No. 415-2020

IN THE

Supreme Court of the United States

APRIL TERM, 2020

PAN CHEN,
PETITIONER

V.

TOWN OF TOUROVILLE,
RESPONDENT.

ON WRIT OF CERTIORARI FROM THE STATE OF FUCHSBERG COURT OF APPEALS

BRIEF FOR THE RESPONDENT

TEAM SEVEN

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Questions Presented

1. Whether the right to free exercise of religion is infringed upon by an ordinance that requires individuals to temporarily remove headdresses before entering a municipal building.
2. Whether the public interest served by Touroville's ordinance, to protect the public and public employees from potential violence, outweighs the Petitioner's religious interest not to remove his headdress.

Jurisdictional Statement

The judgment of the Appellate Division, Second Department affirming the State of Fuchsberg Supreme Court was entered on January 3, 2020, and this Court granted Appellant's timely petition for Writ of Certiorari. The Court has jurisdiction over this case under 28 U.S.C. §1257(a).

Statement of the Case

Petitioner, Pan Chen, is a businessman from Touroville, Fuchsberg, who visits the town municipal building to conduct business. On May 19, 2017, Petitioner entered the town's municipal building, but was denied access through security when he refused to comply with a town ordinance that required all headdresses to be searched prior to entering the building.

I. Statement of the Facts

On May 16, 2017, after a public hearing, the Touroville Town Council adopted an ordinance which amended Chapter 23 of the Touroville Code. R. at 4. The ordinance repealed an exemption that allowed headdresses worn in compliance with a genuine religious faith not to be searched. *Id*. During the comment period, before voting took place, the public voiced their opinions on the ordinance. *Id*. At all public hearings, Touroville grants two minutes each for residents who wish to address the Town Council. *Id*. The Town Council does not engage in questions or comments. R. at 4-5.

During the comment period on May 16, 2017, members of the public voiced their opinions on the ordinance. R. at 4. The members of the Town Council did not address these comments, nor did they make comments about religion. R. at 11-12. The only public employees who spoke during the comment period were the Chief of the Town's Police Department, County Sheriff, and the Town Attorney. R. at 24-25. Each of these individuals spoke about their concern that criminals could sneak concealed weapons or contraband into the municipal building through unsearched headdresses. *Id.*

Touroville residents, including Petitioner, were allowed to speak during the comment period. R. at 23. Individuals voiced their concerns over the religious exemption, including the

growing threat of terrorism, discrimination against those who wear headdresses for nonreligious purposes, and fear for their safety when entering the town municipal building. R. at 23-24. Again, no one from the Town Council engaged with any of the speakers. R. at 11-12. Instead, they let the individuals voice their concerns, and then they moved on to the next speaker. *Id.*

Subsequently, on May 19, 2017, upon entrance to the municipal building, Petitioner refused to remove his headdress in accordance with the recently enacted ordinance and was denied entry. R. at 6. Petitioner had attended the public hearing just days prior and knew that the ordinance had been passed. R. at 23. However, he chose to ignore the ordinance and tried to enter the municipal building anyway. R. at 6.

On July 12, 2017, Petitioner filed a Complaint under 42 U.S.C. 1983 in the State of Fuchsberg Supreme Court against the Town of Touroville regarding his having been denied access to the municipal building. *Id.* After a hearing held on November 20, 2018, the trial court dismissed the claim. R. at 2. The court's order was affirmed by the Appellate Division of the Fuchsberg Supreme Court on April 18, 2019. R. at 3.

II. Procedural History

The United States Supreme Court has jurisdiction over the matter because the claims asserted by Pan Chen ("Petitioner") arise under the laws of Touroville, a town in the State of Fuchsberg. Specifically, these claims fall under Touroville, Fuchsberg Municipal Code § 23-2. The Supreme Court of Fuchsberg granted the Motion to Dismiss, propounded by defendants, the Town of Touroville, in an order entered on November 20, 2018, by the Honorable Marion A. Perone. R. at 2. Petitioner appealed this Order to the Appellate Division, Second Department of the State of Fuchsberg Supreme Court, which affirmed the decision of the lower court in a decision issued April 19, 2019, by Gabriela D. Martinez, Clerk of the Court. R. at 3. Petitioner then appealed this Order to the State of Fuchsberg Court of Appeals, which entered an Opinion and Order finding for the defendants written by the Honorable Francis, Reardon, Sorensen, and Haskell, JJ on January 3, 2020. R. at 4. The Honorable Lakeland, however, concurred in part, but dissented in the judgment. The Honorable Winston, joined by the Honorable Renna, dissented. R. at 13.

