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No. \_\_\_\_\_

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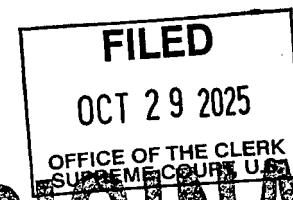
IN THE SUPREME COURT OF THE UNITED STATES

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**CALEB MCGILLVARY**  
Plaintiff/Appellant

v.

**MICHAEL T. G. LONG ET AL.**  
Defendant/Appellee



**ORIGINAL**

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On Petition for Writ of Certiorari to the United States Court of Appeals  
for the 3rd Circuit at Appeal Docket Number 25-1335

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**PETITION FOR WRIT OF CERTIORARI**

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CALEB L. MCGILLVARY  
Third and Federal Street  
New Jersey State Prison  
Po Box 861  
Trenton, NJ 08625-0861  
*In Propria Persona*

## **QUESTIONS PRESENTED FOR REVIEW**

1. Is the use of 3rd Cir. L.A.R. 27.4 to effectively convert an appeal as of right into a discretionary appeal, which denies an appellant the opportunity to fully brief the issues and fails to review the record below despite appellate jurisdiction being present, inconsistent with the Federal Rules of Appellate Procedure and 28 U.S.C. 1291, 1292(a)(1)?
2. Would having papers reviewed by a Large Language Model Artificial Intelligence, such as Grok or ChatGPT, provide a better assurance of Due Process than copied-and-pasted boilerplate opinions?
3. When the U.S. Department of Justice has made findings of a custom, policy, and practice of a state agency, which deprives a group of people of their rights under the Americans with Disabilities Act and Rehabilitation Act, should a preliminary injunction issue to mandate accomodations of those people's disabilities by a reasonable change to that custom, policy, and practice?
4. Is the New Jersey Anti-Polygraph Statute, N.J.S.A. 2C:40A-1, preempted by either the Americans with Disabilities Act, the Rehabilitation Act, and/or the Employee Polygraph Protection Act?

## LIST OF ALL PARTIES TO THE PROCEEDING

The Parties to the proceeding below are:

- 1.) Michael T. G. Long in his official capacity as Director of the NJ Department of Law & Public Safety – Division of Criminal Justice.
- 2.) Matthew J. Platkin in his official capacity as Attorney General of NJ.
- 3.) J. Stephen Ferketic in his official capacity as Chairperson of the Police Training Commission.
- 4.) New Jersey Department of Law and Public Safety
- 5.) State of New Jersey

**LIST OF ALL RELATED PROCEEDINGS**

- 1.) U.S District Court for the District of New Jersey, Dkt. No. 1:24-cv-09507-JMY, Caleb L. McGillvary v. Michael T. G. Long et al., Pending Civil Complaint
- 2.) U.S. Court of Appeals for the 3rd Circuit, Docket Number 25-1335, Caleb L. McGillvary v. Michael T. G. Long et al., August 25, 2025 Summary Affirmance
- 3.) U.S. Court of Appeals for the 3rd Circuit, Docket Number 25-1823, Caleb L. McGillvary v. Michael T. G. Long et al., August 27, 2025 Summary Affirmance
- 4.) U.S. Supreme Court, Docket number 25-5855, In Re Caleb L. McGillvary, Pending Petition for Writ of Mandamus

## TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW	...2
LIST OF ALL PARTIES TO THE PROCEEDING	...3
LIST OF ALL RELATED PROCEEDINGS	...6
TABLE OF CONTENTS	...7
TABLE OF AUTHORITIES CITED	...11
TABLE OF APPENDIX	...17
JURISDICTIONAL STATEMENT	...18
CITATIONS OF LOWER COURT DECISIONS	...18
CONTROLLING PROVISIONS, STATUTES, AND REGULATIONS	...18
STATEMENT OF THE CASE AND GOVERNING FACTS	...18
A. JURISDICTION IN THE COURTS BELOW	...18
B. INTRODUCTION	...19
C. PLAINTIFF'S ADA- AND RA-ELIGIBLE DISABILITY	...21
D. THE HIRING OF SEXUAL PREDATORS AND RETALIATION FOR COMPLAINTS ABOUT SEXUAL PREDATORS AS ROUTINE ORGANIZATIONAL PRACTICES OF THE FAMILY, THE DLPS, AND THE NJDOC	...22
E PLAINTIFF'S ATTEMPTS TO INVOKE ADMINISTRATIVE REMEDIES	...24

F. THE NJDOC'S PATTERN OF RETALIATION FOR EXERCISE OF RIGHTS UNDER THE ADA/RA AND THE FIRST AMENDMENT	...25
G. THE COURT BELOW'S OPINION AND ORDER DENYING PRELIMINARY INJUNCTION	...26
H. THE COURT OF APPEALS' SUMMARY AFFIRMANCE	...27
POINT I: THE USE OF 3RD CIRCUIT LOCAL APPELLATE RULE 27.4 TO CONVERT AN APPEAL AS OF RIGHT TO A DISCRETIONARY APPEAL BY COPYING AND PASTING BOILERPLATE AFFIRMANCES DEPRIVES APPELLANT OF DUE PROCESS, AND IS INCONSISTENT WITH THE FEDERAL RULES OF APPELLATE PROCEDURE, 28 U.S.C. 1291, AND 28 U.S.C. 1292(a)(1)	...27
1. Standard of Review	...27
2. Analysis	...28
POINT II: THE APPEAL SHOULD HAVE BEEN ALLOWED A FULL BRIEFING ON THE MERITS, BECAUSE THE COURT BELOW HAD JURISDICTION AND THE OPINION WHICH THE SUMMARY DISPOSITION RELIED UPON DID NOT ADDRESS THE SUBSTANTIAL QUESTION RAISED BY THIS APPEAL	...32
A. STANDARD OF REVIEW	...32
1. PLAINTIFF IS PRO SE, AND ALL OF HIS DOCUMENTS ARE ENTITLED TO LIBERAL CONSTRUCTION	...32
2. PRELIMINARY INJUNCTION UNDER FED. R. CIV. P. 65 AND 42 U.S.C. 2000e-5	...32
3. AMERICANS WITH DISABILITIES ACT/REHABILITATION ACT	...33
4. RETALIATION FOR EXERCISE OF FEDERAL RIGHTS	...34

## B. ANALYSIS

	...35
1. THE NEW JERSEY ANTI-POLYGRAPH STATUTE, N.J.S.A. 2C:40A-1 IS PREEMPTED BY FEDERAL LAW, BOTH EXPRESSLY AND BECAUSE OF INHERENT CONFLICT	...35
a.) Plaintiff Seeks Reasonable Accomodations Under the ADA/RA, Not Under 42 U.S.C. 1983	...35
b.) Plaintiff Has Shown a Likelihood of Success On The Merits by Credible Evidence In His Declaration, Which Defendants Failed to Rebut or Oppose With Any Evidence Whatsoever	...36
c.) The Accommodations Requested Have Been Held by This Court to be Reasonable, Which Implicates Stare Decisis	...40
i.) The Use of Polygraphs to Screen for Sexually Predatory Behavior Has Been Found Reasonable	...40
ii.) The Use of Polygraphs in Law Enforcement Employment Screenings	...43
iii.) The Prevalence of Sexual Offender Cops Hired in New Jersey	...44
iv.) The Reasonableness of Polygraph Examinations During Employment Screenings to Accommodate Plaintiff's PTSD	...45
c.) The Employee Polygraph Protection Act (EPPA)	
i.) The Responsibility of the USDOJ to Ensure Compliance with the ADA/RA	...46
ii.) The Responsibility of the Federal Bureau of Investigation to Conduct the Polygraph Examinations	...46
iii.) The Contractual Relationship of the DLPS and FBI	...47
iv.) The FBI is Entitled by the EPPA to Polygraph DLPS Employees, and Has a Duty to Do So	...48

d.) The State Law Cited by the Court Below Has Been Preempted	...48
i.) The EPPA Expressly Preempts N.J.S.A. 2C:40A-1	...48
ii.) N.J.S.A. 2C:40A-1 is in Conflict with Federal Law	...51
2. PLAINTIFF'S FIRST AMENDMENT RIGHTS ARE BEING IMMINENTLY THREATENED WITH INTERMITTENT DEPRIVATION IN THE ABSENCE OF INJUNCTIVE RELIEF, HE HAS SHOWN BY A PREPONDERANCE OF EVIDENCE THAT HIS ADA/RA AND RETALIATION CLAIMS ARE LIKELY TO SUCCEED ON THE MERITS, AND THE BALANCE OF THE EQUITIES FAVORS THE ISSUANCE OF INJUNCTIVE RELIEF	...52
a.) The Imminent Threat of Deprivation of Plaintiff's First Amendment Rights is Ongoing and Is Irreparable Harm Per Se	...52
b.) Plaintiff has Shown That His ADA/RA Retaliation Claim and First Amendment Retaliation Claim Are Likely to Succeed on the Merits	...55
CONCLUSION	...56
APPENDIX	...See Separate Volume, Appendix Volume I

