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

APPENDIX TO EMERGENCY APPLICATION

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Dated: September 29, 2021

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UNITED STATES DISCTICT COURT
DISTRICT OF NEW JERSEY

ALEX G. LEONE,	:	**COMPLAINT**
Plaintiff,	:	**JURY TRIAL DEMAND**
v.	:	
	:	
ESSEX COUNTY PROSECUTOR'S OFFICE,	:	
THEODORE STEPHENS II,	:	
ROMESH SUKHDEO,	:	
GWENDOLYN WILLIAMS,	:	
and	:	
ROGER IMHOF,	:	
in their individual and official capacities,	:	
Defendants.	:	

Alex G. Leone ("Plaintiff"), by way of this Complaint against the Essex County Prosecutor's Office, Theodore Stephens II, Romesh Sukhdeo, Gwendolyn Williams, and Roger Imhof (collectively, "Defendants"), whose address is 50 West Market Street, Newark, New Jersey, says:

Jurisdiction and Venue

1. The Court has jurisdiction pursuant to 28 U.S.C. § 1331 because this civil action arises under the First Amendment and 42 U.S.C. § 1983. The Court has supplemental jurisdiction over Plaintiff's state-law claim pursuant to 28 U.S.C. § 1367(a) because it forms part of the same case or controversy. *See also* N.J.S.A. 10:5-13(a)(2).

2. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because this is the district in which a defendant resides and a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this District.

Parties

3. Defendant Essex County Prosecutor's Office ("the ECPO") is an agency of a political subdivision of the State of New Jersey and employs Plaintiff.

4. Defendant Theodore Stephens II is "Acting Essex County Prosecutor;" Romesh Sukhdeo is "Acting First Assistant Prosecutor;" Gwendolyn Williams is "Executive Assistant Prosecutor;" and Roger Imhof is "Chief Assistant Prosecutor." Each is a high-ranking supervisory official at the ECPO, and each either participated directly in or ratified the legal violations described herein.

5. As a political subdivision of a State, or its agency, and its officials, Defendants are state actors subject to suit under 42 U.S.C. § 1983. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 528, 547 (1993).

6. Defendants are an "employer" governed by the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.* ("the NJLAD"). *See* N.J.S.A. 10:5-5(a) & (e).

7. Plaintiff is a "Special Deputy Attorney General" or "Assistant Prosecutor" who has been an employee of Defendants since 2019. *See* N.J.S.A. 10:5-5(f).

Background

8. On April 26, 2021, Plaintiff submitted a request for religious accommodation to Defendants. Ex. A ("the Request for Accommodation" or "the request").

9. Plaintiff used Defendants' form. The form provides a prompt for the "accommodations description and reason therefore." In response to that prompt, in the space provided on the form, Plaintiff handwrote the following:

> Work and pray throughout the day at home, to be physically present at office or court when reasonably necessary or when accommodating this religious need would cause undue hardship.

> Reason: I have a spiritual need to pray in peace and solitude, such as in my backyard, several times throughout the day. [Exs. A & B.][1]

10. In other words, to avoid foregoing a sincerely-held religious practice, Plaintiff requested to work and pray from home when doing so would *not* "cause undue hardship" for Defendants. Exs. A & B.

11. In response to the Request for Accommodation, Defendants scheduled a May 6, 2021 "Teams" meeting to discuss the request. ("Teams" is a software that efficiently enables live audiovisual meetings, with the ability to share screens or documents.)

12. At the meeting, Plaintiff further explained the request, provided additional information, and answered all questions of all parties in attendance, including Defendant Imhof and Defendant Williams.

13. On request, Plaintiff provided a summary shortly after the meeting, which stated:

> - I am requesting an accommodation of modifying the schedule.
> - Currently, the schedule permits me, during every other week, to work from home primarily and be physically present at the office or court when reasonably necessary (several examples were discussed).
> - I am requesting that this status quo continue and be extended from every other week to each week.
>
> The reasons for this request were also covered extensively, but to reiterate:
>
> - I have a spiritual need to pray in peace and solitude, such as in my backyard, several times throughout the day.
> - Being physically present in the office interferes with this necessary religious practice: For instance, it makes me feel uncomfortable and unable to concentrate, prevents

[1] Exhibit B is the relevant text from Exhibit A in typed form. Plaintiff's personal cell phone number and home address have been redacted from Exhibit A. Defendant Imhof's cell phone number has been redacted from Exhibit G. Plaintiff respectfully requests that Defendants not publicly disclose Plaintiff's cell phone number or home address; and that if Defendants intend to do so, they provide notice so that Plaintiff may move for a protective order under Fed. R. Civ. P. 26(c).

spontaneous spoken prayer, is antithetical to that peace and solitude, and permits other people to see or hear me.

- For the above reasons, potential alternatives that were considered—such as commuting to a public park or driving back and forth between my home multiple times throughout the day—are unworkable.

Please let me know if you need any additional information. [Ex. C.]

14. That summary accurately reflects the following facts about Defendants' work schedules and Plaintiff's religious practice:

Defendants' Work Schedules

15. Over the past year, primarily as a result of the pandemic, Defendants have permitted all or mostly all employees to work from home on various schedules and, when working from home, to be physically present at their offices or court when reasonably necessary.

16. A schedule utilized by Defendants is called "A/B," in which one group of people (e.g., the "A" group) works from home during one week while the other group of people works from the office during that week, with the two groups switching places of work (home or office) after each week. This is the schedule to which Plaintiff is currently subject in his ECPO office section ("Financial Crimes and Intellectual Property") and has been subject for most of this year (2021).

17. But during other periods, or for other employees, other schedules applied: For instance, during December 2020 through January 2021, Plaintiff was permitted to work from home each week and required to be physically present at the office or court only when reasonably necessary. **And from approximately November and into the present month (June 2021),** ***at least one entire section of the office ("Adult Trial") was permitted to work from home every day, i.e., each week.***

18. Defendants thus provide individualized exemptions that permit some employees to work from home on some days, or for some reasons, but not others—the opposite of "uniform application of terms and conditions of attendance." *See* N.J.S.A(q)(3)(d)(ii).

Plaintiff's Religious Practice

19. Plaintiff is a Christian for whom prayer, including spontaneous spoken prayer, is both required by his religion and essential to all aspects of his life.

20. This religious practice includes covering certain topics in prayer each day—e.g., gratitude to the Creator for specific blessings, forgiveness, and prayers for the various needs and wellbeing of others—throughout the day, praying about other issues that arise in daily life, and reading Bible verses out loud.

21. This religious practice requires peace and solitude throughout the day: For Plaintiff, for instance, praying requires spontaneously and audibly speaking prayers not heard by others; deep concentration that is only possible in peace and solitude; and perceiving and contemplating the handiwork of the Creator, such as by looking up at the sky.[2] These reasons are naturally interconnected (e.g., Plaintiff cannot concentrate on his spoken prayers when others could hear).

22. When not required to be in the office physically, Plaintiff prays in peace and solitude several times throughout the day, including spontaneously, in his backyard (e.g., on breaks), and when looking at the sky. Plaintiff has done so for more than a year and his dedication to his religious life is stronger than ever. This practice is sincerely held.

23. This practice has never interfered in Plaintiff's work, work efficiency, or responsiveness to work communications. In fact, it greatly assists Plaintiff in his work.

[2] There are scriptural bases for Plaintiff's prayer practice; if relevant, citations to scripture can be provided.

24. When required to be in the office physically, Plaintiff's prayer practice must be foregone: For instance, in an office in which others are in close proximity or could interrupt—e.g., Plaintiff often hears his colleague distinctly through his office wall—peace and solitude and the resulting concentration are impossible, as is the ability to pray spontaneously and audibly without being heard by others.

25. When Plaintiff's prayer practice must be foregone, he suffers psychologically (e.g., by experiencing anxiety or dread during time in the office as well as during nights before going to the office); professionally (e.g., in being unable focus on and complete work efficiently); and even physically (e.g., in suffering sleep problems or headaches).

26. Foregoing Plaintiff's prayer practice is sometimes an unavoidable consequence of life.

27. But here, to the extent Defendants would require, it is not.

The NJLAD[3]

28. The NJLAD prohibits "impos[ing] upon a person as a condition of . . . retaining employment . . . any terms or conditions that would require a person to violate or forego a sincerely held religious practice or religious observance . . . unless, *after engaging in a bona fide effort*, the employer *demonstrates* that it is unable to reasonably accommodate the employee's religious observance or practice *without undue hardship* on the conduct of the employer's business." N.J.S.A. 10:5-12(q)(1) (emphases added).

29. In other words, an employer cannot "require a person to violate or forego a sincerely held religious practice" unless it *both* "engag[es] in a bona fide effort" *and* "demonstrates . . . undue hardship." N.J.S.A. 10:5-12(q)(1).

[3] Because Plaintiff's free exercise claim arose in the process of seeking an accommodation under the NJLAD—and because Defendants attempt to defend their infringement of Plaintiff's free exercise by relying on the NJLAD, *see, e.g.*, Ex. D at 2-3; Ex. G—background regarding the NJLAD is provided first.

30. "Undue hardship" means "an accommodation requiring *unreasonable expense or difficulty, unreasonable interference with the safe or efficient operation of the workplace* or a violation of a bona fide seniority system or . . . any provision of a bona fide collective bargaining agreement." N.J.S.A. 10:5-12(q)(3)(a) (emphasis added).

31. Partly because of its rigorous definition of "undue hardship," and the heightened burden it places on employers, the NJLAD provides "people of faith rights that *exceed[] those afforded*" *under Title VII. Victor v. State*, 203 N.J. 383, 407 (2010) (emphasis added).

32. And the NJLAD must be "liberally construed" to protect these rights. N.J.S.A. 10:5-3.

33. As explained herein, Defendants have failed to fulfill both statutory obligations: to demonstrate undue hardship and to engage in a bona fide effort.

34. But even just one of these failures violates the NJLAD and necessitates judicial intervention. *See* N.J.S.A. 10:5-12(q)(1); N.J.S.A. 10:5-13(a)(2); N.J.S.A. 10:5-3.

Defendants' Violations of the NJLAD
Failure to Demonstrate Undue Hardship

35. After Plaintiff sent the summary on May 6, *see* Ex. C; *supra*, ¶ 13, Defendants proceeded to deny the Request for Accommodation categorically—that is, without granting even a small part of what was requested—requiring Plaintiff to forego his sincerely-held religious practice as a condition of retaining employment. Defendants did so in a memorandum forwarded by Defendant Imhof on May 12, 2021, on which all named Defendants were cc'd. Ex. D ("the Memorandum").

36. The Memorandum's entire analysis consists of one paragraph of assertions; and the Memorandum does not even attempt to connect those assertions to Plaintiff's job responsibilities or the particular facts of Plaintiff's employment. *See* Ex. D at 2-3.

37. In other words, the Memorandum flatly fails to provide individualized consideration to the Request for Accommodation. The Memorandum, moreover, fails to cite even a single concrete fact or specific example in support of its categorical denial.

38. For instance, as a putative reason to deny the request, the Memorandum vaguely asserts that work "meetings are not pre-scheduled and occur on an ad hoc basis," but fails to explain with any fact or example why permitting Plaintiff to participate in such meetings electronically would "requir[e] unreasonable expense or difficulty [or] unreasonable interference with the safe or efficient operation of the workplace," *see* N.J.S.A. 10:5-12(q)(3)(a), and fails to mention that such meetings are rare, Ex. D at 2.

39. (As the past year has made clear, an electronic meeting—whether by simply calling or clicking on a "Teams" icon—does not require "unreasonable expense or difficulty" or "unreasonable interference" with efficiency: It is efficient or even seamless; and, in fact, it was **Defendants' chosen method of meeting** on May 6 to discuss the request, and has been **Plaintiff's supervisor's chosen method of meeting** during weeks Plaintiff is working from home or even when working in the office.)

40. Or, for instance, the Memorandum vaguely asserts that "emergent matters that arise may require immediate response that would necessitate . . . presence in the office," but cites no fact or example of such a scenario—**it is not clear whether such a scenario has ever occurred**—and fails to explain why in such a scenario Plaintiff could not simply drive to the office immediately. *See* Ex. D at 2; *infra*, ¶ 65.

41. Or, for instance, the Memorandum vaguely appeals to "collaborat[ion]" and asserts that "work . . . often requires in person discussion" without any explanation of why "in

person" discussion is "require[d]"—either required at all or required so unconditionally that the request could not be granted even in part. *See* Ex. D at 3.

42. If the statutory duty to *demonstrate undue hardship* means anything, *see* N.J.S.A. 10:5-12(q)(1), it means that Defendants cannot discharge that duty with vague assertions: without citing a single concrete fact or specific example, without any individualized analysis, and without any explanation of the "requirement" of physical presence, which Defendants incoherently claim obtains *at all times*.

43. Defendants' assertions belie the facts of the past year and present status quo.

44. **In addition, the Memorandum triply guts its own professed rationale:**

45. ***First***, it acknowledges that *only in certain circumstances*, and not always, are employees "required to be in the office during their 'at home' week *based on the needs of the office*." Ex. D at 1 (emphasis added).

46. If this admission does not entirely refute Defendants' professed rationale for denying the request categorically, it directly contradicts it. There are two more that do the same:

47. ***Second***, the Memorandum permits Plaintiff to be out of the office and range "a four hundred (400) acre property . . . so long as it does not adversely impact [his] work responsibilities." Ex. D at 3. Defendants have refused to explain why **commuting to and ranging a 400-acre property outside the office** does not impose an undue hardship—but working from home does, allegedly *always* does. *See infra*, ¶¶ 56-58.

48. ***Third***, the Memorandum acknowledges that Defendants have already widely provided the accommodation Plaintiff seeks: They permitted all or almost all employees to work from home at least half the time—currently and for the past year. *See* Ex. D at 1.

49. *And* Defendants already permitted other employees to work from home *fulltime for half a year—even while categorically denying the Request for Accommodation. See* ¶ 17.

50. These admissions plainly show that Defendants do not always suffer unreasonable expense or difficulty—or unreasonable interference with the safe or efficient operation of the workplace—*whenever a single employee* works from outside of the office.

51. In other words, these admissions show that Defendants' categorical denial of the Request for Accommodation, with no individualized consideration, cannot withstand legal scrutiny under the NJLAD's requirement that they "*demonstrate* . . . undue hardship." *See* N.J.S.A. 10:5-12(q)(1) (emphasis added).

Failure to Engage in Bona Fide Effort

52. In addition, the Memorandum and Defendants' subsequent conduct show that they have failed to "engag[e] in a bona fide effort . . . to reasonably accommodate [Plaintiff's] religious observance or practice." *See* N.J.S.A. 10:5-12(q)(1).

53. ***First***, the Memorandum categorically denies the Request for Accommodation, permitting not even days—or even hours or minutes—of work from home to accommodate prayer: Defendants made no effort to determine when the Request for Accommodation would cause undue hardship and when it would not: They simply asserted, categorically, that it always does. This position cannot satisfy even the most lenient level of legal scrutiny—let alone the NJLAD's heightened requirements. ¶ 31.

54. The past year and present status quo—by Defendants' own admissions, *see supra*, ¶¶ 44-51—clearly show both the practicability and efficiency of granting the request. And again, by its own terms, the Request for Accommodation requests that Plaintiff work and pray from home *only when doing so would* not *cause undue hardship for*

Defendants. Exs. A & B. The Memorandum completely omits this crucial component of the request. *See* Ex. D. And when informed of this conspicuous omission, Defendants refused to address it and refused to engage in any effort to accommodate—not even by one day, hour, or minute. *See* Ex. E at 3; Ex. F.

55. ***Second***, the Memorandum's foremost "offer" of an "accommodation" is permitting Plaintiff to "engage in pray in [his] private office during the work day." Ex. D at 3. But this "accommodation" is simply the status quo that gave rise to the need for the Request for Accommodation to begin with; let alone that it is plainly legally required.

56. The Memorandum's other two "accommodations" would either:

a. require Plaintiff—multiple times every day, regardless of the weather—to cross a busy street twice, hike up and down wooded hills and muddy terrain in work attire, and search for potentially secluded areas spread across 400 acres; or

b. be confined to a repurposed soundproof room fitted with surveillance cameras and no windows. Ex. D at 3.

57. For obvious reasons, which can be further explained, none of these "accommodations" promotes work efficiency and all of them would require Plaintiff to forego prayer as required by his religion. Defendants even recognize that they know it—that their proposed "accommodations" "would curtail the spontaneous nature of [Plaintiff's] prayer and . . . subject [Plaintiff] to being seen and heard by others." Ex. D at 1.

58. These proposed "accommodations" defy not only law but logic: for instance, by *always* permitting Plaintiff to be out of the office to range "a four hundred (400) acre property . . . so long as it does not adversely impact [his] work responsibilities," Ex. D at 3, but *never* permitting Plaintiff to be out of the office to work at home on the very same

condition. Defendants have refused to explain this obvious contradiction, among others. *See supra*, ¶¶ 43-48; Ex. F; Ex. G.

59. And even if the proposed accommodations were not illogical, Defendants could not impose them and require Plaintiff to forego prayer as required by his religion "*unless*" Defendants first "demonstrate[d] . . . undue hardship" as defined by statute, which they have failed to do. *See* N.J.S.A. 10:5-12(q)(1) (emphasis added); *supra*, ¶¶ 35-51.

60. ***Third***, Defendants' summary rejection of Plaintiff's thorough and carefully-researched response to the Memorandum, Ex. E, shows they have not engaged in a bona fide effort. As detailed below, Defendants replied to Plaintiff's ten-page response with a boilerplate nonresponse—*and then refused to answer basic questions about the process for considering the requested accommodation. See* Ex. F.

Plaintiff's Response to the Memorandum (Ex. E)

61. On June 1, 2021, Plaintiff responded to the Memorandum raising many of the points expressed in the foregoing paragraphs. Among the points are:

62. The statutory factors used to assess undue hardship clearly cut against denying the Request for Accommodation, *see* N.J.S.A. 10:5-12(q)(3)(b); and upon scrutiny, the reasons offered for denying it plainly do not justify a denial:

a. The Memorandum presents two observations—about in-person court appearances and witness interviews—that are fully consistent with the Request for Accommodation, as the past year and present status quo have made clear: Plaintiff has been and would continue to be physically present for all in-person court appearances and witness interviews; *and the Request for Accommodation expressly*

recognizes his willingness to be physically present, not only under those circumstances, but whenever *working remotely "would cause undue hardship."*

b. The Memorandum utterly fails to explain why permitting Plaintiff to participate in potential meetings telephonically (or through Teams, etc.) in order to accommodate Plaintiff's need to pray would impose an undue hardship, an "unreasonable interference with the safe or efficient operation of the workplace:" It is not clear whether permitting Plaintiff to participate in meetings electronically would impose *even a de minimis burden* on Defendants.

c. The Memorandum makes a vague assertion about nondescript "emergent matters," *see infra*, ¶ 65, provides no specific example or concrete fact in support of any assertion, and fails to provide any individualized analysis.

d. The Memorandum categorically refuses to grant the requested accommodation—not even subject to potential future tailoring—based on extremely rare hypothetical scenarios and speculation; and the Memorandum conspicuously ignores the fact that any accommodation granted could be tailored if necessary in the future.

63. Because they had no substantive response, *see* Ex. F, whether Defendants have even considered any of these weaknesses in their denial is unclear. But what is clear: Their barebones reply shows anything but effort—let alone bona fide effort.

64. In addition, when Plaintiff asked Defendants, "[W]hat is the process for appealing this denial?" Defendants refused to provide a response to that question. Ex. G.

65. Defendants also refused to clarify who participated in denying the request: for instance, Plaintiff's supervisor, who could have informed Defendants that **there has never been an "emergent matter[] that . . . immediate[ly] . . . necessitate[d] [Plaintiff's]**

presence in the office," *see* Ex. D at 2, or that **during weeks Plaintiff was working from home, *all* court appearances and in-person witness interviews proceeded normally and efficiently**, *see* Ex. D at 2; Ex. E at 4.

66. Categorically asserting, with no factual analysis, that the request always imposes undue hardship; "offering" only the status quo or "accommodations" that admittedly have the same problems; and refusing to dialogue and answer basic questions about the process for considering the requested accommodation cannot be the "bona fide effort" required by statute. *See* N.J.S.A. 10:5-12(q)(1).

67. For these reasons, Defendants have failed to fulfill both applicable statutory obligations: Defendants have failed to demonstrate undue hardship and have failed to engage in a bona fide effort to reasonably accommodate Plaintiff's religious practice.

The First Amendment

68. Defendants' failures under the NJLAD presage their violation of the First Amendment.

69. The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." (The Free Exercise Clause governs not only Congress, but States and their political subdivisions and agencies as well. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).)

70. Requiring an employee to forego a sincerely-held religious practice as a condition of retaining employment infringes his right to free exercise within the meaning of the First Amendment. *See, e.g., Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988) ("[T]his Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the

First Amendment."); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 140 (1987) (recognizing the unlawfulness of forcing an employee "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand" (quoting *Sherbert v. Verner*, 374 U.S. 398 (1963))) (citing *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981)).

71. Incidental infringement of free exercise could be legally permissible under *Employment Division v. Smith*, but *Smith*'s rule, by its own terms, applies when an infringement of free exercise is the result of a "valid and neutral law of general applicability" or "an across-the-board . . . prohibition." *See* 494 U.S. 872, 879, 884 (1990); *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. ___, ___ (slip op.) at 5 (June 17, 2021).

72. A rule can fail to be "generally applicable" in numerous ways. For example:

a. If it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," *Fulton*, (slip op.) at 6;

b. If a state actor "permit[s] secular exemptions [to the rule] but not religious ones," or uses "a system of individualized exemptions," *see, e.g.*, *Ward v. Polite*, 667 F.3d 727, 739, 740 (6th Cir. 2012); *Fulton*, (slip op.) at 5-6; or

c. "[W]henever [the rule] treat[s] *any* comparable secular activity more favorably than religious exercise," *Tandon v Newsom*, 141 S. Ct. 1294, 1296 (2021) (citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67-68 (2020) (per curiam)).

73. And when *Smith*'s requirement of general applicability is not met, *strict scrutiny applies*. *Fulton*, (slip op.) at 13; *Tandon*, 141 S. Ct. at 1296.

74. Defendants fail to comply with the mandates of neutrality and general applicability.

Defendants' Violation of the First Amendment

75. So Defendants trigger strict scrutiny for at least the three reasons outlined above:

a. Defendants have "prohibit[ed] religious conduct," i.e., working from home as necessary to pray, "while permitting secular conduct," i.e., working from home for secular reasons, which "undermines the government's asserted interests in a similar way"—in fact, the same exact way, *see Fulton*, (slip op.) at 6; Ex. E at 1-2;

b. Defendants "permit secular exemptions," e.g., medical-based exemptions, "but not religious ones;" and Defendants use "a system of individualized exemptions" that permits some employees to work from home (e.g., *dozens of employees* in "Adult Trial") at some times (e.g., *fulltime from November into the present month*) but not others, and for some reasons (e.g., secular reasons related to the pandemic, or employees' other reasons) but not others, *see, e.g.*, *Ward*, 667 F.3d 739-40; *Fulton*, (slip op.) at 5-6; *supra*, ¶¶ 15-18; *and*

c. **Defendants treat the activity of working from home for secular reasons more favorably *than the same exact activity undertaken for religious reasons*, which they have chosen to prohibit categorically**, *see Tandon*, 141 S. Ct. at 1296; *supra*, ¶¶ 35 & 54-55; Ex. D at 2.

76. Accordingly, strict scrutiny applies. *See, e.g.*, *Tandon*, 141 S. Ct. at 1296.

77. To survive strict scrutiny, a defendant must demonstrate that its infringement of free exercise furthers "interests of the highest order" *and* is "narrowly tailored in pursuit of those interests." *Church of Lukumi Babalu Aye*, 508 U.S. at 546.

78. Defendants do not even come close to meeting their burden under any form of heightened scrutiny, *see supra* ¶¶ 31 & 53, let alone strict scrutiny:

a. Defendants assert only vague interests not backed by any concrete fact or specific example, *see* Ex. D at 2-3; Exs. F & G; *see, e.g.*, *Fulton*, (slip op.) at 13-14 ("The City states these objectives at a high level of generality, but the First Amendment demands a more precise analysis."); and provided no individualized analysis, *see, e.g.*, *Fulton* (slip op.) at 14 ("The question . . . is not whether the City has a compelling interest in enforcing its . . . policies generally, but whether it has such an interest in denying an exception to [*Plaintiff*]"); *and*

b. Defendants have *categorically* prohibited Plaintiff's free exercise of his prayer practice—the exact opposite of narrow tailoring, *see, e.g.*, *supra*, ¶¶ 53-54 (Defendants have refused to permit even "one day, hour, or minute" of work from home as necessary to accommodate prayer); Ex. D at 2-3; *see generally* Ex. E.

79. Defendants also refused to provide any additional reasons or explanation. Exs. F & G.

80. **And *by extending the very same accommodation requested by Plaintiff to dozens if not hundreds of other employees***, *see supra*, ¶¶ 17, 48 & 74, Defendant Essex County Prosecutor's Office "itself has demonstrated that it has at its disposal an approach" that would accommodate Plaintiff's sincerely-held religious practice without undue hardship. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 730 (2014).

81. Defendants even considered and denied the Request for Accommodation—during April 26, 2021, to May 21, 2021—*during the very time they were already granting the same accommodation to other employees for secular reasons*, **proving they have at their disposal just such an approach**. *Hobby Lobby*, 573 U.S. at 730; Exs. A & D.

82. Defendants cannot rely on a medical rationale to defend their totally untailored religious discrimination. *See, e.g.*, *Fraternal Ord. of Police Newark Lodge No. 12 v.*

City of Newark, 170 F.3d 359, 367 (3d Cir. 1999) (Alito, J.) (recognizing the unlawfulness of "a value judgment that secular (i.e., medical) motivations . . . are important enough to overcome [an employer's] general interest . . . but that religious motivations are not"); *id.* ("We are at a loss to understand why religious exemptions threaten important city interests but medical exemptions do not.").

FIRST CLAIM:
VIOLATION OF THE RIGHT TO FREE EXERCISE (42 U.S.C. § 1983)

83. Plaintiff repeats and realleges each of the allegations of this Complaint.

84. By requiring Plaintiff to forego his sincerely-held religious practice as a condition of retaining employment, *see, e.g.*, *supra*, ¶¶ 24, 35 & 53, Defendants have infringed Plaintiff's free exercise. *See, e.g.*, *Lyng*, 485 U.S. at 450; *Hobbie v*, 480 U.S. at 140.

85. Defendants cannot rely on *Smith* to defend their infringement of Plaintiff's free exercise. *See supra*, ¶¶ 74-80. Strict scrutiny applies. *See supra*, ¶ 74.

86. Defendants fail to satisfy any form of heightened scrutiny, *see, e.g.*, *City of Newark*, 170 F.3d at 365-67, let alone strict scrutiny. *See supra*, ¶ 77.

SECOND CLAIM:
VIOLATION OF THE NJLAD

87. Plaintiff repeats and realleges each of the allegations of this Complaint.

88. The NJLAD prohibits "impos[ing] upon a person as a condition of . . . retaining employment . . . any terms or conditions that would require a person to violate or forego a sincerely held religious practice or religious observance . . . *unless, after engaging in a bona fide effort,* the employer *demonstrates* that it is unable to reasonably accommodate the employee's religious observance or practice *without undue hardship* on the conduct of the employer's business." N.J.S.A. 10:5-12(q)(1) (emphases added).

89. As discussed above, Defendants are governed by the NJLAD but have failed to fulfill both of those statutory obligations. *See supra*, ¶¶ 3-7 & 35-67.

90. Each of these failures is an "unlawful employment practice." N.J.S.A. 10:5-12(q)(1).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests the following relief:

a. Declaratory judgment that the acts and omissions of Defendants described herein violate the laws of the United States and the State of New Jersey;

b. Permanent enjoinment of these legal violations;

c. Compensatory damages;

d. Nominal damages;

e. Punitive damages for Defendants' wanton and willful disregard of Plaintiff's rights;

f. Reasonable attorneys' fees, expenses, and costs, including, but not limited to, court costs, expert fees, and all attorneys' fees incurred by Plaintiff; and

g. Any other relief the Court deems just and appropriate.[4]

JURY TRIAL DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable.

Dated: June 18, 2021

By:
/s/ Alex G. Leone
Alex G. Leone
P.O. Box 1274
Maplewood, NJ 07040

[4] On an email to Defendant Imhof cc'ing all named individual defendants, Plaintiff asked: "Are there any people other than those cc'd on this email who have participated in the process of considering and denying the request?" Neither Defendant Imhof nor any Defendant answered this question. *See* Ex. G. Accordingly, Plaintiff reserves the right to amend the Complaint to add additional defendants if appropriate in light of discovery.

Exhibit A

COUNTY OF ESSEX
OFFICE OF HUMAN RESOURCE
HALL OF RECORDS-ROOM 340
NEWARK, NJ 07102

Request for Religious Accommodation
(To be completed by employee or applicant)
APPLICANT INFORMATION (THIS SECTION IS TO BE COMPLETED BY APPLICANTS ONLY)

APPLICANT NAME:		**DEPARTMENT IN WHICH YOU ARE SEEKING EMPLOYMENT**	
HOME ADDRESS:		**TELEPHONE(HOME):**	
		TELEPHONE(CELL):	
		EMAIL ADDRESS:	

EMPLOYEE INFORMATION (THIS SECTION TO BE COMPLETED BY EMPLOYEES ONLY)

EMPLOYEE NAME:	Alexander Leone	**EMPLOYEE ID NUMBER:**	
POSITION TITLE:	SDAG/AP	**If member of Union, indicate which Union:**	
DEPARTMENT:	IP/Fin. Crimes	**WORK LOCATION:**	Prospect Ave., West Orange
WORK HOURS/DAYS:	8:30-4:30, M-F	**DAYS OFF:**	
HOME ADDRESS:		**TELEPHONE(WORK):**	
		TELEPHONE(HOME):	
		TELEPHONE(CELL):	

ACCOMMODATION INFORMATION (THIS SECTION TO BE COMPLETED BY APPLICANT AND EMPLOYEES)

ACCOMMODATIONS DESCRIPTION AND REASON THEREFORE (INCLUDE THE DATE THE REQUEST ACCOMMODATION IS TO BEGIN): Work and pray throughout the day at home, to be physically present at office or court when reasonably necessary or when accomodating this Religious need would cause undue hardship	**(ATTACH ADDITIONAL SHEETS IF NECESSARY.)** Reason: I have a spiritual need to pray in peace and Solitude, such as in my backyard, several times throughout the day.
ACCOMMODATION REQUESTED IS (CIRCLE ONE):	**PERMANENT** **TEMPORARY**
IF ACCOMMODATION IS TEMPORARY, PLEASE PROVIDE START DATE AND END DATE.	
**** ATTACH ANY DOCUMENTS WHICH SUPPORT YOUR ACCOMMODATION REQUEST.**	
IF THE ACCOMMODATION WAS REQUESTED PREVIOUSLY, YOU MUST COMPLETE THE FOLLOWING SECTION:	
DATE OF PREVIOUS REQUEST:	
NAME/TITLE OF PERSON WHO RECEIVED REQUEST:	

Response to Religious Accommodations

(To be completed by the department director or his/her designated management representative)

Complete this section ONLY if the accommodation is granted.

IS THIS ACCOMMODATION PERMANENT OR TEMPORARY (CIRCLE ONE)	PERMANENT TEMPORARY
IF ACCOMMODATION IS TEMPORARY, PLEASE PROVIDE START DATE AND END DATE.	
PROVIDE A SYNOPSIS OF THE ACCOMMODATION, INCLUDING EFFECTIVE DATE, DURATION, AND CHANGES TO THE REQUESTED ACCOMMODATION, IF ANY.	

Complete this section ONLY if the accommodation is denied

PROVIDE THE REASON(S) FOR DENIAL INCLUDING WHY GRANTING THE REQUEST MAY CAUSE UNDUE HARDSHIP TO THE DEPARTMENT/COUNTY.	(ATTACH ADDITIONAL SHEET IF NECESSARY.)

RESPONDING OFFICIAL'S SIGNATURE/DATE: _____

Once a decision has been made to grant or deny a request for religious accommodation, the responding official should provide the employee or applicant with a copy of this Response to Religious Accommodation Request form. A decision should be made no later than ten (10) business days after the submission of the Request for Religious Accommodation form by the employee or applicant.

OUTCOME(CICRLE ONE):	**GRANTED** **DENIED**
DATE GRANTED OR DENIED:	
STATUS OF ACCOMMODATION (CIRCLE ONE):	**PERMANENT** **TEMPORARY**

APPLICANT/EMPLOYEE SIGNATURE/DATE: Alex Leone 04/26/21

RESPONDING OFFICIAL'S SIGNATURE: _____

REQUEST RECEIVED ON: _____

Exhibit B

Work and pray throughout the day at home, to be physically present at office or court when reasonably necessary or when accommodating this religious need would cause undue hardship. Reason: I have a spiritual need to pray in peace and solitude, such as in my backyard, several times throughout the day.

Exhibit C

Alexander Leone

From: Alexander Leone
Sent: Thursday, May 6, 2021 2:35 PM
To: Walter Dirkin
Subject: "Supplement" Requested by Ms. Gaccione

Dear Walter,

I believe Ms. Gaccione, summarizing what I said on the form and during the meeting, stated the request very well but:

- I am requesting an accommodation of modifying the schedule.
- Currently, the schedule permits me, during every other week, to work from home primarily and be physically present at the office or court when reasonably necessary (several examples were discussed).
- I am requesting that this status quo continue and be extended from every other week to each week.

The reasons for this request were also covered extensively, but to reiterate:

- I have a spiritual need to pray in peace and solitude, such as in my backyard, several times throughout the day.
- Being physically present in the office interferes with this necessary religious practice: For instance, it makes me feel uncomfortable and unable to concentrate, prevents spontaneous spoken prayer, is antithetical to that peace and solitude, and permits other people to see or hear me.
- For the above reasons, potential alternatives that were considered—such as commuting to a public park or driving back and forth between my home multiple times throughout the day—are unworkable.

Please let me know if you need any additional information.

Thank you,

Alex

From: Alexander Leone
Sent: Friday, April 30, 2021 1:33 PM
To: Walter Dirkin <Walter.Dirkin@njecpo.org>
Subject: Re: Request for Religious Accommodation

Dear Walter,

Attached and below, please find the text from the form (under "accommodations description and reason therefore").

Thank you,

Alex

***

> Work and pray throughout the day at home, to be physically present at office or court when reasonably necessary or when accommodating this religious need would cause undue hardship. Reason: I have a spiritual need to pray in peace and solitude, such as in my backyard, several times throughout the day.

From: Alexander Leone
Sent: Monday, April 26, 2021 11:00 AM
To: Walter Dirkin <Walter.Dirkin@njecpo.org>
Cc: Pamela Kearney <Pamela.Kearney@njecpo.org>
Subject: Request for Religious Accommodation

Dear Walter,

Attached, please find the request for religious accommodation form. Please let me know if any additional information is required.

Thank you,

Alex

Exhibit D

OFFICE OF THE ESSEX COUNTY PROSECUTOR

THEODORE N. STEPHENS, II
ACTING ESSEX COUNTY PROSECUTOR

ESSEX COUNTY VETERANS COURTHOUSE, NEWARK, NEW JERSEY 07102
Tel: (973) 621-4700 Fax: (973) 621-5697

ROMESH C. SUKHDEO
ACTING FIRST ASSISTANT PROSECUTOR

MITCHELL G. McGUIRE III
ACTING CHIEF OF DETECTIVES

MEMORANDUM

TO: Alexander Leone, Assistant Prosecutor

FROM: Roger J. Imhof, Chief Assistant Prosecutor

DATE: May 12, 2021

RE: Religious Accommodation Request

Please accept the within Memorandum in response to your Request for Religious Accommodation submitted on April 26, 2021. As you know, representatives from the Essex County Prosecutor's Office (ECPO) and Essex County Counsel, Courtney Gaccione met with you on May 6, 2021 (via Teams remote video conferencing) to discuss your request and obtain further information from you regarding the specific nature of the accommodation you are seeking. On that same date, at the request of Ms. Gaccione, you submitted an email to your direct supervisor Deputy Chief Assistant Prosecutor, Walter Dirkin, summarizing your accommodation request.

Summary of the Religious Accommodation Request

You have advised the ECPO that you are seeking a schedule modification to work from home on a full-time basis to pray at home. You are requesting that the accommodation begin immediately and be permanent. You have identified as holding a belief in Christianity without more specific information provided about any particular provision of Christianity connected to your accommodation request.

Currently, due to the COVID-19 pandemic, the ECPO is working an A/B schedule which permits Assistant Prosecutors to work one week at home and the following week in the office. This schedule was implemented in March 2020 to minimize the number of staff in the office at one time. You acknowledged that there are instances when Assistant Prosecutors are required to be in the office during their "at home" week based on the needs of the office. You have advised that you do not presently require any accommodation while working at home pursuant to the A/B schedule format. However, you would like to be able to work from home every day except for when it is "reasonably necessary" to be physically in the office. You have indicated that you

are requesting that this accommodation continue past the discontinuation of the A/B schedule so that you could remain working from home on a full-time basis. You have advised that you will continue to be in the office when "reasonably necessary" such as court appearances or in-person meetings.

The basis for your request is your spiritual need to pray in peace and solitude in a location, such as in your backyard, several times throughout the day. You have indicated that being physically present in the office interferes with this necessary religious practice as it makes you feel uncomfortable and unable to concentrate or focus on prayer, prevents spontaneous spoken prayer and is contrary to the peace and solitude that you seek. You also indicated that prayer in the office would subject you to being overheard by others. You advised, when asked, that prayer in the County park across the street from your worksite was not an acceptable alternative because it would curtail the spontaneous nature of your prayer and it would also subject you to being seen and heard by others. You likewise indicated that traveling home from your worksite during the day to pray would not be acceptable because it would not allow you to pray spontaneously throughout the day. While not ideal, you advised that prayer in the office on a limited basis if you are in the office when "reasonably necessary" would be acceptable because it would be infrequent. You advised that you would pray in your office with the door closed. On an on-going basis, however, you stated that being in the office every day (or every other week during the pendency of the A/B schedule) would not be conducive to the peace and solitude you seek during prayer as well as subjecting you to interruption and being overheard. Finally, you advised that at this current time you no longer require any specific religious accommodation while physically present in a courtroom and you confirmed that there are no issues outstanding in connection with your prior accommodation requests dated January 10, 2020 and March 2, 2020.

ECPO Response

Currently, the ECPO is on an alternating week A/B schedule. You will be permitted to remain on the current A/B schedule with one week in the office and one week at home on an alternating basis. Your presence in the office on your "at home" week may still be required based on the needs of the office. Moreover, the ECPO anticipates that it will discontinue the A/B schedule in the coming months. At that time, you will be required to be in the office on a full-time basis. Accordingly, your request to work from home on a full-time basis presently or in the future is denied.

It is the nature of the work performed by the ECPO that individuals be physically present in the office. As discussed during our meeting, in person courtroom appearances will resume at some point in the future. Many ECPO meetings are not pre-scheduled and occur on an ad hoc basis that requires the presence of attorneys in the office. In person witness interviews are preferred over those conducted remotely. Additionally, emergent matters that arise may require immediate response that would necessitate your presence in the office. You acknowledged the

collaborative nature of ECPO's work which often requires in person discussion. Finally, as discussed during our meeting, the workload of the ECPO was significantly decreased during the pandemic. It is anticipated that workload will begin to increase now that the pandemic has begun to subside. For these reasons, the ECPO takes the position that to allow your religious accommodation request to work from home on a full-time basis would cause an undue hardship on the office. Specifically, your requested accommodation would cause an unreasonable interference with the efficient operation of the workplace pursuant to N.J.S.A. 10:5-12 (q)(1).

