting events and concerts" and others were given more favorable capacity and numerical restrictions than those imposed on churches). And, as is equally true here, this Court noted that "**[i]t is unsurprising that such litigants are entitled to relief. California's Blueprint System contains myriad exceptions and accommodations for comparable activities, thus requiring the application of strict scrutiny**." *Id.* at 1298 (emphasis added).

In *Catholic Diocese*, 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:

> In a red zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as "essential" may admit as many people as they wish. And the list of "essential" businesses includes things such as acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all **plants manufacturing chemicals and microelectronics and all transportation facilities**.

Catholic Diocese, 141 S. Ct. at 66 (emphasis added). Moreover, "[t]he disparate treatment is even more striking in an orange zone. While attendance at houses of worship is limited to 25 persons, even non-essential businesses may decide for themselves how many persons to admit." *Id.* "[A] large store in Brooklyn . . . could literally have hundreds of people shopping there on any given day. Yet a nearby church or synagogue would be prohibited from allowing more than 10 or 25 people inside for a worship service." *Id.* (cleaned up).

Justice Gorsuch elaborated further,

> the Governor has chosen to impose *no* capacity restrictions on certain businesses he considers "essential." And it turns out the businesses the Governor considers essential include **hardware stores, acupuncturists, and liquor stores. Bicycle repair shops, certain signage companies, accountants, lawyers, and insurance agents are all essential too**. So, at least according to the Governor, it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians.

Id. at 69 (bold emphasis added; italics original) (Gorsuch, J., concurring). Indeed, in New York, "People may gather inside for extended periods in bus stations and airports, in laundromats and banks, in hardware stores and liquor shops." *Id.*

Justice Kavanaugh similarly noted New York's disparate treatment of worship, which is equally present here:

> New York's restrictions on houses of worship not only are severe, but also are discriminatory. In red and orange zones, houses of worship must adhere to numerical caps of 10 and 25 people, respectively, but those caps do not apply to some secular buildings in the same neighborhoods. **In a red zone, for example, a church or synagogue must adhere to a 10-person attendance cap, while a grocery store, pet store, or big-box store down the street does not face the same restriction. In an orange zone, the discrimination against religion is even starker: Essential businesses and many non-essential businesses are subject to no attendance caps at all**.

Id. at 73 (emphasis added) (Kavanaugh, J., concurring).

In *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021), this Court yet again faced a state's COVID-19 regime discriminating against religious worship services while exempting myriad other categories of business and sectors. *See id.* at 718-19 (Gorsuch, J.) (noting the more favorable treatment of train stations, hairstylists, manicurists, buses, bus terminals, shopping malls, salons) There, like Maine did here in its previous orders, California imposed a total prohibition on religious worship services. 141 S. Ct. at 716. Based on *Catholic Diocese*, 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 716-17 (Roberts, C.J., concurring) (emphasis added).

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

> 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. Indeed, "**[e]ven in times of crisis—perhaps *especially* in times of crisis—we have a duty to hold governments to the Constitution**." *Id.* (bold emphasis added).

As is true here (V. Compl. Ex. E at 1), government "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.* at 718. 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 – equally of import here – "**[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*, 141 S. Ct. 1289 (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 1289-90.

The Ninth Circuit, too, was faced with many of the identical discriminatory restrictions at issue here and found them to mandate strict scrutiny. "Casinos, bowling alleys, retail businesses, restaurants, arcades, and other similar secular entities are limited to 50% of fire-code capacity, yet houses of worship are limited to fifty people regardless of their fire-code capacities." *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1233 (9th Cir. 2020); *Calvary Chapel Lone Mountain v. Sisolak*, 831 F. App'x 317, 317 (9th Cir. 2020) (same).

And, when faced with numerical restrictions double and quadruple those of the Governor's last 50-person limit, 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). When discussing such restrictions, 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," 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. See also Harvest Rock*, 985 F.3d at 771 (same). Indeed, as Judge O'Scannlain pointed out, under this Court's *Catholic Diocese* decision, "[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).

In *Agudath Israel of Am. v. Cuomo*, 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. 983 F.3d 620, at 626, 631-32 (2d Cir. 2020).

The same is true here, where the Governor has permitted myriad exempt entities to operate without numerical restriction or more favorable limitations than

that imposed on religious worship services. Beginning March 24, 2020, the Governor first exempted an expansive list of activities that were not subject to the strict numerical caps placed on religious worship services. Those exemptions included **22 sectors and industries and 40 categories,** including "food processing," "grocery and household goods (including convenience stores)," such as WalMart and Target; "essential home repair, hardware and auto repair," such as Home Depot, Lowe's, and other "big-box" stores; "gas stations and laundromats;" "industrial manufacturing;" "transportation centers," such as bus stations, train stations, and airports, marijuana dispensaries, and "legal, business, professional, environmental permitting and insurance services." (V. Compl. Ex. C at 2; CISA Memo at 7-13.)

