No. 23-3265

United States Court of Appeals for the Third Circuit

ALEXANDER SMITH,
Plaintiff-Appellant,
v.
CITY OF ATLANTIC CITY, ET. AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of New Jersey, Hon. Christine P. O'Hearn
No. 1:19-cv-6865

APPELLANT'S OPENING BRIEF

JOSHUA C. MCDANIEL
PARKER W. KNIGHT III
KATHRYN F. MAHONEY
HARVARD LAW SCHOOL
RELIGIOUS FREEDOM CLINIC
6 Everett Street, Suite 5110
Cambridge, MA 02138
(617) 496-4383

REBECCA R. DUMMERMUTH
KAYLA A. TONEY
FIRST LIBERTY INSTITUTE
1331 Pennsylvania Ave. NW, Ste. 1401
Washington, DC 20004
(202) 918-1554

JEFFREY C. MATEER
DAVID J. HACKER
JUSTIN E. BUTTERFIELD
FIRST LIBERTY INSTITUTE
2001 W. Plano Pkwy, Ste. 1600
Plano, TX 75075
(972) 941-4444

Attorneys for Plaintiff-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

INTRODUCTION

Federal law protects the right of religious employees to practice their faith at work. Under Title VII, employers must accommodate their workers' religious beliefs and practices unless doing so would impose an "undue hardship" on the employer's business—a high bar that "means what it says." *Groff v. DeJoy*, 600 U.S. 447, 471 (2023). Likewise, the First Amendment forbids government employers from discriminating against their employees' religious exercise. Here, the Atlantic City Fire Department (ACFD) violated both commands when it refused to allow an Air Mask Technician to grow a religious beard. A clean shave enhances the fit of the air masks firefighters use. But Plaintiff's job duties and responsibilities don't require him to fight fires. In fact, they require him *not* to fight fires so he can keep his colleagues safe. Because the district court's summary judgment ruling let the Department off the hook without proof of any hardship, let alone undisputed proof that accommodating must result in "substantial additional costs," *id.* at 469, that ruling must be reversed.

The evidence, which this Court must consider in the light most favorable to Plaintiff, is straightforward. Plaintiff Alexander Smith is a

born-again Christian who has devoted his life to serving his community. As pastor of a vibrant local congregation, he believes he has a religious obligation to wear a beard. As an ACFD employee, he fought fires for many years, but for the past eight years he has served in the administrative position of Air Mask Technician. In that role, he doesn't fight fires. If he is called to the scene of a fire, his job requires him to stay far from the fire so he can refill the air bottles and service the masks of firefighters who do enter burning buildings.

ACFD refused to grant Mr. Smith an accommodation from its policy that employees be clean-shaven. That policy exists so firefighters can have an ideal fit on their air masks when entering fires—exactly what Air Mask Technicians are not permitted to do. Yet ACFD didn't consider that fact. It accused Mr. Smith of threatening his own and others' safety and abruptly denied his request without exploring alternative means of allowing him to practice his faith. Every workday in the years since that denial, Mr. Smith has been forced to choose between his conscience and his career.

ACFD's conduct violated the law. It violated Title VII's religious accommodation mandate by refusing to grant a reasonable

accommodation with nothing more than a hand wave at safety concerns. It violated Title VII's prohibition against retaliation when it responded to Mr. Smith's request and lawsuit by threatening him with termination, vindictively calling on him to fight a fire even though he lacked proper equipment and training, and then suspending him and docking his pay. And it violated the Constitution's free exercise and equal protection guarantees when it forced Mr. Smith to shave while allowing other employees to keep facial hair during emergency call-backs. The district court's summary judgment ruling in ACFD's favor contradicts recent Supreme Court case law, fails to hold ACFD to its demanding burden of proof, and glosses over the ample evidence in Mr. Smith's favor.

This appeal is an ideal opportunity for this Court to provide much-needed guidance after the Supreme Court's decision last term in *Groff*. *Groff* left "the context-specific application of [its] clarified standard" for lower courts to resolve "in [a] common-sense manner." 600 U.S. at 471, 473. Yet despite that, the district court concluded that Title VII offers him no protection. Forcing an employee whose job requires him not to fight fires to shave so that he can fight fires defies common sense.

This Court should reverse the summary judgment ruling in ACFD's favor and either reverse or vacate and remand the district court's denial of a preliminary injunction.

ISSUES PRESENTED

1. Whether the district court erred by granting summary judgment in ACFD's favor on Plaintiff's Title VII accommodation claim where evidence shows his job doesn't require him to be clean-shaven, ACFD failed to explore alternatives, and it has not "show[n] that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business." *Groff*, 600 U.S. at 470; *see* JA014–21.
2. Whether the district court erred by granting summary judgment in ACFD's favor on Plaintiff's Title VII retaliation claim where evidence shows that ACFD responded to his request for accommodation, lodging of a complaint, and filing of this lawsuit by refusing to accommodate him, ordering him to perform unsafe fire suppression duties, charging him with insubordination, and suspending him for 40 days with docked pay. *See* JA021–22.

3. Whether the district court erred by granting summary judgment in ACFD's favor on Plaintiff's First Amendment free exercise claim where evidence shows that ACFD has individualized review mechanisms for accommodation requests, applies its policies unequally, and refused to accommodate Plaintiff's sincere religious practice without providing any rationale more specific than "safety concerns." *See* JA007–13.
4. Whether the district court erred by granting summary judgment in ACFD's favor on Plaintiff's equal protection claim where evidence shows that ACFD forced Plaintiff to shave his religious beard while allowing similarly situated firefighters to keep facial hair in call-back situations. *See* JA013–15.
5. Whether the district court's denial of a preliminary injunction should be reversed or at least vacated for reconsideration in light of this Court's summary judgment analysis. *See* JA024–43.

STATEMENT OF RELATED CASES

This is an appeal from *Alexander Smith v. City of Atlantic City, et al.*, Case No. 19-cv-6865. Plaintiff previously filed a notice of appeal from the preliminary injunction order in this case (Case No. 19-1665). That appeal

was voluntarily dismissed before briefing. Counsel is unaware of any related case decided or pending before this or any other court.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over Mr. Smith's federal claims under 28 U.S.C. § 1331 and over his New Jersey claims under 28 U.S.C. § 1367. The district court denied Mr. Smith's motion for a preliminary injunction, JA044, and on November 28, 2023, granted summary judgment in favor of Defendants, JA023. Mr. Smith timely appealed on December 27, 2023. JA001; Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction over the appeal of both orders under 28 U.S.C. § 1291; *see In re Westinghouse Sec. Lit.*, 90 F.3d 696, 706 (3d Cir. 1996) ("[P]rior interlocutory orders merge with the final judgment in a case.").

STATEMENT OF THE CASE

A. Alexander Smith is a devout Christian minister who believes his faith requires him to grow a beard.

Alexander Smith became a born-again Christian nearly 30 years ago. JA227. Soon after, he became an ordained minister in his church and eventually founded his own congregation, Community Harvesters Church, in downtown Atlantic City. *Id.* He faithfully leads his congregation in worship and community service as a pastor. *Id.*; JA437.

Since becoming a born-again Christian, Mr. Smith has continued learning about God and his faith. To that end, he is pursuing a Master of Divinity at Rockbridge Theological Seminary. JA227. Mr. Smith believes that as a leader in his church and to express his sincere religious conviction, he has an obligation to grow a beard. JA226; JA437–38. In seeking to model his life after examples in scripture like "Moses, Aaron, Ezra, [His] Lord Saviour Jesus Christ, . . . the prophets and the apostles," Mr. Smith believes that growing a beard will allow him to live his life in harmony with biblical teachings. JA437; *see* JA226.

B. After Mr. Smith served for over a decade as a firefighter, ACFD promoted him to the administrative position of Air Mask Technician.

Mr. Smith serves the Atlantic City community not only as a church leader, but also as a member of ACFD. JA227; JA626. In his first role, which he held for over a decade, he fought fires and performed search-and-rescue. JA227. In 2015, however, ACFD promoted him to the administrative position of Air Mask Technician. JA228; JA652. Since then, he has been ACFD's only assigned Air Mask Technician. JA654; JA626; JA578. He also serves as Police and Fire Department Chaplain. JA026; JA227.

As Air Mask Technician, Mr. Smith is responsible for ACFD's Self-Contained Breathing Apparatuses (SCBAs). SCBAs are air masks firefighters wear when they enter burning buildings or other hazardous environments. Each SCBA attaches to a pack containing air bottles that firefighters wear as part of their equipment, and they provide clean air to prevent firefighters from breathing in anything dangerous. The Air Mask Technician's role includes repairing and maintaining these SCBAs, performing yearly fit tests on ACFD personnel, refilling empty air bottles, ordering supplies, and distributing equipment. JA225; JA386; JA653.

