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No. 22-5234

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

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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GLOSSARY

ASVAB: Armed Services Vocation Aptitude Battery

Br.: Plaintiffs' Merits Opening Brief

DEP: Delayed Entry Program

MCRP: Marine Corps Reference Publication

PFB: *Pseudofolliculitis Barbae* (also referred to as "razor bumps")

Resp.: Defendants' Merits Response Brief

ROTC: Reserve Officers' Training Corps

RFRA: Religious Freedom Restoration Act

INTRODUCTION

Defendants have the burdens backward. At the preliminary injunction stage, the burdens track those at trial. Plaintiffs have met their burden. Defendants do not dispute that requiring Plaintiffs to shave and abandon their articles of faith imposes a substantial burden on their sincere religious beliefs. What remains is Defendants' burden to prove a compelling governmental interest that cannot be met except by barring Plaintiffs from serving in the Marine Corps. Satisfying strict scrutiny is always exceedingly difficult—even more so where the government proposes a categorical exclusion of an entire class from ever becoming Marines solely because of their religious practices.

Yet all Defendants proffer in support of this radical outcome is a single declaration by a single Marine colonel asserting—unsupported by any scientific data, reasoned analysis, military study, or experiential evidence—that Plaintiffs' religious beards somehow imperil national security during recruit training. But strict scrutiny requires proof. Given the extensive comparable exemptions Defendants allow for secular reasons, the accommodations other branches provide for Sikhs, and the *years* Defendants have had to substantiate their exclusion of Plaintiffs, an injunction must issue due to Defendants' failure to make any showing that admitting Sikhs would lead to a harmful outcome. It is Defendants' burden, and they have not met it.

The Marine Corps already permits medical beards during recruit training, accommodates a variety of hairstyles for women, and allows tattoos essentially anywhere. Yet Defendants have no explanation for how the approved exceptions to "stripping" recruits of "individuality" do not jeopardize national security but accommodating three Sikhs will.

Defendants cannot delay a ruling on their lack of evidence by asking the Court to wait for discovery. They have had *decades* to justify their decision to exclude observant Sikhs generally, and *two years* to justify excluding Plaintiffs specifically. At minimum, under federal law and their own regulations, Defendants' evidence for excluding should have been in their possession when they rejected Plaintiffs. It should *already* be in the record. Its absence only underscores that Defendants have long been violating the law, enhancing the need for a preliminary injunction.

Pleading the "status quo" is equally unavailing since the status quo arises from a rule that conflicts with both military history and the current practice of *every other branch of the military*. All branches include expeditionary forces required to deploy at a moment's notice. But while the government's other military branches successfully accommodate religious beards during basic training, the government allows the Marine Corps to refuse.

This refusal places enormous pressure on Plaintiffs to abandon their religious principles. That pressure builds daily. Without a decision by the end of the year, the Marine Corps will have succeeded in excluding

Milaap Chahal. By April 2023, Jaskirat Singh will lose his Delayed Entry Program contract. Aekash Singh is being compelled to make critical decisions about his career without knowing whether the Marine Corps will ever be an option. Each Plaintiff has already lost years of training and advancement opportunities. These are concrete harms that compound the ongoing irreparable harm from unconstitutional discrimination because of their religious beliefs—harms only this Court can stop.

Speaking for all armed services, the United States Solicitor General recently identified another significant injury from the Marine Corps' discrimination: national security. She explained to the Supreme Court that the "armed forces know from hard experience" that it is a "critical national security imperative to attain diversity" within the military. This interest starts at recruit training, "because the military has a closed personnel system"—its "pipeline" for Marines comes from boot camp, not "lateral hiring." Further, to have "legitimacy in the eyes of the public" it is "necessary" that the military "broadly reflect the diversity of our country." The Marine Corps' categorical discrimination against observant Sikhs hurts military readiness.

SUMMARY OF ARGUMENT

Defendants have not met their burden of proof under RFRA or the Free Exercise Clause. Plaintiffs thus are likely to succeed on the merits of their claims. The remaining injunction factors also favor relief.

I. The Marine Corps has not shown that its asserted interest in uniformity is compelling, or that banning observant Sikhs is the least restrictive means of ensuring national security. Exceptions are already allowed for medical beards, multiple hairstyles for women, and tattoos, with no explanation for why these are benign but exempting Sikhs creates a national security risk. Furthermore, the Marine Corps fails to distinguish itself from every other branch of the armed forces—all of which accommodate Sikh religious observance during recruit training.

II. The Marine Corps ignores the free exercise standard set forth in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881-82 (2021), and declines to explain how its policy is generally applicable despite allowing both categorical and discretionary secular exemptions from uniformity during recruit training.

