Case not yet scheduled for oral argument.

Case Nos. 07-7163, 07-7164

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CALVERT L. POTTER, *et al.,*

Plaintiffs-Appellees,

vs.

THE DISTRICT OF COLUMBIA,

Defendant-Appellant,

STEVEN B. CHASIN, *et al.*

Plaintiffs-Appellees,

vs.

THE DISTRICT OF COLUMBIA,

Defendant-Appellant,

On Appeal from the United States District Court for the District of Columbia,
Nos. 01-1189, 05-1792

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May 23, 2008

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

The Certificate as to parties, rulings and related questions contained in the Department's Brief is accurate and accepted by Plaintiffs with the following exception:

Intervenors: The United States intervened in 2001 to support the constitutionality of the Religious Freedom Restoration Act after the Department challenged its constitutionality as applied to the District of Columbia, whereupon the Department withdrew its motion. [*See Potter* Dkt. 15, 23, 25, 26.] The United States has not been active in the case since then.

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GLOSSARY

As required by Cir. Ct. Rule 28(a)(3), Appellees present the following glossary of abbreviations and acronyms. Since the list is short, the items are presented in a logical order approximating their appearance in the brief, rather than alphabetically:

- **Department** — District of Columbia Department of Fire and Emergency Medical Services, which includes the firefighters and paramedics of the District of Columbia. "Department" is also used herein as a synonym for appellant District of Columbia.

- **RFRA** — Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq*., the statute involved in these appeals.

- **IDLH** — Immediately Dangerous to Life or Health, a term used in the Department's Respiratory Protection Plan [*Potter* Dkt. 92, Attach. 12] to describe environments which are regarded, as the term implies, as immediately dangerous to life or health, such as fire scenes where toxic gases are present.

- **SCBA** — Self Contained Breathing Apparatus. The safest breathing device available for use by firefighters, which consists of a tank of pressurized air that, through a hose and regulator valve, delivers pure air to a facemask worn by the firefighter. The Respiratory Protection Plan requires the use of SCBAs by firefighters in IDLH environments, and in environments where the degree of contamination is unknown. The Department's paramedics do not use SCBAs, and are not trained in their use.

- **APR** — Air Purifying Respirator. A device that provides more limited protection from airborne contaminants by allowing the wearer to inhale air through a filter. The "go-bags" issued to all Department members in 2001 or 2002 allow the wearer to create an APR by screwing a cartridge filter contained in the "go-bag" into the same facemask used with the SCBAs used by firefighters (after removing the SCBA air hose from the facemask, if necessary). The Respiratory Protection Plan allows the use of APRs only in environments known to be non-IDLH (i.e., not immediately dangerous to life or health).

- **PAPR** — Powered Air Purifying Respirator. A device that also provides limited protection from airborne contaminants through the use of a filter, but which includes a battery-powered fan that draws air through the filter, rather than requiring the user to draw air through the filter by inhaling. There are various types of PAPRs, some using facemasks and others using hoods or shrouds. The Department has purchased a number of facemask PAPRs sold by the same manufacturer that supplies the SCBAs worn by the Department's firefighters and the APR cartridge filters contained in "go bags." These PAPRs use the same facemask as the Department's SCBAs and APRs.

ISSUES PRESENTED FOR REVIEW

1. Even if the Department can persuade this Court that in opposing Plaintiffs' motion for summary judgment it actually attempted to raise the issue of whether SCBAs (see preceding Glossary) can be safely used by bearded firefighters, was it properly within the discretion of the district court to refuse to allow the Department to pursue that argument, more than a year after the Department had affirmatively informed the court and the Plaintiffs that it was not seeking to justify its ban on facial hair on this basis, and after extensive discovery and further proceedings had been conducted in reliance on the Department's disclaimer of the issue?
2. Did the Department in fact fail to raise the issue of SCBA safety at any time prior to the entry of summary judgment, and if so should the summary judgment for Plaintiffs be affirmed because the district court was under no obligation to consider an issue raised for the first time on a motion for reconsideration?
3. In opposing Plaintiffs' motion for summary judgment, did the Department come forward with specific admissible evidence sufficient to allow the trial court to find that it had borne its burden of proof under the Religious Freedom Restoration Act to show that the use of SCBAs by bearded firefighters would create a safety threat justifying the Department's ban on facial hair?
4. In opposing Plaintiffs' motion for summary judgment, did the Department come forward with specific admissible evidence sufficient to allow the trial court to find that it had borne its burden of proof under the Religious Freedom Restoration Act to show that bearded firefighters were unable to obtain satisfactory facemask-to-face seals any less consistently than clean-shaven firefighters, or that the Scott C420 PAPR is not a safe, reliable, and suitable alternative to the Department's Go-Bag respirator?

5. Even if the Department properly demonstrated the existence of a genuine dispute of fact regarding the safety of SCBAs, did it show that this was a material fact with regard to the Plaintiffs who are paramedics, in view of the undisputed fact that paramedics do not use SCBAs and are not trained in their use?

STATUTES AND REGULATIONS

The statute under which these cases arise is presented in the Statutory Addendum included at the end of the Department's Brief. In relevant part it provides:

> [The] Government may substantially burden a person's exercise of religion only if *it demonstrates* that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the *least restrictive means* of furthering that compelling governmental interest.
>
> * * *
>
> As used in this Act . . . the term "demonstrates" means meets the burden of going forward with the evidence and of persuasion[.]
>
> * * *
>
> This Act applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before of after the enactment of this Act.

Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1, 2000bb-2(3), 2000bb-3(a).

COUNTERSTATEMENT OF THE CASE

Introduction

These appeals arise from two consolidated lawsuits under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq*. The *Potter* lawsuit was filed by six firefighters in 2001 when the District of Columbia Department of Fire and Emergency Medical Services (the "Department") threatened to discharge all members who violated a ban on beards (or, although not relevant here, a ban on prohibited hair styles and head coverings). The *Chasin* lawsuit was filed by six additional Plaintiffs, two firefighters and four paramedics, in 2005 when the Department refused to treat similarly situated non-plaintiff employees in accordance with the district court's orders regarding the *Potter* plaintiffs. Plaintiffs in both cases asserted that their religious convictions compelled them to wear their beards (as they had done for many years), a fact which the Department has never contested.[1]

To understand the issue presented by these appeals, a few introductory words are needed concerning forms of respiratory protection for firefighters and paramedics, and about the summary judgment entered by the district court leading to these appeals. As explained in greater detail below,[2] firefighters normally wear a Self-Contained Breathing Apparatus ("SCBA") which supplies pure air to their facemasks through a hose and regulator valve from tanks on their backs. The question whether an SCBA provides adequate respiratory protection to a bearded firefighter was addressed in the proceedings leading to a 2001 preliminary injunction in *Potter*, when an expert declaration submitted by the Plaintiffs persuaded the district court that facial hair would

---

[1] Six of the twelve Plaintiffs were Muslim, three were Christian, one was Jewish, one was Rastafarian, and one followed an African-Caribbean faith. *See Potter* Dkt. 147; *Chasin* Dkt. 54 (Amended Complaints).

[2] *See also* the Glossary following the Table of Authorities submitted in accordance with Rule 28(a)(3) of this Court.

not compromise the safety of bearded firefighters using SCBAs. This is because the "positive pressure" feature of SCBAs – meaning that the pressurized air from the tank creates a higher pressure inside the wearer's facemask than the outside ambient air – would result in clean air escaping through any leak in the facemask seal, rather than toxic gases entering the facemask. The Department did not appeal the 2001 preliminary injunction, and instead issued a Special Order (No. 2001-48) that allowed all employees with religious needs to wear beards for the next four years.

In 2005, however, the Department issued a new ban on beards, based on a rationale that had nothing to do with the safety of SCBAs, but resting instead on the contention that firefighters and paramedics might, in the event of a massive terrorist attack, have to wear "negative pressure" devices called Air Purifying Respirators ("APRs") in certain circumstances not requiring the use of SCBAs. Because of the "negative pressure" feature of APRs, which require the wearer to inhale air through a filter attached to his or her facemask, and thereby produce a lower pressure inside the mask than outside, an imperfect facemask seal caused by facial hair could result in the inward leakage of outside air. When the Department threatened to apply this new policy to bearded members of the Department despite the outstanding 2001 preliminary injunction, the district court held an evidentiary hearing and issued a clarification of the injunction requiring the Department to allow the Plaintiffs to take fit tests to show they could achieve an adequately tight facemask fit despite their beards.

The district court's 2005 preliminary injunction was based on (1) an explicit finding that it was "undisputed" that SCBAs did not present a safety issue – a finding made in reliance on representations made to the Court by the Department's counsel and testimony by the Department's witness at the 2005 evidentiary hearing – and (2) the conclusion that the

Department's rigid refusal to even allow Plaintiffs to take fit tests violated RFRA.

A year later, after further proceedings and extensive discovery, the Department moved for summary judgment, and Plaintiffs cross-moved for summary judgment. The district court denied the Department's motion, and entered summary judgment for Plaintiffs in September 2007. Once again, the court held that it was undisputed that SCBAs presented no safety issues for bearded firefighters, a holding based in substantial part on the Department's failure to challenge the Court's 2005 finding that the issue was undisputed, either at that time or at any time since. This meant that the only disputes requiring resolution were (i) whether Plaintiffs could safely wear "negative pressure" APRs if a mass emergency of the sort the Department conjured occurred, and (ii) whether Plaintiffs would need to wear such devices.

