No. 98-1919

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

CITY OF NEWARK; NEWARK POLICE DEPARTMENT; JOSEPH J. SANTIAGO, NEWARK POLICE DIRECTOR; THOMAS C. O'REILLY, NEWARK POLICE CHIEF OF POLICE,

*Petitioners*,

v.

FRATERNAL ORDER OF POLICE NEWARK LODGE NO. 12; FARUQ ABDUL-AZIZ; SHAKOOR MUSTAFA,

*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## BRIEF OF RESPONDENTS FARUQ ABDUL-AZIZ AND SHAKOOR MUSTAFA IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Whether a city that exempts from its grooming standards police officers with medical reasons for not shaving, but refuses to exempt officers who have religious reasons for not shaving, violates the Free Exercise Clause of the United States Constitution when it fails to offer any valid justification for its discrimination against officers with religious reasons?

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Respondents Faruq Abdul-Aziz, and Shakoor Mustafa, plaintiffs-appellees below, respectfully submit this Brief in Opposition to the Petition for a Writ of Certiorari filed by petitioners City of Newark, *et al.*, Defendants-Appellants below.[*]

[*]Petitioners have included the Fraternal Order of Police, Newark Lodge No. 12 ("F.O.P.") in the caption to their petition and have styled the case with F.O.P. as the lead respondent. We

have therefore used that caption here. However, the District Court dismissed the F.O.P. from the case for lack of standing, Pet. App. at 29a, and the F.O.P. did not appeal this decision. The F.O.P. is, accordingly, not a party to the case in this Court.

## COUNTERSTATEMENT OF THE CASE

Neither in their Statement of the Case, nor anywhere else in their Petition for a Writ of Certiorari, do Petitioners directly address the central holding of the Court of Appeals: that Newark's grooming policy is not a neutral and generally applicable law within the meaning of *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). Indeed, nowhere in their Petition do they even *cite*–much less discuss–the precedent of this Court on which the Third Circuit based its decision, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). Respondents therefore believe that it is necessary to provide this Court with a detailed Counterstatement of the Case.

Since 1971 the Newark Police Department (the "Department") has had on its books an internal order requiring employees to shave their beards. Pet. App. at 2a. The order permits mustaches and sideburns, and allows officers to wear beards when their undercover assignments or duties permit. *Id.* at 3a. Enforcement prior to 1997 was spotty. Respondents Faruq Abdul-Aziz and Shakoor Mustafa are devout Sunni Muslims who have a religious obligation to grow their beards. *Id.* at 25a-26a & n.1.[1] Respondents have worn beards while serving on the force for at least ten years. App. at 26a. Mustafa has worn his since 1986, and Aziz, who joined the force in 1989, has worn a

[1] The Sunnah states "Do the opposite of what the Pagans do, cut the mustaches short and leave the beard (as it is) . . . . Shorten your moustaches and let your beards grow, be different from the people of the book . . . ." Pet. App. at 25a-26a n.1. These passages are mandatory: "The refusal by a Sunni Muslim male who can grow a beard to wear one is a major sin and is tantamount to eating pork." Pet. App. at 26a.

beard ever since his graduation from the police academy. Pet. App. at 26a. Nevertheless, after the two officers had informed Department officials that they were wearing their beards for religious reasons, Pet. App. at 4a, Mustafa and Aziz received Preliminary Notices of Disciplinary Action under the no-beards order in July 1996 and January 1997, respectively. Pet. App. at 26a.

On January 24, 1997, the Chief of Police issued an order declaring what he termed a "zero tolerance" policy for officers who were not in compliance with the 1971 grooming order. Pet. App. at 47a. This so-called zero-tolerance order, however, explicitly exempted officers with "medical clearance" to grow a beard. Pet. App. at 47a; Pet. App. at 15a & n.6. These officers with medical clearance typically have a skin condition known as pseudofolliculitis barbae ("PFB"), a condition which is caused when men prone to the condition shave. Pet. App. 36a-37a & n.7; Pet. App. at 2a. It is treated by growing a beard. Pet. App. at 37a n.7. Respondents Aziz and Mustafa, who had religious reasons for not shaving, were ordered to appear for disciplinary hearings in May 1997. Pet. App. at 5a.

