IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUKHBIR SINGH TOOR, *et al.*,

Plaintiffs,

v.

DAVID H. BERGER, *et al*.,

Defendants.

Civil Action No. 1:22-cv-01004

REPLY MEMORANDUM IN SUPPORT OF THE APPLICATION FOR PRELIMINARY INJUNCTION ON BEHALF OF PLAINTIFFS MILAAP SINGH CHAHAL, AEKASH SINGH, AND JASKIRAT SINGH

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INTRODUCTION

There are certainly many things the Marine Corps could do to "strip recruits of their individuality and civilian identity" and to "indoctrinate them" to "think first and foremost of their membership on a team." Opp. 1. But it cannot run roughshod over the Constitution in doing so. For example, an order banning any prayer during recruit training could be applied under the guise of teaching new recruits to trust their military leaders, but would unquestionably set off constitutional alarm bells. Yet that is no different from what the Marine Corps has done here. By barring Sikhs who won't shave their hair and beards or shed other prescribed articles of faith, the Marine Corps has put Plaintiffs to a stark choice: give up serving in the Marine Corps or commit a religious sin as severe for them as committing adultery.

It is no defense that The Marine Corps asks Plaintiffs to abandon their sincerely held religious beliefs in the name of "uniformity." In reality, The Marine Corps has no "strict discipline of uniformity," Opp. 1, but only a general practice with myriad exceptions specifically designed to diversify The Marine Corps to "reflect[] the Nation whose principles [it] defend[s]."[1] Female recruits, for example, are not forced to shave their heads for boot camp, presumably in deference to cultural norms and to entice more women to join. Recruits with *pseudofolliculitis barbae* (PFB), a painful skin condition that afflicts approximately 60% of all black males, can get medical exemptions during boot camp, presumably to advance the important goal of racial diversity.

And the Marine Corps has relaxed uniformity standards in other areas as well. Recently, it has relaxed its rules on tattoos, Compl. Ex. B, and issued new rules permitting "edg[ed] up" haircuts, manicured nails, and special characters on nametapes to preserve ethnic spellings, Compl. Ex. W at 1-2—all departures from uniformity made explicitly because "[d]iversity … is inextricably linked to … readiness and mission success." Compl. Ex. X. at 1.

[1] Memorandum from Carlos D. Toro, Sec'y of the Navy, on Dep't of the Navy Diversity, Equity, and Inclusion Going Forward to Assistant Sec'ys of the Navy et al. (Nov. 12, 2021), Compl. Ex. X.

Given the Marine Corps' demonstrated willingness to relax uniformity standards to favor other forms of diversity, its refusal to do so for religious diversity is fatal. The Religious Freedom Restoration Act (RFRA) and the First and Fifth Amendments prohibit such discrimination absent a compelling government interest that cannot be met any other way. And where, as here, the government "leaves appreciable damage to [a] supposedly vital interest unprohibited," it cannot demonstrate it is advancing "an interest of the highest order." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020) (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993)). That is especially true in this instance, because the Marine Corps admits that its other accommodations for diversity have not diminished its mission readiness—even asserting publicly that "diversity is our greatest strength." Marine Corps Recruit Depot Parris Island, S.C. (@MCRDPI), Twitter (June 4, 2021, 2:13 PM), https://twitter.com/mcrdpi/status/1400878319587975171.[2] Its case is further undermined by its admission that "[s]piritual readiness … is the foundation of moral courage" that better enables Marines to do what is right "no matter what the cost."[3]

Because the Marine Corps makes so many other exceptions to uniformity and concedes that religious observance brings unique benefits, Plaintiffs are highly likely to succeed in showing that the Marine Corps has no compelling interest in denying their requests for religious accommodation. The other preliminary-injunction factors likewise weigh overwhelmingly in Plaintiffs' favor. And the Marine Corps' conclusory assertions that Plaintiffs' accommodations are uniquely harmful warrant zero deference. Thus, the Court should enjoin the Marine Corps from

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[2] *See also* United States Marine Corps (@USMC), Twitter (June 14, 2017, 12:10 PM), https://mobile.twitter.com/usmc/status/875022583971758080 ("[I]n reality, diversity is the only way to achieve a quality fighting force that is equipped for the challenges of the future") (quoting Brig. Gen. Seely, then-Director of Marine Corps Intelligence); Department of Defense (@DeptofDefense), Twitter (Feb. 9, 2021, 12:00 PM), https://twitter.com/DeptofDefense/status/1359185522841833474 (sharing "Strength through diversity" message on "Marines [who] broke barriers" for Black History Month).

[3] *The Commander's Handbook for Religious Ministry Support*, US Marine Corps, MCRP 3-30D.4 (Feb. 2, 2004), https://perma.cc/BUM3-GPR6.

discriminatorily enforcing its uniformity regulations in a manner that bars Plaintiffs from serving unless they abandon their articles of faith.

