UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ALEXANDER SMITH, Plaintiff, -against- CITY OF ATLANTIC CITY; SCOTT EVANS, as Chief of the Atlantic City Fire Department; and THOMAS J. CULLENY JR., Deputy Chief of the Atlantic City Fire Department, Defendants.	No. **COMPLAINT** **Demand for Trial by Jury**

Plaintiff Alexander Smith, as and for his complaint, by his attorneys Beldock Levine & Hoffman LLP, alleges as follows:

PRELIMINARY STATEMENT

1. This is a civil rights action to remedy the discriminatory and unconstitutional treatment of Alexander Smith, an African-American devout Christian who wears a three-inch beard as an expression of his sincerely held religious beliefs. Mr. Smith has been an Air Mask Technician for the Atlantic City Fire Department ("ACFD") since 2015. His job duties consist of maintaining all Self-Contained Breathing Apparatuses and Air Cylinders ("SCBA") used by firefighters, repairing SCBA masks and air pieces, and refilling SCBA air bottles. Mr. Smith's employment with the ACFD does not require him to use SCBAs or facial masks of any kind.

2. In fact, because Mr. Smith is the technician who handles the tests, Mr. Smith could not wear a mask because he has not been fit-tested since 2016.

3. The ACFD has a written policy prohibiting beards of any length. The purported reason for the policy is to ensure that all members of service are able to don protective masks that seal to the face. The policy provides for an exception to this rule where members are "called

in on an emergency call-back" instructing that such members "shall not be required to shave prior to arrival at the station or fire scene." (ACFD Operations Order # 0303).

4. On January 3, 2019, Mr. Smith made a formal request to his supervisors at the ACFD for an accommodation to wear his beard because of his religious beliefs and convictions. Mr. Smith provided religious letters and scriptural support for his request and explained that he no longer wears the mask that forms the basis of the security concern. On February 15, 2019, Mr. Smith's religious accommodation request was denied because of purported "overwhelming safety concerns" for Mr. Smith and his fellow firefighters. Mr. Smith was informed that, if he did not appear for work clean shaven, he would be immediately suspended without pay and face termination.

5. Defendants' denial of Mr. Smith's accommodation based on his sincerely held religious beliefs is arbitrary, capricious, and contrary to law. Indeed, the Third Circuit Court of Appeals, in an opinion written by then-Court of Appeals Judge Samuel Alito in 1999, clearly delineated the right for reasonable accommodation for this exact circumstance. (*See* Fraternal Order of Newark Lodge No. 12, 170 F.3d 359 (3d Cir. 1999) attached hereto as Exhibit 1.) Even the U.S. armed forces have revised their grooming policies to provide for religious accommodations in these circumstances. (*See* Exhibit 2.)

6. Mr. Smith faces irreparable injury if he is suspended without pay for expressing his sincerely held religious beliefs. Accordingly, Mr. Smith seeks, *inter alia*, an injunction enjoining the ACFD from any adverse employment actions against him; an award of compensatory and punitive damage in an amount to be determined at trial; an award of attorneys' fees and costs; and such other relief as this Court deems just and equitable.

JURISDICTION

7. Jurisdiction is conferred on this Court under 28 U.S.C. §§ 1331 and 1343(a)(3) and (4).

8. Plaintiff's claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure.

9. This Court also has supplemental jurisdiction under 28 U.S.C. § 1367 to hear Plaintiff's state law claims.

VENUE

10. Venue is proper in the United States District Court for the District of New Jersey pursuant to 28 U.S.C. § 1391(b)(1) and (2), as at least one of the defendants resides in this district and the acts alleged herein were committed within this district.

PARTIES

11. At all times relevant hereto, Plaintiff ALEXANDER SMITH is an African-American Christian man. He was, and remains, a resident of the State of New Jersey, County of Atlantic, and a citizen of the United States.

12. Defendant CITY OF ATLANTIC CITY ("the CITY") is a municipal entity created and authorized under the laws of the State of New Jersey. The City is authorized by law to maintain a fire department and does maintain the ACFD, which acts as its agent in the area of, *inter alia*, fire protection. The CITY assumes the risks incidental to the maintenance of the ACFD and the employment of fire department employees.

13. Defendant SCOTT EVANS is the Chief of the ACFD. He is sued in his individual and official capacity.

14. Defendant THOMAS J. CULLENY JR. is the Deputy Chief of the ACFD and Plaintiff's direct supervisor. He is sued in his individual and official capacity.

15. At all times relevant herein, Defendants EVANS and CULLENY have acted under color of law, and within their authority as employees, officers, and/or agents of the ACFD and/or the CITY.

STATEMENT OF FACTS

Grooming Requirements in the Atlantic City Fire Department

16. ACFD Operational Guideline Number 0303, which was first made effective in January 1979 and was revised on January 23, 2018, requires that:

> 5. Members shall be clean shaven while on duty. . . .
>
> 6. ….[b]eards and goatees of any type are specifically prohibited. In no case shall facial hair, including stubble, inhibit the seal of the air mask's face piece. Facial hair of any type shall not interfere with the seal of SCBA face piece. No hair is permitted below the lip." (Smith Aff. at Ex. 1.)

17. The SCBA refers to Self-Contained Breathing Apparatuses and Air Cylinders which are required respiratory equipment for all "firefighters" on "suppression" duty, *i.e.*, those firefighters who are engaged in search and rescue or extinguishing fires.

18. The Guidelines provide only one exception to the no-beard requirement: "those persons called in on an emergency call-back shall not be required to shave prior to arrival at the station or fire scene."

19. Thus, in an emergency, members do not need to be clean shaven in order to respond.

20. The ACFD does not provide a policy for requesting a religious or medical accommodation.

Mr. Smith's Religious Beliefs and the ACFD's Failure to Provide a Reasonable Accommodation

21. Mr. Smith is African-American who became a born-again Christin in 1996.

22. In 2000, he was ordained as a minister.

23. Mr. Smith joined the ACFD on February 22, 2004, just over 15 years ago.

24. He initially joined the ACFD as a firefighter in the Fire Suppression Unit of ACFD. In that role, he was tasked with responding to a fire in either the Engine Company—where he extinguished fires—or in a Ladder Company where he performed search and rescue.

25. In November of 2015, Mr. Smith was promoted to an administrative position at the Fire Shop, which is a part of the ACFD.

26. As part of his promotion to the Fire Shop, Mr. Smith became, and remains, an Air Mask Technician.

27. Mr. Smith's responsibilities as an Air Mask Technician are: performing repairs on SCBA masks and face pieces; refilling empty or partially empty SCBA air bottles; performing yearly fit tests on all ACFD personnel; and otherwise maintaining SCBA units used by the firefighters who respond to fires.

28. While Mr. Smith does respond to fire emergencies as an Air Mask Technician, he does so solely for the purpose of refilling SCBA air bottles; his job responsibilities do not include participation in extinguishing fires or search and rescue.

29. In the three and a half years since he has worked as Air Mask Technician, Mr. Smith has never been required to enter a burning building, use SCBAs, or wear a face mask of any kind.

30. In fact, Mr. Smith has not been fit-tested since 2016 and is therefore not authorized to don an SCBA mask.

Mr. Smith's Request for a Religious Accommodation

31. Mr. Smith began growing a beard in December of 2018, because of his genuine and sincere belief that he wear a beard as an expression of his faith.

32. On January 3, 2019, Mr. Smith e-mailed Defendant Chief Culleny, attaching a request for an accommodation "to continue to wear my beard due to my religious beliefs and convictions."

33. On January 3, 2019 at approximately 1:30 p.m., Mr. Smith met with Anthony Swan, Solicitor for the City of Atlantic City regarding his request.

34. Mr. Swan informed Mr. Smith that he should submit a request and provide proof as to why he would like the accommodation.

35. On that date, Mr. Smith filled out and gave Mr. Swan a copy of an article explaining the biblical basis for his request.

36. He also provided Mr. Swan with an EEOC publication entitled "Religious Garb and Grooming in the Workplace: Rights and Responsibilities."

37. Mr. Smith explained that his job duties as an Air Mask Technician did not require him to wear SCBAs or air masks of any kind and that he, in fact, had never been required to wear an SCBA or air mask at any time during the three-and-a-half years he had been an Air Mask Technician.

38. On January 7, 2019, Defendant Deputy Chief Thomas Culleny Jr. called Mr. Smith and said that Chief Scott Evans received an email from the City Solicitor's office advising them to keep Mr. Smith from responding to any fire emergencies until a decision was made regarding his requested accommodation.

39. On January 9, 2019, Mr. Smith received a letter from Defendant Deputy Chief Culleny informing Mr. Smith that he was "in receipt of [Mr. Smith's] request for a religious accommodation pursuant to [his] January 3, 2019 correspondence." He informed Mr. Smith that he was "unable to adequately evaluate" Mr. Smith's request because "additional information" was required. Specifically, he requested "any written directive relative to your faith that requires the wearing of facial hair."

