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Case Number 354,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

In re Covid-Related Restrictions on Religious Services	:	**No. 354, 2023**
	:	
	:	Courts Below:
	:	The Superior Court of the State of Delaware, C.A.No. N23C-01-123-MAA; and The Chancery Court of the State of Delaware, C.A.No. 21-1036-JTL

APPELLANTS' OPENING BRIEF

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Dated: December 22, 2023

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NATURE OF PROCEEDINGS

This is a consolidated civil action for declaratory and permanent injunctive relief, as well as compensatory and nominal damages, for the loss of religious freedoms - under Article I, § 1 of the Delaware Constitution and also the First and Fourteenth Amendments to the United States Constitution - during the first fourteen weeks of the March 13, 2020 pandemic in Delaware through June 15, 2020.

Appellant Pastor Alan Hines originally filed this case in Chancery Court on December 1, 2021. Appellant Reverend David W. Landow filed his own separate action later that same day. At the defense request,[1] the cases were consolidated. (C.D.I. 15). In response to certain material misrepresentations made to Chief Judge Connolly in an earlier sister action in Bullock v. Carney, C.A.No. 20-674-CFC (D.Del.) (see C.D.I. 10), the Chancery Court took the unusual step of Ordering Defendant to file an Answer (C.D.I. 15), and reaffirmed that ruling when it was questioned. (C.D.I. 19).

A 320 paragraph, 116 page and 23,251 word Consolidated Complaint was filed (C.D.I. 16), and the required Answer followed. (C.D.I. 21). Plaintiffs Moved for judgment on the pleadings (C.D.I. 22) and the defense later Moved to

[1] Chancery docket item "C.D.I." 6. References to the Superior Court docket will be "S.D.I. __" while this Court's docket will be as "D.I. __".

dismiss. (C.D.I. 23). The Vice Chancellor decided to handle the defense motion first, held a lengthy 3+ hour oral argument on October 11, 2022 (see C.D.I. 36-37, 41-43) and on November 22, 2022, issued a 51 page decision and Order (Tabs B-C attached) transferring, pursuant to 10 Del.C. § 1902, the case to Superior Court on equity jurisdiction grounds, which Plaintiffs elected to do. (C.D.I.48).

In Superior Court, at the defense request, the defense motion was rebriefed. (See S.D.I. 11-17). A lengthy oral argument was held on the defense motion alone on May 31, 2023, and a 49 page decision dismissing the case primarily on immunity grounds was issued on August 28, 2023. (Tab A).

A Notice of Appeal was timely filed on September 27, 2023. (D.I. 1). Upon Appellants' Motion, this Court granted the parties an additional 3,000 words each for their primary briefs. (D.I. 13). This is Appellants' Opening Brief.

SUMMARY OF ARGUMENT

1. A statute cannot give the Governor "discretion" to exercise a "power" that two provisions of the Delaware Constitution expressly bar him from ever exercising and the Governor's usurpation of this "power" injured Plaintiffs.

2. Qualified immunity does not apply to non-discretionary decisions.

3. Equity has jurisdiction to enjoin Defendant's actions because there is no adequate remedy at law for the irreparable injuries they cause.

STATEMENT OF FACTS

A. Religious Worship Is Communal.

As detailed at length in the Complaint, numerous verses from the Holy Bible require coming together to worship God, by means of assembling to preach, sing, fellowship, baptize and share the Lord's Supper. (¶¶ 20-24,46-84; A521-23, 534-53).[2] This specifically includes in times of "disaster" or "pestilence." (¶ 50; see ¶¶ 192-200;A535,590-93).[3] Presented with many of these same Bible verses 48 years ago, this Court recognized "Religion, at least in part, is historically a communal exercise."[4] None of this can be reasonably disputed and Plaintiffs request the Court take judicial notice under Del.R.Evid. 201-202.

B. The History of Plagues and Pestilence.

Plaintiffs request the Court take judicial notice of the fact that long before the recent miracles of modern medicine, the framers of the Delaware Constitutions of 1776, 1792, 1831 and 1897 lived in an era of intimate familiarity with

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[2] All "¶" references are to the Consolidated Complaint found at C.D.I. 16, S.D.I. 7 and in the Appendix at A510.

[3] Preachers and theologians throughout the centuries have noted the same. (¶ 195 - in times of "death struggles" (Martin Luther ~1500); ¶ 196 - "in times of public calamity" (Williams Cupper 1592); ¶ 198 - "in time of the danger of the plague" (William Scot 1606)). (A592-93).

[4] Keegan v. Univ. of Del., 349 A.2d 14, 17 (Del. 1975), cert denied, 424 U.S. 934 (1976), rehearing denied, 425 U.S. 945 (1976).

contagious diseases, plagues and epidemics which manifested themselves throughout this time frame. Review of many state and federal Supreme Court decisions reveal this, including: the Great Smallpox Epidemic of 1775-1782, before, during and after the enactment of Delaware's first Constitution;[5] the yellow fever epidemic throughout the 1790's when Delaware was enacting its second;[6] the cholera pandemic in the 1830's at the time of Delaware's third;[7] and the widespread epidemics of both yellow fever and smallpox in the 1890's as Delaware was enacting our current Constitution.[8]

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[5] See Corman v. Acting Sec'y of Pa. Dep't of Health, 266 A.3d 452, 472 (Pa. 2021) (discussing the "devastation" wrought by that "historic epidemic" of the "scourge of smallpox").

[6] See, e.g. Fulton v. City of Phila., 141 S.Ct. 1868, 1874 (2021) (noting the 1798 "yellow fever epidemic" in Philadelphia); Smith v. Turner, 48 U.S. 283, 299-300 (1849) (noting counsel's historical recounting that "yellow-fever had first made its appearance, and raged with great violence, in Philadelphia, in 1793. In 1795, in the summer, it broke out in New York, and raged there with considerable violence."); id. at 341 (noting the "havoc in the summer of 1798 is represented as terrific. The whole country was roused."); Soohan v. City of Phila, 33 Pa. 9, 20 (Pa. 1859) (noting both "the great yellow fever of 1793" and that "[i]n 1797 and 1798, the fever again prevailed in Philadelphia with fearful violence").

[7] Corman, 266 A.3d at 473 (discussing numerous "cholera pandemics," including the one in 1832).

[8] See, e.g. La. v. Tex., 176 U.S. 1, 6 (1900) (lawsuit addressing quarantine measures arising out of "the yellow fever outbreak of 1897"); Compagnie Francaise de Navigation a Vapeur v. Bd. of Health, 186 U.S. 380, 386 (1902) (same, and terming it "the epidemic of 1897"); Duffield v. Sch. Dist. of City of Williamsport, 29 A. 742, 742 (Pa. 1894) (observing "smallpox now exists in Williamsport, and ... has been epidemic in many near-by-cities...."); Burbage v.

1. Smallpox.

At the very moment of Delaware's 1776 founding, the Great Smallpox Epidemic of 1775-82 raged, and ultimately -

> ravaged the greater part of North America, from Mexico to Massachusetts ... killing more than a hundred thousand people and maiming many more ... By the time the pestilence was over, it had reshaped human destinies across the continent.[9]

It has been called -

> the defining and determining event of the era for many residents of North America. With the exception of the [Revolutionary W]ar itself, epidemic smallpox was the greatest upheaval to afflict the continent in those years.[10]

The British also used smallpox to wage germ warfare against General

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Am. Nat. Bank, 20 S.E. 240, 240 (Ga. 1894) (noting "an epidemic of yellow fever [ ] in the summer and fall of 1893"); Randolph v. Seaboard Air Line Ry., 67 S.E. 933, 933 (Ga. 1910) (noting "the yellow fever epidemic in 1893"); see also Ripley v. U.S., 223 U.S. 695, 697 (1912) (lawsuit arising from a 1903 "epidemic of yellow fever").

[9] Elizabeth A. Fenn, Pox Americana: The Great Smallpox Epidemic of 1775-82 3 (Hill & Wang 2001); see id. at 259 (it "united North Americans far and wide in a common, if horrific, experience. That experience was epidemic smallpox, passed from one human being to another in a chain of connections as terrible as it was stunning.").

[10] Id. at 9; see id. at 273-75 (comparing the baseline figure of 25,000 soldiers in the Continental Army who died of all combined causes to the 130,000+ persons throughout North American who died in the smallpox epidemic); id. at 275 ("While the American Revolution may have defined the era for history, epidemic smallpox nevertheless defined it for many of the Americans who lived and died in that time.").

Washington's troops around Boston in 1775.[11] And smallpox was responsible for the "Canadian calamity" and "Quebec debacle"[12] the following year as American forces failed to take Quebec City due to the "smallpox epidemic of 1776" which killed "[a]bout one-third" of the Continental soldiers,[13] an event that lengthened the war and eventually led to General Washington's controversial decision to innoculate the entire Continental Army.[14]

Smallpox continued to bedevil throughout the Nineteenth Century, leading to "severe outbreaks" in Washington, D.C. in 1861-62, continuing thereafter during the Civil War. Indeed, President Lincoln was suffering from its early stages when he delivered the Gettysburg Address in 1863.[15] Subsequent outbreaks included New York in 1868-75,[16] and the "U.S. Smallpox Epidemic of 1901-03" which raged throughout Boston, New York, Philadelphia, Cleveland and New

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[11] Ron Chernow, Washington, A Life 199-200, 231-32, 286 (Penguin 2010).

[12] Pox Americana 260.

[13] Encyclopedia of Plague and Pestilence: From Ancient Times to the Present 317, 479 (George Childs Kohn, ed., 3d ed., 2008).

[14] Pox Americana 260.

[15] Encyclopedia 418-19, 481.

[16] Id. at 482.

