SUPERIOR COURT OF PENNSYLVANIA

280 EDA 2024

Fred DiMeo and Nancy DiMeo

Plaintiffs-Appellees

v.

PETER GROSS, D.O. AND G.S. PETER GROSS, D.O., P.C., PENNSYLVANIA HOSPITAL OF THE UNIVERSITY OF PA HEALTH SYSTEM, UNIVERSITY OF PENNSYLVANIA HEALTH SYSTEM, TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA

Defendants-Appellants

AMICUS BRIEF OF THE JEWISH COALITION FOR RELIGIOUS LIBERTY, COALITION FOR JEWISH VALUES, AND THE LOUIS D. BRANDEIS LAW SOCIETY IN SUPPORT OF APPELLANT

Appeal from Philadelphia County Court of Common Pleas, dated November 18, 2023, No. 191003447

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STATEMENT OF INTEREST[1]

The Jewish Coalition for Religious Liberty is an organization of Jewish rabbis, lawyers, and professionals who are committed to defending religious liberty. As members of a minority faith that adheres to practices that many in the majority may not know or understand, the Jewish Coalition for Religious Liberty has an interest in ensuring that courts and other government entities accommodate and respect the sincerely held beliefs and practices of Jewish Americans, and are prohibited from evaluating the validity of those beliefs. The Jewish Coalition for Religious Liberty is also interested in ensuring that all Americans' First Amendment Free Exercise rights are protected.

Coalition for Jewish Values is the largest Rabbinic public policy organization in America, representing over 2,500 traditional, Orthodox rabbis. CJV promotes religious liberty,

[1] No one other than the amici, their members, and their counsel paid for or authored this brief, in whole or in part.

human rights, and classical Jewish ideas in public policy, and does so through education, mobilization, and advocacy, including by filing amicus curiae briefs in defense of equality and freedom for religious institutions and individuals. CJV has a strong interest in ensuring that observant Jews are free to practice the core tenets of their faith, which include observing holy days such as Yom Kippur according to Jewish law and tradition, without fear of government sanction or persecution.

The Louis D. Brandeis Law Society is a professional organization for Jewish lawyers, judges, and law students in Philadelphia and the surrounding region. Given the recent surge in anti-Semitism, the Society believes there is an urgent need for collective action and awareness. The Society is committed to countering anti-Semitism through education, advocacy, and leveraging legal expertise. This case has particular significance to the Society, named in honor of the late Justice Louis D. Brandeis (1856–1941), the first Jew to

ever serve on the United States Supreme Court. To preserve the rule of law in a just society, courts must not disregard the core religious practices of litigants, lawyers, or judges. This form of discrimination undermines the pursuit of justice.

SUMMARY OF ARGUMENT

No American should have to choose between his constitutional rights: whether to violate his core religious beliefs or to attend his own jury trial before a jury of his peers. Yet that is the unconstitutional choice that the Philadelphia County Court of Common Pleas subjected Defendant-Appellant Dr. Peter Gross ("the Doctor") to when it scheduled his jury trial for Yom Kippur and refused his accommodation request to continue the trial by one day so that both he and an observant Jewish juror would be able to attend without violating their religious beliefs. This was an egregious violation of the Doctor's First Amendment rights, and it warrants reversal of the jury verdict against him and remand for a new trial.

Such discrimination could only happen to a religious minority, because courts do not schedule proceedings on Sundays or holidays observed by those of majoritarian faiths. Yet the court refused to accommodate the Doctor and juror's core religious practices while making many other accommodations for secular reasons. This unequal treatment demonstrates the court's disregard of the significance of Yom Kippur, the holiest day of the year for Jews, and it triggers strict scrutiny under the Free Exercise Clause of the First Amendment. The trial court also erred when it made the Doctor's counsel choose whether to tell the jury his reason for being absent from his own trial or else to allow the jurors to think he was callous and uncaring—a situation that risked fueling anti-Semitism and created a significant risk of prejudicing the verdict against him.

Amici submit this brief to assist the Superior Court in (1) understanding the religious significance of Yom Kippur for observant Jews and (2) applying Free Exercise precedent to

address the constitutional violation that occurred when the trial court scheduled the trial on Yom Kippur and refused to accommodate the Doctor and an observant Jewish juror.

ARGUMENT

I. For observant Jews, including the Doctor, attending court during Yom Kippur would require intolerable violations of Jewish religious law.