To accommodate your request regarding prayer while in the workplace, the ECPO can offer you the following accommodations:

1) You may continue to engage in pray in your private office during the work day;
2) You may access the Essex County Eagle Rock Reservation that is directly across the street from your worksite. The Eagle Rock Reservation is a four hundred (400) acre property with multiple secluded areas. This option is offered as you specifically referenced your preference to pray outside. You are granted permission to exercise your right to prayer at this location as your needs require so long as it does not adversely impact your work responsibilities;
3) The ECPO has identified a soundproof interview room located on the third floor of the building where you are currently assigned. The interview room does not have occupants on either side and would be completely private. The soundproofing will address your concern about others being able to hear you during prayer. ECPO is prepared to offer you this room on either a permanent basis (if you wish to relocate your office) or you may remain in your current office and use this office on an as needed basis. You will have exclusive use of this office with the ability to lock the door when in use to avoid any distractions or interruptions.

You are welcome to utilize one or all the above accommodations effective immediately. You may advise Deputy Chief Assistant Prosecutor Dirkin of your decision to utilize any or all these accommodations. Finally, please note that your schedule will revert to the normal A/B schedule effective Monday, May 17th. Thank you for your attention to this matter.

cc: Theodore N. Stephens, II, Essex County Prosecutor
Romesh Sukhdeo, Acting First Assistant Prosecutor
Walter Dirkin, Deputy Chief Assistant Prosecutor
Gwen Williams, Executive Assistant Prosecutor
Amy DePaul, Trial Court Administrator
Robert Jackson, County Administrator/Director of Human Resources
Jaqueline Jones, Deputy Director, Human Resources
Courtney Gaccione, Essex County Counsel

Exhibit E

Memorandum

To: Mr. Roger Imhof, Chief Assistant Prosecutor
From: Alex Leone
Date: June 1, 2021
Re: Religious Accommodation Request

Dear Chief Assistant Prosecutor Imhof,

Please accept this memorandum and renewed request for a religious accommodation in response to your May 12, 2021 memorandum (the "Memorandum").

* * *

The Memorandum cites the New Jersey Law Against Discrimination ("the NJLAD"). The NJLAD prohibits "impos[ing] upon a person as a condition of . . . retaining employment . . . any terms or conditions that would require a person to violate or forego a sincerely held religious practice or religious observance . . . *unless, after engaging in a bona fide effort*, the employer *demonstrates* that it is unable to reasonably accommodate the employee's religious observance or practice *without undue hardship* on the conduct of the employer's business." N.J.S.A. 10:5-12(q)(1) (emphases added).[1] Here, as explained below, ECPO has not engaged in a bona fide effort to accommodate my sincerely held religious practice and observance. *See* Request for Religious Accommodation (April 26, 2021) ("Request for Accommodation" or "the request"); May 6 Email. Nor has it demonstrated that accommodating my sincerely held religious practice and observance would impose an undue hardship.

Many, if not all, ECPO employees were permitted to work from home throughout the past year—and continue to be permitted—based on a secular rationale. Now I, a single employee, am

[1] "Undue hardship" means "an accommodation requiring *unreasonable expense or difficulty, unreasonable interference with the safe or efficient operation of the workplace* or a violation of a bona fide seniority system or a violation of any provision of a bona fide collective bargaining agreement." N.J.S.A. § 10:5-12(q)(3)(a) (emphases added). The NJLAD, accordingly, "g[ives] people of faith rights that exceed[] those afforded them through . . . Title VII." *See Victor v. State*, 203 N.J. 383, 407 (2010).

requesting what is essentially the same accommodation based on a religious rationale. The Memorandum attempts to deny this request *categorically* with *no* individualized consideration—even though the past year and present status quo have shown clearly that it can be accommodated efficiently, if not easily.

The statutory factors used to assess undue hardship cut against that attempted denial; and upon scrutiny, the reasons offered for it plainly do not justify it. *See* N.J.S.A. 10:5-12(q)(3)(b). Each of the factors is addressed in turn.

(i) "The identifiable cost of the accommodation, including the costs of loss of productivity and of retaining or hiring employees or transferring employees from one facility to another, in relation to the size and operating cost of the employer."

The Memorandum suggests that granting the Request for Accommodation would bear a "cost" in the form of "loss of productivity." *See* N.J.S.A. 10:5-12(q)(3)(b)(i); Memorandum at 3 (asserting that the "requested accommodation would cause an unreasonable interference with the efficient operation of the workplace"). But the reasons offered in support of this suggestion—either individually or collectively—plainly do not justify a categorical denial of the request.

First, the Memorandum observes that "in person courtroom appearances will resume at some point in the future." Memorandum at 2. Speculation about what might happen "at some point in the future" cannot justify a categorical denial of the requested accommodation at the present time. Regardless, in-person courtroom appearances were the first example I provided at the May 6 meeting of a circumstance in which all would agree that physical presence *is* reasonably necessary. *See* Memorandum at 2 (recognizing that under the Request for Accommodation I "will continue to be in the office when reasonably necessary[,] such as court appearances"). They are also mentioned in the Request for Accommodation itself (requesting "to be physically present at office *or court* when reasonably necessary" (emphasis added)).

To be clear, and to reiterate, the requested accommodation would *not* interfere with in-person courtroom appearances: I have been and would continue to be physically present for all of them; *and the Request for Accommodation expressly recognizes my willingness to be physically present, not only under those circumstances, but whenever working remotely "would cause undue hardship."* The Memorandum completely omits that crucial component of the Request for Accommodation: again, willingness to be physically present *whenever "accommodating [my] religious need would cause undue hardship."* In that omission, as throughout, *the Memorandum flatly fails to provide individualized consideration to the request.*

In addition, on April 26, I submitted a request—to both my immediate supervisor, Deputy Chief Assistant Prosecutor Walter Dirkin, and potential future supervisor, Director Frank Ducoat—to transfer to the Appellate Unit, which generally requires fewer in-person court appearances. This request was specifically mentioned to you, Chief Assistant Prosecutor Imhof, during the May 6 meeting. Yet the Memorandum does not address it.

Second, the Memorandum asserts that "[m]any ECPO meetings are not pre-scheduled and occur on an ad hoc basis that requires the presence of attorneys in the office." Memorandum at 2. ***Yet the Memorandum provides no explanation why permitting me to participate in such meetings telephonically (or through Teams, etc.) in order to accommodate my religious need would impose an undue hardship, an "unreasonable interference with the safe or efficient operation of the workplace."*** Such meetings have, in fact, occurred telephonically (or through Teams, etc.) over the past year—as, in fact, did the May 6 meeting to discuss the request. Such meetings have not required "unreasonable expense or difficulty" or resulted in "unreasonable interference with the safe or efficient operation of the workplace;" the Memorandum cites no fact

to the contrary. And any rare "ad hoc" in-person meetings have been indistinguishable from telephonic meetings.

On very rare occasions—perhaps three over the course of the year—a supervisor scheduled an in-person meeting for which physical presence was requested but not immediately required. I believe such meetings occurred both during weeks that I was scheduled to work in the office and weeks I was not. Such scheduling of and attending an in-person meeting, a process which was already in place before the request, is fully consistent with and contemplated by it. *See* Request for Accommodation (anticipating "physical[] presen[ce]" at the office).[2]

Third, the Memorandum observes that "in person witness interviews are preferred over those conducted remotely." Memorandum at 2. But like in-person courtroom appearances, *I cited observation of witness interviews at the May 6 meeting as an example of a circumstance in which physical presence* is *reasonably necessary.* To be clear, and to reiterate, the requested accommodation would *not* interfere with in-person observation of witness interviews: I have been and would continue to be present for all of them—for instance, I was scheduled to work from home but physically present to observe witness interviews on March 11, and March 25, 2021.

Fourth, the Memorandum asserts that "emergent matters that arise may require immediate response that would necessitate [my] presence in the office." Memorandum at 2. A timely response to emergent matters is always appropriate. Yet to my knowledge there has not been a single instance in which being in the office was "necessitate[d]" in order to respond to an emergent

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[2] The Memorandum asserts that I "acknowledged the collaborative nature of ECPO's work which *often requires in person discussion*." *See* Memorandum at 2-3 (emphasis added). I acknowledged, like the Request for Accommodation itself suggests, that in-person discussion could potentially be required. But I would not acknowledge that such discussion is "require[d]" "*often*" because that is false: The Memorandum does not even attempt to explain why in-person discussion is "required"—either required at all or required so frequently that the Request for Accommodation must be categorically denied—and there has not been a single occasion on which telephonic (or Teams, etc.) meetings did not work efficiently. Telephonic (or Teams, etc.) meetings work efficiently, for example, even for entire grand jury presentations with exposition of exhibits, etc.

matter. The Memorandum cites none: The Memorandum's vague assertions about nondescript "emergent matters"—and the Memorandum generally—are devoid of specific examples or concrete facts. What such a hypothetical scenario would be like is, therefore, a mystery. Even assuming such a scenario could occur at some theoretical point in the future, it would not be a reason to deny the Request for Accommodation categorically. As with other points the Memorandum tries to make, *it provides no explanation why permitting me to assist in such theoretical matters telephonically (or through Teams, etc.)—or, if necessary, to drive to the office immediately*[3]*—in order to accommodate my need to pray would impose an undue hardship.* And again, *the Memorandum provides no individualized analysis.*

Finally, the Memorandum observes that "[i]t is anticipated that [the] workload will begin to increase now that the pandemic has begun to subside." Memorandum at 3. Like the observation about potential in-person court appearances "at some point in the future," a vague observation about what is "anticipated" cannot justify a categorical denial of the requested accommodation at the present time. The Memorandum conspicuously ignores the fact that the Request for Accommodation could be tailored if necessary in the future. At most, an increased workload may make the circumstances under which it is reasonably necessary to be in the office more frequent. And again, *such circumstances are contemplated by the Request for Accommodation.*

---

[3] The drive to the office from my home is approximately twenty minutes. It is difficult to imagine the strange scenario in which *both* physical presence at the office in West Orange (as opposed to the courthouse, which is in Newark) is required *and* there is not twenty minutes to spare in getting there. (As observed above, this vague assertion about nondescript "emergent matters"—like the other assertions in the Memorandum—is not supported by any specific example or concrete fact. The Memorandum provides zero individualized analysis.)

In addition, this speculation about "emergent matters" shows the illogic of *permitting* me to range a nearby "four hundred (400) acre property" "so long as it does not adversely impact [my] work responsibilities," as discussed below, but *denying* me the requested accommodation of working and praying at home *when it would* not *cause undue hardship. See* Memorandum at 3; Request for Accommodation (requesting "to be physically present at office or court . . . *when accommodating [my] religious need would cause undue hardship*" (emphasis added)).

Further, my ability to focus on and complete work *depends on my religious practice and observance and resulting spiritual and mental wellbeing*: In other words, I suffer and am unable to focus on and complete work efficiently when denied the opportunity to pray spontaneously in peace and solitude; and my work is almost always more efficiently completed from home.[4]

In sum, the Memorandum:

- Presents two observations—about in-person court appearances and witness interviews—that are *uncontested and fully consistent with the Request for Accommodation*, as the past year and present status quo have made clear;
- ***Fails to explain why permitting me to participate in meetings telephonically (or through Teams, etc.) in order to accommodate my need to pray would impose an undue hardship, an "unreasonable interference with the safe or efficient operation of the workplace***;"
- Makes a vague assertion about nondescript "emergent matters," *provides no specific example or concrete fact in support of its assertions*, ***and fails to provide*** **any** ***individualized analysis***; and
- Categorically refuses to grant the requested accommodation—*even subject to potential future tailoring*—based on extremely rare hypothetical scenarios and speculation.

Given that it provides *no* specific example, *no* concrete fact, and *no* individualized analysis, the Memorandum fails to show *even a de minimis interest* in denying the accommodation of participating telephonically and presenting physically as reasonably necessary. And it does not permit accommodation *to any extent*, instead denying categorically—and unlawfully.

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[4] For instance, while being permitted to work from home, I have volunteered additional assistance many times; have expressly remarked that I am happy to take more work; and have completed assignments so quickly and thoroughly that it has surprised my supervisor.

(ii) "The number of individuals who will need the particular accommodation for a sincerely held religious observance or practice."

The Memorandum does not identify a single additional person who "will need the particular accommodation for a sincerely held religious observance or practice." *See* N.J.S.A. 10:5-12(q)(3)(b)(ii). Accordingly, like the first statutory factor, this factor weighs in favor of granting the Request for Accommodation.

(iii) "For an employer with multiple facilities, the degree to which the geographic separateness or administrative or fiscal relationship of the facilities will make the accommodation more difficult or expensive."

This statutory factor apparently has no application here. *See* N.J.S.A. 10:5-12(q)(3)(b)(iii).

* * *

Although the Memorandum purports to offer three alternative "accommodations," it is unclear whether these are offered in ignorance of the facts—either those underlying the Request for Accommodation or those of the "accommodations" themselves. And by not permitting *any* work and prayer from the peace and solitude of my home—even though it has been and is widely permitted based on a secular rationale—the "accommodations" show that ECPO has not engaged in a bona fide effort to accommodate my sincerely held religious practice and observance.

First, the Memorandum states that I "may continue to engage in pray in [my] private office during the work day." Memorandum at 3. Permitting me to "continue to engage in pray" in my private office is not an offer of an accommodation—it is permitted anyway and is plainly legally required to be permitted. To style this "offer" as an "accommodation" also suggests a lack of basic knowledge of the facts underlying the Request for Accommodation, which was submitted because being in the office "makes me feel uncomfortable and unable to concentrate, prevents spontaneous spoken prayer, is antithetical to that peace and solitude, and permits other people to see or hear me." *See* May 6 Email; Request for Accommodation; Memorandum at 2 (recognizing that "being

physically present in the office interferes with [my] necessary religious practice as it makes [me] feel uncomfortable and unable to concentrate or focus on prayer, prevents spontaneous spoken prayer and is contrary to the peace and solitude that [the prayer requires]"). And to style its foremost "offer" as an "accommodation"—when what is being "offered" is already part of the status quo—further shows that ECPO has not engaged in a bona fide effort to accommodate my sincerely held religious practice and observance.

Second, the Memorandum states that I "may access the Essex County Eagle Rock Reservation . . . so long as it does not adversely impact [my] work responsibilities." Memorandum at 3. But as suggested previously, *see* May 6 Email, requiring me to cross a busy street twice, hike up and down wooded hills and muddy terrain in work attire, and search out potentially "secluded areas"—multiple times every day, regardless of the weather—is hardly an accommodation at all. *And* as both I and the Memorandum recognize, "it would curtail the spontaneous nature of [my] prayer and it would also subject [me] to being seen and heard by others." *See* Memorandum at 2.

Furthermore, this offer to range "a four hundred (400) acre property" shows how illogical and unlawful it is to deny the Request for Accommodation: Under this offer, I would be "granted permission to exercise [my] right to prayer at this [400-acre property] *as [my] needs require so long as it does not adversely impact [my] work responsibilities*," **proving that even extended and ad hoc physical absence from the office would not impose an undue hardship**. *See* Memorandum at 3 (emphasis added). Crossing the busy Prospect Avenue twice; hiking up and down wooded hills and muddy terrain in work attire; searching out potentially "secluded areas" on the "four hundred (400) acre property;" praying, if possible; and journeying back to the office—multiple times every day—*will take more time than simply driving to the office when reasonably necessary*. *And*, as reiterated above, it is unworkable because "it would curtail the spontaneous

nature of [my] prayer and it would also subject [me] to being seen and heard by others." *See* Memorandum at 2.

Third, the Memorandum offers me the opportunity to be confined to a repurposed soundproof room fitted with surveillance cameras and no windows. Memorandum at 3. Yet being in such a room would further deny me the peace and solitude necessary to pray found in places such as my backyard. *See* Request for Accommodation (recognizing the "need to pray . . . such as in my backyard"); May 6 Email; Memorandum at 3 (recognizing the "preference to pray outside"). Whereas being confined to a room with no windows fulltime would further deny me the peace and solitude necessary to pray, the need to commute back and forth to such a room would also prevent spontaneous prayer and such commuting "would . . . subject [me] to being seen and heard by others." *See* Memorandum at 2. And like the "journey-to-the-center-of-the-400-acre-property" accommodation, this "accommodation" similarly shows the illogic of denying the request—and instead requiring a different kind of physical absence from the office: in isolation in a soundproof room even with the door "lock[ed]." *See* Memorandum at 3.

* * *

The past year and present status quo have made it abundantly clear that working from home does not impose an undue hardship: It has been and continues to be permitted widely based on a secular rationale. The Memorandum—completely lacking in specific examples, concrete facts, and individualized analysis—shows that ECPO has not engaged in a bona fide effort to accommodate my sincerely held religious practice and observance.[5] The reasons for denying the

[5] The Memorandum asserts that I "have identified as holding a belief in Christianity without more specific information provided about any particular provision of Christianity connected to [my] accommodation request." Memorandum at 1. This assertion is false: I have repeatedly stated that prayer is a necessary component of my practice of Christianity, that Christianity as I practice it requires prayer in peace and solitude such as in my backyard throughout the day. The assertion also seems disingenuous: No one asked about "more specific information . . . about any particular provision of Christianity" at the May 6 meeting.

Request for Accommodation offered in the Memorandum do not stand up to scrutiny and cannot justify treating a religious rationale for telework less favorably than the secular rationale already accepted. For instance, the Memorandum utterly fails to explain why permitting me to participate in meetings telephonically (or through Teams, etc.) in order to accommodate my need to pray would impose an undue hardship, an "unreasonable interference with the safe or efficient operation of the workplace;" it does not even attempt to explain why physical presence is "required"—either required at all or required so frequently that the Request for Accommodation must be categorically denied. And it conspicuously ignores that the Request for Accommodation could be tailored in the future if necessary, and omits a crucial component of it: willingness to be physically present *whenever "accommodating [my] religious need would cause undue hardship."* **Accordingly, it clearly falls short of demonstrating undue hardship.**

If ECPO continues to deny the Request for Accommodation in its entirety, it will be in violation of the NJLAD among other statutory and constitutional provisions under which I reserve all rights. I respectfully request that ECPO grant the Request for Accommodation.[6]

Thank you,
Alex G. Leone

cc: Theodore N. Stephens, II, Essex County Prosecutor
Romesh Sukhdeo, Acting First Assistant Prosecutor
Walter Dirkin, Deputy Chief Assistant Prosecutor
Gwen Williams, Executive Assistant Prosecutor
Courtney Gaccione, Essex County Counsel

[6] The Memorandum asserts that at the May 6 meeting I "confirmed there are no issues outstanding in connection with [my] prior accommodation requests dated January 10, 2020 and March 2, 2020." Memorandum at 2. To be clear, I stated that I did not think a religious accommodation request was the proper framework for addressing that circumstance and that any outstanding issues need not be addressed at that time.

Exhibit F

OFFICE OF THE ESSEX COUNTY PROSECUTOR

THEODORE N. STEPHENS, II

ACTING ESSEX COUNTY PROSECUTOR

ESSEX COUNTY VETERANS COURTHOUSE, NEWARK, NEW JERSEY 07102

Tel: (973) 621-4700 Fax: (973) 621-5697

ROMESH C. SUKHDEO
ACTING FIRST ASSISTANT PROSECUTOR

MITCHELL G. McGUIRE III
ACTING CHIEF OF DETECTIVES

MEMORANDUM

TO: Alexander Leone, Assistant Prosecutor

FROM: Roger J. Imhof, Chief Assistant Prosecutor

DATE: June 9, 2021

RE: Religious Accommodation Request

I am in receipt of you Memorandum dated June 1, 2021, which sets forth your renewed request for a religious accommodation from the Essex County Prosecutor's Office (ECPO). The ECPO's position, set forth in its Memorandum dated May 12, 2021, remains unchanged. Furthermore, please be advised that your request to be transferred to the Appellate Section was denied by an email from the Director of the Appellate Section, Frank Ducoat (dated May 3, 2021), as there are currently no openings in this section. Your request has been noted and should future openings become available your request will be considered. Thank you for your attention to this matter.

cc: Theodore N. Stephens, II, Essex County Prosecutor
Romesh Sukhdeo, Acting First Assistant Prosecutor
Walter Dirkin, Deputy Chief Assistant Prosecutor
Gwen Williams, Executive Assistant Prosecutor
Amy DePaul, Trial Court Administrator
Robert Jackson, County Administrator/Director of Human Resources
Jaqueline Jones, Deputy Director, Human Resources
Courtney Gaccione, Essex County Counsel

Exhibit G

Alexander Leone

From: Roger Imhof
Sent: Thursday, June 10, 2021 5:38 PM
To: Alexander Leone
Cc: Theodore Stephens; Romesh Sukhdeo; Gwen Williams; Courtney Gaccione
Subject: RE: Religious Accommodation

A.P. Leone,

I would again direct you to the Memorandum dated May 12, 2021, regarding your request for a religious accommodation from the Essex County Prosecutor's Office (ECPO) for guidance. ECPO continues to stand by the reasons set forth in the memorandum as the basis of the religious accommodation being offered to you.

Thank you.

Roger J. Imhof
Chief Assistant Prosecutor
Essex County Prosecutor's Office
50 West Market Street
Newark, New Jersey 070102
O-973.621.5693

From: Alexander Leone
Sent: Thursday, June 10, 2021 11:06 AM
To: Roger Imhof <Roger.Imhof@njecpo.org>
Cc: Theodore Stephens <Theodore.Stephens@njecpo.org>; Romesh Sukhdeo <Romesh.Sukhdeo@njecpo.org>; Gwen Williams <Gwen.Williams@njecpo.org>; Roger Imhof <Roger.Imhof@njecpo.org>; Courtney Gaccione <cgaccione@counsel.essexcountynj.org>
Subject: Re: Religious Accommodation

Dear CAP Imhof,

This memo says that "ECPO's position . . . remains unchanged" but does not provide any substantive reply. To be clear:

- **Neither you nor anyone else has any substantive reply to any of the points raised in my June 1 memo? Or any additional reason or explanation for denying the renewed request?**
- **Are there any people other than those cc'd on this email who have participated in the process of considering and denying the request?**

Separately, what is the process for appealing this denial?

Thank you,

Alex

From: Roger Imhof <Roger.Imhof@njecpo.org>
Sent: Wednesday, une , 2021 12:2 PM
To: Alexander Leone <Alexander.Leone@njecpo.org>
Subject: Religious Accommodation

A.P. Leone,

Attached please find CP s response to your memorandum dated une 1, 2021.

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

Alex G. Leone

(b) County of Residence of First Listed Plaintiff Union
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*

DEFENDANTS

Essex County Prosecutor's Office et al.

County of Residence of First Listed Defendant Essex
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☑ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☑ 1	☑ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance	PERSONAL INJURY	PERSONAL INJURY	☐ 625 Drug Related Seizure of Property 21 USC 881	☐ 422 Appeal 28 USC 158	☐ 375 False Claims Act
☐ 120 Marine	☐ 310 Airplane	☐ 365 Personal Injury - Product Liability	☐ 690 Other	☐ 423 Withdrawal 28 USC 157	☐ 376 Qui Tam (31 USC 3729(a))
☐ 130 Miller Act	☐ 315 Airplane Product Liability	☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability		INTELLECTUAL PROPERTY RIGHTS	☐ 400 State Reapportionment
☐ 140 Negotiable Instrument	☐ 320 Assault, Libel & Slander	☐ 368 Asbestos Personal Injury Product Liability		☐ 820 Copyrights	☐ 410 Antitrust
☐ 150 Recovery of Overpayment & Enforcement of Judgment	☐ 330 Federal Employers' Liability	PERSONAL PROPERTY	LABOR	☐ 830 Patent	☐ 430 Banks and Banking
☐ 151 Medicare Act	☐ 340 Marine	☐ 370 Other Fraud	☐ 710 Fair Labor Standards Act	☐ 835 Patent - Abbreviated New Drug Application	☐ 450 Commerce
☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)	☐ 345 Marine Product Liability	☐ 371 Truth in Lending	☐ 720 Labor/Management Relations	☐ 840 Trademark	☐ 460 Deportation
☐ 153 Recovery of Overpayment of Veteran's Benefits	☐ 350 Motor Vehicle	☐ 380 Other Personal Property Damage	☐ 740 Railway Labor Act	☐ 880 Defend Trade Secrets Act of 2016	☐ 470 Racketeer Influenced and Corrupt Organizations
☐ 160 Stockholders' Suits	☐ 355 Motor Vehicle Product Liability	☐ 385 Property Damage Product Liability	☐ 751 Family and Medical Leave Act	SOCIAL SECURITY	☐ 480 Consumer Credit (15 USC 1681 or 1692)
☐ 190 Other Contract	☐ 360 Other Personal Injury		☐ 790 Other Labor Litigation	☐ 861 HIA (1395ff)	☐ 485 Telephone Consumer Protection Act
☐ 195 Contract Product Liability	☐ 362 Personal Injury - Medical Malpractice		☐ 791 Employee Retirement Income Security Act	☐ 862 Black Lung (923)	☐ 490 Cable/Sat TV
☐ 196 Franchise				☐ 863 DIWC/DIWW (405(g))	☐ 850 Securities/Commodities/ Exchange
				☐ 864 SSID Title XVI	☐ 890 Other Statutory Actions
				☐ 865 RSI (405(g))	☐ 891 Agricultural Acts
					☐ 893 Environmental Matters
				FEDERAL TAX SUITS	☐ 895 Freedom of Information Act
				☐ 870 Taxes (U.S. Plaintiff or Defendant)	☐ 896 Arbitration
				☐ 871 IRS—Third Party 26 USC 7609	☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
					☐ 950 Constitutionality of State Statutes

REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	IMMIGRATION
☐ 210 Land Condemnation	☐ 440 Other Civil Rights	Habeas Corpus:	☐ 462 Naturalization Application
☐ 220 Foreclosure	☐ 441 Voting	☐ 463 Alien Detainee	☐ 465 Other Immigration Actions
☐ 230 Rent Lease & Ejectment	☐ 442 Employment	☐ 510 Motions to Vacate Sentence	
☐ 240 Torts to Land	☐ 443 Housing/ Accommodations	☐ 530 General	
☐ 245 Tort Product Liability	☐ 445 Amer. w/Disabilities - Employment	☐ 535 Death Penalty	
☐ 290 All Other Real Property	☐ 446 Amer. w/Disabilities - Other	Other:	
	☐ 448 Education	☐ 540 Mandamus & Other	
		☑ 550 Civil Rights	
		☐ 555 Prison Condition	
		☐ 560 Civil Detainee - Conditions of Confinement	

V. ORIGIN *(Place an "X" in One Box Only)*

☑ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
42 U.S.C. s. 1983

Brief description of cause:
Defendants have infringed Plaintiff's First Amendment right to free exercise and violated his rights under state law (NJLAD).

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. **DEMAND $** CHECK YES only if demanded in complaint: **JURY DEMAND:** ☑ Yes ☐ No

VIII. RELATED CASE(S) IF ANY *(See instructions)*: JUDGE _____ DOCKET NUMBER _____

DATE June 18, 2021

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I.(a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: Nature of Suit Code Descriptions.

V. Origin. Place an "X" in one of the seven boxes.
Original Proceedings. (1) Cases which originate in the United States district courts.
Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.
Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service.

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

UNITED STATES DISCTICT COURT
DISTRICT OF NEW JERSEY

ALEX G. LEONE,	:	**NOTICE OF MOTION**
Plaintiff,	:	**AND MOTION FOR**
v.	:	**PRELIMINARY**
	:	**INJUNCTION**
ESSEX COUNTY PROSECUTOR'S OFFICE,	:	Docket No. 2:21-cv-12786
THEODORE STEPHENS II,	:	
ROMESH SUKHDEO,	:	
GWENDOLYN WILLIAMS,	:	
and	:	
ROGER IMHOF,	:	
in their individual and official capacities,	:	
Defendants.	:	

To the Parties and their Attorneys:

PLEASE TAKE NOTICE that on September 7, 2021, or as soon thereafter as the matter may be heard, before the Honorable Susan D. Wigenton, United States District Court, Martin Luther King Building & U.S. Courthouse, Courtroom 5C, Newark, New Jersey, Plaintiff will and hereby does move the Court for a preliminary injunction.

As explained in the Complaint, Plaintiff seeks to pray each day as his religion requires, and to that end he sought a religious accommodation from his government employer, the Essex County Prosecutor's Office, and its highest-ranking officials, the individual defendants. Defendants, however, categorically denied that request for a religious accommodation, thereby prohibiting Plaintiff's free exercise, *while, for secular reasons, broadly extending the very same accommodation Plaintiff sought to other employees*. Defendants continue to engage in religious discrimination against Plaintiff to this day, *and have indicated that they will increase their infringement of Plaintiff's free exercise by 100% starting August 2, 2021.*

In particular, Plaintiff seeks to enjoin Defendants from disciplining or disadvantaging Plaintiff simply for his free exercise, insofar as he must pray outside the office at home, in a manner completely consistent with all job responsibilities and rules.

This Motion is based on the Complaint in this action; this Notice of Motion; the Memorandum of Points and Authorities filed herewith; the Declaration of Plaintiff and other attached exhibits; all material of which this Court may take judicial notice; and such oral and documentary evidence as may be presented to the Court.

Date: July 30, 2021

Respectfully submitted:
By: /s/Alex G. Leone
Alex G. Leone

UNITED STATES DISCTICT COURT
DISTRICT OF NEW JERSEY

ALEX G. LEONE,	:	**MEMORANDUM OF**
Plaintiff,	:	**POINTS AND**
v.	:	**AUTHORITIES**
	:	
ESSEX COUNTY PROSECUTOR'S OFFICE,	:	Docket No. 2:21-cv-12786
THEODORE STEPHENS II,	:	
ROMESH SUKHDEO,	:	
GWENDOLYN WILLIAMS,	:	
and	:	
ROGER IMHOF,	:	
in their individual and official capacities,	:	
Defendants.	:	

TABLE OF CONTENTS

INTRODUCTION

For more than a year, Defendants have judged that secular reasons are adequate to permit employees to work from home, and have permitted many employees to do just that, including on a fulltime basis. Yet at the same time, Defendants have judged *religious* reasons *inadequate* to permit a single employee to work from home *at all*, and have categorically prohibited Plaintiff from so doing. The effect of this discriminatory policy choice—as explained to Defendants prior and subsequent to the filing of this action—is to prevent Plaintiff from praying as his religion requires throughout each work day. This infringement of free exercise is devastating to Plaintiff.

Defendants currently require Plaintiff to be physically present in the office during each day of every other week. Although this requirement is arbitrary and discriminatory—again, Defendants have permitted many employees to work from home fulltime for secular reasons—it is preferable to what Defendants have now stated they will do on August 2: require Plaintiff to forego his prayer practice *every* day of *every* week, instead of every other week. Changing the status quo and increasing infringement of Plaintiff's free exercise *by 100%* is not only unnecessary and inhumane; it is unlawful.

As explained below, this change to the status quo threatens immediate irreparable injury to Plaintiff, in addition to the irreparable injury already inflicted routinely. The balance of equities is not even close: It tips decisively in Plaintiff's favor. And the vague and conclusory reasons asserted to support this discrimination show that it cannot be in the public interest. Accordingly, Plaintiff respectfully requests a preliminary injunction.

FACTUAL BACKGROUND

Plaintiff incorporates the Complaint ("Compl.") and its attachments by reference and briefly recounts the following facts. During the past year, Defendants have permitted employees to work from home for secular reasons (e.g., to prevent viral transmission).

(Compl. ¶15). For instance, employees in the "Adult Trial" section of Plaintiff's office were permitted to work from home fulltime during November 2020 into June 2021; and employees in the "Appellate" section of Plaintiff's office have been permitted to work from home fulltime from March 2020 to this day. (Compl. ¶ 17; Motion for Preliminary Injunction ("MPI") Ex. A ¶¶ 10 & 11).[1]

On April 26, 2021, Plaintiff requested that he be permitted to work from home for religious reasons. (*See, e.g.*, Compl. Exs. A & B ("the Request")). In sum, Plaintiff's religion requires him to pray, including aloud and spontaneously, throughout each day; and Plaintiff's religious belief is that the peace and solitude required for this practice are impossible in the office. (*See, e.g.*, Compl. ¶¶ 19-27; Compl. Ex. C; MPI Ex. A ¶ 13). Notably, in requesting a religious accommodation, Plaintiff did *not* request to be absolved of *any* work responsibility; Plaintiff's prayer practice has never interfered in his work. (Compl. ¶ 23; MPI Ex. A ¶ 17). Plaintiff *did* expressly request an accommodation *only* to the extent it would *not* impose a hardship on Defendants. (*See, e.g.*, Compl. Exs. A & B). Plaintiff is, and has always been, fully willing to be physically present for anything required by his job responsibilities—including, for instance, in-person court appearances, witness interviews, or any other obligation. (*See, e.g.*, Compl. ¶ 62; MPI Ex. A ¶ 9). Defendants, nonetheless, categorically denied Plaintiff's request for a religious accommodation, thus prohibiting his free exercise of religion on all work days. (Compl. Ex. D; MPI Ex. A ¶ 13). Astonishingly, Defendants' categorical prohibition applies regardless of the circumstances and even "in the future." (Compl. Ex. D at 3).

Defendants' sole rationale for this extreme prohibition consisted of a single paragraph of assertions. (*See id.* at 2-3). Defendants refused to explain these assertions.

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[1] This Memorandum cites exhibits both to the Complaint and to this Motion. In citing exhibits to the Complaint, this Memorandum will cite "Compl. Ex. __." In citing exhibits to this Motion, this Memorandum will cite "MPI Ex. __."

(*See* Compl. Exs. E, F & G). And, factually as well as a matter of common sense, it is clear that the assertions cannot justify Defendants' categorical religious discrimination against Plaintiff. (*See* Compl. Ex. E at 2-6; MPI Ex. A ¶¶ 3-8 & 17). If this was clear on May 12, 2021, when Defendants denied the Request, it is even clearer today, given that over the past several months none of the purported reasons Defendants gave for categorically prohibiting Plaintiff's prayer practice has ever applied. (*See* MPI Ex. A ¶¶ 3-6). In addition, Defendants offered Plaintiff alternative "accommodations" that either make no sense—for instance, Defendants' foremost offer of an "accommodation" is literally no accommodation (Compl. Ex. D at 3)—or directly contradict Defendants' putative rationale for denying the Request to begin with—for instance, Defendants would generally *permit* Plaintiff 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" (Compl. Ex. D at 3), but *never* permit Plaintiff work at his nearby home, where he can actually pray and work consistent with his job responsibilities, on the very same condition (*see, e.g.*, Compl. ¶ 58; MPI Ex. A ¶¶ 13-17).

On June 22, 2021, in a letter to Defendants' counsel, Plaintiff reiterated that "[e]very day [he is] required to go to the office for no apparent reason, [he] suffer[s] foregoing [his] prayer practice," and respectfully requested that *at least during days Plaintiff's supervisor would not be in the office and on vacation*—amounting to weeks across June through August—Plaintiff be permitted to work from home as he does normally and efficiently every other week. (MPI Ex. B). Counsel for Defendants never responded to this letter or even acknowledged its receipt.[2]

[2] Subsequently, on July 23, Plaintiff forwarded the letter to Defendants' newer counsel (*see* E.C.F. No. 6), who did acknowledge its receipt.

On July 26, 2021, Defendant Sukhdeo announced that "starting Monday, August 2, 2021," there would "no longer be" a schedule that permits Plaintiff to work from home at least half the time. (*See* MPI Ex. C). Unless the Court grants preliminary relief, **this change in the status quo will cause a 100% increase in Defendants' infringement of Plaintiff's free exercise,** doubling the number of days on which Defendants prohibit Plaintiff's prayer practice.

LEGAL STANDARD

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Establishing likelihood of success on the merits does not require a showing that the plaintiff's chance of success is "more likely than not," but only "a showing significantly better than negligible:" that the plaintiff "*can* win on the merits." *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017) (emphasis added). The balance-of-equities and public-interest factors "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009).

ARGUMENT

I. Plaintiff has a strong likelihood of success on the merits.

Plaintiff establishes not only that he can win on the merits, but that his likelihood of success is strong. As explained below, Defendants' totally untailored religious discrimination against Plaintiff is subject to strict scrutiny, which it flatly fails. Moreover, Defendants "ha[ve] not offered any interest in defense of [their discriminatory] policy that is able to withstand *any form* of heightened scrutiny." *See Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.);

(Compl. Ex. D at 2-3; Compl. Ex. E at 2-6).[3] Defendants, therefore, fail to carry *their* burden on this motion. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006); *Reilly*, 858 F.3d at 180; *see also Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666 (2004) (affirming that a plaintiff moving for a preliminary injunction "must be deemed likely to prevail" unless the government justifies its infringement of First Amendment liberty under the appropriate level of scrutiny).

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." (The Free Exercise Clause governs not only Congress, but States and their political subdivisions, agencies, and officials as well. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).) "Free exercise" includes "not only belief and profession but the performance of (or abstention from) physical acts." *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990). And the Free Exercise Clause protects even religious practices that some may find unusual or idiosyncratic, such as the ritual killing and eating of guinea pigs and turtles. *See, e.g., Lukumi*, 508 U.S. at 525; *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981); *see also Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005) (noting the "vulnerability" of informal or uncommon Christian

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[3] If Defendants were to offer new reasons for their discrimination now—after requiring Plaintiff to file a lawsuit and seek emergency relief—it would mean the reasons originally offered were pretextual: at the very least, that they were not the reasons that "actually motivate[d]" Defendants' decision to deny Plaintiff a religious accommodation. *See Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994); (*see also infra*, note 4). What's more: Defendants chose to "stand by" the reasons originally offered as *the sole rationale for their religious discrimination*, and refused to offer any additional reason when Plaintiff asked Defendants *before filing this lawsuit*: "Neither you nor anyone else has any . . . additional reason or explanation [for categorically denying Plaintiff's request for a religious accommodation]?" (Compl. Ex. G).

Inexplicably, Defendants also refused to respond when asked if there is a "process for appealing th[e] denial" of Plaintiff's request for a religious accommodation. (*Id.*).

practices to "subtle forms of discrimination"). "[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect." *Thomas*, 450 U.S. at 715-16. "Courts should not undertake to dissect religious beliefs," *id.* at 715, and "[e]valuating the extent of a burden on religious practice is equally impermissible," *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 170 (3d Cir. 2002). Nor is it permissible to enquire whether religious practices are "mandatory" or "optional." *Id.*

Requiring an employee to forego a sincerely-held religious practice as a condition of retaining employment infringes his right to free exercise within the meaning of the First Amendment. *See, e.g.*, *Thomas*, 450 U.S. at 717; *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *see also Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988) ("[T]his Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment."). For instance, it is unlawful to force an employee "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *See, e.g.*, *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 140 (1987) (quoting *Sherbert*, 374 U.S. at 404); *Thomas*, 450 U.S. at 717.

Incidental infringement of free exercise could be legally permissible under *Smith*, but *Smith*'s rule, by its own terms, applies when an infringement of free exercise is the result of a "valid and neutral law of general applicability." *See* 494 U.S. at 879; *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. ___, ___ (slip op.) at 5 (June 17, 2021). A government policy can fail to be "generally applicable" in numerous ways, such as:

- If it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," *Fulton*, (slip op.) at 6;

- If a state actor "permit[s] secular exemptions [to the policy] but not religious ones," *Fulton*, (slip op.) at 5-6, including "individualized exemptions," *see, e.g.*, *Ward v. Polite*, 667 F.3d 727, 739, 740 (6th Cir. 2012), *or* "categorical exemptions," *see, e.g.*, *Fraternal Order*, 170 F.3d at 365; or
- "[W]henever [the policy] treat[s] *any* comparable secular activity more favorably than religious exercise," *Tandon v Newsom*, 141 S. Ct. 1294, 1296 (2021) (citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67-68 (2020) (per curiam)).

