

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 20-2096

Rev. Dr. Christopher Alan Bullock

v.

Governor John C. Carney, individually
and in his official capacity as Governor of Delaware
(D. Del. 1-20-cv-00674)

Present: McKEE, SHWARTZ, and PHIPPS, Circuit Judges

AMENDED ORDER

AND NOW, May 30, 2020, the District Court of Delaware's order denying Appellant's Emergency Motion for a Temporary Restraining Order and/or a Preliminary Injunction is affirmed substantially for the reasons set forth in the Court's May 29, 2020 Memorandum Opinion.

Judge Phipps dissents from this order and files the attached dissenting opinion.

By the Court,

s/ Theodore A. McKee
Circuit Judge

Dated: May 30, 2020

cc: All counsel of record

PHIPPS, *Circuit Judge*, dissenting,

Reverend Dr. Christopher Alan Bullock seeks emergency relief to allow him to celebrate services on Pentecost Sunday with his congregation – the Canaan Baptist Church in Wilmington, Delaware – as he did before the present coronavirus pandemic. A state of emergency declaration issued by Delaware Governor John C. Carney prohibits him from doing so. That order, which unquestionably seeks to protect people from the serious public health threat of the coronavirus, does not prohibit religious services altogether, but it does impose limitations specifically upon churches and houses of worship. This dispute, in which Reverend Bullock seeks to vindicate his First Amendment rights of free exercise and assembly, concerns four of those restrictions – those pertaining to gathering size, preaching, baptism, and communion.

To obtain the emergency relief that he seeks, Reverend Bullock must satisfy a four-part legal standard. The first two components of the test serve as gateways, and a person seeking injunctive relief must meet two requirements:

- (1) A reasonable probability of eventual success in the litigation, and
- (2) A more-likely-than-not irreparable injury absent the emergency relief.

See Reilly v. City of Harrisburg, 858 F.3d 173, 176, 179 (3d Cir. 2017). If those showings are made, then an overall balancing takes place in consideration of two additional factors:

- (3) The possibility of harm to other interested persons from the grant or denial of the injunction, and
- (4) The public interest.

See id. at 176, 179. On balance, Reverend Bullock satisfies this test for emergency injunctive relief.

I. Reverend Bullock has demonstrated a reasonable probability of success on the merits for his First Amendment claims.

In the matrix that governs judicial review of constitutional claims, two avenues exist for analyzing free exercise challenges. On the one hand, when a claim presents a free exercise challenge in isolation, such as a request to use a controlled substance for religious purpose, then a neutral law of general applicability may constitutionally impose an incidental burden on religion. *See Employment Div. Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 879 (1990). On the other hand, for a “hybrid situation,” when a law burdening religion also impinges on another right, such as “any communicative activity or parental right,” then the restriction receives strict scrutiny. *Id.* at 882. Strict scrutiny requires that a law restricting religion advance a state interest “of the highest order” and be narrowly tailored in pursuit of that interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)).

This case presents a hybrid situation. Reverend Bullock does not bring a free exercise claim in isolation, but rather he also challenges a restriction on a communicative element of that freedom. Specifically, he disputes limitations on gathering size, preaching, baptism, and communion. And in any event, because these restrictions govern churches specifically, they do not act as neutral and generally applicable regulations. Accordingly, to be constitutional, the Governor’s order must survive strict scrutiny.

A reasonable probability exists that the Governor's order does not meet that most exacting standard of constitutional scrutiny especially because in the First Amendment context, the state has the burden of justifying its regulation. *See Reilly*, 858 F.3d at 180. Here, the Governor's order furthers a compelling state interest – preventing the spread of the coronavirus. But for the reasons below, a reasonable probability exists that the Governor will not be able to demonstrate that the challenged restrictions on churches are narrowly tailored to accomplishing that goal.

a. Capacity Restrictions on Congregations

Under its 18th modification, the Governor's order restricts congregation size for houses of worship. Specifically, churches must comply with either a prior ten-person limit or conduct in-person services with a maximum of 30% fire occupancy. *See* Appellant's Letter Regarding Timeline of Factual Changes Ex. C, pg. 1, ECF No. 7 (May 25, 2020); *see also* Eighteenth Modification: State of Emergency Declaration, <https://governor.delaware.gov/health-soe/eighteenth-state-of-emergency/> (May 18, 2020); Guidance for Communities of Worship, <https://coronavirus.delaware.gov/wp-content/uploads/sites/177/2020/05/Communities-of-Worship-Guidance-Revised-5.23.20.pdf> (May 23, 2020). But other than general concerns about social distancing, the Governor does not explain why 30% – as opposed to 35%, 40%, or 90% – is the appropriate occupancy limit for churches. Similarly, the Governor has not demonstrated why other standards for social distancing and cleanliness would not allow gatherings of additional persons. None of this is to say that the Governor's efforts are not well-

intended or generally reasonable, but under strict scrutiny, to burden religious liberty requires more than a simply a reasonable approach.

