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. 21-1047

STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF EDMUND DI LISCIA'S APPLICATION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiff Edmund Di Liscia currently serves in the United States Navy as an Electrician's Mate ("EMN3"). He is a devout Chassidic Jew who sincerely believes that he must maintain a beard to comply with his religious obligations. Since December 2018, he has been granted a temporary religious accommodation allowing him to wear his beard. But on April 14, 2021, his commanding officer ordered him that he must allow himself to be shaved by a shipmate at approximately 4:30 PM ET today. As memorialized in the attached Record of Counseling provided to EMN3 Di Liscia this morning shortly before 5 AM ET, failure to allow himself to be shaved will be in violation of a "direct order" and subject him to substantial punishment. As the Record of Counseling shows, the Navy has identified no exigent circumstances requiring EMN3 Di Liscia to be immediately shaved, but rather is requiring it now purely as a procedural matter.

The Navy's order contradicts its own regulations, the Religious Freedom Restoration Act (RFRA), and the United States Constitution. Indeed, this district has previously granted similar emergency relief to soldiers in the Army. *Singh v. Carter*, 168 F. Supp. 3d 216, 229 (D.D.C. 2016) (issuing TRO against discriminatory testing of a Sikh soldier concerning his religious beard). EMN3 Di Liscia seeks a temporary restraining order and a preliminary injunction preventing the Navy from forcing him to shave his existing beard, worn in compliance with his religious beliefs and his previous accommodation.

The case is particularly straightforward under RFRA. As a Chassidic Jew, EMN3 Di Liscia sincerely believes that he should wear a beard as an expression of obedience and fidelity to God. The Navy's order that he shave or face disciplinary action burdens his religious exercise. Thus, under the strict scrutiny framework that RFRA applies here, the Navy must show both a compelling government interest as applied to EMN3 Di Liscia in these circumstances and that its order is the least restrictive means of furthering that interest. It can show neither.

The Navy has no compelling interest in immediately requiring EMN3 Di Liscia to shave his beard. The accommodation granted to EMN3 Di Liscia has not harmed his performance of his duties in any way, and he has successfully passed routine gas-mask-seal-integrity tests while wearing his beard. The Navy has also granted religious exemptions to other Sailors, such as MC3 Leandros Katsareas, who was granted an accommodation to wear a 4-inch beard consistent with his Muslim faith. Further, as a matter of morale-improvement, the Sailors on EMN3 Di Liscia's ship have been granted a broad no-shave chit permitting them to shave just once every two weeks. And, more generally, the Navy has long exempted thousands of Sailors with medical beard exemptions. Moreover, the Navy is an outlier among the services, with both the Army and the Air Force allowing religious accommodations for beards. Finally, in the exigent circumstance that there was a specific, concrete, and imminent threat to life or limb, EMN3 Di Liscia's faith would permit him to shave. In the absence of such a threat, and in the presence of so many exemptions to the shaving requirement, the Navy's interest here is not compelling.

These exemptions also confirm that the Navy's order is not the least restrictive means of furthering any compelling government interest. If the Navy can safely fight fires while Sailors hold morale and medical beard exemptions, why can it not accomplish this goal with EMN3 Di Liscia, especially given that his beard has posed no problem to date and he is willing to shave it in truly exigent circumstances? Even if his beard posed a safety risk, which it does not, the Navy's own regulations direct that EMN3 Di Liscia may be assigned temporarily to some other duty for "protect[ion] from circumstances that are incompatible with [his] religious accommodation." Bureau of Navy Personnel Instruction 1730.11A ¶ 5(g)(2) (as updated March 16, 2020). Commanders may only suspend religious accommodations "if necessary due to an imminent threat to health or safety," *id.* In other words, the Navy itself must recognize that its order is not the least

restrictive way to further any interest. Finally, that EMN3 Di Liscia could maintain his existing beard in other branches of the U.S. Armed Forces (or in militaries around the world) demonstrates that less restrictive alternatives are available.