ARGUMENT

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

The Marine Corps concedes every fact necessary to resolve the RFRA claim in Plaintiffs' favor. It does "not contest" that Plaintiffs' requests for accommodation are "rooted in sincerely held religious beliefs." Opp. 2. And it admits that forcing Plaintiffs to shave and abandon their articles of faith "will burden those beliefs." *Id*. The claim thus turns solely on whether The Marine Corps has a compelling interest that cannot be met except through suppression of religious articles and forced shaves. But even there, The Marine Corps' own admissions defeat its argument. Indeed, it admits making so many exemptions for other Marines that it cannot credibly claim that accommodating Plaintiffs would even marginally impede its interests, rendering its position against Plaintiffs hypocritical at best. Regardless of how much deference courts might owe the military generally, the Court cannot ignore the Marine Corps' own admissions and relevant conduct. Deference is not credulity.

A. The Marine Corps has no compelling interest in forcing Plaintiffs to shave or to abandon their articles of faith.

The Marine Corps claims that "mission accomplishment, unit cohesion, and good order and discipline" justify the infringements on Plaintiffs' free exercise of religion. Opp. 9. But 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 Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 430 (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 v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021).

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. It is undisputed that The Marine Corps has recently permitted greater individual expression through tattoos, which, as of October 2021, are categorically permitted anywhere on the body except the hands, neck, and face. Compl. Ex. B. In issuing this update, Marine Corps Commandant General, Defendant David H. Berger, stated that

> [t]he American people expect ... Marines to represent the nation they are sworn to protect[.] The tattoo policy over the years has attempted to balance the individual desires of Marines with the need to maintain the disciplined appearance expected of our profession. This bulletin ensures that the Marine Corps maintains its ties to the society it represents and removes all barriers to entry for those members of society wishing to join its ranks.[4]

In pursuit of this diversity and the desire to remove barriers to entry, even hand, neck, and face tattoos may be exempted upon request. Compl. Ex. B at 3.

It is also undisputed that the Marine Corps has exempted women from the asserted "uniformity" of having all new recruits shave their heads. Women are offered multiple permissible hairstyles of varying "lengths and styles." Opp. 17; Mem. 18. And it is undisputed that the Marine Corps' "no-beard" policy includes a process by which Marines suffering from PFB may obtain a medical exemption, even "*during* recruit training." Opp. 18; Mem. 18. Indeed, just six months ago, the Marine Corps made medical exemptions even easier to get and maintain. Now, medical personnel can grant *permanent* beard accommodations without commander approval; Marines can no longer be separated because of an indefinite need for a medical beard; and Marines are no longer required to prove their condition by carrying a copy of their waiver with them. Mem. 18. Additionally, in March 2022, the Marine Corps relaxed still other "uniformity" regulations specifically to "promote a culture of inclusion." Mem. 19. Given this "system of exemptions," the Marine Corps cannot credibly claim a compelling interest in denying these three Plaintiffs a comparable accommodation. *Fulton*, 141 S. Ct. at 1882; *see also Brown v. Ent. Merchs. Ass'n*,

[4] *Marine Corps Bulletin 1020*, Commandant of the Marine Corps (Oct. 20, 2021), https://perma.cc/4ZPC-NLS9.

564 U.S. 786, 803 n.9 (2011) (government "does not have a compelling interest in each marginal … point by which its goals are [supposedly] advanced.").

The Marine Corps' attempt to defend the myriad ways it has relaxed its grooming and uniform policies further undermines its arguments on compelling interest. Its response, for example, to tattoos—a form of expression far more individualized than Plaintiffs' articles of faith—is particularly telling. It insists that, because tattoos are commonplace and "extremely difficult to alter," preventing tattooed Marines from enlisting would diminish "accomplishment of the Marine Corps mission." Opp. 16. But the Marine Corps completely fails to explain why preventing Sikhs from serving would not have *the exact same* effect. Indeed, barring devout Sikhs from serving in the Marine Corps because of their religiously mandated beards would deprive our nation of the type of servicemembers "who served … with tremendous success" and "earned commendations and outstanding reviews." *Singh v. McHugh*, 185 F. Supp. 3d 201, 227-28 (D.D.C. 2016) (summarizing the careers of four Sikh soldiers who were given the accommodations sought here). It is also inconsistent with the Marine Corps' stated desire to remove barriers for those seeking entry into its ranks. The Marine Corps' eagerness to accommodate tattoos merely because they are commonplace, contrasted with its hard opposition to religious articles, which signify profound spiritual commitment and discipline, underscores that the policy is not just underinclusive, but also discriminatory. *See Fraternal Ord. of Police v. City of Newark*, 170 F.3d 359, 367 (3d Cir. 1999) (Alito, J.) (noting that distinctions based on religion constitute unlawful religious targeting). The Marine Corps' only response is that requests for religious accommodation are different because they might be "repeated" by others. Opp. 12. But that argument does not pass muster, as tattoo exemptions are far more likely to multiply. *Compare* Opp. 16 ("[tattoo] policy arose out of a recognition that a substantial number of people in this country have tattoos") *with* Opp. 12 ("granting these [religious accommodations] could open the door to still more requests for accommodation from other recruits").