Most of Mr. Smith's work is done at the central fire shop, a building far away from local stations or fires. *See* JA215. When he does report to a fire scene, Mr. Smith operates the Air Unit, a device with an air compressor that he uses to refill firefighters' air bottles. JA576–77. Because firefighters need to access the Air Unit in a place where they can safely remove their SCBAs and switch tanks when their tanks are low, Mr. Smith makes sure to stay "in an environment where [he's] getting fresh air," which is outside the "hot zone" where masks would be needed. JA587–89. If wind or weather conditions change, he repositions himself

to ensure he is always in a safe environment. *Id.* As a result, in eight years of service in this role, Mr. Smith has never had to wear an SCBA to perform his duties as Air Mask Technician. JA656.

C. ACFD prohibits facial hair so firefighters can have an ideal fit for their air masks.

SCBAs are "positive pressure" masks, meaning air is forced from air bottles into the mask and "the force of the air that's coming out [of the mask] is greater than the atmospheric pressure." JA419. Thus, even when the air mask lacks a tight fit or the seal is compromised, the pressurized air "push[es] away" any harmful materials, like smoke, to keep the wearer safe. *Id.* When that happens, the air bottle's supply doesn't last as long.

SCBAs have a built-in safety system. When an air bottle's supply reaches one-third capacity, an alarm sounds that prompts firefighters to immediately leave a hazardous environment and go to the Air Unit where Mr. Smith can refill their bottles. JA420.

All SCBAs leak to some degree, and various factors can increase the leakage rate, such as facial hair, wear and tear of the mask, and changes in the shape of the wearer's face (for example, from gaining or losing weight). JA303; JA358; JA598. Other factors like physical fitness can also

lessen air bottle life. JA304. ACFD's air bottles typically supply 45 minutes of air, but for a firefighter in poor physical condition that time can drop to 15 or 20 minutes. *Id.*

ACFD addresses SCBA efficiency with two policies. The first is the fit test Mr. Smith administers each year. Each year about 15 to 20 firefighters do not pass the fit test because of wear and tear to their masks. JA303. By contrast, there are no examples in the record of firefighters failing a fit test because of facial hair, and there are several examples of firefighters passing with facial hair. JA289–90; JA387–88. Mr. Smith, for example, has passed the fit test with nine days of facial hair growth, about a quarter-inch beard. JA290.

The second is the grooming policy, which seeks to ensure that facial hair does not "inhibit the seal of the air mask's face piece" during fire suppression activities. JA071; JA229. But that policy has an exception written into it. The Department exempts "emergency call-backs," so firefighters can grow facial hair when they are off duty even though they might be called in for an emergency. JA071; JA211–12. When off-duty firefighters are called to respond to an ongoing fire emergency, they are allowed to report straight to the fire or fire station with their beards. *Id.*

When they do, supervisors have the discretion to let them engage in activities that require SCBAs, even though they have facial hair. JA354. During the last 15 years of Mr. Smith's career, there have been 15 to 20 emergency call-backs. JA308.

ACFD could take other measures to maximize SCBA efficiency, but it doesn't. For example, ACFD "has no physical fitness standards in place." JA304. In specific cases, ACFD's operational guidelines give supervisors "[a]uthority to deviate from" the "standardized use of SCBA." JA073. And though every ACFD employee was supposed to be scheduled for a fit test every year, administrative employees like Mr. Smith and the Fire Chief were not scheduled to do so for many years. JA289–90; JA386; JA602; JA608. ACFD only started requiring Mr. Smith to be fit tested after he filed this lawsuit. JA036; JA211.

D. ACFD denied Mr. Smith's request to grow a religious beard and threatened to fire him.

As the Air Mask Technician, Mr. Smith recognized that in his administrative position he could follow his religious obligation to grow a beard without compromising on safety. JA439. So, on January 3, 2019, he wrote to Deputy Chief Culleny to request a religious accommodation "to continue to wear [his] beard." JA173. He also consulted with the City

Solicitor, who told him to submit proof of the sincerity of his religious beliefs. JA669. Mr. Smith submitted documentation supporting his religious convictions and EEOC guidance on religious grooming in the workplace. JA230; JA173–84.

That same week, Mr. Smith responded to a fire with a three-inch beard and performed his role administering the Air Unit at a safe distance without issue. JA230; JA199. Even so, the City Solicitor advised ACFD to stop Mr. Smith from responding to fires until they resolved his accommodation request. JA230.

Deputy Chief Culleny then told Mr. Smith he was "unable to adequately evaluate" his request without more information about his beliefs, which Mr. Smith then submitted. *Id.*; JA191–93. After two weeks without a reply—and repeated questioning about his beard by one of the captains, who kept ordering him to shave—Mr. Smith followed up. JA231. But rather than provide an answer, Deputy Chief Culleny told Mr. Smith he needed to talk to an HR representative. *Id.* In turn, HR told him to file a formal complaint through the Department's employee complaint procedure. So Mr. Smith did, attaching letters from two pastors in his support and his church's bylaws. JA231; JA196–209.

After another three weeks, Deputy Chief Culleny called Mr. Smith to Chief Evans's office. Mr. Smith was "intimidated by the two highest ranking members of the ACFD," who commanded him "to appear for duty clean shaven" and threatened that if he did not "shave [his] beard completely, [he] would be immediately suspended without pay." JA672; JA210.

Defendants Culleny and Evans then handed Mr. Smith a letter denying his religious accommodation request. JA210; JA232. The letter attributed the decision to "overwhelming safety concerns" for Mr. Smith, his fellow firefighters, and the public. JA210. But it didn't explain what those safety concerns were for an Air Mask Technician or why they couldn't be addressed without making Mr. Smith violate his faith. *See id.*

Although the letter claimed that ACFD "undertook . . . the interactive process" that federal law requires, ACFD never discussed or offered any potential alternative accommodations to Mr. Smith. *Id.*; JA232. Nor did ACFD offer him an opportunity to consult with union representation. JA672. Instead, over the 43 days between when Mr. Smith first requested the accommodation and when he received the denial, all ACFD did was call two SCBA mask vendors to ask if they could

provide different types of air masks for firefighters with beards. JA647–48. One of those vendors said they didn't have an alternative "yet," and the other said another type of mask (used in the private sector) "was going to be the answer to everything." JA457–58; *see* JA365–66. But when ACFD denied Mr. Smith's request and ordered him to shave, no one mentioned these prospective solutions.

E. After Mr. Smith sued, ACFD ordered him to fight a fire and punished him when he could not because of safety concerns.

Mr. Smith sued AFCD, asserting failure-to-accommodate and retaliation claims under Title VII and claims under the federal Constitution's Free Exercise and Equal Protection Clauses, along with analogous state law claims. JA211–24. Soon after, the district court denied Mr. Smith's motion for a preliminary injunction. JA024; JA044.

In August 2020, while discovery was ongoing, ACFD ordered Mr. Smith to report for firefighting duties during a tropical storm. JA637; JA428. This was the first (and only) time ACFD had called on him to help fight a fire since his promotion to an administrative role five years earlier. In fact, it was the first time any Air Mask Technician had been ordered to perform fire suppression activities since at least 1987. JA676;

JA278. Under ACFD's standard operating procedures, if additional firefighters are needed in an emergency, the Department is supposed to call in firefighters from other stations, then turn to an emergency call-back of off-duty firefighters, and then "mutual aid" from surrounding towns' fire departments. JA307. In this instance, however, ACFD leapfrogged that additional aid and targeted Mr. Smith.

The order required Mr. Smith to assist with fire suppression even though he lacked proper equipment and hadn't been fit tested for an SCBA or trained in fire suppression in over five years. JA663. So, fearing that responding to a fire without training or proper equipment would make him "a danger to himself, his colleagues, and the public," Mr. Smith did not report. *Id.*

ACFD's response was swift and severe. Rather than follow its progressive discipline policy or involve union representation, ACFD straightaway charged him with insubordination and suspended him for 40 days, including 20 without pay. JA434; JA685–86.

Later, New Jersey's Office of Public Employees' Occupational Safety and Health vindicated Mr. Smith's account and sanctioned ACFD for

bypassing proper safety protocols. JA395–96. Even so, the discipline remains on Mr. Smith's employment record. Dkt. No. 122 at 24.

F. The district court granted summary judgment to ACFD on all of Mr. Smith's claims.

Despite ACFD's targeting Mr. Smith in violation of its own safety regulations, the district court granted summary judgment in ACFD's favor on all counts. Without engaging with the evidence that SCBAs can operate safely over facial hair, the district court held that because Mr. Smith "has at least on one occasion been ordered to perform fire suppression duties," ACFD's reference to safety concerns was both justified and sufficient to show undue hardship. JA019. Alternatively, it held that ACFD made a good faith effort to accommodate Mr. Smith, even though ACFD never discussed alternatives with Mr. Smith or offered him a compromise. JA018. The district court also concluded that Mr. Smith's retaliation claim couldn't proceed, while reiterating—again without considering the specific cost implications—that ACFD's generalized and unexplained "safety" interest justified the Department's actions as a matter of law. JA021–22.

