IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

In re Covid-Related Restrictions on	**:**	**Consolidated**
Religious Services	**:**	**C.A.No. 21-1036-JTL**

PLAINTIFFS' CONSOLIDATED OPENING BRIEF IN SUPPORT OF THEIR RULE 12(c) MOTION FOR JUDGMENT ON THE PLEADINGS

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Pages**

Constitutions, Statutes and Rules

Other Authorities

NATURE & STAGE OF THE PROCEEDINGS

A. Nature. This is a civil action for declaratory and permanent injunctive relief, as well as compensatory and nominal damages, for the loss of religious freedoms – under Article I, Section 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 emergency in Delaware through June 15, 2020.

B. Stage.

1. The Court's Order. Following the defense request (D.I. 6), the Court Ordered the filing (D.I. 15) of a consolidated Complaint. (D.I. 16). In response to Plaintiffs' concerns (see D.I. 10 at 2-3), the Court ordered Defendant to fairly meet the allegations of the consolidated Complaint. (D.I. 15 at 4).

2. Bad Faith Denials. Defendant declined and, consistent with his obstructive actions (see D.I. 10 ¶¶ 3-5 - listing examples) in the earlier case for Pastor Bullock in federal court,[1] aggressively denied everything. Representative examples include:

a. Quotes From The Holy Bible. Specific quotes from the

[1] (See D.I. 16 (Consolidated Complaint) and 21 (Answer) (jointly hereinafter "Compl./Ans.") ¶¶ 94, 33; see id. ¶ 109 - explaining how the Bullock case eventually resolved).

Old Testament (age: ~2,500 years) and New Testament (~1,900 years) of the Holy Bible are in effect denied under Chancery Court Rule 8(b). (See, e.g. D.I. 21 ¶¶ 46-47, 49-51).

b. Christians Attend Church On Sundays. Similarly, Defendant also denied that for 2,000 years Christians have attended church on Sundays. (Id. at ¶ 48).

c. Plaintiffs Are Church Pastors. Defendant denied Plaintiffs are church pastors or Christians. (Id. ¶ 13)

d. Not Wearing A Mask While Speaking At His Own Press Conferences. In his unsworn, unverified Answer, the Governor Defendant belatedly claims to have worn a mask or face shield while speaking at his press conferences. (Id. ¶ 97). Yet his own official videos of these reveal the opposite.[2]

Second, Defendant was publicly called out by the national and local news media, including the Associated Press, Delaware State News, NBC Philadelphia, CBS Salisbury and U.S. News, 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 House of Worship] must face away from the audience if they are not wearing a face covering or face shield —

[2] See, e.g. Governor John Carney, 5/15/20: Covid Briefing, www.facebook.com/JohnCarneyDE/videos/693900467818572 (last visited on Jan. 25, 2022).

something Carney has not done in his twice-weekly coronavirus news conferences.[3]

e. His Orders "Effectively" Shut Down Religious Worship.

No doubt because it triggers liability under both the Delaware and federal Constitutions (see Arg. **II.F.** and **III.A.2.** below), Defendant denied his well-publicized[4] public admission that his Orders "effectively" shut down religious worship in Delaware (D.I. 21 ¶¶ 121, 91, 93, 151, 241, 292). But, again, his own publicly posted press conference video reveals his admission to this.[5]

f. Rule 8(b) Violation. In a Court of equity, the Defendant did not meet his obligations under Chancery Rule 8(b) to plead in good faith to the

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[3] 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) (all last visited on Jan. 13, 2022).

[4] (See Tab A at p.2 - Plaintiffs' Jan. 17, 2022 spoliation letter to Defendant - discussing a news story in the Delaware press about this admission).

[5] See www.facebook.com/JohnCarneyDE/videos/693900467818572 at approximately 20:00-20:21 (last visited on Jan. 25, 2022). After its initial disappearance, this video reappeared following Plaintiffs' spoliation notice. (Tab A). It is proper to cite the Governor's own statements and news releases to the press. See 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).

historical factual allegations in this case, or even the plain text of his many Orders.[6]

C. This Motion. Nevertheless, because Defendant's underlying misconduct is properly before the Court and considered under Del.R.Evid. (hereinafter "D.R.E.") 201-202, the law of judicial admissions, and also Rule 12(c) standards, this present Motion is brought to address all liability issues. The record includes:

- both separately filed Complaints, verified under oath by Plaintiffs (D.I. 1 in both the Hines and Landow actions), and the consolidation of the same (D.I. 16);
- the unverified Answer (D.I. 21);
- Defendant's many official Orders attached to the original Complaint (D.I. 1); and
- numerous judicial admissions by Defendant's attorneys to Chief Judge Connolly in the Bullock federal court matter about the nature and effect of Defendant's Orders. (See, e.g. Compl./Ans. ¶¶ 95-96, 101).

This is the consolidated Opening Brief of Plaintiffs Pastor Hines and Reverend Landow in support of their motion.

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[6] See Guidelines to Help Lawyers Practicing in the Court of Chancery at 17, courts.delaware.gov/forms/download.aspx?id=99468 ("Parties should take seriously the provisions of Rule 8(b) and not aggressively deny basic facts without a good faith basis for doing so") (last visited on April 10, 2022).

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. (D.I. 16 ¶¶ 20-24, 46-84). This specifically includes in times of "disaster ... or pestilence." (Id. at ¶ 50; see also ¶¶ 192-200).[7] Presented with many of these same Bible verses 47 years ago, the Delaware Supreme Court recognized "Religion, at least in part, is historically a communal exercise."[8] None of this can be reasonably disputed and Plaintiff requests the Court take judicial notice of this under D.R.E. 201-202.

B. The History Of Plagues And Pestilence. 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 contagious diseases, plagues and epidemics which manifested themselves throughout this time frame. Under D.R.E. 201-202, Plaintiff requests the Court take judicial notice of

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[7] Preachers and theologians throughout the centuries have noted the same. (Id. at ¶ 195 – in times of "death struggles" (Martin Luther circa 1500); ¶ 196 – "in times of public calamity" (Williams Cupper 1592); ¶ 198 – "in time of the danger of the plague" (William Scot 1606)).

[8] 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).

the following.

1. Court Decisions. Numerous opinions of the U.S. Supreme Court and the Supreme Courts of our sister states recount or otherwise arise out of such plagues and pestilence. These include: the yellow fever epidemic throughout the 1790's when Delaware was debating and eventually enacting its second Constitution;[9] and the widespread epidemics of both yellow fever and smallpox in the 1890's as Delaware was enacting its currently operative Constitution.[10] The

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[9] 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 "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"); see also In re Girard's Estate, 127 A.2d 287, 319 (Pa. 1956) (recounting the same); Ogden v. Cowley, 2 Johns. 274, 275 (N.Y. 1807) (noting that in 1799 "the yellow fever prevailed in the city of New-York").

[10] 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 is and has been epidemic in many near-by-cities...."); Burbage v. American 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").

case law similarly recounts federal efforts to address contagious diseases after Delaware's third Constitution but before its fourth.[11]

2. 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.[12]

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.[13]

The British also used smallpox to wage germ warfare against General

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[11] See, e.g. Dunwoody v. U.S., 143 U.S. 578, 579 (1892) (recounting a March 3, 1879 Act of Congress "to prevent the introduction of contagious diseases into the United States").

[12] Elizabeth A. Fenn, Pox Americana: The Great Smallpox Epidemic of 1775-82 3 (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.").

[13] 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.[14] And smallpox was responsible for the "Canadian calamity" and "Quebec debacle"[15] 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,[16] an event that lengthened the war and eventually led to General Washington's controversial decision to innoculate the entire Continental Army.[17]

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.[18] Subsequent outbreaks included New York in 1868-75,[19] and the "U.S. Smallpox Epidemic of 1901-03" which raged throughout Boston, New York, Philadelphia, Cleveland and New

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

[15] Pox Americana 260.

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

[17] Pox Americana 260.

[18] Encyclopedia 418-19, 481.

[19] Id. at 482.

Jersey.[20]

3. 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.[21] Charleston, South Carolina was regularly ravaged by similar epidemics, with its first in 1699 and its final lasting from 1792-1799.[22] New York was not spared.[23] Other major epidemic level outbreaks occurred in 1878-79 throughout the Mississippi and Ohio River valleys, eventually ranging from New Orleans up to Pittsburgh.[24]

4. Malaria. As the Wall Street Journal has explained, malaria –

> infection left its mark on nearly every ancient society, contributing to the collapse of Bronze-Age civilizations in Greece, Mesopotamia and Egypt .... [The invention of quinine allowed a cure and] George Washington secured

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[20] Id. at 430, 483.

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

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

[23] Id. at 479.

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

> 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.[25]

During the Civil War, the Union Army alone reported more than 1,300,000 cases of malaria infection amongst its troops.[26]

5. Other Plagues. Others major outbreaks in the relevant time frame include:

- Scarlet fever throughout New England from 1793-95;[27]
- Cholera epidemics swept the U.S. in 1832, 1849, 1866 and 1873;[28]
- Dengue fever epidemics throughout the southern U.S. in 1826-28, 1850-51 and 1878-80;[29] and
- The "Asiatic Influenza Pandemic of 1889-90," in New York, Boston, San Francisco, New Orleans and later in Virginia and South Carolina.[30]

Other historical examples are set forth in the Complaint and not challenged by

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

[26] Encyclopedia 418.

[27] Id. at 479.

[28] Id. at 414-18, 481-82.

[29] Id. at 419, 412, 481, 483.

[30] Id. at 21, 117.

Defendant. (See Compl./Ans. ¶¶ 192-205). None of this can be reasonably disputed under D.R.E. 201-202.

C. The Most Recent Pestilence. On March 13, 2020, Defendant imposed a state-wide lockdown because of Covid-19.[31]

D. Four Categories of Restrictions On Communal Religious Worship. Defendant subsequently created four categories of Orders banning, restricting and/or otherwise interfering in communal religious worship.[32]

1. The Pre-May 15th Orders. 237 categories of "essential" secular businesses and institutions were allowed to operate at full capacity. (Ex. C at 1-4; Ex. B at 4-18; see Compl./Ans. ¶¶ 88-90, 124-28). Although listed as essential (Ex. C at 4; Ex. B at 16; see Compl./Ans. ¶¶ 117-23), churches were limited to 10 persons or less. (Ex. A at 1-2; Ex. E at 6; see Compl./Ans. ¶¶ 117-23).

a. Admission – This "Effectively" Shut Down Communal Religious Worship. As already noted in section **B.2.d.** of the Nature & Stage above, Defendant publicly **admitted** to the Delaware media at his press conference on May 15, 2020, that his Orders here "effectively" shut down religious worship

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[31] (Compl./Ans. ¶¶ 4, 86-87, Ex. B at 1). References to "Ex." are to the Exhibits attached to the December 1, 2021 Verified Complaint (D.I. 1), while "Tab" references are to attachments to this Brief.