## TABLE OF AUTHORITIES CITED

### Cases

<u>Allen v. Thomas</u> , 388 F.3d 147, 149-150 (CA5 2004)	...34
<u>Anderson v. City of Philadelphia</u> , 845 F.2d 1216 (CA3 1988)	...43
<u>Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.</u> , 897 F.3d 314, 334 (D.C. Cir. 2018)	...53
<u>Benisek v. Lamone</u> , 201 L.Ed.2d 398, 400-401 (2018)	...33
<u>C.E.R. 1988, Inc. v. Aetna Casualty &amp; Surety Co.</u> , 386 F.3d 263 (CA3 2004)	...51
<u>Colorado River Water Conservation Dist. v. United States</u> , 424 U.S. 800, 817-818 (1976)	...30
<u>Commonwealth of Pa. v. O'Neill</u> , 100 F.R.D. 354, 364 (E.D.Pa. Nov. 17, 1983), <u>Aff'd</u> 1984 U.S. App. LEXIS 26831 (CA3 1984)	...44
<u>Durham v. Kelley</u> , 2023 U.S. App. LEXIS 24764 at *7 (CA3 2023)	...33, 35
<u>Elansari v. United States</u> , 615 Fed. Appx. 760, 2015 U.S. App. LEXIS 16076 (3d Cir. Pa., Sept. 10, 2015)	...29
<u>Elrod v. Burns</u> , 427 U.S. 347, 373 (1976)	...53
<u>Erickson v Pardus</u> , 551 U.S. 89, 94 (2007)	...32
<u>Furgess v. Pa. DOC</u> , 933 F.3d 285, 290 (CA3 2019)	...26, 27, 34, 46, 54
<u>Gary v. Air Group, Inc.</u> , 397 F.3d 183, 186 (CA3 2005)	...49
<u>G.P. v. Santiam-Midwest Lumber Co.</u> , 81 F.3d 355, 361 (CA3 1996)	...42
<u>Haines v Kerner</u> , 404 U.S. 519, 520 (1972)	...32

<u>Hossaini v. W. Mo. Med. Ctr.</u> , 140 F.3d 1140, 1143 (CA8 1998)	...49
<u>In re Caleb L. McGillvary</u> , Dkt. No. 25-5855, (S. Ct.)	...5
<u>J.B. v. N.J. State Parole Bd.</u> , 444 N.J. Super. 115, 141 n. 12 (App. Div. 2016)	...40, 41
<u>J.B. v. N.J. State Parole Bd.</u> , 229 N.J. 21, 42 (2017)	...40
<u>Karcher v. May</u> , 484 U.S. 72, 77-80 (1987)	...28
<u>Mays v. Springborn</u> , 575 F.3d 643, 650 (CA7 2009)	...34
<u>McGillvary v. Long</u> , Dkt. No. 1:24-cv-09507-JMY (U.S.D.J. – D.N.J.)	...5, 18
<u>McGillvary v. Long</u> , Dkt. No. 25-1335 (U.S. Ct. of App. – 3rd Cir.)	...5
<u>McGillvary v. Long</u> , Dkt. No. 25-1823 (U.S. Ct. of App. – 3rd Cir.)	...5
<u>Muhammed v. Close</u> , 379 F.3d 413, 417-418 (CA6 2004)	...35
<u>Rauser v. Horn</u> , 241 F.3d 330, 333 (CA3 2001)	...34
<u>Roman Catholic Diocese v. Cuomo</u> , 208 L.Ed.2d 206, 209-210 (2020)	...53
<u>S.H. ex rel. Durrell v. Lower Merion Sch. Dist.</u> , 729 F.3d 248, 265 (CA3 2013)	...34
<u>Saari v. Smith Barney, Harris Upham &amp; Co., Inc.</u> , 968 F.2d 877, 880 (CA9 1992)	...49
<u>St. Thomas - St. John Hotel &amp; Tourism Ass'n v. Virgin Islands</u> , 357 F.3d 297, 302 (CA3 2004)	...48
<u>Shelley v. Metzger</u> , 832 Fed. Appx. 102, 2020 U.S. App. LEXIS 32530 (3d Cir. Del., Oct. 15, 2020)	...29

<u>Stehney v. Perry</u> , 101 F.3d 925, 938 (CA3 1996)	...49, 51
<u>Texans for Free Enter. v. Tex. Ethics Commn.</u> , 732 F.3d 535, 539 (CA5 2013)	...53
<u>Truth Found. Ministries, NFP v. Vill. of Romeoville</u> , 387 F.Supp.3d 896, 898 (N.D.Ill. 2016)	...53
<u>United States v. Lee</u> , 315 F.3d 206 (CA3 2003)	...40
<u>Winter v. NRDC, Inc.</u> , 555 U.S. 7, 20 (2009)	...32, 33
 <b>Constitution, Statutes, Regulations, and Rules</b>	
28 <u>C.F.R.</u> 0.85	...47
28 <u>C.F.R.</u> 35.152	...46
28 <u>C.F.R.</u> 35.190(b)(6)	...46
28 <u>U.S.C.</u> 1254(1)	...18
28 <u>U.S.C.</u> 1291	...2, 27, 28
28 <u>U.S.C.</u> 1292(a)(1)	...2, 19, 27, 28
28 <u>U.S.C.</u> 1331	...18
28 <u>U.S.C.</u> 2072	...28
28 <u>U.S.C.</u> 2075	...28
29 U.S.C. 794	... 19, 33, 52
29 <u>U.S.C.</u> 2001-2005	...49, 50
29 <u>U.S.C.</u> 2001-2009	...26, 49

<u>29 U.S.C.</u> 2006(a)	...26, 50, 51
<u>29 U.S.C.</u> 2006(b)	...51
<u>29 U.S.C.</u> 2006(c)	...26, 47, 48, 50, 51
<u>29 U.S.C.</u> 2007-2008	...49
<u>29 U.S.C.</u> 2009	...26, 47, 50, 51
<u>34 U.S.C.</u> 10226(b)	...20, 47
<u>42 U.S.C.</u> 1983	...19, 35, 36
<u>42 U.S.C.</u> 2000e-5	...32, 33
<u>42 U.S.C.</u> 12132	...19, 52
<u>42 U.S.C.</u> 12133	...19, 33
<u>42 U.S.C.</u> 12203	...19
<u>3rd Cir. L.A.R.</u> 27.4	...2, 27, 31
<u>F.R.A.P.</u> 1(a)(1)	...28
<u>F.R.A.P.</u> 10	...28, 31
<u>F.R.A.P.</u> 28	...28, 29, 31
<u>F.R.A.P.</u> 30	...28, 31
<u>F.R.A.P.</u> 31	...28, 29, 31
<u>F.R.A.P.</u> 32	...28, 29, 31
<u>F.R.A.P.</u> 47(a)(1)	...27, 31

