No. __-____

IN THE SUPREME COURT OF THE UNITED STATES

ALEX G. LEONE,

Applicant,

v.

ESSEX COUNTY PROSECUTOR'S OFFICE,
THEODORE STEPHENS II,
ROMESH SUKHDEO,
GWENDOLYN WILLIAMS, AND
ROGER IMHOF,

Respondents.

To the Honorable Samuel A. Alito, Jr.,
Associate Justice of the United States Supreme Court and
Circuit Justice for the Third Circuit

EMERGENCY APPLICATION
FOR INJUNCTION PENDING APPELLATE REVIEW
OR, IN THE ALTERNATIVE,
FOR A WRIT OF CERTIORARI BEFORE JUDGMENT
AND INJUNCTION PENDING RESOLUTION
OR SUMMARY REVERSAL

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Dated: September 29, 2021

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Applicant Alex G. Leone represents that he does not have any parent entities and does not issue stock.

Respectfully submitted,

/s/ Alex G. Leone
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Dated: September 29, 2021

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To the Honorable Samuel A. Alito, Jr., Associate Justice of the United States Supreme Court and Circuit Justice for the Third Circuit:

This Court has held that when government officials permit themselves discretion to grant exemptions from their policies for secular reasons, a refusal to grant an exemption for religious reasons is subject to strict scrutiny. This case presents an astonishing example of government officials disregarding this important rule, as well as triggering strict scrutiny in numerous additional ways clearly identified by this Court's precedents.

For more than a year, Respondents, a local-government employer and its highest-ranking officials, have judged secular reasons adequate to permit employees to work from home, and have exercised discretion to permit all employees to do just that, including on a fulltime basis for prolonged periods. Yet at the very same time, and to this day, Respondents have judged *religious* reasons *inadequate* to permit *a single employee* to work from home *at all*—and in a May 2021 memorandum, explicitly and categorically prohibited Applicant from working from home for religious reasons to any extent, including "in the future." The religious basis for Applicant's need to work from home was explained thoroughly pre-litigation and below; and Respondents have unequivocally agreed that the sincerity of Applicant's religious beliefs is undisputed. The free exercise burden and resulting irreparable harm imposed by Respondents here are thus indisputable.

As explained herein, several facts compound the illegality of Respondents' totally untailored discrimination against religion. Applicant mentions just three now. First, the putative rationale for Respondents' extreme prohibition on accommodating religious reasons for working from home consists only of vague assertions stated only at a high level of generality. Second, Applicant has repeatedly made clear that he is willing to be physically present for anything required by any job responsibility—that he wishes to work from home for religious reasons only when doing so would not "cause undue hardship" for Respondents. And, third, the record is shot through with indicia of hostility to religion.

Accordingly, Applicant respectfully requests that the Court order Respondents not to discipline or otherwise disadvantage Applicant for his free exercise during the pendency of this appeal. Applicant has no objection to the Court making clear that it is **not** enjoining Respondents from disciplining or disadvantaging Applicant, or any employee, for any act or omission inconsistent with any job responsibility or rule.

JURISDICTION

Applicant filed a complaint in the United States District Court for the District of New Jersey on June 18, 2021,[1] bringing a claim under the First Amendment and a claim under a provision of state law, and moved for a preliminary injunction on July 30, 2021,[2] after Respondents had threatened to double the burden on Applicant's free exercise on July 26, 2021.[3] The District Court had jurisdiction over this lawsuit under 28 U.S.C. §§ 1331 and 1343 and had authority to issue an injunction under 28 U.S.C. §§ 2201 and 2202.

Without citing the record or any source of law, the District Court denied Applicant's motion for a preliminary injunction on September 7, 2021.[4] That day, Applicant filed a notice of appeal and an emergency motion in the District Court,[5] and filed an emergency motion for an injunction pending appeal in the Court of Appeals on September 14, 2021.[6] The Court of Appeals has jurisdiction over the appeal under 28 U.S.C. § 1292(a). Two judges of the Court of Appeals denied the motion for an injunction pending appeal on September 22, 2021, without explanation.[7]

This Court has jurisdiction over this Application under 28 U.S.C. § 1254(1) and has authority to grant the relief requested under the All Writs Act, 28 U.S.C. § 1651.

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1 Appendix to Emergency Motion ("App.") 1-50.
2 App. 51.
3 App. 75.
4 App. 179-80; App. 172-177 at 23:6-28:11; *see also* App. 178 at 29:6-9.
5 App. 181-82. The District Court denied the motion September 23. App. 250-51.
6 App. 183-212.
7 App. 248-49.

FACTUAL BACKGROUND AND ADDITIONAL PROCEDURAL HISTORY

A. Factual Background

Applicant incorporates the Complaint and its attachments by reference,[8] and briefly recounts the following facts. Respondents are the highest-ranking officials at the Essex County Prosecutor's Office, and the office itself, an agency of a state political subdivision, and have employed Applicant since 2019.[9] Since early 2020, Respondents have exercised discretion to permit employees to work from home for secular reasons (e.g., to prevent viral transmission).[10] For instance, in the District Court, Respondents confirmed that "out of an abundance of caution" they exercised that discretion to adopt policies under which "all employees worked from home full-time" for secular reasons for prolonged periods during the past year.[11] Respondents have expressly recognized that the factual record in this case is undisputed,[12] and that record also shows that Respondents have engaged in multiple such exercises of discretion, including permitting and shifting different work-from-home schedules for different employees at different times.[13]

On April 26, 2021, at the very time Respondents were widely permitting employees including Applicant to work from home for secular reasons,[14] Applicant

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8 App. 1-50.

9 App. 2 ¶¶ 3-7.

10 App. 4 ¶ 15.

11 App. 86-87. For instance, employees in the "Adult Trial" section of Applicant's office were permitted to work from home fulltime during November 2020 into June 2021; and employees in the "Appellate" section of Applicant's office were permitted to work from home fulltime from March 2020 through the date on which Applicant filed a motion for preliminary injunction. App. 71 ¶¶ 10 & 11; App. 4 ¶ 17.

12 App. 223 (Respondents confirming in the Court of Appeals that "[h]ere, the factual record is not in dispute").

13 *See, e.g.*, App. 86-87 (Respondents acknowledging that they have shifted their work-from-home policies around multiple times); App. 71 ¶¶ 10 & 11 (providing uncontroverted testimony on the different work-from-home schedules Respondents used for different office units at different times); App. 4 ¶¶ 15-17.

14 App. 87 (recognizing that in April 2021 Respondents permitted employees to work from home when "it was deemed necessary" for secular reasons); App. 71 ¶¶ 10 & 11 (Applicant testifying to same); App. 4 ¶¶ 15-17; App. 117-18.

requested that he be permitted to work from home for religious reasons.[15] Applicant submitted a written request for this religious accommodation,[16] and made clear that he requests only that the same "status quo" that permitted work from home for secular reasons "continue" and be "extended" for the religious reasons provided by Applicant.[17] In sum, Applicant's religion requires him to practice prayer, including aloud and spontaneously, throughout each day; and his religious belief is that the peace and solitude required for this practice are impossible in the office.[18] Respondents have unequivocally recognized that there is no dispute over the sincerity of Applicant's religious beliefs.[19]

Importantly, in requesting to work from home for religious reasons, Applicant did not request to be absolved of any job responsibility.[20] Applicant's prayer practice has never interfered in his work and greatly assists him in his work.[21] Applicant expressly requested to work from home only to the extent it would not "cause undue hardship" for Respondents.[22] Applicant is, and has always been, fully willing to be physically present for anything required by any job responsibility—including in-person court appearances

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15 App. 21-25. Exhibit B of the Complaint (App. 25) is the relevant handwritten text of Exhibit A (App. 21-23) in typed format. *See* App. 3 n.1; App. 27. For simplicity, herein Applicant will cite the text in Exhibit B (App. 25).

16 App. 25.

17 App. 27; *see, e.g.*, App. 51 (making clear that Applicant is requesting "the very same accommodation" Respondents granted widely for secular reasons); App. 131 (same); App. 142 ("[Applicant] seeks only the exact same accommodation that was extended to employees for secular reasons for more than a year."); App. 155 at 6:7-10 (same); App. 171 at 22:3-4 ("I am seeking simply the same exact accommodation that was extended to people for secular reasons.").

18 App. 5-6 ¶¶ 19-27; App. 71 ¶¶ 13-14; App. 207 n.15 (citing Bible verses relevant to Applicant's prayer practice after Respondents had repeatedly suggested it was necessary to dissect "a specific provision in Christianity" in order to evaluate the merits of Applicant's claim); *see also* I Peter 3:15-17.

19 *See, e.g.*, App. 88 (Respondents "do not contest that Applicant's religious beliefs are sincerely held."))