The district court also granted ACFD summary judgment on Mr. Smith's constitutional challenges. On Mr. Smith's free exercise claim,

rather than assess the effect of accommodating Mr. Smith, the district court analyzed the grooming policy writ large. It concluded that the grooming policy was neutral, generally applicable, and rationally related to safety (while downplaying the exception written into the policy). JA009–13. And on his equal protection claim, the court held that there was no group of similarly situated employees who were treated differently than Mr. Smith. JA015; *see* JA289–90; JA387; JA388; JA071; JA211–12.

As a result of the district court's rulings, Mr. Smith has no recourse to argue his case to a jury, and he has been forced to shave for work every day in violation of his religious beliefs, despite never needing to don an SCBA or go into a fire.

SUMMARY OF THE ARGUMENT

Title VII requires employers to accommodate employees' religious beliefs and practices unless doing so would pose an "undue hardship." 42 U.S.C. § 2000e(j). In *Groff*, the Supreme Court recently clarified that "'undue hardship' . . . means something very different from a burden that is merely more than *de minimis*." 600 U.S. at 469. To establish the defense, "an employer must *show* that the burden of granting an

accommodation would result in substantial increased costs in relation to the conduct of its particular business." *Id.* at 470 (emphasis added). ACFD hasn't even attempted to properly make that showing.

I. Under *Groff*, an employer cannot rest its undue hardship defense on generalized concerns. Yet that is precisely what ACFD has done here. Rather than point to specific and quantifiable impacts that Mr. Smith's proposed accommodation would impose, ACFD broadly claims that allowing Mr. Smith to grow facial hair would be unsafe. Under *Groff*, that's not enough.

In fact, accommodating Mr. Smith's request raises no safety concerns. His role as an Air Mask Technician doesn't require him to wear an SCBA—which explains why ACFD never bothered to fit test or train him for years. Even if he did have such a role, the evidence in Mr. Smith's favor shows that positive pressure masks can be effectively worn with facial hair and that firefighters can and do pass fit tests with a beard.

Even if AFCD needed to call on its Air Mask Technician to fight a fire and even if SCBAs didn't work with facial hair, ACFD has made no attempt to explore other accommodations—including accommodations that other fire departments have granted. Given ACFD's large size and

operating costs and the (exceedingly rare) frequency of needing to call an Air Mask Technician to abandon the Air Unit and enter a burning building, ACFD must explain why options like allowing a closely cut beard, offering voluntary shift swapping, or calling in other units would be prohibitively expensive. *See Groff*, 600 U.S. at 473 (noting that it "would not be enough" for an employer to conclude that one accommodation isn't feasible if "other options, such as voluntary shift swapping," might be available). It failed to do so here.

II. ACFD also violated Title VII by retaliating against Mr. Smith. In response to Mr. Smith's protected actions of seeking an accommodation, lodging a complaint with the City, and filing this lawsuit, ACFD denied his request, illegally ordered him to fight a fire without proper equipment or training, and severely disciplined him. That no Air Mask Technician has been ordered to fight fires in decades confirms that any "non-retaliatory" reason ACFD might offer for its actions is pretextual. A reasonable juror could easily find that ACFD's actions amounted to retaliation.

III. ACFD also violated Mr. Smith's free exercise rights. The Department's grooming policy allows for both individualized and

categorical exemptions, and its enforcement is unequal and underinclusive. As a result, ACFD's policy is neither neutral nor generally applicable, so it triggers strict scrutiny. ACFD hasn't shown that it has a compelling interest in denying Mr. Smith's accommodation. And even if it had, ACFD could have achieved its goals without prohibiting him from exercising his faith.

IV. Finally, ACFD failed to defeat Mr. Smith's equal protection claim. ACFD routinely allows firefighters assigned to fire suppression to grow beards when they are off duty because they are unlikely to need to use a SCBA. As an Air Mask Technician, Mr. Smith meets that standard even when he is on duty. Yet despite being similarly situated, he is not allowed to grow a beard. Furthermore, Mr. Smith is the only Air Mask Technician in at least 37 years that ACFD has ordered to fight a fire. Under either theory, the evidence supports an equal protection claim.

In sum, Mr. Smith not only presented enough evidence to defeat summary judgment, he also demonstrated that he is likely to prevail on each claim. This Court should reverse the district court's grant of summary judgment and either reverse or vacate and remand its denial of a preliminary injunction.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment de novo. *Bruni v. City of Pittsburgh*, 941 F.3d 73, 82 (3d Cir. 2019). Summary judgment in ACFD's favor is appropriate only if "there is no genuine dispute as to any material fact and [ACFD] is entitled to judgment as a matter of law." *Id.* (quoting Fed. R. Civ. P. 56(a)). At this stage, the Court must "view the facts in the light most favorable" to Mr. Smith and "make all reasonable inferences in [Mr. Smith's] favor." *Galli v. N.J. Meadowlands Comm'n*, 490 F.3d 265, 270 (3d Cir. 2007). And because First Amendment rights are at stake, the Court must also undertake an "exacting review" of the evidence with a "particularly close focus on facts that are determinative of a constitutional right." *Armour v. County of Beaver*, 271 F.3d 417, 420 (3d Cir. 2001).

This Court reviews the district court's denial of a preliminary injunction for abuse of discretion. In doing so, it reviews the district court's findings of fact for clear error and legal conclusions de novo. *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 252 (3d Cir. 2002).

ARGUMENT[1]

I. ACFD violated Title VII when it refused to accommodate Mr. Smith's religious practice.

Title VII requires employers to accommodate their workers' religious exercise unless the employer "demonstrates" an "undue hardship." 42 U.S.C. § 2000e(j). Following the heavily-criticized decision *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), courts for many years read the term "undue hardship" narrowly to mean anything more than a de minimis burden. The Supreme Court unanimously rejected that view in *Groff v. DeJoy*, 600 U.S. at 472. Now, better in line with the statute's text, employers must show that accommodating a religious practice would impose a "burden, privation, or adversity" that "rise[s] to an 'excessive' or

[1] Mr. Smith's state law claims mirror his federal claims. Since they rise and fall together, this brief focuses on the federal claims. *See Carmona v. Resorts Int'l Hotel*, 189 N.J. 354, 370–71 (N.J. 2007) (explaining that New Jersey Law Against Discrimination jurisprudence adopts Title VII caselaw); *Trafton v. City of Woodbury*, 799 F. Supp. 2d 417, 443–44 (D.N.J. 2011) (the New Jersey Civil Rights Act operates identically to 42 U.S.C. § 1983); *Wiley Mission v. New Jersey*, No. 10-3024, 2011 WL 3841437 at *18 (D.N.J. Aug. 25, 2011) (noting that courts typically "equate" the New Jersey Free Exercise Clause with the federal version); *Myrie v. Comm'r, N.J. Dep't. of Corr.*, 267 F.3d 251, 255 n.2 (3d Cir. 2001) ("The Fourteenth Amendment's guarantee[] of . . . equal protection [is] equatable with . . . [the equal protection guarantee] of the New Jersey Constitution.").

'unjustifiable' level." *Id.* at 469. Yet here, the district court paid little heed to *Groff* or the facts at hand and granted summary judgment to ACFD based on misplaced safety concerns. This Court should hold that ACFD failed to establish either an undue hardship or a good faith effort to accommodate.

A. As the Supreme Court recently reaffirmed in *Groff*, Title VII provides robust protections to plaintiffs like Mr. Smith.

"In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964." *Bostock v. Clayton County*, 590 U.S. 644, 649–50 (2020). Among the Act's key protections, Title VII requires employers "to reasonably accommodate . . . an employee's . . . religious observance or practice" unless the employer "demonstrates" that granting an accommodation would impose an "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). By enshrining this essential protection for religious exercise, Title VII "gives [religious practices] favored treatment, affirmatively obligating" employers to accommodate their workers' reasonable religious practices. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015). Even

"otherwise-neutral policies [must] give way to the need for an accommodation." *Id.*

The Supreme Court recently reaffirmed that obligation in *Groff*—a case in which the employer made some efforts to accommodate, unlike ACFD here. Gerald Groff was a Christian postal worker who asked his employer USPS for an accommodation not to work on Sundays. *Groff*, 600 U.S. at 454. USPS considered his request and offered to let him either take a shift schedule that started Sunday after worship services or take a shift schedule that required Sunday work, but the postmaster would help facilitate voluntary shift swaps at least some Sundays. *Groff v. DeJoy*, 35 F.4th 162, 166, 168 (3d Cir. 2022). Groff's faith, however, precluded him from any Sunday work, so those options didn't solve his problem. Still, USPS claimed—without an accounting or quantifying of costs—that those were the only two options that wouldn't "impact operations." *Id.* at 166.

When Groff's case reached the Third Circuit, this Court ruled against him. *Id.* at 175–76. Reasoning that "economic or non-economic costs" can amount to undue hardships, this Court concluded that Groff's proposed accommodation would impose "more than a de minimis cost . . . [by]

impos[ing] on his coworkers, disrupt[ing] the workplace and workflow, and diminish[ing] employee morale." *Id.* at 174 n.18, 175 (relying on *Hardison*, 432 U.S. at 84).