Regarding the exception for women's hairstyles, the Marine Corps contends that letting women select a hairstyle that best suits them is an "inapposite" comparison, because the Marine Corps still

preserves "uniformity as to each sex." Opp. 17. But the comparison is perfectly apt: allowing women a choice of hairstyles permits individualized expression that directly undermines the uniformity of shaved heads. Moreover, the Marine Corps does not, and cannot, explain why its interest in uniformity can differ across sex, but not religion—especially now that it integrates men and women in platoon training to "extend[] the cohesion between male and female Marines from the start." Sgt. Tessa Watts, *Making History for Women and Marines at MCRD San Diego*, U.S. Marine Corps. (Mar. 19, 2021), https://perma.cc/RZF8-BVBG. Perhaps the Marine Corps assumes that no reasonable Marine would see a woman with longer hair as demonstrating poor discipline or asserting her individuality, as opposed to simply maintaining her hair in a manner culturally expected. But that only underscores the comparison: as this Court has already explained, no reasonable person would think a Sikh Marine 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." *McHugh*, 185 F. Supp. 3d at 227. To the contrary, it would be obvious that such adherence to religious practice—indeed, a strict religious uniform—proceeds from "a very different source" than a desire for expressive individualism. *Id.*

Finally, as to medical waivers, the Marine Corps cites a recent vaccine case (*Navy SEAL 1*) to insist that medical beards and religious beards are not proper comparators (although it admits other courts have disagreed). Opp. 18. But that case stands for a different and irrelevant proposition: that exempting those for whom "vaccination would cause more medical harm than it would good … serves the military's interest" in servicemembers' health, rather than undermining it. *Navy SEAL 1 v. Austin*, No. 22-0688, 2022 WL 1294486, at *12 (D.D.C. Apr. 29, 2022). That is a far cry from here, where medical and religious exemptions impact the Marine Corps' interest in uniformity the exact same way. *See Fraternal Ord. of Police*, 170 F.3d at 365-67 (finding "no apparent reason" why permitting religious beards "should create any greater difficulties" for uniformity than "medical exemptions," other than "a value judgment in favor of secular motivations"). And they also impact the Marine Corps' interest in mission accomplishment the exact same way: by making more qualified individuals available to serve.

Unable to justify its discriminatory targeting of religious accommodations, the Marine Corps resorts to saying it has reached some limit on available accommodations and must now consider "the aggregate effect of granting … similar requests that could arise" in the future. Opp. 12. RFRA, however, expressly prohibits relying on such "slippery-slope concerns." *O Centro*, 546 U.S. at 435-36 (refusing "classic rejoinder of bureaucrats throughout history" that "[i]f I make an exception for you, I'll have to make one for everybody, so no exceptions"). RFRA instead requires strict scrutiny to be assessed "to the particular claimant." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014). The Marine Corps' non-RFRA cases, Opp. 12, are thus inapposite. Moreover, it is simply not "compelling" for the Marine Corps to grant easy access to medical beards, to exempt women from shaved-heads, and to allow tattoos almost anywhere for everyone, including during recruit training, yet still claim that it has a compelling reason to draw the line when it comes to religious exemptions. That is particularly so considering that requests for religious accommodations signify greater fidelity to the type of moral commitments that are essential to the military's mission accomplishment.[5] *See supra*, n.3 at 1-4 (noting that "[s]piritual readiness is a force multiplier" because it promotes "courage" to do what is right "no matter what the cost"). Thus, the Marine Corps ultimately compels the proper outcome of this lawsuit by having acknowledged that "diversity provides us a competitive warfighting advantage over our adversaries … who place a premium on uniformity of thought." *Talent Management 2030*, Dep't

[5] The Marine Corps also argues that, in seeking a religious accommodation, Plaintiffs are somehow unwilling to engage in the "common sacrifice" required of all recruits participating in boot camp. *See* Opp. 5 ("'[E]veryone desiring to be a Marine often must be willing to give up something' to complete the transformation from civilian to Marine.… 'This common sacrifice contributes to the forging of unit cohesion'"); Opp. 12 ("Permitting exceptions could undermine the entire training group's feeling of 'common sacrifice that contributes to the forging of unit cohesion.'"). But this is simply untrue. Like all other recruits, Plaintiffs must leave their families, homes, and regular comforts to attend boot camp. Once there, they will be isolated from the outside world and allowed only minimal contact with loved ones. To suggest that Plaintiffs would somehow be sacrificing *less*, and thereby undermining unit cohesion, ignores this reality. In fact, by denying the requested religious accommodation but granting other non-religious ones, the Marines essentially ask Plaintiffs to sacrifice *more* by enduring all of the hardships of bootcamp, in addition to forcing them to dispose of their religious beliefs.

of the Navy, U.S. Marine Corps, 5 (Nov. 2021), https://perma.cc/FGC9-4JQT. It cannot now argue that it has a compelling interest in suppressing Plaintiffs' religious exercise after prioritizing diversity in its ranks everywhere else.

B. Religious suppression is not the least restrictive means of achieving the Marine Corps' interests.

The Marine Corps fails under least restrictive means for the same reasons it fails under compelling interest. The Supreme Court has repeatedly held that the inability to distinguish requests for accommodation that have been denied from those that have been granted defeats any argument that the denials are a least restrictive means. *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021); *Holt v. Hobbs*, 574 U.S. 352, 369 (2015). This remains true even where 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*, 141 S. Ct. at 1297 ("Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious exercise too."); *Holt*, 574 U.S. at 369 (successful accommodations in other prisons "suggests that the Department could satisfy its security concerns through a means less restrictive"); *see also Hobby Lobby*, 573 U.S. at 730 (by permitting an accommodation for religious non-profits, agency "demonstrated that it has at its disposal an approach that is less restrictive" for religious for-profits). Here, the Marine Corps' arguments are even more feeble considering that the requested accommodations pose no 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.