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

Even under the last iteration of her unconstitutional regime, while the Governor removed some entities and sectors from the exempt list, there remained a number of entities that had no capacity or numerical restrictions whatsoever – and

many of those are identical to the ones this Court has noted as constitutionally comparable. (*See* Addendum Chart (noting that food processing and agriculture, industrial manufacturing, warehousing, legal, business, professional, and environmental permitting, insurance services, food banks and food pantries, laundromats, and public transportation were all **exempt** from any restrictions).)

Thus, the Governor's Orders restricted (and threaten to restrict again) Calvary Chapel to 50 people while permitting similar congregate activity in nonreligious gatherings—many of which were specifically mentioned as comparables in *Catholic Diocese*, *South Bay*, *Harvest Rock*, and the decisions Second, Sixth, and Ninth Circuits. Examples include: food packaging and processing, laundromats, warehouses, grocery stores, liquor stores, retail stores, malls, transportation facilities, bus stations, train stations, airports, gambling centers, acupuncture facilities, garages, plants manufacturing chemicals and microelectronics, hardware stores, repair shops, signage companies, accountants, lawyers, insurance agents, pet stores, film production facilities, and more. *See, e.g., Catholic Diocese*, 141 S. Ct. at 66; *id.* at 69 (Gorsuch, J., concurring); *id.* (Kavanaugh, J., concurring); *Calvary Chapel*, 982 F.3d at 1233; *Agudath Israel*, 983 F.3d at 632; *Harvest Rock Church v. Newsom*, 977 F.3d 771, 731 (9th Cir. 2020) (O'Scannlain, J., dissenting).

The litany of exemptions compared to the 50-person limit on religious assemblies "cannot be viewed as neutral because they single out houses of worship for especially harsh treatment." *Catholic Diocese,* 141 S. Ct. at 66. When compared

with the restrictions of 10 or 25 people at issue in *Catholic Diocese*, the Governor's Orders violate the First Amendment because a 50-person cap is still

> far more restrictive than any COVID-related regulations that have previously come before the Court, much tighter than those adopted by many other jurisdictions hard hit by the pandemic, and far more severe than has been shown to be required to prevent the spread of the virus at the applicant's services.

Id. at 67; *Calvary Chapel Dayton Valley*, 982 F.3d at 1233 (same).

The fact that some retailers and other gatherings were subject to similar restrictions is wholly irrelevant because not all of them were. The fact remains that some gatherings were exempt, but places of worship were not afforded that treatment. "**[U]nder this Court's precedents, it does not suffice for a State to point out that, as compared to houses of worship, *some* secular businesses are subject to similarly severe or even more severe restrictions**." *Catholic Diocese*, 141 S. Ct. at 73 (Kavanaugh, J., concurring) (bold emphasis added)). *See also Tandon*, 141 S. Ct. at 1296 ("It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue.").

"Rather, once a State has created a favored class of businesses"—which the Governor did—"the State must justify why houses of worship are excluded from the favored class." *Id. See also Tandon*, 141 S. Ct. at 1296-97 ("the government has the burden to establish that the challenged law satisfies strict scrutiny. To do so, it must do more than assert that certain risk factors "are always present in worship, or always absent from the other secular activities the government may allow. . .

narrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID."). "**Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious exercise too**." *Id.* at 1297 (emphasis added).

When faced with an identical numerical cap of 50-persons, the Ninth Circuit held that Nevada's COVID-19 restrictions on religious worship services could not survive *Catholic Diocese*. 982 F.3d at 1233 ("**The Supreme Court's decision in *Roman Catholic Diocese* compels us to reverse the district court**." (emphasis added)). Indeed,

> 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.

Id. (citation omitted); *Calvary Chapel Lone Mountain*, 831 F. App'x at 317 (same).

And, there is no world in which 44 categories of exempt business sectors creating hundreds of subcategories of exempt secular activities and facilities—all of which were present in *Tandon*, *Catholic Diocese*, *South Bay*, *Harvest Rock*, *Calvary*

Chapel Dayton Valley, *Calvary Chapel Lone Mountain*, and *Agudath Israel*—can be the least restrictive means available. "[T]here is no world in which the Constitution tolerates color-coded executive edicts that open liquor stores and bike shops [and hundreds of other essential businesses] but shutter churches, synagogues, and mosques." 141 S. Ct. at 72 (Gorsuch, J., concurring).