[32] All are in the record (see D.I. 1 at Exs. A-E, H, J-K, M-N) and are admissible under D.R.E. 201-202.

in Delaware. (Compl./Ans. ¶¶ 121, 91, 93, 151, 241, 292).

2. May 15th Orders. Another 12 categories of non-essential industries were then reopened and allowed to operate, effective June 1st, at 30% capacity if they practiced basic social distancing requirements. (Ex. H at 15-22, 24-25; Compl./Ans. ¶¶ 138-46). Churches were again excluded. (Ex. H at 25; Compl./Ans. ¶¶ 138-46).

3. May 18th Orders. 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). In the enabling Declaration (Ex. J), Defendant presented churches with a stark, Hobson's choice (id. at 6), either:

> (a). Continue to operate at the pre-existing 10 person or less requirement which, as already noted, Defendant admitted was "effectively" a total shutdown; or
>
> (b). Be allowed to operate at 30% capacity provided you surrender your sincerely held religious beliefs and allow the government to dictate the form and content of your religious worship services in at least 14+ ways detailed in the Complaint.

(See Ex. K at 1-4; Ex. L at 1-2; Compl./Ans. ¶¶ 93, 151-63). Defense counsel admitted this Hobson's choice. (Tab B - 5/28/20 tr. at 59). These conditions included banning:

- all religious services on 6 out of 7 days every week;
- a preacher speaking 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.

(Ex. K at 1-4; Compl./Ans. ¶¶ 93, 150-63). 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). Otherwise, worship continued to be "effectively" banned.

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

Defendant admitted to the federal court "that a substantial number of the specific guidelines" here "are not [of] general application," (Tab B - 5/28/20 tr. at 24, 75, see 22-23, 105-06), as there were no comparable restrictions on any other secular entity, only churches.

b. These Restrictions Allowed Jewish Religious Practices To Continue. The chairman of the Governor's handpicked religious council is a Jewish rabbi. At the time the council contained no Protestant or Catholic clergy

members. (Compl./Ans. ¶ 104). While Defendant banned the touching required for Baptisms (Ex. K. at 4), no similar restrictions were imposed on Jewish circumcisions. (See Ex. K). The federal court was troubled by this differential treatment between "Jewish circumcisions" and "Protestant baptisms." (Tab C - 6/2/20 tr. at 28-29). The 10 person restriction also accords with the minimum necessary for Jewish services, the Minyan. (Compl./Ans. ¶¶ 161-62).

4. May 22nd Forward Orders. On May 22, 2020, Defendant issued a new enabling declaration (Ex. M), with five new pages of regulations effective the next day. (Ex. N). Restrictions continued. (See Compl./Ans. ¶¶ 166-71). For example, the ban on touching Baptisms continued (Ex. N at 4), preachers and singers still were gagged (id. at 2-3), and traditional Communion was again banned. (Id. at 4-5). There were no comparable restrictions on any other secular entity, such as daycares or restaurants serving food, only churches. (Compl./Ans. ¶¶ 166-71, 272-75).

> As to the pastor gag rule (Ex. N. at 2), 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.

(Tab B - 5/28/20 tr. at 38, see 36-41 for context). Baptisms, subject to three prior pages of rules, were permitted but only with no touching. (Ex. N at 4, see 1-3).

This led to the following exchange between the federal court and Defendant's many attorneys:

> 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 the way they have in the guidance that was issued pursuant to the modifications to the State of Emergency declaration?
>
> A. I do not.

(Tab C - 6/2/20 tr. at 7).

E. Imprisonment For Violation. Although many of Defendant's Orders were formally termed "guidelines," the federal court observed "guidance ... is a misnomer." (Tab C - 6/2/20 tr. at 5-6). Despite the terminology, Defendant admitted "they have the force and effect of law." (Tab B - 5/28/20 tr. at 12-14). The very text of the Orders state that their violation "constitutes a criminal offense" (Ex. E § 8; Ex. D § 7; Ex. J § B; Ex. M § F.5.), punishable by 6 months in prison and a $500 fine under, *inter alia*, 20 Del.C. § 3125.

F. Sincerely Held Religious Beliefs. In accord with prior representations (see D.I. 18 at Tab A), Defendant does not challenge the sincerity of Plaintiffs' religious beliefs. (See Compl./Ans. ¶¶ 19-20, 52-53, 56, 62, 65, 74, 79).[33]

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[33] Accordingly, and together with their self-evident religious nature, see Facts at **A.** above and Arg. **III.A.**, **III.D.1.a.** and **II** below, the case law requirement is satisfied. See Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 171 (3d Cir. 2002) (beliefs must be sincerely held and religious in nature); DeHart v. Horn, 227 F.3d 47, 51 (3d Cir. 2000) (same); Africa v. Pa., 662 F.2d

G. Injuries. Pastors Hines and Landow were injured by Defendant's actions (see D.I. 16 ¶¶ 173-77), although these injuries are beyond the scope of the present motion.[34]

QUESTIONS PRESENTED

1. Does the plain text of Art. I, § 1 of the Delaware Constitution's absolute ban on any interference by any government official in the free exercise of religious worship forbid and make illegal all of Defendant's Orders under Count I?

2. Given that Defendant admits his Orders were not generally applicable, and also because they lack facial neutrality, do they survive strict scrutiny under the First Amendment's Free Exercise Clause under Count II?

3. Did Defendant's Orders excessively entangle the State in internal church affairs, have a primary effect of inhibiting religion or otherwise demonstrate a preference for the practices of one religion over another in violation of the First Amendment's Establishment Clause under Count IV?

4. Given Defendant's Orders also implicated additional constitutional freedoms, such as speech, assembly and association, in addition to free exercise,

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1025, 1029-30 (3d Cir. 1981) (same).

[34] See also Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S.Ct. 63, 67 (2020) (per curiam) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

do they survive strict scrutiny under the First Amendment under Count III?

5. Do Defendant's Orders survive strict scrutiny review even though they create an explicit and facially religious suspect classification under the Fourteenth Amendment under Count V?

ARGUMENT

I. STANDARD OF REVIEW.

A. Rule 12(c). Under Rule 12(c), facts and inferences are viewed in the light most favorable to the non-moving party. Chicago Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC, 166 A.3d 912, 917 n.13 (Del. 2017). In addition to the Complaint and Answer, the Court also "may consider documents integral to the pleadings, including documents incorporated by reference and exhibits attached to the pleadings, and facts subject to judicial notice." Jimenez v. Palacios, 250 A.3d 814, 827 (Del.Ch. 2019) (internal footnotes omitted).

B. Judicial Notice. Under D.R.E. 201(d), the "court may take judicial notice" of adjudicative facts "at any stage of the proceeding." The Court "[m]ust take judicial notice if a party requests it and the court is supplied with the necessary information," id. at 201(c)(2), but even in the absence of an explicit request, the decision is at the court's discretion. Id. at 201(c)(1); see Montgomery Cellular Holding Co. v. Dobler, 880 A.2d 206, 226 (Del. 2005).

Such adjudicative facts are "not subject to reasonable dispute" because they are "generally known" in the jurisdiction or "[c]an be accurately and readily determined from sources whose accuracy cannot be reasonably questioned." D.R.E. 201(b). The utility of D.R.E. 201(b)'s "not subject to reasonable dispute" standard is demonstrated by review of the scope of facts to which it has been applied.[35]

Under D.R.E. 202(a), the Court "must take" judicial notice of all forms of Delaware and U.S. laws. Judicial notice also "must be taken" of all private acts, regulations, ordinances and court records if a party requests it and supplies the court with the necessary information. Id. at 202(d)(2). This specifically includes all forms of law of this State, id. at 202(d)(1)(B), and "[t]he records of ... any other court of this State or federal court sitting in or for this State." Id. at 202(d)(1)(C).[36]

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[35] See, e.g. Cooke v. State, 97 A.3d 513, 545 (Del. 2014) (recognizing "sex is a common part of human life"); Malpiede v. Townson, 780 A.2d 1075, 1090 (Del. 2001) (finding a certificate of incorporation "could easily be found in the public files in the Secretary of State's office"); Jianniney v. State, 962 A.2d 229, 230 (Del. 2008) (observing that "many courts have taken judicial notice of facts derived from internet map sites" such as "street locations and driving distances").

[36] Our Supreme Court has relied on both D.R.E. 201 and 202 in finding admissible records taken from other Delaware courts in different proceedings involving the same party. See In re Shearin, 765 A.2d 930, 935-36 (Del. 2000) (per curiam) (finding a verified Complaint and other docket items from an earlier court proceeding "were admissible pursuant to [D.R.E.] 201 and 803(8)"); Tigani v. C.I.P. Assocs., 228 A.3d 409 (Table), 2020 WL 2037241, at *2 & n.16, 18 (Del. 2020) (relying on D.R.E. 202(d)(1)(C) to take judicial notice of earlier

C. Judicial Admissions. Finally –

> Voluntary and knowing concessions of fact made by a party during judicial proceedings (e.g., statements contained in pleadings, stipulations, depositions, or testimony; responses to requests for admissions; counsel's statements to the court) are termed "judicial admissions."

Merritt v. United Parcel Serv., 956 A.2d 1196, 1201 (Del. 2008). They are "traditionally considered conclusive and binding both upon the party against whom they operate, and upon the court." Id. at 1201-02.

D. Summary. Consequently, the Court can consider: documents attached to the complaint; adjudicative facts; court transcript records; judicial admissions found in this and the Bullock federal case; as well as the verifications by both Plaintiffs as to their religious faith and doctrine, and the centrality and sincerity of their beliefs.

II. ART. I, § 1 OF THE DELAWARE CONSTITUTION BARRED ALL THE GOVERNOR'S ACTIONS UNDER COUNT I.

A. Introduction. "It is axiomatic that the State cannot ignore our Constitution." Bridgeville Rifle & Pistol Club v. Small, 176 A.3d 632, 653 (Del. 2017) (en banc).

> [T]he very enumeration of the right takes it out of the hands of government ... the power to decide on a case-by-case basis whether the right *is really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.

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proceedings in the Justice of the Peace Court).

Id. at 660 n.149.

The one sentence Preamble to the Delaware Constitution of 1897 ("Del.Const.") states, "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 that "these rights are essential to their welfare." (emphasis added). Immediately following, the First Freedom of the Delaware Bill of Rights states –

> Although it is the duty of all persons frequently to assemble together for the public worship of Almighty God; and piety and morality, on which the prosperity of communities depends, are hereby promoted; ... 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. at Art. I, § 1 (emphasis added). The Reserve Clause, which encompasses all of Article I continues and states –

> **WE DECLARE THAT EVERYTHING IN THIS ARTICLE IS RESERVED OUT OF THE GENERAL POWERS OF GOVERNMENT HEREINAFTER MENTIONED**.