<u>F.R.A.P.</u> 47(a)(2)	...27
<u>F.R.A.P.</u> 47(b)	...31
<u>Fed. R. Civ. P.</u> 65	...32
<u>Fed. R. Evid.</u> 201(b)	...39, 44
<u>Fed. R. Evid.</u> 406	...23, 39, 44, 55
<u>N.J.A.C.</u> 10A:3-5.6	...24
<u>N.J.S.A.</u> 2C:40A-1	...2, 26, 35, 48, 49, 51, 52
<u>N.J.S.A.</u> 52:17B-70(d)	...47
<u>N.J.S.A.</u> 52:17B-71 et seq.	...53
<u>N.J.S.A.</u> 52:17B-71a	...47
<u>N.J.S.A.</u> 52:17B-75	...47, 48
<u>U.S. Const. Amdt.</u> I	...25, 35, 36, 37, 38, 52, 54, 55
<u>U.S. Const. Art.</u> VI, cl.2	...52

## Texts, Treatises, and Law Reviews

Daniel T. Wilcox & Daniel E. Sosnowski, Polygraph Examination of British Sexual Offenders: A Pilot Study on Sexual History Disclosure Testing, 11 J. Sexual Aggression, 3, 3 (2005) ...41

Docket No. 309-5, U.S. Department of Justice Office of the Inspector General Evaluation and Inspections Division, Use of Polygraph Examinations in the Department of Justice (Sep. 2006) ...43

Don Grubin, The Case for Polygraph Testing of Sex Offenders, 13 Legal & Criminological Psychol, 177, 187 (2008) ...41

Hedges, Chris. "BLUE SHADOWS - A Special Report: Suspicions Swirl Around New Jersey Police Clique," The New York Times (May 13, 2000) ...22

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Michael T. Bourke, et al., The Use of Tactical Polygraph with Sex Offenders, 21(3) J. of Sexual Aggression, 354 (Feb. 2014) ...42

New Jersey Senate Joint Resolution No. 108, 219th Legislature ...23

Sean P. Sullivan, "Sexual Abuse of Inmates at N.J. Women's Prison is an 'Open Secret,' Federal Inquiry Finds", NJ Star-Ledger (April 14, 2020) ...44

U.S. Department of Justice Civil Rights Division Investigation of the Edna Mahan Correctional Facility for Women (Apr. 2020) ...22, 23

## TABLE OF APPENDIX

Exhibit A – Judgment and Opinion of U.S. Court of Appeals for the 3rd Circuit dated August 25, 2025, summarily affirming denial of injunctive relief	...Pa3
Exhibit B - Order of U.S. Court of Appeals for the 3rd Circuit dated October 21, 2025, denying petition for rehearing	...Pa6
Exhibit C – Opinion of the District Court dated February 13, 2025 relied upon by the U.S. Court of Appeals for the 3rd Circuit	...Pa9
Exhibit D – Order of the District Court dated February 13, 2025 denying injunctive relief	...Pa19
Exhibit E – Text of Controlling Statutes	...Pa21

## **JURISDICTIONAL STATEMENT**

The Judgment of the U.S. Court of Appeals for the 3rd Circuit summarily affirming the District Court's denial of injunctive relief was entered on August 25, 2025. The Order of the U.S. Court of Appeals for the 3rd Circuit denying the Petition for Rehearing in this matter was entered on October 21, 2025. This Court has jurisdiction to issue the writ of certiorari under 28 U.S.C. 1254(1).

## **CITATIONS OF LOWER COURT DECISIONS**

1.) The Decision of the Court Below was Unpublished, and is found at ECF 34 in McGillvary v. Long, Docket Number 1:24-cv-09507-JMY of the U.S. District Court for the District of New Jersey.

## **CONTROLLING PROVISIONS, STATUTES, AND REGULATIONS**

The pertinent provisions of statutes and regulations involved are too lengthy to be set forth verbatim in this petition, but are set forth in the Appendix at Exhibit E.

## **STATEMENT OF THE CASE AND GOVERNING FACTS**

### **A. JURISDICTION IN THE COURTS BELOW**

Federal Jurisdiction existed in the Court of First Instance by virtue of 28 U.S.C. 1331, which provides federal courts jurisdiction to

hear claims arising under 29 U.S.C. 794, 42 U.S.C. 1983, and 42 U.S.C. 12132, 12133, 12203.

The U.S. Court of Appeals for the 3rd Circuit had jurisdiction under 28 U.S.C. 1292(a)(1); and has issued a judgment, attached as Exhibit A to the Appendix; summarily affirming the decision of the District Court denying preliminary injunction; which was filed below as 3rd Cir. CM/ECF no. 34.

## **B. INTRODUCTION**

Plaintiff Caleb L. McGillvary (Plaintiff) has provided documentation showing that he has the disability of Post-Traumatic Stress Disorder (PTSD); which impacts one or more of his major life functions; and for which he was, as defined by 3rd Circuit law, denied access to programs, services, and activities through deliberate discrimination by employees of Defendants State of New Jersey, NJ Department of Law & Public Safety (DLPS), J. Stephen Ferketic, Matthew J. Platkin, and Michael T. G. Long (Colectively, "Defendants"); and through Defendants' failure to accomodate his PTSD by enacting screening procedures used successfully by the majority of other states.

Plaintiff has cited to caselaw and provided evidence that the requested accomodations are reasonable and would be effective at providing him access to public programs by removing non-convicted sexual predators. Indeed, the Defendants have admitted before State Courts that the requested polygraphs are effective at screening for sexually predatory behavior; and this Court has previously upheld the use of polygraphs in law enforcement employment screenings as reasonable and in the public interest.

Defendants have not challenged, nor provided evidence to rebut, any of these assertions; nor have they imputed the efficacy of the requested screening processes; nor have they shown by any competent evidence what, if any, burden or expense they would incur. See 34 U.S.C. 10226 (FBI would, perhaps gladly, pay for the polygraphing through the US DOJ). Defendants cite an antiquated NJ law that the 3rd Circuit specifically held was preempted by federal statute, and rely on misstatements of the issues.

Perplexingly, the Court Below sided with the Defendants' sparse, legally erroneous, and factually unsubstantiated arguments: citing to issues not briefed by parties, such as reliability of polygraphs

and staffing issues. The 3rd Circuit then summarily affirmed this, apparently without having reviewed any of the papers.

### **C. PLAINTIFF'S ADA- AND RA-ELIGIBLE DISABILITY**

Plaintiff has provided mental health reports from numerous psychiatrists, psychologists, and Mental Health Counselors, under seal, showing that he suffers from Post-Traumatic Stress Disorder (PTSD). See DNJ ECF 12, Exhibits B, H-M. As indicated in the reports, Plaintiff's PTSD results from childhood physical and sexual abuse, as well as from Plaintiff surviving sexual assault, and is commonly referred to as Rape Trauma Syndrome (RTS). This diagnosed mental health disability has been found by medical professionals to affect numerous major life activities, including his ability to sleep (Due to nightmares), perform manual tasks (Due to "flashback" panic attacks), eat (Due to anxiety), learn (Due to racing and intrusive thoughts), read (Due to racing and intrusive thoughts), concentrate (Due to racing and intrusive thoughts), think (Due to racing and intrusive thoughts), work (Due to anxiety and panic attacks), communicate (Due to triggers), and interact with others (Due to anxiety, panic attacks, and triggers). See Verified Initial Complaint; ECF 1, para. 11; ECF 12, Exhibits H-M.

**D. THE HIRING OF SEXUAL PREDATORS AND RETALIATION FOR COMPLAINTS ABOUT SEXUAL PREDATORS AS ROUTINE ORGANIZATIONAL PRACTICES OF THE FAMILY, THE DLPS, AND THE NJDOC**

The State of New Jersey's Department of Corrections (NJDOC) is notorious for hiring DLPS-licensed correctional officers who sexually abuse inmates, including juveniles. See ECF 7, ECF 10 Declaration, Exhibit F (providing numerous widely-reported judicially noticeable examples of cops sexually abusing inmates).