III. Defendants' protestations that Plaintiffs are not suffering irreparable harm in being officially excluded by their government because of their faith are contrary to precedent and ignore the ongoing concrete harms Plaintiffs are suffering.

IV. The district court erred in finding that the balance of harms and public interest can favor the government even when Defendants' actions are both unconstitutional and causing irreparable harm. The Marine Corps failed to prove that allowing three Sikhs to begin recruit training will threaten national security. Indeed, the government agrees that diversity supports, not threatens, national security.

STANDARD OF REVIEW

Defendants wrongly state that a preliminary injunction is reviewed solely for abuse of discretion. Resp.13. Rather, this Court "reviews the district court's legal conclusions as to each of the four factors *de novo*"; only "its *weighing* of them" is reviewed "for abuse of discretion." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016) (emphasis added).

The Court need not decide whether a higher standard should apply where the preliminary injunction effectively grants full relief on the merits of a claim. First, that question is not at issue here because the government's delay has already forced Aekash Singh to postpone joining the Marine Corps. A. Singh Decl. ¶ 4. Thus, contrary to Defendants' claims, Aekash will not receive "full relief" before the conclusion of this litigation (though he will receive much-needed interim relief, *id.*), and Defendants can still "secure further review" later. Resp.15. Second, even under the government's "strong showing" standard, its own cited cases demonstrate that Plaintiffs are entitled to relief. *Id.* (citing, *inter alia*, *A.H. v. French*, 985 F.3d 165, 184 (2d Cir. 2021) ("denial of a constitutional right," even for "minimal periods of time," "ordinarily warrants a finding of irreparable harm")).

Moreover, the government does not cite a single instance of this Court applying a higher standard in a relevant case. It instead relies entirely on the footnoted dictum of a fifty-year-old opinion. Resp.15. But it then

agrees that *Winter v. Natural Resources Defense Council* supplies the relevant preliminary injunction test for this case. Resp.14. And *Winter* does not apply a higher standard even though it precisely involved a situation where "the preliminary injunction was 'the whole ball game.'" 555 U.S. 7, 33 (2008). This Court's decisions have done the same. *Ku Klux Klan v. District of Columbia*, 972 F.2d 365, 369 (D.C. Cir. 1992) (preliminary injunction gave "the full measure of relief [plaintiff] sought through its complaint"); *Karem v. Trump*, 960 F.3d 656 (D.C. Cir. 2020) (similar); *League of Women Voters*, 838 F.3d at 6 (similar); *see also Ctr. for Pub. Integrity v. DoD*, 411 F. Supp. 3d 5 (D.D.C. 2019) (similar).

In any case, the test for a preliminary injunction itself anticipates such situations, allowing the Court to weigh the movant's likelihood of success and irreparable harm against the interests of the opposing party and the public. But those factors all weigh decisively in Plaintiffs' favor.

ARGUMENT

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

The only question under RFRA is whether the government has met its evidentiary burden under strict scrutiny. Here, the government's responses come nowhere close.

A. The government has not shown a compelling interest in banning Plaintiffs from recruit training.

Under RFRA, courts must look "beyond broadly formulated interests" and "scrutinize[] the asserted harm of granting specific exemptions to

particular religious claimants." *Gonzales v. O Centro*, 546 U.S. 418, 431 (2006). Thus, "the question … is not whether the [government] has a compelling interest in enforcing its … policies generally, but whether it has such an interest in denying an exception to [the specific plaintiff]." *Fulton*, 141 S. Ct. at 1881. The government's own brief confirms that it cannot make this showing here.

The Marine Corps claims repeatedly that its compelling interests in "mission accomplishment, unit cohesion, and good order and discipline," Resp.9, can only be accomplished by requiring Marines to "carry[] out the same activities in the same way" as every other recruit, Resp.6. But the Marine Corps does not actually require this, nor can it so pretend. "[M]ale recruits" do not "shave … together" "in the same manner," Resp.20, because the Marine Corps readily permits, in the name of diversity, Black men and others afflicted with PFB to use clippers or chemicals rather than a razor to maintain a clean and neat appearance, Resp.30.[1] Nor does the Marine Corps require this of females, who, in the name of diversity, do not "shower [and] dress" using "the same set of regimented practices,"

[1] This is to say nothing of the natural variations that occur within the male population. Not all eighteen-year-old men grow enough facial hair to require a daily shave, and not all men have sufficient hair to require a weekly, or any, buzz cut. *See* Resp.7. The Marine Corps' failure to purge these recruits only underscores the infirmity of its arguments.

Resp.20, 33, because women are explicitly permitted to maintain a number of different hairstyles, each subject to different regulation, Resp.32.