Id. at Reserve Clause (bolding and capitalization in original). Count I is founded upon the plain and unambiguous meaning of these same words which explicitly

forbid the Governor Defendant from doing what he did. Importantly, however, even if one reviews the history and origin of these words, such analysis reinforces that they mean what they very clearly say.[37]

B. History and Origin Of The Language.

1. 1776 – Delaware's Declaration And Constitution.

a. Origin Of The Language. Section 2 of the Declaration of Rights and Fundamental Rules of the Delaware State ("1776 Declaration"), states–

> That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings ... and [ ] no authority can our ought to be vested in, or assumed by any power whatever that shall in any case interfere with, or in any manner controul the right of conscience in the free exercise of religious worship. (emphasis added)

Article 29 of the Delaware Constitution of 1776 ("1776 Constitution") also states "There shall be no establishment of any one religious sect in this state in preference to another."

b. Absolute Rights. Three categories of absolute rights are

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[37] See, e.g. Randy J. Holland, The Delaware Constitution: How key provisions differ from their federal counterparts, Delaware Lawyer (Fall 2021), at 9 ("when a specific provision is at issue in a state constitution, the history and origin of that particular text must be examined"); In re Request of Governor for an Advisory Op., 905 A.2d 106, 108 (Del. 2006) (noting "the significance of knowing the original text, context and evolution of any phrase that appears in the present Delaware Constitution."); accord Bridgeville Rifle, 176 A.3d at 642.

contained within these two foundational documents.

(1). Abolition Of New Slavery. Article 26 of the 1776 Constitution forbids the holding or sale of persons newly brought into the state in slavery "under any pretence whatever."

(2). Free Exercise Of Religious Worship. As noted above, § 2 of the 1776 Declaration states that "no authority can our ought to be vested in, or assumed by any power whatever" which interferes with or controls the free exercise of religious worship.

(3). Reserve Clause – 28 Specifically Identified "Inviolable" Rights. Finally, in what has been alternately termed a "reserve clause"[38] or an "entrenchment clause,"[39] Article 30 of the 1776 Constitution explains that for 28 specifically identified provisions of the combined 1776 Declaration and Constitution,[40] none "ought ever to be violated on any pretence

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[38] State v. Bender, 293 A.2d 551, 552 (Del. 1972); see Bridgeville Rifle, 176 A.3d at 643.

[39] 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 173 (2020) ("Early State Constitutions").

[40] These include all 23 sections from the 1776 Declaration, and from the 1776 Constitution: the abolition of slavery, the ban on the establishment in preference of a religious sect; the name of the State, and various details regarding the establishment and functioning of the legislative body.

whatever." By doing so, Delaware "created two levels of constitutional provisions: the inviolable" and then ones that could be amended by a specified legislative majority.[41] Notably, Article 30 gave this second layer of no "pretence whatever" inviolable protection to both abolition of slavery and free exercise of religious worship which themselves already contained absolute protection based on their plain language, as noted above.[42]

2. 1792 – New Constitution. The Delaware Constitution of 1792 ("1792 Constitution") made a number of significant changes. Of those relevant, some were as to form but others as to substance.

a. Do Any Absolute Rights Remain? Many sections of Article I of the 1792 Constitution – the Delaware Bill of Rights – use the language "shall," a number of which qualify it in some way.[43] Those to the side, what happened to the three absolute rights above identified from the 1776 foundational documents? Only one remains for certain. One was eliminated entirely. The last was reworked and reworded.

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[41] Early State Constitutions 173.

[42] See id. at 178 n.65 ("the importance of this ban was underscored by its inclusion among the provisions listed in Article [30] that were not to be violated 'on any pretence what[]ever'").

[43] See, e.g. Art. I, §§ 5-13.

(1). Free Exercise Of Religious Worship – Remains.

The only absolute language remaining is found in the new Art. I, § 1, which was created by merging portions of § 2 of the old 1776 Declaration[44] with parts of Art. 29 of the 1776 Constitution, thus combining absolute protection of religious worship with forbidding government preferences for certain types of worship or religious sects. It now stated –

> Although it is the duty of all men frequently to assemble together for the public worship of the Author of the universe; and piety and morality, on which the prosperity of communities depends, are thereby promoted ... **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.

1792 Del.Const. Art. I, § 1 (all emphasis added). For our present purposes, the biggest substantive changes here appear to be:

- the addition of completely new language with no 1776 predecessor noting the "duty of all men frequently to assemble together for the public worship of the Author of the universe;"
- replacing "no authority" from the 1776 Declaration with the more expansive term "no power;" and

[44] The remainder of old § 2 was transferred to the new Preamble. See 1792 Const. Preamble ("Through Divine goodness all men have by nature the rights of worshiping and serving their Creator according to the dictates of their consciences ... as these rights are essential to their welfare ....").

- replacing "any power" from the 1776 Declaration with "any magistrate."[45]

The plain text here is quite broad and makes clear that "no power" can be exercised by "any magistrate" if it interferes with how one's conscience dictates they freely exercise their right of religious worship, and including the newly recognized "duty of all men frequently to assemble together for [ ] public worship..." This absolute language "has remained virtually unchanged since" 1792,[46] including through the later 1831 Constitutional Convention, which was a point of great pride by the Committee on the Bill of Rights at the still later 1897 Convention.

This Bill of Rights is regarded, astonishingly and with great unanimity, by

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[45] This includes executive branch officials. See, e.g. 1776 Const. Art. 7 (referring to the chief executive officer of Delaware as the "President, or Chief Magistrate"); The Federalist #47, at 239 (James Madison) (Dover Thrift ed. 2014) (1788) ("In Delaware, the chief executive magistrate is annually elected by the legislative department."); see also U.S. v. Burr, 25 F.Cas. 30, 34 (C.C.D. Va. 1807) (Marshall, C.J.) (referring to President Jefferson as "the chief magistrate of the nation" and comparing him to the "chief magistrate of a state"); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 483 (2010) (referring to the President as "the supreme Magistrate").

[46] Randy J. Holland, The Delaware Constitution 37 (Oxford Univ. Press, 2d ed., 2017)("The Delaware Constitution"); accord In re Request of Governor, 905 A.2d at 108; see Rodman Ward, Jr. and Paul J. Lockwood, Bill of Rights Article I, in The Delaware Constitution of 1897: The First One Hundred Years 76, 85 (Randy J. Holland & Harvey Bernard Rubenstein eds., 1997) (latter "The First One Hundred Years") (has "never since significantly changed").

> the Members of the Convention, as almost the same document. Gentlemen of the Convention are so earnest and anxious that they may transmit this valuable relic of the former centuries to their children and grand-children, and they might point to themselves with pride, that they have left it simply intact, scarcely a dot from the *I* or a cross from the *t* being omitted.

4 Debates and Proceedings of the Constitutional Convention of the State of Delaware 2386 (1958) (quoted in In re Request of Governor, 905 A.2d at 108) (internal bracketing omitted). The plain meaning of this 246 year old unequivocal language is at the crux of Count I of our case.

(a). Efforts To Remove This Broad Protection Were Rejected. Importantly, the 1792 Constitutional framers recognized just how broad and expansive this provision was and rejected efforts to remove it. As Justice Holland explained –

> During the 1792 Convention, unsuccessful attempts were made to remove the introductory clause[47] as well as the provision 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."

The Delaware Constitution 38. Efforts to remove the words forming the very foundation of our current lawsuit were explicitly rejected in 1792.

(2). Abolition Of Slavery – Eliminated. The 1792 Constitutional framers clearly knew how to eliminate absolute rights because they

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[47] Which notes "it is the duty of all persons frequently to assemble together for the public worship of the Author of the universe." (emphasis added).

completely eliminated the only other independent absolute right contained within the 1776 Constitution – the complete abolition of the slave trade.[48]

(3). Old Reserve Clause – On No " Pretence Whatever" To Touch 28 Specific Rights – Reworked. The concept and words of Article 30 of the 1776 Constitution – forbidding "violat[ion] on any pretence whatever" – were reworked and transferred to a new Reserve Clause which applies to the entirety of the 19 sections of the new Article I of the new Delaware Bill of Rights, and stated, "**We declare that every thing in this article is reserved out of the general powers of government here-in-after mentioned**." 1792 Del.Const. Reserve Clause (emphasis in original). Stated another way, no power that can be exercised by Delaware government – including by the Legislature (Article II), the Governor (Article III) or the Judiciary (Article VI) – is permitted to change anything contained within Article I unless: its plain terms so permit;[49] or, the Constitution is properly amended, Bender, 293 A.2d at 554, which has

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[48] See Early State Constitutions 178 n.65 ("The 1792 constitution removed this article.").

[49] As noted, some of the Article I rights have qualifying terms. See, e.g. Art. I, § 5 ("responsible for the abuse"); Art. I, § 6 ("unreasonable"); Art. I, § 7 ("unless by"); Art. I, § 8 ("except in cases"); Art. I, § 9 ("according to such regulations as shall be made by law"); Art. I, § 10 ("but by authority of the Legislature"); Art. I, § 11 ("Excessive"); Art. I, § 12 ("sufficient"); Art. I, § 13 ("unless").

happened "many times over the last century." In re Request of Governor, 905 A.2d at 107. The Reserve Clause was "unanimously approved" by the delegates at the 1792 convention. Bridgeville Rifle, 176 A.3d at 643 n.50.

C. Plain Language Today. Review of the plain language of the current Delaware Constitution (see Arg. **II.A.** above) reveals that it contains three separate and independent protections which make Defendant's actions illegal.

1. Article I, Section 1. Under the plain text of Art. I, § 1, the Governor has "no power" whatsoever to interfere with the free exercise of religious worship, which is noted to include "frequent[] ... assembl[y] together for [ ] public worship of Almighty God." This is an absolute right. This is the clear and unambiguous meaning of its plain terms.

2. Preamble. The Preamble also notes the people's same natural "rights of worshiping ... their Creator" and finds it "essential to their welfare." Del.Const. Preamble. This reaffirms the importance of the explicit right to worship that follows immediately in Art. I, § 1.[50]

3. Reserve Clause. Continuing, the Reserve Clause explicitly

[50] See Bridgeville Rifle, 176 A.3d at 647-48 (explaining that the existence of a right in the Preamble affirms the importance of a right found later in the Constitution); Young v. Red Clay Consol. Sch. Dist., 122 A.3d 784, 841 (Del.Ch. 2015) (a judge "should look to embodiments of those concepts that have been deeply and widely endorsed, such as indications from other provisions of the Delaware Constitution").

reaffirms that the position and authority of the Governor is unable to impinge upon anything in the Delaware Bill of Rights, of which Art. I, § 1 is a part.[51] The Reserve Clause cannot be "ignore[d]." Bridgeville Rifle, 176 A.3d at 643 n.49.

