IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDMUND DI LISCIA, et al.,

Plaintiffs,

v.

LLOYD JAMES AUSTIN III, et al.,

Defendants.

Civil Action No. 1:21-cv-01047-TJK

REPLY IN SUPPORT OF PLAINTIFF MOHAMMED SHOYEB'S APPLICATION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 3

I. OS2 Shoyeb is likely to succeed on all of his claims. 3

A. The Government concedes that strict scrutiny applies. 4

B. The Government cannot satisfy strict scrutiny. 7

1. The Government's alleged compelling interest fails for multiple reasons. 7

a. Public Image as Initial Motivation 8

b. Medical Waivers 9

c. Religion and Morale Waivers 10

d. The Scientific Data 12

e. Empirical Evidence 15

2. Even if the Government had a compelling interest, forcing OS2 Shoyeb to violate his beliefs would not be the least restrictive means. 17

II. All remaining factors favor a preliminary injunction. 20

CONCLUSION 24

CERTIFICATE OF SERVICE 25

INTRODUCTION

The Navy currently allows thousands of sailors to serve with beards worn for medical reasons alone. Accordingly, the Navy can—and thus must—accommodate OS2 Shoyeb's beard worn for religious reasons. That is doubly true here, where the Navy has already admitted that "the probability of a negative consequence" from a beard causing "an ineffective seal" is "relatively low." Broad existing accommodations, with low risks of any harm, show that the Navy can accommodate OS2 Shoyeb. While the Government points to generalized compelling interests in safety and mission accomplishment (interests the Plaintiffs, as Sailors, take very seriously), it fails to tailor those interests to OS2 Shoyeb. But the Religious Freedom Restoration Act (RFRA) and the First Amendment require much more than just "high level" concerns about potential safety risks. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021). They demand a "precise analysis" that "scrutinize[s] the asserted harm of granting specific exemptions to particular religious claimants." *Id.* And even if such searching inquiry does reveal compelling concerns, the Government must further prove it has no possible solution that would avoid suppressing religion. If it "*can* achieve its interests in a manner that does not burden religion, it *must* do so." *Id.* (emphases added).

Under this standard, the Government's arguments fail. The Navy's own grooming policies reveal they were enacted primarily over concerns about appearance, not safety. And to this day, they include explicit allowances for both medical and religious beards. In addition, the Navy has long had a tradition of allowing Sailors to grow beards while at sea to build morale and reward excellent performance. It was only after Plaintiffs brought this lawsuit that the Navy claimed such practices were unauthorized. Opp. Ex. K. Even then, it acknowledged that "exceptions to policy" could still be obtained via "waivers for religious accommodations" and "waivers due to a medical diagnosis." *Id.* ¶ 3.

Nor has the Government, from the entire history of beards in the Navy, identified a single incident when any of this sea of beards has endangered anyone, during a fire or otherwise. To the contrary, the reports from some of the Navy's most recent onboard conflagrations identify a long list of safety hazards that would have to be ameliorated before beards even cross the radar. *See, e.g.*, Opp. Ex. M at 15-16. The science backs this up. The decades-old NIOSH and OSHA studies the Government relies upon test a variety of masks. But only positive-pressure SCBA masks are at issue here, and the Government has pointed to no specific harm from wearing them with a beard other than the "reduced service time" caused by air leaking out, not in. The Navy's myriad exceptions, its disregard of other leak risks, and its problem-free history further undermine its claim that OS2 Shoyeb must shave.

Even if the data were troubling, the Navy has not used the least restrictive means available to pursue its interest. The most obvious is to take the Army's approach: require him (and any of thousands of other bearded Sailors) to shave if and when a true emergency arises. Tellingly, the Government has already agreed to grant accommodations to the rest of the Plaintiffs in this case, and its only argument that it cannot treat OS2 Shoyeb the same is that he is currently deployed at sea. But Plaintiff Katsareas's ship was docked for repairs when the Government first denied his accommodation, and Plaintiff Di Liscia's ship was at sea when the Government finally agreed to accommodate him pending the outcome of this litigation. The Navy's inconsistency suggests it has no good reason not to accommodate OS2 Shoyeb as well. That the Army, Air Force, and foreign militaries around the world all grant such accommodations only reinforces this conclusion.

Those accommodations reveal another less restrictive means: if the risks really are as great as the Navy claims, let Sailors with religious and medical waivers use any of the masks—as the Army has done—that *specifically* are authorized for use with beards. But the truth is that the Navy has

allowed medical beards with standard masks for forty years, and almost any beard for decades before that. The risks are known, and as experience has shown, extremely low. So, as long as the Navy continues to allow medical waivers on ships at sea or otherwise, it must also allow waivers for religious belief.

At bottom, what is legally just, is also good for the Navy. Medical waivers go predominantly to African American men, who both serve disproportionately in the military,[1] and—as the Navy itself has observed—suffer disproportionately from the skin conditions that necessitate medical waivers. The Navy is best served when seeking ways to facilitate their service, with their medical needs met, not when pressuring them to get permanent hair removal or exit the military. And the same is true for religious minorities. Sailors are better when allowed to serve consistent with their faith, rather than forced to suppress what often motivates them in the first place. While RFRA and the First Amendment require the Navy to accommodate them, a commitment to mission accomplishment recommends the same result. But with the Navy declining to follow the guidance of other branches and voluntarily accommodate OS2 Shoyeb, this Court should enforce the law. OS2 Shoyeb's motion should be granted.

