No. 20-0456 (L) & 20-0650 (CON)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SALIK BEY, TERREL JOSEPH, STEVEN SEYMOUR, and CLYDE PHILLIPS,

Plaintiffs – Appellees – Cross-Appellants,

v.

CITY OF NEW YORK, FIRE COMMISSIONER DANIEL A. NIGRO, NEW YORK CITY FIRE DEPARTMENT, JOHN AND JANE DOES 1-10, KAREN HURWITZ, and SHENECIA BEECHER,

Defendants – Appellants – Cross-Appellees.

On Appeal from the U.S. District Court for the Eastern District of New York

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BRIEF FOR APPELLEES – CROSS-APPELLANTS
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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

INTRODUCTION

Plaintiffs in this case are four African-American firefighters who have dedicated their professional lives to public service. Each completed years of rigorous training—both physical and mental—and beat out thousands of other aspiring firefighters to earn coveted positions with the New York City Fire Department (FDNY). Throughout their time with the Department, Plaintiffs have performed their jobs capably and courageously, often risking their lives to protect others. This case is about their ability to continue to do those jobs.

Plaintiffs suffer from a medical condition that prevents them from shaving their facial hair down to the skin. Because the condition makes it extremely painful for Plaintiffs to use a razor, FDNY granted them a medical exemption from its grooming policy, which requires firefighters to be clean shaven. To obtain the exemption, each Plaintiff had to keep his facial hair closely cropped and pass regular "fit tests" to show that his hair did not compromise the face-mask seal on his breathing apparatus. Plaintiffs complied with those requirements for nearly three years—along with more than a dozen other firefighters—without any change in their job performance. In 2018, however, the Department revoked the medical exemption. The revocation forced Plaintiffs into an agonizing dilemma: they could either shave down to the skin—enduring extreme pain and likely disfigurement in the process—or abandon the careers they had worked so hard to build.

Federal law protects Plaintiffs from having to make that impossible choice. As explained below, the Americans with Disabilities Act (ADA) and Title VII's disparate-impact provision both require FDNY to reinstate Plaintiffs' exemption from the Department's clean-shave policy. The only way for FDNY to avoid that result here would be to show that reinstating the exemption would cause it to suffer an "undue hardship" (under the ADA) and conflict with "business necessity" (under Title VII). FDNY has made no such showing here and, in fact, has not offered any evidence—expert or otherwise—to satisfy its burden under either statute. Instead, FDNY rests its entire defense on a twenty-year-old federal safety regulation, which the Department recently reinterpreted to preclude any accommodations for Plaintiffs' medical condition.

The district court properly rejected FDNY's interpretation of that regulation and correctly held that the regulation does not shield FDNY from liability here. As the court reasoned, the Occupational Safety and Health Administration has consistently construed the regulation to permit the type of remedy Plaintiffs are seeking here: namely, an accommodation that would permit them to grow 1 to 3 millimeters of facial hair—an amount less than stubble—provided that they pass regular tests showing that their respirator masks fit securely. FDNY itself construed the regulation to permit such an accommodation for years prior to its 2018 policy change. And other fire departments continue to permit similar accommodations,

notwithstanding the regulation. FDNY's strained reading of the regulation, thus, cannot justify its refusal to grant Plaintiffs the accommodation they seek in this case.

Nor is there any other evidence in the record to support FDNY's stated safety rationale. Indeed, the Department has failed to identify even a single incident in which a firefighter was unable to achieve a secure face-mask seal under the prior accommodation, let alone any actual harms that resulted from such an incident. Rather, the undisputed evidence—including the opinions of multiple experts—shows that Plaintiffs' proposed accommodation is safe and costless for FDNY to implement. That record permits only one outcome here: that summary judgment be granted to Plaintiffs on both their ADA claims and their Title VII disparate-impact claim.

STATEMENT OF JURISDICTION

Plaintiffs Salik Bey, Terrel Joseph, Steven Seymour, and Clyde Phillips filed this action for damages and injunctive relief against the City of New York, FDNY, and various FDNY officials.[1] The district court's jurisdiction arose under 28 U.S.C. §§ 1331, 1343, and 1367. On January 29, 2020, the district court granted summary judgment to Plaintiffs on their ADA claims, granted summary judgment to FDNY on all remaining federal claims, dismissed Plaintiffs' state-law claims without prejudice, and ordered FDNY to reinstate its prior accommodation for Plaintiffs' disability.

[1] For simplicity's sake, this brief refers to all Defendants collectively as "FDNY." All citations to the Special Appendix appear as "SPA ___." All citations to the Joint Appendix appear as "A___."

SPA 1–26. FDNY filed a timely appeal of the ruling on the ADA claims on February 3, A3091, and Plaintiffs filed a timely cross-appeal of the ruling on their Title VII disparate-impact claim on February 20, A3094. *See* Fed. R. App. P. 4(a). Because the district court's order granted injunctive relief to Plaintiffs on their ADA claims and denied injunctive relief on their Title VII disparate-impact claim, this Court has appellate jurisdiction over both appeals under 28 U.S.C. § 1292(a)(1).[2]

STATEMENT OF THE ISSUES

FDNY's grooming policy generally requires all active-duty firefighters to be clean shaven. Although FDNY had previously provided Plaintiffs with an accommodation for their medical condition under the ADA, the Department revoked that accommodation in 2018. The questions presented on appeal are:

1. Whether FDNY presented sufficient evidence to show that reinstating Plaintiffs' prior accommodation would impose an "undue hardship" on the Department under the ADA.

[2] FDNY's opening brief stated that this Court has appellate jurisdiction under 28 U.S.C. § 1291 "because the district court issued a final judgment." FDNY Br. 3. The district court's order, however, only addressed issues of liability and never resolved Plaintiffs' claims for damages. The district court also never set out its judgment on damages in any "separate document," as required under Federal Rule of Civil Procedure 58. Accordingly, the district court's order cannot be construed as a final order for the purposes of § 1291 (although the order remains appealable under § 1292(a), as set forth above).

2. Whether FDNY presented sufficient evidence to show that the policy is justified by "business necessity" under Title VII.

STATEMENT OF THE CASE

These cross appeals arise from a summary-judgment order issued by the U.S. District Court for the Eastern District of New York (Weinstein, J.). *See Bey v. City of New York*, No. 18-CV-4655, 2020 WL 467507 (E.D.N.Y. Jan. 29, 2020).

A. Factual Background

Plaintiffs are four African-American firefighters who suffer from a dermatological condition called *pseudofolliculitis barbae*, or "PFB," which prevents them from shaving their facial hair down to the skin. All four Plaintiffs were diagnosed with the condition in their youth and have tried various treatments over the years, all without sustained success. A1873–74, A1950–60, A2096–2102, A2209–11. Although they are able to trim their facial hair without significant discomfort, they cannot obtain a clean shave without experiencing extreme pain, which is often accompanied by scarring, abscesses, papules, and other forms of disfigurement. A1629, 1879, A1955–56, A2104, A2208. Their situation, unfortunately, is not unique: medical experts estimate that PFB afflicts roughly 45-85 percent of African-American men. A1628–30.

Between August 2015 and May 2018, FDNY provided Plaintiffs with a "reasonable accommodation" that exempted them from the Department's grooming policy, which requires all active-duty firefighters to maintain a clean shave. A246–53,

A257. The accommodation—which FDNY provided pursuant to its disability-rights policy—allowed Plaintiffs to maintain "closely-cropped" facial hair as long as they abided by certain other conditions. A257; *see also* SPA 8 (noting that the accommodation permitted Plaintiffs to maintain hair "between 1 millimeter and a quarter inch long"); A246–53 (Accommodation Letters). Absent the accommodation, they would have been required to shave their facial hair all the way down to the skin, pursuant to FDNY's clean-shave policy. A257.