The trial court's act of scheduling the Doctor's jury trial for Yom Kippur and its refusal to accommodate his request for a one-day continuance reveal its disregard for the religious significance of Yom Kippur. Amici seek to assist this Court in understanding its significance, in order to correct the prejudicial error below.

In Jewish law and tradition, Yom Kippur, translated as "Day of Atonement" or "Day of Forgiveness," is the holiest day of the year.[2] It is described in the Torah, the Five Books of

[2] *Yom Kippur*, Torah.org, https://torah.org/yom-kippur/; *Yom Kippur 2024*, Chabad.org, https://www.chabad.org/library/article_cdo/aid/4687/jewish/Yom-Kippur.htm.

Moses, as a "holy convocation"[3] and "a day of complete rest."[4] Spiritually, it is the culmination of the "Ten Days of Repentance" that begin on Rosh HaShanah, the Jewish New Year[5]: "For on this day he shall provide atonement for you to cleanse you; from all your sins before HASHEM shall you be cleansed."[6] Many Jews believe that health and sickness, joy and despair, and even life and death are subject to divine judgments that are, in part, decided by one's actions on that day.

Most critically, Yom Kippur is marked by religious obligations and strict prohibitions precluding regular activities such as attending court proceedings.[7] All

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[3] Leviticus 23:27 (trans. *The Stone Edition Tanach,* Mesorah Publications 1996).
[4] Leviticus 16:31.
[5] Rabbi Yehudah Prero, *The Ten Days of Repentance: Ideas for Inspiration*, Torah.org, https://torah.org/learning/yomtov-yomkippur-vol1no40/.
[6] Leviticus 16:30.
[7] *See, e.g.*, Encyclopedia Judaica, *Practice and Procedure*, Jewish Virtual Library (2008), https://www.jewishvirtuallibrary.org/practice-procedure (explaining that ancient Jewish courts never held court on the Sabbath or holy days,

restrictions of Sabbath observance apply as well to Yom Kippur,[8] including prohibitions on travel by car, use of electronic devices, participation in any form of commerce or business, and writing notes.[9] In addition, the day requires a set of five unique afflictions, including prohibiting eating, drinking, and bathing.[10]

Leviticus 23:26–32 emphasizes the gravity of these prohibitions, while underscoring that the observances of Yom Kippur are an "eternal decree throughout your generations":

> HASHEM spoke to Moses, saying: But on the tenth day of this month it is the Day of Atonement; there shall be a holy convocation for you, and you shall afflict yourselves; you shall offer a fire-offering to HASHEM. You shall not do any work on this very

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due in part to the prohibition on writing, and only in "exceptionally urgent cases" on the eves of Sabbath or holy days, "but a party summoned was not punished for failing to appear on such a day").

[8] Rabbi Yosef Karo, *Siman* 611 law 2, *Shulchan Aruch* (first published in 1565 CE).

[9] OU Staff, *The 39 Categories of Sabbath Work Prohibited by Law*, Orthodox Union, https://www.ou.org/holidays/the_thirty_nine_categories_of_sabbath_work_prohibited_by_law/.

[10] The Mishnah, *Tractate Yoma* Ch. 8 Mishnah 1 (written in the third century CE, the Mishnah is the earliest compendium of the Oral Law).

> day, for it is the Day of Atonement to provide you atonement before HASHEM, your God. For any soul who will not be afflicted on this very day will be cut off from its people. And any soul who will do any work on this very day, I will destroy that soul from among its people. You shall not do any work; it is an eternal decree throughout your generations in all your dwelling places. It is a day of complete rest for you and you shall afflict yourselves; on the ninth of the month in the evening—from evening to evening—you shall rest on your rest day.[11]

In keeping with these clear Torah commands, observant Jews have long commemorated Yom Kippur as the most significant day for repentance, prayer, and seeking forgiveness and reconciliation with God and other people.[12]

Yet observing Yom Kippur is far more than what observant Jews abstain from—it also merits active devotion and significant time investment, requiring a full day of communal prayer services in the synagogue. Worshippers dress in white to symbolize sinless angelic beings, the burial shroud, and the physical and spiritual purity that is needed

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[11] Leviticus 23:26–32.
[12] *Id.*

to worship God.[13] Observant Jewish men must attend five prayer services in person at their local synagogue, and the services last a total of 14–15 hours. The *Maariv* prayer service occurs on the evening of Yom Kippur, where worshippers renounce unintentional vows they may make during the year ahead;[14] *Shacharit* is "the morning prayer, which includes a reading from Leviticus followed by the Yizkor memorial service"; *Musaf* "includes a detailed account of the Yom Kippur Temple service"; *Minchah* includes the reading of the Book of Jonah; and *Neilah* is "the closing of the gates' service at sunset, followed by the *shofar* blast marking the end of the fast."[15] Given these several lengthy and mandatory prayer

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[13] Shalom Goodman, *19 Yom Kippur Facts Every Jew Should Know*, Chabad.org, https://www.chabad.org/library/article_cdo/aid/3784348/jewish/19-Yom-Kippur-Facts-Every-Jew-Should-Know.htm.

