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IN THE SUPREME COURT OF THE STATE OF DELAWARE

In re Covid-Related Restrictions on Religious Services	:	**No. 354, 2023**
	:	
	:	Courts Below:
	:	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

APPELLANTS' REPLY BRIEF

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ARGUMENT

I. THE GOVERNOR DOES NOT HAVE "DISCRETION" TO EXERCISE A "POWER" EXPRESSLY FORBIDDEN TO HIM BY THE DELAWARE CONSTITUTION.

A. What Is Not Contested.

Defendant makes no argument in response to many of the key legal and factual issues addressed in Plaintiffs' Opening Brief and in the later Amicus Brief of the Delaware Legislators. As a result, the following are uncontested.

1. The Unambiguous Constitutional Text Expressly Restricts the "Power" of the Governor.

First, Article I, § 1 and the Reserve Clause of the Delaware Constitution expressly and absolutely restrict the "power" of the Governor as demonstrated by: (1) their plain text; (2) the clear intent of the 1792 Convention that enacted them; (3) the conclusion of our Constitution's foremost legal and judicial historian; (4) the writings of our State's leading academic historians and political scientists of the last 70 years; (5) an exhaustive host of legal scholarship; and (6) the context and evolution of the language back to William Penn. (OB at 22-40; Legislators at 7-11,18-19,21-22).

2. The Clear Requirements of this Court's Precedents.

Second, under this Court's many precedents, the plain meaning of the constitutional text governs and knowing their context, evolution and history is

vital to a proper understanding. (OB at 21-24,38).

3. The Challenged Restrictions Fall Squarely Within the Prohibitions of the Plain Language of the Constitutional Text.

Next, Defendant's restrictions on core communal religious worship within the four walls of the church building fall squarely within the plain meaning of "rights of conscience," "free exercise of religious worship," "preference," "modes of worship" and other language of Article I, § 1. (Legislators at 12-18; OB at 42,46-48,53-54;A670-75).

4. The Applicability of Judicial Notice.

Continuing, Del.R.Evid. 201-202 have been properly invoked and the long history of plagues and pestilence, epidemics and pandemics, found in court decisions, historical materials and foundational religious texts is properly part of the underlying factual record. (OB at 4-10,36-37; Legislators at 15-16).

5. Defendant's Many Binding Judicial Admissions.

Nor does Defendant challenge the legal admissibility of his many judicial admissions on liability, which are "conclusive and binding both upon the party against whom they operate, and upon the court,"[1] including that:

- his Orders "are not [of] general application," (OB at 13);

[1] Merritt v. United Parcel Serv., 956 A.2d 1196, 1201-02 (Del. 2008).

- never in the history of "Delaware law or in any other law in the United States" has government mandated "specific procedures ... for baptisms" the way Defendant did here, (id. at 17);

- his Orders were "specific restrictions targeting a form of worship," (id. at 18);

- he used his "preferred" religious council to craft restrictions on religious worship, (id. at 14); and

- the ability to "attend mass" and "take Communion" in person are key to the constitutional analysis. (Id. at 18).

6. Defendant's Many Public Evidentiary Admissions.

Defendant also does not challenge under Del.R.Evid. 801(d)(2) or 201 the binding nature of his public admissions made in speeches to the citizenry, still posted to his official website, including that:

- his Orders "effectively" shut down all communal religious worship statewide, (OB at 11);

- religious "faith exists for a year just like" 2020, during times of "plagues and pestilence," (Legislators at 15-16);[2] and

- he selectively imposed his gag order restriction only on religious speech but not on political speech. (OB at 16).

[2] "[P]estilence" includes epidemics. 2 An American Dictionary of the English Language (Noah Webster, ed., 1st ed., 1828); www.merriam-webster.com/dictionary/pestilence.

B. The Many Defense Errors.

1. "Unprecedented"

The defense claim that the threat of COVID is factually "unprecedented" in our constitutional history (AB at 1,3,15) is factually and definitionally incorrect.