Before the hearing, Respondents filed a complaint in the United States District Court for the District of New Jersey requesting permanent injunctive relief on the ground, *inter alia*, that enforcement of the order violated their rights under the Free Exercise Clause of the First Amendment. The District Court granted Respondents summary judgment on that claim. Pet. App. at 41a.

A unanimous panel of the Third Circuit affirmed. 170 F.3d 359 (3d Cir. 1999). Judge Samuel Alito, writing for the court, held that the grooming policy discriminated against the Respondents in violation of their free exercise rights. The

Court of Appeals recognized that this Court in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), held 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)." *Id.* at 879 (quotations omitted). But *Smith*, the Court of Appeals emphasized, also held that a different rule applies to laws that are not neutral and generally applicable: "[W]here 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." Pet. App. at 13a (quoting *Smith*, 494 U.S. at 884).

The Court of Appeals then turned to this Court's decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). The law at issue there had prohibited the killing of animals for religious reasons, but had permitted it when undertaken for various secular ones, a distinction which "devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons. Thus, religious practice is being singled out for discriminatory treatment." *Id.* at 537-38. This Court explained that since the law at issue in *Hialeah* "require[d] 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." *Id.* at 537 (quotations omitted). Where such exemptions exist, the government "may not refuse to extend that system to cases of 'religious hardship' without compelling reasons." *Id.* (quoting *Smith*, 494 U.S. at 884 (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986))).

The Third Circuit determined that the Newark Police

Department had engaged in just such a forbidden judgment when it determined that an officer's religious reasons for not shaving are of lesser import than medical reasons.[2] Judge Alito wrote that "the Court's concern [in *Smith* and *Hialeah*] was the prospect of the government's deciding that secular motivations are more important than religious motivations." Pet. App. at 16a-17a. Citing to this Court's insistence that "*categories of selection* are of paramount concern when a law has the incidental effect of burdening religious practice," *Hialeah*, 508 U.S. at 542 (emphasis added), the Court of Appeals found Newark's categories of selection to be wanting. The Free Exercise Clause is even "further implicated," Judge Alito wrote, "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," Pet. App. at 17a (emphasis added).[3] Therefore, the Court of Appeals

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[2]In their reply brief below, the Petitioners made a belated attempt to deny the existence of a medical exemption. Judge Alito was sharply critical of that attempt in his opinion for the Court:

> 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 ¶ 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."

Pet. App. at 15a n.6.

[3]Petitioners argued below that they only created the medical

concluded, the Department's decision to provide exemptions for medical reasons while refusing to do so for religious reasons "trigger[ed] heightened scrutiny under *Smith* and *Lukumi*." *Id.*

The Court of Appeals then found that Petitioners had advanced no interest sufficient to withstand any level of heightened scrutiny. Pet. App. at 21a. Petitioners' only arguments were that they wanted to convey the image of a "monolithic, highly disciplined force" with a "uniformity of appearance," Pet. App. at 19a, and that permitting beards for religious reasons would undermine the Department's "morale and esprit de corps," Pet. App. at 20a, public confidence in the force, *id.*, and the ability of the public to identify officers. Pet. App. at 19a. To be sure, these are very serious state interests, as the Court of Appeals noted. Pet. App. at 19a-20a. Petitioners could not explain, however, why "the presence of officers who wear beards for medical reasons does not [undermine these interests] but the presence of officers who wear beards for religious reasons would." *Id.* at 20a. The Court of Appeals was thus "at a loss to understand why religious exemptions threaten important city interests

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exemption to comply with the "reasonable accommodation" provisions of the Americans with Disabilities Act, 42 U.S.C. § 12111(b)(5)(A) (1994), saying that "the law may require" a medical exemption to their grooming policy. Pet. App. at 16a. However, the Court of Appeals noted that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(j), places on employers the same "reasonable accommodation" requirement with regard to religion. The court further noted that Petitioners had been put on notice concerning the religious accommodation requirements, but had elected only to accommodate the medical obstacles and not the religious ones. Pet. App. at 16a. The court concluded: "In light of these circumstances, we cannot accept the Department's position that its differential treatment of medical exemptions and religious exemptions is premised on a good-faith belief that the former may be required by law while the latter are not." *Id.*

but medical exemptions do not," and concluded that the Department's policy violated the First Amendment. *Id.* at 20a-21a.

