S. SIMCHA GOLDMAN, *Petitioner, v.* CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, *et al., Respondents.*

No. 84-1097

SUPREME COURT OF THE UNITED STATES

1984 U.S. Briefs 1097; 1985 U.S. S. Ct. Briefs LEXIS 33

October Term, 1985

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**[*1]**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FROM THE DISTRICT OF COLUMBIA CIRCUIT

# BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AS *AMICUS CURIAE*

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## INTEREST OF THE AMICUS CURIAE

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League ("ADL") was organized in 1913 as a section of the B'nai B'rith to advance good will and mutual understanding among Americans of all races and creeds and to combat racial and religious prejudice in the United States.

Among its other activities directed to these ends, the ADL has filed briefs *amicus curiae* opposing practices and policies which impair the integrity and self-respect of individuals of all races. Briefs have been filed in such cases as *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *NAACP* v. *Alabama*, 377 U.S. 288 (1964); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); and *Runyon* v. *McCrary*, 427 U.S. 160 (1976).

The ADL also supports the rights of all groups to practice their religion free from unjustified governmental interference. The ADL has filed briefs in *Torcaso* v. *Watkins*, 367 U.S. 488 (1961); *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Wallace* v. *Jaffree*, 105 S. Ct. 2479 (1985), and other cases before this Court in support of these vital First Amendment rights.

In the case now before it, the Court is asked to decide whether the Court of Appeals for the District of Columbia Circuit erred in holding that the Air Force, solely in the interest of enforcing a headgear regulation which the Air Force concedes is "arbitrary", can require an Orthodox Jewish psychologist to violate a fundamental religious obligation by prohibiting him from wearing a yarmulke while on duty at an Air Force hospital. As an organization committed to safeguarding religious freedom and constitutional guarantees against arbitrary and overly restrictive regulations, the ADL believes that the fundamental strictures of th First Amendment cannot be cast aside simply because the setting for religious observance is in the military, and that this Court should honor petitioner's modest request to be permitted to wear a yarmulke while serving our country as a psychologist at an Air Force hospital.

The ADL respectfully submits that the decision of the Court of Appeals for the District of Columbia Circuit should be reversed.

The Anti-Defamation League of B'nai B'rith submits this brief in support of the petitioner and respectfully submits that the judgment of the Court of Appeals for the District of Columbia Circuit should be reversed.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 734 F.2d 1531. The Findings of Fact and Conclusions of Law of the United States District Court for the District of Columbia are unreported. The opinion of the District Court granting a preliminary injunction is reported at 530 F. Supp. 12.

## STATEMENT OF THE CASE

1. The Facts

Petitioner S. Simcha Goldman, an Orthodox Jew who has served with distinction in two branches of the United States military for fourteen years, was assigned, after completing a Ph.D. in clinical psychology in 1977, to work at the Mental Health Clinic of the Air Force Regional Hospital at the March Air Force Base (March AFB) in Riverside, California. n1 As an Orthodox **[*5]** Jew, he wore at all times, as he has done throughout his life, a diminutive head-covering known as a "yarmulke" in fulfillment of a Jewish religious requirement that he keep his head covered at all times. n2 There is no dispute as to the sincerity of petitioner's religious beliefs.

n1 Between 1970 and 1972, petitioner, who is an ordained rabbi, served as a chaplain in the United States Navy, "where he wore a yarmulke as a head covering while in uniform without incident." 734 F.2d at 1532.

n2 The religious practice of wearing a yarmulke, a head covering worn by observant Jews, is of ancient origin. References to the practice appear in the Talmud, an authoritative compendium of Jewish law completed by approximately 500 C.E. *See Tractate Shabbath*, 118b and *Tractate Kiddushim*, 31a (The Traditional Press 1979). The practice has been firmly established since the Middle Ages. For example, Maimonides wrote in his classic 12th century philosophical treatise, *The Guide to the Perplexed*, Part III, Chapter LII, at 295 (M. Friedlander ed. 1881), that "The great men among our Sages would not uncover their heads because they believed that God's glory was round them and over them. . . ." And Rabbi S. R. Hirsch wrote in his 19th century commentary on the Jewish *Siddur* (prayer book), *Hirsch Siddur*, at 14 (1969), that "[t]he Jew symbolically expresses [submission to God] by keeping his head covered, and in this subordination to God he finds his own honor." **[*6]**