And when the requirement of general applicability is not met, *strict scrutiny applies*. *Fulton*, (slip op.) at 13; *Tandon*, 141 S. Ct. at 1296. Here, Defendants fail to comply with the mandates of neutrality and general applicability three times over:

- Defendants have "prohibit[ed] religious conduct," i.e., working at home for religious reasons in a manner completely consistent with job responsibilities, "while permitting secular conduct," i.e., working from home for secular reasons, which "undermines the government's asserted interests in a similar way"—in fact, the same exact way, *see Fulton*, (slip op.) at 6.
- Defendants "permit secular exemptions," e.g., medical-based exemptions, "but not religious ones," *Fulton*, (slip op.) at 5-6; (Compl. ¶¶ 15-18; MPI Ex. A ¶¶ 3 & 10-12); Defendants use "a system of individualized exemptions" that permits some employees to work from home (e.g., employees in the "Adult Trial" or "Appellate" sections) at some times (e.g., fulltime from March 2020 even to today) but not others, and for some reasons (e.g., secular reasons related to the pandemic, or employees' other reasons) but not others, *see, e.g.*, *Ward*, 667 F.3d 739-40; *and* Defendants categorically discriminate against religious exemptions, *see, e.g.*, *Fraternal Order*, 170 F.3d at 365; (Compl. Ex.

D at 2-3). In other words, "we are confronted with a scheme that features both individualized and categorical secular exemptions." *See Blackhawk v. Commonwealth*, 381 F.3d 202, 212 (3d Cir. 2004) (Alito, J.).

- Defendants also treat the activity of working from home for secular reasons more favorably *than the same exact activity undertaken for religious reasons*, which they have unlawfully chosen to prohibit categorically, *see Tandon*, 141 S. Ct. at 1296; (Compl. ¶¶ 35 & 53-54; Compl. Ex. D at 2-3).

So strict scrutiny applies three times over, and it is fatal to Defendants' religious discrimination against Plaintiff: To survive strict scrutiny, *the government must demonstrate* that its infringement of free exercise furthers "interests of the highest order" *and* is "narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546. Defendants cannot demonstrate either requirement; they do not even come close to meeting their burden under any form of heightened scrutiny, let alone strict scrutiny:[4]

- Defendants assert only weak and vague interests in support of their religious discrimination, not backed by any concrete fact or specific example, *see, e.g.*, *Fulton*, (slip op.) at 13-14 ("The City states these objectives at a high level of generality, but *the First Amendment demands a more precise analysis*." (emphasis added)); and Defendants provided *no* individualized analysis in their discrimination against Plaintiff, *see, e.g.*, *id.* at 14 ("The question . . . is not whether the City has a compelling interest in enforcing its . . . policies generally,

[4] Plaintiff's position is that Defendants have not shown even a de minimis interest in support of their discrimination. (*See, e.g.*, Compl. Ex. E at 2-10; *see generally* Compl.). In addition, because Defendants' discrimination is motivated by unlawful intent, is totally untailored, and is shot through with inconsistencies, it would not pass even the most minimal level of scrutiny, let alone a heightened level of scrutiny, let alone strict scrutiny. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 632-33 (1996); (*infra*, notes 5 & 8).

but whether it has such an interest in denying an exception to [*Plaintiff in particular*]"); (Compl. Ex. D at 2-3; Compl. Ex. E at 2-6); *and*

- Defendants have *categorically* prohibited Plaintiff's free exercise of his prayer practice *under all circumstances and even in the future*—the exact opposite of narrow tailoring (*see, e.g.*, Compl. ¶ 53 (Defendants have refused to permit even "one day, hour, or minute" of work from home as necessary to accommodate prayer); Compl. Ex. D at 2-3); *Fulton*, (slip op.) at 13-14.

Defendants refused to provide any additional reasons or explanation for this religious discrimination. (Compl. Exs. F & G; *supra*, note 2). Yet *by extending the very same accommodation requested by Plaintiff to many other employees for months or even more than a year* (*see* Compl. ¶¶ 17 & 48; MPI Ex. A ¶¶ 10-12), Defendant Essex County Prosecutor's Office "itself has demonstrated that it has at its disposal an approach" that would accommodate Plaintiff's sincerely-held religious practice without even a minimal burden. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 730 (2014). Defendants even considered and denied the Request—during April 26, 2021, to May 21, 2021—during the very time they were already granting the same accommodation to other employees for secular reasons, *proving they have at their disposal just such an approach. See id.* 573 U.S. at 730; (Compl. Exs. A & D; MPI Ex. A ¶¶ 3, 6-8 & 10-12).

Defendants, therefore, flatly fail strict scrutiny. And as made clear in Plaintiff's response (Compl. Ex. E) to Defendants' denial of the Request (Compl. Ex. D), Defendants "ha[ve] not offered any interest in defense of [their] policy that is able to withstand *any form of heightened scrutiny*." *See Fraternal Order*, 170 F.3d at 366.

If the Court of Appeals's decision in *Fraternal Order*, is not directly on point here, it is on all fours with this case. There, as here, the government had a policy requiring its employees to forego a sincerely held religious practice: growing a beard. *See id.* at 360.

There, as here, the government made exemptions to its policy for secular reasons. *See id.* at 365. There, as here, the government "refuse[d] to make exemptions" for an employee "whose religious beliefs prohibit them" from complying with the general policy. *See id.* at 360. And there, as here, the reasons offered by the government to justify its religious discrimination dissolved under scrutiny. *See id.* at 366-67. For instance, the Court of Appeals rejected *even physical 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." *Id.* at 366; *see also Roman Catholic Diocese*, 141 S. Ct. at 67 (enjoining regulations that burdened religious practices *even though the regulations were designed to "[s]tem[] the spread of COVID–19"—an "unquestionably a compelling interest"*—because they were not "narrowly tailored") (emphasis added)).

So here: As discussed above and in the Complaint, Defendants' religious discrimination against Plaintiff is totally untailored: Whereas Defendants judged a secular rationale for working from home broadly acceptable, and have permitted employees to work from home *fulltime during the past year*, Defendants categorically rejected a religious rationale for working from home and *will not permit Plaintiff to work for home for religious reasons during even "one day, hour, or minute"—now or "in the future."* (*See* Compl. ¶ 54; Compl. Ex. D at 2; MPI Ex. A ¶¶ 8-12). "Defendants made no effort to determine when [accommodating Plaintiff's free exercise] would cause undue hardship and when it would not: They simply asserted, categorically, that it always does." (Compl. ¶ 53). Defendants' assertion is antithetical to their legal obligation here: *They* "*must do more* than assert that certain risk [or cost] 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.

But Defendants' discriminatory policy is not only totally untailored: Unlike *safety and human life* in *Fraternal Order* and *Roman Catholic Diocese*, the interests purportedly underlying Defendants' policy are themselves exceptionally weak, if even coherent. (*See supra*, note 4).[5] And Defendants offer not even a single concrete fact or specific example to support these purported interests. For instance, as foremost reasons for categorically prohibiting Plaintiff's prayer practice, Defendants vaguely assert that "[m]any ECPO meetings are not pre-scheduled" and that its work is "collaborative" (Compl. Ex. D. at 2-3); they then utterly fail to explain why permitting Plaintiff to participate in these nondescript meetings or collaboration "telephonically (or through Teams, etc.) in order to accommodate [his] religious need would impose an undue hardship"—*or any burden at all*—on Defendants. (Compl Ex. E at 3-4; *see also* Compl. Ex. E at 4 n.2).[6] Defendants also vaguely assert that "emergent matters that arise may require immediate response," but utterly fail to explain why this vague assertion would suggest Plaintiff can *never* work

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[5] Multiple instances of inconsistency on the part of Defendants are discussed herein as well as in the record. (*See, e.g.*, Compl. Ex. E at 2-10). An example that leaps off the page is the *first sentence* of Defendants' one-paragraph 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." (Compl. Ex. D at 2). If this assertion were accurate, it would mean that all of Defendants' employees working from home either performed no work or performed no work "in the nature" of their employment. This assertion is nonsense and even disrespectful to the many employees who have worked and continue to work hard, even overtime, from home.

[6] As discussed in the Complaint, Defendants also observe that "in person courtroom appearances will resume at some point in the future" and that "[i]n person witness interviews are preferred over those conducted remotely." (Compl. Ex. D at 2; *see also* Compl. Ex. E at 2-4 (explaining the irrelevance of these observations)). These observations are uncontested, but how they tend to support a categorical denial of the Request is unclear. (They do not.) As Defendants are aware, appearing in person for court hearings or witness interviews *or any work obligation* is completely consistent with working from home as a general matter: Over the past year, Plaintiff has been and would continue to be physically present for *all* in-person court appearances, witness interviews, and other obligations (*see* Compl. ¶¶ 62 & 65; MPI Ex. A ¶¶ 3 & 9); and the Request itself expressly recognizes Plaintiff's willingness to be physically present, not only under those circumstances, but *whenever* working remotely "would cause undue hardship" for Defendants (Compl. Exs. A & B).

from his nearby home as necessary to pray in a manner completely consistent with all job responsibilities and rules. (*See id.* at 4-5). Let alone that, during the past year, there has never been such an "emergent matter[]" that necessitated Plaintiff's immediate physical presence in the office. (MPI Ex. A ¶ 4). Defendants cannot speculate and "assume the worst" when an employee seeks a religious accommodation. *See Tandon*, 141 S. Ct. at 1297; *Sherbert*, 374 U.S. at 407. Yet that is exactly what Defendants have done here.

If Defendants' vague assertions regarding their interests could have potentially been found persuasive, Defendants' own admissions foreclose that possibility multiple times over. (*See* Compl. ¶¶ 43-50). ***First***, Defendants acknowledge that only in certain circumstances, *and not always*, are employees "required to be in the office during their 'at home' week *based on the needs of the office*." (Compl. Ex. D at 1 (emphasis added)). ***Second***, Defendants would generally permit Plaintiff 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* permit Plaintiff to be out of the office to work at his nearby home, **where he can actually pray *and* work in peace and solitude**, on the very same condition. (Compl. Ex. D at 3 (emphasis added)). ***And third***, Defendants recognize, as they must, that they already widely permitted the accommodation Plaintiff is seeking to others for secular reasons. (Compl. Ex. D at 1; Compl. ¶¶ 15-18; MPI Ex. A ¶¶ 3 & 10-12). Plaintiff is "at a loss to understand" how permitting *numerous other employees to work from home for secular reasons fulltime during months to a year*—or permitting Plaintiff 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*. *See, e.g.*, *Fraternal Order*, 170 F.3d at 366; (Compl. Ex. D at 2 (categorically prohibiting free exercise "presently or in the future")). "[T]here is no apparent reason why permitting [Plaintiff to work from home] for religious

reasons should create any greater difficulties" than permitting many others to work from home for secular reasons over long periods. *See Fraternal Order*, 170 F.3d at 366.

Defendants are required "to explain why [they] could not" accommodate Plaintiff's religious practice, *see Tandon*, 141 S. Ct. at 1297, yet under even an intermediate standard of review they fail to carry their burden on this element, *see Gonzales*, 546 U.S. at 429; *Reilly*, 858 F.3d at 180; *Fraternal Order*, 170 F.3d at 366, so Plaintiff "must be deemed likely to prevail," *see Ashcroft*, 542 U.S. at 666.

II. Plaintiff will continue to suffer irreparable harm—and face an immediate threat of even greater irreparable harm—absent preliminary relief.

A person is "irreparably harmed by the loss of free exercise rights 'for even minimal periods of time.'" *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020)). Yet, here, the prohibition on Plaintiff's prayer practice imposed by Defendants is not "minimal" in duration. *See id.* According to Defendants themselves, it is categorical and permanent. (*See* Compl. Ex. D at 2 (categorically denying Plaintiff's request to work from home as necessary to pray, **regardless of the circumstances, "presently or in the future"**)).[7]

For months, Plaintiff has been using "accrued time" (e.g., "sick" or "vacation" days) for multiple days during weeks Defendants have arbitrarily required Plaintiff to

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[7] That Defendants chose to prohibit Plaintiff from working at home as necessary to pray categorically, regardless of the circumstances, *and even in the future*, further evidences their unlawful intent to discriminate against religion.

Notably, on April 26, 2021, Plaintiff requested that he be transferred to the Appellate section of the office. (Compl. Ex. E at 3). Naturally, because the work of the Appellate section is predominantly writing and the vast majority of its court appearances are pre-scheduled in advance, working in the Appellate section is particularly amenable to the religious accommodation requested by Plaintiff. Plaintiff suspects—but hopes it is not the case—that Defendants will conspire not to place Plaintiff in the Appellate section so as not to undermine *even further* their extraordinarily weak rationale for denying his religious accommodation request. (Even first-year attorneys hired by the Essex County Prosecutor's Office are permitted to join the Appellate Unit, and there is no question regarding Plaintiff's qualifications.)

forgo his prayer practice. Using accrued time this way helps prevent irreparable harm to Plaintiff on at least those days. Plaintiff's supervisor has been personally informed of this practice; and on June 22, Plaintiff sent a letter to Defendants' counsel informing her of this practice as well. (MPI Ex. B).

In that letter, Plaintiff respectfully requested that, at least during days or weeks Plaintiff's supervisor would not be in the office and on vacation, Plaintiff be permitted to work from home as he does normally and efficiently every other week. (*Id.*) (Plaintiff often works from home normally and efficiently even on days when using accrued time.) Counsel for Defendants never responded to this letter or even acknowledged its receipt. (*See supra*, note 2).

A preliminary injunction that would prevent Plaintiff from being penalized simply for his free exercise—insofar as he works from home as necessary to pray in a manner completely consistent with all job responsibilities and rules—is necessary to prevent this irreparable harm. *See Tandon*, 141 S. Ct. at 1297 (citing *Roman Catholic Diocese*, 141 S. Ct. at 67). This is irreparable harm that Defendants have inexplicably refused to take even minimal steps to prevent (*see, e.g.*, MPI Ex. B) *and have stated they will double in the immediate future* (MPI Ex. C).

III. The remaining factors clearly weigh in favor of granting injunctive relief.

As observed above, when the government is the party opposing a preliminary injunction, the balancing and public-interest factors merge. *See 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 v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Here, on Plaintiff's side, the effect of withholding relief would be devastating: As he has repeatedly informed Defendants, being required to forgo his prayer practice causes him suffering on multiple levels. (Compl. Ex. E at 6 ("I suffer and

am unable to focus on and complete work efficiently when denied the opportunity to pray"); MPI Ex. B ("Every day I am required to go to the office for no apparent reason, I suffer foregoing my prayer practice. It is spiritually and psychologically painful."); MPI Ex. A ¶ 16). Defendants have now stated that they will increase this irreparable harm *by 100%* (MPI Ex. C)—unless the Court grants preliminary relief.

On Defendants' side, it is not clear what harm, if any, would follow if the Court were to grant relief. Despite Defendants' vague assertions (*see* Compl. Ex. D at 2-3; Compl. Ex. E at 2-6), they have not identified a single concrete fact or specific example—let alone actual evidence—that suggests they would suffer *even a small burden* if they permitted Plaintiff to work from home as necessary to pray in a manner consistent with all job responsibilities and rules (*see* Compl. Ex. E at 6 (Defendants "fail[ed] to show even a de minimis interest in denying the accommodation."); *supra*, note 4).

And if any "public consequences" would result from granting preliminary 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); *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 178 (3d Cir. 2002) ("[T]he public interest clearly favors the protection of constitutional rights."). At the very least, "it has not been shown that granting th[is] application[] will harm the public." *See Roman Catholic Diocese*, 141 S. Ct. at 68. And even the public's *compelling* interest in *"[s]temming the spread" of a virus during a pandemic*, cannot justify totally untailored religious discrimination like Defendants'. *See, e.g., id.* at 67 (emphasis added). Defendants' discriminatory "value judgment that secular (i.e., medical) motivations . . . are important enough to overcome its general interest[s] . . . but that religious motivations are not" cannot stand. *See Fraternal Order*, 170 F.3d at 366.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant Plaintiff's motion for preliminary relief and enjoin Defendants from disciplining Plaintiff simply for his free exercise of religion. *See, e.g.*., *Fraternal Order*, 170 F.3d at 361 (affirming an order enjoining the government "from disciplining or otherwise disadvantaging" employees for their free exercise).[8]

Date: July 30, 2021

Respectfully submitted,

By: /s/Alex G. Leone
Alex G. Leone

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[8] Defendants may attempt to argue that this motion—or this case as a whole—will be mooted if or when they change their policy that currently permits others to work from home. This argument would make no sense logically: Defendants continue their intentional discrimination against Plaintiff's religious practice; Plaintiff continues to suffer the consequences of that religious discrimination; and treating others differently for secular reasons changes neither of those facts. (The argument would be equally meritless as applied to Plaintiff's NJLAD claim.)

The argument is also foreclosed legally: "[E]ven if the government *withdraws*" a restriction on free exercise, that action itself would "not necessarily moot the case;" a plaintiff "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. *See Tandon*, 141 S. Ct. at 1297 (citing *Roman Catholic Diocese*, 141 S. Ct., at 68) (emphases added). Again, here, even if Defendants change their policy that currently permits others to work from home for secular reasons, Plaintiff would remain not only under a "constant threat" of free exercise infringement: Defendants' free exercise infringement against Plaintiff *will have never abated*, let alone the policy resulting in the infringement actually "withdraw[n]." *See id.* And of course, Defendants' discretion to grant exemptions and permit others to work from home for secular reasons may again be exercised at any time. *See, e.g., Covid cases are rising again in all 50 states across U.S. as delta variant tightens its grip*, CNBC (July 23, 2021), https://www.cnbc.com/2021/07/23/covid-cases-are-rising-again-in-all-50-states-across-us-as-delta-variant-tightens-its-grip.html; *Tandon*, 141 S. Ct. at 1297.

Additionally, as discussed herein, Defendants' "decision to provide medical exemptions while refusing religious exemptions" shows their "discriminatory intent" against religion. *See Fraternal Order*, 170 F.3d at 365; *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (plurality opinion); *Tenafly Eruv*, 309 F.3d at 168. Government action motivated by discriminatory intent against religion itself is "never permissible," regardless of the government's treatment of others. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

Exhibit A

UNITED STATES DISCTICT COURT
DISTRICT OF NEW JERSEY

ALEX G. LEONE,	:	**DECLARATION SUPP-**
Plaintiff,	:	**ORTING MOTION FOR**
v.	:	**PRELIMINARY**
	:	**INJUNCTION**
ESSEX COUNTY PROSECUTOR'S OFFICE,	:	Docket No. 2:21-cv-12786
THEODORE STEPHENS II,	:	
ROMESH SUKHDEO,	:	
GWENDOLYN WILLIAMS,	:	
and	:	
ROGER IMHOF,	:	
in their individual and official capacities,	:	
Defendants.	:	

Under 28 U.S.C. § 1746, Alex G. Leone states that the following is true and correct:

1. I have been an employee of the Essex County Prosecutor's Office since 2019.

2. I have been employed in the "Intellectual Property/Financial Crimes" section of this office for approximately the past eleven months to a year.

3. During this time, all in-person court appearances, witness interviews, or other in-person obligations for which I have been responsible have proceeded normally and efficiently, including on days I was working from home. (I have worked from home approximately each day of every other week, except during December 2020 through January 2021, as well as limited other times, when I was permitted to work from home fulltime for secular reasons.)

4. During this time, there has never been an emergent matter that necessitated my immediate physical presence in the office. I am not sure what such a hypothetical scenario would be like.

5. During this time, any "ad hoc" meetings conducted in person in the office have been indistinguishable from any "ad hoc" meetings conducted over the phone from home.

6. As a general matter, meetings conducted through the phone or "Teams" permit efficient collaboration and communication. In fact, Defendants' chosen method of meeting has often been through the phone or "Teams," such as on May 6, 2021.

7. As a general matter, compliance with all work rules and attendance to all work responsibilities are completely consistent with working from home.

8. Defendants' widely-permitted current work-from-home system (e.g., signing in to work via email, administratively making case documents accessible on an online platform, and efficiently completing work on a laptop) has shown this.

9. Even so, 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.

10. Employees in the "Adult Trial" section were permitted by Defendants to work from home fulltime during November 2020 into June 2021 for secular reasons. (Plaintiff is informed of this directly by employee(s) in that section.)

11. Employees in the "Appellate" section were permitted by Defendants to work from home fulltime during March 2020 through the present day for secular reasons. (Plaintiff is informed of this directly by employee(s) in that section.)

12. On information and belief, other employees have been permitted to work from home for secular reasons as well.

13. When physically present in the office, I am forced to forgo a prayer practice I engage in throughout every work day. (I engage in this practice every day except Sunday.) My religious belief is that the peace and solitude required for this practice are impossible in the office.

14. This prayer practice and the religious belief underlying it are sincerely held and have formed part of my daily life for more than a year.

15. Requiring me to commute to and range a public park to seek peace and solitude each time I feel the need to pray would also force me to forgo this practice, including the spontaneous aspects of it—as would being confined to a soundproof room with no windows.

16. Forgoing my prayer practice causes adverse spiritual, psychological, and even physical effects on me.

17. Working at my nearby home is generally a sure way to ensure I can engage in my required prayer practice as well as attend to all work responsibilities efficiently. My prayer practice has never interfered in my work.

18. Defendants are aware of or have previously been advised of the foregoing facts.

I declare under penalty of perjury, under the laws of the United States and the State of New Jersey, that the foregoing is true and correct to the best of my knowledge.

Executed on: July 30, 2021

By: /s/Alex G. Leone
Alex G. Leone

Exhibit B

June 22, 2021

Dear Ms. Gaccione,

First, I wish to say that I do not consider you an adversary and I apologize if this legal action will cause any stress or inconvenience for you or your colleagues. As shown by my memo and subsequent emails, I had hoped there were another way to make progress toward a just resolution. But based on the June 9 and 10 emails to me, I saw no other way than this.

Second, I wish to renew my request for an accommodation. Every day I am required to go to the office for no apparent reason, I suffer foregoing my prayer practice. It is spiritually and psychologically painful. There is even less apparent reason to require me to be here during June 21 to 25, July 12 to 23, and August 25 to 27, when not even my supervisor will be.

To avoid that spiritual and psychological pain, I use accrued time, which adds to this unfairness. It will run out. Damages will continue to accumulate. We may find ourselves in an emergency posture. None of us needs any of this trouble.

Third, I wish to advise that I am always willing to work toward a just resolution. As the complaint has made clear, this failure to follow the law is hurting me. Regardless, despite the legal errors, I respect Ted, Romesh, Gwen, and Roger and believe they mean well at heart. We can move past all of this, and dismiss the lawsuit, at any time, with no hard feelings.

I genuinely hope to continue to do good work for this office; and as you are aware, I requested to transfer to the Appellate Unit, where remote work is even more easily accommodated and, I am told, my abilities would better assist. That said, in lieu of accommodation of my religious practice as required by law, I will work to protect my rights to the end.

Thank you,

Alex

/s/ Alex G. Leone

Exhibit C

Alexander Leone

From: Walter Dirkin
Sent: Monday, July 26, 2021 9:45 AM
To: Walter Dirkin
Subject: August 2, 2021, Return to Regular Schedule

All,

I have been advised by the First Assistant Prosecutor that, Starting Monday, August 2, 2021, the Essex County Prosecutor's Office will return to regular in office scheduling and there will no longer be an A/B schedule. I was also asked to remind everyone, as has always been the case, that proper work attire is required within the office. Sometime after August 2, 2021, we will arrange for the return of office issued equipment that you may have in your home. Please do not bring the equipment on August 2, 2021, as we need to ensure that a proper record is made of its return.

Thank you for your attention to this matter.

Very truly yours ,

Walter J. Dirkin
Deputy Chief Assistant Prosecutor

UNITED STATES DISCTICT COURT
DISTRICT OF NEW JERSEY

ALEX G. LEONE,	:	**[PROPOSED] ORDER**
Plaintiff,	:	
v.	:	
	:	
ESSEX COUNTY PROSECUTOR'S OFFICE,	:	Docket No. 2:21-cv-12786
THEODORE STEPHENS II,	:	
ROMESH SUKHDEO,	:	
GWENDOLYN WILLIAMS,	:	
and	:	
ROGER IMHOF,	:	
in their individual and official capacities,	:	
Defendants.	:	

On _____ __, 2021, the Court heard Plaintiffs' motion for a preliminary injunction. After hearing this motion and considering the arguments and papers submitted, the Court hereby GRANTS Plaintiffs' motion and enters the following preliminary injunction:

IT IS HEREBY ORDERED that Defendants are enjoined from disciplining or otherwise disadvantaging Plaintiff simply for praying in accordance with his religion, including at home on work days.

The Court does **not** enjoin anything else, including disciplining Plaintiff or any employee for any act or omission inconsistent with any job duty, obligation, rule, or responsibility.

IT IS SO ORDERED.

Dated: _____ __, 2021, at __:__ _.m.

Newark, New Jersey

The Honorable Susan D. Wigenton
United States District Judge

August 12, 2021

The Honorable Susan D. Wigenton
United States District Judge for the District of New Jersey
Martin Luther King Building & U.S. Courthouse
50 Walnut Street
Newark, New Jersey 07102

Re: *Leone v. ECPO, et al.* (2:21-cv-12786-SDW-ESK)

Dear Judge Wigenton,

Plaintiff writes to inform the Court at this earliest reasonable time that a hearing including witness testimony may be necessary to resolve the preliminary injunction motion filed in this matter (E.C.F. No. 8).

On August 11, 2021, Defendants' counsel, Ms. Kathleen Barnett Einhorn, sent a letter to Plaintiff asserting that the preliminary injunction motion "is frivolous" and declaring that Plaintiff must "withdraw [the] motion" or else Defendants will "seek sanctions."[1] In the letter, Defendants also stated that they "intend to refute [Plaintiff's] factual version." It is not clear what facts in the record Defendants dispute, but their opposition papers due August 24 (*see* L. Civ. R. 78.1(a); D.E. No. 9) should confirm whether material facts are actually disputed. If they are, Plaintiff respectfully requests the opportunity to subpoena a small number of witnesses, if not one witness, and present testimony on any disputed material facts. In addition, Plaintiff believed that the motion could be decided on the papers, but based on Defendants' extreme assertion that the motion is frivolous, Plaintiff respectfully requests that the Court order oral argument and permit Plaintiff to defend the merits of the motion before the Court.

Because Plaintiff continues to suffer irreparable harm as a result of Defendants' unlawful discrimination, *see, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021), Plaintiff also respectfully requests expedited consideration of the preliminary injunction motion once briefing is completed. Plaintiff is aware of the extraordinary number of cases active in the District and truly appreciates the Court's thoughtful attention to this matter.

Respectfully submitted,

/s/ Alex G. Leone
Alex G. Leone
P.O. Box 1274, Maplewood, New Jersey 07040
aleone@jd16.law.harvard.edu

Cc: Defendants; Defendants' Counsel

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[1] This assertion is defamatory and any motion for sanctions by Defendants would itself violate Rule 11. *See* Fed. R. Civ. P. 11(b)(2) (requiring that legal contentions presented to the Court be "warranted by existing law or by a nonfrivolous argument"). In addition, counsel's threat that Plaintiff must "withdraw [the] motion" or else Defendants will "seek sanctions" is clearly motivated by an "improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." *See* Fed. R. Civ. P. 11(b)(1). Counsel's unfair and apparently unlawful effort to bully Plaintiff into withdrawing the motion, however, is not the main subject of this letter to the Court. Nonetheless, counsel's letter—of which almost every sentence is questionable at best—is attached as Exhibit A.

Exhibit A

GENOVA BURNS
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August 11, 2021

BY E-MAIL: aleone@jd16.law.harvard.edu

Alex G. Leone, Esq.
P.O. Box 1274
Maplewood, New Jersey 07040

Re: Alex Leone v. Essex County Prosecutor's Office, et al.
Civ. No. 2:21-cv-12786 (SDW)(ESK)

Dear Mr. Leone:

As you are aware, this firm represents Defendants, Essex County Prosecutor's Office, Theodore Stephens II, Romesh Sukhdeo, Gwendolyn Williams, and Roger Imhof ("Defendants") in the above-captioned matter. We are writing to provide you with notice that your Motion for a Preliminary Injunction filed on July 30, 2021, is frivolous and violates Federal Rule of Civil Procedure 11.

The Proposed Order appended to the motion seeks to enjoin Defendants "from disciplining or otherwise disadvantaging Plaintiff simply for praying in accordance with his religion, including at home on work days." The relief sought is not only vague, it presupposes that all facts in Plaintiff's Complaint are uncontroverted, and that Plaintiff's religious accommodation claims are meritorious. This motion, filed before Defendants were even afforded the opportunity to file a responsive pleading, is without merit and not sustainable as a matter of law.

A plaintiff seeking the remedy of preliminary injunctive relief must demonstrate "(1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." Kos Pharms., Inc. v. Andrx Corp., 369 F.3d 700, 708 (3d Cir. 2004). Courts have noted that the issuance of a preliminary injunction is "an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997). "[F]ailure to establish any element in [a plaintiff's] favor renders a preliminary injunction inappropriate." Rush v. Corr. Med. Servs., Inc., 287 F. App'x 142, 144 (3d Cir. 2008).

It is clear that the first two critical elements required for this type of motion cannot be met, and the motion is improperly before the Court. First, it cannot be argued at this juncture that Plaintiff has a likelihood of success on the merits, when the motion presupposes facts and legal bases for an employment discrimination claim that have not yet been litigated, nor have Defendants yet filed an Answer in response to the initial Complaint. The arguments in Plaintiff's brief ask the Court to agree with and accept the automatic legal conclusion that Defendants have violated the New Jersey Law Against Discrimination and infringed upon Plaintiff's First Amendment right to the free exercise of his religion.

Defendants intend to refute your factual version and establish that any employment policy is in fact neutrally applied to all ECPO employees. Currently, all ECPO units are required to be in the office. Further, it is undisputed that Defendants have engaged in the interactive process with you, and that you were offered several alternative accommodations in response to your request. What you are arguing now is not whether any of those accommodations were reasonable, but whether or not they are preferred by you. In addition to conflating an employer's obligations in this regard, you are asking the Court to make an accelerated and final determination on the merits of this case, by way of a motion for preliminary injunction, and this is not permissible.

The second key element that forms the basis for a preliminary injunction - the demonstration that the plaintiff will suffer irreparable harm if an injunction is not issued - cannot be met here. In order to demonstrate irreparable harm will result in the absence of preliminary relief, a plaintiff has the burden of establishing a "clear showing of immediate irreparable injury." ECRI v. McGraw-Hill, Inc., 809 F.2d 223, 226 (3d Cir. 1987).

By your own admission, you are "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." Cert. of Alex G. Leone,¶ 9. You are therefore willing and able to be present in the office and in court when you deem it necessary, and do not argue that you should be relieved of these duties, or are harmed when you are physically present on these days. Further, there is no specific harm identified in your supporting brief or certification on days you do not feel it necessary to be in the office, only that "forgoing prayer practice causes adverse spiritual, psychological and even physical effects on me." Leone Cert., at ¶16. These vague assertions fall far short of the "immediate, irreparable injury" standard which must be demonstrated by a "clear showing" of actual injury or harm.

Upon further review of the applicable legal standard and procedural posture of this case, we expect that you will voluntarily withdraw your motion, since it is plainly evident that the facts of this case do not warrant the "extraordinary and drastic remedy" sought by way of a motion for a preliminary injunction. There is no basis on which this motion should proceed to briefing and oral argument.

GENOVA BURNS
ATTORNEYS-AT-LAW

In order to protect the rights of our client, we are notifying you that if you do not voluntarily withdraw your motion filed on July 30, 2021 within 10 (ten) days, we will be forced to seek sanctions against you pursuant to Fed. R. Civ. P. 11.

Be guided accordingly.

Very truly yours,

GENOVA BURNS LLC

/s/ Kathleen Barnett Einhorn

KATHLEEN BARNETT EINHORN

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ALEX G. LEONE, Plaintiff, v. ESSEX COUNTY PROSECUTOR'S OFFICE, THEODORE STEPHENS II, ROMESH SUKHDEO, GWENDOLYN WILLIAMS and ROGER IMHOF, in their individual and official capacities, Defendants.	**CIVIL ACTION NO.: 2:21-cv-12786-SDW-ESK**

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR THE ENTRY OF A PRELIMINARY INJUNCTION.

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Gwendolyn Williams, & Roger Imhof.

Of Counsel and on the brief:
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On the Brief:
Erica M. Clifford, Esq.
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PRELIMINARY STATEMENT

In his motion for a preliminary injunction, Plaintiff, Alex G. Leone ("Plaintiff"), argues that the decision of his employer, the Essex County Prosecutor's Office ("ECPO"), to have all employees return to the office and court environment on either a hybrid or full-time basis, constitutes a discriminatory policy in violation of his right to the free exercise of his religion under the Federal Constitution and in violation of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -49 ("NJLAD"). That conclusion, however, defies both logic and law and, perhaps more importantly at this procedural juncture, is a far cry from circumstances that warrant the extraordinary measure of injunctive relief.

The quandary faced by employers, indeed all individuals, in the face of this pandemic is well-known and, thus, does not require extensive background for the Court. As the pandemic emerged in full force in New Jersey in March 2020, many basic human activities came to a standstill – businesses were shuttered, families were sheltered in place, and the courts operated entirely remotely. Following CDC guidance and the Governor's Executive Orders, the ECPO advised its employees in March 2020 that they would be working on a hybrid "A/B Schedule." Under this policy, half of the ECPO staff were present in the office for one week, and then working remotely the following week. The primary purpose for this hybrid transition was to avoid having 100% of the staff in the office at the same time, to minimize the potential spread of the COVID-19 virus. This policy was implemented after much consideration as to the safety of its employees, and in response to the realities of struggling with the novel COVID-19 virus.

In November 2020, the A/B Schedule was suspended due to a spike COVID-19 infections and the unavailability of vaccination for employees. As a result, at that point in time, most, if not all, communications were conducted telephonically and by video conferences as a matter of necessity, and

not by arbitrary choice. For the next five months, out of an abundance of caution, all employees worked from home full-time, and would come into the office only occasionally, for the most important in-person tasks.

In recognition of the need to return to court and to the office, and with the newly available COVID-19 vaccinations, the ECPO again implemented the A/B Schedule in April 2021, for units where it was deemed necessary, based on workload. Supervisors and heads of departments were overwhelmed with work, as due to the lack of physical availability of assistant prosecutors, they had extra work to do to move emergent matters along, which meant taking on an extra burden to handle matters themselves and calling assistant prosecutors after to bring them up to speed on their work.

It cannot be overemphasized that the ECPO, as the local county agency charged with enforcement of the laws of this State, is tasked with emergent and critical responsibilities and duties to the public, and the rights of victims as well as those accused before conviction, cannot be held in abeyance. While these proceedings were conducted remotely when absolutely necessary to the health and welfare of the general public of this State, as soon as was deemed safe, the courts advised that it would reopen criminal proceedings and jury trials to be conducted in person.

In acknowledgement of the May 11, 2021 Order from the New Jersey Supreme Court notifying the Bar that in-person jury trials would resume on June 15, 2021, the ECPO began to develop plans to return its employees to the office and to the courts full-time. *See* Certification of Kathleen Barnett Einhorn, dated August 24, 2021 ("Einhorn Cert."), Exhibit ("Ex.") A. Accordingly, the ECPO decided that as of August 2, 2021, all employees were required to be in the office full-time - there were no units excepted from this requirement. *See* Einhorn Cert. at Ex. B ("Imhof Cert.") at ¶ 12.

Plaintiff submitted a request for an accommodation in which he stated that he has "a spiritual need to pray in peace and solitude, such as in [his] backyard, several times throughout the day."

Einhorn Cert. at Ex. C. Plaintiff requested permission to "work and pray throughout the day at home, to be physically present at office or court when reasonably necessary or when accommodating this religious need would cause undue hardship." *Id.*

The ECPO made genuine attempts to accommodate Plaintiff, which took into consideration Plaintiff's request for privacy during prayer (Plaintiff's own private office, or a soundproof interview room), as well as his stated interest in being able to access the outdoors when praying (directly across the street from Plaintiff's office building is the Eagle Rock Reservation, a 400-acre park accessible to the public). *See* Ex. D. These accommodations were summarily rejected by Plaintiff, who insisted that the only accommodation he would accept was the unilateral and subjective authority to determine when he would appear for work, if in his estimation it was necessary to do so. If he did not deem it necessary to appear in person for work, he would not. Plaintiff does not specify dates or times during the day when he needs to pray so the target is always moving. Critically, Plaintiff never submitted such a request for an accommodation of his religious briefs prior to the pandemic, when he worked full time in the office without issue from September 2019 through March 2020.[1] Now, Plaintiff claims that he suffers extreme and irreparable harm should he be forced to come into the office, *albeit* only when he deems it unnecessary. If it is necessary, he is willing and able to come into the office and appear in court, for days and weeks on end with no issue. The harm allegedly suffered by Plaintiff therefore is difficult, if not impossible, to quantify and thus even more challenging to remedy.

Defendants do not contest that Plaintiff's religious beliefs are sincerely held, they respect and take his statements at face value. Defendants instead oppose this motion because the facts of this case do not warrant the emergent relief that Plaintiff is requesting.

[1] The request referenced on page 2 of Ex. D was related to a dispute when Plaintiff closed his eyes for spiritual reflection in a courtroom and was asked by the presiding judge to keep his eyes open. This prior request is not referenced in Plaintiff's Complaint and has nothing to do with the instant matter, or Plaintiff's current employment status.

Plaintiff cannot demonstrate the likelihood of success on the merits of his claims that Defendants violated his first amendment right to the free exercise of his religion, nor that Defendants failed to accommodate his religious accommodation request under the NJLAD. It is undisputed that Defendants put forth a *bona fide* effort to communicate with Plaintiff about his request and carefully considered and then offered several viable alternatives.

Further, the policy of the ECPO requiring its employees to return to work is generally applied and facially neutral. In addition to Plaintiff's failures with respect to the second element, Plaintiff cannot establish that he has suffered and will continue to suffer irreparable harm if the Court does not grant his motion. Plaintiff's assertions that he suffers psychological and physical harm when he cannot be home praying are belied by his assertions that he is fine to come to work for any court proceeding, live witness or victim interviews, or for any other reason, so long as he deems his presence necessary.

Plaintiff's requested emergent relief – that the Court enjoin Defendants from taking any disciplinary action against Plaintiff "simply for praying in accordance with his religion, including at home on work days" is likewise exceptionally vague, and purports to grant Plaintiff unilateral authority to simply come and go as he pleases, with no recourse available to his employer. This relief is not tied to a specific religious practice, or to any specific day or time. It is exactly this kind of specious allegations that courts have determined insufficient to support an order for an injunction.

STATEMENT OF FACTS

The mission of the Essex County Prosecutor's Office is "to seek justice, to serve justice, and to do justice."[2] Plaintiff is an assistant prosecutor in the Financial Crime and Intellectual Property unit at the ECPO. Einhorn Cert. at Ex. D (Compl.) at ¶16. Plaintiff was hired by Defendants on

[2] *Mission Statement,* ESSEX CNTY. PROSECUTOR'S OFF., available at https://www.njecpo.org/?page_id=59, (last visited: Aug. 18, 2021).

September 9, 2019. Imhof Cert. at ¶2. Prior to March 2020, Plaintiff worked in the office every-day along with the rest of the ECPO workforce. *See id.* at ¶3. In March 2020, the ECPO officially instituted its "A/B Schedule," in which employees, including Plaintiff, would work in the office and from home on alternating weeks. *Id.* at ¶3. In November 2020, the ECPO switched to a fully remote schedule, with the exception of specific instances where assistant prosecutors were needed with the greatest urgency. *Id.* at ¶4. In April 2021, assistant prosecutors in various units were informed that they must return on an A/B Schedule, to keep up with the needs of their supervisors. *Id.* at ¶5. During the fully remote schedule beginning in November, department heads had been taking on many of the responsibilities of assistant prosecutors in dealing with emergent matters and bringing them up to speed on the phone, which was not thought to be sustainable. *See* Imhof Cert. at ¶5.

