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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| IN RE COVID-RELATED RESTRICTIONS ON RELIGIOUS SERVICES | ) No. 354, 2023<br>)<br>) On Appeal from a Decision of the<br>) Superior Court of the State of Delaware<br>) C.A. No. N23C-01-123<br>)<br>) On Appeal from a Decision of the Court<br>) of Chancery of the State of Delaware,<br>) C.A. No. 21-1036<br>) |

# APPELLEE'S ANSWERING BRIEF

**STATE OF DELAWARE**
**DEPARTMENT OF JUSTICE**

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Dated: January 22, 2024

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## NATURE OF PROCEEDINGS

In the early months of the emerging COVID-19 global pandemic, the Governor of Delaware issued a series of emergency orders to fight the spread of an unknown and unprecedented virus. Certain orders effectively restricted in-person attendance and activities at religious houses of worship. A year and a half after the Governor lifted those restrictions, with no attempt to reinstitute them, Plaintiffs initiated this lawsuit in the Court of Chancery. Plaintiffs—a reverend and a pastor—allege the restrictions violated their rights under the Delaware Constitution and the United States Constitution.

The Court of Chancery dismissed Plaintiffs' claims for lack of subject matter jurisdiction because Plaintiffs failed to show they were entitled to equitable relief. The Court of Chancery gave Plaintiffs leave to transfer the action to the Superior Court under 10 *Del. C.* § 1902.

Plaintiffs elected to transfer the action to the Superior Court, seeking monetary damages against the Governor in his personal capacity and a declaratory judgment. The Superior Court issued an opinion granting the Governor's motion to dismiss. The Superior Court concluded the State Tort Claims Act and the doctrine of qualified immunity barred Plaintiffs' claims for damages and Plaintiffs' request for a declaratory judgment was not justiciable because there was no active case or controversy and Plaintiffs lacked standing.

Plaintiffs appeal the Court of Chancery's and Superior Court's rulings.

## STATEMENT OF FACTS

### A. The Governor Responds to the Unprecedented COVID-19 Pandemic.

In the early months of 2020, the world started becoming aware of a novel virus called COVID-19, which developed into a years-long global pandemic unprecedented in modern history. B283-327.[1] Along with leaders around the nation and the world, the Governor faced the challenge of navigating the State of Delaware's response to a virus whose effects and scale were yet unknown. The timeline of the Governor's actions demonstrates a real-time effort to contain the spread of the virus and protect the lives of Delawareans.

On March 11, 2020, the World Health Organization declared the COVID-19 outbreak to be a global pandemic. B289.

The following day, the Governor issued a Declaration of State of Emergency (the "SOE Declaration"), pursuant to Title 20, Chapter 31 of the Delaware Code, effective March 13, 2020. B001-004. The SOE Declaration recognized that the federal Centers for Disease Control and Prevention had pronounced COVID-19 to be "a serious public health threat." B001. The SOE Declaration further reflected the determination of the Delaware Department of Health & Social Services' Division of Public Health ("DPH") "that it is vital for the State of Delaware to prepare for the

[1] *See also In re Murphy*, 283 A.3d 1167, 1170 (Del. 2022) (recognizing that as of 2021, the COVID-19 pandemic was "still causing unprecedented illness and death").

possible community transmission of COVID-19 and take steps to avoid the transmission of the virus, which may include avoiding public gatherings." B001.

In the weeks and months that followed, the Governor continuously modified the SOE Declaration to address new information about COVID-19 and the rising spread of cases in Delaware. B107-113. On March 22, 2020, less than two weeks after the original issuance of the SOE Declaration, the Governor issued the Fourth Modification to the SOE Declaration. A210-227. The Fourth Modification set forth responsibilities and requirements applicable to "Essential Businesses" and mandated the closure of "Non-Essential Businesses." A213-214; A226. "Essential Businesses" included "Houses of worship and other place of religious expression or fellowship." A225 at ¶ 6.q.12. Essential Businesses could remain open and operational, subject to adherence to guidelines on social distancing, cleaning, and sanitizing. A213-214. Furthermore, Essential Businesses remained subject to the requirements of the Second Modification, issued on March 18, 2020, which limited in-person gatherings to fewer than fifty people. B007.

On April 1, 2020, the Governor issued the Ninth Modification, which further limited in-person gatherings to ten people, subject to adherence to social distancing and hygiene measures. A234-240.

On April 6, 2020, the Governor issued the Tenth Modification. A242-254. Among other provisions, the Tenth Modification directed Houses of Worship to

"comply with all social distancing requirements set forth in the COVID-19 State of Emergency declaration and all modifications, including attendance of no more than 10 people for in-person services under any circumstances." A247. The ten-person limit was consistent with the Ninth Modification's limitation on attendance at in-person gatherings generally. A234-240.

On May 18, 2020, the Governor issued the Eighteenth Modification, which recognized "it is believed that in-person worship can be safely resumed with appropriate precautions to protect the health of worshipers and the public." A313. Accordingly, the Eighteenth Modification eliminated the ten-person limit and instead, Houses of Worship could either hold in-person services or gatherings of up to ten people or services or gatherings that satisfied concurrently released Guidelines for Safe Worship issued by DPH. A314; A316-319. Houses of Worship could further conduct in-person services or activities with attendance of up to 30 percent of stated fire occupancy requirements if federal social distancing guidelines could be followed. A314.

On May 22, 2020, the Governor issued the Nineteenth Modification, which began implementing a multi-phase plan toward reopening businesses and services. A325-340. The Nineteenth Modification industry-specific guidance via the "Phase 1 Reopen Plan." A334-335; B060-087. Under the Phase 1 Reopen Plan, Houses of Worship could operate at 30 percent of stated fire occupancy requirements. B082.

On May 31, 2020, the Governor issued the Twentieth Modification. B041-056. Among other provisions, the Twentieth Modification struck the Eighteenth Modification with respect to Houses of Worship in its entirely. B051 ¶ D.4. The Twentieth Modification further modified the Nineteenth Modification as applied to Houses of Worship by providing Houses of Worship "may continue to offer in-person services," subject to a capacity of 30 percent of stated fire occupancy requirements. B052 ¶ 5.n.

On June 2, 2020, DPH "expressly revoked" all previously issued guidance with respect to Houses of Worship and issued advisory guidance for holding services. B057-059. The guidance offered guidelines for conducting services safely to minimize the spread of COVID-19, but did not impose any restrictions or obligations beyond the SOE Declaration and effective modifications. B057.

On June 14, 2020, the Governor issued the Twenty-first Modification, which increased the capacity limit for Houses of Worship to 60 percent of stated fire occupancy requirements. B104 ¶ D.7.r.

On July 12, 2021, the Governor ended the State of Emergency and terminated all restrictions in the SOE Declaration and its modifications, effective July 13, 2021. B161-162. Also on July 12, 2021, the Governor declared a "limited" Public Health Emergency pursuant to Title 20, Chapter 31, Subchapter V of the Delaware Code. B164. The Public Health Emergency declaration implemented certain powers for

the Delaware Emergency Management Agency and DPH to take measures to prevent and contain the spread of COVID-19 and required healthcare providers to make COVID-19 testing and vaccinations available to the public. B164-166. The declaration did not affect Houses of Worship.

### B. Filing and Settlement of the *Bullock* Action.

On May 19, 2020, following the issuance of the Eighteenth Modification, Reverend Dr. Christopher Alan Bullock filed a lawsuit against the Governor in the United States District Court for the District of Delaware. B010-040. Bullock sought to enjoin the modifications to the SOE Declaration and DPH guidance then in place as applied to Houses of Worship. B037-038. On May 28, 2020, the District Court denied Bullock's request for a temporary restraining order.[2]

On November 10, 2020, the parties to *Bullock* settled the litigation. B150-160. In the settlement, the Governor agreed "not to impose restrictions that specifically target houses of worship," including eleven enumerated restrictions. B150-151. The Governor further agreed that in the event of any further modifications to the SOE Declaration that utilized the categorization of "Essential Businesses," the term would include Houses of Worship. B150-151.