According to FDNY, the clean-shave policy is designed to ensure that firefighters can achieve a secure fit between their faces and the masks that they must wear to prevent smoke inhalation while fighting fires. A2453, A2625, 2664. Those masks constitute part of a respiratory device—known as a self-contained breathing apparatus (or "SCBA")—which supplies clean air from the respirator's tank to the user's mouth. *See generally* 29 C.F.R. § 1910.134(b) (defining "SCBA" as "an atmosphere-supplying respirator for which the breathing air source is designed to be carried by the user").

Because of the importance of ensuring a tight seal between the firefighter's face and the SCBA mask, FDNY required anyone seeking an accommodation from the clean-shave policy to pass a qualitative "fit test." As its name suggests, a fit test measures the fit of the seal between an SCBA user's face and face-mask in order to ensure that the wearer is breathing air supplied by the respirator and that there are no leaks in the sealing area that would allow contaminated air into the mask. *See* A1636,

A2615; 29 C.F.R. § 1910.134(b) (defining "fit test"). All four Plaintiffs passed fit tests before receiving their accommodations, and they continued to pass regular fit tests (with closely cropped facial hair) after receiving the accommodations. A246–53, A2722–23, A2978–86. Between 2015 and 2018, twelve other firefighters also obtained medical accommodations from the clean-shave policy, as did four firefighters who had religious objections to the policy. A261. Like Plaintiffs, all of those firefighters passed their fit tests. A2721–22.

Fit tests are just one of many safeguards that FDNY relies on to protect against mask leakage. The Department also requires firefighters to submit to daily inspections and to perform daily self-checks to confirm that their face-masks seal securely. A1591, A2350–51, A2591, A2856; *see also* 29 C.F.R. § 1910(g)(1)(iii) ("[T]he employer shall ensure that employees perform a user seal check each time they put on the respirator[.]"). Those daily seal checks—during which a firefighter blows into his mask and listens for any air that might escape—help ensure that firefighters catch any potential problems with their face-masks early as possible. A2215–16. In addition, the SCBAs themselves are designed to mitigate the likelihood of a leak by supplying "positive air pressure" to the mask. A1594, A2672. The positive-pressure system is meant to ensure that the air pressure inside the mask is higher than the air pressure outside the mask, so that any breaks in the mask seal will result in clean air flowing *out* of the mask rather than contaminated air flowing *into* the mask. A107, A1594, A2672

Of the twenty firefighters who were permitted to maintain closely cropped facial hair between 2015 and 2018 for medical or religious reasons, none experienced any adverse consequences as a result of receiving such an accommodation. A2450–51, A2487, A2525, A2628, A2726–27, A2824-25, A2831–32. None reported any face-mask leaks, mask-related injuries, or other impediments to performing their jobs while maintaining facial hair. A2525, A1891, A1893, A2216. And none were the subject of any safety-related incidents or reports concerning dangers to civilians or other firefighters. A1350–51, A2449, A2525, A2587–88, A2724–27, A2832–33.

Nevertheless, in May 2018, FDNY rescinded all of the accommodations it had previously provided, including Plaintiffs' medical accommodations. A259–60. According to FDNY officials, the Department chose to rescind the accommodations in order to comply with a federal regulation promulgated twenty years earlier by the Occupational Safety and Health Administration (OSHA). A2453, A2664, A2825. That regulation, which is generally known as the "respiratory-protection standard," provides guidance to employers in industries where workers are required to use respirators. *See* 29 C.F.R. § 1910.134. As relevant here, the regulation states that employers "shall not permit respirators with tight-fitting facepieces to be worn by employees who have: . . . [f]acial hair that comes between the sealing surface of the facepiece and the face or that interferes with valve function." *Id.* § 1910.134(g)(1)(i). Although the regulation does not generally govern municipal fire departments, 29 U.S.C. § 652(5), New York is one of several states that has voluntarily agreed to adopt

OSHA's regulatory standards for its own state and local workplaces. *See* N.Y. Lab. Law § 27-a(4).

After losing their medical accommodations, all four Plaintiffs eventually began to comply with FDNY's clean-shave policy.[3] SPA 9. As a result of their compliance efforts, they have continued to experience extreme pain and some have suffered from disfigurement, abscesses, severe abrasions, and other symptoms.

B. Procedural Background

Plaintiffs filed this suit against the City of New York, FDNY, and various FDNY officials in August 2018. A4. They alleged that FDNY's decision to rescind its prior accommodations constituted discrimination on the basis of both disability and race. In their amended complaint, they asserted claims under the Americans with Disabilities Act (ADA), Title VII, various constitutional provisions, the New York State Human Rights Law (NYSHRL), and the New York City Human Rights Law (NYCHRL). A26–37 (Amended Complaint). The parties engaged in extensive discovery and, in August 2019, cross-moved for summary judgment on liability as to all claims. A9–10.

In January 2020, the district court issued an opinion granting summary judgment to Plaintiffs on their ADA claims and granting summary judgment to FDNY on all other federal claims. SPA 2–26. With respect to the ADA claims, the

[3] Plaintiff Phillips eventually ceased working for FDNY in late 2019.

court held that FDNY's clean-shave policy discriminated against Plaintiffs on the basis of their disability—namely, PFB—and that FDNY had failed to provide Plaintiffs with reasonable accommodations. SPA 10–21. In reaching that conclusion, the court rejected FDNY's argument that the Department would suffer an "undue hardship" by reinstating Plaintiffs' prior accommodations. SPA 16–19. As the court reasoned, the Department had failed to show that it incurred any harms from providing the accommodations in the past and had not presented sufficient evidence to show that it was likely to suffer any such harms in the future. *See* SPA 18 ("Defendants admit that no heightened safety risk to firefighters or the public was presented by the accommodation previously in effect."). The court also rejected FDNY's assertion that its clean-shave policy was mandated by OSHA, reasoning that OSHA's respiratory-protection standard did not preclude the accommodation Plaintiffs were seeking. SPA 17–18. The court thus ordered that the "medical accommodation previously in effect for full duty FDNY firefighters . . . [be] reinstated." SPA 25.

With respect to Plaintiffs' Title VII claims, the court held that Plaintiffs had not shown that FDNY's revocation of the prior accommodations was motivated by racially discriminatory intent. It therefore held that FDNY was entitled to summary judgment on Plaintiffs' disparate-treatment claim. SPA 21–23. And, because the court concluded that Plaintiffs' disparate-impact claim was "at bottom [a] claim[] for disparate treatment only," it dismissed that claim on the same basis. SPA 24.

Finally, the court dismissed Plaintiffs' state-court claims in a single sentence. It provided no explanation for the dismissal but held that Plaintiffs could pursue those claims in state court. *See* SPA 25 ("Plaintiffs' State and City law claims are dismissed without prejudice for possible pursuit elsewhere").

SUMMARY OF ARGUMENT

I. The district court properly granted summary judgment to Plaintiffs on their ADA claims. Under the ADA, an employer must provide its employees with reasonable accommodations for their disabilities. Any employer who seeks to deny such an accommodation to an employee must show that granting the accommodation would cause it to suffer an "undue hardship." The ADA places the burden on the employer to demonstrate such hardship. FDNY cannot satisfy that burden here.

The accommodation that Plaintiffs have requested is virtually identical to the one that FDNY provided them between 2015 and 2018. Under their proposed accommodation, Plaintiffs would be permitted to grow between 1 and 3 millimeters of facial hair—just enough to avoid aggravating their condition—as long as they continued to pass their fit tests. FDNY contends that providing such an accommodation would impose an undue hardship on the Department by forcing it to jeopardize firefighter safety. Yet, the Department concedes that it never experienced any safety problems—or other hardships—when it provided the same accommodation in the past. Nor has the Department offered any expert evidence to

explain the likelihood, scope, or costs of the safety problems it claims it would face if it were to reinstate the prior accommodation.