From September 1977 until May 1981, he wore a yarmulke while on hospital duty without incident. There is no record that his wearing a yarmulke disrupted the *esprit de corps* among Air Force personnel at the hospital, that it inhibited teamwork at the hospital, or that the Air Force's other objectives such as "motivation" or "image" were tarnished or undermined. On the contrary, Goldman's performance as an Air Force psychologist was highly praised. He scored high marks on the very professional qualities that the Air Force contends would be imperiled were Goldman examine ways to minimize conflict "between the interest of members of the Armed Forces in abiding by their religious tenets and the military interest in maintaining discipline." Religious Practice Study, Executive Summary, at iii. On the issue of religious dress, the study recommended that "[t]he military services should designate living spaces in which religious articles may be worn with the uniform when such wear will not adversely impact unit cohesion". Religious Practice Study, Executive Summary, at xiv. On June 18, 1985, the Department of Defense issued Directive Number 1300.17 (the "Directive"), which established **[*7]** as a goal that the "Military Departments should designate living spaces in which religious articles may be worn with the uniform when wear will not affect adversely unit cohesion." As far as *Amicus* has learned, regulations embodying the Directive have not yet been promulgated by the Air Force. Assuming, *arguendo*, that the Air Force amends AFR 35-10 to comply with the Directive, petitioner would remain prohibited from wearing his yarmulke outside of his barracks. Given the Directive's ambiguity, it is even unclear whether petitioner would be allowed to wear his

yarmulke at all times inside his living quarters. Accordingly, his constitutional challenge to the application of military dress requirements that fail to accommodate his free exercise rights and that arbitrarily and unnecessarily conflict with religious practice survives the Directive, even if implemented.

## SUMMARY OF ARGUMENT

I. The Court of Appeals erred in concluding that the Air Force was not obligated to reasonably accommodate Captain Goldman's request to wear his yarmulke. This Court, in reviewing constitutional challenges to military regulations or analogous congressional statutes pertaining to national **[*8]** defense, requires that such regulations or statutes be narrowly drawn reasonably to accommodate a serviceman's First Amendment rights. The Air Force, in AFR 35-10, has made no such reasonable accommodation, although the record in this case indisputably confirms that granting Captain Goldman's request to wear a yarmulke posed no threat to military discipline or cohesion.

II. The Court of Appeals, in reflexively capitulating to the Air Force's predilection for uniformity in matters of attire, impermissibly abdicated its judicial obligation to scrutinize the constitutionality of AFR 35-10. Claiming deference to the "specialized nature of judgments concerning internal military governance," 734 F.2d at 1538, the Court of Appeals also misapplied the deference that is due to the Air Force's "judgment" in this case. The Air Force has merely speculated as to the effect on unit cohesion and discipline of permitting petitioner to wear his yarmulke; such a "judgment" is entitled to no judicial deference.

## ARGUMENT

### POINT I

### AFR 35-10 IS UNCONSTITUTIONAL AS APPLIED TO PETITIONER BECAUSE IT FAILS REASONABLY TO ACCOMMODATE PETITIONER'S FREE EXERCISE RIGHTS

A. Restrictions **[*9]** on the free exercise of religion can ordinarily be justified only by a compelling state interest that could not otherwise be accomplished.

Guided by the historical legacy of the founding of the Republic, the Framers of the Constitution chose through the First Amendment's "free exercise" clause to insulate religious practice from interference by the state. Punishment for "entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance" was strictly prohibited. *Everson* v. *Board of Education*, 330 U.S. 1, 15-16 (1946); *Reynolds* v. *United States*, 98 U.S. 145, 164 (1878). n4 And while religiously grounded conduct may be subject to regulation where conduct or actions have posed some substantial treat to public safety, peace or order, *Sherbert* v. *Verner*, 374 U.S. 398, 403 (1963), it is equally axiomatic "that there are areas of conduct protected by the Free

Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability." *Wisconsin* v. *Yoder*, 406 U.S. 205, 220 (1972). Thus, this Court has upheld **[*10]** conduct guided by religious belief such as the Amish practice of declining to send children to public or private school after they graduate from eighth grade, *Wisconsin* v. *Yoder, supra;* a Seventh-Day Adventist's claim of entitlement to unemployment compensation when the individual would not work on Saturday, *Sherbert* v. *Verner, supra;* and a Jehovah Witness's right to disseminate religious literature on a street corner, *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940).

n4 Although not the only religious minority to find America a safe haven, the Jews have particular awareness of the experience of religious persecution and of the importance of these constitutional safeguards. *Everson* v. *Board of Education, supra*, 330 U.S. at 9.