40. On January 10, 2019, Mr. Smith provided Deputy Chief Culleny with the requested documentation regarding the basis for his religious beliefs.

41. Mr. Smith followed up with an e-mail to Deputy Chief Culleny attaching documentation in the form of an article providing the scriptural basis for his religious beliefs. (*See* Ex. 3.)

42. On January 23, 2019, Mr. Smith e-mailed Deputy Chief Culleny, copying Chief Evans and a number of other individuals requesting the status of his request for an accommodation and requesting information as to when he would be permitted to resume responding to fire emergencies.

43. The next day, Mr. Smith was informed by Deputy Chief Culleny to contact Ms. Alexis Waiters in Human Resources, which Mr. Smith did.

44. On February 4, 2019, Mr. Smith met with Ms. Waiters.

45. Ms. Waiters directed Mr. Smith to fill out an Employee Complaint Form, which Mr. Smith did.

46. In that Complaint, Mr. Smith explained that he had provided his request for an accommodation on January 4, 2019 together with documentation as to why he believed that he should be permitted to wear his beard based on his religious beliefs.

47. Mr. Smith also attached to the complaint two letters from two different Pastors regarding the religious basis for his beliefs. This included, a letter from Reverend Dr. Odinga Lawrence Maddox II, Pastor of the New African Methodist Episcopal Zion Church and Reverend Eric G. McCoy of the God is Reaching Out Ministries. These letters provide the scriptural basis for the belief of why Christian men are encouraged to wear beards.

48. Mr. Smith also attached the Bylaws of his Church, the Community Harvesters Church, which expresses that "[t]he growing of the beard for men is a scriptural practice that is encouraged in Community Harvesters Church. Many of the prophets in the bible wore beards. For example, David (1 Sam 21:13), Aaron (Psalms 133:2) and Jesus Christ wore beards (Is 50:6)." (Ex. 11.)

49. On February 15, 2019, Mr. Smith was called into Deputy Chief Culleny's office.

50. When he arrived, he was taken to Chief Evan's office where he was told that his request had been denied. He was also provided with a letter.

51. The letter stated that, "[d]ue to the overwhelming safety concerns for yourself as well as your fellow firefighters and the public, your request for a religious exemption is denied. As such, on your next shift you are reassigned to the shop and must report for duty clean shaven, in compliance with ACFD rules and regulations."

52. Upon information and belief, if Mr. Smith returns to work with his beard, Mr. Smith's supervisors will suspend him without pay until he is clean-shaven. Each day he arrives at work with a beard, he will be sent home and will continue to be sent home until his supervisors begin termination proceedings against him.

Irreparable Harm

53. Defendants' unreasonable denial of an accommodation to Mr. Smith regarding his beard is a violation of his constitutional right to express his religious beliefs.

54. The violation of Mr. Smith's constitutional right will continue each day he is pressured to shave his beard.

55. Mr. Smith is a married father of three young children ages 9, 12, and 14. His wife and children all rely on his paycheck to survive.

56. If he is disciplined or suspended without pay, Mr. Smith will default on his many financial obligations.

57. Upon information and belief, Mr. Smith will be suspended on February 26, 2019 if he does not shave his beard. He will not receive any benefits during that time.

58. If Mr. Smith is terminated, he will suffer lost wages, lost benefits, and other adverse and irreparable consequences.

COUNT I
(For Violations of Religious Freedoms Under the First Amendment, 42 U.S.C. § 1983, and the New Jersey Civil Rights Act and Article I, § 3 of the New Jersey State Constitution)

59. Plaintiff repeats and realleges each and every allegation made in the foregoing paragraphs as if fully set forth herein.

60. The ACFD's broad-reaching no beard policy unreasonably interferes with the religious beliefs of the Plaintiff.

61. The Defendants' conduct alleged above "targets" religious exercise and violates the federal and New Jersey State constitutional rights to the free exercise of religion.

62. No legitimate governmental interest justifies the ACFD's no-beard policy.

63. The Defendants failed to engage in the interactive process or provide him with a reasonable accommodation of his request.

64. The Defendants' policy that accommodations are only provided for emergency call-backs violates the Plaintiff's free exercise of his religion, in violation of the First Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment and Article I, Section 3 of the New Jersey State Constitution.

65. Each of the Defendants has acted with deliberate indifference to the constitutional rights of Plaintiff Smith. As a direct and proximate result of the acts and omissions of each of the Defendants, the constitutional rights of Plaintiff have been violated.

66. By acting under color of state law to deprive Plaintiff Smith of his rights under the First Amendment, the Defendants are in violation of 42 U.S.C. § 1983, which prohibits the deprivation under color of state law of rights secured under the United States Constitution.

67. As a direct and proximate result, Plaintiff has suffered injuries and damages set forth above.

68. The Defendants' unlawful conduct was willful, malicious, oppressive, and/or reckless, and was of such a nature that punitive damages should be imposed.

69. Plaintiff Smith has no adequate remedy at law and will suffer serious and irreparable harm to his constitutional rights unless Defendants are enjoined from any adverse employment action against him.

COUNT II
(For Violations of Equal Protection Under the Fourteenth Amendment, 42 U.S.C. § 1983, the New Jersey Civil Rights Act and Article I, § 1, of the New Jersey State Constitution)

70. Plaintiff repeats and realleges each and every allegation made in the foregoing paragraphs as if fully set forth herein.

71. Defendants have discriminated against Plaintiff in violation of the Fourteenth Amendment of the United States Constitution and the New Jersey Civil Rights Act and Article I, section 1 of the New Jersey State Constitution.

72. Each of the Defendants has acted with deliberate indifference to the constitutional rights of Plaintiff Smith. As a direct and proximate result of the acts and omissions of each of the Defendants, the constitutional rights of Plaintiff Smith have been violated.

73. As a direct and proximate result, Plaintiff has suffered injuries and damages set forth above.

74. The Defendants' unlawful conduct was willful, malicious, oppressive, and/or reckless, and was of such a nature that punitive damages should be imposed.

75. Plaintiff Smith has no adequate remedy at law and will suffer serious and irreparable harm to his constitutional rights unless Defendants are enjoined from enforcing the ACFD's no beard policy described herein.

COUNT III
(For Violations of Title VII of the Civil Rights Act of 1964)

76. Plaintiff repeats and realleges each and every allegation made in the foregoing paragraphs as if fully set forth herein.

77. Plaintiff, as a devout Christian, believes that it is his religious mandate to wear a beard.

78. Defendants have discriminated against Plaintiff Smith in the following manners:

a. Failing to provide an adequate religious accommodation that allows the growth of a reasonable length beard; and

b. Retaliating against Plaintiff for exercising his right to practice his religion by wearing a moderate length beard.

79. As a direct and proximate result, Plaintiff has suffered injuries and damages set forth above.

80. The Defendants' unlawful conduct was willful, malicious, oppressive, and/or reckless, and was of such a nature that punitive damages should be imposed.

81. Plaintiff Smith has no adequate remedy at law and will suffer serious and irreparable harm to his rights under Title VII unless Defendants are enjoined from taking any adverse employment against Plaintiff.

COUNT IV
(For Violations of the New Jersey Law Against Discrimination)

82. Plaintiff repeats and realleges each and every allegation made in the foregoing paragraphs as if fully set forth herein.

83. Defendants' conduct described above has discriminated against Plaintiff due to his religion.

84. Defendants have retaliated against Plaintiff as a result of the exercise of his religious beliefs.

85. As a direct and proximate result, Plaintiff has suffered injuries and damages set forth above.

86. The Defendants' unlawful conduct was willful, malicious, oppressive, and/or reckless, and was of such a nature that punitive damages should be imposed.

87. Plaintiff Smith has no adequate remedy at law and will suffer serious and irreparable harm to his rights under the New Jersey Law Against Discrimination unless Defendants are enjoined from taking any adverse employment action against Plaintiff.

JURY DEMAND

88. Plaintiff demands a trial by jury.

WHEREFORE, Plaintiff respectfully requests that this Court:

a. Judgment declaring that Defendants' acts complained of herein violated Plaintiff's rights under the First and Fourteenth Amendments to the United States Constitution and New Jersey law;

b. Judgment declaring that Defendants' acts complained of herein violated Plaintiff's rights as secured by applicable state and local law prohibiting retaliation in employment;

c. An Order direction Defendants to expunge Plaintiff Smith's record of any wrongdoing;

d. An Order enjoining and restraining Defendants from taking any adverse employment action against Plaintiff;

e. Award Plaintiff Smith compensatory damages in in an amount that is fair, just and reasonable, to be determined at trial;

f. Award Plaintiff Smith punitive damages against the individual defendants in an amount to be determined at trial;

g. Award Plaintiff reasonable attorneys' fees and costs; and

h. Grant such other and further relief as this Court may deem appropriate and equitable, including injunctive and declaratory relief as may be required in the interests of justice.