Instead, FDNY's entire safety rationale rests on its flawed reading of an Occupational Safety and Health Administration regulation governing the use of respirators in the workplace. Specifically, FDNY now reads the regulation—which had been in effect throughout the prior accommodation period—to require all respirator users to be completely clean shaven on their cheeks, chin, neck, and jaw. But, as the district court rightly noted, OSHA itself has rejected that broad reading of the regulation. And other employers who are subject to the regulation have likewise construed it to permit accommodations of the type Plaintiffs are seeking. Thus, absent any independent evidence to support its asserted safety justification, FDNY cannot satisfy its burden under the ADA merely by pointing to its interpretation of the OSHA regulation.

II. The district court should have granted summary judgment to Plaintiffs on their Title VII disparate-impact claim. To make out a prima facie case of disparate-impact liability under Title VII, a plaintiff need only show that a facially neutral employment policy has a disproportionate impact on a protected group. Here, there is no dispute that FDNY's clean-shave policy has a disproportionate impact on African-American men, who suffer from PFB at a significantly higher rate than others. Indeed, FDNY's own officials acknowledged that their decision to rescind the prior accommodation would have a disparate impact on Black firefighters.

Nevertheless, despite the undisputed statistical evidence, the district court declined to even examine whether Plaintiffs had made a prima facie showing of disparate impact. Instead, the court simply held that Plaintiffs' disparate-impact allegations were "at bottom claims for disparate treatment only," SPA 24, and rejected the claim for lack of evidence of discriminatory intent. That ruling cannot be squared with this Court's longstanding approach to disparate-impact claims, which recognizes that such claims must be evaluated under an entirely different standard than disparate-treatment claims.

An employer can rebut a plaintiff's prima facie showing of disparate impact by producing evidence that its challenged employment policy is justified by "business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i). FDNY has not produced such evidence here. Just like its "undue hardship" defense, FDNY's entire "business necessity" defense rests on its recent reinterpretation of the 1998 OSHA regulation. That reinterpretation is incorrect and cannot, without more, justify the Department's refusal to grant the limited accommodation Plaintiffs have requested from the clean-shave policy. Accordingly, the district court's order granting summary judgment to FDNY on Plaintiffs' disparate-impact claim should be reversed.

STANDARD OF REVIEW

"This Court reviews a district court's decision on a motion for summary judgment de novo." *Bethpage Water Dist. v. Northrop Grumman Corp.*, 884 F.3d 118, 124 (2d Cir. 2018).

ARGUMENT

I. The district court properly granted summary judgment to Plaintiffs on their ADA claims.

The ADA proscribes "discriminat[ion] against a qualified individual on the basis of disability in regard to . . . the terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). The statute defines such discrimination to include an employer's failure to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." *Id.* § 12112(b)(5)(A).

To determine whether an employer has failed to provide a reasonable accommodation, this Court applies a straightforward burden-shifting framework. Under that framework, the plaintiff-employee bears the initial burden of "suggest[ing] the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits." *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995).[4] "If a plaintiff suggests plausible accommodations, the burden of proof shifts to the defendant to demonstrate that such accommodations would present undue

[4] To prevail on a failure-to-accommodate claim, "an employee must show that: '(1) [he] is a person with a disability under the meaning of the ADA; (2) an employer covered by the statute had notice of his disability; (3) with reasonable accommodation, [the employee] could perform the essential functions of the job at issue; and (4) the employer has refused to make such accommodations.'" *Noll v. Int'l Bus. Machs. Corp.*, 787 F.3d 89, 94 (2d Cir. 2015) (citation omitted; alterations in original). There is no dispute here that PFB is a disability under the ADA, nor that FDNY is covered by the ADA. The central question in FDNY's appeal, therefore, is whether Plaintiffs' requested accommodation is reasonable.

hardships and would therefore be unreasonable." *McMillan v. City of New York*, 711 F.3d 120, 128 (2d Cir. 2013); *see also* 42 U.S.C. § 12112(b)(5)(A) (providing an affirmative defense for employers who "demonstrate that the accommodation would impose an undue hardship on the operation of the business"). As explained below, FDNY has failed to show that Plaintiffs' proposed accommodation would impose an undue hardship on the Department.

A. Plaintiffs' proposed accommodation is reasonable.

The plaintiff's initial burden to identify a reasonable accommodation under the ADA "is not heavy." *McMillan*, 711 F.3d at 127. Rather, "with regard to the reasonableness of a proposed accommodation, a plaintiff bears only a light burden of production that is satisfied if the costs of the accommodation do not on their face obviously exceed the benefits." *McBride v. BIC Consumer Prod. Mfg. Co.*, 583 F.3d 92, 97 (2d Cir. 2009); *see also U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002) (stating that, to satisfy this initial burden, the plaintiff "need only show that an 'accommodation' seems reasonable on its face").

Plaintiffs have easily satisfied that burden here. Their proposed accommodation would effectively reinstate the one that FDNY previously provided to numerous firefighters (including Plaintiffs) between 2015 and 2018. Specifically, under the proposed accommodation, FDNY would allow Plaintiffs to maintain facial hair of up to 3 millimeters in length—even less than the permissible length of the prior accommodation—provided that they continue to regularly pass their qualitative

fit tests and daily seal checks. The record contains ample evidence showing that the costs of this accommodation would "not on their face obviously exceed the benefits." *McBride*, 583 F.3d at 97.

First, as the district court emphasized, FDNY's own commissioner admitted during his deposition that FDNY did not incur any costs when it previously offered the same accommodation to Plaintiffs. *See* SPA 17; *see also* A2832–33 (Dep. of Commissioner Nigro). Several other FDNY officials likewise admitted that the prior accommodation did not result in any adverse consequences for the Department. *See, e.g.*, A1350–51 (Dep. of Assistant Commissioner Nguyen) ("I'm not aware of any incident where their accommodation created injury or anything like that."); A1135–36 (Dep. of Deputy Director of Equal Employment Opportunity Office Tolani) (acknowledging that firefighters who received prior accommodation continued to perform their duties without incident); A2724–27 (Dep. of Disability Rights Coordinator Loubriel) (stating that the prior accommodation did not cost FDNY anything or impede any firefighter's job performance). There is, therefore, no dispute that it was costless for FDNY to provide the same accommodation previously.

FDNY's admissions on this point are sufficient to satisfy Plaintiffs' initial burden. As this Court has recognized, an employer's prior history of providing an accommodation without incident is typically sufficient to establish that the accommodation is facially reasonable. *See, e.g.*, *Rodal v. Anesthesia Grp. of Onondaga*, 369 F.3d 113, 121 (2d Cir. 2004) (concluding that the employer's "own evidence indicates

that it did not consider the requested scheduling accommodation unreasonable" where the employer had previously provided a similar accommodation for "several months"). In *McMillan*, for instance, this Court reversed a district court's order granting summary judgment to a municipal agency that had refused to accommodate an employee whose disability prevented him from arriving at the office as early as others. *See* 711 F.3d at 123–25. The employee had requested an accommodation that would have allowed him to arrive late and make up for the missed time by working through his lunch break and staying late. *Id.* at 127–28. In holding that his proposed accommodation was facially reasonable, this Court specifically cited the agency's history of "explicitly or implicitly" permitting the employee's late arrivals and, more generally, of permitting other employees some flexibility in their working hours. *Id.* at 127–28. The same reasoning applies here: an accommodation that was previously provided to numerous employees—without incident—is facially reasonable.

In fact, the record in this case contains even more evidence (beyond FDNY's past conduct) to show that the proposed accommodation would not cost the Department anything. Plaintiffs testified at their depositions that, during the period since FDNY rescinded their prior accommodations, they have personally observed multiple firefighters wearing facial hair out in the field. *See, e.g.*, A2271 (Seymour Dep.) (stating that "guys in other battalions would be just, like, rocking a full, thicker beard than I would"); A801–04 (Joseph Dep.) (identifying a firefighter in his unit whom he had seen wearing facial hair); *see also* A2391–92 (Hamilton Dep.) ("I go in

the field and I'm seeing facial hair that looks like they haven't shaved and nobody is saying anything to them."). Another firefighter, who is not a party to this case, recounted similar experiences. *See* A1278–82 (Wilson Dep.) (recounting incidents in which she observed firefighters with facial hair). FDNY has not attempted to refute that testimony or identify any safety-related problems that have resulted from its ongoing failure to fully enforce the clean-shave policy.

