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May 27, 2020 **Via CM/ECF**

The Honorable Colm F. Connolly
U.S. District Court for the District of Delaware
J. Caleb Boggs Federal Building
844 N. King Street
Wilmington, DE 19801-3555

RE: **Bullock v. Carney**, C.A.No. 20-674-CFC (D.Del.)
Response to the Court's Questions

Dear Judge Connolly,

This is Plaintiff's response to the questions posed by the Court in its Oral Order of May 26, 2020 at 8:16 a.m.

I. Question #1: (a). Are the State's guidelines revised as of May 23, 2020 narrowly tailored to advance the State's interest in preventing the spread of the virus? (b). If not, identify specifically the guidelines that are not narrowly tailored and in what respect.

A. Answer to 1(a). No.

1. Terminology. Although the Governor has termed them "Guidelines" and, as a result, the Court understandably uses that term as well, this terminology is inaccurate. In this context, guidelines connotes suggestions or recommended practices. But when the violation of those suggestions or recommended practices results in criminal sanctions and jail time, as the Governor's here do, they are more accurately termed laws or regulations with the force of criminal law, given violation deprives one of their liberty and sends them to prison for six months. See 20 Del.C. § 3125.

The May 18th Modification Order found at Tab A to Plaintiff's Opening Brief (D.I. 4) concludes with this warning to Churches –

> This Order has the force and effect of law. Any failure to comply with the provisions contained in a Declaration of a State of Emergency or any

> modification to a Declaration of the State of Emergency constitutes a criminal offense. 20 Del.C. §§ 3115(b); 3116 (9); 3122; 3125. State and local law enforcement agencies are authorized to enforce the provisions of any Declaration of a State of Emergency.

In other words, obey or be arrested. In direct contrast is the "Interim Guidance for Communities of Faith" issued by the CDC also on May 23rd (Tab A attached), the same day as defendant's Order under scrutiny herein. Its first three paragraphs merit review on the pending constitutional issues.

> CDC offers the following general considerations to help communities of faith discern how best to practice their beliefs while keeping their staff and congregations safe. Millions of Americans embrace worship as an essential part of life. For many faith traditions, gathering together for worship is at the heart of what it means to be a community of faith. But as Americans are now aware, gatherings present a risk for increasing spread of COVID-19 during this Public Health Emergency. CDC offers these suggestions for faith communities to consider and accept, reject, or modify, consistent with their own faith traditions, in the course of preparing to reconvene for in-person gatherings while still working to prevent the spread of COVID-19.
>
> This guidance is not intended to infringe on rights protected by the First Amendment to the U.S. Constitution . . . The federal government may not prescribe standards for interactions of faith communities in houses of worship, and in accordance with the First Amendment, no faith community should be asked to adopt any mitigation strategies that are more stringent than the mitigation strategies asked of similarly situated entities or activities.
>
> In addition, we note that while many types of gatherings are important for civic and economic well-being, religious worship has particularly profound significance to communities and individuals, including as a right protected by the First Amendment. State and local authorities are reminded to take this vital right into account when establishing their own reopening plans. (Emphasis added).

It is the criminal penalties which attach to, and the coerced conduct which results from, the Governor's mandates on the form and content of religious

worship services that triggers many of the Establishment Clause violations set forth in Count IV of the Verified Complaint, as well as the related Free Exercise Clause principles which undergird Counts I and II.[1] For example, under his May 18th Order defendant Carney, among other things, forbade and limited worship to only one single day in a week, limited preaching to a single hour or less, denied admission to the elderly, refused the use of the chalice with the sacred blood therein, prohibited baptism of any type or hand-to-hand distribution of communion, and the holding of youth groups, drug addiction or other mercy ministries in the building. So failure to comply sends Pastor Bullock, and his parishioners, to prison for six months.