The Court has ruled that "[i]f the purpose or effect of a law is to impede the observance of one or all religions . . . that law is constitutionally invalid even though the burden may be characterized as being only indirect." *Braunfeld* v. *Brown*, 366 U.S. 599, 607 (1961). Although a regulation may be neutral on its face, the Court has recognized that **[*11]** "in its application, [the regulation may] offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion." *Wisconsin* v. *Yoder, supra*, 406 U.S. at 220; *Thomas* v. *Review Board*, 450 U.S. 707, 717 (1981). Especially when the effect of compliance with state law requires abandonment of a particular religious observance, the Court has been reluctant to compel the individual to choose between compliance and violation of his religious belief. To protect this fundamental constitutional guarantee, the Court has employed heightened scrutiny in reviewing regulations or statutes challenged on free exercise grounds:

We must . . . consider whether some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice. In this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation."

*Sherbert* v. *Verner, supra*, 374 U.S. at 406 (citation omitted). **[*12]** *See also* *Wisconsin* v. *Yoder, supra*, 406 U.S. at 215 ("only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion"); *Thomas* v. *Review Board, supra*, 450 U.S. at 718.

The free exercise cases, in short, convincingly testify to the weighly concerns implicated when government impinges on matters of religious conscience. There can be no doubt that, in the civilian context, petitioner's right to wear a yarmulke -- a religious article obviously posing no threat to public safety, peace or order, *Sherbert* v. *Verner, supra* -- could not be proscribed o subjected to regulation.

B. The Air Force is constitutionally required reasonably to accommodate petitioner's free exercise rights by promulgating narrowly drawn regulations.

The Court has recognized that these fundamental rights are not forfeited when one enters military service. To the contrary, "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." *Chappell* v. *Wallace*, 462 U.S. 296, 304 (1983); *Crawford* v. *Cushman*, 531 F.2d 1114, 1120 (2d Cir. 1976) **[*13]** ("a succession of cases . . . has reiterated the proposition that the military is subject to the Bill of Rights and its constitutional implications").

Historically, the military has endeavored to promote, not obstruct, a serviceman's religious practice. The courts consistently have upheld, if not applauded, the military's concerted effort to keep religious ritual and observance accessible to our servicemen. *See, e.g.*, *Abington School District* v. *Schempp*, 374 U.S. 203, 296-98 (1963) (Brennan, J., concurring); *id.* at 308-09 (Stewart, J., dissenting) ("[A] lonely soldier stationed at some far away outpost could surely complain that a government which did *not* provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion."); *Katcoff* v. *Marsh*, 755 F.2d 223, 228 (2d Cir. 1985) (upholding military chaplaincy against constitutional challenge; "the Army has proceeded on the premise that having uprooted the soldiers from their natural habitats it owes them a duty to satisfy their Free Exercise rights, especially since the failure to do so would diminish morale, thereby weakening our national **[*14]** defense"). The recent Religious Practice Study at iv agrees, noting that "[d]uring the Revolutionary War commanders were tasked with assuring that weekly religious services were conducted. Today a detailed and inclusive command religious program is a vital element in all military units. This program recognizes the importance of religious, spiritual and moral values to service members."

Given the military's historic solicitude for religious observances, its uncompromising objection to petitioner's yarmulke is surprising. The Air Force argues that permitting this inconspicuous religious symbol might in unspecified circumstances undermine morale and discipline. Vague conjecture, however, cannot justify a sweeping prohibition on religious dress appurtenances in the military. Even when national security or defense is at stake, "'[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms'." *United States* v. *Robel*, 389 U.S. 258, 265 (1967), *quoting* *NAACP* v. *Button*, 371 U.S. 415, 438 (1963). Government regulation in all circumstances must conform to the fundamental and peremptory constitutional **[*15]** precepts that limit the power of government in order to safeguard basic individual rights. As the Court observed in *Rostker* v. *Goldberg*, *supra*, 453 U.S. at 70, "the courts are called upon to decide whether Congress [or here, the military], acting under an explicit grant of . . . authority, has by that action transgressed an explicit guarantee of individual rights which limits the authority so conferred."