The reports submitted by Plaintiffs' experts further underscore the reasonableness of their proposed accommodation. Plaintiffs' medical expert explicitly concluded—based on his careful review of the recent academic literature—that "a closely cropped electrically clipped beard of 1-3 mm in length would have no effect on the seal" of an SCBA respirator. A1638 (Serota Report) (reviewing recent academic literature). And Plaintiffs' industrial-hygiene expert similarly concluded—based on his review of the polymeric seals of the SCBA face-masks and Plaintiffs' past fit-test results—that "[m]aintaining 0.5mm-5 mm of hair has no effect on the seal." A1603 (Abraham Report).

FDNY has not submitted any evidence to refute these reports. Nor are the reports' findings especially surprising. To the contrary, they accord with the experiences of other fire departments that have permitted firefighters to maintain small amounts of facial hair. *See, e.g.*, *Kennedy v. District of Columbia*, 654 A.2d 847, 855 (D.C. 1994) ("[O]f the approximately twenty firefighters who were afflicted with pseudofolliculitis barbae ('PFB') and were allowed to wear short beards, there were no

reported incidents resulting from improperly secured face masks in the past seven years."). And they are consistent with the policies of other fire departments that permit exemptions to their clean-shave policies—just as FDNY itself once did.[5]

B. FDNY failed to present sufficient evidence to establish that the proposed accommodations would impose an "undue hardship."

FDNY contends that Plaintiffs' proposed accommodation is unreasonable because it would impose an "undue hardship" on the Department. Under the ADA, the employer bears the burden of demonstrating undue hardship, "proof of which requires a detailed showing that the proposed accommodation would 'requir[e] significant difficulty or expense.'" *Rodal*, 369 F.3d at 121–22 (quoting 42 U.S.C. § 12111(10)(A)). To satisfy that burden, the employer must do more than speculate about the potential costs of the accommodation; rather, the employer "must show special (typically case-specific) circumstances that demonstrate undue hardship in the *particular* circumstances." *Barnett*, 535 U.S. at 402 (emphasis added); *see also, e.g.*, *Simms v. City of New York*, 160 F. Supp. 2d 398, 405–06 (E.D.N.Y. 2001) (requiring fire

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[5] *See, e.g.*, *San Bernardino County Fire Department Operations Directives, Sec. 2410: Grooming Standards*, https://perma.cc/849U-QKXG (last visited June 15, 2020) ("Deviations may be permitted when physical characteristics make stated guidelines impossible or impractical."); *Chino Valley Fire District, Policy 1004: Personal Clothing, Grooming and Appearance Standards*, https://perma.cc/JCZ6-5MWR (last visited June 15, 2020) ("Any member who has a condition due to a protected category (e.g., race, physical disability) which affects any aspect of personal hygiene covered by this policy may qualify for an accommodation[.]"). Notably, California (like New York) has adopted OSHA's regulations, making them mandatory for state and local employees, including most fire departments.

Continued on next page.

department to "present more than speculation as to possible safety concerns posed by Plaintiff's condition" and, instead, to show "that Plaintiff's diabetes rendered him incapable of performing his job").[6]

FDNY has not met that burden here. The Department concedes that it did not suffer any hardship—financial or otherwise—during the nearly three years that it accommodated firefighters with PFB who passed their fit tests. *See* SPA 16–17. FDNY's own commissioner explicitly testified that he was unaware of any hardships that the prior accommodations imposed on the Department.[7] And several other FDNY officials also confirmed that the Department did not suffer any hardship in providing those accommodations. *See* A2726–27 (Loubriel Dep.); A2525 (Dep. of Safety Chief Jardin); A2628 (Dep. of Deputy Chief Medical Officer Beecher); A2450-

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[6] Although courts sometimes characterize "undue hardship" as an "affirmative defense," that characterization does not alter the defendant's burden. *See Borkowski*, 63 F.3d at 138 ("At this point the defendant's burden of persuading the factfinder that the plaintiff's proposed accommodation is unreasonable merges, in effect, with its burden of showing, as an affirmative defense, that the proposed accommodation would cause it to suffer an undue hardship."). In practice, "meeting the burden of nonpersuasion on the reasonableness of the accommodation and demonstrating that the accommodation imposes an undue hardship amount to the same thing." *Id.*

[7] Q: In terms of hardship, the fact that these individuals were permitted to grow some facial hair as a result of their accommodations before they were revoked, did that cause any hardship on the department, the fact that they were permitted to grow some facial hair and be full duty fire fighters?

MS. O'CONNOR: Objection.

A: Not that I'm aware of.

A2832 (Nigro Dep.); *see also* A2831 ("I wouldn't say hardship.").

51 (Tolani Dep.); A2487 (Dep. of Deputy Chief Medical Officer Hurwitz). What's more, several officials specifically acknowledged that Plaintiffs performed their jobs without incident throughout the prior accommodations period—as did every other fit-tested firefighter. *See* A2824–26 (Nigro Dep.); A2674–75 (Nguyen Dep.); A2724–25 (Loubriel Dep.).

Nevertheless, despite its inability to identify any hardships stemming from providing the accommodation in the past, FDNY now contends that the accommodation *could* impose undue hardship in the future by exposing the Department to unacceptable safety risks. Notably, FDNY has not attempted to support that claim with any expert evidence. Nor has it identified any factual evidence to support its claim—not even from one of the *other* jurisdictions where firefighters *can* obtain an accommodation like the one Plaintiffs have requested. *See supra* n.5 (providing examples of departments that offer medical exemptions). Instead, FDNY bases its entire undue-hardship argument on the existence of a 1998 OSHA regulation governing the use of respirators in the workplace.[8] A2453 (Tolani Dep.) ("The sole concern at the time was the safety issues based on the [state] and OSHA regulations."); A2825 (Nigro Dep.) (acknowledging that FDNY's safety rationale rests entirely on the OSHA regulation and that he could neither "dispute"

[8] *See* 29 C.F.R. § 1910.134(g)(1)(i) (providing that employers "shall not permit respirators with tight-fitting facepieces to be worn by employees who have: . . . [f]acial hair that comes between the sealing surface of the facepiece and the face or that interferes with valve function").

nor "endorse" the scientific basis for the regulation). FDNY's reliance on that regulation is misplaced for several reasons.

First, as the district court properly recognized, the regulation does not actually preclude FDNY from providing the accommodation Plaintiffs have requested. SPA 17–18. Indeed, FDNY itself previously construed the regulation to permit the *same* accommodation. *See* A246–53. And FDNY is hardly the only employer—or even the only fire department—to have read the regulation to permit such accommodations: as noted above, other fire departments provide for disability-based exemptions, and other types of employers, including the U.S. military, have historically permitted such accommodations, as well. *See* A2725 (acknowledging that the military has provided accommodations for people with PFB). That reading accords with common sense. After all, if the regulation truly prohibited any hair where the respirator face-mask meets the face, then it would require many men to shave multiple times each day to prevent a five-o'clock shadow from forming. Such a reading is simply not plausible.