On April 26, 2021, Plaintiff submitted his request for a permanent religious accommodation. *See* Ex. C. In it, Plaintiff stated that he has a "spiritual need to pray in peace and solitude, such as in [his] backyard, several times throughout the day." *Id.* As a result of this "need," Plaintiff requested to work from home (permanently) and will only be physically present at the office or court "when reasonably necessary" or "when accommodating this religious need would cause undue hardship." *Id.* This accommodation request was submitted to Deputy Chief Prosecutor Walter Dirkin ("Dirkin"). *See* Imhof Cert. at ¶6.

On May 6, 2021, Chief Assistant Prosecutor Roger Imhof ("Imhof"), Executive Assistant Prosecutor Gwendolyn Williams, Dirkin and Essex County Counsel Courtney Gaccione met with Plaintiff over videoconference to gather more specific information regarding his request. *See* Ex. D; *see also* Imhof Cert. at ¶7. Imhof stated the following regarding that conference:

> During this conference, I explained to Plaintiff that as a new attorney with the Prosecutor's Office, his presence in the office was necessary to his growth and development as a trial lawyer – to observe colleagues at other trials, and to collaborate and strategize with colleagues in the

> office regarding investigations, witness and victim interviews, case presentations to grand juries, among other responsibilities of an Assistant Prosecutor.
>
> Imhof Cert. at ¶8.

On May 12, 2021, Imhof sent a memorandum in response to Plaintiff's request. *See* Ex. D. In this memorandum, Imhof first outlined Plaintiff's requests and the clarifying conversations surrounding the requests. *Id.* Plaintiff's request was permanent in nature and was to begin immediately, seeking to never have to work full-time in the office again. *Id.*

To add context to his original request, Imhof explained the ECPO's understanding that the basis for Plaintiff's request was a spiritual "need" to pray in peace in his backyard several times per day, "spontaneously." Ex. D. Plaintiff insisted that being physically present in the office made him feel uncomfortable and unable to focus on his spontaneous spoken prayer. *Id.* He claimed that it was "contrary to the peace and solitude" that he desired. *Id.* He also stated that he does not want to be overheard by others. *Id.* Plaintiff further stated that his "need" to pray spontaneously throughout the day was based in Christianity, but he did not provide ECPO with a specific provision in Christianity that this "need" was derived from. *Id.*

Defendants offered accommodations based on Plaintiff's criteria. Imhof Cert. at ¶9. When asked if prayer at the park across the street from the office was an acceptable alternative, Plaintiff told the ECPO that it was not, as it would "curtail the spontaneous nature of [his] prayer and subject [him] to being heard or seen by others." Ex. D. Plaintiff stated that praying in the office with his door closed for privacy would occasionally be a viable option, but doing so every day would not be conducive to the peace and solitude that he needs and would subject him to the possibility for interruption or being overheard. *Id.* In sum, Plaintiff is unwilling to accept any deviation from the accommodations he requested – to be able to work from his backyard, full-time, despite the rest of

the staff returning to the office full-time. *See* Imhof Cert. at ¶11.

In the second portion of this memorandum, Imhof denied Plaintiff's request to permanently work from home on a full-time basis. Ex. D. Imhof stated that in the coming months, ECPO would discontinue the A/B Schedule and return to regular, pre-pandemic in-office work requirements. *Id.*[3] Additionally, it is anticipated that a return to in-person court appearances is not far off, Imhof explained. *Id.* Further, Imhof noted that meetings are not always prescheduled, and require the presence of attorneys, as do in-person witness interviews. *Id.* Additionally, Imhof explained that emergent matters come about that require immediate responses, necessitating the presence of attorneys as well. *Id.* The collaborative nature of the work would result in a loss of effectiveness if not done in-person. *See* Ex. D. Though partially remote work was the only reasonable option during the pandemic, Imhof anticipates a surge of new matters as the State attempts a return to normalcy, which changes the outlook for assistant prosecutors and would make remote work insufficient. *Id.* As a result, Imhof stated that allowing Plaintiff to permanently work from home would constitute and unreasonable interference with the efficient operation of the workplace, pursuant to N.J.S.A. 10:5-12 (q)(1). *Id.*

Despite the denial of Plaintiff's accommodation request, Imhof reiterated three potential accommodations to Plaintiff: (1) to pray in his office whenever needed throughout the workday; (2) to utilize the Essex County Eagle Rock Reservation (located directly across the street from the ECPO's office), whenever he needed to spontaneously pray, so long as it does not adversely affect his work responsibilities, *Id.*; and (3) to provide exclusive permission to use a soundproof interview room on the third floor of the same building to which he is currently assigned. *See* Ex. D.

[3] Note, as noted above, that the ECPO did in fact institute full time in-office work requirements on August 2, 2021. At the time of Imhof's memorandum, the A/B Schedule was in effect, with assistant prosecutors coming in, even during "at home weeks," based on the needs of the office.

On June 1, 2021, Plaintiff submitted a memorandum in response to Imhof's, renewing his request to permanently work from home; voicing his displeasure with Imhof's attempted compromise; and issuing a new request to be transferred to the ECPO's Appellate Division Unit. *See* Einhorn Cert. at Ex. E. Plaintiff requested to be transferred to the Appellate Division in an effort to not be bound by the impending schedule changes which would not permit him to work from home. *See* Plaintiff's Brief in Support of his Motion for a Preliminary Injunction, dated July 30, 2021 ("Pl. Br."), p. 14, Footnote 7. On June 9, 2021, Imhof sent a response to Plaintiff noting that there are no openings in the Appellate Division, and that the ECPO's position on his request for religious accommodations remains unchanged. Ex. F. Plaintiff claims that the Appellate Division employees at Plaintiff's office have been permitted to work from home since the beginning of the pandemic in March 2020 through the present day. *See* Pl. Br., p. 3. However, as of August 2, 2021, all employees of every unit, including the Appellate and Adult Trial Sections, were required to be back in the office full time. *See* Imhof Cert. at ¶12. This updated protocol was announced in an email from Walter Dirkin to the Essex County Prosecutor's Office staff, on July 26, 2021. Ex. G.

After refusing to arrive at a compromise, and displeased with the ECPO's denial of vesting Plaintiff with unfettered authority to determine the nature of his employment, Plaintiff filed a Complaint in the New Jersey District Court on June 18, 2021. *See* Ex. H. Defendants filed a Notice of Appearance on July 19, 2021. Plaintiff then filed this motion for a Preliminary Injunction on July 30, 2021. For the reasons set forth below, Defendants assert that the facts do not warrant the extreme remedy of even temporary injunctive relief, thus, Plaintiff's motion should be denied.

LEGAL ARGUMENT

A. LEGAL STANDARD FOR AN APPLICATION FOR INJUNCTIVE RELIEF.

"[I]njunctive relief is an 'extraordinary remedy, which should be granted only in limited circumstances.'" *Checker Cab of Philadelphia Inc. v. Uber Techs., Inc.*, 642 F. App'x 229, 231 (3d Cir. 2016) (quoting *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 586 (3d Cir. 2002)).

To obtain a preliminary injunction, the movant must establish: "(1) a likelihood of success on the merits; (2) he or she will suffer irreparable harm if the injunction is denied; (3) granting relief will not result in even greater harm to the nonmoving party; and (4) the public interest favors such relief." *Exec. Home Care Franchising LLC v. Marshall Health Corp.*, 642 F. App'x 181, 183 (3d Cir. 2016) (quoting *Miller v. Mitchell*, 598 F.3d 139, 147 (3d Cir. 2010)). "The first two factors are the 'most critical,' and the Court considers these 'gateway factors' before the third and fourth factors. [] Only if a plaintiff meets the threshold for these gateway factors does the Court consider the remaining factors." *Julius Realty Corp. v. Thompson*, 2020 WL 2539188, at *1 (D.N.J. May 19, 2020) (internal citations omitted).

Of course, as is the case here, "[a] plaintiff's failure to establish *any* element in its favor renders a preliminary injunction inappropriate." *NutraSweet Co. v. Vit-Mar Enters., Inc.*, 176 F.3d 151, 153 (3d Cir. 1999). Plaintiff fails to carry this burden on all four elements, therefore, he falls woefully short of the scrutiny that accompanies a request for injunctive relief.

B. PLAINTIFF CANNOT SHOW THAT HE IS LIKELY TO SUCCEED ON THE MERITS OF HIS FREE EXERCISE CLAIM.

Plaintiff's first count claims that Defendants violated his right to freely exercise his religion under Section 1983 and the First Amendment of the United States Constitution because he is not allowed to work from home. *See* Ex. D. The Free Exercise Clause prohibits regulation of religious beliefs and also protects religiously motivated expression. *See McTernan v. City of York*, 564 F.3d 636, 647 (3d Cir. 2009)(citing *Employment Div., Dept of Human Res. of Or. v. Smith,* 494 U.S. 872, 877 (1990)). That said, no right, including the right vested under the Free Exercise Clause, is absolute. *See id.* When the challenged government action, or in this case "state" action, is "neutral and generally applicable" the government need not justify the policy with a compelling governmental interest as would be required under the strict scrutiny standard. *Employment Div., Dept of Human Res. of Or.*, 494 U.S. at 879.

"A [state action] is 'neutral' if it does not target religiously motivated conduct...." *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004). It is "generally applicable" if it extends to all conduct and does not selectively burden religiously motivated conduct. *See Combs v. Homer-Center Sch. Dist.,* 540 F.3d 231, 242 (3d Cir. 2008) (citing *Blackhawk,* 381 F.3d at 209)). Should the action be deemed neutral and generally applicable, rational basis scrutiny applies which "requires merely that the action be rationally related to a legitimate government objective." *Tenafly Eruv Ass'n v. Tenafly,* 309 F.3d 144, 165 n. 24 (3d Cir. 2002).

Plaintiff concedes that this analysis applies to neutrally facial policies in his moving brief, but argues that because the ECPO has made secular exemptions for other categories of employees, ECPO's return to work policy should be subject to the heightened standard of strict scrutiny. *See* Pl. Br. pp. 7-9. Plaintiff is incorrect.

The ECPO permitted all of its employees to work from home for a temporary period of time during a global health emergency. Acting in conjunction with the Executive Orders of the Governor

of New Jersey and the Country at large, especially as New Jersey was substantially impacted by the virus, the ECPO initially allowed its employees to work partially remotely. That ECPO had this remote work policy at the height of the pandemic cannot now be argued to constitute a categorical secular exemption.

It is undisputed that all ECPO employees, of every unit, were required to return to work on August 2, 2021, following the availability of vaccines and the re-opening of the courts to in person proceedings. *See* Ex. G. There is no categorical secular exemption for any group of people, and Plaintiff has not been subject to "putative action" by being required to return to the office. The ECPO has a legitimate objective in having its assistant prosecutors, like Plaintiff, in the office, actively collaborating with senior staff members on case presentations to grand juries, analyzing whether to prosecute a particular suspect, to accept a plea bargain in a given case or risk taking it to trial, or to argue a certain point of law. The job is fast paced and high energy, and an Assistant Prosecutor needs to be able to think on one's feet. As Defendant Imhof explained to Plaintiff during the May 6, 2021 discussion regarding his request for accommodation, it is vital to the development of the new and inexperienced attorneys to observe senior colleagues at other trials, and to collaborate and strategize with colleagues in the office regarding investigations, witness and victim interviews, case presentations to grand juries, and other critical law enforcement tasks as they arise. *See* Imhof Cert. at ¶8.

Requiring Plaintiff to come into the office, given the nature of his job, coupled with the accommodations already offered by the ECPO, satisfies this standard that the policy is rationally related to a legitimate government objective. The ECPO's return to work policy therefore withstands the low bar of rational basis scrutiny. Accordingly, Plaintiff cannot not prevail on his constitutional claim against Defendants.

C. PLAINTIFF CANNOT SHOW THAT HE IS LIKELY TO SUCCEED ON THE MERITS OF HIS NJLAD CLAIM.

In Count Two of his Complaint, Plaintiff claims that Defendants failed to provide him with a religious accommodation in violation of the NJLAD. *See* Compl. at ¶¶18, 19. The NJLAD prohibits employers from imposing a condition that "would require a person to violate or forego a sincerely held religious practice or observance" unless, "after engaging in bona fide effort, the employer demonstrates that it is unable to reasonably accommodate the employee's religious observance or practice without undue hardship on the conduct of the employer's business." N.J.S.A. 10:5-12(q)(1).

Here, Plaintiff, along with all other ECPO employees, is simply being asked to appear for work as an Assistant Prosecutor in one of the busiest counties in the State. When Plaintiff advised his supervisor of his need to practice prayer during the day, the ECPO quickly held a meeting to present Plaintiff with reasonable alternatives. *See* Ex. D. In other words, the ECPO's immediate response was not rejection, as Plaintiff suggests, but a good faith showing of an intent to arrive at a meaningful compromise. Plaintiff, however, was clearly uninterested in a compromise of any nature.

The ECPO plainly engaged in *bona fide* efforts to formulate alternative accommodations, which took into consideration the stated reasons behind Plaintiff's request:

> 1) You may continue to engage in pray in your private office during the work day;
>
> 2) You may access the Essex County Eagle Rock Reservation that is directly across the street from your worksite. The Eagle Rock Reservation is a four hundred (400) acre property with multiple secluded areas. This option is offered as you specifically referenced your preference to pray outside. . . .
>
> 3) The ECPO has identified a soundproof interview room located on the third floor of the building where you are currently assigned. The interview room does not have occupants on either side and would be completely private. The soundproofing will address your concern

> about others being able to hear you during prayer. ECPO is prepared to offer you this room on either a permanent basis (if you wish to relocate your office) or you may remain in your current office and use this office on an as needed basis. . . .

See id. These accommodations were summarily rejected by Plaintiff, who insisted that the only accommodation he would accept was the unilateral and subjective authority to determine when he would appear for work. If he did not deem it necessary to appear in person for work, he would not. *See id.*

Plaintiff does not claim that anyone at the ECPO forbid him from praying while at work, by contrast the ECPO permit him to leave the office at any time to access the outdoor park across the street and pray in complete solitude. Or he can use his private office. Or he can use a soundproof interview room where he would not have any concern about being overheard. He has not been told that he can only pray at "X" time, or only in "X" place, nor has he been told that he cannot pray in the office in any manner at all. The only demand that the ECPO rejected was Plaintiff's request to work entirely from home unless and until Plaintiff deems it necessary to come to the office.

At this point, what Plaintiff is arguing is not whether any of the ECPO's accommodations were reasonable, as that would imply that Plaintiff was genuinely engaging in the process to arrive at a fair accommodation. Rather, Plaintiff contends that unless the Court holds that Plaintiff can work exclusively from home, Plaintiff's rights under State and Federal law, will be unduly burdened.

Defendants submit that the Court need not address Plaintiff's alleged undue hardship in its analysis of this application because the ECPO has not refused to, or been unable to, offer reasonable accommodations to Plaintiff. They have. What would be an undue hardship for the ECPO is to have Plaintiff work remotely every day, unless or until Plaintiff finds it "reasonably necessary" to come in. It was explained to Plaintiff that it would be a hardship for the ECPO if one of their Assistant Prosecutors was not present for *ad hoc* meetings, or emergent matters as they often arise in Plaintiff's

line of work, or to collaborate with and observe senior colleagues. *See* Imhof Cert at ¶8; *see also* Ex. D.

Plaintiff was able to adhere to this requirement to physically appear in the office, upon his hire and for approximately six months thereafter, before the pandemic forced extreme change at the office. These are once again the present-day requirements, which Plaintiff initially adhered to without issue.

Plaintiff will not be able to prevail on the merits of his NJLAD claim because Defendants put forth a *bona fide* effort to offer Plaintiff reasonable accommodations in light of his request. He cannot prove otherwise. Thus, Plaintiff's instant motion should be denied.

D. PLAINTIFF FAILS TO ESTABLISH THAT HE WILL SUFFER IRREPARABLE HARM IF THE COURT DENIES HIS MOTION FOR A PRELIMINARY INJUNCTION.

In addition to establishing a likelihood of success on the merits, Plaintiff must also establish that he will suffer irreparable harm without a preliminary injunction. *Exec. Home Care Franchising LLC,* 642 F. App'x at 183. This element cannot be met here. In order to demonstrate irreparable harm, a plaintiff has the burden of establishing a "clear showing of immediate irreparable injury." *ECRI v. McGraw-Hill, Inc.,* 809 F.2d 223, 226 (3d Cir. 1987).

In *In re Revel AC, Inc.,* 802 F.3d 558 (3d Cir. 2015), the Court held that to establish irreparable harm, a plaintiff "must demonstrate an injury that is neither remote nor speculative, but actual and imminent." *Id.* at 571 (quoting *Tucker Anthony Realty Corp. v. Schlesinger,* 888 F.2d 969, 975 (2d Cir. 1989)).

Plaintiff claims in his brief that "foregoing [his] prayer practice causes adverse spiritual, psychological, and even physical effects on me." *See* Pl. Br. p. 16. However, Plaintiff does not explain what these effects are, nor is it even remotely a foregone conclusion that Plaintiff must forego

prayer when he is in the office.

By Plaintiff's own admission, Plaintiff is "fully willing to be physically present for anything required by [his] job responsibilities – including, for instance, in-person court appearances, witness interviews, or any other obligation." Certification of Alex G. Leone, dated July 30, 2021 ("Leone Cert"), at ¶ 9. Plaintiff is therefore willing and able to be present in the office and in court when he deems it necessary, and does not argue that he should be relieved of these duties, or is harmed when he is physically present on these days.

There is no specific harm identified in his supporting brief or certification on days he does not feel it necessary to be in the office, only that "forgoing prayer practice causes adverse spiritual, psychological and even physical effects on [him]." Leone Cert. at ¶16. These vague assertions fall far short of the "immediate, irreparable injury" standard which must be demonstrated by a "clear showing" of actual injury or harm. *ECRI,* 809 F.2d at 226.

Plaintiff also has demonstrated that mere presence in the office does not cause him irreparable harm of any cognizable sort, as he was able to work full time in the office from hire date in September 2019 until March 2020.

Plaintiff mentions as part of his argument on this point that he has been using his accrued time off during times which he has been required to go into the office. *See* Pl. Br., pp. 14-15. Plaintiff is permitted to use his accrued time off however he would like to. That said, Plaintiff's decision to call out every other day to avoid coming into the office does not demonstrate a cognizable, irreparable harm that ECPO's policy is inflicting. This conduct actually underscores the fact that Plaintiff does not suffer actual irreparable harm when he is in the office, because there is no distinctive difference between coming in on a Monday versus a Wednesday, and Plaintiff does not attempt to make such a distinction in his brief or declaration. Plaintiff has failed to demonstrate that he will suffer irreparable

harm if the preliminary injunction is not granted at this stage, and as such, the preliminary injunction should be denied.

E. A BALANCING OF THE EQUITIES WEIGHS HEAVILY IN FAVOR OF DENYING PLAINTIFF'S MOTION.

Though it is already clear that Plaintiff fails on the first two prongs of the test outlined in *Exec. Home Care Franchising LLC,* Plaintiff also falls short upon review of a balancing of the equities. *Id.* at 183. Even setting aside the myriad of fatal deficiencies in Plaintiff's position on the first two factors, Plaintiff equally fails on this point as well. "Before granting an injunction, a district court must balance the relative harm to the parties, i.e., the potential injury to the plaintiff if an injunction does not issue versus the potential injury to the defendant if the injunction is issued." *Vista India v. Raaga, LLC,* 501 F. Supp. 2d 605, 624 (D.N.J. 2007) (quoting *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.,* 290 F.3d 578, 596 (3d Cir. 2002)).

Plaintiff's argument is that if this motion is denied, Plaintiff will "be required to forgo his prayer practice," which he insists causes him to suffer on "multiple levels." Pl. Br., pp. 15-16. However, if that injury were to occur, which Defendants adamantly contend it would not, it would be of Plaintiff's own doing. Plaintiff was offered three viable accommodations by Defendants in order to permit him to continue to pray privately even after the remote work protocols ended. *See* Ex. D. If he were required to return to the office, he could avail himself of any of the various more than reasonable accommodations to ensure he could work from the office, and continue to engage in daily prayer.

As outlined in Imhof's memorandum, the ECPO offered to let Plaintiff pray in his office whenever needed throughout the workday. *See* Ex. D. Alternatively, the ECPO has permitted Plaintiff to go directly across the street to the Essex County Eagle Rock Reservation so long as it does not adversely affect his work responsibilities. *Id.* It is a 400-acre property with multiple secluded

areas. *Id.* Plaintiff specifically asked to pray outside, and this would afford him the opportunity to do so at his desired times. *Id.*

The final accommodation offer was for Plaintiff to have exclusive permission to use a soundproof interview room on the third floor of the same building in which he is assigned. Ex. D. Plaintiff would be allowed to use the room on a permanent basis if he relocated his office, or he could go to the room when needed from his current office. *Id.* Plaintiff would have exclusive use of the office and the ability to lock the door to avoid any distractions or interruptions. *Id.* This offer would allow him to pray in quiet, without any chance of him being overheard or disrupted. *Id.* If he chooses to utilize the soundproof interview room and move his office to the area, he can seamlessly enter the room spontaneously, when he feels the sudden urge to pray that he describes. *Id.*

These accommodations are generous, and directly touch upon the unique, specific criteria which Plaintiff "needs" to pray. Plaintiff would not only have the chance to pray in a private, quiet environment – and outside if he so chooses – but he would also simply be in the same day-to-day situation as he was during the first six months of his employment prior to the pandemic. He would also be in the same situation as those assistant prosecutors in the Adult Trial and in the Appellate Division. *See* Imhof Cert. at ¶12.

On the other hand, an erroneously issued preliminary injunction would cause undue harm to the ECPO, as they have acted in good faith at all times and tried to accommodate Plaintiff as effectively as possible within reason. As Imhof outlined in his response to Plaintiff's request, there is actual harm that would occur to Defendants if this motion were to be granted;

> It is the nature of the work performed by the ECPO that [requires] individuals [to] be physically present in the office. As discussed during our meeting, in person courtroom appearances will resume at some point in the future. Many ECPO meetings are not pre-scheduled and occur on an *ad hoc* basis that requires the presence of attorneys in the office. In-

> person interviews are preferred over those conducted remotely. Additionally, emergent matters that arise may require immediate response that would necessitate your presence in the office. You acknowledged the collaborative nature of ECPO's work which often requires in person discussion. Finally, as discussed during our meeting, the workload of the ECPO was significantly decreased during the pandemic. It is anticipated that workload will begin to increase now that the pandemic has begun to subside. For these reasons, ECPO takes the position that to allow your religious accommodation request to work from home on a full-time basis would cause an undue hardship to the office.

Ex. D. Imhof cited N.J.S.A. 10:5-12(q)(1), explaining that this requested accommodation would bring about undue hardship to the ECPO, by way of "unreasonable interference with the safe or efficient operation of the workplace." *Id.* Although remote work was allowed during the heart of the COVID-19 pandemic, it is quite obvious that a workplace does not function at full effectiveness during the emergency protocols that companies temporarily put into place. These measures were never, at any point, intended to be permanent, and these neutral measures applied to all employees equally. At this point in time, all employees at Plaintiff's level are no longer permitted to work from home. *See* Imhof Cert. at ¶12.

However, Mr. Leone is the one seeking preferential treatment. He is the one who wants the rules to apply in a special way to him, despite accusing the ECPO of treating him in a lesser, discriminatory fashion. Plaintiff was hired as part of a system, in which employees are expected to be present at their place of work, in order to do their job utilizing the resources and relationships they have at the office. He is part of a collaborative team, and he must be present immediately (within reason) for any sort of unexpected reason in which his availability is necessary. The lack of availability and irreplaceable physical presence would create an undue hardship, as Plaintiff was hired and is being paid to do just that, absent temporary extreme measures due to an extreme global health crisis.

Plaintiff was expected to comply with the above availability needs prior to the pandemic. Defendants are sensitive to the fact that everyone is different, and some people have unique needs that are *within reason* to accommodate. Defendants offered more than reasonable accommodations for these needs. *See* Ex. D. However, his demands transform the essence and nature of the job altogether, leading to an extreme effectiveness decline, and causing undue hardship to Defendants, and thus are not within reason.

If this preliminary injunction were not granted, Plaintiff would simply be returning to the same day-to-day job situation for which he was hired and successfully worked through for six months prior to the pandemic. If the preliminary injunction were to be granted, Defendants would be forced to employ an employee who cannot provide the availability and general effectiveness, which is irreplaceable, that the job requires, despite offering him extremely reasonable accommodations based on his demands. This would in turn cause an undue hardship to Defendants. It is quite clear that in balancing the equities, Defendants would be far more harmed by the granting of the preliminary injunction than Plaintiff would by its denial. Hence, Plaintiff has failed to satisfy his burden to prove this third element.

F. GRANTING AN INJUNCTION IS NOT IN THE PUBLIC INTEREST.

Plaintiff has failed to establish that not granting this preliminary injunction would be against public interest, and on the contrary, Defendants argue that *granting* the injunction is *against* public interest. "In considering where the public interest lies, it is essential to evaluate the possible effects upon the public from the grant or denial of injunctive relief." *Oburn v. Shapp*, 521 F.2d 142, 152 (3d Cir. 1975), *holding modified by Am. Tel. & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421 (3d Cir. 1994). "As the Supreme Court has observed, 'parts of equity may, and

frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'" *Instant Air Freight Co. v. C.F. Air Freight, Inc.,* 882 F.2d 797, 803 (3d Cir. 1989)(quoting *Virginian Ry. Co. v. System Fed'n No. 40,* 300 U.S. 515, 552 (1937)).

A prosecutor serves the public and the public's interest. *See American Bar Association Standard 3-1.2: Functions and Duties of the Prosecutor*; *see also American Bar Association Standard 3-1.3: The Client of the Prosecutor*. Therefore, if a prosecutor is not able to adequately develop professionally and satisfy his job obligations, it is harmful to public interest. Here, Defendants argue that by not being available in the office, as he was for months prior to the pandemic, Plaintiff would be unable to properly develop professionally, which would harm the public as a whole, whom he represents.

In May 2021, Imhof warned Plaintiff that the ECPO would be disadvantaged by his lack of physical availability. *See* Imhof Cert. at ¶¶7-8. As a new attorney, Imhof advised Plaintiff that his presence, outside of his direct personal work responsibilities, was integral to his "growth and development." *Id.* This includes the opportunity to "observe colleagues at other trials, and to collaborate and strategize with colleagues in the office regarding investigations, witness and victim interviews, case presentations to grand juries, among other responsibilities." *Id.* Additionally, in his memorandum to Plaintiff, Imhof explained that the case load for an assistant prosecutor will only grow more burdensome with the return to the office. *See* Ex. D. As a result, it would not only be difficult for Plaintiff to develop properly as an attorney, but there is also a high likelihood that permanently working from home would cause difficulties in handling the burdensome case load, decreasing his effectiveness as a servant of public interest. Therefore, Plaintiff not being available in-person is harmful to public interest, and as a result, the preliminary injunction should be denied

on those grounds, as well as the others above.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for a Preliminary Injunction should be denied.

Respectfully submitted,

GENOVA BURNS LLC

Dated: August 24, 2021

/s/*Kathleen Barnett Einhorn*

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CERTIFICATE OF SERVICE

I, Kathleen Barnett Einhorn, the undersigned, certify under penalty of perjury, that on August 24, 2021, I caused a true and correct copy of the attached Memorandum of Law in Opposition to Plaintiff's Motion for a Preliminary Injunction, Certification of Counsel, and the exhibits attached thereto, to be served via the Court's CM/ECF System.

Dated: August 24, 2021

/s/ Kathleen Barnett Einhorn
Kathleen Barnett Einhorn

16103074v2 (1582.132)

EXHIBIT A

NOTICE TO THE BAR

RESUMPTION OF IN-PERSON JURY TRIALS ON OR AFTER JUNE 15, 2021 – PRIORITIZATION OF CRIMINAL TRIALS THAT INVOLVE DETAINED DEFENDANTS

The Supreme Court has authorized the resumption of in-person criminal jury trials, and some in-person civil jury trials, effective on or after June 15, 2021. Criminal jury trials will be conducted in person and will be the priority, with cases that involve detained defendants continuing to receive the highest priority. Most civil jury trials at present will continue to be conducted in a virtual format. The Court's May 11, 2021 Order is attached.

The Court's authorization to resume in-person jury trials is based on improved COVID-19 trends throughout New Jersey. In-person jury trials will be conducted with necessary health precautions, including social distancing and the requirement that participants wear face masks except in limited circumstances when other health protections are in place. As announced in this May 6, 2021 notice, up to 50% of judges and state court employees will be present in state court locations as of June 15, 2021. Those on-site judges and state court employees will support upcoming in-person jury trials and other court events.

The Court in a separate May 11, 2021 Order also has authorized the resumption of in-person grand jury sessions, which must be conducted with necessary health precautions.

Questions about this notice may be directed to the Office of the Administrative Director of the Courts at (609) 376-3000.

Hon. Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts

Dated: May 11, 2021

SUPREME COURT OF NEW JERSEY

In response to the ongoing COVID-19 public health emergency, the Supreme Court has authorized various adjustments to court operations so as to protect the health and safety of all court users. Based on improved COVID-19 trends, the Court today authorizes the resumption of certain in-person jury proceedings on or after June 15, 2021 as set forth in this Order.

The Judiciary throughout the COVID-19 pandemic has been guided by the recommendations of public health authorities, including the New Jersey Department of Health (NJ DOH). Today, based on positive trends statewide, key public health indicators regarding COVID-19 in New Jersey are encouraging. New cases, hospitalizations, and deaths have been decreasing for several weeks and continue to decline. In all regions of the state, the COVID-19 Activity Level Index (CALI) is moderate or better. Subject to continued appropriate precautions, including face masks and social distancing, the data supports the resumption of in-person jury trials throughout New Jersey.

Although COVID-19 trends today are substantially improved, the pandemic is still affecting many aspects of court operations. Public health authorities including the Centers for Disease Control and Prevention (CDC) continue to caution against large gatherings for all people and against even moderate gatherings for individuals who are not fully vaccinated against the COVID-19 virus. Accordingly, the resumption of certain in-person jury trials will remain at a

limited capacity, both statewide and vicinage by vicinage, as compared to pre-pandemic operations.

The provisions of this Order for the most part align with the Court's July 22, 2020 Order and appended Plan (as updated August 14, 2020), and replicate to the extent practicable pre-COVID-19 jury processes. Criminal jury trials will be conducted in person and will be the priority, with cases that involve detained defendants continuing to receive the highest priority. In addition to those important and urgent criminal trials, the Judiciary also can sustain civil jury trials, which in general will continue to be conducted in a virtual format. This blended approach – with some jury trials conducted in person and others remotely – will support case resolution and ongoing adherence to social distancing and other precautions that remain critical to protect against the COVID-19 virus.

Accordingly, it is ORDERED that the following provisions are effective immediately except as otherwise stated herein:

(1) JURY SELECTION

a. Jury selection for criminal and civil trials will begin in a virtual format.

b. The juror summons will inform prospective jurors that (1) the jury selection process will begin in a virtual format; and (2) their service may continue virtually or may involve reporting in person to a courthouse with safety precautions.

c. Judiciary staff will communicate with qualified jurors about their technological capacity to participate in virtual selection.

d. Jurors can participate in virtual selection using a laptop, tablet, smartphone, or other comparable device with a reliable Internet connection and a functioning web camera.

e. When a juror is otherwise able to participate in virtual selection but requires technological support, the Judiciary will continue to provide such jurors with restricted-use devices and related supports (including, as necessary, broadband capacity), which will be configured and administered solely by the Judiciary.

f. Before starting virtual jury selection, Judiciary staff will provide initial Zoom testing and onboarding for qualified jurors.

g. The Judiciary will continue to advise jurors of COVID-19 protocols, including the requirement that individuals who are subject to isolation or quarantine must not report to the courthouse. During virtual selection, the judge will invite jurors to raise any specific questions about their ability to report in person (if proceeding to an in-person trial) during sidebar, in the presence of the attorneys and parties.

(2) CRIMINAL JURY TRIALS

a. Jury selection for criminal trials will begin virtually and then proceed to a final in-person phase. The in-person phase of selection will be conducted in compliance with all applicable current public health precautions.

    i. All case-specific questioning of jurors will be conducted during the virtual *voir dire* process in the presence of the judge, attorneys, and parties. Jurors will be excused for cause based on that questioning.

    ii. After virtual questioning and for-cause excusals, the remaining small number of jurors will be directed to report in person to the courthouse in small groups for the final phase of selection, including the exercise of peremptory challenges.

b. Cases involving detained defendants will continue to be the top priority. Consistent with existing Judiciary policy, selection of trials will focus on detained defendants who are approaching the end of excludable time. The extensions of preindictment and post-indictment excludable time will conclude as set forth in the Court's April 9, 2021 Order.

(3) CIVIL JURY TRIALS

a. Jury selection for civil trials will be conducted in an entirely virtual format, consistent with the provisions of the Court's January 7, 2021 and February 1, 2021 Orders.

b. Most civil jury trials will continue to be conducted in a virtual format, consistent with the provisions of the Court's January 7, 2021 and February 1, 2021 Orders. Track I and Track II trials will proceed virtually absent compelling circumstances as determined by the Assignment Judge.

c. Civil cases that are especially urgent, including those that involve a plaintiff whom doctors have determined has a limited life expectancy, will be prioritized for in-person trials.

d. Assignment Judges may authorize additional in-person civil jury trials based on local resources, so long as those in-person civil jury trials do not reduce the Judiciary's capacity to conduct other urgent court events, including in-person criminal trials involving detained defendants.

(4) PUBLIC ACCESS TO JURY PROCEEDINGS

a. To avoid inadvertent broadcast of juror images, jury selection in both criminal jury trials and civil jury trials will not be live broadcast.

b. To the greatest extent practicable, public access to all phases of jury selection (in both civil and criminal trials) and virtual civil jury trials,

will be provided by permitting limited numbers of observers to be physically present in the courtroom or other courthouse location, consistent with social distancing and other requirements. Assignment Judges may permit remote options for observation based on individual circumstances.

c. Socially distanced in-person jury trials may be live broadcast. In general, instead of live broadcast, public access will be provided by permitting individuals to be physically present in the courtroom, consistent with social distancing and other requirements. As necessary, individualized remote access also may be permitted.

(5) OPERATIONAL GUIDANCE

The Administrative Director of the Courts is authorized to promulgate additional protocols on jury operation relating to this resumption of in-person jury proceedings during the ongoing COVID-19 pandemic.

For the Court,

Chief Justice

Dated: May 11, 2021

EXHIBIT B

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Theodore Stephens II, Romesh Sukhdeo,
Gwendolyn Williams, and Roger Imhof

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ALEX G. LEONE, Plaintiff, v. ESSEX COUNTY PROSECUTOR'S OFFICE, THEODORE STEPHENS II, ROMESH SUKHDEO, GWENDOLYN WILLIAMS, and ROGER IMHOF, in their individual and official capacities, Defendants.	**CIVIL ACTION NO. 2:21-cv-12786-SDW-ESK** **CERTIFICATION OF ROGER IMHOF**

I, ROGER IMHOF, hereby certify as follows:

1. I am currently employed by the Essex County Prosecutor's Office ("ECPO") as Chief Assistant Prosecutor. I submit this certification upon my personal knowledge and in support of Defendants' Opposition to Plaintiff, Alex G. Leone's ("Plaintiff"), Motion for a Preliminary Injunction.

2. Plaintiff was hired on September 9, 2019.

3. A little more than six months later, in March 2020, the ECPO offices informed employees that in order to limit employee exposure to one another due to the Covid-19 pandemic, employees would be working on an A/B schedule, meaning that employees would rotate being in the office one week, and then working remotely the following week.

4. On or about November 15, 2020, the A/B schedule was suspended due to increased concern about in-person contact, and as such, assistant prosecutors were only required to come into the office as needed, while supervisors and department heads were in the office most days handling emergent matters.

5. On or about April 5, 2021, assistant prosecutors in various units, including Plaintiff's unit, were informed that they must return to an A/B schedule based on the workload of their department heads, who had been taking on many of the responsibilities of assistant prosecutors and calling them to get them up to speed on matters, which was not sustainable with an increased workload.

6. On or about April 26, 2021, Plaintiff submitted a request for accommodation form to his supervisor, Deputy Chief Prosecutor Walter Dirkin ("Dirkin").

7. On or about May 6, 2021, in response to Plaintiff's request, a video conference meeting was scheduled with Plaintiff which I participated in, as well as Executive Assistant Prosecutor Gwendolyn Williams, and Dirkin.

8. During this conference, I explained to Plaintiff that his presence in the office was necessary to handle emergent matters, which were unfairly falling on heads of departments who were coming in daily; additionally, as a new attorney with the Prosecutor's Office, his presence in the office was vital to his growth and development as a trial lawyer – to observe colleagues at other trials, and to collaborate and strategize with colleagues in the office regarding investigations, witness and victim interviews, case presentations to grand juries, among other responsibilities of an Assistant Prosecutor.

9. There were several accommodations offered by the ECPO that were discussed with Plaintiff, which were memorialized in my memorandum dated May 12, 2021.

10. One of the alternatives presented to him was the private interview room which, while outfitted with surveillance cameras, an employee can remove the key which activates the surveillance cameras, and take it into the room with him, thereby assuring him or herself that the cameras are not on and the employee is not being recorded.

11. Plaintiff rejected all of the ECPO's proposed accommodations.

12. As of August 2, 2021, all ECPO employees - of every unit including the Appellate and Adult Trial Sections – are required to be back in the office full time.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

/s/ Roger Imhof
ROGER IMHOF

Dated: August 24, 2021

16076039v1 (1582.132)

UNITED STATES DISCTICT COURT
DISTRICT OF NEW JERSEY

ALEX G. LEONE,	:	**REPLY IN SUPPORT**
Plaintiff,	:	**OF MOTION FOR**
v.	:	**PRELIMINARY**
	:	**INJUNCTION**
ESSEX COUNTY PROSECUTOR'S OFFICE,	:	Docket No. 2:21-cv-12786
THEODORE STEPHENS II,	:	**Motion Day:**
ROMESH SUKHDEO,	:	September 7, 2021
GWENDOLYN WILLIAMS,	:	
and	:	
ROGER IMHOF,	:	
in their individual and official capacities,	:	
Defendants.	:	

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INTRODUCTION

In their legal arguments, Defendants fail to cite the applicable legal standards; conspicuously omit binding and on-point cases, citing only one of the Supreme Court's precedents on religious liberty only in passing; and make multiple clearly identifiable legal errors. In their assertions on the facts, Defendants offer virtually no evidence and fail to identify any concrete fact or specific example that could even conceivably justify their totally untailored religious discrimination—instead resorting to mischaracterizations, if not downright misrepresentations.

Plaintiff replies to each of these sets of fatal issues below.[1]

ARGUMENT

I. Defendants' Legal Arguments

Defendants' legal argument section is sloppy, to say the least.

A. Likelihood of Success on the Merits

First, after opening with citations to three unpublished cases,[2] Defendants cite a defunct case that misstates the preliminary injunction standard. (*See* Opp. at 9 (citing *NutraSweet Co. v. Vit–Mar Enters., Inc.*, 176 F.3d 151, 153 (3d Cir. 1999)). In a precedential opinion, the Court of Appeals identified *NutraSweet*—down to Defendants' exact pincite—as part of an "inconsistent line of cases" that "compounded subtle misinterpretations of . . . longstanding jurisprudence," and went on to clarify the

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[1] Citations in this brief will be as follows: to the Complaint (D.E. No. 1) as "Compl." and its exhibits as "Compl. Ex. __"; to the Memorandum (D.E. No. 8-1) supporting the Motion for Preliminary Injunction (D.E. No. 8) as "MPI Br." and the exhibits to the Motion as "MPI Br. Ex. __"; and to Defendants' Brief (D.E. No. 11) as "Opp."

