

**IN THE
SUPREME COURT OF THE UNITED STATES**

Lynn Doxey,

Petitioner,

v.

Waterford Police Department, et al.,

Respondents.

**ORDER GRANTING PETITION FOR
WRIT OF CERTIORARI**

November 13, 2009

On Petition for Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit in the above captioned case:

The petition is hereby GRANTED on the following questions:

1. Do the Religion Clauses of the First Amendment prohibit a city's police department from co-sponsoring, and requiring its officers to attend, community meetings that regularly include a prayer?
2. Does Title VII of the Civil Rights Act of 1964 or the Free Exercise Clause protect the right of an on-duty police officer to wear a headscarf as required by her religious beliefs?

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

No. 08 -- 2178

LYNN DOXEY,

Appellant,

v.

WATERFORD POLICE DEPARTMENT, AND BRENT DERUM, IN HIS OFFICIAL CAPACITY
AS CHIEF, WATERFORD POLICE DEPARTMENT

Appellees.

Appeal from the United States District Court
For the District of Centerville

Before: Javier Gonzalez, Brad Jolie, and Kathryn Cruise, Circuit Judges

Opinion by Circuit Judge Gonzalez

I. INTRODUCTION

This case involves a complaint by a police officer, Lynn Doxey, concerning the degree to which a police department may regulate her activities and dress. Doxey claims that the Waterford Police Department (WPD) violated the Constitution by co-sponsoring a community meeting at which prayers were part of the regular agenda; by requiring her to attend such meetings, including the portion at which prayers were spoken; and by prohibiting her while on duty from wearing a headscarf, as required by her religious beliefs.

The facts of this case are not in dispute. Waterford is one of the fastest growing communities in the state. Since the 1980s, Waterford has experienced a significant increase of Arab immigrants, the vast majority of whom are practicing Muslims. Unfortunately, relations between the minority Arab population and the majority population have been tense. These tensions have only increased since September 11, 2001, with the town of Waterford gaining notoriety in the state for its residents' hostile attitude toward and distrust of Arab-Americans. And on February 1, 2005, vandals destroyed a civic monument dedicated to Waterford service members who have served in armed conflicts. Although no one has been convicted for the crime, press accounts suggest that radical Muslims, angry about this country's policies toward the Middle East, were responsible.

Officer Lynn Doxey worked as an officer in the Waterford Police Department from October 1998 to April 2005. Doxey, a practicing Muslim, always wore a religious headscarf (a khimar or hijab) while in uniform and on duty. Wearing a headscarf, Doxey avers, is an obligation required by the Qur'an.¹ The headscarf, worn underneath her department-issued cap, covered the top of Doxey's head underneath the cap, a small part of her forehead, and the back of Doxey's neck. For nearly seven years Doxey wore the hijab with no apparent resistance from her superiors. In her affidavit to the trial court, which was undisputed by the Police Department, Doxey claimed that her supervisors had always been aware that Doxey wore a hijab on duty, but prior to 2005, said nothing to her that would indicate their disapproval of the scarf.

As a part of her official duties, Doxey was required to attend monthly Community Beat Meetings pursuant to Waterford City Ordinance §112. (J.A. 1.) These meetings are hosted by the WPD and conducted by a resident beat facilitator (a community member) and an officer

¹ The Qur'an instructs Muslim men and women to dress modestly. *See* Qur'an 33:58-59 ("Enjoin your wives, your daughters, and the wives of true believers that they should case their outer garments over their persons."). Wearing a hijab is an expression of obedience to that commandment.

assigned to that beat. The City of Waterford is divided into ten patrol areas – beats – with six to eight officers assigned to each beat. Officers patrol the same area for at least a year, allowing them to become familiar with the neighborhood.

The WPD requires that at least two officers and a sergeant attend the monthly meeting. Gang unit officers, tactical officers, detectives, and any other members of the Police Department may attend meetings as appropriate.

The beat officer and the resident beat facilitator, with input from the rest of the community, design the agenda of each meeting. The meetings are intended to allow officers and the community to engage in joint problem solving, to inform the community about police operations in the area, and to create a greater sense of community in each beat. (J.A. 1.) All residents, business owners, and representatives from local schools, churches and neighborhood organizations are encouraged to attend in order to have the most effective meeting possible. The beat officer establishes the agenda and ensures that the meeting is conducted efficiently.

The WPD does not provide a site for the meetings; rather, it encourages resident facilitators to choose a location within the community at which to hold the meeting. The Department advises the resident facilitators to choose locations that have convenient parking, are generally accessible to all persons including those with disabilities, and are large enough to comfortably accommodate all participants.

The meetings in Officer Doxey's Green Valley beat are facilitated by Officer Oscar Poe and Pastor Calvin Bowie. The Green Valley meetings are held on the first Monday of every month at 7:30 pm. In even numbered months, the meeting is held at the Waterford Church of Christ, a non-denominational Christian church where Mr. Bowie is pastor. In odd numbered months, the meeting is held at the Green Valley Community Recreation Center, a facility with no

religious identity or affiliation. The average attendance per month is around 50, of which 5-10 typically are juveniles, ages 15-18, who are interested in the monthly agenda. Occasionally, a parent will bring a younger child.