Because the Navy cannot satisfy the extraordinarily high standard of strict scrutiny, EMN3 Di Liscia is likely to prevail on the merits of his RFRA, Free Exercise, and Equal Protection claims regarding his existing beard. The other injunction factors weigh in his favor, too. He will suffer irreparable harm absent relief: either a blatant violation of his religious beliefs or harsh discipline from the Navy. As discussed, the Navy's safety interests are not compromised by EMN3 Di Liscia's beard. And relief would be in the public's interest, as it would affirm the core rights of religious exercise and expression guaranteed by federal law. The Court should issue a temporary restraining order and a preliminary injunction enjoining the Navy from requiring EMN3 Di Liscia to shave his existing beard during the pendency of this action.

BACKGROUND

EMN3 Di Liscia's Jewish Beliefs

EMN3 Di Liscia is a devout Chassidic Jew and has practiced his religion both before and during his enlistment in the Navy. Declaration of Edmund Di Liscia (hereinafter "Decl.") ¶ 3. Within this form of Orthodox Judaism, it is a religious requirement and an expression of obedience and fidelity to God for men not to cut the side and edges of their hair. *Id.* (quoting *Leviticus* 19:27). The growth of facial hair also promotes physical and spiritual modesty and is a sign of spiritual maturity in his faith community. *Id.* This practice is ancient, going back thousands of years. *Id.*; *see also* Compl. ¶¶ 29-34 (describing Orthodox Jewish beliefs regarding wearing beards). Several other Orthodox Jewish men serving in the U.S. Armed Forces have obtained religious accommodations permitting them to wear their beards. *See, e.g.*, Anthony Hooker, *Rare Army*

Rabbi Serves Soldiers, U.S. Army (July 13, 2010), https://perma.cc/6GC9-AES3 (Chaplain (Col.) Jacob Goldstein, who served with a beard for 38 years in the U.S. Army before retiring in 2015); Susan A. Merkner, *Holocaust Day of Remembrance Carries Message of Resiliency*, U.S. Army (Apr. 12, 2018), https://perma.cc/272J-QFX4 (Chaplain (Capt.) Menachem Stern, U.S. Army); Jeannie Yandel & Hannah Burn, *Seattle Rabbi Becomes First Bearded Air Force Chaplain*, KUOW (Sept. 26, 2014), https://perma.cc/7VMT-GW2P (Chaplain (Capt.) Eli Estrin, U.S. Air Force). Like them, EMN3 Di Liscia sincerely believes that he is required by his faith to observe this practice. Decl. ¶ 3.

Relevant U.S. Navy Regulations

Both the Department of Defense and the U.S. Navy have adopted regulations regarding religious accommodation requests. Binding Department of Defense regulations state that the Department "will normally accommodate practices of a Service member based on sincerely held religious belief." These regulations explicitly adopt the language and legal standards of RFRA: if a military "policy, practice or duty substantially burdens a Service member's exercise of religion, accommodation can only be denied if" the policy is "in furtherance of a compelling governmental interest" and is "the least restrictive means of furthering that compelling governmental interest." Dep't of Defense Instruction 1300.17 ¶ 1.2(e) (as updated September 1, 2020) (hereinafter "Defense Instr.") (Baxter Decl. Ex. A), https://perma.cc/FML5-VQU6. Navy regulations have long required that commanding officers "use all proper means to foster high morale, and to develop and strengthen the moral and spiritual well-being of the personnel under his or her command" and "provide maximum opportunity for the free exercise of religion by members of the naval service." U.S. Navy Regulations, Article 0820 (September 14, 1990). Likewise, a recently-updated Navy Instruction explains that "[r]eligious liberty is more than freedom to worship" and "includes the

freedom to integrate one's religion into every aspect of one's life." Bureau of Navy Personnel Instruction 1730.11A ¶ 3 (as updated March 16, 2020) (hereinafter "Navy Instr.") (Baxter Decl. Ex. B), https://perma.cc/ZT2Q-AGKR. The Instruction reiterates that "commanders will provide maximum opportunity for the free exercise of religion by members of the naval service." *Id.* ¶ 5. And the Instruction specifically contemplates the type of accommodation EMN3 Di Liscia has requested: "When a Sailor is authorized to wear a beard of greater than 2 inches in length, the beard must be rolled, tied and/or otherwise groomed to achieve a length not to exceed 2 inches when measured from the bottom of the chin." *Id.* ¶ 5(d)(4)(c).

