No. 415-2020

IN THE

SUPREME COURT OF THE UNITED STATES

PAN CHEN

Petitioner,

v.

TOWN OF TOUROVILLE

Respondent.

ON WRIT OF CERTIORARI

FROM THE STATE OF FUCHSBERG COURT OF APPEALS

BRIEF FOR PETITIONER

Team 14

Counsel for Petitioner

November 15, 2019

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QUESTIONS PRESENTED

I. Under the First Amendment Free Exercise Clause, may Touroville amend a fifty-year-old code to address unsubstantiated security concerns, when the code bars a Sikh from entering the municipal building without removing his religious headwear, and the code provides an exemption for medical headwear?

II. Did the Touroville town council act with animus when it removed a religious exemption from an already non-neutral code, and when the inspiration for removing the exemption was rooted in Touroville citizens' bias against religions that require religious headwear?

STATEMENT OF JURISDICTION

The State of Fuchsberg Supreme Court upheld the constitutionality of Touroville Code § 23-2 and dismissed Mr. Chen's claim against the Town of Touroville. R. at 2. The Fuchsberg Court of Appeals affirmed this decision. R. at 13. This Court granted Chen's petition for a writ of certiorari. R. at 20. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

Statement of Facts

Pan Chen, a Touroville citizen and the owner of Body Talk, a local night club, regularly attended Touroville's municipal building for consultations with town officials and litigation in the building's courtrooms related to his business. R. at 6; 26. However, on May 19, 2017, Chen was denied entry to Touroville's municipal building for his customary business-related activities when he was ordered to remove his turban during a security screening, but could not comply without violating his belief in Sikhism. R. at 6. Chen was asked by Officer Russo, the screening officer, to remove his turban in observance of a new law passed by Touroville. *Id.* Chen explained to Officer Russo that his "head covering has a significant religious purpose, and he

cannot remove it in public." *Id.* Yet, Officer Russo stated that, "he [did] not care" and that "he [was] just doing his job." *Id.* Chen left the building to avoid being arrested for noncompliance. *Id.* During the trial in this case, Chen highlighted the difficulty he and other Sikhs experience in removing and reapplying their turbans, as these turbans include several layers and may take over ten minutes to assemble. R. at 7. He also explained that, "it is an affront to [his] dignity to remove [his] turban in the presence of the public or even in a private room" because Sikhs should only remove their turbans in their homes and should only do so around their family members. *Id.*

On May 16, 2017, three days prior to Chen's denied access to the municipal building, Touroville's town council held a public hearing, in which citizens discussed amending a fifty-year-old code. R. at 4; 28. This code, cited as Chapter 23 of Touroville's Municipal Code, required the removal of headdresses, defined as "any article[s] unnatural to the wearer that fully or partially cover[] the wearer's head or face" upon entry into the municipal building. R. at 5. It granted both medical and religious exemptions. *Id.* The religious exemption specifically was contested at Touroville's public hearing. *Id.* Citizens alleged "potential threats of terrorism," complaining that Touroville granted Chen "special privileges" in allowing him to wear his "bulky turban" in the municipal building, while "real Americans" were prevented from wearing their cowboy hats. *Id.* Touroville Police Chief, Victor Coyner, and Lander County Sheriff, Carol Mackay, expressed concern that criminal syndicates would use religious exemptions as ploys to sneak contraband into the municipal building and its town court. *Id.* Yet, Chen responded in defense of his religious exemption, explaining that, "the real reason the Town contemplated the amendment to the code was that his business brought him into conflict with a town councilwoman, Lillian Flanagan, whom Mr. Pan Chen had successfully sued for a handsome

sum." *Id.* He even suggested removing his ceremonial knife and allowing officers to touch and scan his turban upon entering the municipal building. *Id.* Despite Chen's comments, Flanagan and other council members immediately passed Resolution 2, repealing the religious exemption to the fifty-year-old code, while keeping the medical exemption untouched. *Id.* The code punished non-compliance, providing that a willful violation of Chapter 23 constitutes a misdemeanor, while a negligent violation invokes civil penalties. R. at 6.

Touroville's amending of its fifty-year-old code attracted the attention of the local press. On May 17, 2017, the day after the public hearing, the Lander County Times featured a front-page photo exhibiting a speaker, Jackson, at the town council meeting in a shirt displaying "a cartoon image of a man wearing a turban with a light fuse extending out from the top of the man's turban." R. at 5. A Lander County Times article explained that Supervisor Buri and other town council members "snickered when Jackson approached the lectern." R. at 26. Debra Lax, an administrative assistant to Councilwoman Flanagan, spoke about her fear and other employees' fears of Chen. *Id.* Another resident voiced her concern that "radical terrorists are taking over America." *Id.*

Furthermore, despite the town council's policy of allowing citizens to speak for no more than two uninterrupted minutes, the audience "booed" during Chen's comments. R. at 4-5; 26. Even though Town Clerk, Paula Hubbard attempted to silence the audience, the audience "continued to cheer and jeer as people spoke" and applauded after the unanimous passing of the code. R. at 26. In reacting to his experience at the town council meeting, Chen stated that, "he has lived in the country all of his life and has never faced discrimination like this." *Id.*

Procedural History

On July 12, 2017, Chen filed a claim in the State of Fuchsberg Supreme Court for Lander County against the Town of Touroville. R. at 6. Chen's complaint sought "monetary damages"; "a declaration that the challenged code is unconstitutional either on its face or as applied"; and "an injunction against enforcement of the code." *Id.* Touroville moved to dismiss the claim on September 12, arguing that, as a public safety measure, the code was "a reasonable measure enacted to further the administration of government." *Id.* After a hearing held on November 20, 2018, the court granted Touroville's motion to dismiss the case, despite the "extensive testimony [provided] on the difficulty of removing and replacing a Sikh turban." R. at 7. The Appellate Division of the Fuchsberg Supreme Court affirmed this decision on April 18, 2019. R. at 3.

