No. 22-5234

In the United States Court of Appeals for the District of Columbia

JASKIRAT SINGH, AEKASH SINGH, MILAAP SINGH CHAHAL,
Plaintiffs–Appellants,

v.

DAVID H. BERGER, ET AL.,
Defendants–Appellees.

Appeal from the United States District Court
for the District of Columbia
Honorable Richard J. Leon
(1:22-cv-01004-RJL)

BRIEF FOR THE ALEPH INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS–APPELLANTS' EMERGENCY MOTION PENDING APPEAL, OR IN THE ALTERNATIVE, TO EXPEDITE APPEAL

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(a)(1)

A. Parties and *Amici*. Except for the Aleph Institute, all parties, interveners, and *amici* appearing before the district court and in this Court are listed in the Brief of Plaintiffs–Appellants.

B. Ruling Under Review. References to the ruling at issue appear in the Brief for Plaintiffs–Appellants.

C. Related Cases. To *amicus*'s knowledge, this case has not previously been before this Court and an accurate reference to the related cases pending in this or any other court appears in the Brief for Plaintiffs–Appellants.

CORPORATE DISCLOSURE STATEMENT

Amicus Aleph Institute states that it does not have a parent corporation and does not issue stock. *See* Fed. R. App. P. 26.1. The Aleph Institute also states that it is a Section 501(c)(3) certified nonprofit Jewish organization that is a chaplain endorser accredited by the Department of Defense and that helps guide U.S. military members through the processes necessary to obtain religious accommodations.

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INTRODUCTION

The Plaintiffs are three Sikhs who are fully qualified to serve in the Marine Corps. But the Marine Corps has barred them from entering recruit training unless they abandon their articles of faith—their uncut hair and turbans. The Marine Corps' justification for denying the Plaintiffs religious exemptions? The Marine Corps asserts that its already-exemption-riddled mandate for uniformity furthers its interests in "mission accomplishment, unit cohesion, and good order and discipline." Mem. Op. at A9. The district court agreed that the Marine Corps had credibly alleged that granting the requested exemptions would "pose a serious threat to national security." *Id.* at A12 (citation omitted). So the district court denied Plaintiffs' motion for a preliminary injunction. *Id.* at A13.

This brief describes why the Marines Corps' compelling-interest argument fails: The Marine Corps doesn't tailor or support its stated interests based on the particular facts and circumstances here as required by law. And because the Marines Corps hasn't adequately articulated (much less offered sufficient evidence to support) a

particularized compelling interest, the Plaintiffs' beard and turban exemptions should be granted.

INTEREST OF AMICUS CURIAE*

The Aleph Institute is a Section 501(c)(3) certified nonprofit Jewish organization dedicated to assisting and caring for the spiritual wellbeing of members of specific populations who are isolated from the regular community, such as U.S. military personnel, prisoners, and people institutionalized or at risk of incarceration due to mental illness or addictions. The main thrust of the Aleph Institute's work in the military context is its work as one of three Jewish organizations recognized by the Department of Defense as a chaplain endorser. This means that the Aleph Institute has the unique ability to take responsibility for a chaplain's accreditation under relevant military regulations. *See, e.g.*, Department of the Army, Reg. 165-1, Army Chaplain Corps Activities para. 6-14(b) (June 23, 2015) (describing an endorser's role). But as relevant here, the Aleph Institute also provides guidance for Jews serving in every branch of

* No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *amicus*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

the armed forces who seek religious accommodations enabling them to serve their Country without violating their religious obligations.

This brief offers the Aleph Institute's unique perspective based on its experience and success guiding individuals through the religious-accommodation process in the military. The Aleph Institute can speak to the importance of assessing each individual's accommodation request on its own merits. And it can provide examples of chaplains endorsed by the Aleph Institute who have been granted similar accommodations in other branches of the military as a result of its advocacy—none of which have undermined military preparedness. This unique perspective is necessary considering the breadth of the Marine Corps' asserted interests here. *See* D.C. Cir. R. 29(a).

ARGUMENT

Enacted by Congress in 1993, the Religious Freedom Restoration Act (RFRA) provides that a government can't substantially burden a person's religious exercise unless the government's actions are the least restrictive means to further a compelling government interest. *See* 42 U.S.C. § 2000bb-1(b); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* (*O Centro*), 546 U.S. 418, 423 (2006) (holding that the government

failed to show a compelling government interest at the preliminary injunction stage). This applies to all federal-government-imposed burdens on religious exercise, "even if the burden results from a rule of general applicability." *See* 42 U.S.C. § 2000bb-1(a).