Jersey.[17]

2. Yellow Fever.

Yellow fever epidemics also have plagued our country since the founding. An example is the Philadelphia Yellow Fever Epidemic of 1793. This "[l]egendary epidemic ... paralyz[ed] local, state, and national government" in what was then our nation's capital, "10 percent of the population" died after more than a third of the population became infected. People were "dying in the streets," local "government collapsed" and "chaos" reigned.[18] Charleston, South Carolina was regularly ravaged by similar epidemics, with its first in 1699 and its final lasting from 1792-1799.[19] New York was not spared.[20] Other major epidemic level outbreaks occurred in 1878-79 throughout the Mississippi and Ohio River Valleys, eventually ranging from New Orleans up to Pittsburgh.[21]

3. Malaria.

Malaria -

infection left its mark on nearly every ancient society, contributing to the

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[17] Id. at 430, 483.

[18] Id. at 303-304, 479.

[19] Id. at 69-71, 479.

[20] Id. at 479.

[21] Id. at 433-35, 482.

> collapse of Bronze-Age civilizations in Greece, Mesopotamia and Egypt .... [The invention of quinine allowed a cure and] George Washington secured almost all the available supplies of it for his Continental Army during the War of Independence. When Lord Cornwallis surrendered at Yorktown in 1781, less than half his army was fit to fight. Malaria had incapacitated the rest.[22]

During the Civil War, the Union Army alone reported more than 1,300,000 cases of malaria infection amongst its troops.[23]

4. Other Plagues.

Other major outbreaks in the relevant time frame include:

- Scarlet fever throughout New England from 1793-95;[24]
- Multiple "cholera pandemics" swept the U.S. in 1832, 1849, 1866 and 1873;[25]
- Dengue fever epidemics throughout the southern U.S. in 1826-28, 1850-51 and 1878-80;[26] and
- The "Asiatic Influenza Pandemic of 1889-90," in New York, Boston, San Francisco, New Orleans and later in Virginia and South Carolina.[27]

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[22] Amanda Foreman, "How Malaria Brought Down Great Empires," Wall Street Journal C4 (Oct. 16-17, 2021).

[23] Encyclopedia 418.

[24] Id. at 479.

[25] Corman, 266 A.3d at 473; Encyclopedia 414-18, 481-82.

[26] Encyclopedia 419, 412, 481, 483.

[27] Id. at 21, 117.

Other historical examples are set forth in the Complaint. (¶¶ 192-205;A590-96). None of this can be reasonably disputed under Del.R.Evid. 201-202.

C. The Most Recent Pestilence.

On March 13, 2020, Defendant imposed a state-wide lockdown because of Covid-19.[28]

D. Four Categories of Restrictions On Communal Religious Worship.

This case challenges four categories of Defendant's Orders in early 2020 which banned, restricted or otherwise interfered with communal religious worship in churches while allowing thousands of secular businesses to freely operate.[29]

1. The Pre-May 15th Orders Single Out Religion For Disfavored Treatment.

Defendant created 237 categories of essential businesses and allowed 236 of them to operate freely. (Ex.C at 1-4; Ex.B at 4-18; see ¶¶ 88-90,124-28; A229-32, 213-27,554,568-71). Churches were the only category limited to 10 total persons. (Ex.A at 1-2; Ex.E at 6; see ¶¶ 117-23;A206-07,247,564-68). The Vice Chancellor concurred and held that "[o]nly religious organizations" were so

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[28] (¶¶ 4,86-87; Ex. B at 1; A512-13,554,210). References to "Ex." are to the Exhibits attached to the December 1, 2021 Verified Complaint (C.D.I. 1).

[29] (Exs.A-E,H,J-K,M-N; A205,209,228,233,241,269,308,315,324,341).

limited and the "Ten-Person Restriction did not apply to any other category." (Tab B at 11). The Superior Court concluded "only Houses of Worship were subject to this ten person restriction" which could not be exceeded "under any circumstances." (Tab A at 7).

a. Liability Admission - This "Effectively" Shut Down Communal Religious Worship.

On May 15, 2020, Defendant publicly admitted to the Delaware news media that his Orders "effectively" shut down religious worship in Delaware. (¶¶ 121, 91,93,151,241,292;Tab B at 13; A566-67,554-55,577-78,605,616). The Vice Chancellor specifically analyzed this admission and concluded it was "a *de facto* prohibition on opening" churches. (Tab B at 14).

2. May 15th Orders Again Exclude Churches.

Another 12 categories of non-essential businesses were then reopened and allowed to operate, effective June 1st, at 30% capacity if they practiced basic social distancing requirements but churches were again excluded. (Ex.H at 15-22,24-25; id. at 25; ¶¶ 138-46;A284-91,293-94,574-76).

3. May 18th Orders Impose More Unprecedented Restrictions On Churches.

Four pages of detailed operating requirements for churches were issued, explaining how they were allowed to practice their religious beliefs subject to

conditions effective May 20th. (Ex.K;A315). In the enabling Declaration (Ex.J; A308), Defendant presented churches with a stark, Hobson's choice (id. at 6; A314), either:

> (a). Continue to operate at the pre-existing 10 person or less requirement which Defendant admitted was "effectively" a "*de facto*" total shutdown; or
>
> (b). Be allowed to operate at 30% capacity if you surrender your sincerely held religious beliefs and allow Defendant to dictate the form and content of your religious worship services in 14+ specific ways.

(See Ex.K at 1-4; Ex.L at 1-2; ¶¶ 93,151-63;A316-19,321-22,555-56,577-84).[30]

These conditions included banning:

- all religious services on 6 out of 7 days every week;
- a preacher from preaching without a mask;
- Baptism;
- Communion;
- those 65 or older, and those with underlying health conditions, from attendance;
- any worship service on the single day over 60 minutes; and
- all Church related ministries, including drug and alcohol counseling, and many others.

[30] Defense counsel admitted this Hobson's choice to Chief Judge Connolly. (Bullock 5/28/20 tr. at 59;A95).

(Ex.K at 1-4; ¶¶ 93,150-63; Tab A at 8;A316-19,555-56,577-84). Only if all these and other mandates were met would Defendant allow live in-person worship services to occur at 30% capacity. (Ex.K at 1;A316). Otherwise, worship continued to be "effectively" banned, the "*de facto*" closure.

a. Liability Admission - These "Are Not [Of] General Application."

Defendant made a binding judicial admission to the federal court "that a substantial number of the specific guidelines" here "are not [of] general application," (Bullock 5/28/20 tr. at 24,75, see 22-23,105-06; A58-60,111,141-42), as there were no comparable restrictions on any other secular entity, only churches. The Vice Chancellor recognized this admission (Tab B at 20), as did Defendant in briefing below. (C.D.I.34 at 11).

b. Judicial Conclusion - Not Generally Applicable.

Chief Judge Connolly also independently found "I am pretty safe in concluding ... it's very clear that the guidance is not a general application." (Bullock 5/28/20 tr. at 24,23,75; see Bullock 6/2/20 tr. at 18-19;A59-60,111,161-62). The Superior Court concluded similarly. (See Tab A at 7).

c. Judicial Conclusion - "I'm Just at a Loss" Why Religion Was Specifically Targeted.

As the federal court repeatedly exclaimed, "I'm just at a loss" why

Defendant is issuing orders "directed solely at communities of worship." (Bullock 6/2/20 tr. at 9-10;A152-53). These Orders are "directed specifically to practices that are religious and only religious." (Id. at 5;A148). "[Y]ou've got guidance that is specifically directed to communities of worship ... that is not prescribed with respect to any other types of entities..." (Bullock 5/28/20 tr. at 23;A59).

d. Liability Admission - Defendant's Preferential Treatment of Jewish Religious Practices.

Defendant publicly admitted he had crafted his church restrictions in reliance on his "preferred" religious council, chaired by a Jewish rabbi, which contained no Protestant or Catholic clergy members. (¶ 104;A560-61). While Defendant banned the touching required for baptisms (Ex.K. at 4;A319), he imposed no similar restrictions on Jewish circumcisions (see Ex.K;A316-19), as the Superior Court also found. (Tab A at 8). This troubled the federal court which observed the legal "landscape changes drastically" when the Governor's Orders "treat Jewish circumcisions differently than Protestant baptisms." (Bullock 6/2/20 tr. at 28-29;A171-72). The 10 person restriction also accords with the minimum necessary for Jewish services, the Minyan. (¶¶ 161-62;A583).

4. May 22nd Forward Orders Again Target Religion.

On May 22, 2020, Defendant issued a new enabling declaration (Ex.M; A324), with five new pages of regulations effective the next day. (Ex.N;A341).

Restrictions continued. (¶¶ 166-71;A585). Traditional Communion was again banned (Ex.N at 3-5;A344-46), but there were no comparable restrictions on any other secular entity, such as daycares or restaurants serving food - only churches. (¶¶ 166-71,272-75;A585,613-14). The ban on touching baptisms remained and preachers and singers still were gagged. (Ex.N at 2-4;A343-45).

a. Gagging of Religious Speech Alone.

As to the pastor gag rule (id. at 2; A343), Defendant's attorneys admitted -

> the Governor's position is that a preacher must wear a mask or face shield while preaching, and if they cannot, then they should not face directly to the congregation when they are projecting their voice.

(Bullock 5/28/20 tr. at 38, see 36-41 - context; A72-77). Only religious speech was muzzled this way. (¶¶ 96-99;A557-59).

(1). Political Speech to Rooms Full of Reporters.

Both in his Answer and in representations to the Vice Chancellor below, the Governor factually denied this and claimed to have worn a mask while speaking at his many press conferences. (Ans. ¶ 97, A396; C.D.I.34 at 14).

But the falsity of these factual denials was conclusively proven. First, Defendant was widely, publicly and contemporaneously called out by the national and local news media for not wearing a mask while requiring it of pastors.