[14] Menachem Posner, *What Is Kol Nidre?*, Chabad.org, https://www.chabad.org/library/article_cdo/aid/5345/jewish/Kol-Nidre.htm.

[15] *What Is Yom Kippur?*, Chabad.org, https://www.chabad.org/library/article_cdo/aid/177886/jewish/What-Is-Yom-Kippur.htm.

services, the worshipper has perhaps only a one- or two-hour break during the entire day of Yom Kippur; many spend the entire day at the synagogue.

Following the Torah reading, many Jews recite a prayer for the souls of deceased relatives. This prayer, said to honor or even beneficially impact the souls of the dead, attracts even many Jews who might not otherwise pray for their own benefit, but are willing to do so in the hope that it might benefit their parents in Heaven. These prayer services also include a confessional prayer that is viewed as an important part of repentance—a matter that many consider vital to obtaining a favorable divine judgment. These are prayers that bring adults, including on occasion amici, to tears in the synagogue.

For observant Jews like the Doctor, none of these actions or abstentions is a choice. Observant Jews throughout history and around the world are compelled by their beliefs and commandments to worship on Yom Kippur in these very

specific ways. To violate its prohibitions would not only be sinful; it carries the threat of spiritual excision from God and the Jewish Nation: "I will destroy that soul from among its people."[16]

If the Doctor were to have chosen to attend his jury trial rather than observe Yom Kippur, he would have violated his religious beliefs by (1) traveling to the courthouse, (2) using electricity, (3) missing four of the five prayer services and 14–15 hours of prayer and worship with his community at his local synagogue, (4) engaging in work and business, (5) engaging in weekday activities, and potentially (6) writing notes. And all this without eating or drinking for 25 hours. With these actions, he would have thumbed his nose at his God on the very day he was expected to devote to repentance and reconciliation. This would be unthinkable for any sincerely observant Jew—and it was for the Doctor, which is

[16] Leviticus 23:30.

why he chose to miss his own jury trial rather than commit these egregious violations of his faith.

Thus, when the trial court scheduled the Doctor's jury trial on the holiest day of the Jewish calendar, and then refused his simple request of a one-day continuance, it explicitly required the Doctor to engage in behavior that he feared would imperil both his life and his eternal soul in order to exercise his "constitutional right to be present" for his own hearing. *Saul v. Saul*, 1 Pa. D. & C.2d 486, 487 (Pa. Com. Pl. 1955). The only observant Jewish juror on the panel was similarly excluded from participation in the trial because the court dismissed her for cause during jury selection due to her core religious exercise of observing Yom Kippur. What is more, the court's suggestion that trial counsel disclose to the remaining jurors the reason for the Doctor's absence only further prejudiced his trial.

Therefore, this Court should reverse the jury verdict and remand for a new trial.

II. The court's insistence on scheduling the Doctor's jury trial on Yom Kippur and refusing to accommodate his faith violated the Free Exercise Clause.

The trial court's unwillingness to grant a simple scheduling accommodation to the Doctor after it scheduled his trial on Yom Kippur infringed upon his First Amendment rights.

By providing that "Congress shall make no law . . . prohibiting the free exercise" of religion, the Free Exercise Clause broadly proscribes government interference with sincere religious exercise.[17] U.S. Const. amend. I. If the

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[17] As the Doctor's opening brief explains, Article I, Section 3 of the Pennsylvania Constitution is even more protective than the First Amendment because it describes religious liberty as a positive "natural and indefeasible right," and it provides that "no human authority can, in any case whatever, control or interfere with the rights of conscience." Pa. Const. art. I, § 3; *see, e.g.*, *Jud. Inquiry & Review Bd. v. Fink*, 532 A.2d 358, 369 (Pa. 1987) ("Pennsylvania, more than any other sovereignty in history, traces its origins directly to the principle that the fundamental right of conscience is inviolate . . . . A citizen of this Commonwealth is free, of longstanding right, to practice a religion or not, as he sees fit, and whether he practices a religion is strictly and exclusively a private matter, not a matter for inquiry by the state.")

government interferes with religious practice in a way that is either not generally applicable or nonneutral, it bears the burden of overcoming strict scrutiny—the most difficult test in constitutional law.