[2] *Bullock v. Carney*, 463 F. Supp. 3d 519 (D. Del. 2020).

### C. Plaintiffs File This Action.

On December 1, 2021, Plaintiffs filed suit in the Court of Chancery.[3] Plaintiffs challenged the constitutionality of the restrictions affecting Houses of Worship between March and May 2020 (the "Challenged Restrictions"). In their consolidated complaint, Plaintiffs conceded that no restrictions on Houses of Worship existed as of June 2, 2020—a year and a half prior to the lawsuit—when DPH revoked its guidance. B218 ¶ 107.

[3] Of note, neither Plaintiff Hines nor Plaintiff Landow signed the May 16, 2020 letter to the Governor expressing concern about the SOE Declaration and modifications. A296-314.

## SUMMARY OF THE ARGUMENT

1. Denied. The Superior Court correctly found the State Tort Claims Act bars Plaintiffs' claims under the Delaware Constitution against the Governor for damages arising from the Governor's exercise of his discretionary powers. The Superior Court also correctly found Plaintiffs are not entitled to seek a declaratory judgment against the Governor because Plaintiffs lack standing and there is no active case or controversy.

2. Denied. The Superior Court correctly found qualified immunity bars Plaintiffs' claims under the United States Constitution against the Governor. Plaintiffs failed to allege that the Governor's actions violated clearly established constitutional rights.

3. Denied. The Court of Chancery correctly held it lacked subject matter jurisdiction over Plaintiffs' claims, which are legal in nature and do not sound in equity.

## ARGUMENT

### I. THE GOVERNOR IS IMMUNE FROM PLAINTIFFS' DAMAGES CLAIM UNDER THE DELAWARE CONSTITUTION.

#### A. Question Presented

Whether the Superior Court correctly held the Delaware State Tort Claims Act bars Plaintiffs' claims for damages under the Delaware Constitution against the Governor for actions taken within his discretionary powers. Appellants' Tab A ("Super. Op.") at 32-39.

#### B. Scope of Review

This Court reviews a trial court's decision on a motion to dismiss and questions of law *de novo*. *See McCaffrey v. City of Wilmington*, 133 A.3d 536, 544 (Del. 2016).

#### C. Merits of Argument

Plaintiffs seek damages from the Governor in his individual capacity for alleged violations of their rights under the Delaware Constitution. A523-A524. Plaintiffs thus seek to hold the Governor personally liable for exercising his emergency powers, under the express statutory authority of the Emergency Management Act ("EMA"), 20 Del. C. §§ 3115, *et seq.*, to issue orders designed to prevent the spread of a novel and deadly virus under rapidly evolving and uncertain conditions. Plaintiffs' claim for damages under the Delaware Constitution is barred by the Delaware State Tort Claims Act ("STCA"). Therefore, the Superior Court

did not commit legal error when it held that the STCA immunizes Governor Carney from damages based on his discretionary actions under the EMA.

**1. Plaintiffs Do Not Have a Private Cause of Action**

Fundamentally, Plaintiffs have failed to show that they possess a private cause of action to enforce Article 1, § 1 of the Delaware Constitution. Federal statute authorizes private causes of actions against state officers for damages for deprivation of one's rights under the United States Constitution. *See* 42 U.S.C. § 1983. But Delaware has no statutory analog for alleged violations of the Delaware Constitution. *See Schueller v. Cordrey*, 2017 WL 568344, at *2 (Del. Super. Feb. 13, 2017), *aff'd*, 195 A.3d 33 (Del. 2018) (recognizing "there is no state statute similar to section 1983 of the Civil Rights Act that already exists to define the scope of this new cause of action and its limits").

Accordingly, Delaware courts have not recognized private causes of action for damages arising from alleged violations of rights guaranteed under Article I. *See, e.g.*, *Rodriguez v. Cahall*, 2023 WL 569358, at *6 (Del. Super. Jan. 27, 2023) (declining to find a cause of action for violations of due process rights Art. I, §7 or rights to be free of cruel punishments under §11); *Schueller*, 2017 WL 568344, at *2 (declining to find a cause of action for violations of rights against unreasonable searches or seizures under Art. I, §6); *Winter v. Richman*, 2020 WL 6940760, at *2 (D. Del. Nov. 25, 2020) (declining to find a cause of action under Art. I, §11); *Carr*

*v. Town of Dewey Beach*, 730 F. Supp. 591, 600 (D. Del. 1990) (expressing doubt about whether a cause of action exists under Art. I, § 7).

So too, here. Delaware law does not recognize the private cause of action for damages that Plaintiffs bring against the Governor.

### 2. The State Tort Claims Act Bars Plaintiffs' Claims for Damages

The STCA bars Plaintiffs' request for damages against the Governor. The STCA provides a limited waiver of sovereign immunity as to state officials and employees for claims premised on the individual's official duties. 10 *Del. C.* § 4001. But the STCA affords a presumption that an official's actions were (i) discretionary, (ii) undertaken in good faith, and (iii) without gross or wanton negligence—in those circumstances, the official is entitled to immunity. *Id.*; *Browne v. Robb*, 583 A.2d 949, 950 (Del. 1990) (noting "complaint was insufficient to rebut the presumption of statutory immunity"). Plaintiffs bear "'the burden of proving absence of one or more' of the immunity elements." *Browne*, 583 A.2d at 952 (quoting 10 *Del. C.* § 4001(3)). A complaint seeking damages will be dismissed if it does not allege facts overcoming the presumption. *Id.*

The second and third prongs of the STCA are not at issue here. Plaintiffs do not challenge the Superior Court's finding that Plaintiffs failed to properly plead that the Governor was acting in bad faith or that he acted with gross or wanton negligence. Super. Op. at 39; *see Oney v. State*, 482 A.2d 756, 758 (Del. 1984)

("Given that the issue was raised at trial but no argument . . . was included in defendant's brief on direct appeal, we must conclude that defendant's counsel deliberately chose not to raise the issue.").[4]

As to the first prong, an official's actions are either discretionary (and eligible for immunity) or ministerial (and not). *Jackson v. Minner*, 2013 WL 871784, at *5-6 (Del. Super. Mar. 1, 2013), *aff'd*, 74 A.3d 654 (Del. 2013). An act is discretionary if it "arose out of and in connection with the performance of an official duty requiring a determination of policy, the interpretation or enforcement of statutes, rules or regulations, . . . or any other official duty involving the exercise of discretion on the part of the public officer. . . ." 10 *Del. C.* § 4001(1). Official conduct meets the definition when "there is no hard and fast rule as to [the] course of conduct that one must or must not take." *Wonnum v. Way*, 2017 WL 3168968, at *3 (Del. Super. July 25, 2017). By contrast, ministerial (i.e. non-discretionary) acts "'involve less in the way of personal decision or judgment,' are more routine, and typically involve conduct directed by mandatory rules or policies." *J.L. v. Barnes*, 33 A.3d 902, 914

[4] Indeed, the day after the parties executed the settlement agreement, Bullock's counsel, who also represent Plaintiffs here, told the press that the Governor had acted in good faith in handling the COVID-19 emergency. *See* Esteban Parra, *Gov. Carney Settles Federal Case Over Restrictions Impacting Places of Worship in Pandemic*, DelawareOnline.com (Nov. 11, 2020), https://www.delawareonline.com/story/news/2020/11/11/delaware-governor-settles-lawsuit-asking-reopen-houses-worship/6232131002/ ("'The governor made many mistakes here, but it was an emergency,' Neuberger said. 'No one questions his good faith, he just got bad advice from his purported expert religious advisers.'").

(Del. Super. 2011) (quoting *Sussex County v. Morris*, 610 A.2d 1354, 1359 (Del. 1992)).