Even more revealing of constitutional infirmity are his March 23rd Orders whose detail prohibits, for example, at the Roman Catholic Mass the use of the chalice to create the memorial blood and wine sacrament or placing a Host dipped in wine on a tongue; which stops all adult or infant baptisms to initiate members into the church and its offer of eternal salvation; or disallows use of a safely placed choir of more than two persons in a balcony, or even the congregation in the balcony with the choir leading worship on the floor.

The recent CDC guidelines explicitly allow all the activities Carney makes crimes. CDC suggestions are examples of best practices and recommendations in social distancing, cleanliness, use of masks, and other areas which do not carry criminal penalties for their violation and so do not violate the Establishment Clause and its sister the Free Exercise Clause. Such parallel examples are prime evidence that the Governor's Orders are not narrowly tailored as required by strict scrutiny analysis, all the more so given that the Delaware General Assembly has, in the very same statutory scheme upon which the Governor relies to criminalize violation of his mandates, explicitly required that such mandates "shall be consistent" with those issued by federal authorities, 20 Del.C. § 3121(c), such as the CDC.

2. The Narrowly Tailored Question is Directly Tied to the Earlier Constitutional Analysis. As addressed in Plaintiff's Opening Brief (D.I. 4 at 14-

[1] Of course, as discussed in the Establishment Clause section below, the Supreme Court has explained that the Clause is violated even without such criminal penalties attached because of the inherently coercive nature of such 'guidelines' issuing from the government. (See **II.B.2.** below).

15; see also id. at 16-18), both the Third Circuit and the Supreme Court have repeatedly explained that the question of whether something is narrowly tailored to survive strict scrutiny review is directly related to whether this Court determines that those same challenged actions:

- are neutral;
- are generally applicable;
- are overbroad;
- are being selectively enforced;
- impose unequal burdens on religious versus secular actions;
- are underinclusive;
- and the like.

See, e.g. Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 172 (3d Cir. 2002) ("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"); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) ("even were the governmental interests compelling, the ordinances are not drawn in narrow terms to accomplish those interests. As we have discussed ... all four ordinances are overbroad or underinclusive in substantial respects. The 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.").

B. Answer to #1(b). The most recent May 23, 2020 guidelines that are not narrowly tailored are specifically identified as follows.

First, that the Governor's Orders are not narrowly tailored already has been addressed in detail in Plaintiff's Opening Brief. (D.I. 4 at 3-14).

Second, here, 'slow and easy' and consistent with the CDC's guidelines is the policy of Plaintiff, as demonstrated by those same CDC social distancing, cleanliness and other guidelines already long found on the church website. (See D.I. 3 at 2-3). Plaintiff and other responsible Christian religious officials do their best to protect their members, for in the words of the expert declaration already in the record, they are their brothers and sisters in Christ and our members would be

more protected in church than in businesses with mere 'customers' because in church, we are family together in Christ who care deeply for one another. (See D.I. 5 at Tab A at ¶ 15 - Declaration of Rev. David Landow).

The list requested by the Court follows:

1. Delaware churches from hundreds of faith traditions and practices are subject to an overbroad five pages of detailed and confusing regulations. None of these regulations are in any way comparable to the less detailed yet much more understandable four pages of suggestions of the CDC. (Tab A). Additionally, no other category of industry or business in Delaware is subjected to such detailed restrictions. Indeed, since the days of his Fourth Modification, the Governor has specifically created 237 entire broad categories of exemptions of businesses and industries in Delaware that are not subject to such detailed requirements. (D.I. 1, Ex. B,C) Failure to apply such similar restrictions to churches demonstrates that the Governor's approach is not narrowly tailored.[2]

2. The defendant's Phase One Reopening Plan of May 15th, effective June 1st, has only one page of regulations for Arts and Culture Industry at page 15; Restaurants and Bars only have one page found at page 16; Tanning Salons only 12 lines at page 19; Gyms less than a page at 19; Casinos almost a page at 20; and Retail stores less than a page at 17.[3] There is no comparison between these and the five pages of detailed regulations to which churches are subjected. This demonstrates selective enforcement and underinclusiveness of the rationale and need upon which the Governor relies to justify his detailed regulation of churches. If such a reason were truly valid, such detail would be applied to these others as well.