> [Defendant's Order] requires that anyone speaking, reading or singing to a live audience [in a Church] must face away from the audience if

> they are not wearing a face covering or face shield — something Carney has not done in his twice-weekly coronavirus news conferences.[31]

Second, after being caught spoliating contrary evidence,[32] at least 24 press conference and interview videos originally broadcast from March 18- June 2, 2020 were begrudgingly reposted to the Governor's website, demonstrating that he never wore the mask as he falsely claimed.[33]

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[31] See, e.g. apnews.com/article/5e0d2c2a749a46a424a0481799f20291; baytobaynews.com/stories/carney-to-back-off-delaware-religious-worship-restrictions,22456; www.nbcphiladelphia.com/news/coronavirus/delaware-governor-carney-religious-worship/2416851/; www.wboc.com/news/politics/delaware-governor-backs-off-restrictions-on-church-services/article_4d249a9c-2c63-529e-9c37-3844047f6451.html; www.usnews.com/news/best-states/delaware/articles/2020-06-02/delaware-governor-to-back-off-religious-worship-restrictions (emphasis added). (Accord ¶ 97;A558).

[32] See A466-69.

[33] The entire archive is found at www.facebook.com/JohnCarneyDE/videos and scrolling down to the relevant time frame. Directly linked, representative examples are found here: www.facebook.com/JohnCarneyDE/videos/virtual-qa-with-governor-carney-governor-carney-and-dr-kara-odom-walker-secretar/148881083135940/ (3/27/20); www.facebook.com/JohnCarneyDE/videos/4320-covid-19-press-briefing-governor-carney-dr-karyl-rattay-director-division-o/2919923704712351/ (4/3/20); www.facebook. com/JohnCarneyDE/videos/693900467818572 (5/15/20); www.facebook.com/JohnCarneyDE/videos/52220-covid-19-briefing/608617043194912/ (5/22/20); www.facebook.com/JohnCarneyDE/videos /6220-covid-19-briefing/573515856638994/ (6/2/20); accord ¶ 97; A558. It is proper to cite the Governor's own public statements. See, e.g. Del.R.Evid. 201; Delawareans for Educ. Opportunity v. Carney, 199 A.3d 109, 136 (Del.Ch. 2018) (quoting the Governor's own public statements to a school board contained within a press release posted online by the Governor's Office).

(2). Political Speech to a Church Sanctuary Full of Pastors.

Similarly, when now President, then candidate, Biden gave his June 1, 2020 speech to a church sanctuary full of pastors, the Wilmington News Journal memorialized that he "push[ed] down the mask on his face" when "he got up and spoke."[34]

b. Unprecedented Baptism Procedures.

Baptisms were subject to three pages of detailed rules and were permitted only if no touching was involved. (Ex.N at 4, see 1-3;A342-45). In the federal court's words, "it prescribes the manner in which a baptism is to be conducted ... and it has prohibitions about it, but it has got prescriptions." (Bullock 6/2/20 tr. at 8;A151). The most telling judicial admission is taken from the following exchange between the federal court and defense counsel -

> Q. Do you know of any other occasion in Delaware law or in any other law in the United States where specific procedures have been prescribed for baptisms in th[is] way...?
>
> A. I do not.

(Id. at 7;A150). As Chief Judge Connolly observed -

> that the State not surprisingly is unable to point to any case ever or situation ever where a State has dictated how a baptism should be performed by a

[34] www.delawareonline.com/story/news/2020/06/01/delaware-biden-says-he-create-police-oversight-board-president/5307634002/. Accord ¶ 98;A558-59.

religious organization, that ought to tell you something.

(Id. at 10-11;A153-54).

5. Liability Admission - "Specific Restrictions Targeting a Form of Worship."

Defense counsel made several additional judicial admissions to the federal court, aptly describing many of Defendant's Orders as "specific restrictions targeting a form of worship" and admitted the factual relevance to the constitutional analysis of being able to "attend mass" and "take Communion" in person. (Bullock 8/20/20 tr. at 17;A191).

E. Imprisonment For Violation.

Defendant denies that violation of his Orders was a crime. (Ans. ¶¶ 296-97;A459). But the federal, Chancery and Superior Courts all categorically rejected this false claim (Bullock 5/28/20 tr. at 12-14; Bullock 6/2/20 tr. at 5-6; Tab B at 9; Tab A at 6; A48-50,148-49), and instead found that although they were formally termed "guidelines," violation actually "constitute[d] a criminal offense." (Ex. E § 8; Ex. D § 7; Ex. J § B; Ex. M § F.5.; A253-54,240, 314,340).

F. Plaintiffs.

Plaintiffs are both dedicated and experienced clergy in the Free Will Baptist and Orthodox Presbyterian faith traditions, each leading large congregations of Delawareans. (¶¶ 13-18;A517-21).

1. Sincerely Held Religious Beliefs.

The details of their sincerely held religious beliefs, requiring religiously motivated actions, all grounded in specific passages from the Holy Bible, and consistent with historical experience of more than 2,000 years, are detailed at length in the Complaint. (¶¶ 18-24,45a-84,247-49,192-201,256,1; A520-23,532-53,608-09,590-94,610,510).

2. Injuries.

Defendant's actions required Plaintiffs to violate their rights of religious conscience, in numerous ways, on at least 29 specific occasions, and include traditional tort injuries. (¶¶ 173-77, 241-49, 295-301,42,152-54,315,288,279,264, 25; A586-88,605-09,617-18,531-32,578-81,620,616,614,609,523).

G. Governor Carper's Clarion Call that the Delaware Constitution Matters.

In 1997, then Governor Carper urged all Delawareans to "familiariz[e] yourselves" with "the Delaware Constitution and study its contents," because "an informed and engaged citizenry is essential to any democratic government."[35]

1. 165 Church Pastors Respond.

Consistent with that admonition, on May 16, 2020, 165 Delaware pastors,

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[35] Thomas R. Carper, Introduction in The Constitution of the State of Delaware, (Del. Heritage Comm'n, 1997). (A31).

representing many thousands of parishioners in church congregations from all across our State, respectfully petitioned Governor Carper's successor, urging he not ignore the plain words of the very first sentence of that same Constitution. (Ex.I at 2; ¶¶ 147-49,44; A297,577,532).

2. The Committee to Save Christmas.

Several days earlier, a May 13, 2020 petition from the Committee to Save Christmas asked him "to restore and protect the respect required for the cherished constitutional freedoms of all Delawareans." (Ex.G at 1; ¶¶ 133-37,92; A263,573, 555).

3. Rev. Dr. Bullock's Federal Lawsuit.

The federal lawsuit by Rev. Dr. Christopher Bullock of Canaan Baptist Church was filed on May 19, 2020. It originally discussed and recounted, and was eventually formally amended to include, these same Delaware Constitution protections. (¶¶ 94-110,164,172,32-33; A556-63,584,586,526-28).

4. Concerned Delaware Legislators.

Finally, the record below also demonstrates concern from the Legislative Branch that the Executive was ignoring the very first sentence of the same Constitution all public officials in Delaware take an oath to uphold. (A470).

ARGUMENT

I. THE GOVERNOR DOES NOT HAVE "DISCRETION" TO EXERCISE A "POWER" EXPRESSLY FORBIDDEN TO HIM BY THE DELAWARE CONSTITUTION.

A. Questions Presented.

Did the Superior Court err in holding that the Delaware Constitution does not create "hard and fast rules" that have to be followed such that a mere statute can give the Governor "discretion" to exercise a "power" explicitly forbidden him by two of our Constitution's express protections, and that Plaintiffs cannot object despite being the very persons these constitutional provisions are intended to protect? (See S.D.I.21 at 7-10,29-35; S.D.I.33 at 27-51,67-71; A651-75,691-95).

B. Scope of Review.

A Rule 12(b)(6) dismissal receives *de novo* review. State ex rel. Jennings v. Monsanto Co., 299 A.3d 372, 381 (Del. 2023). All well-pled facts are accepted as true, plaintiffs receive the inferences and the "reasonably conceivable" standard applies. Id. Constitutional and other legal questions also receive *de novo* review. Albence v. Higgin, 295 A.3d 1065, 1085 (Del. 2022) (en banc).

C. Merits of Argument.

1. Constitutional Law 101.

"[T]he foundation upon which our constitutional jurisprudence is built is the

principle that the constitution controls any legislative act repugnant to it." Id. at 1089 (cleaned up). Additionally,

> Constitutions simultaneously empower and constrain. At the same time that they authorize various branches of government to exercise sovereign power, they limit that power in lots of ways, including through ... explicit constraints on the exercise of power.

Ciraci v. J.M. Smucker Co., 62 F.4th 278, 280 (6th Cir. 2023).

2. The Unmistakable Constitutional Text.

"Any analysis of a Delaware Constitutional provision begins with that provision's language itself." Capriglione v. State ex rel. Jennings, 279 A.3d 803, 806 (Del. 2021) (en banc). We are fortunate to have a Constitution where "[t]he phrasing is in the main direct and quite readable."[36]

The first two sentences of the Delaware Constitution use the word 'worship' six times. The first reference is found in the Preamble, which recognizes that "Through Divine goodness, all people have by nature the rights of worshiping and serving their Creator according to the dictates of their consciences" and finds "these rights are essential to their welfare." Del.Const. Pmbl.[37] Immediately

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[36] Paul Dolan, Government and Administration of Delaware 19 (Crowell Co. 1956).

[37] See Bridgeville Rifle & Pistol Club, Ltd. v. Small, 176 A.3d 632, 647-48 (Del. 2017)(en banc) (the existence of a right in the Preamble affirms the importance of a right found later in the Constitution).

thereafter, the First Freedom of the Delaware Bill of Rights begins by recognizing "the duty of all persons frequently to assemble together for the public worship of Almighty God," finding that "piety and morality, on which the prosperity of communities depends, are hereby promoted" by this. Del.Const. Art. I, § 1. It then continues, stating that -

> no power shall or ought to be vested in or assumed by any magistrate that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship, nor a preference given by law to any religious societies, denominations, or modes of worship.