More to the point, OSHA itself has made clear that the regulation only prohibits facial hair that actually interferes with the respirator seal. In 2003, for example, the agency sent Senator Carl Levin a guidance letter—one of its earliest interpretations of the rule—that stated: "While the [regulation] does not ban beards per se, it does require employers to ensure that bearded employees who are required to wear tight-fitting facepieces *trim their beards* so that they do not interfere with the sealing surface of the respirator or are not so large that they could interfere with valve

function." OSHA, Letter to Hon. Carl Levin (Mar. 7, 2003) (emphasis added), *available at* https://perma.cc/8XTF-WGTS. Subsequent guidance—which remains on OSHA's website—similarly directs workers to "trim" their facial hair in order to ensure a secure seal, rather than mandating that the hair be removed entirely. *See, e.g.*, *OSHA Bulletin: General Respiratory Protection Guidance for Employers and Workers*, https://perma.cc/PNL6-6Y83 (last visited July 1, 2020) ("If your respirator requires a tight fit, you must trim back your beard so that it will not interfere with the face-facepiece seal."). The agency's repeated emphasis on "trimming" facial hair confirms that it never intended to require the use of a razor blade to remove all facial hair.

The agency reaffirmed that understanding of the regulation in a 2016 guidance letter, which, like the earlier guidance, focused on hair that "*compromises* the seal of the respirator." A169 (emphasis added). The letter specifically stated that "[f]acial hair is allowed as long as it does not protrude under the respirator seal, or extend far enough to interfere with the device's valve function." A169. And it confirmed that the regulation permits "mustaches, sideburns, and small goatees that are neatly trimmed." A169. Plaintiffs' proposed accommodation falls well within the realm of "neatly trimmed" growth contemplated by the letter. Contrary to FDNY's characterizations, the accommodation would not permit Plaintiffs to maintain "a *few days* growth of stubble." FDNY Br. 6 (emphasis added). Rather, it would permit them to grow the functional equivalent of a five o'clock shadow: 1 to 3 millimeters of hair—just enough to avoid having to apply a razor directly to their skin. Moreover, to receive

even that small allowance, Plaintiffs would still have to pass all of their fit tests. OSHA's guidance makes clear that such an accommodation is permissible.

The district court properly relied on OSHA's guidance in rejecting FDNY's newfound construction of the regulation. *See Decker v. Northwest Environmental Def. Ctr.*, 568 U.S. 597, 613 (2013) ("When an agency interprets its own regulation, the Court, as a general rule, defers to it unless that interpretation is plainly erroneous or inconsistent with the regulation." (citation and quotation marks omitted)). Although FDNY contends that the district court should not have relied on that guidance because the regulation is not "genuinely ambiguous," FDNY Br. 16–17 (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019)), the Department's own actions belie that argument: once again, FDNY *itself* previously construed the regulation to permit the accommodation at issue here. *See* 246–53 (permitting each Plaintiff to maintain facial hair that is "even, *neatly trimmed*, and close to [the] face" (emphasis added)). The Department cannot reasonably argue that its own prior interpretation of the regulation is now implausible—particularly when other fire departments continue to provide for similar accommodations. *See supra* n.5.

In any event, even if FDNY's broad reading of the regulation were correct—and it is not—the regulation still would not suffice, on its own, to satisfy FDNY's burden of persuasion. The ADA requires an employer to make a "detailed showing" that an accommodation will impose "significant difficulty or expense." *Rodal*, 369 F.3d at 121–22 (citation omitted). FDNY cannot make such a showing without

producing *specific* proof to rebut Plaintiffs' evidence that their proposed accommodation is safe. *See Stone v. City of Mount Vernon*, 118 F.3d 92, 98–99 (2d Cir. 1997) ("[W]hile the plaintiff could meet her burden of production by identifying an accommodation that facially achieves a rough proportionality between costs and benefits, an employer seeking to meet its burden of persuasion on reasonable accommodation and undue hardship must undertake a *more refined analysis*." (emphasis added; citation omitted)); *cf. Wright v. New York State Dep't of Corr.*, 831 F.3d 64, 78 (2d Cir. 2016) (holding, under Title II of the ADA, that "an accommodation should not be denied without an *individualized inquiry* into its reasonableness" (emphasis added)).[9] The existence of a generally applicable OSHA regulation, without more, is not sufficient to rebut Plaintiffs' evidence here.

The D.C. Circuit's decision in *Potter v. District of Columbia*, 558 F.3d 542 (D.C. Cir. 2009), illustrates this point well. In *Potter*, a group of firefighters brought suit under the Religious Freedom Restoration Act (RFRA) to challenge the District of Columbia's policy requiring them to be clean shaven. *Id.* at 544. Just like FDNY, the District sought to justify its policy on safety grounds and "bore the burden of

[9] Although *Wright* arose under Title II of the ADA, it nevertheless provides useful guidance in the Title I (i.e., employment) context. *See McElwee v. Orange County*, 700 F.3d 635, 641 n.2 (2d Cir. 2012) ("Although McElwee brought the instant case pursuant to Title II of the ADA, we may look for guidance to case law under Title I of the ADA, which governs employment discrimination, because . . . courts use the terms 'reasonable modifications' in Title II and 'reasonable accommodations' in Title I interchangeably.").

Continued on next page.

pointing to evidence that could create an issue of material fact as to the safety of SCBAs." *Id.* at 550.[10] The District pointed, in particular, "to scientific articles, *federal safety regulations*, and manufacturer directions" cited by its expert. *Id.* (emphasis added); *see also id.* at 553 (Williams, J., concurring) (noting that "the record clearly alerted the court to the Occupational Safety and Health Administration's belief that facial hair poses risks for the use of respirators generally"). Nevertheless, the court held that the District "did not carry its burden . . . to establish an issue of material [fact] regarding the safety of SCBAs," *id.* at 551.

In reaching that conclusion, the *Potter* court underscored the District's failure to respond directly to the plaintiffs' evidence that bearded firefighters could safely use SCBAs. *See, e.g.*, 558 F.3d at 548 ("[T]he District of Columbia did not directly address the assertion that it is safe for firefighters to use a SCBA."); *id.* at 549 ("On summary judgment, the district court is to give credence to uncontradicted and unimpeached evidence supporting the moving party, and so the district court could properly take the firefighters' assertion of SCBA safety as true."). Here, FDNY committed the same basic error by failing to produce evidence that directly refutes Plaintiffs' evidence that they can safely wear respirators under the requested accommodation. *See supra* Part I.A (recounting Plaintiffs' evidence). Indeed, FDNY produced even *less* evidence in this case than the District produced in *Potter*: whereas the District had

[10] RFRA, like the ADA, places the burden on the defendant to justify its challenged policy.

relied on an expert to explain its safety concerns, FDNY has offered no expert analysis and, instead, relies *solely* on their (erroneous) reinterpretation of the OSHA regulation. That is plainly insufficient to satisfy its burden of persuasion under the ADA.

C. The cases cited by FDNY are inapposite.

FDNY has not cited any cases endorsing its current reading of OSHA's respiratory-protection regulation. Nor has it cited any cases holding that an employer can rely on that regulation as its sole basis for rescinding an accommodation that it previously offered without incident. The few cases FDNY does cite, moreover, have little to do with the ADA's "undue hardship" standard: in fact, most apply different legal standards altogether. *See, e.g.*, *Lapid-Laurel v. Zoning Bd. of Adjustment*, 284 F.3d 442, 455 (3d Cir. 2002) (denying accommodation under the Fair Housing Amendments Act while expressly declining to apply ADA standards governing the "employer-employee relationship").

For example, FDNY repeatedly invokes the Ninth Circuit's decision in *Bhatia v. Chevron USA, Inc.*, 734 F.2d 1382 (9th Cir. 1984). But *Bhatia*—which predates both the ADA and the OSHA regulation—involved a claim of *religious* discrimination under Title VII. The EEOC has made clear that Title VII's "undue hardship" requirement differs significantly from the ADA's requirement and, critically, that it is much easier for an employer to show undue hardship under Title VII than under the ADA. As an agency regulation explains: "To demonstrate undue hardship pursuant to the ADA

and this part, an employer must show *substantially more difficulty or expense* than would be needed to satisfy the 'de minimis' title VII standard of undue hardship." 29 C.F.R. pt. 1630 (Appendix) (emphasis added). FDNY's reliance on *Bhatia* is thus unavailing.