Although courts routinely cite the neutral and generally applicable test from *Employment Division v. Smith*, 494 U.S. 872 (1990), the U.S. Supreme Court has clarified *Smith*'s holding in recent years. *See Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993); *Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n*, 584 U.S. 617 (2018); *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021); *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022). To the extent that the Doctor's First Amendment rights (as opposed to the more protective guarantees of the Pennsylvania Constitution) are at stake, his

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(quoting *Commonwealth v. Eubanks*, 512 A.2d 619 (Pa. 1986)); *see also* Gary Gildin*, Coda to William Penn's Overture: Safeguarding Non-Mainstream Religious Liberty Under the Pennsylvania Constitution*, 4 U. PA. J. CONST. L. 81, 85 (2001) ("Article I, Section 3 of the Pennsylvania Constitution safeguards individual religious liberty more expansively than the Free Exercise Clause.").

case is controlled by the updated version of the test the Court has applied in these intervening decisions.

A. The court's discretion to grant scheduling accommodations triggers strict scrutiny under *Fulton*.

Under the U.S. Supreme Court's precedent in *Fulton v. City of Philadelphia*, a government policy or practice "is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." 539 U.S. at 533 (cleaned up). In *Fulton*, the unanimous Supreme Court held that Philadelphia's foster care contracting policy was not generally applicable, and thus triggered strict scrutiny, because the city commissioner had discretion to grant exemptions—though the commissioner had never granted one. A "formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it 'invite[s]' the government to decide which reasons for not complying with

the policy are worthy of solicitude . . . at the Commissioner's 'sole discretion.'" *Id.* at 537 (quoting *Smith*, 494 U.S. at 884).

In his detailed concurrence in *Fulton*, Justice Alito addressed many reasons why the *Smith* framework has been harmful to religious Americans and does not align with the original meaning of the Free Exercise Clause. As an example, he cited *Philips v. Gratz*, 2 Pen. & W. 412 (Pa. 1831), where the Pennsylvania Supreme Court "rejected the [Jewish] plaintiff's religious objection to trial on Saturday," "proclaim[ing] that a citizen's obligation to the State must always take precedence over any religious obligation." *Fulton*, 593 U.S. at 589 (Alito, J., concurring). Such a rationale eviscerates religious liberty and ignores the strong protections in the Pennsylvania Constitution as well as the United States' long history of religious exemptions on matters of conscience with greater impact on a citizen's obligations, such oaths or military conscription. *Id.* at 582–83.

Here, the trial court's refusal to accommodate the Doctor's request for a one-day continuance to observe the holiest day of the Jewish calendar runs afoul of the Free Exercise Clause under *Fulton*. Regardless of whether the court had granted scheduling accommodations for other reasons—and it did—it possessed absolute discretion to do so. Indeed, the court showed itself very willing to accommodate the schedules and preferences of expert witnesses, but not the defendant Doctor.

This unequal treatment is especially problematic because only the Doctor possessed the constitutional right to a jury trial of his peers, and the right under the Pennsylvania Constitution to attend his own trial. *See, e.g.*, *Saul*, 1 Pa. D. & C.2d at 487 (in civil trial, "the parties . . . have a constitutional right to be present"); *Cordes v. Assocs. of Internal Med.*, 87 A.3d 829, 863 n.1 (Pa. Super. Ct. 2014) (Donohue, J., concurring) (recognizing in medical malpractice context "the

guarantee provided by both the United States and Pennsylvania constitutions of a trial 'by an impartial jury'").

One struggles to think of a government decisionmaker with more absolute discretion than a judge setting the dates for a jury trial.[18] That discretion enables the judge to weigh which reasons for requesting a scheduling change are "worthy of solicitude," the exact problem identified in *Fulton*, 539 U.S. at 537. Thus, the court's scheduling policy could not be generally applicable, and strict scrutiny applies to the court's refusal to accommodate the Doctor's faith—even if it made no other scheduling accommodations.