The district court found it unnecessary to resolve the first dispute, because it concluded that the Department had failed, despite multiple opportunities, to bear its burden of proof under RFRA to show that burdens placed upon Plaintiffs' exercise of their religious beliefs could not be avoided by operational adjustments to redeploy Plaintiffs to duties not requiring the use of "negative pressure" APRs in the event of a mass catastrophe.

The Department makes no effort to show this Court that the district court erred in this determination; it points to no record evidence that operational adjustments of the sort described by the district court would be infeasible, or even that they had seriously been considered by the Department. The basis of the district court's judgment thus stands unchallenged here.

Instead, the Department now mounts an attack on the safety of SCBAs – an issue it explicitly conceded in 2005. The only reason for reversal asserted in the Department's brief is that the district court erred in holding that there was no genuine dispute of material fact concerning the Plaintiffs' ability to wear positive pressure SCBAs safely (Department's Br. at

12). That is the *only* issue raised by the Department in these appeals. To understand why the Department's argument is untenable, a more detailed description of the proceedings below is needed, since Department's brief omits important facts.

Background and the 2001 Preliminary Injunction in *Potter*

Prior to April 2001, the Department's firefighters and paramedics had been allowed to wear beards for a number of years. Until 1994, this accommodation was offered only to members who suffered from a skin condition causing "razor bumps" (*pseudofolliculitis barbae)*, and their beards were (at least officially) limited to 1/4 inch in length. The discrimination in granting this accommodation was successfully challenged in *Kennedy v. District of Columbia*, 654 A.2d 847 (D.C. 1994), in which the court affirmed a decision of the District's Human Rights agency that the Department could not prohibit facial hair for firefighters who did not have *pseudofolliculitis barbae* on the ground that it was unsafe while admitting that facial hair was safe for firefighters who had *pseudofolliculitis barbae*. In the wake of the *Kennedy* decision, the Department's grooming policy was amended to permit all members to wear 1/4-inch beards. In practice, however, the 1/4-inch limit was not enforced and many members wore longer beards, without a single reported safety problem. [*Potter* Dkt. 92, Ex. 4 at ¶ 6.]

In March 2001, the Department announced that the grooming policy (including the 1/4-inch limit on beards) would be strictly enforced beginning on April 1. Special Order 2001-18 stated that strict compliance was necessary both to promote "*esprit de corp[s]*" and because "certain hair and beard styles . . . present a health and safety risk." [*Potter* Dkt. 92, Attach. 10.] Six firefighters whose religious convictions required them to wear beards longer than 1/4 inch, or

to otherwise violate the new directive,[3] filed suit to enjoin the new program of strict enforcement, asserting that RFRA prohibited this unnecessary limitation upon their free exercise of religion. [*Potter* Dkt. 1.] In its memorandum opposing preliminary relief, the Department did not question the sincerity of the plaintiffs' religious beliefs or attempt to argue that promoting *esprit de corps* represented a "compelling governmental interest" under RFRA. [*Potter* Dkt. 8.] The Department did argue that there was a valid safety reason for banning beards longer than 1/4 inch, because longer beards might prevent a firefighter from obtaining a tight fit with the facemasks of their SCBAs.

In support of their preliminary injunction motion, however, the *Potter* Plaintiffs submitted the declaration of Alexander Santora, the recently retired Deputy Chief and Chief of Safety of the New York City Fire Department, who explained that because SCBAs are "positive pressure" respirators that supply compressed air to maintain pressure inside the facemask that is higher than the possibly toxic outside atmosphere, any imperfections in the facemask's seal caused by facial hair or other factors will result only in an outward flow of clean air from the mask, and not an inward flow of potentially dangerous gases or particulates. Chief Santora also explained that (i) "Due to multiple 'facial variables,' such as facial structure, weight, skin conditions and the presence of scars, it is often difficult to achieve a perfect facepiece-to-face seal," even in the absence of facial hair; (ii) there is no evidence that beards greater than 1/4 inch in length will cause more air to escape than these other causes of imperfect seals; and (iii) "factors unrelated to facepiece-to-face fit [a]ffect the rate at which a firefighter's available

[3] In addition to firefighters who wore beards for religious reasons, the Plaintiffs also included a Rastafarian who wore dreadlocks and a Muslim who had been ordered not to wear his skullcap (kufi). The Department long ago conceded that dreadlocks and skullcaps pose no safety problems.

air supply is utilized more drastically than fit factors. The size, weight, lung capacity, cardio-vascular fitness, activity level and health of the firefighter each significantly [a]ffect the rate at which the SCBA's air supply is utilized/exhausted." [*Potter* Dkt. 2, Ex. H at ¶¶ 8-18, resubmitted at *Potter* Dkt. 92, Attach. 11], App. ___-___.

Persuaded by this evidence, the district court entered a preliminary injunction on June 22, 2001, prohibiting the Department from requiring the Plaintiffs to comply with the grooming policy to the extent that it would require them to violate their religious beliefs. [*Potter* Dkt. 34.] The Department did not appeal, but instead exempted all employees, not just the Plaintiffs, whose religious convictions prevented them from complying with the policy. *See* Special Order 2001-48 [*Potter* Dkt. 51, Ex. A], App___.

Over the next four years, the Department continued to allow Plaintiffs, and other firefighters with religious needs, to wear their beards, without any reported safety issues, while advising the district court in periodic status reports that it was developing a new policy that might eliminate the need for further litigation. [*E.g., Potter* Dkt. 39, 46.]

The Department's New Theory in 2005 and the Clarified Preliminary Injunction

The litigation entered a new phase in May 2005, when the Department issued a new Special Order 2005-20 banning any facial hair that would come between the sealing surface of the facemask and the wearer's skin. [*Potter* Dkt. 92, Attach. 11], App.___. When the Department indicated that it would apply the new policy to the Plaintiffs despite the 2001 preliminary injunction, Plaintiffs sought protection from the district court.

At a hearing on June 13, 2005, the Department explained to the Court that it was not trying to justify the new policy because of any safety risk associated with positive-pressure SCBAs. To the contrary, the Department expressly disclaimed any such concern:

> Now, [with an SCBA] you will have the lifetime that you can spend in a fire reduced, because every time there's a break in the seal and the air has to blow, that's air that's not in your tank, but maybe an hour tank will last 45 minutes. *That's not what we're worried about*.

June 13, 2005 Transcript at 6:11-16 (emphasis added) [*Potter* Dkt. 80], App. ___-___.[4]

Instead, the Department's 2005 initiative was based on the "post 9-11" specter of a catastrophic event such as a terrorist-caused explosion of a railroad car carrying chlorine gas on the rail line "that runs [underground] within four blocks of the Capitol . . . [that] would have a plume of 14 miles long." *Id*. at 4:22-5:18, App. ___-___. In such circumstances, the Department argued, "every firefighter in the District of Columbia is going to have to be able to respond, and they can't respond with the [positive-pressure] SCBA units they now have." *Id*. at 5:14-18, App. ___-___. Indeed, the Department stated, "We're also talking about the EMS techs [Emergency Medical Service paramedics]. They don't [use] positive pressure masks at all. . . . Every EMS tech in the District will respond to that kind of an emergency, and the only thing they'll have are negative pressure masks. . . ." *Id*. at 7:16-23; *see generally* 4:18-10:7, App. ___-___.

The "negative pressure masks" to which the Department's counsel referred were filter devices called Air Purifying Respirators (APRs) that users could assemble by combining their facemasks with cartridge filters that were included in the "go-bags" that had been issued to every firefighter and EMS paramedic in the Department for use in situations not requiring SCBAs. These APRs were designed to be used with the same facemask used with an SCBA. After

[4] Chief Santora, in his 2001 declaration submitted in support of the Plaintiffs' initial motion for preliminary relief, had explained the several reasons why the possible reduction in the length of time an SCBA air tank might last because of outward leaks caused by an imperfect facemask seal did not present a safety risk, including the fact that numerous other factors affect the rate at which an SCBAs air is exhausted, the safety mechanisms that tell a firefighter that his air is low in ample time to exit the scene, and the safety margins built into the air tank's rated service-life rating. [*Potter* Dkt. 2, Ex. H at ¶¶ 14-18, resubmitted at *Potter* Dkt. 92, Attach. 11], App. ___-___.

unscrewing the air hose from the SCBA tank and screwing in the cartridge filter (via an adapter), the wearer could inhale outside air through the filter. *Id*. at 7:24-8:9, App. ___-___. Used in this manner, the outside air would be filtered, but the air pressure inside the facemask would be lower than that of the outside atmosphere during inhalation – hence "negative pressure" – and therefore possible leaks inward through an imperfect facemask seal would be a concern.

The "go-bags" had been issued to all members of the Department in late 2001 or early 2002 [*Potter* Dkt. 92, Attach. 11 (Special Order 29-2002)], but at the time of the 2005 proceedings the go-bag filter cartridges had never been used. Nor is there any evidence they have ever been used since then. The Department had, however, adopted a detailed Respiratory Protection Plan [*Potter* Dkt. 92, Attach. 12] specifying the conditions under which different protective equipment should be used. In circumstances that are regarded as Immediately Dangerous to Life or Health (IDLH), such as fire scenes with toxic gases, or when the extent of a hazard is unknown, such as a chemical spill of unknown type, the Respiratory Protection Plan (and common sense) requires the use of SCBAs which provide pressurized air from a tank worn on the user's back, the highest level of protection available. *Id*. at 9-10. Negative-pressure APR respirators, such as those fashioned from the filter cartridges contained in go-bags, may be used only in less dangerous, non-IDLH circumstances, such as dealing with tear gas or in clean-up operations after an emergency is over or at the outer fringes of a scene. *Id*. at 10-11.