B. Under *Tandon*, *Catholic Diocese*, *South Bay*, *Harvest Rock*, and *Gateway City* the Governor's Discriminatory Restrictions on Religious Worship Services Cannot Survive Strict Scrutiny.

1. The Governor's Orders Substantially Burden Calvary Chapel's Sincerely Held Religious Beliefs.

Calvary Chapel has and exercises sincere religious beliefs, rooted in Biblical commands (*e.g.*, *Hebrews* 10:25), that Christians are not to forsake assembling together, and that they are to do so even more in times of peril and crisis. (V. Compl., ¶89.) "[T]he Greek work translated church . . . literally means **assembly**." *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 912 (W.D. Ky. Apr. 11, 2020) (cleaned up) (emphasis added). Though the Governor might not view church worship services and gathering as fundamental to religious exercise—or "Essential" like 'big box' and warehouse store shopping, or more important than mass protest gatherings—"religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Rev. Bd. of Ind. Emp. Security Div.*, 450 U.S. 707, 714 (1981). The Governor's Orders numerically restricting Calvary Chapel's religious worship services inside its Church, on pain of criminal sanctions, unquestionably and substantially burdens Calvary

Chapel's exercise of religion according to its sincerely held beliefs. "The Governor's actions substantially burden the congregants' sincerely held religious practices—**and plainly so**. Religion motivates the worship services." *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 613 (6th Cir. 2020) (emphasis added).

2. Because the Governor's Orders Impose Discriminatory Numerical Caps on Calvary Chapel's Religious Worship Services While Leaving Scores of Nonreligious Gatherings Exempt From Such Harsh Restrictions, They Are Not Narrowly Tailored or the Least Restrictive Means.

Because the Governor's Orders are neither neutral nor generally applicable, they must satisfy strict scrutiny, meaning the restrictions must be supported by a compelling interest and narrowly tailored. *Catholic Diocese*, 141 S. Ct. at 67; *Calvary Chapel Dayton Valley*, 982 F.3d at 1233 ("disparate treatment of religion triggers strict scrutiny"). This is "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 US. 507, 534 (1997) Indeed, as this Court said in *Tandon*, "**[t]hat standard is not watered down; it really means what it says**." 141 S. Ct. at 1298 (emphasis added) (cleaned up). And, that test is rarely passed. *See Burson v. Freeman*, 504 U.S. 191, 200 (1992) ("[W]e readily acknowledge that a law rarely survives such scrutiny . . . ."). This is not that rare case.

Whatever interest the Governor claims, she cannot show the orders are the least restrictive means of protecting that interest. And it is the Governor's burden to make the showing because "the burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). "As the Government bears the burden of proof on the ultimate

question of . . . constitutionality, **[Calvary Chapel] must be deemed likely to prevail unless the Government has shown** that [their] proposed less restrictive alternatives are less effective than [the orders]." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (emphasis added). Under that standard, "[n]arrow tailoring requires the government to demonstrate that a policy is the 'least restrictive means' of achieving its objectives." *Agudath Israel*, 983 F.3d at 633 (quoting *Thomas*, 450 U.S. at 718).

To meet this burden, the government must show it "**seriously** undertook to address the problem with less intrusive tools readily available to it," meaning that it "**considered different methods that other jurisdictions have found effective**." *McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014) (emphasis added). *See also Agudath Israel*, 983 F.3d at 633 (same). And the Governor must "show either that **substantially less-restrictive alternatives were tried and failed**, or that the **alternatives were closely examined and ruled out for good reason**," *Bruni v. City of Pittsburgh*, 824 F.3d 353, 370 (3d Cir. 2016) (emphasis added), and that "imposing lesser burdens on religious liberty 'would fail to achieve the government's interest, not simply that the chosen route was easier.'" *Agudath Israel*, 983 F.3d at 633 (quoting *McCullen*, 134 S. Ct. at 495).

Beginning March 18, 2020, continuing for over 14 months, and remaining a constant threat every day under the rise of the Delta variant, **the government has imposed discriminatory restrictions on indoor religious worship services**. The Governor tried nothing else and continued this unconstitutional reign of executive fiat for over a year. That plainly fails the *McCullen* standard.

In *Harvest Rock* and *South Bay*, this Court was presented with amicus noting the remaining states with strict numerical caps on religious worship services. As Judge Gorsuch noted, "California is the only state in the country that has gone so far as to ban *all* indoor worship services." *South Bay*, 141 S. Ct. at 717 (Gorsuch, J., Statement) (citing Brief for Becket Fund for Religious Liberty, at 5-6). But, after this Court struck down California's total prohibition on worship services, **Maine became the most restrictive state with a 50-person numerical cap for religious worship services**. (*See* Case No. 20A136 &20A137, *Harvest Rock Church v. Newsom* & *South Bay United Pentecostal Church v. Newsom*, Brief of Becket Fund for Religious Liberty at 6 (noting that "[o]f the remaining states with numerical caps, Maine limits in-person worship to 50 persons," which is the most restrictive now)).

