EFiled: Jan 28 2024 10:53AM EST
Filing ID 71890893
Case Number 354,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

[CORRECTED] BRIEF OF 21 MEMBERS OF THE DELAWARE GENERAL ASSEMBLY AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

Julianne E. Murray (Bar No. 5649)
Law Offices of Murray, Phillips & Gay
215 E. Market Street
Georgetown, DE 19947
(302) 855-9300
julie@murrayphillipslaw.com

Counsel for 21 Members of the Delaware General Assembly

Dated: January 29, 2024

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases ***Pages***

Constitutions

Statutes

Dictionaries

Other Authorities

STATEMENT OF IDENTITY, INTEREST AND SOURCE OF AUTHORITY OF *AMICI CURIAE*

Amici are 21 sitting members of the Delaware General Assembly,[1] sworn to "uphold and defend the Constitutions" of the United States and Delaware.[2] *Amici* believe this obligation extends to expressing their views, as members of a co-equal branch of government, on the interpretation and history of the Delaware Constitution so it is not altered without the consent of the People.

[1] A complete list of *amici* is attached at Exhibit A.

[2] Del. Const. art. XIV, § 1.

SUMMARY OF ARGUMENT

The Governor cannot defy our Constitution.

ARGUMENT

I. THE PEOPLE CREATED OUR CONSTITUTION WHICH NO BRANCH OF GOVERNMENT CAN DEFY WITHOUT VIOLATING THE VERY SOCIAL COMPACT UPON WHICH OUR STATE IS FOUNDED.

A. The Social Compact.

Our system of government is built upon the legacies of distinguished political theorists John Locke, Jean Jacques Rousseau, and Charles Montesquieu, among others,[3] whose works were influential and "well known" to our state and national Founders "in 1776."[4] All lawfully exercised power comes from the People.[5] In the words of then Governor Thomas R. Carper to the Citizens of Delaware on the 100th anniversary of the Supreme Law at the center of this appeal,

Our State Constitution serves as more than just a blueprint for orderly rule, and

---

[3] *See, e.g.*, *Evans v. State*, 872 A.2d 539, 543-44 (Del. 2005)(en banc).

[4] *Id.* at 544; *see, e.g.*, *Cannon v. State*, 807 A.2d 556, 568 (Del. 2002) (Holland, J., dissenting) ("[t]he first section of the Declaration of Rights reflected a continued adherence to the philosophy of Locke ..."); *Ariz. State Legis. v. Ariz. Indep. Redist. Comm'n*, 576 U.S. 787, 820 (2015) (same for the Declaration of Independence).

[5] *See, e.g.*, Del. Const. intr. cl. ("We the People, hereby ordain and establish this Constitution of Government for the State of Delaware"); *id.* at pmbl. ("all just authority in the institutions of political society is derived from the people,"; *id.* at art. XIV, § 1 ("the powers of this office flow from the people I am privileged to represent"); *see also* U.S. Const. pmbl. ("WE THE PEOPLE of the United States..."); U.S. Decl. of Indep. ¶ 2 ("Governments are instituted among Men, deriving their just powers from the consent of the governed."); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 821 (1995) ("Ours is a 'government of the people, by the people, for the people.'") (quoting A. Lincoln, *Gettysburg Address* (1863)).

> a contract between the elected and those they govern. It is also a living symbol of our core values ... [and] the very foundation upon which our democracy rests.[6]

Thus any action by a branch of government that violates our Constitution violates the fundamental social compact with the People of our State.

B. We Are a Government of Laws, Not of Men.

One of the defining characteristics of the American experiment is that we are "a government of laws, and not of men." *Marbury v. Madison*, 5 U.S. 137, 163 (1803); *accord Dorsey v. State*, 761 A.2d 807, 821 (Del. 2000).[7] In this Court's words,

> In *Marbury v. Madison*, [5 U.S. at 177,] the United States Supreme Court held "[i]t is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it." Therefore, "an act of the legislature, repugnant to the constitution, is void."

Evans, 872 A.2d at 553. "To conclude otherwise would, in Chief Justice Marshall's words 'subvert the very foundation of all written Constitutions ... to restrict ... powers within narrow limits.'" *Id.* (quoting *Marbury*, 5 U.S. at 178).