Dated: New York, New York
February 25, 2019

Respectfully submitted,

BELDOCK LEVINE & HOFFMAN LLP
99 Park Avenue, PH/ 26th Fl.
New York, New York 10016
(212) 490-0400

By:____________________
Luna Droubi

FRATERNAL ORDER OF POLICE NEWARK LODGE NO. 12; FARUQ ABDUL-AZIZ; SHAKOOR MUSTAFA v. CITY OF NEWARK; NEWARK POLICE DEPARTMENT; JOSEPH J. SANTIAGO, NEWARK POLICE DIRECTOR; THOMAS C. O'REILLY, NEWARK CHIEF OF POLICE, Appellants

No. 97-5542

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

170 F.3d 359*; *1999 U.S. App. LEXIS 3338*; *79 Fair Empl. Prac. Cas. (BNA) 323*; *75 Empl. Prac. Dec. (CCH) P45,820

June 25, 1998, Argued
March 3, 1999, Filed

SUBSEQUENT HISTORY: [**1] Certiorari Denied October 4, 1999, Reported at: *1999 U.S. LEXIS 5004*.

PRIOR HISTORY: ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY. (D.C. Civil No. 97-02672). (District Judge: Honorable John W. Bissell).

DISPOSITION: Affirmed.

COUNSEL: MICHELLE HOLLAR-GREGORY, DARRYL M. SAUNDERS (Argued), City of Newark, Newark, NJ, Counsel for Appellants.

ROBERT R. CANNAN (Argued), MARIO E. DIRIENZO, Spevack & Cannan, Iselin, NJ, Counsel for Appellees.

KEVIN J. HASSON (Argued), ERIC W. TREENE, ROMAN STORZER, The Becket Fund for Religious Liberty, Washington, DC. RONALD K. CHEN, DAVID ROCAH, American Civil Liberties Union of New Jersey, Newark, NJ. STEVEN M. FREEMAN, DAVID ROSENBERG, ERICA M. BROIDO, LAUREN LEVIN, Anti-Defamation League, New York, NY, Counsel for Amici Curiae in Support of Appellees.

JUDGES: Before: GREENBERG, ALITO, and McKEE, Circuit Judges.

OPINION BY: ALITO

OPINION

[*360] **OPINION OF THE COURT**

ALITO, *Circuit Judge*:

This appeal presents the question whether the policy of the Newark (N.J.) Police Department regarding the wearing of beards by officers violates the *Free Exercise Clause of the First Amendment*. Under that policy, which the District [**2] Court held to be unconstitutional, exemptions are made for medical reasons (typically because of a skin condition called pseudo folliculitis barbae), but the Department refuses to make exemptions for officers whose religious beliefs prohibit them from shaving their beards. Because the Department makes exemptions from its policy for secular reasons and has not offered any substantial justification for refusing to provide similar treatment for officers who are required to wear beards for religious reasons, we conclude that the Department's policy violates the *First Amendment*. Accordingly, we affirm the District Court's order

permanently enjoining the Department from disciplining two Islamic officers who have refused to shave their beards for religious reasons.

I

Since 1971, male officers in the Newark Police Department have been subject to an internal order that requires them to shave their beards. In relevant part, the order provides:

> Full beards, goatees or other growths of hair below the lower lip, on the chin, or lower jaw bone area are prohibited.

App. at 94 (Special Order from the Chief of Police No. 71-15, p.2 ("Order 71-15")). The order permits officers to wear [**3] mustaches and sideburns, *id*., and it allows exemptions from the "no-beard" rule for undercover officers whose "assignments or duties permit a departure from the requirements." *Id.* at 93. *See* Appellees' Br. at 14; Reply Br. at 9.

Officers Faruq Abdul-Aziz and Shakoor Mustafa are both devout Sunni Muslims who assert that they believe that they are under a religious obligation to grow their beards. *See* App. at 9-10; Supp. App. 3-4. According to the affidavit of an imam, "it is an obligation for men who can grow a beard, to do so" and not to shave. Supp. App. at 3. The affidavit continues:

> . . . The Quran commands the wearing of a beard implicitly. The Sunnah is the detailed explanation of the general injunctions contained in the Quran. The Sunnah says in too many verses to recount [:]"Grow the beard, trim the mustache."
>
> . . . I teach as the Prophet Mohammed taught that the Sunnah must be followed as well as the Quran. This in the unequivocal teaching for the past 1,418 years, by the one billion living Sunni Muslims world wide.
>
> . . . The refusal by a Sunni Muslim male who can grow a beard, to wear one is a major sin. I teach based upon the way I was [**4] taught and it is understood in my faith that the non-wearing of a beard by the male who can, for any reason is as [serious] a sin as eating pork.
>
> . . . This is not a discretionary instruction; it is a commandment. A Sunni Muslim male will not be saved from this major sin because of an instruction of another, [*361] even an employer to shave his beard and the penalties will be meted out by Allah.

Supp. App. at 4. The defendants have not disputed the sincerity of the plaintiffs' beliefs. [1]

1 *Cf. Lewis v. Scott, 910 F. Supp. 282, 287 (E.D. Tex. 1995)* (testimony of an Islamic chaplain regarding whether a beard is obligatory).

When Aziz and Mustafa were questioned about their non-compliance with Order 71-15, they informed Department officials that they were growing their beards for religious reasons. *See* Supp. App. at 1 & 5. This explanation was apparently deemed inadequate, and Mustafa received a Preliminary Notice of Disciplinary Action in July 1996 charging him with [**5] disobeying an oral command to comply with Order 71-15. App. at 96-97. Aziz received a similar notice in January 1997. *Id.* at 98-99. In both cases, the notices informed the officers that their actions might warrant "removal" from the Department. *Id.* at 96 & 98.

On January 24, 1997, Chief of Police Thomas C. O'Reilly announced a "Zero Tolerance" policy for officers who were not in compliance with Order 71-15 and had not received "medical clearance" to wear a beard. App. at 95 (Memorandum from the Chief of Police No. 97-30 ("Memo 97-30")). Consistent with this policy, the Department ordered Officers Aziz and Mustafa to appear for disciplinary hearing in May 1997.

Prior to the hearing, Mustafa and Aziz filed a complaint in the District Court requesting permanent injunctive relief on the ground that the Department's enforcement of Order 71-15 would violate their rights under the *Free Exercise Clause of the First Amendment*. [2] After the defendants filed a motion to dismiss, and the plaintiffs filed a motion for summary judgment, the District Court held a hearing and concluded that the Department's application of Order 71-15 to Mustafa and Aziz would violate their free exercise [**6] rights.

Accordingly, the District Court permanently enjoined the defendants "from disciplining or otherwise disadvantaging Plaintiffs Aziz and Mustafa for violating Order 71-15 or any other directive which would require them to shave or trim their beards in violation of their religious beliefs." App. at 23.

> 2 Mustafa and Aziz brought several other claims, all of which were dismissed by the District Court. *See* App. at 15-16. The plaintiffs have not appealed these dismissals.

II

The *Free Exercise Clause of the First Amendment*, which has been made applicable to the States through the *Fourteenth Amendment*, *see Cantwell v. Connecticut, 310 U.S. 296, 303, 84 L. Ed. 1213, 60 S. Ct. 900 (1940)*, provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. *U.S. Const. amend. I.* For many years, the Supreme Court appeared to interpret the *free exercise clause* as requiring the [**7] government to make religious exemptions from neutral, generally applicable laws that have the incidental effect of substantially burdening religious conduct. *See Wisconsin v. Yoder, 406 U.S. 205, 220, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972)* ("There are areas of conduct protected by the *Free Exercise Clause of the First Amendment* and thus beyond the power of the State to control, even under regulations of general applicability."); *see also Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 832-34, 109 S. Ct. 1514, 103 L. Ed. 2d 914 (1989)*; *Thomas v. Review Bd. of Indiana Employment Div., 450 U.S. 707, 717, 67 L. Ed. 2d 624, 101 S. Ct. 1425 (1981)*; *Sherbert v. Verner, 374 U.S. 398, 403-404, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963)*. In these cases, the Court required the government to meet "strict scrutiny" when application of a given law or regulation served to impose a substantial burden on religious activity. *See Thomas, 450 U.S. at 718* ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."); [**8] *Yoder, 406 U.S. at 215* ("Only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.").

In 1986, a plurality of the Court raised doubts about the breadth of the Court's "exemption" jurisprudence and proposed a new [*362] approach. *See Bowen v. Roy, 476 U.S. 693, 703-08, 90 L. Ed. 2d 735, 106 S. Ct. 2147 (1986)* (Burger, C.J., joined by Rehnquist and Powell, J.J.). In *Roy*, a mother and father who wished to participate in the Aid to Families with Dependent Children program objected on religious grounds to the requirement that they furnish their daughter's Social Security number as a condition of receiving benefits. *Id. at 695*. Although the Court's precedent indicated that these circumstances were sufficient to trigger strict scrutiny because the government had "conditioned receipt of an important benefit upon conduct proscribed by a religious faith," *Thomas, 450 U.S. at 717-718*, the plurality opinion applied rational basis review. *Roy, 476 U.S. at 707-08*. The opinion explained:

> We conclude . . . [**9] that government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons. Although the denial of government benefits over religious objection can raise serious Free Exercise problems, these two very different forms of government action are not governed by the same constitutional standard.