3. One time only sacred Baptisms still are prohibited but the Phase One Performing Arts guidelines at page 15 contain no limits on touching or such

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[2] "[C]ategorical exemptions ... trigger strict scrutiny because at least some of the exemptions available ... undermine the interests served by [the challenged state action] to at least the same degree as would an exemption for a person like" Pastor Bullock. Blackhawk v. Pa., 381 F.3d 202, 211 (3d Cir. 2004).

[3] See https://governor.delaware.gov/wp-content/uploads/sites/24/2020/05/Delaware-Economic-Reopening-Guidance-Phase-1-Revised_05202020.pdf (last visited on May 26, 2020).

physical conduct in a dramatic production. (See footnote 3 above). And, of course, doctors can touch their patients in their offices or otherwise while wearing gloves and using their best professional judgment on how to otherwise social distance.

4. Although no longer explicitly banned, churches are now to discourage the elderly not to attend worship where they can seek corporate prayer for their survival from the virus threat and instead they are to remain sheltering in place. (D.I. 7 at Tab C at 1). No such discouraging limits apply to the elderly going to casinos, food stores, restaurants, or big box stores. (D.I. 1 at Ex. B at 4)

5. Subject to the Hobson's choice conditions, church occupancy is limited to 30% (D.I. 7 at Tab C at 1), but big box stores that are open 7 days a week, such as Walmart (D.I. 1 at Ex. D), and, for example, manufacturing plants of products, have no occupancy limit under the Fourth Modification which declared 237 businesses essential. (D.I. 1 at Ex. B at 13).

6. More than two persons choirs still are banned. (D.I. 7 at Tab C at 2). But there are no such choral limits on the Arts and Culture Industry. (See footnote 3 above at p. 15).

7. Pre-suit only, one, 60 minute worship service a week was permitted with no youth groups, mercy ministries, or other religious meetings allowed in the building at all. Now under the Governor's most recent and everchanging fallback position (D.I. 7 at Tab C at 4), all such events must be on-line but for limited 10 person youth groups only. Contrast that with the lack of such limits on the broad, undefined "social advocacy organizations" use of their facilities for meetings of any type. The American Civil Liberties Union, the National Association for the Advancement of Colored People, the United Way of Delaware, the Delaware State Bar Association, Planned Parenthood of Delaware, and the Wilmington News Journal are not so limited. (D.I. 1 at Ex. C at 4). Instead, they are trusted to use their common sense. Yet the Governor does not trust churches or people of faith to do the same.

8. Ordinarily a face shield or face covering is required for a priest or pastor to speak or preach to his parishioners. (D.I. 7 at Tab C at 2). Stated another way, explicitly First Amendment protected churches are hobbled by such detailed specific guidelines – problems with hearing such muffled or otherwise gagged sources of speech are self-evident – despite the fact that 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." Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S.Ct. 1719, 1727 (2018). Simply stated, you cannot learn from one whom you cannot hear well. Yet as to other First Amendment group protected entities, such as the NAACP, the ACLU, the DSBA and the Wilmington News Journal, they do not face any such level of detailed and specific guidelines carrying the force of a mandatory six months imprisonment. Nor do such restrictions exist for the plethora of Wilmington law firms, banks, government offices and other large employers and entities throughout the state when social distancing is practiced. (D.I. 1 at Ex. B at 4)