4. Summary. The Governor lacks any legal authority whatsoever, and so is powerless, to interfere with the free exercise of religious worship in Delaware. Given that his Orders "effectively" closed all religious worship in the State, also eventually banned Baptism and person-to-person Communion, invented new rituals, excluded the elderly and gagged preachers, among other things, they illegitimately violated the plain and unambiguous text of the Delaware Constitution, and all of its predecessors going back to 1776.

D. Case Law Specific To Art. I., § 1. Delaware courts have only briefly touched on the nature and scope of this clear language addressing the free exercise of religious worship, but two of these cases have recognized the absolute nature of the right.

1. "Legislation Affecting That Right Is Prohibited." In Delaware Trust Co. v. Fitzmaurice, the Chancery Court succinctly stated that under Art. I, § 1, "[r]eligious freedom is guaranteed to all citizens, and any legislation affecting

[51] In its original form in the 1792 Constitution, the Reserve Clause was bolded for emphasis. Later in the 1831 Constitution it also was put in all capital letters. It remains in that form today – bolded in all capital letters – to ensure future generations get the message.

that right is prohibited." 31 A.2d 383, 386 (Del.Ch. 1943) (emphasis added). Note, "any legislation ... is prohibited." The right is absolute.

2. Applies To "Any Magistrate ... In Any Case." The Delaware Supreme Court has agreed that the plain text of Art. I, § 1 "enjoin[s] 'any magistrate ... in any case' from interfering with the free exercise of religious worship" and found it to be of "equal force" to the First Amendment. East Lake Methodist Episcopal Church, Inc. v. Trustees of the Peninsula-Del. Annual Conf. of the United Methodist Church, Inc., 731 A.2d 798, 805 n.2 (Del. 1999) (en banc). "[A]ny magistrate" in "any case" is "enjoin[ed]" from "interfering." The right is absolute.[52]

3. It Is Not "Interpreted Identically" To The First Amendment. Finally, the Delaware Supreme Court, again sitting en banc, has specifically noted that the Art. I, § 1 decision in East Lake represents the primary example that "the Declaration of Rights in the Delaware Constitution has not always been interpreted identically to the counterpart provisions in the federal Bill of Rights." Doe v. Wilmington Hous. Auth., 88 A.3d 654, 661 (Del. 2014) (en banc); see id. at n.23 (citing East Lake on the civil side as well as various criminal cases). Stated another way, our Supreme Court sitting en banc cited East Lake as the

[52] The meaning of the phrase "equal force" here was clarified 15 years later, as discussed in the next subsection.

primary example of the Delaware Constitution providing broader protections than the U.S. Constitution.

E. How To Interpret Our Constitution? "Delaware judges cannot faithfully discharge the responsibilities of their office by simply holding that the Declaration of Rights in Article I of the Delaware Constitution is necessarily in 'lock step' with the United States Supreme Court's construction of the federal Bill of Rights." Dorsey v. State, 761 A.2d 807, 814 (Del. 2000). As this Court has explained –

> Delaware jurisprudence generally favors the primacy model and resists the lockstep model. Skepticism about lockstep interpretations is particularly strong for provisions which ... appear in Delaware's Declaration of Rights.

Young, 122 A.3d at 812.[53] "Underlying this skepticism is a coherent judicial philosophy based on federalism and dual sovereignty." Id. at 813.[54]

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[53] See Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law 174 (2018) ("A grave threat to independent state constitutions, and a key impediment to the role of state courts in contributing to the dialogue of American constitutional law, is lockstepping: the tendency of some state courts to diminish their constitutions by interpreting them in reflexive imitation of the federal courts' interpretation of the Federal Constitution.")("51 Imperfect Solutions").

[54] See, e.g. Robert F. Williams, The Law of American State Constitutions 198 (2009) (addressing the "strong argument" that "states and their constitutions" are "part of an interlocking plan of federalism devised collectively by the people of the nation and maintained by them as part of a comprehensive plan designed to serve the overriding national purpose of protecting the liberty of all Americans.") ("American State Constitutions") (quoting James A. Gardner, State Constitutional

"Consequently, the Delaware Constitution, like the constitutions of certain other states, may provide individuals with greater rights than those afforded by the United States Constitution. Put simply, state charters are the foundations of American constitutional law."[55]

To aid in this analysis, our Supreme Court laid out seven non-exclusive factors that should be considered in determining if a state constitutional provision provides broader protection than a federal counterpart. Doe, 88 A.3d at 662-63. Six appear relevant.

1. Textual Language. "Any analysis of a Delaware Constitutional provision begins with that provision's language itself." In re Request of Governor for Advisory Op., 950 A.2d 651, 653 (Del. 2008). As explained below, this Court need look no further given its clarity.

a. Clear And Unequivocal Language. As the Delaware Supreme Court has long made clear, "[w]e are not required to apply general principles of constitutional law to resolve a question which the Constitution itself

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Rights as Resistence to National Power: Toward a Functional Theory of State Constitutions, 91 Geo.L.J. 1003, 1005 (2003)).

[55] Young, 122 A.3d at 813 (ultimately quoting Randy J. Holland, State Constitutions: Purpose and Function, in First One Hundred Years 5, 18) (internal punctuation and footnote omitted); see 51 Imperfect Solutions 1 ("virtually all of the foundational liberties that protect Americans originated in the state constitutions and to this day remain independently protected by them.").

specifically addresses. If the language of the Constitution is clear and unequivocal there is no room for judicial construction." Barron v. Kleinman, 550 A.2d 324, 326 (Del. 1988).[56]

b. Distinctive Language And Wording. The "phrasing of a particular provision ... may be so significantly different from the language used to address the same subject in the federal Constitution that we can feel free to interpret our provision on an independent basis." Doe, 88 A.3d at 662. This is true even when the provisions "share a similar historical context," id. at 665, if it has "distinctive language" from the federal counterpart. Id.

(1). 800% More Words. There are 800% more words (128) addressing religious worship and preferences in Art. I, § 1 than the mere 16 used in the First Amendment's Religion Clauses. If the 23 related words

[56] This has long been the law. See Opinion of the Justices, 290 A.2d 645, 647 (Del. 1972) (when faced with "clear and unequivocal language," one does not even look to legislative history because "there is no room for judicial interpretation, construction, or search for intent"); Marker v. State, 450 A.2d 397, 399 (Del. 1982) ("The courts have discretion to construe the language of the Constitution only when it is in some way obscure or doubtful in its meaning. Conversely, where the language is clear and unequivocal, the Constitution must be held to mean that which it plainly states, there being no room for construction by the courts.")(internal citation omitted); In re Opinion of the Justices, 575 A.2d 1186, 1189 (Del. 1990) ("the role of the judiciary is limited to giving that language its literal effect.").

addressing religious worship and liberty in the Preamble are included,[57] that increases to an almost 944%.

(2). Expressly Covers "Worship". Additionally, Art. I, § 1 expressly uses the word "worship" five times (and once in the Preamble), while worship is never mentioned in the First Amendment. As this Court has noted, "[a]n implied right is not the same thing as an express right." Young, 122 A.3d at 814. This right is express in Delaware.

(3). Expressly Covers Frequent "Assembl[y] Together" For "Public Worship" By Delawareans. Additionally, the "duty" of Delawareans "frequently to assemble together for [ ] public worship" expressly addresses public gatherings, not merely private prayer in private homes, and forbids government interference therewith. There is no such corollary in the First Amendment.

(4). Total Ban On Interference By "Any Magistrate" In "Any Case". Continuing, unlike Art. I, § 1 which specifically contemplates, and explicitly forbids the exercise of "power" by "any magistrate" in "any case" that can interfere with how the right of conscience manifests itself in religious worship, the First Amendment, again, contains no such corollary, its plain text

[57] As Delaware law requires. (See footnote 50 above.)

extends only to Congress and has only been extended by court decision to others.

(5). Double Protection – The Reserve Clause.

Similarly, there is no federal corollary to the Reserve Clause that expressly removes any tampering whatsoever with this right from the powers of government. We can call this the 'we really mean it' clause.

2. Legislative History. Although this step, and others, are unnecessary because the language is clear and unambiguous, its review reaches the same conclusion. Here, that legislative history is "largely coterminous with the development of the Delaware Constitution." Young, 122 A.3d at 819.

First, as already noted above, the history at the 1792 Constitutional convention demonstrates that the breadth of Art. I., § 1 was expressly considered yet the convention rejected efforts to cut back and limit its protections.

Second, as the Delaware Supreme Court has explained, the 1792 Delaware Constitutional convention was held in the immediate aftermath of Delaware's ratification of, *inter alia*, the First Amendment in 1790. The 1792 Delaware convention was held "to enumerate, and more precisely define, the Rights reserved out of the general Powers of Government." Bridgeville Rifle, 176 A.3d at 646 (citing various minutes and legislative history) (emphasis added). This is exactly what they did. Although it could have cut back upon and chosen to parrot the

cribbed 16 words of the First Amendment's protections, that approach was rejected and the expansive language and absolute protections of the 1776 Constitution and Declaration were carried forward, strengthened and ratified.

Finally, 105 years later at the Constitutional convention that ultimately ratified our present Delaware Constitution, the "long and unique heritage of ... the history of Delaware," already addressed above, was noted as an important factor in declining to amend Article I."[58]

3-4. Preexisting State Law And State Traditions. Merging two of the factors, organic Delaware law, reflected in an unbroken chain of constitutional protections going back to 1776 has long been concerned with, and indeed expressly outlawed, the very conduct challenged herein.

5. Structural Differences. Unlike the specifically enumerated powers granted to the federal government in the U.S. Constitution –

> Our State Constitution, on the other hand, serves only to limit the sovereign power which inheres directly in the people and indirectly in their elected representatives. Hence, the explicit affirmation of fundamental rights in our Constitution can be seen as a guarantee of those rights and not as a restriction upon them.

Doe, 88 A.3d at 662.[59] This –

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[58] Bill of Rights Article I 78 (quoted in Young, 122 A.3d at 822).

[59] See American State Constitutions 3 ("A state constitution ... provides limitations on the otherwise plenary, residual, sovereign power of states to make

> structural distinction has particular salience in light of the important role that the declarations of rights in state constitutions long played in protecting fundamental freedoms. At the time of the ratification of the United States Constitution in 1787, the declarations of rights in state constitutions were paramount.

Young, 122 A.3d at 825-26. Moving forward a century, "[w]hen delegates during the Convention of 1896-97 decided to maintain the Declaration of Rights without change ... they understood themselves to be affecting in the most direct way possible the rights they would possess vis-à-vis their state government." Id. at 826. As this Court has long explained, specific to Art. I, § 1, such "constitutional guarantees are limitations on the powers of the government, not on the rights of the governed." Del. Trust Co., 31 A.2d at 389. Here, this structure doubly forbade any interference whatsoever in the free exercise of public assembly for religious worship.