Summary of Argument

As the Town of Touroville's ordinance does not facially or covertly target any specific religion or religion in general, and because it does not infringe on any other fundamental right nor impose a substantial burden on the free exercise of religion, it is constitutional. This Court should affirm the decision of the Appellate Department, Second Division.

First, Touroville's ordinance is subject to rational review. The ordinance is facially neutral and applies to anyone who enters the courthouse. It does not target any specific religion or religion in general. Also, the neutral ordinance does not mask any government ill will or hostility towards any religion. Under the Free Exercise Clause, laws that are neutral and generally applicable may be applied to religiously motivated conduct without compelling justification.

Second, there is no additional constitutional right, such as freedom of speech or equal protection, upon which the ordinance is infringing. Therefore, it would survive a "hybrid" analysis. The act of wearing a headdress in accordance with religious obligations does not qualify as conduct that communicates and is, therefore, not speech. However, even if it was speech, the Touroville ordinance is content-neutral. Moreover, the ordinance does not violate Petitioner's equal protection rights. While the ordinance provides an exemption to individuals for verifiable medical purposes, those without a verifiable medical condition are not a suspect or quasi-suspect class. Therefore, the ordinance should be subject to the rational basis test and held constitutional. Since there is no other fundamental right that is being infringed, it is not a hybrid situation. Rather, it is solely a free exercise claim unconnected with any other fundamental right.

Third, the ordinance would survive strict scrutiny under the *Sherbert* test. Any burden the ordinance places on the petitioner is incidental, not substantial. There are numerous state interests related to courthouse administration that case law recognizes, and public safety inside a courthouse

is certainly a compelling one. Requiring the temporary removal of headdresses for security inspection is the least restrictive means of advancing Touroville's compelling interest in public safety. Therefore, the law is constitutional.

Argument

I. Touroville's ordinance is subject to the *Smith* test and does not violate the Free Exercise Clause of the First Amendment.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. Const. Amend. I. The two clauses contained therein, the Establishment Clause and the Free Exercise Clause, have been made applicable to the States through incorporation by the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The clauses "require the state to be neutral in its relations with groups of religious believers and non-believers." *Everson v. Board of Education*, 330 U.S. 1, 18 (1947).

"The free exercise of religion is the right to believe and profess whatever religious doctrine one desires." *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990). The First Amendment excludes "governmental regulation of religious beliefs as such." *Sherbert v. Verner,* 374 U.S. 398, 402 (1963). But the "exercise of religion" often involves more than belief and profession of a religion, including the performance of, or abstention from, physical acts. *Smith,* 497 U.S. at 877. Examples of these acts include attending services, taking communion, as well as abstaining from particular food, drink, and activities. *Id.* "It would doubtless be unconstitutional, for example, to ban the casting of 'statues that are to be used for worship purposes,' or to prohibit bowing down before a golden calf." *Id.* at 877-878.

A. The changes to the Touroville Code are neutral and generally applicable.

In *Smith*, this Court held that a "neutral, generally applicable regulatory law" may be applied to religiously motivated conduct without compelling justification. 494 U.S. at 880. A law is "neutral" if it has a secular purpose that the State is free to regulate, and neither advances nor inhibits religion. *Id.* at 887; *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 392 (1990). A law is "generally applicable" if it applies neutrally to all members of society. *Smith*, 494 U.S. at 879-81; *Jimmy Swaggart Ministries*, 493 U.S. at 391-92. Furthermore, "[a] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993) (citing *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990)). However, "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Id*. at 546. Thus, a law "failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id*. at 531-532. "The minimum requirement of neutrality is that a law not discriminate on its face." *Id*. at 533.

In *Smith*, two Native American employees who regularly ingested peyote as part of their religious practice were terminated from their positions and subsequently denied unemployment benefits for having violated a state criminal statute, as the use of peyote was illegal in Oregon. *Id.* at 660. The Court held that the law denying the employees' unemployment benefits was constitutional. *Id.* at 674. The Court reasoned that the criminal statute was not directly targeted to Native Americans, but rather to all citizens of Oregon. *Id.* at 672.

The Touroville Code is structured like the Oregon Criminal Code outlawing peyote. No language in the Touroville Code suggests the town is targeting Sikhs or any other religious group.

Therefore, rational review is appropriate. The changes made to Chapter 23 of Touroville's municipal code removed the religious exemption for wearing headdresses while passing through security. Touroville, Fuchsberg, Municipal Code § 23-2. The code has a secular purpose, namely providing for the safety and security of the town's municipal building.

