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May 13, 2020

Governor John Carney
Carvel State Office Building
820 N. French Street
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Wilmington, DE 19801

RE: **The Committee to Save Christmas**

Dear Governor Carney,

This is a First Amendment protected petition for the redress of grievances filed by “the Committee to Save Christmas” (“Committee”), acting on behalf of numerous Delaware citizens adversely affected by your March 13th State of Emergency and subsequent Orders (collectively, “your Orders”). Your Orders illegally discriminated against religious worship as well as banned peaceable protest under the First and Fourteenth Amendments to the U.S. Constitution. However, with the immediacy of the unexpected emergency now behind us and the luxury of time for deliberation at hand to plan for the expected second wave of COVID-19 cases in the Fall, your Orders now must be rewritten to restore and protect the respect required for the cherished constitutional freedoms of all Delawareans.

Mistakes Can Happen In An Emergency

Even the federal courts understand that good faith mistakes can happen in an emergency when public officials must react to ever changing facts on the ground and quickly respond under pressure.¹ For example, recently the governor of New Jersey reportedly dismissed these cherished constitutional rights as “above my pay grade,” and admitted he “wasn’t thinking of the Bill of Rights” in responding to the COVID-19 situation. But, on reflection, will the arrests of public protest organizers at Legislative Hall in Trenton, N.J., or the arrests of 15 mourners paying their respects from their cars in a parking lot at a Jewish Rabbi’s funeral service in Lakewood, N.J., be found to violate the U.S. Constitution but nevertheless be immunized as taken in good faith in a quickly developing situation by that governor? Or, when it was feared that hospital space would be lacking, was it a good faith error in judgment for the New York governor to move COVID-19 patients into open beds in nursing homes housing the elderly, who then succumbed to the virus which was spread to them?

¹ See, e.g. Sanford v. Stiles, 456 F.3d 298, 301 (3d Cir. 2006) (“the level of culpability required to shock the conscience will depend upon the extent to which a state actor is required to act under pressure”).

Under the Fourteenth Amendment's protections for both life and liberty, perhaps such actions taken in a hyperpressurized environment or even made in a matter of mere hours would not be expected to be found to violate the Due Process clause or to shock any judicial conscience.

However, when, as now, there is time to deliberate and make unhurried judgments, you will be judged by whether you were "deliberately indifferent" to the cherished constitutional rights of those affected by your actions.²

Freedom of Worship and Religion

Violation of your Orders constitutes a crime punishable by six months in prison for any member of our faith communities. 20 Del.C. § 3125. And fear of such imprisonment prevented Christians from attending Church services on Easter Sunday, April 12, 2020. Your Orders "criminalized the communal celebration of Easter"³ and barred citizens from gathering in their churches for this most holy day of the year.

This must never happen again. With eight months now remaining before the communal celebration of Christmas, now is the time for you to take proper steps to allow religious worship inside churches, synagogues and mosques, provided social distancing and other generally applicable health related precautions are responsibly practiced by the religious congregations. Otherwise, Christmas this year also will be criminalized here in Delaware, as you did for Easter.

More specifically, your orders allow secular activities but not religious worship activities. Grocery stores, law firms, laundromats, liquor stores, mining operations and landscaping businesses, among others, continue to operate so long as they follow social distancing and other generally applicable health related precautions. But your Orders "do not permit **soul-sustaining group services** of faith organizations, even if the groups adhere to all the public health guidelines required of the other services." Roberts v. Neace, – F.3d –, 2020 WL 2316679, *3 (6th Cir. May 9, 2020) (emphasis added). As the Sixth Circuit recently explained -

Keep in mind that the Church and its congregants just want to be treated equally. They don't seek to insulate themselves from the Commonwealth's general public health guidelines. They simply wish to incorporate them into their worship services. They are willing to practice social distancing. They are willing to follow any hygiene requirements. They do not ask to share a chalice. The Governor has offered no good reason for refusing to trust the congregants who promise to use care in worship in just the same way it trusts accountants, lawyers, and

² See, e.g. Nicini v. Morra, 212 F.3d 798, 810 (3d Cir. 2000) (en banc); Cnty. Of Sacramento v. Lewis, 523 U.S. 833, 850 (1998).