Black's defines "unprecedented" as "Never before known; without any earlier example."[3] But exhaustive historical examples of similar widespread and deadly plagues and pestilence, epidemics and pandemics, occurring contemporaneously with the enactment of all four of Delaware's Constitutions were factually recounted at length. Defendant dismissed these as "irrelevant"[4] "historical events"[5] below, and abandoned the field on appeal by conceding their historical accuracy and admissibility.

This demonstrates that ours is not a case addressing "unprecedented societal concerns" that were foreign to our constitutional framers in 1776, 1792, 1831 and 1897.[6] Instead, there was abundant contemporaneous and analogous factual

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[3] Black's Law Dictionary (7th ed., 1999); accord 2 An American Dictionary of the English Language (Noah Webster, ed., 1st ed., 1828)("Having no precedent or example; not preceded by a like case; not having the authority of prior example"); 2 A Dictionary of the English Language (Samuel Johnson, ed., 6th ed., 1785)("not justifiable by any example").

[4] (C.D.I.34 at 5 n.3).

[5] (Ans. ¶¶ 192-205;A430-35).

[6] New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 27 (2022).

precedent. Yet despite being all too familiar with and aware of the problems of such plagues and pestilence, Delaware's framers nevertheless chose to strip Delaware government of all "power" to interfere with communal religious worship in the four walls of Delaware churches. This is the first and strongest command in our Constitution. The fact that other states lack such express constitutional protection takes nothing away from our Delaware Constitution which contains it.

2. The False Claim Churches Were Not Singled Out.

The defense insists churches were treated the same as everyone else. (AB at 16,4-5).

a. Judicial Rejection.

But despite ever-shifting claims over the last four years, by an ever-changing platoon of 11 defense attorneys including members of one of this nation's most prominent law firms, the State Solicitor, the Defensive Litigation Unit Department Head, Assistant Head, and many others, these arguments have been universally, repeatedly and emphatically rejected and debunked by three Delaware jurists, sitting in three different courts, before two different sovereigns.

- From the Vice Chancellor: "[o]nly religious organizations" were limited and the "[t]en person restriction did not apply to any other category," (OB at 10-11);
- From the Superior Court Judge: "only Houses of Worship were subject to this ten person restriction" which could not be exceeded

"under any circumstances," (id. at 11);

- From the Chief Judge in federal court: "I'm just at a loss" why Defendant is issuing orders "directed solely at communities of worship" for actions that are "not prescribed with respect to any other type of entity," so "it's very clear" these are "not of a general application." (Id. at 13-14).

b. Factual Rejection.

The factual sequence of Defendant's many official Orders and regulations affecting churches is summarized in the earlier brief (OB at 10-18), and exhaustively detailed in the Complaint. (¶¶ 111-32,138-46,150-71,85-107,238, 241-49,268,271-75,293,296-300,310-12;A553-85,604-09,612-14,617-20).

(1). The Fourth Modification.

Briefly, the 237 Essential Businesses list expressly limited churches to "no more than 10 people" starting March 22, 2020.[7] Review demonstrates that churches were the only Essential Business limited to 10 persons. (Ex.C at A229-32). Suggesting 3 separate jurists got it wrong, Defendant makes claims about the Fourth Modification (AB at 16) which do not survive basic review. The very page cited reveals educational institutions have no limit and "organizing capacity" groups are not required to limit, only "attempt to limit." (Ex.B at A225, #11,25).

[7] (Ex.C at A232; see Ex.B at A213, ¶ 3).

(2). The Ninth and Tenth Modifications.

(a). 10 Person Limit.

Moving forward in time, the mandatory 10 person limit on churches was reaffirmed and continued into June.[8] Defense claims that the later Ninth and Tenth Modifications treated all equally (AB at 4-5) are contradicted by the record which demonstrates that while restrictions on (almost) all were loosened, churches were targeted and clamped down upon even further. Unlike churches which were still expressly limited to 10, all other 236 categories of Essential Businesses were expressly exempted from having the following included in their persons total:

- all employees, (Ex.D at A237 ¶ 1 at lines 19-21);
- all customers up to 20% of fire occupancy. (Id. at A238 ¶ 2.a.).

