IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

REV. DR. CHRISTOPHER ALAN BULLOCK,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**C.A.No. 20-674-CFC**
	:	
GOVERNOR JOHN C. CARNEY, individually and in his official capacity as the Governor of Delaware,	:	
	:	
Defendant.	:	

PLAINTIFF'S OPENING BRIEF IN SUPPORT OF HIS MOTION FOR A TEMPORARY RETRAINING ORDER AND/OR A PRELIMINARY INJUNCTION

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NATURE AND STAGE OF THE PROCEEDINGS

This is Plaintiff's Opening Brief in support of his Motion for immediate injunctive relief.

SUMMARY OF THE ARGUMENT

Defendant's Orders: (1) discriminate against religious practice, facially and as applied, while exempting hundreds of categories of secular activities from similar restrictions; and (2) dictate the form and content of religious worship in Delaware. This violates the First and Fourteenth Amendments.

STATEMENT OF FACTS

Defendant has created three categories of restrictions on religious worship.

1. The Pre-May 15th Orders. 237 categories of "essential" secular businesses and institutions are allowed to operate at full capacity. (¶¶ 12,42,44,48,79-80; Ex.C; Ex.B at 4-18).[1] Although listed as essential, churches are limited to 10 persons or less. (¶¶ 40,42,46-48,59,63,69,71,74,76,78; Ex.B at 16; Ex.C at 4). The Governor **admitted** the actual effects of his Orders – churches are completely shut down and barred from holding in-person religious services. (¶¶ 71-73).

2. May 15th Orders. Another 12 categories of non-essential industries now

[1] References to "¶" or "Ex." are to the May 19th Verified Complaint and its attachments (D.I. 1), while "Tab" references are an attachment to this Brief.

are allowed to operate June 1st at 30% capacity provided they practice basic social distancing requirements. Churches are excluded. (¶¶ 75-78).

3. May 18th Orders. Four pages of detailed operating requirements for churches issue, explaining how they are allowed to practice their religious beliefs subject to conditions effective May 20th. (Ex. F). In the enabling Declaration (Tab A attached), defendant presented churches with a stark, Hobson's choice (id. at 6), either:

(a). Operate at the pre-existing 10 person or less requirement, an already admitted effective total shutdown; or

(b). Make a deal with the devil and 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 as detailed in 14+ ways in the Complaint. (See ¶¶ 79-81; Ex.F).

Only if all these and other mandates are met does defendant allow live in-person worship services to occur at 30% capacity. (Tab A at 6; Ex.F). Otherwise, worship is effectively banned. (¶¶ 71-73).

ARGUMENT

I. INJUNCTIVE RELIEF IS REQUIRED.

A. The Test. A movant for preliminary equitable relief must meet the two

"most critical" factors, he: (1) "can win on the merits (which requires a showing significantly better than negligible but not necessarily more likely than not);" and "is more likely than not to suffer irreparable harm in the absence of preliminary relief." Reilly v. City of Harrisburg, 858 F.3d 173, 179 (3d Cir. 2017). If met, a court determines: (3) harm to others; and (4) the public interest. Id.

B. Pastor Bullock Will Succeed On His Free Exercise Claim. "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). "[G]overnment may not ... impose special disabilities on the basis of ... religious status." Employ. Div. v. Smith, 494 U.S. 872, 877 (1990).

A law which burdens religious practice and fails one of the interrelated requirements of neutrality or general applicability, receives strict scrutiny review. Lukumi, 508 U.S. at 531-32.

1. The Governor's Orders Are Not Neutral. "[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.

a. They Lack Facial Neutrality. 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.

The Governor's pre-May 18th Orders repeatedly use the phrases such as "Places of Worship," "Worship Services," "clergy," "Faith-based communities" and "Religious Facilities," (¶¶ 40-42,44,47,74; Ex.A at 1-2; Ex.B at 16; Ex.C at 4) and carve them out for special disfavored treatment while his May 18th Orders specify down to the jot and tittle how churches are permitted to worship God. (See ¶¶ 79-81; Ex.F).