[2] (*See* Opp. at 9 (citing *Checker Cab of Philadelphia Inc. v. Uber Techs., Inc.*, 642 F. App'x 229, 231 (3d Cir. 2016); *Exec. Home Care Franchising LLC v. Marshall Health Corp.*, 642 F. App'x 181, 183 (3d Cir. 2016); *Julius Realty Corp. v. Thompson*, 2020 WL 2539188 (D.N.J. May 19, 2020))). Unpublished cases "are not binding." *El v. City of Pittsburgh*, 975 F.3d 327, 340 (3d Cir. 2020).

applicable standard. *See Reilly v. City of Harrisburg*, 858 F.3d 173, 177 (3d Cir. 2017). Whereas Defendants incorrectly state that "of course" "[a] plaintiff's failure to establish any element in its favor renders a preliminary injunction inappropriate"—and would strip the Court of its discretion to weigh all four preliminary injunction factors—the correct standard is more favorable to Plaintiff:

> [A] movant for preliminary equitable relief must meet the threshold for the first two "most critical" factors: it must demonstrate that it can win on the merits (which requires a showing significantly better than negligible but not necessarily more likely than not) and that it is more likely than not to suffer irreparable harm in the absence of preliminary relief. If these gateway factors are met, a court then considers the remaining two factors and determines in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief.
>
> *Id.* at 179 (footnotes omitted).

Then, Defendants—either ignorantly or intentionally[3]—omit an aspect of the preliminary injunction analysis crucial "*in First Amendment cases*:" A plaintiff moving for a preliminary injunction "must be deemed likely to prevail" on the merits *unless the government justifies its infringement of First Amendment liberty under the appropriate level of scrutiny*. *See Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666 (2004); *Reilly*, 858 F.3d at 180 (emphasis added). Here—as explained in Plaintiff's brief (MPI Br. at 5-14) and again below—"the [g]overnment failed" to do so: Defendants do not even come close. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006); (MPI Br. at 5-14).

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[3] Because Defendants' counsel is a law partner and chair of her law firm's "Complex Commercial Litigation" practice group, https://www.genovaburns.com/attorneys/kathleen-barnett-einhorn, and because Plaintiff previously cited *Reilly* and its applicable standards several times (MPI Br. at 5, 6 & 14), it is difficult to avoid the inference that this omission was intentional.

But not only have Defendants omitted this important aspect of the applicable legal standard—and utterly failed to carry their burden under it—*they have illicitly attempted to shift the burden to Plaintiff* to explain why their proposed "accommodations" are unreasonable. (*See, e.g.*, Opp. at 13 (asserting that "the Court need not address" Defendants' burdening of Plaintiff's free exercise "because the ECPO has . . . offer[ed] reasonable accommodations to Plaintiff")). It is easy to explain why Defendants' proposed "accommodations" are unreasonable, and Plaintiff will do so, for the fourth time,[4] below. But to be clear, Defendants' illicit attempt to shift that burden to Plaintiff has no basis in law—and is even directly contradicted by the state law governing Defendants. *See* N.J.S.A. 10:5-12(q)(1) (providing that an employer cannot "require a person to violate or forego a sincerely held religious practice" *unless the employer "demonstrates" that accommodating the religious practice would cause "undue hardship"*); (Opp. at 12 (recognizing this legal requirement)).

Next, Defendants fallaciously argue that because some or all employees "were required to return [physically] to work on August 2, 2021"—or because Defendants are not *at this moment* granting secular exemptions from the requirement that employees be physically present in the office—their policies are "neutral and generally applicable." (*See* Opp. at 10-11). This fallacious argument, however, "misapprehends the issue:" The Supreme Court has foreclosed Defendants' argument—actually, stronger versions of it—twice over. *See Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. ___, ___ (slip op.) at 10 (June 17, 2021); *Tandon v Newsom*, 141 S. Ct. 1294, 1297 (2021).[5]

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[4] (*See* Compl. Ex. E at 7-9; Compl ¶¶ 47 & 55-59; MPI Br. at 4 & 13).

[5] Defendants do not cite *Fulton* even one time, not even when discussing the requirements of neutrality and general applicability, which the Court directly addressed in *Fulton* only months ago. (*See* Opp. at 10); *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. ___, ___ (slip op.) at 5-7 (June 17, 2021). It is understandable why Defendants would want to pretend *Fulton* does not exist: It is a binding Supreme Court case that

- In *Fulton*, the Supreme Court made clear that having "a formal mechanism for granting exceptions" *at all* "renders [Defendants'] 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.[6] This is so because it permits the government "to decide which reasons for not complying with the policy are worthy of solicitude." *Id.* Here, not only *may* Defendants' "decide which reasons for not complying with the[ir] [physical presence] policy are worthy of solicitude:" They in fact decided during more than a year that secular reasons are "worthy of solicitude" but that religious reasons are not *and never are. See id.* Moreover, Defendants may exercise the arbitrary discretion accorded to them under their formal or informal exemption policies at any time and decide *again* that secular reasons are worthy of solicitude *while continuing to discriminate against religion. 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

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severely undermines, if not outright refutes, their entire position and shows clearly that preliminary relief should be granted.

[6] Defendants may attempt to argue that because they do not have a *formal* mechanism for granting exemptions from the requirement that employees report physically for work, they are not subject to the legal analysis in *Fulton*. Defendants apparently do have a formal mechanism, or several, for granting exemptions from that requirement. (*See, e.g.*, MPI Ex. A ¶¶ 10-11; MPI Ex. C; Opp. at 1-2 (describing the deliberative processes underlying Defendants' decisions to permit certain employees to work from home at certain times); Opp. at 5-6 (describing the formal process Defendants claim they followed when considering Plaintiff's request for an exemption)). But "formal" or "informal," the argument would make no sense: *The very potential* for granting exemptions, *Fulton* makes clear, is the problem; and an *informal* system depending *even more* on Defendants' arbitrary discretion poses an *even greater threat* of religious discrimination. *See Fulton*, (slip op.) at 10. Stated simply, the Supreme Court's "concern [i]s the prospect of the government's deciding that secular motivations are more important than religious motivations," *Fraternal Order, Police Newark v. City, Newark*, 170 F.3d 359, 365 (3d Cir. 1999), *and that is precisely what Defendants have done here*—and in the absence of preliminary relief, would be permitted to continue to do.

(August 26, 2021) ("It is indisputable that the public has a strong interest in combating the spread of the COVID–19 Delta variant."); *Hospital visitor restrictions return in parts of New Jersey as COVID cases spike.*[7] Stated simply, the Supreme Court's "concern [i]s the prospect of the government's deciding that secular motivations are more important than religious motivations," *Fraternal Order, Police Newark v. City, Newark*, 170 F.3d 359, 365 (3d Cir. 1999), *and that is precisely what Defendants have done here*—and in the absence of preliminary relief, would be permitted to continue to do.

- In *Tandon*, which Defendants also pretend does not exist, the Supreme Court made clear that "*even if the government withdraws*" a restriction on free exercise, *a plaintiff "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. *Tandon,* 141 S. Ct. at 1297 (citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (per curiam))) (emphases added). Here, Plaintiff remains not only under a "constant threat" of free exercise infringement: Defendants' free exercise infringement against Plaintiff has never ended—*and was recently increased by 100%—let alone the discriminatory policy resulting in the infringement actually "withdraw[n]." See id.*; (Compl. Ex. D. at 2-3 (stating Defendant's policy of categorically discriminating against a religious accommodation even "in the future")). And despite Defendants' August 2 shifting of who must be physically present in the office or when, Defendants' discretion to grant exemptions and

[7] North Jersey.com, (Aug. 19, 2021), https://www.northjersey.com/story/news/coronavirus/2021/08/19/southern-nj-hospitals-limit-visitors-covid-cases-spike-delta-varient/8199037002/.

permit employees to work from home for secular reasons *may again be exercised at any time*. *See Tandon*, 141 S. Ct. at 1297; *Alabama Association*, (slip op.) at 8; (*see, e.g.*, *supra*, note 7). In other words, as observed above, Defendants maintain arbitrary discretion to favor secular reasons for working from home over religious reasons. This is precisely the kind of discretion the Supreme Court has said is *not* neutral and generally applicable and squarely raises—and, here, actualizes—the Court's concern that the government will engage in religious discrimination. *See Fulton*, (slip. op.) at 10; *Fraternal Order*, 170 F.3d at 365.

In addition, regardless of their treatment of others for secular reasons, Defendants intentionally discriminated against religion in denying the Request for Accommodation, *explicitly and categorically singling out religion as* never *an adequate basis to permit work from home*. (Compl. Ex. D at 2 (categorically asserting that religion can *never* justify working from home *at all* "presently or in the future"). This "decision to provide medical exemptions while [*categorically*] refusing [a] religious exemption[] is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny." *See Fraternal Order*, 170 F.3d at 365; *id.* (noting that it is *even more problematic* when a government employer permits a "categorical exemption" for secular reasons "but not for . . . religious" reasons). Defendants' discriminatory intent has continued from that decision *until this day*: It does not cease to exist simply because Defendants have decided to treat others differently for secular reasons, and Defendants' hostility to religion is shockingly evident *even in their brief*. (*See, e.g.*, Opp. at 5, 6 &17 (derisively referring to the religious need to pray in scarequotes multiple times); Opp. at 3 (derisively referring to Plaintiff's prayer practice as a "moving" "target")).

Therefore, there are *three reasons each of which is independently sufficient* to reject Defendants' contention that their discretionary policies are neutral and generally applicable. (*See also* Compl. ¶¶ 72-76; MPI Br. at 7-9).

Finally, and tellingly, Defendants argue only that rational basis scrutiny applies and that their religious discrimination "withstands the low bar of rational basis scrutiny."[8] This is a pipedream and deliberate disregard for the applicable standard announced by the Supreme Court. *See, e.g.*, *Fulton*, (slip op.) at 6; *Tandon*, 141 S. Ct. at 1296; *see also Fraternal Order*, 170 F.3d at 366. As Plaintiff had twice explained, strict scrutiny applies three times over. (*See* Compl. ¶¶ 72-76; MPI Br. at 7-9). And similar to their failure to cite the applicable preliminary injunction standards (and *Fulton* and *Tandon*), Defendants' fail to cite the Court of Appeals's binding decision in *Fraternal Order, which is on all fours with this case and shows clearly that heightened scrutiny applies and that preliminary relief should be granted.* (*See* MPI Br. at 10-11). *Defendants do not even attempt to distinguish* Fraternal Order; they literally do not even cite it even one time.[9]

On the merits, Plaintiff needed only to make "a showing significantly better than negligible:" that he "*can* win on the merits." *See Reilly*, 858 F.3d at 179 (emphasis added).

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[8] It does not: Because Defendants' discrimination is motivated by unlawful intent, is totally untailored, and is shot through with inconsistencies, it would not pass even the most minimal level of scrutiny, let alone a heightened level of scrutiny, let alone strict scrutiny. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 632-33 (1996); (MPI Br. at 12 n.5).

[9] The loosely relevant cases Defendants *do* cite plainly support the application for preliminary relief. *Compare, e.g.*, *McTernan v. City of York*, 564 F.3d 636, 647 (3d Cir. 2009) ("Government action is not neutral and generally applicable . . . if it burdens religiously motivated conduct but exempts substantial comparable conduct that is not religiously motivated."), *with* Compl. ¶ 75 (Defendants have "prohibit[ed] religious conduct," i.e., working from home as necessary to pray, "while permitting secular conduct," i.e., working from home for secular reasons, which "undermines the government's asserted interests in a similar way"—in fact, the same exact way. (citing *Fulton*, (slip op.) at 6)); *see also McTernan*, 564 F.3d at 650-51 (suggesting that even when the government asserts an "interest in *safety and avoiding collisions*" its discrimination should be enjoined if its means of advancing its asserted interest are not narrowly tailored (emphasis added)).

Plaintiff easily made this showing. (*See* MPI Br. at 5-14). In contrast, Defendants do not even come close to discharging their duty to justify their burdening of Plaintiff's free exercise, having eked out only a dubious argument that they pass mere rational basis scrutiny. (*See supra*, note 8). Accordingly, Plaintiff "must be deemed likely to prevail" on the merits. *See Ashcroft*, 542 U.S. at 666; *Gonzales*, 546 U.S. at 429; *Reilly*, at 180.

B. Irreparable Harm

On the issue of irreparable harm, Defendants continue to make clearly identifiable errors of law and fact.[10]

First, Defendants entirely omit the controlling standard provided directly by the Supreme Court: 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) (citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020)). As if this standard and Plaintiff's analysis of it were not sufficient to find this factor in favor of Plaintiff here (*see* MPI Br. at 14-15)—where Defendants' infringement of free exercise is not only not "minimal" in duration but *categorical and permanent—Defendants' themselves apparently concede that Plaintiff is suffering irreparable harm*: "The harm allegedly suffered by Plaintiff . . . is difficult, if not impossible, to quantify and thus even more challenging to remedy." (*See* Opp. at 3); *Ramsay v. Nat'l Bd. of Med. Examiners*, 968 F.3d 251, 262 (3d Cir. 2020) (defining irreparable harm).

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[10] As in the preceding section, Defendants again open with citation to an unpublished case and again cite a defunct case on which the Court of Appeals cast doubt in *Reilly*. (*See* Opp. at 14 (citing *ECRI v. McGraw-Hill, Inc.*, 809 F.2d 223, 226 (3d Cir. 1987)); *Reilly*, 858 F.3d at 177 (discussing *ECRI*).

Defendants also cited *ECRI* in their dubious attempt to bully Plaintiff into withdrawing the instant motion. (D.E. No. 10-1 (Ex. A)). As is now clear, counsel's letter was premised on a negligent lack of basic legal research—and sheer bad faith at worst—further strengthening the inference that *the attempt to bully Plaintiff into withdrawing the instant motion was unlawful and further undermining the defamatory assertion that the motion "is frivolous." See id.*; (*infra*, note 22).

Then, having correctly recognized that "Plaintiff's religious beliefs are sincerely held" (Opp. at 3), Defendants illegitimately attempt to dispute that "Plaintiff must forego prayer when he is in the office" (Opp. at 14-15). Yet Plaintiff has stated (and declared under penalty of perjury) unequivocally:

> When physically present in the office, I am forced to forgo a prayer practice I engage in throughout every work day. (I engage in this practice every day except Sunday.) My religious belief is that the peace and solitude required for this practice are impossible in the office.
>
> (MPI Ex. A ¶ 13; *see also, e.g.*, Compl. ¶¶ 19-27).

As the Supreme Court has made clear, "it is not for [courts] to say that . . . 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;'" and, here, "there is no dispute that it does." *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014) (quoting *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 716 (1981)); (Opp. at 3). Yet Defendants would have the Court disregard this rule and enquire whether Plaintiff's religious convictions *really* require Plaintiff to pray audibly and spontaneously in peace and solitude outside the office, requiring him to forgo his prayer practice while in the office. What's more: Defendants have repeatedly suggested that it is appropriate to dissect "a specific provision in Christianity" to determine whether granting the requested accommodation is appropriate. (Opp. at 6; Compl. Ex. D at 1; *see also* Compl. Ex. E at 9 n.5; Compl. n.2).[11] *See Thomas*, 450 U.S. at 715 ("Courts should not undertake to dissect religious beliefs.").

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[11] If Defendants are interested in "a specific provision in Christianity" relevant to Plaintiff's prayer practice, they could consult the Bible. *See, e.g.*, Genesis 1:1; Exodus 15:26; Deuteronomy 10:14; Joshua 1:9; I Kings 4:29-33; I Chronicles 16:8; Nehemiah 2:4-5; & 9:4-6; Job 26:13, 38:4 & 38-41; Psalms 1:1-3, 8:3-5, 19:1-2, 30:11-12, 35:28, 40:16-17, 51:15-17, 63:5, 64:1, 66:19, 71:8 & 24, 89:1 & 11, 94:18-19, 95:1-5, 102:25, 104:14-17 & 33, 107:41, 119:12-13 & 148:7-10; Isaiah 44:24 & 51:13; Jeremiah 17:14; Ezekiel 1:1; Amos 9:6; Matthew 5, 6:3-4, 6:5-6, 6:17-18, 6:26-29, 8:7, 14:23, 22:37-40

Next, Defendants fallaciously assert that, because Plaintiff is "fully willing to be physically present for anything required by [his] job responsibilities," he does not suffer irreparable harm when discriminatorily forced to forgo his prayer practice. (*See* Opp. at 15). Of course, irreparable harm occurs here *as a result of Defendants' unlawful discrimination*—but requiring Plaintiff to be physically present in order to fulfill his job responsibilities would not be unlawful discrimination, because the same requirement applies to all employees when work from home is permitted by Defendants for secular reasons, and Plaintiff has never even asked to be absolved of any job responsibility to begin with. (*See, e.g.*, Compl. Exs. A & B). He asked simply that the status quo that extended a work-from-home accommodation to employees for secular reasons be extended to him for religious reasons. (*See, e.g.*, Compl. Ex. C).

But in discriminatorily requiring Plaintiff to be physically present *irrespective of his job responsibilities*,[12] Defendants are refusing to extend that same accommodation accorded to all employees for secular reasons: requiring their physical presence *only* "*based on the needs of the office.*" (*See* Compl. 45-46 & MPI Br. at 13 (quoting Compl. Ex. D at 2)). Hence Defendants fallaciously conflate the forgoing of Plaintiff's prayer practice *at all*—which may incidentally occur as a result of being in the office when

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& 25:31-46; Mark 1:35-36, 6:46 & 7:34; Luke 2:13-14, 12:22-28, 18:9-14 & 23:34; John 1:1, 12:44 & 17:1-2; Acts 1:10-11 & 6:2-4; Romans 1:20; II Corinthians 10:3-5; Ephesians 1:15-16, 6:1-4 & 6:13-18; Philippians 4:6; Colossians 4:2; I Thessalonians 5:16-18; Hebrews 13:15; James 1:27; Revelation 21:9-11.

[12] The illogic of Defendants' discrimination against religion is plainly evident in their "offers" of "accommodations"—for instance, Defendants would generally *permit* Plaintiff 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*" (Compl. Ex. D at 3 (emphasis added)), but *never* permit Plaintiff work at his nearby home, where he can actually pray and work consistent with his job responsibilities, on the very same condition (*see, e.g.*, Compl. ¶ 58; MPI Ex. A ¶¶ 13-17). These putative "accommodations" will be addressed again below.

reasonably necessary—with irreparable harm, which occurs only when forgoing the prayer practice *is a result of Defendants' unlawful discrimination.* Plaintiff already observed that forgoing his prayer practice "is sometimes an unavoidable consequence of life." (Compl. ¶ 26). To attempt to use this commonsense observation against Plaintiff is legally fallacious and highly inappropriate.[13]

Additionally, and again fallaciously, Defendants suggest that their religious discrimination "does not cause [Plaintiff] irreparable harm" because "he was able to work full time in the office" before the pandemic. (*See* Opp. at 15; Opp. at 3 (calling this observation "critically" important)). It is true that Plaintiff worked in a different unit of the office for several months before the pandemic and during that time sought only other religious accommodations. Yet, again, the Supreme Court puts the lie to Defendants' fallacy: "The First Amendment protects the free exercise rights of employees who adopt religious beliefs or convert from one faith to another after they are hired;" and "[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 rights and causes him irreparable harm. *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 144 (1987). Defendants do not cite *Hobbie*; and other than *Smith* on one page in passing (Opp. at 10), *they do not cite any Supreme Court precedent on religious liberty.*

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[13] The upshot of Defendants' observation that "there is no distinctive difference between coming in on a Monday versus a Wednesday," if any, is unclear. (*See* Opp. at 15). As made clear in his brief, "Plaintiff has been using 'accrued time' . . . for multiple days during weeks Defendants have arbitrarily required Plaintiff to forgo his prayer practice"—now, every week (*see* MPI Ex. C)—which "prevent[s] irreparable harm to Plaintiff on at least those days." (*See* MPI Br. at 13-14). The need to use accrued time this way arises solely because of Defendants' unlawful religious discrimination. The only reason Plaintiff does not use accrued time on both "Monday" *and* "Wednesday" is because it "will run out" (*see* Compl. MPI Ex. B); and Defendants have threatened to penalize Plaintiff if he works from home as necessary to pray—*completely consistently with his job responsibilities*—without using accrued time (*see, e.g.*, Compl. Ex. D at 2-3)

C. Balancing of the Equities

Defendants already concede that "[t]he harm allegedly suffered by Plaintiff . . . is difficult, if not impossible, to quantify and thus even more challenging to remedy." (*See* Opp. at 3). They also concede that Plaintiff has identified additional harm he is suffering—"adverse spiritual, psychological and even physical effects"—but that this formulation is not "specific" enough in Defendants' estimation. (*See, e.g.*, Opp. at 15). Defendants could have answered their own desire for specificity by actually reading the Complaint and other record documents: In addition to the irreparable harm of burdened free exercise, Plaintiff has identified numerous specific examples of harm inflicted on him by Defendants' unlawful discrimination: "experiencing anxiety or dread during time in the office as well as during nights before going to the office;" "being unable focus on and complete work efficiently;" "suffering sleep problems or headaches;" and bearing the unfair financial disadvantage of being forced by Defendants to use accrued time in order to engage in his prayer practice; *and more*. (*See* Compl. ¶ 25; MPI Ex. B; *see also* MPI Br. at 15 ("Plaintiff often works from home normally and efficiently even on days when using accrued time")). Yet, despite their desire for specificity when they hope it will harm Plaintiff's case, Defendants *still* have not identified a single specific fact or concrete example in support of their totally untailored religious discrimination.

In contrast to Plaintiff, Defendants claim, Defendants would suffer "actual harm" if the Court granted preliminary relief. (Opp. at 18). This assertion is as unfounded now as it was when Defendants first made it (Compl. Ex. D at 2-3) and then refused to defend it (Compl. Ex. G). The past several months have made this abundantly clear: None of the purported reasons Defendants gave for categorically prohibiting Plaintiff's prayer practice has ever applied. (*See* MPI Ex. A ¶¶ 3-6). The extent of "actual harm" identified by Defendants is limited to the paragraph of vague assertions in their memorandum that

initially denied Plaintiff's request for a religious accommodation. (*See* Opp. at 17-18 (citing Compl. Ex. D at 2-3)). These vague assertions have already been debunked—repeatedly. (*See, e.g.*, Compl. Ex. E at 2-6; Compl. ¶¶ 35-67; MPI Br. at 12-14; *see also* MPI Br. at 12 n.5). And the Supreme Court has made clear that stating putative interests "at a high level of generality" is not sufficient to justify Defendants' discrimination: "the First Amendment demands a more precise analysis." *See Fulton*, (slip op.) at 13-14.

But not only have these vague assertions been repeatedly debunked: *Even now Defendants fail to offer a single concrete fact or specific example in support of them*, as is evident from the certification of Defendant Imhof. (Opp. Ex. B).[14] Other than a press release (Opp. Ex. A), the certification of Defendant Imhof is *the only putative evidence offered by Defendants*—yet it contains only vague assertions and uncontested observations *without citing any concrete fact or specific example* that could even potentially justify Defendants' religious discrimination.

A particularly telling example is Defendants' repeated, vague assertions regarding "emergent matters" (Opp. Ex. B at ¶ 8), that "emergent matters that arise may require immediate response that would necessitate [Plaintiff's] presence in the office" (Opp. at 18 (citing Compl. Ex. D at 2)). To someone who has no idea what is going on, that statement could potentially sound persuasive. But as Plaintiff has made clear (and declared under penalty of perjury): During the entirety of a year in Plaintiff's present position, "there has never been an emergent matter that necessitated [his] immediate physical presence in the office;" and Plaintiff is not even "sure what such a hypothetical scenario would be like," nor do Defendants provide any insight on this mystery even now.

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[14] Defendant Imhof's certification fails to comply with 28 U.S.C. § 1746 (e.g., it fails to certify "under penalty of perjury"). *See* L. Civ. R. 7.2(a) (listing "affidavits, declarations, [and] certifications" in reference to 28 U.S.C. § 1746). Regardless, as explained above, it does not controvert any material fact in the record.

(*See, e.g.*, MPI Ex. A ¶ 4; Compl. ¶ 40). Plaintiff's testimony is entirely uncontroverted and the closest Defendants even come to addressing it is the additional vague assertion that "emergent matters . . . often arise in Plaintiff's line of work." (*See* Opp. at 13-14). Yes, emergent matters often arise within a legal "line of work" generally—but not in Plaintiff's employment specifically. (*See, e.g.*, MPI Ex. A ¶ 4; Compl. ¶ 40). Defendants apparently do not even try to dispute this fact. Nor do Defendants explain why in the event such a rare and hypothetical scenario comes to pass "Plaintiff could not simply drive to the office immediately" from his nearby home. (*See* Compl. ¶¶ 40 & 65; *see also* Compl. Ex. E at 5 n.3 ("The drive to the office from [Plaintiff's] home is approximately twenty minutes.")).

Another telling example is Defendants' continued, misplaced reliance on potential in-person obligations such as witness interviews or court presentations. (Opp. Ex. B at ¶ 8). As Plaintiff made clear before filing this action, and even clearer when he declared under penalty of perjury in his motion papers: "To be clear, and to reiterate, the requested accommodation would not interfere with in-person observation of witness interviews" or court appearances (Compl. Ex. E at 2); "*all in-person court appearances, witness interviews, or other in-person obligations for which [Plaintiff] ha[s] been responsible have proceeded normally and efficiently, including on days [he] was working from home*" (MPI Ex. A ¶ 3 (emphasis added)). Plaintiff is "fully willing to be physically present for anything required by [his] job responsibilities—including, for instance, in-person court appearances, witness interviews, or any other obligation." (MPI Ex. A ¶ 9). Again, *this testimony is entirely uncontroverted and Defendants do not address it factually.*

Additionally—and, predictably, vaguely—Defendants appeal to "collaborat[ion]" (Opp. Ex. B at ¶ 8) and "*ad hoc* meetings" (Opp. at 13). Yet Defendants again fail to offer evidence on this putative interest, and fail to controvert Plaintiff's evidence: Ad hoc

meetings are rare (Compl. ¶ 38), like in-person meetings generally (Compl. Ex. E at 4); "ad hoc" meetings conducted in person in the office have been indistinguishable from "ad hoc" meetings conducted electronically while working from home (MPI Ex. A ¶ 5); and electronic meetings are "efficient or even seamless" and are often Defendants' and Plaintiff's supervisor's chosen method of meeting (Compl. ¶ 39). *Defendants utterly fail to explain with any fact or example* why permitting Plaintiff to participate in such meetings or collaboration electronically would "requir[e] unreasonable expense or difficulty [or] unreasonable interference with the safe or efficient operation of the workplace"—or how doing so would place even a small burden on Defendants. (Compl. ¶ 38 (quoting N.J.S.A. 10:5-12(q)(3)(a)).[15]

As with each putative interest: Defendants make a vague assertion at a high level of generality, *see Fulton*, (slip op.) at 13-14, without even trying to connect it to Plaintiff's employment specifically; Plaintiff debunks it with a clear explanation and citation to evidence; and Defendants fail to respond with anything but another vague assertion—let alone a shred of evidence to the contrary.

In their brief and accompanying papers, Defendants illicitly attempt to supplement their rationale for religious discrimination—despite previously "st[anding] by" that plainly deficient rationale as the exclusive rationale for their religious discrimination. (*See* MPI Br. at 6 n.3 (citing Compl. Ex. G)).[16] Regardless, the interests they attempt to

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[15] Plaintiff recognizes that in-person meetings may sometimes be reasonably necessary (Compl. Ex. E at 4 n.2) although they have generally been quite rare (Compl. Ex. E at 4 ("On very rare occasions—perhaps three over the course of the year—a supervisor scheduled an in-person meeting for which physical presence was requested but not immediately required.")). *Again*, Plaintiff is *"fully willing to be physically present for anything required by [his] job responsibilities—including, for instance, in-person court appearances, witness interviews, or any other obligation."* (MPI Ex. A ¶ 9 (emphasis added)).

[16] Defendants chose to "stand by" the reasons originally offered as the sole rationale for their religious discrimination, and refused to offer any additional reason when Plaintiff

smuggle in now are equally without merit. For instance, after never mentioning the issue before, Defendants now vaguely assert that "department heads . . . had been taking on many of the responsibilities of assistant prosecutors" (*see* Opp. Ex. B at ¶¶ 5 & 8) but do not even attempt to connect this vague assertion to Plaintiff. Nor could they: Plaintiff is not aware of a single occasion on which a "department head," or anyone, "took on" any of his job responsibilities, nor do Defendants identify even one such occasion. Similarly, after never mentioning a putative interest in Plaintiff's "growth and development" through "observ[ation of] colleagues at other trials," they now cite this as a reason for categorically discriminating against Plaintiff's religious practice. (*See* Opp. Ex. B at ¶ 8). Yet, *as with each putative interest debunked previously*, Defendants have provided zero evidentiary basis in support of the putative interest: Plaintiff is not aware of a single occasion on which Defendants (or Plaintiff's supervisor) requested that Plaintiff observe another attorney's trial—nor would Plaintiff have objected to doing so had Defendants made this request. *As explained repeatedly*: Plaintiff is "fully willing to be physically present for anything required by [his] job responsibilities—including, for instance, in-person court appearances, witness interviews, or any other obligation," such as observing a trial (MPI Ex. A ¶ 9); and, *again*, Plaintiff is fully willing to be physically present *whenever* "accommodating [his] religious need would cause undue hardship." (Compl. Exs. A & B; Compl. Ex. E at 3; MPI Br. at 12 n.6).

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asked Defendants *before filing this lawsuit*: "Neither you nor anyone else has any . . . additional reason or explanation [for categorically denying Plaintiff's request for a religious accommodation]?" (Compl. Ex. G). That Defendants are smuggling in new reasons for their discrimination now—after requiring Plaintiff to sue and seek emergency relief—means the reasons originally offered were pretextual: at the very least, that they were not the reasons that "actually motivate[d]" Defendants' decision to deny Plaintiff a religious accommodation. *See Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994).

Defendants—in their brief but, tellingly, not their certification—vaguely suggest that permitting Plaintiff to work from home as necessary to pray would lead to a lack of "availability" or "effectiveness decline." (Opp. at 19). Yet they do not cite a single fact to support this vague suggestion and do not address Plaintiff's testimony to the contrary. (*See* MPI Ex. A ¶¶ 3-9 & 17). Defendants have also apparently chosen to remain willfully ignorant of information known by Plaintiff's supervisor regarding Plaintiff's excellent availability and efficiency when working from home.[17] For instance, when working from home, Plaintiff "completed assignments so quickly and thoroughly [(e.g., on May 6)] that it has surprised" his supervisor. (Compl. Ex. E at 6 n.4). 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. (*See id.* ("For instance, while being permitted to work from home, I have volunteered additional assistance many times; have expressly remarked that I am happy to take more work; and have completed assignments so quickly and thoroughly that it has surprised my supervisor.")). *And* being forced to forgo his prayer practice *hampers* Plaintiff's work efficiency: Plaintiff's "prayer practice has never interfered in Plaintiff's work, work efficiency, or responsiveness to

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[17] A complete failure by Defendants to consult Plaintiff's supervisor regarding this highly relevant information would be an inexcusable failure in diligence. *See* Fed. R. Civ. P. 11(b) (requiring "an inquiry reasonable under the circumstances"); New Jersey Rule of Professional Conduct 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client."); L. Civ. R. 103.1(a); Compl. ¶ 65 (observing that Plaintiff's supervisor "could have informed Defendants" of relevant information).

In the alternative, if Defendants and Defendants' counsel consulted Plaintiff's supervisor and are aware of this highly relevant information but have hidden it from the Court, they apparently have "misle[d] the tribunal." *See* New Jersey Rule of Professional Conduct 3.3(5); Fed. R. Civ. P. 11(b)(3) (requiring that "factual contentions have evidentiary support").

work communications. *In fact, it greatly assists Plaintiff in his work.*" (Compl. ¶ 23 (emphasis added)).

Despite the transparent weakness of these vague, evidence-free "interests," Defendants assert that it is "quite clear that in balancing the equities, Defendants would be far more harmed by the granting of the preliminary injunction than Plaintiff would by its denial." (Opp. at 19). Defendants would have the Court accept this assertion despite their concession that Plaintiff suffers irreparable harm—harm, in Defendants' words, "difficult, if not impossible, to quantify and thus even more challenging to remedy" (Opp. at 3)—as well as other harm (Opp. at 15) and despite offering *zero evidence* in support of *any harm* that Defendants would suffer if the Court were to grant preliminary relief (*see generally* Opp. Ex. B). Yet the assertion is not only totally unsupported *and* contradicted; it makes no sense to begin with: If the Essex County Prosecutor's Office can maintain its important responsibility to serve the public *when everyone is working from home for secular reasons during a year* (*see* Opp. at 20), the Court should be "at a loss to understand" why Defendants are now saying they cannot permit a single person to work from home for religious reasons—*at all, ever*. *See Fraternal Order*, 170 F.3d at 367.

D. Public Interest[18]

Defendants' arguments on this factor cannot pass the straight-face test. After completely omitting concern for Plaintiff's professional development in the extraordinarily weak rationale they "st[ood] by" previously (*see* Compl. Ex. G; *supra*, note 16), Defendants now would have the Court accept as a foremost reason against granting the motion that permitting Plaintiff to work from home as necessary to pray

[18] Continuing their string of failures to engage in basic legal research and consult Supreme Court precedent, Defendants have not noted that the balance-of-equities and public-interest factors "merge when the Government is the opposing party." *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Because Defendants have distinguished these two factors for separate analysis, this reply's structure will reflect that distinction.

would be "harmful to public interest" because Plaintiff would not "adequately develop professionally." (*See* Opp. at 20). Defendants, however, cannot speculate and "assume the worst" simply because Plaintiff 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 Defendants' speculative assertion reduces to. (*See also* Opp. at 7 ("anticipat[ing]" that "remote work is insufficient"); Compl. Ex. E at 2 & 5 (explaining that vague "anticipation" and speculation about "some point in the future" cannot justify Defendants' categorical religious discrimination)). Furthermore, being forced to forgo his prayer practice—regardless of the "needs of the office" (*see* Compl. Ex. D at 2)—*severely hampers Plaintiff's professional development and wellbeing on multiple levels*. (*See* Compl. ¶ 25; MPI Ex. A ¶ 17).

Defendants' remaining attempts to make an argument in this section similarly fall flat: For instance, Defendants assert a "likelihood" that "working from home would cause difficulties in handling [a] burdensome case load." (Opp. at 20). But Plaintiff already refuted this non-point months ago: Defendants "conspicuously ignore[] the fact that [an accommodation granted] could be tailored if necessary in the future;" and "[a]t most, an increased workload may make the circumstances under which it is reasonably necessary to be in the office more frequent; *and*, "again, *such circumstances are contemplated by the Request for Accommodation*" itself. (Compl. Ex E at 5; Compl. Exs. A & B).

These weak attempts at arguments do not even come close to showing that it would be in the public interest to permit Defendants to continue to burden Plaintiff's free exercise: "[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); *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 178 (3d Cir. 2002) ("[T]he public interest clearly favors the protection of constitutional rights.").

Even the public's *compelling* interest in *"[s]temming the spread" of a virus during a pandemic*, cannot justify totally untailored religious discrimination like Defendants'. *See, e.g., Roman Catholic Diocese*, 141 S. Ct. at 67 (emphasis added); *Fraternal Order*, 170 F.3d at 366-67. And permitting Plaintiff to work from home as necessary to pray *would actually advance the public's interest in stemming the spread of the virus during this pandemic. See Alabama Association*, (slip op.) at 8; (*see, e.g., supra*, note 7). Even though Defendants used this putative interest to suspend the requirement that *"all employees" report physically to work for prolonged periods* (Opp. at 2), they have apparently given it zero weight in their calculated decision to discriminate against Plaintiff's religious practice.

This is pure discrimination against religion: Defendants' discriminatory "value judgment that secular (i.e., medical) motivations . . . are important enough to overcome its general interest[s] . . . but that religious motivations are not" cannot stand. *See Fraternal Order*, 170 F.3d at 366; (MPI Br. at 5-16).

II. Defendants' Factual Mischaracterizations (or Misrepresentations)

That Defendants' legal arguments are baseless, and because they utterly failed to carry their burden under the applicable standard, *see, e.g., Reilly*, 858 F.3d at 180, suffice to refute their assertion that the Court should deny the motion. But several of Defendants' factual mischaracterizations—if not downright misrepresentations—require at least brief responses in support of the same conclusion:

- *Defendants' opening statement* falsely asserts that Plaintiff argues that Defendants' August 2 decision "to have all employees return to the office . . . constitutes a discriminatory policy in violation of [Plaintiff's] right to the free exercise." (Opp. at 1). To be clear, Defendants' August 2 exercise of discretion is a result of their policy, formal or informal, that permits Defendants to make value judgments about which

reasons are adequate to permit working from home: Defendants' policy permits them arbitrary discretion to favor secular reasons for working from home over religious reasons, and they in fact exercised their discretion in that fashion for more than a year. The "discriminatory policy" itself, however, is Defendants' categorical discrimination against religion expressed explicitly in a memorandum: According to that memorandum, *religion can never be an adequate basis to permit work from home as necessary to pray at all, to any extent, under any circumstances "presently or in the future."* (Compl. Ex. D at 2-3). Even milder religious discrimination would violate the Free Exercise Clause, but here Defendants have chosen a position of extreme intolerance and hostility to religion glaringly evident not only in the facts of this case but even in their brief. (*See, e.g.*, Opp. at 5, 6 & 17 (derisively referring to the religious need to pray in scarequotes multiple times); Opp. at 3).

- Defendants repeatedly make false assertions like, "Plaintiff [seeks] unilateral authority to simply come and go as he pleases, with no recourse available to his employer." (Opp. at 4; *see also, e.g.*, Opp. at 3, 5, 8 (falsely accusing Plaintiff of seeking "unfettered authority to determine the nature of his employment") & 13). To be clear, Plaintiff seeks only the *exact same accommodation that was extended to employees for secular reasons for more than a year*: to work from home as a general matter and to be physically present whenever reasonably necessary or, as Defendants' put it, "based on the needs of the office." (*See* Compl. Ex. D at 1).[19] In other words, Plaintiff simply requested that the "status quo continue" (Compl. Ex. C): that the

[19] Here, Plaintiff could again observe that he is "fully willing to be physically present for anything required by [his] job responsibilities—including, for instance, in-person court appearances, witness interviews, or any other obligation" (MPI Ex. A ¶ 9)—but only in an echo chamber of willful ignorance and religious animus would this not already be clear.

status quo that permitted "all employees [to] work[] from home full-time" for secular reasons (Opp. at 2) continue for Plaintiff for religious reasons. This was made especially clear during the May 6 meeting (*see* Compl. ¶¶ 11-12) when Defendants' counsel, Ms. Courtney Gaccione, expressed puzzlement over the meaning of the term "status quo." That was Plaintiff's request then and it is Plaintiff's request now. Defendants attempt to mislead by mischaracterizing what Plaintiff is seeking, which was proven to be efficiently administrable for hundreds of employees for more than a year and, obviously, did not accord them "unfettered authority to determine the nature of [their] employment." (Opp. at 8; MPI Br. at 12 n.5).[20]

- Defendants assert that their proposed "accommodations" are "generous" and "more than reasonable." (Opp. at 16 & 17). But these are not accommodations at all, which has already been explained to Defendants multiple times. (*See* Compl. Ex. E at 7-9; Compl. ¶¶ 55-50; MPI Br. at 4). They are better described as *anti-accommodations*, which not only would require Plaintiff to forgo his prayer practice but would also impose significant burdens on Plaintiff:

  (1) Defendants' foremost "offer" of an "accommodation" is literally no accommodation: that Plaintiff "may continue to engage in pray" under the circumstances which Plaintiff informed Defendants his religious convictions do not permit him to do so, *the circumstances from which Plaintiff requested an accommodation in the first place*. (*See* Compl. Exs. A, B & D at 3; MPI

[20] A variation on the flavor of the false assertions discussed in this paragraph is that "Plaintiff contends that unless the Court holds that Plaintiff can work exclusively from home, Plaintiff's rights under State and Federal law, will be unduly burdened." (*See* Opp. at 13). Plaintiff has never asked to work "exclusively from home"—this is a blatant mischaracterization or downright misrepresentation—and, in fact, he has made clear *on more than five occasions now* that he seeks to work from home *only when doing so would not impose a hardship on Defendants*. (Compl. Exs. A & B; Compl. Ex. E at 3 & 10; Compl. ¶ 10; MPI Br. at 12 n.6).