Additionally, *Catholic Diocese* and *Calvary Chapel Dayton Valley* demonstrate that the Governor cannot satisfy her burden here. In *Catholic Diocese*, this Court held that it was "hard to see how the challenged regulations can be regarded as narrowly tailored" because limits of 10 and 25 people were "far more restrictive than any COVID-related regulations that have previously come before the Court, much tighter than those adopted by many other jurisdictions hard-hit by the pandemic, and far more severe than has been shown to be required to prevent the spread of the virus at the applicant's services." 141 S. Ct. at 67. **If restrictions of 10 and 25 (*Catholic Diocese*), 50 (*Calvary Chapel Dayton Valley)*, and the 100 and 200 (*South Bay* and *Harvest Rock*) person numerical cap were not narrowly tailored, then Maine's 50-person numerical cap is not narrowly tailored**.

Indeed, when the Ninth Circuit was presented with a 50-person restriction on religious worship services in *Calvary Chapel Dayton Valley*, and it similarly held that such a discriminatory restriction imposed on Churches, but not other nonreligious gatherings was not narrowly tailored. 982 F.3d at 1234. Specifically, the Ninth Circuit held that "although less restrictive in some respects than the New York regulations reviewed in *Roman Catholic Diocese*," the 50-person cap disparately imposed on only religious worship services "is not narrowly tailored" because other gatherings were not subject to the same restriction. *Id. See also Calvary Chapel Lone Mountain*, 831 F. App'x at 318 (same).

More fatally for the Governor's 50-person cap, however, is the fact that even 100 and 200 person limits on religious worship services have been held unconstitutional under *Catholic Diocese*. *See, e.g.*, *South Bay*, 985 F.3d 1128 (enjoining 100 and 200 person caps because they "will undeniably unconstitutionally deprive some of South Bay's worshippers of participation in its worship services, causing irreparable harm."); *Harvest Rock*, 985 F.3d at 771 (same). And, this Court's "**controlling decisions also eliminate any notion that [Maine's] measures withstand such scrutiny**." *Harvest Rock*, 985 F.3d at 771 (O'Scannlain, J., concurring) (emphasis added).

If there is one lesson from this Court's *Tandon*, *Catholic Diocese*, *South Bay*, and *Harvest Rock* decisions, discriminatory numerical caps that are only applied to religious gatherings cannot withstand First Amendment scrutiny. Indeed, despite the Governor's unending recitation that her measures are temporary, **her**

unconstitutional regime lasted for more than a year and remains a constant threat to this day. As Justice Gorsuch noted,

> one could be forgiven for doubting its asserted timeline. Government actors have been moving the goalposts on pandemic-related sacrifices for months, adopting new benchmarks that always seem to put restoration of liberty just around the corner. As this crisis enters its second year—and hovers over a second Lent, a second Passover, and a second Ramadan—it is too late for the State to defend extreme measures with claims of temporary exigency, if it ever could. Drafting narrowly tailored regulations can be difficult. But if Hollywood may host a studio audience or film a singing competition while not a single soul may enter California's churches, synagogues, and mosques, something has gone seriously awry.

South Bay, 2021 WL 406258, *4 (Gorsuch, J., Statement) (emphasis added).

And, if any doubt could have remained, this Court cleared it up by noting that "[t]his is the fifth time the Court has summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious worship." *Tandon*, 141 S. Ct. at 1297. Indeed, as Justice Gorsuch noted, "[t]oday's orders should have been needless; the lower courts in these cases should have followed the extensive guidance this Court already gave." *South Bay*, 141 S. Ct. at 719 (Gorsuch, J.). Unfortunately, neither the lower courts in this matter nor the Governor have followed that extensive guidance. The Governor's restrictions should be enjoined.