So Plaintiffs' large churches got a maximum of 10, counting all preachers, liturgical staff, parishioners and security in a time of church burnings. But all other 236 categories of businesses received hundreds more spread over their employees and customers.[9]

This was what Defendant meant when he admitted to the Delaware news media that his orders had "effectively" shut down all communal religious worship

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[8] (See Ex.A at A206-07; Ex.E at A247 ¶ 1.e.; Ex.H at A294; Ex.J at A314).

[9] Defendant was forced to admit this to the federal court. (A142-43).

in Delaware. (OB at 11). Or, in the Vice Chancellor's words, Defendant's "*de facto* prohibition on opening." (Id.). There was no way for Plaintiffs' churches, or any others statewide, to operate and stay open. They were forced to close.

A statewide Governor imposed shutdown of all communal religious worship in our State is a far cry from, and the extreme opposite of, the "no power" to interfere with religious worship prohibition required by Article I, § 1. Forced closure of all is the ultimate interference. The Delaware Constitution's absolute prohibition to the side, it also falls far short of even the much lesser neutrality requirements of the First Amendment. See, e.g. Keegan v. Univ. of Delaware, 349 A.2d 14, 16 (Del. 1975)("neutrality is the safe harbor in which to avoid First Amendment violations."); Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 527 (2022)("evenhanded, across-the-board" treatment of religion is the rule).

(b). More Restrictions on Religious Worship.

As noted, Defendant continued to pile additional unprecedented restrictions on the form and content of religious worship in churches from the Ninth Modification forward.[10] Yet despite their being extensively detailed in the earlier brief (OB at 12-18,47,53-54), the defense surrenders the field and ignores them. But these restrictions, these details, are key. They include, *inter alia*, restrictions

[10] (See, e.g. Ex.A at A206-08; Ex.K at A316-19; Ex.N at A342-46).

which even defense counsel conceded were: "specific restrictions targeting a form of worship" (id. at 18); and others with no precedent "in Delaware law or in any other law in the United States." (Id. at 17).

For example, if Plaintiffs agreed to: (1) bar anyone age 65 or older from attending service; and (2) never hold any religious service whatsoever on Mondays, Tuesdays, Wednesdays, Thursdays, Fridays, and Saturdays; Defendant would allow them to increase capacity of a single Sunday service to 30%. If Plaintiffs refused, they were stuck with the 10 person limit, the "*de facto*" closure. (See OB at 11-18 for more details and examples). But no such Hobson's choice was imposed on any other category of entities, only churches. Casinos, liquor stores, abortion clinics, law firms, social advocacy organizations and hundreds more were free to remain open.[11] This fact was not lost on the 165+ pastors, and others, who contemporaneously petitioned on behalf of thousands of Delawareans, asking by what legal authority Defendant had closed their churches in violation of the express "no power" prohibition of Article I, § 1, while leaving thousands of businesses not even arguably covered by any provision whatsoever of our Delaware Constitution free to operate and "gather[] in large numbers" unrestricted. (Ex.I at A296-97; Ex.G at A264-68). Nor was this discriminatory treatment lost on

[11] (See Ex.C at A229-32; Ex.I at A296; Ex.G at A264; rewirenewsgroup.com/2020/04/14/abortion-access-covid-states/#delaware).

the Chief Judge of our federal court who "conclud[ed]" religion was clearly targeted. (OB 13-14).

3. Big Picture - What Standard to Apply?

Try as he may to hide behind a false flag of emergency, the undisputed facts reveal ours was not a situation where a simple one or two line statewide shutdown was quickly ordered. Instead, Defendant's many Orders attached to Plaintiffs' Complaint reveal Defendant created, and over time developed, hundreds of pages of exhaustively detailed exceptions to his shutdown rule and soon after also began to meddle into the forbidden realm of religious rites, rituals and communal worship. The creation of such a detailed exception system has long been fatal under First Amendment analysis. (OB at 49-52; Legislators at 17-18). As this Court presciently held in Keegan in 1975, "neutrality is the safe harbor," 349 A.2d at 16, so an "absolute ban of all religious worship," id., while allowing numerous "other activities," id. at 19, triggers a constitutional violation. At a bare minimum, Article I, § 1 requires the same. (Legislators at 18).