Id. at 706 (emphasis added). *See also id. at 704.*

In sum, the plurality proposed that the Court continue to apply heightened scrutiny to neutral, generally applicable laws that burden religious activity by affirmatively compelling or prohibiting conduct, but apply rational basis scrutiny to neutral, generally applicable rules governing benefits programs. However, rather than advocating the overruling of the Court's prior benefits-exemption cases, such as *Sherbert* and *Thomas*, the plurality distinguished those decisions on the ground that they concerned laws that already included [**10] "mechanisms for individualized exemptions." *Roy, 476 U.S. at 708*. The plurality explained that if "a state creates such a mechanism, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent," and it is "appropriate to require the State to demonstrate a compelling reason for denying the requested exemption." *Id.* Since the statutory

framework at issue in *Roy* did not provide for individualized exemptions, the plurality did not believe that the Court's prior benefits decisions were controlling.

The *Roy* plurality's attempt to distinguish the Court's previous decisions and apply rational basis review failed to garner a majority of the Court. *See id. at 715-16* (Blackmun, J., concurring in part); *id. at 728-32* (O'Connor, J., joined by Brennan and Marshall, J.J., concurring in part and dissenting in part); *id. at 733* (White, J., dissenting). In 1990, however, the legal landscape changed dramatically when the Supreme Court handed down its decision in *Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990).* [**11] *Smith* concerned two individuals who were denied state unemployment compensation benefits after being fired from their jobs for ingesting peyote, a controlled substance under Oregon law. *Id. at 874*. The individuals challenged the denial of benefits on the ground that they were entitled to religious exemptions since they had ingested peyote for sacramental purposes at a ceremony of the Native American Church. Declining to apply strict scrutiny, the Court concluded that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Smith, 494 U.S. at 879* (quotations omitted). *See also id. at 878* (explaining that "if prohibiting the exercise of religion" is "merely the incidental effect of a generally applicable and otherwise valid provision, the *First Amendment* has not been offended"). Accordingly, the Court held that Oregon could, consistent with the *Free* [**12] *Exercise Clause*, criminalize religious peyote use and deny unemployment compensation benefits to individuals whose job dismissals resulted [*363] from such use. *Id. at 890*.

The *Smith* Court, however, did not overrule its prior free exercise decisions, but rather distinguished them. *See Smith, 494 U.S. at 881-884*. [3] In this case, the plaintiffs contend that their Free Exercise claim is not governed by the generally applicable *Smith* rule but is instead governed by the Court's pre-*Smith* decisions. In this connection, the plaintiffs make three arguments. First, they contend that the *Smith* decision should be limited to cases involving criminal prohibitions. Second, they argue that the *Smith* analysis does not apply to government rules that, like the "no-beard" policy, already make secular exemptions for certain individuals. Finally, they maintain that the *Smith* rule does not bar their exemption claim because they are relying on both the *Free Exercise Clause* and the Free Speech Clause. The District Court accepted the plaintiffs' first argument, applied the Court's pre-*Smith* jurisprudence, and concluded that the *Free* [**13] *Exercise Clause* prohibits the Department from enforcing its "no-beard" policy against Aziz and Mustafa. While we disagree with the District Court's conclusion that *Smith* is limited to the criminal context, we believe that the plaintiffs are entitled to a religious exemption since the Department already makes secular exemptions. As a result, we need not reach the plaintiffs' "hybrid" free speech/free exercise argument. [4] *See generally Smith, 494 U.S. at 881-882* (distinguishing "hybrid" claims from free exercise claims).

3 *See generally* Note, James M. Oleske, Jr., *Undue Burdens and the Free Exercise of Religion: Reworking a "Jurisprudence of Doubt", 85 Geo. L.J. 751 (1997).*

4 We do note, however, that the plaintiffs failed to allege a free speech violation in their complaint, *see* App. at 83-92, and explicitly disavowed such a claim before the District Court. *See* App. at 58 (July 18, 1997 Hearing) (counsel for plaintiffs) ("We can all agree that freedom of expression would not extend to the wearing of beards.").

[**14] III

A

Aziz and Mustafa first contend that the *Smith* rule applies only to cases involving criminal prohibitions. Since this case concerns a non-criminal prohibition, Aziz and Mustafa argue that the Court's pre-*Smith* decisions govern and heightened scrutiny applies. This position, however, has already been rejected by our court. *See Salvation Army v. Department of Community Affairs of New Jersey, 919 F.2d 183, 194-96 (3d Cir. 1990). Salvation Army* involved a claim by The Salvation Army ("TSA") that it was entitled to a religious exemption from the requirements of the New Jersey Rooming and Boarding House Act of 1979, *N.J. Stat. Ann. § 55:13B-1* (West 1989), and the regulations promulgated thereunder. *Salvation Army, 919 F.2d. at 185*. Like Aziz and Mustafa, TSA argued that "the Court's holding in *Smith* was limited to free exercise challenges to neutral, generally applicable *criminal statutes* ." *Id. at 194*

(emphasis in original). Our response was unequivocal: "We cannot accept this interpretation of *Smith*." *Id.*

In addition to the analysis provided in *Salvation Army*, *see 919 F.2d at 194-96*, [**15] we believe there are two further reasons to conclude that *Smith* is not limited to cases involving criminal statutes. First, under a contrary reading of *Smith*, the *Free Exercise Clause* would not be implicated when the government prohibits religious conduct through generally applicable laws, *Smith, 494 U.S. at 878-79*, but would be implicated when the government imposes a lesser burden on religion through a generally applicable civil regulation. This counter-intuitive interpretation of the *First Amendment* is undermined by the very language of the *Smith* opinion:

> If a state has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the *First Amendment*, *it certainly follows that it may impose the lesser burden* of denying unemployment compensation benefits to persons who engage in that conduct.

Smith, 494 U.S. at 875 (quotation omitted) (emphasis added). *See also id. at 898-99* (opinion of O'Connor, J., joined by Brennan, Marshall, and [*364] Blackmun, J.J.) ("A neutral criminal law prohibiting conduct that a State may legitimately regulate is, if anything, [**16] more burdensome than a neutral civil statute placing legitimate conditions on the award of a state benefit.").

Second, the Supreme Court's most recent characterization of *Smith* supports our holding in *Salvation Army* that *Smith* is not limited to the criminal context. In *City of Boerne v. Flores, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997)*, the Supreme Court stated:

> *Smith* held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.

Id. 117 S. Ct. at 2161. Nowhere in its discussion of *Smith* did the *Flores* Court indicate that the *Smith* decision only applied to generally applicable criminal laws. In fact, the law at issue in *Flores* was a non-criminal landmark ordinance. *See Flores, 117 S. Ct. at 2160*. If the plaintiffs are correct, and *Smith* does not apply to non-criminal provisions, there would have been no need for the *Flores* Court even to discuss *Smith*. However, the *Flores* Court did much more than to discuss *Smith*; it struck down the Religious Freedom Restoration Act of [**17] 1993, insofar as it applied to the states, for the very reason that it was inconsistent with *Smith*. *See Flores, 117 S. Ct. at 2171-72*. In light of *Flores*, it is difficult to say that *Smith* has no application to cases involving non-criminal statutes.

Because this court has already rejected the argument that *Smith* is limited to cases involving criminal statutes, and because that rejection is amply supported by both the *Smith* opinion itself and recent Supreme Court case law, we cannot agree with the plaintiffs and the District Court that *Smith* is distinguishable on the ground that it concerned a criminal statute.

B

Aziz and Mustafa's second argument is that the Department's refusal to make religious exemptions from its no-beard policy should be reviewed under strict scrutiny because the Department makes secular exemptions to its policy. This contention rests on the following passage from *Smith* in which the Court explained why some of its earlier religious exemption cases had applied strict scrutiny:

> The statutory conditions in *Sherbert* and *Thomas* provided that a person was not eligible for unemployment compensation benefits [**18] if, 'without good cause,' he had quit work or refused available work. The 'good cause' standard created a mechanism for individualized exemptions. As the plurality pointed out in *Roy*, our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason.

Smith, 494 U.S. at 884 (quotations, citations, and alterations omitted).