That these Orders are facially religious is self-evident from their content. Merriam-Webster alternately defines "worship" as "a form of religious practice with its creed and ritual" or "reverence offered a divine being or supernatural power."[2] Indeed, the religious meaning of the word "worship" is deeply embedded in the foundational charter of our state. The Delaware Constitution conclusively resolves the Orders' religious nature. Article 1, § 1, entitled "Freedom of Religion," explains "it is the duty of all persons frequently to assemble together for the public worship of Almighty God" and finds that "no power shall or ought to be ... assumed by any magistrate that shall in any case interfere with ... the free exercise of religious worship." Del.Const. Art.1, § 1.

[2] https://www.merriam-webster.com/dictionary/worship (last visited on May 17, 2020).

"Through Divine goodness, all people have by nature the rights of worshiping and serving their Creator according to the dictates of their consciences." Del.Const. Preamble. The Delaware Constitution makes clear that the object of such public "worship" is the "Almighty God," the "Creator." "Worship" is clearly a religious term without secular meaning, as are the other religious terms used by the Orders, which are not facially neutral.

b. They Lack As Applied Neutrality. The Free Exercise Clause "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.

(1). The Admitted Discriminatory Effect. "[T]he effect of a law in its real operation is strong evidence of its object." Id. at 535.

Here, the Governor admits that the effect of his pre-May 18th Orders was the wholesale closure of churches throughout Delaware. In his own words, when "[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." (¶ 71) (emphasis added). This lacks neutrality.

The Governor's May 18th Orders then presented churches with a stark

choice: (1) continue to be completely shut down; or (2) allow the government to dictate the form and content of how you worship God. This also lacks neutrality.[3]

(2). Widespread Exemptions. When the government grants many exemptions 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.

Here, the Governor unleashed a torrent of approximately 237 exemptions for broad categories of secular businesses and other institutions allowing them to open provided they practice certain social distancing behaviors at full capacity, and later others at 30% capacity. Yet the Governor has refused to grant similar exemptions to religious worship and admits that the actual, practical effect of his Orders is that all such religious worship activities are shutdown entirely. Then on May 18th, the Governor presented another option: the shutdown would be lifted if churches allow him to dictate the form and content of their religious worship services.

In doing so, the Governor "devalues" religion, judging it to be "of lesser

[3] See also Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2022 (2017) (the "Free Exercise Clause protects against indirect coercion or penalties on the free exercise of religion, not just outright prohibitions") (internal punctuation omitted); 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.").

import" than shopping malls, law firms, financial services, liquor stores and many others which may operate without restriction. That is not neutrality. Such "selective, discretionary application ... violates the neutrality principle" because it "devalues" and "singles out ... religiously motivated conduct for discriminatory treatment." Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 166 (3d Cir. 2002) (internal punctuation omitted).

For example, although "social advocacy organizations" are allowed to remain open (Ex.C at 4), the Governor singled out religious organizations, churches and other houses of worship that would otherwise engage in religious advocacy from the pulpit, imposing such draconian restrictions that they are effectively shut down.

The Third Circuit has repeatedly held that the creation of broad categories of exemptions itself demonstrates a lack of neutrality. For example, in Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365 (3d Cir. 1999), the Court held that the decision to grant a single category of exemptions – medical – from the requirements of a rule, but not grant similar religious exemptions, showed a lack of neutrality, triggering strict scrutiny analysis. The Supreme

> Court's concern was the prospect of the government's deciding that secular motivations are more important than religious motivations. If anything, this

> concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection.

FOP, 170 F.3d at 365. Under FOP, the granting of a single secular exemption requires the granting of a comparable religious one. In our present case, the Governor's creation of not just a single secular category of exemptions but instead 237 categories of exemptions for secularly motivated activities but not allowing similar exemptions for religious worship, is not neutral. All the more so when the admitted effect is a total shutdown of churches unless they allow him to dictate how they worship God. No secular entity was asked to make that stark choice.