Pastor Bowie became the resident beat facilitator in October 2004. He suggested to Officer Poe that since the Green Valley community was very religious, it might be a good idea to begin each meeting with a short prayer, followed by a moment of silent reflection. Officer Poe agreed, stating that as long as all the community members felt comfortable with that, it was “Okay by me.” Officer Poe and Pastor Bowie agreed that Pastor Bowie would offer the invocation. Neither discussed the content of the prayers.

Officer Doxey attended the October 2004 meeting. Pastor Bowie took notes and gave the following prayer at the beginning of the meeting:

Let us pray. Lord God, Our Father, we entreat you this evening to bestow upon us your wisdom and understanding as we meet together as members of this community. Help us to understand the needs of our neighbors. Help us to be wise as we seek to improve conditions in our community. Help those who feel the need to resort to theft or selling drugs to find an honest way of gaining their daily bread. Help them and us to replace bad habits with good. Protect the good officers, as they patrol in our community and in our city, from accident and from those that would do them harm. Forgive us our trespasses and help us to forgive those who offend us. Help us to love and serve others. In the sacred name of Jesus, we pray, Amen.

(J.A. 2.)

Following the October meeting, Officer Doxey spoke to the Chief of Police, Brent Derum, about the prayer. She told him it made her “uncomfortable,” to which Derum replied, “Sorry about that.” No further action was taken by either party at that time.

In January 2005, after three more beat meetings had opened with similar though not identical prayers by Pastor Bowie,² Officer Doxey again approached Derum and requested that the prayer and moment of silence be removed from the beat meeting agenda. Derum explained that he did not know who put them on the agenda, but that he would “take care of it.”

The meeting on February 7, 2005 again opened with a prayer, as follows:

Let us pray. Tonight we are meeting to discuss very important issues regarding our community. Help us to understand one another and communicate with one another in an effective and respectful manner. Where there are disagreements, help us find the best answer. Please open our minds and our hearts so that we may receive your spirit and your wisdom. Help us recognize those who stand in need of our help. Help us know how best to assist those in need. We thank you for the wonderful men and women of our police force and are glad that they take the time to meet with us. Help us to maximize our time in order to make the most of the opportunity this meeting provides. We ask you to help those who feel the need to turn to crime to turn to you instead, for we know that the road is narrow. Help them to find the better path. Amen.

(J.A. 6.)³

As soon as the prayer began, Officer Doxey left the room, returning after the prayer and moment of silence concluded. After the meeting, several community members approached Officer Poe and complained that it was disrespectful and offensive that the Muslim officer (referring to Officer Doxey) left during the prayer. Officer Poe noted these complaints and reported them to Chief Derum.

The following day, Officer Doxey approached Chief Derum in his office and requested that the prayer be removed from the agenda of future meetings. Doxey called the prayers “inappropriate” and told Derum that she was upset that Bowie was “bringing religion into the meetings.” Derum told Officer Doxey that the prayer was important to the community members,

² The prayers at issue in this litigation are set out in the agenda of the beat meetings from September 2004 through February 2005. (J.A. 2-6.) The October and January prayers explicitly invoke the name of Jesus Christ; the other prayers in the record do not.

³ The text of the prayer was included in the agenda handed out at each meeting, and some attendees joined Pastor Bowie in reading the prayer, but he did not request their participation.

and that her decision to leave the room during the prayer “reflected poorly on the Police Department” and was “unacceptable” because it had upset some of the community attendees.

Just days after their meeting, the Department issued a new uniform policy for its police officers. (J.A. 7.) The policy was made available to all officers and staff, along with a notice stating that the policy would take effect on March 1, 2005. (J.A. 7.) General Order No. 180(G) stated that “personal ornaments shall not be worn by an officer, nor affixed to any part of the officer’s uniform, unless the Chief of Police approves in advance and in writing.” (J.A. 8.) The order stated that the new policy was prompted by the Department’s concern for officer safety, department cohesion, and the maintenance of a professional image. (J.A. 7.)

In late February, Doxey met with Chief Derum to express her concern about the new uniform policy, and to request written approval to wear her scarf while on duty. Derum said that he would “think about it” and get back to her before the effective date of the policy. Derum failed to discuss the issue with Doxey before March 1, 2005.

On March 1, 2005, Doxey reported for duty wearing her hijab under her cap, as usual. Derum called Doxey into his office and said that wearing the scarf while in uniform and on duty violated the Department’s new policy. Doxey requested an exemption to the uniform policy, but Derum denied the request. Derum stated that his reason for enforcing the Order and refusing an exemption was “for your safety, and for the safety of the public.” Derum expressed concern that the hijab might give a detained person something to grab in a physical altercation with Doxey. He also stated that the Department wanted to convey a sense of uniformity to engender greater public respect and trust. Derum explained that the public’s concern was evident in the “many complaints” the Department had received about Doxey’s hijab. If Doxey continued to wear the hijab while on duty, Derum declared, she would be subject to discipline for insubordination.