The Superior Court correctly held the Governor's actions were discretionary. This Court recently stated that the "Governor's exercise of emergency powers is a discretionary act." *Facer v. Carney*, 277 A.3d 937 (TABLE), 2022 WL 1561444 (Del. 2022), *rearg. denied* (June 1, 2022).

As the Superior Court acknowledged, the language of the EMA is broad, permitting various avenues to the Governor to act. *See* 20 Del. C. § 3115(b) ("In performing the duties of the Governor under this chapter, the Governor may issue, amend and rescind *all necessary* executive orders, emergency orders, proclamations and regulations, which shall have the force and effect of law." (emphasis added)), 3116(b)(13)("The Governor may . . .Take *such other actions* as the Governor reasonably believes necessary to help maintain life, health, property or public peace." (emphasis added)). Thus, the Superior Court did not commit error when it found the broad language of the EMA indicated a discretionary duty. *See Sadler-Ievoli v. Sutton Bus & Truck Co.*, 2013 WL 3010719, at *2 (Del. Super. June 4, 2013) (finding the methods of supervision of students on a school bus discretionary and stating that the "Court will consider the existence of rules, policies, or regulations that minimize or remove opportunities for independent action"). Because Plaintiffs are unable to claim there were hard and fast rules for how the

Governor was to handle an unprecedented global pandemic, the Governor's acts—decisions such as which restrictions to impose, against whom, and for how long—required him to determine policy, interpret and enforce statutes, rules or regulations, and to exercise his discretion. These are the sorts of decisions protected by the STCA.

Plaintiffs also cannot claim that the Superior Court is alone in finding that a state emergency management act provided government officials with broad discretion to implement orders to protect citizen health and safety. Super. Op. at 35-36 & n.142; *see also Grisham v. Romero*, 483 P.3d 545, 558-59 (N.M. 2021) (rejecting the argument that the Secretary of Health's broad emergency powers to respond to the COVID-19 pandemic infringed on legislative authority to promulgate law and special sessions of the legislature were the proper avenue to promulgate COVID-19 policies); *Beshear v. Acree*, 615 S.W.3d 780, 812-13 (Ky. 2020) (declining to find the governor's "broad" emergency powers to act in the face of the COVID-19 pandemic as an unconstitutional delegation of legislative power); *Desrosiers v. Governor*, 158 N.E.3d 827, 835-37 (Mass. 2020) (finding the plain language of the state's emergency statute provided the Governor with "broad authority" to fight the COVID-19 pandemic)).

Unsurprisingly, Plaintiffs do not argue that the Governor's acts were ministerial. Plaintiffs instead argue that the Governor did not have the discretion to

act here because he did not possess the "power" to do so under the Delaware Constitution. OB at 38-39. Plaintiffs' argument is circular – i.e., the Governor does not have discretion to violate the Delaware Constitution; therefore, his actions were not discretionary because he violated the Delaware Constitution. The problem with Plaintiffs' argument is that, in addition to being circular, it is irrelevant under the first prong of the STCA, which is concerned with the *type* of authority being wielded, not the merits.

Plaintiffs' argument is also wrong in substance. First, the Governor did not "shutdown [] all communal religious worship throughout" Delaware. OB at 39. Houses of Worship were designated as Essential Businesses and permitted to remain open (in addition to holding remote and outdoor services), unlike a host of other "Non-Essential Businesses," which were closed entirely. Plaintiffs also omit that the 10-person indoor gathering limit applied to "educational institutions" and a number of other "business, professional, labor, or other similar businesses that act in an organizing capacity," as Houses of Worship do. A225 ¶ 6.q. That the ten-person limit widely applied to numerous Essential Businesses further contradicts Plaintiffs' baseless assertion that it was specifically adopted to give preferential treatment to Jewish religious practices. OB at 14.

Second, despite Article 1, Section 1 of the Delaware Constitution being "analogous" to the Establishment and Free Exercises Clauses of the United States

Constitution, such that "Delaware courts are guided by First Amendment case law," Plaintiffs fail to cite to federal or Delaware caselaw asserting that religious practice cannot be restricted. *Doe v. Cape Henlopen Sch. Dist.*, 759 F. Supp. 2d 522, 528 (D. Del. 2011) (citing *E. Lake Methodist Episcopal Church, Inc. v. Trs. of the Peninsula–Del. Annual Conference of the United Methodist Church*, 731 A.2d 798, 805 n.2 (Del. 1999); *Newmark v. Williams*, 588 A.2d 1108, 1112 (Del. 1991)). Plaintiffs instead rely on cases for general constitutional principles that do not concern challenges under Article I, Section 1 of the Delaware Constitution. *See, e.g.*, *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632, 642 (Del. 2017) (analyzing Article 1, § 20 of the DE Const.); *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 37 (2022) (analyzing the Second Amendment to the U.S. Constitution).

Plaintiffs cite to the Federal Tort Claims Act for the proposition that their claims fall outside the STCA simply by alleging a constitutional violation, but their argument is misplaced.[5] OB at 40-41. The FTCA provides an exception to sovereign immunity and allows private suits against the United States government (not individual officials) for torts committed by federal employees acting within the

[5] This argument was raised for the first time below at oral argument before the Delaware Superior Court. *See* A655-A656.

scope of their official duties. 28 U.S.C. § 1346(b)(1). However, the FTCA exempts claims that are:

> based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a).

In *Xi v. Haugen*, the sole case Plaintiffs rely on, the District Court dismissed claims brought under the FTCA in connection with the investigation and arrest of plaintiff for allegations of espionage that turned out to be mistaken, on the grounds that the federal agents' actions were discretionary. 68 F.4th 824, 832 (3d Cir. 2023). The Third Circuit reversed, finding the trial court erred by importing the "clearly established constitutional rights" prong of qualified immunity into the discretionary prong of the FTCA. *Id.* at 839-40. Plaintiffs focus in on the Third Circuit's reasoning that "because government officials never have discretion to violate the Constitution, unconstitutional government conduct is per se outside the discretionary function exception." *Id.* at 839. But Plaintiffs sidestep *why* the Third Circuit found error in dismissing the FTCA claims even if the alleged constitutional violations were not clearly established. Crucially, the Third Circuit found that requiring the existence of clearly established constitutional rights would serve no purpose in the "discretionary function context" of the FTCA:

> The Supreme Court excluded clearly established constitutional violations from the protections of qualified immunity because it would be unfair to hold individual officers liable for conduct not previously identified as unlawful and the Court was mindful of the chilling effect and social costs of that liability. But these concerns are absent in the FTCA context, where only the federal government—not individual officers—can be liable.

*Id.* at 839-40 (internal quotation marks and citations omitted).

Here, the analysis under the STCA is entirely distinct. Unlike the FTCA, the STCA provides for causes of action against individual state officials or employees under certain circumstances. The Superior Court carefully and correctly assessed whether the Governor's actions were discretionary under the STCA, separate from the qualified immunity analysis of federal constitutional violations alleged by Plaintiffs. Under the rule urged by Plaintiffs, all a plaintiff would need to do to subject a state official or employee to individual liability is allege a constitutional violation. Such a rule would completely contravene the purpose of the State Tort Claims Act.

## II. THE GOVERNOR IS IMMUNE FROM PLAINTIFFS' DAMAGES CLAIM UNDER THE UNITED STATES CONSTITUTION.

### A. Question Presented

Whether the Superior Court correctly held the doctrine of qualified immunity bars Plaintiffs' claims for damages under the United States Constitution against the Governor. Super. Op. at 21-28.

### B. Scope of Review

Review is *de novo*. See section I(B).

### C. Merits of Argument

Plaintiffs seek damages from the Governor in his individual capacity for alleged violations of their rights under the United States Constitution, pursuant to 42 U.S.C. § 1983, when he exercised his emergency powers under express statutory authority to curtail a novel and deadly virus. A523-A524. Plaintiffs' claim for damages under the U.S. Constitution is barred by qualified immunity, and the Superior Court correctly found that the Governor is entitled to qualified immunity.