6. Public Attitudes. In the same way that "public attitudes" are reflected in laws enacted by the General Assembly, Doe, 88 A.3d at 665, so also are they reflected in Delaware's long, unbroken constitutional tradition dating back to 1776 of absolute protection of the right to religious worship and a complete ban on any government interference whatsoever.

F. "Near Total Bans" On Constitutional Rights Are Never Legal. Ours

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law and govern themselves.")

is not the first Delaware case in which an executive branch official has imposed rules which effectively banned the exercise of a fundamental constitutional right. The executive actions affecting the Art. I., § 20 right to bear arms in Bridgeville Rifle, 176 A.3d 632, are instructive and were described as:

- "result[ing] in a near total ban of firearms," id. at 636; accord id. at 639;
- "[t]he practical implication of this regulatory scheme is the prohibition of all firearms," id. at 637;
- "[i]n effect ... [it] ... completely bans firearms," id. at 637;
- "acts as a total ban," id. at 637; accord id. at 641, 652, 658;
- "permit[ing] only a very limited class of" citizens "to exercise a narrow sliver of their Section 20 rights," id. at 652; and
- "can a fundamental constitutional right be eliminated entirely, or virtually entirely." Id. at 639.

The en banc Court explained that "the ability to exercise Section 20's fundamental rights must be meaningful and that the State must preserve an avenue for carrying out [the Section's] core purposes." Id. at 638. Each "separate clause" must be given the meaning its plain language requires. Id. at 643. The Court also emphasized the importance of the question of whether the state actor "had the authority to enact such unconstitutional regulations in the first place." Id. at 639.

Here, Defendant Carney's admission that the effect of his Orders was the

shutdown of in person indoor religious worship throughout Delaware indicates they were the functional equivalent of the "practical," "near total," "[i]n effect ... complete[ ] ban" at issue in Bridgeville Rifle. This cannot stand because the right to assemble, in person with others to publicly worship God is an explicitly protected Delaware Constitutional right that was taken entirely out of the hands and power of government to interfere with or otherwise meddle in.

G. Test To Apply. The "Delaware Constitution may provide broader or additional rights than the federal constitution, which provides a floor or baseline rights." Bridgeville Rifle, 176 A.3d at 642 (internal punctuation omitted).

1. Absolute Right. For the reasons explained at length above, the clear and unequivocal words of Art. I, § 1 create an absolute right to communal worship, belief and practice. Our many constitutional framers were highly intelligent persons, long experienced with both plague and pestilence, such as smallpox, and yet they, nevertheless, expressly created such an absolute constitutional right and imposed a double ban on government interference with this right.

2. Compelling State Interest, Narrowly Drawn. Alternatively, for the reasons set forth in the Complaint (D.I. 1, 16 ¶¶ 7-8), the Sherbert v. Verner,

374 U.S. 398, 404 (1963), test should be adopted,[60] with a threshold of "incidental" burden, not "substantial," based on the holding of the Delaware Supreme Court in Keegan which explained that "even an 'incidental burden' on the free exercise of religion must be justified by a 'compelling state interest.'" 349 A.2d at 17.[61] Accordingly, a law that imposes an incidental burden on religious worship, belief or practice can be sustained only if it is narrowly tailored to serve a compelling state interest, even if the law is of general applicability. Under the analysis found in Argument **III.F.** below, no such compelling state interest, narrowly drawn exists.

3. Smith/Lukumi Approach. At minimum, the current mandatory minimum Smith/Lukumi test (D.I. 16 ¶¶ 10-11), addressed in greater detail in Arguments **III** and **V** below, should apply. For the reasons set forth there, it cannot be met either.

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[60] See, e.g. Wisconsin v. Yoder, 406 U.S. 205, 220 (1972)("unduly burdens the free exercise of religion"); Frazee v. Ill. Dept. of Employ. Sec., 489 U.S. 829, 832 (1989) (both applying the Sherbert test).

[61] This remains the law today. See, e.g. Tenafly, 309 F.3d at 170 ("Under Smith and Lukumi, however, there is no substantial burden requirement when government discriminates against religious conduct. Instead, the plaintiffs need to show only a sufficient interest in the case to meet the normal requirement of constitutional standing.") (internal citations and punctuation omitted); Emp. Div. v. Smith, 494 U.S. 872, 887 (1990) ("courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.").

III. DEFENDANT'S ACTIONS WERE NEITHER NEUTRAL NOR GENERALLY APPLICABLE AND FAIL STRICT SCRUTINY REVIEW UNDER THE FREE EXERCISE CLAUSE AND COUNT II.

A. Bans On Attending Religious Worship Services Always Have Been Held Unconstitutional. "The 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 – where the government took actions which outright forbade, or otherwise interfered with, attendance at worship services – is telling. Both pre and post Covid, such actions have universally been held to violate the First Amendment.

1. Pre-Covid. Briefly, in Keegan, the Delaware Supreme Court 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.

Similarly, in Smith, the U.S. Supreme Court observed "[i]t would be true, we think ... 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." 494 U.S. at 877.

Finally, in Tenafly, the Third Circuit addressed discriminatory actions by a Pennsylvania borough that had the effect of creating an "inability to attend synagogue on the Sabbath." 309 F.3d at 170. In a comprehensive analysis, our Circuit struck this down as a clear free exercise violation. Id. at 165-78.

Defendant's bans on "assembling ... for a worship service" on the "Sabbath" and "sacramental use of bread and wine" were illegal under just these precedents alone.

2. Post-Covid. In Diocese of Brooklyn, 141 S.Ct. 63, the U.S. Supreme Court addressed an identical 10 person restriction on worship services and found "[i]f 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, and found this unconstitutional because such illegal actions "by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty." Id. at 68. Precedent over this 47 year span affirms that the Governor ripped "the very heart" out of "religious liberty" in Delaware with his 10 person ban which, he admits, "effectively" shut down communal religious worship. (Facts at **D.1.a.** above).

B. The Governing Legal Test. "[G]overnment may not ... impose special

disabilities on the basis of ... religious status." Smith, 494 U.S. at 877. This includes "indirect coercion or penalties ... not just outright prohibitions." Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S.Ct. 2012, 2022 (2017); see id. ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege"). Accordingly, a law which burdens religious practice and fails one of the interrelated requirements of general applicability or neutrality receives strict scrutiny review. Lukumi, 508 U.S. at 531-32.

C. The Governor's Orders Were Not Generally Applicable. "The Free Exercise Clause protects religious observers against unequal treatment and inequality results when a [government official] decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." Lukumi, 508 U.S. at 542-43 (internal punctuation and citation omitted).

1. Defendant Admitted His Orders Fail This Requirement. Under pointed questioning by the federal court, Defendant's counsel admitted in a binding judicial admission that his Orders "are not [of] general application." (Facts at **D.3.a.** above). This lack of general applicability admission alone triggers strict scrutiny under Smith/Lukumi.

2. The District Of Delaware Also Recognized The Lack Of General Applicability. As Chief Judge Connolly repeatedly observed, "it's very clear that the guidance is not a general application." (Tab B - 5/28/20 tr. at 24, 75; see also Tab C - 6/2/20 tr. at 18-19), and instead "is specifically directed to communities of worship ... [in a way] that is not prescribed with respect to any other types of entities other than communities of worship." (Tab B - 5/28/20 tr. at 23).

3. The Delaware Supreme Court Previously Has Struck Down Such Targeting Of Religious Worship. In the Keegan decision where the Delaware Supreme Court struck down the University's ban on the Roman Catholic Mass, key to the Court's legal reasoning was the finding that the ban was specifically targeted at religious worship and religious worship alone.

> 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....

Keegan, 349 A.2d at 17-18. This has been Delaware's interpretation of the First Amendment for 47 years.

4. The Plethora Of Exceptions Proves This Underinclusiveness. In its most recent Free Exercise decision from June 2021, the U.S. Supreme Court specifically held that the very existence of a mechanism to grant exemptions

automatically renders the policy not of general applicability, even if no exemption has actually been granted yet.

> The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless of whether any exceptions have been given, because it invites the government to decide which reasons for not complying with the policy are worthy of solicitude.

Fulton, 141 S.Ct. at 1879. Thus, when the government has the discretion to grant any secular exemptions whatsoever to a law, the refusal to extend such exemptions to a religious entity "devalues religious" actions, "judging them to be of lesser import than nonreligious" actions. Lukumi, 508 U.S. at 537. And as the Third Circuit has explained repeatedly, any system of exemptions, be they "categorical" or "individualized" triggers strict scrutiny review under Smith/Lukumi. Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365 (3d Cir. 1999).[62]

Here, the widespread system of at least 237 exemptions allowing the opening of numerous secular entities throughout the state completely undermines the Governor's stated purpose of forcing churches to remain closed to prevent the spread of disease. This is true even when "public health hazards" and "health

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[62] Since FOP in 1999, Third Circuit law has clearly established that the granting of only a single exemption requires that such an exemption also be granted to a religious person. See also Tenafly, 309 F.3d at 166-67. In Fulton in 2021, the Supreme Court explained it is the very existence of an exception system that is key, not the granting itself.

risks" are at issue if religious institutions are being forced to bear the burden of mitigating those risks to an extent not required of secular institutions. Lukumi, 508 U.S. at 544-45. Here, the Governor "has not explained why commercial operations ... do not implicate [his] professed desire to prevent [the risk] and preserve the public health." Id. at 545. The Orders –

> have every appearance of a prohibition that society is prepared to impose upon [churches] but not upon itself. This precise evil is what the requirement of general applicability is designed to prevent.

Id. at 545-46 (internal punctuation and citation omitted). Any "underinclusive" government approach is not generally applicable as a matter of law under Lukumi. Id. at 543-46.

D. The Governor's Orders Were Not Neutral Either. "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." Id. at 533.

1. They Lack Facial Neutrality As Written. The "minimum requirement of neutrality is that a law not discriminate on its face." Id. "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." Id. Here, fatally, no Order is facially neutral.

a. The Words Used. The Governor's Orders repeatedly use

phrases such as "Houses of Worship," "Places of Worship," "Worship Services," "places of religious expression or fellowship," "clergy," "Faith-based communities" and "Religious Facilities," and carve them out for special disfavored treatment while others specify down to the jot and tittle how churches are permitted to worship God.[63]

That these Orders are facially religious is self-evident from their content. First, "worship" is defined as "a form of religious practice with its creed and ritual" or "reverence offered a divine being or supernatural power."[64]

Second, because the religious meaning of the word "worship" is deeply embedded in the Delaware Constitution,[65] this also demonstrates the Orders' religious nature. "Worship" is clearly a religious term without secular meaning, as are the many other religious terms used by the Orders.

b. Chief Judge Connolly Found Religion Was Targeted. In Bullock, Chief Judge Connolly observed that Defendant's Orders were "directed specifically to practices that are religious and only religious" (Tab C - 6/2/20 tr. at

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[63] (See Ex. A at 1-3; Ex. K at 1-4; Ex. N. at 1-5; Ex. B at 16; Ex. J at 5-6; Ex. H at 25).

