SCHEDULED FOR ARGUMENT NOVEMBER 29, 2022
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)

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel of record certify as follows:

A. PARTIES

1. The following are parties in this Court:
   a. Plaintiffs-Appellants:
      i. Jaskirat Singh
      ii. Aekash Singh
      iii. Milaap Singh Chahal
   b. Plaintiff-Appellee:
      i. Sukhbir Singh Toor
   c. Defendants-Appellees:
      i. David H. Berger, Commandant of the Marine Corps
      ii. Lloyd James Austin III, Secretary of Defense
      iii. U.S. Department of Defense
      iv. Carlos Del Toro, Secretary of the Navy
      v. U.S. Department of the Navy
      vi. Eric M. Smith, Assistant Commandant of the Marine Corps
      vii. David A. Ottignon, Deputy Commandant of Manpower and Reserve Affairs, U.S. Marine Corps
   d. Amici
      i. Aleph Institute
      ii. American Islamic Congress
      iii. Anti-Defamation League
      iv. Eric Fanning
      v. Chaplain Jacob Goldstein (Ret.)
      vi. Mark Hertling, R
      vii. Patrick Huston

viii. Interfaith Alliance
ix. Jewish Coalition for Religious Liberty
x. Jeffrey Kendall
xi. Muslim Public Affairs Council
xii. Sikh American Veterans Alliance
xiii. Women Veterans and Families Network

B. RULINGS UNDER REVIEW

On August 24, 2022, the Honorable Richard J. Leon entered an opinion and order denying Plaintiffs-Appellants' motion for preliminary injunction, A813, A826. The opinion is available at *Toor v. Berger*, No. 22-cv-1004, 2022 WL 3646565 (D.D.C. Aug. 24, 2022).

C. RELATED CASES

The following related cases have been litigated in the district court below:

- *Di Liscia v. Austin*, No. 21-1047 (D.D.C.) (currently pending)
- *Singh v. Carter*, No. 16-399 (D.D.C.) (closed)
- *Singh v. McConville*, No. 16-581 (D.D.C.) (closed)
- *Singh v. McHugh*, No. 14-1906 (D.D.C.) (closed)

/s/ Eric S. Baxter
Eric S. Baxter

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GLOSSARY

ASVAB: Armed Services Vocation Aptitude Battery

MCRP: Marine Corps Reference Publication

ROTC: Reserve Officers' Training Corps

RFRA: Religious Freedom Restoration Act

JURISDICTIONAL STATEMENT

The district court entered an order denying Plaintiffs' motion for a preliminary injunction on August 24, 2022. A826. Plaintiffs filed a timely notice of appeal on September 6, 2022. A827. The district court had jurisdiction under 28 U.S.C. § 1331, and this Court has jurisdiction under 28 U.S.C. § 1292(a)(1), as this is an appeal from an order denying a preliminary injunction.

INTRODUCTION

This case is about whether the government can bar Americans from serving in our Nation's military because of their faith. All parties agree that this question is subject to strict scrutiny—the most demanding level of review. Yet two years into the process, the government still has no coherent reason for its decision to bar Plaintiffs-Appellants because of their Sikh articles of faith. The government concedes that Plaintiffs are eager and fully qualified to serve. And it concedes that they are generally capable and authorized to serve throughout their military careers with their articles of faith intact.

Yet the government has repeatedly blocked Plaintiffs from commencing recruit training unless they first violate their core religious beliefs by shaving their heads and beards for recruit training as a showing of loyalty to the Marine Corp and their fellow Marines. No such demands are made for recruits of other faiths. Christians are not asked to forgo Bible study for recruit training. Jews and Muslims are not asked to eat pork. A rule that forces Sikhs to do the equivalent—even if only incidentally—demands a compelling justification.

The government has none. It has essentially abandoned its argument that hair and beard uniformity (during recruit training only) is essential to national security. But its new justification is no better. It cannot be that the daily shared experience of new recruits shaving crown and jaw during recruit training is what makes a lifelong Marine. The bathroom

is hardly the battlefield. The government's national security argument is further undermined by the other departures it allows from shared experience of shaving. After Day 1 of recruit training, male recruits may maintain beards for medical reasons, which means they might never shave during training. The government has no explanation for why clipping instead of shaving does not trigger national security concerns, but tying a beard close to the face does. Similarly, female recruits are exempt from head-shaving and can choose long, medium, or short hair worn in locks, twists, or braids—all without threatening national security.

These accommodations also undermine the government's alternative explanation that all new recruits must be stripped of their individuality. So do its tattoo rules, which generously allow tattoos anywhere on the body except the face, neck, and hands, although those too can be approved at the government's discretion. Notably, within the last year, regulations regarding all three exemptions were relaxed for the specific purpose of attracting more diverse recruits. That alone belies any justification the government might assert for denying the exact same accommodations to attract more Sikh recruits.

The government has a long history of asserting "national security" to bar minority religious observance in the military. Congress explicitly repudiated that argument in 1987 when it passed a statue overturning a Supreme Court ruling that gave the military deference on that issue. Instead, Congress insisted that the military accommodate religious wear

unless it would interfere with performance of specific military duties or could not be kept neat and conservative. In passing the law, Congress specifically anticipated Sikh articles of faith and rejected the very arguments the Marine Corps makes here. The Religious Freedom Restoration Act further reinforced that message.

The U.S. Army and Air Force both now accommodate religious headgear, unshorn hair, and beards throughout Sikhs' military careers, as do other respected militaries worldwide. The U.S. Navy and the Marine Corps itself likewise grant accommodations for religious minorities' grooming and attire requests for much of a service member's career. The Marine Corps stands alone with its blanket ban on accommodation during recruit training. Yet its broad and generalized justifications fall far short of justifying its career-killing rule. It has the burden to show why it can grant religious accommodations *after* the thirteen weeks of training—i.e., why its national-security uniformity concerns vanish for the vast majority of a Marine's career—but not during recruit training.

Plaintiffs are entitled to relief now. Denying them access to the military for any length of time because of their religious observance constitutes irreparable harm as a matter of law. Now they have also lost one-and-a-half to two years of their careers that they can never get back, with untold impact on their promotion opportunities and time for retiring. Every day they are being forced to make decisions about their future under a cloud of uncertainty.

The government faces no prejudice from expedited proceedings. Under both the Religious Freedom Restoration Act and the First Amendment, it was required to show a compelling justification for its religious discrimination when it first denied Plaintiffs' accommodation requests one year ago. Since that time, it has not introduced or proffered any additional evidence beyond what is already in the record. Sikhs have been barred from military service because of their articles of faith only since 1981. Prior to that, they served at least as far back as World War I. Yet the government still has not proffered a single piece of evidence beyond its mere say-so that compelling Sikhs to shave during recruit training is, or ever has been, essential to national security. Indeed, the evidence to the contrary is so overwhelming that Plaintiffs are entitled to an injunction under any standard of proof, heightened or not, and at any stage of the litigation.

STATEMENT OF THE ISSUES

1. Under the Religious Freedom Restoration Act, is denying Plaintiffs a religious accommodation for unshorn hair and beards during recruit training the least restrictive means of meeting a compelling governmental interest, even though the Marine Corps allows medical exemptions for beards, does not require women to shave their heads, and allows tattoos?

2. Is it a violation of the Free Exercise Clause for the Marine Corps to deny Plaintiffs' religious accommodations to maintain unshorn hair

and beards during recruit training where it allows comparable accommodations to other recruits for secular reasons?

3. Are Plaintiffs suffering irreparable harm from being denied a religious accommodation?

4. Do the balance of harms and public interest favor granting an injunction preserving Plaintiffs' RFRA and Free Exercise rights?

STATEMENT OF THE CASE

A. The Sikh Faith

Sikhism is a monotheistic religion that originated in fifteenth-century South Asia. It is the world's fifth-largest faith, with roughly 25 million adherents worldwide, including 700,000 in the United States. A025 ¶¶ 74-75. Members of the Sikh religion are committed to "a message of devotion and remembrance of God at all times, truthful living, equality of mankind, [and] social justice." *Introduction to Sikhism*, Sikhs.org (2011), https://perma.cc/LSV6-NN6T. As an external reminder of this inward devotion, Sikhs commit themselves to the "Five Ks," or articles of faith: *kesh* (unshorn hair), *kanga* (wooden comb), *kara* (metal bracelet), *kacchera* (under-shorts), and *kirpan* (ceremonial knife). A025 ¶¶ 78-79; A027 ¶ 84. Sikhs who undergo the formal initiation ceremony of *Amrit Sanskar* generally believe they must wear all five articles of faith.

The Sikh Code of Conduct, called the *Rehat Maryada*, outlines the requirements for the five articles of faith.[1] It explains that the *kesh*, or unshorn hair, has unique significance. It calls Sikhs to "affirm that the body, as divinely created, is sacrosanct in its completeness." Eleanor Nesbitt, *Sikhism: A Very Short Introduction* 54 (2005). Indeed, "[a]ll codes and manuals defining Sikh conduct are unanimous in saying that uncut hair is obligatory." 2 *The Encyclopedia of Sikhism* 466 (Harbans Singh ed., 2d ed. 2001). The practice of maintaining unshorn hair and beards was begun by Guru Nanak, who regarded it as living in harmony with God's will. Indeed, failing to maintain *kesh* amounts to violating one of only four "cardinal sins" in Sikhism, W.H. McLeod, *The A to Z of Sikhism* 119 (2005), tantamount to adultery or "the direst apostasy," A026 ¶ 82; *The Encyclopedia of Sikhism* 466.