The Fuchsberg Court of Appeals affirmed the decision of the Fuchsberg Supreme Court on January 3, 2020. R. at 13. The court relied on *Employment Division v. Smith*, holding that Touroville's code was a neutral law of general applicability and failed to meet the rational basis standard of animus set forth by this Court in *Church of Lukumi Babalu Aye v. City of Hialeah* or *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*. R. at 9; 11-12. Alternatively, the court found that if the strict scrutiny standard set forth in *Sherbert v. Verner* were to be applied, Chen's constitutional challenge could not be upheld because Touroville had a compelling governmental interest in contributing to the security of its employees and visitors. R. at 9. Moreover, the court found that, because Chen voluntarily conducted business in the town courthouse and public buildings, he could not be granted a religious exemption from a neutral code. R. at 10.

Chief Justice Winston, joined by Justice Renna, in a dissenting opinion, provided that the court should reevaluate applying the experimental precedent established in *Smith*. R. at 15. The

Chief Justice also found that Touroville's code did not meet the *Smith* rational basis test, as the specific use of the word, "headdress" and the circumstances surrounding the town council meeting cast doubt on Touroville's motivations and neutrality in amending its code. R. at 16-17. Justice Winston also explicated that the code would not survive strict scrutiny because, contrary to the holding of the majority, the code burdens Chen's sincerely held religious beliefs and is not narrowly tailored to protect a compelling governmental interest. R. at 18.

Finally, the Supreme Court of the United States granted Chen's Petition for Writ of Certiorari to determine whether Touroville's repeal of the religious exemption from its code violated Chen's free exercise rights, and whether Touroville acted with animus in targeting Chen through its amended code. R. at 20.

SUMMARY OF THE ARGUMENT

The Petitioner respectfully requests that this Court reverse the decision of the State of Fuchsberg Court of Appeals for two reasons.

First, Touroville's amended code violates the Free Exercise Clause. Though this Court began applying the rational basis scrutiny standard to free exercise claims in 1990, the Petitioner respectfully requests that this Court overturn the holding in *Smith* because it adversely affects minority religions, relies on invalid law through its application of *Minersville School District v. Gobitis*, and it has been ripe for reconsideration by this Court. This Court should instead apply the strict scrutiny standard set forth in *Sherbert v. Verner*, which is still valid law.

Alternatively, if this Court chooses to apply *Smith*, Chen's free exercise claim should nevertheless trigger strict scrutiny analysis because it serves as a hybrid right with Chen's communicative activities. These activities include: 1) Chen's right to petition the government and to peaceably assemble in Touroville's municipal building and Town Court; and 2) Chen's

freedom of expression through his wearing of a Sikh turban to communicate the tenets of his faith. Chen's speech claims meet both the "independently protected constitutional protection" test and the "colorable claim" tests for hybrid rights, subjecting these claims, in addition to Chen's free exercise claim, to strict scrutiny analysis.

For a government to justify any substantial burden it imposes on an individual's sincerely held religious belief, it must demonstrate a compelling interest pursued using the least restrictive means. In amending Touroville Code § 23-2 to prevent individuals from wearing religious headdresses into Touroville's municipal building, the town substantially burdened Chen's sincerely held religious belief in Sikhism, which prohibits followers from removing their turbans in public. Touroville's alleged aim in amending its ordinance to combat terrorism fails to meet the degree requisite for a compelling governmental interest because there were no verified instances of criminal activity cited in the record. Lastly, Touroville did not apply the least restrictive means in amending its ordinance because Touroville could have implemented a pat-down policy for religious headdresses, or it could have left Chen's original religious exemption intact alongside the untouched medical exemption. Because Touroville failed to demonstrate a compelling governmental interest pursued using the least restrictive means, the Town does not meet the burden of strict scrutiny in violating Chen's free exercise of religion.

Second, the Touroville town council members acted with animus in repealing the religious exemption to Touroville's ordinance. Touroville Code § 23-2 is neither facially neutral, nor is it generally applicable, as the purpose behind amending the code was to keep Chen from accessing the municipal buildings and the court.

The Code is not facially neutral or generally applicable. The Code uses language that implies a religious meaning. When taken into context with the events leading up to the

amendment, it is apparent that the town council intended to burden religions that require headwear. Furthermore, the possibility of incurring criminal liability for not removing religious headwear points to a specific burden against religion, negating any potential neutrality. In addition, the Code is not generally applicable. By maintaining a generalized medical exemption, while barring a religious exemption, the Code forces those who practice certain religions to choose between maintaining their religious tenets and having access to the municipal buildings and courts. A blanket medical exemption significantly undermines the alleged security interest in preventing the smuggling of contraband into the building.