The U.S. Supreme Court has outlined that qualified immunity "'attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 5 (2021) (quoting *White v. Pauly*, 580 U.S. 73, 78-79 (2017)); *see also Hanson v. Del. State Pub. Integrity Comm'n*, 2012 WL 3860732, at *15 (Del. Super. Aug. 30, 2012), *aff'd*, 69 A.3d 370 (TABLE), 2013 WL 3155002

(Del. 2013). "A right is clearly established when it is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Rivas-Villegas*, 595 U.S. at 5 (quoting *Mullenix v. Luna*, 577 U.S. 7, 11 (2015)). Trial judges are given broad discretion to decide the order in which they analyze the two inquiries of a qualified immunity analysis and whether they proceed to the latter inquiry at all. *See Pearson v. Callahan*, 555 U.S. 223, 227, 236 (2009) (holding that the rigid two step inquiry for deciding government officials' qualified immunity claims outlined in *Saucier v. Katz*, 533 U.S. 194 (2001) was no longer mandatory). The Superior Court began and ended with the second—whether the right is clearly established.

**1. The Governor's Acts Were Discretionary**

Plaintiffs attempt to invoke the so-called ministerial exception to qualified immunity, arguing the Governor had no discretion to implement the Challenged Restrictions. OB at 43-44. The "continued validity" of the ministerial exception to qualified immunity has been questioned, but even if it remains viable, the "definition of a discretionary function is broad." *Eddy v. V.I. Water & Power Auth.*, 256 F.3d 204, 210-11 (3d Cir. 2001). Conversely, the ministerial exception is "extremely narrow in scope" and applies even if the official is asked to exercise his judgment "rarely or to a small degree." *Gagne v. City of Galveston*, 805 F.2d 558, 560 (5th Cir. 1986). "A law that fails to specify the precise action that the official must take

in each instance creates only discretionary authority; and that authority remains discretionary however egregiously it is abused." *Eddy*, 256 F.3d at 210 (quoting *Davis v. Scherer*, 468 U.S. 183, 196 n.14 (1984)). Plaintiffs' argument fails for both of those reasons.

For reasons discussed in section I(C) above, the Governor implemented the Challenged Restrictions under authority granted to him from the EMA. The language of the EMA is broad and enabling; it does not specify any precise action that must be taken. Therefore, the Governor *was* acting under discretionary authority.

Second, Plaintiffs' argument is really a contention that the Challenged Restrictions were so unconstitutional that they were outside the Governor's discretion. OB at 44 ("For reasons addressed in Argument I.C. above, the Delaware Governor has no discretion to exercise a 'power' expressly forbidden from him by the Delaware Constitution"). But whether the Challenged Restrictions were constitutional has no bearing on whether the Governor's actions were discretionary. Indeed, in *Davis*, which Plaintiffs cite as support for this argument, the Supreme Court of the United States held the trial court's "finding that appellants ignored a clear legal command does not bear on the 'ministerial' nature of appellants' duties." *Davis v. Scherer*, 468 U.S. 183, 196 n.14 (1984) (reversing the court below for its

affirmation of the trial court and failure to dismiss the case on qualified immunity grounds).

**2. The Governor's Actions Were Not "Obviously" Invalid**

Plaintiffs next argue that the invalidity of the Challenged Restrictions so "obvious" because they violated Delaware law and, therefore, the Superior Court erred by requiring Plaintiffs to cite to "materially similar cases." OB at 44-45. As promised, Plaintiffs rely on dissimilar cases involving defendants who committed sexual violence, *see* OB at 44 (citing *E.D. v. Sharkey*, 928 F.3d 299, 308 (3d Cir. 2019) (holding that the plaintiff had the right to be free from defendant's sexual assault as "obvious"); *Kane v. Barger*, 902 F.3d 185, 195 (3d Cir. 2018) (noting that the defendant's sexual assault was "obvious")), plaintiffs sentenced to solitary confinement, *id.* (citing *Clark v. Coupe*, 55 F.4th 167, 182-88 (3d Cir. 2022) (holding the trial court's granting of qualified immunity was premature because the allegation was the placement of the inmate in solitary confinement for seven months despite prison officials knowing of his serious mental illness); *Williams v. Secretary*, 848 F.3d 549, 561-62 (3d Cir. 2017) (finding the plaintiffs had sufficiently alleged a protected liberty interest where they claimed they remained in solitary confinement for years despite no longer being sentenced to death row), plaintiff was tightly handcuffed to a "hitching post" on multiple occasions, *see id.* at 44-45 (citing *Hope v. Pelzer*, 536 U.S. 730, 733–34 (2002)) and where the plaintiffs watched a police

officer shoot their pet dog to death as it tried to crawl away, despite the dog neither growling nor barking at the officer. *See id* (citing *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 211 (3d Cir. 2001)).

Plaintiffs desire this Court to draw a comparison between this case and the obviousness of a victim having a right not to be sexually assaulted or pet owners having the right not to watch their pet dog be shot to death when the dog posed no immediate danger. This is an inappropriate comparison as the Governor's conduct was neither shocking nor without a conceivable legitimate justification. The Governor was acting pursuant to his authority under a Delaware statute during the state of a global pandemic and not out of some criminal animus.

Next, Plaintiffs argue that the Challenged Restrictions were "so obvious" and "patently violative" because they interfered with Plaintiffs' religious exercise. OB at 45-46. In support of their argument, Plaintiffs' rely on *Mack v. Yost*, 63 F.4th 211 (3d Cir. 2023), a recent case holding correctional officers were not entitled to qualified immunity against claims that they had intentionally and unjustifiably prevented an inmate from observing his religion's prayer rites using threats, harassment and intimidation, such as saying to him, "There is no good Muslim but a dead Muslim"; deliberately interrupting his daily prayers; and secretly putting a sticker on his back while he was praying that read, "I love pork bacon." *Id.* at 218-19. The Third Circuit held qualified immunity was inapplicable because "it should

be clear to any reasonable correctional officer that, in the absence of some legitimate penological interest, he may not seek to prevent an inmate from praying in accordance with his faith," despite the lack of precedent directly on point. *Id*. at 233.

*Mack* has no application here because there *is* case law on point—including the Chief Justice of the United States opining in late May 2020 that the extent of the government's power to enact COVID-protective measures that burden the exercise of religion "is a dynamic and fact-intensive matter subject to reasonable disagreement." *See S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring)); *see also League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App'x 125, 127-28 (6th Cir. 2020) ("[T]he police power retained by the states empowers state officials to address pandemics such as COVID-19 largely without interference from the courts."). It cannot be "obvious" that an action was unconstitutional when there is contemporaneous precedent finding its constitutionality was (and is) an open question.

This case is also nothing like *Mack* factually. Plaintiffs do not allege the Governor personally, intentionally, or violently attacked their religious exercise. The Challenged Restrictions were broadly applicable and extended to secular institutions. The Governor issued them, not out of animus, but with the intent to preserve the public health in the face of an unprecedent global pandemic.

Moreover, *Mack* cuts against Plaintiffs' argument because it reinforces:

> The Supreme Court has repeatedly cautioned that the qualified immunity inquiry demands a high degree of specificity and that courts may not define clearly established law at a high level of generality, which would avoid[] the crucial question whether the official acted reasonably in the particular circumstances that he or she faced.

*Mack*, 63 F.4th at 228 (quoting *D.C. v. Wesby*, 138 S. Ct. 577, 590 (2018)) (internal quotation marks omitted).

