IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

REV. DR. CHRISTOPHER ALAN BULLOCK,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**C.A.No. 20-674-CFC**
	:	
GOVERNOR JOHN C. CARNEY, in his official capacity as the Governor of Delaware,	:	
	:	
Defendant.	:	

PLAINTIFF'S ANSWERING BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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NATURE AND STAGE OF THE PROCEEDINGS

Plaintiff relies upon the recitations set forth in the defense opening brief (D.I. 44) and in the Court's earlier memorandum opinion. (D.I. 16). This is plaintiff's Answering Brief in opposition to the defense motion to dismiss.

SUMMARY OF THE ARGUMENT

It is unavoidable that the relief sought in this case is messy procedurally because the defendant Governor continuously changes his policies in order to avoid review and a ruling by the Court.[1] As a result, analysis of the mootness and Ex parte Young issues are inextricably intertwined and one cannot be understood without the other.

Under the circumstances then existing when the Second Amended Complaint was filed, plaintiff procedurally sought declaratory relief under 28 U.S.C. §§ 2201-2202 that defendant's many actions had violated the First and Fourteenth Amendments. No independent injunctive relief was sought because procedurally, the ever-shifting *status quo* in that moment no longer actively violated the Constitution and, in the Governor's own words, he had already backpedaled, moved the target several times and "g[iven] Rev. Dr. Bullock the relief he sought in his original Verified Complaint." (D.I. 44 at 8).

[1] This is the "moving target" problem repeatedly referenced during earlier proceedings. (See, e.g. Tab C - 6/2/20 tr. at 13, 27).

But the case still is not moot because under the 'capable of repetition but evading review' and 'voluntary cessation of illegal conduct' mootness exceptions the Governor refused to renounce his discretion to shift yet again and return to his prior ways. Instead, he retains the ability to go back to his old approach of targeted persecution of the Christian faith: (1) at any time in the future; and/or (2) the moment this lawsuit ends. Absent a legally enforceable mechanism, such as a declaratory judgment or a consent decree, he is free to resume his prior illegal ways at any time – a type of litigation tactic gamesmanship which both the Supreme Court and Third Circuit regularly condemn. Indeed, defendant began to do so just days after filing his opening brief disclaiming all such intent. So the case is not moot and the legal dispute is ongoing.

The relief sought is also prospective, and satisfies the requirements of Ex parte Young, again, because defendant only has temporarily changed his ways to evade judicial review and he retains the discretion to resume them at any time. So upon the Court's issuance of a declaratory judgment stating that his past actions (and now presently resuming ones) are illegal, the Court is specifically empowered by the text of the declaratory judgment statute to issue an injunction barring any such ongoing misconduct, as well as future misconduct, which can otherwise return at any time.

The Supreme Court has long held that such "[a] declaratory judgment can then be used as a predicate to further relief, including an injunction," Powell v. McCormack, 395 U.S. 486, 499 (1969), as part of the "further necessary or proper relief" authorized by 28 U.S.C. § 2202. It is this type of declaratory and "necessary or proper" supportive injunctive relief that is explicitly sought by plaintiff (D.I. 36 at p.31) to hit an ever moving target scrambling to evade review.

STATEMENT OF FACTS

A. The Facts Until the Filing of the Defense Motion. Plaintiff relies upon the recitation set forth in the defense brief (D.I. 44), supplemented by the following.

B. The Facts Since the Filing of the Defense Motion. On September 3, 2020, defendant issued his 27th Modification (Tab A attached), which revoked everything previously issued and **reinstated** at least some of the earlier restrictions on Churches, including that pastors such as plaintiff, must preach facing a wall and that readers and singers must do the same. (Id. at p.19 at H.1.ii.2.i.4.; see id. at p.18 at H.1.ii.). This is a variation on the preaching, singing and reading to a wall issue (see D.I. 36-5 at 2), that was discussed at length at the TRO hearing as a clear constitutional violation (Tab B - 5/28/20 tr. at 36-41, 71, 100), and which defense counsel summarized as -

> the Governor's position is that a preacher must wear a mask or face shield while preaching, and if they cannot, then they should not face directly to the congregation when they are projecting their voice.