The following day, March 2, Doxey arrived to work wearing her hijab. Derum confronted her immediately. An argument followed in which Doxey defended her wearing of the hijab for religious reasons, and noted that at least one other officer wore a flag-pin on his lapel in apparent violation of the order. Derum stated that her wearing of the hijab was “clearly different.” Doxey asked whether she could be transferred to a desk position where safety would not be an issue. Derum refused, and Doxey immediately left the station. Derum subsequently brought formal disciplinary proceedings against her, resulting in a three-week unpaid suspension. Doxey did not return to work after the suspension and was ultimately discharged in early April.

Doxey appealed the discipline through local administrative offices and was denied any relief. Doxey also filed a complaint with the EEOC, which declined to take action and gave Doxey the right to sue. Doxey brought suit against the WPD and Chief Derum under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, alleging that the Department violated her civil rights by failing to accommodate her religious requirement to wear the hijab. She sought damages, reinstatement to her position with the WPD, and an injunction against further interference with her right to wear a hijab while on duty.

Additionally, Doxey sued under 42 U.S.C. § 1983, alleging that the WPD had violated her constitutional right to the free exercise of religion, as guaranteed by the First Amendment, and had violated the Establishment Clause by allowing, participating in, and instigating prayer at community beat meetings that she was required to attend. She requested that the court enjoin the WPD from holding any prayers at the meetings, or in the alternative, if she were reinstated, from requiring her attendance at the portion of the meetings in which the prayers are given.

After both Doxey and both defendants filed cross-motions for summary judgment, the district court rejected Doxey's claims, and granted the defendants' motions for summary judgment on all counts. Doxey subsequently appealed to this Court.

II. ANALYSIS

The district court had jurisdiction under 28 U.S.C. § 1331. As this case is an appeal of the district court's final judgment, we have jurisdiction pursuant to 28 U.S.C. § 1291. Because this appeal concerns the district court's grant of summary judgment and there are no material facts in dispute, we review the legal issues *de novo*. See *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 466 n.10 (1992).

A. Doxey's Claims Regarding Prayer at Community Meetings

Doxey argues that the prayers offered at the beat meetings constitute impermissible government speech in violation of the Establishment Clause and should therefore be enjoined. In the alternative, Doxey argues that even if the prayers do not violate the Establishment Clause, the WPD compelled her attendance during the prayers, thereby offending her free exercise rights. We agree with Doxey that the prayers constitute government speech. We disagree, however, that this speech violates the Establishment Clause or Doxey's free exercise rights.

1. The Prayers are Government Speech

We must first consider whether the speech at issue is even attributable to the state. In *Turner v. City Council of Fredericksburg*, 534 F.3d 352 (4th Cir. 2008), Justice O'Connor, sitting on a Fourth Circuit panel by designation, outlined four considerations to guide courts in determining whether the government is speaking:

- (1) the central "purpose" of the program in which the speech in question occurs;
- (2) the degree of "editorial control" exercised by the government or private entities over the content of the speech; (3) the identity of the "literal speaker"; and

(4) whether the government or the private entity bears the “ultimate responsibility” for the content of the speech.

Id. at 354. The application of these factors persuades us that the speech at issue is governmental.

The first factor suggests that the prayer is government speech. The Community Beat Meetings are held pursuant to a city ordinance. The Chief of Police, who is a city employee, administers the Community Beat Meeting program, and the meetings are run by a WPD officer with the assistance of a community member. The meetings bear the mark of official government action.

The second factor, the degree of editorial control retained by the municipality, further suggests that the speech was governmental. A WPD representative, Officer Poe, collaborates with only one other individual to create the content of the meetings, including the prayer. Doxey’s own actions speak to this issue as well. The fact that she went to Chief Derum to seek removal of the prayers shows that she believed that the WPD had the authority to exclude the prayers from the meetings.

We next inquire into the status of the person who literally spoke. Pastor Bowie is not an official government representative. Taken alone, this factor suggests that the prayer is not government speech. However, a speaker need not be an official representative for the speech to be governmental. *See Simpson v. Chesterfield County Bd. of Sup’rs*, 404 F.3d 276, 288 (4th Cir. 2005) (holding that prayers offered by volunteer clergy were attributable to the government).

The fourth factor reveals that the WPD bears the ultimate responsibility for the speech. Waterford City Ordinance §112(A)(3) states that: “This section shall be administered and implemented by the Chief of Police.” (J.A. 1.) Furthermore, the beat officer is responsible for establishing the agenda and ensuring that the meeting is effective. Thus, the ultimate

responsibility for the meetings lies with the WPD, the Chief of Police, and the Waterford City Council, rather than any private actor.

We conclude that Pastor Bowie's prayers constitute government speech.