The paramount importance of unshorn hair to the Sikh faith is manifest throughout history. Many Sikhs have chosen death and martyrdom rather than cut their hair. *See generally* Louis E. Fenech, *Martyrdom in the Sikh Tradition* (2000). For example, in 1716, 780 Sikhs were executed in Delhi based on their refusal to cut their hair. Each Sikh was offered freedom if he cut his hair, but not one out of 780 relinquished Sikhism.

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[1] *Sikh Rehat Maryada in English*, Shiromani Gurdwara Parbandhak Committee, https://perma.cc/ZQ5B-MKJL.

The Sikh Symbols: The Hair and the Sikh Sacrifices, Sikh Missionary Society U.K. (2004), https://perma.cc/A9JA-3DV3.

Historically, uncut hair and turbans have been the most central visible feature of the Sikh identity. For example, in the 18th century, Sikhs in South Asia were persecuted and forced to convert from their religion; the method of forcing conversions was to remove a Sikh's turban and cut off his hair. A027 ¶ 85. Since then, forcing a Sikh to cut his hair has symbolized denying that person the right to belong to the Sikh faith. A027 ¶ 86.

B. The Plaintiffs

Plaintiffs are three practicing Sikhs: Aekash Singh, Milaap Singh Chahal, and Jaskirat Singh. As required by their Sikh faith, they maintain unshorn beards and unshorn hair worn in a turban. A025-26 ¶ 79. Since childhood, they have each faithfully honored this religious duty by refraining from cutting any of their hair. A032 ¶ 123; A035 ¶ 150; A037-38 ¶¶ 170-71.

Their faith has also motivated them to become Marines, A033 ¶¶ 130-31, A036 ¶ 155, A039 ¶¶ 180-84, because service in the armed forces has long been a central part of the Sikh tradition. This tradition dates back to Guru Gobind Singh's creation of the Khalsa, a spiritual order and army composed of initiated Sikhs to resist persecution by the Mughal Empire

in the late seventeenth century. The Khalsa warrior-saints order instructs Sikhs to take up arms against oppression as a religious duty.[2] Observant Sikhs have thus served with their articles of faith intact in militaries around the world, including in the United States from at least World War I.[3]

Each Plaintiff has passed all the physical and medical tests required to join the Marine Corps, and thus has been qualified to serve his country for well over a year. Each has pursued a religious accommodation that would allow him to serve in the Marine Corps without having to abandon his articles of faith. A034 ¶ 139; A039-40 ¶¶ 185-88; A203. After extended delay, each has now been told he can get a religious accommodation only if he first agrees to abandon his articles of faith for the thirteen weeks of recruit training. A057; A164; A234.

Aekash Singh passed the Armed Services Vocation Aptitude Battery (ASVAB) test and Marine Corps physical tests on September 30, 2020, over two years ago. A039 ¶ 186. But because he would not cut his hair, a recruiter told him he was not authorized to join the Marines. A039 ¶ 186. On October 9, 2020, with guidance from recruiters, Aekash tried again to

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[2] Sir Charles Gough & Arthur Donald Innes, *The Sikhs and the Sikh Wars*, 18-21 (1897); Arvind-Pal Singh Mandair, *Sikhism: A Guide for the Perplexed*, 4, 55 (2013).

[3] *Statement for the Record of the Sikh Coalition,* House Armed Services Committee Hearing on Religious Accommodations in the Armed Services (Sept. 19, 2014), https://perma.cc/DCS7-A8PR.

swear in and was again denied. He was told to leave the swear-in room and that he would have to remove his turban in order to be sworn in. A040 ¶ 188. He submitted a pre-accession request for a religious accommodation on March 1, 2021. A040 ¶ 189; A224. The Marine Corps' deadline for responding to this request was 60 days. Marine Corps Order 1730.9 ¶¶ 4b(1)(b)-(c) (July 12, 2021) (A187). After seven months of delay, however, and despite consistent communication between Aekash's attorneys and Navy and Marine Corps officials, counsel for the Commandant of the Marine Corps told Aekash's attorneys on October 8, 2021 that he had to resubmit his accommodation request. A040-41 ¶ 194. He did so on October 13, 2021. A040 ¶ 188.

In December 2021, Aekash received a text from his recruiter asking him to write a statement confirming that he was a "conscientious objector" "due to [his] religion," because "the command is asking for it." A590. Aekash reiterated that he is not a conscientious objector but in fact wants "to obtain a religious accommodation to enlist in the United States Marine Corps." *Id.*

On February 22, 2022, nearly a year after his original request and four months after his renewed accommodation request, Aekash received a false accommodation: it could take effect only if he first shaved his hair and beard to commence recruit training. A041 ¶¶ 199-202. Aekash appealed this decision internally on March 8, 2022, A042 ¶ 204, but still has heard nothing.

Milaap Singh Chahal sought a religious accommodation from the Marine Corps on March 1, 2021. On June 30, 2021, he passed the ASVAB test and was told by recruiters that he was fully qualified to join, but he was not allowed to sign a contract or swear in without removing his turban and cutting his hair or receiving a religious accommodation. A034 ¶ 139. On September 27, 2021, the Marine Corps gave him the same false accommodation conditioned on his willingness to first shave his hair and beard for recruit training. A164. He appealed on October 21, 2021, but still has not received a response. A169.

Jaskirat Singh sought a religious accommodation from the Marine Corps on November 24, 2021. A203. He received a response on February 7, 2022, providing him the same false accommodation as the other Plaintiffs. A057. Jaskirat appealed on February 21, 2022, but still has not received a response.

In explaining its refusal to accommodate Plaintiffs during recruit training, the Marine Corps insists denial is necessary for "breaking down individuality and training recruits to think of their team first." *E.g.*, A058 ¶ 2(d). Plaintiffs' careers have now been on hold for over a year.[4]

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[4] Plaintiffs also seek accommodation for another article of faith, the *kara* (steel bracelet). Because Chahal has been formally initiated in the *Amrit Sanskar* ceremony, he also seeks accommodation for three other articles of faith worn beneath the clothes: *kacchera* (undershorts*), kanga*

C. Relevant Statutes and Military Regulations

After decades of Sikhs serving in the Armed Forces, a policy change in 1981 excluded practicing Sikhs.[5] This exclusion was near absolute until 2017, when the Army in a litigation settlement agreement reversed course.[6] Each branch of the military now at least partially accommodates servicemembers with religious beards and turbans, including Sikhs. The Army allows unshorn hair and beards for religious reasons except when there is actual risk of chemical, biological, radiological, or nuclear exposure.[7] In February 2020, the Air Force updated its policy to provide the same accommodations.[8] And the Navy and Marines both allow accommodations, with some exceptions.[9] There are at least 100 Sikhs serving with

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(small comb worn in the turban), and *kirpan* (emblem of justice resembling a small knife). A032 ¶¶ 124-25. The government denied accommodation but has not explained how these articles would harm their uniformity interests, instead focusing on Plaintiffs' beards and turbans.

[5] *See* U.S. Naval Institute Staff, *A Brief History of Grooming in the U.S. Navy,* USNI News (Oct. 23, 2014), https://perma.cc/HX9Y-SJMJ.

[6] *See* Army Directive 2017-03 (Policy for Brigade-Level Approval of Certain Requests for Religious Accommodation) (Jan. 3, 2017), https://perma.cc/V25D-4LPJ; Army Reg. 600-20 Appendix P (July 24, 2020), https://perma.cc/9JDV-ZJYL.

[7] *See id.*

[8] *See* Air Force Instruction 36-2903, Dress and Personal Appearance of Air Force Personnel (updated Mar. 15, 2021), https://perma.cc/ME57-FDM7.

[9] *See* Navy Bureau of Personnel Instr. 1730.11A (as updated Mar. 16, 2020), https://perma.cc/ZT2Q-AGKR; A057, A070.

distinction in the U.S. military.[10] Only the Marines have imposed a categorical ban on religious accommodations for unshorn hair and beards during recruit training.

Both Department of Defense and Marine Corps regulations have explicitly adopted the Religious Freedom Restoration Act ("RFRA"): if a military "policy, practice or duty substantially burdens a Service member's exercise of religion, accommodation can only be denied if" the policy is "in furtherance of a compelling governmental interest" and is "the least restrictive means of furthering that compelling governmental interest." A551-552 ¶ 1.2(e) (citing 42 U.S.C. § 2000bb-1); A187 ¶ 2. The regulations emphasize that the Marine Corps is obliged "to find ways to facilitate each Marine's commitment to their faith[.]" A189 ¶ 3(b)(3).

Further, the Marine Corps recently relaxed many aspects of its grooming policies to improve recruitment and diversity. *See*, *e.g.*, A543. On October 29, 2021, the Marine Corps updated its policies to automatically allow tattoos anywhere on the body except the head, neck, and hands, and to allow individualized exceptions even for face, neck, or hand tattoos. A062.