(Id. at 38; see id. at 40 - the Court noting that defendant's obduracy here was forcing the Court's hand).[2]

As explained in Argument I below, because defendant remains free to continue to immediately reinstate his other prior bans on Baptism, Communion and the like (D.I. 1 at Ex.F pp.3-4), this case is not moot.

ARGUMENT

I. THIS CASE IS NOT MOOT.

A. Introduction. There is a "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." Col. River Water Conservation Dist. v. U.S., 424 U.S. 800, 817 (1976); accord Mata v. Lynch, 576 U.S. 143, 150 (2015). The courts are familiar with the games defendants play to avoid the consequences of having their conduct declared illegal by a federal court. In the Supreme Court's words –

> a party cannot automatically moot a case simply by ending its unlawful conduct once sued, else it could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where it left off, repeating this cycle until it achieves all its unlawful ends.

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[2] The preaching to the wall rule violated the Establishment Clause (Count IV), First Amendment hybrid rights (Count II), Fourteenth Amendment suspect class (Count III) and Free Exercise neutrality. (Count I).

U.S. v. Sanchez-Gomez, 138 S.Ct. 1532, 1537 n.1 (2018) (internal punctuation omitted). "It is no small matter to deprive a litigant of the rewards of his efforts." Adarand Constructors, Inc. v. Slater, 528 U.S. 216, 224 (2000). Proper application of the doctrine "protects plaintiffs from defendants who seek to evade sanction by predictable protestations of repentance and reform." Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 66-67 (1987) (internal punctuation omitted). This "rule traces to the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior." City News & Novelty, Inc. v. City of Waukesha, 531 U.S. 278, 284 n.1 (2001).

B. Mootness Defined. "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." Knox v. Serv. Emp. Int'l. Union, Local 1000, 567 U.S. 298, 307 (2012) (internal punctuation omitted). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." Id. at 307-08 (internal punctuation omitted).

C. A "Heavy," "Formidable" and "Stringent" Burden of Proof is On Defendant. The law is clear and unequivocal that the "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to

start up again lies with the party asserting mootness." Friends of the Earth, Inc. v. Laidlaw Envtr. Serv. (TOC), Inc., 528 U.S. 167, 189 (2000) (internal punctuation). Events must make "it absolutely clear that [a defendant's conduct] could not reasonably be expected to recur." Id. at 193. This is a "heavy," "formidable" and "stringent" burden," which is impossible for the defendant to meet herein. U.S. v. Gov't of V.I., 363 F.3d 276, 285 (3d Cir. 2004) ("GVI").

As noted in section B. of the Facts above, just days after filing his opening brief disclaiming any intent to do so, defendant quietly resumed some of his prior policies and can resume others at any time of his choosing. For these reasons alone, this case is not moot. Out of an abundance of caution however, plaintiff will continue the analysis below.

D. The "Capable of Repetition" and "Voluntary Cessation" Exceptions.

Two well-established mootness exceptions apply to our case, both of which factually overlap to a significant degree and so are discussed together below.

First are actions capable of repetition but evading review which applies "if (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." Sanchez-Gomez, 138 S.Ct. at 1540 (internal punctuation omitted).

Second, "[a]s a general rule, voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." DeJohn v. Temple Univ., 537 F.3d 301, 309 (3d Cir. 2008) (internal punctuation omitted). "If it did, the courts would be compelled to leave the defendant free to return to his old ways." Friends of the Earth, 528 U.S. at 189 (internal punctuation omitted); see Knox, 567 U.S. at 307 (otherwise it "would permit a resumption of the challenged conduct as soon as the case is dismissed."). This rule is "well settled." Friends of the Earth, 528 U.S. at 189; accord GVI, 363 F.3d at 285.[3]

Relying on this line of precedent, the Third Circuit has repeatedly identified two important factors in determining whether there is a reasonable expectation that the misconduct will recur.[4] First, the timing of the change. Second, whether the defendant defends his prior actions or has conceded their illegality. See GVI, 363 F.3d at 285-86; DeJohn, 537 F.3d at 309-11.[5]

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[3] Plaintiff has repeatedly addressed this exception since the defendant began shifting the targets to evade judicial review. (See D.I. 7 at 1; D.I. 13 at 8-9; Tab C - 6/2/20 tr. at 13; Tab D - 8/20/20 tr. at 12-14).