*Robel*, as the Court of Appeals recognized, 734 F.2d at 1536, supplies the guiding principle. "[T]he Constitution requires that the conflict between congressional power [over national security] and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict." *United States* v. *Robel*, *supra*, 389 U.S. at 268 n.20. *Robel* struck down legislation aimed at protecting the Nation's military secrets -- a concern of the highest order and certainly on a par with solicitude for military discipline -- because the legislation imposed too substantial a burden on the implied constitutional right of freedom of association. Military regulations no less than congressional enactments must accept that **[*16]** where First Amendment rights are

implicated, a regulation must be carefully tailored to minimize constitutional conflict. With respect to military regulations which circumscribe First Amendment freedoms, the inquiry becomes whether those regulations are drafted and applied in a manner that reasonably accommodates the exercise of those basic freedoms.

*Brown* v. *Glines*, 444 U.S. 348 (1980), is illustrative. Glines, a captain in the Air Force Reserve, solicited signatures protesting Air Force grooming standards in violation of applicable Air Force regulations. Air Force Regulation 30-1(9) prohibited Air Force personnel from soliciting or collecting signatures on a petition "within an Air Force facility . . . without first obtaining authorization from the appropriate commander"; AFR 35-15(3)(a)(1) prohibited the distribution of "any printed or written material . . . within any Air Force installation without permission of the Commander." Glines was aware of these regulations, yet failed initially to seek authorization from the base commander.

The Court in that case upheld the challenged regulations, noting that the regulations in question "restrict speech no **[*17]** more than is reasonably necessary to protect the substantial government interest" involved. *Brown* v. *Glines, supra*, 444 U.S. at 355. Significantly, the *Glines* regulations, which implemented an Army and Air Force directive, explicitly recognized that the military must make every effort to accommodate even speech critical of the military:

That directive advises commanders to preserve servicemen's "right of expression . . . to the maximum extent possible, consistent with good order and discipline and the national security" . . . . Thus, the regulations in both services prevent commanders from interfering with the circulation of any materials other than those posing a clear danger to military loyalty, discipline or morale. . . . Indeed, the Air Force regulations specifically prevent commanders from halting the distribution of materials that merely criticize the Government or its policies.

*Id.* at 355.

Glines' facial attack on the regulation failed because the challenged regulation embodied a substantial effort by the Air Force to accommodate First Amendment-protected speech, permitting the military to censure only those materials that **[*18]** "posed a clear danger to military loyalty, discipline or morale."

*Greer* v. *Spock*, 424 U.S. 828 (1976), is similarly instructive and illustrates the distinction between permissible and impermissible blanket prohibition on First Amendment exercise. The Court in *Spock* made two determinations: first, that the military had authority to ban all political campaign activities within the confines of a military base; second, that the military may require written campaign materials to be submitted for review before distribution on a military installation. The ban on all on-base political demonstrations was upheld as a legitimate attempt to insulate the military "from both the reality and the appearance of acting as a handmaiden for partisan political causes or candidates." 424 U.S. at 839. Almost by definition, pursuit of this goal forecloses individualized determination concerning particular political causes. On the other hand, the pre-clearance procedure for written materials was designed to prevent distribution of materials that would constitute "'a clear danger to [military] loyalty, discipline or morale.'" 424 U.S. at 840. The challenged **[*19]** regulation obviously contemplated particularized review of

materials sought to be distributed, and the narrow and principled basis on which distribution could be interdicted was clearly an important factor in the Court's approval of the regulation.