Nor can the Marine Corps distinguish the accommodations already successfully allowed in other branches of the U.S. military and in foreign militaries. Mem. 31-32. Its only response is to claim that it is "the chief expeditionary force of the United States military" with a "singular expeditionary mission" involving "dangerous and contingent environments." Opp. 1, 16. But the

Army likewise prides itself on its "combination of expeditionary capability and campaign quality," with a focus on "contested conditions" and "austere expeditionary conditions." *ADP 3-0 Operations*, U.S. Dep't of the Army, 1-10, 1-12 (July 2019), https://perma.cc/5VEX-XGJ2. So do the Air Force and Navy. *See AFDP 3-0 Operations and Planning*, Curtis E. LeMay Center for Doctrine Development and Education, 146 (Nov. 4, 2016), https://perma.cc/YHZ5-YV2C (describing "foundations of Air Force expeditionary operations"); *Naval Warfare*, Naval Doctrine Publication 1, 39 (Apr. 2020), https://perma.cc/5M7G-WAMH (discussing "the expeditionary nature of naval operations"). Yet these branches have managed to accommodate Sikhs' religious exercise during boot camp without compromising mission accomplishment.

Next, the Marine Corps attempts to distinguish *Singh v. McHugh*, where this Court found that the Army violated RFRA in denying a Sikh soldier an "accommodation that would enable him to enroll in ROTC while maintaining" his religious beard and turban. 185 F. Supp. 3d at 217. Specifically, the Marine Corps argues that *McHugh* is inapposite because it only involved accession into ROTC. Opp. 19. But that argument fails for two reasons. First, in reaching its decision, the Court relied on the Army's own evidence of four Sikhs then currently serving, whose commanders and colleagues had "heaped" praise "on [their] service"—"including, in particular, for their discipline and leadership." 185 F. Supp. 3d at 229; *see also id*. at 228-29. The Court found no evidence that permitting any of those Sikhs "to maintain his articles of faith would undermine the quality of his training, unit cohesion and morale, [or] military readiness" *Id*. at 229-30. Second, dozens of additional Soldiers, Airmen, and Sailors have now "had the chance to prove themselves," *id*. at 230, in actual military service, along with scores of individuals who have done the same in in foreign militaries. Yet the Marine Corps cannot identify even a single instance of how these religious accommodations have impaired mission readiness in any way. Mem. 31-32.

Perhaps recognizing this weakness, the Marine Corps pivots to arguing that, regardless of the interests at stake or the tailoring involved, the Court should simply give the Marine Corps "deference" to decide which exceptions from uniformity to grant. Opp. 7. But the cases it cites precede RFRA. *See* Opp. 7-8. Its reliance on *Goldman v. Weinberger*, 475 U.S. 503 (1986), is

particularly unavailing. Just one year after *Goldman*, Congress limited its holding, enacting legislation guaranteeing that, with only limited exceptions, "a member of the armed forces may wear an item of religious apparel while wearing the uniform of the member's armed force." 10 U.S.C. § 774(a) (enacted Dec. 4, 1987). Sikh articles of faith were specifically considered by Congress in enacting that legislation. *See, e.g.*, H.R Rep. No.100-446, at 638 (1987); 133 Cong. Rec. 25250 (1987); 133 Cong. Rec. 11851 (1987). At least for purposes of recruit training, this statute alone should lead to a ruling in Plaintiffs' favor.

RFRA further rendered *Goldman* and the Marine Corps' other cited cases inapplicable by making clear there is no exception to strict scrutiny under that law. Rather, as the Supreme Court held in *Holt*, "RFRA … 'makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress.'" 574 U.S. at 364 (quoting *O Centro*, 546 U.S. at 434). Despite the Marine Corps' selective quoting from RFRA's House and Senate Reports, Opp. 7, the legislative history shows that Congress specifically rejected "carv[ing] out an exception to the compelling interest test for military regulations that burden religious practice." *See* S. Rep. No. 103-111, at 11 (1993). Rather, RFRA requires courts to review the claims of both "prisoners and military personnel under the compelling governmental interest test." H.R. Rep. No. 103-88, at 8 (1993); *accord* S. Rep. No. 103-111, at 12. While Congress explained that "the expertise and authority of military … officials" could still be considered, H.R. Rep. No. 103-88, it would be only within the strict-scrutiny standard, a "workable test for striking sensible balances." 42 U.S.C. § 2000bb(a)(5). Congress felt "confident" that this standard would not "adversely impair the ability of the U.S. military to maintain good order, discipline, and security." S. Rep. No. 103-111, at 12. Thus, as another judge of this Court has already held, "[t]he *Goldman* case does not govern the [RFRA] analysis" because *Goldman* rejected the strict scrutiny that was later explicitly written into RFRA's text. *McHugh*, 185 F. Supp. 3d at 221 n.15.