It is also judicially noticeable that there is a police gang known as "The Family" operating within New Jersey, and using a "Blue Wall" policy of obstruction of justice to quash any investigations or proceedings against their members for any misconduct, sexual or otherwise. See Hedges, Chris. "BLUE SHADOWS - A Special Report: Suspicions Swirl Around New Jersey Police Clique," The New York Times (May 13, 2000); see also F.R.E. 201(b). The DLPS-licensed officers employed at NJDOC, many of whom are members of The Family, have been found by the USDOJ to engage in "a culture of acceptance of sexual abuse [that] has persisted for many years and continues to the present." See U.S. Department of Justice Civil Rights Division Investigation of the Edna Mahan Correctional Facility for

Women (Apr. 2020), P. 5. The USDOJ indicated that there is a custom and policy of retaliation for making complaints about sexual predators who are employed by the NJDOC and licensed by the DLPS. Id. at P.8-11. Throughout the report, it is clear that the NJDOC and DLPS have a long-standing custom and policy of hiring sexual predators, Ibid. The State of New Jersey, and all its agencies and officers, are estopped from disputing the findings of the USDOJ's report: having adopted a resolution a year after the USDOJ report was published which conceded to the facts found by the report; and further found that neither of the customs and policies of retaliation nor hiring sex offenders as cops have been rectified, but remain in full force and effect.

See New Jersey Senate Joint Resolution No. 108, 219th Legislature; see also F.R.E. 406 (routine organizational practices of an association or entity are competent evidence to show that an agent or employee of that agency acted in conformity with those practices on a given occasion).

Most pertinent to this case, they've hired at least one DLPS-licensed officer at NJ State Prison who is known to fondle inmates' testicles during pat-down searches, and in response to Plaintiff's

request for reasonable accomodations, have stated that "You are subject to seach procedures pursuant to N.J.A.C. 10A:3-5.6" by guards who discriminate against him because of his PTSD. See ECF 10 Declaration, Exhibit C. Mental Health Professionals have found that the triggering of Plaintiff's PTSD by deliberate discrimination by at least one of these officers, has caused him to be constructively denied access to the programs, services, and activities of NJSP; causing him to incur additional expenses just to be able to eat to survive and work on his cases. See ECF 12, Exhibits K, L, M.

#### **E PLAINTIFF'S ATTEMPTS TO INVOKE ADMINISTRATIVE REMEDIES**

Plaintiff filed numerous grievances regarding the NJDOC's discrimination against him because of his PTSD, and failure to reasonably accomodate his PTSD. These grievances culminated in the NJDOC advising him that the NJDOC was not in charge of the hiring process of its officers. See Declaration, Exhibit D. Plaintiff thereafter filed a petition for rulemaking with the DLPS, requesting that they reasonably accomodate his PTSD by implementing effective screenings to prevent non-convicted sexual predators from being licensed by the DLPS and thereby gaining employment with the NJDOC. See ECF 7,

ECF 10 Declaration, Exhibit F. The DLPS refused to provide a public hearing on the petition, and denied it on August 14, 2024. The notice of this denial was published in the September 16, 2024 New Jersey Register, at 56 N.J.R. 1887(c). See ECF 10 Declaration, Exhibit G.

**F. THE NJDOC'S PATTERN OF RETALIATION FOR EXERCISE OF RIGHTS UNDER THE ADA/RA AND THE FIRST AMENDMENT**

Plaintiff has filed numerous declarations and motions for emergency relief during the pendency of this motion, each indicating a pattern of retaliation by DLPS-licensed officers against Plaintiff for his exercise of rights under the ADA/RA and the First Amendment. ECF 14, 16, 18, and 20. Included in these declarations are sworn declarations from eyewitnesses that, even in the midst of the Court Below's consideration of this motion, a DLPS-licensed officer threatened Plaintiff with rape as Plaintiff was attempting to access the programs and services of the prison law library. See ECF 14 and attachments thereto. In addition to these sworn declarations, the retaliations are substantiated by video surveillance and audio which captured the threats directed to Plaintiff by DLPS-licensed NJDOC officers, which would be sufficient to deter a person of ordinary firmness from exercising their rights under the ADA/RA or the First

Amendment. Ibid. The evidence proffered in these declarations is sufficient to substantiate that the retaliations constitute a routine organizational practices of the DLPS-licensed officers at NJDOC. See F.R.E. 406. This evidence was properly before the Court Below during its consideration of the motion for preliminary injunction.

#### **G. THE COURT BELOW'S OPINION AND ORDER DENYING PRELIMINARY INJUNCTION**

The Court Below denied Plaintiff's motion for preliminary injunction on February 13, 2025. ECF 35. In the memorandum opinion accompanying the order, the Court Below made findings of fact not supported by any evidence in the record, indicating as basis for its decision the "reliability of polygraphs" and "staffing concerns"; neither of which were briefed by parties. See ECF 34. The Court Below also held that N.J.S.A. 2C:40A-1 wasn't preempted by 29 U.S.C. 2009, but that State Government employees are completely exempted from the provisions of 29 U.S.C. 2001-2009 by 29 U.S.C. 2006(a). Ibid. The Court Below didn't address the status of DLPS as a contractor of the Federal Bureau of Investigation (FBI), or the application of 29 U.S.C. 2006(c) to DLPS employees for that reason; nor the preemption of state law by the ADA/RA and codified regulations set forth in Furgess v. Pa. DOC, 933

F.3d 285, 290 (CA3 2019); nor the effective denial of access to programs and services under the ADA/RA's rubric, which is the subject of this motion for preliminary injunction. *Ibid.* These holdings were contrary to law.

## **H. THE COURT OF APPEALS' SUMMARY AFFIRMANCE**

This appeal of the Court Below's order denying Plaintiff's motion for preliminary injunction, ECF 35, was summarily affirmed in a one paragraph boilerplate that was almost identical to numerous other opinions in factually distinct cases.

### **ARGUMENT**

**POINT I: THE USE OF 3RD CIRCUIT LOCAL APPELLATE RULE 27.4 TO CONVERT AN APPEAL AS OF RIGHT TO A DISCRETIONARY APPEAL BY COPYING AND PASTING BOILERPLATE AFFIRMANCES DEPRIVES APPELLANT OF DUE PROCESS, AND IS INCONSISTENT WITH THE FEDERAL RULES OF APPELLATE PROCEDURE, 28 U.S.C. 1291, AND 28 U.S.C. 1292(a)(1)**

#### **1. Standard of Review**

Local circuit rules must be consistent with Acts of Congress and rules promulgated by the Supreme Court. F.R.A.P. 47(a)(1). A circuit court may not enforce a local rule imposing a requirement of form in any manner that causes a party to lose rights. F.R.A.P. 47(a)(2).

A party may appeal as of right from final judgments or orders of the district court. 28 U.S.C. 1291. A party may also appeal as of right from interlocutory orders denying injunctive relief. 28 U.S.C. 1292(a)(1). This right to appeal is substantive, and inheritable. Karcher v. May, 484 U.S. 72, 77-80 (1987).

The Federal Rules of Appellate Procedure were promulgated by the Supreme Court pursuant to the Rules Enabling Act, 28 U.S.C. 2072, 2075. These Rules govern the procedure for all appeals taken to the United States Courts of Appeal. F.R.A.P. 1(a)(1). The Rules indicate that all appeals as of right shall be briefed prior to a decision on the merits; See F.R.A.P. 28, 31, 32; and that those decisions shall be based on a review of those briefs and all relevant portions of the Record; See F.R.A.P. 10, 30.

## 2. Analysis

The Supreme Court has held that the right to an appeal is a substantive one, which is inheritable to successors in interest. See Karcher, 484 U.S. at 77-80. The Federal Rules of Appellate Procedure indicate that the right contemplates a full briefing of the merits of the issues, and a full review of the record on appeal. Yet the order issued in

this matter is the exact same, word for word, as the orders issued by this Court in other, factually-distinct cases. See Shelley v. Metzger, 832 Fed. Appx. 102, 2020 U.S. App. LEXIS 32530 (3d Cir. Del., Oct. 15, 2020); Elansari v. United States, 615 Fed. Appx. 760, 2015 U.S. App. LEXIS 16076 (3d Cir. Pa., Sept. 10, 2015).