After a religious accommodation is granted, "[a] commander may require immediate compliance with suspension of [the] religious accommodation only if necessary due to an imminent threat to health or safety." *Id.* ¶ 5(g)(2). Otherwise, "the Sailor or candidate must be given five business days to submit an appeal" of the suspension. *Id.* And "[w]hen the conditions that required the suspension are no longer present, the Sailor may resume the religious practice per the original waiver." *Id.* ¶ 5(g)(3).

EMN3 Di Liscia's Efforts to Obtain an Accommodation and the Order to Shave

As an observant Jew, EMN3 Di Liscia came to boot camp with a full beard. Decl. ¶ 4. He immediately sought to speak with a chaplain to obtain an accommodation for his beard. *Id.* But he was told that if he pursued speaking with a chaplain about the matter, he would be immediately kicked out of the Navy. *Id.* Out of fear, he shaved. *Id.*

EMN3 Di Liscia regretted that decision and, about five months later, sought and received a no-shave chit, a religious accommodation allowing him to temporarily keep his beard. *Id.* EMN3 Di Liscia obtained the no-shave chit around December 2018, while he was assigned to shore

command. *Id.* The chit transferred over to sea duty with him for his current deployment, per Navy Instr. 1730.11. He has not shaved since being granted the no-shave chit.

EMN3 Di Liscia sought a durable religious accommodation on September 8, 2020, that would provide more long-term protection than his current no-shave chit. *Id.* ¶ 8. But on December 21, 2020, his religious accommodation request was denied by the Deputy Chief of Naval Operations (DCNO) on the stated grounds of safety concerns and possible interference with the effective performance of his duties, particularly in the event that he might have to wear a sealed gas mask or similar equipment. *Id.* ¶ 9; *see also* Baxter Decl. Ex. D (DCNO Denial Letter). Notably, though, the DCNO's letter denying his accommodation acknowledged that "the probability of a negative consequence from an ineffective seal is relatively low." Decl. ¶ 17.

In late March and early April 2021, with the assistance of his ship's chaplain, EMN3 Di Liscia filed an appeal of the DCNO's decision to the Chief of Naval Operations. *Id.* ¶ 10. The appeal was filed pursuant to DoDI 1300.17 and Navy Instr. 1730.11A. *Id.*

But EMN3 Di Liscia's commander now insists that the no-shave chit he received as a religious accommodation is no longer valid. *Id.* ¶ 6. On April 14, 2021, his commander informed him that he must shave on before reporting to duty on the morning April 16, 2021, and that he will be required to shave regularly thereafter. *Id.* ¶ 7. If EMN3 Di Liscia does not shave, he will face disciplinary action, which would permanently damage his career in the Navy and may subject him to other severe personal penalties. *Id.*

At approximately 5 AM ET today, EMN3 Di Liscia met with another commanding officer, who issued him a Record of Counseling memorializing that he has received a direct order to shave and that he will be in violation of the order and face punishment if he does not shave "prior to quarters on 16APR2021," which is around 4:30 ET, April 15, 2021. *See* Exhibit E at 1 (Record of

Counseling). The Record of Counseling does not identify any exigent circumstances requiring the immediate abrogation of EMN3 Di Liscia's existing accommodation. Rather, it expressly indicates that the order is purely procedural. That is, the Navy takes the position that the DCNO's denial letter from December 2020 concerning EMN3 Di Liscia's request for a *permanent* accommodation also voided his current *temporary* accommodation, even though the DCNO's denial concerned a different accommodation request *and* is currently on appeal. *Id.* at 2. EMN3 is currently aboard the USS Theodore Roosevelt in the South China Sea, and counsel's understanding is that he must shave by approximately 4:30 PM ET.

The Navy has not attempted to justify this immediate shave order. EMN3 Di Liscia's job requires him to assist with maintaining electrical equipment within the ship's reactor plant. *Id.* ¶ 16. He also stands watch on control stations and takes intakes and logs. *Id.* He does not perform work where it is common or likely that the use of face masks (including gas masks, self-contained breathing apparatus face masks and respirators) could be affected by a beard. *Id.* In his entire service as an EMN3, he has never had to don a gas mask as part of his usual duties. *Id.* ¶ 18.