Female recruits are never required to shave their heads for recruit training. A304-306. And since 2018, the Marine Corps has also allowed

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[10] Dave Philipps, *The Marines Reluctantly Let a Sikh Officer Wear a Turban*, The New York Times (updated Sept. 28, 2021), https://nyti.ms/3BHjbXm.

them to wear diverse hairstyles of varying lengths including locks, twists, and braids. A304-306.

On January 21, 2022, the Marine Corps announced a relaxed exemption for Marines with medical-beard needs, including those with *pseudofolliculitis barbae*, a painful condition inflamed by shaving that affects roughly 60% of African-American men. A268; *Pseudofolliculitis Barbae*, American Osteopathic College of Dermatology, https://perma.cc/EB8Z-SXGU.[11] While the Marine Corps has long permitted temporary exemptions for servicemembers with medical conditions, medical personnel are now authorized to grant *permanent* exemptions without going through the requesting individual's commander. A269. Recent policy changes have also relaxed uniformity rules regarding hair, fingernail polish, head gear, and other attire. A539.

D. This Lawsuit

On April 11, 2022, Plaintiffs filed their complaint. Two days later, they moved for a preliminary injunction to allow them to begin basic training without removing their articles of faith. Dkt.16.

After a hearing on June 28, the district court denied the preliminary injunction on August 24. A813. The court recognized that Plaintiffs' claims were of "immense importance," A821, but held that it "need not

[11] As of 2020, there were over 17,000 Black male Marines on Active Duty. *2020 Demographics: Profile of the Military Community*, Department of Defense, https://perma.cc/Q38V-AJN5.

address [them] now," A822. Instead, the court denied the injunction based on "the public interest alone." A822. Even assuming the Marine Corps' actions violated RFRA and the First Amendment, the Court held that "the public interest" prevailed, because allowing Plaintiffs to serve with their articles of faith intact "will 'pose a serious threat to national security' by disrupting defendants' well-established method of transforming recruits through the discipline of uniformity." A824. Plaintiffs appealed on September 6. On September 19, they sought an injunction pending appeal in the district court, which was denied on September 20. Plaintiffs then moved this Court for an injunction pending appeal or, in the alternative, an accelerated briefing schedule on September 23. This Court held oral argument on the motion on October 11 and granted the alternative relief on October 12.

STANDARD OF REVIEW

An injunction is warranted if the moving parties show "1) a substantial likelihood of success on the merits, 2) that [they] would suffer irreparable injury if the injunction is not granted, 3) that an injunction would not substantially injure other interested parties, and 4) that the public interest would be furthered by the injunction." *Mills v. District of Columbia*, 571 F.3d 1304, 1308 (D.C. Cir. 2009). The third and fourth factors merge where the government is the opposing party. *Karem v. Trump*, 960 F.3d 656, 668 (D.C. Cir. 2020).

This Court "reviews the district court's legal conclusions as to each of the four factors de novo, and its weighing of them for abuse of discretion." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016). A district court is required to "balance the strengths of the requesting party's arguments *in each of the four required areas*." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (emphasis added). "If the showing in one area is particularly strong, an injunction may issue even if the showings in other areas are rather weak." *Id.* This Court may, without remand, "independently grant an injunction after considering the proper factors," especially when "a fundamental constitutional issue is at stake and time is of the essence." *League of Women Voters*, 838 F.3d at 7.

This Court has never directly held that a different standard should apply if a preliminary injunction would effectively grant full relief on the merits of a claim. The closest it has come is a passing footnote in an opinion from half a century ago suggesting that a preliminary injunction "should not work to give a party essentially the full relief he seeks on the merits." *Dorfmann v. Boozer*, 414 F.2d 1168, 1173 n.13. (D.C. Cir. 1969). The Court should decline to apply this dictum here for multiple reasons.

First, the footnote is non-binding. *See United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997) (explaining that a footnote that is "[u]nnecessary to the court's disposition of the case … binds neither us nor the

district judge," especially where no "subsequent decision transformed [the] footnote … into a circuit holding"). Nor does it state a categorical rule. The sole authority the Court relied on stated only that such injunctions should "ordinarily" be denied and went on to uphold the injunction at issue because the plaintiffs' injury appeared irreparable and because denying relief "obviously would have been more damaging to the plaintiff than to the defendants." *Selchow & Righter Co. v. W. Printing & Lithographing Co.*, 112 F.2d 430, 430-32 (7th Cir. 1940); *see also Singh v. Carter*, 185 F. Supp. 3d 11, 17 (D.D.C. 2016) (citing *Dorfmann* to say that "a preliminary injunction *generally* 'should not work ….'") (emphasis added). Indeed, the judges in the District Court consistently apply the standard factors, even after citing the *Dorfmann* footnote. *See, e.g.*, *Singh v. McConville*, 187 F. Supp. 3d 152, 160 (D.D.C. 2016) (conducting a traditional irreparable harm analysis under the usual standard despite having recognized that plaintiffs' relief "essentially encompasses all of the relief sought in the underlying complaint"); *Manzanita Band of Kumeyaay Nation v. Wolf*, 496 F. Supp. 3d 257, 262 (D.D.C. 2020) (recognizing *Dorfmann* before laying out and applying the regular preliminary injunction test).

This Court has likewise ignored the *Dorfmann* footnote where the standard factors weighed strongly in the movant's favor. In *League of Women Voters*, for example, the movant sought a preliminary injunction

to stop a federal agency from listing states' proof-of-citizenship requirements on voter registration cards just weeks before the registration deadline. After the district court denied relief, this court reversed to grant a preliminary injunction on expedited proceedings, giving the plaintiffs the entire relief they were seeking. 838 F.3d at 7. The Court granted the relief because the movant had demonstrated "substantial (perhaps overwhelming) likelihood of success on the merits," *id.* at 9, and "irreparable" harm, *id.*, where a "fundamental constitutional issue [was] at stake and time [was] of the essence," *id.* at 7. The Court's reasoning demonstrated that balancing the modern factors is sufficient to address any risks associated with granting full relief on a preliminary injunction. Notably, the dissent also relied only on the injunction factors, making no mention of *Dorfmann* or its footnote 13.

Supreme Court doctrine similarly does not distinguish between preliminary injunctions based on whether the relief is "full." Indeed, *Winter v. Natural Resources Defense Council*, which the district court relied on here, was precisely a case where "the preliminary injunction was 'the whole ball game.'" 555 U.S. 7, 33 (2008). And the Supreme Court has also declined to apply a heightened standard in similar cases where the consequences of the preliminary injunction would be irremediable. In *Tandon v. Newsom*, for example, the Court granted an injunction pending appeal to allow religious services to continue, even though there would

be no way to remedy the government's asserted harm of COVID transmission resulting from the carrying on of such services. 141 S. Ct. 1294, 1297 (2021).

Even assuming that *Dorfmann* and *League of Women Voters* together set a higher standard for this type of preliminary injunction, Plaintiffs would easily satisfy it. The few circuits adopting this approach require a "strong showing" of irreparable harm and a "clear or substantial likelihood of success on the merits" by plaintiffs seeking full relief. *A.H. by & through Hester v. French*, 985 F.3d 165, 176 (2d Cir. 2021); *see also O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 976 (10th Cir. 2004) (requiring plaintiffs to "make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms"). As demonstrated more fully below, given the many Marine Corps grooming exceptions, the incoherency of its argument that national security hinges on forcing Plaintiffs to cut their hair and shave during recruit training, the fact that other branches and respected militaries around the world accommodate Sikhs, and Congress's clear direction for the military to accommodation religious wear, Plaintiffs have clearly and substantially shown that they are likely to succeed on the merits. Similarly, the Marine Corps' ongoing discrimination and violation of Plaintiffs' constitutional rights demonstrate a strong showing

of irreparable harm as a matter of law. Indeed, it was precisely a constitutional violation of a free exercise right that the Second Circuit held satisfied the heightened showing in *French*. 985 F.3d at 184.

Here the standard injunction factors adequately take into consideration all of the facts necessary to protect the relevant interests. Because—as demonstrated below—Plaintiffs are facing irreparable harm to their constitutionally protected rights, where timing is of the essence, and are overwhelmingly likely to succeed on the merits, a preliminary injunction is warranted now.

It is irrelevant that perhaps two Plaintiffs may finish recruit training before the merits are decided. At least one of them will not. And the Marine Corps will have to meet the same standards for future recruits. *Cf. Safari Club Int'l v. Jewell*, 842 F.3d 1280, 1287 (D.C. Cir. 2016) (mooting a challenge to "a specific agency action" doesn't necessarily moot challenge to "the *policy* that underlies that action"). Furthermore, while exceedingly unlikely, if the government eventually vindicates its national security claims, the Marine Corps could give Plaintiffs an honorable discharge. And the Marine Corps cannot credibly claim that Plaintiffs' fellow recruits would already have been harmed by exposure to their unshorn hair and beards when it already allows numerous comparable exceptions to its grooming standards.

In sum, the four-factor balancing test already takes all of the relevant concerns into account. And here, even with the most careful balancing, Plaintiffs are entitled to preliminary injunctive relief.

PRELIMINARY QUESTIONS

The Court requested that the parties respond specifically to the following questions:

Q1: What is the appropriate standard to obtain a preliminary injunction that would effectively grant full relief on the merits of a claim, and has that standard been met here?