[64] "Worship" Merriam-Webster.com Dictionary, Merriam-Webster, www.merriam-webster.com/dictionary/worship (last visited on Apr. 10, 2022).

[65] See Arg. **II** above.

5), including, among other things, "prescrib[ing] the manner in which a baptism is to be conducted." (Id. at 8). In response to pointed questioning, Defendant's attorneys admitted they knew of no "other occasion in Delaware law or in any other law in the United States where specific procedures have been prescribed for baptisms" by the government in the way Defendant did. (Facts at **D.4.** above). As the Court also noted:

- "I'm just at a loss" as to why Defendant is issuing orders "directed solely at communities of worship." (Tab C - 6/2/20 tr. at 9-10).
- "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 religious organization, that ought to tell you something." (Id. at 10-11).
- "you've got guidance that is specifically directed to communities of worship that have the force of law that is not prescribed with respect to any other types of entities..." (Tab B - 5/28/20 tr. at 23).

2. They Lack As Applied Neutrality. The Free Exercise Clause also "forbids subtle departures from neutrality," "covert suppression" of religion as well as "governmental hostility which is masked, as well as overt." Lukumi, 508 U.S. at 534. So a court "must survey meticulously the circumstances of government categories to eliminate ... religious gerrymanders." Id.

a. The Admitted Discriminatory Effect Demonstrates The Lack Of Neutrality. "[T]he effect of a law in its real operation is strong evidence

of its object." Id. at 535; Tenafly, 309 F.3d at 167.[66]

As noted earlier, in Diocese of Brooklyn the Supreme Court specifically considered such 10 person limits and struck them down because their effects lack neutrality and "strike at the very heart of the First Amendment's guarantee of religious liberty." 141 S.Ct. at 68.

Here, the Governor also admitted the 'effect' of his pre-May 18th Orders was the wholesale closure of churches throughout Delaware, which ends the issue as a matter of law. In his own words, "[w]e just limited public gatherings to 10 or fewer, which effectively, for many of those places of worship meant that there wasn't a way for them to stay open." (Facts at **D.1.a.**) (emphasis added). This effect lacked neutrality.

b. Widespread Exemptions Violate Neutrality. For reasons similar to those already addressed above, the 237 separate categories of exemptions also demonstrate the lack of neutrality. See Tenafly, 309 F.3d at 166 ("the neutrality principle applies with equal force when government creates categorical, as opposed to individualized, exceptions for secularly motivated

[66] The Third Circuit has explained "the objective effects" of a government action can be sufficient to establish lack of neutrality, even when the enabling statute was facially neutral. Tenafly, 309 F.3d at 168 n.30.

conduct").[67] This includes both "tacitly or expressly granted exemptions." Id. at 167.

In doing so, the Governor "devalues" religion, judging it to be "of lesser import" than shopping malls, law firms, financial services, liquor stores and many others which were allowed operate. Such "selective, discretionary application ... violates the neutrality principle" because it "devalues" and "singles out ... religiously motivated conduct for discriminatory treatment." Id. at 168 (internal punctuation omitted).

c. The Orders Proscribe More Religious Conduct Than Necessary. Additionally, when a law "proscribe[s] more religious conduct than is necessary to achieve their stated ends[,] [i]t is not unreasonable to infer" that the purpose of the law is "to suppress the conduct because of its religious motivation." Lukumi, 508 U.S. at 538.

Here, the Governor had already determined that the use of social distancing practices by law firms, liquor stores, big box stores, and many others would serve

[67] The importance of the neutrality principle to First Amendment analysis has been clearly established in Delaware for many decades. See Keegan, 349 A.2d at 16 ("neutrality is the safe harbor in which to avoid First Amendment violations").

the government's interests.[68] But rather than apply those same social distancing practices to church services, he instead proscribed more religious conduct than necessary and entirely shut down religious worship services. Such unequal application of social distancing principles and selective enforcement of mandatory shutdowns violates Lukumi and long established non-discrimination principles of the Fourteenth Amendment,[69] as well as the First.[70] As the Supreme Court has explained specific to the COVID context, the "state cannot assume the worst when people go to worship but assume the best when people go to work." Tandon, 141 S.Ct. at 1297.

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[68] The U.S. Supreme Court relied upon comparisons to big box stores, retail establishments, factories and schools in striking down the 10 person worship limit. See Diocese of Brooklyn, 141 S.Ct. at 66-67; see also Tandon v. Newsom, 141 S.Ct. 1294, 1297 (2021) (per curiam) (comparing a three household limit on at home religious services to "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants.").

[69] See, e.g. Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (if a law "is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.").

[70] See, e.g. Cox v. La., 379 U.S. 536, 557-58 (1965) ("It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or ... the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute.").

d. Violation Of The Delaware Constitution Demonstrates Lack Of Neutrality Also. As exhaustively addressed in Argument **II** above, the plain text of the Delaware Constitution strips the Governor of power to interfere with public assembly for religious worship. He cannot ignore the foundational charter of our State. That he nevertheless did so is compelling evidence itself.[71]

For the reasons set forth above, the Defendant demonstrated a clear lack of both neutrality and general applicability by protecting secular interests more than comparable religious ones. Yet the Free Exercise Clause will not stand for such targeted religious discrimination, no matter how well-meaning or paternalistic the intent behind it. Here -

> the unexplained breadth of the ban on religious services, together with its haven for numerous secular exceptions, cannot co-exist with a society that places religious freedom in a place of honor in the Bill of Rights: the First Amendment.

Roberts v. Neace, 958 F.3d 409, 416 (6th Cir. 2020) (per curiam).

E. Meddling In the Faith And Mission Of The Church Calls For Strict Scrutiny Analysis. Finally, the U.S. Supreme Court separately has clearly held that even in situations where a law satisfies the requirements of Smith because it is

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[71] See, e.g. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977) ("Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.").

both neutral and generally applicable, courts nevertheless still must require strict scrutiny analysis if it meddles in "an internal church decision that affects the faith and mission of the church itself." Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012); accord Trinity Lutheran, 137 S.Ct. at 2021 n.2.[72]

In our present case, Defendant improperly meddled in at least three ways affecting the very mission and faith of Plaintiffs' churches.

1. The Lord's Supper. One of two fundamental sacraments, or means to God's grace, is the Lord's Supper, or Communion. (D.I. 16 ¶ 79-84). The U.S. Supreme Court in Smith opined that to prohibit "sacramental use of bread and wine," violated free exercise. 494 U.S. at 877. But the Defendant in his May 18th Order explicitly banned person to person Communion and made other alternative forms of Communion impossible given other restrictions.

> There shall be no exchange of the elements person-to-person or use of a common cup. We understand that certain faiths may require Communion to be administered person-to-person. Unfortunately, this is not permitted at this time.

(Ex. K at 3).

2. Baptisms. Although a key sacrament to all Christians, as the

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[72] Thus, this has overlaps with aspects of Establishment Clause analysis addressed in Argument **IV** below.

name suggests, nothing is more fundamental to Baptists than the baptism of new believers. (D.I. 16 ¶¶ 74-78). But the Order forbids a pastor from holding the person they are baptizing. (Ex. K at 4 - "the officiant shall not hold a candidate for baptism"). But Baptism is a physical sacrament requiring physical contact while dunking an adult under a pool of water. Yet Defendant's Orders nevertheless, for example, dictated how a Baptist church was to go about baptizing Baptist believers, requirements which – even Defendant's own attorneys admit – have no precedent "in Delaware law or in any other law in the United States." (Facts at **D.4.** above).

3. Gagging Preachers. Simply stated, nothing is more fundamental to a preacher than the ability of his audience to hear what he says as he preaches the Gospel.[73] Indeed, problems with hearing the words of someone speaking who is wearing a mask or facing the wall instead of facing his audience are self-evident. However, the Defendant required a Pastor to wear a face-mask while preaching to his congregation and, if he refused, that he turn his back to his congregation and preach to the front sanctuary wall of his Church. In response to the federal court's careful inquiry about whether the requirement was being perhaps misinterpreted, Defendant's lawyers helpfully clarified "the Governor's

[73] See, e.g. Romans 10:17 ("faith comes from hearing the message, and the message is heard through the word of Christ.").

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." (Facts at **D.4.** above).

Defendant's arbitrary and self-serving double standard targeting religion here was even called out by the national news media. (See Nature & Stage at **B.2.d.** above). Similarly, when President Biden gave his June 1, 2020 speech to a Wilmington church full of pastors and reporters, the Wilmington News Journal observed that he "push[ed] down the mask on his face" when "he got up and spoke."[74] Arbitrarily, neither the Governor of this State nor the Chief Magistrate of those United had to wear a mask or turn and face the wall when they spoke. But a Pastor would go to jail for reading the Bible in the same way. This "devalues religious" speech, "judging [it] to be of lesser import than nonreligious" speech. Lukumi, 508 U.S. at 537.

Such interference with the faith and mission of the church requires strict scrutiny analysis if it is ever to be justified. Hosanna-Tabor, 565 U.S. at 190.

F. The Orders Fail Strict Scrutiny. "A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of

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[74] www.delawareonline.com/story/news/2020/06/01/delaware-biden-says-he-create-police-oversight-board-president/5307634002/ (last visited on Jan. 17, 2022).

scrutiny." Lukumi, 508 U.S. at 546. It must (1) advance "interests of the highest order" and (2) be "narrowly tailored to achieve those interests." Fulton, 141 S.Ct. at 1881. "Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so." Id.

1. Proper And Narrow Framing Of The Question. In the recent Fulton decision, the Supreme Court clarified the compelling state interest analysis and explained that it cannot take place at a broad level of generality but must instead be targeted to the specific claimant in the case. 141 S.Ct. at 1881. The analysis should not be conducted –

> at a high level of generality, [because] the First Amendment demands a more precise analysis. Rather than rely on broadly formulated interests, courts must scrutinize the asserted harm of granting specific exemptions to particular religious claimants. The question, then, is not whether the [government] has a compelling interest in enforcing its [legal orders or policies] generally, but whether it has such an interest in denying an exception to [the religious claimant].