The Supreme Court reversed. "[B]rushing away th[e] mistaken [de minimis] view" perpetuated by reliance on *Hardison*, the Court returned to what the "statute actually says": "An employer who fails to provide an accommodation has a defense only if the hardship is 'undue.'" *Groff*, 600 U.S. at 468, 472. That standard is high. A "hardship" is certainly "more severe than a mere burden." *Id.* at 469. And by saying the hardship must be "undue," Congress meant "something greater than hardship." *Id.* An "*undue* hardship" "must rise to an 'excessive' or 'unjustifiable' level." *Id.* (emphasis added). In other words, an employer must accommodate unless it can "show that the burden of granting an accommodation would result in substantial increased costs." *Id.* at 470.

In clarifying the meaning of "undue hardship," the Court explained how the analysis should be applied:

First, by framing the standard in terms of "increased costs," the Court made clear that the hardship must not only be severe; it must be quantified. And to say a cost is "substantial" also requires assessing the

cost "in relation to" the employer's "particular business." *Id.* Courts must therefore consider "all relevant factors, . . . including the particular accommodations at issue and their practical impact in light of the nature, size, and operating cost of an employer." *Id.* at 470–71 (cleaned up). Therefore, pointing to generalized concerns isn't enough. The employer must trace how such concerns "go on to affect the conduct of the business." *Id.* at 472 (cleaned up). "[A] court cannot stop its analysis without examining whether that further logical step is shown." *Id.*

Second, an employer can't dodge its duty to accommodate merely because a particular means of accommodating wouldn't work. "Title VII requires that an employer reasonably accommodate an employee's practice of religion, not merely that it assess the reasonableness of a particular possible accommodation or accommodations." *Id.* at 473. In a case like *Groff*, for example, "it would not be enough for an employer to conclude that forcing other employees to work overtime would" cost too much. *Id.* The employer would still need to consider "other options, such as voluntary shift swapping." *Id.*

Third, the undue hardship standard is a common-sense test. *See id.* at 471 (noting that courts should resolve the undue hardship question "in

the context of the employer's business" and in a "common-sense manner"). Courts should consider the "practical impact" of "particular accommodations." *Id.* at 470. And they should reject excuses that are implausible or illogical.

In sum, *Groff* makes clear that Title VII's undue hardship standard demands much more than what many courts had long thought. Employers shoulder the burden of *showing* how the particular accommodations at issue would result in unjustifiably high costs in light of the employer's particular size and operations—and the outdated "de minimis" test is a dead letter.

B. ACFD failed to show that accommodating Mr. Smith would cause undue hardship.

Because no one disputes that Mr. Smith established a prima facie case of failure-to-accommodate under Title VII, *see* JA017, it is ACFD's burden to show an undue hardship under *Groff*'s clarified standard. ACFD failed to meet its burden both because it made no attempt to put forward the kind of specific "costs" that *Groff* requires and because, even if it had, allowing an Air Mask Technician to grow a beard wouldn't compromise safety.

1. ACFD did not put forward the kind of evidence required by *Groff*.

Groff does not permit employers to claim an undue hardship by merely pointing to generalized interests. *Cf. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 438 (2006) (explaining that, under another religious freedom law, the government's "invocation of . . . general interests, standing alone, is not enough"). Instead, employers must quantify claimed hardships so that a factfinder can properly determine whether the costs of an accommodation are "substantial." Wholly hypothetical and noneconomic concerns are insufficient to show "substantial increased costs" unless and until the employer takes the further "logical step" of tying them to downstream economic impacts on the business. *Groff*, 600 U.S. at 470, 472.

Since *Groff*, at least one other circuit has recognized as much. In *Hebrew v. Texas Department of Criminal Justice*, the Fifth Circuit reversed a district court's grant of summary judgment in favor of an employer when the employer argued that a religious beard accommodation would raise safety concerns. 80 F.4th 717 (5th Cir. 2023). The Fifth Circuit explained that the employer "nowhere identifie[d] any actual costs" of accommodating the employee. *Id.* at 722. An employer

cannot meet its burden of showing "'substantial increased costs' affecting its entire business" by "simply identif[ying] its security and safety concerns without regard to costs." *Id.* at 722–23.

Here, too, ACFD simply asserted that allowing Mr. Smith to grow a beard would undermine "safety." JA210. It made no attempt to show if and how addressing those concerns would result in increased costs, let alone that those costs were substantial in the context of its size, budget, and so on. Although *Groff* demands specificity, ACFD failed to "do any analysis" or "present[] any estimate" of the costs it would have incurred by accommodating Mr. Smith's religious belief. *Scafidi v. B. Braun Med., Inc.*, No. 22-CV-2772, 2024 WL 184258, at *11 (M.D. Fla. Jan. 17, 2024) (finding "genuine dispute of material fact exists as to whether [the employer] would have suffered an undue hardship if it had allowed [its employee] to stay in her customer-facing position without getting vaccinated" because employer failed to provide specific cost estimate). Without a concrete estimate of the impact of the employer's alleged safety concerns, a factfinder cannot evaluate the key issue: whether ACFD would face "substantial increased costs in relation to the conduct of its particular business." *Groff*, 600 U.S. at 470.

Despite reciting *Groff*'s standard, the district court failed to apply it. Pointing to pre-*Groff* precedent, the court reasoned that "[s]uch costs can be economic or non-economic." JA018 (citing *Webb v. City of Philadelphia*, 562 F.3d 256, 260 (3d Cir. 2009)). And wrongly assuming that Mr. Smith couldn't wear an SCBA with facial hair and that he needed to be able to don an SCBA, the court reasoned that granting his request would "come at a substantial non-economic cost" because Mr. Smith "would never be able to don an SCBA without creating substantial risk." *Id.*

The district court erred by not taking the "further logical step" of exploring how much it would cost to alleviate any safety concerns. *Groff*, 600 U.S. at 472. The court didn't consider whether other firefighters could be called in his stead, whether the Department could arrange for additional backup units, or whether the cost of those measures would be significant in the context of ACFD's operations. *See id.* at 473 (noting that it "would not be enough" to reject a single possible accommodation, because "[c]onsideration of other options . . . would also be necessary"); JA659–60 ("[ACFD] never provided Mr. Smith an opportunity to discuss options for accommodating his request including alternatives to the

SCBAs or even the ability to shave his religious beard in extreme and rare circumstances.").

The district court's ruling fails on this ground alone.

2. Even the "hardship" ACFD presented is not supported by the record.

Even if a vague and unquantified "safety interest" were enough to satisfy ACFD's burden, ACFD hasn't shown that it has a safety interest in forcing Mr. Smith to violate his faith. A reasonable juror could find that Mr. Smith is not required to wear an SCBA, obviating any safety concerns. And even in the rare instance in which he might need to wear one, there is evidence that SCBAs are safe when worn over a beard.

To conclude otherwise, the district court overlooked four key facts. First, Mr. Smith is not a traditional firefighter. JA257–58. His job is not to enter structure fires or other hazardous environments where an SCBA is needed. Instead, as an Air Mask Technician, he is an administrative employee, and like other administrative employees, he works far away from fires. JA386; JA225.

Second, even when Mr. Smith does respond to a fire scene, his job requires him to stay away from areas that would require SCBA use. Because he performs the vital function of refilling air bottles for

firefighters going into a hazardous environment, he must stay safely outside that environment. When firefighters come to the Air Unit, they "have their facepieces off." JA587. Thus, Mr. Smith remains "in an environment where [he's] getting fresh air," avoiding "a hot zone or even a warm zone where wisps of smoke may come over." *Id.* And when "conditions worsen at the scene"—a situation the district court expressed concern about—Mr. Smith must strategically re-evaluate wind and weather conditions and reposition himself where it's safe for him and his colleagues to breathe without masks. JA588–89. As a result, in eight years as an Air Mask Technician, Mr. Smith has never had to wear an SCBA at the scene of a fire. JA656.

Third, Mr. Smith is not required—or even allowed—to leave the Air Unit when he's at the scene of a fire, even in an emergency situation. Instead, he must remain with the Air Unit Truck, outside the hazardous area, to fill the air tanks of the firefighters suppressing the fire. *See* JA767–77; JA579. If Mr. Smith abandons the unit, there is no procedure for someone else to refill the air tanks that are needed for firefighters to continue fire suppression work. *See* JA577. ACFD has in place procedures to call additional support from other stations, off-duty

firefighters, and other towns and counties during serious fires so that the Air Mask Technician doesn't need to make the unsafe decision to leave the Air Unit.