Plaintiffs have addressed this question in the "Standard of Review" section of this brief. *See supra* 14.

Q2: What religious and medical accommodations, if any, are granted to Marines entering the Marine Corps' Officer Candidates School?

Plaintiffs do not have information sufficient to answer this question. It is known, however, that the United States Military Academy at West Point fully accommodates Sikhs. Rule 41(a)(1)(A) Notice of Voluntary Dismissal Without Prejudice, *Chahal v. Seamands,* No. 17-12656 (E.D. Mich. Aug. 24, 2017), ECF No. 13. Sikhs are also fully accommodated at the United States Naval Academy. A016-17 ¶ 14; Navy Bureau of Personnel Instr. 1730.11A, ¶ 3 (as updated Mar. 16, 2020), https://perma.cc/ZT2Q-AGKR. Defendants have conceded that "graduates of the [Naval Academy] may be accepted for commission in the USMC after graduation." A728 ¶ 34.

Q3: When will the Government's statutory authority to further extend the plaintiffs-appellants' eligibility for the Delayed Entry Program expire?

It is Plaintiffs' understanding that eligibility for the Delayed Entry Program may only be extended for one 365-day period, meaning the person must enlist within two years of signing their papers. 10 U.S.C. § 513(b). This means that Plaintiff Jaskirat Singh's deadline to enter service is April 30, 2023.

Q4: How long would it likely take, if an injunction were issued, for these three plaintiffs actually to begin basic training?

Plaintiff Jaskirat Singh has been ready for the last eighteen months to commence recruit training at any time. He remains prepared to ship out for recruit training as soon as a spot is open. He has been told by his recruiter that the Marine Corps begins a new cycle of initial recruit training twice a month. His recruiter has told him that these trainings are never full, and that even if there were limited spots, he would receive priority over new recruits.

After Plaintiff Milaap Chahal first submitted his accommodation request to the Marine Corps, he anticipated being able to join the Marine Corps within a matter of months. He has been ready to join any time since then. After the district court hearing on Plaintiffs' motion for a preliminary injunction, Plaintiff Chahal decided he could not wait past the new year to begin his military career and began exploring options with the Army. Following the initial hearing in this Court, Plaintiff Chahal

informed counsel that he was pursuing an option to enroll in the Army ROTC at Central Washington University. If he is not able to join the Marine Corps by the end of the year, he will pursue an Army career. Currently, however, he still intends to join the Marine Corps.

Plaintiff Aekash Singh had just begun community college when he first went to a Military Entrance Processing Station. He anticipated taking one semester off from school for recruit training as soon as he was authorized to serve with his articles of faith. The process has now taken two years. Since he has only three semesters left, he has now decided to finish his degree in May 2024 and then join the Marine Corps. He needs to know as soon as possible whether this is going to be an option since he must be able to tell any employers or graduate schools (including medical school) if he will be entering the Marine Corps, as that affects both his employment prospects and his graduate admission prospects. If permitted, he fully intends to serve in the Marine Corps.

SUMMARY OF ARGUMENT

Plaintiffs have shown a likelihood of success on their RFRA and free exercise claims. And the remaining injunction factors favor relief.

I. Under RFRA, the government may not impose a substantial burden on religious exercise unless imposing that burden is the least restrictive means of advancing a compelling government interest. The Marine Corps' asserted interests in a shared uniform experience and breaking down recruits' individuality cannot satisfy this test given the patchwork

of exemptions from uniformity the Marine Corps allows for medical beards, tattoos, and women's diverse hairstyles—all allowed specifically to respect recruits' individual needs and preferences and to increase diversity. Furthermore, barring observant Sikhs from joining the Marine Corps cannot be the least restrictive means of ensuring national security when every other branch of the United States Armed Forces accommodates Sikhs' religious observance during recruit training, and when the Marine Corp itself is willing to accommodate them after recruit training is completed. Congress has specifically directed otherwise.

II. Under the Free Exercise Clause, the Marine Corps must satisfy strict scrutiny unless the burden on religious exercise is the result of a neutral, generally applicable law. The Marine Corps' policy is not generally applicable because it allows both categorical and discretionary exemptions from uniformity during recruit training for secular, but not religious, reasons. These same exemptions for medical beards, tattoos, and women's diverse hairstyles also mean the Marine Corps cannot satisfy strict scrutiny.

III. Without a preliminary injunction, Plaintiffs will suffer irreparable harm because "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020). In addition, the Marine Corps' discrimination has forced Plaintiffs to put their

lives and careers on hold for one and a half or two years, and Plaintiffs cannot continue to do so indefinitely.

IV. The balance of harms and public interest favor a preliminary injunction. Balancing these factors requires considering Plaintiffs likelihood of success because the public interest always favors following the Constitution. The district court committed legal error when it ignored the test Congress established for balancing asserted military interests against the rights of servicemembers to practice their faith and instead deferred to the mere say-so of a single Marine Corps officer. The Marine Corps has provided no evidence that allowing three Sikhs to begin recruit training with unshorn beards and hair will threaten national security, while allowing thousands of other recruits to have medical beards, visible tattoos, and diverse hair lengths and styles will not.

ARGUMENT

Plaintiffs seek a preliminary injunction on their RFRA and Free Exercise claims. For the reasons set forth below, Plaintiffs are likely to succeed on the merits of each claim.

I. Plaintiffs are likely to succeed on their RFRA claims.

The likelihood of success on the merits is the "most important" factor in determining whether to grant a preliminary injunction. *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014). District courts in this Circuit have repeatedly ruled in favor of granting religious beard accommodations to military servicemembers, indicating that Plaintiffs' claims are

likely to succeed here. *Singh v. McHugh*, 185 F. Supp. 3d 201, 217 (D.D.C. 2016); *Singh v. Carter*, 168 F. Supp. 3d 216, 229 (D.D.C. 2016); *see also* Order at 1, *Di Liscia v. Austin*, No. 21-1047 (D.D.C. Apr. 15, 2021), ECF No. 7 (granting administrative stay of shave order).

RFRA prohibits the government from substantially burdening "a person's exercise of religion" unless it "demonstrates" that the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a), (b). At the preliminary-injunction stage, RFRA's burdens of proof "track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). Thus, Plaintiffs must initially show that their sincere religious exercise has been substantially burdened. *Id.* at 428. The burden then shifts to the government to show that it has a compelling interest in overriding the religious exercise that cannot be satisfied through less restrictive means. *Id.* at 429.

Here, the government concedes that Plaintiffs' religious beliefs are both sincere and substantially burdened by the Marine Corps' grooming regulations. Dkt.35 at 2 (PI Opp.); IPA Opp.9 (not addressing substantial burden or sincerity). Thus, the only question before the Court on Plaintiffs' RFRA claim is whether Defendants have a compelling interest in forcing Plaintiffs to abandon their religious beliefs and practices during recruit training. And on that question, Plaintiffs are overwhelmingly

likely to succeed on the merits. The Marine Corps has already agreed that Plaintiffs' articles of faith will be permitted post-training.[12] Here, the government is only resisting over the brief period of recruit training. Yet, even during training, the Marine Corps already allows numerous deviations from uniformity to accommodate characteristics that, unlike religion, have no constitutional protection. It follows that the government cannot show that forcing Plaintiffs to abandon their faith for the thirteen weeks of their recruit training furthers a compelling interest at all, let alone in the least-restrictive way.

A. The government failed to prove it has a compelling interest in forcing Plaintiffs to forgo their religious practice.

The burden of showing a compelling interest is the "most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). To meet it, the Marine Corps cannot simply cite "broadly formulated interes[ts]" that, at a high level of generality, seem compelling. *Holt v. Hobbs*, 574 U.S. 352, 362 (2015). Rather, RFRA demands a "'more focused' inquiry," requiring the Marine Corps to satisfy the test with respect to the "asserted harm of granting specific exemptions" to "the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 420; *Holt*, 574 U.S. at 363 (court must

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[12] The Marine Corps has agreed that it will accommodate Plaintiffs after their recruit training except when serving in "combat zones." A059; A166; A236. The scope and propriety of that limitation is also part of the lawsuit before the district court but is not at issue in this appeal.

"look to the marginal interest in enforcing the challenged government action in that particular context") (cleaned up). That is, the government must show it has a compelling interest in imposing its grooming requirement specifically *on Plaintiffs* during recruit training.

This rule applies even to critically important interests such as protecting public health during a pandemic, *Diocese of Brooklyn*, 141 S. Ct. at 67; enforcing federal drug laws, *O Centro*, 546 U.S. at 433; prison safety, *Holt*, 574 U.S. at 362; and protecting personnel in federal buildings, *Tagore v. United States*, 735 F.3d 324, 330-31 (5th Cir. 2013). Under strict scrutiny, "so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021).

For three reasons, the government's general interests in uniformity, discipline, or good order are insufficient to justify forcing these specific Plaintiffs to violate their faith.

First, the government's interests are fatally undermined by existing regulations that provide broad categorical and individualized exemptions allowing for substantial differences in appearance. For instance, Marines can wear visible tattoos, including on their face and neck with individualized approval. A062. Female Marines can wear short, medium, or long hair in various hairstyles. PI Opp.17. And male Marines with a medical exemption can permanently wear beards. A268; A256 (exemption process for Marines with *pseudofolliculitis barbae*).