Faced with the Department's new theory for justifying a ban on facial hair that might impact the use of facemasks with go-bag cartridge filters, the district court held an evidentiary hearing on August 1, 2005. Both sides submitted briefs and supporting materials before and after the hearing. [*Potter* Dkt. 92, 93, 95, 96.] At the hearing, to support their contention that they should at a minimum be allowed to take "fit tests" to determine whether their beards

actually prevented an adequate facemask seal, Plaintiffs presented the uncontradicted testimony of the President of the firefighters union that hundreds of bearded firefighters had taken and passed fit tests during the years before the Department adopted its new policy of refusing to allow such tests. August 1, 2005 Transcript at 41:1-43:13 [*Potter* Dkt. 96 Ex. A]. There was also testimony from witnesses for both sides that there were no reports of injury or other safety issues during the decades during which many firefighters had worn beards with their SCBAs. *Id*. at 38:19-39:16, 79:23-80:6.[5]

The Department's chief witness, Captain William Flint, then the Department's Safety Officer, also explained once again why a SCBA does not present a safety hazard even if the facemask seal is not perfect, because it "Creates a positive pressure within the face piece, so that if there were to be a leak, then air would leak out to the side instead of the toxic atmosphere being drawn in." *Id*. at 88:15-22; *see generally id*. at 88:15-89:16, App. ___-___. Because the Department did not seek to justify the new facial hair ban by raising safety concerns about the use of positive-pressure SCBAs, the hearing and the parties' submissions focused on whether the plaintiffs could perform their duties safely if the Department ever encountered a situation requiring the use of negative-pressure APRs using the cartridge filters from their "go-bags," rather than the SCBAs firefighters normally use. Testimony at the hearing also confirmed that although the Department had issued the "go-bags" to its members in the fall of 2001, no Department member had ever used a go-bag filter cartridge in the line of duty. *Id*. at 127:4-6;

[5] One of the Plaintiffs, now nearing retirement, has worn his beard safely since he joined the Department in September 1975. Declaration of Dwight Evans, *Chasin* Dkt. 3. Other Plaintiffs have also worn beards safely as Department members for many years. *See, e.g.,* Declaration of Eleon Baker, *Chasin* Dkt. 3 (22 years); Declaration of Hassan Umrani, *Potter* Dkt. 2 (19 years); Declaration of Kevin Conerly, *Chasin* Dkt. 3 (19 years); Declaration of Steven Chasin, *Chasin* Dkt. 3 (18 years); Declaration of Jasper Sterling, *Chasin* Dkt. 3 (17 years); Declaration of Calvert Potter, *Potter* Dkt. 2 (12 years).

158:11-12.

There was also evidence submitted by both sides concerning the possible use of devices called Powered Air Purifying Respirators ("PAPRs") as an alternative to negative pressure APRs that could be used by bearded firefighters (or others) who could not achieve an adequate facemask fit. A PAPR also uses cartridge filters, but includes a battery-powered fan that "sucks the air through the [filter] cartridge and then blows it through the face piece," which Captain Flint agreed "turns a negative pressure system into a positive pressure system." *Id.* at 93:10-94:2.

The district court issued a memorandum opinion and order on August 11, 2005, clarifying and extending the 2001 preliminary injunction to require the Department to allow the plaintiffs to take fit tests and be returned to duty if they could achieve an adequately tight facemask seal. [*Potter* Dkt. 97, 98], App. ___-___ (reported at 382 F. Supp. 2d 35). The Opinion prefaced its analysis by stating:

> *It is undisputed that firefighters who wear beards can safely operate[] the positive pressure self contained breathing apparatus (SCBA)* that firefighters use in situations considered to be immediately dangerous to life and health, such as oxygen-deficient atmospheres.

[*Potter* Dkt. 98 at 6 (emphasis added)], App. ___-___. The Court explained the basis for the absence of any dispute on this point, noting that it was "undisputed that the SCBA is the safest of all the available respiratory protection options, because . . . any break in the seal between a firefighter's face and his SCBA mask will cause air from the tank to blow out, due to the positive pressure, preventing air from the surrounding environment from entering the mask." *Id.* at 7, App. ___-___.

Therefore, the court found, "*The disagreement in this case concerns the safe operation of* <u>*negative*</u> *pressure masks by firefighters,*" since the Department "requires D.C. firefighters to be

able to safely wear the filter respirators issued to them in 'Go-Bags' after the 9/11 terrorist attacks." *Id.* (emphasis added, underscoring in original), App. ___-___.

The district court found the record unclear on this issue, chiefly because of the Department's rigid refusal to allow Plaintiffs to take fit tests (which prevented the Plaintiffs from showing that they could achieve an adequate fit). "That rigidity," the court held, "is not acceptable, in view of RFRA's command that 'governments should not substantially burden religious exercise without compelling justification.'" *Id*. at 11, App. ___-___. Accordingly, the district court ordered the Department to conduct a series of fit tests for the Plaintiffs during a period of several months, while allowing it to place them on administrative duty "until or unless they can pass an appropriate face-fit test." *Potter* Dkt. 97.[6] The Department again did not appeal from the modified preliminary injunction, but went ahead with the testing program ordered.

The Department did not, then or at any time during the following year, in any way challenge – as mistaken or wrong in any way – the district court's clear findings that "It is undisputed firefighters who wear beards can safely operate[] the positive pressure self contained breathing apparatus (SCBA)" and that "The disagreement in this case concerns the safe operation of <u>negative</u> pressure masks by firefighters." [*Potter* Dkt. 98 at 6, 7], App. ___-___.

The *Chasin* Lawsuit and Parallel Preliminary Injunction

Despite the August 11 order, the Department refused to conduct fit tests for the small number of other members who also wore beards for religious reasons, insisting that it would follow its rigid policy, already rejected by the district court, of simply discharging any man who

[6] The district court did not reach the question whether PAPRs solved the Department's alleged safety concerns, finding the record unclear as to whether the Department had enough of them or whether they were "interoperab[le]" (*i.e.*, compatible) with the equipment used by other area fire departments. [*Potter* Dkt. 98 at 10], App. ___-___. The district court also noted, but did not rule upon, Plaintiffs' assertion that the OSHA regulations upon which the Department's new facial hair policy was supposedly based do not apply to the District of Columbia. *Id.*

refused to shave. This position led to the September 2005 filing of the *Chasin* lawsuit, and a motion for a preliminary injunction, by two firefighters and four paramedics.[7] On November 10, 2005, the district court entered a preliminary injunction in the *Chasin* case, allowing the Department to place the plaintiffs on administrative duty pending completion of a series of fit tests and consolidating the two suits. [*Chasin* Dkt. 11.]

Further Proceedings and the Summary Judgment Challenged in These Appeals

During the following year, while the fit test program proceeded, the parties engaged in discovery directed to the issues left unresolved by the August 11 order and opinion, to wit, testing procedures and results for bearded and clean-shaven members of the Department, and the availability and adequacy of alternative solutions such as PAPRs. In April 2006, in response to the district court's request for a proposed schedule for further proceedings, the Department stated that it believed the record was sufficiently developed for summary disposition and planned to file a motion for summary judgment, while Plaintiffs stated that they believed further discovery was appropriate but could be completed promptly. [*Potter* Dkt. 120.]

Plaintiffs had previously noticed the deposition of a Dr. Roy T. McKay, from whom the Department had obtained a declaration that it had submitted as purported expert evidence in opposing a preliminary injunction in the *Chasin* case [*Chasin* Dkt. 8, Ex. 1], App. ___-___, on the ground that testing bearded firefighters was useless because results would be inherently variable from one occasion to the next. The Department refused to produce Dr. McKay for the noticed deposition. [*Potter* Dkt. 120 at 1-2; *Potter* Dkt. 127, Iverson Decl. at ¶ 2; *Potter* Dkt. 133, Ex. 2 at ¶ 4.] It did continue to produce documents in response to Plaintiffs' discovery

[7] Paramedics do not use SCBAs, and had never been issued *any* respiratory protection equipment until they received Go-Bags in early 2002. Declaration of Steven Chasin at ¶ 5 [*Chasin* Dkt. 3].

requests for several months, however. *Id*. at 5.

The Department moved for summary judgment on July 7, 2006 [*Potter* Dkt. 124], and a month later filed a motion to stay discovery "outside the context of a rule 56(f) determination" on the ground that the record was adequate for summary disposition [*Potter* Dkt. 126], which the Plaintiffs opposed [*Potter* Dkt. 127]. Plaintiffs filed their opposition to the Department's summary judgment motion on October 13, 2006 [*Potter* Dkt. 132], and cross-moved for summary judgment on October 16, 2006 [*Potter* Dkt. 133].

The Department never withdrew or modified its pending motion to stay discovery, even after the Plaintiffs cross-moved for summary judgment. Instead the Department continued to refuse to produce Dr. McKay for deposition, and also refused to produce Department employees noticed for depositions or to produce further documents after filing its motion. [*Potter* Dkt. 133, Ex. 2 at ¶¶ 4, 6.] Several months after the cross-motions for summary judgment had been filed, the district court granted the Department's motion to stay discovery. [*Potter* Dkt. 138.]