ARGUMENT

I. OS2 Shoyeb is likely to succeed on all of his claims.

On each of OS2 Shoyeb's RFRA, Free Exercise, and Equal Protection claims, the Government essentially admits that strict scrutiny applies. Considering the extensive beard waivers already in place, and the less restrictive alternatives otherwise available, strict scrutiny's "most demanding"

[1] *See, e.g.*, Office of Army Demographics, *Blacks in the U.S. Army*, 2 (2010), https://perma.cc/LBK3-LYDP.

standard, *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997), is not met. OS2 Shoyeb thus is highly likely to prevail on each of his claims.

A. The Government concedes that strict scrutiny applies.

RFRA: With respect to OS2 Shoyeb's RFRA claim, for purposes of the pending motion, the Government "assum[es] that [OS2] Shoyeb's religious beliefs are sincere and have been substantially burdened." Opp.12 & n.3. This alone is sufficient to trigger strict scrutiny of the Navy's decision to deny OS2 Shoyeb a religious accommodation. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006); *Potter v. District of Columbia*, 558 F.3d 542, 546 (D.C. Cir. 2009).

Free Exercise: Similarly, as to OS2 Shoyeb's Free Exercise claim, it is undisputed that the Navy's no-beard policy has express exemptions for Sailors with either specified medical conditions or a religious need. Opp.2. Specifically, it provides that "[t]he face shall be clean shaven *unless* a shaving waiver is authorized by the Commanding Officer per BUPERSINST 1000.22 *or* a religious accommodation has been granted per BUPERSINST 1730.11[A]." NAVPERS 156651 § 2201.2 (emphases added).[2]

Instruction 1000.22 addresses waivers for Sailors "diagnosed with Pseudofolliculitis Barbae," or "shaving bumps," a condition that primarily affects African American men with thick, curly facial hair, which—when shaved, tends to "curve back toward the surface of the skin resulting in irritation and, in some cases, re-penetration of the skin[,] … red papules, pustules, darkened skin and scarring." Opp. Ex. C (Instruction 1000.22) §§ 4, 5. Other medical conditions, such as "nodulocystic acne and severe facial scarring," are also addressed. *Id*. § 5. While the Instruction

[2] BUPERSINST refers to an "Instruction" issued by the Bureau of Navy Personnel. NAVPERS refers to a Navy Personnel "Regulation." Hereafter, this brief will use the terms "Instruction" and "Regulation."

prescribes a medical regime to treat, and hopefully ameliorate, such conditions, *id*. § 6.b-c, "Sailors whose prescribed … treatment options have been determined by the health care provider and [commanding officer] to be ineffective" are "placed on a modified grooming routine" on which they may then maintain a quarter-inch beard that is only "re-evaluated annually," *id*. § 6.e.

Instruction 1730.11A addresses waivers for Sailors with religious needs. It requires "[a]ll Navy personnel" to "expeditiously … act on requests for religious accommodations" and review them "on a case-by-case basis giving consideration to the full range of facts and circumstances" consistent with RFRA's strict-scrutiny standard. Opp. Ex. B (Instruction 1730.11A) § 5.a.

Strict scrutiny is triggered under the Free Exercise Clause "whenever [the government] treat[s] *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). "Comparability" is measured by "the risks various activities oppose." *Id*. It cannot be disputed that—if posing any risk at all—beards pose identical risk whether they are worn for secular medical or purely religious reasons. *Accord Fraternal Order of Police v. Newark*, 170 F.3d 359, 367 (3d Cir. 1999) (Alito, J.) ("We are at a loss to understand why religious exemptions [to a no beard policy] threaten important city interests but medical exemptions do not.").[3] And even where exemptions are subject to government discretion or other limitations, the mere "creation of a formal mechanism for granting exceptions" triggers strict scrutiny, "regardless whether any exceptions have been given" in practice. *Fulton v. Philadelphia*, 141 S. Ct. 1868, 1879 (2021).

[3] The Government treats *Fraternal Order* as inapposite because it deals with uniformity rather than safety but does not explain why the same logic would not hold. *See* Opp.20. Regardless, the Supreme Court has applied the same analysis in cases implicating health and safety. *See, e.g., Tandon,* 141 S. Ct. 1294.

Equal Protection: Finally, as to OS2 Shoyeb's Equal Protection claim, the Government agrees that strict scrutiny applies to restrictions that would categorize Sailors based on an "inherently suspect characteristic," Opp.21, which would include religion. But it argues that strict scrutiny should not apply here, because the Navy "imposes the same standards for a medical waiver" as it does for a religious accommodation, in that both "go through a rigorous review process" and "are subject to denial, in the case of a religious accommodation request, or to suspension, in the case of a medical waiver, for operational needs."

This argument is flawed for at least two reasons. First, the Government's argument reveals unequal treatment on its face: religious accommodations are subject to "denial" while medical waivers are subject only to "suspension … for operational needs," Opp.22, a much looser restriction than the complete ban imposed on OS2 Shoyeb, *see, e.g.*, Katsareas Decl. ¶ 10; Braggs Decl. ¶ 7. Second, the Government fails to adequately dispute that OS2 Shoyeb *has* been treated unequally from other Sailors. It tries distinguishing the accommodations granted to MC3 Katsareas, EMN3 Di Liscia, and ABF3 Braggs on the ground that "none of those Plaintiffs are currently serving aboard a warship *at sea*." Opp.27. But neither was OS2 Shoyeb when his accommodation was initially denied. Or MP3 Katsareas when his was initially denied. Katsareas Decl. ¶ 2. And EMN3 Di Liscia *was* deployed at sea when the Government initially agreed to grant him an accommodation pending this litigation. Di Liscia Decl. (Dkt. 2-4) ¶ 5; Dkts. 8 & 10.