Finally, the council meeting in which the Code was amended was rife with blatant vitriolic attacks leveled against Chen, and the town council did nothing to attempt to maintain order and civility. This shows that the intention of the amendment was to target Chen in retaliation for Chen's winning of a lawsuit against Ms. Flanagan. The councilmembers' prejudice also demonstrates the targeting of minority religions. Lastly, neither the town council nor local law enforcement can point to any situations in which contraband was smuggled into the municipal buildings or into the Town Court to be distributed to criminal syndicates.

ARGUMENT

The town hall is the epicenter for commercial activity, equal justice under law, and the "intellectual individualism and . . . rich cultural diversities that we owe to exceptional minds." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641-42 (1943). Touroville's amending of a fifty-year-old code to restrict a citizen from accessing its municipal building and its courtrooms solely because of his diverse religious practices violates both "intellectual individualism" and the "cultural diversit[y]" attributable to the town hall. *Id.*

I. TOUROVILLE'S CODE PROHIBITING THE WEARING OF RELIGIOUS HEADDRESSES IN THE TOWN'S MUNICIPAL BUILDING VIOLATES THE FREE EXERCISE CLAUSE.

The Free Exercise Clause of the First Amendment "guarantees freedom concerning religion," preventing Congress from "restricting an individual's religious practices." U.S. Const. amend. I. Selective incorporation applies the Free Exercise Clause of the First Amendment against state and local governments through the Due Process Clause of the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 164, 166 (1968). Here, the Fourteenth Amendment applies the First Amendment against the State of Fuchsberg, indicating that the State cannot "restrict an individual's religious practices." U.S. Const. amend. I.

The State of Fuchsberg violated Chen's freedom of religion in allowing Touroville to amend Touroville Code § 23-2, barring Chen from wearing his turban in the municipal building and from engaging in business and community-based activities.

A. This Court Should Overturn *Smith* and Should Apply the *Sherbert* Strict Scrutiny Standard to Chen's Free Exercise Claim.

Since 1990, this Court has applied Employment *Division v. Smith* in deciding free exercise cases. In *Smith*, this Court provided that, "if prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Employment Div. v. Smith*, 494 U.S. 872, 878 (1990). Though the majority in *Smith* aimed to avoid the carving out of overbroad religious exemptions to neutral and generally applicable laws, it acknowledged that its holding would adversely affect minority religions. *Smith*, 494 U.S. at 888; *First Covenant Church v. City of Seattle*, 840 P.2d 174, 187 (Wash. 1992). This prediction has since been affirmed, as very few free exercise cases have been decided in favor of minority religions. *See, e.g.*, *Christian Legal Soc'y v. Martinez* , 561 U.S. 661, 697 (2010) (applying *Smith* to bar a Christian group on a law school campus from

meeting and from freely exercising its belief in only appointing people subscribing to its "Statement of Faith" to leadership roles).

It is also significant to note that two years after *Smith* was decided, *Minersville School District v. Gobitis*, "one of the cases upon which the Smith . . . court principally relied . . . was overruled." *Covenant Church*, 840 P.2d at 187. These issues have led to this Court looking for a chance to reconsider its holding in *Smith* on multiple occasions. *See Fulton v. City of Philadelphia*, 2020 U.S. LEXIS 961, *cert. granted* (entailing the belief-based hiring policies of a Catholic agency for foster parents); *see also Kennedy v. Bremerton School District*, 139 S. Ct. 634 (2019), *cert. denied* (involving a prayer led by a school football coach; the note denying certiorari specifically mentioned that *Smith* not being brought up for review weighed into the decision). The fact that *Smith* disadvantages minority religions, relies on invalid law, and has been ripe for reconsideration by this Court, suggests that the holding of the case should be overturned.

The alternative to *Smith* rational basis scrutiny for free exercise claims is the strict scrutiny standard found in *Sherbert v. Verner*. *Sherbert v. Verner*, 374 U.S. at 404, 408 (1963). *Sherbert* was not abrogated by *Smith*, and this Court relied on the strict scrutiny test set forth in *Sherbert* for decades before radically shifting to rational basis scrutiny. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 207, 208 (1972) (providing that a law prohibiting Amish families from foregoing compulsory schooling and pursuing alternative educational options in accordance with their beliefs failed to meet the burden of strict scrutiny).

Given that *Sherbert* is still valid law, that the free exercise of religion serves as a fundamental right, and that fundamental rights have historically been analyzed under the strict

scrutiny standard, this Court should apply strict scrutiny analysis to Chen's free exercise claim. *Reno v. Flores*, 507 U.S. 292, 302 (1993); *Barnette*, 319 U.S. at 624.

B. Alternatively, if This Court Chooses to Apply *Smith*, Chen's Free Exercise Claim Should Still be Subject to Strict Scrutiny Because It Serves as a Hybrid Right.

Hybrid rights claims "involve 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. Though this Court has not adopted a uniform approach for determining what comprises a successful hybrid rights challenge, the United States Courts of Appeals have applied two primary tests for assessing hybrid rights claims.

One approach adopted by the First Circuit provides that a free exercise claim must be "conjoined with an independently protected constitutional protection" to trigger analysis under the hybrid rights theory. *Brown v. Hot, Sexy, & Safer Prods.*, 68 F.3d 525, 539 (1st Cir. 1995). An "independently protected constitutional protection" is one that is "fundamental or implicit in the concept of ordered liberty." *Id.* A second approach adopted by the Ninth and Tenth Circuits explains that, "a free exercise plaintiff must make out a colorable claim that a companion right has been violated – that is, a fair probability or a likelihood, but not a certitude, of success on the merits." *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999). *Smith* provides that hybrid rights claims are subject to strict scrutiny. *Id.* at 532. Thus, the State of Fuchsberg Supreme Court erred in analyzing Touroville Code § 23-2 under rational basis scrutiny because the code's restrictions impact Chen's free exercise of religion and his freedom of speech, triggering strict scrutiny under *Smith*.