The contrast between the application of AFR 35-10 to preclude all visual religious dress supplementing the Air Force uniform and the regulations upheld in *Brown* v. *Glines* and *Greer* v. *Spock* is striking. Although there can be no dispute that AFR 35-10, as applied, infringes on free exercise by servicemen who are religiously required to wear visible attire supplementing the Air Force uniform, there are no guidelines or procedures for determining whether particular religious garb would interfere with the objectives that the Air Force seeks to further in mandating dress uniformity. All departures are forbidden. This is not accommodation to the guarantee of religious observance contained in the Bill of Rights and otherwise embraced by the military. Rather, it reflects a rigid, unaccommodating and impermissible disregard of that guarantee in favor of nothing more than military convenience. *Korematsu* v. *United States*, 323 U.S. 214, 244-45 (1944) **[*20]** (Jackson, J., dissenting).

C. Reasonable accommodation requires the Air Force to permit Captain Goldman to wear a yarmulke.

The Air Force justifies its refusal to permit Captain Goldman to wear his yarmulke by retreating behind broad generalizations concerning military discipline, training and *esprit de corps*. With legerdemain and shifting argument, it implies that these ends can only be efficiently served if no deviation is permitted from strict dress uniformity. "Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim." *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 221. Under the principles of *Wisconsin* v. *Yoder* and kindred decisions of this Court, as modified in the military context by *Robel*, *Brown* v. *Glines*, and *Greer* v. *Spock*, the Air Force is required to make a reasoned determination of its ability to relax dress regulations where necessary to accommodate religious freedom in the individual instance, and, on the facts of this case, to permit the wearing of a yarmulke.

1. The Air Force has failed to establish that its objectives would be undermined were Captain Goldman permitted **[*21]** to wear a yarmulke.

The Air Force, although given ample opportunity, has made no attempt to demonstrate how its goals are served by its action in Captain Goldman's case. The government tacitly recognizes that its putative objective of uniform military dress as a vehicle for achieving a cohesive and disciplined fighting force, however unassailable as a general proposition, finds attenuated application to Captain Goldman's situation and his request for a *de minimus* departure from the Air Force's sartorial standard. Captain Goldman is not trained to fight or to instruct men in combat; he is an Air Force psychologist. His station is a military hospital, not the battlefield or the barracks. The yarmulke that he must wear according to the religious dictates of his conscience is a small and unobtrusive head covering, hardly incongruous with Captain Goldman's otherwise conforming and well-kempt military attire. As might be expected, the record is devoid of any suggestion that the yarmulke has been the occasion for the slightest brech in Air Force discipline or has in any way impacted on Air Force morale or *esprit de corps*. If the constitutional guarantees afforded service personnel **[*22]** are to have genuine import, the military must be required to distinguish those religious practices that compromise legitimate

military ends and those, such as petitioner's practice of wearing a yarmulke, that do not. *Cf. Abington School District* v. *Schempp, supra,* 374 U.S. at 308 (Goldberg, J. concurring) ("[T]he measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.") n5 If in these circumstances the judiciary were to profess an unwillingness to review and strike a military regulation that impermissibly compromises religious freedom, then the oftrepeated assurance that "one's constitutional rights are not surrendered upon entering the Armed Services," *Middendorf* v. *Henry,* 425 U.S. 25, 50 (1976) (Powell, J., concurring), becomes an empty, misleading platitude.

n5 One must conclude that the uncompromising and rigid posture of the Air Force arises out of a failure fully to appreciate the unique and specially protected position freedom of religious observance occupies in the constitutional scheme. The heavy reliance placed by the government on *Kelley* v. *Johnson,* 425 U.S. 238 (1976) and, in the Court of Appeals, *Marshall* v. *District of Columbia Government,* 559 F.2d 726 (D.C. Cir. 1977) -- cases dealing with non-religiously based challenges to police grooming regulations -- is symptomatic of an inability to distinguish between religious beliefs and other conduct-motivating philosophies and opinions. This confusion is further illustrated by the government's lumping together of "religious, ethnic, or cultural traditions or simply personal taste" (Brief of Respondents in Opposition to Petition for Writ of Certiorari at 5), as if religious practice and personal taste were of the same constitutional dimension. **[*23]**