[4] This is in addition to the fact that defendant already has resumed some of his prior policies (see Facts at B. above), which is compelling evidence he will continue to do so.

[5] Review of these and every other Third Circuit and Supreme Court case in the mootness context involving the actions of state actor defendants fails to reveal

1. Timing of the Change. As our Circuit recently observed, when a defendant only changes their policy "in response to this litigation," such action "weighs against mootness." Fields v. Speaker of Penn. House of Reps., 936 F.3d 142, 161 (3d Cir. 2019).

In a factual setting closely parallel to our own, in GVI, the U.S. moved to terminate an illegal contract entered into by the Virgin Islands which violated a federal consent decree. Shortly before the federal court hearing on the motion, the Governor invoked his emergency powers to terminate the contract himself and then claimed the issue was moot. Our Circuit rejected this, observing:

> The timing of the contract termination – just five days after the United States moved to invalidate it, and just two days before the District Court's hearing on the motion – strongly suggests that the impending litigation was the cause of the termination.... In short, the mere fact that the Governor has

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the existence of any claimed evidentiary "presumption" that the government will not violate the law in the future. (Cf. OB at 9-10). The single overruled District of Delaware case, Doe v. Wilmington Hous. Auth., 880 F.Supp.2d 513, 524 (D.Del. 2012), cited by the defense in support of this proposition, (id.), relies on the same contrary foreign Circuit precedent also cited by the defense. Plaintiff respectfully submits that this single point of law in this single District of Delaware case that was subsequently overruled by the Third Circuit on the merits, see Doe v. Wilmington Hous. Auth., 568 Fed.Appx. 128, 129 (3d Cir. 2014), was wrongly decided on this smaller point as well, which itself is contrary to our own Circuit's clear precedent. Third Circuit case law regularly addresses these issues in cases involving government defendants and gives no such presumption. See, e.g. GVI, 363 F.3d at 284-86; DeJohn, 537 F.3d at 308-11. Instead, as discussed in Argument I.D. of this brief, there is a strong skepticism of such self-serving claims – such as the similar ones made by the Governor of the Virgin Islands in GVI discussed below.

> terminated a contract in this one instance with litigation lurking a couple of days away gives no assurance that a similar contract will not be entered into in the future.

GVI, 363 F.3d at 285.

In our present case, defendant first abandoned many of his unconstitutional rules just three days after the Complaint was filed (OB at 4; see D.I. 36-3 at p.2) and mere days before the Court's May 28th TRO hearing. And following withering questioning by the Court about unconstitutionality of the remaining policies at the June 2nd hearing (Tab C - 6/2/20 tr. at 4-5, 7-11, 16-19, 28-29), more changes were made the very next day.[6] The suspect timing here aligns closely with GVI and demonstrates that the termination was a mere litigation tactic, undermining the *bona fides* and sincerity of both Governor's belatedly claimed changes of heart.