Like every EMN, Di Liscia is trained to fight fires. *Id.* ¶ 17. While wearing a beard, he has undergone and passed routine gas-mask-seal-integrity tests, and his beard did not interfere with obtaining a satisfactory seal. *Id.* Moreover, neither he nor fellow Sailors with him were required to undergo a full-chamber test because, as indicated by the first-class petty officer overseeing the seal-integrity test, the Damage Control department was not concerned about their ability to safely don a mask in the event of damage control. *Id.* ¶ 17.

Sailors with duties similar to his have received religious-beard accommodations. *Id.* ¶ 19. For example, the Navy granted MC3 Leandros Katsareas, a practicing Muslim, a four-inch beard accommodation on sea duty while temporarily serving in the Auxiliary Security Force, because

"the nature of [his] duties makes it highly unlikely that [he] will be required to don personal protective equipment." *Id.* ¶ 19.

Other branches of the U.S. military currently accommodate service members with religious beards. *Id.* ¶ 20. As of 2017, the U.S. Army allows religious beards except when there is actual risk of CBRN exposure. *See* Army Directives 2017-03; 2016-34; *see also* Army Directive 2018-19 ¶ 5(b)(1)-(2) (requiring accommodated soldiers to shave for actual "threat of exposure to toxic CBRN agents," but not for "training or tactical simulations designed to ensure that the Soldier is fully familiar with use of the protective mask"). The Air Force updated its policy in February 2020 to reflect its allowance of religious beards, and it has recently approved accommodations for Muslim and Sikh service members, among others. *Id.* ¶ 20; *see also* Secretary of the Air Force, Air Force Instruction 36-2903, https://perma.cc/ME57-FDM7; *see also* Oriana Pawlyk, *Air Force Special Operations Approves First Beard, Turban Waiver for Sikh Airman*, Military.com (July 30, 2020), https://perma.cc/4UZZ-TX3G.

Further, since being at sea, EMN3 Di Liscia's fellow Sailors aboard the USS Theodore Roosevelt have received MWR (Morale, Welfare, and Recreation) no-shave chits that allow them to shave only once every two weeks. *Id.* ¶ 5. Moreover, even beyond this immediate context, many Sailors have been allowed beards for medical reasons. *Id.* ¶ 14; Bureau of Naval Personnel, Management of Navy Uniformed Personnel Diagnosed with Pseudofolliculitis Barbae, Instruction 1000.22C ¶ 6 (Oct. 8, 2019), https://perma.cc/9ETC-QBJM.

There may be times when a high probability of CBRN warfare could serve as a basis for the Navy requiring all Sailors to be clean-shaven. In such circumstances, EMN3 Di Liscia would comply and shave until the threat is past, since his faith dictates that the preservation of life is of

paramount importance in situations where there is a specific, concrete, or imminent threat to life or limb. But EMN3 Di Liscia is in no such high-risk situation.

STANDARD FOR GRANTING TEMPORARY AND PRELIMINARY INJUNCTIVE RELIEF

EMN3 Di Liscia is entitled to both temporary and preliminary injunctive relief protecting his existing beard while the Navy considers his request for an additional accommodation and while that request, if denied, is reviewed by the Court. Under Federal Rule of Civil Procedure 65, a plaintiff seeking interim injunctive relief must show (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm if injunctive relief is not granted; (3) that the balance of interest among the parties favors injunctive relief; and (4) that injunctive relief would be in the best interest of the public generally. *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008)). In the past, the D.C. Circuit has taken a "sliding scale" approach in evaluating these factors. *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009). Under that approach, if the party seeking injunctive relief "makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor." *Id.* at 1291-92. And under either approach, all factors weigh overwhelmingly in EMN3 Di Liscia's favor.

"The purpose of a temporary restraining order is to preserve the status quo for a limited period of time until the Court has the opportunity to pass on the merits of the demand for a preliminary injunction." *Barrow v. Graham*, 124 F. Supp. 2d 714, 715-16 (D.D.C. 2000). The four-part injunctive relief standard should apply here.

ARGUMENT

In his applications for temporary restraining order and preliminary injunction, EMN3 Di Liscia raises three of the claims set forth in his verified complaint regarding his ability to retain his existing beard: RFRA, First Amendment Free Exercise, and Fifth Amendment Equal Protection. For the reasons set forth below, EMN3 Di Liscia is likely to succeed on the merits of each of those claims. The Navy cannot show that requiring EMN3 Di Liscia to shave his existing beard is the least restrictive means of furthering any compelling government interest. Because EMN3 Di Liscia is likely to succeed on the merits of his claims and satisfies the other injunctive relief factors as well, preliminary injunctive relief should be granted.