Id. (emphasis added).

In the authoritative words of the Delaware Constitution's "most eminent student,"[38] Article I, § 1 plainly "limits the power of the state government." Randy J. Holland, The Delaware State Constitution 38 (Oxford Univ. Press, 2d ed., 2017). It is written in clear and absolute terms.[39] "When a constitutional provision is unambiguous, we rely on its plain language." Op. of the Justs., 274 A.3d 269, 272 (Del. 2022) (en banc). Thus it is clear and unequivocal that Defendant has "no power" to act in this area. With "no power" to act, Defendant

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[38] Thomas L. Ambro and David C. McBride, Editors' Note, Delaware Lawyer 3 (Fall 2021).

[39] It is not like some of the other Article I rights that are written with qualifying terms, such as reasonableness, leaving room for the exercise of discretion. See, e.g. Art. I, §§ 5-13.

has no discretion in how to exercise a "power" he does not possess.

If there were any doubt, the Reserve Clause removes it, stating -

> **EVERYTHING IN THIS ARTICLE IS RESERVED OUT OF THE GENERAL POWERS OF GOVERNMENT HEREINAFTER MENTIONED**.[40]

The position of Governor is a "hereinafter" creation of Article III, and the Reserve Clause explicitly states that the fundamental First Freedom contained within Article I, § 1 is beyond the "powers" of such a government official ever to impact.

For these reasons, Defendant's actions fail this Court's threshold question of whether a state actor "had the authority to enact such unconstitutional regulations in the first place." Bridgeville, 176 A.3d at 639. The Superior Court's conclusion that the Delaware Constitution does not create "hard and fast rules" that the Governor must follow regarding communal religious worship (Tab A at 34), is clear legal error.

3. Context and Evolution of the Language.

This Court's precedents also require "knowing the original text, context and evolution of any phrase that appears in the present Delaware Constitution." Id. at 642.

a. Context - the 1792 Constitutional Convention.

[40] The Reserve Clause cannot be "ignore[d]." Bridgeville, 176 A.3d at 643 n.49 & 653.

The text of Article I, § 1 has been "virtually unchanged since the 1792 Constitution."[41] In the unanimous words of the delegates themselves, the very purpose of that Convention was "to enumerate, and more precisely to define, the Rights reserved out of the general Powers of Government" moving forward.[42] In the same way, the specific "purpose of amending the Delaware Declaration of Rights" of 1776 at the 1792 Convention was "to enumerate and more precisely define rights reserved out of the general powers of government."[43]

(1). This Was No Historical Aberration.

The drafters of our early constitutions "saw themselves as reformers intent upon limiting the exercise of power. Their documents stressed citizens' rights as opposed to government power." Carol E. Hoffecker, Democracy in Delaware: The Story of the First State's General Assembly 44 (Cedar Tree 2004). They "set limitations regarding the use of the residue of plenary sovereign powers that remain with state governments" and set "limits on governmental power."[44]

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[41] Holland, Delaware State Constitution 37.

[42] Proceedings of the Constitutional Convention of 1792 777, 841 (Claudia L. Bushman, Harold B. Hancock and Elizabeth Moyne Homsey, eds., 1988).

[43] Holland, Delaware State Constitution 34; Bridgeville, 176 A.3d at 646.

[44] Randy J. Holland, State Constitutions: Purpose and Function, in The Delaware Constitution of 1897: The First One Hundred Years 13-14 (Randy J. Holland & Harvey Bernard Rubenstein, eds., 1997); see Evans v. State, 872 A.2d 539, 545 (Del. 2005) (en banc) (the purpose was "to define the sovereign power

(2). Hands Off Religion.

"[T]he earliest state constitutionalists deeply distrusted republican government regarding religious freedom and establishment."[45]

> After sketching general principles, all eighteenth-century bills of rights went on to articulate detailed limitations on government regarding issues of contemporary interest. These included highly specific limitations on executive authority.... Perhaps the best example is how early bills of rights addressed freedom of religion and church-state issues. Scarred by a variety of different entanglements between church and state, revolutionary Americans were extremely sensitive to these issues.[46]

Accordingly, "they defined carefully the limits of government authority ... by providing clear and detailed limitations."[47] The "framers clearly sought to identify and circumscribe the powers of government ... in matters of religion."[48] They

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with precision and to restrain its exercise within marked boundaries.").

[45] Jonathan L. Marshfield, America's Misunderstood Constitutional Rights 170 U.Penn L.Rev. 853, 875 (2022).

[46] Id. at 885-86; see id. at 882 (these "were responsive to the lived abuses of executive power"); Marc W. Kruman, State Constitution Making in Revolutionary America: Between Authority and Liberty 156-63 (Univ. N.C. Press 1997) (explaining that abuses by the King, as well as Parliament, led to these specific limitations on governmental power); Peter J. Galie, Christopher Bopst & Bethany Kirschner, Bill of Rights Before the Bill of Rights: Early State Constitutions and the American Tradition of Rights, 1776-1790 14 (Palgrave MacMillan 2020) (same).

[47] Misunderstood Constitutional Rights 886; see id. at 877-78,882,888-89, 891-92.

[48] Between Authority and Liberty 49.

knew they -

> were writing documents that would influence future generations ... [G]iven the seductions of power and the inevitable decay of politics, they necessarily distrusted their contemporaries and their successors. Viewing the constitutions as fundamental law, they wrote declarations of rights ... that ... restrained rulers.[49]

Key was that they "built restrictions on governmental power into the documents. The act of writing the constitutions, by itself, restricted the government and the exercise of governmental power."[50]

(3). Delaware Rejected Numerous Efforts to Eliminate the Absolute Protection for Religious Worship.

There were at least five attempts to eliminate the absolute religious worship protections contained within Article I, § 1 at the 1792 Convention. Consistent with the above history of distrust of government interference with religion, all were, in Justice Holland's words, "unsuccessful"[51] and rejected. First, there were three votes to remove the first clause recognizing the "duty of all persons frequently to assemble together for ... public worship."[52] Second, two attempts

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[49] Id. at 59; see id. at 156-62.

[50] Id. at 161.

[51] Delaware State Constitution 38.

[52] 1792 Constitutional Convention 783,786,907.

were made to eliminate the key "no power" and "any magistrate" language.[53] Third, the description of how the "right of conscience" specifically includes the act of "religious worship" was voted back in after an attempt to eliminate this specific language,[54] which was previously contained in the direct predecessor protection found in § 2 of the 1776 Delaware Declaration of Rights and Fundamental Rules.

Thus, review of the context found in the historical record confirms that this protection was absolute and numerous efforts to change it so it was not absolute were repeatedly rejected. Because Defendant had no "power" to act, he had no discretion to exercise over communal religious worship.

b. Evolution - Delaware's Prior 1776 Constitution & Declaration.

(1). Strengthening of the Religious Freedom Language.

Article I, § 1 of our 1792 Constitution was created by: (1) merging portions of § 2 of the 1776 Declaration[55] with parts of Article 29 of the 1776 Delaware

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[53] Id. at 907-08,911-12.

[54] Id. at 912-13; compare with id. at 783,786,907,912 (the more limited language that was rejected).

[55] The remainder of old § 2 was transferred to the new 1792 Preamble.

Constitution;[56] (2) strengthening the language; and (3) making certain additions. Those were:

- the creation of a new first clause, with no 1776 predecessor, recognizing the "duty of all men frequently to assemble together for the public worship of the Author of the universe;"
- replacing "no authority" (implying official legal sanction) with the more expansive term "no power;" and
- replacing "any power" with "any magistrate."

It is clear that the 1792 Constitutional Convention sought to strengthen the communal religious worship protections of Article I, § 1 beyond even what they were in 1776.

(2). The Big Picture.

(a). Elimination of All Absolute Protections But One.

As addressed in greater detail in the briefing below (see C.D.I.30 at 21-28), there were a number of absolute rights in Delaware's two founding documents from 1776: (1) the abolition of new slavery;[57] (2) the right of conscience in the free exercise of religious worship;[58] and (3) the 28 provisions specifically

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[56] The remainder of old Article 29 was transferred to Article VIII, § 9 of the 1792 Constitution.

[57] 1776 Del.Const. Art. 26.

[58] 1776 Del.Decl. § 2.

identified in the "reserve clause"[59] barring violation "on any pretence whatever."[60]

But in the 1792 Constitution, only one absolute protection remained - the free exercise of religious worship found in Article I, § 1 which had been joined with the preference and establishment protections of old Article 29 of the 1776 Constitution. The abolition of slavery was completely eliminated, while the Reserve Clause was reworked into its current form already discussed above.

Stated another way, all absolute protections were eliminated but for that given to the right of conscience as it manifests itself in the free exercise of religious worship, which itself received an additional layer of no "powers" to alter protection under the new iteration of the Reserve Clause.

(b). This Was Excluded From the Movement to Restore "Power" to the Executive Branch.

Under the 1776 Constitution, "the office of governor was abolished" and was "a complete non-entity," "[t]he executive power ... was strictly limited" and there were significant separation of powers concerns vis-a-vis the power of the

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[59] State v. Bender, 293 A.2d 551, 552 (Del. 1972); Bridgeville, 176 A.3d at 643; see also Early State Constitutions 173 (terming it an "entrenchment clause"); Between Authority and Liberty 56 ("list of unamendable articles").

[60] 1776 Del.Const. Art. 30. These include all sections from the 1776 Declaration, and the abolition of slavery, the bans on the establishment of a preferred religious sect and clergy holding public office, and other irrelevant provision from the 1776 Constitution.

legislative branch. Problems with this soon emerged and the 1792 Constitution began to swing the pendulum back and return significant powers to the executive.[61]

Yet despite this trend of increasing the executive's power, Article I, § 1 did not do so. Instead, the opposite occurred and its language was strengthened to ensure that "no power" could be exercised by "any magistrate" that could in any way interfere with communal religious worship.