After first representing to the federal court the "claim that the Governor's orders ... violate [Article I, § 1] presents a novel and complex issue of Delaware state law,"[12] the defense soon flip-flopped and claimed in Chancery to have

[12] Bullock v. Carney, C.A.No. 20-674-CFC (D.Del.), at D.I. 44 at 17-18 n.6.

suddenly discovered a plethora of directly on point precedent. (See C.D.I.38 at 12). The problem with the defense attempt to elide over into the merits (AB at 16-17) is it misrepresents the state of Delaware case law in a case where Defendant has long implored the lower courts not to address that case law despite the exhaustive merits briefing below. (C.D.I.30,34,38).

But consistent with the position taken by the Delaware ACLU for decades,[13] this Court has specifically observed that Article I, § 1 is the lead civil law example that "the Declaration of Rights in the Delaware Constitution has not always been interpreted identically to the counterpart provisions in the federal Bill of Rights." Doe v. Wilmington Hous. Auth., 88 A.3d 654, 661 (Del. 2014) (en banc); see id. at n.23.[14]

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[13] See, e.g. Richard Morse & Joy Mulholland, Article I of the Delaware Constitution: Liberty Begins at Home, Delaware Lawyer 20 (Winter 2011/2012) ("the drafters of ... Art. I, § 1 took care" in choosing its wording and its "text ... supports greater protection for religious freedom" than the parallel provisions of "the First Amendment."); Jack Blumenfeld & Lawrence Hamermesh, Prayer in Public Schools, Delaware Lawyer 16 (Fall 1986) (arguing the plain meaning of Art. I, § 1); see also Carroll Poole & Max Bell, Jr., The Delaware Declaration of Rights, Delaware Lawyer 117-21 (Fall 1987) (discussing the historical origins of the limitations on sovereign "power" in constitutions and also the "freedom of worship," establishment and other restrictions on power guarantees under the 1776 Declaration of Rights and Art. I of the 1792 Constitution) (AR97,78,88-91).

[14] See also Delaware Trust Co. v. Fitzmaurice, 31 A.2d 383, 389 (Del.Ch. 1943) (under Art. I, § 1, "[r]eligious freedom is guaranteed to all citizens, and any legislation affecting that right is prohibited.... The[se] constitutional guarantees are limitations on the powers of the government, not on the rights of the governed");

Acknowledging the limited case law on the question, this case since day 1 has sought to clarify which of three possible legal standards should be applied to Article I, § 1. (See Compl. ¶¶ 5-11,A513-16; C.D.I.30 at 39-40). What prevented that determination by the lower courts was Defendant's immunity defense, which has led us to our present appeal which squarely presents the legal and logical question of whether Defendant has "discretion" to exercise a "power" that our Constitution twice forbids that he ever exercise when it comes to communal religious worship.

The defense would have this Court ignore the plain language of the first sentence of our Constitution, a request which others have noted has serious implications for other constitutional and statutory rights in our state. (See Legislators at 21). But stripping our government of all "power" over religious worship and conscience was the precise intent of the first sentence in our Constitution. (OB at 24-38).[15] Until amended or repealed, the unambiguous plain

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East Lake Methodist Episcopal Church, Inc. v. Trustees of the Peninsula-Del. Annual Conf. of the United Methodist Church, Inc., 731 A.2d 798, 805 n.2 (Del. 1999)(en banc)(agreeing the plain text of Art. I, § 1 "enjoin[s] 'any magistrate ... in any case' from interfering with the free exercise of religious worship").

[15] Nor was this an outlier at the time. See, e.g. James Kent, 2 Commentaries on American Law Lecture XXIV 34 (Halsted, 2d ed. 1832)("The free exercise and enjoyment of religious profession and worship, may be considered as one of the absolute rights of individuals, recognized in our American constitutions, and secured to them by law."); Joseph Story, 3

language of Article I, § 1 governs.