Similarly, in DeJohn, the Court was faced with a First Amendment challenge to a policy which Temple defended in litigation, only to abandon on the eve of summary judgment motions and then claimed no decision was necessary because of mootness. Citing DVI, the DeJohn Court found the timing of this change suspect and, therefore, the defendant had failed to carry its heavy burden of demonstrating no reasonable expectation that it would reimplement the same

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[6] As revealed by defendant's own notification letter to the Court (D.I. 25), this occurred on June 3rd, the day after the Court hearing, not later on June 2nd as the defense brief now belatedly implies. (See OB at 4-5).

policy when the litigation was over. 537 F.3d at 310-11. Our District has expressed strong skepticism of similar claims. See Del. Audubon Soc., Inc. v. Sec. of U.S. Dept. of Interior, 612 F.Supp.2d 442, 448-49 (D.Del. 2009) (analyzing a defendant's mootness claims and finding them undermined by the timing of its policy changes which took place only after a lawsuit was filed and finding insufficient the lack of any legally binding and enforceable mechanism to ensure such prior practices do not resume); id. at 449 ("Without more, the mere fact that, while in litigation, the defendants proclaim that [they will not resume their earlier illegal conduct] is not enough.").

2. Defense of the Prior Misconduct. When a defendant "continues to defend the constitutionality" of their prior misconduct, even "despite its counsel's statements ... that it would not reinstate them," it is not "absolutely clear" that the defendant "would not revert to" the prior policy in the future. Fields, 936 F.3d at 161. Thus, given that defendant continues to explicitly defend the constitutionality of his prior policies (see, e.g. OB at 8 n.2; D.I. 33 at ¶¶ 115, 133, 144, 154), repeated defense protestations ring hollow that the many sins of the past will not be repeated. (See, e.g. OB at 10-11; Tab D - 8/20/20 tr. at 24).[7]

[7] In GVI, our Circuit rejected a similar claim that a public statement by a Governor is evidence sufficient to establish that the government "would not simply change its mind and attempt to reinstate the challenged" policy after the trial court had declared the challenge moot. 363 F.3d at 285. In the Court's

As the Third Circuit explained in GVI in 2004, it has been the law of our Circuit since 1979 that "when a party does not change its substantive stance as to the validity of the [policy] but merely terminates it for allegedly purely practical reasons (such as avoiding litigation), the termination of the [policy] does not render the case moot." 363 F.3d at 286 (citing Dow Chem. Co. v. U.S., E.P.A., 605 F.2d 673, 679 (3d Cir. 1979)).

E. Whether Declaratory Relief is Sought is Another Factor. As our Circuit recently noted, as is our present case, when the relief sought is a "declaratory judgment about the [prior] practice," this factor also weighs against a finding of mootness. Fields, 936 F.3d at 162. In such circumstances, "a defendant arguing mootness must show that there is no reasonable likelihood that a declaratory judgment would affect the parties' future conduct." Hartness v. Penn. State Educ. Ass'n, 963 F.3d 301, 306 (3d Cir. 2020). The Governor cannot meet this burden.

The actions underlying our present case have clearly and repeatedly demonstrated defendant's proclivity for violating numerous First and Fourteenth Amendment freedoms. From his historically unprecedented decision to dictate specific procedures for conducting the religious rite of Baptism in Baptist

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words, "[w]e are unpersuaded." Id.

Churches (D.I. 36 at ¶¶ 160-64; D.I. 1 at Ex.F pp.3-4), to his state sanctioned preference for Jewish religious customs while persecuting Christian ones with threat of imprisonment (D.I. 36 at ¶¶ 165-66, 161, 15, 37, 80, 99) – both of which this Court has already called out as constitutionally suspect (Tab C - 6/2/20 tr. at 7, 28-29) – defendant's actions cry out for the very sanction that a declaratory judgment would provide to ensure such illegality, in contravention of what the Court has termed "the most fundamental rights embedded in our Constitution" (Tab B - 5/28/20 TRO tr. at 43, 48), does not resume in the future.

F. Defendant's Pie Crust Promises. Ignoring Fed.R.Evid. 408, defendants cite the content of settlement discussions in their brief. (See OB at 11). Plaintiff notes that during the same settlement negotiations, the Governor refused to agree to the following representative sampling of settlement terms:

- "The Governor agrees that all future Orders will be consistent with the Establishment Clause and interpretive case law under the First Amendment."
- "The Governor agrees that, in the future, his Orders shall not ... ban the physical contact required for Baptisms in the Baptist faith while at the same time allowing the physical contact required for circumcisions in the Jewish faith."