Fourth, though ACFD now claims Mr. Smith could be needed for fire suppression duties, its longstanding practices suggest the opposite. As soon as Mr. Smith became an Air Mask Technician in 2015, he, like other administrative employees, stopped being fit tested for an SCBA or trained in fire suppression. JA424; JA302; *see* JA582. No Air Mask Technician for over three decades leading up to this litigation was ever called on to perform duties requiring an SCBA. JA278; JA676. Only after this litigation began did ACFD call on an untrained and unequipped Mr. Smith to perform fire suppression and then start scheduling him for fit testing and training. *See Patterson v. Strippoli*, 639 F. App'x 137, 143 (3d Cir. 2016) (observing that post-filing conduct is "not probative" of pre-litigation conduct and that if it is "to be taken into account at all, it might tend to show the existence of prior discrimination and an effort to repair the harm after discovery" (quoting *Rich v. Martin Marietta Corp.*, 5 22 F.2d 333, 346 (10th Cir. 1975))). If ACFD had expected that Mr. Smith might be needed for fire suppression, it would have ensured from the

outset that he was prepared to perform those duties safely and competently.

Finally, even if some rare circumstance required Mr. Smith to wear a mask, evidence also demonstrates that he could do so safely with a beard. ACFD's SCBAs are positive pressure masks, which do not allow any harmful materials to enter, even if the mask is not tightly fitted. JA419; JA303. "[F]or the vast majority of firefighter activity, a perfect seal between the face mask and the face is not required for safety." *Potter v. District of Columbia*, No. 01-1189, 2007 WL 2892685, at *7 (D.D.C. Sept. 28, 2007), *aff'd*, 558 F.3d 542 (D.C. Cir. 2009). So even without a perfect seal, "firefighters who wear beards can safely operate the positive pressure . . . SCBA[s] in situations considered to be immediately dangerous to life and health." *Potter v. District of Columbia*, 382 F. Supp. 2d 35, 39 (D.D.C. 2005).

ACFD's policies bear this out. Other factors similarly affect SCBAs by lowering the longevity of the air supply. But ACFD has no procedures in place, like a fitness test, to mitigate those factors, nor have injuries resulted. JA303–04. What's more, the SCBA alarm and the protocol requiring firefighters to immediately exit a hazardous environment

guarantee that safety won't be compromised even if conditions change. JA420.

These concerns are also at a minimum for Mr. Smith. If, for some reason, he needs to wear an SCBA while manning the Air Unit—something that has never happened in eight years—he will have an unlimited supply of air. Even if he runs out of air at a marginally higher rate, he's required as Air Mask Technician to stay with the Air Unit, so he could easily refill his tank as often as he needs. *See* JA589–60.

The district court brushed all this aside because ACFD called Mr. Smith to suppress a fire one time in eight years, after he filed this lawsuit. *See* JA019 ("[T]he fact remains that [Mr. Smith] has at least on one occasion been ordered to perform fire suppression duties . . . and could be called on to do so again."). But that logic failed to draw inferences in Mr. Smith's favor. A jury could reasonably infer that because an Air Mask Technician had never been called to fight a fire in decades, ACFD's post-lawsuit decision to call Mr. Smith without proper equipment or training was retaliation. Afterward, the state sanctioned ACFD for its failure to train "firefighters assigned to administrative roles." JA395. In any event, that evidence confirms that, at most, calling an Air Mask

Technician is a once-in-a-few-decades event, so the economic cost of assigning alternative personnel would be nominal in the long run.

In sum, ACFD claims that "safety concerns" prompted its denial of Mr. Smith's accommodation, but those concerns are not warranted by the record. The hypothetical scenario that would require Mr. Smith to perform fire suppression duties is that (1) there is an emergency situation where (2) more personnel are needed for fire suppression, (3) not enough firefighters are able to respond to an emergency call-back, (4) mutual aid cannot provide enough support, (5) ACFD goes against its own procedures by taking an Air Mask Technician off the Air Unit, (6) there is another Air Mask Technician who can stay with the air unit, and (7) ACFD chooses Mr. Smith instead of another administrative employee or someone less experienced as an Air Mask Technician to perform suppression even though (8) it is aware of his religious requirement to wear a beard. Even in that extraordinarily remote case, a jury could also easily find that Mr. Smith would be putting no one at risk by wearing an SCBA over his beard. At a minimum, whether ACFD's safety concern creates substantial increased costs is a material dispute that should be weighed by a jury.

3. ACFD did not show that it made a good faith effort to accommodate Mr. Smith's religious practice.

In some circumstances, an employer can meet its burden to reasonably accommodate by showing it made a good faith effort to accommodate the employee. But ACFD failed to make this showing. It merely called two vendors to ask if they had a mask that could be safely worn with facial hair. JA018.

That isn't what's meant by a good faith effort. To make a showing of a good faith effort, the employer must show "that it has *offered* [the plaintiff] a reasonable accommodation." *Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220, 224–25 (3d Cir. 2000); *see Miller v. Port Auth. of N.Y. & N.J.*, 788 F. App'x 886, 889–90 (3d Cir. 2019) (determining that an employer made a good faith effort when it "offer[ed]" a "reasonable accommodation"). In other words, if the employer offers an actual accommodation that is reasonable, the employee can't hold out for a different, more-preferred accommodation. *See Shelton*, 223 F.3d at 225.

Here, ACFD did not offer *any* accommodations. JA232. Although ACFD claimed it engaged in "the interactive process," there is nothing in the record to support that claim: it neither proposed an accommodation to Mr. Smith nor even gave him the opportunity to "discuss options for

accommodating [his] request." *Id.*; *see Groff*, 600 U.S. at 473 ("Title VII requires that an employer reasonably accommodate an employee's practice of religion, not merely that it assess the reasonableness of a particular possible accommodation."). ACFD denied Mr. Smith's request out of hand. Had ACFD investigated alternatives, it would have found that Mr. Smith is open to alternative accommodations, such as wearing a beard that is only a quarter-inch long, wearing a beard that still allows him to pass a fit test, or wearing a longer beard but then occasionally trimming it to a length that passes a fit test in the rare event that ACFD needs him to perform fire suppression.

Thus, ACFD's good-faith-effort theory fails. There is no evidence that ACFD offered a reasonable accommodation, and certainly not undisputed evidence establishing the defense as a matter of law.

* * *

Compared to *Groff*, this is an easy case. While the Postal Service pointed to at least some specific hardships like increased duties for co-workers, ACFD has merely gestured at a generalized interest in "safety" without any indication of cost. While the Postal Service offered Groff two alternative accommodations, ACFD offered Mr. Smith none. And while

the proposed accommodation impacted Groff's normal work duties—mail delivery—Mr. Smith's accommodation would impact his work only in the unlikely event that he was asked to perform tasks outside his job description.

Mr. Smith deserves his day in court to ask the jury to hold ACFD accountable for failing to accommodate his sincere religious exercise. On the present record, ACFD hasn't shown that allowing an administrative employee to grow a beard would result in substantial increased costs.

II. ACFD violated Title VII when it retaliated against Mr. Smith.

ACFD violated Title VII not only by failing to accommodate Mr. Smith's protected religious exercise but also by retaliating against him for attempting to vindicate his rights. 42 U.S.C. § 2000e-3(a). Under that provision, if Mr. Smith points to evidence that he (1) engaged in a "protected employee activity" (2) that was "causal[ly] connect[ed]" (3) to "adverse action[s] by [his] employer," ACFD must establish a "legitimate, non-retaliatory reason" for its actions. *Daniels v. Sch. Dist. of Phila.*, 776 F.3d 181, 193 (3d Cir. 2015). Yet even if ACFD posits such a reason, Mr. Smith can still show that the "explanation was false, and that retaliation

was the real reason." *Id.* (quoting *Marra v. Phila. Hous. Auth.*, 497 F.3d 286, 300 (3d. Cir. 2007)).

Mr. Smith engaged in a series of protected activities, including requesting an accommodation, JA173; lodging a complaint with HR, JA199–202; and ultimately, filing this lawsuit. *See Daniels*, 776 F.3d at 193 (noting that protected activity includes both the "filing of formal charges" and "informal protests" like "making complaints" (quoting *Curay-Cramer v. Ursuline Acad. of Wilmington*, 450 F.3d 130, 135 (3d Cir. 2006))). In response, ACFD discriminated against Mr. Smith by denying the accommodation he was entitled to without bothering to engage in the required interactive process. JA210; JA232; *see EEOC v. Allstate Ins. Co.*, 778 F.3d 444, 453 (3d Cir. 2015) (noting that adverse employment actions include "depriv[ing the] employee[] of something to which they were entitled"). ACFD then threatened Mr. Smith with suspension and termination unless he returned to work clean-shaven. JA226; *see Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (adverse employment action is anything that "might have dissuaded a reasonable worker from making or supporting a charge of discrimination") (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C.

Cir. 2006)). After Mr. Smith filed this lawsuit, ACFD ignored procedure when it called him back into fire suppression duty in one instance, despite failing to provide necessary equipment and training. JA248–49; JA431. And when Mr. Smith resisted putting himself and others at risk, ACFD charged him with insubordination and placed him on suspension for 40 days, 20 of which were without pay. JA432–35; JA685–86; *see White*, 548 U.S. at 73 ("[T]he jury's conclusion that the 37–day suspension without pay was materially adverse was a reasonable one.").