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

While Calvary Chapel was limited to a strict 50-person cap for indoor religious worship services (*supra* Section II.A-B), it could gather in the same buildings with an unlimited number of people to provide social services or "necessities of life" to feed,

shelter, or counsel people. (*See* V. Compl. Ex. C at 7.) This internal discrimination was present since the original Stay at Home Order of March 24, 2020 (V. Compl. Ex. C), and remained true throughout the Governor's regime. As Judge O'Scannlain pointed out previously in *Harvest Rock*, "even non-worship activities conducted by or within a place of worship are not subject to the attendance parameters" otherwise applicable to places of worship. *Harvest Rock*, 977 F.3d at 734 (O'Scannlain, J., dissenting). Such internal micromanagement of the affairs of Calvary Chapel's religious activities is plainly unconstitutional. *See Our Lady of Guadalupe Sch. v. Morrisey-Berru*, 140 S. Ct. 2049, 2055 (2020) ("**State interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion. The First Amendment outlaws such intrusion**." (emphasis added)).

II. CALVARY CHAPEL HAS A CLEAR AND INDISPUTABLE RIGHT TO RELIEF UNDER THIS COURT'S ESTABLISHMENT CLAUSE PRECEDENT BECAUSE THE GOVERNOR'S ORDERS DISCRIMINATORILY RESTRICT PEOPLE FROM ATTENDING RELIGIOUS WORSHIP SERVICES.

Calvary Chapel also has a clear and indisputable right to relief for its Establishment Clause claims because the Governor's Orders discriminatorily and disparately restricted religious worship services while exempting myriad other nonreligious gatherings. This display of overt hostility towards religious gatherings cannot suffice under the First Amendment. And, a pandemic or an emergency does not change that fact. Indeed, as Justice Gorsuch pointed out, "[e]ven if the

Constitution has taken a holiday during this pandemic, it cannot become a sabbatical" because "[i]n far too many places, for far too long, our first freedom has fallen on deaf ears." *Catholic Diocese*, 141 S. Ct. at 70 (Gorsuch, J., concurring). That is certainly true of Calvary Chapel here.

Hostility towards and disparate treatment of religious worship services plainly violates the Establishment Clause. "**If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein**." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (emphasis added). Where, as here, Calvary Chapel seeks to be free from disparate treatment by the State, the very core of the Establishment Clause is at issue. "An attack founded on disparate treatment of "religious" claims invokes what is perhaps the central purpose of the Establishment Clause—**the purpose of ensuring governmental neutrality in matters of religion**." *Gillette v. United States*, 401 U.S. 437, 449 (1971) (emphasis added). Indeed, the Establishment Clause "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). That mandate of preventing hostility towards religions is equally present in times of exigent circumstances, such as COVID-19. For, as "[a]n instrument of social peace, the Establishment Clause does not become less so when social rancor runs exceptionally high." *Lund v. Rowan Cnty.*, 863 F.3d 268, 275 (4th Cir. 2017) (emphasis added). "The '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 to remain away from church against his will**." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947) (emphasis added). The Governor's Orders run roughshod over the triumvirate of this Court's *Everson*, *Lynch*, and *Gillette* precedent. Calvary Chapel has a clear and indisputable right to relief under the Establishment Clause.

Moreover, gathering together for religious worship services is a matter of faith and doctrine, and the First Amendment prohibits infringement into such matters. "The First Amendment protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government **as well as those of faith and doctrine**.'" *Our Lady of Guadalupe Sch. v. Morrisey-Berru*, 140 S. Ct. 2049, 2055 (2020) (emphasis added) (quoting *Kedroff v. Saint Nicholas Cathedral of Russion Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)). Indeed, "among other things, the Religion Clauses protect the right of churches and other religious institutions to decide matters of faith and doctrine without government intrusion." *Id.* at 2060 (cleaned up) (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 186 (2012)). "**State interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion. The First Amendment outlaws such intrusion**." *Id.* (emphasis added). The Governor's callous indifference to the constitutional infirmity of restricting a deeply-held

religious practice of gathering for worship services is wholly foreign to the First Amendment.

III. THIS COURT'S *CATHOLIC DIOCESE* DECISION MANDATES A FINDING THAT CALVARY CHAPEL IS SUFFERING IRREPARABLE HARM ABSENT INJUNCTIVE RELIEF AGAINST THE GOVERNOR'S DISCRIMINATORY ORDERS.

Catholic Diocese also compels a finding that Calvary Chapel is suffering irreparable harm as a matter of law each day the Governor's discriminatory Orders remain in place. No pastor, church, or parishioner in America should have to choose between worship and criminal sanction. As Justice Kavanaugh also recognized,

> **There is also no good reason to delay issuance of the injunctions** . . . issuing the injunctions now . . . will not only ensure that the applicants' constitutional rights are protected, but also will provide some needed clarity for the State and religious organizations.