So, too, is the Department's reliance on *Shannon v. New York City Transit Authority*, 332 F.3d 95 (2d Cir. 2003). Although *Shannon* did arise under the ADA (unlike FDNY's other cited cases), it focused on issues wholly irrelevant to this appeal. *See, e.g.*, *id.* at 101–03 (considering whether "the ability to distinguish the colors of traffic signals [is] an essential function of being a bus driver in New York City"). The Court never even had occasion to reach the "undue hardship" issue in *Shannon* because the plaintiff had "failed to identify any reasonable accommodation" in the first place. *Id.* at 104. Unsurprisingly, the word "hardship" does not appear anywhere in the Court's opinion. *Shannon* therefore does little to advance FDNY's defense here.

II. The district court erred in granting summary judgment to FDNY on Plaintiffs' disparate-impact claim under Title VII.

A. Plaintiffs made out a prima facie case of disparate-impact liability.

Title VII prohibits employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C. § 2000e-2(a)(1). "This mandate encompasses more than just overt and intentional discrimination. It also proscribes facially neutral employment practices which result in discrimination because they fall more harshly on

a protected group than on other groups, and cannot be justified." *EEOC v. Joint Apprenticeship Comm. of Joint Indus. Bd. of Elec. Indus.*, 186 F.3d 110, 116 (2d Cir. 1999). To that end, the statute prohibits any "employment practice that causes a disparate impact on the basis of race" unless that practice is "job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A).

To make out a prima facie case of disparate impact under Title VII, a plaintiff must: "(1) identify a specific employment practice or policy; (2) demonstrate that a disparity exists; and (3) establish a causal relationship between the two." *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 151 (2d Cir. 2012) (citations and quotation marks omitted); *see also Joint Apprenticeship Comm.*, 186 F.3d at 117 ("[A] plaintiff may establish a prima facie case of disparate impact discrimination by proffering statistical evidence which reveals a disparity substantial enough to raise an inference of causation.").

Here, there can be no reasonable dispute that Plaintiffs have made out a prima facie case. The record establishes that PFB disproportionately affects Black men and that clean-shave policies generally have a greater impact on Black men than any other group. A2943 (Serota Report). Several of FDNY's own officials, including the commissioner, openly acknowledged that the Department's revocation of the prior medical accommodations disproportionately affected Black firefighters. *See, e.g.*, A2822–23 (Nigro Dep.) (stating that the revocation's disproportionate racial impact "made the change more painful"); A259–61 (Nguyen Decl.) (noting that twelve of the

sixteen firefighters who received medical accommodations were African-American, even though only one-tenth of FDNY firefighters overall are African-American).

Nevertheless, despite the undisputed evidence of a statistical disparity, the district court rejected Plaintiffs' disparate-impact claim. The court's discussion of the disparate-impact claim never even mentioned the statistical disparity—in stark contrast to the various cases recognizing that employees may establish a prima facie case based on similar disparities. *See, e.g.*, *Bradley v. Pizzaco of Neb., Inc.*, 939 F.2d 610, 613 (8th Cir. 1991) ("EEOC's evidence makes clear that Domino's strictly-enforced no-beard policy has a discriminatory impact on black males. PFB prevents a sizable segment of the black male population from appearing clean-shaven, but does not similarly affect white males.").[11] Instead, the district court held that "Plaintiffs' specific factual allegations are at bottom claims for *disparate treatment* only" and dismissed the disparate-impact claim on that basis. SPA 24 (emphasis added).

[11] *See also, e.g.*, *Johnson v. Memphis Police Dep't*, 713 F. Supp. 244, 247 (W.D. Tenn. 1989) (recognizing that a "no-beard" policy would have racially disparate impact unless the employer allowed a medical exception to accommodate PFB); *Richardson v. Quik Trip Corp.*, 591 F. Supp. 1151, 1155 (S.D. Iowa 1984) (concluding that "plaintiff has shown that defendant's no-beard policy operates to exclude a disproportionate number of black males from employment"); *EEOC v. Trailways, Inc.*, 530 F. Supp. 54, 59 (D. Colo. 1981) ("The impact of the 'no-beard' policy clearly falls more heavily on blacks than it does on whites, and I think that the principles of *Griggs v. Duke Power Co.* (1971) . . . require that actionable Title VII impact be found."); *see generally* Emily Gold Waldman, *The Preferred Preferences in Employment Discrimination Law*, 97 N.C. L. Rev. 91, 112 (2018) ("Courts have generally accepted the argument that, because African American men suffer from PFB at a much higher rate, no-beard policies have a disparate impact as to race.").

The district court's disparate-impact analysis rests on a misunderstanding of Title VII. Although Title VII prohibits employers from engaging in both "disparate treatment" and "disparate impact," the "type of evidence that supports a disparate-impact claim is different from that which would support a disparate-treatment claim." *United States v. Brennan*, 650 F.3d 65, 113 (2d Cir. 2011); *see also Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 248 (2015) (Scalia, J., dissenting) ("Disparate-treatment and disparate-impact claims come with different standards of liability, different defenses, and different remedies."). As this Court has explained, "[u]nlike disparate-treatment liability, in which intent is a core consideration and for which consistent standards are simply impractical, disparate-impact liability involves *quantitative* metrics." *Briscoe v. City of New Haven*, 654 F.3d 200, 208 (2d Cir. 2011) (emphasis added). By construing Plaintiffs' disparate-impact claims as "claims for disparate treatment only," SPA 24, the district court disregarded that key difference between the two theories of liability.

The district court's approach also rests on the mistaken premise that a single set of facts cannot implicate multiple theories of liability. *Cf. Soldal v. Cook County*, 506 U.S. 56, 70 (1992) ("Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's 'dominant' character."). The court's conclusion that Plaintiffs' evidence of a statistical disparity was insufficient to establish *disparate-treatment* liability did not relieve it of its (independent) obligation to consider whether those disparities might support

disparate-impact liability. In fact, Title VII plaintiffs often rely on statistical disparities as evidence of *both* disparate treatment *and* disparate impact. When that happens, courts—including this one—analyze each claim independently. *See, e.g.*, *Chin*, 685 F.3d at 154-55 (analyzing statistical disparity separately under disparate-impact and disparate-treatment standards); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1117-25 (11th Cir. 1993) (evaluating disparate-treatment challenge to clean-shave policy separately from disparate-impact challenge). That is what the district court should have done—but failed to do—here.

While the district court sought to justify its approach by citing a pair of cases from the Western District of New York, SPA 24, neither of those cases is instructive here. Indeed, in both of those cases—neither of which involved Title VII claims—the court explicitly recognized that disparate-impact claims typically require an analysis of statistical disparities. *See Kourofsky v. Genencor Int'l, Inc.*, 459 F. Supp. 2d 206, 210 (W.D.N.Y. 2006) (describing how to analyze such disparities under the Age Discrimination in Employment Act); *Khalil v. Farash Corp.*, 452 F. Supp. 2d 203, 210 (W.D.N.Y. 2006) (same, under the Fair Housing Act). The disparate-impact claims in those cases failed because the plaintiffs had neglected to identify a facially neutral policy that actually produced such a disparity. *Kourofsky*, 459 F. Supp. 2d at 215 (noting that the plaintiffs "do not identify any facially neutral policy that produced such a result"); *Khalil*, 452 F. Supp. 2d at 208 ("I am not convinced that this case is even appropriate for application of disparate-impact analysis, which requires that a

facially neutral policy have discriminatory effect."). Neither case held that a court could resolve a disparate-impact claim without considering whether a statistical disparity exists (as the district court here did). And, to the extent that either case suggested as much, it was wrong for the reasons outlined above.

B. FDNY failed to present sufficient evidence to establish that the clean-shave policy was justified by "business necessity."