Yet, according to the Marine Corps, the goal of "achieving cohesion through an immersive experience," Resp.32, indeed, the entire "psychological transformation [of all recruits] in their training cycle," Resp.22, would be utterly undone by allowing a Sikh recruit to stand alongside his fellow recruits, neatly tying his beard and turban as the recruit to his left lathers on shaving cream and the recruit to his right opens his clippers, Resp.32. Such sophistry fails, both in logic and in law. Where, as here, the Marine Corps has created an entire "system of exceptions" to its stated interests in "unit cohesion," "good order," and "discipline," that system fatally "undermines the [Marine Corps'] contention that its … policies can brook no departures." *Fulton*, 141 S. Ct. at 1882.

The Marine Corps' attempts to evade this conclusion not only fail, they confirm the untenable nature of Defendants' position. First, as to exceptions for the hairstyles of female recruits, the government contends that allowing diverse hairstyles still applies a "strict grooming requirement[]" with "no exceptions." Resp.31-32. But Sikh recruits too can conform their turbans and beards to "tightly circumscribed standards." Resp.32. This is precisely what Sikhs do in other military branches. Br.35-37. The Ma-

rine Corps provides no explanation as to why providing the same accommodation would require it to "reconfigure" the entire Marine Corps training program. Resp.25.[2]

Perhaps the Marine Corps assumes no reasonable Marine would see a woman with longer hair (or a variety of hairstyles) as demonstrating poor discipline or asserting her individuality, as opposed to simply maintaining her hair in a culturally expected manner. But that only underscores the comparison: as Judge Amy Berman Jackson has explained, no reasonable person would think a Sikh servicemember wearing the unshorn hair mandated for all followers of that faith—with no element of individuality—"signal[s] a rebellious streak or reflect[s] a lack of impulse control or discipline." *Singh v. McHugh*, 185 F. Supp. 3d 201, 227 (D.D.C. 2016). To the contrary, it would be obvious that such strict adherence to religious practice proceeds from "a very different source" than a desire for expressive individualism. *Id.* Defendants may think forcing women to

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[2] Defendants try to minimize the importance of female hairstyles, claiming that "[m]ale and female recruits live in different squad bays and train in different platoons." Resp.31. *But see* National Defense Authorization Act for Fiscal Year 2020, H.R. 2500, 116th Cong. § 565 (2019) (requiring integrated training); *accord* Scottie Andrew, *A platoon of female Marines made history by graduating from this San Diego boot camp*, CNN (May 7, 2021), https://perma.cc/6YQJ-NELH. But even so, the options available to female recruits show that a range of "tightly circumscribed standards," Resp.32, among men poses no real threat.

shave their heads is asking too much, but Congress forbids them from making a value judgment not to respect Sikhs the same way.

Second, the government distinguishes medical beards because those beards are "trim[med] … as much as possible using clippers or chemicals." Resp.30. But there is no "compelling interest in each marginal percentage point … advanced" by such minutiae. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 803 n.9 (2011). Indeed, Defendants fail to explain why this distinction even matters. If recruits with medical waivers can be "psychological[ly] transform[ed]" into Marines by routinely clipping their beards alongside recruits shaving with a razor, Resp.19, so too can Sikhs as they tie their beards and turbans. *See Fraternal Ord. of Police v. Newark*, 170 F.3d 359, 366-67 (3d Cir. 1999) ("no apparent reason" why religious beards "should create any greater difficulties" than "medical exemptions"). The government's alternative conclusion—that permitting a Sikh to tie his beard would somehow make him more susceptible to "primal survival instincts" than a recruit using a clipper, Resp.19—blinks reality. In fact, both types of beards positively impact the government's interest in mission accomplishment the same way: eliminating needless barriers that prevent qualified Americans from serving in the armed forces. The government provides zero explanation as to why the former should be included while the latter remains categorically prohibited.

Moreover, the government has entirely failed to prove that replacing recruits' "primal survival instincts" with a service-over-self mentality

happens *more* in the bathroom than it does in the field. Nor has it explained why Sikh recruits in the Army have—in exemplary fashion—mastered that transformation without being forced to violate their faith. *McHugh*, 185 F. Supp. 3d at 227-28 (summarizing the careers of four Sikh soldiers given the accommodations sought here, noting they "served … with tremendous success" and "earned commendations and outstanding reviews," and acknowledging that their appearance reflects a commitment to submit to higher authorities). As the former Secretary of the Army and retired generals who have "trained, supervised, or managed tens of thousands" of servicemembers confirm, the Marine Corps' "asserted teambuilding, psychological transformation, and shared identity objectives are equally important to the training missions of the other branches," and "none … have been compromised by granting Sikhs religious accommodations." Military Officials Br.12-13.