After the completion of extensive briefing by the parties on the cross-motions for summary judgment – including the Department's opposition to Plaintiffs' motion for summary judgment, which failed to even mention the term "Self Contained Breathing Apparatus" or "SCBA" [*Potter* Dkt. 140], App. ___-___ – the district court issued a memorandum opinion and order on September 28, 2007. [*Potter* Dkt. 151, 152], App. ___-___. The court denied the Department's summary judgment motion and granted Plaintiffs' cross-motion. The court first carefully dissected the different circumstances in which respiratory protection might be needed, and the fact that only positive-pressure SCBAs could be used in IDLH (or unknown) environments presenting (or potentially presenting) an imminent danger to life or health, while negative-pressure APRs assembled by attaching the "go-bag" cartridge filters to the wearer's

facemask (or potentially PAPRs) can be used only in non-IDLH environments not presenting such dangers. [*Potter* Dkt. 151 at 7-13], App. ___-___.

With regard to SCBAs, the court stated that "the Department now apparently concedes that the positive pressure in the SCBA system is adequate to protect the bearded fireman from any leakage that may be caused by facial hair," *id.* at 13, App. ___-___, citing the court's August 2005 memorandum extending the 2001 preliminary injunction, [*Potter* Dkt. 98 at 6-7], App. ___-___, in which the court had clearly stated:

> It is undisputed that firefighters who wear beards can safely operate[] the positive pressure self contained breathing apparatus (SCBA) that firefighters use in situations considered to be immediately dangerous to life and health, such as oxygen-deficient atmospheres.

The Department, as noted earlier, never challenged that statement – which was based on the Department's statement at the June 13, 2005 hearing disclaiming any reliance on any SCBA safety issue ("That's not what we're worried about") [*Potter* Dkt. 80 at 6:11-16], App. ___-___, and the testimony of its witness at the August 1, 2005 hearing (because SCBAs are positive pressure devices, "if there were to be a leak, then air would leak out to the side instead of the toxic atmosphere being drawn in") [*Potter* Dkt. 96, Ex. A at 88:15-22], App. ___-___. Referring again several pages later to the Department's "concession" regarding the safety of SCBAs, and the Department's recognition that "bearded firefighters have worn SCBA units for many years without incident," the court held that "there is no rational connection between the Department's clean-shaven policy and the compelling interest [in safety] it asserts <u>when SCBA units are called for or in use</u> – that is, in almost every firefighting or hazmat operation in which respiratory protection is used at all." (Emphasis in original.) [*Potter* Dkt. 151 at 17], App. ___-___.

The court therefore concluded, as it had a year earlier in its preliminary injunction decision [*Potter* Dkt. 98 at 7], App. ___-___, that "The central dispute in this case is thus

whether bearded firefighters can safely operate using negative pressure protection systems (APRs) in a tight-fitting mask, and whether they need to be able to do so." [*Potter* Dkt. 151 at 13], App. ___-___. With regard to that issue, the court held that the Department had not met its burden of demonstrating the existence of a genuine issue of material fact as to whether its facial hair ban was the least restrictive means of ensuring the safety of its members and the public in the event that the use of "go bag" filter masks ever were necessary, because it had not adduced credible evidence that in such a situation "bearded firefighters . . . could not be redeployed either 'up' to areas of duty where SCBA use is required, or 'down' to cold zone areas where no respiratory protection is needed." *Id*. at 19, App. ___-___. Simply put, "[t]he limited evidence on this point . . . demonstrates that, when [Go-Bag] duty is called for, there are other functions for which bearded firefighters and EMS workers are trained and to which they could be assigned." *Id*. at 20, App. ___-___. The district court held that the Department could not meet its heavy burden under RFRA with "the bare assertion that 'every available resource' is required" in responding to a mass disaster scenario "when the record shows that, even in hazmat situations different resources are applied to different duties, the tiny minority of which actually require the services of the negative pressure APR system from the Go-Bags." *Id*. at 20-21, App. ___-___.[8]

The Department moved for reconsideration, asserting that it had not conceded that "it is

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[8] Because the court held that reassignment away from APR duty in the event of a catastrophic contingency is a less restrictive means of accommodating Plaintiffs' religious practices, it declined to pass upon the adequacy of other less restrictive means that Plaintiffs had advanced, such as equipping the Plaintiffs with PAPRs or allowing them to take fit tests under the same procedures used for clean-shaven firefighters to show they could pass such tests with the same frequency as clean-shaven firefighters. *Id.* at 23-24, App. ___-___. However, should this Court conclude that the district court's judgment cannot be affirmed on the ground on which the district court ruled, the judgment can and should be affirmed on either of these alternative grounds. *See* Part 5 of the Argument, below.

safe to wear a tight-fitting face-piece while in a positive pressure configuration [*i.e.,* an SCBA]." [*Potter* Dkt. 154 at 1-2] In its supporting memorandum, however, the Department failed even to mention (i) its June 2005 statement to the district court disclaiming any contention that any safety issue with SCBAs justified its ban on facial hair, (ii) the testimony of its Safety Officer at the August 2005 hearing, or (iii) its failure to challenge the court's clear August 2005 finding that the SCBA safety issue was "undisputed."

The district court denied reconsideration at a hearing on November 29, 2007. The court pointed to its August 2005 statement that it understood the issue to be conceded and the fact that "Nobody objected to that when I said it two years ago," and as well as to the evidence at the day-long hearing that preceded that statement at which "there was no mention of any safety threats to bearded firefighters who used positive pressure SCBAs and [at which there was evidence from witnesses from both sides that] bearded firefighters have operated masks for a long time without any incident." Nov. 29, 2007 Transcript at 3:23-4:21 [*Potter* Dkt. 171], App. ___-___. The court acknowledged that the District's putative expert had stated in his declaration accompanying the Department's opposition to Plaintiffs' summary judgment motion that there "might" be long-term health effects from the use of SCBAs by bearded firefighters, but that "came years after the 2005 memorandum [opinion], and the entire conduct of the case, as I understood it, was about the operation of negative pressure masks, not positive pressure masks." *Id.*, App. ___-___.

This appeal followed.

SUMMARY OF ARGUMENT

The Department's only argument for reversing the summary judgment entered below is that the district court erred in finding that it was undisputed that SCBAs could be safely used by bearded firefighters. This argument fails for three reasons.

First, even if the Department had tried to reverse its previous position and raise this issue

in opposing Plaintiffs' motion for summary judgment (which it did not), it was within the proper discretion of the district court not to allow such a last-minute change of position. The Department had never objected to the district court's clear finding, more than a year previously, that the issue was undisputed, a finding based upon clear statements by the Department's representatives. Further proceedings and discovery had gone forward during the ensuing year and more in reliance on the proposition that the SCBA safety issue was undisputed.

Second, the Department did not even mention the words "Self Contained Breathing Apparatus" or "SCBA" in opposing Plaintiffs' summary judgment motion, and did not advise the district court that it was seeking to reverse its position regarding the safety of SCBAs until it moved for reconsideration of the district court's summary judgment decision. The Department's efforts in its appellate brief to argue that it did somehow advise the district court that it was reversing its position are contradicted both by the district court's manifest failure to perceive any such thing, despite the close reading of the Department's summary judgment papers demonstrated by the decision below, and by an examination of what the Department did and, more importantly, did not argue in opposing Plaintiffs' motion for summary judgment.

Third, even if the Department were entitled to and in fact did reverse its position in opposing summary judgment, it failed to come forward with sufficient evidence to create a genuine issue of fact on the matter of SCBA safety. Under RFRA and the rules regarding summary judgment, the Department was required to point to specific admissible evidence sufficient to allow a finding in its favor that the use of SCBAs by bearded firemen would be so unsafe that the Department's attempt to ban facial hair was justified. But the Department's Brief relies solely on two declarations by a supposed expert who opined on many other things, but failed to address the key issue of whether a positive pressure SCBA can be relied upon to result

only in an outward leak of pure air in the event a facemask seal is imperfect, and not an inward leak of toxic gases. Every other witness who addressed this issue, including the Department's witness, had previously testified that this would be so. In any event, the Department is not entitled to rely upon the declarations of a purported expert whom it refused to produce for a deposition that was timely noticed by the Plaintiffs.[9]

Even if the preceding arguments are rejected, the decision below should be affirmed as to the Plaintiffs who are paramedics. Only firefighters wear SCBAs; paramedics do not use SCBAs because they are not trained or permitted to work in IDLH environments. So even if the Department did properly and successfully show a genuine issue of fact regarding the use of SCBAs by bearded firefighters, that issue would not be material for paramedics.