(3). The Orders Proscribe More Religious Conduct Than Necessary. 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 has already determined that the use of social distancing practices by law firms, liquor stores, restaurants, tobacco manufacturing, grocery stores, big box stores, museums and many others will serve the government interests. 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 FOP and long established principles of the Fourteenth Amendment[4] as well as the First.[5] For as the Supreme Court has explained, "neutrality in [ ] application requires an equal protection mode of analysis" under the Fourteenth Amendment, id. at 540, and also parallels such First Amendment principles. Id. at 543.

(4). Violation of the Delaware Constitution Demonstrates Lack of Neutrality. The Delaware Constitution strips from the Governor the power to "interfere with ... the free exercise of religious worship" because "it is the duty of all persons frequently to assemble together for the public worship of Almighty God." Del.Const. Art. 1, § 1. He lacks the power to ignore the very first provision in the foundational charter of the State. See, e.g. Bridgeville Rifle & Pistol Club, Ltd. v. Small, 176 A.3d 632, 653 (Del. 2017) ("It

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[4] 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.")

[5] 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.")

is axiomatic that the State cannot ignore our Constitution."). Indeed, even if one were to downgrade this foundational provision to a 'mere' statutory law, only the General Assembly has the power to suspend laws, not the Governor. See Del.Const. Art. 1, § 10 ("No power of suspending laws shall be exercised but by the authority of the General Assembly.").

So to continue to follow Lukumi's mandate to look to equal protection principles, 508 U.S. at 540, it has long been established that violations of laws, rules and procedures are evidence of wrongdoing,[6] here illicit religious discrimination against, and non-neutral targeting of, religious worship. For all of these reasons, the Orders are not neutral.

2. The Governor's Orders Are Not Generally Applicable. "The Free Exercise Clause protects religious observers from 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).

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[6] 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.").

a. The Plethora of Exceptions Demonstrates

Underinclusiveness. The Supreme Court has explained at length that when a government action is "underinclusive" to accomplish the professed purpose justifying that action, it is not generally applicable. Id. at 543-46.

Here, the widespread system of at least 249 exemptions allowing the opening of numerous secular entities throughout the state undermines the Governor's stated purpose of forcing churches to remain closed to prevent the spread of disease. This is true even when it is "public health hazards" and "health risks" at issue and religious institutions are being forced to bear the burden of mitigating those risks in ways not applied to secular institutions. Id. at 544-45. Here, the Governor "has not explained why commercial operations ... do not implicate [his] professed desire to prevent [the risk] and preserve 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).

As the Sixth Circuit recently explained in a similar case challenging a governor's shutdown of churches while exempting numerous secular activities -

> Do the four pages of exceptions in the orders, and the kinds of group activities allowed, remove them from the safe harbor for generally

> applicable laws? We think so. As a rule of thumb, the more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law. At some point, an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny.

Roberts v. Neace, – F.3d –, 2020 WL 2316679, *3 (6th Cir. May 8, 2020) (internal punctuation and citations omitted); see also Maryville Baptist Church, Inc. v. Beshear, – F.3d –, 2020 WL 2111316, *3 (6th Cir. May 2, 2020).

Additionally, if the Governor's Order dictating the form and content of religious worship of God (Facts at **3.**) were truly necessary to prevent virus spread, he would have dictated its application under the first option as well, but he did not, which shows his rationale is underinclusive.

For all of these reasons, the Orders are not generally applicable.

b. Plaintiff Asks for Equal Treatment. The Third Circuit has explained that a religiously motivated plaintiff who is merely asking the government not to invoke against them a law from which secular persons "are effectively exempt" is "not asking for preferential treatment" but instead is merely asking to be treated equally. Tenafly, 309 F.3d at 169. Citing this same governing Third Circuit precedent, the Sixth Circuit recently explained that -

> Keep in mind that the Church and its congregants just want to be treated equally. They don't seek to insulate themselves from the Commonwealth's general public health guidelines. They simply wish to incorporate them into