Plaintiffs' framing of the conduct at issue runs afoul of these directives. Plaintiffs contend the Challenged Restrictions were obviously unconstitutional because they amounted to "bans" on attending worship services and purportedly directed "how one chooses to worship God." OB at 47. But merely pointing to constitutional principles does nothing to help Plaintiffs overcome qualified immunity. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) (noting general assertion of constitutional principle "is of little help in determining whether the violative nature of particular conduct is clearly established"). By building a strawman argument and over-generalizing the legal issues in this case, Plaintiffs mischaracterize the Challenged Restrictions and fail to engage with the specificity required by the Supreme Court. *See Mack*, 63 F.4th at 229 ("[Plaintiff] misses the mark when he frames the relevant right as a freedom from 'restrictions on or hindrances to central religious practices' or 'direct or indirect governmental action'

that burdens his religious practices. That is far too broad and generic a statement." (citations omitted)).

Plaintiffs compound their error asking the Court to extrapolate a supposedly obvious conclusion (at odds with the only cases on point) about the Challenged Restrictions' constitutionality from vague general propositions, *see* OB at 21-38 (discussing the country's founding and the history of plagues and pestilence), relying on cases that bear no factual resemblance to this one. OB at 46-47, 50-54 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524, 527-28 (1993) (addressing ordinances banning animal sacrifice targeted to practices of Santeria); *Emp. Div. Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 882 (1990) (rejecting First Amendment claim concerning use of peyote); *Fowler v. Rhode Island*, 345 U.S. 67, 67-69 (1953) (concerning conviction of a Jehovah's Witness for preaching in a state park); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 152, 157 (3d Cir. 2002) (considering preliminary injunction against borough from barring Orthodox residents from constructing eruv); *FOP Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 360, 364 (3d Cir. 1999) (concerning refusal to grant religious exemptions to no-beard policy for Muslim police officers); and *Keegan v. Univ. of Del.*, 349 A.2d 14, 15, 19 (Del. 1975) (remanding—not deciding—challenge to policy concerning religious practice in dorms and stressing case "deal[t] with a very particular factual situation involving a University campus

dormitory"). Nothing Plaintiffs cite supports finding this case to be one of the "exceedingly rare cases" involving a patently obvious violation of rights sufficient to overcome qualified immunity based on "broad rules and general principles." *See Schneyder v. Smith*, 653 F.3d 313, 330 (3d Cir. 2011).

### 3. The Superior Court Relied on Appropriate Caselaw in Determining No Clearly Established Right Was Implicated

Plaintiffs next propose two interrelated arguments concerning whether a right is clearly established under a qualified immunity analysis. First, that the Superior Court erred by requiring Plaintiffs to "find factually identical cases addressing church closures and establishment issues occurring during a pandemic. OB at 48-49. Second, that the Superior Court "erred by failing to analyze (or even mention) any of the cited and binding precedent from the Third Circuit, U.S. Supreme Court and this Court and instead [relied] solely on foreign district court decisions. . . ." *Id.* at 49.

Although there need not be "a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* (quoting *White*, 580 U.S. at 79) (internal quotation marks omitted). That is, the right must be narrowly drawn and not a "general proposition." *See Brosseau v. Haugen*, 543 U.S. 194, 198-99 (2004) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)) (internal quotation marks omitted);

*accord Estep v. Mackey*, 639 F. App'x 870, 873-74 (3d Cir. 2016) (vacating and remanding district court's order because it failed to identify the constitutional right violated with specificity).

To determine whether a right is clearly established, courts look first to Supreme Court precedent, then controlling authority in Third Circuit jurisprudence, and finally whether there is a "robust consensus of cases of persuasive authority" by sister circuits. *See Porter v. Pennsylvania Dep't of Corr.*, 974 F.3d 431, 449 (3d Cir. 2020) (quoting *Barna v. Bd. of Sch. Dirs.*, 877 F.3d 136, 142 (3d Cir. 2017)). The Supreme Court has repeatedly stated that courts are "'not to define clearly established law at a high level of generality.'" *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)). The fundamental question is "'whether the violative nature of particular conduct is clearly established.'" *Id.* (quoting *Ashcroft*, 563 U.S. at 742).

Plaintiffs fail to cite factually analogous cases which refute the Superior Court's reliance on a plethora of district court caselaw around the country holding that the law was unsettled as to whether officials could issue restrictions to prevent the spread of the COVID-19 pandemic which also affected residents' First Amendment or Equal Protection rights. *See* Super. Op. at 22-23 n.88. Instead, Plaintiffs argue that the Superior Court erred by (1) requiring them to provide factually similar caselaw for their proposition and (2) relying on caselaw from

district courts outside the Third Circuit. OB at 48-49. Plaintiffs' arguments are misguided.

First, relying on *Clark v. Coupe*, Plaintiffs quote the Third Circuit as stating that the "'Supreme Court does not require that earlier cases share the same or even similar facts for a right to be deemed clearly established.'" OB at 48 (quoting *Clark v. Coupe*, 55 F.4th 167, 182 (3d Cir. 2022)). While this quote is taken from *Clark*, the quote continues by stating "it is enough that the prior cases are "factually analogous.'" 55 F.4th at 182. *Clark* does not stand for the proposition that the "clearly established law" can be at a "high level of generality." If it did, then it would be counter to the U.S. Supreme Court's admonishment in *Mullenix v. Luna*. *See Mullenix*, 577 U.S. at 12.

In *Clark*, the Court was confronted with allegations that a prison warden kept a manic depressive and paranoid schizophrenic inmate in solitary confinement for seven months despite knowing of his mental illness. *Id*. at 174. Before the Court indicated that it did not need to find the exact case or a case with similar facts, it was focused on Clark's seven-month imprisonment in solitary confinement. *Id.* at 182. Indeed, the Court summarized the right narrowly – "the right of a prisoner known to be seriously mentally ill to not be placed in solitary confinement for an extended period of time by prison officials who were aware of, but disregarded, the risk of lasting harm posed by such conditions," and held the right of a prisoner not to be

held in solitary confinement for an extended period of time to be long recognized. *Id.* at 182-84. Therefore, *Clark* does not stand for Plaintiffs' argument that broad constitutional principles of freedom of religious expression placed the Governor on notice that the Challenged Restrictions would violate clearly established law, as even *Clark* narrowed the right at issue.

To suggest that the Superior Court's analysis in the present case was too narrowly drawn is to swing the pendulum back in the opposite direction. Plaintiffs desire to persuade this Court that any blanket restrictions imposed in response to a national pandemic cannot restrict religious worship in the slightest. Plaintiffs again rely on general principles from Third Circuit case law. OB at 51-52 (citing *FOP*, 170 F.3d at 365; *Tenafly*, 309 F.3d at 165-172; *Fowler*, 345 U.S. at 69). As previously explained, these cases are too generalized to establish "clearly established law."

Second, Plaintiffs discount the cases on which the Superior Court relies because they were decided by trial courts outside the Third Circuit and (according to Plaintiffs) do not address Free Exercise rights. OB at 49. Plaintiffs are incorrect: the cases do hold that government officials were protected by qualified immunity against constitutional challenges to COVID-protective measures on religious freedom grounds. *See, e.g.*, *Case v. Ivey*, 542 F. Supp. 3d 1245, 1258-62, 1273-79 (M.D. Ala. 2021) (defendants entitled to qualified immunity on claims that orders

imposing restrictions on houses of worship violated Free Exercise Clause and Establishment Clause), *aff'd*, 2022 WL 2441578 (11th Cir. July 5, 2022); *Northland Baptist Church of St. Paul, Minn. v. Walz*, 530 F. Supp. 3d 790, 799, 806-07 (D. Minn. 2021) (finding governor entitled to qualified immunity on claim that orders restricting occupancy at houses of worship violated Free Exercise rights); *Pleasant View Baptist Church v. Beshear*, 78 F.4th 286, 300 (6th Cir. 2023) (affirming district court's finding that governor was entitled to qualified immunity against claim by church that order temporarily halting in-person school violated the Free Exercise Clause); *see also Benner v. Wolf*, 2021 WL 4123973, at *3, *5-6 (M.D. Pa. Sept. 9, 2021) (finding governor entitled to qualified immunity where plaintiffs alleged COVID-19 restrictions violated their constitutional rights and district court found no clearly established right); *Mader v. Union Twp.*, 2021 WL 3852072, at *7 (W.D. Pa. Aug. 27, 2021) ("The question whether the government could limit First Amendment rights by prohibiting in-person gatherings given the ongoing COVID-19 pandemic was not clearly established at the time [June 24, 2020], or even several months later.").