³ On Fire Christian Center, Inc. v. Fisher, – F.Supp.3d –, 2020 WL 1820249, *1 (W.D. Ky. April 11, 2020).

laundromat workers to do the same.

Come to think of it, aren't the two groups of people often the same people—going to work on one day and going to worship on another? How can the same person be trusted to comply with social distancing and other health guidelines in secular settings but not be trusted to do the same in religious settings? The distinction defies explanation ...

Id. Closer to home, the Third Circuit has long held, “the Free Exercise Clause’s mandate of neutrality toward religion prohibits government from ‘deciding that secular motivations are more important than religious motivations.’”⁴ Ultimately, your lack of evenhanded treatment of religious worship fails strict scrutiny analysis under decades of Third Circuit and Supreme Court precedent.⁵

Under your Orders, a person can go out to a liquor store to buy beer but cannot go out to their church to worship God. Such a distinction cannot stand because “if beer is ‘essential,’ so is Easter,” and so shall be Christmas. On Fire Christian Ctr., 2020 WL 1820249, at *7.

As an example familiar to your own religious background, Masses can be celebrated within any Roman Catholic church by spacing congregants within the pews. In churches, if the pastors and congregations so desire, more Masses could be offered at additional times to accommodate all those wishing to attend weekly religious services.

Saving Christmas and other weekly religious services is a most pressing issue for those citizens of religious faith in Delaware and allows you to prevent further invidious content discrimination against them. Do not let what has happened in our sister states happen here. For example, the governor of Virginia threatened the pastor of Lighthouse Fellowship Church in nearby Chincoteague Island with jail and a \$2,500 fine for holding a 16 person church service on Palm Sunday, in a building where 225 could otherwise be seated, even though social distancing was practiced, as was allowed in Virginia for “essential” businesses like accountants, lawyers, liquor stores, dry cleaners, building-supply retailers and the like where customers pass each other and transact business at close quarters. The church sued and the U.S. Department of Justice has intervened to protect it from this illicit religious content discrimination. Matthew Schneider, the special U.S. Attorney reviewing State activities in this regard is quoted as saying - “Unlawful discrimination against people who exercise their right to religion violates the First Amendment whether we are in a pandemic or not.” Or, in the words of the U.S. Attorney General on April 27th, “the Constitution is not suspended in times of crisis.”

⁴ Tenaflly Eruv Ass'n, Inc. v. Borough of Tenaflly, 309 F.3d 144, 165 (3d Cir. 2002) (quoting Fraternal Order of Police v. City of Newark, 170 F.3d 359, 365 (3d Cir.1999)).

⁵ See, e.g. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993); Tenaflly, supra.

Your emergency Orders, criminalizing Easter worship and services within the walls of church sanctuaries, can be viewed as an honest mistake. But let's correct that mistake and ensure it is not repeated in the future. Provided churches practice the generally applicable social distancing requirements, religious service attendance must be permitted.

While the state has an obvious interest in preventing the spread of infectious disease, its restrictions of the fundamental right to communal worship must be the least restrictive means practically available. And, if the state permits social interaction for commercial or other purposes, as occurred here in Delaware, but denies similar social interaction for religious exercise, this is not using the least restrictive means to regulate First Amendment-protected activity and your Orders are illegal, unconstitutional and cry out for correction. As one federal court recently held – “If social distancing is good enough for Home Depot and Kroger, it is good enough for in-person religious services which, unlike the foregoing, benefit from constitutional protection.” Tabernacle Baptist Church, Inc. v. Beshear, – F.Supp.3d –, 2020 WL 2305307, at *5 (E.D. Ky. May 8, 2020).