Given the timing of these actions, a reasonable juror could infer a causal connection between them and Mr. Smith's attempt to exercise his religion. *See Carvalho-Grevious v. Del. State Univ.*, 851 F.3d 249, 260 (3d Cir. 2017) (quoting *Shaner v. Synthes*, 204 F.3d 494, 505 (3d Cir. 2000)) (noting that a causal connection can be drawn from timing that is "unusually suggestive of retaliatory motive.").

The evidence also undermines the only non-retaliatory explanation offered by ACFD: safety. As discussed above, the record does not support a safety concern, and ACFD's insistence that Mr. Smith perform fire suppression without training or equipment *threatened* the safety of Mr. Smith and other ACFD employees. JA674. Indeed, ACFD's lack of

concern about safety was underscored when the state occupational safety office imposed sanctions for numerous safety concerns after that incident. JA391–98. A reasonable juror could therefore find that ACFD's purported "objective safety interest" is pretextual, JA021, and that ACFD's actions were "actually motivated by retaliatory animus." *Moore v. City of Philadelphia*, 461 F.3d 331, 346 (3d Cir. 2006).

Despite numerous triable issues of fact, the district court failed to adequately grapple with Mr. Smith's retaliation claims. It dismissed them out of hand, claiming his brief in opposition to summary judgment was in "contrast" with cherry-picked portions of Mr. Smith's deposition testimony where he pointed to his accommodation denial as ACFD's only retaliatory action. JA021–22; *see* JA650. The district court hung its hat on a footnote in *Davila v. City of Camden*, 66 F. Supp. 3d 529, 535 n.5 (D.N.J. 2014). Yet the problem in *Davila* was that an affidavit was conclusory. *Id.* at 535 n.5. Mr. Smith's claims of retaliation are anything but. Each theory of retaliation detailed above is supported by independent evidence in the record. *See Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 560 F.3d 156, 162 (3d Cir. 2009) (finding affidavit not "conclusory" where "specific . . . evidence" was introduced to back the

claim). Furthermore, courts cannot "reject later statements solely because they conflict with prior deposition testimony." *SodexoMAGIC, LLC v. Drexel Univ.*, 24 F.4th 183, 210 (3d Cir. 2022).

At a minimum, the evidence taken in Mr. Smith's favor suggests that ACFD acted with retaliatory motive. Mr. Smith's retaliation claim should be allowed to go to a jury.

III. ACFD's refusal to grant a religious exemption to Mr. Smith violated the Free Exercise Clause.

ACFD's outright rejection of Mr. Smith's religious accommodation also infringes upon the rights secured to him by the First Amendment. By providing that "Congress shall make no law . . . prohibiting the free exercise" of religion, the Free Exercise Clause broadly proscribes government interference with sincere religious expression. U.S. Const. amend. I. If the government interferes with religious practice in a way that is either not generally applicable or nonneutral, it bears the burden of overcoming the high bar of strict scrutiny.[2] ACFD's policy and practice fails at every level.

[2] The free exercise framework announced in *Employment Division v. Smith* would require Mr. Smith to show ACFD's policies are either not neutral or not generally applicable in order for them to be subject to strict

A. Because ACFD's grooming policy is not neutral or generally applicable, strict scrutiny applies.

There's no dispute that ACFD burdened Mr. Smith's sincere religious practice by forcing him to choose between losing his job and violating his faith. JA013; *see Sherbert v. Verner*, 374 U.S. 398, 406 (1963). Thus, strict scrutiny applies unless ACFD's policy is both neutral and generally applicable. *See Kennedy*, 597 U.S. at 508 ("Failing either the neutrality

---

scrutiny. *See* 494 U.S. 872, 879–81 (1990). But the Supreme Court has backed away from *Smith* in recent years, and Mr. Smith preserves for Supreme Court review the argument that *Smith* and its framework should be overruled. *See Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993); *Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n*, 584 U.S. 617 (2018); *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021); *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022). Indeed, *Smith* has been embattled since the day it was decided, has proven unworkable in practice, and is inconsistent with the Free Exercise Clause's original public meaning. *See, e.g.*, *Fulton*, 593 U.S. at 614 (Alito, J., concurring) ("*Smith* was wrongly decided. As long as it remains on the books, it threatens a fundamental freedom."); *id.* at 618, 626 (Gorsuch, J., concurring) ("*Smith* failed to respect this Court's precedents, was mistaken as a matter of the Constitution's original public meaning, and has proven unworkable in practice. . . . No fewer than ten Justices—including six sitting Justices—have questioned its fidelity to the Constitution."); *id.* at 543 (Barrett, J., concurring) ("The textual and structural arguments against *Smith* are [] compelling."). The fact that the continuing burden on Mr. Smith's basic religious practice is undisputed yet the district court still ruled against him shows the *Smith* test's unworkability.

or general applicability test is sufficient to trigger strict scrutiny."). It is neither.

1. The grooming policy is not generally applicable because it allows for individualized exemptions.

A government policy "is not generally applicable if it 'invites' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Fulton*, 593 U.S. at 533 (quoting *Smith*, 494 U.S. at 884). In *Fulton*, for example, the defendant city's policy wasn't generally applicable because it gave the city commissioner discretion to grant exceptions, even though the commissioner had never granted one. *Id.* at 537.

ACFD allows for individualized exemptions that render its policy not generally applicable in at least three ways.

First, ACFD has in place a formal system for granting individualized exemptions from its grooming policy. Mr. Smith learned first-hand about that system when he requested an accommodation. After his initial request, Mr. Smith was instructed that he needed to both file a formal exemption request with ACFD and file a formal complaint. JA669; JA192; JA196; JA518–20. Mr. Smith followed these formalized processes, which ultimately led to the denial of his accommodation.

ACFD asserted below, and the district court agreed, that ACFD's grooming policy does not permit individualized exemptions because no exemption from the policy has been granted. JA617; JA010 (rejecting Plaintiff's argument because "a fellow firefighter's request for a medical, non-religious exemption to the grooming policy was denied"). But *Fulton* was no different. As in *Fulton*, the fact that no exceptions have yet been granted is irrelevant—the mere "creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given." *Fulton*, 593 U.S. at 537.

Second, the Department's SCBA policy explicitly allows for discretionary exemptions as to "[e]ach firefighter": the "[a]uthority to deviate from this procedure rests with the company captains, and the incident commander." JA073. The grooming policy is closely intertwined with ACFD's SCBA policy, since ACFD's stated purpose of the grooming policy is to facilitate SCBA use. JA070. So, the company captains and incident commander retain the discretion to grant any individualized exemption from the use of an SCBA with a beard—i.e., an exemption from the grooming policy.

Third, the grooming policy's emergency call-back exception also authorizes particularized evaluation, requiring "officer[s] to make a determination" when an individual arrives on a call-back about whether he is "going to be able to fight [the] fire" in light of the length of his facial hair. JA618. In other words, the exception "[i]s not a blanket exception," but when a firefighter shows up to an emergency call-back with a beard, an officer can decide "on a case by case basis" whether or not his beard is too long to allow SCBA use. JA353–54.

In sum, there are not only one, but three "mechanism[s] for individualized exemptions" which "invite[] [ACFD] to decide which reasons for not complying with the policy are worthy of solicitude." *Fulton*, 593 U.S. at 533, 537. ACFD employees must shave under the grooming policy "unless an exception is granted by [ACFD]" through one of its ordered systems of considering "request[s] for a shaving exemption." *Id.* at 535; JA618. On this basis alone, the district court should have required ACFD to satisfy strict scrutiny.

2. The grooming policy is not generally applicable because of its categorical emergency call-back exemption.

To be generally applicable, a policy must apply "across the board." *Smith*, 494 U.S. at 884. Thus, government policies are not generally applicable if they contain a "categorical exemption" that "undoubtedly undermines" the interest underlying the policy. *Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365–66 (3d Cir. 1999); *see also Fulton*, 593 U.S. at 534 ("A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."). ACFD's categorical exemption from the grooming policy for emergency call-backs does precisely that: It allows the same activity—growing facial hair—in a secular circumstance even more likely to raise the purported safety concerns ACFD cited when denying Mr. Smith's accommodation.

ACFD claims and the district court agreed that "safety is put at risk when anything inhibits the seal of an SCBA, including facial hair." JA012. If that were true, the facial hair of a firefighter called in on a secular call-back exemption and the facial hair of an individual with a

religious exemption would interfere with the fit of an SCBA identically. Besides, if all facial hair creates a safety issue as ACFD asserts, then the call-back exemption—which applies to all off-duty firefighters—would threaten that interest far more than a single religious accommodation for an administrative employee.