Although Oxford English Dictionary defines a headdress as "[a]n ornamental covering or band for the head, especially one worn on ceremonial occasions," the town of Touroville defines it differently. Tourville's municipal code defines a headdress as "any article unnatural to the wearer that fully or partially covers the wearer's head or face unless the said article is worn for a legitimate, verifiable medical purpose." Touroville, Fuchsberg, Municipal Code § 23-2. The Touroville definition for "headdress" includes much more than the Oxford English Dictionary definition. In Touroville's definition, it is evident that the legislature wanted to include more items, such as hats, knit caps, ski masks, helmets, and other articles individuals may wear on their heads. Also, a legislature is under no pressure to use dictionary definitions in lawmaking. Different dictionaries define words differently. Moreover, definitions change over time. Regardless, a dictionary should only be used by a reviewing court when a term is undefined. *See Davis v. Farmers Ins. Co. of Ariz.,* 2006–NMCA–099, ¶ 7 (quoting *Battishill v. Farmers Alliance Ins. Co.,* 2006–NMSC–004, ¶ 8.) By providing its own definition section in the code, Touroville prevents any confusion as to the meaning of the word "headdress."

Touroville's municipal code is a non-discriminatory, broadly applicable regulation that protects judges, lawyers, the public, and other government personnel from potential violence or terrorist attacks carried out using smuggled contraband. The municipal code's increase in security regulations does not target one religion or religion in general. Instead, the code is secular and applies to all individuals who enter the courthouse. No language in the code carries even the

slightest religious connotation; this was the finding of the Appellate Division, Second Department and is supported by the language in the municipal code itself.

B. Touroville's municipal ordinance is free of subtle departures from neutrality and does not covertly suppress religious beliefs.

The Free Exercise Clause protects against government hostility when it is both masked and obvious. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 534. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Walz v. Tax Comm'n of New York City,* 397 U.S. 664, 696 (1970). When looking to the circumstances surrounding the enactment of an ordinance, including the language used, connotations alone are not enough to invalidate a law. There must be something more than a religious connotation to wording of the ordinance. *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 533-534 (1993).

In *Church of the Lukumi Babalu Aye, Inc.,* the Court held that the banning of the central element of a religious service was the motivation for passing an ordinance against animal sacrifice. 508 U.S. at 545. The City of Hialeah, Florida, issued a resolution that stated "residents and citizens of the City of Hialeah have expressed their concern that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety," and "reiterate[d]" the city's commitment to prohibit "any and all [such] acts of any and all religious groups." *Id.* at 535. The Court held that this language was evidence that the city of Hialeah improperly targeted a religious group. *Id.* at 545. The Court also found that the language of the laws in *Lukumi* was not intended to address safety concerns, but rather to prevent a particular religious practice. *Id.* at 535. No such language exists in the Touroville municipal code.

Here, the Touroville municipal code does not ban anything at all, let alone the central element of a religious practice. Individuals are permitted to wear headdresses inside and outside

of the municipal building. Individuals are merely required to briefly remove headdresses prior to entering the building for the purpose of a safety search. Also, unlike the City of Hialeah, Touroville did not create a new law. Rather, it amended an existing ordinance. Whereas the City of Hialeah targeted a specific religious practice, the changes Touroville made to its code apply equally to all.

The instant case is further distinguishable from Lukumi in respect to the public meeting held to discuss the amendment. Unlike the remarks made by council members of the City of Hialeah, none of the Touroville council members used any disparaging language whatsoever at the town council meeting held on May 16, 2016 during which the amendment to the municipal code was discussed. In fact, none of the council members made any comments at all. The only city employees who made comments were the police chief, sheriff, and city attorney. In their statements, none of those individuals made any reference to religious groups, individuals, or religion in general. Sheriff Mackay spoke about the need for a uniform security policy to secure the municipal building. Town Attorney Daniel Collins said the amendment to the code was legal because its purpose was to provide for the security of the municipal building. Likewise, Police Chief Coyner stated there was a need to secure the municipal building, and that he feared people were smuggling contraband inside their headdresses.

The Touroville definition of the word "headdress" differs from the Oxford English Dictionary definition and, therefore, has no religious connotation. However, even if there were a religious connotation, that would not be enough to invalidate the ordinance.

II. The hybrid-rights exception does not apply because this is not a situation in which a free exercise claim is coupled with an additional constitutional protection that has been violated.

"The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press." *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 881 (1990). This is known as a "hybrid situation." *Id.* The instant case "does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity…" *Id.* Though this is not a hybrid situation at all, Petitioner may attempt to invoke a hybrid situation by raising a claim pertaining to either freedom of speech or equal protection.