The Marine Corps does cite one post-RFRA case, *Navy SEAL 1*, Opp. 8, but that case does not provide the Marine Corps any cover either. In *Navy SEAL 1*, the court narrowly found only that deference was appropriate where a high "degree of military and scientific expertise" was required

to assess the military's tailoring, and the plaintiff's claim required actively "contesting the [military's] scientific conclusions" specific to vaccine efficacy. *Id*. at *7-8. Here, Plaintiffs contest no conclusions that would require such expertise[6] and ask the Court to resolve no disputed facts. Indeed, whether the Marine Corps' restrictions on Sikh practice meet the compelling interest standard, when it has allowed multiple comparable exceptions without incident, is a straightforward question of law that requires no military expertise. *McHugh*, 185 F. Supp. 3d at 224-30. In any event, *Navy SEAL 1* cited *McHugh*'s approach to strict scrutiny as "appropriate" in drawing a line between respecting expertise and applying strict scrutiny by its terms. 2022 WL 1294486 at *8. Importantly, courts are never required to give "a degree of deference that is tantamount to unquestioning acceptance," *Holt*, 574 U.S. at 364, which is what the Marine Corps asks for here.

The Marine Corps admits that it makes many exceptions to uniformity in support of increased diversity, that this diversity brings independent strength to the Marine Corps, and that religious fidelity in particular serves to advance military readiness. Under these circumstances, its 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). Whatever respect the military may be owed in other circumstances, it "does not justify the abdication of the responsibility, conferred by Congress, to apply [RFRA's] rigorous standard" here. *Holt*, 574 U.S. at 364.

II. Plaintiffs are likely to succeed on their Free Exercise Clause claims.

The Marine Corps also fails to refute Plaintiffs likelihood of success under the Free Exercise Clause. It erroneously assumes its policy must only survive rational-basis scrutiny, but that argument ignores recent Supreme Court precedent holding the exact opposite. In *Fulton v. City of Philadelphia*, the Court noted that rational basis applies only when a law is neutral and generally

[6] The Marine Corps points only to its "long experience" and "professional military judgment." Opp. 1-2.

applicable. 141 S. Ct. 1868, 1876 (2021). But "[a] law … lacks general applicability" where, as here, "it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id*. at 1877. So long as the government treats "*any* comparable secular activit[ies] more favorably than religious exercise," strict scrutiny applies. *Tandon*, 141 S. Ct. at 1296-97. And because the Marine Corps has already conceded multiple secular exceptions to its preference for uniformity, strict scrutiny is unavoidably triggered.

The Marine Corps' backstop argument likewise fails. It contends that strict scrutiny does not apply because its uniformity policies leave it no discretion over their application. Opp. 22. This argument is puzzling, at best, as the Marine Corps' recently updated policies regarding tattoos, women's hairstyles, and PFB waivers, as well as its own brief in the present matter, make plain the presence of such discretion. *See, e.g.*, Opp. 18 (discussing "no-shave waiver[s]"); *see also* Compl. Ex. B ¶ 4a(2)(h) (discretion to grant tattoo exemptions). Indeed, the Marine Corps acknowledges that Plaintiff's own requests for accommodations went through an "extensive" review process before being denied, Opp. 3-4. Under *Fulton*, strict scrutiny is triggered by the mere existence of discretionary exemption processes, regardless of "whether any exceptions have been given." 141 S. Ct. at 1879. And for all the reasons set forth previously, *supra* Part I, the Marine Corps fails strict scrutiny.

III. Plaintiffs are likely to succeed on their Equal Protection claim.

As with the free exercise claim, the Marine Corps mistakenly spends the vast majority of its equal protection argument discussing the rational-basis test. Opp. 22-25. But that is based on a fatal inaccuracy. Although the "general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest," that rule "gives way" when a policy makes distinctions based on a suspect classification or burdens the exercise of a fundamental constitutional right. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). That is precisely the case here. Indeed, the Marine Corps does not even attempt to dispute that religion is a fundamental right, because it cannot. *Johnson v. Robison*, 415

U.S. 361, 375 n.14 (1974). Nor can it deny that discrimination on the basis of religion is "inherently suspect." *King's Garden, Inc. v. FCC*, 498 F.2d 51, 57 (D.C. Cir. 1974), Opp. 22-23. Here, the Marine Corps' policies impose burdens on Plaintiffs due to their unique religious practices. Because "the restriction jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic," "[s]trict scrutiny … is warranted." *Banner v. United States*, 428 F.3d 303, 307 (D.C. Cir. 2005) (cleaned up); *Cleburne*, 473 U.S. at 440. And for all the same reasons as set forth above, the Marine Corps' policies fail to satisfy this rigorous test.

IV. The remaining factors each weigh in favor of granting preliminary injunctive relief.

Because this is a First Amendment case, Plaintiffs likelihood of success on the merits is alone sufficient to justify a preliminary injunction. Mem. 35. But even if it were not, the Marine Corps has failed to demonstrate that any of the other factors weigh in its favor.

A. Plaintiffs will suffer irreparable harm absent injunctive relief.

The case law is overwhelming that government pressure that threatens to chill religious exercise constitutes irreparable harm *per se*. Mem. 36; *see also Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 129 (D.D.C. 2012) (confirming that *per se* standard applies to both Free Exercise and RFRA claims). In an apparent effort to cloud this clarity, the Marine Corps mischaracterizes several cases, but to no avail. Each in fact reinforces that the irreparable harm prong weighs decisively in Plaintiffs' favor.