9. The Governor's Orders also go into specific detail about how a pastor or priest is able to tend to his flock and exercise his First Amendment protected rights to preach, teach, pray and otherwise worship and practice his faith.[4] Initially, until this lawsuit was filed, they were limited to preaching, teaching, limited types of singing, crammed in a single day each week for 60 short minutes total. Now they are, among other things, barred from baptizing new believers and from administering the Lord's Supper as commanded by their protected religious faith tradition. Yet the Governor's guidelines do not similarly restrict any other analogously protected First Amendment activities of secular advocacy organizations. The Governor does not dictate to the ACLU how to practice law. He has not mandated to the NAACP how to effectively advocate. He has not barred the large business and bankruptcy law firms in Wilmington from filing motions to dismiss as they see fit or prohibited them from filing motions in limine. He has not required the DSBA to proclaim the proper ends of the practice of law. Nor has he prescribed the News Journal from reporting on his violations of the very Constitution he once took an oath to uphold and protect. Absent such similar mandates, the Governor cannot, consistent with the First Amendment, dictate to a church how its preacher is to preach and how the congregation is to worship God.[5]

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[4] See Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995); Cox v. La., 379 U.S. 536, 540, 552 (1965); Widmar v. Vincent, 454 U.S. 263, 269 (1981); Donovan ex rel. Donovan v. Punxsutawney Area Sch. Bd., 336 F.3d 211, 225 (3d Cir. 2003) (all cases collectively addressing that these are core First Amendment protected activities).

[5] Even despite the requirements of Smith, the Supreme Court has repeatedly made clear that actions by government that intrude on sacrosanct internal church

10. To the extent the Governor's most recent rules on cleanliness, distancing, use of masks and the like are mandatory requirements the violation of which will result in imprisonment, they are overbroad compared to the CDC guidelines, while at the same time they are underinclusive given their lack of application to approximately 237 categories of businesses long exempted from such detailed requirements by the Governor.

11. Finally, for purposes of this TRO record, the most recent Orders (D.I. 7 at Tab C), which in detail govern by category the "[e]xchange of materials of any kind is strongly discouraged, preparation of Consecrated or blessed food or drink, and distribution of consecrated or blessed food or drink," are underinclusive They bar the chalice, or cup of the May 18th Orders, and totally leave any religious tradition celebrating the Last Supper, the Mass or Communion at the mercy of the authorities. However, food preparation at a restaurant is not subject to such confusion and scrutiny. (See footnote 3 above at p. 16).

Finally, given that the Court's question in this regard was specifically directed at the Governor's May 23rd Orders and mandates (D.I. 7 at Tab C), discussion is not included of the Governor's May 18th Orders and mandates (D.I. 1 at Ex. F; D.I. 4 at Tab A) upon which the Governor has beat a hasty tactical retreat in response to this lawsuit. However, as explained in Plaintiff's letter of the evening of May 25th (D.I. 7 at 1), "such voluntary cessation of a challenged practice does not moot a case unless subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Trinity, 137 S.Ct. at 2019 n.1; Fields v. Speaker of Pa. House of Rep., 936 F.3d 142, 161 (3d Cir. 2019). Indeed, both the Supreme Court and Third Circuit have made clear that it is a "heavy burden" to bear of making "absolutely clear" that the Governor could not revert to his policy of religious discrimination against Pastor Bullock and his parishioners if the curve rises or there is a spike from a chicken

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matters affecting the faith and very mission of the church itself are so much an anathema to the First Amendment that they automatically receive strict scrutiny even if the government action itself is neutral and generally applicable. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012) ("neutral, generally applicable laws that infringe the Free Exercise Clause receive strict scrutiny if they "interfere[ ] with an internal church decision that affects the faith and mission of the church itself"); accord Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S.Ct. 2012, 2021 n.2 (2017).

processing plant, a restaurant, a Walmart or a short term rental. Trinity, 137 S.Ct. at 2019 n.1.[6]

II. Question #2: How do the claims asserted in Counts III and IV differ from the claim asserted in Count I? What are the elements of each claim? Are the claims analytically distinct?