b. Restrictions on Communicating with the Congregation

The Governor's order also restricts the manner in which a religious leader may address the congregation. *See* Eighteenth Modification. A religious leader must wear a mask and maintain a six-foot distance or, if a mask is unavailable or cannot be used, then the religious leader should not directly face the congregation or should increase the distance between him or herself and the congregation. *See id.* But Delaware does not require business employees to wear masks unless working in areas open to the public or if it is likely that the employee will come within six feet of other staff. *See* Guidance for Face Coverings, <https://coronavirus.delaware.gov/guidance-for-face-coverings>. Thus, if an employee does not need to wear a mask in a non-public area of a business unless it is likely that the employee will come within six feet of another, then there is a reasonable probability that requiring a religious leader to wear a mask *and* maintain a six-foot distance from his or her seated congregation is not a narrowly tailored means of furthering the Governor's objective.

c. The Restrictions on Baptism

The Governor's order also prevents holding a person during baptism. *See id.* That restriction seeks to promote health by preserving distance between officiants and the person being baptized. But Delaware already allows persons to be within a six-foot distance of non-family members in certain situations, including childcare for children of essential workers and employees of reopened businesses. *See* Additional Requirements

for Department of Services for Children, Youth & their Families

<https://coronavirus.delaware.gov/wp-content/uploads/sites/177/2020/05/DSCYF->

[Emergency-care-requirements-revised-5.5.20.pdf](#) (May 5, 2020). Delaware restricts the number of children present and requires a health screening questionnaire, temperature checks, and heightened sanitizing requirements, but it has not restricted childcare providers from holding the infants and children in their care. By allowing childcare workers to hold children with appropriate precautions shows a reasonable probability that the government's interest can be achieved without impinging on a sacred religious ceremony.

d. The Regulation of the Receipt of Communion

Baptism is not the only sacrament affected by the Governor's order, which also governs communion. The order prevents preparing communion without gloves and distributing communion in communal containers without a single individual using tongs or another barrier to hand-to-hand contact. *See* Appellant's Letter at Ex. C, pg. 2-3. With respect to communicants, the order prevents them from accepting consecrated or blessed food or drink unless they are more than six feet from any non-household members. *See id.* But persons in Delaware may grocery shop without gloves, and that may involve handling items that other shoppers will later touch, and so again, a reasonable probability exists that the Governor will not be able to justify this restriction as a narrowly tailored means of achieving his salutary goal.

II. Irreparable injury is more likely than not.

It is more likely than not that the Governor's limitations will cause irreparable injury to Reverend Bullock. A presumption of irreparable harm attaches to a deprivation of a First Amendment right. *See* 11A Charles Alan Wright & Arthur P. Miller, *Fed. Prac. & Proc.*, § 2948.1 (3d ed. Apr. 2012 update) (“When an alleged deprivation of a constitutional right is involved, such as the right to free speech or freedom of religion, most courts hold that no further showing of irreparable injury is necessary.”); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”); *Nebraska Press Ass’n v. Stuart*, 423 U.S. 1327, 1329 (1975) (“[A]ny First Amendment infringement that occurs with each passing day is irreparable.”). And here, it does not appear likely that the Governor will be able to rebut that presumption because attending and participating in religious services on Pentecost Sunday cannot be entirely recreated.

In rejecting the claim of irreparable injury, the District Court conflated the irreparable injury requirement with maintaining the *status quo*. But the two are not the same, and an irreparable injury is not categorically obviated simply because prior conditions were less injurious. *See Ortho Pharm. Corp. v. Amgen, Inc.*, 882 F.2d 806, 813-14 (3d Cir. 1989) (“If the existing ‘status quo’ is currently causing one of the parties irreparable injury . . . then it is necessary to alter the situation to prevent the injury” through injunctive relief.” (citing *Canal Auth. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974) (“[F]ocus always must be on the prevention of injury by the proper order, not

merely on preservation of the status quo.”)). In any event, the *status quo ante* here is not some interstitial moment between modifications to the Governor’s orders, but rather the period before the Governor issued any restrictions on the free exercise of religion.

III. The possibility of harm to other interested persons and the public interest do not conclusively favor either party.

The third and fourth factors do resolve resoundingly on either side of the balance. The most interested persons – parishioners of the Canaan Baptist Church – have their constitutionally protected freedoms abridged by the Governor’s order. But they, along with members of the public, are the intended beneficiaries of the Governor’s efforts to contain the coronavirus.

* * *

Weighed accordingly, Reverend Bullock has satisfied the four-part test for emergency injunctive relief. He has demonstrated a reasonable probability of success on the merits and irreparable injury. Those strongly tilt the balance in his favor, and the effects on other interested persons and the public interest do not alter the outcome here. Thus, I would reverse the order of the District Court and allow Reverend Bullock to exercise his religious liberty and freedom of assembly as he and his congregation have historically done on Pentecost Sunday.