But RFRA's expansive protections are meaningless if the statute isn't correctly analyzed. And here, the district court ignored the likelihood of success on the merits. Instead, it relied only on the Marine Corps' asserted interest, implicitly assuming that the Marine Corps has a compelling government interest in national security without applying the appropriate RFRA standard. But the question isn't whether the government has a generalized interest that's compelling; it's whether the government has a compelling interest in failing to provide *these particular Plaintiffs* an exception to *this particular policy*, at *this particular time*, and under *these particular facts*. *Cf. Ramirez v. Collier*, 142 S. Ct. 1264, 1281 (2022) ("[C]ourts take cases one at a time, considering only the particular claimant whose sincere exercise of religion is being substantially burdened." (cleaned up)).†

† Though *Ramirez* deals with a claim under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc, the Supreme Court has long recognized that the same compelling-interest

The district court acknowledged this as the proper test. *See* Mem. Op. at A7. But it didn't correctly apply it. *See id.* at A12 (accepting that the Marine Corps had "credibly alleged" broad interests in ensuring "successful training and mission accomplishment and protecting national security" (citations omitted)). And when correctly applied, it's clear that the Marine Corps hasn't met its burden under RFRA because it's failed to state or produce evidence of a sufficiently particularized compelling interest.

I. The Marine Corps fails to meet its burden under RFRA because it hasn't articulated a compelling interest prohibiting it from granting these particular Plaintiffs exceptions to these particular policies, at this particular time, under this particular set of facts.

RFRA requires "the [g]overnment to demonstrate that the compelling[-]interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 430–31 (quoting 42 U.S.C. § 2000bb-1(b)); *accord Ramirez*, 142 S. Ct. at 1281; *Yellowbear v. Lampert*, 741 F.3d 48, 57 (10th Cir. 2014) (Gorsuch, J.) (holding that courts "must examine both sides of the ledger

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test applies to both RFRA and RLUIPA claims. *See O Centro*, 546 U.S. at 436.

on [a] case-specific level of generality: asking whether the government's particular interest in burdening [a plaintiff's] particular religious exercise is justified in light of the record in [the] case").

In *O Centro*, the Supreme Court rejected the government's argument that generalized concerns about the Controlled Substances Act "preclude[d] any consideration of individualized exceptions such as that sought by the [respondent church]." 546 U.S. at 430. Here, the Marine Corps has made equally generalized statements about its interest in "mission accomplishment" and why absolute conformity with the Marine Corps' uniform and grooming policies is necessary to further that interest. *See* Mem. Op. at A9–A13. But just as in *O Centro*, the Marine Corps' "mere invocation" of a generalized interest "cannot carry the day." 546 U.S. at 432; *see also Holt v. Hobbs*, 574 U.S. 352, 362–63 (2015) (rejecting the governments' argument that it had a compelling interest in prison safety and security and noting that "RLUIPA, like RFRA, contemplates a 'more focused' inquiry" as stated in *O Centro* (citation omitted)). Rather, the Marine Corps must allege and prove that it has a compelling interest in barring *these Plaintiffs* from the accommodations

to uniform and grooming policies as required by their sincerely held religious beliefs.

The district court also referenced the Marine Corps' asserted "public interest in national defense." Mem. Op. at A10 (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). To be sure, no one doubts the Nation's interest in a strong and effective military. But the fact that U.S. military interests are implicated doesn't give the government a get-out-of-RFRA-free card. *See Singh v. McHugh*, 185 F. Supp. 3d 201, 217–18 (D.D.C. 2016) (applying RFRA in the military context). And even if the Marine Corps has interests in "mission accomplishment," "uniformity," or "national security" generally, that doesn't "necessarily prove, without more," that uniformity in every respect, including this one, furthers that same compelling interest. *Cf. Yellowbear*, 741 F.3d at 58 (noting it was the court's "statutory duty to decide whether the prison's claimed safety and cost interests qualif[ied] as compelling in the context of particular cases, not in the abstract"); *Singh*, 185 F. Supp. 3d at 217–18 (applying the particularity requirement in the context of a religious exemption request in the Army). Indeed, accepting such broadly construed interests as sufficient negates

the strict-scrutiny standard's "fundamental purpose"—to "take 'relevant differences' into account." *O Centro*, 546 U.S. at 432 (citation omitted).

In sum, RFRA requires that the Marine Corps show why it has a compelling interest in denying these Plaintiffs an exception to this policy at this time under this set of facts. But the Marine Corps hasn't done so. Thus, an injunction pending appeal is warranted.

II. The Marine Corps also fails to meet its burden under RFRA because it hasn't provided particularized evidence of a compelling interest.

RFRA also requires that the Marine Corps put forth evidence to prove a particularized compelling interest. Mere "conjecture" or "speculation" isn't enough. *See Ramirez v. Collier*, 142 S. Ct. 1264, 1280 (2022); *accord Yellowbear*, 741 F.3d at 59 (holding that the compelling-interest test can't be satisfied by "the government's bare say-so"). Rather, the Marine Corps must offer evidence that its policy is the least restrictive means of advancing its interests, meaning that the Marine Corps must "'show that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party.'" *Holt*, 574 U.S. at 364–65 (alterations adopted) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014)). At

bottom, the Marine Corps must show why an accommodation for these specific Plaintiffs in these particular circumstances implicates a compelling government interest.