C. The Decision Below.

---

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

[7] *See Cooper v. Aaron*, 358 U.S. 1, 23 (1958) (Frankfurter, J., concurring) ("The historic phrase 'a government of laws and not of men' epitomizes… character of our political society. When John Adams put that phrase into the Massachusetts Declaration of Rights, pt. 1, art. 30, he was not indulging in a rhetorical flourish… 'A government of laws and not of men' was the rejection in positive terms of rule by fiat, whether by the fiat of governmental or private power.").

The central question in this appeal is whether the Governor has the "discretion" to exercise a "power" that is he barred from exercising under multiple provisions of the Delaware Constitution.

The Chancery Court below: (1) correctly observed that "the immunity theories ... are more tied with the merits" under our Constitution (Transcript at 142, A509); (2) and thus focused on the legally and logically problematic nature of how any government actor can ever have "discretion" to take an action that is expressly prohibited by our Constitution (id. at 54-57, 97, A487, 497); but (3) ultimately did not reach the question on jurisdictional grounds.

Following transfer, the Superior Court erred, not by squarely addressing the central legal issue and reaching an incorrect decision, but by not addressing the central constitutional question in any way. Because the Legislature operates within the same constitutional bounds as the Executive, the question is not whether the Legislature ever enacted a statute which creates "hard and fast rules" which limit the Executive's "discretion" to close down communal religious worship in every church, all across our State. Instead, the question is whether the Constitution expressly bars the Executive from ever exercising such a "power" to do so. As addressed below, the plain text and long history of the relevant constitutional protections makes clear that our Constitution bars the Governor from ever exercising any such "power."

The Superior Court's failure to recognize that our Delaware Constitution

controls any and all conflicting statutes, orders, regulations and other government mandates to the contrary violates fundamental principles of constitutional supremacy long recognized by this Court and requires reversal.[8]

[8] *See, e.g.*, *Albence v. Higgin*, 295 A.3d 1065, 1089 (Del. 2022)(en banc) (when there is a "conflict between the Constitution and a statute, the Constitution will prevail."); *id.* ("the foundation upon which our constitutional jurisprudence is built is the principle that 'the constitution controls any legislative act repugnant to it.'"); *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632, 653 (Del. 2017)(en banc)("It is axiomatic that the State cannot ignore our Constitution"); *id.* ("As in other areas concerning fundamental rights, statutes and regulations ... must comply with our Constitution.")

II. THE PLAIN LANGUAGE OF THE DELAWARE BILL OF RIGHTS REQUIRES REVERSAL.

A. The Delaware Constitution of 1792.

Three provisions of the Delaware Constitution are relevant to this appeal, Article I, § 1, the Preamble and the Reserve Clause. All have been in their current, substantive form since the Delaware Constitution of 1792.[9] This was a point of great pride by the Committee on the Bill of Rights at the 1897 Convention.

> This Bill of Rights is regarded, astonishingly and with great unanimity, by the Members of the Convention, as almost the same document. Gentlemen of the Convention are so earnest and anxious that they may transmit this valuable relic of the former centuries to their children and grand-children, and they might point to themselves with pride, that they have left it simply intact, scarcely a dot from the *i* or a cross from the *t* being omitted.[10]

At the time of the founding, Delaware was governed by two separate but related charters, our: (1) 1776 Declaration of Rights; and (2) 1776 Constitution.[11] One key and unanimous purpose of the 1792 Constitutional Convention was "to enumerate, and more precisely to define, the Rights reserved out of the general Powers of

---

[9] *See, e.g.*, Rodman Ward, Jr. and Paul J. Lockwood, *Bill of Rights Article I,* in *The Delaware Constitution of 1897: The First One Hundred Years* 76, 85 (Randy J. Holland & Harvey Bernard Rubenstein eds., 1997).

[10] 4 *Debates and Proceedings of the Constitutional Convention of the State of Delaware* 2386 (1958) (quoted in *In re Request of Governor for an Advisory Op.*, 905 A.2d 106, 108 (Del. 2006)(internal bracketing omitted)).

[11] Maurice A. Hartnett, III, *Delaware's Charters and Prior Constitutions*, in *The First One Hundred Years* 28-31.

Government" moving forward.[12]

B. Article I, § 1.

The first freedom in the Delaware Bill of Rights states in relevant part,

> [1] Although it is the duty of all persons frequently to assemble together for the public worship of Almighty God; and piety and morality, on which the prosperity of communities depends, are hereby promoted; ... [2] no power shall or ought to be vested in or assumed by any magistrate that shall in any case interfere with, or in any manner control the rights of conscience, [3] in the free exercise of religious worship, ...