Ex. A ¶ 13; *see also* Opp. at 16 (outrageously calling "let[ting] Plaintiff pray in his office . . . generous")).

(2) Defendants' second offer of an "accommodation" would require Plaintiff to forgo the spontaneous nature of his prayer practice and commute to a nearby public park in order to pray. (Compl. Ex. D at 3). Defendants even concede that this "accommodation" would "curtail the spontaneous nature of [Plaintiff's] prayer and it would also subject [him] to being seen and heard by others." (Compl. Ex. D at 2). What's more: This "accommodation" would "require Plaintiff—multiple times every day, regardless of the weather—to cross a busy street twice, hike up and down wooded hills and muddy terrain in work attire, and search for [and hope to find] secluded areas spread across 400 acres"—all while away from his work computer. (Compl. ¶ 56). This list of burdens imposed on Plaintiff is non-exhaustive. In what sense any of this could be described as an "accommodation"—let alone a "generous" one—is a mystery.

(3) Defendants' third offer of an "accommodation," similarly, would require Plaintiff to forgo the spontaneous nature of his prayer practice or the connection to creation that it requires. (*See, e.g.*, Compl. ¶ 21 (noting that an element of Plaintiff's prayer practice is "perceiving and contemplating the handiwork of the Creator, such as by looking up at the sky")). In other words, Plaintiff must refrain from praying until he commutes to a soundproof room with no windows and no connection to nature—or be confined to that room all day every day. (Compl. Ex. D at 3).

Defendants' "accommodations," therefore, are thinly-disguised efforts to force Plaintiff to change his religious practice. They also make no sense to begin

with: For instance, Defendants would always permit Plaintiff to be out of the office to range "a four hundred (400) acre property . . . so long as it does not adversely impact [his] work responsibilities," but *never* permit Plaintiff to be out of the office to work at his nearby home as necessary to pray on the very same condition. (Compl. Ex. D at 2-3). ***This fact alone refutes Defendants' entire position* (*see* Compl. ¶¶ 44-51) and again shows that religious animus is the only plausible explanation for Defendants' categorical refusal to accommodate religion *at all*.**[21]

- Defendants assert that the "remote work [they] allowed" constituted "neutral measures applied to all employees equally." (Opp. at 18). But apparently Defendants do not have the facts of their own employment straight: Employees in some units were permitted to work at home fulltime while at the same time others (e.g., Plaintiff) were permitted to work at home only halftime, and Defendants shifted these policies around multiple times. (MPI Ex. A ¶¶ 10-12; Compl. ¶¶ 16-18). Defendants even considered and categorically denied Plaintiff's religious accommodation request—during April 26, 2021, to May 21, 2021—*during the very time they were already granting the exact same accommodation to other employees for secular reasons*. (Compl. ¶ 81; MPI Ex A ¶¶ 10 & 11). If this is not evidence of extreme hostility to religion, it is not clear what would be—short of explicit examples of derision such as those found in Defendants' brief. (*See, e.g.*, Opp. at 5, 6 & 17; Opp. at 3).
- Defendants falsely assert that "Plaintiff requested to be transferred to the Appellate [Section] in an effort to not be bound by the impending schedule changes which would

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[21] As explained above, Defendants' illicit attempt to shift the burden to explain why those "accommodations" are unreasonable in order to prevail on this motion turns the law on its head. *See Gonzales*, 546 U.S.at 429; *Ashcroft*, 542 U.S. at 666; *Reilly*, 858 F.3d at 180; *Fraternal Order*, 170 F.3d at 366; N.J.S.A. 10:5-12(q)(1); *see also Greater Phila. Chamber of Commerce v. City of Philadelphia*, 949 F.3d 116, 133 (3d Cir. 2020) ("In First Amendment cases the initial burden is flipped.").

not permit him to work from home." (Opp. at 8). Plaintiff requested to transfer to the Appellate Section *in April*, when there were no "impending schedule changes," based on his genuine interest, the encouragement of a wise and respected colleague, and his belief that his abilities would better serve the office there. That "remote work is even more easily accommodated" there is, indeed, an additional reason Plaintiff would wish to transfer there (*see* MPI Ex. B) but raises the question why Defendants—who do not dispute that remote work *is* more easily accommodated there—have not so much as recognized this as a viable future accommodation (*see* MPI Br. at 14 n.7).

- Defendants assert —so falsely, and with such a palpable lack of self-awareness—that Plaintiff has been "clearly uninterested in a compromise of any nature." (*See* Opp. at 12). It is Defendants, however, that have inexplicably refused to accommodate Plaintiff's prayer practice "even by one day, hour, or minute" (Compl. ¶¶ 53, 54 & 78), *even while permitting others to work from home fulltime for secular reasons* (Compl. ¶ 81; MPI Ex A ¶¶ 10 & 11). Defendants also refused to provide any substantive reply to Plaintiff's "thorough and carefully-researched response" to their denial of his request for a religious accommodation (Compl. ¶ 60); and they even refused to respond when asked whether there was any way to appeal their extreme denial of Plaintiff's request, raising significant due process concerns (*see* Compl. Ex. G). Plaintiff, in contrast, endeavored to reason with Defendants in good faith before filing this action (*see* Compl. Exs. E, F & G) and informed Defendants shortly after filing this action that he is "always willing to work toward a just resolution"—a communication which Defendants entirely ignored. (MPI Ex. B; MPI Br. at 15). *Defendants have even inappropriately and ironically sought to use Plaintiff's willingness to be physically present at work when reasonably necessary against him.* (Opp. at 15).

- Defendants claim that the relief requested (MPI Br. at 17; D.E. No. 8-5) is "exceptionally vague" (Opp. at 4). The relief requested, however, is substantially identical to the relief granted and affirmed by the Court of Appeals in *Fraternal Order*, *see* 170 F.3d at 361 & 367, which is on all fours with this case, but that Defendants do not cite even one time. In *Fraternal Order*, the District Court enjoined the government employer "from disciplining or otherwise disadvantaging Plaintiffs . . . for violating Order 71-15 or any other directive which would require them to shave or trim their beards in violation of their religious beliefs." *Id.* at 361; (*see also* MPI Br. at 10-11 (discussing the overwhelming analogy of *Fraternal Order* to this case)). Here, Plaintiff has proposed that the Court enjoin Defendants "from disciplining or otherwise disadvantaging Plaintiff simply for praying in accordance with his religion, including at home on work days." (D.E. No. 8-5). But the word choice for any relief granted is fully within the Court's discretion and could just as easily say: "Defendants are enjoined from disciplining or otherwise disadvantaging Plaintiff for violating the May 12, 2021 Memorandum (Compl. Ex. D) that categorically discriminates against religion, or any other directive which would require him to forgo prayer in violation of his religious beliefs." The precise parallel to the relief granted in *Fraternal Order* is crystal clear. And Plaintiff—consistent with his desire *not* to impose hardship on Defendants and for the sake of clarity—added that the Court would "**not**" be enjoining "anything else, including disciplining Plaintiff or any employee for any act or omission inconsistent with any job duty, obligation, rule, or responsibility." (*See* D.E. No. 8-5). The requested relief would not only be clear and substantially identical to that granted in *Fraternal Order*: *Defendants would already know exactly what it*

entails because it would preserve the status quo under which the parties operated when Plaintiff was permitted to work from home for secular reasons.[22]

CONCLUSION

Defendants' legal arguments are baseless; they neither carried their burden under the applicable standards nor cited any concrete fact or specific example in support of their discrimination; and by repeatedly mischaracterizing or misrepresenting facts—and even deriding religion in their brief—they rear the ugly face of their entrenched desire to burden Plaintiff's free exercise.

For the reasons discussed in Plaintiff's brief and reiterated herein, Plaintiff respectfully requests that the Court grant preliminary relief. [23]

Respectfully submitted,

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[22] The unfounded notion that the relief sought is "vague" was Defendants' foremost point in support of their defamatory assertion that the motion "is frivolous." (*See* D.E. No. 10-1 (Ex. A)). At minimum, the choice to send Plaintiff the letter containing that assertion now appears even more likely to have been highly unethical: Whereas that letter threatened that Plaintiff must "withdraw [the] motion" or else Defendants will "seek sanctions," *Defendants have not even attempted to argue in their brief that any aspect of the motion is frivolous—or that there is* any *basis for sanctions.* (*See id.*) Accordingly, it is difficult if not impossible to avoid the inference that the letter was simply a legally-baseless attempt to bully Plaintiff into withdrawing the motion so that Defendants could gain a strategic advantage in this case—an unethical embarrassment.

[23] Plaintiff apologizes for the length of this brief and respectfully requests leave to file it without a separate docket entry and despite the page limit prescribed in the Local Rules. *See* L. Civ. R. 7.2(b). **Counsel for Defendants has consented.**

The length of this brief was determined not only by the need to illuminate Defendants' fundamental errors of law and to refute their factual mischaracterizations or misrepresentations, but also to leave no doubt regarding Defendants' defamatory assertion that the pending motion "is frivolous." (*See* D.E. No. 10 Ex. A; *see also supra*, note 22).

CERTIFICATE OF SERVICE

Alex G. Leone hereby certifies that this brief is served electronically on the defendants in this matter and their counsel on August 31, 2021. *See* L. Civ. R. 5.2, Section 14(b)(1).

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ALEX G. LEONE,

Plaintiff,

v.

ESSEX COUNTY PROSECUTOR'S OFFICE, THEODORE STEPHENS II, ROMESH SUKHDEO, GWENDOLYN WILLIAMS, and ROGER IMHOF, in their individual and official capacities,

Defendants.

CIVIL ACTION NUMBER:

2:21-cv-012786-SDW

ORAL ARGUMENT

Pages 1 - 29

Martin Luther King Building & U.S. Courthouse
50 Walnut Street
Newark, New Jersey 07101
Tuesday, September 7, 2021
Commencing at 3:06 p.m.

B E F O R E: THE HONORABLE SUSAN D. WIGENTON, UNITED STATES DISTRICT JUDGE

Joanne L. Sekella
Official Court Reporter
sekella@gmail.com
(908) 310-1177

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

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INDEX

(PROCEEDINGS held remotely before **The Honorable SUSAN D. WIGENTON**, United States District Judge, at 3:06 p.m.)

THE COURT: Good afternoon, everyone.

MR. LEONE: Good afternoon, Judge.

THE COURT: This is the matter of Alex -- is it Leone or Leone?

MR. LEONE: Leone is good, Judge. Thank you.

THE COURT: Very good.

-- *Alex Leone vs. Essex County Prosecutor's Office, et al.* under Docket Number 21-12786.

And we will have appearances entered first and then we will go from there. And we will start with you first, Mr. Leone.

MR. LEONE: Yes, Judge. Alex Leone for myself, the plaintiff.

THE COURT: All right, very well.

And I don't know, are we going to you, Ms. Clifford, or...

MS. CLIFFORD: Your Honor, Erica Clifford from Genova Burns, on behalf of defendants, Essex County Prosecutor's Office, Theodore Stephens, II, Romesh Sukhdeo, Gwendolyn Williams and Roger Imhof.

THE COURT: All right, very well.

And, Ms. Gaccione, if I am saying that right.

MS. GACCIONE: Good afternoon, Your Honor. I am not

making an appearance in this matter. I am in this case just representing the County of Essex, but I will not be appearing on the record.

THE COURT: All right, very well. Thank you for entering your appearance.

So we are set down today, I scheduled this for an oral hearing in light of the application that has been filed by Mr. Leone in this matter for a preliminary injunction and injunctive relief.

I have read the submissions that have been provided to the Court and wanted to give an opportunity to be heard as it relates to the claims.

So I will hear from you first, Mr. Leone. I have read what you have submitted, but to the extent you want to expound upon that a little bit, you are certainly free to do so.

ARGUMENT BY PLAINTIFF

MR. LEONE: Thank you, Judge. Good afternoon and may it please the Court.

If I may just begin by briefly addressing a few facts in the case that are based on some record documents and then I can walk more methodically through preliminary injunction factors, if it would please the Court. I will keep it brief. I know Your Honor said that Your Honor has read all the submissions.

So I will begin with Exhibit A of the complaint, which was the request for religious accommodation in this matter. A few things to note about that.

The request for accommodations specifically asks accommodation only to the extent that it would not put an undue hardship on the defendants.

In addition, it requests only that the same status quo that was extended to employees, including myself, for secular reasons permitting them to work from home be extended to me for religious reasons.

I just wanted to note that about Exhibit A to the complaint, and then as important as is Exhibit A to the complaint is Exhibit D of the complaint, which is the denial of that request. And there would be a few things that I note about that.

I think first and foremost that it's important to see that it's a categorical denial, that it doesn't permit accommodation to any extent, even on the important condition in the request itself, which was that accommodation not put any hardship or undue hardship on the defendants.

The denial is categorical. It says, essentially, under no circumstances that that request can be granted, even now or in the future. To that extent, it is singling out this religious request for especially harsh treatment that it did not -- that the defendants in this matter did not treat

secular reasons for working from home in that way.

And then I think in addition to those two exhibits, Exhibit A of the complaint and Exhibit D of the complaint, it's important to be aware of the factual context in which these were made.

The denial occurred at the very time the defendants were already granting the very same accommodation requested to other people for secular reasons. And in addition to that, the defendants didn't permit any further discussion or appeal of the denial. And that's in Exhibit G of the complaint where the defendants don't answer when I asked if there was any way to appeal it.

I think that those facts, taken together based on the record documents and the context, really tell the story of this case.

And if now it would please the Court, I can walk more methodically through the preliminary injunction factors.

It's important to have the right standard here. I think there was an issue that came up in the briefing. I think the right standard is essentially summarized in *Reilly* and then applied by later cases.

It's important to note that the defendants also have an obligation on this motion. I think that my understanding of the test is that if I show that they are burdening my for exercise, then they have a burden to justify that infringement

for exercise under the appropriate level of legal scrutiny. And to the extent that they don't, I think that the cases say, including *Ashcroft v ACLU*, which is cited in *Reilly* that I must be deemed likely to prevail on the merits.

So on this first factor, I think it's clear that I have shown a burden to my free exercise that the defendants have required me to forego sincerely-held religious practice as a condition of retaining employment.

The practice is described in the complaint and it's made even clearer in my declaration under penalty of perjury as to what the practice is and that I would be required to forego it when required to be physically present in the office.

I think it's very clear that there is a burdening of free exercise in this case. And I think the cases that apply make it clear that strict scrutiny applies. It's very clear that rational basis does not apply.

One could argue at a minimum that some heightened scrutiny applies, but I think that *Fulton* in particular makes clear that strict scrutiny applies here. And that's because the actions and the policy of the defendants are not neutral or generally applicable.

There's multiple ways in which their policies and their decisions have failed to be neutral and generally applicable. I can address it in more detail. I think they

were addressed pretty comprehensively in the briefing.

The defendants tried to raise a few arguments in their briefing as to why these policies are neutral and generally applicable. I believe the way I have put it is that this misapprehends the argument, and I've cited *Fulton* on that. I am happy to discuss any of those arguments in more detail.

But in any event, the defendants, I believe, are subject to strict scrutiny under the cases and the cases show clearly that they have not even begun to justify their religious discrimination here.

To justify their religious discrimination under strict scrutiny they would need to show that they have compelling interest. Their assertions in this case thus far, going back to their assertions in Exhibit D of the complaint where they attempt to justify the religious discrimination -- just paragraph Assertions -- are stated in extremely high level of generality. They never get more detailed than that level of generality.

And *Fulton* says, expressly, that the defendant that is engaging in religious discrimination cannot justify its religious discrimination at such a high level of generality by stating its interests at such a high level of generality.

Here, the defendants do that repeatedly. And not only would that alone be sufficient to show that I must be

deemed likely to prevail and likely to have success on the merits, I actually debunked their interests.

So they don't state their interests at a very -- at the requisite level of specificity. But in addition to that, I debunk them by providing the testimony under penalty of perjury and repeated explanations, going back to Exhibit E of the complaint, that explain why their interests are either nonexistent or don't even come close to justifying this religious discrimination.

I will just mention one example that was mentioned in my reply and has been mentioned many times before, which is where the defendants appealed to some vague notion of emergent matters without any factual connection to my employment. And they go so far in their brief as to mention this extremely high level of generality as to the line of employment but don't provide a single fact in support of that alleged interest.

And we see in the cases, including *Fraternal Order* and *Roman Catholic Diocese*, that the government, even asserting an interest in safety, is not going to be sufficient unless they can show their interest is narrowly tailored. And I will address in a moment.

Just some of the fact --

THE COURT: Let me ask you this, Mr. Leone. All right. Let me ask you this.

MR. LEONE: Yes.

THE COURT: Where do things stand now?

MR. LEONE: I believe --

THE COURT: Meaning are you going into the office or are you not?

MR. LEONE: Yes, Judge. So I do go into the office as a general matter. I use accrued time, as I mentioned in a record exhibit and mentioned in the briefing, that I do use some accrued time in order to be able to pray, as I have described in the papers.

As a general matter, the defendants are requiring me to go into the office every day, which is the factual circumstance that is mentioned on the face of the motion for preliminary injunction itself.

So in other words, the defendants do continue to categorically discriminate against religion, do continue to refuse to permit even one minute, day or hour of the religious practice that asked them accommodation for.

THE COURT: So one of the accommodations that were outlined in the memorandum from the prosecutor's office indicated providing you access to a soundproof room. Has that been something that has been permitted, explored? Where does that stand?

MR. LEONE: Yes, Judge. So if I may just preface my response to Your Honor's question with a more general legal

point.

THE COURT: Sure.

MR. LEONE: The defendants on this motion and in general attempt to shift the burden to me as the plaintiff to explain why their proposed accommodations are unreasonable. I have explained repeatedly why they are, but just wanted the record to be clear that to my knowledge there is no source of law that would require me to explain why these accommodations are unreasonable in order to be entitled to relief here.

On the accommodations itself, Your Honor mentioned the soundproof room. There is also the requirement that I commute to a nearby public park if I wanted to pray.

THE COURT: Right.

MR. LEONE: Or the nonaccommodation of just maintaining the status quo.

All three of the accommodations would essentially require me to change my religious practice. And I try to make that clear in the brief, in the latter part of the brief where I address the defendants' factual assertions.

So regarding, if I can just go in order in each of the accommodations starting from --

THE COURT: I am only asking you about the soundproof room. That is the only thing I am asking you about and I just want to know specifically what is the issue with that?

I understand you have put a lot of things in your

papers, your papers are very voluminous. I am just asking you, we are on the record, so if you can just indulge me and tell me what the issue is with that.

MR. LEONE: Yes, Judge. If I may rely on my brief for that and read from my brief.

Judge, I addressed this accommodation at Page 24 of the brief. And this is where I say that the defendants' third offer of accommodation similarly would require plaintiff to forego the spontaneous nature of his prayer practice or the connection to creation that it requires.

And I cite complaint Paragraph 21, noting that an element of plaintiff's prayer practice is, quote, perceiving and contemplating the handiwork of the Creator, such as by looking up at the sky.

And then I say, regarding this proposed accommodation, In order words, plaintiff must refrain from praying until he commutes to a soundproof room with no windows and no connection to nature or be confined to that room all day every day.

THE COURT: Okay.

MR. LEONE: So, as all three of these accommodations, similar among them is that it would require me to change my religious practice in order to accept this as a so-called accommodation.

THE COURT: Okay, fair enough. All right.

Anything else you want to add, Mr. Leone?

MR. LEONE: I was just going to continue to walk through likelihood of success on the merits on irreparable harm.

Would Your Honor like me to move onto irreparable harm.

THE COURT: Right, yes, you can.

MR. LEONE: Sure. So, Judge, regarding irreparable harm, I think this factor is especially clear here. The Supreme Court stated directly that being denied First Amendment liberty or infringement of First Amendment rights for even a minimal period of time constitutes irreparable harm.

The defendants don't cite the cases that this is stated in. They don't try to explain why the standard doesn't apply here. In general, they really don't cite any Supreme Court cases on religious liberty other than *Smith* in passing.

I think it's clear under *Tandon v Newsome*, for example, and *Roman Catholic Diocese*, that being denied religious liberty under infringement such as this, for even a minimal period of time, constitutes irreparable injury.

And then I just wanted to say that if that were not clear enough, the defendants actually themselves apparently concede that I am suffering irreparable injury here, which they say in their brief is, I believe they say difficult if

not impossible to remedy.

So I think that factor under in light of *Tandon* and in light of *Roman Catholic Diocese* and in light of the defendants' own admissions is also particularly clear.

Regarding the third factor, Judge, which is the combined balancing of harms and public interest here, this factor --

THE COURT: You don't have to go through those. That's fine. I mean, obviously the Court's focus is on the irreparable harm and the likelihood of success.

Let me ask you in terms of, once again from a practical standpoint, what would be your proposal in terms of you going into the office? Because I know that your request referenced going in as necessary. And so just I am curious as to what that actually means.

MR. LEONE: Yes, Judge. Well, I have tried to be clear from the beginning, and from Exhibit C of the complaint, which was an e-mail sent post the meeting that I had with the defendants to discuss this matter, that I am simply requesting that the status quo that was extended to employees for secular reasons be extended to me for religious reasons.

To my knowledge, there would be no difference between what I am requesting and what they already gave employees, including me, for secular reasons.

THE COURT: Would you agree that those extensions

were provided during the course of the pandemic when most people were not in the office, so they had the A/B schedule and people were coming in every other week? Are there other extensions that have been provided outside of that?

MR. LEONE: Outside of that, Judge, I do believe, on information and belief, that the defendants do permit people to work from home from time to time for other reasons other than the pandemic.

The pandemic is the main reason that they made exceptions to their physical requirement, their policy of requiring people to be physically present in the office for. It's a medical rationale. It's based on medicine or, you know, physical health, like the rationale in *Fraternal Order*, which is another case the defendants don't cite here.

But yes, Judge, I believe that that's the main instance in which they have permitted people this benefit of this accommodation for secular reasons. That would be the virus-related or medical-related rationale.

THE COURT: Okay. All right.

And prior to that, Mr. Leone, it is fair to say when you commenced employment on September 9th of 2019, you were going into the office regularly, up until March of 2020, when, essentially, the office closed or was placed on this A/B schedule as a result of the pandemic.

Is that accurate?

MR. LEONE: That's generally, correct, Judge. I was in a different unit of the office and I believe that I might have taken days off for religious reasons here or there. But as a general matter, I did report.

It seems that, if I may just offer a point on this, the defendants tried to use that against me in a way that violates Supreme Court precedent, which would be the case v *Hobbie, Hobbie* that I cited in my briefing and I can find it and cite it for Your Honor.

But the timing -- the case says that the timing of when a person chooses to engage in the religious exercise such as this is not relevant to determining whether they are being burdened in their free exercise or whether they are suffering irreparable harm.

THE COURT: So when you initially began employment with the prosecutor's office you were in what division and where are you now?

MR. LEONE: So that was in the juvenile division where I began. And now I am currently in the intellectual property and financial crimes unit.

THE COURT: Okay. And I note that there was a request to be moved to the appellate division, but that was denied because there was no availability of a position.

MR. LEONE: Yes, Judge. I think that's a way to say it. I didn't understand it as a denial in a communication

with the director himself. He said, you know, I will keep you in mind and as soon as there is an opening you will be considered. So I considered it kind of in abeyance, not a denial. But yes, I have not been transferred to the appellate unit.

Does that answer Your Honor's question?

THE COURT: Yes, it does. Very well.

Anything else you want to add, Mr. Leone?

MR. LEONE: I think, Judge, I would just, if I was going to add a final thing, it would be to look at the cases here. I tried to make it clear in the brief that *Fraternal Order* is on force with this case down to the very rationale that they use, which is a medical rationale, to permit exemptions from their policy.

Fulton also makes very clear that there would be a burdening for exercise here and that the defendants' system that permits them discretion to discriminate among the kinds of reasons that permit people to work from home, triggers strict scrutiny. I think once that that's clear, and based on those cases, the defendants essentially cannot succeed on the merits here.

THE COURT: All right, very well. Thank you, Mr. Leone.

Ms. Clifford, do you want to be heard?

ARGUMENT BY DEFENDANT

MS. CLIFFORD: Thank you, Judge.

We won't belabor the points, as Your Honor has made some of the arguments that the defendants brought up.

I do want to distinguish several of the cases that plaintiff cites to. And while his cites to the caselaw are accurate, those cases are factually distinguishable. For example, *Tandon vs. Newsom*, regarding a California regulation that prohibited social gatherings for religious services, but then permitted them for households of three or more for secular activities such as restaurants, retail stores and hair salons.

So there was a clear distinction as to how secular versus religious activities were treated. And thus, in those cases the standard was properly strict scrutiny.

I just want to briefly focus on the two prongs of the standard that the plaintiff must surmount to be successful in this motion; as he mentions, likelihood of success on the merits as well as irreparable harm. And plaintiff has not here established irreparable harm.

As we have already discussed, when he began his employment with the ECPO from September 2019 to March 2020, he was at work in the office and at trial every day with no issues, did not make any requests related to working from home to accommodate his religious beliefs.

And even now, as he does admit, the requested relief

is he can work in the office and in court when he believes it is warranted. And that's not defined and it's highly subjective to the plaintiff's own determination as to when he believes that he should be physically present at work.

On those days when he is preparing for grand jury presentations, trials, witness interviews, and the like, he is not physically harmed. He is in the office.

He has made several requests, of which the ECPO engaged in a bona fide effort to determine any reasonable accommodations made to him.

And not to again belabor the point, and in the alternatives of which we are all aware, the soundproof room, he has a private office with a door. He was requesting outdoor access. He can go outside; there is the Eagle Rock Reservation across the street. These were summarily rejected by plaintiff.

And the defendants' obligation is only to engage in that bona fide effort. And if it's unduly interfering with or preventing the efficient operation of the ECPO, that's where that obligation ends.

It appears that the plaintiff in this case doesn't -- is not interested in a reasonable accommodation but the one that he prefers, which is to work at home on the days he wants to and to come in on the days he doesn't.

We would end that, with respect to his First

Amendment claim, because it's a neutral, generally applicable policy of the ECPO that every single employee must now be full time in the office, it would be subject to rational review, which is only that the ECPO proved that it is -- there is a rational reason, excuse me -- that the work policy is rationally related to a legitimate Government objective.

The ECPO is the county's law enforcement agency and it is one of the busiest in the state. The assistant prosecutors are required to be at trial to collaborate with colleagues, to engage in ad hoc meetings, and be there.

Now that the courts have reopened, criminal trials have now become -- are now conducted in person. It's, respectfully, not for the plaintiff to decide that he can do these functions remotely with such a critical law enforcement agency.

Emergency appearances come up from time to time as well.

And so, respectfully, Your Honor, he has not been able to establish those two prongs.

THE COURT: Very well. Thank you, Ms. Clifford.

Do you want to add anything else, Mr. Leone?

REPLY ARGUMENT BY PLAINTIFF

MR. LEONE: Judge, just to respond to a few points.

I think there is a theme here kind of mischaracterizes what I am not seeking. I am not seeking any

subjective authority. I think that was the word that Ms. Clifford used.

I am seeking simply the same exact accommodation that was extended to people for secular reasons.

And then I think, again, the defendants try to rely on their shifting of their policies on August 2nd to require some or all -- the briefing actually kind of leaves open, because it mentions the qualification of at plaintiff's level of the employees that are required to be in the office now, but they shifted the policies in August 2nd to require most employees to be in the office.

I think that the defendants misunderstand the significance of this decision. There is essentially no significance of this decision. Even if they never granted the ability for people to work from home in the pandemic, the fact that they maintain a system that permits them the discretion to do that means that their policies are not general -- neutral and generally applicable, and the *Fulton* case makes that clear.

In addition, on that same point, the *Tandon* case makes this point doubly aware that the Court says that even when the defendants withdraw a restriction on free exercise, a plaintiff nonetheless remains entitled to emergency injunctive relief when he remains under a constant threat, the Government will use its power to reinstate the challenged restriction.

Here the defendants maintain their power to reinstate the challenged restriction because the challenged restriction is still in effect. They still burden my free exercise.

THE COURT: Very well. Thank you.

COURT'S DECISION ON REQUEST FOR PRELIMINARY INJUNCTION

THE COURT: As I indicated at the outset, I did have the opportunity to read the submissions that have been filed with the Court and wanted to have argument today to allow each side to expound a bit.

And I think here, because we are talking about a request for injunctive relief, which is obviously extraordinary relief. It is not in the context of what the lawsuit involves. This lawsuit was filed and then this request for injunctive relief was filed thereafter. And so the Court has to look at the primary two factors, albeit there are four factors, but those two primary factors being irreparable harm that would result if relief is not granted to the plaintiff; and in addition to that, the likelihood of success on the plaintiff's claims in this action.

And so I focus on those two things first because I think that that's, while the balancing of the harms and obviously the public interest are other aspects of the Court's consideration, these primary two areas are the ones that I draw attention to.

So the part I am having trouble with, quite frankly,

is that there a constant sort of representation that relief has been granted for secular reasons. And what's lost in that assertion is the fact that the relief that was granted, specifically that everyone was permitted to work from home, was during the course of a pandemic. And when, essentially, pretty much everyone throughout the country and in many parts of the world, were not able to go to their places of employment because of the very serious affects and concerns related to the pandemic.

So this was not a decision that was made sort of just very loosely or without very serious consideration to what's involved in making a determination to not go into our offices.

And in this instance in particular, we are speaking of a prosecutor's office, and probably one of the most, busiest counties in the state where, I mean, the number of trials that are done on a regular basis far exceeds what happens in many counties in this state.

But aside from that, the fact is that it appears that there has been a schedule that was set out by the prosecutor's office as to the return, information was given in a timely manner to all employees that they had to return.

I am not suggesting in any way that Mr. Leone is not at liberty to engage in religious practices, regardless of whether he engaged in them before or that he just started engaging in these practices now. The issue is whether or not

his religious practice is truly being prevented or not being accommodated in any way.

And once again, there were several accommodations that were offered by the prosecutor's office that were not acceptable to Mr. Leone. And as I understand it, essentially, the request was to work from home unless necessary to come in. There is no indication as to what "necessary to come in," what that means or when that would happen.

And quite frankly, in this position, being an assistant prosecutor in a prosecutor's office, to basically have the employee determine when is an acceptable time to come in versus when it is not would be extremely difficult for the office to maintain any type of control or any type of direction over the office.

So now we turn to whether these are even reasonable accommodations. And let's be clear, I am not making a determination that is a final determination. This is for purposes of a preliminary injunction. And so the preliminary injunctive relief that is being sought is essentially that the status quo be maintained, that Mr. Leone does not have to go into the office unless he feels it is necessary and so that he can exercise his religious practice of being able to engage in vocal prayer or prayer of any nature. And so that is what we are referring to.

And so for our purposes here today, as to whether

there is in fact a true likelihood of success on that claim with all the factors being considered, that this was a pandemic that existed, that schedules were put in place by the prosecutor's office to eliminate and certainly decrease the potential of the spread of COVID-19, and that essentially those many restrictions were lifted, and some are being engaged in again, but many restrictions were lifted. Some of those restrictions being lifted, therefore required that people are required to go back into the office.

And so while it's indicated that upon information and belief that others might be given some accommodation, none of that has been brought before the Court and nothing has been submitted to the Court that anyone else is being given an accommodation to not go into the office, in light of the determination as of August 2nd for all employees to return to the prosecutor's office.

So that component of irreparable harm is also an extremely heavy burden. So the irreparable harm being, and I understand. Obviously when you are talking about freedom of religion being curtailed, irreparable harm is assumed and it is pretty much automatic.

In this instance, however, when accommodations have certainly attempted to be made, I am not suggesting they are acceptable in final form, but that is what the lawsuit is for. And that is what the lawsuit will basically flush out and

that's what discovery will address, to the extent that those are issues that still have yet to be addressed.

But for purposes of this Court rendering a decision at this preliminary status and at this point to say that there is a sincere likelihood of success and that there is irreparable harm that has resulted to the plaintiff in this case, I don't feel that that burden has been met.

And I would also note that when, like I said, there is a lot of documentation that has already been submitted, and this may be something that gets moved to a summary judgment stage very quickly, quite frankly, and I am fine with that as well. Obviously, I will defer to the magistrate judge on how that proceeds and goes forward.

But for our purposes here today, where we are asking for injunctive relief, I don't believe that the factors have been satisfied, specifically the factors of a likelihood of success. And I don't believe that there has been a showing of irreparable harm to the plaintiff in this case.

There have certainly been assertions as to it not being preferred and that there is a comparison of secular reasons versus religious reasons. But once again, it is important to note the distinction here is that these are -- the return to the office was dictated by the pandemic. And being away from the office was being dictated by the pandemic.

At this point, while, Mr. Leone, you might find great

success of the lawsuit overall, I don't believe that this warrants an injunctive relief in this case.

So the request for injunctive relief is denied. The matter will proceed in the normal course. And the matter will be set down before Judge Kiel and you will proceed with discovery aspects of the case.

And as I said, if he moves it quickly to a summary judgment stage, then we will certainly address that in short order as well.

But I will issue an order to that effect. It will be filed on the electronic filing system.

COURT'S DECISION ON REQUEST TO STRIKE THE ANSWER

THE COURT: And I also want to address something that was filed recently as well, which was a request to strike the answer of the prosecutor's office. That request is denied. That is extreme relief.

Certainly, under the circumstances, there has been absolutely no showing of any prejudice to the plaintiff or anything of that nature. So there is no basis to strike the answer, which would be, once again, an extreme penalty under the circumstances.

So with that being stated, I thank all of you for your presentations today. I will have an order issued. As I said, it will be filed electronically, so you will have access to it in that way as well. And you will hear from Judge Kiel

going forward as it relates to the discovery portion of the case.

Have a great day.

MR. LEONE: Thank you, Judge. If I may ask --

THE COURT: I'm sorry?

MR. LEONE: Sorry, Judge. Will Your Honor be submitting a written opinion or any further explanation for your --

THE COURT: I will not. No.

Anything further?

Very well. Have a great afternoon, everyone.

I will keep my staff on. Everyone else is free to go. Thank you.

THE COURTROOM DEPUTY: Court is adjourned.

(The proceeding is adjourned at 3:38 p.m.)

FEDERAL OFFICIAL COURT REPORTER'S CERTIFICATE

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/S/ Joanne Sekella, CCR, CRCR, RMR — September 9, 2021

Official Court Reporter — Date

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ALEX G. LEONE, Plaintiff, v. ESSEX COUNTY PROSECUTOR'S OFFICE, THEODORE STEPHENS II, ROMESH SUKHDEO, GWENDOLYN WILLIAMS, and ROGER IMHOF, Defendants.	Civil Action No. 21-12786 (SDW) (ESK) **ORDER** September 7, 2021

WHEREAS on July 30, 2021, Plaintiff Alex G. Leone ("Plaintiff") filed a motion requesting a preliminary injunction to bar Defendants Essex County Prosecutor's Office, Theodore Stephens II, Romesh Sukhdeo, Gwendolyn Williams, and Roger Imhof (collectively, "Defendants") from requiring that Plaintiff return to the office "*every* day of *every* week." (D.E. 8-1 at 2 (emphases in original).) On August 24, 2021, Defendants opposed. (D.E. 11.) Plaintiff replied on August 31, 2021. (D.E. 13); and

WHEREAS on September 1, 2021, Plaintiff filed a letter, (D.E. 15), requesting that this Court strike Defendants' Answer, (D.E. 14), as untimely; and

WHEREAS this Court has considered the parties' submissions, as well as the oral arguments presented before this Court at the virtual hearing held on September 7, 2021,

IT IS, on this 7th day of September 2021, for the reasons stated on the record today,

ORDERED that Plaintiff's request for a preliminary injunction (D.E. 8) is **DENIED**, and

ORDERED that this matter shall proceed in the normal course; and

ORDERED that Plaintiff's request to strike Defendants' Answer (D.E. 15) is **DENIED.**

SO ORDERED.

/s/ Susan D. Wigenton
United States District Judge

Orig: Clerk
cc: Parties
Edward S. Kiel, U.S.M.J.

UNITED STATES DISCTICT COURT
DISTRICT OF NEW JERSEY

ALEX G. LEONE,	:	**NOTICE OF APPEAL**
Plaintiff,	:	
v.	:	
	:	
ESSEX COUNTY PROSECUTOR'S OFFICE,	:	Docket No. 2:21-cv-12786
THEODORE STEPHENS II,	:	
ROMESH SUKHDEO,	:	
GWENDOLYN WILLIAMS,	:	
and	:	
ROGER IMHOF,	:	
in their individual and official capacities,	:	
Defendants.	:	

Notice is hereby given that Alex G. Leone, Plaintiff in the above-captioned case, appeals to the United States Court of Appeals for the Third Circuit from the Court's Order denying Plaintiff's Motion for a Preliminary Injunction (D.E. No. 8), entered on the record in this matter on September 7, 2021 (D.E. No. __ (forthcoming); *see* D.E. No. 17 ("**motion denied** . . . Order to be filed")).

Date: September 7, 2021

Respectfully submitted,

By: /s/Alex G. Leone
Alex G. Leone
P.O. Box 1274
Maplewood, New Jersey 07040
aleone@jd16.law.harvard.edu

CERTIFICATE OF SERVICE

Alex G. Leone hereby certifies that this notice is served electronically on the defendants in this matter and their counsel on September 7, 2021. *See* L. Civ. R. 5.2, Section 14(b)(1).

/s/ Alex G. Leone
Alex G. Leone
P.O. Box 1274
Maplewood, New Jersey 07040
aleone@jd16.law.harvard.edu

No. 21-2684

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

ALEX G. LEONE,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court
for the District of New Jersey
No. 21-12786
(Honorable Susan D. Wigenton)

EMERGENCY MOTION OF APPELLANT ALEX G. LEONE FOR AN INJUNCTION PENDING APPEAL UNDER FED. R. APP. P. 8

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Other Authority

Appellant Alex G. Leone ("Appellant") respectfully moves for an emergency injunction pending appeal pursuant to Federal Rule of Appellate Procedure 8. On September 7, 2021, the District Court denied Appellant's motion for a preliminary injunction. (D.E. No. 18).[1] That day, Appellant appealed and moved for an emergency injunction pending appeal before the District Court. (D.E. No. 20). The District Court has not decided that motion. Given the ongoing violation of the First Amendment and the resulting irreparable harm to Appellant, Appellant respectfully submits that awaiting a ruling by the District Court would be "impracticable." *See* Fed. R. App. P. 8(a); *see also, e.g.*, *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001) (not requiring the filing of a motion for injunction in a district court because of the "immediacy of the problem and the district court's legal error concerning the First Amendment").

Absent an injunction, Appellant will continue to suffer irreparable harm as a result of the appellees' ("Defendants'") religious discrimination. *See, e.g., Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. ___, ___ (slip op.) at 5-6 (June 17, 2021); *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021). Accordingly, Appellant respectfully requests an order enjoining Defendants from disciplining or otherwise disadvantaging Appellant for his free exercise, such as for violating their May 12, 2021 policy (D.E. No. 1 ("Compl") Ex. D at 2-3), which categorically discriminates against religion. *See, e.g.*, *Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 361, 366 (3d Cir. 1999) (affirming an injunction against a government employer preventing it from "disciplining or otherwise disadvantaging" Free Exercise Clause plaintiffs "for violating [a government policy that categorically discriminated against religious accommodation] or any other directive which would require them to . . . violat[e] . . . their religious beliefs").