A. Introduction. Answering the last question first will aid in responding to the first two questions.

B. Are the Claims Analytically Distinct?

1. Counts I-III - Partly Overlapping Analysis. Although Counts I (Free Exercise - Alone), II (Free Exercise - Hybrid) and III (Equal Protection - Suspect Class) are three separate and independent constitutional law claims, their application in this case reaches the same shared end – strict scrutiny review of the Governor's actions. Stated another way, there is a two step process required to analyze each of Counts I, II and III. Step one for each is analytically distinct, while step two is the same, strict scrutiny review.[7]

2. Count IV - Distinct Analysis. Count IV invokes the analytically distinct Establishment Clause. The mode of analysis it applies is separate and distinct from that of Counts I-III. For example, it does not speak in terms of compelling state interests.

Instead, the much maligned three-pronged test of Lemon v. Kurtzman, 403 U. S. 602 (1971), is still the law of the land. 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

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[6] Paragraph 1 of the Verified Complaint and item E of the Wherefore Clause demonstrate the need also to remove "as legal precedents for similar future emergency action" all the Orders from the 10 person limit on worship, and those following, should the pandemic resurge.

[7] As already noted above however, there is substantial overlap between these two steps since much of the evidence under step one serves a dual purpose under step two. (See **I.A.2.** above).

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 completely fail the excessive entanglement prong and, given his own admission that the effect of his Orders is a total shutdown of church services in Delaware, it fails under the second prong as well.

"The Establishment Clause 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); see Lee v. Weisman, 505 U.S. 577, 591 (1992) ("the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions."). In Doe, the Third Circuit explained that the "Supreme Court's Establishment Clause jurisprudence is vast and comprised of interlocking lines of cases applying the Clause in particular situations.[8] However, at the very least, the Court has ascribed to the First Amendment the following general meaning." Doe, 653 F.3d at 269-70. Among other things, Doe reaffirms the clarity of the general meaning of Establishment Clause law, specifically identifying that a state or government actor cannot:

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

Doe, 653 F.3d at 270 (quoting Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 15-16 (1947)). Notably, the Governor's May 18th and May 23rd Orders do all of, or variations on, each of these constitutionally forbidden things.

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[8] The Supreme Court recently surveyed its history and identified six broad categories of Establishment Clause cases. 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.

One example of what constitutes improper intervention in religious affairs demonstrates the breadth of the Establishment Clause's prohibition in this regard. In Lee v. Weisman, 505 U.S. 577, the Supreme Court specifically 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 high school graduation. Id. 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.[9] In that case, the purpose was prayer. In our case, it is religious worship which encompasses not just prayer, but preaching, teaching and singing as well.

The Establishment Clause exists because of the history of religious persecution that led many to flee their homes and come to and help found our Country. For example, Plymouth Colony in modern day Massachusetts was founded by the Pilgrims fleeing persecution by the officially sanctioned Church of England. William Penn and the Quakers founded Pennsylvania (and governed its lower three counties that are now Delaware) seeking to practice their religion free of persecution in that same England. Maryland was founded as a haven for Catholics persecuted for practicing their religious beliefs throughout Europe. Roger Williams founded Rhode Island as a haven from persecution for many other religious minorities. In the Supreme Court's words:

> By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a

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[9] That Lee occurred in the context of private religious speech at a public high 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 seeks to intrude, first with his four page (D.I. 1 at Ex. A) and now five page (D.I. 7 at Tab C) "guidelines" dictating the form and content of this private religious worship. Notably, Lee also explains that impermissible "[e]ntanglement may be substantive ... or procedural," Lee, 903 F.3d at 120 (internal punctuation omitted), as in our present case.