The government again fails to explain why the Army's *identical* initial concerns are compelling for the Marine Corps even though they proved completely unfounded in the Army. *McHugh*, 185 F. Supp. 3d at 230 (noting the Army's own internal study showed that Sikh "religious accommodations did not have a significant impact on unit morale, cohesion, good order, and discipline"); *compare id.* at 222 (Army declaration stating denial was to "reinforce[] notions of selfless service" and "inhibit personal … impulses that may be antithetical to mission accomplishment"),

with A720, A724 (Marine declaration stating denial is to instill willingness to "sacrifice their own needs for the needs of the unit's mission" and "counter … humanity's most primal survival instincts").

Similarly, Defendants insist that "every minute" of recruit training must be "filled with activities that are carried out in the same manner," Resp.20, and that the "entire experience is carefully orchestrated" to be "all-encompassing," requiring recruits to spend "every moment with their platoon." Resp.31. But they fail to explain why that same interest can allow diversity three times a day in the dining hall (where religious diets are accommodated) and once a week on Sunday mornings (when certain religious recruits who worship that day are permitted to do so). SECNAV 1730.8B(7) (diet); *Recruit Training Calendar,* U.S. Marine Corps, https://perma.cc/9VT7-YLGL (worship).

Third, the government counters that it permits tattoos—a form of expression far more individualized than Plaintiffs' articles of faith—only because they are "prevalent and not readily removed." Resp.32. But so are Sikh beards. Br.5-7 (Sikhs, members of the world's fifth largest religion, have chosen death over shaving). Defendants' argument gives short shrift to the magnitude of abandoning faith under government coercion: for "centuries," "men have suffered death rather than subordinate their allegiance to God to the authority of the state." *Girouard v. United States*, 328 U.S. 61, 68 (1946). Preferring tattoos over religion because of factors like perceived ease of removal is precisely the kind of value judgment that

cannot pass strict scrutiny. *Church of the Lukumi v. City of Hialeah*, 508 U.S. 520, 546-47 (1993) (government fails strict scrutiny where it "restricts only conduct protected by the First Amendment and fails to … restrict other conduct producing substantial harm … of the same sort").

Moreover, the government acknowledges, as it must, that—like female hairstyles and no-shave waivers—tattoo prohibitions were relaxed in "pursuit of, and recognition of the need for, diversity and inclusion," Resp.33; *see* Br.12-13; *Marine Corps Bulletin 1020,* Commandant of the Marine Corps (Oct. 20, 2021), https://perma.cc/4ZPC-NLS9. But the government nowhere explains why it can accommodate "prevalent" tattoos, female hairstyles, and no-shave waivers to foster "diversity and inclusion," but it cannot accommodate a small number of observant Sikhs—most of whom are also ethnic minorities.

This failure rings especially hollow given that, like losing recruits with tattoos, categorically barring Sikhs would deprive the Marine Corps of recruits equipped with cultural knowledge critical to mission accomplishment. *McHugh*, 185 F. Supp. 3d at 227-28; Military Officials Br.16-17. It also deprives Sikhs and other religious minorities of the "spiritual fitness" that the Marine Corps has expressly recognized "provide[s] the bedrock upon which the concepts of honor, courage, and commitment are built." Military Officials Br.16-17; Chaplain Goldstein Br.7-10 (quoting Marine Corps research that "spiritual fitness plays a key role in resili-

ency"); Muslim Public Affairs Br.9 (citing military research that "spiritual readiness" contributes to "lower rates of depression, substance abuse, PTSD, and suicide").

Indeed, as the Solicitor General recently explained before the Supreme Court, "when we do not have a diverse officer corps that is broadly reflective of a diverse fighting force, our strength and cohesion and military readiness suffer," and "it is a critical national security imperative to attain diversity within the officer corps." Transcript of Oral Arg. at 143-44, *Students for Fair Admissions v. Univ. of N.C.,* No. 21-707 (Oct. 31, 2022), https://perma.cc/4T3Y-3TW5. Thus, accommodating Plaintiffs here furthers, rather than undermines, the "national security" goals of the military. But on this score, Defendants are tellingly silent. At bottom, favoring tattoo diversity over religious diversity is not just illegally discriminatory*, Fraternal Ord.*, 170 F.3d at 367, it is also underinclusive with respect to the Marine Corps' own stated goals.

Lastly, Defendants briefly allude to the "amplified" effects of granting "similar requests." Resp.22. RFRA expressly prohibits reliance on these types of "slippery-slope concerns." *O Centro*, 546 U.S. at 435-36 (refusing "classic rejoinder of bureaucrats" that "[i]f I make an exception for you, I'll have to make one for everybody"). RFRA instead requires strict scrutiny to be assessed to "the particular claimant." *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 726 (2014). And, in any event, the "amplified" effect

of accommodating kosher and halal diets during recruit training has not broken the force.