A. Petitioner's conduct is not speech.

Chapter 23 of the Code of the Town of Touroville does not violate the First Amendment right to freedom of speech. Though the Supreme Court has previously opined that "[i]t is possible to find some kernel of expression in almost every activity a person undertakes…", it also acknowledged that "…such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). Courts apply a two-pronged test to determine whether conduct is protected "symbolic speech": (1) whether "an intent to convey a particularized message was present"; and (2) whether "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Spence v. Washington,* 418 U.S. 405, 409 (1974).

The instant case is similar to *Neinast v. Board of Trustees of Columbus Metropolitan Library*, in which a plaintiff argued that his going barefoot in the city library conveyed a message

to others and was, therefore, symbolic speech protected by the First Amendment. 190 F.Supp.2d 1040, 1045 (S.D.Ohio Mar 27, 2002). The court held that the plaintiff failed to satisfy the first prong of the *Spence* test because his conduct did "not indicate an intent to convey a particularized message." *Id.* The court also held that the plaintiff failed to satisfy the second prong of the *Spence* test "because his conduct occurred in a library rather than a political setting, and [therefore] there [was] not a great likelihood that other Library patrons [would] understand his purported message." *Id.*

Here, to assert a freedom of speech claim, Petitioner must maintain that his wearing a headdress is intended to convey a particularized message with there being a great likelihood that the message will be understood by those who view it. It cannot be said that Petitioner's wearing a headdress is intended to convey a particularized message to others. Rather, Petitioner alleges in his complaint that the tenants of his religion require him to wear a turban, even calling the practice a "religious obligation." Accordingly, Petitioner does not wear his headdress to express a message to others, but rather to fulfill a religious obligation prescribed by his deity. Additionally, it cannot be said that there is a great likelihood that the message would be understood by municipal building patrons generally. Specifically, the instant case involves Petitioner's wearing a headdress in a municipal building, rather than a religious setting. Individuals do not generally patronize municipal buildings to communicate religious messages. Therefore, there is not a great likelihood that his message would be understood in the surrounding circumstances. Consequently, Petitioner's conduct is not protected symbolic speech under the First Amendment.

B. The ordinance does not violate the First Amendment right to free speech.

The First Amendment provides in part that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. When this Court decides whether a law infringes upon an individual right to free speech, the law in question must be free of four defects. First, the law must not be unduly vague. *See Coats v. Cincinnati*, 402 U.S. 611 (1971). Second, the law must not be substantially overbroad. *See Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981). Third, the law must not discriminate on the basis of subject matter. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). Finally, the law must discriminate on the basis of viewpoint. *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). The Touroville ordinance does not suffer from any of these four defects and is, therefore, constitutionally valid.

In *Coats v. Cincinnati,* a city ordinance made it a criminal offense for three or more persons to assemble on a sidewalk and "annoy" any passersby. 402 U.S. 611 (1971). The ordinance specified no standard of conduct that would be considered "annoying", but rather was unduly vague, leaving the standard open for subjective interpretation. The Court held that the ordinance was unconstitutional, reasoning that "men of common intelligence must necessarily guess at its meaning." *Id.* Unlike the city ordinance in *Coates,* the Touroville ordinance is clear in its definition of what constitutes a headdress and men of common intelligence would understand its meeting.

In *Schad v. Borough of Mt. Ephraim*, an ordinance banned all live entertainment within its city limits. 452 U.S. at 61. The defendant opened an adult bookstore, and later installed coin-operated devices allowing customers to watch live nude dancing. *Id.* The live entertainment services were deemed to be in violation of the city's commercial zoning ordinance. *Id.* The ordinance contained an exhaustive list of permissible commercial uses, but did not include live

entertainment. *Id.* This Court held that the ordinance prohibited speech that would otherwise have been protected under the First Amendment and it was, therefore, substantially overbroad. *Id.* at 62.

Touroville's ordinance is strikingly different from the ordinance in *Schad,* as it does not restrict other speech that is protected under the First Amendment. In fact, Touroville's ordinance is not prohibiting any speech at all. The ordinance in *Schad* banned *all* live entertainment. Here, Touroville's ordinance does not ban all headdresses. Instead, it merely requires that headdresses be momentarily taken off and searched prior to entering the municipal building. Further, individuals may still wear headdresses before and after entering the municipal building.