Indeed, the plaintiffs in *Case* argued that the Governor of Alabama could not " 'tell[] churches how they may assemble and worship, mandate[e] universal mask wearing, and pick[] and choos[e] which businesses may stay open'" through his COVID-19 protective measures and the Court of Appeals for the Eleventh Circuit

held that the plaintiffs focus "defines the inquiry far too narrowly." *Case v. Ivey*, 2022 WL 2441578, at *2 (11th Cir. July 5, 2022).

Plaintiffs' criticism of these cases as having been decided by out-of-circuit courts is beside the point because Plaintiffs cannot point to any decision anywhere that says otherwise. Regardless of where the cases on point were decided, they show that a reasonable person in the Governor's position had no reason to know in March through June 2, 2020 that the Challenged Restrictions were unconstitutional beyond debate.

Plaintiffs also argue the Superior Court erred by failing to recognize that the constitutional principles in *Roman Catholic Diocese of Brooklyn v Cuomo*, which was decided on November 25, 2020 after the Challenged Restrictions had been withdrawn, "broke no new ground" and the principles pre-dated the Governor's orders in this case. OB at 50. Plaintiffs again rely on a generalized principle that "if a single exception is made for non-religious conduct, religious conduct must receive the same." *Id.* As explained above, these are insufficient to assert clearly established law. *Cuomo* is the first case to apply such general principles in the context of a novel pandemic like the COVID-19 pandemic and because the case post-dated the Governor's actions here it could not place the Governor on notice that his actions violated clearly established law.

In contrast, the Superior Court correctly analyzed whether it was clearly established that the Challenged Restrictions were unlawful during the period the restrictions were in place, from March 22, 2020 to June 2, 2020. Super. Op. at 21-22. As outlined by the Superior Court, federal courts that have addressed the constitutionality of COVID-protective measures, including the Supreme Court of the United States, have consistently found that the law in this area was (and is) not clearly established such that a reasonable person in the Governor's position in March through June 2, 2020 would have known whether the Challenged Restrictions were unconstitutional. *See Benner*, 2021 WL 4123973, at *5 ("'no Supreme Court precedent, Third Circuit precedent, or robust consensus of persuasive authority had held that' similar restrictions violated clearly established law"); *Northland Baptist Church of St. Paul, Minn.*, 530 F. Supp. 3d at 807 (D. Minn. 2021) (finding governor entitled to qualified immunity on challenges to COVID-19 restrictions on religious freedom grounds); *Case*, 542 F. Supp. 3d at 1270 (M.D. Ala. 2021), *aff'd*, 2022 WL 2441578 (11th Cir. July 5, 2022); *Pleasant View Baptist Church,* 78 F.4th at 300 ("As the Governor points out, Plaintiffs have not provided this court with any cases denying a government official qualified immunity for their immediate public-health response to the COVID-19 pandemic."); *see also Bastian v. Lamont*, 2022 WL 2477863, at *7 (D. Conn. July 6, 2022) ("[I]t is implausible that 'every reasonable official' would have understood issuing or enforcing public health policies [in

response to COVID-19] violated the plaintiffs' rights."); *Bojicic v. DeWine*, 569 F. Supp. 3d 669, 692 (N.D. Ohio 2021), *aff'd*, 2022 WL 3585636 (6th Cir. Aug. 22, 2022), *cert. denied*, 143 S. Ct. 735 (2023) ("[I]t is simply irrational to assert that a reasonable health official would have known that imposing business closings in response to a pandemic clearly violated Supreme Court precedent."); *Mader*, 2021 WL 3852072, at *7 (finding it "not clear" to the Township that preventing the public from entering the building for a township meeting on June 24, 2020, when the public could attend the meeting virtually, "violated a clearly established right of which a reasonable township official would have been aware").

In fact, "while there is no established precedent to suggest that [COVID-19-related] limitations were unconstitutional, there *is* established precedent to demonstrate that, in enacting [orders closing businesses during the pandemic], [state officials] acted within the limits of their Constitutionally entrusted duty to guard and protect the safety and health of the people of [the state]." *Hinkle Fam. Fun Ctr., LLC v. Grisham*, 586 F. Supp. 3d 1118, 1128-29 (D.N.M. 2022), *aff'd*, 2022 WL 17972138, at *3 (10th Cir. Dec. 28, 2022), *cert. denied*, 143 S. Ct. 2613 (2023); *see also Bastian*, 2022 WL 2477863, at *7 (noting Supreme Court orders addressing challenges to COVID-19 restrictions "have suggested that courts should grant wide latitude to elected officials under these circumstances"). Because Plaintiffs "have identified neither Supreme Court precedent nor a robust consensus of cases of

persuasive authority" showing the Governor violated clearly established law, the Governor is entitled to qualified immunity. *Mirabella v. Villard*, 853 F.3d 641, 653 (3d Cir. 2017).

Finally, Plaintiffs claim the Superior Court erred by not addressing "the issue" of their Fourteenth Amendment and establishment clause arguments. OB at 52-53. Although unclear, it appears Plaintiffs argue the Superior Court impermissibly declined to address their claims that the Governor's actions violated the Fourteenth Amendment and the establishment clause. But the Superior Court specifically addressed whether there was clearly established case law with respect to Plaintiffs' claims and correctly found there was not. *See, e.g.*, Super. Op. at 22-23 n.88.

## III. PLAINTIFFS' REQUEST FOR DECLARATORY RELIEF IS NOT JUSTICIABLE.

### A. Questions Presented

1. Whether the Superior Court correctly held that Plaintiffs' claim for declaratory relief based on the Governor's past acts did not assert a present case or controversy. Super. Op. at 40-45.
2. Whether the Superior Court correctly held that Plaintiffs lacked standing to sue based on the speculative nature of their alleged future injury. Super. Op. at 45-48.

### B. Scope of Review

Review is *de novo. See* Section I(B).

### C. Merits of Argument

The Superior Court rightfully held that Plaintiffs' request for a declaratory judgment (A621-A623) is not justiciable. Super. Op. at 44, 48. Pursuant to the Declaratory Judgment Act, Delaware courts possess discretion to render declaratory judgments. *See* 10 *Del. C.* §§ 6501 *et seq.* Yet, "the Declaratory Judgment Act is not to be used as a means of eliciting advisory opinions from the courts." *Ackerman v. Stemerman*, 201 A.2d 173, 175 (Del. 1964). As noted by the Superior Court, "'[a]dvisory opinions . . . put the court at risk of making incorrect judgments on the basis of insufficiently developed facts, as well as prematurely influencing the development of the law.'" Super. Op. at 41 (quoting *Manchester v. Narragansett*

*Capital, Inc.*, 1989 WL 125190, at *10 (Del. Ch. Oct. 19, 1989)). Plaintiffs seek a judicial pronouncement that restrictions briefly in place in early 2020 violated their constitutional rights. Those are not justiciable claims because there is no present case or controversy and Plaintiffs do not possess standing to sue.

### 1. Lack of a Case or Controversy

Pursuant to *Rollins International, Inc. v. International Hydronics Corp.*, there is a four-part test for determining whether an actual controversy exists for a declaratory judgment claim:

> (1) It must be a controversy involving the rights or other legal relations of the party seeking declaratory relief; (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) the controversy must be between parties whose interests are real and adverse; [and] (4) the issue involved in the controversy must be ripe for judicial determination.