Id. (internal punctuation and citations omitted). So the question is not whether there is a broad or general interest in protecting against COVID, but whether the Defendant Governor has such a compelling interest in denying an exemption to the individual challenging it.[75] Indeed, such an individualized approach appears

[75] In light of this subsequent clarification of the legal standard, the broadly generalized compelling state interest that was conceded to exist in Bullock (Tab B - 5/28/20 at 14 - terming it "the Governor has a compelling interest in preventing the spread of the coronovirus in Delaware") is inconsistent with the proper legal

consistent with the legal analysis taken by the Delaware Supreme Court since at least 1975. See Keegan, 349 A.2d at 17 ("the question is better put, in our judgment, from the perspective of the individual student").

2. No Compelling State Interest Exists In This Case. As the Court explained in weighing the compelling state interest question in Fulton, the "creation of a system of exceptions ... undermines the City's contention that its [laws] can brook no departures." 141 S.Ct. at 1882. Similarly, in our present case the widespread system of 237 categorical exemptions demonstrates the lack of such a compelling interest for the same reasons since liquor stores, big box stores and many other categories of businesses were all allowed to stay open.

In the same way, "there [is] no evidence that [either Plaintiff's church] have contributed to the spread of COVID-19." Diocese of Brooklyn, 141 S.Ct. at 67. Here, Rev. Landow speaks movingly of his desire to avoid COVID infection of any member of his congregation. He –

> care[s] deeply for the physical well-being of [his] members and go[es] to great lengths and ha[s] crafted careful policies to protect them. ... [He] cares more for the well-being of his congregation than a business cares for its customers because members ... are his brothers and sisters in Christ.

(D.I. 16 ¶ 45a.B.-C.). There is no evidence to the contrary.

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standard clarified thirteen months later in Fulton and so must be narrowed and now properly analyzed specific to our current Plaintiffs.

3. Not Narrowly Tailored. Nor are the Orders narrowly tailored.

a. Blanket Exemptions And Selective Enforcement.

Here, again the system of 237 blanket exemptions and selective enforcement of restrictions undermines the stated rationale of banning religious worship services to prevent virus spread and "[t]he proffered objectives are not pursued with respect to analogous non-religious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree." Lukumi, 504 U.S. at 546. Such underinclusiveness demonstrates that "it is only conduct motivated by religious conviction that bears the weight of the governmental restrictions." Id. at 547. Such targeting of religiously motivated conduct is the precise harm the Free Exercise Clause is intended to prevent.

b. Not Neutral. Since the Orders are not neutral but instead target "worship," this alone prevents them from being narrowly drawn. Tenafly, 309 F.3d at 172 ("Much of our strict scrutiny analysis parallels our earlier discussion of why the Borough's decision is not religion-neutral" and describing part of the Supreme Court's Lukumi holding as demonstrating that "lack of neutrality eviscerates contention that restriction is narrowly tailored to advance compelling interest").

c. The Same Standards Do Not Apply Across the Board.

Here, if the stated purpose was to prevent infection, the use of the very same social distancing practices the Governor already found sufficient for social advocacy organizations, big box stores and at least 237 other broad categories of businesses, also would have been sufficient for use by churches.

d. Judge Phipps Also Identified The Lack Of Narrow Tailoring In Bullock. During the emergency overnight TRO appeal in the Bullock matter, Judge Phipps of the Third Circuit explained in detail why Defendant's exception riddled Orders were not narrowly tailored to satisfy strict scrutiny review. See Bullock v. Carney, 2020 WL 7038527, at *2-3 (3d Cir. June 4, 2020) (Phipps, J., dissenting).[76] These included:

- Defendant's Orders imposed additional requirements on Pastors standing more than 6 feet away from their congregation but did not impose any similar additional restrictions on any employees of a secular businesses. Id. at 2.

- Defendant's Orders forbade a pastor from touching a child during a Baptism but did not impose any similar requirements on other essential workers such as childcare workers. Id.

- Defendant's Orders also imposed certain restrictions on how Churches touch and prepare food and drink used in Communion but did not impose any similar requirements on persons touching food in secular settings, such as grocery stores. Id. at 3.

e. From The Many Examples Presented To Chief Judge

[76] This analysis is consistent with the U.S. Supreme Court's later holding in Diocese of Brooklyn. See 141 S.Ct. at 66-67.

Connolly. Defendant's Phase One Reopening Plan (Ex. H) had only one page of regulations for Arts and Culture Industry (id. at 15); Restaurants and Bars only had one page (id. at 16); Tanning Salons only 12 lines (id. at 19); Gyms less than a page (id. at 19); Casinos almost a page (id. at 20); and Retail stores less than a page. (Id. at 17). There is no comparison between these and the five pages of detailed regulations to which churches are subjected. (See Ex. K). A longer, more detailed list of the similar disparate treatment here is found in the Complaint. (D.I. 16 ¶ 127).

f. The Most "Compelling" Example Noted By The Federal Court. Presumably because it recognized the clear constitutionally forbidden content and viewpoint based discrimination against religious expression, the federal court in Bullock found especially "compelling" the lack of any similar restrictions whatsoever on any "social advocacy organizations." (Tab B - 5/28/20 tr. at 87-88).[77] The Governor did not:

- dictate to the ACLU how to practice law and "create a more perfect union;"[78]

[77] To be clear, as noted in an earlier footnote, the U.S. Supreme Court subsequently found the appropriate comparators for churches are big box stores, retail establishments, factories, schools, casinos and the like, not just social advocacy organizations.

[78] www.aclu.org/ (last visited on Jan. 16, 2022).

- mandate to the NAACP how to effectively advocate and "disrupt inequality, dismantle racism, and accelerate change;"[79]

- forbid the Delaware State Bar Association from seeking "the advancement of the science of jurisprudence;"[80] or

- order the News Journal to cease being "vigilant watchdogs of government."[81]

Absent such similar mandates on secular expression, the Governor cannot, and could not, consistent with the First Amendment, dictate how a preacher is to preach, how a Baptist is to baptize, or how a church is to celebrate Communion.[82]

G. Conclusion. The Governor's Orders, criminalizing the historic communal practice of Sunday religious worship, and regulating religious rites, practices and rituals, were not generally applicable, or neutral, and they also meddled in the faith and mission of Plaintiffs' churches. Nor were they supported

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[79] naacp.org/ (last visited on Jan. 16, 2022).

[80] www.dsba.org/about-the-dsba/ (last visited on Jan. 16, 2022).

[81] cm.delawareonline.com/ethical-conduct (last visited on Jan. 16, 2022).

[82] See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S.Ct. 1719, 1727 (2018) (the "First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths."); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 831 (1995) ("It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought ... Religion may be a vast area of inquiry, but it also provides ... a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.").

by a specific compelling state interest, narrowly drawn, all in violation of the Free Exercise Clause of the First Amendment.

IV. DEFENDANT'S ORDERS EXCESSIVELY ENTANGLED THE STATE IN INTERNAL CHURCH AFFAIRS, HAD A PRIMARY EFFECT OF INHIBITING RELIGION AND DEMONSTRATED A PREFERENCE FOR A PARTICULAR RELIGION AND SO VIOLATED THE ESTABLISHMENT CLAUSE UNDER COUNT IV.

A. Introduction. The Constitutional "Framers deemed religious establishment antithetical to the freedom of all." Lee v. Weisman, 505 U.S. 577, 591 (1992).

1. How It Relates To The Free Exercise Clause. The Establishment and Free Exercise Clauses (Counts II-IV), share similar purposes of protecting religion from government interference. Speaking generally, sometimes it helps to think of them as flip sides of the same coin. Often the courts refer to both clauses collectively as existing to prevent government from intruding on how churches function internally in matters such as faith, doctrine and worship, and how churches express these things.[83]

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[83] See, e.g. Lee, 505 U.S. at 589 ("The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission."); Askew v. Trustees of the Gen. Assembly, 684 F.3d 413, 418 (3d Cir. 2012) ("The Religion Clauses guard against such government interference with ... internal church decisions that affect the faith and mission of

2. The Basics. Defendant's detailed, multi-page Orders dictating specifically how religious worship must be conducted, its content and restricting who may attend (Facts at **D.** above), impermissibly and dramatically entangled the state in religious affairs and, in doing so, violated the Establishment Clause.

> The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,– freedom to believe and freedom to act.

Cantwell v. Conn., 310 U.S. 296, 303 (1940) (emphasis added). The Supreme Court has explained that the jurisprudence surrounding our Religion Clauses –

> radiates ... a spirit of freedom for religious organizations, an independence from secular control or manipulation — in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.

Hosanna-Tabor, 565 U.S. at 186. Plainly, "the text of the First Amendment itself ... gives special solicitude to the rights of religious organizations." Id. at 189.

B. The Legal Test. "[T]he Establishment Clause is a specific prohibition on forms of state intervention in religious affairs." Lee, 505 U.S. at 591; ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1478 (3d Cir. 1996). It

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the church itself") (internal punctuation omitted); id. at 415 (noting "the non-entanglement principle embedded in the Religion Clauses").

was "designed as a specific bulwark against the potential abuses of governmental power," Doe v. Indian River Sch. Dist., 653 F.3d 256, 269 (3d Cir. 2011) (internal punctuation omitted), as occurred here in Delaware.

The much maligned three-pronged test of Lemon v. Kurtzman, 403 U.S. 602 (1971), still governs. It asks whether a challenged government action (1) has a secular purpose, (2) has a principal or primary effect that neither advances nor inhibits religion and (3) does not foster an excessive government entanglement with religion. See Am. Legion v. Am. Humanist Ass'n, 139 S.Ct. 2067, 2078-79 (2019). If the answer to any of those questions is yes, it is struck down.

The Governor's actions in our case fail all three of these prongs. The purpose was not secular. The Orders lack facial neutrality as written and Chief Judge Connolly found that religion was specifically targeted. (See Arg. **III.C.2.** and **III.D.1.b.** above).

The Governor admitted the primary discriminatory effect was to shut down all religious services in Delaware (Facts at **D.1.a.**), and such an improper effect also demonstrates the lack of any cognizable secular purpose. (See Arg. **III.D.2.a.** above).

Last, his Orders fostered an excessive government entanglement with religion in that he was designing and mandating particular forms of religious ritual

and practice, while also demonstrating a preference for the practices of one belief system over another. For example, communal worship was "effectively" outlawed and instead was only to occur outside in parking lots, or for rich churches by livestream. He redefined religious rites and rituals, such as by mandatory touchless Baptism and eliminated person-to-person exchange of bread and wine, and yet he allowed Hebrew touch and cutting in circumcision, and permitted the Hebrew Minyan worship service which only needs 10 to be official.