4. Our Constitution, the Police Power and Its Limits.

As Chief Justice Richards explained, "[o]ur State Constitution ... is not a grant of power but is a limitation upon the powers which the State inherently possesses." State ex rel. James v. Schorr, 65 A.2d 810, 812 (Del. 1948). In Chief Justice Southerland's words, "[t]he general principles of constitutional law relating to the state's police power and the limitations on its exercise have been frequently stated by our courts." State v. Hobson, 83 A.2d 846, 855 (Del. 1961). But even the "police power...is always subject to express or implied constitutional restraints." Id. (quoting Gallegher v. Davis, 183 A. 620, 625 (Del.Super. 1936) (Layton, C.J.)). Our case addresses two such "express ... constitutional restraints," id., the "no power" prohibition of Article I, § 1, and the "OUT OF THE GENERAL POWERS" bar of the Reserve Clause. Defendant simply has no discretion to exercise a "power" he is constitutionally barred from ever exercising.

Defendant nevertheless attempts to do so. But, as this Court has long held, any "assumption of a power" not granted by our Constitution is "usurpation"

Commentaries on the Constitution of the United States § 1870 (Hilliard 1833)("The rights of conscience are, indeed, beyond the just reach of any human power. They are given by God, and cannot be encroached upon by human authority...."); id. § 1865 (the "free exercise of religion" includes "the freedom of public worship according to the dictates of one's conscience.").

which would -

> elevate [the usurping branch] above the constitution; overturn the foundation on which its own authority rests; demolish the whole frame and texture of our republican form of government, and prostrate every thing to the worst species of tyranny and despotism.

Rice v. Foster, 4 Del. 479, 489 (Del. 1847). "[A]ll respect for the fundamental law is [then] lost, and the powers of the government are just what those in authority please to call them." Schorr, 65 A.2d at 814.

The Delaware Constitution has specific provisions addressing emergency situations,[16] but does not limit the "no power" prohibition of Article I, § 1.

5. Discretionary vs. Ministerial.

The defense spills much ink to muddy the water on the discretionary vs. ministerial issue. (AB at 12-19). But the Chancery Court quickly identified that the traditional analysis does not fit a situation where there is an express prohibition on the exercise of "power." It is an "[o]dd" and "linguistically poor fit," as the defense conceded. (Tr. at 54-57,97;A487,497). But do not lose the forest for the trees: one still cannot have "discretion" to exercise a "power" one is prohibited from exercising; while a complete prohibition on action is logically different from a ministerial duty to perform a specific action. But to shoehorn it

[16] See Del.Const. Art. XVII, § 1; Art. VIII, § 6(c); Art. II, § 5; State ex rel. Gebelein v. Killen, 454 A.2d 737, 748 (Del. 1982)(Art. III, § 9; Art. XV, § 5); Op. of the Justices, 190 A.2d 521, 522-23 (Del. 1963)(Art. II, § 6, Art. III, § 20).

into the traditional analysis where it does not fit, the ministerial duty is to completely refrain from acting. But again, it is a complete prohibition on ever acting in the area. "No power" still means "no power."[17]

6. Standing.

The greater flexibility of the standing inquiry in state court versus federal court is well-known.[18] But even federally, what satisfies standing in Free Exercise cases is well-established. The Third Circuit has held for decades that a person's "inability to attend synagogue on the Sabbath" because of a defendant's actions "easily suffices" to establish standing. Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144, 170 (3d Cir. 2002). Defendant criminalized Plaintiffs attending church for fourteen weeks. This "easily suffices."

In the context of barring a citizen from publicly "sharing his [religious] faith," the U.S. Supreme Court has held that "an award of nominal damages by itself can redress a past injury" over similar standing and case or controversy

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[17] The defense reading of Xi v. Haugen, 68 F.4th 824 (3d Cir. 2023), defies that decision's oft-repeated holding that under the similarly worded Federal Tort Claims Act - and even in the absence of a "no power" prohibition - a government official still does not have "discretion" to violate the Constitution. In the recent words of the First Circuit, this is an "'elementary' proposition." Torres-Estrada v. Cases, 88 F.4th 14, 21-22 (1st Cir. 2023).