(3). No Intrusion Into the Religious Realm.

Importantly, in Delaware, the ban on interference and other meddling by the government into the religious realm went both ways.

> No clergyman or preacher of the gospel, of any denomination, shall be capable of holding any civil office in this state, or of being a member of either branch of the Legislature, while he continues in the exercise of the pastoral or clerical functions.

1792 Const. Art. VIII, § 9. This was a continuation of the above noted provision

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[61] See Dolan, Government and Administration 15-16,72-73; John A. Munroe, Colonial Delaware: A History 243 (Del. Heritage Press, 2d ed., 2003); Carol E. Hoffecker, Delaware: A Bicentennial History 159,170-71 (W.W. Norton & Co. 1977); Hoffecker, Democracy in Delaware 44,59; Holland, Purpose and Function 6; Maurice A. Hartnett, III, Delaware's Charters and Prior Constitutions, in First One Hundred Years 24,30,36; Holland, Delaware State Constitution 10-13; Paul Dolan, The Supreme Court of Delaware, 1900-1952, 56 Dick.L.Rev. 166, 168 (1952), excerpted at courts.delaware.gov/supreme/history/history1.aspx.

previously found in Article 29 of the 1776 Constitution,[62] and was part and parcel of a larger plan and theory of government.

> Church and state were kept separate in that magistrates managed the political realm, while the spiritual realm was left to the clerics ... Church and state had their separate spheres of action and neither was to transgress the domain of the other.[63]

That Delaware government was forbidden from interfering in religion in any way was no accident.

c. Context & Evolution - Our Unique Colonial Legacy as Children of William Penn.

This special protection for communal religious worship is not surprising given, shortly after his religious conversion at age 23 in 1667, Delaware's founding father, William Penn, was repeatedly arrested and imprisoned because he: (1) assembled together with fellow believers to worship God; (2) preached at those assemblies; and (3) preached on the street after the King had closed the

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[62] See Dolan, Government and Administration 15-16; Hartnett, Charters and Prior Constitutions 31; see also Holland, Delaware State Constitution 9 (discussing failed efforts to remove this by Thomas McKean at the 1776 Convention); Proceedings of the Constitutional Convention of 1776 217-18 (Claudia L. Bushman, Harold B. Hancock and Elizabeth Moyne Homsey, eds., 1987)(reflecting that failed vote).

[63] Early State Constitutions 79 (cleaned up); id. (citing a chart listing Delaware as the lead early colonial example of this); id. at ix (thanking Justice Holland for his contributions); see also Between Authority and Liberty 49 (discussing the specificity of framers in "circumscribing the powers of government ... in matters of religion").

church building. His actions had violated the English Conventicle[64] Acts of 1664 and 1670, as well as other decrees and laws.[65] His initial arrest was "the first great crisis of Penn's life as a Quaker" and it resulted in his "first written denunciation of persecution and defense of liberty of conscience, inaugurating a long public career that would stretch over more than four decades."[66] His experiences in these years are "essential to understanding Penn's ... articulation of religious liberty as a theoretical ideal and a practical political reality."[67]

His many subsequent writings on the subject always articulated what was then a "radical" view, that "liberty of conscience includes protection not only of the rights to belief, but also to worship and assembly" and "any obstacles set in the way of individuals meeting for religious worship" by the government were

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[64] A conventicle is an "assembly for worship." 1 A Dictionary of the English Language (Samuel Johnson, ed., 6th ed., 1785); accord An Universal Etymological English Dictionary (Nathaniel Bailey, ed., 21st ed., 1775); 1 An American Dictionary of the English Language (Noah Webster, ed., 1st ed., 1828).

[65] See Andrew R. Murphy, William Penn: A Life 50,63,71,76-77,82-83,4 (Oxford Univ. Press, 2019); Andrew R. Murphy, Liberty, Conscience & Toleration: The Political Thought of William Penn 18,22,28,30,32-35,40-43,56-83 (Oxford Univ. Press, 2016).

[66] A Life 49-50.

[67] Political Thought 27,155,x,127.

forbidden"[68]

Although Penn would fail in his lifelong effort to convince the King and Parliament to enact a "new Magna Charta" for England that "would enshrine liberty of conscience as a fundamental right" so "that it shall not be in the power of after ages to alter it,"[69] he ensured a different result was reached in his colonies across the Atlantic.

Initially, every law he enacted in his then combined[70] Delaware and Pennsylvania colonies protected both faith and worship from any and all interference.[71] But Penn knew that such mere statutes, which he called

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[68] A Life 83-84 (analyzing William Penn, The great case of liberty of conscience 11-12,4 (1670)); see Political Thought 42-43 ("not only individual belief but also corporate worship; not simply an individual but a collective right ... meeting with others serves an integral purpose to the exercise of individual conscience."); id. at 40 (Penn "defined a religious assembly as a place 'where persons are congregated with a real purpose of worshipping God, by prayer, or otherwise'").

[69] A Life 195,279; see Political Thought 194-97,229-30.

[70] See Act of Union (1682), 1 Pa. Statutes at Large 1; In re Request of Governor for an Advisory Op., 905 A.2d 106, 109 (Del. 2006) (discussing the Act of Union). Thereafter all laws applied equally to the Lower Three Counties. See Flanagin v. Daws, 7 Del. 476, 494 (Del. 1862); Frieszleben v. Shallcross, 19 A. 576, 578 (Del. 1890); see generally Randy J. Holland, Delaware's Destiny Determined by Lewes 68-72 (Del. Heritage Press 2013).

[71] See Laws Agreed Upon in England XXXV (1682), 1 Pa. Statutes at Large 319, 324 ("all Persons ... shall in no wayes be molested or prejudiced for their Religious Perswasion or Practice in matters of Faith and Worship"); The Great Law, Concerning Liberty of Conscience, Chapter 1 (1682), 1 Pa. Statutes at

"superficial" laws,[72] could always be changed in the future because they "are Temporary and Alterable."[73] Accordingly, he chose to forever protect these cherished liberties by making them part of the final, "fundamental" law of his colony, because "in all cases, fundamental law trumped superficial law, since 'the superstructure can not quarrel or invalid its own foundation.'"[74] Accordingly, in 1701, he created the final pre-Revolutionary, colonial Charter of Government for Pennsylvania and Delaware.[75] Article I stated -

> Because no People can be truly happy, though under the greatest Enjoyment of Civil Liberties, if abridged of the Freedom of their Consciences, as to their Religious Profession and Worship ... no Person ... shall be in any Case molested or prejudiced, in his or their Person or Estate, because of his or their conscientious Persuasion or Practice.[76]

Large 5-6, 28 ("no person .... Shall in any case be molested or prejudiced for his or her Conscientious persuasion or practice" and "shall freely and fully enjoy ... Liberty in that respect without any Interruption or reflection"); The Law Concerning Liberty of Conscience, Chapter 1 (1693), 1 Pa. Statutes at Large 149 (same); The Law Concerning Liberty of Conscience, Chapter 1 (1700), 2 Pa. Statutes at Large 3-4 (same).

[72] A Life 85.

[73] The great case 24, Early English Books Online Text Creation Partnership, http://name.umdl.umich.edu/A54146.0001.001.

[74] A Life 85 (quoting The great case 29).

[75] A Life 278-79; Political Thought 229-30.

[76] 1701 Charter of Privileges, Art. I in volumes 5 & 1 of The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of

To remove any doubt, Article VIII explained -

> because the Happiness of Mankind depends so much upon the Enjoying of Liberty of their Consciences ... the First Article of this Charter relating to Liberty of Conscience, and every Part and Clause therein, according to the true Intent and Meaning thereof, shall be kept and remain, without any Alteration, inviolably for ever.[77]

Because of this, "William Penn's colony" was "a haven ... where freedom of religion was practiced as nowhere else in the English-speaking world." Hoffecker, Delaware: A Bicentennial History 78. It is well-established that the later Delaware Constitutions, in Justice Hartnett's words, "continued" and "reflected provisions contained in the prior colonial charters."[78] Thus, Articles I and VIII of the Charter of Privileges are the direct predecessors of Article I and the Reserve Clause of our current Delaware Constitution, respectively. This history makes clear the "mischiefs" that were "intended to be prevented" by them. Op. of the Justs., 274 A.3d at 273.

d. Context - Plagues & Pestilence.

As exhaustively addressed in section **B.** of the Facts above, the drafters of

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America 3077 & 558 (Francis Newton Thorpe, ed., Gov't. Printing Office 1909), https://oll.libertyfund.org/title/thorpe-the-federal-and-state-constitutions-7-vols.

[77] Id. at Art. VIII in Federal and State Constitutions 3079-80,560-61.

[78] Hartnett, Charters and Prior Constitutions 23; see id. at 26 ("had considerable influence on").

our Delaware Constitutions were intimately familiar with widespread plagues and pestilence, epidemics and pandemics. So also was Delaware's founding father William Penn, who: was physically scarred for life after being stricken by smallpox in childhood in 1647; lost a third of his ship's passengers to smallpox on the first trip to his colonies in 1682; and where, later, both his and neighboring colonies suffered from deadly "smallpox infestation" in 1699 and 1702.[79] This was in addition to Penn's many years living in "disease-ridden ... London" where bubonic plague, the Black Death, "wrecked havoc ... for more than three centuries," regularly caused "public health catastrophes of the first order," wiping out up to one third of the population of major cities.[80] The defense conceded this history below but dismissed it as "irrelevant." (C.D.I.34 at 5 n.3).