The presence of both categorical and individualized exceptions creates "a higher burden" on the Marines to "show[] that the law, as applied, furthers [its] compelling interest[s]." *McHugh*, 185 F. Supp. 3d at 223 (quoting *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 472-73 (5th Cir. 2014)). It not only makes the existence of a compelling interest more important (to prevent religious discrimination) but also decreases the likelihood that any purportedly compelling interest even exists. *Fulton*, 141 S. Ct. at 1877, 1879, 1882 (exemptions both trigger strict scrutiny and "undermine[]" the government's defense). As a unanimous Supreme Court explained, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (cleaned up); *see also Sanjour v. EPA*, 56 F.3d 85, 95 (D.C. Cir. 1995) (en banc) ("Because the government has thus not even attempted to regulate a broad category of behavior … giving rise to precisely the harm that supposedly motivated it to adopt the regulations, we have trouble taking the government's avowed interest to heart.").

Here, these exemptions are fatal. The government failed to show that the gradation between a *medical* beard and a *religious* beard matters for its asserted interests in national security. If recruits with medical exemptions can satisfy the Marine Corps' need for "a set of regimented practices," IPA Opp.17, by clipping their beards each morning while standing

side by side with the recruits who fully shave, the government must explain why Sikh recruits who neatly groom and tie their beards each morning cannot. But the government has provided no such evidence. Similarly, it has made no effort to show that Marines are forged more through minutes grooming in the bathroom than hours training in the field. For good reason, since such efforts would have failed: there is no "compelling interest in each marginal percentage point by which [governmental] goals are advanced." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 803 n.9 (2011).

In *Fraternal Order of Police v. Newark*, for example, the Third Circuit evaluated a "no-beard policy," which the police department justified by the purported need for a uniform force that "convey[ed] the image of a 'monolithic, highly disciplined force." 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.). The court struck down the policy, concluding the governmental interest was undermined by allowing beards for medical reasons. The court explained that "the Department has made a value judgment that secular (*i.e.*, medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not." *Id.*; *see also Potter v. District of Columbia*, 558 F.3d 542, 547 (D.C. Cir. 2009) (affirming summary judgment for Muslim firefighters because the government failed to "proffer[] evidence" that its "clean-shaven requirement [was] narrowly tailored to further the interest of protecting firefighters"); *Kennedy v. District of Columbia*, 654 A.2d

847, 855 (D.C. 1994) (noting that inconsistent enforcement undermined the fire department's uniformity arguments regarding "*esprit de corps*"). Thus, if the government's interest in a "uniform" clean-shaven appearance can, for instance, broadly allow an unlimited number of Marines to wear medical beards, then there cannot be a compelling need to reject religious beards.

The Supreme Court took an even stricter approach in *Fulton*, concluding that even when no exception had ever been granted, the government's "creation of a system of exceptions" fatally "undermine[d] the City's contention that its non-discrimination policies can brook no departures," thus failing strict scrutiny. 141 S. Ct. at 1882. Here, the exceptions are no mere possibility but are actually granted in the name of diversity, recruitment, and retention. A062; A539. That makes this case easier than *Fulton*. Allowing the religious beards and turbans at issue here would impair uniformity no more than individual tattoos, diverse hairstyles, or the natural diversity in height, build, skin color, and appearance that is inherent to every class of recruits. While uniformity certainly has a role, the Marine Corps would not exist without diverse recruits. The exceptions that the Marine Corps carves out for other kinds of diversity reveal that its actual need is for a strong, uniformly committed team rather than Marines who appear identical.

Second, the Marine Corps cannot show that its interest would be impaired by specifically allowing Plaintiffs to maintain their beards, hair,

and religious articles during recruit training. *See O Centro*, 546 U.S. at 431. Here, the government admits that it *will* grant an accommodation to Plaintiffs *after* recruit training, and its regulations forbid removing that accommodation for any reason other than an "imminent threat to health and safety." A187 ¶ 4d(2)(b). This means that the uniformity interest simply evaporates immediately after the first thirteen weeks of a Marine's career and can *never* thereafter be the basis for rescinding an accommodation. Such ephemeral interests are rarely compelling. Further, recruit training is the period when Plaintiffs are *least* likely to encounter enemy fire or other imminent threats to health or safety. If unbending uniformity is so critical to mission accomplishment, surely the Marine Corps' interest would be stronger during actual missions—yet in that situation its accommodation is *more* generous, which undermines its alleged compelling interest for purposes of recruit training. *Cf. McHugh*, 185 F. Supp. 3d at 225 (Army lacked compelling interest in denying accommodation to Sikh ROTC applicant, because during training he would not encounter a "real tactical operation" where he would need to shave).

Similarly, Defendants failed to provide any specific evidence showing that they had conducted tests or studies to determine that religious beards (as opposed to medical beards) harm recruit training. Despite having years to pull together the necessary evidence to support their decision to deny Plaintiffs' accommodations, and despite being required to have such evidence as a basis for making that decision, Defendants have only

provided a generalized declaration, with no supporting materials or proof that the Marine Corps has studied the issue. That is fatal for its compelling-interest showing. *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 821 (2000) (governmental failure to conduct "some sort of field survey" made it "impossible to know" if regulation served a compelling interest); *see also Pursuing Am.'s Greatness v. Fed. Election Comm'n,* 831 F.3d 500, 511 (D.C. Cir. 2016) ("What is clear, however, is that the FEC 'must present more than anecdote and supposition' to support a regulation subject to strict scrutiny.").

Third, experience from other military branches confirms that no compelling interest exists. *See Ramirez v. Collier*, 142 S. Ct. 1264, 1288 (2022) (Kavanaugh, J., concurring) (noting the experience of other government entities can "help structure the inquiry and focus the Court's assessment" of a government's compelling-interest argument). In *McHugh*, the court rejected the same argument asserted by the Marine Corps here, noting that observant Sikhs serving in the past had "earned commendations and outstanding reviews" from their peers and superiors "notwithstanding the deviation from the uniformity." 185 F. Supp. 3d at 228. The undisputed evidence showed that none of the "negative consequences" predicted by the Army actually came about. *Id*. at 229. Rather, accommodated Sikhs achieved "exemplary service records" once they "had the chance to prove themselves." *Id*. at 230. The court explained that even if a soldier's failure to follow standards in some instances "might

signal a rebellious streak or reflect a lack of impulse control or discipline," applying that rationale to religious accommodations "fails to grapple with the fact that any deviation from the rules on [a religious observer's] part flows from a very different source." *Id.* at 227. The court thus found the Army's general interests in "[u]nit cohesion and morale," "[g]ood order and discipline," and "[i]ndividual and unit readiness" lacking. *Id.* at 223. Hundreds of observant Sikhs now serve with excellence in the Army and Air Force, both of which permit religious accommodations across the board without regard to whether they will serve with a unit that is expeditionary by nature after completing initial recruit training.

B. The government failed to prove that forcing Plaintiffs to violate their faith is the least-restrictive means.

The government also cannot show that forcing Plaintiffs to violate their religious beliefs is the least-restrictive means of furthering its purported interests.

This test is "exceptionally demanding," *Holt*, 574 U.S. at 364, mandating that the government "must" use "a less restrictive means" if one "is available for the Government to achieve its goals." *Id.* at 365. Even when a compelling interest might exist generally, the government must "demonstrate[] that it has actually considered and rejected the efficacy of less restrictive measures." *Native Am. Council of Tribes v. Weber*, 750 F.3d 742, 751-52 (8th Cir. 2014) (quoting *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005)). "The statute makes clear that 'the term

"demonstrates" means'" that the government bears "'the burdens of going forward with the evidence and of persuasion.'" *Potter*, 558 F.3d at 546 (quoting 42 U.S.C. § 2000bb-2(3)). Thus, the Marine Corps must put on a persuasive, evidence-based showing that it conducted "case-by-case" analysis that considered all available options, and may not rely on "conjecture" or "speculation" about what "might" happen "in some future case." *Ramirez*, 142 S. Ct. at 1280; *NIFLA v. Becerra*,138 S. Ct. 2361, 2376 (2018) (government flunked narrow-tailoring test where it had "identified no evidence" to "prove" tailoring); *see also McHugh*, 185 F. Supp. 3d at 231 n.23 (finding that the military failed to pursue workable alternatives when it denied religious beard accommodation for observant Sikh). And, where there are exceptions to a scheme that the government insists is the least restrictive, those exceptions "demonstrate that other, less-restrictive alternatives could exist," thus defeating the government's argument. *McHugh*, 185 F. Supp. 3d at 232 n.25.

Applying the standard here yields the same outcome as in *Carter* and *McHugh*: the Marine Corps flunks the test. Numerous deviations from the ordinary "uniform" appearance are permissible within the Marine Corps without any concern of breaking from uniformity or detracting from mission accomplishment. This includes full-sleeve tattoos, exceptions to the shaved-head requirement for women, accommodations for women to wear different hair styles and varying lengths, and exceptions to the no-beard requirement for men with medical needs—not to mention

the wide variations among Marines, hairstyles and haircuts, mustaches, and countless other deviations from uniformity. A062; A539; A275 at 1-12 through -17 & fig.1-3.