ARGUMENT

1. Legal Standards and the Applicable Standards of Review For These Appeals

A. The Religious Freedom Restoration Act requires the Department to show that it has actively sought but been unable to devise a less restrictive means to further its compelling interest without burdening Plaintiffs' exercise of their religious convictions

Plaintiffs brought the actions from which these appeals arise under the Religious Freedom Restoration Act, ("RFRA"), 42 U.S.C. § 2000bb *et seq*., which Congress enacted to restore the free exercise test of cases such as *Sherbert v. Verner*, 374 U.S. 398 (1963), that had been struck down in *Employment Division v. Smith*, 494 U.S. 872 (1990). RFRA provides in

[9] Even if the Court concludes that the judgment cannot be affirmed on the ground on which the district court ruled, it can and should be affirmed on alternative grounds that were presented to the district court: that the Department has failed to show that bearded firefighters cannot obtain satisfactory facemask-to-face seals any less consistently than clean-shaven firefighters; and that the Department has failed to show that the Scott C420 PAPR is not a safe, reliable, and suitable alternative to the Department's Go-Bag respirator. The district court properly concluded that the Department had failed to carry its burden on these issues, but declined formally to rule on them. *See* Part 5 of the Argument, below.

relevant part:

> [The] Government may substantially burden a person's exercise of religion only if *it demonstrates* that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the *least restrictive means* of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1 (emphasis added).[10] RFRA thus imposes a "strict scrutiny," *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006),"compelling interest test" that is "'the most demanding test known to constitutional [or other] law,'" *Village of Bensenville v. FAA*, 457 F.3d 52, 67 (D.C. Cir. 2006) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997)). Moreover, the government's obligation to "demonstrate" that any burden it imposes is the least restrictive means of furthering a compelling governmental interest is itself carefully defined in the statute:

> The term "demonstrates" means meets the burdens of going forward *with the evidence* and of persuasion.

42 U.S.C. § 2000bb-2(3) (emphasis added).

RFRA therefore requires the government to seek to accommodate the religious needs of its employees. *See, e.g., O Centro Espirita,* 546 U.S. at 421 ("RFRA operates by mandating consideration, under the compelling interest test, of exceptions to 'rule[s] of general applicability.'" (quoting 42 U. S. C. §2000bb–1(a))); *Cheema v. Thompson*, 67 F.3d 883, 885

[10] Although RFRA was declared unconstitutional as applied to state governments in *City of Boerne v. Flores*, 521 U.S. 507 (1997), it remains in effect as applied to the federal government. *See, e.g.*, *O Centro Espirita Beneficente Uniao do Vegetal v. Gonzales*, 546 U.S. 418 (2006); *Webman v. Federal Bureau of Prisons*, 441 F.3d 1022 (D.C. Cir. 2006). About two months after the district court entered its June 2001 preliminary injunction, the Department, relying upon *City of Boerne*, moved to dismiss the *Potter* action on the ground that RFRA was unconstitutional as applied to the District of Columbia government. After the United States intervened to support the constitutionality of its statute, the Department withdrew its motion. (*See Potter* Dkt. 15, 23, 25, 26.)

(9th Cir. 1995) (government failed to demonstrate lack of a less restrictive alternative; "Its stance . . . that it had no obligation to do so . . . was quite mistaken."). While Plaintiffs have never disputed that safety can be a compelling governmental interest in the context of the Fire and Emergency Medical Services Department, that does not lighten the Department's burden of proving "with . . . evidence" that *discharging* the plaintiffs for their religious observance is the only way to protect the safety of the District of Columbia. As the district court properly ruled, the Department has not met that burden.

B. To defeat summary judgment the District had to identify specific admissible evidence sufficient to allow the trial court to find it had satisfied its burden of proof under the Religious Freedom Restoration Act

Summary judgment should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). As this Court and the Supreme Court have explained, "A dispute about a material fact is not genuine unless the evidence is such that a reasonable jury could return a verdict for the nonmoving party, and a moving party is entitled to a judgment as a matter of law if the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Haynes v. Williams*, 392 F.3d 478, 481 (D.C. Cir. 2004) (quoting *Anderson v. Liberty Lobby,* 477 U.S. 242, 248 (1986), and *Celotex,* 477 U.S. at 322) (internal quotation marks and citation omitted). Mere assertions in an expert declaration that do not provide specific reasoning and factual support to justify a conclusion regarding a material fact do not satisfy this burden. As this Court has explained, summary judgment "affidavits will not suffice if [they] are conclusory, . . . or if they are too vague or sweeping," *Billington*, 233 F.3d at 584 (quoting *Campbell v. DOJ*, 164 F.3d 20, 30 (D.C. Cir. 1998)); *see also Jackson v. Anchor Packing Co*., 994 F.2d 1295, 1303-04 (8th Cir. 1993) ("Conclusory affidavits, even from

expert witnesses, do not provide a basis upon which to deny motions for summary judgment.”). Because the Department bears the burden under RFRA both of going forward with evidence and of persuasion, it cannot survive a summary judgment motion without pointing to admissible evidence from which a reasonable factfinder could conclude that there are no accommodations that will permit Plaintiffs to perform their jobs safely. *Cf. American Council of the Blind v. Paulson*, ___ F.3d ___, 2008 WL 2095846 at *6 (D.C. Cir. No. 07-5063) (May 20, 2008) (summary judgment for plaintiff affirmed where defendant failed to carry his burden under the Rehabilitation Act of showing that “all accommodations would be unduly burdensome”).

C. Substantive factual and legal determinations are reviewed de novo in an appeal from the grant of summary judgment, but the trial court’s determination of whether a party will be allowed to withdraw a prior concession is reviewed for abuse of discretion

Two standards of review are implicated by these appeals. This Court reviews a district court’s summary judgment ruling de novo. *E.g.*, *Feirson v. District of Columbia*, 506 F.3d 1063, 1066 (D.C. Cir. 2007). However, the district court's holding that the Department would not be allowed to reverse its position regarding the safety of SCBAs more than a year after agreeing that was not an issue in the case, and after the filing of cross-motions for summary judgment, is a case-management ruling reviewed only for abuse of discretion. *See, e.g.*, *Nat’l Westminster Bank PLC v. United States*, 512 F.3d 1347, 1363 (Fed. Cir. 2008) (“Likewise, the issue of waiver [of an argument] is also within the discretion of the trial court, consistent with its broad duties in managing the conduct of cases pending before it.” (internal quotation marks omitted)); *Flynn v. Dick Corp.*, 481 F.3d 824, 834 (D.C. Cir. 2007) (“In general, the district court enjoys wide discretion in managing discovery, and, accordingly, we review the district court's discovery rulings for abuse of discretion only.” (internal quotation marks and brackets omitted)); *Teneyck v. Omni Shoreham Hotel*, 365 F.3d 1139, 1155-56 (D.C. Cir. 2004) (district court’s management

of trial proceedings reviewed for abuse of discretion); *Berry v. District of Columbia*, 833 F.2d 1031, 1037 n.24 (D.C. Cir. 1987) (applying abuse of discretion standard and noting that "[a] trial court's decisions with respect to the management of its docket are normally entitled to deference").

2. The Department Agreed That Bearded Firefighters Could Safely Use Positive Pressure SCBAs In 2005; It Was Within The Trial Court's Discretion To Refuse To Allow The Department To Reverse Its Position A Year Later

The Department claims that it never conceded that the use of SCBAs by bearded firefighters did not present a safety threat justifying the limitations it sought to impose on Plaintiffs' exercise of their religious convictions. (Department's Br. at 12.) On the record in this case, that is a risible assertion. In explaining to the district court the justifications for its new effort to ban facial hair in June 2005, the Department explicitly told the district court that it was not trying to justify the new policy on the basis of safety issues with the use of SCBAs by bearded firefighters. [*Potter* Dkt. 80 at 6:11-16 ("That's not what we're worried about")], App. ___-___.[11] The Department, to the contrary, explained and sought to justify its new attempt to ban facial hair, despite the 2001 preliminary injunction, *only* in terms of the dangers of a mass terrorist attack requiring everyone in the Department to don negative pressure APRs using their "go bag" cartridge filters, which would assertedly carry a risk of inward leakage. *Id*. at 4:18-10:7, App. ___-___.

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[11] Indeed, any possible SCBA issue was a ghost laid largely to rest by the issuance of the court's 2001 preliminary injunction, when the *Potter* plaintiffs had rebutted the Department's unsubstantiated safety concerns by presenting the expert declaration of FDNY Chief Santora which explained the reasons why the positive pressure operation of SCBA would result in any leakage being outward from the facemask, and why, as the Department's representative agreed in June 2005, any possible reduction in the length of time a tank of air would last was not a safety concern. [*Potter* Dkt. 2, Ex. H at ¶¶ 8-18, resubmitted at *Potter* Dkt. 92, Attach. 11], App. ___-___.

The Department also presented no evidence at the August 2005 hearing that a safety issue with SCBAs justified burdening the Plaintiffs' exercise of their religious beliefs. To the contrary, its lead witness agreed that the positive pressure operation of SCBAs would mean that any facemask leakage would be outward, not inward. August 1, 2005 Transcript at 88:15-89:16 [*Potter* Dkt. 96, Ex. A], App. ___-___.

It was therefore entirely reasonable for the district court to state in its opinion modifying the preliminary injunction in August 2005 that "It is undisputed that firefighters who wear beards can safely operate[] the positive pressure self contained breathing apparatus." [*Potter* Dkt. 98 at 6], App. ___-___.

Most importantly (although entirely predictably, given all that had gone before), the Department never challenged that statement, then or during the months of discovery that followed.

The only real issue regarding the Department's position on the safety of SCBAs is therefore not whether the Department agreed with the district court that this issue was undisputed in 2005, but whether the Department was entitled to reverse its field much later in the litigation and attempt to claim that a safety issue with SCBAs did justify its new anti-beard policy. The answer is no.

The Department claims that it raised the issue of SCBA safety in opposing Plaintiffs' motion for summary judgment. Plaintiffs show in Part 3 below that this is not true. The Department did not raise the issue of SCBA safety until its motion for reconsideration, after summary judgment had been entered for Plaintiffs. But whichever is the case, the district court acted well within its discretion in refusing to allow the Department to reverse its position over a year after conceding the issue, and after extensive discovery was conducted in reliance on the

proposition that there was no dispute as to the safety of SCBAs when used by bearded firefighters.