For example, the Marine Corps cites *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290 (D.C. Cir. 2006), to suggest that—on the facts of this case—the irreparable harm standard is unachievably high. Opp. 24. But the court in *Chaplaincy* considered two options for showing irreparable harm, both of which Plaintiffs easily satisfy.

First, the court considered the actual "tangible injury" supposedly caused by certain Navy promotion boards' alleged discrimination against non-liturgical chaplains. 454 F.3d at 298. The court found this injury "far too speculative to warrant preliminary injunctive relief," because "[a]t most, the Navy's purported practice reduce[d] Appellant's *opportunities* for promotion." *Id.* Any actual injury depended on future vacancies being available and individual plaintiffs actually

qualifying for those vacancies. *Id*. Thus, the only relief that could "eventually follow" was "*possible* promotions." *Id*. On its own terms, this alleged injury was too "hypothetical" to show "that equitable relief [was] urgently necessary." *Id*.

Here in contrast, Plaintiffs have already been found fully qualified to serve as Marines, Compl. ¶¶ 138-39, 157-58, 186-88, and are being stopped from commencing recruit training only because they refuse to violate their religious convictions. Thus, they can satisfy the irreparable harm standard on the basis of this immediate, ongoing injury alone.

But more importantly, the *Chaplaincy* court went on to ask separately whether "the Navy's alleged violation of the Establishment Clause *per se* constitute[d] irreparable harm" due to its constitutional nature. 454 F.3d at 298-99. After a thorough analysis, the Court held that it did, concluding that—despite the hypothetical and insufficient nature of the actual harm—"the irreparable injury prong" was "satisfied" once the plaintiff had "allege[d] a violation of the Establishment Clause." *Id*. at 305, 303. That was "sufficient, without more," to satisfy the test. *Id*. at 303. The Marine Corps' suggestion that "the showing of irreparable harm must be *especially strong*" in the military context, Opp. 24, is thus misleading. As the *Chaplaincy* case makes clear, the entire point of the *per se* rule for constitutional claims is that it is met based on the constitutional nature of the claim, regardless of the severity of the actual injury. *Chaplaincy*, 454 F.3d at 303.

In a footnote, the Marine Corps tries to distinguish that holding as applying only to Establishment Clause claims. *See* Opp. 25 n.2. But that again mischaracterizes the case. The court in *Chaplaincy* emphasized that the *per se* rule applies most clearly "with respect to restrictions on free speech, free exercise of religion, or other variants of freedom of expression." 343 F.3d at 302. It emphasized that, "in almost all of the many subsequent cases" that have applied the *per se* rule, "the operative First Amendment liberties allegedly violated were variants of expressive liberties, such as the rights to speak, associate, petition, or exercise one's religion." *Id.* at 300. Thus, there is no question that the *per se* rule applies here.

The D.C. Circuit has held that, in limited circumstances, the *per se* rule applies differently to expressive liberties than it does in the Establishment Clause context. This is because "[t]he harm

inflicted by religious establishment is self-executing and requires no attendant conduct on the part of the individual." *Chaplaincy*, 454 F.3d at 303. Thus, in the context of expressive liberties, while plaintiffs need not establish severity, *id*. at 298-99, they may be required to show that injury is imminent, *id*. at 301. But that requirement is easily satisfied here, because the Marine Corps' policy "'directly limits'" free exercise such that "'the irreparable nature of the harm may be presumed.'" *Id*. (quoting *Bronx Household of Faith v. Bd. of Educ*., 331 F.3d 342, 349-50 (2d Cir. 2003)). Moreover, the *per se* standard is satisfied once the moving party can show that it "[is] or will be engaging in constitutionally protected behavior" and that its "'First Amendment interests are either threatened or in fact being impaired at the time relief is sought.'" *Id*. (quoting *Nat'l Treasury Emps. Union v. United States*, 927 F.2d 1253, 1254-55 (D.C. Cir. 1991)). That standard is easily satisfied here, as Plaintiffs are already engaging in constitutionally protected behavior and are currently being barred from commencing their military service as a result.

The rulings in *Church v. Biden*, No. 21-2815, 2021 WL 5179215 (D.D.C. Nov. 8, 2021), and *Shaw v. Austin*, 539 F. Supp. 3d 169 (D.D.C. 2021), on which the Marine Corps also relies, Opp. 24, are not to the contrary. In *Church*, the court addressed employment claims alleging a constitutional injury separate from those alleging non-constitutional injury. It found no irreparable harm as to the former only because the plaintiffs had already "received a temporary administrative exemption from the vaccine mandate" at issue. 2021 WL 5179215, at *16. And because the outcome of their pending application for a full religious exemption was still unknown, the claim of "constitutional and statutory injury" was even further "speculative and not clearly imminent." *Id*.