Moreover, the policies of similarly situated entities confirm that the Marine Corps has less-restrictive alternatives available, and the Marines Corps provided no evidence that it even attempted to study those policies and explain why it cannot adopt them. *Nat'l Ass'n of Mfrs. v. SEC,* 800 F.3d 518, 555 (D.C. Cir. 2015) (explaining that even under the less demanding "narrowly tailored" standard, "[t]he government cannot satisfy that standard if it presents no evidence that less restrictive means would fail"). The Army and the Air Force both permit religious beards during initial training, as does the United States Military Academy,[13] and the Naval Academy,[14] whose graduates may be commissioned as Marine Corps officers. A728 ¶ 34. Navy regulations likewise state that observant Sikh sailors who are granted a religious accommodation for the turban "are not required to wear military headgear in addition to their religious head covering if such military headgear would violate their sincerely held

[13] *See* Rule 41(a)(1)(A) Notice of Voluntary Dismissal Without Prejudice, *Chahal v. Seamands,* No. 17-12656 (E.D. Mich. Aug. 24, 2017), ECF No. 13.

[14] Navy Bureau of Personnel Instr. 1730.11A, ¶ 3 (as updated Mar. 16, 2020), https://perma.cc/ZT2Q-AGKR.

religious beliefs." A084 ¶ 5d(4)(a). The Marine Corps, therefore, at a minimum, must show that it *actually considered* those policies—which it did not do, and which means its tailoring argument must fail. *Warsoldier*, 418 F.3d at 999.

The Marines Corps would likewise fail because it carries a burden to show why these accommodations that have proven effective for other "well-run" branches of the military *could not* equally accommodate the Marine Corps' needs—which, again, it did not do. *Holt*, 574 U.S. at 368 (state prison could not bar religious conduct other prisons safely allowed); *Ramirez*, 142 S. Ct. at 1279-80 (rejecting narrow-tailoring arguments that failed to distinguish other governments' successful accommodations). Mere "*meager* efforts" to explain why accommodating policies "adopted by those other institutions would not work" cannot suffice. *Rich v. Sec'y, Fla. Dep't of Corrs.*, 716 F.3d 525, 534 (11th Cir. 2013). Completely *nonexistent* efforts, then, fail right out of the gate. This is particularly true considering that the Marine Corps has had *years* to put together the record—with actual evidence, not just say-so—that was required to support their decision to deny Plaintiffs' accommodations.

Militaries around the world also accommodate servicemembers with religious headwear and beards, including in the United Kingdom, Canada, Australia, New Zealand, India, Israel, and the United Nations.[15] Many other countries including Germany, Hungary, and other NATO members also allow beards for non-religious reasons without detracting from mission readiness. A707 ¶ 12. Canada's former Minister of National Defence, Harjit Sajjan, is a bearded Sikh who previously served alongside U.S. forces in Afghanistan. Dkt.16-1 at 6.

Finally, Congress itself spoke directly to this issue after the Supreme Court in *Goldman v. Weinberger*, 475 U.S. 503 (1986), deferred to the military's alleged uniformity interests—the same interests asserted here—to deny a Jewish service member's free exercise claim regarding his right to wear a yarmulke. Congress responded by enacting a statute that directs the military to allow religious wear by service members in uniform, unless it would "interfere with the performance of the member's military duties" or would not be "neat and conservative." 10 U.S.C.

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[15] *See, e.g.*, Royal Navy, *Chapter 38: Policy and Appearance,* at § 3827 (Effective Feb. 2019), https://perma.cc/T7WC-Y5MZ; Canadian Armed Forces, *Dress Instructions: Religious and Spiritual Consideration on Dress,* Government of Canada (Aug. 8, 2022), https://bit.ly/3dyufOx; The Australian Army, *Army Dress Manual,* Dep't of Defence (Effective Dec. 20, 2019), https://bit.ly/3S9mPjI; *see also* A023 ¶ 53; Dkt.16-1 at 5-6 & n.6.

§ 774(b). Sikh articles of faith were specifically envisioned in that legislation. *See, e.g.*, H.R Rep. No.100-446, at 638 (1987); 133 Cong. Rec. at 25250 (1987); 133 Cong. Rec. at 11851 (1987). Denying Plaintiffs a religious accommodation specifically approved by Congress cannot legitimately be the "least restrictive means" of enforcing an interest that Congress already rejected.

Because forcing Plaintiffs to shave, cut their hair, and remove their religious articles against their religious beliefs is not the least-restrictive means of promoting any compelling government interest, they are likely to succeed on the merits of their RFRA claim.

II. Plaintiffs are likely to succeed on their Free Exercise claim.

Government action that burdens religious exercise is subject to strict scrutiny if it is "not neutral or not of general application." *Lukumi*, 508 U.S. at 546. "A law … lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877; *see also Tandon v. Newsom*, 141 S. Ct. at 1296 (actions trigger strict scrutiny "whenever they treat *any* comparable secular activity more favorably than religious exercise").

Here, the permitted deviations from uniformity—including deviations that allow alternate hairstyles, permanent beard accommodations for medical reasons, and visible tattoos in all circumstances—pose the exact

same risks to the government's alleged interests, thus treating "comparable secular activit[ies] more favorably than religious exercise." *Tandon*, 141 S. Ct. at 1296; *see, e.g.*, A064 ¶ 4a(2)(h) (explaining that even those Marines with "tattoos or brands outside of the authorized areas delineated within this Bulletin may request an exception to policy"). Indeed, the Supreme Court has held that the mere *existence* of the discretion to grant exemptions, no matter "whether any exceptions have been given," triggers strict scrutiny. *Fulton*, 141 S. Ct. at 1879.

Marines are diverse. Some are tall, some are compact.[16] Some are men, some women. Some are dark, some tan, some fair. Some are bald, some bearded, some mustached, some long-haired. Some have blonde hair, some brown, some black or gray. Some wear glasses, some prosthetics, some tattoos. All are united by a drive to faithfully and effectively serve their country and their fellow Marines. Refusing to accommodate Sikhs who undisputedly share that same drive and ability to serve while granting uniformity exceptions for other reasons impermissibly "impose[s] special disabilities on the basis of … religious status." *Lukumi*, 508 U.S. at 533. This requires scrutiny that the government cannot satisfy. *Supra* Part I.

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[16] Marines can vary in stature from 4-foot-8-inches and 85 pounds to 6-foot-10-inches and 263 pounds. *See USMC Body Composition Program Standards*, U.S. Marine Corps, https://perma.cc/L8NH-XTPZ.

III. The Plaintiffs are suffering irreparable harm.

Government action unconstitutionally burdening religious exercise constitutes irreparable harm *per se*. Indeed, even the district court was forced to acknowledge that, under both the First Amendment and RFRA, a showing of likely success on the merits "suffices to show … irreparabl[e] harm[]," A821 (quoting *Capitol Hill Baptist Church v. Bowser*, 496 F. Supp. 3d 284, 301 (2020)).

Despite acknowledging this blackletter law, the district court explicitly chose to ignore it, thus overlooking entirely the irreparable harm of forcing Plaintiffs to continue choosing between abandoning their religious beliefs and serving their country. That hands-off approach to the First Amendment is antithetical to the Constitution. Rather, a proper application of the law leads to the inescapable conclusion that Plaintiffs have demonstrated irreparable harm, and in three ways.

First, the Supreme Court and this Court have held that restrictions on religious exercise "cause irreparable harm" and that "'the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Diocese of Brooklyn*, 141 S. Ct. at 67.

Here, Plaintiffs are fully qualified to serve as Marines, A034 ¶ 138-39, A036 ¶ 157-58, A039-40 ¶ 186-88, but cannot commence recruit training only because they refuse to violate their religious convictions. This immediate, ongoing injury alone demonstrates irreparable harm.

Second, Plaintiffs are subject to the First Amendment harm of discriminatory religious targeting. In *Bonnette v. D.C. Court of Appeals*, 796 F. Supp. 2d 164 (D.D.C. 2011), the blind plaintiff sought an accommodation for the Multistate Bar Examination. Defendants argued the plaintiff "cannot show that she is likely to suffer irreparable harm because it is possible that she will pass the D.C. Bar Exam using" alternate accommodations. *Id.* at 187. The court held that "forcing Plaintiff to take the MBE under discriminatory conditions is itself a form of irreparable injury." *Id.* And in *Carter*, the court protected a Sikh soldier from the Army's requirement that he undergo discriminatory testing about his religious beard, in part because "being subjected to discrimination is by itself an irreparable harm." 168 F. Supp. 3d at 233. So too here. Under the governing regulations, Plaintiffs are fully entitled to religious accommodations and to receive one of the myriad individualized grooming exemptions that the Marine Corps provides to others. The discrimination against them is an independent irreparable harm.

Third, each Plaintiff has waited for over a year to begin their recruit training. They have put their lives on hold, and in some cases, have been forced to look for other opportunities that could foreclose their ability to enlist if they are not granted an accommodation within a matter of months. Jaskirat Singh, for example, has a statutory limit that could prevent his contract from being extended beyond April 30, 2023. 10 U.S.C. § 513(b). Plaintiff Chahal has indicated that he must pursue an Army

ROTC program in January if he is not granted an accommodation before then. This lost ability to "pursue professional and personal opportunities" and to "mak[e] future plans" is yet further irreparable harm. *Nio v. U.S. Dep't of Homeland Sec.*, 270 F. Supp. 3d 49, 62 (D.D.C. 2017); *accord Aziz v. Trump*, 234 F. Supp. 3d 724, 737 (E.D. Va. 2017) (travel ban against certain "Muslim-majority" countries was irreparable harm).