It is a well-established principle that district courts have considerable latitude to manage their own courtrooms, and to determine whether litigants should be allowed to raise new issues in an untimely manner. *See, e.g., Havenfield Corp. v. H & R Block, Inc.*, 509 F.2d 1263, 1272 (8th Cir.) ("The district judge did not abuse his discretion by not allowing the untimely raising of new issues by defendant"), *cert. denied*, 421 U.S. 999 (1975). Here, the trial judge clearly did not even realize that the Department was trying to raise a safety issue regarding SCBAs until the Department moved for reconsideration of his summary judgment order in October 2007. In denying that motion, the trial judge clearly stated the reasons why he found the issue "undisputed" in August 2005 (without protest from the Department), and also made it clear that he was not going to tolerate a sudden, last minute change in the Department's position after "the entire conduct of the case [for such a lengthy period], as I understood it, was about the operation of negative pressure masks, not positive pressure [SCBA] masks." [*Potter* Dkt. 171 at 3:23-4:21], App. ___-___.

This was an entirely reasonable determination by the district court. Months of discovery and other proceedings had gone forward since August 2005 focusing on the issues that the Department had stated were in dispute, namely, the ability of Plaintiffs to pass fit tests to show they could safely use negative pressure "go bag" filter respirators and the availability of other alternatives, such as operational adjustments in the assignment of the handful of bearded Plaintiffs or their possible use of alternative, safer equipment such as PAPRs, in the event of the sort of catastrophic event hypothesized by the Department. The Department, at the time it filed its summary judgment motion, had moved to stay discovery "outside the context of a rule 56(f)

determination" on the ground that the record was adequate for summary disposition [*Potter* Dkt. 126], and it did not withdraw that motion after Plaintiffs cross-moved for summary judgment, with the result that the district court approved the stay of discovery requested by the Department several months later [*Potter* Dkt. 138].

Obviously, if the Department were allowed to reverse its position at the last moment and argue that its ban on beards was justified by a newly discerned safety issue with SCBAs, new rounds of discovery and further contentious proceedings would be necessary in lawsuits that had been pending since 2001. It was entirely within the proper discretion of the district court to reject any such burdensome *volte face* by the Department. *See, e.g., Pilots Against Illegal Dues v. Air Line Pilots Ass'n*, 938 F.2d 1123, 1133 (10th Cir. 1991) (exclusion of evidence "on the ground that it sought to inject new issues into the trial in an untimely fashion" was "not an abuse of discretion"); *Samuels v. Wilder*, 871 F.2d 1346, 1350 (7th Cir. 1989) ("The district court does not abuse its discretion by denying a motion to amend if granting leave to amend would unduly prejudice a party not afforded an adequate chance to respond to the newly-raised issues"); *Martell v. Boardwalk Enters., Inc.*, 748 F.2d 740, 749-50 (2d Cir. 1984) (denial of motion to assert a claim of indemnification on the eve of trial not an abuse of discretion); *Knight v. Otis Elevator Co.*, 596 F.2d 84 (3d Cir. 1979) (theory not argued in pre-trial memoranda properly excluded from argument at trial). Even if the trial court's decision on this procedural point were subject to de novo review (which would make no sense, since the trial judge, not the members of this Court, had supervised the course of proceedings and discovery in the courtroom below), the trial judge's determination was reasonable and should be affirmed.

3. The Department Did Not Tell The Court It Was Changing Is Position Regarding The Safety Of SCBAs Until After Summary Judgment Was Entered, And That Was Too Late

Even if, contrary to established law and common sense, the Department were entitled so

late in the proceedings to change its previously stated position regarding the safety of SCBAs in opposing summary judgment, the Department in fact never did tell the Court in its opposition to Plaintiffs' summary judgment motion that it was reversing its position regarding SCBA safety. The district judge's summary judgment decision [*Potter* Dkt. 151], App. ___-___, shows that he had read the Department's summary judgment papers, including its opposition to Plaintiffs' summary judgment motion, with considerable care, yet he greeted with manifest surprise the Department's motion for reconsideration arguing that he had erred in finding the SCBA safety issue undisputed. *See* Nov. 29, 2007 Transcript at 3:23-4:21 [*Potter* Dkt. 171], App. ___-____.

It is hardly surprising that the trial judge did not glean from the Department's opposition to Plaintiff's summary judgment motion that the Department had reversed its previously stated position regarding SCBAs and was now disputing the safety of SCBAs. The Department's opposition *did not even mention* the term "Self Contained Breathing Apparatus" or "SCBA" [*Potter* Dkt. 140], App. ___-___. Instead, it was devoted to debating the issues that both sides believed were in dispute – the fairness of the Department's different procedures for conducting fit tests for the Plaintiffs vs. clean-shaven firefighters, *id.* at 2-5, 9-10, App. ___-___; the adequacy of PAPRs as a possible less restrictive alternative, *id.* at 5-6, 11-12, App. ___-___; the Department's mistaken contention that statements in the court's preliminary injunction decision constituted unchangeable "law of the case," *id*. at 7-8, App. ___-___; whether operational adjustments in the assignments for Plaintiffs during a hypothetical mass emergency would be a less restrictive alternative, *id.* at 10-11, App. ___-___; and – very briefly – legal standards under RFRA, *id.* at 12-13, App. ___-___.

The Department tries to explain away its failure to even mention the words "Self Contained Breathing Apparatus" or "SCBA" in its memorandum in opposition – inexplicable if

indeed it was trying to tell the court that it was reversing its previously stated position – by saying that it did mention safety issues involving "tight fitting face pieces," *e.g.*, *id.* at 2, App. ___-___. The flaw in this explanation is that, in the context of all prior proceedings and statements by the Department, the safety issue involving tight fitting face pieces that was under discussion was the issue of possible leaks in face masks used as negative pressure APRs with "go bag" cartridge filters, where a possible lack of a tight fit could result in an inward leakage of outside air, and not with positive pressure SCBAs, where both the Plaintiffs' expert, Chief Santora, and the Department's witness, Captain Flint, agreed that any leakage would be outward rather than inward.

The best the Department can manage is to point to a single mention at the end of a paragraph at page 9 of its summary judgment opposition, *id.* at 9, App. ___-___, that its expert believed that "Even when used in a positive pressure configuration, use of a tight-fitting face piece presents an unacceptable risk to the wearer's health. [Third McKay Decl.] at ¶ 23, 24." But all that declaration states in paragraph 23 is that the evidence that the bearded Plaintiffs have fought hundreds of fires without causing injury "may" not take into account "slowly developing health effects," for which the declaration points only to literature indicating that firefighters have an increased risk of cancer for which "the reasons are not clear." [*Potter* Dkt. 141, Ex. 1 at ¶ 23], App. ___-___. Paragraph 24 of the declaration, in turn, says only that a single exposure to a chemical or biological agent "as a result of terrorist activity" would be more likely "into the facepiece having a poor seal," without any explanation why this would happen with a positive pressure mask, as opposed to a negative pressure mask [*Id.* at ¶ 24], App. ___-___. Thus, a diligent effort by the district court to track down the basis for the Department's fleeting, uninformative sentence at page 9 of its opposition would hardly have informed the court that the

Department was reversing its oft-stated position that it was not seeking to justify its beard ban because of safety concerns with SCBAs.

If the Department wished to, or was in fact truly trying to, reverse its position regarding the safety of SCBAs for bearded firemen, it had a clear duty when it opposed Plaintiffs' motion for summary judgment to inform the court in plain and unmistakable terms that it was doing so, particularly in view of the avulsive effect such a radically new position would have on the established posture of these cases, and on the Department's own, then-pending motion to stay discovery. The Department failed to do this.[12]

The Department's after-the-fact attempts to suggest that its responses [*Potter* Dkt. 140, Attach. 5], App. ___-___, to Plaintiffs' statement of undisputed facts [submitted with *Potter* Dkt. 133] plainly communicated that it was reversing its position regarding the safety of SCBAs are equally unavailing. Thus, the Department now claims that it "disputed plaintiffs' assertion that it was undisputed that '[I]t is not dangerous for a firefighter to work in a hazardous environment using an SCBA.'" (Department's Br. at 8.) But in fact the Department did *not* dispute that proposition. All that it disputed was a technical detail regarding whether an SCBA "supplies a continuous flow of pressurized air from air tanks worn by firefighters into their facemask," as stated in Plaintiff's Statement No. 5, or whether SCBAs are equipped with

[12] Indeed, for the Department to have reversed course on the SCBA issue in its summary judgment papers would have made its own arguments internally inconsistent. Both in its own motion for summary judgment, and in its opposition to Plaintiffs' motion for summary judgment, the Department argued forcefully that the rulings in the district court's August 2005 order were the law of the case, and as such were no longer open for litigation. *See Potter* Dkt. 124 at 12-15; *Potter* Dkt. 140 at 7-8, App. ___-___. But that is the same order in which the district court found that the safety of SCBA use by bearded firefighters was undisputed. *Potter* Dkt. 98 at 6-7, App. ___-___. Thus, the Department could not have argued that the SCBA issue was disputed without fatally undercutting its own argument about the law of the case.

"pressure-demand regulators . . . to provide breathing air into the facepiece when the pressure in the facepiece falls below a pre-defined (positive) value," as the Department (correctly) pointed out in its Response. [*Potter* Dkt. 140, Attach. **5** at ¶ 5], App. ___-___.