ACFD has presented no reason "why religious exemptions threaten important [department] interests but [the emergency call-back] exemption [does] not." *Fraternal Ord. of Police*, 170 F.3d at 367 (holding a police department's clean-shaven requirement was not generally applicable because it had a categorical medical exemption but denied religious exemptions). That's because ACFD has "made a value judgment that secular [] motivations for wearing a beard are important enough to overcome its general interest in [safety] but that religious motivations are not." *Id.* at 366. When the government makes such a judgment, its actions must survive strict scrutiny. *Id.*

3. The grooming policy is not neutral because it has not been enforced uniformly on a religion-neutral basis.

In addition, ACFD has not acted neutrally. The Free Exercise Clause "forbids" all "departures from neutrality." *Lukumi*, 508 U.S. at 534. And a policy "must be both facially and actually neutral" to escape strict

scrutiny. *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 241 (3d Cir. 2008); *see also Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 167 (3d Cir. 2002). That means a policy's application cannot "treat any comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 593 U.S. 61, 62 (2021).

In practice, ACFD has not treated religious requests in an evenhanded way. For example, when Chief Evans was asked if the "Department ever allowed any individual exemptions from the clean shave requirement," he testified that ACFD has "never allowed any exemptions for fit testing." JA617. ACFD's SCBA fit testing record, however, contradicts that claim. Although all ACFD employees are supposed to be fit tested annually, many, especially those in administrative roles, were not tested for years, and some were allowed to pass the fit test with beards. JA386; JA602; JA608; JA289. Mr. Smith was one of those administrative employees who wasn't regularly scheduled for fit tests—that is, until he requested a religious exemption. JA654.

Courts have applied strict scrutiny in similar circumstances. *See, e.g.*, *Litzman v. New York City Police Dep't*, No. 12 CIV. 4681 HB, 2013 WL

6049066, at *3 (S.D.N.Y. Nov. 15, 2013) (holding that a "no-beard policy" was facially neutral, but the "record demonstrate[d] that de facto exceptions . . . abound[ed]" and that the policy was "not uniformly enforced"); *Sughrim v. New York*, 503 F. Supp. 3d 68, 89 (S.D.N.Y. 2020) (finding a grooming policy not neutral because the government "applied [it] to those officers who [sought] to maintain beards for religious reasons, while overlooking clear violations of the directive by officers who wore beards for non-religious reasons"); *Talukder v. New York*, No. 22-CV-1452 (RA), 2023 WL 2752863 (S.D.N.Y. Mar. 31, 2023) (same).

Because ACFD "exercises discretion with respect to a facially neutral rule in a discriminatory fashion"—implementing a policy that "is not uniformly enforced"—its grooming policy is not "actually neutral" and strict scrutiny is therefore appropriate. *Combs*, 540 F.3d at 241; *Litzman*, 2013 WL 6049066, at *3.[3]

[3] The district court suggested that "in the public employment context, a facially neutral law may only reach intermediate scrutiny." JA010. It did so in reliance on dicta in a footnote in *Fraternal Order*, which noted that the regulation at issue in that case "[could] not survive even [intermediate] scrutiny." *Fraternal Ord. of Police*, 170 F.3d at 366 n.7. But *Fraternal Order* in the same footnote acknowledged that the Supreme Court "speak[s] in terms of strict scrutiny when discussing the requirements for making distinctions between religious and secular

B. ACFD failed to satisfy strict scrutiny.

ACFD cannot clear the high bar of strict scrutiny. It bears the burden to show its treatment of Mr. Smith was "narrowly tailored to serve a compelling state interest." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 18 (2020) (cleaned up). Yet ACFD has failed to show *either* that its generic "safety" interest is compelling or that measures less restrictive of Mr. Smith's religious practice could not address its asserted interest.

1. ACFD has not shown that its generic safety interest is compelling.

At the first step of strict scrutiny, ACFD must identify a compelling interest. *See Sherbert*, 374 U.S. at 406 (explaining that "only the gravest abuses, endangering paramount interest, give occasion for permissible limitation" (cleaned up)). To meet that burden, ACFD cannot rely on "broadly formulated interests," but must identify with "particularity" the harm that would result from granting an exemption specifically to Mr.

---

exemptions." *Id.* And neither this Court nor the Supreme Court has ever held that the public-employment context should alter the free exercise tier of scrutiny. Indeed, the Supreme Court recently applied strict scrutiny in a public employment context. *See Kennedy*, 597 U.S. at 508. Thus, the context of public employment doesn't change the analysis, and strict scrutiny should apply.

Smith. *Fulton*, 593 U.S. at 541; *O Centro*, 546 U.S. at 431; *see also Singh v. Berger*, 56 F.4th 88, 103 (D.C. Cir. 2022) (quoting *Fulton*, 593 U.S. at 542) (finding that Marine Corps failed to demonstrate, "in light of its preexisting exemptions to the grooming process," "'why it has a particular interest' in denying hair, beard, and religious article exceptions to these Plaintiffs"). So the relevant issue here is not, as ACFD and the district court construed it, whether the grooming policy writ large promotes a compelling interest. The issue is rather whether ACFD's denial of Mr. Smith's religious accommodation does so. *See O Centro*, 546 U.S. at 431.

ACFD hasn't made that showing. The Department dismissed Mr. Smith's religious exemption with a perfunctory nod to "safety concerns" and elaborated no further, taking no account of Mr. Smith's specific circumstances. JA210. ACFD did not, for instance, consider that Mr. Smith is an administrative employee working in a role which, for over three decades before this litigation, was never required to fight fires. Nor did it consider the reality that "firefighters who wear beards can safely operate the positive pressure [SCBAs]" anyway. *Potter*, 382 F. Supp. 2d at 39; JA303; JA321. Here, therefore, a jury could certainly conclude that exempting Mr. Smith poses no compelling risk to the Department's goals.

What's more, even taking ACFD's stated safety interest at face value, it hasn't treated that interest—even in general terms—as compelling. The grooming policy's call-back exemption and its lack of enforcement, *see* Sections I.B.ii–iii, *supra*, both implicate safety concerns far more than would allowing a single administrative employee to wear a beard in observance of his faith.

Because ACFD "fails to show that granting [Mr. Smith] an exception will put [its] goals at risk," its asserted interest is "insufficient." JA210; *Fulton*, 593 U.S. at 541–42.

2. ACFD has not shown that its denial of Mr. Smith's religious exemption is narrowly tailored.

Nor has ACFD proven that denying Mr. Smith's accommodation outright was necessary to achieve its interest. *Tandon*, 593 U.S. at 63. In fact, there are many other measures that ACFD could have taken. *See supra* Section I.B.3. For instance, given that Mr. Smith is a single administrative employee and the only impact from using an SCBA with facial hair is reduced tank life, ACFD could have allowed him to be fit tested for SCBA use with a higher level of leakage allowed than its typical fit test. It could have offered him an accommodation to wear a quarter-inch beard that would still allow him to pass the fit test as ordinarily

conducted. Or it could have allowed him to grow a beard but trim it to fit-test length in the extraordinarily rare case that he was needed for fire suppression.

Indeed, ACFD in other contexts pursues its stated objectives through exactly these kinds of flexible means, permitting exemptions like the one for emergency call-backs and lax enforcement of its grooming and SCBA policies. *See Blackhawk v. Pennsylvania*, 381 F.3d 202, 214 (3d Cir. 2004); *Lukumi*, 508 U.S. at 546–47 (holding that conduct is "not drawn in narrow terms" when it is "underinclusive . . . with respect to [] the interests that respondent has asserted"). The record also shows that ACFD's grooming policy is not uniformly applied but that the policy—and other safety protocols—are routinely underenforced for secular reasons. This nonneutral lack of enforcement is so pervasive that the Department was sanctioned for its deviations from safety protocols. JA395; *see Tenafly*, 309 F.3d at 172 (citing *Lukumi*, 508 U.S. at 546–47) (explaining that such lack of neutrality "eviscerates" any claim that the government action is narrowly tailored).

What's more, other fire, police, and military departments permit—and indeed, have been required to permit—religious accommodations to

their grooming policies. That indicates that less-restrictive means are not only available, but currently in use. *Washington v. Klem*, 497 F.3d 272, 285 (3d Cir. 2007) (noting the relevance of the practices of other similar government actors); *Holt v. Hobbs*, 574 U.S. 352, 368 (2015) (same); *see, e.g.*, *Potter*, 2007 WL 2892685, at *1–2; *Singh*, 56 F.4th at 104–05, 110 (discussing available alternatives to shaving like grooming or tying beards to shorten them, and requiring the Marine Corps to allow religious beard accommodations); *Fraternal Ord. of Police*, 170 F.3d at 360.

A jury could thus easily conclude that ACFD did not pursue the least restrictive option available. *See McTernan v. City of York*, 564 F.3d 636, 651 (3d Cir. 2009). So ACFD fails strict scrutiny on this prong as well.

C. ACFD's actions would fail even rational basis review.

Even if ACFD's policies were neutral and generally applicable, ACFD's denial of Mr. Smith's accommodation isn't even "rationally related to a legitimate government objective." *Tenafly*, 309 F.3d at 165 n.24. Thus, under any level of scrutiny, the district court should not have granted summary judgment to ACFD.