The Court reiterated this understanding of its religious exemption jurisprudence, and applied it outside the unemployment compensation context, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537-38, 124 L. Ed. 2d 472, 113 S. Ct. 2217 (1993)*. In *Lukumi*, the Court reviewed several municipal ordinances regulating the slaughter of animals, one of which prescribed punishments for "whoever . . . unnecessarily . . . kills any animal." *Id. at 537*. The Court explained that this ordinance could not be applied to punish the ritual slaughter of animals by members of the Santeria religion when the ordinance was not applied [**19] to secular killings:

> Because [the ordinance] requires an evaluation of the particular justification for the killing, this ordinance represents a system of individualized governmental assessment of the reasons for the relevant conduct. As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of "religious hardship" without compelling reason. Respondent's application of the test of necessity *devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons. Thus religious practice is* [*365] *being singled out for discriminatory treatment*.

Lukumi, 508 U.S. at 537-38 (emphasis added) (quotations and citations omitted). [5]

5 *See also Roy, 476 U.S. at 708* (plurality opinion):

> If a state creates a mechanism [for exemptions], its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent. Thus . . . to consider a religiously motivated resignation to be "without good cause" tends to exhibit hostility, not neutrality, towards religion.

[**20] Aziz and Mustafa contend that, since the Department provides medical -- but not religious -- exemptions from its "no-beard" policy, [6] it has unconstitutionally devalued their religious reasons for wearing beards by judging them to be of lesser import than medical reasons. The Department, on the other hand, maintains that its distinction between medical exemptions and religious exemptions does not represent an impermissible value judgment because medical exemptions are made only so as to comply with the Americans with Disabilities Act ("ADA"), *42 U.S.C. § 12101 (1994)*. *See* Brief in Support of the Defendants' Motion to Dismiss at 11. While this argument initially appears persuasive, it ultimately cannot be sustained.

6 In their reply brief, the defendants argue for the first time that the District Court "incorrectly decided the City of Newark has a medical exception." Reply Br. at 14. We will not entertain this argument as it conflicts with the defendants' position both in the District Court and in their opening brief to this court. *See* Defendants' Answer P 3; Brief in Support of Defendants' Motion to Dismiss at 11; Appellants' Br. at 11. Moreover, we are at a loss to understand the defendants' new position given that Memo 97-30 clearly provides exemptions from the "Zero Tolerance" policy for those who "have received medical clearance." App. at 95.

[**21] It is true that the ADA requires employers to make "reasonable accommodations" for individuals with disabilities. *42 U.S.C. § 12111(b)(5)(A) (1994)*. However, Title VII of the Civil Rights Act of 1964 imposes an identical obligation on employers with respect to accommodating religion. *42 U.S.C. § 2000e(j) (1994)*. This parallel requirement undermines the Department's contention that it provides a medical exception, but not a religious exception, because it believes that "the law may require" a medical exception. Brief in Support of Defendants' Motion to Dismiss at 11. Furthermore, it is noteworthy that the Department has clearly been put on notice of Title VII's religious accommodation requirements. *See* EEOC Determination Letter, Charge No. 171970408 (attached to Plaintiffs' Letter Brief in Response to Defendants' Cross Motion for

Summary Judgment); App. at 83 (Plaintiffs' Complaint) (citing Title VII). In light of these circumstances, we cannot accept the Department's position that its differential treatment of medical exemptions and [**22] religious exemptions is premised on a good-faith belief that the former may be required by law while the latter are not.

We also reject the argument that, because the medical exemption is not an "individualized exemption," the *Smith*/*Lukumi* rule does not apply. *See* App. at 19 (Dist. Ct. Op. at 12). While the Supreme Court did speak in terms of "individualized exemptions" in *Smith* and *Lukumi*, it is clear from those decisions that the Court's concern was the prospect of the government's deciding that secular motivations are more important than religious motivations. If anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection. *See generally Lukumi, 508 U.S. at 542 (1992)* ("All laws are selective to some extent, but *categories* of selection are of paramount concern when a law has the incidental effect of burdening religious practice.) (emphasis added). Therefore, we conclude that the Department's decision to provide medical [**23] exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi* .

Contrary to the Department's contention, our decision to apply heightened scrutiny is entirely consistent with the result in *Smith*. In *Smith*, the Court upheld an Oregon law [*366] that prohibited the "knowing or intentional possession of a 'controlled substance' unless the substance has been prescribed by a medical practitioner." *Smith, 494 U.S. at 874*. The Department argues that, since the prescription exception did not prompt the *Smith* Court to apply heightened scrutiny to the Oregon law, we should not apply heightened scrutiny in the instant case based on the Department's allowance of medical exemptions. *See* Appellants' Br. at 8-9. This argument, however, overlooks a critical difference between the prescription exception in the Oregon law and the medical exemption in this case.

The Department's decision to allow officers to wear beards for medical reasons undoubtedly undermines the Department's interest in fostering a uniform appearance through its "no-beard" policy. By [**24] contrast, the prescription exception to Oregon's drug law does not necessarily undermine Oregon's interest in curbing the unregulated use of dangerous drugs. Rather, the prescription exception is more akin to the Department's undercover exception, which does not undermine the Department's interest in uniformity because undercover officers "obviously are not held out to the public as law enforcement personnel." Reply Br. at 9. The prescription exception and the undercover exception do not trigger heightened scrutiny because the *Free Exercise Clause* does not require the government to apply its laws to activities that it does not have an interest in preventing. However, the medical exemption raises concern because it indicates that the Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not. As discussed above, when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive [**25] heightened scrutiny. [7]

7 While *Smith* and *Lukumi* speak in terms of strict scrutiny when discussing the requirements for making distinctions between religious and secular exemptions, *see Smith, 494 U.S. at 884* (requiring a "compelling reason"); *Lukumi, 508 U.S. at 537* (same), we will assume that an intermediate level of scrutiny applies since this case arose in the public employment context and since the Department's actions cannot survive even that level of scrutiny.

C

The Department has not offered any interest in defense of its policy that is able to withstand any form of heightened scrutiny. The Department contends that it wants to convey the image of a " 'monolithic, highly disciplined force' " and that "uniformity [of appearance] not only benefits the men and women that risk their lives on a daily basis, but offers the public a sense of security in having readily identifiable and trusted public servants." Appellant's Brief at 14 (citation omitted). We will [**26] address separately all of the interests that we can discern in this passage.

The Department hints that other officers and citizens

might have difficulty identifying a bearded officer as a genuine Newark police officer and that this might undermine safety. But while safety is undoubtedly an interest of the greatest importance, the Department's partial no-beard policy is not tailored to serve that interest. Uniformed officers, whether bearded or clean-shaven, should be readily identifiable. Officers who wear plain clothes are not supposed to stand out to the same degree as uniformed officers, and in any event the Department permits such officers to wear beards for medical reasons. The Department does not contend that these medical exemptions pose a serious threat to the safety of the members of the force or to the general public, and there is no apparent reason why permitting officers to wear beards for religious reasons should create any greater difficulties in this regard.

The Department also suggests that permitting officers to wear beards for religious reasons would undermine the force's morale and esprit de corps. However, the Department has provided no legitimate explanation [**27] as to why the presence of officers who wear beards for medical reasons does not have this effect but the presence of officers who wear beards for religious reasons would. And the same is true with respect to [*367] the Department's suggestion that the presence of officers who wear beards for religious reasons would undermine public confidence in the force. We are at a loss to understand why religious exemptions threaten important city interests but medical exemptions do not. Conceivably, the Department may think that permitting officers to wear beards for religious reasons would present a greater threat to the sense of uniformity that it wishes to foster because the difference that this practice highlights -- namely, a difference in religious belief and practice -- is not superficial (like the presence of pseudo folliculitis barbae) and thus may cause divisions in the ranks and among the public. (There is no doubt that religious differences have been a cause of dissension throughout much of human history.) But if this is the Department's thinking -- and we emphasize that the Department has not spelled out this argument in so many words -- what it means is that Sunni Muslim officers [**28] who share the plaintiffs' religious beliefs are prohibited from wearing beards precisely for the purpose of obscuring the fact that they hold those beliefs and that they differ in this respect from most of the other members of the force. In other words, if this is the real reason for the distinction that is drawn between medical and religious exemptions, we have before us a policy the very purpose of which is to suppress manifestations of the religious diversity that the *First Amendment* safeguards. Before sanctioning such a policy, we would require a far more substantial showing than the Department has made in this case. We thus conclude that the Department's policy cannot survive any degree of heightened scrutiny and thus cannot be sustained. [8]

8 We also reject the defendants' argument that the District Court erred in awarding some $ 12,000 in attorney's fees in favor of the plaintiffs. The defendants argue that this amount was unnecessary because the plaintiffs might have prevailed without federal court litigation had they pursued available administrative remedies. We conclude, however, that the District Court acted well within the proper bounds of its discretion in making the award that it did under the circumstances present here.

[**29] IV

For the reasons set out above, we affirm the decision of the District Court.