Similarly, in *Shaw*, the court addressed the arguments regarding constitutional harm separately from those regarding non-constitutional harm and ultimately found no irreparable harm only because the constitutional harm was not squarely presented at the preliminary injunction stage. 539 F. Supp. 3d at 180-81, 184; *see also Navajo Nation v. Azar*, 292 F. Supp. 3d 508, 513 (D.D.C. 2018) (non-military case addressing non-constitutional funding claims finding no irreparable harm because no shortfall of funds; Navajo Nation had excess funds from previous years; case would be

resolved before excess funds reached, even if needed); *Cal. Ass'n of Priv. Postsecondary Schs. v. DeVos*, 344 F. Supp. 3d 158, 173 (D.D.C. 2018) (plaintiff did "not come close to clearing that hurdle" of irreparable harm on due process claims because they were barely raised and challenged regulations came "with a presumption of constitutionality"). None of these cases resemble the facts here, where Plaintiffs' injuries are already evident and ongoing.

Finally, the Marine Corps' arguments that Plaintiffs are not suffering irreparable harm because they are "free to exercise their religion as" "civilians," Opp. 25, and that their alleged injury is "at most" an "employment-related harm[]," Opp. 26, fail for similar reasons. RFRA and the First Amendment protect not just Plaintiffs' right to exercise their religion "as civilians," but also to participate in all aspects of public life—including military service—free from pressure to violate their religious convictions. The Marine Corps cannot "condition[] receipt" of such benefits "upon conduct proscribed by a religious faith." *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981). While such "compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Id.*; *see also Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (RFRA prohibits government from putting "'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'"); *Sambrano v. United Airlines, Inc.*, No. 21-11159, 2022 WL 486610 at *7 (5th Cir. Feb. 17, 2022) ("[H]arm flows from [the] decision to coerce the plaintiffs into violating their religious convictions; that harm and that harm alone is irreparable and supports a preliminary injunction."); *see also Lep v. Trump*, No. 19-2799, 2019 U.S. Dist. LEXIS 189842, at *20-21 (D.D.C. Sept. 23, 2019) (holding that the government coercing a defendant into accepting a less favorable agreement constituted irreparable harm). Thus, "focusing exclusively on financial harm misses the mark because '[t]he loss of First Amendment freedoms, even for minimal periods of time unquestionably constitutes irreparable injury.'" *Air Force Officer v. Austin*, No. 22-00009, 2022 WL 468799, at *12 (M.D. Ga. Feb. 15, 2022).

Moreover, by granting secular, but not religious, exemptions, the Marine Corps has committed an additional First Amendment wrong by engaging in religious targeting. Being subjected to such

discrimination "is by itself irreparable harm" as well. *Singh v. Carter*, 168 F. Supp. 3d 216, 233 (D.D.C. 2016).

Finally, even without the constitutional claims, the harms in this case go well beyond typical harm from loss of employment. Plaintiffs cannot be made whole through money damages and are not merely seeking other work after wrongful discharges. Their lives have been placed in limbo for over a year while they wait for approval of their religious accommodations. In such circumstances, courts have not hesitated to find irreparable harm. *Nio v. U.S. Dep't of Homeland Sec.*, 270 F. Supp. 3d 49, 62 (D.D.C. 2017) (finding irreparable harm from loss of ability to "pursue professional and personal opportunities"); *see also Aziz v. Trump*, 234 F. Supp. 3d 724, 737 (E.D. Va. 2017) (holding that "the restraint on liberty imposed by" an international travel ban against certain "Muslim-majority" countries independently posed an irreparable harm). In this case, Plaintiffs—even though American citizens—still face equivalent uncertainty in that they are prevented "from making future plans," with their ability to "pursue professional and personal opportunities" having been "curtailed" as they await resolution of their religious accommodations. *Id.*

B. The balance of harms and public interest weigh in Plaintiffs' favor.

The Marine Corps concedes that all other branches of the U.S. military allow Sikhs to undergo basic training with their articles of faith in place, as do militaries around the world—all without injury to military readiness. Mem. 31-32; Opp. 15-16. It also concedes that it makes myriad exceptions to its uniformity standards to diversify its ranks and in deference to prevailing cultural norms and trends for inclusionary purposes. Opp. 16-18 ("recognition that a substantial number of people in this country have tattoos"). Thus, by its own concessions the Marine Corps has acknowledged that the balance-of-harms and public-interest factors favor Plaintiffs here. Indeed, having made so many other exceptions to uniformity, including many for a good purpose, and publicly announcing its desire to remove barriers to entry for those wishing to join its ranks, the Marine Corps cannot claim any significant harm in diversifying the ranks to admit observant Sikhs.

Mem. 18; Opp. 16. Most importantly, the public interest always weighs against religious discrimination. *See* Mem. 37-38.

Thus unable to argue the merits of the balance of harms and the public interest, the Marine Corps instead inserts a new procedural argument—that "Plaintiffs seek mandatory injunctive relief"—and then falls back once more on its plea for military deference. Opp. 27. Both of these arguments should be rejected.

First, the Marine Corps' assertion that Plaintiffs face a higher bar for seeking "mandatory injunctive relief" rather than maintaining "the status quo," Opp. 27, is mere semantics. The D.C. Circuit has long "rejected any distinction between a mandatory and prohibitory injunction," in large part because "the 'mandatory injunction' has not yet been devised that could not be stated in 'prohibitory' terms." *League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 7 (D.C. Cir. 2016). So it is here. Plaintiffs do not ask this Court to find them qualified to join the Marine Corps; the Marine Corps has already done that. Plaintiffs ask only that the Marine Corps uphold the status quo of letting them maintain their articles of faith while it continues to diversify, but without illegal and unconstitutional discrimination. Preliminary injunctions should always favor upholding the Constitution. Furthermore, granting the requested preliminary relief will do nothing to hinder the interests of either party. Even if the Marine Corps were ultimately to prevail—an unlikely prospect, *see supra* Parts I-III—interim relief in Plaintiffs' favor would have no lasting impact. To the contrary, continuing to pressure Plaintiffs and other Sikhs to violate their core religious beliefs is irreparably injurious, *see supra* Part IV.A, and sends a message that Sikhs are second-class citizens who need not apply to the Marine Corps. The Court should resist the Marine Corps' efforts to justify this invidious messaging.