Under the First Amendment Free Speech Clause, United States citizens have the right "peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const. amend. I. Though this Court has not yet decided a case involving a hybrid rights claim between

the freedom of religion and the right to petition, it has interpreted the right to petition to include the right of access to courts. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972). Touroville's amended code denies Chen access to the Town Court, which rests inside the municipal building, unless he removes his turban in violation of his faith. R. at 5. This denial of access to the Town Court inhibits Chen's ability to engage in civil litigation on behalf of his company and his clients.

Furthermore, Touroville's amended code violates Chen's "right to peaceably assemble." This right allows for the collective gathering of individuals to petition the government. *See Edwards v. South Carolina*, 372 U.S. 229, 230, 235, 238 (1963) (determining that a South Carolina statute could not constitutionally interfere with students' right to peaceably assemble in front of a government building to protest segregation)*; see also Hague v. Comm. of Indus. Org.*, 307 U.S. 496, 501 (1939) (holding "a city ordinance forbidding the leasing of any hall, without a permit from the Chief of Police, for a public meeting at which a speaker shall advocate obstruction of the Government" unconstitutional). Obstruction of access from the municipal building bars Chen from meeting with officials in town offices for business and from attending town council meetings. R. at 4.

As an enumerated constitutional right, the freedom "peaceably to assemble, and to petition the government for a redress of grievances" is "fundamental or implicit in the concept of ordered liberty." *Brown*, 68 F.3d at 532. The violation of this fundamental right indicates success for Chen's freedom of assembly claim as an "independently protected constitutional protection" or as a "colorable claim" under the hybrid rights theory. The fulfillment of both tests under the hybrid rights theory subjects Chen's free exercise challenge to strict scrutiny analysis.

The First Amendment Free Speech Clause also protects freedom of expression. U.S. Const. amend. I. Symbolic speech, or that which possesses "an intent to convey a particularized message" and produces a high probability "that the message will be understood by those who view it," is a form of free expression protected under the First Amendment. *Texas v. Johnson*, 491 U.S. 397, 404 (1989). This Court has analyzed individuals' clothing articles as symbolic speech. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (providing that the wearing of armbands to protest the Vietnam War in violation of a school policy was protected symbolic speech due to its political message). The Maryland District Court classified religious articles specifically as symbolic speech and as exemptions from a school policy prohibiting the wearing of hats under the hybrid rights theory. *Isaacs v. Board of Educ.*, 40 F. Supp. 2d 335, 339 (D. Md. 1999). Though not binding, *Isaacs v. Board of Education* is notable due to the court's willingness to exempt religious garb, even though free speech is limited "in light of the special characteristics of the school environment." *Tinker*, 393 U.S. at 506. Lastly, in *EEOC v. Abercrombie & Fitch Stores, Inc.*, this Court inexplicitly applied the hybrid rights theory to determine that a practicing Muslim wearing a headscarf as an expression of her religion in violation of a store's "Look Policy" could not be prevented from employment. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2031 (2015).

Chen's turban meets the definition of symbolic speech. His decision to wear his turban publicly as a display of one of the five articles of the Sikh faith demonstrates an "intent to convey a particularized message." *Singh v. Carter*, 168 F. Supp. 3d 216, 220 (D.D.C. 2016); *Johnson*, 491 U.S. at 404. Chen's message was understood by Touroville citizens, considering that his daily wearing of the turban to the municipal building under his exemption to Touroville's original code spurred comments at the public hearing related to "radical religions." R. at 23.

Because the symbolic speech test is met under the First Amendment, Chen's freedom of expression claim, in conjunction with his free exercise claim, succeeds under the "independently protected constitutional protection" test for hybrid rights challenges.

Furthermore, there is "a fair probability or a likelihood . . . of success on the merits" for Chen's freedom of expression claim in the context of a municipal building, given that a school possessing a unique custodial environment, subject to stricter speech regulations, acknowledged religious headwear as expression. *Isaacs*, 40 F. Supp. 2d at 339. Should this Court find that the holding in *Isaacs* is not persuasive, the "colorable claim" test would nevertheless be fulfilled under *EEOC v. Abercrombie*, as Chen's Sikh turban possesses similar expressive qualities to a Muslim headscarf. *Abercrombie*, 135 S. Ct. at 2031. The likelihood of success for Chen's companion freedom of expression claim under both tests creates a hybrid rights claim subject to strict scrutiny analysis.

C. Touroville's Code Fails to Meet Strict Scrutiny.

When a government substantially burdens an individual's sincerely held religious belief, it must show a compelling governmental interest pursued by the least restrictive means to meet the burden of strict scrutiny. *Sherbert*, 374 U.S. at 406. Here, Touroville's amended code substantially burdens Chen's sincerely held religious belief in Sikhism by coercing him to remove his turban in public. R. at 26. Touroville's unsubstantiated claims of terrorist activity decline to meet the degree requisite to uphold a compelling governmental interest. R. at 5. Lastly, Touroville's intrusive security proceedings were not pursued using the least restrictive means when less restrictive security measures were available. R. at 6.