It is simply not "compelling" for the Marine Corps to allow medical beards, grant numerous hair styles to women, and permit tattoos indiscriminately, yet still claim a need to draw the line at accommodating a religious minority.

B. The government has not shown that its ban passes the least restrictive means test.

The Marine Corps fails on least-restrictive-means for much the same reasons. Its inability to distinguish accommodations *denied* from those *granted* defeats their arguments for excluding Plaintiffs. This remains true even where the government claims that additional accommodations will put human life at risk, due, for example, to an ongoing pandemic or to potential breaches in prison security. *See Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (where government permits secular activities, "it must show that the religious exercise at issue is more dangerous than those activities," since "precautions that suffice for other activities suffice for religious exercise too"); *Holt v. Hobbs*, 574 U.S. 352, 368-69 (2015) (successful accommodations in other prisons "suggests that the Department could satisfy its security concerns through a means less restrictive"). Here, the Marine Corps' arguments are even more feeble considering that the requested accommodations concern recruit training, where the government is not asserting any risk to human life or safety. And

because the Marine Corps cannot distinguish Plaintiffs' religious accommodations from the multitude it has already granted, the least-restrictive-means test is not met.

Further, the Marine Corps cannot distinguish the accommodations allowed in other branches and in foreign militaries, Br.35-37, including "expeditionary units" in other branches. Resp.24 n.3 (conceding this fact with respect to the Navy Seals and Army Special Forces). The government makes much of the claim that not every Army or Air Force unit is expeditionary, Resp.23-24, but—even if true—that is a distinction without a difference. The Army defines itself by its "combination of expeditionary capability and campaign quality."[3] So do the Navy and Air Force.[4] And they are likewise expected to "deploy at a moment's notice."

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[3] U.S. Dep't of the Army, *ADP 3-0 Operations*, § 1-59 at 1-10 (July 31, 2019), https://perma.cc/DL5K-E24D; *see also 101st Airborne Division*: *Mission*, U.S. Army, https://perma.cc/DB43-JLG3 ("The 101st Airborne Division (Air Assault) provides our Nation an unmatched expeditionary Air Assault capability").

[4] U.S. Dep't of the Navy, *AFDP 3-0 Operations and Planning* 146 (Nov. 4, 2016), https://perma.cc/YHZ5-YV2C; *Naval Warfare*, Naval Doctrine Publication 1, 33 (Apr. 2020), https://perma.cc/5M7G-WAMH.

Resp.24.[5] Yet these branches have managed to accommodate Sikhs during boot camp. The Marine Corps does not show it has studied other branches' accommodations and determined them impracticable, which independently sinks its least-restrictive-means argument. *Native Am. Council of Tribes v. Weber*, 750 F.3d 742, 751-52 (8th Cir. 2014) (government must show it has "actually considered and rejected the efficacy of less restrictive measures"); DoDI 1300.17 (A552, A558) ("burden of proof is placed upon the DoD [c]omponent" and must show there are no "[a]lternate means available").[6] Moreover, once Defendants get around to actually connecting their "expeditionary" point to their interest in banning Sikhs—explaining that the Marine Corps is nurturing "a team-oriented state of mind," the "most important element" of "expeditionary operations," A724—it turns out that the other branches share precisely this

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[5] 2nd Lt. Angela DiMattia, *Testing unit readiness at moment's notice*, U.S. Army (June 23, 2018) https://perma.cc/F6VX-DDMB ("Since the inception of the Army in 1775, Soldiers have been expected to deploy in defense of the nation at a moment's notice."); *82nd Airborne Division: Mission*, U.S. Army Fort Bragg, https://perma.cc/F7P5-TS58 ("The mission of the 82nd Airborne Division is to, within 18 hours of notification, strategically deploy"); *see also* Sarah Blake Morgan & Jonathan Drew, *On short notice, US fast-response force flies to Mideast*, AP News (Jan. 5, 2020), https://perma.cc/AUA3-N5NB (describing recent Army deployment within 24 hours).

[6] The government also appears not to have consulted Sikhs' history in expeditionary forces. *See, e.g.*, Black Mountain Expedition 1891 https://perma.cc/PS7W-K586; Pushpindar Singh Chopra, *Lore of the Jullundur Brigade*, Spectrum (Aug. 31, 2014), https://perma.cc/YC46-8A5Z.

interest too. *See*, *e.g.*, *McHugh*, 185 F. Supp. 3d at 222 (noting Army's interest in ensuring "a strong team identity" to "build[] an effective fighting force").