2. The Prayers Are Permissible Government Speech

Not all government speech touching on matters of religion violates the Constitution. *See Pleasant Grove City v. Summum*, 129 S.Ct. 1125, 1134 (2009). However, the Establishment Clause forbids government speech endorsing a particular religious view. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000). There are two lines of cases from which we might draw principles useful to our determination of this issue – those involving prayer in schools and those having to do with legislative prayer.

a. **The Relevant Analogy**

Similar to the Sixth Circuit in *Coles v. Cleveland Bd. of Educ.*, we must choose which line of Supreme Court precedent to apply. 171 F.3d 369, 371 (6th Cir. 1999) (holding that prayer at school board meeting was more analogous to school prayer than legislative prayer).

Two concerns are present in the school-prayer cases: (1) the persons subject to the prayers are young students, and (2) the nature of the meetings is such that young people would feel coerced to participate in a government-sponsored religious activity. *See Lee v. Weisman*, 505 U.S. 577, 591-98 (1992); *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 310-13. The state violates the Establishment Clause when it forces an impressionable student to participate in a religious exercise sponsored by the government. *Lee*, 505 U.S. at 599.

These concerns are not present in cases involving legislative prayer. In *Marsh v. Chambers*, for example, the Supreme Court held that the invocations given before the sessions of the Nebraska state legislature did not violate the Establishment Clause in part because members

of the legislature are adults “presumably not readily susceptible to religious indoctrination.” 463 U.S. 783, 792 (1983) (internal quotations omitted).

In this case, the analogy to legislative prayer, however imperfect, is better than an analogy to school prayer. Like most attendees, Doxey is an adult. She is presumably not susceptible to religious indoctrination or peer pressure like a young student is. *Compare Lee*, 505 U.S. at 593 *with Marsh*, 463 U.S. at 792. The heightened concern that comes with protecting the freedoms of those in elementary and secondary schools is not present in this situation. Although the record reveals that several minors attended each meeting, either as interested members of the community or as part of a family group, their attendance was never required. Nor, of course, were they required or even invited to participate in uttering the prayer.

Second, even though Doxey is required to attend the meetings as a part of her employment, “coercion” is usually only a concern where youth are involved. *See Lee*, 505 U.S. at 593. Although some items discussed at the meetings involved schools and juveniles, the community meetings here took place in an mature atmosphere where adults discussed crime, violence, and drug abuse. Thus, these meetings were more akin to the meeting of a deliberative body where discussion and recommendations about public welfare are made. *Cf. Coles*, 171 F.3d at 375.

Because the context of the Community Beat Meetings appears most similar to a legislative setting, we reject Doxey’s contention that any and all prayers offered in the meetings would be unconstitutional. Now we must determine whether the nature of Pastor Bowie’s prayers renders them unconstitutional. In doing so, we draw heavily from the factors used by courts when considering the permissibility of specific legislative prayers.

b. Bowie's Prayers Do Not Violate the Establishment Clause

We find “no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.” *Marsh*, 463 U.S. at 794-95. We therefore hold that Bowie’s prayers do not violate the Establishment Clause.

In making a similar determination, the Court in *Marsh* considered the chaplain’s religious affiliation, his tenure, and the sectarian or non-sectarian nature of the invocation. *Marsh*, 463 U.S. at 792-95; *Pelphrey*, 547 F.3d at 1271. The court ultimately concluded that the prayers were in the Judeo-Christian tradition, were non-sectarian, and were not violative of the First Amendment. *Marsh*, 463 U.S. at 793.

It can be difficult for courts to draw the line between sectarian and non-sectarian prayers. *Pelphrey*, 547 F.3d at 1272. This is why the majority in *Marsh* states, “it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.” *Marsh*, 463 U.S. at 795. The content is of no concern to us unless there is an “indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.” *Id.* at 794-95. What is prohibited is a more aggressive form of proselytizing that seeks to convert citizens. *Snyder*, 159 F.3d at 1234 n.10. Passing references to sect-specific ideas of deity need not lead to unconstitutional prayer. In *Marsh*, the fact that the prayers were non-sectarian is highlighted, but the opinion does not rely on the non-sectarian character of the prayers in upholding them as constitutional. *Marsh*, 463 U.S. at 793 n.14; *Pelphrey*, 547 F.3d at 1271. Only legislative prayers that seek to convert citizens or could be construed as demonstrating that one religious group is preferred over another are prohibited. *Cf. County of Allegheny v. ACLU*, 492 U.S. 573, 605 (1989).

In the instant case, the prayers at the Community Beat Meetings were always offered by Pastor Calvin Bowie, the pastor of a non-denominational Christian church in which a beat meeting is held every other month. Pastor Bowie is also the community facilitator for the Green Valley area beat.

Although the October and January prayers were explicitly offered in the name of Jesus, the other prayers were more general and non-sectarian. (*See* J.A. 2-6.) These prayers, viewed cumulatively, do not appear to proselytize or to advance or disparage any particular religion. There is no language in any prayer calling for anyone in attendance to change his or her religious views.