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[1] A September 9, 2021 docket entry for this appeal (No. 21-2684) states that the record is "available on District Court CM/ECF," to which Appellant cites herein.

INTRODUCTION

For more than a year, Defendants have judged that secular reasons are adequate to permit employees to work from home, and have exercised discretion to permit many employees to do just that, including on a fulltime basis for prolonged periods. Yet at the same time, Defendants have judged *religious* reasons *inadequate* to permit a single employee to work from home *at all*, and on May 12, 2021, categorically prohibited Appellant from so doing. The effect of this discriminatory policy choice—as explained to Defendants prior to the filing of this action and in the record and briefing below—is to prevent Appellant from praying as his religion requires throughout each work day. This burdening of free exercise is devastating to Appellant; and, absent injunctive relief, the irreparable harm and other harms it inflicts on each work day will continue.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant incorporates the Complaint and its attachments by reference and briefly recounts the following facts. Defendants are high-ranking officials at the Essex County Prosecutor's Office, and the office itself, an agency of the State of New Jersey, and have employed Appellant since 2019. (Compl. ¶¶ 4-7). Since early 2020, Defendants have exercised discretion to permit employees to work from home for secular reasons (e.g., to prevent viral transmission). (Compl. ¶15). In the District Court, Defendants confirmed that "out of an abundance of caution" they exercised that discretion to enact policies under which "all employees worked from home full-time" for secular reasons for prolonged periods during the past year. (D.E. No. 11 at 2).[2]

[2] For instance, employees in the "Adult Trial" section of Appellant's office were permitted to work from home fulltime during November 2020 into June 2021; and employees in the "Appellate" section of Appellant's office have been permitted to work from home fulltime from March 2020 through the date on which Appellant filed a motion for preliminary injunction. (Compl. ¶ 17; D.E. No 8-2 ("Leone Decl.") ¶¶ 10 & 11).

On April 26, 2021, Appellant requested that going forward he be permitted to work from home for religious reasons. (*See, e.g.*, Compl. Exs. A & B; Compl. Ex C (requesting that the "status quo" that permitted Appellant to work from home for secular reasons at least half the time "continue" for Appellant for religious reasons)). In sum, Appellant's religion requires him to pray, including aloud and spontaneously, throughout each day; and Appellant's religious belief is that the peace and solitude required for this practice are impossible in the office. (*See, e.g.*, Compl. ¶¶ 19-27; Compl. Ex. C; D.E. No. 8-1 ("Leone Decl.") ¶ 13; *see also infra*, note 15). Importantly, in requesting a religious accommodation, Appellant did not request to be absolved of any work responsibility; Appellant's prayer practice has never interfered in his work and greatly assists him in his work. (Compl. ¶ 23; Leone Decl. ¶ 17). Appellant expressly requested an accommodation *only* to the extent it would *not* impose a hardship on Defendants. (*See, e.g.*, Compl. Exs. A & B (requesting "to be physically present at [the] office . . . when accommodating this religious need would cause undue hardship")). Appellant is, and has always been, fully willing to be physically present for anything required by his job responsibilities—including in-person court appearances, witness interviews, or any other obligation. (*See, e.g.*, Compl. ¶ 62(a); Leone Decl. ¶ 9).

Defendants, nonetheless, categorically denied Appellant's request for a religious accommodation, thus singling out religion as *never* worthy of accommodation *at all*—putting Appellant to the choice of forgoing his prayer practice or being disciplined by his employer, and thus burdening Appellant's free exercise of religion on all work days. (Compl. Ex. D at 2-3; Leone Decl. ¶ 13-14). Astonishingly, Defendants' policy of categorically refusing to accommodate religion applies regardless of the circumstances and even "in the future." (Compl. Ex. D at 2-3). Yet at the very time Defendants adopted this discriminatory policy, they were already granting to other employees for secular

reasons the very accommodation requested by Appellant. (*See, e.g.*, Leone Decl. ¶¶ 10-11; D.E. No. 11 at 2). This inexplicable singling out of religion for especially harsh treatment forms the primary basis of Defendants' violation of the First Amendment.

Defendants' sole rationale for their extreme prohibition on accommodating religious reasons for working from home consisted of a single paragraph of vague assertions. (*See* Compl. Ex. D at 2-3). Defendants refused to explain these assertions but nonetheless "st[oo]d by" them. (Compl. Exs. E, F & G). The record below makes clear that the assertions cannot justify Defendants' categorical religious discrimination against Appellant. (*See, e.g.*, Compl. Ex. E at 2-6; Leone Decl. ¶¶ 3-9 & 17; D.E. No. 13 ("Reply") at 13-19). If this was clear on May 12, 2021, when Defendants denied the request for accommodation, it is even clearer today: Since Defendants' discriminatory policy was adopted, none of the purported reasons Defendants gave for categorically prohibiting Appellant's prayer practice has ever applied. (*See, e.g.*, Leone Decl. ¶¶ 3-7).

On July 26, 2021, Defendant Sukhdeo announced that "starting Monday, August 2, 2021," there would "no longer be" a schedule that permits Appellant to work from home at any time. (*See* D.E. No 8-4). Accordingly, on July 30, 2021, Appellant moved for a preliminary injunction (D.E. No. 8), the denial of which is the subject of this appeal. The change in status quo threatened on July 26 came to pass and has caused a 100%+ increase in Defendants' burdening of Appellant's free exercise, at least doubling the number of days on which Defendants prohibit Appellant's prayer practice. (*See id.*).[3]

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[3] Although their relevance is questionable, *see infra*, note 6, it is worth mentioning "accommodations" Defendants "offered" Appellant alongside their categorical refusal to accommodate his prayer practice. (*See* Compl. Ex. D at 2-3). These "accommodations" are "better described as *anti-accommodations*, which not only would require Plaintiff to forgo his prayer practice but would also impose significant burdens on Plaintiff." (*See* Reply at 23-25). The proposed "accommodations" directly contradict not only Appellant's religious beliefs regarding his prayer practice (*see, e.g.*, Leone Dec. ¶ 13) but also Defendants' putative rationale for denying Appellant's religious accommodation request to begin with—for instance, by generally permitting Appellant to be physically

Prior to completion of briefing on the motion, Appellant notified the District Court that Defendants privately asserted to Appellant that the motion "is frivolous" and attempted to bully him into withdrawing the motion by threatening to "seek sanctions" against him. (*See* D.E. No. 10 & D.E. No. 10-1). Appellant also informed the District Court that Defendants indicated they would be disputing facts; and, to the extent any material facts were disputed, Appellant "respectfully request[ed] the opportunity to subpoena a small number of witnesses, if not one witness, and present testimony on any disputed material facts." (D.E. No. 10). Defendants ultimately did not dispute any material fact—nor did they even attempt to defend their apparently unethical assertion that the motion "is frivolous"—and the Court did not invite presentation of additional evidence at the brief September 7, 2021 hearing it held on the motion. Accordingly, the record before the District Court at the hearing consisted of the Complaint and its exhibits; letters to the Court from the parties; a declaration under penalty of perjury by Appellant (Leone Decl.); and a press release and deficient certification by one defendant (D.E. No. 11-3 ("Imhof Cert.")).[4]

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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 Appellant work at his nearby home, where he can actually pray and work consistent with his job responsibilities, on the very same condition (*see, e.g.*, Compl. Ex. D at 3; Compl. ¶ 58; Leone Dec. ¶¶ 13-17).

After questioning why Appellant's religious beliefs conflict with one of the proposed "accommodations" (OA Tr. at 12:22-24), the District Court apparently reduced Appellant's religious beliefs to things "preferred" by Appellant (*see id.* at 27:19-21).

[4] Defendant Imhof's certification, the only evidence submitted by Defendants other than a press release, fails to comply with 28 U.S.C. § 1746. (*See* D.E. No. 11-3 (failing to certify "under penalty of perjury")); *see also* L. Civ. R. 7.2(a) (listing "affidavits, declarations, [and] certifications" in reference to 28 U.S.C. § 1746). Regardless, as explained herein, the certification contains only vague assertions or uncontested observations and does not controvert any material fact in the record.

At that hearing, the District Court repeatedly rushed Appellant's oral argument (*see* D.E. No. 23, Oral Argument Transcript ("OA Tr."), at 12:20-24, 14:1-7, 15:5-10 & 18:7-10); did not permit oral argument on certain preliminary injunction factors (*id.* at 15:5-10); asked zero questions of the defendants; and issued a brief oral ruling, in which the Court assumed facts not in the record (*see, e.g.*, *id.* at 24:10-17 (e.g., referencing nonexistent trials) & 25:5-14 (quoting from and relying on an apparently non-existent source regarding relief not sought)) and made several clear legal errors (*see, e.g.*, *id.* at 23:25-24:9 & 27:21-24 (creating a pandemic exception to the Constitution); 24:25-25:2 (questioning whether Appellant's 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 Defendants' 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"); 25:3-5 (illicitly shifting the burden of narrow tailoring to Appellant); 25:9-14 (conflating Appellant's individual request for an accommodation with "control" over an entire "office"); 26:10-16 (apparently assuming that diversity in the kinds of secular exemptions permitted by Defendants' discretionary policies is required to make their discretion subject to strict scrutiny); 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); 27:25-28:2 (recognizing that Appellant's claim "might find great success" but ruling that the claim does not have a likelihood of success on the merits)).

In its entire ruling, the District Court did not cite a single legal authority or the record even one time; and it was unclear whether the District Court was familiar with the applicable Supreme Court precedents, *compare, e.g.*, 24:25-25:2 ("The issue is whether or not his religious practice is truly being prevented or not being accommodated in any

way."), *with Fulton* (slip. op) at 10 ("That misapprehends the issue."), and basic record documents, *compare, e.g.*, OA Tr. 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"),[5] *with* D.E. No. 8-5 (proposing relief precisely parallel to that granted in *Fraternal Order* and clarifying that the District Court is "**not** enjoin[ing] anything else, including disciplining Appellant or any employee for any act or omission inconsistent with any job duty, obligation, rule, or responsibility"); (*see* Compl. Ex. A).

ARGUMENT

> When evaluating a motion for preliminary injunctive relief, a court considers four factors: (1) has the moving party established a reasonable likelihood of success on the merits (which need not be more likely than not); (2) is the movant more likely than not to suffer irreparable harm in the absence of preliminary relief; (3) does the balance of equities tip in its favor; and (4) is an injunction in the public interest?

Fulton v. City of Philadelphia, 922 F.3d 140, 152 (3d Cir. 2019) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017)); *see also Reilly*, 838 F.3d at 179-80 (requiring for "likelihood of success" only "a showing significantly better than negligible"—that the movant "*can* win on the merits"—and that *the government* justify its burdening of First Amendment freedom or else the movant "be deemed likely to prevail")); *In re Revel AC, Inc.*, 802 F.3d 558, 565 (3d Cir. 2015). When the government is the party opposing a preliminary injunction, the latter two factors merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009).

Importantly, this Court recognizes "a constitutional duty to conduct an independent examination of the record as a whole when a case presents a First Amendment claim." *Brown v. City of Pittsburgh*, 586 F.3d 263, 269 (3d Cir. 2009).

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[5] Defendants repeatedly made similar factual mischaracterizations, several of which are addressed at pages 21 to 28 of Appellant's Reply (D.E. No. 13).

I. Appellant has demonstrated a strong likelihood of success on the merits of his First Amendment Free Exercise claim.

Defendants' policy of categorically denying Appellant a religious accommodation imposes an obvious burden on Appellant's free exercise: This discriminatory policy choice prevents Appellant, on fear of discipline from Defendants, from engaging in his prayer practice during every work day. (*See, e.g.*, Compl ¶¶ 19-27; Leone Decl. ¶ 13 (declaring under penalty of perjury, "When physically present in the office, I am forced to forgo a prayer practice I engage in throughout every work day. (I engage in this practice every day except Sunday.) My religious belief is that the peace and solitude required for this practice are impossible in the office.")). The sincerity of Appellant's religious beliefs is uncontested. (*See* Opp. at 3 ("Defendants do not contest that Appellant's religious beliefs are sincerely held.")).[6] So putting Appellant to a choice "between following the precepts of h[is] 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

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[6] Although Defendants recognize that Appellant's religious beliefs reflect "honest conviction," *see Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014) (quoting *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 716 (1981)), they have illegitimately attempted to dispute the content of those beliefs (*see, e.g.*, D.E. No. 11 at 14-15). They have also repeatedly attempted to force Appellant to change these beliefs so that he could deem Defendants' proposed "accommodations" acceptable. (*See, e.g.*, Opp. at 17 (calling "accommodations" that would force Appellant to change his prayer practice "generous"); *see also supra*, note 3). *And* Defendants have illicitly attempted to shift the legal burden to explain why their proposed "accommodations" are unreasonable (*see, e.g.*, D.E. No. 11 at 13), which turns the law on its head. *See 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); *Reilly*, 858 F.3d at 180; *Fraternal Order*, 170 F.3d at 366; N.J.S.A. 10:5-12(q)(1); *see also Greater Phila. Chamber of Commerce v. City of Philadelphia*, 949 F.3d 116, 133 (3d Cir. 2020) ("In First Amendment cases the initial burden is flipped.").

Given that the proposed "accommodations" indisputably conflict with the religious beliefs Defendants correctly recognize as sincerely-held, it is unclear whether the "accommodations" have any further relevance to the merits of Appellant's First Amendment claim. (*See, e.g.*, Compl. Ex. E at 7-9; Compl. ¶¶ 56-59; Leone Dec. ¶ 13; Reply at 23-25).

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*, 450 U.S. at 717.

Defendants, tellingly, contend only that this burdening is subject to rational basis scrutiny (*see* D.E. No. 11 at 10-11), but this Court's and the Supreme Court's precedents make clear that rational basis does not apply here: For at least three reasons, Defendants' discriminatory policy choice is subject to strict scrutiny, which it flatly fails. Therefore, there are at least three ways in which Defendants are violating the First Amendment, addressed in turn in Section A below.

A. Defendants' discrimination is subject to strict scrutiny.

First, Defendants' discriminatory policy choice lacks neutrality. Their May 12 memorandum makes clear: *Religion can never be* an adequate basis for a work-from-home accommodation, neither now nor "in the future." (Compl. Ex. D at 2). Defendants thus "single[d] out [religious] worship for especially harsh treatment," *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020), **at the very time they were already granting for secular reasons the very accommodation requested by Appellant** (*see, e.g.*, Compl. ¶¶ 15-18 & 75-81; Leone Decl. ¶¶ 10-12; D.E. No. 11 at 2). The only plausible explanation for this lack of neutrality is hostility to religion, hostility evident even in Defendants' briefing below. (*See, e.g.*, D.E. No. 11 at 5, 6 & 17 (derisively referring to the religious need to pray in scarequotes multiple times); *id.* at 3 (derisively referring to Appellant's prayer practice as a "moving" "target")). And Defendants' assertion that religion can never justify a work-from-home accommodation, even "in the future" (Compl. Ex. D at 2), shows that they "presuppose[] the illegitimacy of religious beliefs and practices." *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). Therefore, Defendants' 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, and strict scrutiny applies, *see, e.g.*, *Lukumi*, 508 U.S. at 546; *Fulton* (slip op.) at 13.[7]

Second, for multiple reasons, Defendants' discriminatory policy choice is not generally applicable: Defendants have "prohibit[ed] religious conduct," i.e., working at home for religious reasons even "in the future" (Compl. Ex. D at 2), "while permitting secular conduct," i.e., working from home for secular reasons (Leone Decl. ¶¶ 10-11; Opp. at 2), which "undermines the government's asserted interests in a similar way"—in fact, the same exact way, *see, e.g.*, *Fulton*, (slip op.) at 6; *and* Defendants treat the activity of working from home for secular reasons more favorably *than the same exact activity undertaken for religious reasons*, which they have chosen to prohibit categorically, *see, e.g.*, *Tandon*, 141 S. Ct. at 1296. Lacking general applicability in either of these ways is sufficient to trigger strict scrutiny. *Fulton*, (slip op.) at 6; *Tandon*, 141 S. Ct. at 1296; *Blackhawk v. Commonwealth*, 381 F.3d 202, 211 (3d Cir. 2004) ("trigger[ing] strict scrutiny" because the "[secular] exemptions [made] available [by the government] undermine[d] the interests" the government claimed to be pursuing).

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[7] *Fraternal Order* "assume[d] that an intermediate level of scrutiny applie[d]" partially because this Court believed the government's "actions [could not] survive even that level of scrutiny." 170 F.3d at 366 n.7. (As explained herein and in the briefing below (*see, e.g.*, D.E. No. 8-1 at 5-13) the same is true here.) *Fraternal Order* also assumed an intermediate level of scrutiny partially because that case "arose in the public employment context." 170 F.3d at 366 n.7. Since *Fraternal Order* was decided, however, the Supreme Court in *Fulton* has 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)). And when the government breaches either of those requirements, such as with a system of discretionary exemptions that permits discrimination against religion, *strict scrutiny applies*. *See, e.g.*, *id.* at 13.

Third, and in the same vein, Defendants' 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.[8] Defendants maintain arbitrary discretion[9] to favor secular reasons for working from home over religious reasons—and they have in fact used their discretion in this manner to burden Appellant's free exercise. (*Compare, e.g.*, Complaint Ex. D at 2 (Defendants exercising their discretion to deny Appellant a work-from-home accommodation, even "in the future," and even at the very time they were widely permitting work-from-home accommodation for secular reasons), *with* Leone Decl. ¶¶ 10-11 *and* Opp. at 2 (Defendants recognizing that under their exercise of discretion "all employees worked from home full-time" for secular reasons)). This is precisely the kind of discretionary

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[8] Defendants apparently make both individualized and categorical exemptions. (*Compare, e.g.*, Compl. ¶¶ 16-17 & Leone Decl. ¶¶ 10-11 (Defendants creating different work-from-home policies based on individual work units) *and* D.E. No. 11 at 18 (apparently recognizing that Defendants distinguish work-from-home policies based on employee "level"), *with* D.E. No. 11 at 2 (Defendants categorically permitting "all employees [to] work[] from home full-time" for secular reasons) *and* Compl. Ex. D at 2 (Defendants categorically refusing to accommodate religious reasons for working from home even "in the future")).

Regardless, this Court has made clear that either kind of exemption is constitutionally suspect—and that categorical discrimination like that certainly at issue here can be even more problematic than individualized discrimination: "[I]t is clear from [*Smith* and *Lukumi*] that the 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 Blackhawk*, 381 F.3d at 212 ("[W]e are confronted with a scheme that features both individualized and categorical secular exemptions, and it is these that trigger strict scrutiny.").

[9] Not only is Defendants' discretion arbitrary: Defendants totally refused to explain their exercise of discretion when Appellant presented them with pointed criticism of it before filing this lawsuit; and they declined to respond when Appellant asked if there was a way to appeal their extreme refusal to accommodate religion even "in the future," raising significant due process concerns. (*See* Compl. Ex. D at 2 & Exs. E, F & G).

system the Supreme Court and this Court have said makes the government's actions subject to strict scrutiny, because this is precisely the kind of discretionary system which squarely raises—and, here, actualizes—the Courts' concern that the government will engage in religious discrimination. *See, e.g.*, *Fulton*, (slip. op.) at 10; *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.").

Any one the reasons discussed above independently suffices to show that Defendants' policies are not neutral and generally applicable. Defendants responded to the upshot of this proposition—that their burdening of Appellant's free exercise is subject to strict scrutiny—with a series of fallacious arguments in the District Court (*see, e.g.*, Reply at 4-7 & 11-12), but Appellant will address only one in detail now.

Defendants assert that because some or all employees "were required to return [physically] to work on August 2, 2021"—or because Defendants are not *at this moment* granting secular exemptions from the requirement that employees be physically present for work—their policies are "neutral and generally applicable." (*See* D.E. No. 11 at 10-11). This fallacious argument, however, "misapprehends the issue:" The Supreme Court has foreclosed the argument—actually, stronger versions of it—twice over. *See Fulton*, (slip op.) at 10; *Tandon*, 141 S. Ct. at 1297.[10]

[10] Neither in briefing nor at oral argument did Defendants cite *Fulton* even one time, not even when discussing the requirements of neutrality and general applicability, which *Fulton* directly addressed only months ago. (*See, e.g.*, D.E. No. 11 at 10); *Fulton*, (slip op.) at 5-7. It is understandable why Defendants would want to pretend *Fulton* does not exist: It is a 9-0 Supreme Court case that puts the lie to their fallacious arguments. It is not clear, however, why *the District Court* also pretended that *Fulton* does not exist—declining to cite *Fulton* even once and in its ruling not addressing any of Appellant's arguments based on *Fulton*. (*See generally* OA Tr. at 23:6-28:11).

In *Fulton*, the Supreme Court made clear that having "a formal mechanism for granting exceptions"[11] *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 the policy are worthy of solicitude." *Id.* Here, not only *may* Defendants' "decide which reasons for not complying with the[ir] [physical presence] policy are worthy of solicitude:" They in fact decided that secular reasons are "worthy of solicitude" but that religious reasons are not *and never are. See id.*; (Compl. Ex. D at 2). Moreover, Defendants may exercise their standardless, arbitrary discretion at any time and decide again that secular reasons are worthy of solicitude *while continuing to discriminate against religion. 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."); ("Both 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]").[12] Stated simply, the Supreme Court's "concern [i]s the prospect of the

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[11] Formal or informal, the very potential for granting exemptions, *Fulton* makes clear, is the problem; and an *informal* system depending *even more* on Defendants' arbitrary discretion poses an *even greater threat* of religious discrimination. *See Fulton*, (slip op.) at 10. Stated simply, the Supreme 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 Defendants have done here*—and in the absence of preliminary relief, would be permitted to continue to do.

[12] *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/.

government's deciding that secular motivations are more important than religious motivations," *Fraternal Order*, 170 F.3d at 365, *and that is precisely what Defendants have done here*—and in the absence of preliminary relief, would be permitted to continue.

In *Tandon*, the Supreme 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. *Tandon,* 141 S. Ct. at 1297 (citing *Roman Catholic Diocese*, 141 S. Ct. at 68) (emphases added). Here, Appellant remains not only under a "constant threat" of free exercise burden: Defendants' burdening of Appellant's prayer practice has never ended—*and was increased by 100% on August 2*—let alone the discriminatory policy resulting in the burdening actually "withdraw[n]." *See id.*; (Compl. Ex. D. at 2-3 (stating Defendant's policy of categorically discriminating against a religious accommodation even "in the future")). And despite Defendants' August 2 shifting of who must be physically present in the office or when, Defendants' discretion to grant exemptions and permit employees to work from home for secular reasons may again be exercised at any time. *See Tandon*, 141 S. Ct. at 1297; *Alabama Association*, (slip op.) at 8; *supra*, note 12. In other words, as observed above, Defendants maintain arbitrary discretion to favor secular reasons for working from home over religious reasons. The Supreme Court's and this Court's concern that the government will engage in religious discrimination is therefore squarely implicated here. *See, e.g.*, *Fulton*, (slip. op.) at 10; *Fraternal Order*, 170 F.3d at 365.

In addition, regardless of their treatment of others for secular reasons, Defendants intentionally discriminated against religion in denying Appellant an accommodation, explicitly and categorically singling out religion as never an adequate basis to permit work from home. (Compl. Ex. D at 2 (categorically asserting that religion can never justify

working from home "presently or in the future")). 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, and Defendants' discriminatory intent has continued from that decision until this day: It does not cease to exist simply because Defendants have decided to treat others differently for secular reasons. And Defendants' hostility to religion is shockingly evident even in their brief. (*See, e.g.*, Opp. at 5, 6 & 17 (derisively referring to the religious need to pray in scarequotes multiple times); Opp. at 3).

B. Defendants' discrimination cannot pass 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 Defendants' 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). Defendants' totally-untailored and unlawfully-motivated religious discrimination cannot pass even rational basis review.

1. Defendants' putative interests are far from compelling.

To attempt to justify their religious discrimination, Defendants 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 (Compl. Ex. G) consists of a single paragraph of factually unsupported assertions (Compl. Ex. D at 2-3) stated at a "high level of generality." *See, e.g.*, *Fulton*, (slip op.) 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)). To this day, Defendants have provided zero individualized analysis of Appellant's request for an accommodation as it relates to Appellant's employment in particular. *See, e.g.*, *id.* 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 [*Appellant in particular*]"); (*see also generally* Imhof Cert.). Each of Defendants' putative interests—such as their vague appeals to "emergent matters" that "may" require attention (*see* Compl. Ex. D at 2-3; Imhof Cert. ¶ 8)—has been debunked. Repeatedly. (*See, e.g.*, Compl. Ex. E at 2-6; Compl. ¶¶ 35-67; Leone Decl. ¶¶ 3-5 ("[T]here has never been an emergent matter that necessitated my immediate physical presence in the office. I am not sure what such a hypothetical scenario would be like."); D.E. No. 8-1 at 12-14; Reply at 14-19; *see also* D.E. No. 8-1 at 12 n.5). And Defendants' only attempts at providing evidence in support of these interests are (i) a press release; and (ii) the deficient certification of Defendant Imhof,[13] which re-asserts only vague interests at only a high level of generality. (*Compare, e.g.*, D.E. No. 13 at 5 (vaguely asserting that "department heads had been taking on many of the responsibilities of assistant prosecutors") *with*, Reply at 7 ("Appellant is not aware of a single occasion on which a 'department head,' or anyone, 'took on' any of his job responsibilities, nor do Defendants identify even one such occasion.")).

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

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[13] *See supra*, note 4.

Ex. E at 2-6; Compl. ¶¶ 35-67; Leone Decl. ¶¶ 3-5; D.E. No. 8-1 at 12-14; Reply at 14-19); and Defendants fail to respond with anything but more vague, generalized assertions—let alone a shred of evidence to the contrary.

In addition, Defendants themselves contradict their own putative interests in categorically denying Appellant a religious accommodation—three times over. (*See* Compl. ¶¶ 44-51). ***First***, Defendants 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." (Compl. Ex. D at 1; *see also* Compl. Exs. A & B (specifying that religious accommodation is *not* sought when it is necessary to be in the office)). ***Second***, Defendants would generally permit Appellant 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 permit Appellant to be out of the office to work at his nearby home, where he can actually pray and work in peace, on the very same condition. (Compl. Ex. D at 3 (emphasis added)). **This nonsensical "accommodation" alone refutes Defendants' entire position.** ***And third***, Defendants recognize, as they must, that for secular reasons they already widely permitted the accommodation Appellant is seeking. (Compl. Ex. D at 1; Compl. ¶¶ 15-18; Leone Decl. ¶¶ 3 & 10-12; D.E. No. 11 at 2).

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 Appellant 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. *See, e.g.*, *Fraternal Order*, 170 F.3d at 366; (Compl. Ex. D at 2 (categorically prohibiting free exercise "presently or in the future")). "[T]here is no apparent reason why permitting [Appellant to work from home] for

religious reasons should create any greater difficulties" than permitting many others to work from home for secular reasons. *See Fraternal Order*, 170 F.3d at 366.

2. Defendants' chosen method of advancing their putative interests—categorical religious discrimination—is totally untailored.

Defendants have *categorically* prohibited Appellant's free exercise of his prayer practice under all circumstances and even in the future—the exact opposite of narrow tailoring. (*See, e.g.*, Compl. ¶ 53 (Defendants have refused to permit even "one day, hour, or minute" of work from home as necessary to accommodate prayer); Compl. Ex. D at 2-3); *Fulton*, (slip op.) at 13-14. In other words, "Defendants made no effort to determine when [accommodating Appellant's free exercise] would cause undue hardship and when it would not: They simply asserted, categorically, that it always does." (Compl. ¶ 53). Defendants' assertion is antithetical to their actual legal obligation here: *They* "*must do more* than assert that certain risk [or cost] 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. Yet they offer only the opposite and ignore "many other less restrictive rules" they could use instead of categorical religious discrimination. *See, e.g.*, *Roman Catholic Diocese*, 141 S. Ct. at 67.

The government's failure to tailor its discrimination here is equivalent to the government's failure in *Fraternal Order*, which is on all fours with this case (*see, e.g.*, D.E. No. 8-1 at 10-11) but which Defendants did not even attempt to distinguish and which the District Court did not cite even one time. In *Fraternal Order*, this Court rejected *even physical 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." *Id.* at 366; *see also Roman Catholic Diocese*, 141 S. Ct. at 67 (enjoining regulations that burdened religious practices even

though the regulations were designed to "[s]tem[] the spread of COVID-19"—an "unquestionably a compelling interest"—because they were not "narrowly tailored") (emphasis added)); *McTernan v. City of York*, 564 F.3d 636, 650-51 (3d Cir. 2009). (So here, yet with Defendants' much weaker putative interests.) As discussed herein and in the record below, Defendants' religious discrimination against Appellant is totally untailored: Whereas Defendants judged a secular rationale for working from home broadly acceptable, they categorically rejected a religious rationale for working from home and refused to permit Appellant to work for home for religious reasons during even "one day, hour, or minute"—now or "in the future." (*See, e.g.*, Compl. ¶ 54; Leone Decl. ¶¶ 8-12; Compl. Ex. D at 2).

3. Defendants' discrimination would not pass even rational basis.

Although Defendants argued below only that rational basis applies here (*see* D.E. No. 11 at 10-11) it is clear that rational basis does not apply. *See, e.g.*, *Fulton* (slip op.) at 13; *Tandon*, 141 S. Ct. at 1296; *Roman Catholic Diocese*, 141 S. Ct. at 66; *Masterpiece*, 138 S. Ct. at 1731; *Lukumi*, 508 U.S. at 546; *Thomas*, 450 U.S. at 718; *Blackhawk*, 381 F.3d at 211. But Defendants' discrimination would not pass muster even under that highly-deferential standard: Defendants have not cited a single fact in support of the proposition that they have a legitimate interest in categorically denying religious accommodation to Appellant (*see* Compl. Ex. D at 2-3; Imhof Cert.); and there is no rational relationship—at least not one explained by Defendants (*see, e.g.*, Compl. ¶ 62(b) (observing that Defendants "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 Defendants); Compl Ex. E at 3-4; *see also* Compl. Ex. E at 4 n.2)—between the maximally discriminatory policy Defendants' 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, Defendants' policies are shot through with inconsistencies[14] and are motivated by unlawful intent. *See, e.g., Romer v. Evans*, 517 U.S. 620, 632-33 (1996). Defendants' 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 Fraternal Order*, 170 F.3d at 365 ("[The] decision to provide medical exemptions while [categorically] refusing [a] religious exemption[] is sufficiently suggestive of discriminatory intent."). Defendants' hostility to religion is evident *even in their briefing below*. (*See, e.g.*, Opp. at 5, 6 & 17 (derisively referring to the religious need to pray in scarequotes); Opp. at 3).

C. Appellant must be deemed likely to prevail on the merits.

Defendants do not even come close to justifying their burdening of Appellant's free exercise, having eked out only a dubious argument that they pass mere rational basis. (*See* D.E. No. 11 at 10-11). Furthermore, it is unclear whether there is any relevant distinction between the merits of this case and those in *Fraternal Order*, where the government at least claimed to have a compelling interest (in safety). Accordingly,

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[14] Multiple instances of inconsistency on the part of Defendants are discussed herein as well as in the record. (*See, e.g.*, Compl. Ex. E at 2-10). For example, Defendants asserted that they cannot accommodate Appellant's religious practice *at all, ever*, despite granting the very accommodation Appellant was seeking—at the very time Appellant was seeking it—to others for secular reasons.

Another example that leaps off the page is the first sentence of Defendants' 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." (Compl. Ex. D at 2). If this assertion were accurate, it would mean that all of Defendants' employees working from home either performed no work or performed no work "in the nature" of their employment. This assertion is nonsense and even disrespectful to the many employees who have worked hard, even overtime, from home.

Appellant "must be deemed likely to prevail" on the merits. *See Ashcroft*, 542 U.S. at 666; *O Centro*, 546 U.S. at 429; *Reilly*, at 180.

II. Appellant has demonstrated that he will suffer—and is suffering—irreparable harm on each work day in the absence of 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) (citing *Roman Catholic Diocese*, 141 S. Ct. at 67). As if this standard were not sufficient to find that Appellant has shown this factor here—where Defendants' burdening of free exercise is not only not "minimal" in duration but categorical and permanent—Defendants' themselves apparently concede that Appellant is suffering irreparable harm: "The harm allegedly suffered by Appellant . . . is difficult, if not impossible, to quantify and thus even more challenging to remedy." (*See* D.E. No. 11 at 3); *Ramsay v. Nat'l Bd. of Med. Examiners*, 968 F.3d 251, 262 (3d Cir. 2020) (defining irreparable harm).

Defendants, nonetheless, advance multiple fallacies in support of the mistaken conclusion that Appellant is not suffering irreparable harm in the loss of his free exercise rights. Appellant will briefly note these now and address them in greater detail if Defendants attempt to rely on them again in this Court:

- *Compare, e.g.*, D.E. No. 11 at 3 & 14-15 (recognizing that Appellant's religious beliefs are sincerely held but disputing the content of those beliefs), *with* Leone Decl. ¶ 13 *and Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014) (quoting *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 716 (1981)) (making clear that disputing the content of religious beliefs is legally impermissible).
- *Compare, e.g.*, D.E. No. 11 at 6 *and* Compl. Ex. D at 1 (repeatedly suggesting that dissection of "a specific provision in Christianity" is appropriate in adjudicating

Appellant's claims), *with Thomas*, 450 U.S. at 715 ("Courts should not undertake to dissect religious beliefs.").[15]

- *Compare, e.g.*, D.E. No. 11 at 12-19 (repeatedly attempting to shift the burden to explain the unreasonableness of Defendants' proposed "accommodations" to Appellant), with *Reilly*, 858 F.3d at 180 (citing *O Centro*, 546 U.S.at 429; *Ashcroft*, 542 U.S. at 666) (making clear that the movant "must be deemed likely to prevail" unless *the government* justifies its burdening of religious exercise), *Fraternal Order* F.3d at 366 ("The [*government*] has not offered any interest in defense of its policy that is able to withstand any form of heightened scrutiny."), *and* N.J.S.A. 10:5-12(q)(1) (providing that *an employer* must accommodate a sincerely-held religious practice unless *the employer* "demonstrates . . . undue hardship").
- *Compare, e.g.*, D.E. No. 11 at 15 (asserting that Defendants' religious discrimination "does not cause [Appellant] irreparable harm" because "he was able to work full time in the office" before the pandemic), with *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

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[15] If Defendants are interested in "a specific provision in Christianity" regarding Appellant's prayer practice, they could consult the Bible. *See, e.g.*, Genesis 1:1; Exodus 15:26; Deuteronomy 10:14; Joshua 1:9; I Kings 4:29-33; I Chronicles 16:8; Nehemiah 2:4-5; & 9:4-6; Job 26:13, 38:4 & 38-41; Psalms 1:1-3, 8:3-5, 19:1-2, 30:11-12, 35:28, 40:16-17, 51:15-17, 63:5, 64:1, 66:19, 71:8 & 24, 89:1 & 11, 94:18-19, 95:1-5, 102:25, 104:14-17 & 33, 107:41, 119:12-13, 141:1-2 & 148:7-10; Proverbs 1:3, 3:5 & 3:25-26; Isaiah 44:24 & 51:13; Jeremiah 17:14; Ezekiel 1:1; Amos 9:6; Matthew 5, 6:3-4, 6:5-6, 6:17-18, 6:26-29, 8:7, 14:23, 22:37-40 & 25:31-46; Mark 1:35-36, 6:46 & 7:34; Luke 2:13-14, 12:22-28, 18:9-14 & 23:34; John 1:1, 12:44 & 17:1-2; Acts 1:10-11 & 6:2-4; Romans 1:20; II Corinthians 10:3-5; Ephesians 1:15-16, 6:1-4 & 6:13-18; Philippians 4:6; Colossians 4:2; I Thessalonians 5:16-18; Hebrews 13:15; James 1:27; Revelation 21: 9-11.

practice "is immaterial" to determining whether an employer burdens his free exercise and causes him irreparable harm).[16]

None of these fallacies calls into question the upshot of the Supreme Court's clear statement of the relevant rule, *see Tandon*, 141 S. Ct. at 1297 (citing *Roman Catholic Diocese*, 141 S. Ct. at 67), which the District Court apparently recognized but then inexplicably disregarded (*see* OA Tr. at 26:19-27:7).

III. Granting preliminary relief is in the public interest.

As observed above, when the government is the party opposing a preliminary injunction, the balancing and public-interest factors merge. *See Nken*, 556 U.S. at 435. 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. Here, on Appellant's side, the effect of withholding relief is and would continue to be devastating: As he has repeatedly informed Defendants, 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 levels. (Compl. ¶ 25; Compl. Ex. E at 6 ("I suffer and am unable to focus on and complete work efficiently when denied the opportunity to pray"); D.E. No. 8-3 ("It is spiritually and psychologically painful."); Leone Decl. ¶ 16). Defendants unnecessarily and inhumanely upended the status quo and increased these harms *by 100%* on August 2—prompting the application for preliminary relief in the District Court. (*See* D.E. No. 8).

On Defendants' side, it is not clear what harm, if any, would follow if the Court were to grant relief. Despite Defendants' vague assertions (*see* Compl. Ex. D at 2-3; Imhof Cert; *see also* Compl. Ex. E at 2-6), they have not identified a single concrete fact

[16] Defendants never cited *Hobbie*; and other than *Smith* on one page in passing (D.E. No. 11 at 10), *they did not cite any Supreme Court precedent* on religious liberty; nor did the District Court cite the Supreme Court, or any court, in its ruling, even though at oral argument Appellant cited *Hobbie* on exactly this point. (*See* OA Tr. at 17:5-14).

or specific example—let alone actual evidence—that suggests they would suffer even a small burden if they permitted Appellant to work from home as necessary to pray as contemplated by the request for accommodation (*see* Compl. Exs. A & B; E at 6 (Defendants "fail[ed] to show even a de minimis interest in denying the [request].")).

In their briefing—after never mentioning it before (Compl. Ex. D at 2-3) and "stand[ing] by" their omission (Compl. Ex. G)—Defendants claimed that that permitting Appellant to work from home as necessary to pray would be "harmful to public interest" because Appellant would not "adequately develop professionally." (*See* D.E. No. 11 at 20). Defendants, however, cannot speculate and "assume the worst" simply because Appellant 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 Defendants' speculative assertion reduces to. (*See also* D.E. No. 11 at 7 ("anticipat[ing]" that "remote work is insufficient"); Compl. Ex. E at 2 & 5 (explaining that vague "anticipation" and speculation about "some point in the future" cannot justify Defendants' categorical religious discrimination)). Furthermore, being forced to forgo his prayer practice severely hampers Appellant's professional development and wellbeing on multiple levels. (*See* Compl. ¶ 25; Leone Decl. ¶ 17).

Defendants' remaining attempts to make an argument on this factor similarly fell flat: For instance, Defendants asserted a "likelihood" that "working from home would cause difficulties in handling [a] burdensome case load." (D.E. No. 11 at 20). But Appellant already refuted this non-point months ago: Defendants "conspicuously ignore[] the fact that [an accommodation granted] could be tailored if necessary in the future;" and "[a]t most, an increased workload may make the circumstances under which it is reasonably necessary to be in the office more frequent;" *and*, "again, such

circumstances are contemplated by the Request for Accommodation" itself. (Compl. Ex E at 5; Compl. Exs. A & B; *see also* D.E. No. 13 at 18-19 (citing Compl. Ex. E at 6 n.4)).

If any "public consequences" would result from granting preliminary 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); *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 178 (3d Cir. 2002) ("[T]he public interest clearly favors the protection of constitutional rights.").