Changing tacks, the government argues that, regardless of narrow tailoring, this Court should simply give it "deference." Resp.17. But the principal case relied upon for this proposition, *Goldman v. Weinberger*, 475 U.S. 503 (1986), Resp.17-18, predates not just one, but *two* statutory commands that explicitly hold the military to a higher standard before infringing on free exercise. Just one year after *Goldman*, where the Supreme Court deferentially reviewed the Air Force's refusal to accommodate a Jewish servicemember's First Amendment right to wear a yarmulke, Congress enacted 10 U.S.C. § 774 to "supersede[]" *Goldman*, override the Air Force's reasoning (which mirrored the Marine Corps' reasoning here), and mandate an exception to uniformity for religious apparel. *Rasul v. Myers*, 512 F.3d 644, 669 n.22 (D.C. Cir. 2008). 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). This alone leads to a ruling in Plaintiffs' favor here.

Congress further limited deference by enacting RFRA. The government asserts that RFRA left *Goldman* intact, Resp.17, but notably cites nothing in the statute's text for that proposition. That is because nothing in the text supports it. *See Sierra Club v. Wheeler*, 956 F.3d 612, 616 (D.C. Cir. 2020) ("[S]tatutory interpretation begins with the language of the

statute itself." (cleaned up)). Rather, RFRA's plain text requires strict scrutiny whenever any "branch" of government—including the military—imposes a "substantial[] burden" on religion. 42 U.S.C. § 2000bb-1(a), (b). "[M]ilitary" "expertise" could still be considered, H.R. Rep. No. 103-88 (1993), but only within the strict-scrutiny standard—a "workable test for striking sensible balances," 42 U.S.C. § 2000bb(a)(5).

It is no surprise then, that rather than pointing to RFRA's text, Defendants rely exclusively on legislative history. *See* Resp.17. But contrary to the government's selective quotations, RFRA's legislative history "confirms that [its] choice of language was no accident." *Warger v. Shauers*, 574 U.S. 40, 48 (2014). Congress specifically rejected "carv[ing] out an exception … for military regulations." S. Rep. No. 103-111, at 11 (1993). Thus, *Goldman* "does not govern the [RFRA] analysis" because it directly contradicts the strict scrutiny later written into RFRA. *McHugh*, 185 F. Supp. 3d at 221 n.15.

In any case, courts are never required to give "a degree of deference that is tantamount to unquestioning acceptance." *Holt*, 574 U.S. at 364.[7]

[7] The government's passing mention of *Navy Seals 1-26*, Resp.25-26, is unfounded for multiple reasons, not least because the Marine Corps already accommodates Sikhs after recruit training. *Accord Ramirez v. Collier*, 142 S. Ct. 1264, 1288 (2022) (Kavanaugh, J., concurring) ("history and [government] practice," not deference, "focus the Court's assessment" of narrow tailoring).

Despite its lengthy descriptions of, and appeals to, Colonel Jeppe's declaration, *see, e.g.*, Resp.41-42, this declaration does not contain a shred of evidence justifying its conclusion that it can accommodate medical beards, tattoos, and diverse hairstyles but must draw a hard line with respect to Sikhs. Rather, the declaration is merely a string of conclusory statements, to which the government now asks this Court to defer unquestioningly. *See also* Resp.21-22. Adopting this argument would fundamentally transform strict scrutiny from a "most rigorous and exacting standard" for protecting fundamental rights, *Miller v. Johnson*, 515 U.S. 900, 920 (1995), into a toothless nullity. The standard is "exceptionally demanding." *Hobby Lobby*, 573 U.S. at 728. And the government nowhere explains how its concept of deference is reconcilable with strict scrutiny. *See Fisher v. Univ. of Tex.*, 570 U.S. 297, 313 (2013) (reversing decision that misapplied strict scrutiny because the lower court afforded the governmental actor "a degree of deference" incompatible with strict-scrutiny analysis).

II. Plaintiffs are likely to succeed on their free exercise claims.

Because the Marine Corps concedes multiple secular exceptions, strict scrutiny is unavoidable. Resp.30-32. Strict scrutiny applies whenever the government permits "individualized" exemptions or "prohibits religious conduct while permitting" "*any* comparable secular activity." *Fulton*, 141 S. Ct. at 1877; *Tandon*, 141 S. Ct. at 1296. The government does both.

For example, the Marine Corps' recently relaxed tattoo rules are meant to "remove[] all barriers to entry" and accommodate "the individual desires of Marines." A062. The government insists this categorical exemption doesn't undermine its uniformity interest because the Marine Corps "places strict limits on [tattoos'] form, content, and placement, including that they not be on the head, neck or hands." Resp.32. But the same regulation expressly permits individualized exceptions for tattoos anywhere on the body. A064. The mere existence of this "formal system of entirely discretionary exceptions" triggers strict scrutiny, regardless of "whether any exceptions have been given." *Fulton*, 141 S. Ct. at 1878-79.