In *City of Cincinnati v. Discovery Network, Inc.*, the city granted permits to third-party companies enabling them to place on public property freestanding newsracks for the distribution of free magazines consisting primarily of advertisements. 507 U.S. at 410. Subsequently, the city revoked the permits in the interests of safety and aesthetics of the city's streets and sidewalks. *Id.* The city did so on the grounds that magazines were "commercial handbills" that were already prohibited by an existing city ordinance. *Id.* The Court held that the ordinance violated the First Amendment. *Id.* at 429-430. It reasoned that, since newsracks containing advertisements and those containing newspapers are similarly situated to one another, the ordinance suffered from subject matter discrimination. *Id.*

Here, the Touroville ordinance requires all headdresses to be searched, except those worn for a verifiable medical purpose. Unlike the similarly situated nature of newsracks containing advertisements and those containing newspapers, headdresses worn for religious purposes are not similarly situated to those worn for medical purposes. The Touroville ordinance does not discriminate against certain subject matter like the ordinance in *City of Cincinnati* did and, therefore, satisfies subject matter discrimination test.

The First Amendment prohibits the government from banning certain viewpoints. For example, in *R.A.V. v. City of St. Paul,* this Court struck down St. Paul's bias-motivated crime ordinance and reversed the conviction of a teenager for burning a cross on the lawn of an African-American family. 505 U.S. at 380. The Court held that the ordinance violated the First Amendment protection of freedom of speech because it proscribed the expression of particular ideas. *Id.* at 393. The Court reasoned that the ordinance went "…beyond mere content discrimination to actual viewpoint discrimination." *Id.* at 391.

The instant case is unlike *R.A.V.* Here, Touroville's ordinance does not favor one viewpoint over another. Rather, all headdresses worn for nonmedical purposes are subject to search. Individuals are treated equally, regardless of their religious practice or expression of any kind. Touroville's ordinance does not promote a certain viewpoint, nor does it prohibit another viewpoint. Therefore, the ordinance does not suffer from viewpoint discrimination and is constitutionally valid.

The government has the power to impose limits on free speech in regard to its time, place, and manner of delivery. As noted in *Clark* v. *Community for Creative Non-Violence,* "... [time, place, and manner] restrictions ... are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." 468 U.S. 288, 288 (1984). Touroville's ordinance is an example of a proper time, place, and manner regulation. Individuals are only asked to remove their headdresses for a short period of time prior to entering the municipal building, and there is ample opportunity to wear a headdress before and after the brief security screening. Accordingly, the ordinance is narrowly

tailored to serve the substantial governmental interest of providing for the health, safety, and welfare of the public.

C. The ordinance does not violate the Equal Protection Clause of the Fourteenth Amendment.

The Fourteenth Amendment provides, in relevant part, that "[n]o State shall [deny] to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. However, "[t]he Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer v. Evans*, 517 U.S. 620, 631, (1996) (citing *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 271–272 (1979)). Thus, it follows that "if a law neither burdens a fundamental right nor targets a suspect class," then the legislative classification will be upheld "so long as it bears a rational relation to some legitimate end." *Id.* (citing *Heller v. Doe,* 509 U.S. 312, 319–320 (1993)). In other words, "...a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Id.* at 632 (citing *New Orleans v. Dukes,* 427 U.S. 297 (1976)).

In *Romer*, Colorado voters adopted an amendment to their state constitution that effectively prohibited anti-discrimination statutes designed to protect persons based on their sexual orientation. 517 U.S. at 620. The Court held that the amendment failed to satisfy the rational basis standard of review and was, therefore, unconstitutional. *Id.* at 632. The Court reasoned, in part, that the amendment was a violation of the Equal Protection Clause for two main reasons. *Id.* First, the amendment imposed "...a broad and undifferentiated disability on a single named group…" *Id.* Specifically, the amendment targeted a minority based upon sexual orientation. *Id.* at 635. Second, the amendment lacked "...a rational relationship to legitimate state interests." *Id*. at 632.

Specifically, the amendment appeared to be born of pure animus toward gays and lesbians, as there was no readily apparent rational relationship to a legitimate governmental purpose. *Id.* at 635.