At the very least, "it has not been shown that granting th[is] application[] will harm the public." *See Roman Catholic Diocese*, 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 Defendants'. *See, e.g., id.* at 67 (emphasis added); *Fraternal Order*, 170 F.3d at 366-67. And permitting Appellant to work from home as necessary to pray would actually advance the public's interest in stemming the spread of the virus during this pandemic. *See Alabama Association*, (slip op.) at 8; *see, e.g., supra*, note 12. Even though Defendants used this putative interest to suspend the requirement that "all employees" report physically to work for prolonged periods (D.E. No. 11 at 2), they have apparently given it zero weight in their calculated decision to discriminate against Appellant's religious practice.

CONCLUSION

Defendants' discriminatory "value judgment that secular (i.e., medical) motivations . . . are important enough to overcome [their] general interest[s] . . . but that religious motivations are not" cannot stand. *See Fraternal Order*, 170 F.3d at 366. Defendants' neither carried their burden under the applicable standards nor cited any concrete fact or specific example in support of their discrimination; and by repeatedly

mischaracterizing or misrepresenting facts[17]—and even deriding religion in their briefing —they rear the ugly face of their entrenched desire to burden Appellant's free exercise.

For the reasons discussed herein and reiterated in Appellant's briefing below, Appellant respectfully requests that this Court grant preliminary relief pending appeal.[18] Appellant respectfully requests oral argument on this motion, *see* Fed. R. App. P. 27(e); L. App. R. 27.1, and permission to file it despite its wordcount, *see* Fed. Rs. App. P. 2 & 27(d)(2)(A).

Date: September 14, 2021

Respectfully submitted,

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17 *See supra*, note 5.

18 The unfounded notion that the relief sought is "vague" was Defendants' foremost point in support of their unethical assertion that Appellant must "withdraw [the] motion" for preliminary relief or else Defendants will "seek sanctions" against him. (*See* D.E. No. 10-1 at 1 & 3). The relief requested, however, is substantially identical to the relief granted and affirmed by this Court in *Fraternal Order*. *See* 170 F.3d at 361 & 367. In *Fraternal Order*, the District Court enjoined the government employer "from disciplining or otherwise disadvantaging Appellants . . . for violating Order 71-15 or any other directive which would require them to shave or trim their beards in violation of their religious beliefs." *Id.* at 361; (*see also* D.E. No. 8-1 at 10-11 (discussing the overwhelming analogy of *Fraternal Order* to this case)). **Here, Appellant proposes that the Court enjoin Defendants from disciplining or otherwise disadvantaging Appellant for his free exercise, such as for violating their May 12, 2021 policy (Compl. D at 2-3), which categorically discriminates against religion. The precise parallel to the relief granted in *Fraternal Order* is crystal clear. And Appellant—consistent with his desire *not* to impose hardship on Defendants and for the sake of clarity—added in the relief proposed below and proposes now that the Court would "not" be enjoining "anything else, including disciplining Appellant or any employee for any act or omission inconsistent with any job duty, obligation, rule, or responsibility." (*See* D.E. No. 8-5).**

The requested relief would not only be clear and substantially identical to that granted in *Fraternal Order*: Defendants would already know exactly what it entails because it would preserve the status quo of when the original motion was filed, under which Appellant was permitted to work from home for secular reasons and, in Defendants' words, to be physically present "based on the needs of the office." (Compl. Ex. D at 2).

CERTIFICATE OF SERVICE

Alex G. Leone hereby certifies that this brief is served electronically on the defendants in this matter and their counsel on September 14, 2021. *See* L. Civ. R. 5.2, Section 14(b)(1).

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 21-cv-12786

ALEX G. LEONE,

Appellant

-v-

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

Appellees.

On Appeal from the United States District Court of the District of New Jersey

Docket No. 2:21-cv-12786-SDW-ESK

APPELLEE'S BRIEF IN OPPOSITION TO APPELLANT'S MOTION FOR PRELIMINARY INJUNCTION

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SUBJECT MATTER AND APPELLATE JURISDICTION

This Court has jurisdiction over the appeal and instant motion pursuant to 28 USC §1292(a)(1).

ISSUES ON APPEAL

Alex G. Leone appealed the September 7, 2021 decision of the Honorable Susan D. Wigenton, U.S.D.J. denying his motion for injunctive relief in the form of enjoining Defendants Essex County Prosecutor's Office, Theodore Stephens II, Romesh Sukhdeo, Gwendolyn Williams and Roger Imhof ("ECPO Defendants") from "disciplining or otherwise disadvantaging Plaintiff simply for praying in accordance with his religion, including at home on work days." See D.E. Nos. 8-5, 18.

PROCEDURAL HISTORY

Appellant filed a two-count Complaint in the Federal District Court for the District of New Jersey on June 18, 2021. See D.E. No. 1. The First Count alleged a "Violation of the Right to Free Exercise (42 U.S.C. §1983)," and the Second Count alleged a "Violation of the NJLAD." Id.

On July 30, 2021 Appellant filed a Motion seeking a Preliminary Injunction enjoining Defendants from "disciplining or otherwise disadvantaging Plaintiff simply for praying in accordance with his religion, including at home on work days." D.E. No. 8. The ECPO Defendants opposed the motion on August 24, 2021, and filed an Answer to the Complaint on August 31, 2021. See D.E. No.

11; see also D.E. No. 14. Appellant filed a Reply in support of his application on August 31, 2021, and oral argument was held before the Honorable Susan D. Wigenton, U.S.D.J. on September 7, 2021. See D.E. No. 13; see also D.E. No. 17. On September 7, 2021, the Court entered an Order denying Appellant's request for a Preliminary Injunction. See D.E. No. 18.

Appellant filed a Notice of Appeal with this Court on September 7, 2021. See Third Cir. D.E. No. 1. Appellant also filed a second Motion for Preliminary Injunction with the District Court on September 7, 2021, pending the results of the Appeal. See D.E. No. 20. On September 14, 2021, Appellant filed a Motion for Emergency Injunction with the Third Circuit. See Third Cir. D.E. No. 3.

On September 16, 2021, the ECPO Defendants filed an Opposition to Appellant's second Motion for a Preliminary Injunction in the District Court. See D.E. No. 25. Appellant filed his Reply brief in support of this District Court motion on September 16, 2021. See D.E. No. 26.

STATEMENT OF FACTS

Appellant was hired as an Assistant Prosecutor by Defendant ECPO on September 9, 2019. See D.E. No. 11, Exh. B at ¶2. From his hire until the end of March 2020, Appellant worked in the office every day along with the rest of the ECPO workforce. Id. at ¶3. In March 2020, in response to the global COVID-19 pandemic, the ECPO shifted to a predominately remote work schedule to stem the

spread of the virus that had inundated hospitals and severely impacted New Jersey in particular. Id.

On April 26, 2021, Appellant submitted his request for a religious accommodation, stating that he has a "spiritual need to pray in peace and solitude, such as in [his] backyard, several times throughout the day." See D.E. No. 1, Exh. A. As a result, Appellant requested to work from home (permanently) and would only be physically present at the office or court "when reasonably necessary" or "when accommodating this religious need would cause undue hardship." Id.

On May 6, 2021, Chief Assistant Prosecutor Roger Imhof ("Imhof"), Executive Assistant Prosecutor Gwendolyn Williams, Deputy Chief Prosecutor Walter Dirkin and Essex County Counsel Courtney Gaccione met with Appellant over videoconference to discuss his request. See D.E. No. 1, Exh. D; D.E. No. 11, Exh. B at ¶7. During this conference, it was explained to Appellant that:

> as a new attorney with the Prosecutor's Office, his presence in the office was necessary to his growth and development as a trial lawyer – to observe colleagues at other trials, and to collaborate and strategize with colleagues in the office regarding investigations, witness and victim interviews, case presentations to grand juries, among other responsibilities of an Assistant Prosecutor.
>
> D.E. No. 11, Exh. B at ¶8.

On May 12, 2021, Defendant Imhof issued a memorandum in response to Appellant's request, which in part memorialized the discussion with Appellant

during the May 6 conference. See D.E. No. 1, Ex. D.

In the memorandum, Defendant Imhof recounted Appellant's reasoning for the need for the accommodation stating that: praying in the office made him feel uncomfortable; it was "contrary to the peace and solitude" that he desired; and that he did not want to be overheard by others. Id. To accommodate this request, the ECPO proposed three alternatives tailored to Appellant's specific concerns, that Appellant be permitted: (1) to pray in his private office; (2) to access the Essex County Eagle Rock Reservation directly across from his worksite; and (3) to utilize a completely private soundproof interview room in the same office. See D.E. 1, Exh. D. When asked if prayer at the park across the street from the office was an acceptable alternative, Appellant told the ECPO that it was not, as it would "curtail the spontaneous nature of [his] prayer and subject [him] to being heard or seen by others." See D.E. No. 1, Exh. E. Appellant stated that praying in the office with his door closed for privacy would occasionally be a viable option, but doing so every day would not be conducive to the peace and solitude that he needs and would subject him to the possibility for interruption or being overheard. Id.

Imhof responded that Appellant's in-office presence was important for multiple reasons. For example, meetings are not always prescheduled, as emergent matters often arise, and require the presence of attorneys, as do in-person witness interviews; the collaborative nature of the work would result in a loss of

effectiveness if not done in-person; and Imhof anticipated a surge of new matters as the State attempts a return to normalcy, which would make remote work insufficient. See D.E. No. 11, Exh. D. Moreover, the New Jersey Supreme Court, by Order dated May 11, 2021, indicated that in-person jury trials would resume on June 15, 2021, thus further support for the ECPO's need to return to the office. See D.E. No. 11, Exh. A. As a result, Imhof stated that allowing Appellant to permanently work from home would constitute an unreasonable interference with the efficient operation of the workplace, pursuant to N.J.S.A. 10:5-12 (q)(1). Id.

On June 1, 2021, Appellant submitted a memorandum in response to Imhof's, rejecting each of the three proposed accommodations. See D.E. No. 1, Exh. E. On July 26, 2021, all ECPO employees were notified that they were required to return to work full time as of Monday, August 2, 2021. See D.E. 11, Exh. G.

LEGAL ARGUMENT

I.

STANDARD OF REVIEW

Injunctions pending appeal are "extraordinary remed[ies] never awarded as of right." Winter v. NRDC, 555 U.S. 7, 24 (2008). To prevail on a motion for an injunction pending appeal, Appellant must show both (1) a "strong" likelihood of success on the merits and (2) irreparable injury in the absence of an injunction. Hilton v. Braunskill, 481 U.S. 770, 776 (1987). The first two elements in the preliminary injunction analysis are "the most critical," Nken v. Holder, 556 U.S.

418, 434 (2009), though the appellate court will also (3) balance the parties' interests in analyzing whether an injunction will injure other interested parties, as well as examine (4) the public interest. In re Revel AC, Inc., 802 F.3d 558, 568–71 (3d Cir. 2015). Here, none of the four factors in this analysis favors taking this extraordinary step under these circumstances.

The Court of Appeals will review the District Court's grant or denial of a preliminary injunction for 'an abuse of discretion, an error of law, or a clear mistake in the consideration of proof.'" 431 E. Palisade Ave. Real Est., LLC v. City of Englewood, 977 F.3d 277, 283 (3d Cir. 2020).

Here, the factual record is not in dispute, though the parties' characterization of the proofs differ - the ECPO Defendants will elaborate on Appellant's mischaracterizations of statements made by Defendants at greater length below. Following extensive briefing and oral argument, the District Court held that Appellant failed to demonstrate the requisite criteria to warrant injunctive relief and denied Appellant's motion. Judge Wigenton did not abuse her discretion or make a clear error of law in rendering her September 7 decision. Respectfully, this Court should deny Appellant's Motion for an Injunction Pending Appeal.

II.

THE DISTRICT COURT CORRECTLY DETERMINED THAT APPELLANT COULD NOT DEMONSTRATE THAT HE WAS LIKELY TO PREVAIL ON THE MERITS

Judge Wigenton properly determined that Appellant had not met his burden in establishing that he was likely to prevail on the merits of his claims and therefore he was not entitled to the emergent relief requested in his motion for a preliminary injunction.

A. Appellant Cannot Establish that Defendants' Policy Violates his First Amendment Rights

In the first count of his Complaint, Appellant asserts a claim under 42 U.S.C. 1983, which allows suits against state actors for claims of constitutional violations. See D.E. 1, Pl. Compl., ¶¶ 83-86. Appellant alleges that the ECPO Defendants violated his First Amendment right to freely exercise his religion because he is not allowed to work from home. Id., ¶ 13, 84. The Free Exercise Clause prohibits the regulation of religious beliefs and also protects religiously motivated expression. See McTernan v. City of York, 564 F.3d 636, 647 (3d Cir. 2009). That said, no right, including the right vested under the Free Exercise Clause, is absolute. Id.

When the government action challenged on constitutional grounds is "neutral and generally applicable" the government need not justify the policy with a compelling governmental interest as would be required under the strict scrutiny standard. Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 273 (3d Cir. 2007).

"A [state action] is 'neutral' if it does not target religiously motivated conduct...." Blackhawk v. Pennsylvania, 381 F.3d 202, 209 (3d Cir. 2004). It is "generally applicable" if it extends to all conduct and does not selectively burden religiously motivated conduct. See Combs v. Homer–Center Sch. Dist., 540 F.3d 231, 242 (3d Cir. 2008) (citing Blackhawk, 381 F.3d at 209)). Rational basis review applies to actions that are deemed neutral and generally applicable, and this standard "requires merely that the action be rationally related to a legitimate government objective." Tenafly Eruv Ass'n v. Tenafly, 309 F.3d 144, 165 n. 24 (3d Cir. 2002).

In his supporting brief to this motion, Appellant repeatedly refers to Defendant Imhof's May 12, 2021 memorandum as the government "policy" that he challenges as unconstitutional.[1] See Appellant Br. at 5, 12-13; See also Addendum, D.E. No. 1, Exh. D.[2] This memorandum was an individualized response to Appellant's individualized request for an accommodation. In it, the ECPO Defendants offer several tailored accommodations to Appellant, all of which he summarily rejected. See D.E. No. 1, Exh. E.

[1] Further, Appellant mischaracterizes the contents of this memorandum, repeatedly stating that Defendant Imhoff said that religion can never justify working from home, which is nowhere in the language of the memorandum. Appellant's request to work from home indefinitely unless required to be in court or at interviews is the specific accommodation that was denied, at the same time workable alternatives were offered to, and rejected by, Appellant.

[2] For consistency purposes, Appellees will follow Appellant's citations to the lower court docket number and addendum.

The policy that was the impetus for Appellant's first motion for a preliminary injunction in the District Court was ECPO's return to work policy implemented for all employees as of August 2, 2021. See D.E. No. 8-4. This policy is facially neutral and generally applicable to all ECPO employees and is thus subject to rational basis standard of constitutional review. There is no categorical secular exemption for any group of people; this is a policy that is applied generally to every employee of the Prosecutor's Office and is neutral on its face.

Plaintiff cites to several United States Supreme Court and Third Circuit cases in attempts to support his conclusory position that Defendant ECPO's requirement that employees report full time to work is discriminatory on its face, without acknowledging that the facts presented in those cases are plainly distinguishable from the case at bar.

The facts presented in the instant matter begin with a global pandemic that resulted in all but essential businesses being shuttered, families and individuals sheltering in place, and the near standstill of this country and particularly this State, as federal and state mandates and executive orders sought to stem the spread of the deadly COVID-19 virus. Appellant points to the ECPO's temporary remote work environment, in line with most government agencies and businesses in the state, as "create[ing] a mechanism for individualized exemptions" and/or a "categorical exemption for individuals with a secular objection but not for individuals with a

religious objection" of the type that warranted strict scrutiny in Tandon v Newsom and Fraternal Order of Police. See Appellant's Br. at 14, n. 8 and 16. Those decisions are easily distinguishable from Appellant's claims.

In Tandom v Newsom, the Supreme Court found that the California State Blueprint System, which prohibited social gatherings greater than three households in number for religious services in some counties, but did not implement a similar across-the-board prohibition for secular establishments and activities such as retail stores, hair salons, movie theaters and restaurants, did not pass constitutional muster. Tandon v. Newsom, 141 S. Ct. 1294, 1297 (2021).

The Supreme Court, in applying strict scrutiny and finding that the state regulation did not overcome this standard, found that "it is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue." Id. at 1296. The Court found that whenever a government regulation "treats any comparable secular activity more favorably than religious exercise" strict scrutiny is triggered. Id. (emphasis added.) The second part of the test examined the comparability analysis, which in this context was "concerned with the risks various activities posed, not the reasons why people gather." Id. In Tandon, the same risks were at issue and thus the activities were deemed comparable. Once deemed comparable, the restriction could not unfairly burden the religious activity. The Supreme Court found that because the

Ninth Circuit did not conclude that gatherings at the secular businesses posed a lesser risk of transmission than the plaintiffs' proposed religious exercise at home, there was no compelling interest that would justify the differential treatment and the restriction was not narrowly tailored, thus the government could not surmount the strict scrutiny inquiry. Id. at 1297.

Here, we are not dealing with comparators. The ECPO temporarily had its employees work from home during the pandemic, as all but essential businesses did, in compliance with federal and state mandate and executive orders in response to the Covid-19 outbreak. Now, as courts are reopening and many employees are vaccinated and back to work, all ECPO employees must return to work. All of them. With no exceptions, secular or otherwise. There are no "comparable risks" to analyze in the instant case and there is no "formal mechanism for exemptions" at the ECPO. The abrupt shutdown and temporary remote work schedule in response to a global pandemic does not establish that the ECPO had a mechanism in place for secular exemptions for the requirement that their employees work in the office and in court.

The Tandon Court underscored California's differential treatment of comparable activities in its conclusion:

> It is unsurprising that such litigants are entitled to relief. California's Blueprint System contains myriad exceptions and accommodations for comparable activities, thus requiring the application of strict scrutiny.

Id. at 1298 (emphasis added.)

There are no such "myriad exceptions and accommodations" for other individuals or group of employees in the ECPO. There are zero exceptions to the August 2 return to work policy, and Appellant does not point to any such exemptions. See OA Tr. 26:12-14. Nor is there a formal mechanism for providing such exemptions, as Appellant argues. See Appellant Br. at 16. There was never any formal mechanism by which exemptions were made for secular reasons and thus the heightened level of scrutiny applied, and the ultimate holdings of the Tandon, supra, and Fulton, Fraternal Order, and Roman Catholic Diocese, infra, have no bearing on this case.

Despite the clear difference in the arbitrary restriction in Tandon as compared to the ECPO's policy that all employees return to work, Appellant cites to Tandon to support the position that even when the government withdraws its policy that burdens free exercise, he "remains under constant threat" that the government will use its "power to reinstate the challenged restriction..." See Appellant Br. at 17. The Tandon Court specifically noted that California officials have "a track record of 'moving the goalposts. . . .'" (Id. at 1297) and it is not clear what restriction in the instant matter that Appellant fears will be reinstated. The ECPO policy requires its employees to return to work and Appellant is not being treated differently in that respect than any other employee, or category of employees.

The circumstances of this case can also be distinguished from the other Supreme Court and Third Circuit cases cited to by Plaintiff. In Fulton v City of Philadelphia, the Supreme Court held that "the refusal of Philadelphia to contract with [Catholic Social Services] for the provision of foster care services unless it agrees to certify same-sex couples as foster parents" triggered strict scrutiny standard of review which the City could not overcome. Fulton v. City of Philadelphia, Pennsylvania, 141 S. Ct. 1868, 1882 (2021). The Fulton Court found that the City, in its standard foster care contract, had a provision that "incorporates a system of individual exemptions, made available in this case at the 'sole discretion of the Commissioner" and thus it could not justify the refusal to provide an exemption to others from certain contract provisions to the CSS. Fulton v. City of Philadelphia, Pennsylvania, 141 S. Ct. 1868, 1878 (2021).

In Fraternal Order of Police, the Court found that the Newark Police Department's individualized medical exemptions provided to some officers which permitted them to circumvent its no-beard policy, while refusing religious exemptions from the same requirement, triggered strict scrutiny. Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365 (3d Cir. 1999).

Finally, in Roman Catholic Diocese, the Supreme Court found that New York's restriction of a maximum of ten people to attend religious services in areas designated as "red zones" was not constitutionally permissible because "[i]n a red

zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as 'essential may admit as many people as they wish. And the list of 'essential' businesses includes things such as acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities." Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020).

The clear distinctive treatment between secular and religious activities is apparent from the facts of all of these decisions which triggered strict scrutiny review, and completely absent from the facts at bar. The ECPO policy applies to each and every one of its employees across the board, with zero exemptions for any reason. See D.E. No. 11-3, Imhof Cert., ¶5.

The policy clearly satisfies the rational-basis standard of review requiring that the policy be rationally related to a legitimate government objective. Brown v. City of Pittsburgh, 586 F.3d 263, 284 (3d Cir. 2009). As Judge Wigenton recognized, the ECPO is a critical law enforcement agency in one of the most populated and busiest counties in the state. See OA Tr., 24:13-17. As the Courts have reopened and criminal trials have resumed, the influx of complaints and investigations have increased, and it is essential that the employees of the Prosecutor's Office and its attorneys be in the office and in court on a full time basis. Collaboration and

observation of colleagues during witness and victim interviews, grand jury presentations and trials, are among an Assistant Prosecutor's most critical tasks, and it is essential that newer attorneys gain experience and guidance from their more experienced colleagues that remote work does not offer. See D.E. No. 11-3, ¶8; D.E. No. 1, Exh. D, pp. 2-3.

Accordingly, the neutral, generally applicable policy of the ECPO that requires its employees to appear in the office and at trial on a full time basis is rationally related to a legitimate government objective and therefore satisfies the rational-basis standard of review. Plaintiff is not entitled to a preliminary injunction because he cannot establish that he is likely to succeed on the merits of his First Amendment claim.

B. Plaintiff Cannot Establish that He is Likely to Prevail on the Merits of His New Jersey Law Against Discrimination Claim

The NJLAD prohibits employers from imposing a condition that "would require a person to violate or forego a sincerely held religious practice or observance" unless, "after engaging in bona fide effort, the employer demonstrates that it is unable to reasonably accommodate the employee's religious observance or practice without undue hardship on the conduct of the employer's business." N.J.S.A. 10:5-12(q)(1).

It is undisputed from the record that the ECPO Defendants have not told Appellant that he must forego his prayer practice while at work, as Appellant alleges,

and it is also undisputed that his supervisors engaged in a bona fide effort to accommodate Appellant. They scheduled a conference with him to further discuss the basis for his requests, and issued a written memorandum offering several reasonable alternatives to accommodate Appellant's prayer practice at work. See D.E. No. 1, Exh. D. Finally, the ECPO also explained why the all-or-nothing arrangement proposed by Appellant would pose an undue hardship on the operations of the Prosecutor's Office and on Appellant's growth and development as a County Assistant Prosecutor. This is not at all the case where an employee requested an accommodation and was met with silence, such that a failure to accommodate would be presumed. Appellant simply cannot show that he would prevail on the merits of his LAD claim and thus his motion for a preliminary injunction was denied.

Because Appellant continues to state that he is not required to offer any response to the offered accommodations and argues that it is the ECPO Defendants' legal obligation to provide him with the specific accommodation he seeks and nothing short of it because anything less will infringe upon his rights, Appellees will briefly recount the analysis that courts use when examining Title VII failure to accommodate claims. Appellant could have asserted federal claims for failure to accommodate religious practices under either the 1983 framework or pursuant to Title VII or both. Bradley v. Pittsburgh Bd. of Ed., 913 F.2d 1064, 1078-79 (3d Cir. 1990). Appellant chose to file under Section 1983 and allege an infringement of free

exercise, possibly to avoid the administrative prerequisite of filing an EEOC complaint before filing suit. The Title VII rubric appears best suited to Appellant's failure to accommodate claim based upon religion, and is included in this analysis because it also closely tracks the analysis under the NJLAD.

In a fairly recent Third Circuit decision, Miller v. Port Auth. of New York & New Jersey, 788 F. App'x 886, 889 (3d Cir. 2019), the Court examined somewhat analogous facts to those at bar. The plaintiff worked in the mechanical maintenance unit of the Port Authority, and a few days after he was hired, he requested that he be taken off rotational shifts that required him to work on the Sabbath (Friday evening to Saturday evening shifts) and Jewish holidays. Id. at 887. His employer stated that they could not alter the employee schedules because they were negotiated as part of a collective bargaining agreement. Id. Instead, they offered Miller the option to swap shifts with co-workers, and told him that he could use vacation, personal excused time, or compensatory time. Id. at 887-88. Miller disputed the offered accommodations as unreasonable, used only personal time on those shifts he said he could not work, and when that leave was exhausted, he failed to show up at work and was terminated. Id. at 888.

The Court of Appeals determined that an employee's "general dissatisfaction with its employer's efforts to facilitate an accommodation" did not create a factual dispute as to whether the accommodation was reasonable. Id. at 890. It found that

the Port Authority's offer to accommodate Miller's religious practices by allowing him to use paid time off and to utilize voluntary mutual swaps with other co-workers was a good faith effort and the accommodation offered was deemed reasonable by the Court. Id. at 889. The Third Circuit affirmed the decision of the District Court, and adopted the lower court's reasoning.

The District Court held that the Port Authority was not required "to accommodate the religious practices of an employee in exactly the way the employee would like to be accommodated" and "[w]here both the employee and the employer propose an accommodation, the employer does not have to accept the employee's proposal." Miller v. Port Auth. of New York and New Jersey, 351 F.Supp.3d 762, 779 (D.N.J. 2018) (quoting Ansonia Bd. of Educ. V. Philbrook, 479 U.S. 60, 68 (1986)("any reasonable accommodation by the employer is sufficient to meet its accommodation obligation.").

The Miller Court did not agree with the employee's blanket statement that anything other than the grant of his specific request was not an accommodation, and cautioned that "the employee therefore cannot make an all-or-nothing demand, but must work with an employer that is attempting to offer an accommodation:

> An employee cannot shirk his duties to try to accommodate himself or to cooperate with his employer in reaching an accommodation by a mere recalcitrant citation of religious precepts. Nor can he thereby shift all responsibility for accommodation to his employer. Where an employee refuses to attempt to accommodate his own

> beliefs or to cooperate with his employer's attempt to reach a reasonable accommodation, he may render an accommodation impossible.

Id. (quoting Chrysler Corp. v. Mann, 561 F.2d 1282, 1285 (8th Cir. 1977.)

The Supreme Court has established that "a sufficient religious accommodation need not be the 'most' reasonable one (in the employee's view), it need not be the one the employee suggests or prefers, and it need not be the one that least burdens the employee." Shelton v. Univ. of Med. & Dentistry of New Jersey, 223 F.3d 220, 225 (3d Cir. 2000)(citing to Philbrook, supra, 479 U.S. at 68–69, 107 S.Ct. 367. Simply put, when the employer offers any reasonable accommodation, "the statutory inquiry is at an end." Philbrook, at 68.

Appellant falsely claims that "Defendants asserted that they cannot accommodate Appellant's religious practice at all, ever. . . ." See Appellant Br. at 23, n. 14. Like the plaintiff in Miller, this is not an accurate summary of the record because in fact, Appellant has been offered several reasonable accommodations. Elsewhere in his brief, Appellant again falsely claims that "Defendants, nonetheless, categorically denied Appellant's request for a religious accommodation, thus singling out religion as never worthy of accommodation at all – putting Appellant to the choice of forgoing his prayer practice or being disciplined by his employer. . . ." See Appellant Br. at 6.

The ECPO Defendants are not prohibiting Appellant's prayer practice. The ECPO has offered several alternatives that reflect workable compromises and Appellant has rejected all of them out of hand. See D.E. No. 1, Exhs. D-E. Appellant has not been told that he can only pray at "X" time, or only in "X" place, nor has he been told that he cannot pray in the office in any manner at all. See D.E. No. 1, Exh. D, p. 3. However, Appellant only wants to pray at home and if he cannot be home, he cannot pray. This is Appellant's ultimatum, not ECPO's.

It is undisputed that Appellant was offered private work environments where he can pray in solitude – he has his own private office where he can close the door, alternatively, he was offered a soundproof interview room in the same office that would ensure that colleagues would not hear him when he sought refuge to pray out loud. When Appellant relayed that he also needed to be outside, to connect with nature and perceive the handiwork of the Creator such as by looking up at the sky [See D.E. No. 1, 21; See also OA Tr. 13:11-19] his supervisors advised that he was welcome to walk across the street from his office to a 400 acre forest reserve and recreational park set into the Watching Mountains, the Eagle Rock Reservation, for moments when he needed to pray and be outside and in nature when doing so. Id. The alternatives offered by the ECPO were tailored to the stated reasons for Appellant's request that his prayer practice be accommodated.

In light of the repeated communications, meetings and alternative accommodations offered to Plaintiff, it cannot be said that Defendants did not put forth a bona fide effort in attempts to accommodate Plaintiff, nor can it be argued that Defendants are requiring him to entirely forego his prayer practice. As held in Miller, supra, it is not the ECPO Defendants' obligation to accept the exact terms of employment dictated by Appellant in his accommodation proposal. What Appellant is arguing is that the proposed alternatives are not good enough. That does not make him likely to prevail on the merits of his claim, and Appellant's motion must be denied.

III.

THE DISTRICT COURT CORRECTLY FOUND THAT APPELLANT COULD NOT DEMONSTRATE IRREPARABLE HARM

"[T]he assertion of First Amendment rights does not automatically require a finding of irreparable injury, thus entitling a plaintiff to a preliminary injunction if he shows a likelihood of success on the merits." Hohe v. Casey, 868 F.2d 69, 72–73 (3d Cir. 1989). "[I]t is the "direct penalization, as opposed to incidental inhibition, of First Amendment rights [which] constitutes irreparable injury." Id. (quoting Cate v. Oldham, 707 F.2d 1176, 1188 (11th Cir. 1983); See Wooley v. Maynard, 430 U.S. 705 (1977). Constitutional harm is not necessarily synonymous with the irreparable harm necessary for issuance of a preliminary injunction. Id. (citing

to City of Los Angeles v. Lyons, 461 U.S. 95, 112–13 (1983). "[A] failure to demonstrate irreparable injury must necessarily result in the denial of a preliminary injunction." Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 800 (3d Cir. 1989).

Appellant claims that foregoing his prayer practice causes adverse spiritual, psychological, and physical effects, but that statement relies on the faulty conclusion that he is being required to forego his prayer practice by the ECPO, when he has not demonstrated that he is forbidden from prayer when required to appear at work. The ECPO return to work policy is not a "direct penalization" of Appellant's religious practice, but rather represents an "incidental inhibition."

By his own admission, Appellant is "fully willing to be physically present for anything required by [his] job responsibilities – including, for instance, in-person court appearances, witness interviews, or any other obligation." See D.E. No. 8-2, ¶ 9. He is therefore willing to be present in the office and in court when he deems it necessary, and has never argued that he should be relieved of these duties, nor has he argued he experiences irreparable harm when he is present on these days.

Judge Wigenton acknowledged that the demonstration of irreparable harm is a heavy burden for the movant, and in the case of allegations of a constitutional violation, if rights were truly being violated, the assumption of irreparable harm can be automatic. However, the judge correctly noted the distinction in the facts of this

case "when accommodations have certainly attempted to be made. See OA Tr. 26:17-23. The judge did not disregard any material facts of this case, she acknowledged that because accommodations have been made it is not the case where irreparable harm is presumed because free exercise of religion is completely prohibited. As stated above, the hard line that if he is to pray, he cannot leave his house - is Appellant's ultimatum, not the ECPO's.

In his brief, Appellant claims that Defendants' "policy"

> prevents Appellant, on fear of discipline from Defendants, from engaging in his prayer practice during every work day.

See Appellant Br. at 11.

It appears here that Appellant is stating that he does not pray because he fears discipline from the ECPO Defendants. This is after the ECPO Defendants have offered him several accommodations consisting of various tailored environments for Appellant's prayer practice. Clearly any alleged fear is a result of Appellant's own manufacture. Appellant reiterates that Defendants are "putting Appellant to a choice 'between following the precepts of h[is] religion and forfeiting [work], on the one hand, and abandoning one of the precepts of [his] religions in order to accept the work, on the other hand. . . . " See Appellant Br. at 11. No one has issued an

ultimatum to Appellant demanding that he forfeit his work or abandon his religion. These are scenarios imagined by Appellant.

When asked by Judge Wigenton the current status of employment and whether Appellant goes into the office, Appellant responded:

> So I do go into the office as a general matter. I use accrued time, as I mentioned in a record exhibit and mentioned in the briefing, that I do use some accrued time in order to be able to pray, as I have described in the papers.

See OA Tr. 11:2-10.

Appellant currently notifies his supervisor that he is taking every other day off, which further weakens Plaintiff's claim that he suffers actual irreparable harm when he is in the office, because there is no distinctive difference between coming in on a Monday versus a Wednesday, and Plaintiff does not attempt to make such a distinction in his brief or declarations. Plaintiff has failed to demonstrate that he will suffer irreparable harm if the preliminary injunction is not granted at this stage, and as such, the preliminary injunction should be denied.

IV.

BALANCING OF THE EQUITIES AND PUBLIC INTEREST FACTORS ALSO WEIGH IN FAVOR OF DENIAL OF PLAINTIFF'S MOTION

Though it is already clear that Appellant has not met the two most critical prongs of the test pertaining to the grant of preliminary injunctions, a balancing of

the equities and consideration of the public interest also makes it clear that Appellant's motion should be denied.

In weighing the equities, the court must "balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." Reilly v. City of Harrisburg, 858 F.3d 173, 178 (3d Cir. 2017).

Appellant's argument is that if this motion is denied, Appellant will "be required to forego his prayer practice," which causes his to suffer psychologically, professionally, and physically. See D.E. No. 1, ¶ 25. Appellant also acknowledges that "forgoing his prayer practice is sometimes an unavoidable consequence of life." Id. at ¶ 26. The ECPO has offered several accommodations to Appellant that would allow him to pray at work and not have to forgo his practice, which Appellant concedes is sometimes unavoidable. Appellant has been told he can pray in his office whenever needed throughout the workday, he can pray in a soundproof interview room if he desired more privacy than a closed office. Alternatively, he is permitted Plaintiff to leave the office and pray outside at the Eagle Rock Reservation, a 400-acre property with multiple secluded areas. See D.E. No. 1, Exh. D, p. 3. These accommodations directly touch upon the unique, specific criteria outlined by Appellant and are designed to minimize any harm suffered by Appellant, who can strike a balance between his work as an Assistant Prosecutor, and his private

religious beliefs.

On the other hand, were the Court to grant Appellant's motion, the Court would be unduly interfering with the efficient operation of the busiest law enforcement and prosecutorial county agency in the State. Now that in person criminal trials have resumed and investigations have increased exponentially as the State has reopened, to mandate that the ECPO carve out exceptions and permit its Assistant Prosecutors to work remotely except when in their estimation their appearance is warranted - is simply not feasible, and would in fact harm the public's interest.

While remote work may have been feasible on a temporary basis when courts were closed, complaints and investigations slowed as citizens remained predominately in their homes, now the County is in need of its trial lawyers to be back in the office, collaborating with colleagues, attending ad hoc meetings and court appearances as they arise, interviewing witnesses and victims, and responding to the duties of the chief law enforcement officials of the County.

CONCLUSION

Judge Wigenton's decision did not evidence an abuse of discretion, plain error, nor did she make a clear mistake in her interpretation of the facts of this case. She properly found that ECPO's return to work policy does not provide for individualized or categorical exemptions on secular grounds, and that a nation-wide

and particularly state-wide shutdown of businesses, government agencies, and courts – which all turned to remote schedules – does not constitute a mechanism for exemptions that discriminates against religious activities. Nor could Appellant demonstrate that he was entitled to a presumption of irreparable harm because the ECPO did offer several accommodations to Appellant and thus Defendants' return to work policy was not solely prohibitive of Appellant's religious practice.

Appellant has not shown a likelihood of success on the merits of his constitutional or NJLAD claims, and cannot demonstrate irreparable harm. Accordingly, Appellees respectfully submit to this Court that the District Court opinion denying Appellant's motion for a preliminary injunction be affirmed.

Respectfully submitted,

GENOVA BURNS LLC

Dated: September 20, 2021

/s/Kathleen Barnett Einhorn

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CERTIFICATE OF BAR MEMBERSHIP

The undersigned hereby certify that they are members of the Bar of the United States Court of Appeals for the Third Circuit.

s/*Kathleen Barnett Einhorn*
Kathleen Barnett Einhorn, Esq.

CERTIFICATE AS TO VIRUS SCAN

I certify that the electronic submission was subjected to a virus scan by Security Manager AV Defender.

s/*Kathleen Barnett Einhorn*
Kathleen Barnett Einhorn, Esq.

CERTIFICATION OF IDENTICAL COMPLIANCE OF BRIEFS

The undersigned certifies that the text of the electronically filed brief is identical to the text in the paper copies.

s/*Kathleen Barnett Einhorn*
Kathleen Barnett Einhorn, Esq.

CERTIFICATION OF WORD COUNT

This brief contains 6324 words, excluding the parts of the brief exempted.

This brief complies with the typeface requirements and the type style requirements of because this brief has been prepared in a proportionally spaced typeface using Word Microsoft 365 in Times New Roman font, type 14 point.

s/Kathleen Barnett Einhorn
Kathleen Barnett Einhorn, Esq.

Dated: September 20, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September 2021, I electronically filed the foregoing Brief of Defendants, Essex County Prosecutor's Office, Theodore Stephens II, Romesh Sukhdeo, Gwendolyn Williams, and Roger Imhof, using the Court's CM/ECF system, that an original and six (6) paper copies of the Brief were delivered to the Clerk's Office and that two (2) paper copies of this Brief were also served by Overnight U.S. Mail upon:

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Dated: September 20, 2021

#16120287 (1582.132)

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ECO-036-E

No. 21-2684

ALEX G. LEONE,
Appellant

v.

ESSEX COUNTY PROSECUTOR OFFICE;
THEODORE STEPHENS, II;
ROMESH SUKHDEO; GWENDOLYN WILLIAMS;
ROGER IMHOF, in their individual and official capacities

(D.N.J. No. 2-21-cv-12786)

Present: KRAUSE and PORTER, Circuit Judges

1. Emergency Motion Appellant for an Injunction Pending Appeal under Fed. R. App. P. 8, with Request for Oral Argument on the Motion and Permission to file Overlength Motion;

2. Addendum by Appellant to Motion for Injunction containing District Court Documents Referenced in Motion;

3. Response by Appellant in Opposition to Emergency Motion Appellant for an Injunction Pending Appeal under Fed. R. App. P. 8, with Request for Oral Argument on the Motion and Permission to file Overlength Motion;

4. Reply by Appellant In Support of Emergency Motion for an Injunction Pending Appeal under Fed. R. App. P. 8.

Respectfully,
Clerk/pdb

ORDER

Appellant's request to file an overlength emergency motion for injunction pending appeal is granted. Appellant's emergency motion for injunction pending appeal is denied in all other respects.

By the Court,

s/ Cheryl Ann Krause
Circuit Judge

Dated: September 22, 2021
PDB/cc: All Counsel of Record

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

ALEX G. LEONE, Plaintiff, v. ESSEX COUNTY PROSECUTOR'S OFFICE, THEODORE STEPHENS II, ROMESH SUKHDEO, GWENDOLYN WILLIAMS, and ROGER IMHOF, Defendants.	Civil Action No. 21-12786 (SDW) (ESK) **ORDER** September 23, 2021

WIGENTON, District Judge.

This matter, having come before this Court on Plaintiff Alex G. Leone's ("Defendant") Motion for Preliminary Injunction Pending Appeal (the "Motion"), and this Court having considered the parties' submissions, for the reasons stated in this Court's Opinion dated September 23, 2021,

IT IS on this 23rd day of September, 2021

ORDERED that Plaintiff's Motion (D.E. 20) is **DENIED**.

SO ORDERED.

/s/ Susan D. Wigenton

SUSAN D. WIGENTON, U.S.D.J.

Orig: Clerk
Edward S. Kiel, U.S.M.J.
Parties