C. The Clear Everson Requirements. The Third Circuit has explained that the "Supreme Court's Establishment Clause jurisprudence is vast and comprised of interlocking lines of cases applying the Clause in particular situations.[84] However, at the very least, the Court has ascribed to the First Amendment the following general meaning." Doe, 653 F.3d at 269-70. A state actor may not:

- "force []or influence a person ... to remain away from church against his will;"
- "punish[]" a person "for church attendance;"
- "participate in the affairs of any religious organizations;"

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[84] The Supreme Court recently surveyed its history and identified six broad categories of Establishment Clause cases into which most, but not all, of its decisions fall. See Am. Legion, 139 S.Ct. at 2082 n.16 (citing cases). Two of those categories are relevant here: (1) "state interference with internal church affairs;" and (2) "regulation of private religious speech." Id.

- "set up a church;" or
- "pass laws which aid one religion ... or prefer one religion over another.")

Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 15-16 (1947); accord Doe, 653 F.3d at 270.

Notably, the Governor's Orders do all of, or variations on, each of these constitutionally forbidden things. (See Facts at **D.**). For example:

- He "force[d]" Plaintiffs and others "to remain away from church against [their] will."
- It was a crime to try to go to church on Easter in March of 2020. And such "church attendance" was subject to "punish[ment]" with six months in jail.
- He did "participate in the affairs of ... religious organizations" by defining their religious rites and rituals regarding Baptism and the Lord's Supper.
- He "set up a church" by defining how worship was to be conducted, such as by preaching to the back wall, or through livestream or in outside parking lots with permitted religious rituals.
- He did "pass laws which aid one religion ... or prefer one religion over another" regarding the Hebrew requirement of circumcision and the Minyan of 10.

As to the latter, the federal court observed the legal "landscape changes drastically" when the Governor's Orders "treat Jewish circumcisions differently

than Protestant baptisms." (Tab C - 6/2/20 tr. at 28-29).

D. Even Guidance Without The Force of Law Violates The Clause.

One example of the Establishment Clause's prohibition on intervention in religious affairs is demonstrated by Lee v. Weisman. There the Supreme Court addressed a factual scenario where government officials issued official "Guidelines for Civic Occasions" which made various recommendations to a rabbi before he performed a religious function, in that case, a prayer at a public middle school graduation. 505 U.S. at 581 and 588. And even in a situation where there was no criminal sanction attached for their violation (in that they were truly guidelines and not misidentified or disguised criminal laws), id. at 588, the Court found this to violate "a cornerstone principle of our Establishment Clause jurisprudence," id., since it is never the place of the government to be directly or indirectly involved in creating or otherwise controlling the content of something with such an inherently religious purpose.[85] In that case, the purpose was prayer.

[85] That Lee occurred in the context of private religious speech at a public middle school graduation at a state facility only strengthens the application of the Establishment Clause principle to our case which involves purely private religious speech, worship and services within the four walls of a private church into which the Governor intruded with his many "guidelines" dictating the form and content of this private religious worship. The Third Circuit has explained that impermissible "[e]ntanglement may be substantive ... or procedural," Lee v. Sixth Mount Zion Baptist Church of Pittsburgh, 903 F.3d 113, 120 (3d Cir. 2018) (internal punctuation omitted), as in our present case.

In our case, it is religious worship which encompasses not just prayer, but also preaching, teaching and singing.

E. The Historical Practice And Understanding. Importantly, the Establishment Clause also "must be interpreted by reference to historical practices and understandings." Town of Greece v. Galloway, 572 U.S. 565, 576 (2014) (internal punctuation omitted).

It cannot be disputed that the Establishment Clause exists because of the history of religious persecution and forced adherence to the religious doctrines and practices of the established Church of England that led many to flee their homes and come to and help found our Country. In the Supreme Court's words, "[s]eeking to escape the control of the national church, the Puritans fled to New England, where they hoped to elect their own ministers and establish their own modes of worship." Hosanna-Tabor, 565 U.S. at 182. As the Verified Complaint makes clear, many of the original thirteen colonies – including Delaware, Pennsylvania, Maryland, Rhode Island and Massachusetts – were founded seeking religious freedom. (D.I. 16 ¶¶ 210-15). As the Library of Congress explains:

> Many of the British North American colonies that eventually formed the United States of America were settled in the seventeenth century by men and women, who, in the face of European persecution, refused to compromise passionately held religious convictions and fled Europe. The New England colonies, New Jersey, Pennsylvania, and Maryland were conceived and established as "plantations of religion." ... [T]he great

majority left Europe to worship God in the way they believed to be correct.[86]

In light of this history, the U.S. Supreme Court has recognized that –

> By the time of the adoption of the [U.S.] Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services. They knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval from each King, Queen, or Protector that came to temporary power. The Constitution was intended to avert a part of this danger by leaving the government of this country in the hands of the people rather than in the hands of any monarch. But this safeguard was not enough. Our Founders were no more willing to let the content of their prayers and their privilege of praying whenever they pleased be influenced by the ballot box than they were to let these vital matters of personal conscience depend upon the succession of monarchs.

Engel v. Vitale, 370 U.S. 421, 429 (1962) (emphasis added).

These same historical practices and understandings are reflected in both the Preamble and Art. 1, § 1 of the Delaware Constitution, which traces itself directly back to 1776. Government officials are strictly barred from any interference with religious assembly or the free exercise of worship and are similarly barred from indicating a "preference" to any "modes of worship." Del.Const. Art. 1, § 1. That

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[86] Religion and the Founding of the American Republic, America as a Religious Refuge: the Seventeenth Century, www.loc.gov/exhibits/religion/rel01.html (last visited on April 1, 2022).

is the undisputed historical understanding which makes plain that the Governor's unprecedented Orders here dictating how religious worship services must be conducted, if allowed to be conducted at all, violates the Establishment Clause by, *inter alia*, excessively entangling the government with religious worship and the internal affairs of churches.

V. DEFENDANT'S ORDERS VIOLATE THE HYBRID RIGHTS PROTECTION OF THE FIRST AMENDMENT UNDER COUNT III.

A. The Basics. The "First Amendment bars application of a neutral, generally applicable law to religiously motivated action" when the actions involve the Free Exercise Clause "in conjunction with other constitutional protections," such as other First or Fourteenth Amendment rights. Smith, 494 U.S. at 881; see also Tenafly, 309 F.3d at 165 n.26 (a "hybrid rights" claim). In other words, strict scrutiny applies even if the law is neutral and generally applicable as long as other constitutional freedoms are implicated.

B. Numerous Additional Constitutional Freedoms Are At Issue. In addition to free exercise, the Orders banning in-person religious services, and later dictating the content of those worship services, also implicate the First Amendment freedoms of speech, assembly and association.[87] It has long been

[87] The overlap here is not surprising given the "Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment." Lee, 505 U.S. at 591.

established that the –

> The purpose of the Constitution and Bill of Rights ... was to take government off the backs of people. The First Amendment's ban against Congress 'abridging' freedom of speech, the right peaceably to assemble ... and the associational freedom that goes with those rights creates a preserve where the views of the individual are made inviolate.

Schneider v. Smith, 390 U.S. 17, 25 (1968). Religious speech, assembly and association receive just as much protection under the First Amendment as their secular counterparts.

> Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. Indeed ... government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing, or even acts of worship.

Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (numerous internal citations omitted). The right to assemble in order to "say prayers, sing hymns, and conduct a peaceful program," Cox, 379 U.S. at 540, is "secured ... by the First Amendment" against government infringement. Id. at 552. "[R]eligious worship and discussion ... are forms of speech and association protected by the First Amendment." Widmar v. Vincent, 454 U.S. 263, 269 (1981); accord Donovan ex rel. Donovan v. Punxsutawney Area Sch. Bd., 336 F.3d 211, 225 (3d Cir. 2003). It is clear that these First Amendment rights are

implicated by, for example, limiting preaching and singing to only 60 minutes.[88]

C. The Orders Fail Strict Scrutiny. For the reasons explained in Argument **III.F.** above, the Governor's actions fail strict scrutiny review.

VI. DEFENDANT CREATED A SUSPECT CLASS BASED ON RELIGION WHICH VIOLATES THE FOURTEENTH AMENDMENT UNDER COUNT V.

A. An Explicitly Religious Classification Was Created. Under the Fourteenth Amendment, "we strictly scrutinize governmental classifications based on religion." Smith, 494 U.S. at 886 n.3; see Schumacher v. Nix, 965 F.2d 1262, 1266 (3d Cir. 1992) ("a classification ... drawn upon inherently suspect distinctions such as ... religion ... must meet the strict scrutiny standard.").

> These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy - a view that those in the burdened class are not as worthy or deserving as others. For these reasons ... these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

This element is satisfied. The Orders lacked facial neutrality in targeting religion as written and Chief Judge Connolly found that religion was specifically targeted. (See Arg. **III.D.1.b.** and **III.C.2.** above). The Governor also admitted

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[88] As addressed in Argument **VI** and **IV**, additional Fourteenth and First Amendment interests also are implicated.

the primary discriminatory effect of his shutdown Order on worship (see Facts at **D.1.a.** above), and that his Orders were not generally applicable. (See Facts at **D.3.a.** above).

B. The Orders Fail Strict Scrutiny. For the reasons explained in Argument **III.F.** above, the Governor's actions fail strict scrutiny review.

CONCLUSION

Factually, it cannot reasonably be disputed that each Plaintiff sincerely wanted to worship God communally in his church on Sundays. But on penalty of imprisonment the Governor admitted that he, by written Order, had "effectively" prohibited all religious worship in Delaware, while allowing 237 other preferred categories of secular entities to assemble.

Legally, the absolute prohibition of religious worship has been struck down or condemned by the Delaware Supreme Court, the U.S. Supreme Court and the Third Circuit, whenever it has occurred or was postulated.

Consequently, for Count I, under Article 1, § 1 of the Delaware Constitution, judgment has to be entered against this Sunday ban because the Governor "interfere[d] with ... the free exercise of religious worship," actions which our Constitution has long explicitly made clear he lacks the authority to take. The Delaware framers lived, wrote and later reaffirmed their text in a world

of widespread pandemic death by smallpox, yellow fever, malaria and other fatal disease. And the plain meaning of that text allowed no medical or other exception to the right to Sunday communal worship.

Judgment for Counts II-III and V is the same under Fulton, Diocese of Brooklyn, Lukumi and Smith, because Defendant's Orders: were facially discriminatory as written; had the admitted 'effect' of a total shutdown of all church attendance; were admittedly not of general application; and any asserted interest was neither compelling nor narrowly drawn.

Finally, judgment also is required under Count IV because Defendant's actions excessively entangled the State with religion in ways that even the Delaware Attorney General's Office admits are without precedent in the history of the United States, and for other reasons that violate many of the most fundamental precepts of Establishment Clause jurisprudence since Everson.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Chancery Court Rule 171(f), 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 171(d)(4) and the type-volume requirements of Rule 171(f) as modified by the Court's February 7, 2022 briefing Order (D.I. 27), as it is prepared in Times New Roman 14-point typeface, and does not exceed 18,000 words, to wit, it contains 17,355 words.

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