So in addition to being incorrect, the non-binding, double-hearsay, pie crust promises offered up by defendant's own employees carry no weight in the balancing under the case law cited above and fail to satisfy the "heavy,"

"formidable" and "stringent" burden of proof. GVI, 363 F.3d at 285.

G. Conclusion. For four months now, defendant has continuously shifted the target to evade judicial review of his unconstitutional actions banning Baptism, Communion and effective preaching. Notwithstanding his easily broken pie crust promises to the contrary, because there is no consent decree, declaratory judgment or other binding mechanism to cabin his discretion, he remains free to resume his illegal activities at any time before or after Christmas (as it appears he has already begun to do).[8] As a result, the counts in this case satisfy two independent exceptions to the mootness doctrine designed to protect plaintiffs against precisely this type of gamesmanship. This case is not moot and so there is a live case or controversy to be decided.

II. THE REQUIREMENTS OF EX PARTE YOUNG ARE FULFILLED.

A. Introduction. Since defendant raises no other justiciability claims, by definition, a case that is not moot satisfies the case or controversy requirement of Article III. See generally Campbell-Ewald Co. v. Gomez, 136 S.Ct. 663, 669 (2016) (addressing the interplay between mootness and Article III). The case or

[8] At the Rule 16, the Court aptly summarized plaintiff's position – that defendant would resume his unconstitutional policies this Fall if a second wave hits. (Tab D - 8/20/20 tr. at 23). Defendant's subsequent actions reveal a slight variation on this – resuming such improper policies even in the absence of a second wave.

controversy here is defendant's ongoing violation of numerous First and Fourteenth Amendment rights of plaintiff, which defendant continues to deny he committed. (OB at 8 n.2). It is ongoing because, as already established under two exceptions to the mootness doctrine in Argument I. above, defendant has failed to carry his "heavy burden" of proving that it is "absolutely clear" that he will not continue to violate several of the most fundamental constitutional rights, indeed his own actions reveal that such misconduct has already begun to resume even before Christmas. So declaratory relief is necessary and prospective.

B. Ex parte Young. As the Supreme Court has explained, the "ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 327 (2015). Accordingly, "we have long held that federal courts may in some circumstances grant [ ] relief against state officers who are violating, or planning to violate, federal law." Id. at 326.

One such circumstance is known as Ex parte Young doctrine, which holds there is no Eleventh Amendment bar to an official capacity lawsuit against a state official: (1) when he commits an ongoing violation of federal law; and (2) the plaintiff seeks prospective relief from it. Waterfront Comm'n of N.Y. Harbor v. Gov. of N.J., 961 F.3d 234, 238 (3d Cir. 2020). This is so because any action by a

state actor which violates the Constitution is void, thereby stripping that defendant of the sovereign immunity he would otherwise derive from the state. Va. Office for Prot. and Advocacy v. Stewart, 563 U.S. 247, 254-55 (2011).

1. Prong One - Ongoing Violation of Federal Law. For the reasons set forth in Arguments I. and II.A. above, an ongoing violation of the federal Constitution has been proven under our Circuit test.

2. Prong Two - Plaintiff Seeks Prospective Relief From the Same. The doctrine applies to the "precise situation of a federal court commanding a state official to do nothing more than refrain from violating federal law." Waterfront, 961 F.3d at 238 (internal punctuation omitted).