[18] Such discretion is not an automatic Free Exercise violation. But it directs reviewing courts to apply strict scrutiny, which means the government must demonstrate a compelling interest in denying an exception to that particular plaintiff and demonstrate that it has used the least restrictive means in pursuing that interest. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 406–07 (1963) (describing compelling interest standard); *Holt v. Hobbs*, 574 U.S. 352, 364 (2015) (describing least restrictive means standard).

B. The court's willingness to grant secular scheduling accommodations while denying the Doctor's religious accommodation triggers strict scrutiny under *Tandon*.

The trial court additionally subjected its scheduling to strict scrutiny under the Free Exercise Clause when it made accommodations for non-religious reasons while refusing to accommodate the Doctor's religious exercise.

In *Fulton*, the Supreme Court explained that, in addition to discretion that undermines general applicability, "[a] law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." 593 U.S. at 534. In *Tandon v. Newsom*, the Court explained that the application of a government policy or practice cannot "treat *any* comparable secular activity more favorably than religious exercise." 593 U.S. 61, 62 (2021). Thus, in *Tandon*, when the government allowed hair salons, retail stores, movie theaters, and indoor restaurants to remain open during the COVID-19 pandemic, undermining its public safety rationale,

its refusal to allow believers to gather for worship and prayer triggered strict scrutiny. *Id.* at 63–64 ("The State cannot 'assume the worst when people go to worship but assume the best when people go to work.'" (citing *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020))).

So too here. In fact, the court's stated reason for denying the Doctor's accommodation request was its desire to accommodate Plaintiffs' expert. At the pretrial status conference, the Doctor requested a continuance of one day because of Yom Kippur. Plaintiffs objected to his religious accommodation request for scheduling reasons, claiming one of their experts was only available to testify on September 25, the day of Yom Kippur. The court accommodated the expert's scheduling preference over the Doctor's religious exercise. Yet during cross-examination on voir dire, Plaintiffs' expert testified that he often takes two days off work to testify at trial. Nor do experts carry gold status when it comes to scheduling—Defendants' experts had to testify remotely and

ahead of schedule to accommodate the court. Thus, the court made an impermissible and unnecessary value judgment when it chose to accommodate the expert's schedule but not the Doctor's.

Ultimately, this is an even clearer non-neutral preference of secular activity over religious exercise than in *Tandon*, because, when faced with potentially conflicting requests, the court chose the secular over the religious. It would be as if, under the COVID restrictions, only one building were permitted to open its doors, and the court chose the hair salon over the synagogue.

C. The trial court's actions cannot survive strict scrutiny.

Under both *Fulton* and *Tandon*, the trial court's scheduling policy and decision were neither neutral nor generally applicable. Therefore, strict scrutiny applies, which means the government bears the burden to show that its treatment of the Doctor was "'narrowly tailored' to serve a 'compelling' state interest." *Roman Cath. Diocese of Brooklyn*

v. Cuomo, 592 U.S. 14, 18 (2020) (citing *Lukumi*, 508 U.S. at 546).

To survive strict scrutiny, the government must identify a compelling interest. *See Sherbert*, 374 U.S. at 406 (explaining that "(o)nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation" (internal citation omitted)). To meet that burden, the government cannot rely on "broadly formulated interests," but must identify with "particularity" the harm that would result from granting an exemption specifically to the Doctor. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 431 (2006). In other words, this Court must "scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants," *id.*, and "look to the marginal interest in enforcing" the challenged government action in that particular context. *Holt*, 574 U.S. at 363 (alteration in original) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 572 U.S. 682, 726–27 (2014)).

The court did not even try to demonstrate that it has a compelling interest in avoiding postponing the trial for a single day. While the existence of some exceptions does not on its face doom the analysis, the court cannot claim that it is impossible to grant any exceptions whatsoever when it does in fact accommodate secular requests. *Fulton*, 593 U.S. at 542. The government is required to distinguish between the secular and religious requests and to show why it can accommodate one and not the other. It did not even attempt to do so here.

Even if the government can prove a compelling interest, it also bears the burden of showing that denying the religious claimant's request is the least restrictive way of pursuing that interest. This standard is "exceptionally demanding, and it requires the government to show that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party." *Holt*, 574 U.S. at 364–65 (cleaned up). In other words, "if a less

restrictive means is available for the Government to achieve its goals, the Government must use it." *Id.* at 365 (citation omitted). In *Holt*, the Supreme Court held that even though maintaining prison security could be a compelling interest, denying a religious beard accommodation request was not the least restrictive means of furthering that interest. *Id.* at 368–69.