1. Touroville's code substantially burdens Chen's sincerely held religious belief.

The government cannot lawfully interfere with a sincerely held religious belief, or one that is maintained in good faith, even if the belief is unorthodox. *See United States v. Ballard*, 322 U.S. 78, 80, 81, 86, 88 (1944) (providing that a group of self-purporting supernatural healers maintained a good faith religious belief and could thus not be prosecuted for falsifying their beliefs to collect money).

Lower courts have expanded this Court's definition of a sincerely held religious belief maintained in good faith. For example, in *McMillan v. State*, the Court of Appeals of Maryland held that one's religious belief may not be used to "cloak . . . illegal activities and bring them under the umbrella of protection afforded by the First Amendment." *McMillan v. State*, 258 Md. 147, 153 (1970). In *McMillan,* when asked to remove his filaas, or religious headwear in the trial courtroom, McMillan verbally testified that he belonged to the Ujamma sect for two years and that "his religion compelled him to wear his filaas," *Id.* at 149. The appellate court held that McMillan's statements regarding the duration and tenets of his faith could potentially demonstrate a sincerely held religious belief. *Id.* at 154. This case is instructive because it is factually similar to Chen's case and because it supplies specific examples to support the broad definition of "good faith."

Chen, like McMillan, demonstrated a sincerely held religious belief through his verbal statements. Just as McMillan verbally explained to the trial court that his religious tenets necessitated the wearing of a filaas, Chen explained to the State of Fuchsberg Supreme Court that "a Sikh is only supposed to remove his turban in the privacy of his home and only around members of his family." *McMillan,* 258 Md. at 154; R. at 7. Chen also told Officer Russo at the security screening that "his head covering has a significant religious purpose, and he cannot

remove it in public," reiterating Chen's dedication to Sikhism. R. at 6. Chen's actions, like his verbal statements, indicate that his beliefs are sincerely held. Chen habitually wore a Sikh turban during business activities in accordance with his religious exemption to Touroville's original code. R. at 4. This consistent practice parallels the consistency in McMillan's exercise of his faith for two years, and it shows a good faith adherence to Sikhism, refuting the Town's unsupported belief that Chen used his turban to "cloak . . . illicit activities," such as concealing contraband. R. at 5; *McMillan*, 258 Md. at 153-54. Thus, Chen's sincerely held religious belief should neither be questioned nor burdened by Touroville simply because it may be unorthodox to the majority of townspeople.

Given that Chen has manifested his sincerely held religious belief through his words and through his actions, it must next be determined whether Touroville substantially burdened Chen's belief through its amended code. This Court indirectly defined "substantial burden" in *Sherbert* by explaining that South Carolina fostered an "imposition . . . of choice" for an individual between free exercise and employment benefits. *Sherbert*, 374 U.S. at 404.

The imposition of choice between free exercise and financial benefits demonstrated in *Sherbert* applies in the present case, as Touroville's code compels Chen to choose between the free exercise of his Sikh faith and his right to conduct business activities and litigation with government employees at the municipal building. R. at 5. Though the State of Fuchsberg Supreme Court cites to *United States v. Lee* in opining that Chen's "voluntary commercial activity does not allow [him] to escape the code regulating his commercial activities based on religious grounds," *Lee* is highly distinguishable from the present case. R. at 10. In *Lee*, an Amish employer's religious belief against participation in the social security system was not substantially burdened by a tax requirement because this requirement contributed to the

functioning of the collective tax system. *United States v. Lee*, 455 U.S. 252, 254, 260 (1982). Here, Chen's choice to wear a turban has a minimal impact on the town's operations. In fact, Chen's wearing of a turban while his religious exemption to Touroville's code was intact neither prevented the municipal building from executing its daily operations or from fulfilling its security interests. R. at 4. Unlike Lee, who was unhindered in conducting his business while participating in the social security program, Chen cannot sustain his local business as a night club owner without successfully communicating with town officials and maintaining access to the town's legal system. R. at 4; 26. Therefore, Touroville's imposition of a code forcing Chen to choose between wearing his turban and his financial stability substantially burdens his sincerely held religious belief.

A substantial burden to a sincerely held religious belief may also "exist[] when government action puts 'substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008). Touroville substantially pressured Chen to modify his behavior in violation of his beliefs by causing him to compromise with the town and suggest parting with his ceremonial knife, an article of the Sikh faith, in Touroville's public buildings. R. at 5; *Singh*, 168 F. Supp. 3d at 220. The code's requirement that Chen remove his turban upon entering the municipal building also places substantial pressure on Chen to modify his behavior and violate his religious beliefs because Sikhs must only remove their turbans at home in front of family members. R. at 5. Hence, Touroville's code failing to exempt Chen's headdress imposes a substantial burden on Chen's sincerely held religious belief because it is "an affront to his dignity to remove his turban in the presence of the public." R. at 7.

2. Touroville's code fails to show a compelling interest pursued by the least restrictive means.

In defining what constitutes a compelling governmental interest, this Court has determined that the question "is one of balance and degree—courts are called upon to determine when the societal interest becomes so important as to justify an incursion by the state into religious activity that is otherwise protected by the free exercise clause of the first amendment." *In re Palmer*, 120 R.I. 250, 254 (1978). A compelling governmental interest must be pursued by the least restrictive means, signifying that there is not a "less restrictive alternative" to carrying out any given regulation. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 740 (2014).

