IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MAINE
Bangor Division

CALVARY CHAPEL OF BANGOR, Plaintiff, v. JANET MILLS, in her official capacity as Governor of the State of Maine, Defendant.	)	Case No. 1:20-cv-00156-NT

"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]

PLAINTIFF'S RENEWED MOTION FOR PRELIMINARY INJUNCTION WITH INCORPORATED MEMORANDUM OF LAW

Pursuant to Fed. R. Civ. P. 65 and L.R. 7, Plaintiff, CALVARY CHAPEL OF BANGOR ("Calvary Chapel"), by and through the undersigned counsel, hereby move this Court for a Preliminary Injunction, enjoining Defendant, JANET MILLS, in her official capacity as Governor of the State of Maine ("the Governor") from enforcing her unconstitutional and discriminatory COVID-19 restrictions on Calvary Chapel's religious worship services.

MEMORANDUM OF LAW IN SUPPORT

For the second time, Calvary Chapel prays to this Court to do what the Constitution demands (and has demanded since March 2020, **11 months ago**), enjoin the Governor from enforcing her discriminatory COVID-19 restrictions that impose draconian and unconscionable restrictions on religious worship services while exempting myriad secular businesses and gatherings from similar restrictions. The First Amendment prohibits the discriminatory regime

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

under which Calvary Chapel has been suffering for **339 days**. Indeed, "**even in a pandemic, the Constitution cannot be put away and forgotten**." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (*Catholic Diocese*) (emphasis added).

The Supreme Court's decisions in *Catholic Diocese*, *South Bay United Pentecostal Church v. Newsom*, No. 20A136, 2021 WL 406258 (U.S. Feb. 5, 2021), and *Harvest Rock Church v. Newsom*, No. 20A137, 2021 WL 406257 (U.S. Feb. 5, 2021), and the decisions of the circuit courts post-*Catholic Diocese* compel a single result: **the Governor's discriminatory restrictions on Calvary Chapel's religious worship services violate the First Amendment and must be enjoined**. As the Ninth Circuit recently held, *Catholic Diocese* "**represented a seismic shift in Free Exercise law**, and compels the result in this case." *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1232 (9th Cir. 2020) (emphasis added). And when two Ninth Circuit panels refused to follow *Catholic Diocese*, Justice Gorsuch expressed the Supreme Court's frustrations: "Today's orders should have been needless; **the lower courts in these cases should have followed the extensive guidance this Court already gave**." *South Bay*, 2021 WL 406258, *3 (Gorsuch, J., statement) (emphasis added). Though for some courts, the First Amendment was seemingly placed on "a holiday during this pandemic, **it cannot become a sabbatical**. . . . [C]ourts must resume applying the Free Exercise Clause." *Catholic Diocese*, 141 S. Ct. at 70 (Gorsuch, J., concurring) (emphasis added).

The conclusion here is simple: **numerical caps imposed on religious services while other nonreligious gatherings of like kind are not subject to such caps cannot withstand strict scrutiny**. *See, e.g.*, *Catholic Diocese*, 141 S. Ct. at 65 (enjoining New York's discriminatory 10 and 25-person caps on religious worship services); *South Bay*, 2021 WL 406258 at *1 (enjoining California's total prohibition on religious worship services); *Harvest Rock*, 2021 WL 406257 at

*1 (same); *Calvary Chapel Dayton Valley*, 982 F.3d at 1233 (enjoining Nevada's 50-person cap on religious worship services); *Calvary Chapel Lone Mountain v. Sisolak*, 831 F. App'x 317 (9th Cir. 2020) (same); *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620 (2d. Cir. 2020) (enjoining New York's discriminatory 10 and 25-person cap on religious worship services); *South Bay United Pentecostal Church v. Newsom*, No. 20-56358, 2021 WL 222814, *17 (9th Cir. Jan. 22, 2021) (enjoining California's 100 and 200-person caps on religious worship services); *Harvest Rock Church v. Newsom*, 985 F.3d 771 (9th Cir. 2021) (enjoining California's 100 and 200-person caps on religious worship services).