Here, the trial court did not attempt to establish a compelling interest in denying an accommodation to the Doctor. Even if the court had an interest in controlling the schedule in general, the court had no "interests of the highest order," *Lukumi*, 508 U.S. at 546, that would justify denying the Doctor's request that the trial be scheduled when he—and the observant Jewish juror—could participate in the trial, especially given the court's choice to accommodate the expert instead. In contexts where much more significant interests are at stake, such as prison safety, courts are still required to

scrutinize the harm of granting an exemption to each particular claimant. *Holt*, 574 U.S. at 363.

Here, the only impact of shifting the trial schedule by one day would have been that the plaintiff's expert may have needed to testify remotely—exactly what the defendant's experts already had to do. Thus, it is hard to imagine how scheduling the trial for another day could cause any harm at all besides potentially minor administrative inconvenience—and even that is a stretch, given the numerous scheduling accommodations that courts, including this trial court in this litigation, make every day for secular reasons.

Furthermore, the trial court's blanket denial was not the least restrictive means of pursuing its scheduling goals. Its refusal to accommodate was maximally restrictive to the Doctor—forcing him to choose between his right to attend his own jury trial and his core religious obligations. The court could have taken many other measures, such as scheduling the trial to start the day after Yom Kippur in the first place,

granting a one-day continuance, or granting a longer continuance until a time when the plaintiff's expert was available. Even if the court insisted on refusing to accommodate the Doctor, its action would have been less restrictive if it had allowed trial counsel to place his objection on the record, instead of shutting down the accommodation request entirely.

Thus, the trial court's actions cannot survive strict scrutiny, and they violated the Free Exercise Clause in a way that prejudiced the verdict and warrants remand for a new trial.

D. The court's hostility toward the Doctor's faith violates the Free Exercise Clause under *Lukumi* and *Masterpiece Cakeshop*.

While the exercise of discretion by government decisionmakers and the granting of secular accommodations but not religious accommodations trigger strict scrutiny under the Free Exercise Clause, hostility from government decisionmakers goes a step further and is an automatic Free

Exercise violation. When "'official expressions of hostility' to religion accompany laws or policies burdening religious exercise . . . we have 'set aside such policies without further inquiry.'" *Kennedy*, 597 U.S. at 525 n.1 (2022) (quoting *Masterpiece Cakeshop*, 584 U.S. at 634–35, 639–40) (state commissioner violated Free Exercise Clause when he called cakeshop owner's faith "despicable" and "merely rhetorical"; this demonstrated "a clear and impermissible hostility toward [his] sincere religious beliefs"). Such hostility need not be overt, though it often is. The Free Exercise Clause "forbids even subtle departures from neutrality." *Lukumi*, 508 U.S. at 534.

Here, the court's hostility was anything but subtle. The court refused to accommodate the Doctor's core religious exercise, and then prevented his attorney from objecting to this ruling on the record. The court then made his attorney choose whether to reveal to the jury the reason for the Doctor's absence, inviting further anti-Semitism, or to allow jurors to

think he didn't care enough to attend his own trial, where the core issue was negligence. When trial commenced on Yom Kippur, with the Doctor and one juror absent because of their religious obligations, the Doctor's counsel attempted to put his objections on the record, but the judge refused, saying there would be "no discussion or argument" because the plaintiffs' expert was not available the next day. The Doctor's counsel was then faced with a Hobson's choice—either disclose his client's faith, opening him up to more anti-Semitic hostility, or leave jurors to think he was callous about the plaintiff's medical condition and did not care enough to attend trial. The court should not have placed the Doctor or his counsel in this position. The hostility he experienced is reflected in the high jury verdict of $3.5 million in *non-economic* damages. This hostility, created and furthered by the trial court, is a violation of the Free Exercise Clause under *Lukumi*, *Masterpiece Cakeshop*, and *Kennedy*.

CONCLUSION

For these reasons, the jury was prejudiced against the Doctor, and the verdict against him should be overturned. The Doctor deserves a new trial, scheduled on a day when he can attend without being forced to choose between his constitutional rights.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH WORD COUNT

I certify that this document complies with the word limit of Pa.R.A.P. 531(b)(3) because, excluding the parts exempted by Pa.R.A.P. 2135(b), it contains 4,656 words.

/s/ *Lauren Gailey*
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April 24, 2024

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April 24, 2024

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