[18] See, e.g. In re Delaware Public Schools Litigation, 239 A.3d 451, 510-13, 538-40 (Del.Ch. 2020).

challenges. Uzuegbunam v. Preczewski, 141 S.Ct. 792, 796 (2021). The Court's lengthy analysis makes clear that because the law does not value economic rights over non-economic ones, it is the violation of the constitutional right that is key. Once established, nominal damages "provide the necessary redress." Id. at 796-802.[19]

7. Private Right of Action.

Raised for the first time on appeal (AB at 11-12), this ahistorical argument lacks merit because it omits both: this Court's binding precedent to the contrary; and the unique Delaware constitutional provision on which that decision from Justice Holland was based.

Goodman v. State, 882 A.2d 173, 174-77 (Del. 2005), was a civil case involving an unlawful seizure of a citizen's property by the State, where no other state statute allowed an action for civil damages for that seizure. This Court explained that the 'open courts' or 'remedies' clause of Article I, § 9 is crucial because it provides a "right under the Delaware Constitution to bring a separate civil action for damages." Id. at 177; accord id. at 178 (noting "the Delaware

[19] Through the justiciability lens, defense counsel admitted this "is not a hypothetical dispute, it's a ripe dispute." (Tr. at 32;A481). The Vice Chancellor noted: (1) agreement, (id. at 45-46,43,49,116;A484-85,502); and (2) that the Defendant uses "adversity" in a way the legal test does not. (Id. at 38-44;A483-84).

constitutional right to bring a separate action for damages"). Continuing, for cases against state actors, Article I, § 9 provides this is done by legislation enacted by the General Assembly. Id. at 177-78. In such circumstances, the relevant "basic statutory waiver of sovereign immunity is contained in the State Tort Claims Act." Id. at 178. As long as an exception of the STCA is met, sovereign immunity is waived and an action for damages may be brought. Id.

But none of the cases relied upon by the defense cite or discuss this Court's Goodman decision and the unique role played by Article I, § 9 here. Of those, only Judge Schwartz's decision (fifteen years prior to Goodman) even talks about the role of Article I, § 9.[20] And the District Court's analysis supports Plaintiffs, finding state constitutional claims are viable if one of the exceptions of the STCA is met.

> The Tort Claims Act bars plaintiff's damages claim under article I, section 7 of the Delaware Constitution unless the claim comes within one of the exceptions provided by the Act.

Id. at 601 (emphasis added). The decision noted the same analysis "applies equally" under Article I, § 6. Id. at 602.[21]

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[20] See Carr v. Town of Dewey Beach, 730 F.Supp. 591, 602 n.9 (D.Del. 1990).

[21] The lead defense case can be, awkwardly, harmonized with Goodman and Article I, § 9 since Schueller v. Cordrey, 2017 WL 568344, *2 (Del.Super. Feb. 13, 2017), found an alternative state law remedy for damages existed under

Consistent with Goodman, Delaware courts have regularly interpreted the STCA as the method required by Article I, § 9 to bring constitutional claims against state actors. See, e.g. Ross/Pitts v. Cramer, 1998 Del.Super. Lexis 206, *6 (Del.Super. Jan. 29, 1998)(expressly applying STCA by way of Article I, § 9 to various state constitutional civil claims); Vick v. Haller, 512 A.2d 249, 252 (Del.Super. 1986) (Jacobs, V.C.)(applying STCA to ineffective assistance of counsel civil claims); see also State v. Upshur, 2011 WL 1465527, *25-26 (Del.Super. Apr. 13, 2011)(not mentioning the STCA but holding "a civil lawsuit for damages" is the sole remedy for specific types of Article I, § 6 violations and "is more consistent with the intent of the framers of our constitution").[22]

But putting to the side the existence and remedial intent of the STCA,[23] at its core the defense position is that the vindication of fundamental constitutional rights turns on legislative grace. Yet in Obergefell v. Hodges, 576 U.S. 644, 677

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state common law.