Second, Plaintiffs have already addressed why deference is not legally warranted here. *See, supra* at 9-10. But it is worth further noting that the Court's deference is owed mainly to the United States Constitution. The Constitution provides that "*Congress* shall have power to … raise and support armies" and to "provide and maintain a navy" and to "make rules for the government and regulation of the land and naval forces." Const. Art. I § 8 (emphasis added). Thus, deference

properly understood is to Congress, not to the military. Congress has already made clear that the Marine Corps should accommodate religious apparel as much as possible, 10 U.S.C. § 774, and that the Marine Corps is subject to RFRA's strict scrutiny of any substantial burden on the free exercise of religion, *supra* at 10. Even within the RFRA framework, deference is due to the military at most when it is reasoned, consistent, and narrowly based on issues of unique military expertise. *Cf. Holt*, 574 U.S. at 371 (Sotomayor, J., concurring). Deference does not "extend so far" that "officials may declare a compelling governmental interest by fiat." *Id*. (quoting *Yellowbear v. Lampert*, 741 F.3d 48, 59 (10th Cir. 2014) (Gorsuch, J.). And it cannot be "tantamount to unquestioning acceptance" nor reflect "officials' mere say-so." *Holt*, 574 U.S. at 364, 369. Rather, the Marine Corps must be held to its RFRA burden and the identical burden it has chosen to impose on itself. Dep't of Defense Instr. 1300.17; Marine Corps Order 1730.9 (Compl. Ex. L).

While the Marine Corps claims that it has "grant[ed] nearly all of Plaintiffs' requested accommodations," Opp. 12, its rejection of Plaintiffs' religious accommodations during recruit training serves to wholly exclude Plaintiffs and all other observant Sikhs from the Marine Corps. This directly contradicts the mandate of the nation's Commander-in-Chief, that "[a]ll Americans who are qualified to serve in the Armed Forces of the United States … should be able to serve. The All-Volunteer Force thrives when it is composed of diverse Americans who can meet the rigorous standards for military service, and an inclusive military strengthens our national security." Exec. Order No. 14,004, 86 Fed. Reg. 7,471 (Jan. 25, 2021). In sum, the "balancing of equities" and "public interest" run against "depriv[ing] the military of skilled and talented" servicemembers, and in favor of those who seek "to serve their Nation with honor and dignity, volunteering to face extreme hardships, to endure lengthy deployments and separation from family and friends, and to willingly make the ultimate sacrifice of their lives if necessary." *Doe v. Trump*, No. 17-5267, 2017 WL 6553389, at *3 (D.C. Cir. Dec. 22, 2017).

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully urge the Court to grant their application for a preliminary injunction enjoining the Marine Corps from forcing them to violate their sincere

religious beliefs by compelling them to shave their hair and beards and remove their turbans and other articles of faith in order to commence their recruit training.

Respectfully submitted this 13th day of June, 2022.

/s/ Eric S. Baxter
Eric S. Baxter (D.C. Bar No. 479221)
Daniel Blomberg (D.C. Bar No. 1032624)
Diana Verm Thomson (D.C. Bar No. 1811222)
Laura Wolk (D.C. Bar No. 1643193)
The Becket Fund for Religious Liberty
1919 Pennsylvania Ave. NW, Suite 400
Washington, DC, 20006
(202) 955-0095 PHONE
(202) 955-0090 FAX
ebaxter@becketlaw.org

Amandeep S. Sidhu (D.C. Bar No. 978142)
Winston & Strawn LLP
1901 L St., NW
Washington, DC, 20036-3506
(202) 282-5828 PHONE
asidhu@winston.com

Amrith Kaur Aakre (Admitted *Pro Hac Vice*)
Giselle Klapper (Admitted *Pro Hac Vice*)
The Sikh Coalition
50 Broad St., Suite 504
New York, NY 10004
(847) 786-5839 PHONE
amrith@sikhcoalition.org
giselle@sikhcoalition.org

Counsel for All Plaintiffs

Brian W. Song (Admitted *Pro Hac Vice*)
Matthew K. Cowherd (D.C. Bar 229924)
Baker & Hostetler LLP
45 Rockefeller Plaza
New York, NY 10111
(212) 589-4200 PHONE
bsong@bakerlaw.com
mcowherd@bakerlaw.com

Counsel for Plaintiff Jaskirat Singh

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 13, 2022, a true and correct copy of the foregoing was electronically filed using the CM/ECF system, which will send notification of such filing to all counsel of record. A copy of the foregoing was also served on counsel for Defendants by email.

/s/ Eric S. Baxter
Eric S. Baxter

Counsel for Plaintiffs