Doxey argues that the mere mention of Jesus Christ in the October and January prayers advances the Christian religion and is unconstitutional under *Marsh*. *See Wynne v. Town of Great Falls*, 376 F.3d 292, 300-02 (4th Cir. 2004) (holding that invocations which specifically call on Jesus Christ are not constitutionally acceptable). The Fourth Circuit defines “advance” as “simply to forward, further or promote” the belief. *Id.* at 300. Admittedly, all legislative prayers indicate some preference for a specific religion and for religion at the expense of the non-religious. *Snyder*, 159 F.3d at 1234 n.10. Legislative prayer is religious speech, and will therefore always contain, explicitly or implicitly, a religious message that “forwards, furthers, or promotes” some version of religion. *Id.* However, the mere fact that a person uses a specific name for God does not mean that the religion is advanced in a way that would violate the Establishment Clause and *Marsh*.

Taken as a whole, Pastor Bowie’s prayers did not exploit the prayer opportunity to further the Christian faith or disparage another. *See Pelphrey*, 547 F.3d at 1277-78. Furthermore, Pastor Bowie’s prayers were not “overtly and consistently sectarian” in character.

See Hinrichs v. Bosma, 440 F.3d 393, 396 (7th Cir. 2006). The prayers offered at the Community Beat Meetings fit into the genre of legislative prayer that has become “part of the fabric of our society” and constitutes a “tolerable acknowledgement of beliefs widely held among the people.” *Snyder*, 159 F.3d at 1233 (*quoting Marsh*, 463 U.S. at 792). As such, they do not run afoul of the Establishment Clause.

3. Doxey’s Free Exercise Claim Fails Because She Is Not Required to Participate in the Prayer

Doxey further argues that the WPD, by allowing prayer at meetings that she was required to attend, has violated her rights under the Free Exercise Clause. Therefore, Doxey asserts that she had a right to be excused from the prayer portion of the meeting. Because the meetings were not worship events, her rights under the Free Exercise Clause were not violated. Indeed, Doxey has failed to show, and it is difficult to imagine, how the fact of hearing an invocation inhibited her ability to exercise her religious beliefs.

Even if the WPD compelled Doxey’s presence at the meetings during the prayers, she was still not required or expected to participate in the prayers. In addition, the WPD has shown that requiring Doxey to be present was necessary to Waterford’s goal of “[creating] a greater sense of unity” in the community. (J.A. 1.) Therefore, Doxey has no valid objection, under the Free Exercise Clause, to the prayers or to her required attendance at the community meetings.

Because the prayers are permissible government speech, and because Doxey was not forced to participate in the prayers, we agree with the district court that the WPD did not violate the Establishment Clause or the Free Exercise Clause with regard to the Community Beat Meetings.

B. Doxey's Religious Freedom to Wear the Hijab While on Duty

1. Title VII of the Civil Rights Act of 1964

Doxey desired to wear her hijab while on duty, but was ordered to remove the scarf in compliance with the Department's dress code. She asserts that the Department violated Title VII of the Civil Rights Act by failing to allow her to wear the hijab with her police uniform. Title VII requires an employer to "reasonably accommodate" an employee's religious observances or practices unless such accommodation constitutes an undue hardship on the employer. 42 U.S.C. § 2000e(j). The Supreme Court has defined an undue hardship as one that exacts more than a de minimis cost on the employer, either economic or non-economic. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

When analyzing a Title VII case, the court is first required to consider whether the plaintiff has made a prima facie case of discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Once she has, the burden then falls on the employer to demonstrate that it cannot reasonably accommodate the employee's religious practices. *See id.* In this case, Doxey has made a prima facie case of discrimination. She has shown that she had a sincere religious practice that conflicted with an employment requirement, and that she was disciplined for failing to comply with the requirement. The burden is therefore on the WPD to demonstrate that it was (and continues to be) unable to reasonably accommodate Doxey's religious practice without incurring an undue hardship.

In his deposition, (J.A. 9-10), Chief Derum articulated a host of concerns raised by Doxey's wearing of the hijab. First, officer safety could be compromised because Doxey's scarf would be an easy target in a physical altercation. Second, the unity required to foster esprit de corps would be hampered by Doxey's distinctive headscarf. This interest would even be

compromised by Doxey's offer to take a job at a desk, out of the public eye, because any officer who works with Doxey would be aware of the distinctive differences apparent in Doxey's uniform. Third, in a community particularly sensitive to racial and ethnic tension, some members of the public might fear that Doxey lacks the neutrality required to perform her duties effectively, and might be less likely to respond to Doxey's requests if they see her wearing the hijab with her official uniform. Allowing Doxey to wear the hijab, claimed Derum, imposed an undue hardship on the Police Department.

Doxey does not argue that these concerns are illegitimate. Rather, she asserts that because the policy, in her view, was inconsistently applied, the Department would not truly suffer undue hardship by allowing her to wear the hijab. In her affidavit, Doxey described as exceptions to the dress code an officer who fastened a small pin showing the American flag, another officer who frequently wore a Waterford High School handkerchief in his breast pocket, and yet another officer who wore a yellow rubber band on her wrist in support of cancer patients. These exceptions, argues Doxey, suggest that Chief Derum had no systematic method to determine what is permitted under the policy, and that Derum's refusal to grant Doxey an exception was based on religious discrimination. However, as Derum pointed out, no other exception to the policy identified by Doxey is fraught with the safety concerns that come with Doxey's hijab. (J.A. 10.)