Since the November 25 decision in *Catholic Diocese*, the Supreme Court has vacated **every order** presented to it upholding discriminatory restrictions on places of worship. *See, e.g.*, *Harvest Rock Church v. Newsom*, No. 20A94, 2020 WL 7061630 (U.S. Dec. 3, 2020) (granting a petition for certiorari, vacating the lower court'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*, No. 20A95, 2020 WL 7346601 (U.S. Dec. 15, 2020) (same); *Gish v. Newsom*, No. 20A120, 2021 WL 422669 (U.S. Feb. 8, 2021) (same). Maine – **which now has the dubious distinction of being the most restrictive State in the Nation** – cannot continue to impose its discriminatory 50-person cap on Calvary Chapel's religious worship services while exempting whole swaths of gatherings identical to those present in the binding decisions of the Supreme Court. The preliminary injunction should issue immediately. And, the lower courts that refused to apply *Catholic Diocese* were met with second Supreme Court opinions on February 5, 2021 chastising them for their failure to follow the clear dictates of *Catholic Diocese* and reversing their decisions to the contrary. *See South Bay*, 2021 WL 406258 at *1 (enjoining California's total prohibition on religious worship services); *Harvest Rock*, 2021 WL 406257 at *1 (same).

LEGAL ARGUMENT

I. THE SUPREME COURT'S DECISIONS IN *CATHOLIC DIOCESE*, *SOUTH BAY*, AND *HARVEST ROCK* DEMONSTRATE THAT CALVARY CHAPEL IS LIKELY TO SUCCEED ON THE MERITS OF ITS FREE EXERCISE CLAIMS.

A. The Governor's Discriminatory Restrictions And Harsh Treatment of Calvary Chapel's Worship Services Violates The First Amendment.

In *Catholic Diocese*, the Supreme 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,

> 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*, No. 20A136, 2021 WL 406258 (U.S. Feb. 5, 2021), the Supreme Court yet again faced a state's COVID-19 regime discriminating against religious worship services while exempting myriad other categories of businesses and sectors. There, like Maine did here in its previous orders, California imposed a total prohibition on religious worship services. 2021 WL 406258, *1. Based on *Catholic Diocese*, the Court issued an injunction prohibiting the Governor from enforcing his unconstitutional prohibitions on religious gatherings. *Id.* Even Chief Justice Roberts noted that while courts have generally been inclined to grant deference during a pandemic, like this Court did before, "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 *1 (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 *2.

> 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 that time, California is not the only state to have gone that far. Indeed, **Maine, too, imposed a total prohibition on religious worship services**. (Dkt. 1-4, 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." 2021 WL 406258, at *2.

As here (Dkt. 1-5, V. Compl. Ex. E at 1), California "presumes that worship inherently involves a large number of people. Never mind that scores might pack into train stations or wait in long checkout lines in the businesses the State allows to remain open." *Id.* 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 *3. Again, 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*, No. 20A137, 2021 WL 406257 (U.S. Feb. 5, 2021), the Court yet again issued an injunction pending appeal against California's discriminatory COVID-19 restrictions. Based on its decisions in *Catholic Diocese* and *South Bay*, this Court again

held that discriminatory restrictions against religious worship services that are not imposed on secular gatherings cannot withstand First Amendment scrutiny and must be enjoined. *Id.* at *1.

Notably, too, in each of these cases the plaintiff was required to "clearly establish their entitlement to relief." *Catholic Diocese*, 141 S. Ct. at 66, which the Supreme Court found met. Thus, if the Supreme Court has already held that identical claims satisfy the clear and indisputable right to relief standard, Calvary Chapel – by necessity – satisfies the lesser standard of a likelihood of success on the merits, which is all that is required here.

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*, 982 F.3d at1233; *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 50-person limit here, the Ninth Circuit struck down such restrictions as unconstitutional under *Catholic Diocese*. *See South Bay United Pentecostal Church v. Newsom*, No. 20-56358, 2021 WL 222814 (9th Cir. Jan. 22, 2021) (enjoining 100 and 200 person restrictions on religious worship as unconstitutionally discriminatory); *Harvest Rock Church v. Newsom*, 985 F.3d 771 (9th Cir. 2021) (same). The Ninth Circuit held that 100 and 200 person limits on religious worship services were not narrowly tailored because "there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services," 2021 WL 222814, at *18 (quoting *Catholic Diocese*, 141 S. Ct. at 67), and violated the First Amendment because such discriminatory "numerical attendance caps will undeniably unconstitutionally deprive some of South Bay's

worshippers of participation in its worship services, causing irreparable harm." *Id.* As Judge O'Scannlain pointed out, after *Catholic Diocese*, "[w]e should have little trouble concluding that these severe measures violate the Free Exercise Clause of the First Amendment" because "**the controlling decisions also eliminate any notion that California's measures withstand such scrutiny**." *Harvest Rock*, 985 F.3d at 771 (O'Scannlain, J., concurring) (emphasis added).