Elsewhere, the Government tries to distinguish MC3 Katsareas's accommodation on the ground that it was granted while he was "assigned to the auxiliary security force." Opp.16. But MC3 Katsareas has still been allowed to maintain his beard even after release from the AFS and reassignment to a position where—over the course of several months—he again had regular watch

duty and could have been called on to respond to emergencies by donning a gas mask. Katsareas Decl. ¶ 12.

Finally, the Government makes no effort to distinguish Sailors with medical no-shave chits, who are almost never required to shave while deployed or otherwise underway "*at sea*." Opp.27; *see also* Braggs Decl. ¶ 9-10; Katsareas Decl. ¶ 10 (recounting that his shipmates with medical no-shave chits were only required to shave when photos were taken for the cruise book). So even though the Navy has reserved the right to suspend medical waivers for "operational needs," Opp.22; *see also* Instruction 1000.22C ¶ 7.c(1), (2), that clearly has never been construed to deny outright an accommodation for Sailors with a medical need, as has been done to OS2 Shoyeb here. And, again, the Navy could just treat OS2 Shoyeb equally: granting him a beard accommodation and only suspending it should "operational needs" *actually* require. *See* Army Directive 2018-19 § 5.b.2 (accommodating religious beards, including during "tactical simulations" on "use of a protective mask," with temporary suspension only for actual "threat of exposure to toxic CBRN agents").

In short, there are three ways to strict scrutiny—via RFRA, the Free Exercise Clause, or the Equal Protection Clause. Any one path suffices, and by its arguments, the Government has essentially conceded all three. Strict scrutiny thus applies.

B. The Government cannot satisfy strict scrutiny.

1. The Government's alleged compelling interest fails for multiple reasons.

The Government claims that "[t]he U.S. Navy has a compelling interest in the safety of a U.S. Navy warship at sea" and that an "integral component" of this interest is "the ability for *all* crew members to participate in damage control actions on a moment's notice." Opp.13. Thus, the Government asserts that there is a "need for service members to be clean shaven to achieve a necessary seal on a facepiece for shipboard self-contained breathing apparatus ("SCBA")."

Opp.13. While perhaps compelling at first, upon close examination, this argument falls apart and—for multiple reasons—fails what is the Constitution's "most demanding … test." *City of Boerne*, 521 U.S. at 534.

a. Public Image as Initial Motivation

First, it is worth noting that the Navy's beard ban first arose from concerns about Sailors' public image, not safety. Indeed, the Navy has a long and proud history of bearded Sailors spanning two centuries. At one time it was the only branch to allow beards,[4] and for much of the 19th and 20th centuries, "neatly trimmed beards" were a distinctive feature of seafaring prowess.[5] But that changed in the 1980s, after public perception of the military took a hit following the Vietnam War and the shabby influence of the Seventies.[6] In 1981, the Navy banned beards for officers in "highly visible positions."[7] Then, in a 1984 memo entitled "Pride and Professionalism," the Navy extended the ban to all Sailors, noting that "the image of a sharp-looking Sailor in a crisp bell bottom uniform" conveyed "precisely the tough fighting Navy we are." Opp. Ex. A. Thus, it was deemed "proper and timely … to require all Navy men to be clean shaven with the exception of neatly trimmed and military-appearing moustaches[.]" Opp. Ex. A. Notably, the order mentioned safety merely in passing as "a useful by-product" for those wearing masks in "stressing

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[4] Alvin M. Alexander, Major, MC, and Walter I. Delph, M.D., *Pseudofolliculitis Barbae in the Military*, Original Communications, 66 Journal of the National Medical Association 6, 461 (Nov. 1974), https://perma.cc/WJ99-ZDNK. "The U.S. Navy is the lone exception when it comes to barring beards. Under the forward-looking leadership of Admiral Elmo R. Zumwalt, the Navy has authorized the wearing of beards by any man who chooses to do so, no matter what his race, creed, or color."

[5] U.S. Naval Institute Staff, *A Brief History of Grooming in the U.S. Navy*, USNI News, Oct. 23, 2014, https://perma.cc/U7VM-3LXZ; Robert F. Dorr and Fred L. Borch, *Hair has Long and Short History in U.S. Armed Forces*, Defense Media Network (Feb. 4, 2021), https://perma.cc/B68X-SQ3C.

[6] *A Brief History of Grooming in the U.S. Navy*, https://perma.cc/U7VM-3LXZ.

[7] *Id*.

environments." *Id*. Secretary of the Navy John Lehman admitted that "a general sharpening of appearance" inspired the change, not concerns about safety.[8] Thus, it is not surprising that—from the beginning—the no-shave rule included an exception: "Medically necessary/approved beards will, of course, be permitted." Opp. Ex. A.

b. Medical Waivers

The Government concedes that the medical exemption is still in place today. Opp.2, 4; Regulation 15665I § 2201.2; *see also* Opp. Ex. K (prohibiting waivers for boosting morale, while upholding "waivers for religious accommodations … and waivers due to a medical diagnosis"). But it has presented no evidence that Sailors with *medical* beards are forced to shave daily when deployed or underway at sea. *Cf.* Katsareas Decl. ¶ 10; Braggs Decl. ¶ 8. This severely undermines the Government's claim that it has a compelling government interest in forcing "*all* crew members," Opp.13, to be clean shaven. Having purposefully included a "system of [medical] exceptions," it cannot legitimately claim that its safety concerns are so compelling that its "policies can brook no departures." *Fulton*, 141 S. Ct. at 1882; *accord Fraternal Order*, 170 F.3d at 366.

The Government makes much of the fact that medical no-shave waivers are no longer available on a permanent basis. Opp.4, 16. But that is of little moment. Waivers are still available for an indeterminate length, as long as they are re-evaluated annually. Instruction 1000.22C ¶ 6. And even if the Navy's aggressive treatment requirements, *see* Opp.4, do successfully reduce the number of medical exceptions, there will always be matriculating Sailors with new conditions, and current Sailors with lingering conditions. As long as any Sailor has an accommodation for medical reasons, the Navy cannot assert a compelling interest to deny Sailors like OS2 Shoyeb an accommodation for religious reasons. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,

[8] *Id*.