The instant case is strikingly different from *Romer*. First, where the amendment at issue in *Romer* imposed "a broad and undifferentiated disability on a single named group," the ordinance at issue here absolutely does not. Rather, the ordinance mandates, without reference to any group to which an individual might belong, that *any* individual must remove his or her headdress prior to entering a building in which Touroville maintains public offices. Further, where the amendment in *Romer* encompassed a facially discriminatory classification of gays and lesbians, the ordinance in the instant case makes no such classification. While the ordinance does provide an exemption for a headdress worn for a legitimate, verifiable medical purposes, persons requiring medical exemptions are not at all similarly situated to individuals who are seeking a religious exemption. Specifically, the ordinance requires that individuals wearing a medical headdress have a *verifiable* medical purpose for doing so, which readily implies that some type of medical verification, or documentation, is required. One can easily deduce that an individual who is able to provide medical documentation for his or her medical headdress, as required by the ordinance, is wearing the headdress under the direction of a physician or other appropriate medical professional. Such an exemption is critical, as Touroville employees, particularly police officers, do not have the training or experience necessary to make determinations as to who is able to remove a certain type of medical headdress versus who is not. Imposing such responsibility on the town's police officers would impose an inordinate degree of liability upon Touroville and its officers and place citizens with special medical needs at unnecessary risk. Second, the ordinance has a clear, rational relationship to legitimate governmental interests. Safety is paramount to Touroville and its operations. The ordinance was originally designed to promote safety. The ordinance, as amended,

was designed to maximize safety. For the foregoing reasons, medical exemptions must be provided. Any other exemptions, however, are unnecessary and have been eliminated in an effort to maximize safety.

III. Touroville's ordinance would survive the Sherbert test because it does not impose a substantial burden on religious exercise and is the least restrictive means of advancing a compelling governmental interest.

Although the ordinance challenged here is neutral and generally applicable, and therefore subject to the *Smith* test, it would also survive strict scrutiny. A law burdening religious practice that is not neutral or of general application must undergo the most rigorous of scrutiny. In order to satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "interests of the highest order" and must be narrowly tailored in pursuit of those interests. *McDaniel v. Paty*, 435 U.S., 615, 628, (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)). "A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *See Church of the Lukumi Babalu Aye, Inc.,* 508 U.S. 546.

This Court first held in *Sherbert v. Verner* that strict scrutiny must be used in evaluating laws challenged on free exercise grounds. 374 U.S. 398 (1963). In that case, the Court held unconstitutional South Carolina's denial of unemployment benefits to an employee who was discharged for refusing to work on her Sabbath. The Court reasoned, in part, that South Carolina failed to prove that the challenged regulation was the least restrictive means of preventing fraudulent unemployment claims. *Id*. at 407. Thus, the test which emerged from *Sherbert* is "a balancing test that [takes] into account whether the challenged action impose[s] a substantial burden on the practice of religion, and if it [does], whether it [is] needed to serve a compelling government interest." *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014) at 693.

It is well established that the First Amendment's guarantee of free exercise of religion is not absolute. *See Reynolds v. United States*, 98 U.S. 145 (1878); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Braunfeld v. Brown*, 366 U.S. 599 (1961). Accordingly, both this Court and lower federal courts have held in various contexts that religious headdresses can be restricted, including for purposes of uniformity of military dress, *see Goldman v. Weinberger*, 475 U.S. 503 (1986); safety of military operations, *see Sherwood v. Brown*, 619 F.2d 47 (9th Cir. 1980); and workplace safety, *see Kalsi v. New York City Transit Authority*, 62 F.Supp.2d 745 (E.D.N.Y. Dec. 22, 1998). The common law right of access to judicial records asserted here by Petitioner is also not absolute. S*ee Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). Accordingly, members of the public wishing to enter a courthouse may be required to submit to a security inspection, which includes the temporary removal of religious headdresses. *See Spanks-El v. Finley*, (N.D. Ill. Apr. 30, 1987), *aff'd,* 845 F.2d 1023 (7th Cir. 1988).

However, state interests in courthouses need not be quite so compelling as public safety alone. Indeed, using the *Sherbert* test, federal courts have found the state's interest in efficient, orderly, and fair administration of courthouse justice to outweigh incidental burdens on religious exercise. *See U.S. v. Fisher*, 571 F.Supp. 1236 (S.D.N.Y. Oct. 4, 1983); *Smilow v. United States*, 465 F.2d 802 (2d Cir. 1972); *Hoyt v. Lewin*, 444 F.Supp.2d 258 (S.D.N.Y. Aug. 13, 2006). Moreover, this Court has "never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation." *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 883 (1990). The Touroville ordinance is distinct from those cases because it imposes an incidental burden on religious practice in furtherance of a compelling government interest. Therefore, if this Court were to apply the *Sherbert* test, Touroville's ordinance would survive.

A. Requiring the temporary removal of headdresses for a security check at the entrance to a municipal building is an incidental burden on religious exercise, not a substantial one.

The burden Touroville's ordinance poses to Petitioner's religious practice meets this Court's definition of an incidental burden which does not violate the Free Exercise Clause. Incidental governmental burdens upon religious practice are those "which may interfere with the practice of certain religions, but which have no tendency to coerce individuals into acting contrary to their religious beliefs." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 440 (1988). While the requirement that an individual's headdress be removed for the purposes of a security check may interfere with the practices of certain religions, it has no tendency to coerce action of any kind. Therefore, it is an incidental burden on religious exercise, not a substantial one, and does not violate the Free Exercise Clause.