Del. Const. art. I, § 1 (enumeration added to clarify discussion below).

1. Origin of the Language.

As addressed in the briefing below, the second and third clauses are a strengthening and broadening of the protection contained in § 2 of the 1776 Declaration, while the first clause has no earlier post-founding analogue and was a completely new provision.

But these specific protections ultimately trace directly to the pre-founding hand of "the father of representative government in Delaware," William Penn,[13] whose oft-

---

[12] *Proceedings ...of the Constitutional Convention of 1792* 777 (Claudia L. Bushman, Harold Hancock and Elizabeth Homsey eds. 1988)(Dec. 6, 1791 unanimous Resolution of the Grand Committee of the Whole Convention); *id.* at 841 (Dec. 10, 1791 report to the Committee of the Whole).

[13] Carol E. Hoffecker, *Democracy in Delaware: The Story of the First State's General Assembly* 1 (Cedar Tree 2004).

expressed, special solicitude for protecting all forms of religious belief and practice of the People from all forms of interference by the government is well known and reflects our state's unique Colonial history.[14] For example, Penn,

> solemnly declare[d] ... that the first article of this charter relating to liberty of conscience, and every part and clause therein, according to the true intent and meaning thereof, shall be kept and remain without any alteration, **inviolably forever**.[15]

2. Failed Efforts to Change the Language.

As Justice Holland has explained, there were numerous "unsuccessful attempts" to remove all of these same words at the 1792 Convention.[16]

a. Duty of All Persons Frequently to Assemble Together For Public Worship.

Three times concerted motions were made in an effort to remove the entirety of the first clause, but three times these motions were voted down and rejected.[17] These words were carefully chosen.

---

[14] *See, e.g.,* Pa. Charter of Liberties of 1701 art. I; An Act for Freedom of Conscience of 1682 chptr. 1; Laws Agreed Upon in England art. XXXV; all in *Colonial Origins of the American Constitution: A Documentary History* 292, 288, 285 (Donald S. Lutz, ed., Liberty Fund 1998).

[15] 1701 Charter art. VIII, ¶ 3 (emphasis added); *see generally id.* at ¶¶ 2, 4, 7 in *Colonial Origins* 294-96.

[16] Randy J. Holland, *The Delaware State Constitution* 38 (Oxford Univ. Press, 2d ed., 2017).

[17] *Constitutional Convention of 1792* 783, 786, 907 (reflecting votes on Dec. 19, 1791, Dec. 20, 1791 and June 11, 1792).

b. No Power ... Any Magistrate ... In Any Case Interfere With the Right of Conscience.

In the same way, the 1792 Convention overwhelmingly rejected a last ditch motion and effort to remove the second clause in its entirety.[18] These words matter.

c. In the Free Exercise of Religious Worship.

Finally, although the third clause was in the earlier 1776 Declaration, it had been removed from the draft under consideration at the 1792 Convention.[19] This was in accord with what Pennsylvania had done in removing the same phrase that was in its own original state constitution of 1776, but was subsequently stricken from its 1790 replacement.[20]

No longer the "Three Lower Counties,"[21] Delaware, however, chose a different path. On the last day of the 1792 Convention, it was moved to add back in the words "in the free exercise of religious worship" and the motion carried.[22] These words have meaning.

---

[18] *Id.* at 907-08, 911-12 (reflecting votes on June 11-12, 1792).

[19] *See id.* at 783, 786, 907, 912.

[20] *Cf.* Pa. Const. of 1776 chapter 1, § 2 at www.paconstitution.org/texts-of-the-constitution/1776-2/; *with* Pa. Const. of 1790, § 3 at www.paconstitution.org/texts-of-the-constitution/1790-2/.

[21] *In re Request of Gov.*, 905 A.2d at 109.

[22] *Constitutional Convention of 1792* 912-13 (reflecting vote on June 12, 1792).

3. Meaning of the Language.

a. No Power by Any Magistrate.

First, "any[23] magistrate[24]" clearly includes the Governor, while "power" still means "power."[25] As Justice Holland also concluded, this "limits the power of the state government."[26]

b. May Control or Interfere With the Rights of Conscience.