508 U.S. 520, 546-47 (1993) ("Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing … alleged harm of the same sort, the interest given in justification of the restriction is not compelling."). Moreover, the relevant consideration here is merely whether the Government has a compelling interest in denying *one* Sailor a beard *for the pendency of this litigation*. There will still be thousands of bearded Sailors in the Navy throughout the litigation; the Government provides no reason to think that it cannot brook one more.

c. Religion and Morale Waivers

The Government also fails to explain why the Navy's recent accommodations for religious and deployment beards don't also undermine its alleged compelling interest. If the safety risks were as serious as claimed, the Navy presumably would not have agreed to resolve Plaintiff Di Liscia's motion for a preliminary injunction by consenting to extend his accommodation pending resolution of this lawsuit, even while he was still on a warship at sea during a time of high tensions with nearby nations.[9] *See* Dkt. 10 (agreeing to give notice of any change in position on Di Liscia's accommodation to allow for dispute to be resolved in court); *see also* Dkt. 2-4 ¶ 5 (noting that he was at sea on the USS Theodore Roosevelt). Indeed, in its letter denying OS2 Shoyeb's accommodation, the Navy concedes that "the probability of a negative consequence from an ineffective seal is relatively low." Opp. Ex. G at 13 of 20.

As for the widespread practice of granting "morale" waivers for Sailors while deployed or otherwise underway, the Government points to the order it issued just over than 24 hours after Plaintiffs filed this lawsuit, proclaiming that such practices are "contrary to Navy policy" and

[9] Brad Lendon, *US and China deploy aircraft carriers in South China Seas as tensions simmer*, CNN (April 12, 2021), https://perma.cc/7TVS-WGQL.

should be "stop[ped] immediately." Opp. Ex. K at 2. But a litigation-driven dispatch ought to be viewed with some caution—such reactive maneuvers may be "arrangements the Navy sought and obtained in order to overcome the lower courts' [ability to grant equitable relief]" and that undermine the statutory or rule-based basis of the protections the Navy would violate. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 46 (2008) (Ginsburg, J., dissenting). The Government insists that the risks associated with beards and masks has been known for more than 40 years. Opp.14. Yet, beyond two memos from 1984 and 1987—which focused on "the image of a sharp-looking Sailor" with only passing reference to safety, Opp. Ex. A; Opp. Ex. L—there is no evidence for nearly 30 years that the Government did anything to stop the use of discretionary waivers granted on deployments to boost Sailor morale.

It beggars belief to suggest the Navy was unaware of this practice, *see* Opp. Ex. K, which appears to have been widely known among Sailors. Katsareas Decl. ¶ 9; Braggs Decl. ¶ 9; Di Liscia Decl. ¶ 5 (Sailors aboard USS Theodore Roosevelt were granted MWR no-shave chit permitting them to grow beards for two weeks at a time). The Navy cannot now, as a litigation position, claim a sudden compelling interest in *entirely* banning beards for safety reasons without highly persuasive evidence. *Geller v. Sec'y of Def.*, 423 F. Supp. 16, 18 (D.D.C. 1976) (rejecting newly alleged governmental interest where Air Force chaplain had been "permitted to wear a beard without criticism, adverse action or ill effects for seven years"). Such a claim is, again, undermined by the fact that the TRO-inspired dispatch itself continues to offer both medical and religious exemptions. Opp. Ex. K at 2 ¶ 3. By leaving "appreciable damage to [the] supposedly vital interest unprohibited," the Navy "cannot be regarded as protecting an interest of the highest order." *Lukumi*, 508 U.S. at 547 (cleaned up).

d. The Scientific Data

The Government leans heavily on Navy reviews conducted in 2016 and 2018. Opp.14. The first purports to have been "a comprehensive review of the laws and studies impacting current naval and federal respiratory protection regulations." Opp. Ex. J at 1. "Based on the available research," it concluded that "deviations from the current prescribed facial hair grooming standards represent significant increased risk to the individual." Opp. Ex. J at 1. The second, from 2018, purports to have been a follow-up review of whether the original 13 studies reviewed in 2016, plus seven others, were still reliable. Opp.15 & Ex. I ¶ 4. As part of this review, the Navy also reached out to the National Institute for Occupational Safety and Health (NIOSH) and the Occupational Safety and Health Administration (OSHA), as well as to "major manufacturers of respirators." *Id*. ¶ 2. From these efforts, the Navy concluded that "the guidance prohibiting facial hair is still valid." *Id*. ¶ 1. But again, looking through the lens of strict scrutiny as required, the Navy's thirty-foot survey of the research has myriad shortcomings.

First, fresh analysis by an Air Force team in 2021 confirms that, in fact, "[t]here are conflicting published reports from the civilian sector with regard to the impact of facial hair on [respiratory mask] fit testing." Lt. Col. Simon Ritchie, et al., *Shaving Waivers in the United States Air Force and Their Impact on Promotions of Black/African-American Members*, 00 Military Medicine 1, 4 (2021); *see also* Evan Floyd et al., *Influence of Facial Hair Length Coarseness, and Areal Density on Seal Leakage of a Tight-fitting Half-face Respirator*, 15 J. Occupational & Env't Hygiene 334, 339 (concluding that even with half-face, negative pressure masks, "adequate fit factor scores" can be reached "with substantial facial hair in the face seal area; thus, the military's "policy of 'no facial hair' might be reasonably relaxed to allow acceptable facial hair").