Touroville claims to possess a security interest in preventing individuals from "smuggling contraband into the [municipal] building"; however, this interest fails to meet the degree requisite for a compelling governmental interest because Touroville's claims of contraband smuggling were unsubstantiated. R. at 6. Touroville's alleged security interest was not pursued using the least restrictive means because "less restrictive alternative[s]" to headdress removal were available. R. at 5. This Court addressed security interests in *Holt v. Hobbs*, by determining that a prison's policy preventing Holt, a practicing Muslim, from growing a beard in accordance with his faith was unconstitutional. *Holt v. Hobbs*, 574 U.S. 352, 358, 369 (2015). Though the prison claimed that it had a compelling state interest in ensuring that inmates would not store contraband in their beards, this interest was not met because the Department failed to "point to any instances in which this had been done in Arkansas or elsewhere." *Id.* at 359. The prison's policy was not pursued by the least restrictive means because the prison refused to accept Holt's compromise to trim his beard and granted exemptions for medical purposes. *Id.* at 358-59.

The present case is factually similar to that of *Holt*. Just as there were unsubstantiated claims of contraband being smuggled into the Arkansas prison through beards in *Holt,* there is no evidence in the record pointing to Chen's or other citizens' smuggling of contraband into the municipal building through headwear. *Holt,* 574 U.S. at 359; R. at 6-7. The prison in *Holt* maintained heightened security interests, considering that, "the central objective of prison administration [is] safeguarding international security," yet it still failed to meet a compelling governmental interest in prohibiting Holt from exercising his religious freedom. *Bell v. Wolfish*, 441 U.S. 520, 547 (1979); *Holt*, 574 U.S. at 359. Thus, Touroville's interest in combatting speculative terrorist activities in a building not subject to the same international security regulations as a prison fails to meet the degree requisite for a compelling governmental interest. *In re Palmer*, 120 R.I. at 254.

Touroville, like the prison in *Holt,* also failed to fulfill the least restrictive means requirement of strict scrutiny by exempting medical conditions from its headwear policy. *Holt*, 574 U.S. at 358. The least restrictive alternative, as underscored by Judge Lakeland in his dissent, would have been for Touroville to keep its religious exemption intact. R. at 14 (Lakeland, J., dissenting). This alternative is feasible because the medical exemption from the original code remains intact, even though medical devices "are often more substantial and more cumbersome than religious garb" and are equally as capable of storing contraband as are religious headdresses. *Id.* Alternatively, the Town could have "allowed police officers and sheriff's deputies to touch and scan [Chen's] headdress." R. at 5. This proposal aligns with TSA's pat-down policy, which prevents individuals in a heightened security interstate travel

setting from removing their headwear unless an alarm is sounded[1]. Even when an alarm is sounded, people wearing religious head coverings are taken to a private, rather than a public screening area. Touroville had numerous options that would have been less intrusive to Chen's faith than coercing him to remove his turban; however, the Town selected the most onerous option to Chen, while simultaneously exempting other groups in pursuing its security initiative.

For the foregoing reasons, Touroville's code fails to meet the burden of strict scrutiny under both a hybrid rights approach and under the direct application of *Sherbert.* Alternatively, Touroville acted with animus in amending its code, failing to meet the rational basis scrutiny standard set forth in *Smith.*

II. THE TOUROVILLE TOWN COUNCIL ACTED WITH ANIMUS WHEN IT REMOVED ITS RELIGIOUS HEADDRESS EXEMPTION.

Animus must be closely examined due to its insidious and sinister nature. Since the adoption of *Masterpiece* and *Lukumi,* legislators and policy makers have been effectively put on notice that their own overt and extreme displays of bias during public hearings may reveal their hostile intentions directed at religion. Animus rears its head most when prejudice and vitriol not only go unhindered and unchecked during the decision-making process, but when those in power tacitly endorse those very sentiments. Religious freedom is a bedrock constitutional principle. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2094 (2019). As such, the courts must stand sentinel whenever religious liberty is threatened.

[1] Transportation Security Administration (March 13 2020, 7:50 PM) https://www.tsa.gov/travel/frequently-asked-questions/may-i-keep-head-coverings-and-other-religious-cultural-or

A. Touroville's Code is Not Facially Neutral.

"The right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'" *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990). Furthermore, "facial neutrality is not determinative . . . [o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Church of Lukumi Babalu Aye*, 508 U.S. at 534. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context. *Id.* at 533. In *Lukumi*, this Court determined that a law made to "protect the public health and prevent cruelty to animals" could be "consistent with the claim of facial discrimination" because it implemented the terms, "ritual" and "sacrifice," which directly related to the Santeria faith's practice of animal sacrifice. *Id.* at 534, 538. While these terms also possessed secular meanings according to Webster's Third New International Dictionary, it was clear from the context that they were intended to target the Santeria faith. *Id.* at 534.