Not only is the order a copied and pasted boilerplate which implicitly shows that the facts and issues weren't fully considered by the Court, but the Order on its face shows that the brief which Appellant filed pursuant to F.R.A.P. 28, 31, and 32 was explicitly disregarded by the Court. The Order makes no reference to the findings of the U.S. Department of Justice regarding the custom, policy, and practice at issue; which were raised in the brief. The Order makes no reference to Appellant's numerous factual and legal contentions regarding the reasonableness of requested accomodations, or the imminence of threatened injury; which were raised in the brief. In fact, the opinion of the District Court upon which the Order purports to be based doesn't address these either. The Order represents little more than the imposition of an arbitrary bar to appeal of these issues, akin to a denial of the discretionary writ of certiorari. This is inconsistent

with the Federal Rules of Appellate Procedure, the Acts of Congress granting Appellate Jurisdiction, and the Supreme Court's admonition that "federal courts generally have a virtually unflagging obligation to exercise the jurisdiction that has been given to them." Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817-818 (1976).

Appellant respectfully posits that the copying and pasting of boilerplate opinions is a violation of Appellant's Constitutional Right to Due Process, because it fails to provide the review of the record below nor the review of the briefing on the merits which is the required procedure of the Rules promulgated by the Supreme Court. The copying and pasting of opinions using computers with Microsoft Word or the like is a novel technology unavailable to Courts in generations past, but so is chatGPT. The difference is, using chatGPT would provide a more certain guarantee of Constitutional Due Process than the current practice of copying and pasting boilerplate that evidences no review of the underlying case whatsoever.

Appellant therefore respectfully requests that all of the record and briefs be processed with a Large Language Model Artificial

Intelligence ("LLM AI"); with prompts that are public records part of this proceeding, for the LLM AI to properly review all of the submissions and issue an opinion which comports with applicable laws. Plaintiff respectfully submits that an acceptable prompt would be, "Assume the role of an unbiased and impartial judge, who always follows the law; and with the U.S. Constitution and all of the statutes, laws, and legal precedent of the 3rd Circuit U.S. Court of appeals and Supreme Court of the U.S. as your guide; render an opinion and decision upon these submissions." This will ensure that the resulting decision is one that actually affords the review of the Record and Briefing on the Merits which is Plaintiff's substantive right.

Because the copied and pasted boilerplate issued in this case, the exact same as in numerous others, causes Plaintiff to lose his substantive right to an appeal as of right by effectively transforming it into a discretionary appeal, such application of 3rd Cir. L. A. R. 27.4 is prohibited by F.R.A.P. 47(b). And the Local Rule permitting such boilerplate denials, 3rd Cir. L. A. R. 27.4, as applied to this case, is inconsistent with the Federal Rules of Appellate Procedure, Rules 10, 28, 30, 31, and 32; and is thus prohibited by F.R.A.P. 47(a)(1).

**POINT II: THE APPEAL SHOULD HAVE BEEN ALLOWED A FULL BRIEFING ON THE MERITS, BECAUSE THE COURT BELOW HAD JURISDICTION AND THE VERY OPINION WHICH THE SUMMARY DISPOSITION RELIED UPON INDICATES THAT THERE IS A SUBSTANTIAL QUESTION RAISED BY THIS APPEAL**

**A. STANDARD OF REVIEW**

**1. PLAINTIFF IS PRO SE, AND ALL OF HIS DOCUMENTS ARE ENTITLED TO LIBERAL CONSTRUCTION**

A "Pro se complaint is held to a less stringent standard than formal pleadings drafted by lawyers." Haines v Kerner, 404 U.S. 519, 520 (1972). The U.S. Supreme Court has held that this mandatory liberal construction applies not only to complaints, but to all documents filed by a pro se litigant: "A document filed pro se is to be liberally construed." Erickson v Pardus, 551 U.S. 89, 94 (2007).

**2. PRELIMINARY INJUNCTION UNDER FED. R. CIV. P. 65 AND 42 U.S.C. 2000e-5**

A Plaintiff seeking a preliminary injunction must establish each of the following: (1) The Plaintiff is likely to suffer irreparable harm in the absence of preliminary injunctive relief; (2) He or she is likely to succeed on the merits; (3) The balance of equities weighs in the Plaintiff's favor; and (4) An injunction is in the public interest. Winter

v. NRDC, Inc., 555 U.S. 7, 20 (2009); Benisek v. Lamone, 201 L.Ed.2d 398, 400-401 (2018).

Remedies available under the Rehabilitation Act (RA) and Americans with Disabilities Act (ADA) are the same as those available under the Civil Rights Act enforcement provision, 42 U.S.C. 2000e-5, which authorizes injunctive relief. See 29 U.S.C. 794a; 42 U.S.C. 12133.

### **3. AMERICANS WITH DISABILITIES ACT/REHABILITATION ACT**

"To state a claim under Title II of the ADA, plaintiffs must demonstrate that: (1) they are qualified individuals; (2) with a disability; and (3) they were excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or were subjected to discrimination by any such entity; (4) by reason of their disability." Durham v. Kelley, 2023 U.S. App. LEXIS 24764 at \*7 (CA3 2023). "The elements of a claim under the RA are the same, except that the plaintiff must also show that the program in question received federal dollars." Ibid. "State prisoners are covered by the ADA." Id. at \*8. "Refusing to make reasonable accommodations is tantamount to denying access." Id. at \*9. "[I]ntentional discrimination ... in this Circuit, may be satisfied by a showing of deliberate

indifference." Furgess, 933 F.3d at 292. To show deliberate indifference, Plaintiffs "must present evidence that shows both: (1) knowledge that a federally protected right is substantially likely to be violated, and (2) failure to act despite that knowledge." S.H. ex rel. Durrell v. Lower Merion Sch. Dist., 729 F.3d 248, 265 (CA3 2013).

#### **4. RETALIATION FOR EXERCISE OF FEDERAL RIGHTS**

To state a claim for retaliation for exercise of rights under the First Amendment or ADA/RA, the prisoner must allege: (1) Constitutionally protected conduct engaged in, or ADA/RA rights exercised, by the prisoner; (2) Adverse action taken against the prisoner by the prison or its officials or employees; and (3) A causal link between the two. See Rauser v. Horn, 241 F.3d 330, 333 (CA3 2001). Types of evidence that have been found to support retaliation claims include the suspicious timing of adverse action shortly after the prisoner has made complaints or filed petitions. See, e.g. Mays v. Springborn, 575 F.3d 643, 650 (CA7 2009) (Commencement of more onerous searches immediately after plaintiff complained of searches); Allen v. Thomas, 388 F.3d 147, 149-150 (CA5 2004) (Confiscation of property shortly after the prisoner had sent letters critical of the prison

to the mail room); Muhammed v. Close, 379 F.3d 413, 417-418 (CA6 2004) (Stating that temporal proximity alone may be significant enough to constitute direct evidence of retaliatory motive).

## **B. ANALYSIS**

### **1. THE NEW JERSEY ANTI-POLYGRAPH STATUTE, N.J.S.A. 2C:40A-1 IS PREEMPTED BY FEDERAL LAW, BOTH EXPRESSLY AND BECAUSE OF INHERENT CONFLICT**

#### **a.) Plaintiff Seeks Reasonable Accomodations Under the ADA/RA, Not Under 42 U.S.C. 1983**

Under 3rd Circuit precedent, the failure to accommodate a disability is the legal equivalent of denying access to the program, service, or activity which wasn't accomodated. Durham, 2023 U.S. App. LEXIS 24764 at \*9 ("Refusing to make reasonable accommodations is tantamount to denying access"). The law library and mailbox services are necessary to exercise of Plaintiff's 1st Amendment Rights, as Defendants freely admitted below. The Court Below did not address Plaintiff's contentions that the screenings are a reasonable accomodation for his PTSD, and the failure to accomodate Plaintiff's PTSD by implementing these screenings has denied and imminently threatens to deny Plaintiff access to programs and services which are necessary to exercise of his 1st Amendment Rights, as a matter of 3rd

Circuit ADA/RA law. The Court Below's reliance on the finding about Plaintiff's conduct in filing documents in lawsuits notwithstanding this denial, misapprehends the law in this regard: under the ADA/RA it's not the factual ability to file by having other inmates access the programs or services as a workaround, it's the legal definition of denial of his own access to programs necessary to do so. The legal basis has been satisfied by the facts as alleged.