140MJC

********** Print Completed **********

Time of Request: Friday, January 06, 2017 17:35:02 EST

Print Number: 2827:590467291
Number of Lines: 415
Number of Pages: 8

Send To: Droubi, Luna
BELDOCK LEVINE & HOFFMAN LLP
99 PARK AVE FL 16
NEW YORK, NY 10016-1508

SECRETARY OF THE ARMY
WASHINGTON

03 JAN 2017

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Army Directive 2017-03 (Policy for Brigade-Level Approval of Certain Requests for Religious Accommodation)

1. References:

a. Title 42, United States Code § 2000bb-1 (Religious Freedom Restoration Act).

b. Title 10, United States Code § 774 (Religious apparel: wearing while in uniform).

c. Department of Defense Instruction 1300.17 (Accommodation of Religious Practices Within the Military Services), February 10, 2009, Incorporating Change 1, Effective January 22, 2014.

d. Army Directive (AD) 2016-34 (Processing Religious Accommodation Requests Requiring a Waiver to Army Uniform or Grooming Policies), 6 Oct 2016.

e. Army Regulation (AR) 600-20 (Army Command Policy), 6 November 2014.

f. AR 670-1 (Wear and Appearance of Army Uniforms and Insignia), 10 April 2015.

2. Purpose and Scope. This directive revises Army uniform and grooming policy to provide wear and appearance standards for the most commonly requested religious accommodations and revises the approval authority for future requests for religious accommodation consistent with these standards. AD 2016-34 (reference 1d) remains in effect and continues to provide the policy for requests for religious accommodation involving uniform wear and grooming, except as modified by this directive.

3. Brigade-Level Accommodation Approval. Since 2009, religious accommodation requests requiring a waiver for uniform wear and grooming have largely fallen into one of three faith practices: the wear of a hijab; the wear of a beard; and the wear of a turban or under-turban/patka, with uncut beard and uncut hair. Based on the successful examples of Soldiers currently serving with these accommodations, I have determined that brigade-level commanders may approve requests for these accommodations, and I direct that the wear and appearance standards established in paragraph 4 of the enclosure to this directive be incorporated into AR 670-1.

a. Individuals will continue to submit all requests for religious accommodation involving uniform wear and grooming pursuant to the process established in AD 2016-34. The Office of the Deputy Chief of Staff (DCS), G-1 Command Policy

Division will make sure the requests are acted upon within the timelines established in AD 2016-34.

b. Commanders receiving an initial request for an accommodation involving uniform wear and grooming will immediately notify the Office of the DCS, G-1 Command Policy Division and prepare a religious accommodation packet consistent with paragraph 5c of AD 2016-34. Notification will be sent to usarmy.pentagon.hqda-dcs-g-1.mbx.command-policy@mail.mil and will include the requestor's name; grade (if applicable); unit; military occupational specialty (MOS) (or prospective MOS, if known); and a copy of the request documents.

c. The Soldier's brigade-level commander will approve a request for a religious accommodation consistent with the standards described in paragraph 4 of the enclosure unless the commander:

(1) determines the request is not based on a sincerely held religious belief, or

(2) identifies a specific, concrete hazard that is not specifically addressed in this directive and that cannot be mitigated by reasonable measures after coordinating with the branch or MOS proponent.

d. When evaluating the sincerity of a Soldier's articulated belief, commanders may consider the credibility and demeanor of the applicant and the circumstances of the request. A religious practice may be an action, behavior, or course of conduct constituting an individual expression of religious beliefs, regardless of whether the practice is compelled by, or central to, the religion concerned.

e. If the brigade-level commander approves a request for accommodation involving grooming and appearance, the commander will notify the Soldier and forward a copy of the approval memorandum through the General Court-Martial Convening Authority (GCMCA) to the DCS, G-1 and U.S. Army Human Resources Command for filing in the Soldier's Army Military Human Resources Record. The accommodation will continue throughout the Soldier's career and may not be permanently revoked or modified unless authorized by me or my designee.

f. If the brigade-level commander does not approve the request, the commander will forward the request to the GCMCA with a recommendation for denial and the reason(s) for the denial. The GCMCA may approve an accommodation request to adhere to the standards described in paragraph 4 of the enclosure or forward it to the DCS, G-1 with a recommendation for denial pursuant to AD 2016-34. Only I or my designee may take final action to deny a request for religious accommodation described in the enclosure.

g. Accession agencies and commands may identify an officer in the grade of colonel/O-6 or higher who is not a commander to serve as the brigade-level approval authority for purposes of evaluating and approving pre-accession requests for religious accommodations described in this paragraph.

4. Wear and Appearance Standards

a. The wear and appearance standards in paragraph 4 of the enclosure will apply to all Soldiers with an accommodation permitting the following faith practices: the wear of a hijab; the wear of a beard; and the wear of a turban or under-turban/patka, with uncut beard and uncut hair. Previously accommodated Soldiers will be issued new approval memoranda no later than 10 January 2017 that include these standards and state that, subject to the provisions of this directive, the accommodations will continue throughout the Soldiers' careers. Such accommodations may not be permanently revoked or modified unless authorized by me or my designee.

b. All Soldiers must wear the Advanced Combat Helmet and other protective headgear in accordance with the applicable technical manuals. As necessary, Soldiers will modify the placement and style of their hair to achieve a proper fit. Removal of pads from helmets for fit or comfort is not permitted except as authorized by the applicable technical manual.

5. Duty Considerations

a. A religious accommodation consistent with the uniform wear and grooming standards in the enclosure will not affect a Soldier's assignment of MOS or branch, duty location, or attendance at military schools, except as described in paragraph 5b for Soldiers with a beard. If a GCMCA, a higher level commander, or an MOS proponent identifies additional specific hazards created by an accommodation that cannot be reasonably mitigated, they must immediately inform the Office of the DCS, G-1 Command Policy Division at usarmy.pentagon.hqda-dcs-g-1.mbx.command-policy@mail.mil.

b. Study results show that beard growth consistently degrades the protection factor provided by the protective masks currently in the Army inventory to an unacceptable degree. Although the addition of a powered air-purifying respirator and/or a protective mask with a loose-fitting facepiece has demonstrated potential to provide adequate protection for bearded individuals operating in hazardous environments, further research, development, testing, and evaluation are necessary to identify masks that are capable of operational use and can be adequately maintained in field conditions. The Assistant Secretary of the Army (Acquisition, Logistics and Technology) will conduct additional testing of existing equipment, ascertain whether product alternatives exist, and provide a plan to acquire protective masks for bearded individuals. This effort will

include an assessment of the feasibility of fielding the current equipment or any alternative product. Until the Army can field such protective gear, these restrictions apply:

(1) Soldiers with a religious accommodation allowing a beard may not attend military schools requiring toxic chemical agent training and may not be assigned to positions requiring compliance with biological, chemical, or nuclear surety requirements in accordance with AR 50-1 (Biological Surety), AR 50-5 (Nuclear Surety), and AR 50-6 (Nuclear and Chemical Weapons and Materiel Chemical Surety). For example, they may not serve as 74A, Chemical, Biological, Radiological, Nuclear (CBRN) Officers; 740A, CBRN Technicians; or 74D, CBRN Specialists.

(2) An accommodation for a beard may be temporarily suspended when a specific and concrete threat of exposure to toxic CBRN agents exists that requires all Soldiers to be clean-shaven, including those with medical profiles. Following the procedures in paragraph 6, commanders may require a Soldier to shave if the unit is in, or about to enter, a real tactical situation where use of a protective mask is actually required and where the inability to safely use the mask could endanger the Soldier and the unit. A Soldier may wear a beard while participating in training or tactical simulations designed to ensure that the Soldier is fully familiar with use of the protective mask.

6. Suspension Procedures

a. When an accommodated Soldier's GCMCA identifies a specific and concrete threat to health and safety based on the accommodation (such as threat of exposure to toxic CBRN agents that may merit a heightened protective posture), the GCMCA, after consultation with the Staff Judge Advocate, will notify the Soldier of the need to suspend the religious accommodation, the basis for the suspension, the date the suspension will likely go into effect, and the Soldier's right to appeal. If the Soldier requests an appeal, the Soldier will have 10 days to submit matters to the Office of the DCS, G-1 Command Policy Division at usarmy.pentagon.hqda-dcs-g-1.mbx.command-policy@mail.mil. The accommodation will not be suspended before I or my designee take action on the appeal.

b. In exigent circumstances involving an imminent threat to health and safety, the GCMCA may shorten the time for appeal and, in urgent circumstances, may require immediate suspension of the accommodation. The GCMCA will notify the Office of the DCS, G-1 Command Policy Division of the decision and its basis as soon as possible at usarmy.pentagon.hqda-dcs-g-1.mbx.command-policy@mail.mil.

c. The GCMCA will reinstate the suspended accommodation when the specific and concrete threat to health and safety as a result of the accommodation no longer exists.