The term "headdress" carries a primarily religious connotation, and may refer to a Sikh turban, Jewish yarmulke, or Islamic hijab, in the same way that the terms, "ritual" and "sacrifice" referred to the Santeria religion in *Lukumi*. A "headdress" is delineated as "an often-elaborate covering for the head" or "a decorative covering for the head."[2] Webster's Third New International Dictionary online provides two visual illustrations of headdresses, both appearing ceremonial or religious in nature. One illustration depicts a Native American headdress, and the other depicts an Egyptian headdress. *Id.* When contrasted with a more secular and inclusive description, such as "headwear," the intention underlying the word "headdress" in Touroville's

[2] *Headdress*, Merriam-Webster (Feb. 2, 2020, 7:24 PM), https://www.merriam-webster.com/dictionary/headdress.

code becomes even more suspect, especially considering that the code was amended on the same day that citizens launched vitriolic attacks toward Chen. R. at 5. Touroville's amending of its code to remove "special privileges" for religion while keeping the medical exemption intact based on racist comments made at the town council meeting indicate animus by suggesting that anyone wearing a turban should be suspected of terrorism and other serious crimes. R. at 4-5. The animus exhibited by the town council in its amending of Touroville Code § 23-2 demonstrates that the code lacks facial neutrality.

In *Locke v. Davey*, this Court analyzed facial neutrality by weighing the penalties of violating the law against the severity of the religious practice. *Locke v. Davey*, 540 U.S. 712, 720 (2004). In conducting this analysis, this Court determined that a program denying state scholarship funds to a student pursuing a theology degree was a "far milder" punishment than the burdensome civil and criminal penalties imposed on the Santeria followers for ritualistic animal sacrifice in *Lukumi*. *Id.* at 715, 720. Thus, the statute in *Locke* implementing the program was facially neutral and not "presumptively unconstitutional" because unlike the *Lukumi* followers, who could be held criminally and civilly liable for practicing their tenets within Hialeah, the student could still practice his religion unencumbered by government interference. *Id*. at 720. Here, the penalties imposed by Touroville's code for noncompliance point to a lack of facial neutrality. Touroville Code §23-12 imposes misdemeanors for willful violations of the revised code and civil penalties for merely negligent violations of the revised code, just as the code in *Lukumi* imposed burdensome civil and criminal penalties for animal sacrifice. R. at 21. Chen's potential legal liability for the simple act of wearing an article of his faith in the municipal building points to a more severe situation than the student's situation in *Locke*, in which the denial of scholarship funds did not amount to a free exercise violation. *Singh*, 168 F. Supp. 3d at

220; *Locke*, 540 U.S. at 720. Hence, Touroville's code, like the code in *Lukumi* and unlike the statute in *Locke*, is facially discriminatory because the penalties imposed by Touroville are more burdensome to Chen than are Chen's religious practices to the town.

B. Touroville's Code is Not Generally Applicable.

"A law or regulation is generally applicable when it encompasses religious and secular populations and only prohibits free exercise of religion as an 'incidental effect' of the valid law." *Smith*, 494 U.S. at 890. *Lukumi* and *Smith* spoke in terms of individualized exceptions; however, "it is clear from those decisions that the Court's concern was the prospect of the government's deciding that secular motivations are more important than religious motivations." *FOP Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999). This concern is increased when the government creates categorical exceptions based on secular objections and not for religious exceptions. *Id.* Therefore, creating a medical exemption and refusing to maintain a religious exemption is "sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*." *Id.*

In *Newark Lodge*, the police department implemented a policy barring officers from growing beards. Though the department carved out a medical exemption from the policy, it refused to extend a religious exemption and failed to provide substantial justification for its decision. *Id.* at 360. By making a categorical secular exemption, the department left itself open to the suspicion that the law was not facially neutral. *Id.* In the present case, there is a similar categorical secular exemption for medical purposes. The court in *Newark* underscored that in *Smith*, there was an exemption in the law related to prescriptions; however, this "prescription" exemption was distinct from the law's "medical" exemptions. *Id.* at 366. Here, the language of Touroville's code revolves around a "medical purpose," rather than a "prescription purpose." R.

at 21. Further, the code remains ambiguous as to what qualifies as a "legitimate, verifiable medical purpose," as it remains silent as to any application. *Id.*

Touroville claims that, "it modified its code to address the security concerns of the Lander County Sheriff and the police chief who testified that the town needed uniform security measures to ensure the safety of the town's employees and visitors." R. at 6. While these security interests may be served by prohibiting people with headwear from entering the municipal building, the council significantly undermines its interests by offering a medical exemption. Furthermore, the council's failure to offer justification for the medical exemption triggers the same suspicion of animus that was displayed in *Newark*. There is no valid reason that the code can maintain a medical exception while rejecting a religious exception. Therefore, this code is not generally applicable.

C. The Town Council's Actions During the Touroville Town Council Meeting and the Council's Intent in Amending the Code Show Animus Toward Chen and Toward His Religion.

Courts are not limited to the official actions of the town and can look to the historical background, specific series of events leading to the policy in question, and legislative history, including contemporaneous statements by the council members, in assessing animus. *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n.*, 138 S. Ct. 1719, 1731 (2018).