I. EMN3 Di Liscia is likely to succeed on his RFRA claim.

RFRA provides that the "Government shall not substantially burden a person's exercise of religion" unless the Government "demonstrates that application of the burden *to the person*—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a), (b) (emphasis added). The term "government" includes any "branch, department, agency . . . and official . . . of the United States," 42 U.S.C. § 2000bb-2(1), including the Department of Defense, the Navy, and their officers in their official capacities. *United States v. Sterling*, 75 M.J. 407, 410 (C.A.A.F. 2016) (citing "Secretary of the Navy Instr[uction] 1730.8B CH-1, Accommodation of Religious Practices," which applies RFRA to the Navy); *Rigdon v. Perry*, 962 F. Supp. 150 (D.D.C. 1997) (applying RFRA against the Secretary of Defense and the Secretaries of the Army, Navy, and Air Force); *see also* Defense Instr. 1300.17 ¶ 1.2(e)(1) (adopting the RFRA standard for military accommodations); *Singh v. McHugh*, 109 F. Supp. 3d 72, 87 (D.D.C. 2015) (finding that Army's refusal to grant Sikh soldier an "accommodation that would enable him to enroll in ROTC while maintaining his religious practice" of wearing a beard and turban violated RFRA); *Singh v. Carter*,

168 F. Supp. 3d 216, 229 (D.D.C. 2016) (granting TRO to protect Sikh Army soldier from discriminatory testing related to his religious beard and turban, because he showed a likelihood of success under RFRA).

At the preliminary injunction stage, the burdens of proof on a RFRA claim "track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). Thus, it is the plaintiff's burden to show "more likely than not" that his sincere religious exercise has been substantially burdened. *Id*. at 428; *see also Holt v. Hobbs*, 574 U.S. 352, 360 (2015) ("[P]etitioner bore the initial burden of proving that the Department's grooming policy implicates his religious exercise."). The burden then shifts to the Government to show that it has a compelling interest in overriding the religious exercise that cannot be satisfied through less restrictive means. *O Centro*, 546 U.S. at 429. Here, the Navy cannot reasonably dispute that EMN3 Di Liscia religious beliefs are sincere and substantially burdened by the Navy's grooming regulations. And considering the facts that EMN3 Di Liscia has been wearing a beard without any operational problems and that the Navy routinely grants medical and morale exemptions for beards, the Navy cannot show that requiring him to shave his existing beard is the least restrictive means of furthering any compelling government interest.

A. EMN3 Di Liscia is sincerely compelled by his Jewish faith to retain his beard.

EMN3 Di Liscia's sincere desire to observe Jewish religious practice cannot reasonably be questioned. "Though the sincerity inquiry is important, it must be handled with a light touch, or 'judicial shyness.'" *Moussazadeh v. Tex. Dep't of Crim. Just.*, 703 F.3d 781, 792 (5th Cir. 2012) (quoting *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 262 (5th Cir. 2010)). Thus, courts should limit themselves "to 'almost exclusively a credibility assessment' when determining sincerity." *Id*. (citing *Kay v. Bemis*, 500 F.3d 1214, 1219 (10th Cir. 2007)). At the preliminary injunction stage, EMN3 Di Liscia's sworn statements in the complaint are sufficient

to establish his sincerity. And "the wearing of beards" has, in any event, long been "a well established religious tradition among members of the Jewish faith." *Geller v. Sec'y of Def.*, 423 F. Supp. 16, 17 (D.D.C. 1976) (finding that the Air Force's requirement that a Jewish chaplain shave his beard violated the First Amendment); *Holt*, 574 U.S. at 362 (noting further that the Free Exercise Clause is "'not limited to beliefs which are shared by all of the members of a religious sect.'"). Thus, it is likely that EMN3 Di Liscia will prevail in any challenge to the sincerity of his desire to fully observe Jewish religious practice.