Catholic Diocese, 141 S. Ct. at 74 (Kavanaugh, J., concurring) (emphasis added). Indeed, "[t]here can be no question that the challenged restrictions, if enforced, will cause irreparable harm," *Id.* at 67, because "'[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

"If only 10 people are admitted to each service, the great majority of those who wish to attend Mass on Sunday or services in a synagogue on Shabbat will be barred." *Id.* at 67-68. That alone was sufficient for this Court to find irreparable harm, and it is also true here under the Governor's regime of a 50-person cap and the constant threat of reinstituted restrictions. Unlike in *Catholic Diocese* where only "the great majority" of attendees and congregants would be barred, here, **every single**

attendee is prohibited from attending worship. And, in *Catholic Diocese*, the Court found that 13 and 7 days was too long to suffer irreparable harm without injunctive relief. *Id.* at 68. Here, Calvary Chapel's injury is worse, as they have been suffering under actual injury and the threat of continuing unconscionable and unconstitutional injury of discriminatory worship prohibitions and restrictions for **over a year.**

As Justice Gorsuch noted,

> Government actors have been moving the goalposts on pandemic-related sacrifices for months, adopting new benchmarks that always seem to put restoration of liberty just around the corner. **As this crisis enters its second year—and hovers over a second Lent, a second Passover, and a second Ramadan—it is too late for the State to defend extreme measures with claims of temporary exigency, if it ever could**. Drafting narrowly tailored regulations can be difficult. But if Hollywood may host a studio audience or film a singing competition while not a single soul may enter California's churches, synagogues, and mosques, something has gone seriously awry.

South Bay, 141 S. Ct. at 720 (emphasis added).

IV. *CATHOLIC DIOCESE* ALSO COMPELS A FINDING THAT INJUNCTIVE RELIEF IS IN THE PUBLIC INTEREST.

As *Catholic Diocese* unequivocally held, where nonreligious gatherings are subject to less restrictive measures than those impose on religious worship services, courts "have a duty to conduct a serious examination of the need for such a drastic measure." 141 S. Ct. at 68. And, as here, "it has not been shown that granting the applications will harm the public." *Id.* Indeed, the State "is in no way harmed by the issuance of an injunction that prevents the state from enforcing unconstitutional restrictions." *Legend Night Club v. Miller*, 637 F.3d 291, 302–03 (4th Cir. 2011). But,

for Calvary Chapel, even minimal infringements upon First Amendment values constitute irreparable injury sufficient to justify injunctive relief. *Catholic Diocese*, 141 S. Ct. at 67; *see also Calvary Chapel Dayton Valley*, 982 F.3d a 1234 (same). As such, there is no comparison between the irreparable loss of First Amendment freedoms suffered by Calvary Chapel and the non-existent interest the Governor has in enforcing and threatening to reinstitute unconstitutional orders. Absent a preliminary injunction, Appellants "face an impossible choice: skip [church] service[s] in violation of their sincere religious beliefs, or risk arrest, mandatory quarantine, or some other enforcement action for practicing those sincere religious beliefs." *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 914 (W.D. Ky. 2020).

And, the public interest is best served by enjoining the government from enforcing its discriminatory and unconstitutional restrictions against religious worship services. *Catholic Diocese*, 141 S. Ct. at 68 (holding that the public interest is best served by preserving constitutional rights because "even in a pandemic, the Constitution cannot be put away and forgotten"); *Calvary Chapel Dayton Valley*, 982 F.3d at 1232 n.3 (same); *id.* at 1234; *Calvary Chapel Lone Mountain*, 831 F. App'x at 318 (same). The same is true here, and the public interest is best served by protecting the rights of Appellants to engage in their constitutionally protected free exercise of religion. **"[T]he public has a profound interest in men and women of faith worshipping together [in church] in a manner consistent with their conscience**." *On Fire*, 453 F. Supp. 3d at 914 (emphasis added).

V. ALTERNATIVELY, BECAUSE THE COURTS BELOW IGNORED THIS COURT'S EXTENSIVE TEACHINGS IN *TANDON*, *SOUTH BAY*, *HARVEST ROCK*, *CATHOLIC DIOCESE*, AND *GATEWAY CITY*, SUMMARY REVERSAL IS APPROPRIATE.