As review of the several detailed sections of the Wherefore clause of the Second Amended Complaint makes clear (D.I. 36 at p.31), this is precisely what plaintiff has asked the Court to do in issuing a declaratory judgment – command the wrongdoing Governor to stop violating federal law.[9] Plaintiff does not want celebration of Christmas this year to be a crime, as were both Easter and Pentecost. Plaintiff even specifically amended his Wherefore clause to cite and discuss the

[9] If defendant continues his pattern of defiance after a judgment, the Court then is empowered by 28 U.S.C. § 2202 to issue an injunction to enforce the declaratory judgment. Again, a "declaratory judgment can then be used as a predicate to further relief, including an injunction," Powell, 395 U.S. at 499, as part of the "further necessary or proper relief" authorized by § 2202.

specifics of the statutory authority to seek the relief found in the Declaratory Judgment Act. (Compare id. with D.I. 1 at p.28-29). This was done to accurately reflect the ever shifting facts and procedural posture of this case as defendant continues to change his ever wobbly legal position to evade judicial review.[10]

a. A Declaratory Judgment is a Prospective Remedy. As the Third Circuit has explained, the "purpose of a declaratory judgment is to declare the rights of litigants ... [t]he remedy is thus by definition prospective in nature," CMR D.N. Corp. v. City of Phila., 703 F.3d 612, 628 (3d Cir. 2013) (internal punctuation omitted), all the more so under the facts of our case where the case and controversy is alive and well while plaintiff lives under a sword of Damocles held by the Governor over his rights to worship God and defendant continues to surreptitiously reimpose them while disclaiming any such intent.[11]

Our Circuit's case law is clear in the declaratory judgment context that "litigants should not be unjustifiably denied the right to obtain an authorized

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[10] As the Court is aware, the retrospective nominal damages earlier sought were previously abandoned to avoid further delay caused by the current Covid-19 moratorium on jury trials.

[11] To the extent the Court still has the questions it raised about declaratory relief at the earlier hearing (Tab D - 8/20/20 tr. at 8), the Supreme Court explained in MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 126-27 (2007), that it has long since "dispelled" any previous "doubts" about whether an action for a declaratory judgment can satisfy the case or controversy requirements of Article III when it answered that question in the affirmative in two 1930s decisions.

remedy in federal court." Kelly v. Maxum Specialty Ins. Group, 868 F.3d 274, 282 (3d Cir. 2017). There is a nine factor test to determine whether a declaratory judgment remedy is proper. Id. at 282-83. Space limitations prevent a more detailed discussion, but the primary factor is the absence of pending parallel state proceedings which "militates significantly in favor" of the remedy, as does: the avoidance of "procedural fencing" of the kind the Governor's moving target defense is engaged in; the resolution of uncertain and ever-shifting legal obligations; the public interest in upholding fundamental constitutional rights; the unavailability of other procedural remedies; and the convenience of the parties. Id. Other factors are not applicable under our facts. Id.[12]

For all the above reasons, the requested declaratory relief is prospective in nature and the requirements of Ex parte Young are satisfied. At the Rule 16 hearing, defense counsel also agreed with the Court that certain types of prospective injunctive relief remain in the case (Tab D - 8/20/20 tr. at 28-29), even following the most recent amendment to the Complaint. So there is a live case and controversy and because the Governor will not commit to lay down his illegal

[12] Plaintiff notes that earlier case law from our Circuit applied a "no useful purpose" test in determining whether the Court should issue a declaratory judgment. Aluminum Co. of Am. v. Beazer East, Inc., 124 F.3d 551, 560 (3d Cir. 1997). For the reasons previously set forth, the usefulness of the purpose here also has been established – protection of plaintiff's fundamental constitutional rights from the evade and shuffle tactics of defendant.

arms, his weapons must be declared unconstitutional so that when he continues use of them again in the pandemic, declaratory and supportive injunctive relief can be sought under the terms of § 2202.

III. SUPPLEMENTAL JURISDICTION IS PROPER.

While not contesting that Count V arises from the same core of operative facts and case or controversy as Counts I-IV under 28 U.S.C. § 1367(a), (OB at 17), defendant raises two avoidance claims under § 1367(c). Each is without merit.

A. § 1367(c)(3) Does Not Apply. For the reasons set forth in Arguments I-II above, this permissive exception does not apply because the Court has jurisdiction over the federal claims.