> 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).[10]

3. Counts I, II and IV - Overlapping Purposes. The Establishment Clause (Count IV) and Free Exercise Clause (Counts I-II), however, 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

[10] This is one of the reasons why the Governor's oft-recited reliance upon his preferred, handpicked Council of Faith-Based Partnerships does not shield his actions from First Amendment scrutiny. The Establishment Clause makes clear it is not the business of any person or entity associated with the government to dictate to others how they worship their God. Each person on that panel can worship God in their own way. As explained in his Opening Brief (D.I. 4 at 12-14), Pastor Bullock and his flock demand the equal treatment required by the First Amendment, even if others of different religious persuasions think him foolish for doing so because they believe their religious beliefs are superior. (See, e.g. https://whyy.org/articles/del-leaders-face-divided-backlash-over-reopening-houses-of-worship/) (last visited on May 26, 2020).

and worship, and how churches express those things.[11] Other times, they are referred to separately but in tandem because of the interlocking interests they protect.[12]

C. How do the claims asserted in Counts III and IV differ from the claim asserted in Count I and what are the elements of each count?

1. Count III. As addressed previously in his Opening Brief (D.I. 4 at 18), the claim asserted in Count III is a claim under the Equal Protection Clause of the Fourteenth Amendment and the long established body of law surrounding government actions that create suspect classes based on certain protected characteristics here, religion.

a. Elements. The elements of such a suspect class claim in this context are two-fold. First, a classification based upon religion. Employ. Div. v. Smith, 494 U.S. 872, 886 n.3 (1990); Schumacher v. Nix, 965 F.2d 1262, 1266 (3d Cir. 1992). This element is satisfied both facially by the plain text of the Governor's Orders specifically addressing religious worship, as well as his admitted effects of those same Orders, that all such religious worship is shut down

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[11] See, e.g. Lee, 505 U.S. at 589 ("The First Amendment 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 the 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 of the Church of the Lord Jesus Christ of the Apostolic Faith Inc., 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 the church itself") (internal punctuation omitted); id. at 415 (noting "the non-entanglement principle embedded in the Religion Clauses").

[12] See, e.g. Lee v. Sixth Mount Zion Baptist Church of Pittsburgh, 903 F.3d 113, 119 (3d Cir. 2018) ("The First Amendment's Establishment Clause prevents excessive government entanglement with religion, while its Free Exercise Clause protects not only the individual's right to believe and profess whatever religious doctrine one desires, but also a religious institution's right to decide matters of faith, doctrine and church governance.") (internal punctuation omitted).

in Delaware. (See D.I. 4 at 3-14). Second, strict scrutiny review of the governmental action requiring a compelling state interest, narrowly tailored to achieve that interest. City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). For reasons previously addressed, the governor cannot meet the narrowly tailored requirement and the underinclusive application of his proffered interest in virus elimination is called into question by his widespread system of categorical exemptions of at least 237 separate categories of businesses and industries throughout Delaware not covered by these same restrictions.

2. Count IV. As already addressed above, Count IV is an Establishment Clause claim under the First Amendment.

a. Elements. The elements of such a claim, as well as its underlying history and grounding in the larger constitutional and First Amendment order, are addressed above.

3. Count I. As addressed in detail in the Opening Brief (D.I. 4 at 3-16), Count I is a Free Exercise Clause claim under the First Amendment. Although it has its own distinct legal analysis separate and apart from the Establishment Clause (Count IV), it shares an overlapping purpose, all of which is already addressed above. As to the Fourteenth Amendment Equal Protection suspect class claim (Count III), although the terminology used in the case law is different, the legal analysis of determining whether there is a religious classification present is similar to the Free Exercise analysis already addressed above. The strict scrutiny analysis is the same.

a. Elements. The elements are two-fold. First the court must determine whether the law is neutral and of general applicability. Lukumi, 508 U.S. at 531-32. If it fails any of these requirements, it receives strict scrutiny review, requiring a compelling state interest and narrow tailoring that satisfies that interest. Id.

III. Question #3: Does Jacobson v. Commonwealth of Massachusetts apply to this case?

A. Brief Answer: Not directly to the Free Exercise claims (Counts I and II), but some legal principles and reasoning the case contains are analogous to those currently applied under our Free Exercise case law so Jacobson has some indirect application. For the Fourteenth Amendment claim (Count III), it is a

relevant precedent. But it does not apply to the Establishment Clause claim (Count IV).