**b.) Plaintiff Has Shown a Likelihood of Success On The Merits by Credible Evidence In His Declaration, Which Defendants Failed to Rebut or Oppose With Any Evidence Whatsoever**

The Court Below found that Plaintiff's claim he was denied access to programs and services was rebutted by his continued ability to file documents in lawsuits. But the claim upon which Plaintiff requests an injunction is under the ADA/RA, not 42 U.S.C. 1983's rubric. The denial of access to programs and services necessary to exercise Plaintiff's 1st Amendment Rights is legally complete upon the failure to accommodate. See Durham, 2023 U.S. App. LEXIS 24764 at \*9 ("refusing to make reasonable accommodations is tantamount to denying access"). Whether Plaintiff has other inmates going to the mailbox or law library for him, and can find workarounds to get filings

into the court anyways, has no bearing on the legal denial of access through failure to accommodate. Defendants have not rebutted, nor even disputed, and in fact admit that the mailbox and law library are necessary to exercise Plaintiff's 1st Amendment Rights; and that they refuse to accommodate his PTSD by screening LEOs with polygraphs to remove non-convicted sexual predators who trigger his PTSD during pat-downs. Nor have they rebutted or disputed the reasonableness or effectiveness of the accommodations requested with any evidence or requests for discovery to develop such, whether through experts or otherwise.

Plaintiff's claims have competent evidentiary support contained in Exhibits to the Declaration in support of his motion for preliminary injunction,, which wasn't addressed by the Court Below:

- i.) Evidence showing Defendants receive federal funds, and that these funds would offset any burden of expenses for implementation of the requested accommodations;
- ii.) Medical records showing Plaintiff has the ADA/RA-eligible disability of PTSD, and that he has been denied access to programs and services by the Defendants' failure to accommodate his disability;

iii.) Public record forms from the DOC showing that Plaintiff has sought administrative remedies for the denial of access to programs and services; in which the DOC admits that the hiring process is not within the scope of prison administration and management, but is within the sole ambit of DLPS;

iv.) An inmate handbook showing evidence that access to programs necessary to exercise 1st Amendment Rights is dependent on pat-down searches;

v.) A petition for rulemaking containing several judicially noticeable articles demonstrating the widespread failure of existing hiring practices to weed out sexual predators from LEO positions; and clearly outlining screening procedures proven to be effective and currently in use by the federal government;

vi.) Proof of exhaustion of administrative remedies with the DLPS of the petition for rulemaking; See ECF 10.3 (Profferring all of this evidence with proper authentication); See also ECF 7 (chock full of judicially noticeable articles showing that screening LEOs with polygraphs is absolutely necessary, given the severity of the problem);

Fed. R. Evid. 201(b), Fed. R. Evid. 406 (routine practices of an organization can prove agent acted in conformity therewith).

Defendants have not objected to the authenticity or admissibility of any of the evidence proffered. They have not produced a scintilla of evidence to counter or rebut it. They have not even addressed, and have therefore conceded, the legal conclusions Plaintiff averred upon the evidence in his initial moving papers. ECF 10. And yet, the Court Below has arrived at a decision that is clearly erroneous for not taking this undisputed evidence into consideration.

Additionally, Plaintiff indicated that he is under imminent threat of being deprived of his First Amendment Rights through the DLPS's failure to accomodate, because of their routine organizational practice of retaliation for exercise of rights under the ADA/RA. This threat has been shown to be imminent by numerous incidents of retaliation occurring since the filing of the motion for preliminary injunction. See ECF 14, 16, 18, and 20. The Court Below did not consider nor make findings on the imminent threat of deprivation of First Amendment rights, which is clearly erroneous and contrary to law.

**c. The Accommodations Requested Have Been Held by This Court to be Reasonable, Which Implicates Stare Decisis**

**i.) The Use of Polygraphs to Screen for Sexually Predatory Behavior Has Been Found Reasonable**

The Use of Polygraphs to assess for sexually predatory behavior was addressed by this Court in United States v. Lee, 315 F.3d 206 (CA3 2003). The Third Circuit held that, notwithstanding the admissibility of polygraph evidence in Court, "We find that the polygraph condition is reasonably related to the protection of the public ... polygraph testing could be beneficial in enhancing the supervision and treatment of [the polygraph subject]." Id. at 217. The New Jersey Supreme Court has weighed in on this matter as well, finding that "such examinations are effective at helping sex offenders overcome denial of responsibility for their sex crimes. In fact, experts suggested that even the threat of having to take a polygraph can stimulate admissions." J.B. v. N.J. State Parole Bd., 229 N.J. 21, 42 (2017). In so holding, the New Jersey Supreme Court upheld factual findings containing a wealth of research that Defendant State of NJ vociferously argued was proof of the efficacy of polygraph examinations in screening for sexual predatory behavior. See J.B. v. N.J. State Parole Bd., 444

N.J. Super. 115, 141 n. 12 (App. Div. 2016); See also Don Grubin, The Case for Polygraph Testing of Sex Offenders, 13 Legal & Criminological Psychol, 177, 187 (2008) ("The evidence suggests that, whatever the pros and cons of polygraph use in other settings, [sex offender polygraph testing] can make a valuable contribution to sex offender treatment and management"); Jill S. Levenson, Sex Offender Polygraph Examination: An Evidence-Based Case Management Tool for Social Workers, 6 J. Evidence-Based Soc. Work, 261, 369 (2009) ("[P]olygraph examination has emerged as a useful tool in encouraging the disclosure of past sexual crimes ... [T]he accuracy of polygraph examinations of sex offenders is unclear. On the other hand, a growing body of evidence supports the value of polygraph examination as a clinical tool in eliciting information for assessment ... and monitoring purposes"); Daniel T. Wilcox & Daniel E. Sosnowski, Polygraph Examination of British Sexual Offenders: A Pilot Study on Sexual History Disclosure Testing, 11 J. Sexual Aggression, 3, 3 (2005) ("This application of the polygraph has shown merit as a means of obtaining additional information about past sexual offending behaviors ... this suggested that collaboration amongst treatment, supervision and polygraph

professionals could help to contain sexual offending behavior more effectively, to improve and enhance public protection"); Matt DeLisi, et al., The Dark Figure of Sexual Offending: New Evidence from Federal Sex Offenders, J. of Criminal Psychology, (2016) (Finding that 69% of polygraphed individuals revealed hitherto unknown sexual offenses, and concluding that polygraph examinations of the sexual histories of sex offenders should be used in the interest of public safety); Michael T. Bourke, et al., The Use of Tactical Polygraph with Sex Offenders, 21(3) J. of Sexual Aggression, 354 (Feb. 2014) (When a polygraph examination was conducted, "an additional 52.8% of the study sample provided disclosures about hands-on [sexual] abuse"). Considering the position taken by Defendant State of NJ in J.B., Defendants who are officers of NJ are judicially estopped from taking a contrary position in this case. See G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 361 (CA3 1996) (Judicial estoppel prohibits parties from taking contrary positions from past cases in an effort to play "fast and loose" with the courts).

The reasonableness of the requested accommodation in assessing for sexually predatory behavior is thus established by

judicially noticeable facts in circuit precedent and judicial admissions by Defendants.