B. The Navy's grooming regulations substantially burden EMN3 Di Liscia's religious expression.

There is also no question that refusing to accommodate EMN3 Di Liscia Jewish religious practice would constitute a substantial burden on his free exercise of religion. "A substantial burden exists when government action puts 'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (quoting *Thomas v. Rev. Bd.*, 450 U.S. 707, 717-18 (1981)). Although substantial burdens come in other forms too, it is well established that this standard is satisfied when the plaintiff is "force[d] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *see also Autor v. Pritzker*, 740 F.3d 176, 182 (D.C. Cir. 2014) (finding a viable claim when lobbyists were forced to choose between their First Amendment right to petition the government and the benefit of serving on a federal advisory committee). Being put to the choice of giving up his religious beliefs or facing military discipline, including possible expulsion from the Navy, unquestionably imposes a substantial burden on EMN3 Di Liscia's religious exercise. *See Holt*, 574 U.S. at 361 (grooming policy that subjected prisoner to "serious disciplinary action" for growing beard constituted a substantial burden); *Singh*

v. McHugh, 109 F. Supp. 3d at 87 (Army's refusal to grant Sikh soldier an "accommodation that would enable him to enroll in ROTC while maintaining his religious practice" constituted a substantial burden); *cf. Singh v. Carter*, 168 F. Supp. 3d at 229 (Army's "specialized testing for further processing of [Sikh soldier's] religious accommodation request is a substantial burden when such testing is not required for soldiers to obtain exceptions from the Army uniform and grooming regulations"). Because the Navy's regulations impose a substantial burden on EMN3 Di Liscia's religious beliefs, he is entitled to an accommodation unless the Navy can show that granting one would impair a compelling government interest that cannot be satisfied via a less restrictive means. The Navy cannot make this showing.

C. The Navy has no compelling interest in forcing EMN3 Di Liscia to abandon his religious practice to continue serving his country.

Because the Navy's regulations substantially burden EMN3 Di Liscia's religious exercise, "the burden [of strict scrutiny] is placed squarely on the [Navy]." *O Centro*, 546 U.S. at 429. Defendants thus must prove that coercing EMN3 Di Liscia "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1(b). This is the "most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997), and a test that this Court recently ruled the Armed Forces flunked in a similar case. *See Singh*, 109 F. Supp. 3d at 96-97.

To meet RFRA's demanding test, the Navy must show that it has a compelling interest in imposing its grooming requirement specifically *on EMN3 Di Liscia*. The Navy cannot meet its burden by citing some "broadly formulated interest[s]" that, at a high level of generality, seem compelling. *Holt*, 574 U.S. at 362. RFRA demands a "'more focused' inquiry: It 'requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being

substantially burdened.'" *Burwell v. Hobby Lobby*, 573 U.S. 682, 726 (2014) (quoting *O Centro*, 546 U.S. at 430-31). This rule applies even to critically important interests such as protecting public health during a pandemic, *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020); enforcing the nation's drug laws, *O Centro*, 546 U.S. at 433; prison safety, *Holt*, 574 U.S. at 362; prevention of animal cruelty, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543-44, 546 (1993); traffic safety, *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1267-68 (11th Cir. 2005); protecting federal buildings, *Tagore v. U.S.*, 735 F.3d 324, 330-31 (5th Cir. 2013); and controlling government costs, *Rich v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525, 533 (11th Cir. 2013).

The Navy cannot meet its heavy burden on "mere say-so." *Holt*, 574 U.S. at 369. RFRA "demands much more," *id.*—namely, specific evidence "prov[ing]" a compelling interest as against EMN3 Di Liscia and his existing beard. *Singh*, 109 F. Supp. 3d at 93-94 (inquiring whether "defendants have proven that the decision to deny *this plaintiff* a religious accommodation . . . actually furthers the compelling interests defendants have identified"). Thus, this Court must "'scrutinize the asserted harm of granting specific exemptions to particular religious claimants' and . . . 'look to the marginal interest in enforcing' the challenged government action in that particular context." *Holt*, 574 U.S. at 363.

And even if that close scrutiny were to reveal that compelling interest would be impaired by EMN3 Di Liscia's beard, the Navy's own regulations direct that, rather than being subjected to a forced shave, he should first be assigned temporarily to some other duty for "protect[ion] from circumstances that are incompatible with [his] religious accommodation." Navy Instr. 1730.11A ¶ 5(g)(2). Naval commanding officers may only suspend religious accommodations immediately "if necessary due to an imminent threat to health or safety." *Id.* But in any case, the Navy has pointed

to no such imminent threat here. Given that its own regulations would not require EMN3 Di Liscia immediately to shave his existing beard, it cannot claim a compelling interest in forcing him to do so, particularly given that EMN3 Di Liscia has already acknowledged that if faced with a life-threatening situation where his beard impeded the safety of his unit, he would shave.