Illegal Restriction of Lawful Protests

Your Orders also bar citizens from exercising their First Amendment rights to assemble, speak, protest and petition the government for redress of grievances, grievances such as your criminalization of religious worship throughout the state. Any citizen bold enough to do so, now or in the Fall, does so at the whim and mercy of you and of local law enforcement officers. This chills protected First Amendment rights.

Yet the cases are legion that petition, assembly and speech on matters of public concern in quintessential public forums such as the park outside Legislative Hall in Dover, or the streets and sidewalks outside the Caravel State Office Building in Wilmington, where your offices are located, cannot be so restricted consistent with the First Amendment.⁶

It has long been the law that “public places historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be public forums.” Grace, 461 U.S. at 177 (internal punctuation omitted).

⁶ See, e.g. Edwards v. S.C., 372 U.S. 229 (1963) (peaceful protests around the State House grounds are protected by the First Amendment); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) (parading and picketing on public streets is protected); Carroll v. President and Com'rs of Princes Anne, 393 U.S. 175 (1968) (political rally by a violently racist group on the courthouse steps is protected); U.S. v. Grace, 461 U.S. 171 (1983) (picketing and leafleting on sidewalks outside the Supreme Court is protected); Boos v. Barry, 485 U.S. 312 (1988) (carrying protest signs on public sidewalks is protected); Snyder v. Phelps, 562 U.S. 443 (2011) (offensive political and religious protests on public lands near the Maryland State House and U.S. Naval Academy is protected).

In such places, the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions are content neutral, and are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication.

Id. (internal punctuation omitted).

Yet the statewide experience with your barring of group protests thus far is anything but evenhanded and content neutral. For example, on April 26, 2020, the enforcing authority itself, including numerous Delaware State Troopers and New Castle County police officers, along with more than 100 police and other vehicles assembled to commemorate the death of a heroic fallen State Trooper in violation of your Orders.⁷ This law enforcement symbolic speech and assembly was in direct violation of the Shelter in Place Order and others of your Orders. But similar assembly by religiously motivated persons is outlawed.

As a result, stricter constitutional standards apply. Since such religious expression is barred, your Orders can be upheld "only if narrowly drawn to accomplish a compelling government interest." Id. And this you cannot do, given the raft of exceptions to such assembly, both as written in your Orders, and as applied in practice by the very law enforcement officers entrusted to enforce it.⁸

Any governing Orders in the future must contain an exception for peaceful speech, protest, assembly and petition throughout Delaware, including those expected by religious persons and churches which, having already been deprived of religious fellowship surrounding the Resurrection of Christ, are unwilling to be similarly deprived of religious celebration surrounding his birth.

Conclusion

The time of emergency is coming to an end, and there are many months to thoughtfully prepare for a Fall surge of the virus. But the illegal hurried infringements of vital constitutional freedoms will remain on the books as precedents unless these past errors are corrected to return to the normal before this crisis arose.

⁷ See <https://www.delawareonline.com/story/news/2020/04/27/jeeps-honor-fallen-delaware-state-police-trooper-three-years-later/3032718001/>

⁸ In the even more forgiving context of limited public forums, the Third Circuit has recently explained that a "trilogy of Supreme Court decisions each addressing blanket bans on religious messages" makes clear that such bans are "impermissible viewpoint discrimination." Ne. Penn. Freethought Soc'y v. Cty. of Lackawanna Transit Sys., 938 F.3d 424, 432 (3d Cir. 2019).

Absent those corrections being made, I expect legal action would be taken in federal court to prevent the repeat of the discriminatory mistakes of the past. But this time, under the “deliberate indifference” test, your conduct will be closely evaluated since many months will have passed for considered correction of the errors of the past.

The Committee to Save Christmas respectfully requests that you respond and advise whether these changes will be made. Without a response we will conclude that you have refused this request for relief from your actions which are causing constant irreparable harm to thousands of citizens in the faith community.

The Committee and its experienced legal counsel stand ready to assist in any rewriting process.

Respectfully yours,



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cc. Stephen J. Neuberger, Esq.

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