Moreover, while the Navy's reviews claimed to identify a lower quality of seal with bearded faces, it has never quantified the alleged degradation. This failing is particularly significant with respect to the positive-pressure masks used by Sailors like OS2 Shoyeb, which maintain an internal air pressure that "exceeds the ambient air pressure outside the respirator," 29 C.F.R. 1910.134(b), thereby preventing the wearer from inhaling impure particulates. Indeed, the Navy has never refuted Plaintiffs' assertions that "[t]his process ensures [that] the wearer continues to breathe clean, tank-supplied oxygen." Opp. Ex. E at 5; Opp. Ex. F at 3. And the authors of the recent Air Force study concluded there are no studies "evaluating facial hair impact on military gas mask fit" specifically. Ritchie at 4. Thus, it is reasonable to anticipate that any degradation for this particular type of mask would vary significantly from degradation identified in studies with masks that do not use positive-pressure protection. To this point, the NIOSH report that the Navy relied on in its 2018 review, *see* Opp. Ex. H ¶ 5 & 10 of 18, suggests that the only beard-related risk that NIOSH associates with positive pressure masks is that they may "suffer from reduced service time along with wasting breathing air during use." *Id*. at 12 of 18. The risk that an imperfect fit might cause some air to leak *out* of the mask, and thereby shorten the amount of time a Sailor might have before changing air tanks, is much different than the risk of an imperfect fit causing air to leak *in* to a mask.[10] The fact that fit-testing is required to be done "in the negative pressure mode, regardless

[10] The absence of testing for military-specific masks is especially troublesome, because *Pseudofolliculitis Barbae* "occurs mainly in African-American/black males." *Pseudofolliculitis of the Beard and Acne Keloidalis Nuchae*, Technical Bulletin, Department of the Army 5, 14 (Dec. 10, 2014), https://perma.cc/BJJ5-R46F. The 2021 Air Force study found that, while "not necessarily … racially biased," the Air Force's promotion system *is* "biased against the presence of facial hair which will likely always affect the promotions of Blacks/African-Americans disproportionately because of the relatively higher need for shaving waivers in this population." Lt. Col. Simon Ritchie, et al., *Shaving Waivers in the United States Air Force and Their Impact on Promotions of Black/African-American Members*, 00 Military Medicine 6 (2021). Similarly, beyond religious minorities, the Navy's superficial reliance on imprecise and outdated data to limit

of the mode of operation (negative or positive pressure) that is used for respiratory protection," 29 C.F.R. § 1910.134 (f)(8), further calls into question whether existing literature captures the high level of protection afforded by the Navy's positive-pressure masks in practice.

This perhaps explains why the Navy has conceded that "the probability of a negative consequence from an ineffective seal is relatively low." Opp. Ex. G at 13 of 20. And it also explains why the Navy has taken no steps to ameliorate other, nearly identical risks. The Navy's 2016 and 2018 safety reviews, for example, conclude that shaving bumps, "stubble," "very short shadow beards," and unique "facial characteristics," which could include unusual shape or scarring, all present the same risks as facial hair. Opp. Ex. J at 3.c; *Id*. at 6, ¶¶ 4, 6; *see also* Opp. Ex. C at 1, ¶ 4 (noting that razor bumps can also prevent "establishing a proper seal"). Thus, for Sailors with *Pseudofollicilitis Barbae*, whether they shave or not, the risk of an imperfect fit is the same. Yet the Navy has never acted to remove the risk of these potential hindrances to a perfect seal. Instead, it outright ignores OSHA guidance that masks should be individually fit-tested to address these concerns, 29 C.F.R. § 1910.134(c) ("employer shall establish … [f]it testing procedures for tight-fitting respirators"), instead leaving Sailors to don "whichever SCBAS masks are in the repair locker and are available at that time," Ex. F at 21 of 43. The Army, in contrast, has its own "Hard-to-Fit" program to address these situations, *Singh v. McHugh*, 185 F. Supp. 3d 201, 231 n.23 (D.D.C. 2016), and broadly grants waivers to soldiers in need of a religious accommodation, Army Directive 2018-19 § 5.b.2. *See also* 29 C.F.R. § 1910.134(d) ("The employer shall select

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opportunities for individuals who need shaving waivers has systemic adverse implications for racial minorities as well. *See also* Dkt 1 [Complaint] ¶ 10 (noting that Plaintiff Braggs "has regularly been pressured to undergo electrolysis or laser hair removal"); Ritchie at 4 (noting that many service members are hesitant to use "laser hair removal and chemical depilatories" because they are "relatively uncomfortable," "could permanently alter their ability to grow facial hair," are "not universally available at all military treatment facilities" and "often cause" an "irritant reaction … that can be too severe for regular use").

respirators from a sufficient number of respirator models and sizes so that the respirator is acceptable to, and correctly fits, the user.")

The Navy's own admission that "the probability of a negative consequence from an ineffective seal is relatively low," its superficial reliance on a review of mask studies generally, rather than studies focused on the positive-pressure masks at issue, and its disregard of other comparable hindrances to a perfect mask seal all lead to one conclusion: the Navy does not actually believe that, or act as if, beards pose a significant threat to the safety of its fleets or Sailors. If it did, it would not continue to expressly authorize medical waivers or leave itself the discretion to grant religious waivers. The Navy cannot meet its heavy burden on "mere say-so." *Holt v. Hobbs*, 574 U.S. 352, 369 (2015). And here, under the "more focused" inquiry that strict scrutiny requires, *O Centro*, 5465 U.S. at 430, the Government's scientific data does not pass the test.[11]

e. Empirical Evidence

Finally, in an effort to carry the day, the Government ultimately relies heavily on the potentially severe consequences that could result *if* something were to go wrong with a bearded Sailor donning a respiratory mask. For example, while admitting that "the probability of a negative consequence from an ineffective seal is relatively low," it warns that "the severity of that consequence may be high—to include injury." Opp. Ex. G at 13 of 20. And it warns about "life threatening situations[s]" that could "impede the safety of … crew members" should Shoyeb's accommodation be granted, a fire break out, and his mask not function as anticipated. Opp.17. But in the course of their normal