Unable to explain how the important ends of dress uniformity have been compromised in Captain Goldman's case, the government seizes upon speculative difficulties that might arise from claims for exceptions to the dress code by other servicemen in other circumstances. The spectre is presented of the dress code under attack by a myriad of religious adherents demanding exception to uniform regulations, and the inability of the military to make reasoned decisions with regard to such claims. (Brief for Respondents in Opposition to Petition for Writ of Certiorari at 5-6, 7-8). Here, the government embarks on a flight of conjecture concerning the number and complexion of possible future claims for dress exemptions -- rank speculation resting neither on experience nor expertise. Indeed, the only evidence presented by the government at trial was a general study of religious dress and grooming, unconnected with religious observances in the military. (Brief for Respondents in Opposition to Petition for Writ of Certiorari at 5 n.5). Nor does the Religious Practice Study supply any instructive data. It summarizes the religious groups with dress restrictions, but fails to indicate how many **[*24]** servicemen are adherents of these religions, whether there have been any substantial number of requests for deviation from military garb requirements, and the nature of such requests. Religious Practice Study at 107-124. A questionnaire on religious practices in the military is equally uninstructive, since it lumps together servicemen who have worn or will wear turbans, skull caps, sashes, stoles, and medallions without differentiation, and was completed by a grossly unrepresentative cross-section of the military, polling only resident students in the various service schools. Religious Practice Study at 127.

Moreover, the suggestion that requests for religiously motivated exceptions to uniform dress requirements would somehow overwhelm the administrative capabilities of the military is

unfounded. The record and the case law reflect only a few instances in which the military has been requested or challenged to make exception for visible religious dress appurtenances. *See* *Khalsa* v. *Weinberger*, 759 F.2d 1411 (9th Cir. 1985) (turban); *Sherwood* v. *Brown*, 619 F.2d 47 (9th Cir.), *cert. denied*, 449 U.S. 919 (1980) (same); *Bitterman* v. *Secretary of Defense*, 553 F. Supp. 719 (D.D.C. 1982), **[*25]** *appeal docketed*, No. 83-1177 (D.C. Cir. Feb. 15, 1983) (yarmulke); *Geller* v. *Secretary of Defense*, 423 F. Supp. 16 (D.D.C. 1976) (beard). Abstract and unproven speculation about alleged administrative difficulty or claims of administrative inconvenience cannot serve as an excuse for denying the fundamental right of servicemen to freedom of religious practice. *Cf.* *Korematsu* v. *United States*, *supra*, 323 U.S. at 244 ("[I]f we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient.")

A like argument advanced by the Air Force (and accepted as dispositive by the Court of Appeals, 734 F.2d at 1540) is that accommodation to certain religious practices would engender hostilities among those groups for whom no exception is made. The argument is equally unpersuasive, yet another instance of a rationale advanced on the basis of sheer speculation unsupported by identifiable military experience. Further, it is at variance with the military's stated lack of concern with claims of "favoritism" in accommodating other religious practices. Religious **[*26]** Practice Study at 95-96 (grumbling by servicemen about religious exemptions from flu shots can be disregarded because it "almost never rises above the nuisancel level."). Indeed, it is apparently inconsistent with the Air Force's admitted practice of allowing airmen to wear religious undergarments and ornaments despite the existence of military-issue undergarments, as well as an Air Force regulation which permits the "wearing of rings and bracelets of nonuniform design," which presumably could include an insignia of religious character. *See* 734 F.2d at 1540. n6

n6 Of course, the Air Force could not, under the pretext of facilitating unit cohesion and *esprit de corps*, forbid a religious practice because it tends to arouse anti-Semitic reaction or other religious animosities and biases. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.'" *City of Cleburne, Texas* v. *Cleburne Living Center, Inc.*, 105 S. Ct. 3249, 3259 (1985), *quoting* *Palmore v. Sidoti*, 104 S. Ct. 1879, 1882 (1984).

The military might indeed be required to make hard-to-quantify judgments **[*27]** whether a particular item of religious dress falls on one side or the other of the line of acceptable departures from standard military dress. Delineating the line will require particularized determination. *See* *Lynch* v. *Donnelly*, 104 S. Ct. 1355, 1361 (1984), where the Court noted that "[i]n each case, the [Establishment Clause] inquiry calls for line drawing; no fixed *per se* rule can be framed." The decision whether to permit certain types of dress while precluding others will necessarily depend on differences of degree. *Cf.* *LeRoy Fibre Co.* v. *Chicago M. & St. P. Ry.*, 232 U.S. 340, 354 (1914) (Holmes, J., concurring) ("The whole law [depends on differences in degree] as soon as it is civilized."). The inherent imprecision of the decisional process does not, however, relieve the military of the constitutional duty to decide each application for religious accommodation on its merits and to permit departure from the dress codes when a reasonable accommodation can be

made.