[22] Notably, since at least 1950 it was the position of the State that the filing of a "civil action against the official who had invaded [a citizen's] rights under the Delaware Constitution" was an "appropriate remedy." Dorsey v. State, 761 A.2d 807, 818 (Del. 2000) (recounting some of that history).

[23] The defense forgets the history which led to the enactment of the STCA and similar statutes. See generally Pajewski v. Perry, 363 A.2d 429, 433-35 (Del. 1976) (recounting decades of strong judicial criticism of sovereign immunity by this Court and urging the General Assembly to enact remedial legislation). The STCA soon followed. See 61 Del. Laws 1978, ch. 431, § 1.

(2015), the U.S. Supreme Court explained that -

> The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act.

For more than 70 years this Court has repeatedly recognized the same for fundamental Delaware constitutional rights.

> We conceive it the duty of the courts to protect constitutional guarantees.... We believe that as long as the Constitution of this state contains the guarantees to the citizen referred to, we have no choice but to use every means at our disposal to preserve those guarantees.

Rickards v. State, 77 A.2d 199, 205 (Del. 1950); accord Dorsey, 761 A.2d at 818.

That is because -

> The freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power. Thus, when the rights of persons are violated, the Constitution requires redress by the courts.... This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.

Obergefell, 576 U.S. at 677 (cleaned up)(internal citations omitted).

The question is whether a Delaware citizen whose constitutional rights have been violated under the 248 year old protections of Article I, § 1, who has already factually, legally and definitionally satisfied the heightened liability standards of the STCA as Article I, § 9 requires, must now overcome a belatedly conjured,

undefined legal hurdle before vindicating their constitutional rights? This Court's answer to that question will impact all twenty one sections of the Delaware Declaration of Rights - from religious freedom in § 1 all the way to the recently enacted, and regularly expanding, "Equality of rights under the law" protections of § 21.

In the words of the Delaware General Assembly in enacting the recent constitutional amendment creating these § 21 rights, "[a] declaration of rights carries with it the promise that the State of Delaware will not impair a person's opportunity to exercise those rights."[24] Defendant asks this Court to abandon that promise. But, in Chancellor Kent's words, "[c]ivil and religious liberty generally go hand in hand, and the suppression of either of them, for any length of time, will terminate the existence of the other." 2 Commentaries 34-35.

[24] 82 Del. Laws 2019, ch. 1, § 1(5); see 83 Del. Laws 2021, ch. 1.

II. DEFENDANT DOES NOT HAVE QUALIFIED IMMUNITY.

First, the current state of the law here was most recently summarized in Thomas v. City of Harrisburg, 88 F.4th 275, 283-85 (3d Cir. 2023). This includes: (1) how to articulate the right at issue factually; (2) the level of legal specificity in prior case law required; and (3) how the "so obvious" that even "general principles" make the law clearly established inquiry works. Review of that decision from Judges Roth and Jordan demonstrates Defendants are incorrect on the merits of how qualified immunity works.

Second, Defendant fails to rebut the abundant cited Third Circuit and Supreme Court case law holding: immunity does not apply to non-discretionary decisions; and if the actions at issue are illegal under state law, the law is considered clearly established. (OB at 43-45).

Third, the claim that the law can only be "obvious" in fact situations that shock the legal conscience fails because ours is not a substantive due process case under the Fourteenth Amendment or a cruel and unusual punishment case under the Eighth. Just last year, the Third Circuit rejected an identical defense argument, concluding it "misses the point." Mack v. Yost, 63 F.4th 211, 236 (3d Cir. 2023). Despite "less viscerally abhorrent conduct" than other legal standards, the acts must still be "judged against the particular standards applicable to the [legal] issue

under examination." Id.

> [T]he fact that there have been few violations of religious liberty involving the rare targeting of an individual based on his religious practices, indicates that the illegality of such conduct is generally obvious enough to be understood even without judicial guidance.

Id. (cleaned up)(internal citations omitted). This is why our federal court was "just at a loss" at how far over the legal line Defendant went in targeting religion. (OB at 13-14).