Ignoring *Fulton*, the Marine Corps argues that its policies need only survive rational basis review because they "are facially neutral regulations that do not single out religion for differential treatment or suppress religious belief." Resp.35. Even if this were the correct standard for neutrality (it isn't), the policies must *also* be generally applicable. *See Fulton*, 141 S. Ct. at 1877 (lack of general applicability triggered strict scrutiny whether or not the policy was neutral). The patchwork of exemptions from uniformity permitted for medical beards, visible tattoos, and women's diverse hairstyles and lengths triggers strict scrutiny, and—as shown above—the government has not satisfied it.

III. Plaintiffs are suffering irreparable harm.

Violations of First Amendment and RFRA rights are "unquestionably" irreparable, even when inflicted for "minimal periods of time." *Roman*

Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020). Here, the standard is clearly met because Plaintiffs' "free exercise of religion" is actively being infringed. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 302-03 (D.C. Cir. 2006).

Defendants respond, incredibly, that despite the Marine Corps' policy categorically barring observant Sikhs, there's *no* "'loss of First Amendment freedoms'" because Plaintiffs can continue to sit out while the appeal proceeds. Resp.39. It is hard to imagine Defendants saying that about a racially exclusionary policy; the fact that they make it to exclude Sikhs emphasizes the need for relief.

Furthermore, if the government's position were correct, the blind plaintiff in *Bonnette v. D.C. Court of Appeals* would have suffered no irreparable harm from the denial of accommodations for the bar exam because she could have waited until after final judgment to take the exam and begin her career as a lawyer—or simply picked a different career that would accommodate her disability. 796 F. Supp. 2d 164, 186-87 (D.D.C. 2011). Indeed, under the government's approach, virtually every First (or, for that matter, Fourteenth) Amendment preliminary injunction motion seeking to enjoin discriminatory eligibility criteria could simply be ignored until final judgment. That's not the law. Even where the practical "consequence[s]" of delay and discrimination are "in all likelihood, a few extra scraped knees," the exclusion of religious minorities from public

service "for which [they are] otherwise qualified" is "odious to our constitution all the same, and cannot stand." *Trinity Lutheran v. Comer*, 137 S. Ct. 2012, 2024-25 (2017); *Singh v. Carter*, 168 F. Supp. 3d 216, 233 (D.D.C. 2016) ("[B]eing subjected to [religious] discrimination is by itself an irreparable harm.").

The irreparable harm to Plaintiffs is not just in their ongoing exclusion from the Marines. It is also the categorical, threshold ineligibility—for them and all observant Sikhs—to be equally considered for service because of Defendants' religiously discriminatory criteria. *Trinity Lutheran*, 137 S. Ct. at 2022 ("The express discrimination … is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations"); *Ne. Fla. Chapter v. Jacksonville*, 508 U.S. 656, 666 (1993) (injury is "inability to compete on equal footing," not "the loss of a contract"). That "plaintiffs remain free" to wait on the outside, Resp.39, exacerbates, not avoids, that injury.

The government also insists that Plaintiffs are not being harmed because the "district court has significantly expedited this case, with discovery already underway and several deadlines approaching." Resp.40. But *shorter* irreparable harm is still irreparable. Further, this rosy picture ignores the actual state of discovery, including Defendants' refusal to answer most of Plaintiffs' interrogatories, to provide information about religious accommodations provided by other branches or at the Naval Academy, or—as yet—to provide documents showing it engaged in the

required RFRA analysis to deny Plaintiffs' requests. And even if motions to compel are not required to obtain that basic information, the district court has yet to set a schedule for summary judgment briefing.

Having already waited years because of the Marine Corps' discriminatory policies, this is time Plaintiffs do not have. Defendants concede that Jaskirat Singh's DEP contract statutorily cannot be extended beyond April 30, 2023. Resp.9, 38. They trivialize the harm of forcing Jaskirat to "take additional steps to redemonstrate his fitness" to rejoin after his contract expires. Resp.38. But forcing Jaskirat through additional testing because of the Marine Corps' illegal exclusion of observant Sikhs is just the kind of "singl[ing] out" for "discriminatory testing" that created irreparable harm in *Carter*. 168 F. Supp. 3d at 233, 236.

The other Plaintiffs likewise face the harm of the "lost opportunity to engage in [their] preferred occupation." *Bonnette*, 796 F. Supp. 2d at 186. Aekash Singh needs to be able to decide soon what to tell employers or graduate schools about whether he will be entering the Marine Corps, and he has already missed specific opportunities to start his Marine Corps career. A. Singh Decl. ¶¶3-4; U.S. Marine Corps, *Officer Commissioning Programs,* https://perma.cc/YG73-H584 (certain officer candidate training opportunities begin after freshman or junior year of college). And Chahal cannot afford to wait beyond December to begin his career and may have to abandon joining the Marines. This lost ability to "pursue professional and personal opportunities" and to "mak[e] future plans" is

yet further irreparable harm. *Nio v. DHS*, 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); *see also Jacksonville*, 508 U.S. at 666 (lost "opportunity to compete" was injury).