1. The council acted without justification when amending Touroville Code § 23-2.

In *Bill Johnson's Restaurants v. NLRB*, this Court found that retaliatory animus existed where a petitioner lacked a reasonable basis upon which to assert that its suit had merit. *Bill Johnson's Rests. v. NLRB*, 461 U.S. 731 at 736 (1983). While *Bill Johnson's* was about a labor dispute, it sheds light on how and when animus can be identified. In *Bill Johnson's*, an employee was fired, presumably for trying to organize a labor union, and the owners of the restaurant filed

a lawsuit against several of their former employees for libel after the employees picketed the restaurant. *Id.* at 733-34. The owners of the restaurant claimed that the picketing employees were leveling false claims against the managers and owners of the restaurant and sought an injunction against the picketing. *Id.* Following the filing of the owners' lawsuit, the employees filed another complaint with the EEOC. *Id.* The NLRB found that the owners' claims were unsubstantiated and were filed out of retaliatory animus. *Id.* at 736. The employees claim for retaliation was added to the list of other employment complaints already existing. *Id.* While this Court held the NLRB's halting of the owner's lawsuit to be improper, it also endorsed the NLRB's position that bringing an unsubstantiated claim to interfere with the employees' rights was retaliatory animus. *Id.* at 744-49. In the present case, the Sheriff and Chief of Police stated that their concern was over the smuggling of contraband into the municipal buildings. R. at 24. Despite these concerns, there was no evidence presented in the record indicating that contraband had, in fact, been smuggled into the municipal buildings via headwear.

Councilmember Flanagan made the motion to amend the code after the attacks leveled against Chen at the public hearing. R. at 25. Ms. Flanagan's motion is especially suspect because Chen had just won a lawsuit against her for a "handsome sum." *Id.* at 5. The absence of proof concerning contraband and the contentious history between Chen and Flanagan indicates that Flanagan and the council acted with retaliatory animus in amending Touroville Code § 23-2.

2. The council tacitly endorsed the citizens' attacks against Chen and his religion during the council meeting**.**

The town council's inconsistent approach to maintaining control over the proceedings not only shows its recognition that the citizens of Touroville were out of order, but it also indicates that the council agreed with the outrageous statements presented by the citizens. Furthermore, Debra Lax did hold an official position with the city and had a personal and a professional

connection to Councilmember Flanagan, which again indicates contention with Mr. Chen. R. at 26. While not as overt as the animus demonstrated in *Masterpiece* or *Lukumi*, the evidence that this amendment was passed with animus is compelling.

a. The town council failed to maintain order and civility during the council meeting.

Speech can be restricted when it has low social value and is clearly outweighed by the "social interest of order and morality." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992). City council meetings are limited public forums, and content-based restrictions are permissible so long as they are viewpoint-neutral. *Norse v. City of Santa Cruz*, 629 F.3d 966, 975 (9th Cir. 2010); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001).

Timmon v. Wood illustrates a case in which several town councilmembers interrupted and redirected a speaker who spoke with far less animosity than that displayed in the Touroville council meeting, but also ended her time for comment early after several personal attacks were levied against another citizen. *Timmon v. Wood*, 633 F. Supp. 2d 453, 457 (W.D. Mich. 2008). Specifically, Timmon made a comment at one meeting that the preceding speaker was "old school" and needed to "stay home," eventually telling one of the council members to "mind [her] own business." *Id.* at 457. At a different meeting, Timmon called the mayor of the city a "carpetbagger," accused one of the city clerks of violating the Michigan State Constitution for mentioning that he was married to another man, and called one of the councilmembers a "cheater" for allegedly keeping polling open later than normal during that councilmember's election. *Id.* The court in *Timmon* granted summary judgment in favor of the town council for restricting Timmon's speech when she became disruptive to the proceedings. *Id.* at 465. *Timmon* shows that when a citizen is speaking out of order, a town council can redirect her speech,

especially against personal attacks, and can even end the speaker's time early if she continues to disregard order and propriety.

In the present case, the town council claims to uphold a policy against interrupting speakers, yet the clerk interrupted Chen during his speaking time in order to quiet the crowd, showing exceptions to this policy and an interest in maintaining some level of order. R. at 26. Despite this break from protocol, the council failed to curtail or temper any of the virulent speech demonstrated by the citizens in favor of the amended code. As reported by Mr. Buchannan, the crowd continued to cheer and jeer throughout the meeting as people spoke. *Id.* Comments ranged from how terrorists are taking over America, to Ms. Lax's comments stating that she and her coworkers feared Chen. *Id.* Five of the seven speakers at the meeting, aside from the new security representative and Chen himself, levied personal and categorical attacks against Chen. *Id.* at 23-24. The failure of the town council to intervene during these personal and categorical attacks demonstrates a blatant disregard for the council's own interest in maintaining order.

b. The town council joined the disparaging attacks levied against Chen.

When Mr. Jackson approached the podium, he wore a t-shirt depicting a caricature of Mr. Chen with a turban concealing a bomb, causing Mr. Buri and other council members to "snicker" in disdain for Chen. *Id.* at 26. Finally, rather than simply sitting quietly after the outrageous remarks made by various Touroville citizens, the town council members thanked each of them for their comments, and then immediately and unanimously passed the proposed amendment. *Id.* These actions show a compelling, personal bias against Mr. Chen on the part of the council members.

Touroville's code is neither facially neutral nor generally applicable. Furthermore, the animus with which the Touroville town council acted when adopting the amendment shows that

Touroville's code was designed to attack anyone practicing a religion that employs headwear as part of its tenets. Accordingly, this Court should either require the reinstitution of the religious exemption or find the Touroville Code § 23-2 unconstitutional as applied.

CONCLUSION

The Petitioner respectfully requests that this Court reverse the holding of the Fuchsberg Court of Appeals, and to hold the amended code unconstitutional, because Touroville did not maintain a compelling state interest pursued by the least restrictive means in amending Touroville Code § 23-2 and because it acted with animus in amending the code.