20 App. 25; App. 27.

21 App. 5 ¶ 23; App. 71 ¶ 17.

22 App. 25 (requesting "to be physically present at [the] office . . . when accommodating this religious need would cause undue hardship").

or witness interviews, or any other obligation.[23] All such obligations proceeded normally including when Applicant was permitted to work from home for secular reasons.[24]

Nonetheless, in a policy memo dated May 12, 2021,[25] Respondents categorically denied Applicant's request to work from home for religious reasons, brooking not even a moment of accommodation of his religious practice—then, now, or even "in the future."[26] In other words, at the very time Respondents were already widely permitting employees including Applicant to work from home for secular reasons,[27] Respondents singled out religion as never an adequate basis to work from home *to any extent, ever.*[28] This discriminatory policy has put Applicant to the choice of forgoing his prayer practice on all work days or being disciplined by his employer, and thus burdens Applicant's free exercise and routinely inflicts irreparable, and other harm, on him.[29] Applicant has avoided irreparable harm on at least some work days by using dwindling "sick" or "vacation" time;[30] Applicant often works all the same on such days but from home.[31]

Respondents' sole rationale for their extreme prohibition on accommodating religious reasons for working from home consisted of a single paragraph of vague assertions.[32] Pre-litigation, Applicant presented Respondents with pointed criticism of

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23 App. 71 ¶ 9; App. 12-13 ¶ 62(a); *cf. Sherbert v. Verner*, 374 U.S. 398, 410 (1963) ("This is not a case in which an employee's religious convictions serve to make him a nonproductive member of society.").

24 App. 70-71 ¶¶ 3, 7 & 17 ("My prayer practice has never interfered in my work."); App. 13-14 ¶ 65; App. 37 ("[F]or instance, I was scheduled to work from home but physically present to observe witness interviews on March 11, and March 25, 2021.").

25 App. 30-32.

26 App. 31.

27 App. 86-87; App. 71 ¶¶ 10 & 11; App. 4 ¶¶ 15-17; *see supra*, note 14.

28 App. 31 (categorically denying Applicant's "[religious] request to work from home" even as to "the future").

29 App 71 ¶¶ 13-16.

30 App. 65-66; App. 73.

31 App. 66.

32 App. 31-32.

this putative rationale for religious discrimination,[33] but Respondents refused to provide any substantive response and "st[oo]d by" that putative rationale.[34] (Respondents also inexplicably refused to respond when Applicant asked if there was any "process for appealing" the policy that categorically discriminated against his religious request.)[35] As explained below, the record makes clear that Respondents' vague assertions cannot justify their categorical religious discrimination against Applicant.[36] If this was clear on May 12, 2021, it is even clearer today: The uncontested factual record shows that none of the purported reasons Respondents gave for categorically prohibiting Applicant's prayer practice has ever applied in Applicant's employment.[37] What's more: The only evidence that Respondents have offered in litigation in support of their religious discrimination consists of (i) a tangentially-relevant press release;[38] and (ii) an apparently deficient "certification" of one defendant,[39] which simply re-asserts Respondents' vague interests at a high level of generality and does not controvert any material fact.[40]

Respondents suggested below that Title VII governs this case;[41] and their legal arguments have relied heavily on "accommodations" "offered" Applicant at the time they singled out his religious request for disfavored treatment in the May 12 memorandum.[42]

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33 App. 34-43.

34 App. 47.

35 App. 47.

36 App. 70-71 ¶¶ 3-7 & 17; App. 7-14 ¶¶ 35-67; App. 35-39; App. 63-65; App. 139-41; App. 200-204.

37 App. 70-71 ¶¶ 3-7 & 17; *see* App. 223 ("[T]he factual record is not in dispute.").

38 App. 109-15.

39 App. 117-20. This "certification" apparently fails to comply with 28 U.S.C. § 1746. *See* App. 117-20 (failing to certify "under penalty of perjury," mentioning only non-descript "punishment"); *see also* L. Civ. R. 7.2(a). Regardless, as explained herein, the certification contains only vague assertions or uncontested observations and does not controvert any material fact in the record.

40 App. 223.

41 *See, e.g.*, App. 229 (asserting that *Fulton*, *Tandon*, and *Diocese of Brooklyn* "have no bearing on this case"); App. 234-36 (discussing an unpublished Title VII case).

42 The "accommodations" are listed at App. 32 and explained at App. 143-45. In sum, they consist in (i) nothing; (ii) requiring Applicant to commute to a 400-acre public

B. Additional Procedural History

On July 26, 2021, Respondent Sukhdeo announced that "starting Monday, August 2, 2021" for the immediate future there would "no longer be" a schedule that permits Applicant to work from home even for secular reasons.[43] Accordingly, on July 30, 2021, Applicant moved for a preliminary injunction,[44] the denial of which is on appeal.[45] The change in status quo threatened on July 26 came to pass on August 2 and increased Respondents' burdening of Applicant's free exercise by 100%, at least doubling the number of days on which Respondents prohibit Applicant's prayer practice.[46]

Prior to completion of briefing on the preliminary injunction motion, Applicant notified the District Court that Respondents privately asserted to Applicant that the motion "is frivolous" and attempted to bully him into withdrawing the motion by threatening to "seek sanctions" against him.[47] Applicant also informed the District Court that Respondents indicated at that time they would be disputing facts; and, to the extent any material facts were disputed, Applicant "respectfully request[ed] the opportunity to

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park each time he wishes to engage in his prayer practice; and (iii) confining Applicant to a windowless soundproof room fitted with security cameras. App. 32. The undisputed factual record shows that these are better described as *anti*-accommodations, which not only would require Applicant to forgo his prayer practice, but which would also impose significant burdens on him. *See* App. 71 ¶¶ 13 & 15; App. 11-12 ¶¶ 55-59; App. 143-45.

43 App. 75. The "First Assistant" is Respondent Sukhdeo. *See* App. 2 ¶ 4.

44 App. 51.

45 App. 181-82.

46 As noted above, *supra*, note 14, Respondents exercised discretion to shift their work-from-home policies around multiple times. On July 26, when Respondent Sukhdeo announced the most recent shift in Respondents' work-from-home policies, Applicant was permitted to work from home for secular reasons at least half of the time, *see* App. 27, and moved for a preliminary injunction on the early morning of a day he was working from home, *see* App. 51. The motion filed below sought to preserve the status quo on that day and sought virtually the same relief Applicant seeks in this Court. *See* App. 76. A 100% increase in the burdening of Applicant's free exercise occurred as a result of Respondents' August 2 policy change: Whereas Applicant was permitted to work from home at least half the time for secular reasons before the change, Applicant was not permitted to work from home at any time after the change because Respondents' policy of categorically discriminating against religion remained in effect. *See* App. 31; App. 51.

47 App. 77-81.

subpoena a small number of witnesses, if not one witness, and present testimony on any disputed material facts."[48] Respondents ultimately did not dispute any material fact[49]—nor did they even attempt to defend their apparently unethical assertion that the motion was "frivolous"[50]—and the Court did not invite presentation of additional evidence either before or during the brief September 7, 2021 hearing it held on the motion.

At that hearing, the District Court repeatedly rushed Applicant's oral argument;[51] did not permit oral argument on certain preliminary injunction factors;[52] asked zero questions of Respondents; and issued a brief oral ruling, in which the Court assumed facts not in the record,[53] made several clear legal errors,[54] and denied the motion without opinion.[55] In its entire ruling, the District Court did not cite a single legal authority or the

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48 App. 77.

49 App. 223 (Respondents confirming in the Court of Appeals that "[h]ere, the factual record is not in dispute").

50 *See* App. 148 n.22 (further explaining why this assertion is apparently unethical).

51 *See* App. 161 at 12:20-24; 163 at 14:1-7; 164 at 15:5-10; 167 at 18:7-11.

52 App. 164 at 15:5-10.

53 *See, e.g.*, App. 173 at 24:10-17 (e.g., referencing nonexistent trials) & 174 at 25:5-14 (quoting from an apparently non-existent source regarding relief not sought).

54 *See, e.g.*, App. 172 at 23:25-24:9 & App. 176 at 27:21-24 (creating a pandemic exception to the Constitution); App. 173-74 at 24:25-25:2 (questioning whether Applicant's undisputed religious beliefs are "truly" the case); *id.* (stating a legal test that has no basis in Supreme Court or any precedent); *id.* at 24:5-17 (analyzing whether Respondents' discretionary policies make sense at an extremely high level of generality, such as by referencing "everyone throughout the country," "our offices," and "counties in the state"); App. 174 at 25:3-5 (illicitly shifting the burden of narrow tailoring to Applicant); *id.* at 25:9-14 (conflating Applicant's individual request for an accommodation with "control" over an entire "office"); App. 175 at 26:12-16 (apparently assuming that additional diversity in the kinds of secular exemptions permitted by Respondents' discretionary policies is required to make their discretion subject to strict scrutiny); App. 175-76 at 26:19-27:7 (recognizing that in "freedom of religion being curtailed, irreparable harm . . . is pretty much automatic" but going on to assert that the Court "do[es]n't feel" there is irreparable harm in this case); App. 176-77 at 27:25-28:2 (recognizing that Applicant's claim "might find great success" but ruling that the claim does not have a likelihood of success on the merits); *cf. Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring) ("What could justify so radical a departure from the First Amendment's terms and long-settled rules about its application?").

55 *See* App. 178 at 29:6-9.

record even one time; and it was unclear whether the District Court was familiar with the applicable precedents of this Court,[56] or basic record documents.[57]

After appealing, Applicant filed an emergency motion for an injunction pending appeal with the Court of Appeals on September 14, 2021,[58] which was denied without explanation on September 22, 2021.[59] As a last resort, Applicant now seeks relief here.