The Navy's *general* interests in safety, discipline, good order, or uniformity are insufficient to justify forcing EMN3 Di Liscia to shave at this time. Any purported interest in safety, discipline, good order, or uniformity is fatally undermined by the fact that existing Navy regulations provide broad categorical exemptions, and the Navy has granted thousands of individualized exceptions, to its beard policies. That includes the beards that EMN3 Di Liscia's shipmates have been allowed to wear for two weeks at a time, granted for morale purposes. The presence of both categorical exemptions and individualized exceptions creates "a higher burden" on the Navy to "show[ ] that the law, as applied, furthers [its] compelling interest[s]." *Singh*, 109 F. Supp. 3d at 94 (quoting *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 472-73 (5th Cir. 2014)). It also makes the existence of a compelling interest both more important (to guard against religious discrimination) and less likely. *Fraternal Order of Police v. Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.). As a unanimous Supreme Court explained, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (cleaned up). Here, because the Navy's regulations "presently do[ ] not apply" to thousands of soldiers, the Navy's interests in denying a temporary accommodation to EMN3 Di Liscia "cannot be compelling." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1143 (2013).

First, the Navy provides a broad medical exemption to its beard ban. For years, the Navy allowed Sailors suffering from *pseudofolliculitis barbae* to obtain "a permanent 'no shave' status,"

under which they were permitted to wear a quarter-inch beard at all times. Bureau of Naval Personnel, Management and Disposition of Navy Personnel with Pseudofolliculitis Barbae, Instruction 1000.22B ¶¶ 6-7 (Dec. 27, 2004), https://perma.cc/VEW4-ASUH. After a 2019 amendment, permanent no-shave statuses are unavailable, but Sailors with medical conditions may continue to receive both temporary no-shave statuses and no-shave statuses of indeterminate length that merely require annual reevaluations. Bureau of Naval Personnel, Management of Navy Uniformed Personnel Diagnosed with Pseudofolliculitis Barbae, Instruction 1000.22C ¶ 6 (Oct. 8, 2019), https://perma.cc/9ETC-QBJM. These broad medical exemptions demonstrate that the Navy does not have compelling safety or uniformity interests in forcing EMN3 Di Liscia to immediately shave his existing beard.

Second, the Navy commonly grants individual exceptions to its beard ban. For instance, Sailors at sea can frequently "purchase" Morale, Welfare and Recreation waivers allowing them to grow a beard. *See* Compl. ¶ 65; *see also* Decl. ¶ 5 (attesting that Sailors aboard the USS Theodore Roosevelt have enjoyed just such MWR no-shave chits). Second, the Navy has routinely granted religious accommodations for a beard to Sailors on shore duty. *See* Baxter Decl. Ex. C. The existence of these exceptions eviscerates any "uniformity" interest.

Third, EMN3 Di Liscia has already been successfully wearing a beard under his existing partial accommodation and the Navy has pointed to no reason why it suddenly must be shaved. And EMN3 Di Liscia has already acknowledged that if faced with a life-threatening situation where his beard impeded the safety of his team, he would shave. Decl. ¶ 22. In short, an accommodation for EMN3 Di Liscia's existing beard certainly would not harm the Navy's interests any more than the categorical deviations in uniformity inherent in the medical regulations and the thousands of exceptions to uniformity the Navy has granted to individual Sailors.

Finally, even if there was something about EMN3 Di Liscia's current assignment that raised some unique concerns, the Navy's own regulations direct that he may be assigned temporarily to some other duty for "protect[ion] from circumstances that are incompatible with [his] religious accommodation." Navy Instr. 1730.11A ¶ 5(g)(2).