Here, the Marine Corps has offered no evidence to show that it has a compelling interest in the wholesale prohibition on Plaintiffs' requested accommodations. In fact, the Marine Corps even acknowledges that the "uniform and grooming standards" are merely "*some* of the tools used to instill and maintain" the shared identity. Mem. Op. at A11 (emphasis added). It doesn't follow (nor does the Marine Corps allege, much less prove) that a shared identity among Marines is unattainable absent uniformity in these respects. Nor does RFRA "permit such unquestioning deference." *Holt*, 574 U.S. at 364.

What's more, the evidence of exemptions that the Marine Corps already grants undermines the Marine Corps' argument. *See* Plaintiffs–Appellants' Motion at 10 (listing "broad categorical and individualized exemptions allowing for differences in appearance"); *id.* at 12 (noting the Marines Corps' willingness to grant accommodations after basic training). So does the evidence of the religious accommodations granted by the other branches of the U.S. military and by other countries'

militaries. *See id.* at 12–15 (other branches of the U.S. military); *id.* at 15 (other countries' militaries).

To that evidence, *amicus* adds three accounts where similar accommodations didn't compromise national security. The first is that of Rabbi Geller, a Jewish Chaplain in the Air Force. *See Geller v. Secretary of Defense*, 423 F. Supp. 16 (D.D.C. 1976). After allowing Rabbi Geller to wear a beard for over six years, the Air Force reassigned him to inactive reserve status when he refused to shave his beard for religious reasons. *Id.* at 16. The Air Force argued that it had a compelling interest in maintaining a "military image" or "neatness, cleanliness and safety." *Id.* at 18. But the court held that there was "no adequate justification for the inflexible approach of the Air Force." *Id.* And so the court granted Rabbi Geller's accommodation. *Id.*

The second example is Army Chaplain Colonel Jacob Goldstein. The Army granted Rabbi Goldstein a special exception allowing him to keep an unshaven beard. Rabbi Goldstein retired in 2015 after serving 38 years of active duty, including deployments to Bosnia, South Korea, Afghanistan, and Guantanamo Bay, Cuba. *See* Spc. Anthony Hooker, *Rare Army Rabbi Serves Soldiers*, U.S. Army,

https://www.army.mil/article/42219/rare_army_rabbi_serves_soldiers. Rabbi Goldstein was also the Senior Chaplain for all military branches at Ground Zero after the September 11, 2011 terrorist attack. *Id.* Given this breadth of dedicated service, it's clear that Rabbi Goldstein's beard didn't undermine the Army's interest in national security.

And the third example is Menachem Stern, a rabbi endorsed by the Aleph Institute who was prohibited from serving as an Army Chaplain due to his refusal to shave his beard. Rabbi Stern initiated litigation against the Army to assert his rights. *See Stern v. Secretary of the Army*, Civ. Action No. 10-2077 (JDB). And the Army eventually agreed to accept Rabbi Stern as a chaplain. Rabbi Stern has been assigned to Arlington National Cemetery—a station reserved for only the best chaplains in the U.S. military. And he's presently on temporary deployment in Iraq, after serving several tours over his nearly ten years of service—all without his beard critically undermining the good order and discipline of the Army.

Accepting the Marine Corps' arguments at face value, allowing any differences in appearance would severely undermine the Marine Corps' battle-readiness. But these arguments strain credulity considering exemptions the Marine Corps already allows and the evidence of similar

accommodations in other branches of the military. And tragically, what the Marine Corps' policy *would do* is undermine the ability of chaplain endorsers such as the Aleph Institute to get much-needed chaplains into the field to serve our soldiers.

Because the Marine Corps hasn't offered evidence showing that granting these specific accommodations to these specific Plaintiffs implicates a compelling interest, its arguments fail.

CONCLUSION

The Marine Corps has the burden to establish a compelling interest particular to the Plaintiffs based on their specific circumstances. It must also show evidence to support its assertion that denying these accommodations is the least restrictive means of fulfilling that interest. The Marine Corps hasn't carried either burden. So the Marine Corps' generally asserted interests must yield to the Plaintiffs' request for a religious accommodation. Thus, this Court should grant the Plaintiffs' motion for an injunction pending appeal.

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CERTIFICATE OF COMPLIANCE

This brief complies with the requirements of Fed. R. App. P. 29(a)(5) because it has 2382 words—fewer than half the words allowed for a party's main brief under Fed. R. App. P. 27(d)(2)(A).

This brief complies with the typeface and type styles requirements of Fed. R. App. P. 32(a) because the motion has been prepared in a proportionately spaced typeface using Microsoft Office Word in 14-point Century Schoolbook font.

Dated: September 29, 2022.

s/Michael J. Walsh, Jr.
MICHAEL J. WALSH, JR.

CERTIFICATE OF SERVICE

I, Michael J. Walsh, hereby certify that on September 29, 2022, I served a true and correct copy of the brief on all parties of record via CM/ECF.

s/Michael J. Walsh, Jr.
MICHAEL J. WALSH, JR.