---

[23] *See, e.g.*, 1 *A Dictionary of the English Language* (S. Johnson 6th ed. 1785)("Every ... in all its senses," "Whosoever"); 1 *An American Dictionary of the English Language* (N. Webster 1st ed. 1828) ("an indefinite number" or "quantity").

[24] *See, e.g.*, 2 *Johnson's 1785* ("A man…invested with authority; a governor; an executor of the laws"); 2 *Webster's 1828* ("a public civil officer, invested with the executive government," specifically identifying "governors"); *Black's Law Dictionary* (7th Ed. 1999) ("a governor in a state" or an "official who possesses whatever power is specified in the ... grant of authority"); Del. Const. of 1776 art. 7 (referring to the chief executive officer of Delaware as the "President, or Chief Magistrate"); *The Federalist #47* 239 (James Madison)(Dover Thrift ed. 2014) (1788)("In Delaware, the chief executive magistrate is…by the legislative department."); *see also U.S. v. Burr*, 25 F.Cas. 30, 34 (C.C.D. Va. 1807)(referring to President Jefferson as "the chief magistrate of the nation" and comparing him to the "chief magistrate of a state"); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483 (2010) (referring to the President as "the supreme Magistrate").

[25] *Cf.* 2 *Johnson's 1785* ("Command; authority; dominion," "Influence," "Ability; force; reach," "Government; right of governing correlative to subjection," "One invested with dominion"); 2 *Webster's 1828* ("Command; the right of governing") *with Black's* ("the ability conferred on a person by the law to alter, by an act of will, the rights, duties ... or other legal relations either of that person or of another").

[26] *Delaware State Constitution* 38.

"Control,"[27] "interfere,"[28] and "conscience"[29] all retain identical meanings.

c. In the Free Exercise of Religious Worship.

(1). Dictionary Definitions.

The definition of "free" remains the same.[30] "Exercise" continues to mean "Practice; outward performance" as in "the public exercise of their religion" which includes "Act of divine worship, whether publick or private."[31] "Religion,"[32]

---

[27] *Cf.* 1 *Johnson's 1785* ("To govern; to restrain" and "To keep under check"); *accord* 1 *Webster's 1828* (also, "to subject to authority"); *with Black's* ("To exercise power or influence over," "To regulate or govern").

[28] *Cf.* 1 *Johnson's 1785* ("To interpose; to intermeddle"); *accord 1 Webster's 1828*; *with* "Interference" *Black's* ("The act of meddling in another's affairs," "An obstruction or hindrance").

[29] *Cf.* 1 *Johnson's 1785* ("The knowledge or faculty by which we judge the goodness or wickedness of ourselves," "knowledge of our own thoughts or actions," "principle of action"); 1 *Webster's 1828* ("judgment of right and wrong;" explaining "some writers [call it] the moral sense ... the general principle of moral approbation or disapprobation, applied to one's own conduct"); *with Black's* ("The moral sense of right or wrong; esp., a moral sense applied to one's own judgment and actions").

[30] *Cf.* 1 *Johnson's 1785* ("At liberty," "Uncompelled; unrestrained," "Permitted; allowed"); *accord* 1 *Webster's 1828* (also, "To remove from a thing any encumbrance or obstruction"); *with Black's* ("Not subject to the constraint or domination of another ... Characterized by choice, rather than by compulsion or constraint").

[31] 1 *Johnson's 1785*; *accord* 1 *Webster's 1828*; *see Black's* ("To make use of; to put into action" and citing the definition of "Free Exercise Clause" as "prohibiting the government from interfering in people's religious practices or forms of worship").

[32] *See* 2 *Johnson's 1785* ("A system of divine faith and worship"); *accord* 2 *Webster's 1828* (also, "[t]he rites of religion in the plural"); *accord Black's*.

"religious"[33] and "religiously,"[34] also carry the same meanings.

"Worship," then and now, focuses on the very types of religious actions at issue in this case - communal preaching, singing, prayer and fellowship.[35]

(2). The Same Subject in the Constitution.

The use of the same word "worship" in two additional places in the Constitution reinforces this conclusion. The first clause of Article I, the removal of which was repeatedly defeated at the 1792 convention, addresses the "duty of all persons frequently to assemble together for [ ] public worship" Del. Const. art. I, § 1. The definition of "assemble,"[36] "frequently"[37] and the key modifier of "public"[38] add to

---

[33] *See* 2 *Johnson's 1785* (as "disposed to the duties of religion," "Teaching religion," "Appropriated to strict observance of holy duties"); *accord* 2 *Webster's 1828* (also, "Devoted to the practice of religion").