*Rollins Int'l, Inc. v. Int'l Hydronics Corp.*, 303 A.2d 660, 662-63 (Del. 1973). The analysis of the actual controversy factors is "commonsense." *Buckeye P'rs, L.P. v. GT USA Wilm., LLC*, 2022 WL 906521, at *21 (Del. Ch. Mar. 29, 2022). Plaintiffs' declaratory judgment claim does not satisfy the second or third prong. The parties are neither adverse nor is there a present actual case or controversy. The Superior Court correctly found that the parties are not adverse because the Governor is "currently taking no action to infringe upon those civil rights Plaintiffs claim were harmed." Super. Op. at 44.

In their Superior Court Complaint, Plaintiffs expressly sought declaratory relief regarding "previous acts of Defendant Carney." A621-A623. "'[P]ast exposure to illegal conduct does not in itself show a present case or controversy . . . .'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974)). The Superior Court rightfully observed that "Delaware courts will not pronounce that past actions 'were right or wrong' when those actions have 'no demonstrable continuing effect.'" Super. Op. at 40 n.157 (quoting *Spencer v. Kemna*, 523 U.S. 1, 18 (1998)).

Plaintiffs are seeking declaratory judgments for past actions. Their claims concern challenged restrictions imposed by gubernatorial executive orders issued between March 2020 and May 2020 and which have not been in effect since June 2, 2020. The challenged restrictions were therefore inoperable eighteen (18) months before Plaintiffs filed their Verified Complaints in the Delaware Court of Chancery (December 1, 2021) and thirty-one (31) months before they filed their first Consolidated Complaint in the Superior Court (January 13, 2023). Indeed, Plaintiffs conceded in their Superior Court Complaint that all challenged restrictions allegedly burdening their rights were "abandoned" as of June 2, 2020. A561.

Instead of addressing how claims based on restrictions terminated nearly three years ago present a current case or controversy, Plaintiffs ignore this part of the Superior Court's opinion and pivot to asserting they have standing to challenge

constitutional wrongs. OB at 41-42. Plaintiffs provide no basis for this Court to disrupt the Superior Court's holding that "[t]o issue declaratory relief at this juncture is tantamount to using an advisory opinion because it would have no practical impact or effect on the status quo." Super. Op. at 44. Furthermore, by not addressing the issue, Plaintiffs waive their ability to argue that the *Rollins'* factors support their position. *See Oney*, 482 A.2d at 758.

**2. Plaintiffs Lack Standing to Sue**

A plaintiff bears the burden of establishing standing by showing: "(i) the plaintiff has suffered an 'injury-in-fact,' i.e., a concrete and actual invasion of a legally protected interest; (ii) there is a causal connection between the injury and the conduct complained of; and (iii) it is likely the injury will be redressed by a favorable court decision.'" *Albence v. Higgin*, 295 A.3d 1065, 1086 (Del. 2022). Concerning the third prong, redressability, the question is whether an injury is "'likely, as opposed to merely speculative,' that the requested relief will remedy the alleged violation." *State v. MacColl*, 2022 WL 2388397, at *8 (Del. Super. July 1, 2022) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)). The Superior Court correctly held Plaintiffs fall short under the redressability prong. Plaintiffs seek a declaratory judgment that past restrictions violated their constitutional rights. But those restrictions have not been in effect since June 2020. As the Superior Court found, even assuming past violations, the declaratory judgment sought by Plaintiffs

would only serve to "bring Plaintiffs satisfaction," not "alter the status quo." Superior Ct. Op. at 47-48.

Plaintiffs' sole argument on appeal is that they have standing because Article I, § 1 of the Delaware Constitution protects their right to religious worship. OB at 41-42. But the question is not whether Plaintiffs have constitutional rights. Nor should the Court credit Plaintiffs' offensive rhetoric that the Governor believes "religious worship rights are no big deal." OB at 42. The question is whether the declaratory relief requested by Plaintiffs satisfies established Delaware law on standing. The Superior Court correctly found it does not.

### 3. The Mootness Doctrine Is Inapplicable

Finally, the Superior Court correctly found the mootness doctrine and its exceptions did not apply to Plaintiffs' claims because the claims were not justiciable when filed. Super. Op. at 48-49; *see also Gen. Motors Corp. v. New Castle Cty.*, 701 A.2d 819, 823 (Del. 1997) ("According to the mootness doctrine, although there may have been a justiciable controversy *at the time the litigation was commenced*, the action will be dismissed if that controversy ceases to exist." (emphasis added)). Plaintiffs assert in passing that the Superior Court was incorrect to rule mootness doctrines inapplicable because Plaintiffs had not raised mootness in their briefing. OB at 59 n.111. But Plaintiffs specifically argued in their complaint that exceptions to the mootness doctrine apply to their claims. A525-A532 ¶¶ 28-45.

Plaintiffs' reliance on two Superior Court cases they argue "reject[] the lower court's reasoning" by "finding claims not to be moot under similar circumstances" is misplaced. OB at 59 n.111. These cases are not analogous. The court in *Sanborn v. Geico General Insurance Company* held that the plaintiff had standing to bring the lawsuit against GEICO, so analysis of the mootness doctrine was appropriate. *Sanborn v. Geico Gen. Ins. Co.*, 2016 WL 520010, at *6 (Del. Super. Feb. 1, 2016). And in *First State Orthopaedics, P.A. v. Employers Ins. Co. of Wausau*, 2020 WL 2458255 (Del. Super. May 12, 2020), the court found that the defendant was defending its prior practice and had not reached an agreement with the plaintiff to end the practice. *Id.* at *3. Conversely, here, the Governor entered into a relevant settlement agreement that, as the Court of Chancery recognized, "provides objective evidence that the Governor does not intend to re-impose the Challenged Restrictions." Appellants' Tab B ("Ch. Op.") at 4.

## IV. THE COURT OF CHANCERY LACKS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS.

### A. Question Presented

Whether the Court of Chancery correctly held that it lacked subject matter jurisdiction because Plaintiffs were not entitled to a permanent injunction. Ch. Op. at 51.

### B. Scope of Review

Review is *de novo*. *See* Section I(B).

### C. Merits of Argument

Plaintiffs sought to avail themselves of the Court of Chancery's equitable jurisdiction by initially seeking a "permanent injunction prohibiting the Governor from implementing similar restrictions in the future." Ch. Op. at 1. The Court of Chancery found Plaintiffs failed to demonstrate they were entitled to a "prophylactic permanent injunction" and dismissed the claims for lack of subject matter jurisdiction. Ch. Op. at 5. Plaintiffs contend the Court of Chancery erred because they do not have an adequate remedy at law and there is "reasonable apprehension" of future harm. OB at 55-61. Plaintiffs' arguments lack merit.

#### 1. Plaintiffs Had an Adequate Remedy at Law

Plaintiffs argue that a remedy at law would be inadequate because there was irreparable harm here. OB at 55-56. Yet, the Court of Chancery deemed whether there was imminent irreparable harm a "red herring" in its analysis because it is too

narrow in requiring imminency. Ch. Op. at 31-32. The Court viewed the focus on imminent irreparable harm in the permanent injunction context to be a mistaken "mutation" carried over from earlier phases of a case when imminency is relevant, such as deciding whether to issue temporary restraining orders or preliminary injunctions. *Id.* at 32-34.

The court reasoned that since a "permanent injunction is final relief, it does not require a showing of imminent irreparable harm." *Id.* at 37. Instead, a permanent injunction requires showing that no legal remedy is adequate. *Id.* at 37-38. Showing that a legal remedy is inadequate does not require showing of imminent irreparable harm, or even irreparable harm. *Id.* at 38. Relying on Judge Posner, the court noted that while "irreparable harm is one way of demonstrating that legal remedies are inadequate," it is not a requirement for a permanent injunction and should not be. *Id.* at 38-42. Therefore, the court reframed the test "through the correct lens" – whether there was a "reasonable apprehension of a future wrong." *Id.* at 46-47 (quoting *McMahon v. New Castle Assocs.*, 532 A.2d 601, 606 (Del. Ch. 1987) (internal quotation marks omitted)).