REASONS FOR GRANTING THIS APPLICATION

The All Writs Act, 28 U.S.C. § 1651(a), authorizes an individual Justice or the Court to issue an injunction when (1) the circumstances presented are "critical and exigent;" (2) the legal rights at issue are "indisputably clear;" and (3) injunctive relief is "necessary or appropriate in aid of [the Court's] jurisdictio[n]." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312 (1986) (Scalia, J., in chambers) (quoting *Fishman v. Schaffer*, 429 U.S. 1325, 1326 (1976) (Marshall, J., in chambers) (alterations in original); *Communist Party of Ind. v. Whitcomb*, 409 U.S. 1235 (1972) (Rehnquist, J., in chambers); 28 U.S.C. § 1651(a)); *see* Supreme Court Rules 20 & 22. The Court has discretion to issue a temporary injunction "based on all the circumstances of the case" without its order "be[ing] construed as an expression of the Court's views on the merits" of the underlying claim. *Little Sisters of the Poor Home for the Aged v. Sebelius*, 571 U.S. 1171 (2014).

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56 *Compare, e.g.*, App. 173-74 at 24:25-25:2 ("The issue is whether or not his religious practice is *truly being prevented* or not being accommodated *in any way*." (emphases added)), *with Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. __, __ (slip. op) at 10 (June 17, 2021) ("That misapprehends the issue.").

57 *Compare, e.g.*, App. 174 at 25:18-21 (asserting that "the preliminary injunctive relief that is being sought is . . . that Mr. Leone does not have to go into the office unless he feels it is necessary"), *with* App. 76 (proposing relief precisely parallel to that affirmed in *Fraternal Order* and clarifying that the District Court is "**not** enjoin[ing] anything else, including disciplining Applicant or any employee for any act or omission inconsistent with any job duty, obligation, rule, or responsibility") *and supra*, note 17; *see* App. 25.

58 App. 183-212.

59 App. 248-49.

A Circuit Justice or the full Court may also grant injunctive relief "[i]f there is a 'significant possibility' that the Court would" grant certiorari "and reverse, and if there is a likelihood that irreparable injury will result if relief is not granted." *Am. Trucking Ass'ns, Inc. v. Gray*, 483 U.S. 1306, 1308 (1987) (Blackmun, J.); *see also Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers) (considering whether there is a "fair prospect" of reversal). This Court has previously granted injunctive relief when applicants "have shown that their First Amendment claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest." *See, e.g.*, *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (per curiam); *Tandon v. Newsom*, 141 S. Ct. 1294, 1296-98 (2021).

I. Applicant has shown that his First Amendment claim is likely to prevail.

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." The Free Exercise Clause governs not only Congress and its laws, but also States and their agencies and policies as well. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)). Although this Court has held that free exercise concerns do not generally affect the obligation to comply with a valid and neutral law of general applicability, *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990), "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny," *Lukumi*, 508 U.S. at 546. A government policy can fail to be neutral or generally applicable in multiple ways, including:

- Lacking neutrality because it "single[s] out [religious] worship for especially harsh treatment," *see Diocese of Brooklyn*, 141 S. Ct. at 66;

- Lacking neutrality because it "presupposes the illegitimacy of religious beliefs and practices," *see Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018);
- Lacking neutrality because it "discriminate[s] on its face" regarding religion, *see Lukumi*, 508 U.S. at 533;
- Lacking general applicability because it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. __, __ (slip op.) at 6 (June 17, 2021);
- Lacking general applicability because it "treat[s] *any* comparable secular activity more favorably than religious exercise," *see Tandon*, 141 S. Ct. at 1296; and
- Lacking general applicability because it permits "individualized exemptions," *see Fulton* (slip op.) at 6, *or* because it "creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection," *see Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999).

Any one of the above triggers suffices to subject a government policy that burdens religious exercise to strict scrutiny. Here, as explained below, *each* of these triggers subjects Respondents' religious discrimination against Applicant to strict scrutiny.

A. Respondents' policy indisputably burdens Applicant's free exercise.

Applicant has stated unequivocally under penalty of perjury, and Respondents have confirmed that they do not dispute:[60]

> When physically present in the office, I am forced to forgo a prayer practice I engage in throughout every work day. . . . My religious belief is that the peace and solitude required for this practice are impossible in the office . . . . Working at my nearby home is generally a sure way to ensure I can

[60] *See, e.g.*, App. 223 (Respondents confirming in the Court of Appeals that "[h]ere, the factual record is not in dispute").

> engage in my required prayer practice as well as attend to all work responsibilities efficiently.[61]

Respondents, however, have categorically prohibited Applicant from working from home in order to accommodate this religious practice.[62] That discriminatory policy choice prevents Applicant, on fear of discipline from Respondents, from engaging in his prayer practice during every work day: "When physically present in the office, [Applicant] [is] forced to forgo [the] prayer practice" as a result of his religious belief about the peace and solitude it requires;[63] and, although Applicant has no burden to show it,[64] forcing Applicant to commute to a public park or be confined a windowless room with surveillance cameras,[65] as Respondents have "generous[ly]" proposed,[66] "would also force [Applicant] to forgo this practice, including the spontaneous aspects of it"[67] or the connection to "the handiwork of the Creator" that it requires.[68] *See, e.g.*, Fulton (slip op.) at 4-5 (ruling "it is plain" that "putting [a religious adherent] to the choice of curtailing its mission or approving relationships inconsistent with its [religious] beliefs" burdens free exercise); *Holt v. Hobbs*, 135 S. Ct. 853, 862-63 (2015) (recognizing that

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61 App. 71 ¶¶ 13-17.

62 App. 31.

63 App. 71 ¶ 13; *see also* App. 5-6 ¶¶ 19-27.

64 *See, e.g.*, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006); *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666 (2004).

65 *See* App. 32; *see also, e.g.*, App. 119 ¶ 10 (attempting to explain why Respondents believe Applicant should feel comfortable engaging in his prayer practice in a windowless room fitted with security cameras); *supra*, note 42.

66 *See* App. 102 (asserting that these "accommodations" are "generous").

67 App. 71 ¶ 15.

68 App. 5 ¶ 21. These "accommodations" also contradict Respondents' putative rationale for categorically denying Applicant's religious request to begin with—for instance, by nonsensically permitting Applicant to be physically out of the office to range "a four hundred (400) acre [public park] . . . so long as it does not adversely impact [his] work responsibilities," but never permitting Applicant to be at his nearby home, where he can actually pray and work consistent with his job responsibilities, on the very same condition. *See* App. 31; App. 11-12 ¶ 58; App. 71 ¶¶ 13-17.

"put[ting] [a religious adherent] to [a] choice" between religious exercise and penalties "easily satisfie[s]" the inquiry whether his free exercise is burdened, even substantially).

Accordingly, Respondents' putting Applicant to a choice "between following the precepts of [his] religion and forfeiting [work], on the one hand, and abandoning one of the precepts of [his] religion in order to accept work, on the other hand" is a textbook example of burdening free exercise. *See, e.g.*, *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 140 (1987) (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 717 (1981); *see also, e.g.*, *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005) (observing that informal Christian practices are more vulnerable "to subtle forms of discrimination"). And "it is not for [courts] to say that [Applicant's] . . . religious beliefs are mistaken or insubstantial. Instead, [thei]r 'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction.'" *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014) (quoting *Thomas*, 450 U.S. at 716); *Fulton* (slip op.) at 5 (quoting *Thomas*, 450 U.S. at 714). Here, there is no dispute that it does.[69] *See id.*

B. Respondents' discriminatory policy is subject to strict scrutiny because it (1) lacks neutrality and (2) lacks general applicability.

(1) Respondent's policy lacks neutrality in at least three ways:

a. Respondents' policy memorandum makes clear: Religion can never be an adequate basis for a work-from-home accommodation, to any extent, neither now nor "in the future."[70] Respondents thus "single[d] out [religious] worship for especially harsh treatment," *Diocese of Brooklyn*, 141 S. Ct. at 66, at the

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69 App. 223 (Respondents confirming that "the factual record is not in dispute").

70 App. 31.

very time they were already granting for secular reasons the very accommodation requested by Applicant.[71] The only plausible explanation for this striking lack of neutrality is hostility to religion, **hostility shockingly evident even in Respondents' briefing below.**[72]

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[71] App. 86-87; App. 71 ¶¶ 10 & 11; App. 4 ¶¶ 15-17.

[72] App. 90, 91 & 102 (derisively referring to Applicant's religious need to pray in scare quotes, as a "need," multiple times); App. at 88 (derisively referring to Applicant's prayer practice as a "moving" "target"). *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018) (recognizing that government officials disparage religion "by characterizing it as merely rhetorical—something insubstantial [or] even insincere").