If a plaintiff makes out a prima facie case for disparate impact, the burden then shifts to the defendant to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i). "At this phase, the defendant carries the burden of production." *Joint Apprenticeship Comm.*, 186 F.3d at 120. That burden "is greater than [the] burden of merely showing a legitimate, non-discriminatory reason in response to a claim of discriminatory treatment. The hard, cold statistical record of impact provides a stronger circumstantial case of discrimination than a subjective claim of improper motivation." *Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007, 1015 (2d Cir. 1980).

An employer's generalized safety concerns are rarely sufficient to establish business necessity under Title VII. *See, e.g.*, *Craig v. Los Angeles County*, 626 F.2d 659, 667 n.8 (9th Cir. 1980) ("Mere opinion testimony by sheriff's department personnel that height is effective in control functions is inadequate to establish the significant correlation that is required under Title VII."). Rather, "to establish a safety-based

business necessity defense, employers have been required to present convincing expert testimony demonstrating that a challenged practice is in fact required to protect employees or third parties from documented hazards." *Fitzpatrick*, 2 F.3d at 1119 n.6 (11th Cir. 1993); *see also Guardians Ass'n of New York City Police Dep't, Inc. v. Civil Serv. Comm'n*, 633 F.2d 232, 241 (2d Cir. 1980) (explaining that the business-necessity inquiry often "involves issues and problems which are outside the experience of most laymen" (citation omitted)), *aff'd*, 463 U.S. 582 (1983). In short, to show business necessity, an employer typically must present specific evidence that the challenged practice is "*necessary* to safe and efficient job performance." *Dothard v. Rawlinson*, 433 U.S. 321, 331 n.14 (1977) (emphasis added).

The Eleventh Circuit's decision in *Fitzpatrick* invoked that basic principle in circumstances nearly identical to this case, explaining that a fire department's claim "that a challenged practice is required for safety" is not "by any means unassailable." 2 F.3d at 1121. In that case, a group of Black firefighters who had been diagnosed with PFB brought a disparate-impact claim challenging the Atlanta Fire Department's clean-shave requirement. *Id.* at 1113–14. Although the Eleventh Circuit ultimately upheld the policy, it did so based on the plaintiffs' failure to submit any evidence showing that they could actually obtain a secure face-mask seal while wearing facial hair. *See, e.g.*, *id.* at 1122 (noting that the "firefighters cite no evidence to show that partial shaving would be a viable and safe alternative"); *id.* at 1120 (noting that the "firefighters have not adduced evidence showing how carefully the firefighters' seals

were monitored" before the clean-shave policy was adopted). Critically, however, the court made clear that it would have reached a different conclusion if the plaintiffs had presented "[e]xpert testimony or results from adequately conducted field tests tending to show that shadow beards do not prevent SCBA's from sealing to the face." *Id.* at 1121.

That is precisely what Plaintiffs have done here. *See supra* Part I.A (describing Plaintiffs' expert reports and history of successful fit tests); *e.g.*, A1638 (Serota Report) ("[H]aving a closely cropped electrically clipped beard of 1-3 mm in length would have no effect on the seal."); A1603 (Abraham Report) ("Maintaining 0.5mm-5 mm of hair has no effect on the seal."); A2978–86 (Fit Test Results). Furthermore, unlike the fire department in *Fitzpatrick*, FDNY has not offered any expert or factual witnesses of its own to rebut Plaintiffs' evidence that they can obtain a secure respirator fit and safely perform their jobs while maintaining a minimal amount of facial hair. To the contrary, the Department admits that Plaintiffs passed all of their fit tests and daily seal checks during the prior accommodation period. And it further admits that the prior accommodations did not result in any safety incidents or other problems.

The only evidence FDNY has offered to demonstrate business necessity is OSHA's respiratory-protection regulation. As explained above, however, that regulation does not preclude firefighters from maintaining the insignificant amount of facial hair permitted under Plaintiffs' proposed accommodation. *See supra* Part I.B.

Indeed, the text of the regulation, OSHA's longstanding guidance, and FDNY's own prior reading of the regulation all demonstrate that the regulation permits small amounts of facial hair and, as such, cannot justify FDNY's inflexible clean-shave policy. *See id.* Nor is FDNY's recent reinterpretation of the regulation sufficient to refute the considerable evidence in the record establishing that firefighters with PFB can safely perform their duties (just as they did between 2015 and 2018). *See supra* Part I.A; *cf. Potter*, 558 F.3d at 549 ("On summary judgment, the district court is to give credence to uncontradicted and unimpeached evidence supporting the moving party, and so the district court could properly take the firefighters' assertion of SCBA safety as true."). Thus, given FDNY's failure to cite any other evidence to support its safety-based rationale, the district court should have granted summary judgment to Plaintiffs on their disparate-impact claim.

Furthermore, even if Plaintiffs were not entitled to summary judgment on the current record—and they are—the district court still would have erred in granting summary judgment to FDNY. After all, FDNY's stated safety concerns would, at most, create a dispute of fact about whether Plaintiffs can safely wear SCBAs under the terms of their proposed accommodation. Once again, both of Plaintiffs' experts have concluded that the proposed accommodation is safe and FDNY has conceded that it did not experience a single safety-related problem during the prior period that it accommodated PFB-afflicted firefighters (all of whom passed their fit tests). On that

record, a reasonable factfinder could conclude that FDNY's decision to rescind the prior medical accommodations was not justified by business necessity.

Indeed, this Court recognized in *M.O.C.H.A. Society, Inc. v. City of Buffalo*, 689 F.3d 263 (2d Cir. 2012), that a factfinder could reasonably reject an employer's business-necessity defense if the employer fails to justify its challenged practice with expert testimony or jurisdiction-specific evidence. *M.O.C.H.A.* involved a Title VII challenge to Buffalo's use of a fire-department examination that statistically disadvantaged Black firefighters in obtaining promotions. *Id.* at 267. After a bench trial, the district court held that the examination—which Buffalo had derived from a "statewide job analysis" involving other cities' fire departments—was justified by business necessity. *Id.* at 275–76. Although this Court ultimately affirmed the verdict in Buffalo's favor (over a dissent by Judge Kearse), it noted that "it would have [also] been within the fact finder's discretion to draw adverse inferences against Buffalo and to conclude that it had not carried its burden on the question of suitable job analysis." *Id.* at 275–76. In explaining its reasoning, the Court specifically cited the City's "perplexing" decision to "defend against a disparate impact claim without calling either an expert or fact witness." *Id.* at 275-76.

FDNY made the same "perplexing" decision in this case and, for that reason, cannot obtain summary judgment on the current evidentiary record. *See Joint Apprenticeship Comm.*, 186 F.3d at 121 (describing employer's failure to produce specific evidence of business necessity as an "unconventional and somewhat myopic litigation

strategy"). Thus, even if this Court affirms the district court's decision to deny summary judgment to Plaintiffs, it still must reverse the district court's decision to grant summary judgment to FDNY, and remand for trial on the disparate-impact claim.

III. If this Court remands any of Plaintiffs' federal claims for trial, it should also instruct the district court to reinstate Plaintiffs' state-law claims.

The district court dismissed Plaintiffs' claims under the NYSHRL and the NYCHRL without explanation or discussion. *See* SPA 25. That lack of explanation, on its own, constitutes an abuse of discretion. *See, e.g.*, *Zhao v. U.S. Dep't of Justice*, 265 F.3d 83, 97 (2d Cir. 2001) ("Failure to explain a decision adequately provides a ground for reversal."). But the court's unexplained dismissal of the state-law claims was especially improper here, given that those claims turn largely on the same legal and factual questions as their federal claims. *See, e.g.*, *Brooklyn Ctr. for Psychotherapy, Inc. v. Philadelphia Indem. Ins. Co.*, 955 F.3d 305, 312 (2d Cir. 2020) (treating "reasonable accommodation" requirement of ADA and NYSHRL as functionally equivalent). Accordingly, should this Court remand any of Plaintiffs' federal claims for trial, it should instruct the district court to reconsider exercising jurisdiction over Plaintiffs' state-law claims in light of judicial-economy concerns.