Courts have consistently held that a uniformed security service is entitled to great deference in its choice of dress and equipment for its personnel. *See Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (upholding Air Force regulation preventing Orthodox Jew from wearing yarmulke because "review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed

for civilian society”); *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) (“Choice of organization, dress, and equipment for law enforcement personnel is a decision entitled to the same sort of presumption of legislative validity as are state choices designed to promote other aims within the cognizance of the State’s police power.”); *Webb v. City of Philadelphia*, 562 F.3d 256, 262 (3d Cir. 2009) (holding that accommodating police officer’s request to wear hijab on duty constitutes undue burden on police department); *Daniels v. City of Arlington*, 246 F.3d 500, 506 (5th Cir. 2001) (holding that requiring police department to accommodate officer’s desire to wear crucifix pin constitutes undue burden under Title VII because “[a] police department cannot be forced to let individual officers add religious symbols to their official uniforms). We follow this precedent and defer to Chief Derum and the WPD. Because the Police Department is in a far superior position to evaluate the concerns associated with officer safety, and because there is a heightened interest in maintaining discipline and harmony among employees in law enforcement, we are hesitant to look behind the reasons given for refusing an exemption for Doxey.⁴

In this case, the Department has justified the policy by its interests in officer safety, uniformity, esprit de corps, and the appearance of religious neutrality. Requiring the Department to accommodate Doxey’s hijab would undermine these interests, and impose more than a de minimis hardship on the WPD. Because the Waterford Police Department was unable to accommodate Doxey’s religious practices without incurring an undue burden, it did not violate Title VII.

⁴ Doxey also suggests that Chief Derum promulgated the new dress code as retaliation for her complaints about the prayers. But the dress code applies to all officers equally, not just to her. Moreover, other than this coincidence of timing, the record includes no evidence of retaliatory motive or other anti-Muslim animus on the part of Chief Derum.

2. Free Exercise

The Free Exercise Clause of the First Amendment provides that “Congress shall make no law . . . prohibiting the free exercise” of religion. U.S. Const. amend. I. The Fourteenth Amendment makes the First Amendment applicable to the States. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). This right to the free exercise of religion, however, “does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability.” *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (quotations omitted). Thus, if a state action is neutral and generally applicable, the free exercise clause does not support a claim for religious exemption. *Id.* However, if the action fails to satisfy the requirements of neutrality and general applicability, application of the law to religious exercise must be “justified by a compelling governmental interest and must be narrowly tailored to advance that interest.” *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993).

Our analysis thus begins with whether the government action at issue, General Order No. 180(G), is neutral and generally applicable. General Order No. 180(G) states that “personal ornaments shall not be worn by an officer, nor affixed to any part of the officer’s uniform, unless the Chief of Police approves in advance and in writing.” (J.A. 8.) On its face, this policy is neutral and of general application. It applies to all officers, regardless of religion. It does not “infringe upon or restrict practices because of their religious motivation.” *Lukumi*, 508 U.S. at 533.

The regulation is also neutral and generally applicable in its effect. The Supreme Court has announced that a law is not generally applicable if its effect is to “impose burdens only on conduct motivated by religious belief.” *Id.* at 543. In this case, the regulation imposes burdens on more than just conduct motivated by religious belief. Any officer who refuses to follow the

policy, or who desires an exemption from it, is affected by the policy equally. For example, as Chief Derum described in his deposition, an officer who wore a baseball cap would violate the policy, as would an officer who wore overtly political paraphernalia. (J.A. 10.) According to his testimony, he would give neither such officer an exemption. *Id.*

Doxey urges us to follow then-Judge Alito’s analysis in *Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), and apply a heightened level of scrutiny to the state action. *Fraternal Order* is inapplicable to the case at hand. In that case, the court was presented with a Free Exercise challenge to a police department’s internal order that required officers to shave their beards. 170 F.3d at 360. The Department’s policy had a medical exemption to the no-beard policy, but not a religious exemption. *Id.* at 365. In failing to extend the exemption to the plaintiffs, the Police Department judged the plaintiffs’ religious reasons to be of “lesser import than the medical reasons.” *Id.* Because the state “refuse[d] to extend th[e] system [of individualized exemptions] to cases of religious hardship,” the policy was examined through a more critical lens. *Id.* at 364 (*quoting Smith*, 494 U.S. at 884).

In this case, the state is not categorically refusing to accept religious reasons, or categorically accepting any non-religious reasons, for an exemption from the uniform policy. As indicated in Chief Derum’s deposition, the Department disallowed headscarves because of concerns for officers’ safety and the uniform appearance of officers. The existence of discretion to allow “personal ornaments” if approved in writing by the Police Chief, (J.A. 8), does not destroy the general applicability and religious neutrality of the WPD dress code.