This Court has a long history of summarily reversing decisions of lower courts where – as here – the court "egregiously misapplied settled law." *Weary v. Cain*, 136 S. Ct. 1002, 1007 (2016) (citing *Mullenix v. Luna*, 577 U.S. 7, 16 (2015); *Stanton v. Sims*, 571 U.S. 3 (2013); *Parker v. Matthews*, 567 U.S. 37 (2012); *Coleman v. Johnson*, 566 U.S. 650 (2012); *Wetzel v. Lambert*, 565 U.S. 520 (2012); *Ryburn v. Huff*, 565 U.S. 469 (2012); and *Sears v. Upton*, 561 U.S. 945 (2010)). Indeed, when a decision of the lower court "disregard[s] our other constitutional decisions," summary reversal is appropriate. *See, e.g.*, *Friedman v. City of Highland Park*, 577 U.S. 1039, 136 U.S. 447, 449-50 (2015) (Scalia, J., dissenting). In fact, this Court's practice of summarily reversing clearly erroneous decisions that misapply this Court's binding precedent applies even when such inquiries involve "intensely factual questions without full briefing and argument," *Weary*, 136 S. Ct. at 1007, and where the decision below is "understandable" but "runs directly counter to our precedents." *Martinez v. Illinois*, 572 U.S. 833, 843 (2014).

This is precisely such a case. There is no breathing room left for discriminatory COVID-19 restrictions, such as the Governor's Orders here, after *Tandon*, *Catholic Diocese*, *South Bay,* and *Harvest Rock*. Indeed, as this Court unequivocally held in *Catholic Diocese*: "**even in a pandemic, the Constitution cannot be put away and forgotten**." 141 S. Ct. at 68 (emphasis added). Where – as here – government regulations "single out houses of worship for especially harsh treatment," Calvary

Chapel must be deemed to "have clearly established [its] entitlement to relief." *Id.* at 66. And, the reason for this is simple: "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).

Yet, despite this clear and unequivocal holding, the First Circuit claimed wiggle room to allow what this Court has prohibited. In fact, while noting that *Catholic Diocese* prohibits government officials from "curtail[ing] individual constitutional liberties during a public health emergency, (Pet. App. at 013), the court nevertheless reached back to Chief Justice Roberts' concurrence in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) to claim that the Governor "be afforded considerable latitude" in curtailing such rights. (Pet. App. at 013.) But, this is plainly erroneous in light of the binding decision of the majority of this Court in *Catholic Diocese*. As the majority held, "[t]he restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty." 141 S. Ct. at 68. And, "we have a duty to conduct a serious examination of the need for such a drastic measure." *Id.* The First Circuit's reliance on expired and inapposite concurrences ignores *Catholic Diocese*, egregiously misapplies its holding, and must be summarily reversed.

If there was any doubt as to the egregious error of the court below, Justice Gorsuch's concurrence lays it to rest. In discussing Chief Justice Roberts' *South Bay* concurrence, Justice Gorsuch noted

> At that time, COVID had been with us, in earnest, for just three months. Now, as we round out 2020 and face the prospect of entering a second calendar year living in the pandemic's shadow, that rationale has expired according to its own terms. Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical. **Rather than apply a nonbinding and expired concurrence from *South Bay*, courts must resume applying the Free Exercise Clause. Today, a majority of the Court makes this plain.**

Id. at 70 (Gorsuch, J., concurring) (emphasis added). Yet, relying on the nonbinding and expired concurrence from *South Bay* and ignoring *Catholic Diocese*'s demands is precisely what the First Circuit did below.

And, if there was any doubt as to the expiration of Chief Justice Roberts' *South Bay* concurrence, even the Chief Justice suggests that his concurrence was limited to the time frame in which it was issued because in *Catholic Diocese*, even the Chief Justice suggested discriminatory numerical caps – such as those at issue here – "do seem unduly restrictive," that "it may well be that such restrictions violate the Free Exercise Clause," and that "the challenged restrictions raise serious concerns under the Constitution." *Id.* at 75 (Roberts, J., concurring).

Yet, despite *Catholic Diocese* clear holding and the "seismic shift" it represented in COVID-19 free exercise litigation, *Calvary Chapel Dayton Valley*, 982 F.3d at 1232, the First Circuit ignored its commands and reached back to a relic of constitutional history that "runs directly counter to our precedents." *Martinez*, 572 U.S. at 843. Indeed, as Justice Gorsuch noted in *Danville Christian Academy v. Beshear*, "**this Court made clear that it would no longer tolerate such departures from the Constitution**." 141 S. Ct. 527, 530 (2020) (Gorsuch, J.,

dissenting) (emphasis added). Because the First Circuit ignored that plain instruction, summary reversal is appropriate.

VI. AT MINIMUM, THIS COURT SHOULD ISSUE A GRANT, VACATE, AND REMAND ORDER AS IT HAS DONE IN NUMEROUS CHALLENGED TO COVID-19 RESTRICTIONS ON RELIGIOUS SERVICES POST-*CATHOLIC DIOCESE*.