Yet the fact that our constitutional drafters were faced with the same societal problem – regularly occurring, widespread, deadly contagious diseases – and nevertheless chose the specific plain language of Article I, § 1 stripping Delaware government of any "power" to "interfere with ... religious worship," is

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[79] Munroe, Colonial Delaware 79; Hoffecker, Democracy in Delaware 9; A Life 14,53,155,298, 303; Anthony R. Wood, "William Penn Once Wanted Chester to Be Philadelphia, Here's What Happened," Philadelphia Inquirer (Oct. 28, 2022), www.inquirer.com/news/philadelphia-william-penn-landing-chester-pa-20221028.html.

[80] A Life 14,33-35,57; see generally ¶¶ 201-202,2; A593-94,511.

key evidence that Defendant's present day justification for his interference with religious worship is legally irrelevant and his actions are unconstitutional. As the U.S. Supreme Court has explained -

> when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the [Constitution].

N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S.Ct. 2111, 2131 (2022). This Court has long looked to such history as vital to determining the meaning of our constitutional provisions.[81]

4. "Discretion" Requires "Power."

By logic and definition, the very existence of "discretion" to make a decision depends upon having the "power" to make that decision.[82] "Power" means today just what it meant at the time of the Founding 250 years ago.[83] Under

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[81] See, e.g. Albence, 295 A.3d at 1088-94, 1069-73; Bridgeville, 176 A.3d at 644-52; In re Request of Gov., 905 A.2d at 107-09.

[82] See, e.g. Black's Law Dictionary (7th ed., 1999) ("[a] public official's power or right to act in certain circumstances according to personal judgment and conscience"); Merriam-Webster's Collegiate Dictionary (10th ed., 1996) ("power of free decision or latitude of choice within certain legal bounds"); 1828 Webster Dictionary ("Liberty or power of acting without other control than one's own judgment"); 1785 Johnson Dictionary ("uncontrolled and unconditional power").

[83] See, e.g. 1775 Bailey Dictionary ("Ability, Authority, Force"); 2 1785 Johnson Dictionary ("authority," "Influence," "right of governing"); 2 1828 Webster Dictionary ("Command; the right of governing, or actual government; ...

Article I, § 1, the Governor has "no power" to interfere with religious worship in a single church,[84] much less admittedly impose a "*de facto*" closure of every church in our State. The Reserve Clause reaffirms that the First Freedom in Article I is "reserved out of the general powers of government hereinafter mentioned," which includes the Governor in Article III.

"It is axiomatic that the State cannot ignore our Constitution."[85] Defendant took an oath to "uphold and defend" the Delaware Constitution,[86] yet he violated its very first sentence. The Governor is not above the law.[87] His shutdown of all communal religious worship throughout our state is one of the specific actions Article I, § 1 of the Delaware Constitution was intended to prevent when it

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authority ... The *power* of the British monarch is limited by law; The *powers* of government are legislative, executive, judicial and ministerial"); Black's ("The legal right or authorization to act or not act; the ability conferred on a person by the law to alter, by an act of will, the rights, duties, liabilities, or other legal relations either of that person or another").

[84] Almost 50 years ago this Court held that the forced closure of even a single religious worship service at a dorm in Newark was constitutionally forbidden under the even less restrictive protections of the federal First Amendment. See Keegan, 349 A.2d at 15-19.

[85] Bridgeville, 176 A.3d at 653.

[86] See Del.Const. Art. XIV; accord 29 Del.C. § 5102.

[87] See, e.g. Davis v. Passman, 442 U.S. 228, 246 (1979) ("No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.").

stripped him of the "power," and thus discretion, to do so.

5. Federal Tort Claims Act.

For nearly 75 years, this Court has repeatedly held that "[w]e conceive it the duty of the courts to protect constitutional guarantees ... we have no choice but to use every means at our disposal to preserve those guarantees."[88]

> Without a constitutional remedy, a Delaware "constitutional right" is an oxymoron that could unravel the entire fabric of protections in Delaware's two hundred and [forty-seven] year old Declaration of Rights.[89]

Although this case has not found a prior Delaware decision addressing whether unconstitutional government actions can ever be discretionary under the State Tort Claims Act, the Third Circuit has repeatedly addressed the same question under the Federal Tort Claims Act. In Xi v. Haugen, 68 F.4th 824 (3d Cir. 2023), our Circuit summarized the law here and explained that -

> because the Government has no discretion to violate the Constitution, FTCA claims premised on conduct that is plausibly alleged to violate the Constitution may not be dismissed on the basis of the discretionary function exception.

Id. at 829. Consistent with the analysis above -

> we—and nearly every circuit to have considered the issue—have held that conduct cannot be discretionary if it violates the Constitution because

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[88] Rickards v. State, 77 A.2d 199, 205 (Del. 1950); Dorsey v. State, 761 A.2d 807, 818 (Del. 2000).

[89] Dorsey, 761 A.2d at 821.

federal officials do not possess discretion to violate constitutional rights.

Id. at 838 (cleaned up). Continuing -

> over thirty years of binding circuit precedent holds that the discretionary exception does not apply to conduct that violates the Constitution regardless of whether the constitutional rights at issue were 'clearly established.' The reason is simple: because government officials never have discretion to violate the Constitution, unconstitutional government conduct is per se outside the discretionary function exception.

Id. at 839 (internal case citations and footnote omitted).

For these reasons, as a matter of fundamental constitutional law, conduct in violation of the Constitution cannot be discretionary under a statute, all the more so when the constitutional provisions at issue expressly strip the government of the very "power" to take the challenged action.

6. Standing.

The interrelated conclusion that Plaintiffs lack standing and there is no case or controversy when their rights under the Delaware Constitution are denied (Tab A at 44-48) is in error.

Plaintiffs are among the very "people" and "persons,"[90] that the plain text of these constitutional provisions are designed to protect.[91] "To ignore that the

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[90] See Del.Const. Pmbl. and Art. I, § 1.

[91] Compare Albence, 295 A.3d at 1087-88 ("It is ... plain to us that Higgin's interest in an election that comports with Article V of the Delaware Constitution is squarely within the zone of interests Article V is designed to protect....").

ultimate objects of our" religious worship protections are those engaging in and leading such religious worship "would be to turn a blind eye to the reality that those most immediately affected—and harmed by" a denial of these rights are those same persons. Id. at 1088.[92]

At its core, this boils down to Defendant's view that religious worship rights are no big deal. Yet the Third Circuit has strongly rejected this.

> [W]hile being denied the right to pray may not seem an egregious deprivation to everyone, for those who are devout it may be very egregious indeed. A wound need not be physical to be serious.

Mack v. Yost, 63 F.4th 211, 236 n.22 (3d Cir. 2023). Article I, § 1 expressly reflects the same.

[92] Clergy in their religious faith traditions are required to act as shepherds of the many Delaware citizens in their religious congregations. See, e.g. Acts 20:28; 1 Peter 5:1-2.

II. DEFENDANT DOES NOT HAVE QUALIFIED IMMUNITY.

A. Question Presented.

Did the Superior Court err in granting Defendant qualified immunity when he lacked both the "discretion" and "power" to make the decisions at issue under state law? (See S.D.I.21 at 20-29; S.D.I.33 at 52-67; A676-91).

B. Scope of Review.

Review is *de novo*. See Argument **I.B.** above.

C. Merits of Argument.

1. Introduction.

Qualified immunity is a two part test, requiring: (1) violation of a constitutional right; and (2) that the right be clearly established. Mack, 63 F.4th at 227. The Superior Court only addressed prong 2.

2. Legal Error #1 - It Does Not Apply to Non-Discretionary Decisions.

Preliminarily, at the threshold, qualified immunity only applies to "discretionary functions" of government officials. Ziglar v. Abbasi, 582 U.S. 120, 150 (2017). It does not apply if they lack "discretionary authority" to take the challenged action. Eddy v. V.I. Water & Power Auth., 256 F.3d 204, 210 (3d Cir. 2001); see Davis v. Scherer, 468 U.S. 183, 196 (1984) (repeatedly noting it applies when officials have the "authority" to act).

For the reasons addressed in Argument **I.C.** above, the Delaware Governor has no discretion to exercise a "power" expressly forbidden from him by the Delaware Constitution. Thus, qualified immunity fails and is inapplicable as a matter of law.

3. Clearly Established.

a. Legal Error #2 - "Obvious" Violation Because the Same Conduct is Illegal Under State Law.

The Third Circuit and U.S. Supreme Court have "consistently"[93] and repeatedly held that when the challenged state actions already are illegal under state law, the state law violation makes the federal violation "obvious" even in the absence of materially similar cases. See, e.g. id. (violation of state statutes relevant to whether constitutional right was clearly established); id. at 185 (same for administrative policies and regulations); E.D. v. Sharkey, 928 F.3d 299, 308 (3d Cir. 2019) (violation "obvious" because same factual conduct already illegal under a state criminal statute); Kane v. Barger, 902 F.3d 185, 195 (3d Cir. 2018) ("obvious" analysis boosted by fact that the underlying conduct "resemble[s]" a crime under state law, despite lack of charge or conviction, and are "effectively" the same); Williams v. Secretary, 848 F.3d 549, 570-71 (3d Cir. 2017) (finding state statute and regulations relevant to the analysis); Hope v. Pelzer, 536 U.S.

[93] Clark v. Coupe, 55 F.4th 167, 187 (3d Cir. 2022).

730, 743-44 (2002) (an administrative regulation "relevant" to whether there was "fair warning to [defendants] that their conduct violated the Constitution"); Brown v. Muhlenberg Tp., 269 F.3d 205, 211 (3d Cir. 2001) (existence of a state statute covering same conduct sufficient to clearly establish the law).

Here, because Defendant's misconduct was illegal under multiple provisions of the Delaware Constitution, defendant had fair warning of the law and the right was clearly established.

b. Legal Error #3 - "So Obvious" & "Patently Violative" Despite Rarity of Such 'Brazen' Misconduct.