Importantly, even under defendant's judicial economy test (OB at 18), the exception to this exception weighs in favor of the Court retaining jurisdiction. Count V arises from the same core of operative facts with which the Court is exceedingly familiar and has already addressed at length over the last four months.[13] Judicial economy is not served by dismissal so that a state court judge

[13] Indeed, even prior to the filing of the Second Amended Complaint (D.I. 36), Art. I, § 1 of the Delaware Constitution was already: (1) discussed and block quoted in the Complaint (see ¶¶ 27 and 26 of both D.I. 1 and 31); and (2) relied upon extensively in the TRO briefing (D.I. 4 at 4-5, 9-10, 20) and argument (Tab B - 5/28/20 tr. at 54, 57, 46-47, 53, 73), as key historical evidence of, and legal support to, the First Amendment Establishment Clause and Free Exercise Counts.

would have to spend months retreading the same ground this Court already effectively plowed.

B. § 1367(c)(1) Does Not Apply. The brief defense footnote (OB at 17 n.6) claiming that the Court's consideration of this provision of the Delaware Constitution presents novel and complex legal questions is similarly without merit.

Putting to the side the plain meaning of its many clear and detailed words,[14] there is 80 years of Delaware case law addressing it,[15] as Judge Robinson also did in the recent past.[16] The plain text of the first section of the first Article of the Delaware Constitution bars the defendant Governor from doing what he did in this case.[17] There is nothing novel or complex here.

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[14] Unlike the mere 16 relevant words of the First Amendment to the U.S. Constitution, Art. I, § 1 of the Delaware Constitution contains 128 words of detailed do's and don'ts, along with another 23 relevant words of the Preamble that even further buttress its plain meaning. (See ¶ 26 of D.I. 1, 31, 36).

[15] See, e.g. Doe v. Wilmington Hous. Auth., 88 A.3d 654, 661 n.23 (Del. 2014); East Lake Methodist Episcopal Church, Inc. v. Tr. of the Peninsula-Del. Annual Conf. of the United Methodist Church, Inc., 731 A.2d 798, 805 n.2 (Del. 1999); Del. Trust Co. v. Fitzmaurice, 31 A.2d 383, 389 (Del.Ch. 1943); Tr. of Pencader Presbyterian Church v. Gibson, 22 A.2d 782, 790 (Del. 1941).

[16] See Doe v. Cape Henlopen Sch. Dist., 759 F.Supp.2d 522, 528 (D.Del. 2011).

[17] Others do as well. See, e.g. Del.Const. Art. I, § 10 ("No power of suspending laws shall be exercised but by authority of the General Assembly."). Defendant lacks the power to suspend mere statutory laws, *a fortiori*, he lacks the power to suspend constitutional provisions which create the very bodies that make those laws.

IV. PLAINTIFF INVOKES HIS RIGHT TO AMEND.

In the event defendant's motion has any merit, because a dismissal for lack of subject matter jurisdiction "is by definition without prejudice,"[18] plaintiff invokes his right to amend the Complaint under Fed.R.Civ.P. 15(a)(2) and add defendant as an individual.[19]

CONCLUSION

Defendant's motion should be denied in its entirety.

Respectfully Submitted,

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[18] N.J. Physicians, Inc. v. President of U.S., 653 F.3d 234, 241 n.8 (3d Cir. 2011); see Figueroa v. Buccaneer Hotel, Inc., 188 F.3d 172, 182 (3d Cir. 1999).

[19] See Premier Comp Sols., LLC v. UPMC, 970 F.3d 316, 319 (3d Cir. 2020) (noting Rule 15's "liberal standard").

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Dated: September 15, 2020 Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE

Pursuant to Judge Connolly's Standing Order dated November 6, 2019, I certify, based on the word-counting function of my word processing system (Word Perfect X4), that this brief complies with that Standing Order, in that the brief is prepared in a 14-point, proportional format (Times New Roman) and contains fewer than 5,000 words, to wit, no more than 4,990 words.

/s/ Stephen J. Neuberger
STEPHEN J. NEUBERGER, ESQ.