> their worship services. They are willing to practice social distancing. They are willing to follow any hygiene requirements. They do not ask to share a chalice. The Governor has offered no good reason for refusing to trust the congregants who promise to use care in worship in just the same way it trusts accountants, lawyers, and laundromat workers to do the same.
>
> Come to think of it, aren't the two groups of people often the same people—going to work on one day and going to worship on another? How can the same person be trusted to comply with social-distancing and other health guidelines in secular settings but not be trusted to do the same in religious settings? The distinction defies explanation, or at least the Governor has not provided one.
>
> Some groups in some settings, we appreciate, may fail to comply with social-distancing rules. If so, the Governor is free to enforce the social-distancing rules against them for that reason and in that setting, whether a worship setting or not. What he can't do is assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings. We have plenty of company in ruling that at some point a proliferation of unexplained exceptions turns a generally applicable law into a discriminatory one.

Roberts, 2020 WL 2316679, *3 (citing, *inter alia*, Tenafly, 309 F.3d at 165-70) (emphasis added).

> Assuming all of the same precautions are taken, why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister?

Id. at *4. The Governor can offer no answer to this question because there is no logical correlation between a complete and total shutdown of religious services to prevent virus spread while contemporaneously allowing at least 237 entire broad categories of secular entities to function unimpeded in the face of the same.

Here, the Governor has demonstrated a clear lack of neutrality and general applicability by protecting secular organizations more than comparable religious ones. Yet the Free Exercise Clause will not stand for such targeted religious discrimination, or even just lack of neutrality, no matter how well-meaning or paternalistic the intent behind it. See On Fire Christian Center, Inc. v. Fisher, – F.Supp.3d –, 2020 WL 1820249, *7 (W.D.Ky. April 11, 2020). 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, 2020 WL 2316679, *5.

3. 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 scrutiny." Lukumi, 504 U.S. at 546. It "must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." Id. (internal punctuation omitted).

Although the interest in preventing virus spread is conceded for purposes of this brief, the above discussion demonstrates that the Orders are not narrowly tailored because they "are overbroad or underinclusive in substantial respects" which calls into question the sincerity of the government's invocation of that interest. Id.; see 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").

Here, the system of blanket exemptions and selective enforcement of restrictions undermines the stated rationale of banning religious worship services to prevent virus spread and so "leaves appreciable damages to that supposedly vital interest unprohibited." 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 restriction." Id. at 547. Such targeting of religiously motivated conduct is the precise harm the Free Exercise Clause is intended to prevent.

Here, if the stated purpose is to prevent infection, the use of the very same social distancing practices the Governor has already found sufficient for law firms, liquor stores, social advocacy organizations, grocery stores, big box stores such as Target and Walmart, and at least 249 other broad categories of businesses, also would be sufficient for use by churches. As one sister federal district court recently explained, "[i]f social distancing is good enough for Home Depot and Kroger, it is good enough for in-person religious services which, unlike the foregoing, benefit from constitutional protection." Tabernacle Baptist Church, Inc. of Nicholasville v. Beshear, – F.Supp.3d –, 2020 WL 2305307, *5 (E.D.Ky.

May 8, 2020).

In the same way, the Hobson's choice presented by the Governor's May 18th Orders (Facts at **3.**) also demonstrates that his actions fail the narrowly tailored requirement. If government takeover of the form and content of worship services was actually required to prevent virus spread, then he would have required such takeover under his 10 person limit option as well. He did not. This reveals that the Governor's actions are a mere pretext for hostility towards those of Faith.

C. Pastor Bullock Will Succeed on His Hybrid First Amendment Claim. The "First Amendment bars application of a neutral, generally applicable law to religiously motivated action" when the actions also involve the Free Exercise Clause "in conjunction with other constitutional protections," such as other First Amendment protections. Smith, 494 U.S. at 881. In other words, strict scrutiny applies even if the law is neutral and generally applicable as long as other First Amendment freedoms are implicated.