In their opposition in the Court of Appeals, Respondents again crudely characterized Applicant's religious practice. *See* App. 237. Respondents apparently ignorantly conflate praying at all (simpliciter) with praying in accordance with the relevant prayer practice. *See* App. 237 (apparently ascribing significance to the fact that Applicant was not commanded by Respondents not to "pray in the office in any manner at all"); *see also* App. 5-6 ¶¶ 19-27 (describing the relevant prayer practice); App. 71 ¶¶ 13-14 (same); App. 207 n.15. And they apparently attempt to invent a new and draconian legal standard. *See* App. 240 (apparently suggesting that the relevant legal question is whether all religious exercise is "completely prohibited" by Respondent's policy). But it is clear that the relevant question is whether Respondents' policy *burdens* religious conduct, not whether it "completely prohibits" religious conduct. *See, e.g.*, *Fulton* (slip op.) at 5; *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 170 (3d Cir. 2002) ("[T]here is no[t] [even a] substantial burden requirement when government discriminates against religious conduct."); *Blackhawk v. Commonwealth*, 381 F.3d 202, 212 (3d Cir. 2004) (rejecting the argument that a government policy "should not be subjected to strict scrutiny . . . because it does not prohibit [a religious adherent] from engaging in religiously motivated conduct but merely obligates him to pay a . . . fee").

Separate from the hostility to religion evident in their briefing, Applicant respectfully submits that Respondents' other actions and choices of language cited herein are more than sufficient to prove Respondents' religious animus. *See, e.g.*, *Diocese of Brooklyn*, 141 S. Ct. at 66; *Masterpiece*, 138 S. Ct. at 1730 ("Another indication of hostility is the difference in treatment between [Applicant's request to work from home for religious reasons] and the [treatment of employees] who [were widely permitted to work from home for secular reasons]."); *id.* (recognizing that government officials acting with hostility toward religion "had treated [non-religious rationales] as legitimate, but treated [a religious rationale] as illegitimate"); *compare, e.g.*, App. 86-87, App. 71 ¶¶ 10 & 11, App. 4 ¶¶ 15-17 *and* App. 117-18 (Respondents broadly and repeatedly treating a secular rationale for working from home as legitimate), *with* App 31 (Respondents treating a religious rationale for working from home as always illegitimate, even "in the future").

"*[E]ven slight suspicion* [of] animosity to religion or distrust of its practices [requires that] all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (emphasis added). Respondents disregard this duty.

b. Respondents' extreme judgment that religion can never justify permitting Applicant a work-from-home accommodation, even "in the future,"[73] shows that they "presuppose[] the illegitimacy of religious beliefs and practices." *See Masterpiece*, 138 S. Ct. at 1731; *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 168 (3d Cir. 2002) (quoting *Lukumi*, 508 U.S. at 537). Respondents' otherwise-inexplicable refusal to respond when asked about a "process for appealing" this extreme judgment shows the same.[74] *See id.*

c. In addition to singling out Applicant's religious rationale for working from home for far harsher treatment than Respondents' widely-deployed secular rationale, Respondents' policy memorandum discriminates on its face against religion, stating explicitly and categorically that *the "[religious] request* to work from home . . . presently or in the future is denied,"[75] sufficing independently to trigger strict scrutiny. *See, e.g.*, *Lukumi*, 508 U.S. at 533.

Therefore, Respondents' May 12 "decision to provide medical exemptions while [*categorically*] refusing [a] religious exemption[] is sufficiently suggestive of discriminatory intent." *See Fraternal Order*, 170 F.3d at 365.[76] "[T]he neutrality inquiry

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[73] App. 31.

[74] App. 47. Respondents' dystopian tactic raises significant due process concerns.

[75] App. 31 (emphasis added). To the extent Respondents' attempt to obfuscate the fact that "the request" is indisputably "the *religious* request," *see, e.g.*, App 25; App. 30, they disregard this Court's precedent. *See, e.g.*, *Lukumi*, 508 U.S. at 533 ("A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context."); *id.* at 522-34 & 537 (making clear that it is necessary to interpret the words of a document to determine whether the document is facially neutral).

[76] *Fraternal Order* "assume[d] that an intermediate level of scrutiny applie[d]" partially because the court believed the government's "actions [could not] survive even that level of scrutiny." 170 F.3d at 366 n.7. (As explained herein, the same is true here.) *Fraternal Order* also assumed an intermediate level of scrutiny partially because that case "arose in the public employment context." *Id.* Since *Fraternal Order* was decided, this Court in *Fulton* made clear that even when the government is acting as a manager—and even a manager of its very own employees or contractors—the First Amendment's requirements of neutrality and general applicability apply in full force nonetheless. *See Fulton* (slip op.) at 8 (citing, *e.g.*, *Garcetti v. Ceballos*, 547 U. S. 410, 418-420 (2006)).

leads to one conclusion." *See, e.g.*, *Lukumi*, 508 U.S. at 542. Strict scrutiny applies. *See, e.g.*, *Diocese of Brooklyn*, 141 S. Ct. at 66-67.

(2) Respondents' policy lacks general applicability in at least three ways.

a. Respondents have "prohibit[ed] religious conduct," *see, Fulton*, (slip op.) at 6, i.e., working at home for religious reasons even "in the future,"[77] while permitting secular conduct, i.e., working from home for secular reasons,[78] which "undermines the government's asserted interests in a similar way"—in fact, in the same exact way.[79] *See id.*; *see also, e.g.*, *Blackhawk v. Commonwealth*, 381 F.3d 202, 211 (3d Cir. 2004) (triggering strict scrutiny because the "[secular] exemptions [made] available [by the government] undermine[d] the interests" the government claimed to be pursuing).

b. Respondents treat the activity of working from home for secular reasons, which they permit widely when they so choose,[80] more favorably than *the same exact activity undertaken for religious reasons*, which they have chosen to prohibit categorically.[81] *See, e.g.*, *Tandon*, 141 S. Ct. at 1296 ("Comparability is concerned with the risks various activities pose . . . ."). In other words, Respondents have "consider[ed] the particular reasons" for

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And when the government breaches either of those requirements, such as with a system of discretionary exemptions that permits discrimination against religion, *or intentionally disfavoring religion*, strict scrutiny applies. *See, e.g.*, *id.* at 8 (recognizing that, as here, "[n]o matter the level of deference" the government's policy could not survive); *id.* at 13.

77 App. 31.

78 App. 86-87; App. 71 ¶¶ 10 & 11; App. 4 ¶¶ 15-17.

79 *See, e.g.*, App. 27 (requesting that the same "status quo" that permitted work from home for secular reasons "continue" for Applicant's religious reasons); App. 51 (making clear that Applicant is requesting "the very same accommodation" Respondents granted widely for secular reasons); App. 131 (same); App. 142 ("[Applicant] seeks only the exact same accommodation that was extended to employees for secular reasons for more than a year."); App. 155 at 6:7-10 (same); App. 171 at 22:3-4 ("I am seeking simply the same exact accommodation that was extended to people for secular reasons.").

80 App. 86-87; App. 71 ¶¶ 10 & 11; App. 4 ¶¶ 15-17; *see supra*, note 14.

81 App. 31.

equivalent conduct, *see Fulton* (slip op.) at 5-6, and have unfavorably distinguished religious reasons from secular reasons; [82] Respondents' "practice [i]s to disfavor the religious basis of [Applicant's] objection," *see Masterpiece*, 138 S. Ct. at 1731.

c. Respondents' discriminatory policy choice was undertaken in the context of their system of "discretionary exemptions." *See, e.g., Fulton* (slip op.) at 8-10; *Blackhawk*, 381 F.3d at 209; *Fraternal Order*, 170 F.3d at 365. [83] Respondents have arbitrary discretion to favor secular reasons for working from home over religious reasons [84]—and they have in fact used their discretion in this manner to burden Applicant's free exercise:[85] Respondents "ha[ve] made clear" that they "ha[ve] no intention" of granting an exemption

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[82] *Compare, e.g.*, App. 86-87 *and* App. 71 ¶¶ 10 & 11 (Respondents broadly and repeatedly treating a secular rationale for working from home as legitimate), *with* App 31 (Respondents treating a religious rationale for working from home as always illegitimate, even "in the future").

[83] Respondents apparently make both individualized and categorical exemptions. *Compare, e.g.*, App. 4 ¶¶ 16-17 & App. 71 ¶¶ 10-11 (Respondents creating different work-from-home policies based on individual work units) *and* App. 103 (apparently distinguishing work-from-home policies based on employee "level"), *with* App. 86-87 (Respondents admitting they categorically permitted "all employees [to] work[] from home full-time" for secular reasons) *and* App. 31 (Respondents categorically refusing to accommodate religious reasons for working from home even "in the future").

Regardless, it is clear that either kind of exemption is constitutionally suspect—and that categorical discrimination in exemptions like that certainly at issue here can be even more problematic than individualized exemptions: "[I]t is clear from [*Smith* and *Lukumi*] that th[is] Court's concern was the prospect of the government's deciding that secular motivations are more important than religious motivations. If anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, *but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection.*" *Fraternal Order*, 170 F.3d at 365 (emphasis added); *see also, e.g., Tenafly Eruv*, 309 F.3d at 166; *Blackhawk*, 381 F.3d at 212.

[84] *See, e.g.*, App. 86-87; App. 71 ¶¶ 10 & 11; App. 4 ¶¶ 15-17.