B. What Happened in Jacobson. Jacobson v. Massachusetts, 197 U.S. 11 (1905) took place before the incorporation of the First Amendment to the states by the U.S. Supreme Court. As a result, the only two constitutional interests applicable to the states that the case addresses are those arising from one of the Reconstruction era Amendments: (1) Fourteenth Amendment liberty interests; and (2) Fourteenth Amendment equal protection.

1. Liberty Interest. In the context of a smallpox inoculation intended to prevent a recurrence of a smallpox epidemic, Jacobson repeatedly explains that the constitutional right at issue is Jacobson's "liberty" interest in his bodily integrity, see, e.g. id. at 24, 26-27, 29, 38, which is why the opinion so often speaks of "arbitrary," "unreasonable" and "oppressive" government actions. See, e.g. id. at 26-28, 38-39. 115 years later, this would come to be known as a substantive due process claim under the Fourteenth Amendment.[13] The Court in Jacobson engaged in the proper balancing of the individual liberty interest against the governmental interest and found the liberty interest lacking in the face of the governmental interest in preventing the spread of a disease. 197 U.S. at 27-30.[14]

2. Equal Protection. Turning to the next constitutional protection, Jacobson engaged in traditional equal protection analysis, id. at 30, and found the law proper because "the statute is applicable equally to all in like condition" and "makes no exception in case of adults in like condition." 197 U.S. at 30. Stated another way, it did not carve out anyone for differential treatment except children of "tender years" with a supporting doctor's note, which the Court found to be

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[13] See, e.g. Cnty. of Sacramento v. Lewis, 523 U.S. 833, 845 (1998) (the "touchstone of due process is protection of the individual against arbitrary action of government."); id. at 846 (substantive due process seeks to prevent "the exercise of power without any reasonable justification in the service of a legitimate governmental objective.").

[14] See Cruzan by Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261, 278 (1990) (explaining that Jacobson "balanced an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interest in preventing disease").

proper. Id.

3. The Court Repeatedly Stated the Limits of Its Holding. Having already conducted the necessary constitutional analysis for each specific constitutional right implicated by the facts of the case, the Jacobson Court continued and explained at least four separate times that it was not faced with a situation where the government action at issue infringed upon any (then existing) constitutional protection.

a. 1st Time. The Court acknowledged that a "local enactment or regulation, even if based on the acknowledged police powers of a state, must always yield in case of conflict with the exercise by the general government of any power it possesses under the Constitution, or with any right which that instrument gives or secures." Id. at 25 (emphasis added).

b. 2nd Time. The Court addressed a body of its own case law, finding that where state laws go "beyond the necessity of the case, and, under the guise of exerting a police power, invade[ ] the domain of Federal authority, and violate[ ] rights secured by the Constitution, this [C]ourt deemed it to be its duty to hold such laws invalid." Id. at 28 (emphasis added).

c. 3rd Time. This time in the context of its equal protection analysis of legislative action, which in our present day we would call rational basis review since it did not implicate any suspect class, the Court explained that when there is "a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." Id. at 31.

d. 4th Time. Finally, in conclusion, the Court found it necessary to repeat what it had said three times already, finding –

> it appropriate, in order to prevent misapprehension as to our views, to observe – perhaps to repeat a thought already sufficiently expressed, namely – that the police power of a state ... may be exerted ... in particular cases, as to justify the interference of the courts to prevent wrong and oppression.

Id. at 38. In doing all of this, the Jacobson Court repeatedly made clear it was not faced with a case dealing with the violation of any right secured by the U.S. Constitution. Instead, it analyzed the two Fourteenth Amendment rights

implicated, substantive due process and equal protection, applied the appropriate legal test and found that Jacobson's claims did not meet their measure. Accordingly, the Court denied him relief.