1. Additional First Amendment Freedoms. 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. It has long been 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 Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (numerous internal citations omitted). The right to assembly 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.

2. The Orders Fail Strict Scrutiny. The Governor's ban on worship services by churches, and Orders regarding how one is permitted to

worship God and who is permitted to do so, also fail strict scrutiny analysis because they are not the least restrictive means. As explained in the Free Exercise section above, the generally applicable social distancing mandates of the CDC are sufficient to accomplish these purposes and already are applied by the Governor to approximately 249 other categories of secular businesses.

D. Pastor Bullock Will Succeed on His Suspect Class Claim. 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, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

By carving out religion for special disfavored treatment and a heightened burden above and beyond that imposed upon at least 249 other secular categories of businesses, the Governor's actions are not narrowly tailored and fail strict scrutiny analysis.

E. Pastor Bullock Will Succeed on His Establishment Clause Claim.

The detailed, multi-page Order dictating specifically how religious worship must be conducted, its content and restricting who may attend, impermissibly and dramatically entangles the state in religious affairs and, in doing so, violates 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 Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 186 (2012). Plainly, "the text of the First Amendment itself ... gives special solicitude to the rights of religious organizations." Id. at 189.

The "Establishment Clause is a specific prohibition on forms of state intervention in religious affairs" ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1478 (3d Cir. 1996), which is violated if it fosters "an excessive government entanglement with religion." Am. Legion v. Am. Humanist

Ass'n, 139 S. Ct. 2067, 2079 (2019), and it "must be interpreted by reference to historical practices and understandings." Town of Greece, N.Y. v. Galloway, 572 U.S. 565, 576 (2014) (internal punctuation omitted).

That historical practice and understanding is reflected in both the Preamble and Article 1, § 1 of the Delaware Constitution, which traces itself directly back to Delaware's 1792 Bill of Rights and has "never since significantly changed."[7] Government official 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.[8] That 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 excessively entangling the government with religious worship and the internal affairs of churches.[9]

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[7] 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).

[8] "The mixing of government and religion can be a threat to free government, even if no one is forced to participate." Lee v. Weisman, 505 U.S. 577, 606 (1992) (J. Blackmun concurring).

[9] "Nearly half a century of review and refinement of Establishment Clause jurisprudence has distilled one clear understanding: Government may neither promote nor affiliate itself with any religious doctrine or organization, nor may it

F. Irreparable Harm. "Limitations on the free exercise of religion inflict irreparable injury." Tenafly, 309 F.3d at 178. Indeed, the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976); accord K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist., 710 F.3d 99, 113 (3d Cir. 2013).

G. Harm to Others. No legally cognizable harm can result to defendant from application to churches of the same social distancing standards already applied to 249 secular industries throughout Delaware. Instead it is better to "impinge on significant interests of the" state, which is "free to attempt to draft new regulations" that are legal, than to deprive churches of their First Amendment freedoms. Swartzwelder v. McNeilly, 297 F.3d 228, 242 (3d Cir. 2002).

H. The Public Interest. "Curtailing constitutionally protected speech will not advance the public interest, and neither the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law." ACLU v. Reno, 217 F.3d 162, 180-81 (3rd Cir. 2000), vacated on other grounds, sub nom, Ashcroft v. ACLU, 535 U.S. 564 (2002). In the same way, "where there are no societal benefits justifying a burden on religious freedom, the public

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obtrude itself in the internal affairs of any religious institution." Id.

interest clearly favors the protection of constitutional rights." Tenafly, 309 F.3d at 178.

CONCLUSION

Defendant's actions violate the First and Fourteenth Amendments.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Judge Connolly's Standing Order dated November 6, 2019, I certify, based on the word-counting function of my word processing system (Word Perfect X4), that this brief complies with that Standing Order, in that the brief is prepared in a 14-point, proportional format (Times New Roman) and contains fewer than 5,000 words, to wit, no more than 4,996 words.

/s/ Stephen J. Neuberger
STEPHEN J. NEUBERGER, ESQ.