7. Additional Changes to AR 670-1. The wear and appearance standards established in paragraphs 1–3 of the enclosure to this directive will be incorporated into the next revision of AR 670-1. The following practices do not require a request for religious accommodation:

a. Female soldiers may wear dreadlocks/locks in accordance with the guidance in paragraph 3-2a(3)(f) for braids, cornrows, and twists.

b. Religious bracelets, similar in style to medical alert, missing in action, prisoner of war, or killed in action identification bracelets, may be worn in uniform or in civilian clothes on duty in accordance with the guidance in paragraph 3-4a.

8. Training. U.S. Army Training and Doctrine Command will integrate religious accommodation training Armywide in the professional military education and leader development courses for all branches. The Chaplain Corps will continue to train unit chaplains to perform their key tasks in support of individual religious accommodation requests and unit leaders who participate in the process.

9. Applicability. The provisions of this directive are effective immediately, unless otherwise stated, and apply to the Active Army, Army National Guard/Army National Guard of the United States, and U.S. Army Reserve.

10. Proponent. The DCS, G-1 is the proponent for this policy and, in coordination with the Assistant Secretary of the Army (Manpower and Reserve Affairs), will ensure that the provisions of this directive are incorporated into the next revisions of AR 600-20 and AR 670-1, as applicable. This directive and AD 2016-34 are rescinded upon their incorporation into the applicable regulations.

Encl

Eric K. Fanning

DISTRIBUTION:
Principal Officials of Headquarters, Department of the Army
Commander
U.S. Army Forces Command
U.S. Army Training and Doctrine Command
U.S. Army Materiel Command
U.S. Army Pacific
U.S. Army Europe
U.S. Army Central
(CONT)

SUBJECT: Army Directive 2017-03 (Policy for Brigade-Level Approval of Certain Requests for Religious Accommodation)

DISTRIBUTION: (CONT)
U.S. Army North
U.S. Army South
U.S. Army Africa/Southern European Task Force
U.S. Army Special Operations Command
Military Surface Deployment and Distribution Command
U.S. Army Space and Missile Defense Command/Army Strategic Command
U.S. Army Cyber Command
U.S. Army Medical Command
U.S. Army Intelligence and Security Command
U.S. Army Criminal Investigation Command
U.S. Army Corps of Engineers
U.S. Army Military District of Washington
U.S. Army Test and Evaluation Command
U.S. Army Installation Management Command
Second Army
Superintendent, United States Military Academy
Director, U.S. Army Acquisition Support Center
Executive Director, Arlington National Cemetery
Commander, U.S. Army Accessions Support Brigade
Commandant, U.S. Army War College

CF:
Director, Army National Guard
Director of Business Transformation
Commander, Eighth Army

CHANGES TO ARMY REGULATION 670-1

1. Paragraph 3-2a(3)(f) is revised to read as follows:

   Braids, cornrows, twists, or locks. Medium and long hair may be styled with braids, cornrows, twists, or locks (see glossary for definitions). Each braid, cornrow, twist, or lock will be of uniform dimension; have a diameter no greater than 1/2 inch; and present a neat, professional, and well-groomed appearance. Each must have the same approximate size of spacing between the braids, cornrows, twists, or locks. Each hairstyle may be worn against the scalp or loose (free-hanging). When worn loose, such hairstyles must be worn in accordance with medium hair length guidelines or secured to the head in the same manner as described for medium or long length hair styles. Ends must be secured inconspicuously. When multiple loose braids, twists, or locks are worn, they must encompass the whole head. When braids, twists, cornrows, and locks are not worn loosely and instead worn close to the scalp, they may stop at one consistent location of the head and must follow the natural direction of the hair when worn back, which is either in general straight lines following the shape of the head or flowing with the natural direction of the hair when worn back with one primary part in the hair (see para 3–2a(1)(c)). Hairstyles may not be styled with designs, sharply curved lines, or zigzag lines. Only one distinctive style (braided, rolled, twisted, or locked) may be worn at one time. Braids, cornrows, twists, and locks that distinctly protrude (up or out) from the head are not authorized.

2. Paragraph 3-2a(3)(g) is deleted.

3. Paragraph 3-4a is revised to read as follows:

   Soldiers may wear a wristwatch, a wrist religious or identification bracelet, and a total of two rings (a wedding set is considered one ring) with Army uniforms, unless prohibited by the commander for safety or health reasons. Soldiers may also wear one activity tracker, pedometer, or heart rate monitor. Any jewelry or monitors Soldiers wear while in uniform or civilian clothes on duty must be conservative. Bracelets are limited to medical alert bracelets, missing in action, prisoner of war, killed in action (black or silver color only), and religious bracelets similar in size and appearance to identification bracelets. Soldiers are authorized to wear only one item on each wrist while in uniform or in civilian clothes on duty. In addition to the one item (watch or identification bracelet) authorized to be worn on each wrist, Soldiers may wear an activity tracker, pedometer, or heart rate monitor.

4. Paragraph 3-15 is inserted as follows:

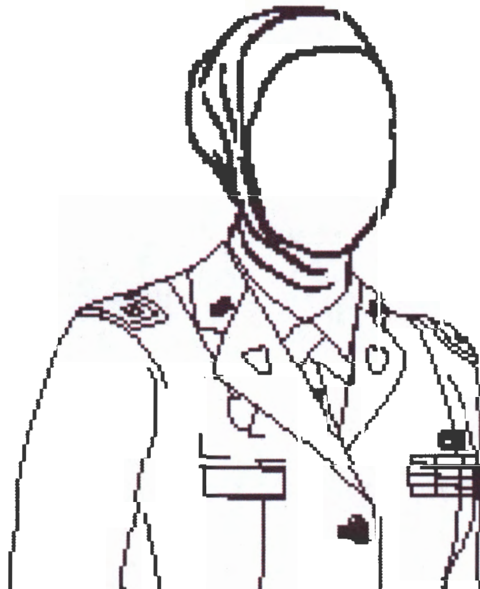
   3-15. Religious accommodations
   Note: The following uniform and grooming standards apply only to Soldiers with an approved religious accommodation for one or more of the listed practices.

a. Hijab (Head Scarf)

(1) An accommodated Soldier may wear a hijab (head scarf) made of a subdued material in a color that closely resembles the assigned uniform (generally black, brown, green, tan, or navy blue as appropriate). The material will be free of designs or markings, except that a Soldier wearing the Army Combat Uniform may wear a hijab in a camouflage pattern matching the uniform. When directed by a commander, the Soldier may be required to wear a hijab made of fire-resistant material.

(2) The hijab will be worn in a neat and conservative manner that presents a professional and well-groomed appearance. The hijab must be closely fitted to the contours of the head and neck and may not cover the eyebrows, eyes, cheeks, nose, mouth, or chin. The bottom edges of the hijab will be tucked under the Soldier's uniform top and all required headgear will still be worn.

(3) Hair underneath the hijab must be worn in a hairstyle authorized for the Soldier in AR 670-1, paragraph 3-2. The bulk of the Soldier's hair and hijab may not impair the ability to wear required headgear, the Advanced Combat Helmet, or other protective equipment; impede the ability to operate an assigned weapon, military equipment, or machinery; or interfere with the ability to perform the Soldier's military duties.

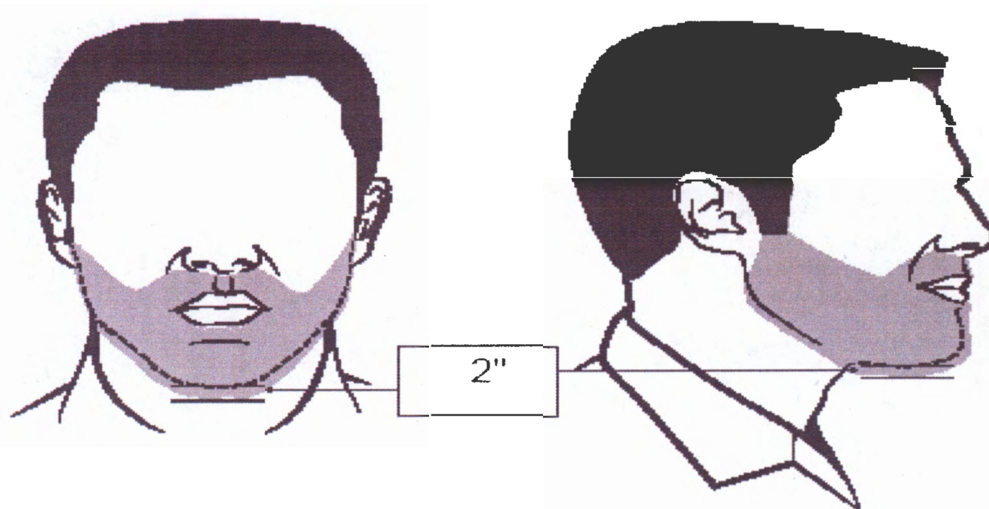


b. Beard

(1) Beards (which include facial and neck hair) must be maintained to a length not to exceed 2 inches when measured from the bottom of the chin. Beard hair longer than 2 inches must be rolled and/or tied to achieve the required length. Beards must be worn in a neat and conservative manner that presents a

professional appearance. Soldiers may use styling products to groom or hold the beard in place, but may not use petroleum-based products if wearing a protective mask during training. The bulk of a Soldier's beard may not impair the ability to operate an assigned weapon, military equipment, or machinery.