Earlier this year, the Third Circuit exhaustively addressed the "so obvious" and "patently violative" qualified immunity standard in the specific context of discrimination against and interference with religious exercise. Mack, 63 F.4th at 232-37 & 230 n.15. The Court explained -

> the most obvious cases will rarely arise because it is mercifully rare that government officials so brazenly seek to suppress worship and prayer. So we are not the least surprised that examples of obvious violations of religious exercise rights are in short supply, and we hope that remains the case.

Id. at 236 n.22. For three decades, the U.S. Supreme Court has held the same, explaining "[t]he principle that government may not enact laws that suppress religious ... practice is so well understood that few violations are recorded in our

opinions." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 523 (1993). Nevertheless, review of those few decisions is telling.

(1). Banning Religious Worship Services Has Always Been Held Unconstitutional.

In 1974, this Court in Keegan addressed an "absolute ban of all religious worship" in student common areas by the University of Delaware, 349 A.2d at 16; see also id. at 15 ("prohibiting religious worship services"), specifically the Roman Catholic Mass, and struck the ban down as a violation of the Free Exercise Clause. Id. at 19. Key to this Court's legal reasoning was the finding that the ban was specifically targeted at religious worship.

> The only activity proscribed by the regulation is worship ... [and thus] in the Constitutional sense o[f] the free exercise of religion ... [i]t is apparent to us that such a regulation impedes the observance of religion....

Id. at 17-18.

Similarly, in Emp. Div. v. Smith, 494 U.S. 872, 877 (1990), the U.S. Supreme Court observed "[i]t would be true ... that a state would be prohibiting the free exercise of religion if it sought to ban" the "performance of (or abstention from) physical acts" such as "assembling with others for a worship service, [or] participating in sacramental use of bread and wine."

Finally, in Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 170 (3d Cir. 2002), the Third Circuit addressed discriminatory actions by a

Pennsylvania borough that had the effect of creating an "inability to attend synagogue on the Sabbath." In a comprehensive analysis, writing for the court Judge Ambro struck this down as a clear Free Exercise violation. Id. at 165-78.[94]

(2). Hands Off How One Worships God.

As addressed in greater detail in the briefing below,[95] review of both the case law and the historical practices and understandings that caused the founding of our state and country make it similarly obvious that Defendant's actions here violate the 247 year old rule that it is none of the Governor's business how one chooses to worship God. Defendant can no more ban communal religious worship on 6 out of 7 days each week, tell a preacher how to baptize the faithful, or impose a "*de facto*" closure of all churches across our state than he can declare himself King. This is why our country was founded, as our foundational charters expressly reflect. Defendant has "no power" to do so under Article I, § 1 and, in the Third Circuit's recent words, the "bedrock principle, enshrined in the Free Exercise Clause of the First Amendment" is that -

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[94] This Court has previously struck down "near total bans" which allowed "only a very limited class of" citizens to exercise only "a narrow sliver" of their fundamental constitutional rights, holding "the ability to exercise" them "must be meaningful and ... preserve an avenue for carrying out [their] core purposes." Bridgeville, 176 A.3d at 638, 636, 639, 652; see id. at 636-39,641,643,652,658.

[95] (See C.D.I.30 at 68-70,63,20-29; C.D.I.38 at 36-37; see also ¶¶ 209-36, 155;A596-603,582).

> Among the most inestimable of our blessings ... [is] liberty to worship our creator in the way we think most agreeable to his will.

Mack, 63 F.4th at 216. It is "obvious" that Defendant's actions to the contrary are "patently violative" of clearly established law.

c. Legal Error #4 - Factually "Same or Even Similar" Earlier Cases Are Not Required.

The Superior Court next erred by requiring Plaintiffs to find factually identical cases addressing church closures and establishment issues occurring during a pandemic. (Tab A at 21-28). But this is legal error.

In the Third Circuit's words, "[t]he Supreme Court does not require that earlier cases share the same or even similar facts for a right to be deemed clearly established." Clark, 55 F.4th at 182.

> As we examine the case law, we must keep in mind that this Court takes a broad view of what constitutes an established right of which a reasonable person would have known. And a right may be "clearly established" even without a precise factual correspondence between the case at issue and a previous case.

Peroza-Benitez v. Smith, 994 F.3d 157, 166 (3d Cir. 2021) (cleaned up and internal citations omitted). "As a result, state officials can still receive fair warning that their conduct is violative even in 'novel factual circumstances' never previously addressed in caselaw." Clark, 55 F.4th at 182 (quoting Hope, 536 U.S.

at 741).[96] For these reasons, "[a] public official ... does not get the benefit of one liability-free violation simply because the circumstance of his case is not identical to that of a prior case." Mack, 63 F.4th at 233 (cleaned up).

d. Legal Error #5 - Ignoring Binding Appellate Precedent in Favor of Foreign Precedent.

The lower court next erred by failing to analyze (or even mention) any of the cited and binding precedent from the Third Circuit, U.S. Supreme Court and this Court and instead relying solely on foreign district court decisions, such as the oft cited Middle District of Alabama. (See Tab A at 22-27). But that is not the way qualified immunity works. Instead, federal law requires first looking to Supreme Court precedent and then to the Third Circuit. Only after these sources have been completely exhausted does one ever look to foreign circuit level authority. Then, only as a last resort, to foreign district courts.[97]

e. Legal Error #6 - Free Exercise.

The only binding precedent ever cited below on Free Exercise was Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S.Ct. 63 (2020). (Tab A at 27-28). The Superior Court recognized its holding that church attendance restrictions

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[96] In Hope, the Supreme Court unanimously agreed on this. See 536 U.S. at 753-54 (Thomas, J. dissenting).

[97] See, e.g. Clark, 55 F.4th at 181.

which "were not 'neutral' or of 'general applicability'" were unconstitutional and "cause[d] irreparable harm," (id. at 27 n.111), but found this could not clearly establish Free Exercise law because the decision postdated the events at issue in our present case. (Id. at 27-28).

The problem with the lower court's approach is the holding in Diocese broke no new ground. Instead, the requirements of "neutrality" and "general applicability" have been the foundation of federal Free Exercise since 1990,[98] and this Court since 1975.[99] Due to space limitations the only cases discussed below are the two influential Third Circuit decisions from 1999 and 2002, holding that if a single exception is made for non-religious conduct, religious conduct must receive the same.[100]

So as properly framed[101] to our case's fact pattern: Was it clearly established that Defendant could not impose a "*de facto*" shutdown and "effectively" close **all**

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[98] See Smith, 494 U.S. 872; accord Lukumi, 508 U.S. 520.

[99] Keegan, 349 A.2d at 17 (striking down on Free Exercise grounds because "[t]he only activity proscribed by the regulation is worship"); id. at 16 (discussing the legality of "allow[ing] religious worship groups the same rights and privileges ... as are accorded other group activities").

[100] An exhaustive analysis is found in the briefing below. (C.D.I.30 at 41-62,39-40; C.D.I.38 at 21-35; C.D.I.33 at 47-50).

[101] See, e.g. Clark, 55 F.4th at 182 (in framing the constitutional right, the "circumstances" and "particularities" matter); Mack, 63 F.4th at 228 ("the specific context of the case" is "essential").

churches in Delaware, impose numerous additional unprecedented restrictions "targeting" them while, at the same time, granting 236 other separate categories of exemptions to thousands of secular businesses all across Delaware, leaving them free of the very restrictions that were, in Chief Judge Connolly's words, "directed solely at" communal religious worship?

(1). 1999 - If the Law Grants a Single Exemption, the Same Must Be Given to Religion.

In Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365 (3d Cir. 1999), the Third Circuit held that the decision to grant a single category of exemptions from the requirements of a rule - but not grant a similar exemption to religion - showed a lack of neutrality, triggering strict scrutiny analysis and a Free Exercise violation. Crystalizing the analysis underlying both Smith and Lukumi, the Court explained that the -

> [Supreme] Court's concern was the prospect of the government's deciding that secular motivations are more important than religious motivations. If anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection.

Id. Under FOP, the granting of a single secular exemption requires the granting of a comparable religious one.

This clearly established the law as of 1999 such that Defendant would know

that his creating not just a single exemption but instead 236 separate categorical ones for secularly motivated activities yet not allowing similar exemptions for religious worship, violates Free Exercise. This is neither new nor novel.

(2). 2002 - Reaffirmed the Exemptions Holding of FOP and More.

In Tenafly, 309 F.3d at 165-72, the Third Circuit again recognized, analyzed and reaffirmed the holdings of FOP, Smith and Lukumi, removing any possible doubt as to their clearly established nature.

Tenafly also held that granting *de facto* exemptions to one particular religion while denying them to another religion also has been clearly established since 1953, id. at 167, when the U.S. Supreme Court held that government action banning certain religious rites of Jehovah's Witnesses while allowing them of Catholics, Protestants and others violated the First Amendment. Fowler v. Rhode Island, 345 U.S. 67, 69 (1953).

This clearly establishes not just the 237 exemptions issue, but also that Defendant's *de facto* exemption of Jewish religious rites of circumcision and the Minyan from his Orders while targeting the Protestant religious rites of baptism and communion has long violated Free Exercise.

f. Legal Error #7 - Suspect Class - Religion.

Suspect class analysis under the Fourteenth Amendment reaches the same

clearly established end.[102] The numerous judicial admissions by the defense and repeated findings by the federal, Chancery and Superior Courts that religion was specifically "targeted" and numerous explicitly religious classifications were created, triggers fatal strict scrutiny analysis. The court below did not address this issue.

g. Legal Error #8 - Establishment Clause.

The court below also conducted no analysis of this issue. Nevertheless,

> The Establishment Clause [ ] stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate.

Engel v. Vitale, 370 U.S. 421, 431-32 (1962).

(1). Our Constitutions.