[11] The Navy's claim that mask manufacturers support their policy, Opp.15, 19, should also be taken with a grain of salt. It appears that, in the early 2000s, at least some manufacturers promoted positive-pressure masks as safe to use with beards, but NIOSH wrote them letters threatening to remove its stamp of approval from their products if they did not stop. Opp. Ex. H at 9 of 18. The Government's reliance on manufacturer statements to support its policy is circular if the Government is telling the manufacturers what to say.

duties, Sailors engage in all kinds of activities—handling firearms, landing jets on a carrier, submerging in a submarine, maintaining nuclear reactors, just to name a few—where there is risk of extremely severe consequences should something go wrong, even though the probability is exceedingly low. But the Government does not insist in entirely eradicating those risks—nor could it and still carry out its mission. Some risk is inevitable. The Government's burden here is to show that the risk is *compelling*. Just showing that heightened measures could reduce the level of risk is not enough. "[T]he government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 803, n.9 (2011).

And, here, the Navy has extensive, experiential evidence to confirm that there is no compelling risk in granting medical or religious accommodations to Sailors who sincerely need them. Despite the strongest history with beards of any military branch, the Navy has not identified a single incident ever when a beard waiver has contributed to a ship fire or other disaster. Indeed, in a recent report regarding the Navy's readiness challenges, the Government Accountability Office focused on "limited maintenance capacity at private and public shipyards as the primary challenge for recovering ship and submarine readiness."[12] In the Navy's detailed, multi-year studies of the handful of ship fires that have occurred in recent years,[13] contributing factors

[12] U.S. Gov't Accountability Office, GAO-21-279, Department of Defense Domain Readiness Varied from Fiscal Year 2017 through Fiscal Year 2019, April 2021, https://perma.cc/3X8B-N9E7.

[13] Of the four ship fires the Government cites, three occurred while in port, not during training or at sea. Several "survivability principles" were implemented after each fire, none of which involved facial hair regulations. *See, e.g.*, *USS Conyngham*, Naval Sea Systems Command, https://web.archive.org/web/20100116120939/http:/www.dcfp.navy.mil/mc/museum/Conyngham/Conyngham1.htm (describing response to fire aboard USS Conyngham); *see also* Megan Eckstein, *Fire Safety Discussions After Bonhomme Richard Fire Centered on Drills, Fire Suppression Systems*, USNI News (Nov. 13, 2020).

included maintenance delays, morale issues leading to arson, understaffed crews, outdated equipment, and failure to perform safety checks. Opp. Ex. M (identifying 22 problems contributing to USS Whidbey Island fire in 2010); Sean Robertson, *U.S. Third Fleet Statement on the USS Bonhomme Richard Criminal Investigation*, America's Navy, July 29, 2021 (charging crew member suspected of arson). But not beards. Considering that medical beards and commander discretion to issue no-shave chits have existed in the Navy for decades with no appreciable injury to Sailor well-being, "it is difficult to see that an outright ban on [a longstanding practice] is necessary to serve a compelling state interest." *Mitchell Cnty. v. Zimmerman*, 810 N.W.2d 1, 17 (Iowa 2012).

2. Even if the Government had a compelling interest, forcing OS2 Shoyeb to violate his beliefs would not be the least restrictive means.

In its reply brief, the Government doubles down on arguing that every "crew member [must] be clean shaven in order to participate in damage control," and that denying OS2 Shoyeb an accommodation is thus "the least restrictive mean[s]." Opp.18. But Plaintiffs have already demonstrated why these arguments are defective, most tellingly because the Navy continues to grant Sailors beard waivers for medical reasons, even though medical beards pose the exact same risks as religious beards. *Supra* Part I.B.1. The "very existence" of these "government-sanctioned exception[s]" proves that "other, less-restrictive alternatives [in fact] exist." *McHugh*, 185 F. Supp. 3d at 231. Namely, the Government can—and must—grant religious waivers just like it grants medical waivers. *Tandon*, 141 S. Ct. at 1296-97 ("[P]recautions that suffice for other activities suffice for religious exercise too[.]").

The Government also ignores Plaintiffs' argument that—even if positive-pressure masks were not sufficient—other masks exist that are capable of providing full protection to bearded individuals. PI Mem.21. The Government's own evidence confirms this. For example, the 2018

NIOSH assessment that the Navy relies on identifies at least three types of masks that "may … be selected and used by workers with facial hair." Opp. Ex. H at 12 of 18. And this Court in *McHugh* itself adopted the Army's evidence that "'there are some protective masks that are capable of providing protection to individuals who wear beards.'" 185 F. Supp. 3d at 231 n.23. Indeed, the Army at times has "created special masks for individuals, and in two cases, it obtained special masks from the United Kingdom." *Id*. Since the Government "can achieve," and has achieved, "its interests in a manner that does not burden religion, it must do so" here as well. *Fulton*, 141 S. Ct. at 1881.