Because this "corrected" lens *broadened* Plaintiffs' ability to seek equitable relief, it is curious that Plaintiffs revert to a narrower analysis of irreparable harm. OB at 55. Nevertheless, Plaintiffs argue that the Governor has caused irreparable harm to his office when he "ignore[s] multiple express limitations on his 'power'

under our Constitution." OB at 55-56. Plaintiffs rely solely, without explanation, on *Kallick v. Sandridge Energy, Inc.*, in which the Court of Chancery granted a stockholder's request for a preliminary injunction against an incumbent board from campaigning against a dissenting stockholder's consent solicitation that would install its own slate of directors. *Id.* (citing *Kallick v. Sandridge Energy, Inc.*, 68 A.3d 242, 264 (Del. Ch. 2013)). In that case, the court found the board likely violated its fiduciary duty of loyalty by unjustifiably withholding approval of the dissenting stockholder's slate of nominees for stockholder vote, where such approval would avoid triggering repayment obligations to creditors. 68 A.3d at 260-61. Thus, the board's self-interested actions posed "immediate, irreparable harm" to stockholders by interfering with their ability to choose directors in a "closely contested election." *Id.* at 264. To the extent *Kallick* is even analogous, Plaintiffs' reliance is misplaced. There is no allegation (nor can there be) that the Governor issued any of the Challenged Restrictions to entrench himself and coerce voters.

Plaintiffs next argue "'that a denial of the right to worship under the federal and state constitutions constitutes irreparable harm.'" OB at 56 (quoting the Court of Chancery's reference to the Governor's *arguendo* statement below). Plaintiffs ignore the Court of Chancery's conclusion that their failure to seek a preliminary injunction to prevent the Governor from acting in 2022 evidences that they could wait until a final adjudication by a court of law in the form of a declaratory judgment.

Ch. Op. at 50. Rather, Plaintiffs argue they need a permanent injunction because of the time it takes a church pastor to decide to sue, a Church to find legal counsel, and an attorney at a small firm to draft legal materials and bring suit. OB at 57-58. Plaintiffs' hypothetical scenarios are directly belied by the *Bullock* action, in which a church pastor filed suit within weeks of the Governor's initial orders and the day after the Eighteenth Modification. B010. But even accepting these hypothetical scenarios, Plaintiffs still fail to show a remedy at law would be inadequate.

Plaintiffs also argue that irreparable damage will be done because a pastor will be unable to "save someone's eternal soul" or "comfort a parishioner" during another pending lawsuit. OB at 58. Plaintiffs rely on a comparative case for this proposition; a case which concerns a marketing company's request for a preliminary injunction against former officers, employees, and contractors who conspired to recruit the company's distributors and damaged the company's relationship with its distributors and caused it to lose customers. *Id.* At 58 n.109 (citing *Zrii, LLC v. Wellness Acquisition Grp., Inc.*, 2009 WL 2998169, at *13 (Del. Ch. Sept. 21, 2009)). It is unclear how this cited case is instructive, where Plaintiffs did not seek any preliminary relief and the orders at issue had not been in place for more than a year.

### 2. The Court of Chancery Did Not Conflate Its Jurisdictional Analysis with One of Mootness

Plaintiffs claim that the Court of Chancery's ruling below "was the functional equivalent of a merits ruling on the disputed defense motion that the case was moot,

but without any consideration of the fully briefed legal questions of whether this Court's exceptions to the mootness doctrine were met, and the merits test also." OB at 59. Plaintiffs' characterization of the Court of Chancery's decision is incorrect.

To support their argument, Plaintiffs claim the Superior Court "functionally treated the factual underpinnings of mootness as having been established by the earlier Chancery decision." *Id.* (citing Super. Op. at 45 & n.173). For this assertion, Plaintiffs rely on a page where the only reference to the Court of Chancery is in a footnote and concerns the Court of Chancery's reasonable apprehension test under its jurisdictional analysis. Super. Op. at 45 n.173. Plaintiffs' characterization of the Superior Court's holding is misguided.

Plaintiffs also claim that the Governor "treated" the Court of Chancery's ruling as resolving the question of mootness. OB at 59. This is incorrect. The Governor argued—and the Superior Court agreed—that the mootness doctrine is inapplicable because the controversy was never ripe to begin with. The Governor's argument does not reference, let alone rely on, any finding by the Court of Chancery as to mootness.

Plaintiffs argue that the *Bullock* settlement does not specifically mention Article I, § 1 of the Delaware Constitution or the Establishment Clause of the United States Constitution. OB at 60. But even so, that does not undermine the Court of Chancery's finding that the representations the Governor made in the settlement

agreement are a "strong indication" that the Governor will not issue similar restrictions. Ch. Op. at 50. As part of the *Bullock* settlement, the Governor agreed "not to impose restrictions that specifically target houses of worship." A562, A586. The Governor also agreed that, if any future emergency orders related to COVID-19 readopted the term "Essential Businesses," that term would include Houses of Worship. A562. As the Court of Chancery found, there is no reasonable basis to suspect that any similar restrictions might be entered in the future. Ch. Op. at 48-49. In the court's view, despite Plaintiffs not being parties to the *Bullock* settlement, it "remains relevant" because the "fact that [the Governor] agreed not to in the Bullock Settlement is a strong indication that the Governor will not take action of that sort." *Id.* at 50.

Next, Plaintiffs argue that the Governor's reservation of his right to reimpose all of his prior policies "is key." OB at 60 & n.113. Plaintiffs ignore that the reservation in the settlement agreement is limited to issuance of neutral rules of general applicability that may affect, but do not target, Houses of Worship. B152 ¶ 2. Furthermore, Plaintiffs rely on cases which do not involve settlement agreements and therefore do not properly align with the enforceable restrictions here that the Governor has voluntarily placed on his ability to implement similar policies. OB at 60 n.113 (citing *Sanborn*, 2016 WL 520010, at *10 (regarding a GEICO internal policy); *First State Orthopaedics, P.A.*, 2020 WL 2458255, at *1 (regarding

a workers' compensation internal policy); *Fields v. Speaker of Pennsylvania House of Representatives*, 936 F.3d 142, 161 (3d Cir. 2019) (concerning the Pennsylvania House of Representatives pre-2017 practice and sign language requiring guests to stand during prayer); *Hartnett v. Pennsylvania State Educ. Ass'n*, 963 F.3d 301, 307 (3d Cir. 2020) (involving a union's collections of fees from non-members).

Plaintiffs also argue that the possible resurgence of a COVID-19 pandemic creates a "reasonable apprehension" that the Governor would re-impose similar restrictions to those challenged in *Bullock* and this matter. OB at 60-61. The Court of Chancery was rightfully unpersuaded by Plaintiffs' argument. *Id.* at 49. In addition to the *Bullock* settlement, the court pointed out that the Governor had specifically "carved out Houses of Worship from otherwise generally applicable safety measures" when the Delta and Omicron variants resulted in a renewed state of emergency in January 2022. *Id.* As the Superior Court pointed out, "any possibility that the Challenged Restrictions or similar restrictions will be put in place again is hypothetical and highly speculative." Super. Op. at 45 & n.173 ("The Court of Appeals for the Third Circuit held that it was not reasonably likely that 'the pandemic such as it presented itself in 2020 and 2021' would occur again." (citing *Clark v. Governor of New Jersey*, 53 F.4th 769, 778 (3d Cir. 2022))). Plaintiffs cannot base their claims on such speculation.

## CONCLUSION

The Court of Chancery correctly found it lacked subject matter jurisdiction over Plaintiffs' claims against the Governor. The Superior Court correctly dismissed Plaintiffs' claims. For the reasons set forth above, this Court should affirm those rulings.

**STATE OF DELAWARE**
**DEPARTMENT OF JUSTICE**

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