Finally, the defense asks this Court to ignore the significance of the Free Exercise neutrality holding of its trail-blazing decision in Keegan. (AB at 27). Yet a decision of this Court cannot be so easily disregarded. In above-the-fold, page A1 coverage, the case was contemporaneously recognized by the Delaware public as a "landmark constitutional battle over the First Amendment."[25] For almost 2½ years, it attracted extensive front page and other local news coverage,[26] the involvement of the era's foremost constitutional law scholar,[27] resulted in the recusal of 2/3's of this Court's Justices and related judicial difficulties,[28] and the

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[25] David Hoffman, Campus Religion Case Heads Into Snare, The Evening Journal (Sept. 16, 1974)(AR43).

[26] (AR1-65,73-74).

[27] (AR25-28,46).

[28] (AR43-44,47-49).

ultimate decision received national news coverage from New York to Honolulu.[29] It continued to attract attention more than a decade later,[30] as our Delaware Bar praised its "neutrality" principle and holding that Free Exercise requires treating religious rights the same as everyone else, while also noting the criticism the decision received nationally before being eventually vindicated by the U.S. Supreme Court.[31] While much of the nation got it wrong, Delaware got it right.

Even lay members of the Editorial Board of The Morning News had no problem discerning this Court's legal holding: "treat everyone alike."[32] But it is "patently obvious" from his 237 exception scheme that Defendant did not do so.

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[29] (AR67-72).

[30] Gary Aber, ACLU vs. ACLU: A House Against Itself, Delaware Lawyer 27-32 (Fall 1986)(AR82-85).

[31] Additional affirmation of this Court's reasoning followed in later years. (Legislators at 17-18; OB at 50,46-47).

[32] Editorial, UD Should Forget It All, The Morning News (Aug. 27, 1975) (AR55-56).

III. THERE IS NO ADEQUATE REMEDY AT LAW FOR PLAINTIFFS' IRREPARABLE INJURIES.

The constant defense refrain is that there is no available legal remedy for Plaintiffs due to immunities. But "[p]erhaps the most often articulated formulation of what constitutes irreparable injury is that it consists of harm for which there can be no adequate recompense at law." In re Shawe & Elting LLC, 2015 WL 4874733, *28 (Del.Ch. Aug. 13, 2015).

CONCLUSION

Our Constitution is "a living symbol of our core values–a record of our collective aspirations and civic ideals.... [I]t helps define what it means to be a Delawarean."[33] Our founding father "was the greatest lawgiver the world has produced."[34] A vital part of his legacy lives on in Article I, § 1. But Defendant ignored that legacy, disregarded our heritage and violated our Constitution.

Governor Carper urged Delawareans to be "informed and engaged" with our Constitution, finding it "essential."[35] A student of history, he knew it is "the first duty of Citizens" to "take alarm at the first experiment on our liberties," because -

> free men ... d[o] not wait till usurped power ha[s] strengthened itself by exercise, and entangled the question in precedents. They s[ee] all the consequences in the principle, and they avoid[] the consequences by denying the principle.[36]

Defendant is not above our Constitution. The decisions below should be reversed.

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[33] Thomas R. Carper, Introduction in The Constitution of the State of Delaware, (Del. Heritage Comm'n, 1997)(A31).

[34] Thomas Jefferson, Letter to Peter Duponceau (Nov. 16, 1825), Founders Online, National Archives, https://founders.archives.gov/documents/Jefferson/98-01-02-5663.

[35] Carper, Introduction (A31).

[36] James Madison, Memorial and Remonstrance Against Religious Assessments (1785), in James Madison: Writings 31 (Jack Rakove, ed., 5th ed. 1999).

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Supreme Court Rule 14(d)(ii), I certify, based on the word-counting function of my word processing system (Word Perfect X4), that this brief complies with the typeface requirements of Rule 13(a) and the type-volume requirements of Rule 14(d)(i), as it is prepared in Times New Roman 14-point typeface, and does not exceed 5,500 words, to wit, it contains 5,494 words.

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