At minimum, should this Court not find summary reversal appropriate in the instant matter, this Court should do as it has done with every other application presented to it since *Catholic Diocese* and issue a grant, vacate, and remand order as to the lower court's denials of injunctive relief here. In every instance where a Church has challenged denials of injunctive relief post-*Catholic Diocese*, this Court has issued GVR Orders requiring the lower courts to reconsider their previous denials of injunctive relief in light of the binding and unequivocal holdings of *Catholic Diocese*. *See, e.g.*, *Harvest Rock Church v. Newsom*, 141 S. Ct. 889 (2020) (granting a petition for certiorari before judgment, vacating the district court and Ninth Circuit's denials of injunctive relief, and remanding for consideration in light of *Catholic Diocese*); *High Plains Harvest Church v. Polis*, 141 S. Ct. 527 (2020) (same); *Robinson v. Murphy*, 141 S. Ct. 972 (2020) (same); *Gish v. Newsom*, 141 S. Ct. 527 (2021) (same). The same relief is warranted here. This Court should, at minimum, grant the application, vacate the decisions of the lower courts, and remand the matter for reconsideration in light of *Catholic Diocese*, *South Bay*, and *Harvest Rock*.

CONCLUSION

For the foregoing reasons, the Motion should be granted, and the Governor enjoined from enforcing or reinstating her unconstitutional restrictions.

Dated this July 23, 2021.

Respectfully submitted,

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ADDENDUM CHART

SECTOR	RESTRICTIONS	AUTHORITIES HOLDING THAT SECTOR IS COMPARABLE TO RELIGIOUS GATHERINGS, WHICH CANNOT BE TREATED LESS FAVORABLY
Religious Gatherings	No more than 50 persons indoors or 5 persons per 1000 square feet, and no more than 100 persons outdoors	N/A
Calvary Chapel Residential Discipleship Program for drug and alcohol rehabilitation	No restrictions or capacity limitations, *unless the gathering includes a religious worship service, in which case the 50-person or 5-person per 1000 square feet applies indoors and 100-person limit applies outdoors*	*Harvest Rock Church v. Newsom*, 977 F.3d 728, 734 (9th Cir. 2020) (O'Scannlain, J., dissenting), vacated *Harvest Rock Church v. Newsom*, 141 S. Ct. 889 (2020)
Food processing and Agriculture	No restrictions or capacity limitations[8]	*Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (manufacturing and chemical plants)

[8] This industry was designated as "Essential" under Executive Order 28 (dkt. 1, V. Compl. ¶32 and Ex. D), and was therefore exempt from numerical or capacity restrictions. (*See also* dkt. 1-5, V. Compl. Ex. E.) Under Maine's framework, those businesses that previously enjoyed higher capacity limits than those permitted by current capacity restrictions outlined in industry checklists were permitted to maintain the more favorable treatment that does not impose any capacity limits, *see* Restarting Maine's Economy FAQs (Mar. 10, 2021), https://www.maine.gov/decd/restarting-maines-economy-faqs (last visited May 13, 2021), unless a Checklist has been issued for the specific industry sector. For this sector, there has been no specific industry checklist. https://www.maine.gov/decd/covid-19-prevention-checklists.

Industrial Manufacturing	No restrictions or capacity limitations[9]	*Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (manufacturing and chemical plants)
Warehousing	No restrictions or capacity limitations[10]	*Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (manufacturing and chemical plants)
Legal, Business, Professional, Environmental Permitting, and Insurance Services	No restrictions or capacity limitations[11]	*Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring) (accountants, lawyers, and insurance agents)
Food Banks and Food Pantries	No restrictions or capacity limitations[12]	*Harvest Rock Church v. Newsom*, 977 F.3d 728, 734 (9th Cir. 2020) (O'Scannlain, J., dissenting), vacated *Harvest Rock Church v. Newsom*, 141 S. Ct. 889 (2020)
Public Transportation	No restrictions or capacity limitations[13]	*Roman Catholic Diocese of Brooklyn v. Cuomo*, 141

[9] *See supra* n.1.

[10] *See supra* n.1.

[11] *See supra* n.1.

[12] *See supra* n.1.

[13] *See supra* n.1.

		S. Ct. 63, 69 (2020) (bus stations and airports); *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 718 (2021) (train stations, bus terminals); *Harvest Rock Church v. Newsom*, 141 S. Ct. 1289, 1290 (2021) (same)
Residential Treatment Programs	No restrictions or capacity limitations[14]	*Harvest Rock Church v. Newsom*, 977 F.3d 728, 734 (9th Cir. 2020) (O'Scannlain, J., dissenting), vacated *Harvest Rock Church v. Newsom*, 141 S. Ct. 889 (2020)
Laundromats	No restrictions or capacity limitations[15]	*Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69 (2020) (laundromats)

[14] *See supra* n.1.

[15] *See supra* n.1.