IV. The district court erred in holding that the balance of harms and public interest favor Defendants.

Courts regularly grant preliminary injunctions where a party has shown that its constitutional rights are being irreparably violated, since the constitution strikes the remaining balance as well. *See*, *e.g.*, *Karem*, 960 F.3d at 668 (further explaining the public interest and balance-of-harms factors merge in such cases). Yet, the district court held that, even assuming Plaintiffs showed likelihood of success and irreparable harm, the equities and public interest necessarily favored Defendants, tilting the balance in their favor due to their asserted interests in national security. A822. That is, based merely on governmental say-so, the court accepted that the public interest favored irreparably violating constitutional rights.

The district court cited no case supporting that shocking legal conclusion. Nor did it grapple with the cases Plaintiffs submitted showing it was wrong as a matter of law. The district court thus committed reversible error in three distinct ways: failing to consider likelihood of success,

failing to balance the preliminary injunction factors, and reaching the wrong conclusion on the facts here. *Pursuing Am.*, 831 F.3d at 511 (legal conclusions reviewed *de novo*, balancing and ultimate determination for abuse of discretion).

A. The district court erred by ignoring likelihood of success.

The district court ignored the well-established principle that "[i]n First Amendment cases, the likelihood of success 'will often be the *determinative* factor.'" *Id.* (emphasis added); *see also Roman Catholic Archbishop of Wash. v. Bowser*, 531 F. Supp. 3d 22, 46 (D.D.C. 2021) (same for RFRA). This is because "there is *always* a strong public interest in the exercise" of First Amendment rights. *Pursuing Am.*, 831 F.3d at 511 (emphasis added). Thus, the Constitution "does not permit [government] to prioritize *any* policy goal" over the First Amendment; rather, the "enforcement of an unconstitutional law is *always* contrary to the public interest." *Karem*, 960 F.3d at 668 (emphasis added) (quoting *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013)); *accord League of Women Voters*, 838 F.3d at 12 ("substantial public interest" in "having government[] agencies abide by … federal laws," and "no public interest in the perpetuation of unlawful agency action"). Thus, where a First Amendment violation *and* irreparable harm are both assumed on the facts of this case, it was reversible legal error to find that there is a public interest in the government continuing to violate the Constitution.

The district court's sole contrary authority was *Winter*, 555 U.S. at 24, 26, 31. But *Winter* does not give the Marine Corps carte blanche to assert "national security" to override the Constitution. To the contrary, *Winter* itself was explicit that "military interests do not always trump other considerations," *id.* at 26, and the Supreme Court has long reaffirmed that "concerns of national security … do not warrant abdication of the judicial role." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010).

Moreover, *Winter* was not a constitutional case. It involved a challenge by environmental organizations to Navy training exercises conducted without an environmental impact statement (EIS). Indeed, "the ultimate legal claim" at issue was not even that the Navy should cease its training, but just that it should have prepared an EIS before starting training. 555 U.S. at 32-33. That's why there was "no basis for enjoining such training in a manner credibly alleged to pose a serious threat to national security." *Id.* But here, Plaintiffs have raised constitutional rights and the relief they seek is inextricably intertwined with the ongoing irreparable harm they are suffering to those rights.

Winter is further inapplicable because the Marine Corps is not being required to suspend training altogether, as the Navy was in *Winter*. *Id.* at 25. Rather, the government is simply being asked to allow three individuals to *participate* in recruit training—which it has already agreed to do *after* they have finished their training, and which other branches of the military *regularly* allow both during and after recruit training.

By failing to consider the likelihood of success on the merits, the district court also ignored this Court's directive that an "extremely high likelihood of success on the merits is a strong indicator that a preliminary injunction would serve the public interest." *League of Women Voters*, 838 F.3d at 12. This Court has reversed lower courts for failing to consider likelihood of success; it should do so again here. *Id.* at 7, 15 (reversing district court's injunction denial that considered only irreparable harm).

B. The district court erred by failing to analyze the factors as Congress required.

The district court committed independent reversible error by failing to analyze the preliminary injunction factors under the test required by Congress. A district court must "balance the strengths of the requesting party's arguments *in each of the four required areas*." *Chaplaincy*, 454 F.3d at 297 (emphasis added). Here, though, Judge Leon simply accepted the government's asserted interests at face value, without subjecting them to the scrutiny required by Congress under RFRA. That was clear legal error.

In enacting RFRA, Congress "ma[de] clear that it is the obligation of the courts to consider whether exceptions are required" under strict scrutiny analysis. *O Centro*, 546 U.S. at 434. Thus, determining the public interest requires following RFRA's test: is the military's burden on reli-

gion the least restrictive means of serving a compelling government interest? 42 U.S.C. § 2000bb. If not, then the public interest does not support the military's actions, and instead requires enjoining the military.

Congress was very clear about its policy decision. In *Goldman v. Weinberger*, the Air Force argued that banning a Jewish psychologist's yarmulke was "essential to the accomplishment of the Air Force's mission." U.S. Br. at 2-4, 475 U.S. 503 (1986) (No. 84-1097). The Supreme Court upheld the ban under a "deferential" standard of review that merely asked whether the military's ban was reasonable. 475 U.S. at 507-08. But Congress enacted RFRA expressly to set aside *Goldman*-style deference in the judiciary and to replace it with strict scrutiny. *O Centro*, 546 U.S. at 434. Thus, the Senate Report set out *Goldman*'s "deferential approach," and then explained that RFRA rejected that approach: "[u]nder the unitary standard set forth in [RFRA], courts will review the free exercise claims of military personnel under the compelling governmental interest test." S. Rep. No. 103-111, at 12 (1993). Likewise, the House Report explained that under RFRA, unlike in *Goldman*, "courts must review the claims of prisoners and military personnel under the compelling governmental interest test," which requires substantial burdens on religion to be "the least restrictive means of protecting a compelling governmental interest," and that "reasonable regulations" based upon speculation "cannot stand." H.R. Rep. No. 103-88, at 8 (1993). The Department of Defense

has accordingly adopted RFRA as the standard governing military burdens on religious belief. DoDI 1300.17 (A548) (acknowledging and following RFRA test for evaluating religious accommodations).

But here, beyond the conclusory assertion of a single military officer, the Marines Corps provided zero evidence to show any connection between uniformity and national security. The Supreme Court has long held that, under RFRA and its companion statute RLUIPA, the government's "mere say-so" is insufficient to establish a compelling government interest. *Holt*, 574 U.S. at 369. Even in contexts like prisons or the military that invoke significant "security concerns," courts still cannot give the government "a degree of deference that is tantamount to unquestioning acceptance." *Id.* at 364-65; *accord id.* at 371 (Sotomayor, J., concurring) (deference does not "extend so far" that "officials may declare a compelling governmental interest by fiat").

Testing the military's claims of national security or mission-accomplishment is crucial because it *often* raises them to reject religious accommodations, only for those claims to quickly prove hollow. For instance, in *Di Liscia v. Austin*, the Navy abruptly ordered a Jewish sailor at sea to shave within twenty-four hours due to a claimed "unacceptable risk to the Navy's compelling interest in mission accomplishment." Compl. Ex. D at 2, No. 21-1047 (ECF No. 1-4). But the Navy quickly remanded the order after a lawsuit was filed, choosing to allow the sailor to retain his beard while at sea. *Id.* at ECF No. 10. The Navy likewise chose to grant

three Muslim sailors the same accommodation soon after—though, once again, only after it initially took the position that granting an accommodation would threaten the "safety and readiness of a U.S. Navy warship operating at sea." *Id.* at ECF No. 26 at 1 and 12; *id.* at ECF No. 30. Perhaps most obviously, in the *McHugh* case, the Army asserted *each of the interests the Marine Corps asserts here*, only for each of them to fail under scrutiny. 185 F. Supp. 3d at 224 ("Notwithstanding the undeniable importance of uniformity to military discipline, unit cohesion, and safety in general, these justifications for the Army's decision do not withstand strict scrutiny."). This is precisely why courts must carefully test the government's claims under RFRA.

The district court accordingly should have found that the public interest was *not* implicated under Congress's standard for determining whether governmental interests can override religion. Failing to analyze the asserted interests via the standard set by Congress, and by Department of Defense regulation, was clear legal error. And, as shown below, it led the court to fail to properly balance the interests at stake here.

C. The factors favor Plaintiffs.

Finally, the district court erred because the public interest and balance of harms favor Plaintiffs. That is especially true here where there is extensive undisputed evidence that the Marine Corps grants for secular reasons the *exact same accommodations* that Plaintiffs seek for religious reasons. National security concerns arising from unshorn hair and

beards are certainly indifferent to whether such grooming is maintained for secular or religious reasons, and the government has offered no "persuasive reasons" why the two must be treated differently. *Holt*, 574 U.S. at 369. Under these circumstances, the Marine Corps' absolute rule against religious accommodation, in contrast to accommodations for women's hair, medical beards, and tattoos, "appears to reflect not expertise or discretion, but instead insufficient appreciation or consideration of the interests at stake." *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 717 (2021) (Roberts, C.J., concurring).