2. In the case of Captain Goldman's yarmulke, the Air Force is clearly required to make exception to AFR 35-10.

Once it is established that the Air Force **[*28]** cannot rely on broad generalizations about the alleged importance of uniform dress to justify in inflexible application of AFR 35-10, Captain Goldman's case becomes an easy one. There is no dispute that "[d]uring his service at March Air Force Base, Goldman's wearing of a yarmulke while in military uniform did not adversely affect the performance of his assigned duties nor the operations at the Base Regional Hospital and did not result in complaints from other personnel." Findings of Fact and Conclusions of Law, *Goldman* v. *Secretary of Defense*, No. 81-1522, at 6, P14. No evidence was presented by the Air Force to indicate that Captain Goldman's yarmulke had any detrimental influence on teamwork, motivation, discipline, *esprit de corps* or image, the factors identified by the Force's expert and accepted by the Court of Appeals as compelling the uniform dress requirements in the military. Wherever the Air Force may ultimately and legitimately draw the line on unacceptable religious clothing, Captain Goldman's yarmulke undoubtedly falls on the side of permissible dress. This is all need be determined in this case.

POINT II

NO JUDICIAL DEFERENCE IS DUE THE UNCONSTITUTIONAL **[*29]** DECISION OF THE AIR FORCE NOT TO ACCOMMODATE PETITIONER'S RELIGIOUS PRACTICES

A. The ruling of the Court of Appeals that the military may insist on compliance with its dress regulations simply "for the sake of enforcement" is deference that would arbitrarily strip service personnel of their First Amendment rights.

In upholding the decision of the Air Force forbidding Captain Goldman from wearing his yarmulke, the Court of Appeals has injected the confusing and troubling notion that in its pursuit of cohesion and obedience, the military may promulgate virtually any conduct-regulating rule and insist on its absolutely uniform enforcement. What renders the regulations unchallengeable, according to the Court of Appeals, is that "the Air Force has no concrete interest [in them] separate from the effect of strict enforcement itself. The rules themselves are arbitrary and are enforced up to an arbitrary cutoff point." 734 F.2d at 1540. In short, the less "interest" the military has in a regulation, the more rigidly it may enforce it. This is not even minimal scrutiny of constitutionally infringing military regulations, it is no scrutiny. It is deference to the **[*30]** military run riot.

The notion that the Air Force's interest in uniformity as such inevitably trumps the freedom guaranteed by the Bill of Rights elevates military uniformity to a super-constitutional principle, one occupied by no other interest in American jurisprudence. On this rationale, the military could order all servicemen regularly to attend a randomly selected denominational religious service or to recite a pledge of support for an arbitrarily chosen political party, if such regulations were aimed at troop regimentation or the conditioning of service personnel to instinctive obedience to command. It is inconceivable, of course, that such regulations could survive constitutional

scrutiny. *See* *Anderson* v. *Laird*, 466 F.2d 283, 295 (D.C. Cir.), *cert. denied*, 409 U.S. 1076 (1972), striking down compulsory chapel attendance at military academies as a violation of the Establishment and Free Exercise Clauses. Even if the ends be legitimate and even if they be ends of national security, the means are unacceptable if they violate the "'letter and the spirit' of the First Amendment." *United States* v. *Robel*, *supra*, 389 U.S. at 268 n.20. **[*31]** Dress uniformity in the military, like any other military rule or practice, must bend to accommodate First Amendment rights of the individual serviceman, if accommodation is possible without realistically compromising the identified purposes of military morale, obedience and cohesion.