But this is merely a quibble about *how* an SCBA maintains positive pressure, not *whether* an SCBA maintains a positive pressure within the wearer's facemask, so that any "minor imperfections in the facemask's seal will result in an outward flow of clean air from the mask, rather than an inward flow of potentially dangerous gases or particulates," with the result that "It is therefore not dangerous for a firefighter to work in a hazardous environment using an SCBA," *id.* Because it did not challenge these important, substantive undisputed facts, the Department – far from telling the court it was reversing its long-stated position – in fact reconfirmed that it was not asserting that SCBAs were unsafe when used by bearded firefighters. The Department's brief is simply seeking to sow confusion where none exists.

In short, the first time the Department asserted that the district court had erred in finding that the safety of SCBAs was "undisputed" – a finding made in its August 2005 preliminary injunction decision [*Potter* Dkt. 98 at 6], App. ___-___, and re-acknowledged its September 2007 summary judgment decision [*Potter* Dkt. 151 at 13, 17], App. ___-___ – was in the Department's motion for reconsideration of the summary judgment decision. That was, to say the least, simply too late to be taken seriously, as the district court correctly found in denying the motion for reconsideration. [*Potter* Dkt. 171 at 3:23-4:21], App. ___-___. *See, e.g., Christianson v. Colt Indus. Operating Corp*., 486 U.S. 800, 817 (1988) ("as a rule courts should be loath[] to ["revisit prior decisions"] in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice" (internal quotations marks and citation omitted)); *Connors v. Hallmark & Son Coal Co*., 935 F.2d 336,

341 n.9 (D.C. Cir. 1991) ("abuse of discretion standard ordinarily applies to a district judge's decision whether to consider a new theory raised on motion for reconsideration"); *Moore v. Hartman*, 332 F. Supp. 2d 252, 257 (D.D.C. 2004) (Where "litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again.").[13]

4. The Department Never Established The Existence Of A Genuine Issue Of Fact Regarding The Safety Of The Use Of SCBAs By Bearded Firefighters

Even if the Department were entitled to reverse its position and inject the issue of SCBA safety into the case at the very last moment, and even if the Department had advised the district court in a sufficiently forthright and direct manner that it was doing so in opposing Plaintiffs' summary judgment motion, there would still remain the question of whether it identified sufficient admissible evidence to create a genuine issue of fact on that score. As the party bearing the burden of proof under RFRA to demonstrate that there was no less restrictive alternative than discharge to avoid substantially burdening Plaintiffs' sincerely held religious beliefs, the Department was required to come forward with sufficient evidence to allow the district court to find that there was a safety issue when SCBAs are used by bearded firemen that is so serious and so insolvable that the ban on facial hair is justifiable for that reason. 42 U.S.C. § 2000bb-2(3); *O Centro Espirita, supra.* The Department failed to do this, and the summary judgment below should be affirmed on the basis of this failure, even if the Court rejects the

[13] Moreover, because the Department's argument that SCBAs are not safe was not properly raised below, it was waived, and should not even be considered here. *See, e.g., District of Columbia v. Air Florida, Inc.,* 750 F.2d 1077, 1084 (D.C. Cir. 1984) ("It is well settled that issues and legal theories not asserted at the District Court level ordinarily will not be heard on appeal"); *Marymount Hosp., Inc. v. Shalala*, 19 F.3d 658, 663 (D.C. Cir. 1994) ("Arguments not made below are deemed waived"); *United States v. Thomas*, 114 F.3d 228, 250 (D.C. Cir. 1997) (same).

arguments presented above.[14]

The Plaintiffs were not required to come forward with evidence, but merely to point to the Department's failure to come forward with evidence adequate to show that it could bear its burden of proof. *Celotex Corp.*, 477 U.S. at 322 (a moving party is "entitled to a judgment as a matter of law" if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"). In fact, however, witnesses for Plaintiffs presented evidence of two sorts that supported their assertions that bearded firefighters can safely use SCBAs. The first is the empirical fact that large numbers of bearded firefighters have worn SCBAs in fighting fires for many years without any reports of injury or any other safety issue. August 1, 2005 Transcript at 38:19-39:16 [*Potter* Dkt. 96, Ex. A]. The second is the explanation that the positive pressure operation of SCBAs means that any leakage will be outward from the facemask if there is an imperfect seal, not an inward leakage of potentially toxic gases. [*Potter* Dkt. 2, Ex. H at ¶¶ 8-18, resubmitted *Potter* Dkt. 92, Attach. 11.]

The Department submitted no evidence to rebut Plaintiffs' evidence. To the contrary, the Department's witnesses agreed that bearded firefighters have worn SCBAs without any reported problems for many years, August 1, 2005 Transcript at 79:23-80:6 [*Potter* Dkt. 96, Ex. A], and

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[14] Because the district court rejected the Department's tardy attempt to argue that SCBAs were unsafe, the court did not did not reach the question whether the Department had come forward with sufficient evidence to demonstrate the existence of a genuine issue of fact on this issue. As previously noted, however, this Court can affirm the summary judgment on any basis supported by the record. *See, e.g.*, *Wilburn v. Robinson*, 480 F.3d 1140, 1148 (D.C. Cir. 2007) ("We can, however, affirm a grant of summary judgment on alternative grounds, if applicable"); *Washington-Baltimore Newspaper Guild v. The Washington Post*, 959 F.2d 288, 292 n.3 (D.C. Cir. 1992) ("We have discretion to uphold a grant of summary judgment under a legal theory different from that applied by the district court, resting the affirmance on any ground that finds support in the record, particularly one raised before the district court").

agreed that the positive pressure design of SCBAs will cause any leakage to be outward, not inward, *id.* at 88:15-89:16, App. ___-___.

The only evidence the Department claims to have submitted to create a genuine issue of material fact is the declarations of Dr. McKay,[15] who offered generalized conclusions that SCBAs are or may be unsafe for bearded firefighters. His position, as the district court noted, "appears to be based on OSHA regulations and manufacturer's instructions [counseling compliance with the OSHA regulations, where applicable], rather than any expert opinion as to whether the positive pressure in the system is adequate to protect against an imperfect seal." [*Potter* Dkt. 151 at 25]. In short, Dr. McKay does not address the central issue, which is not whether there may be some leakage if a bearded fireman cannot attain a perfect facemask seal, but whether that leakage will be an outward leakage from a positive pressure SCBA, as every witness who has addressed that issue has testified, or an inward leakage of toxic outside air, which Dr. McKay does not address, much less demonstrate.[16]

With regard to Dr. McKay's attempt to rely on OSHA regulations and corresponding

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[15] *Chasin* Dkt. 8, Attach. 1, App. ___-___; *Potter* Dkt 141, Ex. 1, App. ___-___.

[16] The only evidence the Department cites beyond the McKay Declarations and materials he relies upon is a passing reference to testimony by Captain Flint at the August 2005 hearing that outward leakage of air from a positive pressure SCBA reduces the service life of a tank of air. (Department's Br. at 13) But Flint never testified that this reduction created a safety issue justifying the ban on facial hair, as opposed to an inconvenience or possibly an economic issue. Moreover, the Department's representative expressly told the district court at the June 2005 hearing that the Department was not concerned with any possible reduction in the service life of an SCBA tank. [*Potter* Dkt. 80 at 6:3-16], App. ___-___. His concession that this issue did not create a safety risk may well have been based in whole or in part on the testimony of Plaintiffs' expert, Chief Santora, at the 2001 preliminary hearing, who explained the several reasons why an imperfect seal did not reduce service life as much as other variables such as a firefighter's size, weight, lung capacity, cardio-vascular fitness, activity level and health, and why an air tank's possible reduced service life did not present a safety issue. [*Potter* Dkt. 2, Ex. H at ¶¶ 14-18, resubmitted as *Potter* Dkt. 92, Attach. 11], App. ___-___.

industry standards, there are several problems. First, although the Department says that it "based" its 2005 policy on OSHA regulations promulgated many years ago (Department's Br. at 9), it does not attempt to claim that those regulations apply to the District of Columbia, which they do not.[17] Even if the regulations did apply to the District of Columbia, RFRA explicitly overrides them.[18] And that, of course, is as it should be. Regulations of general applicability may be enacted for many reasons, and if validly enacted are subject to review only under the "extremely narrow" arbitrary and capricious standard, *U.S. Postal Service v. Gregory*, 534 U.S. 1, 6-7 (2001). A regulation, or an industry standard, may be based on general considerations of convenience (it may be more difficult and time-consuming to experiment with different masks so that a person with facial hair can achieve an adequate fit), or economic considerations (providing a larger or smaller, or even a custom-fitted, facemask may impose an added cost), an excess of caution, or any of a number of other reasons that may make sense across the broad sweep of a large population, but which do not consider individual circumstances.

RFRA stands at the opposite pole. It requires an examination of individual circumstances, and a particularized determination whether a burden on *an individual's* exercise of religious convictions is required by a compelling government interest that can be pursued by no less restrictive an approach. *See* 42 U.S.C. § 2000bb–1(b) ("Government may substantially burden *a person's* exercise of religion only if it demonstrates that application of the burden *to the person* . . . .") (emphasis added); *O Centro Espirita,* 546 U.S. at 430-31 ("RFRA requires the

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[17] The reasons are set out in detail in Plaintiffs' Prehearing Memorandum (*Potter* Dkt. 92) at 26-27.