[85] *Compare, e.g.*, App. 31 (Respondents exercising their discretion to deny Applicant a work-from-home accommodation, even "in the future," and even at the very time they were widely permitting work-from-home accommodations for secular reasons), *with* App. 86-87 (Respondents recognizing that under their exercise of discretion "all employees worked from home full-time" for secular reasons).

to Applicant for religious reasons. *See Fulton* (slip op.) at 7. This is precisely the kind of discretionary system that makes government officials' actions subject to strict scrutiny, because this is precisely the kind of discretionary system which squarely implicates—and, here, actualizes—the Court's concern that the government will engage in religious discrimination. *See, e.g., Fulton* (slip. op.) at 10; *see also, e.g., Blackhawk,* 381 F.3d at 211; *Fraternal Order*, 170 F.3d at 363 ("[T]he plaintiffs are entitled to a religious exemption since the [government] already makes secular exemptions.").

C. Respondents' arguments that strict scrutiny does not apply are unavailing.

Any one the reasons discussed above independently suffices to show that Respondents' policies are not neutral and generally applicable. And "*Smith, Lukumi*, and *Fraternal Order of Police* point the way to the appropriate level of scrutiny in this case." *See Tenafly Eruv*, 309 F.3d at 167. Respondents attempted to avoid this conclusion with a series of fallacious arguments in the lower courts.[86] Applicant will address only one now, which implicates this Court's recent precedents.

(1) Respondents fallaciously attribute dispositive significance to their August 2 decision to shift their work-from-home polices (again).

Respondents asserted below that because some or all employees "were required to return [physically] to work on August 2, 2021"—or because Respondents are not *at this moment* granting exemptions to permit people to work from home for secular reasons—their policies are neutral and generally applicable.[87] This fallacious argument,

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[86] *See, e.g.*, App. 124-27, 130-32, 141-45 & 206-08 (refuting these fallacies).

[87] App. at 96. Despite making this argument in opposing the preliminary injunction motion, neither in briefing nor at oral argument did Respondents cite *Fulton*—nor did the District Court's ruling and order. *See* App. 84; App. 172-77 at 23:6-28:11.

It is unclear whether Respondents' August 2 shift in their work-from-home policies was made in good faith. *Cf. infra*, note 91. But their intentions in that decision do not affect the analysis here. *See Fulton*, (slip op.) at 10; *Tandon*, 141 S. Ct. at 1297.

however, "misapprehends the issue:" The argument—actually, stronger versions of it—is foreclosed twice over. *See Fulton*, (slip op.) at 10; *Tandon*, 141 S. Ct. at 1297.

***In* Fulton**, this Court made clear that having "a formal mechanism for granting exceptions" [88] *at all* "renders [the government's] policy not generally applicable, regardless whether any exceptions" are currently given *or even whether any exceptions ever have been given. Fulton*, (slip. op.) at 10. This is so because the potential for exemptions permits the government "to decide which reasons for not complying with [its] policy are worthy of solicitude." *Id.* Here, Respondents' *in fact decided* that secular reasons are worthy of solicitude but that religious reasons are not *and never are.* [89] *See id.* Moreover, although Respondents have made clear that they think a religious rationale can never be an adequate basis to work from home even "in the [unknown] future,"[90] the same is not true of their preferred secular rationale for permitting work from home. *See, e.g., Alabama Association of Realtors, et al. v. Department of Health and Human Services, et al.*, 594 U.S. __, __ (slip op.) at 8 (August 26, 2021) ("It is indisputable that the public has a strong interest in combating the spread of the COVID-19 Delta variant.").[91]

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88 Formal or informal, the very potential for granting exemptions, *Fulton* makes clear, is the problem; and an *informal* system depending *even more* on Respondents' arbitrary discretion poses an *even greater threat* of religious discrimination. *See Fulton*, (slip op.) at 10; *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1299 (10th Cir. 2004) ("If we were to require the plaintiff to show that the 'system of individualized exemptions' was contained in a written [formal] policy, we would contradict the general principle that greater discretion in the hands of governmental actors makes the action taken pursuant thereto more, not less, constitutionally suspect." (citing *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940))). Stated simply, this Court's "concern [i]s the prospect of the government's deciding that secular motivations are more important than religious motivations," *Fraternal Order*, 170 F.3d at 365, *and that is precisely what Respondents have done here*—and in the absence of relief, would be permitted to continue to do.

89 App. 86-87; App. 71 ¶¶ 10 & 11; App. 4 ¶¶ 15-17; App. 31.

90 App. 31.

91 *See also, e.g., Severe COVID Cases Hit 'Troubling' 4-Month High as Delta Fuels Back-to-School Fears*, NBC (September 9, 2021), https://www.nbcnewyork.com/news/coronavirus/ny-reports-highest-single-day-covid-death-toll-in-months-as-delta-drives-back-to-school-worries/3260499/ ("Both

Stated simply, this Court's "concern [i]s the prospect of the government's deciding that secular motivations are more important than religious motivations," *see Fraternal Order*, 170 F.3d at 365, *and that is precisely what Respondents have done here*—and in the absence of relief pending appeal, would be permitted to continue to do.

***In* Tandon**, this Court made clear that "*even if the government withdraws*" a policy that burdens free exercise, a movant "otherwise entitled to emergency injunctive relief remain[s] entitled" when he "remain[s] under a constant threat" the government will use its "power to reinstate the challenged restriction[]" on free exercise. 141 S. Ct. at 1297 (citing *Diocese of Brooklyn*, 141 S. Ct. at 68) (emphasis added). Here, Applicant remains not only under a "constant threat" of free exercise burden: The burden Respondents impose on Applicant's free exercise has never ended—*and was increased by 100% on August 2*—let alone the discriminatory policy resulting in the burdening actually "withdraw[n]."[92] *See id.*. Therefore, this Court's concern that the government will engage in religious discrimination is plainly actualized here nonetheless. *See, e.g.*, *Fulton*, (slip. op.) at 10; *Tandon*, 141 S. Ct. at 1296-97; *Fraternal Order*, 170 F.3d at 365.

In addition, regardless of their treatment of others for secular reasons, Respondents intentionally discriminated against religion on May 12, explicitly and categorically singling out religion for disfavored treatment, as never an adequate basis to permit work from home.[93] This "decision to provide medical exemptions while [*categorically*] refusing [a] religious exemption[] is sufficiently suggestive of discriminatory intent." *See Fraternal Order*, 170 F.3d at 365. Respondents' discriminatory intent has continued from that decision until this day—it does not cease to

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hospitalizations and deaths in the Garden State are at four-month highs, as are the number of COVID patients on ventilators and in ICUs [as of] Wednesday [September 8, 2021].").

[92] App. 31 (stating Respondent's policy of categorically discriminating against a religious accommodation even "in the future").

[93] App. 31.

exist simply because Respondents have decided to treat others differently for secular reasons[94]—and is shockingly evident even in their briefing.[95]

D. Respondents do not even come close to passing strict scrutiny—or any form of scrutiny.

"[S]trict scrutiny requires the State to further interests of the highest order by means narrowly tailored in pursuit of those interests. That standard is not watered down; it really means what it says." *Tandon*, 141 S. Ct. at 1298 (quoting *Lukumi*, 508 U.S. at 546) (cleaned up). But not only does Respondents' discrimination fail to pass that exacting form of scrutiny to which it is subject: "The [government] has not offered any interest in defense of its policy that is able to withstand *any form of heightened scrutiny*." *See Fraternal Order*, 170 F.3d at 366 (emphasis added). Respondents' totally-untailored and unlawfully-motivated religious discrimination cannot pass even rational basis review.

(1) Respondents' putative interests are far from compelling.

To attempt to justify their religious discrimination, Respondents assert only the vaguest interests, not backed by any concrete fact or specific example: The rationale they "st[ood] by" to justify their religious discrimination[96] consists of a single paragraph of vague assertions[97] stated only at a "high level of generality." *See, e.g.*, *Fulton*, (slip op.)

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94 Importantly, Applicant is "not asking for preferential treatment." *See Tenafly Eruv*, 309 F.3d at 169. Applicant "ask[s] only that [Respondents] not invoke a[] [categorically discriminatory policy against religious rationales for working from home] from which [Respondents' preferred secular rationales] are effectively exempt." *See id.* In other words, Applicant asks that Respondents maintain neutrality and accord Applicant's religious reasons for working from home the same consideration they accord their preferred secular reasons for working from home. *See id.* Because Respondents judge secular medical rationales as adequate to permit work from home, even widely for prolonged periods, *see supra*, note 14, the First Amendment bars them from categorically judging as inadequate Applicant's religious rationale for working from home unless they pass strict scrutiny. *See, e.g.*, *Fulton* (slip op.) at 8; *Fraternal Order*, 170 F.3d at 366-67.

95 *See supra*, note 72.