Petitioners did not seek rehearing or rehearing *en banc*, but elected instead to come directly to this Court.

## REASONS FOR DENYING THE WRIT

Petitioners strain to identify assorted conflicts between the Court of Appeals' decision and a variety of other cases. None of these alleged divergences withstands scrutiny. None, certainly, requires this Court's attention.

### I. THERE IS NO SPLIT IN THE LOWER COURTS.

#### A. There Is No Intracircuit Conflict Between this Case and *Adams v. Commissioner*.

Petitioners begin by announcing that the Court of Appeals' decision is "in direct contradiction" with a tax case also decided by the Third Circuit, *Adams v. Commissioner*, 170 F.3d 173 (3d Cir. Mar. 4, 1999). Pet. at 8. "Remarkably," Petitioners report, *Adams* was handed down by the Third Circuit the day after that same Court handed down its decision in this case. *Id.* That, of course, is remarkable principally because it demonstrates that Petitioners had ample time to seek rehearing *en banc* if they thought there was a conflict between the two decisions. Instead, Petitioners chose, for reasons they do not reveal, to bypass that procedure and invite this Court to sort out the two opinions.

There is, in any event, no conflict between the two cases. *Adams*, Petitioner explains, involved a "devout

Quacker" [sic] who refused to pay taxes to support the military. Pet. at 8. *Adams*, at bottom, is merely a reaffirmation of the settled holding that conscientious objectors must still pay taxes. *United States v. Lee*, 455 U.S. 252, 257 (1982). There is thus no intra-circuit conflict at all, much less one that merits this Court's review.

B. There Is No Conflict Between this Case and the Assorted Other Federal Cases Petitioners Cite.

Next, Petitioners argue that the present case is "inconsistent" with decisions of this "Court, other Third Circuit decisions and various other circuit courts." Pet. at 13. The reference to this Court is apparently to *Kelley v. Johnson*, 425 U.S. 238 (1976), which denied a challenge to grooming regulations that had been brought not on religious grounds, but on the ground that they violated the plaintiff's asserted rights to free expression, equal protection, and "personal liberty" under a substantive due process theory. *Id.* at 241. *Kelley* did not involve the Free Exercise Clause. Indeed, *Kelley* has never even been discussed by this Court in a free exercise context.

The "various other circuits" to which Petitioners refer turn out to be a right-to-travel decision of the Federal Circuit that likewise does not mention the Free Exercise Clause, *Hambsch v. Department of Treasury*, 796 F.2d 430, 434 (Fed. Cir. 1986), and a decision of the Eighth Circuit, *Crain v. Board of Police Commissioners of the Metropolitan Police Dept. of the City of St. Louis*, 920 F.2d 1402 (8th Cir. 1990), that quickly disposes of a broad assortment of claims, and that Petitioners cite for the propositions "that the courts must give due deference to municipal agencies" and that the "relational relationship [sic] applies to regulations affecting certain municipal employees." Pet. at 10.

*Crain* involved a Police Department policy that required officers on paid sick leave to stay home except for visits to their doctors. It was plainly intended to discourage employee abuse of paid sick leave and to shorten the recovery period of those truly ill. 920 F.2d at 1409. And the sole exception to the policy–visits to doctors–furthered the policy's overall purpose. The *Crain* plaintiffs challenged it as an infringement of their right to vote, their right to travel, their right to free exercise and their right to freely associate. Their assorted arguments received only short shrift. (The court, for example, disposed of the Free Exercise Clause argument in the same paragraph as the right-to-vote argument. *Id.* at 1409-10.)