The plain text of both the Establishment Clause and the last 15 words of Article I, § 1 itself clearly establish the law here.

(2). 1947 - Specific List of Forbidden Acts.

In Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 15-16 (1947), the U.S. Supreme Court gave a list of six actions that constitute the absolute, bare minimum meaning of what the Establishment Clause forbids a state actor from

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[102] See, e.g. Schumacher v. Nix, 965 F.2d 1262, 1266 (3d Cir. 1992); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

ever doing. Defendant did five of them,[103] including dictating to a Baptist pastor how to baptize Baptist believers, precisely the type of "unhallowed perversion" the Establishment Clause was meant to prevent.[104] These are obvious and were clearly established since 1947 as hornbook federal constitutional law.

The court below committed multiple legal errors on this federal law issue.

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[103] (See ¶¶ 294-300,A617-18; C.D.I.30 at 65-67; C.D.I.38 at 37-38),

[104] Engel, 370 U.S. at 432.

III. THERE IS NO ADEQUATE REMEDY AT LAW FOR PLAINTIFFS' IRREPARABLE INJURIES.

A. Question Presented.

Did the Chancery Court err in finding there is an adequate remedy at law for the irreparable injuries Plaintiffs suffered? (See C.D.I.33 at 1-45; C.D.I.43 at 67-105,116-28; A490-99,502-05).

B. Scope of Review.

Review here is *de novo*. See Argument **I.B.** above. Rule 12(b)(1) requires a "realistic assessment of the nature of the wrong alleged ... in order to determine whether a legal remedy is available and fully adequate." Candlewood Timber Grp., LLC v. Pan Am. Energy, LLC, 859 A.2d 989, 997 (Del. 2004).

C. Merits of Argument.

1. The Remedy at Law is Inadequate.

The Chancery Court recognized that equity jurisdiction is established by a "show[ing] that legal remedies would be inadequate." (Tab B at 31-32,42).

a. Irreparable Harm.

The court below concluded that a "[s]howing of irreparable harm" meets this test. (Id. at 31,44,2). Plaintiffs concur.

First, in the same way that there is irreparable harm when a director's action "constitutes a fundamental offense to the dignity of [the] corporate office," Kallick

v. Sandridge Energy, Inc., 68 A.3d 242, 264 (Del.Ch. 2013), so also it is a fundamental offense to the dignity of the Article III Governor's Office for Defendant to ignore multiple express limitations on his "power" under our Constitution.

Second, consistent with nearly 5 decades of legal authority presented by Plaintiffs below (C.D.I.33 at 34), the Chancery Court also recognized "that a denial of the right to worship under the federal and state constitutions constitutes irreparable harm" under the case law. (Tab B at 31). Because Plaintiffs were so denied on at least 29 separate occasions, the irreparable harm test was met and Chancery jurisdiction was established.

Finally, future irreparable injury also exists because of the amount of time it will take to seek emergency injunctive relief the next time the Governor and his successors shut down and otherwise interfere with religious worship in violation of Article I, § 1.[105] The U.S. Supreme Court has specifically identified the "time ... to seek and obtain relief from this Court before another Sabbath passes" and thus missing a single religious service as a key factor in preventing "further irreparable

[105] This puts to the side the fact that the federal court repeatedly expressed frustration at having to decide weighty issues concerning fundamental constitutional rights on a rushed schedule rather than giving them the thoughtful consideration they deserve. (See Bullock 5/28/20 tr. at 48,34-35,41-45,47-49; A84,70-71,77-81,83-85).

harm." Diocese, 141 S.Ct. at 68-69.

But no church pastor can quickly make the decision to file a lawsuit and challenge the government given the nature of the sincerely held religious beliefs at issue which require submission to that same government.[106] Additionally, he must prayerfully weigh the "unprecedented amount of hate mail," the risk of having his church burned to the ground and the related threats to the safety of the flock he has been entrusted to lead.[107]

Only then can he try to find an attorney, which itself is a frustrating and time-consuming process in this unique constitutional law arena where the nature of the irreparable injury suffered is not conducive to damages awards.[108] Churches are not billion dollar secular corporations with their own in-house legal departments and long established relationships with multiple white shoe law firms throughout the state and nation hoping to represent them and reap the financial rewards. Churches are instead religious non-profits, looking for an attorney to

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[106] See, e.g. Romans 13:1-2; Matthew 22:21. The petition to Defendant from 165 Delaware pastors addressed this same problem. (Ex.I at 1;A296). Defendant admits Plaintiffs' religious beliefs require Biblical obedience. (Ans. ¶ 19;A362).

[107] (See C.D.I.33 at 5-6).

[108] The lack of attorneys willing to take such cases is one of the reasons Congress enacted 42 U.S.C. § 1988(b) in 1976. See, e.g. S.REP. 94-1011, 2-6, 1976 U.S.C.C.A.N. 5908, 5909-13.

work *pro bono* or on a contingency basis.

Inevitably, in Delaware at least, such an attorney is a solo or a small firm, and "[i]t takes time to put this kind of material together." (Bullock 5/28/20 tr. at 73;A109). And the more time it takes, the greater the irreparable injury to the pastor's religious worship and other religious constitutional rights. More Sunday morning, Sunday evening and/or Wednesday evening services are missed as the days, weeks and months go by. If it takes the next pastor with the courage to challenge the Governor four weeks to find an attorney, that is many multiples of four times more incidents of irreparable injury suffered.

How do you attach a dollar value to not being able to save someone's eternal soul or not being able to comfort a parishioner, hold their hand and pray after their spouse just died?[109] Would this not be at least roughly analogous to the loss of a "unique opportunity" that has been found to demonstrate the appropriateness of an equitable remedy in the corporate context in the past?[110]

For these reasons, an after-the-fact, multi-year Chancery or Superior Court

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[109] Cf. ZRii, LLC v. Wellness Acquisition Grp., Inc., 2009 WL 2998169, *13 (Del.Ch. Sept. 21, 2009) ("Irreparable harm generally exists where injury cannot be adequately compensated by damages.").

[110] See, e.g. In re Del Monte Foods Co. S'holders Litig., 25 A.3d 813, 838 (Del.Ch. 2011); Hollinger Int'l, Inc. v. Black, 844 A.2d 1022, 1090 (Del.Ch. 2004).

lawsuit does not provide an effective remedy when the irreparable injury is to communal religious freedoms that are lost forever before a lawyer can be secured and a case is prepared and filed.

2. The Factual Record on "Reasonable Apprehension" and Mootness.

The Chancery Court's ruling below that there was no "reasonable apprehension" of Defendant reimposing his policies in the future sufficient to establish equity jurisdiction (Tab B at 4,48-51), was the functional equivalent of a merits ruling on the disputed defense motion that the case was moot, but without any consideration of the fully briefed legal questions of whether this Court's exceptions to the mootness doctrine were met, and the merits test also. (See C.D.I. 33 at 65-71,3-45).

Yet the defense treated the ruling as one in the same and, following transfer to the Superior Court, expressly disclaimed reliance upon mootness as grounds for his renewed motion to dismiss brief stating, "mootness is not at issue here." (S.D.I. 19 at 35). The Superior Court also functionally treated the factual underpinnings of mootness as having been established by the earlier Chancery decision. (Tab A at 45 and n.173).[111]

[111] Contradictorily, the Superior Court also stated that Plaintiffs had argued mootness to the Superior Court and ruled it inapplicable (Tab A at 48), despite the fact it was never briefed in any way whatsoever because the defense had expressly

Second, despite this convoluted history, the following abbreviated record compounded the need for equitable relief, no matter the lens through which it is viewed.[112]

The Bullock settlement agreement did not address in any way the protections of Article I, § 1 or the Establishment Clause but only addressed the lesser and different protections of Free Exercise. Defendant there reserved the right to reimpose all of his prior policies, defended their complete legality and has fought to protect his "power" to do so for more than 3½ years.[113]

Here, we have no consent decree, no binding judicial ruling on the merits, no action by the legislature cancelling his authority, no sworn statement denying in a future emergency the right to affect Sunday worship, and no settlement agreement granting third party rights to enforcement. So it is reasonable to expect

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conceded it was not a grounds being moved upon. Nonetheless, Delaware decisions have rejected the lower court's reasoning, finding claims not to be moot under similar circumstances. See Sanborn v. Geico Gen. Ins. Co., 2016 WL 520010, *10,8 (Del.Super. Feb. 1, 2016); First State Orthopaedics, P.A. v. Employers Ins. Co. of Wausau, 2020 WL 2458255,*3 (Del.Super. May 12, 2020).

[112] The full record is found at C.D.I.33 at 2-45,64-72.

[113] Delaware decisions make clear that such continued defense of prior illegality is key. See Sanborn, 2016 WL 520010, *10, 8; First State, 2020 WL 2458255, *3 (Del.Super. May 12, 2020); accord Fields v. Speaker of Pa. House of Reps., 936 F.3d 142, 161 (3d Cir. 2019); Hartnett v. Pa. State Educ. Ass'n, 963 F.3d 301, 306-07 (3d Cir. 2020).

Defendant will in the future again exercise these powers when the next inevitable future plague or pestilence sweeps the globe, triggering future widespread public restrictions by the Governor. (See Facts at **B.** above).

3. Summary.

Consequently, finding no "reasonable apprehension" was error. There was jurisdiction in equity to define the limits of the Governor's "power." The loss of religious freedom is irreparable.

CONCLUSION

The decisions of the Superior and Chancery Courts should be reversed in all respects.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Supreme Court Rule 14(d)(ii), I certify, based on the word-counting function of my word processing system (Word Perfect X4), that this brief complies with the typeface requirements of Rule 13(a) and the type-volume requirements of Rule 14(d)(i) and this Court's October 26, 2023 Order, as it is prepared in Times New Roman 14-point typeface, and does not exceed 13,000 words, to wit, it contains 12,979 words.

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