First, there is evidence that SCBAs work safely with beards. ACFD's position is that "beards and goatees of any type" so significantly threaten an SCBA's performance that allowing a single employee—in an administrative role that has been asked to wear an SCBA only once in over three decades—to grow any type of beard poses "overwhelming safety concerns" to himself, fellow firefighters, and the community. JA617; JA210. That's simply not borne out by the record. Firefighters have passed fit tests with facial hair, and Mr. Smith himself passed with nine days of growth. JA289–90. Yet, while there is no indication of a firefighter failing a fit test due to facial hair, 15 to 20 masks fail the tests every year from normal wear and tear. JA303. So a strict application of the grooming policy against Mr. Smith is not rationally related to safety.

Second, the emergency call-back exception places other firefighters with facial hair on the front lines, further undermining any rational connection between Mr. Smith's treatment and safety. Firefighters frequently grow beards—even significant beards—when off duty. JA364. When they respond to emergency call-backs with facial hair, supervisors have discretion to allow them to wear SCBAs without shaving. *Id*. It is not rational to allow firefighters responding to emergencies to do so with

facial hair while denying effectively the same exemption to Mr. Smith, who is much less likely to need to wear an SCBA.

* * *

In short, the district court erred in granting summary judgment to ACFD on Mr. Smith's First Amendment claim. ACFD must overcome strict scrutiny because it burdened—and continues to burden—Mr. Smith's faith through a policy that is neither generally applicable nor neutral. And ACFD fails strict scrutiny because it cannot show that its denial of Mr. Smith's religious exemption was narrowly tailored to serve any compelling interests. This Court should reverse the district court's erroneous grant of summary judgment so that Mr. Smith has the chance to vindicate the "bedrock constitutional right" secured to him by the First Amendment. *Fulton*, 593 U.S. at 545 (Alito, J., concurring in judgment).

IV. AFCD violated the Equal Protection Clause.

Under the Fourteenth Amendment's Equal Protection Clause, strict scrutiny is triggered when "a classification . . . jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Religious exercise is a fundamental right, and religion is a protected class under

the Equal Protection Clause. *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) ("Unquestionably, the free exercise of religion is a fundamental constitutional right."). ACFD's refusal to allow Mr. Smith to exercise his religious convictions cannot withstand strict scrutiny. *See supra* Section III(B).

The Equal Protection Clause protects against not only facially discriminatory laws, but also "discriminatory enforcement of a facially valid law." *Hill v. City of Scranton*, 411 F.3d 118, 125 (3d Cir. 2005); *see also United States v. Batchelder*, 442 U.S. 114, 125 n.9 (1979) ("The Equal Protection Clause prohibits selective enforcement 'based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'"). A plaintiff establishes a selective-enforcement claim when he shows "that he was treated differently from other similarly situated individuals, . . . based on an 'unjustifiable standard, such as . . . religion.'" *Dique v. N.J. State Police*, 603 F.3d 181, 184 n.5 (3d Cir. 2010) (quoting *Hill*, 411 F.3d at 125).

Mr. Smith's religious exercise is a fundamental right, and ACFD's policy impinges on that right in a way that triggers strict scrutiny under the Equal Protection Clause. The district court granted summary

judgment to ACFD on Mr. Smith's selective-enforcement claim because it thought that he had not identified any similarly situated individuals who were treated differently. Not so. There are two groups of employees that ACFD has treated more favorably than Mr. Smith: off-duty firefighters and previous Air Mask Technicians.

To be similarly situated, comparators must be alike "according to a relevant standard of comparison." *Stradford v. Sec'y Pa. Dep't of Corr.*, 53 F.4th 67, 74 (3d Cir. 2022). The relevant standard of comparison, in turn, is based on the government's stated justification for its treatment of the plaintiff. *DeHart v. Horn*, 390 F.3d 262, 272 (3d Cir. 2004). ACFD's stated justification was SCBA safety, so Mr. Smith is similarly situated to other ACFD employees who are alike in their need to wear an SCBA.

Mr. Smith's risk of needing to wear an SCBA is exceedingly low. Indeed, his role should almost never require him to do so. In practice, ACFD has only asked him to do so once (after he brought this litigation), and it hadn't required any Air Mask Technician to do so for over three decades before that. So Mr. Smith is similarly situated to other members of ACFD who have a very low likelihood of needing to use an SCBA—like those off duty and subject to emergency call-backs. Mr. Smith need only

show he was treated differently than this group of comparators to establish his Equal Protection claim.

He was. Off-duty firefighters are (1) allowed to wear beards, JA364; (2) allowed to respond to emergencies with their beards, JA071; (3) given the opportunity to shave upon arrival to the scene of an emergency, JA354; and (4) at times allowed to conduct emergency operations requiring SCBA masks with those beards. Mr. Smith is not allowed any of these accommodations, although he is even less likely to need to respond to an emergency than these similarly situated individuals.

Air Mask Technicians are another group of similarly situated employees who have been treated more favorably than Mr. Smith. After he initiated this litigation, Mr. Smith was called to perform fire suppression duties, unlike any other Air Mask Technician since at least 1987. JA676; JA278. When Mr. Smith refused the order because he lacked current training in fire suppression, JA663, he was suspended for 40 days, including 20 without pay. JA435. The record reveals no similar treatment of any other Air Mask Technician.

Ignoring these facts, the district court compared Mr. Smith to "all other members of the ACFD" and concluded that the grooming policy (at

least on paper) applies to all employees. JA015. As a result, the court did not grapple with the evidence that there are members of ACFD who are allowed to grow beards. It also failed to address ACFD's different treatment of Mr. Smith compared to other Air Mask Technicians.

This Court should reverse so this claim can go to trial along with Mr. Smith's other claims.

V. Mr. Smith is entitled to a preliminary injunction as his claims proceed.

At the case's outset, the district court denied Mr. Smith's request for a preliminary injunction. As a result, Mr. Smith has been forced to choose between his religious convictions and his livelihood every workday since. If this Court reverses the district court's summary judgment ruling, it should also reverse or vacate and remand the preliminary injunction denial.

Mr. Smith is entitled to a preliminary injunction because he can show: "(1) a likelihood of success on the merits; (2) that [he] will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to [ACFD]; and (4) that the public interest favors such relief." *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004).

The district court rested its denial on the first prong of the test, holding that Mr. Smith was not likely to succeed on the merits of any of his claims. But it made that decision before significant discovery in this case and without the benefit of *Groff*. At any rate, Mr. Smith has strong arguments on all his claims for the many reasons discussed above.

The district court acknowledged that because Mr. Smith "claims violations to his religious freedoms," he has met the irreparable harm element. JA032; *see Roman Cath. Diocese*, 592 U.S. at 19 ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion))). And because it is exceedingly unlikely that Mr. Smith will need to wear an SCBA during this litigation, a preliminary injunction will cause harm to neither ACFD nor the public interest.

The evidence is clear enough that the Court should reverse the preliminary injunction ruling with instructions to grant preliminary relief. But at a minimum, if this Court reverses summary judgment, it should remand this matter to the district court for reconsideration.

CONCLUSION

Our laws were written to protect plaintiffs like Mr. Smith. This Court should reverse the district court's summary judgment ruling and remand the case with instructions to grant a preliminary injunction or at least reconsider that motion in light of this Court's opinion.

Respectfully submitted,

/s/ Kayla A. Toney

KAYLA A. TONEY
Counsel of Record
VA Bar No. 93815
REBECCA R. DUMMERMUTH
FIRST LIBERTY INSTITUTE
1331 Pennsylvania Ave. NW, Ste. 1401
Washington, DC 20004
(202) 918-1554
ktoney@firstliberty.org

JEFFREY C. MATEER
DAVID J. HACKER
JUSTIN E. BUTTERFIELD
FIRST LIBERTY INSTITUTE
2001 W. Plano Pkwy, Ste. 1600
Plano, TX 75075
(972) 941-4444

JOSHUA C. MCDANIEL
PARKER W. KNIGHT III
KATHRYN F. MAHONEY
HARVARD LAW SCHOOL
RELIGIOUS FREEDOM CLINIC
6 Everett Street, Suite 5110
Cambridge, MA 02138
(617) 496-4383

Dated: April 3, 2024

COMBINED CERTIFICATIONS

I, Kayla A. Toney, hereby certify the following:

1. I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit. 3d Cir. R. 28.3(d).

2. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 12, 924 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

3. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

4. The text of the electronic and paper versions of the foregoing brief are identical.

5. A virus check was performed on this brief using Sophos Endpoint Virus Scan v.10.5.1, and no virus was detected.

6. I hereby certify that on April 3, 2024, I caused the foregoing to be electronically filed with the Clerk of Court using CM/ECF System, will send notice of such filing to all registered users. Counsel for Defendants-

Appellees is a Filing User and is served electronically by the Notice of Docket Activity.

Dated: April 3, 2024

s/ Kayla A. Toney
Kayla A. Toney