96 App. 47.

97 App. 31-32.

at 13-14 ("The [government] states [its] objectives at a high level of generality, but *the First Amendment demands a more precise analysis.*" (emphasis added)); *Mast v. Fillmore Cnty.*, 594 U.S. __, __ (Gorsuch, J., concurring) (slip op.) at 4 (July 2, 2021) (cogently laying out this crucially important point of analysis). To this day, Respondents have provided zero individualized consideration of Applicant's religious request.[98] *See, e.g.*, *Fulton* (slip op.) at 14 ("The question . . . is not whether the [government] has a compelling interest in enforcing its . . . policies generally, but whether it has such an interest in denying an exception to [*Applicant in particular*]"). Furthermore, Applicant has debunked each of Respondents' putative interests—repeatedly.[99] Again:

- **Respondents' vaguely assert** that "emergent matters that arise may require immediate response that would necessitate [Applicant's] presence in the office."[100]
    - **Applicant responds** with undisputed testimony under penalty of perjury: "[T]here has never been an emergent matter that necessitated my immediate physical presence in the office. I am not [even] sure what such a hypothetical scenario would be like."[101] Respondents conceptualize this interest at such a high level of generality, so unconnected from Applicant in particular, that apparently they claim only that it applies in Applicant's "line of work."[102]

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98 *See* App. 31-32 & 117-20 (providing Respondents' only rationale for religious discrimination at a very high level of generality, without attempting to connect it to Applicant's employment in particular, and without addressing the factual inconsistencies between their general rationale and Applicant's employment in particular); App. 223.

99 *See, e.g.*, App. 35-39; App. 7-14 ¶¶ 35-65; App. 70-71 ¶¶ 3-9 & 17; App. 63-65; App. 134-39; App. 200-203; *see also* App. 63 nn. 5 & 6.

100 App. 31; *see also* App. 119 ¶ 8 (vaguely referring to "emergent matters").

101 App. 70 ¶ 4. To this day, Respondents have never explained their "emergent matter" assertion with a single concrete fact or specific example.

102 App. 98-99.

- **Respondents vaguely assert** that "in person courtroom appearances will resume at some point in the future" and "[i]n person witness interviews are preferred over those conducted remotely."[103]
    - **Applicant responds** with undisputed testimony under penalty of perjury: "I am, and have always been, fully willing to be physically present for anything required by my job responsibilities—including, for instance, in-person court appearances, witness interviews, or any other obligation;" praying at home "has never interfered in my work."[104] There is no dispute that Applicant's job responsibilities may require him to be physically present for such obligations,[105] and Applicant has always been physically present for all of them—including during weeks he was scheduled to work from home.[106]
- **Respondents vaguely assert** that some "meetings are not pre-scheduled and occur on an ad hoc basis" and that "collaborati[on]" is sometimes necessary.[107]
    - **Applicant responds** with undisputed testimony under penalty of perjury: "[A]ny 'ad hoc' meetings conducted in person in the office have been indistinguishable from any 'ad hoc' meetings conducted over the phone from home."[108] Further, "ad hoc" meetings on work topics "are rare;"[109] and, anyway, Respondents have "utterly fail[ed] to explain why permitting [Applicant] to participate in potential meetings [or collaboration]

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103 App. 31.
104 App. 71 ¶¶ 9 & 17.
105 App. 12-13 ¶ 62(a); App. 35 ("[I]n-person courtroom appearances were the first example [Applicant] provided at the May 6 meeting [*see* App. 3 ¶¶ 11-12] of a circumstance in which all would agree that physical presence is reasonably necessary.").
106 App. 71 ¶ 17; App. 37 ("[F]or instance, [Applicant] was scheduled to work from home but physically present to observe witness interviews on March 11, and March 25, 2021.").
107 App. 31.
108 App. 70 ¶ 5; App. 36-37.
109 App. 8 ¶ 38; *see also* App. 37 n.2.

telephonically . . . would impose an undue hardship . . . [or] even a de minimis burden on [Respondents]."[110]

- **Respondents vaguely assert** that "[i]t is anticipated that [the] workload will . . . increase."[111]
    - **Applicant responds:** "[A] vague observation about what is 'anticipated'" cannot justify categorical religious discrimination "at the present time."[112]
- **Respondents vaguely assert** regarding nondescript people that "department heads . . . had been taking on many of the responsibilities of assistant prosecutors."[113]
    - **Applicant responds unequivocally:** Applicant "is not aware of a single occasion on which a 'department head,' or anyone, 'took on' any of his job responsibilities, nor do [Respondents] identify even one such occasion."[114]
- **Respondents' vaguely assert** that categorically prohibiting Applicant a religious work-from-home accommodation is "vital to his growth and development as a trial lawyer" because he must "observe colleagues at other trials."[115]
    - **Applicant responds unequivocally:** Applicant "is not aware of a single occasion on which [Respondents] (or [Applicant's] supervisor) requested that

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110 App. 13 ¶ 62(b); *see also* App. 8 ¶ 39 (stating without contradiction that electronic methods of meeting are "efficient or even seamless; and, in fact, [were] [Respondents]' chosen method of meeting on May 6 to discuss the [religious] request, and ha[ve] been [Applicant]'s supervisor's chosen method of meeting during weeks [Applicant] is working from home or even when working in the office").

Although Respondents have provided zero examples—they are, in fact, rare—Applicant recognizes that in-person meetings are sometimes reasonably necessary. *See, e.g.*, App. 136 n.15. As reiterated multiple times herein: Applicant is "fully willing to be physically present for anything required by [his] job responsibilities." App. 71 ¶ 9.

111 App. 32.

112 App. 38.

113 App. 118 ¶ 5.

114 App. 201 (quoting App. 137).

115 App. 119 ¶ 8.

[he] observe another attorney's trial—nor would [he] have objected to doing so had [Respondents] made this request."[116]

"There can be no serious claim that those interests justify" categorical discrimination against Applicant's religious practice. *See, e.g.*, *Lukumi*, 508 U.S. at 547. Moreover, Respondents' only attempts at providing evidence in support of those non-interests are (i) a press release; and (ii) the deficient certification of one defendant,[117] which, as explained above, re-asserts only vague interests at only a high level of generality.[118]

It is worth repeating: **Respondents offer not a single concrete fact or specific example in support of their discrimination.** On each putative interest, Respondents make only a vague assertion at an impermissibly high level of generality, without even attempting to connect it to Applicant's employment specifically, *see Fulton*, (slip op.) at 13-14; Applicant debunks it with a clear explanation and citation to evidence "without

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[116] App. 137; *see also* App. 71 ¶ 9. Notably, these latter two "department heads" and "professional development" interests were absent from the putative rationale Respondents "st[oo]d by" previously. *See* App. 31-32; App. 47. Respondents also vaguely reference "effectiveness decline" or "lack of availability" in their briefing. App. 104. Applicant thoroughly refuted this oblique attempt at an argument below. *See* App. 138 ("Defendants have . . . apparently chosen to remain willfully ignorant of information known by Plaintiff's supervisor regarding Plaintiff's excellent availability and efficiency when working from home. For instance, when working from home, Plaintiff 'completed assignments so quickly and thoroughly that it has surprised' his supervisor. And Plaintiff's availability when working from home—e.g., the frequency and speed with which he answers work related phone calls; his exemplary average response time to email communications; and his willingness to take on, or even volunteer for, and complete any assignment at any time, even outside of working hours—has always been exceptional. []For instance, while being permitted to work from home, [he] ha[s] volunteered additional assistance many times; ha[s] expressly remarked that [he] [is] happy to take more work; and ha[s] completed assignments so quickly and thoroughly that it has surprised [his] supervisor." (quoting App. 39 n.4) (internal citations omitted) (footnote omitted)); *see also* App. 223 (confirming that these factual allegations are uncontested).

[117] *See supra*, note 39.

[118] *Compare, e.g.*, App. 119 ¶ 8 (vaguely appealing, not under penalty of perjury, to "emergent matters"), *with* App. 70 ¶ 4 (declaring under penalty of perjury that "there has never been an emergent matter that necessitated [Applicant's] immediate physical presence in the office" and that it is not clear what one "would be like").

contradiction," *see Diocese of Brooklyn*, 141 S. Ct. at 66;[119] and Respondents fail to respond with anything but more vague, generalized assertions—let alone a shred of evidence to the contrary. "Such speculation is insufficient to satisfy strict scrutiny." *See Fulton* (slip op.) at 14. Respondents plainly have "not demonstrated . . . that, in the context of [Applicant's religious request], [their] governmental interests are compelling." *See, e.g.*, *Lukumi*, 508 U.S. at 546.

If Respondents' vague putative interests in categorically discriminating against religion could have potentially been found persuasive, Respondents' own admissions foreclose that possibility—three times over.[120] ***First***, Respondents expressly acknowledge that only in certain circumstances, and not always, are employees "required to be in the office;" whether they are is "based on the needs of the office."[121] ***Second***, Respondents would generally permit Applicant to be physically out of the office to range "a four hundred (400) acre [public park] . . . so long as it does not adversely impact [his] work responsibilities,"[122] but never permit Applicant to be out of the office to work at his nearby home,[123] where he can actually pray and work in peace,[124] on the very same condition. **This nonsensical "accommodation" alone refutes Respondents' entire position.** ***And, third***, Respondents recognize that for secular reasons they already widely permitted the accommodation Applicant is seeking for religious reasons.[125] In other words, Respondents themselves have "demonstrated that [they] ha[ve] at [their] disposal an approach" that would efficiently, if not easily, accommodate Applicant's free exercise:

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119 *See supra*, note 99.

120 *See* App. 9-10 ¶¶ 43-50.

121 App 30; App. 9 ¶ 45; *see also* App. 25 (specifying that Applicant does not seek accommodation for times when it would "cause undue hardship" for Respondents).