Furthermore, this Court in its review of challenges to military law or conduct implicating military self-governance, has always identified a principled basis for deferring to military judgment. For example, *Middendorf* v. *Henry*, *supra*, *Parker* v. *Levy*, 417 U.S. 733 (1974), and *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), involved the unique character of military justice and were clearly informed by the existence of a legislatively enacted Code of Military Justice. *Gilligan* v. *Morgan*, 413 U.S. 1 (1973), and *Orloff* v. *Willoughby*, 345 U.S. 83 (1953), in which expressions of deference to military expertise are most striking and pronounced, dealt with requests that the Court oversee military training and the duty assignment of servicemen. In declining the invitation, the Court forcefully explained that **[*32]** it would not presume to second-guess the military in matters paradigmatic of the military's specializaed expertise. Out of kindred concerns in *Chappell* v. *Wallace*, 462 U.S. 296, 300 (1983), the Court refused to infer a *Bivens*-type constitutional tort in favor of servicemen against their superiors, because to do so would in effect "tamper with the established relationship between enlisted personnel and their superior officers." While solicitous of the prerogatives of the military commanders in their proper sphere, these cases do not relegate to military discretion the First Amendment rights of servicemen.

By contrast, the Air Force in this case possesses no equivalent specialized expertise. It has failed to adduce any evidence that permitting Captain Goldman to wear a yarmulke has or would incur resentment from other servicemen. In short, the Air Force has merely speculated, without factual foundation, as to the effect of excepting petitioner from the requirements of AFR 35-10. Under the circumstances, the Air Force's "judgment" is entitled to no judicial deference.

B. The judiciary's lack of specialized expertise in military matters does not render **[*33]** military judgments on constitutional issues non-reviewable.

The Court of Appeals' too-ready conclusion that it can offer no insight into the possible effect of petitioner's continued wearing of a yarmulke because of the military's alleged expertise in such matters misses the mark for another reason. Even in the civilian context, the judiciary is called upon to rule upon the regulations and judgments of uniquely qualified experts in disciplines which lie outside the ordinary realm of judicial competence. On more than one occasion, this Court has passed judgment on matters involving highly technical scientific inquiries, far more esoteric that the rather common sense issue presented in this case, where lay persons would hardly presume to challenge adequately articulated decisions of experts. *See, e.g.*, *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute*, 448 U.S. 607 (1980), striking down OSHA standards for airborne bezene in the workplace; *American Textile Manufacturers Institute* v. *Donovan*, 452 U.S. 490 (1981), upholding OSHA's cotton dust standard. In cases

such as these, the judiciary does not attempt to second guess **[*34]** the qualified professional's technical judgment. Rather, the court probes whether such judgment has in fact been exercised in a manner consistent with governing legal parameters. In the oft-repeated aphorism of *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965), "[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia. . . ."

If this philosophy of judicial review guides the Court in its congressionally authorized oversight of administrative agencies, it is certainly one which must find application in review of regulations that cramp the exercise of basic First Amendment rights in the military. The "very essence of judicial duty", *Marbury* v. *Madison*, 1 Cranch 137, 178 (1803), is the implementation and protection of the constitutional scheme. In constitutional matters, the Court and not the military is the expert. As Justice Douglas observed, concurring in *Parisi* v. *Davidson*, 405 U.S. 34, 54-55 (1972):

[M]atters of the mind and spirit, rooted in the First Amendment, are not in the keeping of the military . . . . When the military steps over those bounds, it leaves **[*35]** the area of its expertise and foresakes its domain. The matter then becomes one for civilian courts to resolve, consistent with the statutes and with the Constitution.

*See also* *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 640 (1943), observing that "[The Court] cannot because of modest estimates of . . . competence[,] withhold the judgment that history authenticates as the function of this Court when liberty is infringed."

The position taken by the government and endorsed by the Court of Appeals, that the decision of the Air Force to prohibit all departure from standard dress be upheld largely because of the deference due the military, is an invitation to the judiciary in a most sensitive constitutional area to "abdicate [its] ultimate responsibility," *Rostker* v. *Goldberg*, *supra*, 453 U.S. at 67. The invitation is contrary both to the jurisprudence of the Court and elementary logic. Neither extensive military experience nor years of involvement in the military milieu is required to realize that the Air Force has not made an honest attempt narrowly to draw AFR 35-10 to accommodate the rights of the petitioner **[*36]** in this case.

## CONCLUSION

For the foregoing reasons, *Amicus* respectfully submits that the judgent of the Court of Appeals for the District of Columbia Circuit holding AFR 35-10 constitutional as applied to petitioner should be reversed.

Respectfully submitted,

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