[34] *See* 2 *Johnson's 1785* ("Piously; with obedience to the dictates of religion," "Accordingly to the rites of religion."); *accord* 2 *Webster's 1828*.

[35] *See* 2 *Johnson's 1785* ("Adoration; religious act of reverence," examples including "vocal worship to the quire" and "gathered together in several places of the world for the worship of the same God," "to honour or venerate with religious rites," "To perform acts of adoration"); 2 *Webster's 1828* ("the act of paying divine honors to the Supreme Being; or ... in religious exercises consisting in adoration, confession, prayer, thanksgiving and the like," "To perform religious service"); *Black's* ("Any form of religious ... service showing reverence for a divine being," including "public worship" which is defined as "Worship in a public place, without privacy or concealment").

[36] *See* 1 *Johnson's 1785* ("To bring together into one place... To meet together"); 1 *Webster's 1828* ("To meet or come together; to convene, as a number of individuals"); "Assembly" *Black's* ("A group of persons organized and united for some common purpose").

the already above defined term of "worship." *In toto*, they reinforce the plain and continuing meaning of the Article to cover, not just private prayer in one's own home, but a public gathering of persons coming together to worship a higher power, attending services with fellow believers in a church, mosque, synagogue, temple or other place of communal religious worship.

Second, the introductory declaration of our Constitution states,

> Through Divine goodness, all people have by nature the rights of worshiping and serving their Creator according to the dictates of their consciences ... [and such] rights are essential to their welfare.

Del. Const. pmbl. The use of the same word in the Preamble reaffirms the importance of the right to frequent assembly together for public worship, because it is "essential to the[ ] welfare" of the People.[39] It was so essential in fact that in the very next sentence of our Constitution, the Governor was stripped of any "power" to ever squelch it.

---

[37] *See* "Frequent" 1 *Johnson's 1785* ("Often done...often occurring," "Used often to practice any thing"); 1 *Webster's 1828* ("often repeated or occurring," "To visit often; to resort to often or habitually"); *accord Merriam-Webster.com Dictionary*, www.merriam-webster.com/dictionary/frequent.

[38] *See* 2 *Johnson's 1785* ("Open; notorious; generally known," "Open view," "without concealment"); *accord* 2 *Webster's 1828*; *see Merriam-Webster* (("exposed to general view, open"); *Black's* ("A place open or visible to the public").

[39] *See Young v. Consol. Sch. Dist.*, 122 A.3d 784, 841 (Del.Ch. 2015) (a court "should look to embodiments of those concepts that have been deeply and widely endorsed, such as indications from other provisions of the Delaware Constitution").

(3). The History of Interpretation.

Continuing, all three branches of Delaware government have long interpreted the public gathering of religious believers to similarly be essential to the welfare of the People of Delaware.

(a). Executive Branch.

For example, in the midst of the Revolutionary War and the Great Smallpox Epidemic of 1775-1782,[40] Governor Caesar Rodney "recommend[ed]" that Delawareans "attend Places of Publick Worship," to observe "a Day of Fasting ... and Prayer" to "avert those impending Calamities," "grant us Patience in Suffering, and Fortitude in Adversity," "grant ... Comfort to the Afflicted" and asking "Almighty GOD" to be "our Comfort in the Hour of Death."[41] Since the founding, the duty of communal worship together includes during times of widespread deadly disease.

Like his predecessors before him, Governor Carney also has publicly proclaimed to the People of our State that religious faith exists for times of plagues and pestilence, explaining,

The *Bible* is full of stories about plagues and pestilence and people falling on

---

[40] *See* Elizabeth A. Fenn, *Pox Americana: The Great Smallpox Epidemic of 1775-82* 3, 9, 259-60, 273-75 (Hill and Wang 2001); *Encyclopedia of Plague and Pestilence: From Ancient Times to the Present* 317, 479 (George Childs Kohn, ed., 3d ed. 2008).

[41] *Proclamation of Governor Caesar Rodney* 1 (Del. March 30, 1779), www.loc.gov/resource/rbpe.01302500/.