Moreover, both the Army and the Air Force have now adopted policies that allow soldiers and airmen with religious needs to maintain their beards in almost all circumstances. *See* Army Directive 2018-19, https://perma.cc/RYT6-NLK9 (broadly allowing religious beards except for soldiers in certain CBRN-related positions or when there is an actual "threat of exposure to toxic CBRN agents"); Air Force Instruction 36-2903, at ¶ 3.1.2.3, https://perma.cc/B632-7TQZ (allowing beards "as authorized pursuant to a request for a religious accommodation"). The Government responds with an *ipse dixit*, stating that "the U.S. Navy operating environment is different from that of the U.S. Army" and that "[t]he same comments … apply equally to any U.S. Air Force policy." Opp.20. In the Government's telling, different military branches are different, and the details do not require engagement.

But it is the Government's burden, not OS2 Shoyeb's, to "make [a] showing" that the "policies followed [in] other well-run" military branches would not be less restrictive means. *Holt*, 574 U.S. at 368-69 (citation omitted). So the Government holds the burden not only to explain what (remote) risks Shoyeb's beard might present in his actual duties; it must also show the same risks—whether fume inhalation in an emergency or something else—are not present to the same

degree in any Army or Air Force context in which those branches would allow an accommodation. "Otherwise, precautions that suffice for other activities" in other branches "suffice for" Navy "religious exercise too." *Tandon*, 141 S. Ct. at 1297.[14] Here, the Government's failure to distinguish those branches' risk environments is fatal.

Further, while the Government offers a perfunctory response regarding other U.S. military branches, it offers no response at all to Shoyeb's evidence regarding the Royal Navy. Again, its exhibits only underscore the more inclusive approaches of this comparator navy, from which the U.S. Navy took guidance. *See* Opp. Ex. H at 8 ¶ 4.[15]

Nor does the Government address the analogous civilian contexts discussed in the opening brief. For all its emphasis on ship fires, the Government ignores the fact that courts and cities have granted both religious and medical exemptions to civilian firefighters, allowing them to wear beards in many instances. *Potter*, 558 F.3d at 547 (ruling in favor of Muslim firefighters because D.C. failed to contradict their evidence that bearded firefighters could safely wear positive-pressure masks); *Deveaux v. City of Philadelphia*, 75 Pa. D. & C.4th 315 (Pa. Ct. Com. Pl. July 14, 2005) (affirming preliminary injunction protecting beard for Muslim firefighter where study failed to show significant difference between bearded and clean-shaven firefighters using positive pressure masks); *Sadruddin v. City of Newark*, 34 F.Supp.2d 923 (D.N.J. 1999) (upholding claim

[14] The Government also does not address whether the Navy has used every precaution used by these other branches, such as the Army's efforts to address mask-fit problems, as discussed in the opening brief and *McHugh*. PI Mem.20-21; *McHugh*, 185 F. Supp. 3d at 231 n.23 (discussing "'Hard-to-Fit'" program for those unable to "'achieve a satisfactory fit,'" with special mask design and importation).

[15] *See also* "Policy and Appearance," BRd2 – The Queen's Regulations for the Royal Navy, Book 1 Vol. 6 Ch. 38, ¶ 3818 (permitting beards in excess of length limitations for religious reasons; allowing order to "modif[y]" beards where safety dictates, but "[o]ther occasions, such as Operational Sea Training and/or similar exercises, in which the CBRN threat is LOW will not warrant the requirement to shave"; allowing commanders to "consider not deploying [an] individual into theatre" who refuses to modify facial hair).

of Muslim firefighter fired for refusing to shave his beard); *Kennedy v. District of Columbia*, 654 A.2d 847, 855, n. 8 (D.C. 1994) (noting in 1994 "technological advancements" with positive-pressure masks used in firefighting that "are designed to accommodate short beards by preventing any inward leakage of harmful contaminants"); *Lindquist v. City of Coral Gables*, 323 F. Supp. 1161, 1163 (reinstating firefighter and rejecting fire department's argument that sideburns "prevent a satisfactory seal on gas masks").

II. All remaining factors favor a preliminary injunction.

With a likelihood of success on the merits shown, the remaining preliminary injunction analysis is simple. OS2 Shoyeb has shown irreparable injury by showing an injury to religious practice secured by RFRA and the First Amendment, and—once such injuries are shown—the balance of harms and public interest automatically weigh in favor of relief.

On irreparable injury, the Government concedes that, where "a likelihood of success [is shown] on the merits of a RFRA and constitutional claim, the individual also establishes irreparable harm." Opp.23. And it agrees that is so where the injury occurs "for even minimal periods of time." Opp.24 (quoting *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009)).

With the general rule clear, the Government tries to create an exception. It asserts that OS2 Shoyeb was unduly delayed in bringing his claim, and that delay can count against finding irreparable injury to religious rights. This syllogism is mistaken in both its factual and legal premise. As an initial matter, most of the delay the Government cites is due to OS2 Shoyeb's compliance with the Government's own policies—initial compliance with the shave order when uncounseled and unaware of his rights, and diligent pursuit of the internal Navy appeal system. PI Mem.7-8. And the brief time between the beginning of the case and the recent motion is

reasonable, given Shoyeb's limited access to pro bono counsel while stationed, and actively performing military service, on the other side of the world.

But more to the point, delay cannot make truly irreparable harm suddenly reparable. The Government's cited cases stand only for the proposition that delay may underscore or support an inference that an asserted injury is not irreparable. For example, in *Mylan*, the delay between two and eight months "[was] not dispositive," but only "further militate[d] against a finding of irreparable harm' where the only asserted injury was "a mere .4 percent of Mylan's total annual sales" and "[s]uch a minor loss does not constitute irreparable harm." *Mylan Pharms., Inc. v. Shalala*, 81 F. Supp. 2d 30, 43 (D.D.C. 2000). In no case was otherwise-irreparable harm found reparable merely on account of delay. The only case the Government cites relating to the First Amendment was a putative Establishment Clause case against prayer at a presidential inauguration—and there, the district court found the asserted injury was "somewhat tenuous, [and] not concrete," with the plaintiff having "the means at hand to avoid that abstract injury." *Newdow v. Bush*, 355 F. Supp. 2d 265, 292 (D.D.C. 2005) (also finding an injunction would grant "ultimate relief" not later reversible). By contrast, where a "First Amendment and RFRA … injur[y]" is likely, "irreparable" harm has been shown, and no inference from delay is required. *Roman Catholic Archbishop of Wash. v. Bowser*, No. 20-03625 (TNM), 2021 WL 1146399, at *18 (D.D.C. Mar. 25, 2021).