Even so, *Crain*'s analysis, such as it is, does not conflict with the Court of Appeals' decision here. The doctor-visit exemption in *Crain* would not be an unconstitutional distinction for the same reason Judge Alito in this case found the grooming standard exemption for undercover officers not to be an unconstitutional distinction. Petitioners mistakenly think that the "Court of Appeals . . . states that the City of Newark discriminates against the Sunni Muslims, because it does not have a compelling interest for denying a religious exception, although it provides a secular exception *for undercover officers and medical conditions*." Pet. at 15 (emphasis added).

But the Court of Appeals actually held something quite different. Exempting *undercover* officers from the grooming requirement, the court held, was *fully consistent* with the goals of the Department. Pet. App. at 18a. Similarly, the purpose of exempting trips to doctors (and only trips to doctors) from a general policy requiring employees on paid sick leave to stay home is fully consistent with that

policy's purpose. In contrast, extending a medical exemption to a favored, secular class of officers "undoubtedly undermines the Department's interest in fostering a uniform appearance through its no beard policy," Pet. App. at 18a, every bit as much as would the religious exemption that Newark resists. The distinction that Newark draws in this case is simply a value judgment in favor of personal secular reasons for not shaving and opposed to personal religious ones. It therefore violates the Free Exercise Clause, whereas the distinction drawn in the policy at issue in *Crain* does not.[4] There is, therefore, no split between the Court of Appeals in this case and the Eighth Circuit in *Crain*.

C. There Is No Split Between this Case and the New Jersey State Courts.

The final alleged split is between this case and a 1973 *per curiam* decision of the New Jersey Appellate Division, *Akridge v. Barres*, 300 A.2d 866 (N.J. Super. Ct. App. Div. 1973), *aff'd*, 321 A.2d 230 (N.J. 1974), *cert. denied*, 420 U.S. 966 (1975). *Akridge* involved a completely different challenge to the same grooming standards of the Newark police department at issue in this case (but before the medical exemption and so-called "zero tolerance policy" were added).

The plaintiff in *Akridge* was an officer who challenged the grooming regulations, not under the Free Exercise Clause but simply because he was "expressing [his] individual pride as a black man." *Akridge v. Barres*, 289 A.2d 270, 274 (N.J. Super. Ct. Chancery Div. 1972). Faced with such a novel

[4]Petitioners throw in citations to four older district court decisions (and one summary affirmance by, again, the Third Circuit). Pet. at 12-13. They are all pre-*Smith*. They all concern sick-leave policies. And they are all irrelevant for the same reasons *Crain* is.

challenge, the *Akridge* court held that a police department could subject officers to "reasonable regulations having to do with discipline and morale." *Akridge*, 300 A.2d at 867, 122 N.J. Super. 476. There is nothing about *Akridge*–or any of Petitioners' other assorted conflicts–deserving of this Court's attention.

## II. PETITIONERS' OTHER ARGUMENTS ARE IRRELEVANT.

Petitioners complain that the Third Circuit found the City of Newark to be engaged in discrimination, "because it does not have a compelling interest for denying a religious exception, although it provides a secular exception for undercover officers and medical conditions. There is no evidence in the record for the court arrive [sic] at this conclusion." Pet. at 15.

This is perplexing for several reasons. First, as discussed above, the Third Circuit did *not* make a finding of discrimination based on the existence of an exception for undercover officers. In fact, Judge Alito specifically stated that the undercover officer exemption did *not* amount to discrimination against the Respondents. *See supra* at 9-10. Second, the Court of Appeals did *not* find that Petitioners had failed to show a compelling interest for its discrimination. It held that "[t]he Department has not offered any interest in defense of its policy that is able to withstand *any form* of heightened scrutiny." Pet. App. at 19a (emphasis added). Third, there is plainly more than enough evidence in the record to support the Court of Appeals' decision.[5] The

[5]If Petitioners truly thought that there was "no evidence in the record" to support the Court of Appeals' decision, they should at least have filed a petition for rehearing in that court rather than attempt to raise the issue here. *See Rogers v. Lodge*, 458 U.S.

District Court found that there was a medical exemption in place, Pet. App. at 38a-39a, and the Court of Appeals agreed:

> 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 ¶ 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."