In *Agudath Israel v. Cuomo*, the Second Circuit similarly noted that while worship services were restricted to 10 or 25 people, other "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, 631-32 (9th Cir. 2020).[2]

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 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." (Dkt. 1-2, V. Compl. Ex. C at 2.) On March 31, the Governor expanded that list to include **44 categories of businesses**, including "Marijuana Dispensaries," "Hotel and Commercial Lodging," "Real Estate Activities," and several other

[2] Though dealing with religious schools rather than Churches, in *Monclova Christian Acad. v. Tuledo-Lucas Cnty. Health Dep't*, the Sixth Circuit also noted that certain religious schools were prohibited from gathering for in-person instruction while other nonreligious gatherings were not so restricted, including "gyms, tanning salons, office buildings, and the Hollywood Casino." 984 F.3d 477, 82 (6th Cir. Dec. 31, 2020).

categories. (Dkt. 1-4, 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. (Dkt. 1-4, V. Compl. Ex. D at 1.) Yet, again, however, Calvary Chapel's religious worship services were not included on the list of favored sectors permitted to continue gathering.

The Governor first imposed a no worship ban, then no more than 10-people, then a 50-person cap, and most recently no more than five people per 1,000 square feet, which for Calvary Chapel continues to the 50-person numerical cap. While restricting Calvary Chapel to 50 people, the Governor permits 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. *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. 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. The 50-person cap violates the First Amendment because it is "far more severe than has been shown to be required to prevent the spread of the virus." *Id.* at 67.

The fact that some sectors are subject to similar restrictions is wholly irrelevant because not all of them are. The fact remains that some gatherings are exempt, but places of worship are

not. "**[U]nder this Court's precedents, it does not suffice for a State to point out that, as compared to houses of worship, *some* secular businesses are subject to similarly severe or even more severe restrictions**." *Catholic Diocese*, 141 S. Ct. at 73 (Kavanaugh, J., concurring) (bold emphasis added)). "Rather, once a State has created a favored class of businesses"—which the Governor's Orders do—"the State must justify why houses of worship are excluded from the favored class." *Id.* When faced with an identical numerical cap of 50-persons, the Ninth Circuit held that Nevada's 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 *Catholic Diocese*, *South Bay*, *Harvest Rock*, *Calvary Chapel Dayton Valley*, *Calvary Chapel Lone Mountain*, *Agudath Israel*, and *Monclova Christian*—can be the least restrictive means available.

B. Under *Catholic Diocese*, *South Bay*, and *Harvest Rock*, The Governor's Discriminatory Restrictions Cannot Withstand 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. (Dkt. 1, 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—"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 and fines, substantially burdens Calvary Chapel's 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 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), which 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).

Since March 18, 2020, continuing through today, **the government has imposed discriminatory restrictions on indoor religious worship services**—a total of **339 days** as of the filing of this Motion. The Governor tried nothing else and has been continuing this unconstitutional reign of executive fiat for almost a year now. That plainly fails the *McCullen* standard.

In *Harvest Rock* and *South Bay*, the Supreme 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*, 2021 WL 406258, at *2 (Gorsuch, J., Statement) (citing Brief for Becket Fund for Religious Liberty, at 5-6). But, after the Court struck down California's total prohibition on worship services, **Maine is now 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*, the 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.

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 fatal 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*, 20201 WL 222814, at *18 (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 restrictions of 10 and 25 (*Catholic Diocese*), 50 (*Calvary Chapel Dayton Valley* and *Calvary Chapel Lone Mountain)*, 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**. If there is one lesson from the Supreme Court's *Catholic Diocese*, *South Bay*, and *Harvest Rock* decisions, discriminatory numerical caps that are only applied to religious gatherings cannot withstand First Amendment scrutiny. Indeed, **339 days of discriminatory restrictions cannot stand**. 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). The Governor's restrictions should be enjoined.

C. The Governor's Orders Continue To Impose Unconstitutional Internal Discrimination On Calvary Chapel's Worship Services And Its Other Ministries In The Same Building.

While Calvary Chapel is limited to a strict 50-person cap for indoor religious worship services (*supra* Section I.A-B), it may 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. (Dkt. 1-3, V. Compl. Ex. C at 7.) This internal discrimination has been present since the original Stay at Home Order of March 24, 2020 (Dkt. 1-3, V. Compl. Ex. C), and it remains true today. 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)).