Incidental burdens on religious practice do not violate the Free Exercise Clause. For example, in *Lyng*, this Court held that the Free Exercise Clause does not prohibit the government from timber harvesting and road construction on public lands considered sacred by Native Americans. 485 U.S at 440. Although the petitioners in *Lyng* demonstrated that the unspoiled character of the affected lands was essential to the practice of their religion, this Court found that "the affected individuals...would not be coerced by the Government's action into violating their religious beliefs; nor would the governmental action penalize the exercise of religious rights by denying religious adherents an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id.* Thus, "[e]ven assuming that the Government's actions here will virtually destroy the Indians' ability to practice their religion..." those actions did not violate the Free Exercise Clause. *Id*.

The ordinance challenged here meets the *Lyng* definition of an incidental burden. It does not come anywhere near "destroy[ing] Petitioner's ability to practice [his] religion." *Id.* It does not

coerce Petitioner, or anyone, into "violating their religious beliefs," nor does it "penalize the exercise of religious rights by denying religious adherents an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id.* All individuals who wish to enter the municipal building must undergo the exact same security check as Petitioner. Therefore, like the governmental action challenged in *Lyng*, the ordinance challenged here poses an incidental burden which "[does] not require the government to bring forward a compelling justification for its otherwise lawful actions." *Id.* For this reason alone, the ordinance would survive strict scrutiny under the *Sherbert* test.

Petitioner contends that removing and replacing a Sikh turban is more inconvenient than removing and replacing other forms of religious headdress, because a Sikh turban takes approximately ten minutes to remove and replace. However, "[t]he Free Exercise Clause is not a guarantee against inconvenience. Instead, it prevents the government from interfering with the exercise of religious beliefs or practices that, by their nature, are fundamental to the particular adherent's religious sect." *Kelly v. Municipal Court of Marion County*, 852 F.Supp. 724,731 (S.D. Ind., 1994) *aff'd sub nom. Kelly v. Mun. Courts of Marion Cty., Ind.*, 97 F.3d 902 (7th Cir. 1996). Moreover, this Court has "cautioned repeatedly and in many different contexts...that courts must not presume to determine...the plausibility of a religious claim." *Smith*, 494 U.S. at 887. The Court cannot take inconvenience to Petitioner's religious practice into account here without presuming to determine the plausibility of his religious claim.

The extent of inconvenience to Petitioner's religious practice is also inapposite here because, if a particular headdress is fundamental to the practice of a religion, then removing and replacing it imposes an incidental burden whether its removal and replacement takes ten minutes, or ten seconds—and a compelling government interest in courthouse safety can outweigh such a

burden regardless. For example, in *Spanks-El v. Finley*, a Muslim-American challenged a county courthouse requirement that he remove his fez for a security check. (N.D. Ill. Apr. 30, 1987), *aff'd,* 845 F.2d 1023 (7th Cir. 1988). A fez is a type of religious headdress which is easier to remove and replace than a Sikh turban. *Id.* at *1. The court found it significant that the challenged security requirement would not have deprived plaintiff of his fez the entire time he was present in the courthouse, and that he was able to resume wearing it inside the courthouse subsequent to the security check. *Id*. at *3. Although "it [was] clear from the record that the security search consisted of a temporary removal of his hat at a security checkpoint for purposes of visually detecting whether the hat contained a security risk", the court did not measure the burden to the plaintiff's religious practice in terms of the brevity of the search or the comparatively limited inconvenience it imposed. *Id.* at *2. Rather, in finding for the defendants on a motion for summary judgment, the court, consistent with the *Sherbert* test, balanced the presumed burden to the plaintiff's religious practice against the state's asserted interest in courthouse safety. *Id.*

Courthouses may also limit religious practice to certain areas of the building without forbidding such practice entirely within the courthouse. In *Kelly v. Municipal Court of Marion County*, a Jehovah's Witness terminated from employment as a bailiff in a county courthouse brought a free exercise claim against his former employer, on the grounds that he had been forbidden from evangelizing at work and from reading his Bible in a public reception area. 852 F. Supp. at 724. The court denied the free exercise claim. *Id.* at 733. In applying the *Sherbert* test, the court noted that the petitioner was allowed to read his Bible in a break room, and "remained free to study the Bible and to evangelize while not working." *Sherbert.* 354 U.S. at 731. For those reasons, the court held that "the Plaintiff's [religious] interest...cannot be deemed 'substantial' in a constitutional sense." *Id*. at 732.