We also refuse to follow Justice Alito’s analysis because he failed to give sufficient deference to the Police Department. As the Supreme Court has indicated in a related context, “review of military regulations challenged on First Amendment grounds is far more deferential

than constitutional review of similar laws or regulations designed for civilian society.” *Goldman*, 475 U.S. at 507. Indeed, “the Constitution does not compel a public employer to allow religious headcoverings that violate neutral dress codes.” *Holmes v. Marion County Office of Family & Children*, 349 F.3d 914, 917 (7th Cir. 2003). In this case, the WPD, as indicated in the analysis of Title VII, is afforded wide latitude in its decisions to outfit its personnel. We defer to the WPD’s expertise in this area.

The General Order is neutral, generally applicable, and reasonably related to the Department’s concerns for officer safety, department cohesion, and public perception of the Department. As such, it does not violate the Free Exercise Clause of the First Amendment.

V. CONCLUSION

For the foregoing reasons, we affirm the District Court’s grant of summary judgment for Defendants on all of Plaintiff’s claims.

Joint Appendix

Waterford City Ordinance §112 Community-Police Cooperation Initiative

Representatives of the WPD shall meet monthly with a Community Beat Group in each of the ten Police Service Areas.

- (1) Purpose. The purpose of the Community Beat Meeting is to:
 - (a) Facilitate joint problem solving between the WPD and the community;
 - (b) Inform the community about police operations in the area; and
 - (c) Create a greater sense of unity in each Police Service Area (beat).

- (2) Reporting
 - (a) The Chief of Police shall submit semi-annual reports to the Waterford City Council on the progress and activities of each Community Beat Group.
 - (b) The report must contain:
 - (i) Crime Statistics for each beat;
 - (ii) An attendance record of each Community Beat Meeting with the number of community members in attendance and the names of all WPD employees present in their official capacities;
and
 - (iii) Any recommendations made by the Community Beat Groups.

- (3) This section shall be administered and implemented by the Chief of Police.

Notes and Agenda
Green Valley Beat Meeting
October 4, 2004

1. Welcome and Prayer

Let us pray. Lord God, Our Father, we entreat you this evening to bestow upon us your wisdom and understanding as we meet together as members of this community. Help us to understand the needs of our neighbors. Help us to be wise as we seek to improve conditions in our community. Help those who feel the need to resort to theft or selling drugs to find an honest way of gaining their daily bread. Help them and us to replace bad habits with good. Protect the good officers, as they patrol in our community and in our city, from accident and from those that would do them harm. Forgive us our trespasses and help us to forgive those who offend us. Help us to love and serve others. In the sacred name of Jesus, we pray, Amen.

2. Introductions

3. Issues

- a. Loitering near *Bob's Fine Liquor Store*
- b. Vandalism (GRAFFITI), on the I-73 overpass near Green Valley Way
- c. Police Department involvement in after-school activities at Waterford Junior High School.

4. Conclusion and Reception

**Notes and Agenda
Green Valley Beat Meeting
November 1, 2004**

1. Welcome and Prayer

Let us all bow our heads in prayer. Almighty Father, we come before you this evening to discuss matters important to our community. We have gathered with the members of our fine Police Department as concerned citizens. We ask a blessing of protection over each and every member of the Police Department as they justly go about enforcing our laws. We ask your guidance as we discuss the matters before us. We ask for your love to fill our hearts as we seek Your Will. We ask you to help those struggling with addiction to overcome. We ask pardon for our trespasses. We also thank you for your bounteous blessings. May the favor of the Lord God rest upon us and may He establish the work of our hands for us, yes, may He establish the work of our hands. Amen.

2. Introductions

3. Issues

- a. Excessive “parkour” and skateboarding on structures in the Green Valley Square
- b. Reports of prostitution on Main Street
- c. Smashing pumpkins and stealing candy during Halloween

4. Conclusion and Reception

**Notes and Agenda
Green Valley Beat Meeting
December 6, 2004**

1. Welcome and Prayer

Let us pray. Lord, each of us runs in the path of your commands, for you have set our hearts free. Help all of us to continue ever to do so. We meet together, Lord, once again as a community to ask for the blessing of your divine wisdom. We thank you for the protection you have provided our neighborhood and our brothers and sisters of the Waterford Police force. They truly are our finest. As we speak together to discuss the problems of our community, we ask you to replace our ignorance with wisdom, our misunderstanding with compassion, our pride with humility, our anger with peace, and to transform the hate in our hearts into love. Help us all to love our enemies, to do good to those who hate us, to bless those who would curse us and to pray for those who mistreat us. Help us to turn the other cheek. When we are asked to walk a mile, help us to walk two. Help us build this community on a Rock and not on a sandy foundation. In thy name we pray, amen.

2. Introductions

3. Issues

- a. Hold-up at *Bob's Fine Liquor Store* and the time it took for police to respond
- b. Entry-level employment opportunities with the City of Waterford
- c. Improvements to the soup-kitchen and changes to the service schedule

4. Conclusion and Reception

Notes and Agenda
Green Valley Beat Meeting
January 3, 2005

1. Welcome and Prayer

Please join me in prayer. Dear Lord, we are gathered this evening as a concerned and anxious community. We hope to make things better in our community. We ask that you bless us with hope, wisdom, and understanding as we try to find ways to make our community better. We plead and ask you to help us love our neighbor as we love ourselves. We not only ask this for our community, but for communities around the world, especially in Iraq. May those families who lost loved ones earlier this week be comforted by your peace. Protect our troops as you continue to protect our police force and members of our community from those who would do them harm. In the sacred name of Jesus, we pray, Amen.