IV. The balance of equities and public interest favor allowing Plaintiffs to begin recruit training.

The government does not dispute that the public interest favors vindicating First Amendment rights and ending religious discrimination. Mot.18. Moreover, having made multiple exceptions that apparently do not impact national security, and publicly announcing its desire to remove barriers to entry, Br.12-13, the Marine Corps cannot claim any significant harm in admitting observant Sikhs. The government's only response is "defer, defer, defer."

First, the government argues that this Court should defer to the district court's assessment of the public interest. Resp.42. But the district court's legal analysis is reviewed *de novo*. *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016). And its reliance on public interest alone, without considering likelihood of success or irreparable harm, A822, was both wrong and an abuse of discretion. *Cruz v. McAleenan*, 931 F.3d 1186, 1193 (D.C. Cir. 2019). When faced with a First Amendment violation, a court cannot simply accept governmental assertions of public interest since "enforcement of an unconstitutional law is *always* contrary

to the public interest." *Karem*, 960 F.3d at 668 (emphasis added). A law's constitutionality must be assessed.

Further, the district court failed to follow Congress's required approach to determining the public interest in federal laws that substantially burden a person's sincere religious belief: whether application of the law to that person passes strict scrutiny. Br.45-48. The government complains that this "collaps[es] the likelihood of success … and the balance of equities," and amounts to "a categorical rule" in favor of injunctions. Resp.43. Not so. Few cases concern First Amendment interests, and it is well established that, in the rare ones that do, "likelihood of success '*will* often be the determinative factor.'" *Pursuing Am.*, 831 F.3d at 511 (emphasis added). Moreover, the strict scrutiny test used to evaluate First Amendment interests isn't categorical; it's a "workable test for striking sensible balances" that allows courts to account for the government's interests. 42 U.S.C. § 2000bb(a)(5). In reality, it is the *government* that wants a categorical rule—one where whatever it says, goes. RFRA and the First Amendment don't allow such "unquestioning acceptance"—even when the government raises "security concerns." *Holt*, 574 U.S. at 364-65. If the Marine Corps' discriminatory policy fails strict scrutiny, it automatically *is not* necessary to protect national security. The government can't repackage its "mere say-so," *id.* at 369, as a "public interest" argument to avoid the standard Congress imposed.

Second, the government argues that *Winter*, 555 U.S. 7 (2008), requires this Court to defer to the government's assessment that allowing observant Sikhs to go to recruit training or Officer Candidate School will threaten national security. Resp.44-45. But, as Plaintiffs explained, Br.44, *Winter* didn't address Constitutional rights, and was clear that "military interests do not always trump other considerations." 555 U.S. at 26. In any event, to whom does the government want the Court to defer regarding diversity and national security? Apparently not Congress, which has twice directed the military to generously accommodate service members' religious practices. *Supra* at 18-19. Apparently not the Commander-in-Chief, who has mandated that "an inclusive military strengthens our national security." Exec. Order No. 14,004, 86 Fed. Reg. 7471 (Jan. 25, 2021). Nor, apparently, the Solicitor General, who, speaking for the entire Executive Branch, including the Marine Corps, just informed the Supreme Court that removing barriers to entry and creating a diverse military "is a critical national security imperative." Transcript of Oral Arg. at 143-44, *Students for Fair Admissions,* https://perma.cc/4T3Y-3TW5. Not the other military branches, all of which manage to train expeditionary forces without barring Sikhs from service. Nor, even, the Marine Corps' own explanations (outside this litigation) that "[s]piritual

readiness is a force multiplier,"[8] and that the Marine Corps needs a "strategic objective of building a diverse force to meet a peer threat."[9]

Third, deference is unwarranted here because the government's untested claims of national security quickly shrink when exposed to *any* scrutiny. Indeed, courts have *already* rejected the Marine Corps' asserted interests identified here, and we now have years of evidence to show its predictions are baseless. *McHugh*, 185 F. Supp. 3d at 227-28. Moreover, the government now essentially admits that (medical) beards for an *unlimited* number of male Marines in recruit training are permissible, so long as they shave on Day 1 and receive a medical accommodation thereafter. Resp.30-31. Allowing *three* Sikhs an accommodation for Day 1 will not be the straw that breaks national security's back.

CONCLUSION

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

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[8] *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.

[9] 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.

Respectfully submitted,

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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 6,408 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.

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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 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.

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