For assessing the balance of harms and public interest, the Government agrees that the factors "merge when the government is the opposing party," Opp.25 (citation omitted). It does not dispute "the obvious: enforcement of an unconstitutional [regulation] is always contrary to the public interest." *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013). Nor does it contest that "safeguarding religious freedoms protected by the Constitution and by statutes enacted by

Congress" is a "vital public interest." *Roman Catholic Archbishop of Wash.*, 2021 WL1146399, at *19. Nor does it dispute that the "public has a significant interest in having a diverse military" including "religious minorities." *Singh v. Carter*, 168 F. Supp. 3d 216, 235 (D.D.C. 2016); *see* PI Mem.30 (discussing Navy's commitment to same).

The Government's primary rebuttal on these factors is to again dispute (1) the likelihood of success; (2) the possibility of harm to the military; and (3) and the irreparable nature of the injury to Shoyeb. But as explained above, Shoyeb has shown a likelihood of prevailing precisely because accommodating his religious practice would not actually require "interfer[ing] with the safe operation of a U.S. Navy warship at sea," Opp.25, and Shoyeb's prior and current obedience to Navy regulations, Opp.26, does not excuse the irreparable harm.

The Government's two alternative arguments on the public interest are readily rejected, as they were in *Singh v. Carter*. First, the Government suggests that the public interest cuts against any "judicial intrusion in military affairs," which are "constitutionally reserved to the executive and legislative branches of government." Opp.26. But both branches made the decision to pass a law—RFRA—that requires the military to accommodate religious practice wherever possible. And the Navy has incorporated the standard into its own regulations. Navy Instruction 1730.11A. This Court in *Carter* noted that "Congress nowhere inserted any exception for the U.S. Armed Forces from RFRA's application," and that without "an impact on the national defense or the Army's ability to protect our nation's security," the public interest is in favor of "vindicat[ing] … constitutionally and statutorily-protected religious rights." *Carter*, 168 F. Supp. 3d at 226, 235-36 (noting that Congress has conditioned remedies in other statutes addressing religious rights, like RLUIPA). So the analogy to cases where Congress provided no remedy, or where Congress specifically sought to *foreclose* the rights alleged, fail. Opp.25 (citing *Orloff v. Willoughby*, 345

U.S. 83, 95 (1953) (habeas claim for discharge), and *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996) (challenge to Don't Ask, Don't Tell policy embedded in statute)). And in any event, it is not clear the Government would truly assert this special military exemption if it agreed on the merits of the constitutional claims. *See* Opp.26 (Government would "agree" that "the public's interest is aligned with granting [Shoyeb] mandatory injunctive relief" if court found Navy was "engage[d] in religious discrimination," notwithstanding assertions about special rules for military).

Second, the Government asserts the harm analysis "should not focus narrowly on this single case," but instead on the more general interest "in maintaining an effective military." Opp.26, 27. Again, *Carter* rejected this argument, stating that the proper consideration was as to the government's interest in applying a policy to "a single officer currently based in Virginia." *Carter*, 168 F. Supp. 3d at 235. This makes sense, as both RFRA and First Amendment prescribe a judicial analysis limited to the "application of the [challenged] burden to the person." 42 U.S.C. § 2000bb-1(b); *see Fulton*, 141 S. Ct. at 1881 (2021) (Free Exercise Clause, like RFRA, asks "not whether the [government] has a compelling interest in enforcing its [challenged] policies generally, but whether it has such an interest in denying an exception to [the specific plaintiff]"). Viewing cases "in the aggregate" may have been appropriate in cases like *Irby*, where a court considered a dispute over the standard ROTC contract that affected whether a soldier could evade active duty. *Irby v. U.S. Dep't of Army*, 245 F. Supp. 2d 792, 797-98 (E.D. Va. 2003) (also noting special concerns "in light of current events," *i.e.*, imminent war in Iraq). But RFRA, and current Free Exercise doctrine, displaces any presumption of aggregate analysis by mandating a "to the person" standard not applicable to other contexts.[16] *McHugh*, 185 F. Supp. 3d at 223 (citation omitted). As

[16] That is so even assuming the Government's many citations to cases affirming prohibitions on same-sex behavior in the military are still good law today. *See, e.g.*, *Thomasson*, 80 F.3d 915; *Rich v. Sec'y of Army*, 735 F.2d 1220 (10th Cir. 1984); *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997).

the Supreme Court has stated, RFRA specifically rejects the otherwise-typical "bureaucrat[ic]" principle that "[i]f I make an exception for you, I'll have to make one for everybody, so no exceptions." *O Centro*, 546 U.S. at 436. This Court need go no further than the reasoning in *Singh v. Carter*—only strengthened since 2016—to find the remaining injunction factors all favor granting at least preliminary relief allowing Shoyeb to practice his faith.[17]

CONCLUSION

For all the foregoing reasons, OS2 Shoyeb respectfully urges the Court to grant his application for a preliminary injunction.

Respectfully submitted this 13th day of August, 2021.

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[17] The Government does not dispute that if an injunction is granted, security should not be required. PI Mem.30.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 13, 2021, 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.

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