



**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

In re Covid-Related Restrictions on ) No. 354, 2023  
Religious Services )  
)  
) On appeal from decisions of the  
) Superior Court of the State of  
) Delaware, C.A. No.  
) N23C-01-123-MAA and the  
) Chancery Court of the State of  
) Delaware, C.A. No. 21-1036- JTL

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**MOTION OF 21 MEMBERS OF THE DELAWARE GENERAL  
ASSEMBLY FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN  
SUPPORT OF APPELLANTS AND REVERSAL**

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Pursuant to Delaware Supreme Court Rule 28, 21 Members of the Delaware General Assembly holding office under Article II of the Delaware Constitution respectfully Move for leave to file the accompanying brief as *amicus curiae* in support of Appellants Pastor Alan Hines and Reverend David W. Landow. In support of their Motion, Members assert as follows:

Under our Constitution, all lawfully exercised power comes from the People.<sup>1</sup> Until the strict requirements of Article XVI, § 1 (constitutional amendments by the People’s delegates in the General Assembly) or § 2 (constitutional convention if approved by the People) are complied with, the People have mandated that it is the highest law of our State which no branch of

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<sup>1</sup> See Del.Const. intr. cl. (“We the People ... establish this Constitution”); *id.* at pmb. *id.* at art. XIV, § 1.

government may transgress. Anything short of this “inflict[s] a wound upon the constitution which nothing can heal.” *State ex rel. James v. Schorr*, 65 A.2d 810, 814 (Del. 1948).

Pursuant to Article XIV, § 1, Members have sworn to “uphold and defend the Constitutions of my Country and my State.” The obligations of that oath include expressing their views on the importance of our Constitution being faithfully observed and not impermissibly modified, extended, altered or ignored without consent of the People in the manner set forth in Article XVI.

The decision below is contrary to the plain text of our Constitution, and because Article XVI has not been invoked, the Members’ oath of office requires this *amicus* Motion.

As this Court has held,

the very division [of the separation of powers] contemplates a ... **coordination of effort** to the end that the complete power of government will be exercised effectively for the benefit of the people. And **that requires careful attention to, and respectful consideration of, the acts of one branch by another**, to the end that there may be, in the language of *The Federalist, Number 47*, a “chain of connection that binds the whole fabric of the constitution in one indissoluble bond of unity and amity.”

*Op. of the Justs.*, 330 A.2d 764, 769 (Del. 1974)(emphasis added). Stated another way, it is,

essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach

upon the powers confided to the others, but that **each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department** and no other.

*Evans v. State*, 872 A.2d 539, 543 (Del. 2005) (en banc)(quoting *Kilbourn v. Thompson*, 103 U.S. 168, 190 (1880))(emphasis added). In this Court’s words,

the powers of government should be so divided and balanced among several bodies of magistracy, as that **no one could transcend their legal limits, without being effectually checked and restrained by the others.**

*Id.* at 545 (quoting Jefferson, *Notes on Virginia* ed. Peden; 120 3 *Jefferson's Words* 424-25 (Ford ed., 1892))(emphasis added).

This is particularly important where, as here, one of the three co-equal branches has taken actions beyond the scope of the “power” delegated to it by the People in the same Constitution which all three took a solemn oath to uphold.

For these reasons, as members of the General Assembly, *amici*’s views will be useful to this Court in resolving the important constitutional issues raised in this appeal.

In accord with its precedents above, this Court has a long history of respectful consideration of the views of the other members of the co-equal branches of Delaware government when it comes to interpretation of provisions of our Constitution.

For example, in *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632

(Del. 2017)(en banc), a case involving the question of whether members of the Executive branch had overstepped their constitutional authority in violation of another Article I right in the Bill of Rights of our Constitution, this Court allowed various “Members of the Delaware General Assembly” to be heard as *amici*,<sup>2</sup> and specifically relied upon the views of those same Members in concluding that the Executive had overstepped its constitutional authority.<sup>3</sup>

As in *Bridgeville*, this case also involves interpretation of another Article I right and whether the Executive branch has exercised “power” in violation of the First Freedom of the Delaware Constitution which, as Justice Holland succinctly explained, “limits the power of the state government.”<sup>4</sup>

Continuing, in *Doe v. Wilmington Hous. Auth.*, 88 A.3d 654, 657 (Del. 2014)(en banc), this Court permitted the views of 16 members of the Delaware General Assembly to be heard as *amici*, in a matter of first impression, on the meaning of a protection within Article I of our Constitution.

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<sup>2</sup> *Id.* at 635; *id.* at 636 n.1.

<sup>3</sup> *See id.* at 649 n.85.

<sup>4</sup> Randy J. Holland, *The Delaware State Constitution* 38 (2d ed. 2017).

As to the present case, members of the Executive branch (both the Governor and the Attorney General) previously represented, in writing, to the U.S. District Court for the District of Delaware that the legal question at the center of this current appeal presents a “a novel and complex” question of Delaware constitutional law.<sup>5</sup> Thus, as in *Doe*, in such a matter of first impression, the views of Members of the Legislative branch should be heard.

Finally, in *State ex rel. Wahl v. Richards*, 64 A.2d 400, 403 (Del. 1949), this Court allowed a single individual legislator who had taken the same Article XIV, § 1 oath to be heard as *amici* when it came to the question of whether the judiciary was overstepping its constitutional bounds under Article II, § 8 of the Delaware Constitution.<sup>6</sup>

If the views of even a single, individual constitutional actor in one of the co-equal branches of government must be heard, so also must the views of 21 of the same when it comes to the meaning and scope of the protection of the First Freedom of our Constitution.

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<sup>5</sup> See *Rev. Dr. Christopher Alan Bullock v. Governor John C. Carney*, C.A.No. 20-674-CFC (D.Del.), at D.I. 44 at 17-18 n.6 (Opening Brief of the Governor) (the “claim that the Governor’s orders ... violate [art. I, § 1 of] the Delaware Constitution presents a novel and complex issue of Delaware state law”).

<sup>6</sup> See *id.* at 401-03.

Appellants consent to this motion. Appellees position is unknown as emails requesting their position went unanswered. It appears counsel for Appellees are out of the office until January 2, 2024.

Respectfully submitted,

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