122 App. 32.

123 App. 31.

124 App. 71 ¶¶ 7 & 17.

125 App. 86-87; App. 71 ¶¶ 10 & 11; App. 4 ¶¶ 15-17; *see supra*, note 79; App. 223.

treat his religious rationale for working from home the same as their preferred secular rationales for working from home.[126] *See Hobby Lobby*, 134 S. Ct. 2782.

Accordingly, the Court should be "at a loss to understand" why permitting all employees to work from home for secular reasons fulltime for prolonged periods—or permitting Applicant to range 400 acres at will during work hours—does not "threaten important . . . interests," but permitting a single employee to work at home as necessary to pray does, and allegedly *always* does: "[T]here is no apparent reason why permitting [Applicant to work from home at least sometimes] for religious reasons should create any greater difficulties" than permitting many others to work from home for prolonged periods for secular reasons. *See, e.g.*, *Fraternal Order*, 170 F.3d at 366-67.

(2) Respondents' chosen method of advancing their putative interests is totally untailored.

Respondents have categorically refused to permit Applicant to engage in his prayer practice at any time during all working hours and even "in the future"—the exact opposite of narrow tailoring.[127] Respondents' vague interests, if even extant, "could be achieved by narrower [rules] that burdened religion to a far lesser degree." *See, e.g.*, *Lukumi*, 508 U.S. at 546. For instance, Respondents could simply treat Applicant and his religious rationale for working from home the same as they treated all employees and their secular rationale for working from home—as Applicant himself requested.[128] This

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126 *See, e.g.*, *supra*, note 14.

127 App. 10-11 ¶ 54 (stating without contradiction that Respondents have refused to permit even "one day, hour, or minute" of work from home as necessary to accommodate prayer); App. 31 (making clear that Respondents categorically refuse to accommodate Applicant's prayer practice even "in the future").

128 *See, e.g.*, App. 27 (requesting that the "status quo" that permitted work from home for secular reasons "continue" for Applicant's religious reasons); App. 51 (making clear that Applicant is requesting "the very same accommodation" Respondents granted widely for secular reasons); App. 131 (same); App. 142 ("[Applicant] seeks only the exact same accommodation that was extended to employees for secular reasons for more than a

is one among "many other less restrictive rules" Respondents could use instead of categorical religious discrimination. *See, e.g.*, *Diocese of Brooklyn*, 141 S. Ct. at 67.

"[N]arrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest." *Tandon*, 141 S. Ct. at 1296-97. Yet Respondents have "made no effort to determine when [accommodating Applicant's religion] would cause undue hardship or when it would not: They simply asserted, categorically, that it always does."[129] Respondents "must do more than assert that certain risk factors are always present in [working from home as necessary to pray], or always absent from [working from home for secular reasons]." *See Tandon*, 141 S. Ct. at 1296. They have failed. *See id.*

Respondents' failure to tailor their discrimination here is equivalent to, if not much worse than, the government officials' failure in *Fraternal Order*, which is on all fours with this case. [130] In *Fraternal Order*, the Court of Appeals rejected even physical

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year"); App. 155 at 6:7-10 (same); App. 171 at 22:3-4 ("I am seeking simply the same exact accommodation that was extended to people for secular reasons.").

[129] App. 10-11 ¶¶ 53-54.

[130] *See* App. 61-62. Below, Applicant repeatedly cited and analyzed *Fraternal Order*, a precedent binding in the Third Circuit, in support of the original motion for preliminary relief. *See, e.g.*, App. 17-18, 56-68, 125-28, 139, 141, 145 n.21, 147, 159 at 10:18-21, 165 at 16:12-14 & 167 at 18:9-14. But neither in their briefing nor at oral argument on the preliminary injunction motion did Respondents cite *Fraternal Order* even one time. *See, e.g.*, App. 84. And the District Court did not so much as mention this precedential case in its ruling. *See generally* App. 172-77 at 23:5-28:11. It was unclear whether the District Court might have vaguely attempted to distinguish the case based on the fact that it did not happen to arise during a pandemic. *See* App. 175 at 26:2-9 (asserting "that this was a pandemic that existed" and that Respondents' exercises of discretion related to employee scheduling have generally been related to that secular medical rationale). But it is well recognized that "even in a pandemic, the Constitution cannot be put away and forgotten." *Diocese of Brooklyn*, 141 S. Ct. at 68; *see, e.g.*, *Carson v. Simon*, 978 F.3d 1051, 1060 (8th Cir. 2020) ("There is no pandemic exception to the Constitution."); *Tex. League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136, 145 n.7 (5th Cir. 2020) (same); *Berean Baptist Church v. Governor Roy A. Cooper, III*, 460 F.Supp.3d 651 (E.D.N.C. 2020) (same). **And, anyway, Respondents' decision to discriminate categorically against religion now and even "in the future" has no discernable relationship to any pandemic.** *See, e.g.*, App. 31.

safety—"undoubtedly an interest of the greatest importance"—as a satisfactory rationale for the government's discrimination because the government's "policy w[as] not tailored to serve that interest." 170 F.3d at 366-67; *see Diocese of Brooklyn*, 141 S. Ct. at 67 (enjoining government regulations that burdened religious practices even though the regulations were allegedly designed to "[s]tem[] the spread of COVID-19"—an "unquestionably a compelling interest"—because they were not "narrowly tailored"). Yet, as explained above, Respondents' vague putative interests are far weaker than safety and they have failed to tailor their discrimination *at all*: Respondents have refused to permit Applicant to work for home for religious reasons during even "one day, hour, or minute"[131]—now or "in the future."[132] *See, e.g.*, *Fulton* (slip op.) at 14 (rejecting government officials' unsupported contention that their policy "can brook no departures"). To call this discriminatory policy choice tailored to any extent would be doublespeak.[133] Here, then, "[t]he absence of narrow tailoring suffices to establish the invalidity" of Respondents' discriminatory policy. *See, e.g.*, *Lukumi*, 508 U.S. at 546.

(3) Respondents' discrimination would not pass even rational basis.

Respondents' argued below that rational basis applies and did not consider the obvious alternative.[134] It is clear, however, that rational basis does not apply here: Applicant has shown in no less than six ways, clearly identified by this Court's precedents, how Respondents' discrimination triggers strict scrutiny. *See, e.g.*, *Fulton* (slip op.) at 13; *Tandon*, 141 S. Ct. at 1296; *Diocese of Brooklyn*, 141 S. Ct. at 67;

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131 App. 10-11 ¶¶ 53-54.

132 App. 31.

133 Respondents may attempt to argue that they have tailored their categorically discriminatory policy by "offering" Applicant "accommodations." *See* App. 32; *supra*, note 42. But because the undisputed factual record shows that these "accommodations" burden Applicant's prayer practice all the same, *see* App. 71 ¶¶ 13 & 15; App. 11-12 ¶¶ 55-59; App. 143-45, it is not clear whether the "accommodations" are even relevant now. *See Fulton* (slip op.) at 5; *Tenafly Eruv*, 309 F.3d at 170; *Blackhawk*, 381 F.3d at 212.

134 *See* App. 95-96 (omitting any argument on strict scrutiny).

Masterpiece, 138 S. Ct. at 1731; *Lukumi*, 508 U.S. at 546; *Thomas*, 450 U.S. at 718; *see also, e.g.*, *Blackhawk*, 381 F.3d at 212. But Respondents' discrimination would not pass muster even under the highly-deferential standard they wish applied here: Respondents have not cited a single fact in support of the proposition that they have a legitimate interest in categorically prohibiting Applicant's prayer practice even "in the future;"[135] and there is no rational relationship—at least not one explained by Respondents[136]—between the maximally discriminatory policy Respondents have chosen and their putative interests. *See, e.g.*, *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446 (1985) ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.").

Moreover, Respondents' policies and positions are shot through with inconsistencies,[137] and are motivated by unlawful intent. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 633 (1996). Respondents' unlawful intent—which independently suffices to show they cannot pass rational basis—is evident in their May 12 memorandum, which "discriminate[s] on its face" and singles out religion for maximally intolerant treatment. *See, e.g.*, *Lukumi*, 508 U.S. at 533; *see also, e.g.*, *Fraternal Order*, 170 F.3d at 365 ("[The]

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135 *See* App. 31-23; App. 117-20.

136 *See, e.g.*, App. 13 ¶ 62(b) (observing that Respondents "utterly fail[] to explain why permitting Plaintiff to participate . . . telephonically (or through Teams, etc.) in order to accommodate [his] religious need would impose an undue hardship"—or any burden at all—on Respondents); App. 35-39.

137 For example, Respondents asserted that they cannot accommodate Applicant's religious practice at all, neither now nor "in the future," App. 31, despite granting the very accommodation Applicant was seeking—at the very time Applicant was seeking it—to others for secular reasons, App. 87; App. 71 ¶¶ 10 & 11; App. 4 ¶¶ 15-17; App. 117-18.