CONCLUSION

For the foregoing reasons, the district court's order granting summary judgment to Plaintiffs on their ADA claims should be affirmed; the district court's

order granting summary judgment to FDNY and denying summary judgment to Plaintiffs on their Title VII disparate-impact claim should be reversed; the district court's order dismissing Plaintiffs' state-law claims should be reversed; and the case should be remanded for resolution of damages and attorneys' fees.

Respectfully submitted,

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JULY 7, 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 9,665 words and therefore complies with the type-volume requirements of Federal Rule of Appellate Procedure 32(a)(7) and Local Rule 28.1.1. I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared using Microsoft Word 2016 and is written in 14-point Garamond font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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ADDENDUM OF PERTINENT STATUTES & REGULATIONS

TABLE OF CONTENTS

42 U.S.C. § 12112. Discrimination.

(a) General rule

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a), the term "discriminate against a qualified individual on the basis of disability" includes--

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration--

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5) **(A)** not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make

reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

42 U.S.C. § 2000e-2. Unlawful employment practices.

(a) Employer practices

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

. . .

(k) Burden of proof in disparate impact cases

(1) (A) An unlawful employment practice based on disparate impact is established under this subchapter only if--

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B) (i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice."

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

29 C.F.R. § 1910.134. Respiratory protection.

This section applies to General Industry (part 1910), Shipyards (part 1915), Marine Terminals (part 1917), Longshoring (part 1918), and Construction (part 1926).

(a) Permissible practice.

(1) In the control of those occupational diseases caused by breathing air contaminated with harmful dusts, fogs, fumes, mists, gases, smokes, sprays, or vapors, the primary objective shall be to prevent atmospheric contamination. This shall be accomplished as far as feasible by accepted engineering control measures (for example, enclosure or confinement of the operation, general and local ventilation, and substitution of less toxic materials). When effective engineering controls are not feasible, or while they are being instituted, appropriate respirators shall be used pursuant to this section.

(2) A respirator shall be provided to each employee when such equipment is necessary to protect the health of such employee. The employer shall provide the respirators which are applicable and suitable for the purpose intended. The employer shall be responsible for the establishment and maintenance of a respiratory protection program, which shall include the requirements outlined in paragraph (c) of this section. The program shall cover each employee required by this section to use a respirator.

(b) Definitions. The following definitions are important terms used in the respiratory protection standard in this section.

. . .

Fit test means the use of a protocol to qualitatively or quantitatively evaluate the fit of a respirator on an individual. (See also Qualitative fit test QLFT and Quantitative fit test QNFT.)

. . .

Hood means a respiratory inlet covering that completely covers the head and neck and may also cover portions of the shoulders and torso.

Immediately dangerous to life or health (IDLH) means an atmosphere that poses an immediate threat to life, would cause irreversible adverse health effects, or would impair an individual's ability to escape from a dangerous atmosphere.

Interior structural firefighting means the physical activity of fire suppression, rescue or both, inside of buildings or enclosed structures which are involved in a fire situation beyond the incipient stage. (See 29 CFR 1910.155)

Loose-fitting facepiece means a respiratory inlet covering that is designed to form a partial seal with the face.

. . .

Qualitative fit test (QLFT) means a pass/fail fit test to assess the adequacy of respirator fit that relies on the individual's response to the test agent.

Quantitative fit test (QNFT) means an assessment of the adequacy of respirator fit by numerically measuring the amount of leakage into the respirator.

. . .

Self-contained breathing apparatus (SCBA) means an atmosphere-supplying respirator for which the breathing air source is designed to be carried by the user.

. . .

This section means this respiratory protection standard.

Tight-fitting facepiece means a respiratory inlet covering that forms a complete seal with the face.

User seal check means an action conducted by the respirator user to determine if the respirator is properly seated to the face.

. . .

(g) Use of respirators. This paragraph requires employers to establish and implement procedures for the proper use of respirators. These requirements include prohibiting conditions that may result in facepiece seal leakage, preventing employees from removing respirators in hazardous environments, taking actions to ensure continued effective respirator operation throughout the work shift, and establishing procedures for the use of respirators in IDLH atmospheres or in interior structural firefighting situations.

(1) Facepiece seal protection.

(i) The employer shall not permit respirators with tight-fitting facepieces to be worn by employees who have:

(A) Facial hair that comes between the sealing surface of the facepiece and the face or that interferes with valve function; or

(B) Any condition that interferes with the face-to-facepiece seal or valve function.

(ii) If an employee wears corrective glasses or goggles or other personal protective equipment, the employer shall ensure that such equipment is worn in a manner that does not interfere with the seal of the facepiece to the face of the user.

(iii) For all tight-fitting respirators, the employer shall ensure that employees perform a user seal check each time they put on the respirator using the procedures in appendix B–1 or procedures recommended by the respirator manufacturer that the employer demonstrates are as effective as those in appendix B–1 of this section.

(2) Continuing respirator effectiveness.

(i) Appropriate surveillance shall be maintained of work area conditions and degree of employee exposure or stress. When there is a change in work area conditions or degree of employee exposure or stress that may affect respirator effectiveness, the employer shall reevaluate the continued effectiveness of the respirator.

(ii) The employer shall ensure that employees leave the respirator use area:

(A) To wash their faces and respirator facepieces as necessary to prevent eye or skin irritation associated with respirator use; or

(B) If they detect vapor or gas breakthrough, changes in breathing resistance, or leakage of the facepiece; or

(C) To replace the respirator or the filter, cartridge, or canister elements.

(iii) If the employee detects vapor or gas breakthrough, changes in breathing resistance, or leakage of the facepiece, the employer must replace or repair the respirator before allowing the employee to return to the work area.

(3) Procedures for IDLH atmospheres. For all IDLH atmospheres, the employer shall ensure that:

(i) One employee or, when needed, more than one employee is located outside the IDLH atmosphere;

(ii) Visual, voice, or signal line communication is maintained between the employee(s) in the IDLH atmosphere and the employee(s) located outside the IDLH atmosphere;

(iii) The employee(s) located outside the IDLH atmosphere are trained and equipped to provide effective emergency rescue;

(iv) The employer or designee is notified before the employee(s) located outside the IDLH atmosphere enter the IDLH atmosphere to provide emergency rescue;

(v) The employer or designee authorized to do so by the employer, once notified, provides necessary assistance appropriate to the situation;

(vi) Employee(s) located outside the IDLH atmospheres are equipped with:

(A) Pressure demand or other positive pressure SCBAs, or a pressure demand or other positive pressure supplied-air respirator with auxiliary SCBA; and either

(B) Appropriate retrieval equipment for removing the employee(s) who enter(s) these hazardous atmospheres where retrieval equipment would contribute to the rescue of the employee(s) and would not increase the overall risk resulting from entry; or

(C) Equivalent means for rescue where retrieval equipment is not required under paragraph (g)(3)(vi)(B).

(4) Procedures for interior structural firefighting. In addition to the requirements set forth under paragraph (g)(3), in interior structural fires, the employer shall ensure that:

(i) At least two employees enter the IDLH atmosphere and remain in visual or voice contact with one another at all times;

(ii) At least two employees are located outside the IDLH atmosphere; and

(iii) All employees engaged in interior structural firefighting use SCBAs.

Note 1 to paragraph (g): One of the two individuals located outside the IDLH atmosphere may be assigned to an additional role, such as incident commander in charge of the emergency or safety officer, so long as this

individual is able to perform assistance or rescue activities without jeopardizing the safety or health of any firefighter working at the incident.

Note 2 to paragraph (g): Nothing in this section is meant to preclude firefighters from performing emergency rescue activities before an entire team has assembled.