What's more, the Marine Corps' assertion fails on its own terms because it flatly contradicts the Marine's stated interests regarding national security and mission accomplishment. The asserted need for uniformity is irreconcilable with the mandate of the nation's Commander-in-Chief that "an inclusive military strengthens our national security." Exec. Order No. 14,004, 86 Fed. Reg. 7471 (Jan. 25, 2021).

Outside this litigation, the Marine Corps itself has recognized that "[s]piritual readiness is a force multiplier" because it promotes "courage" to do what is right "no matter what the cost." *The Commander's Handbook for Religious Ministry Support*, US Marine Corps, MCRP 6-12C at 1-4 (Feb. 2, 2004), https://perma.cc/BUM3-GPR6. And comparing the Marine Corps' treatment of Plaintiffs to other uniformity interests also belies any threat to national security. The Marine Corps has made clear that servicemembers' diverse backgrounds and the expression of their

identities helps rather than hinders good military order, even recently releasing a strategic plan for diversity, equity, and inclusion.[17]

As Defendant LtGen Ottignon recently explained, "[w]ithout having individuals with different backgrounds, we have the tendency to engage in 'group think.'" *Id.* at 41. He added that "the statistics demonstrate the needle is moving, but admittedly not quickly enough to meet the strategic objective of building a diverse force to meet a peer threat." *Id.* at 47. To seek out racial and ethnic diversity yet exclude religious diversity, particularly when Sikh servicemembers also identify as ethnically diverse, undercuts these asserted goals. *See* National Defense Authorization Act for Fiscal Year 2020, H.R. 2500, 116th Cong. § 530B (2019) ("Any personnel policy developed or implemented by the Department of Defense with respect to members of the armed forces shall ensure equality of treatment and opportunity for all persons in the armed forces, without regard to … religion.").

Accommodating Plaintiffs advances religious diversity and removes a significant barrier to entry for them to serve their country as Marines without compromising their core religious beliefs. The government's own statements and actions thus show that the balance of harms and public interest favor Plaintiffs.

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[17] LtGen David Ottignon & BGen Jason Woodworth, *Diversity, Equity & Inclusion: Why this is important to the Corps as a warfighting organization*, Marine Corps Gazette (July 2021), https://perma.cc/9S26-ZQDL.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully urge the Court to reverse and enter a preliminary injunction.

Respectfully submitted,

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October 28, 2022

CERTIFICATE OF COMPLIANCE

This brief complies with the requirements of Fed. R. App. P. 32(a)(7) and Circuit Rule 32(e) because it has 11,722 words.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

/s/ Eric S. Baxter
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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2022, the foregoing brief was filed electronically with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the Court's CM/ECF system. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Eric S. Baxter
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ADDENDUM

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Except for those reproduced in the Joint Appendix and listed here, all applicable statutes and regulations are reproduced below.

MCBUL 1020 (reproduced at A062)
Navy Bureau of Personnel Instr. 1730.11A (reproduced at A075)
Marine Corps Order 1730.9 (reproduced at A187)
Marine Corps Order 6310.1C (reproduced at A256)
MARADMIN 019/22 (reproduced at A268)
NAVADMIN 064/22 (reproduced at A272)
Marine Corps Order 1020.34H (reproduced at A275)
MARADMIN 134/22 (reproduced at A539)
Department of Defense Instruction 1300.17 (reproduced at A548)

Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1. Free exercise of religion protected.

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to

assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

Enlistments: Delayed Entry Program, 10 U.S.C. § 513

(b)(1) Unless sooner ordered to active duty under chapter 39 of this title or another provision of law, a person enlisted under subsection (a) shall, within 365 days after such enlistment, be discharged from the reserve component in which enlisted and immediately be enlisted in the regular component of an armed force.

(2) The Secretary concerned may extend the 365-day period described in paragraph (1) for any person for up to an additional 365 days if the Secretary determines that it is in the best interests of the armed force of which that person is a member to do so.

Air Force Instruction 36-2903, Dress and Personal Appearance of Air Force Personnel (updated Mar. 15, 2021)

Attachment 8
RELIGIOUS ACCOMMODATION

A8.1. Airmen may request a waiver to permit wear of neat and conservative (defined as, discreet, tidy, and not dissonant or showy in style, size, design, brightness, or color) religious apparel.

Final review will take place within 30 days for cases arising within the U.S. and within 60 days for all other cases, with strict limitations on exception for exigent circumstances (T-0). Exceptions to policy of dress and personal appearance for religious accommodation will be approved when accommodation would not adversely affect mission accomplishment in accordance with DoDI 1300.17. For requests for religious accommodation when accommodation would adversely affect mission accomplishment, in accordance with Title 42, United States Code Section 2000bb-1, requests for religious accommodation from a military policy, practice, or duty that substantially burdens a Service member's exercise of religion may be denied only when the military policy, practice, or duty: (a) furthers a compelling governmental interest and (b) is the least restrictive means of furthering that compelling governmental interest.

[…]

A8.1.3.2. Beards. Beards (which include facial and neck hair) must be maintained to a length not to exceed 2 inches when measured from the bottom of the chin. Beard hair longer than 2 inches must be rolled and/or tied to achieve the required length. Beards must be worn in a neat and

conservative manner that presents a professional appearance. Airmen may use styling products to groom or hold the beard in place, but may not use petroleum based products if wearing a protective mask during training. The bulk of an Airman's beard may not impair the ability to operate an assigned weapon, military equipment, or machinery. A mustache worn with a beard may extend sideways beyond the corners of the mouth to connect with the beard, but must be trimmed or groomed to not cover the upper lip.

[…]

A8.1.3.3. Turban and Under-Turban. An accommodated Airman may wear a turban (or under-turban or patka, as appropriate) made of a subdued material in a color that closely resembles the headgear for an assigned uniform. Wing Commanders may designate conditions where the under-turban will be worn instead of the turban. The turban or under-turban will be worn in a neat and conservative manner that presents a professional and well-groomed appearance. The material will be free of designs or markings, except that an Airman wearing the ABU or OCP may wear a turban or under-turban in a camouflage pattern matching the uniform. When directed by a Commander, the Airman may be required to wear an under-turban made of fire resistant material. Unless duties, position, or assignment require an Airman to wear protective headgear, Airmen granted this accommodation are not required to wear military headgear in addition to the turban or under-turban. Rank will be displayed on

the turban or under-turban when worn in circumstances where military headgear is customarily worn and removed in circumstances where military headgear is not customarily worn, such as indoors or in no-hat/no-salute designated areas. Hair worn under the turban or under-turban is not subject to paragraph 3.1.2 standards, but may not fall over the ears or eyebrows or touch the collar while in uniform. When Airmen are wearing protective headgear with the under-turban, the bulk of the hair will be repositioned or adjusted to ensure proper fit.

Army Directive 600-20 (July 24, 2020)

Appendix P
RELIGIOUS ACCOMMODATION

P-3. Processing Requests related to uniform and grooming.

a. Beards, hijabs, and turbans. Commanders at the GCMCA or the first general officer in the chain of command, and above may approve, disapprove, or elevate religious accommodation requests for beards, hijabs, and turbans worn in accordance with the standards provided in AR 670–1 (see table P–1). Requests must be approved or forwarded to the DCS, G–1 with a recommendation for disapproval within 30 calendar days of initial submission for pre-accession requests and RA requests within 60 calendar days of initial submission for ARNG and USAR requests. Only the DCS, G–1 or designee may grant a request for extension of these timelines.

[…]

c. Duty considerations.

[…]

(2) Study results show that beard growth consistently degrades the protection factor provided by the protective masks currently in the Army inventory to an unacceptable degree. Until the Army can field such protective gear that meets safety standards in conjunction with beard growth, these restrictions apply:

[…]

(b) An accommodation for a beard may be temporarily suspended when a threat of exposure to toxic CBRN agents exists that requires

all Soldiers to be clean-shaven, including those with medical profiles. Following the procedures in paragraph P–3d, commanders may require a Soldier to shave if the unit is in, or about to enter, a tactical situation where use of a protective mask will likely be required and where the inability to safely use the mask could endanger the Soldier and the unit. A Soldier may wear a beard while participating in training or tactical simulations designed to ensure that the Soldier is fully familiar with use of the protective mask.

Army Directive 2017-03, Policy for Brigade-Approval of Certain Requests for Religious Accommodation (Jan. 3, 2017)

2. Purpose and Scope. This directive revises Army uniform and grooming policy to provide wear and appearance standards for the most commonly requested religious accommodations and revises the approval authority for future requests for religious accommodation consistent with these standards. AD 2016-34 (reference 1 d) remains in effect and continues to provide the policy for requests for religious accommodation involving uniform wear and grooming, except as modified by this directive.

3. Brigade-Level Accommodation Approval. Since 2009, religious accommodation requests requiring a waiver for uniform wear and grooming have largely fallen into one of three faith practices: the wear of a hijab; the wear of a beard; and the wear of a turban or under-turban/patka, with uncut beard and uncut hair. Based on the successful examples of Soldiers currently serving with these accommodations, I have determined that brigade-level commanders may approve requests for these accommodations, and I direct that the wear and appearance standards established in paragraph 4 of the enclosure to this directive be incorporated into AR 670-1.