> hard times. In some ways it feels like faith exists for a year just like this past year ... If there's one thing faith teaches us, it's we can get through life's darkest hours....[42]

Consistent with the Governor's recognition, both Appellant Pastors have sincerely held religious beliefs, grounded in specific verses of the same *Bible*, requiring them to communally worship with their flocks, even in times of plagues and pestilence.[43] The Governor repeatedly admitted the sincerity of their religious beliefs here.[44] His admissions are consistent with the religious beliefs of a majority of Delawareans who regularly attend communal religious services to worship as their consciences dictate.[45]

(b). Legislative Branch.

In key statutes covering large parts of everyday Delaware life, our General Assembly also has specifically defined "religion" as "includ[ing] all aspects of religious observance and practice, as well as belief."[46] Coming together for

---

[42] John C. Carney, *Address to the Governor's Prayer Breakfast* (May 6, 2021) (video available at www.facebook.com/JohnCarneyDE/videos/governors-prayer-breakfast/234992691754367/ at 6:33-7:05, 8:03-8:10).

[43] Complaint ¶¶ 19-24, 46-84, 192-200 (A521-23, 534-53, 590-93).

[44] Answer ¶¶ 19-20,52-53,56,62,65,74,79 (A362-63,377-79,383,385, 388-89).

[45] *See* www.pewresearch.org/religion/religious-landscape-study/state/ delaware/ (65% of Delawareans attend religious services at least once or twice a month).

[46] 6 *Del.C.* § 4502(24) (public accommodations); 19 *Del.C.* § 710(23) (employment discrimination).

religious worship is a such a religious practice.

Historically, the General Assembly also has specifically interpreted the first clause of Article I, § 1 and its "assemble together for public worship" language, as recognizing a "Duty of public worship" as part of its larger protection of "Religious liberty."[47]

(c). This Court's Precedent.

Forty-eight years ago, this Court was faced with the University of Delaware's "absolute ban of all religious worship" in student common areas in Newark. *Keegan v. Univ. of Del.*, 349 A.2d 14, 16 (Del. 1975); *see id.* at 15 ("prohibiting religious worship services"). But this Court recognized "[r]eligion, at least in part, is historically a communal exercise," *id.* at 17, concluded that the ban had "both the purpose and the effect of impeding the observance of religion," *id.* at 19, and found it "acts as a prior restraint upon all religious worship, as opposed to all other activities." *Id.*. Prescient of and consistent with the later authoritative holdings of the U.S. Supreme Court and Third Circuit, this Court struck the ban down as a clear violation of Free Exercise. *Id.*[48] At a bare minimum, Article I, § 1 provides equivalent

[47] (Ex. B at 4 - Delaware Constitution (1918)).

[48] *See, e.g.*, *Church of alu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 545-46 (1993) (striking down targeted laws that "have every appearance of a prohibition that society is prepared to impose upon [religious] worshippers but not upon itself. This precise evil is what the requirement of general applicability is designed to prevent.") (cleaned up); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 167 (3d

protection.[49]

C. Reserve Clause.

The Reserve Clause encompasses all of Article I and states,

> **WE DECLARE THAT EVERYTHING IN THIS ARTICLE IS RESERVED OUT OF THE GENERAL POWERS OF GOVERNMENT HEREINAFTER MENTIONED**.

This Court has addressed some of the history and origin of the Reserve Clause in the recent past,[50] and explained that its plain text cannot be "ignore[d]."[51] As alluded to above, its language was taken directly from the unanimous Resolution at the 1792 Convention.[52]

The plain language of our Bill of Rights governs. And unlike some other

---

Cir. 2002) ("the effect of a law in its real operation is strong evidence of its object."); *id.* at 165-78 (government action that has the effect of creating an "inability to attend synagogue on the Sabbath" violates free exercise); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 68 (2020) (a 10 person restriction on worship service attendance, "by effectively barring many from attending religious services, strike[s] at the very heart of the First Amendment's guarantee of religious liberty.").

[49] *See, e.g.*, *Bridgeville*, 176 A.3d at 642 ("our Delaware Constitution may provide 'broader or additional rights' than the federal constitution, which provides a 'floor' or baseline rights.").

[50] *See Bridgeville*, 176 A.3d at 643.

[51] *Id.* at n.49.

[52] *See Constitutional Convention of 1792* 777, 841.