**ii.) The Use of Polygraphs in Law Enforcement Employment Screenings**

This Court broached the subject of polygraph examinations in law enforcement employment screenings, in Anderson v. City of Philadelphia, 845 F.2d 1216 (CA3 1988). In the context of determining the constitutionality of pre-employment polygraph examinations, the Court concluded "that in the absence of a scientific consensus, reasonable law enforcement administrators may choose to include a polygraph requirement in their hiring process..." Id. at 1225. The Department of Justice, tasked with enforcing compliance with the ADA/RA by state law enforcement and correctional facilities, has likewise recognized the reasonableness of polygraph examinations for investigative and other administrative purposes, such as personnel screening. See Docket No. 309-5, U.S. Department of Justice Office of the Inspector General Evaluation and Inspections Division, Use of Polygraph Examinations in the Department of Justice (Sep. 2006). And this Court has previously upheld an injunction requiring police officers to take polygraph examinations as part of employment screenings, in a

precedential opinion. See Commonwealth of Pa. v. O'Neill, 100 F.R.D. 354, 364 (E.D.Pa. Nov. 17, 1983), Aff'd 1984 U.S. App. LEXIS 26831 (CA3 1984).

The reasonableness of the requested accommodations in law enforcement employment screenings is thus established by judicially noticeable facts and circuit precedent.

### **iii.) The Prevalence of Sexual Offender Cops Hired in New Jersey**

Plaintiff has incorporated by reference in his complaint and First Amended Complaint the petition filed as Exhibit A, ECF 7 on the docket below. This petition lists numerous judicially noticeable news articles which demonstrate the routine organizational practice of DLPS and NJDOC in hiring individuals who are later found to be sexual predators due to their targeting individuals in NJDOC custody with sexually predatory behavior. See F.R.E. 201(b), 406; see also Sean P. Sullivan, "Sexual Abuse of Inmates at N.J. Women's Prison is an 'Open Secret,' Federal Inquiry Finds", NJ Star-Ledger (April 14, 2020) ([Https://www.nj.com/coronavirus/2020/04/sexual-abuse-of-inmates-at-nj-womens-prison-is-an-open-secret-federal-inquiry-finds.html](https://www.nj.com/coronavirus/2020/04/sexual-abuse-of-inmates-at-nj-womens-prison-is-an-open-secret-federal-inquiry-finds.html)). Notably, the news articles cited in this petition indicate that

Defendants regularly pay out huge amounts of money as damages and settlements in lawsuits against the State of NJ by victims of the sexually predatory behavior of its officers. Ibid. This excessive amount of net losses would be mitigated by the removal of sexual predators through use of the polygraph examinations, which would offset any costs of implementation thereof.

**iv.) The Reasonableness of Polygraph Examinations During Employment Screenings to Accommodate Plaintiff's PTSD**

The prevalence of non-convicted sexual offender cops being hired by Defendants through their current employment screening process is a judicially noticeable routine organizational practice of the DLPS. The requested polygraph examinations have been shown by abundant judicially noticeable evidence, which Defendants are judicially estopped from contesting, to be effective at screening for past sexually predatory behavior. And both this Court and the Federal Agency tasked with enforcing compliance with the ADA/RA have found the requested accommodation to be reasonable in law enforcement employment screenings. The cost to benefit ratio also tilts in favor of mitigating lawsuits resulting from sexual predators committing torts

against persons in custody of NJDOC. All factors considered, the requested accommodations are reasonable.

**c.) The Employee Polygraph Protection Act (EPPA)**

**i.) The Responsibility of the USDOJ to Ensure Compliance with the ADA/RA**

Plaintiff has argued below that the penological interests of NJ are superseded by the regulations promulgated by the U.S Department of Justice (USDOJ) in regards to ADA/RA compliance by state correctional facilities, citing to Furgess v. Pa. DOC, 933 F.3d 285, 290 (CA3 2019). In Furgess, this Court held that the regulations of the USDOJ to ensure compliance of state correctional and law enforcement institutions with the ADA and RA, promulgated in Title 28 of the Code of Federal Regulations, preempt state law regulations to the contrary. Ibid. Those regulations specifically place state law enforcement and correctional facilities' compliance with ADA/RA under the ambit of the USDOJ. See 28 C.F.R. 35.152, 35.190(b)(6).

**ii.) The Responsibility of the Federal Bureau of Investigation to Conduct the Polygraph Examinations**

The codified regulations of the USDOJ provide that "The Director of the Federal Bureau of Investigation shall conduct personnel

investigations requisite to the work of the Department of Justice and whenever required by statute or otherwise." 28 C.F.R. 0.85. In addition to conducting personnel investigations pursuant to the USDOJ's work to ensure compliance of state law enforcement and correctional facilities with ADA/RA, the FBI has carte blanche express preemption of any state law prohibiting administration of counterintelligence scope lie detector tests to any employee of its contractors. See 29 U.S.C. 2006(c), 2009.

### **iii.) The Contractual Relationship of the DLPS and FBI**

The FBI is authorized by statute to engage in reimbursable or other contracts with state and local agencies, for use of their services, equipment, personnel, and facilities. See 34 U.S.C. 10226(b). Plaintiff has alleged that the DLPS receives money for use of their personnel, services, and facilities pursuant to this authorization, forming a contract thereby with the FBI. See ECF 1, 10. This authorization also undergirds the contract entered into by the DLPS with the FBI pursuant to the Police Training Act, N.J.S.A. 52:17B-70(d). As consideration for performance of duties by the FBI set forth in N.J.S.A. 52:17B-71a; the DLPS reimburses the FBI pursuant to N.J.S.A. 52:17B-

75; thereby forming a reciprocal contract. Defendants are therefore contractors of the FBI, and Defendants have not contested below that they are FBI contractors within the meaning of 29 U.S.C. 2006(c).

**iv.) The FBI is Entitled by the EPPA to Polygraph DLPS Employees, and Has a Duty to Do So**

The EPPA specifically provides that the FBI may polygraph the employees of its contractors using counterintelligence scope polygraphs, and that any state law to the contrary is expressly preempted. See 29 U.S.C. 2006(c). The DLPS is indisputably an FBI contractor, and the FBI has a duty to conduct personnel investigations requisite to the USDOJ's work in ensuring compliance with the ADA/RA.

**d.) The State Law Cited by Defendants Has Been Preempted**

Federal law preempts state law if (1) a federal law expressly states that it preempts state regulation; (2) federal regulation is so comprehensive that Congress left no room for supplemental state regulation; or (3) federal and state law conflict. See St. Thomas - St. John Hotel & Tourism Ass'n v. Virgin Islands, 357 F.3d 297, 302 (CA3 2004).

**i.) The EPPA Expressly Preempts N.J.S.A. 2C:40A-1**

Express preemption exists when a federal statute explicitly supplants state regulation in a specified area. See Gary v. Air Group, Inc., 397 F.3d 183, 186 (CA3 2005).

The decision of the Court Below is in conflict with the holding of the Third Circuit in Stehney v. Perry, 101 F.3d 925, 938 (CA3 1996) ("The district court held the New Jersey anti-polygraphing statute was preempted by a federal statute, the Employee Polygraph Protection Act. We agree."). Stehney held that N.J.S.A. 2C:40A-1 was preempted by 29 U.S.C. 2001-2009 (EPPA). Ibid.