Here, the petitioner's religious interest also cannot be deemed substantial in a constitutional sense. Under the challenged ordinance, the petitioner's religious practice, like the one in *Kelly*, is not forbidden inside the courthouse, and the petitioner remains completely free to observe this practice anywhere else and at any other time. Moreover, like in *Spanks-El*, the petitioner here may resume wearing his headdress elsewhere within the municipal building, provided he undergoes a security check at the entrance like every other member of the public without a verifiable medical exemption. Such a burden on Petitioner's religious practice is incidental by definition. Thus, the ordinance challenged here would survive the *Sherbert* test, because incidental burdens on religious practice "do not require the government to bring forward a compelling justification." *Lyng*, 485 U.S. at 440.

B. The ordinance is the least restrictive means necessary to advance Touroville's compelling interest in public safety in its municipal building.

"The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such." *Sherbert*, 374 U.S. at 402. However, individual conduct, "even when religiously based, [is] often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare…" *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972). Accordingly, "so long as courts have a compelling interest in maintaining, as far as possible, security from danger, the state is entitled to ask that persons seeking courthouse access submit to a brief inspection of those personal articles that reasonably pose a security risk." *Spanks-El,* at *3 (N.D. Ill. Apr. 30, 1987). Maintaining security from danger in municipal buildings is obviously a compelling governmental interest, and because the ordinance challenged here goes no further than subjecting "those personal articles that reasonably pose a security risk" to inspection, it is the least restrictive means of advancing that interest.

The ordinance here is also narrowly tailored because less restrictive means would be ineffective. For example, the petitioner in *Spanks-El* pointed to alternative means of inspecting his fez, such as magnetometers and hand-scanners routinely used in airports and other courthouses. However, the court concluded that "the availability of these techniques surely does not mean they are as effective in detecting breaches of courthouse security as a court might prefer, and is entitled to expect, a security technique to be." *Id*, at *3. The court also noted that, "it is readily apparent that not all security-breaching items, such as a plastic gun or bomb, are detectable by a magnetometer. Furthermore, while a hand-scanner might be useful in detecting the presence of some objects under a hat, it simply cannot provide courthouse deputies with the same assurance of safety that comes with a direct, visual inspection of the interior of a hat." *Id*. The same reasoning applies here, both to Touroville's municipal building, and to headdresses in general. Such articles "reasonably pose a security risk," and direct, visual inspection is the least restrictive means of effectively advancing Touroville's compelling interest in preventing such risks. Moreover, when *Spanks-El* was decided in 1987, there were no 3-D printers capable of home production of plastic guns, nor were blueprints for constructing a plastic gun readily available on the internet, as they are today. Thus, Touroville's interest here is all the more compelling.

Additionally, government interests in courthouses need not be so compelling as the immediate physical safety of the public. Using the *Sherbert* test, federal courts have also found the state's interest in efficient administration of courthouse justice to outweigh considerable burdens on religious practice. For example, in *Fisher*, the court denied a request by one of eight co-defendants in a criminal trial to adjourn on Fridays so that he could attend Muslim prayer services. *Fisher*, 571 F.Supp at 1241. Because of the large number of defendants, and the possibility that the trial could last for months, the court found "[a] compelling interest—one based on both

efficiency and fairness to all concerned—in using all available days of the week for trial of this case." *Id.* Moreover, the court found that "there is no less restrictive alternative by which it can serve this interest and at the same time accommodate [the defendant's] religious beliefs." *Id*. Although the burden on religious practice here is clearly no greater than in *Fisher*, Touroville's interest in public safety is clearly more compelling than trial calendar administration.

The ordinance challenged here involves a lesser burden on religious practice, in furtherance of a more compelling government interest, than any law this Court has struck down using the *Sherbert* test. First, the burden imposed by Touroville's ordinance is clearly a lesser one than the total loss of livelihood caused by the denial of unemployment relief. Second, the government interest advanced by the challenged ordinance, namely the immediate physical safety of members of the public inside a municipal building, is clearly more compelling than the prevention of fraudulent, religion-based unemployment claims. Thus, because Touroville's ordinance is the least restrictive means of advancing an eminently compelling governmental interest, it would survive strict scrutiny under the *Sherbert* test.

Conclusion

Because the Town of Touroville's ordinance does not facially or covertly target any religion or religion in general, and because it does not infringe on any other fundamental right nor impose a substantial burden on the free exercise of religion, it is constitutional. This Court should affirm the decision of the Appellate Department, Second Division.