Article I protections, which by their own terms qualify their scope in some way,[53] § 1's terms are absolute and prohibit the exercise of any government "power" that interferes with communal religious worship. The Reserve Clause reinforces this conclusion, and makes clear that such interference "**IS RESERVED OUT OF THE GENERAL POWERS OF GOVERNMENT HEREINAFTER MENTIONED**," which includes the Legislature (Article II), the Executive (Article III) and the Judiciary (Article IV).

The express limitations imposed on the "power" of Delaware government by the People in our Constitution could not be clearer and bar the Governor from his statewide closure of communal religious worship. The Governor does not have "discretion" to exercise a "power" denied him by our Constitution, unless the Constitution were to be amended.

D. Constitutional Amendment Process

Finally, the constitutional amendment process is not simple by design. The framers understood that the Delaware Constitution was going to be the basis of laws for centuries to come. Understanding that times would change and that changes might be necessary, they created a system to amend the constitution in Article XVI, §1. The

[53] *See, e.g.*, Del. Const. art. I, §§ 5 ("responsible for the abuse"), 6 ("unreasonable"), 7 ("unless by"), 8 ("except in cases"), 9 ("according to such regulations as shall be made by law"), 10 ("but by authority of"), 11 ("Excessive"), 12 ("sufficient"), 13 ("unless").

Delaware Supreme Court has called this process "a very 'special' power." *State v. Bender*, 293 A.2d 551, 554 (Del. 1972). provides:

> **§ 1. Proposal of Constitutional amendments in General Assembly; procedure.**
>
> Section 1. Any amendment or amendments to this Constitution may be proposed in the Senate or House of Representatives; and if the same shall be agreed to by two thirds of all the members elected to each House, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon, and the Secretary of State shall cause such proposed amendment or amendments to be published three months before the next general election in at least three newspapers in each county in which such newspapers shall be published; and if in the General Assembly next after the said election such proposed amendment or amendments shall upon yea and nay vote be agreed to by two thirds of all the members elected to each House, the same shall thereupon become part of the Constitution.

Del. Const. art XVI, §1.

III. TROUBLING IMPLICATIONS.

The implications of ignoring our founding charter's many limitations on the "power" of government are staggering. Numerous provisions address the power of the Legislature,[54] the Judiciary,[55] and the Executive.[56] But the decision below allows one branch to evade the express limitations of its constitutional restraints. That cannot be the law.

Moreover, what does this do to certainty and predictability in the law? One of the largest portions of our budget arises from the corporate franchise and related taxes. But why would a corporation incorporate in a place where the laws are not respected and followed? If Article I, § 1 can be ignored, so can Article IX, §§ 1-2, 4-6. And if the Constitution can be disregarded, so also can lesser statutory laws, such as Chapter 1 of Title 8.

---

[54] *See* Del. Const. art. I, § 10; *Buckingham v. State ex rel. Killoran*, 35 A.2d 903 (Del. 1944) (art. V, § 2, art. III, §§ 6, 19, art. II, § 3, art. III, § 11); *Albence*, 295 A.3d 1065 (art. V, §§ 4,4A); art. V, § 9.

[55] *See Superior Ct. v. State, Pub. Emp. Rels. Bd.*, 988 A.2d 429 (Del. 2010) (en banc) (art. IV, § 13); *State ex rel. Mitchell v. Wolcott*, 83 A.2d 762, 768 (Del. 1951) (art. V, § 6).

[56] *See In re Request of Governor for Advisory Opinion*, 722 A.2d 307, 318-19 (Del. 1998) (art. II, § 14).

CONCLUSION

This Court has long held that,

> The powers of government are trusts of the highest importance; on the faithful and proper exercise of which, depend the welfare and happiness of society. These trusts must be exercised in strict conformity with the spirit and intention of the constitution, by those with whom they are deposited.

Rice v. Foster, 4 Del. 479, 489 (Del. 1847).

This Court has recognized that when one branch "transcend[s] their legal limits," it is the duty of the co-equal branches to "check[] and restrain[]" it. *Evans*, 872 A.2d at 543. The decision below should be reversed. The Executive is no more above the Constitution than the Legislature or the Judiciary.

Respectfully submitted,

Law Offices of
Murray, Phillips & Gay

/s/ Julianne E. Murray

_____

Julianne E. Murray (Bar No. 5649)
215 E. Market Street
Georgetown, DE 19947
(302) 855-9300
julie@murrayphillipslaw.com

Counsel for 21 Members of the Delaware General Assembly

Dated: January 29, 2024