C. Free Exercise Claims. As explained above, Jacobson did not address the Free Exercise Clause in any way since at the time that Clause only applied to the federal government and did not yet apply to the states. 115 years later, it does.

Counts I and II of our present case address the Free Exercise Clause. So although not directly applicable, helpfully, Jacobson's legal analysis of the equal protection claim therein mirrors the neutrality and general applicability requirements of Lukumi, 508 U.S. 520 (1993) and Smith, 494 U.S. 872 (1990) under the Free Exercise Clause.[15] In Jacobson, the law was found to be "applicable equally to all in like condition" and made "no exception[s]." Id. at 30. As a result, no constitutional violation was found. Yet as explained in greater detail in Plaintiff's Opening Brief, as well as above, the Governor's many Orders are riddled with at least 237 categories of secular exceptions, and with innumerable detailed requirements that churches and those of religious faith are mandated to follow but secular persons are exempted from such demands. As a result, the principles of Jacobson help to demonstrate that the Governor's actions in our case violate the Free Exercise Clause.

D. Equal Protection Claim. The same equal protection analysis applied in Jacobson applies to Count III in our present case. The only difference is, unlike the generally applicable to all state action in Jacobson which received, and easily overcame rational basis review, the Governor's Orders in our present case single out churches and religious worship for special disfavored treatment. This is true from the plain text of the Governor's Orders themselves, and from the Governor's own admission that the effect of his Orders was to shut down all religious worship throughout the state while at the same time exempting at least 237 categories of secular business and other industrial interests from such requirements. This

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[15] Perhaps this is not surprising given that Jacobson was actually cited by the Supreme Court at an earlier stage of the same Smith case, see Employ. Div. v. Smith, 485 U.S. 660, 670 n.13 (1988), demonstrating that it was clearly within the Court's contemplation in crafting the new Free Exercise rules two years later that would be applied again in Lukumi and in the many Third Circuit cases upon which Plaintiff's Free Exercise claim is built.

valuing of such secular interests over religious ones is one of the very reasons suspect class Equal Protection analysis exists. Finally, Jacobson only applied the easily satisfied rational basis review to the state action therein because no suspect class was implicated. Conversely, because religion is a suspect class, strict scrutiny applies to our present case, including all which that entails. (See **I.A.2.** above).

E. Establishment Clause Claim. Jacobson has no application to Count IV, Plaintiff's Establishment Clause claim. As explained above, the Governor has no legally recognizable interest in intruding upon internal church matters addressing religious worship, faith, prayer and doctrine. The Establishment Clause stands as a bulwark against such governmental intrusion.

IV. Conclusion.

Next week there could be a spike traced to a Walmart, a chicken plant, a restaurant or short term rental causing the curve to bend upwards again. Then the Governor can reinstate any prior emergency order affecting worship, including those challenged in the initial filing of this lawsuit and which the Governor has strategically abandoned for now.

So, in essence, this case is about preventing two things:

(1). State power to shut down all religious worship again for months with a 10 person cap, when numerous categorical exceptions to uniformity and neutrality are made for: secular advocacy organizations with more than 10 persons; pure secular industry such as manufacturers of products with more than 10 persons in the plants; along with another 235 other officially sanctioned categories of exceptions that the Governor, in his discretion has deemed more important than religious worship; and

(2). State power to establish the rites and rituals of religious worship during another round of the virus.

Plaintiff seeks a TRO and/or a Preliminary Injunction denying the state the power to do these things.

I am at the Court's disposal to address this matter further.

Respectfully submitted,

/s/ Stephen J. Neuberger

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enclosure

cc: All Counsel (via CM/ECF)
Danielle Gibbs, Esquire, Chief Legal Counsel to the Governor of Delaware (via e-mail)
The Honorable Kathy Jennings, Attorney General of the State of Delaware (via e-mail)