(2) A mustache worn with a beard may extend sideways beyond the corners of the mouth to connect with the beard, but must be trimmed or groomed to not cover the upper lip.



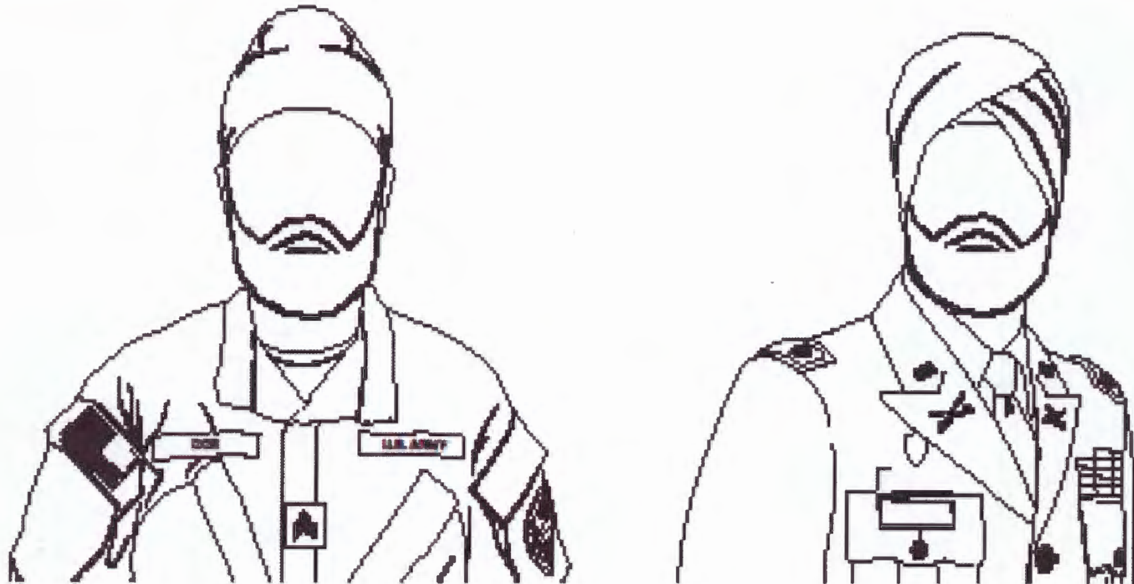
c. Turban and Under-Turban

(1) An accommodated Soldier may wear a turban (or under-turban or patka, as appropriate) made of a subdued material in a color that closely resembles the headgear for an assigned uniform. Commanders may designate conditions where the under-turban will be worn instead of the turban. The turban or under-turban will be worn in a neat and conservative manner that presents a professional and well-groomed appearance. The material will be free of designs or markings, except that a Soldier wearing the Army Combat Uniform may wear a turban or under-turban in a camouflage pattern matching the uniform. Soldiers assigned to units wearing the maroon, tan, or green beret may wear an appropriately colored turban or under-turban as directed by the unit commander. When directed by a commander, the Soldier may be required to wear an under-turban made of fire-resistant material.

(2) Unless duties, position, or assignment require a Soldier to wear the Advanced Combat Helmet or other protective headgear, Soldiers granted this accommodation are not required to wear military headgear in addition to the turban or under-turban. Rank will be displayed on the turban or under-turban when worn in circumstances where military headgear is customarily worn and removed in

circumstances where military headgear is not customarily worn, such as indoors or in no-hat/no-salute designated areas.

(3) Hair worn under the turban or under-turban is not subject to AR 670-1 standards, but may not fall over the ears or eyebrows or touch the collar while in uniform. When the Soldier is wearing an Advanced Combat Helmet or other protective headgear with the under-turban, the bulk of the hair will be repositioned or adjusted to ensure proper fit.



CIVIL COVER SHEET

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

I. (a) PLAINTIFFS

ALEXANDER SMITH

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

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Beldock Levine & Hoffman LLP
99 Park Ave., PH/26th Floor
New York, NY 10016

DEFENDANTS

CITY OF ATLANTIC CITY; SCOTT EVANS; THOMAS J. CULLENY JR.

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

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

Attorneys *(If Known)*

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

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

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

(For Diversity Cases Only)

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

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

Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ❒ 110 Insurance
- ❒ 120 Marine
- ❒ 130 Miller Act
- ❒ 140 Negotiable Instrument
- ❒ 150 Recovery of Overpayment & Enforcement of Judgment
- ❒ 151 Medicare Act
- ❒ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ❒ 153 Recovery of Overpayment of Veteran's Benefits
- ❒ 160 Stockholders' Suits
- ❒ 190 Other Contract
- ❒ 195 Contract Product Liability
- ❒ 196 Franchise

REAL PROPERTY
- ❒ 210 Land Condemnation
- ❒ 220 Foreclosure
- ❒ 230 Rent Lease & Ejectment
- ❒ 240 Torts to Land
- ❒ 245 Tort Product Liability
- ❒ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ❒ 310 Airplane
- ❒ 315 Airplane Product Liability
- ❒ 320 Assault, Libel & Slander
- ❒ 330 Federal Employers' Liability
- ❒ 340 Marine
- ❒ 345 Marine Product Liability
- ❒ 350 Motor Vehicle
- ❒ 355 Motor Vehicle Product Liability
- ❒ 360 Other Personal Injury
- ❒ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ❒ 365 Personal Injury - Product Liability
- ❒ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ❒ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ❒ 370 Other Fraud
- ❒ 371 Truth in Lending
- ❒ 380 Other Personal Property Damage
- ❒ 385 Property Damage Product Liability

CIVIL RIGHTS
- ❒ 440 Other Civil Rights
- ❒ 441 Voting
- ☒ 442 Employment
- ❒ 443 Housing/ Accommodations
- ❒ 445 Amer. w/Disabilities - Employment
- ❒ 446 Amer. w/Disabilities - Other
- ❒ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ❒ 463 Alien Detainee
- ❒ 510 Motions to Vacate Sentence
- ❒ 530 General
- ❒ 535 Death Penalty

Other:
- ❒ 540 Mandamus & Other
- ❒ 550 Civil Rights
- ❒ 555 Prison Condition
- ❒ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ❒ 625 Drug Related Seizure of Property 21 USC 881
- ❒ 690 Other

LABOR
- ❒ 710 Fair Labor Standards Act
- ❒ 720 Labor/Management Relations
- ❒ 740 Railway Labor Act
- ❒ 751 Family and Medical Leave Act
- ❒ 790 Other Labor Litigation
- ❒ 791 Employee Retirement Income Security Act

IMMIGRATION
- ❒ 462 Naturalization Application
- ❒ 465 Other Immigration Actions

BANKRUPTCY
- ❒ 422 Appeal 28 USC 158
- ❒ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ❒ 820 Copyrights
- ❒ 830 Patent
- ❒ 835 Patent - Abbreviated New Drug Application
- ❒ 840 Trademark

SOCIAL SECURITY
- ❒ 861 HIA (1395ff)
- ❒ 862 Black Lung (923)
- ❒ 863 DIWC/DIWW (405(g))
- ❒ 864 SSID Title XVI
- ❒ 865 RSI (405(g))

FEDERAL TAX SUITS
- ❒ 870 Taxes (U.S. Plaintiff or Defendant)
- ❒ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ❒ 375 False Claims Act
- ❒ 376 Qui Tam (31 USC 3729(a))
- ❒ 400 State Reapportionment
- ❒ 410 Antitrust
- ❒ 430 Banks and Banking
- ❒ 450 Commerce
- ❒ 460 Deportation
- ❒ 470 Racketeer Influenced and Corrupt Organizations
- ❒ 480 Consumer Credit
- ❒ 490 Cable/Sat TV
- ❒ 850 Securities/Commodities/ Exchange
- ❒ 890 Other Statutory Actions
- ❒ 891 Agricultural Acts
- ❒ 893 Environmental Matters
- ❒ 895 Freedom of Information Act
- ❒ 896 Arbitration
- ❒ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ❒ 950 Constitutionality of State Statutes

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

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

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing **(*Do not cite jurisdictional statutes unless diversity*)**:
42 U.S.C. Section 1983; Title VII of the Civil Rights Act of 1964

Brief description of cause:
Alleging a violation of rights under the First Amendment; Title VII; and New Jersey State Law

VII. REQUESTED IN COMPLAINT:

❒ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ❒ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE ______ DOCKET NUMBER ______

DATE: 02/25/2019

SIGNATURE OF ATTORNEY OF RECORD: [signature]

FOR OFFICE USE ONLY

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