Here, that internal discrimination has real-world consequences for Calvary Chapel. As part of its Calvary Residential Discipleship program (CRD), Calvary Chapel provides drug, alcohol, and other counseling to 48 residents each day, requiring attendance at religious worship services, fellowship with Calvary Chapel's members during religious worship, and other Bible study activities. (*See* Exhibit A, Declaration of Ken Graves, ¶¶3-15.) And, that program – though exempt under the Governor's Orders – precludes Calvary Chapel from fulfilling that mission with its counseling program because the 50-person cap prohibits Calvary Chapel from conducting worship

with the CRD residents because the group with the pastors exceed the 50-person cap. And no member or guest of Calvary Chapel who is not a resident of the CRD program may attend religious worship services with the residents. Bible study and worship is essential to the CRD program, and this includes worshipping with Believers who are not part of the program. (*Id.*, ¶¶16-23.) Micromanaging the affairs of Calvary Chapel and precluding it from offering religious worship services and fellowship to its members and their Brothers and Sisters in the Residential program imposes unconscionable internal discrimination upon Calvary Chapel. (*Id.* ¶17.)

II. CALVARY CHAPEL IS ALSO LIKELY TO SUCCEED ON THE MERITS OF ITS ESTABLISHMENT CLAUSE CLAIMS BECAUSE THE GOVERNOR'S ORDERS RESTRICT CALVARY CHAPEL'S CONGREGANTS 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 have been discriminatorily and disparately restricting 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 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 the Supreme Court's *Everson*, *Lynch*, and *Gillette* precedent. Calvary Chapel is likely to succeed on the merits of its claims 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 has no authority to dictate the proper manner of religious worship or gathering for such worship.

> **In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all.** The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.

Watson v. Jones, 80 U.S. 679, 728 (1871) (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. *CATHOLIC DIOCESE* ALSO MANDATES A FINDING THAT CALVARY CHAPEL HAS SUFFERED, IS SUFFERING, AND WILL CONTINUE TO SUFFER IRREPARABLE HARM ABSENT INJUNCTIVE RELIEF.

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). "**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 is subject to a 50-person cap. 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** because the 50-person cap precludes Calvary Chapel from offering religious worship services to any besides its Calvary Residential Discipleship program. (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. Here, Calvary Chapel's injury is worse, as they have been suffering the unconscionable and unconstitutional injury of discriminatory worship prohibitions and restrictions for **339 days.** The time has come for the Governor's unconstitutional reign of executive discrimination of religious worship service to meets its rightful place in the dustbin of constitutional history. Calvary Chapel has suffered long enough.

IV. *CATHOLIC DIOCESE* COMPELS A FINDING THAT CALVARY CHAPEL SATISFIES THE OTHER REQUIREMENTS FOR INJUNCTIVE RELIEF.

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. *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 injury suffered by Calvary Chapel and the non-existent interest the Governor has in enforcing unconstitutional orders. Absent a preliminary injunction, Believers "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). The same is true here, and the public interest is best served by protecting the rights of Calvary Chapel 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). Additionally, given the profound impact that Calvary Chapel's ministry has on the lives of some many in its Church and in the CRD program, the public interest is best served by allowing them continue that vital work through religious worship services. (Graves Decl. ¶¶29-34.) And, that is particularly true given the negative and often tragic consequences COVID-19 has rendered on the mental health of the public. (*Id.*, ¶¶32-33.) Religious worship services have never been more essential to the public interest.

CONCLUSION

For the foregoing reasons, the preliminary injunction should issue.

Respectfully submitted,

/s/ Charles W. Hodson
Charles W. Hodson, II
Charles W. Hodson, II Law Office
P.O. Box 1006
Phone: (207) 945-3355
Facsimile: (207) 945-5104
Email: cwh@hodsonlaw.com

/s/ Daniel J. Schmid
Mathew D. Staver*
Horatio G. Mihet*
Roger K. Gannam*
Daniel J. Schmid*
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
Phone: (407) 875-1776
Facsimile: (407) 875-0770
Email: court@lc.org
hmihet@lc.org
rgannam@lc.org
dschmid@lc.org

*Admitted pro hac vice

Attorneys for Calvary Chapel of Bangor

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of February, 2021, I caused a true and correct copy of the foregoing to be electronically filed with this Court. Service will be effectuated via this Court's ECF/electronic notification system.

/s/Daniel J. Schmid
Daniel J. Schmid