[18] *See* 42 U.S.C. § 2000bb-3 ("This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.").

Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' – the particular claimant whose sincere exercise of religion is being substantially burdened."). Dr. McKay's rote invocation of OSHA regulations and related industry standards wholly ignores that key difference. It also fails to provide any factual linkage between the broad generalizations he offers that facial hair should not be present and the specific proposition that the Department tries to claim presents a genuine issue of material fact: to wit, whether the specific SCBA model used by the Department, with its range of facemask sizes and configurations (which there is no indication McKay has ever worked with) can be safely used by these specific Plaintiffs (whose fit tests have never been supervised or reviewed by McKay), as they have been for many years, with reasonable confidence that the SCBAs will maintain a positive pressure so that any possible leakage will be outward – as every witness but McKay agrees will be the case. *See Brainard v. American Skandia Life Assur. Corp*., 432 F.3d 655, 664 (6th Cir. 2005) ("district court acted well within its discretion" in disregarding an "affidavit employ[ing] broad and dramatic language without substance or analysis"); *Guile v. United States*, 422 F.3d 221, 227 (5th Cir. 2005) ("A claim cannot stand or fall on the mere ipse dixit of a credentialed witness." (internal quotation marks omitted)). As this Court has taught, summary judgment "affidavits will not suffice if [they] are conclusory, . . . or if they are too vague or sweeping." *Billington*, 233 F.3d at 584 (quoting *Campbell,* 164 F.3d at 30); *see also Jackson v. Anchor Packing Co*., 994 F.2d 1295, 1303-04 (8th Cir. 1993) ("Conclusory affidavits, even from expert witnesses, do not provide a basis upon which to deny motions for summary judgment.").

Another decisive difficulty with Dr. McKay's declarations is that the Department refused to produce him for a deposition timely noticed by the Plaintiffs months before the summary judgment motions were filed [*Potter* Dkt. 120 at 1-2; *Potter* Dkt. 127, Iverson Decl. at ¶ 2;

Potter Dkt. 133, Ex. 2 at ¶ 4], then moved to stay discovery after filing its motion, and continued to pursue its motion to stay discovery after Plaintiffs moved for summary judgment. Fundamental fairness should prevent the Department from relying on Dr. McKay's declarations to defeat summary judgment, while refusing to permit a deposition that would allow Plaintiffs to examine both whether he qualifies as an expert on SCBA safety,[19] and the basis for his airily delivered statements.

For these reasons, the Department has failed to show the existence of a genuine issue of material fact regarding the safety of SCBAs, and the decision below should be affirmed for that reason if no other.

5. Plaintiffs Are Also Entitled To Affirmance Of The Judgment Below On Additional Alternative Grounds

In the district court, Plaintiffs also moved for summary judgment on two additional grounds. While the district court found it unnecessary to rule on those arguments, Plaintiffs, as appellants, are entitled to pursue them here, *see Warren v. District of Columbia*, 353 F.3d 36, 38 (D.C. Cir. 2004) ("a prevailing party may defend the judgment on any ground decided or raised below"), and the judgment below should be affirmed on either or both of those grounds if it is not affirmed on the ground upon which the district court ruled, *see, e.g., Wilburn v. Robinson*, 480 F.3d 1140, 1148 (D.C. Cir. 2007) ("We can, however, affirm a grant of summary judgment on alternative grounds, if applicable"); *Washington-Baltimore Newspaper Guild v. The Washington Post*, 959 F.2d 288, 292 n.3 (D.C. Cir. 1992) ("We have discretion to uphold a grant

[19] While Dr. McKay may be an expert in some aspects of respirator fit testing, there is no basis to assume that his expertise extends to all aspects of SCBA operation and safety. The University of Cincinnati website (www.eh.uc.edu/dir_individual_details.asp?qcontactid=54) identifies him as a "pulmonary toxicologist" whose research includes certain aspects of respiratory fit test methods and use. Since the Department refused to produce him for actual examination, Plaintiffs and the Court have no way to know what basis, if any, he has to opine on various matters.

of summary judgment under a legal theory different from that applied by the district court, resting the affirmance on any ground that finds support in the record, particularly one raised before the district court”).

First, Plaintiffs pointed out that the Department had not shown that bearded firefighters were unable to obtain satisfactory facemask-to-face seals any less consistently than clean-shaven firefighters, and indeed had refused to provide the data on fit-test results for clean-shaven firefighters, requested by Plaintiffs, that might have shown equal results. [*See Potter* Dkt. 133 at 27-28.] The district court concurred, observing:

> Many of the plaintiffs passed repeated tests before finally failing, and there is inadequate evidence in the record as to whether clean-shaven individuals would pass such monthly tests at higher or lower rates than bearded [Department] workers. It may be the case that bearded firefighters can pass appropriate fit tests with the frequency and consistency necessary to ensure an adequate margin of safety even where they operate their masks as negative pressure APRs. It may not, but the Department does not appear to have investigated the matter beyond the bare administration of fit tests pursuant to this Court’s preliminary injunction, and, as noted above, *has not carried its burden of proof on this point*.

[*Potter* Dkt. 151 (Mem. Op.) at 26 (emphasis added; record citations omitted).] Thus, although not formally ruling on this point, the district court in fact implicitly concluded that Plaintiffs were entitled to summary judgment on this ground, because it was the Department’s burden to prove its safety claim “with … evidence,” and its failure to do so – despite having relevant evidence from its 2006 and 2007 Department-wide fit testing program readily available – requires its defense to be rejected.

Second, Plaintiffs argued that “The Department has not borne, and cannot bear, its burden to show that the Scott C420 PAPR is not a safe, reliable, and suitable alternative to the Department’s Go-Bag respirator.” [*Potter* Dkt. 133 at 28.] While it was not Plaintiffs’ burden to do so, they demonstrated in detail that this Powered Air Purifying Respirator converted a

negative pressure system into a positive pressure system in a manner that was lightweight, long-lasting, inexpensive, and entirely compatible with the Department's existing equipment. *Id*. at 28-36.

Canvassing the record, the district court concluded that the Department had conceded that "This PAPR is interoperable with current systems, and could be attached directly to the plaintiffs' current facemasks." [*Potter* Dkt. 151 at 24 (citing Defendant's Response Facts).] On the issue of whether the PAPR would convert a negative pressure system to a positive pressure (and therefore a safe) system, the court concluded that "The Department's expert testimony is equivocal on this point," and that "it may be the case that a properly configured Scott C420 PAPR would represent a technological means of accommodating these plaintiffs." *Id*. at 25. The court allowed that "It may well not, but the Department does not appear to have investigated the matter beyond adverting to the manufacturer's manual and its reliance (in turn) on OSHA's facial hair standards." *Id*. at 25-26.

Once again, while the district court eschewed ruling on the issue, its conclusion demonstrates that Plaintiffs are entitled to summary judgment. The court appears to have ignored the principle that "the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case . . . at both the directed verdict and summary judgment stages." *Anderson*, 477 U.S. at 255-56. Thus where, as here, the defendant bears the burden of demonstrating "with . . . evidence" that a potential accommodation is unworkable, its presentation of evidence that is merely equivocal, based on its failure to conduct a reasonable investigation (during 6-1/2 years of litigation) shows not the existence of a genuine issue of material fact, but rather the defendant's "fail[ure] to make a showing sufficient to establish the existence of an element essential to that

party's case, and on which that party will bear the burden of proof at trial." *Haynes v. Williams*, 392 F.3d at 481. Summary judgment is therefore appropriate on this ground as well. *See American Council of the Blind*, 2008 WL 2095846 at 6 (summary judgment for plaintiff affirmed where defendant failed to carry his burden under the Rehabilitation Act of showing that "all accommodations would be unduly burdensome").

6. Even If The Department Properly Established A Dispute Of Fact Regarding SCBAs, That Is Not A Material Fact For The Paramedic Plaintiffs, Who Do Not Use SCBAs

Even if the Court rejects the reasons for affirmance argued above, the summary judgment below should be affirmed as to the four Plaintiffs (Chasin, Evans, Rashumaa & Sterling) who are paramedics in the emergency medical services division of the Department. The only ground for reversal presented in Department's brief is that the district court failed to recognize a genuine issue of material fact regarding the safety of SCBAs when used by persons with beards. But it is undisputed that paramedics do not use SCBAs, and are not trained in their use; in no event do they work in IDLH environments. Declaration of Steven Chasin at ¶ 5 [*Chasin* Dkt. 3]. Only firefighters use SCBAs and work in toxic areas.

Therefore, any fact issue relating to SCBAs, even if properly raised and shown to be genuine, would not be material as to the paramedic Plaintiffs. It is clear that RFRA issues must be addressed on an individual basis as to individual plaintiffs. The plaintiffs' claims must be viewed individually. *See* 42 U.S.C. § 2000bb–1(b); *O Centro Espirita,* 546 U.S. at 430-31. Hence, the summary judgment below should be affirmed as to the paramedic Plaintiffs in Case No. 07-7164, even if not affirmed for the firefighter Plaintiffs in these appeals.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

May 23, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief contains 13,831 words as measured by word processing software (excluding those portions specified by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Rule 32(a)(2) of this Court) and therefore complies with the type-volume limitation of no more than 14,000 words set forth in FRAPP 32(a)(7)(B).

____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was mailed, first class postage prepaid (with a courtesy copy by electronic mail) on this 23d day of May, 2008 to:

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