2. Introductions

3. Issues

- a. Disaster planning
- b. Recent string of shooting out car windows with BB guns
- c. Vandalism clean-up opportunities

4. Conclusion and Reception

Notes and Agenda
Green Valley Beat Meeting
February 7, 2005

1. Welcome and Prayer

Let us pray. Tonight we are meeting to discuss very important issues regarding our community. Help us to understand one another and communicate with one another in an effective and respectful manner. Where there are disagreements, help us find the best answer. Please open our minds and our hearts so that we may receive your spirit and your wisdom. Help us recognize those who stand in need of our help. Help us know how best to assist those in need. We thank you for the wonderful men and women of our police force and are glad that they take the time to meet with us. Help us to maximize our time in order to make the most of the opportunity this meeting provides. We ask you to help those who feel the need to turn to crime to turn to you instead, for we know that the road is narrow. Help them to find the better path. Amen.

2. Introductions

3. Issues

- a. Shooting the homeless with paintballs
- b. Gang awareness
- c. Community relations between Muslims and others

4. Conclusion and Reception

WATERFORD POLICE DEPARTMENT GENERAL ORDER

**Brent T. Derum
Chief**

Order Number:	180(G)
Date of Issue:	February 10, 2005
Effective Date:	March 1, 2005
Reevaluation Date:	February 10, 2011

PURPOSE:

This order establishes the policy and standards for uniform dress of sworn officers in the Waterford Police Department. The goal of this order is to promote officer safety, encourage department cohesion and uniformity, and to enforce the perception held by the public that uniformed officers will serve and protect with impartiality. All sworn officers are governed by this order.

INDEX:

1. Uniform
2. Wearing the Uniform
3. Grooming
4. Equipment
5. Care & Replacement

2. **WEARING THE UNIFORM**

A. Shirts

- i. Official department shirts must be pressed and clean at all times.
- ii. The shirt may be buttoned at the collar and worn with a department tie, or open at the collar and worn with an authorized t-shirt or turtleneck.
- iii. Short-sleeved shirts will be worn as part of the summer uniform only.

B. Trousers

- i. Official department trousers must be pressed and clean at all times.
- ii. The trousers will be long enough for the cuff to touch the top of the shoe at the laces.

C. Caps

- i. The official department cap may be worn at the discretion of each officer.
- ii. The bill will face forward, and be at a line horizontal with the eyebrows.

D. Shoes & Socks

- i. Shoes and boots must be kept clean, shined, and in good repair.
- ii. Socks shall be black or dark navy in color, and high enough to cover any exposed leg area.

E. Jewelry & Personal Ornaments

- i. The only items of jewelry permitted to be worn with the uniform are:
 1. A wrist watch
 2. One conservative ring on each hand
 3. Stud-type earrings for female officers only
- ii. Other personal ornaments shall not be worn by an officer, nor affixed to any part of the officer's uniform, unless the Chief of Police approves in advance and in writing.

Relevant Excerpts from the Deposition of Brent Derum

Q. Why did the Department create and enforce the new uniform policy?

A. There was an old policy on the books that we didn't believe addressed current concerns and issues facing the Department. So we decided to create a new, more modern policy to address those concerns.

Q. What were those concerns?

A. Well, first and foremost, we wanted a policy that emphasized uniformity in the Police Department. I've been in law enforcement for 20 years, and I can't tell you how important it is that everyone in the Department is on the same page. We need to have everyone together to serve the public better. Having a uniform policy that emphasized this collectiveness is crucial to our mission.

Q. What el--

A. This uniformity also helps us serve the public better because they can see that we are a neutral body that isn't biased. It really helps the public to see that a police officer is enforcing the law impartially. If somebody sees Doxey's distinctive headscarf, that person might think Doxey would enforce the law partially. And there's one more thing: officer safety. The official department uniforms are designed to allow an officer to conduct his or her job safely and efficiently. We can't have people hanging personal things all over their uniforms that could be grabbed in a scuffle.

Q. But the policy does allow for exceptions?

Deposition of Brent Derum

A. Yes. I can make an exception to the general policy if I feel like any alterations to the uniforms do not interfere with the concerns that I just talked about. So if an officer decided to wear his favorite baseball cap, or a crazy political pin on his uniform, he probably wouldn't be granted an exception.

Q. Officer Doxey stated in her affidavit that one officer frequently wears a pin on his lapel with an American flag, and that another officer wears a local high school handkerchief. Why the exceptions for those alterations and not Officer Doxey's headscarf?

A. Like I told officer Doxey, those situations are completely different. The American flag and the handkerchief with its Waterford High School logos contribute to our mission of community service. They show the public that we're part of this community, and we want to serve the community. And I just don't think that those exceptions present the safety concerns that Officer Doxey's headscarf presents.