Pet. App. at 15a n.6.

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613, 623 (1982) ("this Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts"); Rule 10 ("certiorari is rarely granted when the asserted error consists of erroneous factual findings").

Undeterred, petitioners unveil even more new factual arguments. They now claim that the same medical exemptions whose existence they have in the past variously denied, *id.*, or else blamed on the Americans with Disabilities Act, Pet. App. at 15a-16a, do in fact exist but are given only "temporarily". Pet. at 16. Petitioners rely for this new notion on language in the Chief of Police's zero-tolerance memo that "Personnel who have received medical clearance shall be documented and updated to ensure that medical clearance is current." Pet. at 15. This proves, at most, that medical exemptions can be withdrawn if they are no longer needed. Likewise, were Respondents ever to convert from Islam to a different religion that does not require beards, they too could lose their right to a religious exemption. But they have no plans to do so.[6]

## III. THERE IS AN ALTERNATIVE BASIS FOR AFFIRMANCE

Should this Court grant certiorari, we will defend the judgment below on an alternative basis that the Third Circuit did not reach. That court held that since Plaintiffs prevailed on their theory that the grooming policy was not generally applicable and disfavored religious reasons for not shaving, it "need not reach the plaintiffs' 'hybrid' free speech/free exercise argument." Pet. App. at 10a. In the appeals court, Respondents argued that wearing beards for religious reasons

[6]Petitioners also present another, and curious, new factual argument–that all of the officers with medical exemptions are assigned to different duty where they are not exposed to the public. Pet. at 15. Petitioners did not raise this argument below. In any event, this hardly helps Petitioners. It is, in fact, a further admission that officers with medical reasons for beards are treated more favorably than those with religious reasons. Officers with medical conditions are transferred; those needing religious exemptions are in danger of termination.

implicated the hybrid rights doctrine explained in *Smith*:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.

*Smith*, 494 U.S. at 881.

Petitioners did not contest below that Plaintiffs are required by their faith to follow the teachings of the Sunnah, which states: "Do the opposite of what the Pagans do, cut the mustaches short and leave the beard (as it is) . . . . Be different from the Mushrikeen, trim your mustache and grow your beards . . . . Clip your mustaches and grow your beard–differ from the Magians . . . . Shorten your moustaches and let your beards grow, be different from the people of the book . . . ." Pet. App. at 25a n.1. By growing their beards, Respondents express the fact that they are Muslim, and more particularly that they are "Sunni Muslims who follow the teachings of both the Holy Quran and the Sunnah." *Id.* at 25a (quotations omitted).

The Respondents' wearing of beards is thus a hybrid right as articulated in *Smith*.[7] That is an argument we would

[7]The Court of Appeals noted that Respondents below did not "allege a free speech violation in their complaint." Pet. App. at 10a n.4. But a free-standing free speech claim that would succeed on its own is not necessary. The *Smith* Court described *Wisconsin v. Yoder*, 406 U.S. 205 (1972), as such a hybrid rights case involving the right to raise one's child coupled with free exercise. However, *Yoder* did not hold that parents have a fundamental right to remove their children from compulsory schooling once that right is

press if plenary review were to be granted.

In short, this is a far more complicated case than Petitioners seem to realize. For their part, they offer little more than a wild assortment of insubstantial conflicts, together with new factual arguments and an obstinate refusal to address head-on the holding of the Court below. They have certainly not presented any issue in a form that lends itself to review by this Court.

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decoupled from free exercise and stands on its own. Indeed, a requirement that the additional liberty interest that makes a religion claim hybrid be sufficient on its own would render the very notion of hybrid rights superfluous. *See Thomas v. Anchorage Equal Rights Comm'n*, No. 97-35220, 1999 WL 11337, at *10 (9th Cir. Jan. 14, 1999) ("the Court did *not* rest [the hybrid rights decisions described in *Smith*] upon the recognition of independently viable free speech and substantive due process rights."). Accordingly, there should be no requirement that the secondary right comprised in the hybrid be separately pled. It should be sufficient that Respondents did plead a violation of the Free Exercise Clause.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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