The EPPA has its own set of prohibitions against polygraphing of employees as condition of employment. See 29 U.S.C. 2001-2005, 2007-2008. These prohibitions are what's referred to in the section which has been impermissibly misconstrued by the Court Below: "This Act shall not apply with respect to the United States Government, any State or local government, or any political subdivision of a State or local government." 29 U.S.C. 2006(a); See also Saari v. Smith Barney, Harris Upham & Co., Inc., 968 F.2d 877, 880 (CA9 1992) ("Section 2002 ... is subject to exceptions listed in Sections 2006 and 2007"); Hossaini v. W. Mo. Med. Ctr., 140 F.3d 1140, 1143 (CA8 1998) (Same). Put in its

proper context, this means that the provisions of 29 U.S.C. 2001-2005 do not prohibit State or local governments from polygraphing their employees as a precondition to hiring. But the construction of 29 U.S.C. 2006(a) is expressly limited by 29 U.S.C. 2006(c): "nothing in the Act shall be construed to prohibit the administration of any lie detector test by the Federal Government, in the performance of any counterintelligence function, to any employee of a contractor of the FBI who is engaged in the performance of any work under a contract with the FBI." This mandatory construction means that every State employee of an FBI contractor is subject to counterintelligence-scope polygraphing, and any state law to the contrary is preempted. Any construction of 29 U.S.C. 2006(a) prohibiting polygraph examinations of State employees of FBI contractors, like the DLPS, is impermissible under 29 U.S.C. 2006(c); and the construction of 2006(a) applied by the Court Below is therefore erroneous.

The Court below failed to address the EPPA's provision that 29 U.S.C. 2006(c) expressly preempts any state law preventing the FBI from polygraphing its contractors. See 29 U.S.C. 2009. Defendants did not rebut or oppose Plaintiff's contentions below that they are FBI

contractors, nor that the requested polygraphing falls under the specific purview of 29 U.S.C. 2006(c), 2009. And the construction given 29 U.S.C. 2006(a) by the Court Below would prevent the FBI from ever polygraphing state police who assist with counterterrorism, or with investigations of international smuggling at the ports of NY and NJ. Plaintiff urges the court to invite the U.S. Attorney General to appear as amicus curiae prior to considering construction of this extremely national security-sensitive statute, as important US Government interests would be adversely affected by such a ruling.

**ii.) N.J.S.A. 2C:40A-1 is in Conflict with Federal Law**

Conflict preemption arises only when it is impossible to comply with both federal and state law, or the state law is an obstacle to executing the purposes of the federal law. See C.E.R. 1988, Inc. v. Aetna Casualty & Surety Co., 386 F.3d 263 (CA3 2004).

It is stare decisis that N.J.S.A. 2C:40A-1 conflicts with the purposes of the EPPA, and this is as true for the purpose of 29 U.S.C. 2006(c) as it is for the purpose of 29 U.S.C. 2006(b). See Stehney, 101 F.3d at 938. It also conflicts with the FBI's duty to conduct personnel investigations requisite to the USDOJ's work to ensure compliance

with the ADA/RA. Plaintiff has shown in the points argued above, that the ADA/RA's purpose of requiring reasonable accommodations for disabled persons to access public programs is implicated by the polygraph examinations of law enforcement as part of the employment screening process. The NJ Anti-Polygraph Statute, N.J.S.A. 2C:40A-1 is therefore an obstacle to executing the purposes of 42 U.S.C. 12132 and 29 U.S.C. 794(a). Additionally, because 42 U.S.C. 12132 and 29 U.S.C. 794(a) require the reasonable accommodations embodied by the requested polygraph examinations, N.J.S.A. 2C:40A-1 must give way to these statutes under the Supremacy Clause, U.S. Const. Art. VI, cl.2.

**2. PLAINTIFF'S FIRST AMENDMENT RIGHTS ARE BEING  
IMMINENTLY THREATENED WITH INTERMITTENT  
DEPRIVATION IN THE ABSENCE OF INJUNCTIVE RELIEF, HE  
HAS SHOWN BY A PREPONDERANCE OF EVIDENCE THAT HIS  
ADA/RA AND RETALIATION CLAIMS ARE LIKELY TO SUCCEED  
ON THE MERITS, AND THE BALANCE OF THE EQUITIES  
FAVORS THE ISSUANCE OF INJUNCTIVE RELIEF**

**a.) The Imminent Threat of Deprivation of Plaintiff's First Amendment Rights is Ongoing and Is Irreparable Harm Per Se**

Plaintiff has demonstrated a recurring pattern of direct penalization of First Amendment Rights, which constitutes the imminent threat of irreparable injury for the purpose of granting a preliminary injunction. Furthermore, the threatened loss of First

Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction. Elrod v. Burns, 427 U.S. 347, 373 (1976); See also Roman Catholic Diocese v. Cuomo, 208 L.Ed.2d 206, 209-210 (2020), Archdiocese of Wash. v. Wash. Metro. Area Transit Auth., 897 F.3d 314, 334 (D.C. Cir. 2018), Texans for Free Enter. v. Tex. Ethics Commn., 732 F.3d 535, 539 (CA5 2013), Truth Found. Ministries, NFP v. Vill. of Romeoville, 387 F.Supp.3d 896, 898 (N.D.Ill. 2016).

Plaintiff has shown by his declaration that he has to walk through areas in which he is subject to pat-down searches in order to access the law library and mailbox. He has shown Mental Health Reports indicating that the deliberate discrimination against him by at least one unscreened DLPS-licensed officer is triggering his PTSD and thereby denying him access to programs, services, and activities offered by NJSP. He has shown grievances in which the NJDOC states that it is not in charge of the hiring process for these officers, which process is shown by N.J.S.A. 52:17B-71 et seq. to be under the ambit of the DLPS. Through his petition and the attendant decision on the NJ Registry, Plaintiff has shown the DLPS's knowledge of his disability and failure

to accommodate his access to law library services necessary for his access to the courts, for his ability to petition the government for redress, and for his ability to correspond via mail. Furthermore, the grievances and petition evidence deliberate indifference by the DLPS-licensed officers employed by the NJDOC; and by the DLPS itself; to Plaintiff's PTSD: which is tantamount to denying him access to programs and services which he needs to access in order to exercise his First Amendment Rights, under the rubric of ADA/RA established by this Circuit in Furgess, 933 F.3d at 292 (failure to accomodate is the same as denying access).

Plaintiff has shown by the facts in his declarations at ECF 14, 16, 18, and 20; that he has been subject to repeated retaliations by the NJDOC for exercise of his rights under the ADA/RA and the First Amendment, which constitutes a pattern that places him in imminent threat of deprivation of his First Amendment rights. These retaliations include arbitrary housing unit changes, refusal to process correspondence, deletion of digital correspondence, ripping open and inspecting outgoing legal mail, distributing privileged legal mail to other inmates, threats of rape, threats of institutional charges, threats

of criminal charges, denial of paper for printing and copying, denial of manila envelopes on commissary, conversion or theft of word processor supplies, and interference with other cases pending before the federal courts. Furthermore, the verified FAC evidences deliberate indifference by the DLPS-licensed officers employed by the NJDOC; and by the NJDOC and DLPS themselves; to Plaintiff's PTSD: which is tantamount to denying him access to programs and services which he needs to access in order to exercise his First Amendment Rights.

**b.) Plaintiff has Shown That His ADA/RA Retaliation Claim and First Amendment Retaliation Claim Are Likely to Succeed on the Merits**

Plaintiff has pleaded numerous instances in which he engaged in exercise of his rights under the ADA/RA and in constitutionally protected conduct. See FAC, generally. Temporally proximal to each of these instances, were adverse actions taken by NJDOC that would have the effect of deterring a reasonable person from exercising their rights under the ADA/RA or the Constitution. The temporal proximity of these adverse actions to the protected conduct has occurred so frequently as to render itself subject of the Doctrine of Objective Chances, and/or to constitute evidence of routine organizational practice of the NJDOC under F.R.E. 406. The allegations have been substantiated by the

declarations of no less than 4 witnesses attached to the instant motion, and by video surveillance footage available to this Court on evidentiary hearing. In consideration of the liberal construction afforded to pro se litigants, and the abundance of \*undisputed\* evidence already on the record in support of his claims, it is highly likely that Plaintiff will succeed on the merits of his retaliation claims.

### **CONCLUSION**

For all the foregoing reasons, Plaintiff respectfully prays the Court to grant the writ of certiorari to address the unconstitutional practice of copying-and-pasting boilerplate opinion, instead of using LLM AI to provide the Due Process which litigants are entitled to under our Constitution as requested herein.

Respectfully Submitted,

DATE: 10/28/25

  
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