Another example that leaps off the page is the first sentence of Respondents' one-paragraph putative rationale for their religious discrimination: "It is the nature of the work performed by the [Essex County Prosecutor's Office] that individuals be physically present in the office." App. 31. If this assertion were accurate, it would mean that all of Respondents' employees working from home either performed no work or performed no work "in the nature" of their employment. The assertion is nonsense and even disrespectful to the many employees who have worked hard, even overtime, from home.

decision to provide medical exemptions while [categorically] refusing [a] religious exemption[] is sufficiently suggestive of discriminatory intent."). Again, Respondents' hostility to religion is evident *even in their briefing below*.[138]

In no world does Respondents' totally untailored discrimination against religion pass constitutional muster. The lower courts had "a duty to conduct a serious examination of the need for such a drastic" restriction on free exercise as that imposed by Respondents.[139] *See Diocese of Brooklyn*, 141 S. Ct. at 68; *see also, e.g.*, *Lukumi*, 508 U.S. at 534 ("The Court must survey meticulously the circumstances of governmental categories . . . ."). Yet the lower courts here apparently conducted virtually no examination and in their rulings cited neither the record nor any source of law even one time.[140] The "failure to grant an injunction pending appeal was erroneous." *See, e.g.*, *Tandon*, 141 S. Ct. at 1296; *see also, e.g.*, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (Applicant "must be deemed likely to prevail.").

II. The equities weigh strongly in favor of granting injunctive relief.

A. Respondents' burdening of Applicant's free exercise will continue to cause irreparable harm absent injunctive relief.

A person is "irreparably harmed by the loss of free exercise rights 'for even minimal periods of time.'" *Tandon*, 141 S. Ct. at 1297 (emphasis added) (quoting *Diocese of Brooklyn*, 141 S. Ct. at 67). Respondents' discriminatory policy burdens Applicant's free exercise not only for minimal periods of time, but all day on every work day, categorically and permanently, even "in the future."[141] Absent injunctive relief, Applicant will continue to be "forced to forgo [his] prayer practice" by Respondents

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138 *See, e.g.*, App. 90, 91 & 102; App. 8; *supra*, note 72.
139 *See* App. 31.
140 *See* App. 172-77 at 23:5-28:11; App. 248-49.
141 App. 31.

during "every work day."[142] "There can be no question that the challenged restriction[]" causes and "will [continue to] cause irreparable harm." *See, e.g.*, *Diocese of Brooklyn*, 141 S. Ct. at 67; *id.* at 68-69 (recognizing that emergency relief is warranted even when free exercise applicants "bear [only] *the risk* of suffering further irreparable harm" (emphasis added)). [143]

In addition to the clarity of the definition of irreparable harm in this Court's precedents, Respondents' themselves apparently concede the point: "The harm allegedly suffered by [Applicant] . . . is difficult, if not impossible, to quantify and thus even more challenging to remedy."[144] Applicant respectfully submits that he does not already have a finding on this factor solely because the District Court did not properly apply this Court's precedents—declining to cite any precedent even one time—and instead inexplicably found that it "do[es]n't feel" there is irreparable harm here.[145]

B. The balance of hardships and public interest also clearly weigh in favor of granting this Application.

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[142] App. 71 ¶ 13. In addition, there is a fast-approaching time at which Applicant will be unable to offset this irreparable harm on at least some work days. *See* App. 73 (recognizing that Applicant's dwindling sick and vacation days "will run out").

[143] *Diocese of Brooklyn* also makes clear that government-proposed substitutes for free exercise cannot be used to negate a finding of irreparable harm. *See Diocese of Brooklyn*, 141 S. Ct. at 67 (recognizing, e.g., that "remote viewing is not the same as personal attendance"); *see also, e.g.*, App. 32 (Respondents proposing that instead of engaging in his prayer practice, Applicant commute to and from a public park multiple times each day or be confined to a windowless room fitted with surveillance cameras).

[144] App. 88. Among many other fallacious arguments, Respondents argued below that their religious discrimination "does not cause [Applicant] irreparable harm" because "he was able to work full time in the office" before the pandemic. *See, e.g.*, *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 144 (1987) (making clear that "[t]he timing" of when an employee chooses to begin engaging in a religious practice "is immaterial" to determining whether an employer burdens his free exercise and causes him irreparable harm). Despite Applicant's citations to it, Respondents never addressed *Hobbie* in the District Court; and other than *Smith* on one page in passing (App. 95), it seems Respondents' briefing did not cite any of this Court's religious liberty precedents.

[145] *See* App. 176 at 27:3-7.

When the government is the party opposing a preliminary injunction, the balancing and public-interest factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). The balancing factor focuses on the "effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24. On Applicant's side, the effect of withholding relief is and would continue to be devastating: As he repeatedly informed Respondents and the lower courts, being required to forgo his prayer practice causes him not only the irreparable harm of burdened free exercise, but also harm and suffering on multiple additional levels.[146] Respondents unnecessarily and inhumanely upended the status quo between the parties and increased these harms by 100% on August 2, prompting the original application for preliminary relief.[147]

On the public's side, as shown by the above analysis of Respondents' putative interests, it is not clear what harm, if any, would follow if the Court were to grant relief. Despite Respondents' vague assertions,[148] they have not identified a single concrete fact or specific example—let alone provided actual evidence in support of one—that suggests the public would suffer even a small cost or harm if they permitted Applicant to work from home as necessary to pray. *See, e.g.*, *Tandon*, 141 S. Ct. at 1296 (ruling unavailing even government officials' arguments that granting relief pending appeal would lead to *hospitals being overwhelmed* because the arguments were not adequately supported).

Respondents' foremost argument on this factor below was that permitting Applicant to work from home as necessary to pray would be "harmful to public interest" because Applicant would not "adequately develop professionally."[149] Respondents,

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146 App. 71 ¶ 16; App. 6 ¶ 25; App. 39 ("I suffer and am unable to focus on and complete work efficiently when denied the opportunity to pray."); App. 73 ("It is spiritually and psychologically painful.").

147 App. 51.

148 App. 31-32; App. 117-20.

149 App. 104-05.

however, cannot speculate and "assume the worst" simply because Applicant is seeking a religious accommodation. *See Tandon*, 141 S. Ct. at 1297; *Sherbert*, 374 U.S. at 407. Yet an assumption of the worst is exactly what Respondents' speculative assertion reduces to.[150] Furthermore, being forced to forgo his prayer practice severely hampers Applicant's professional development and wellbeing on multiple levels.[151]

If any "public consequences" would result from granting temporary relief, *see Winter*, 555 U.S. at 24, they would be good consequences: "*[I]t is always in the public interest* to prevent the violation of a party's constitutional rights," *see Am. Bev. Ass'n v. City and Cty. of S.F.*, 916 F.3d 749, 758 (9th Cir. 2019) (en banc) (emphasis added); "the public interest clearly favors the protection of constitutional rights," *Tenafly Eruv*, 309 F.3d at 178. At the very least, "it has not been shown that granting th[is] application[] will harm the public," which has sufficed to support an application for equivalent relief sought in this Court. *See Diocese of Brooklyn*, 141 S. Ct. at 68.

Even the public's compelling interest in *"[s]temming the spread" of a virus during a pandemic*, cannot justify totally untailored religious discrimination like Respondents'. *See, e.g., id.* at 67 (emphasis added); *Fraternal Order*, 170 F.3d at 366-67. But permitting Applicant to work from home as necessary to pray would actually advance the public's interest in stemming the spread of viruses during this pandemic. *See, e.g., Alabama Association*, (slip op.) at 8; *supra*, note 91. Even though Respondents used this putative interest to suspend the requirement that "all employees" report physically to work for prolonged periods,[152] they have apparently given it zero weight in their calculated decision to discriminate against Applicant's religious practice.

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150 *See also* App. 92 ("anticipat[ing]" that "remote work is insufficient"); App. 35 & 38 (explaining that vague "anticipation" and speculation about "some point in the future" cannot justify Respondents' categorical religious discrimination).

151 App. 71 ¶ 16; App. 6 ¶ 25; App. 39; App. 73.

152 *See supra*, note 14.

III. In the alternative, the Court should grant certiorari before judgment or summarily reverse.

In the alternative to entering an injunction pending appeal, Applicant respectfully submits that the Court should grant certiorari before judgment in the Court of Appeals and enjoin Respondents' religious discrimination pending disposition by this Court. *See* 28 U.S.C. § 2101(e). Or this Court should summarily reverse for the reasons it did in *Mast*. *See* 594 U.S. at __ (slip op.) at 1 (Alito, J., concurring) (recognizing that the lower courts "plainly misinterpreted and misapplied" the relevant legal provisions protecting religious liberty); *id.* (slip. op.) at 1-7 (Gorsuch, J., concurring) ("highlight[ing] a few issues" the lower courts inexplicably disregarded in this case).

CONCLUSION

Although free exercise is expressly protected by the second clause of the First Amendment to the highest law of the land, some government officials would relegate it to the status of a footnote in a bureaucratic memorandum—if they see fit to mention it at all. Here, Respondents' discriminatory "value judgment that secular (i.e., medical) motivations . . . are important enough to overcome [their] general interest[s] . . . but that religious motivations are not," and never are, cannot be permitted to stand and continue to inflict irreparable harm on Applicant pending appeal. *See Fraternal Order*, 170 F.3d at 366. Accordingly, Applicant respectfully requests that the Court temporarily enjoin Respondents from continuing to burden Applicant's free exercise; alternatively grant certiorari before judgment and similarly enjoin Respondents; or summarily reverse.

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Respectfully submitted,

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