In analogous cases, other branches of the armed forces have tried and failed to meet the compelling interest standard with respect to similar claimed interests. In one case, Lieutenant General James McConville denied Iknoor Singh's "request to wear unshorn hair, a beard, and a turban" because of the military's general interest in "[u]nit cohesion and morale," "[g]ood order and discipline," "[i]ndividual and unit readiness," and the Sikh applicant's "health and safety." *Singh v. McHugh*, 109 F. Supp. 3d at 93-94; *see also Singh v. Carter*, 168 F. Supp. 3d at 229, 234-36 (enjoining specialized military uniform testing that singled-out a Sikh military officer based on his request to wear unshorn hair, a beard, and a turban). Those justifications "d[id] not withstand scrutiny" then, *Singh v. McHugh*, 185 F. Supp. 3d 201, 224 (D.D.C. 2016), and the Navy's similar interests do not now. These interests are too broadly formulated to answer the question of whether the Navy may force EMN3 Di Liscia to violate his faith instead of continuing his existing accommodation. The Navy has pointed to no compelling interest in this case.

D. Even if the Navy did have a compelling interest here, forcing EMN3 Di Liscia to violate his faith is not the least restrictive means of furthering that interest.

Because the Navy cannot show a compelling governmental interest as applied to EMN3 Di Liscia's beard, this Court need go no further. But even if the Navy had shown such an interest, it could not show that forcing EMN3 Di Liscia to shave his beard is the least restrictive means of furthering that interest.

Meeting the least-restrictive means standard is "exceptionally demanding." *Holt*, 574 U.S. at 364. But that is the intent of the standard—ensuring that the Government "must" use "a less

restrictive means" if one "is available for the Government to achieve its goals." *Id.* at 365. Where there are exceptions to a scheme that the Government insists is the least restrictive, those exceptions defeat the Government's insistence by "demonstrat[ing] that other, less-restrictive alternatives could exist." *Singh*, 109 F. Supp. 3d at 101 (quoting *McAllen Grace*, 764 F.3d at 475).

Applying the standard here yields the same outcome as it did in the *Singh* litigation: the Government flunks the test. A blanket ban on EMN3 Di Liscia's beard simply *cannot* be the least restrictive means in light of the existing accommodations for medical beards. And, as noted above, the Navy's own regulations direct that EMN3 Di Liscia may be assigned temporarily to some other duty for "protect[ion] from circumstances that are incompatible with [his] religious accommodation." Navy Instr. 1730.11A ¶ 5(g)(2). The Navy cannot show that no such alternatives exist.

The Navy's decision to discontinue issuance of permanent no-shave chits (*i.e.*, waivers that allowed sailors who suffer from *pseudofolliculitis barbae* to permanently grow short, well-kept beards) just took effect last October, and those rules do not yet apply to members of the Navy still on deployment or assigned to regions where medical evaluation and treatment are impossible. Moreover, even under the new rules, as discussed, a Sailor can receive an exemption of temporary or indeterminate length, requiring only annual reevaluation. *See, e.g.*, Navy Instr. 1000.22C(7)(9).

Other exceptions, too, show that forcing EMN3 Di Liscia to shave his beard is not the least restrictive means of promoting any compelling interest. As mentioned, Sailors can purchase "chits" allowing them not to shave, and has granted them to Sailors *currently aboard his ship*.

Moreover, the policies of similarly-situated entities confirm that the Navy cannot establish least restrictive means here. When this Court found that "temporary accommodation is a less restrictive means" in *Singh v. McHugh*—allowing an exception to Army grooming requirements

for a Sikh to wear unshorn hair, a beard, and a turban—it noted Lieutenant General McConville's acknowledgement that "there are some protective masks that are capable of providing protection to individuals who wear beards." 185 F. Supp. 3d at 231, 231 n.3. The Army makes use of its "Hard-to-Fit" program, which "has 'provided masks to more than 1,150 warfighters and civilians (including a brigadier general and a command sergeant major)' who have not otherwise been able to 'achieve a satisfactory fit.'" *Id.* at 231 n.3. That Army program has created special masks for individuals and even obtained special masks from the United Kingdom. *Id.* The Navy has not explained why it could not do the same here.[1]

Indeed, other branches of our own nation's armed forces grant hundreds of thousands of individualized exemptions. For instance, Army regulations permit a "large-scale exception . . . to its grooming policies" by allowing soldiers to grow beards where medically necessary. *Singh*, 109 F. Supp. 3d at 97. Since 2007, "the Army has permitted more than 100,000 service members," including officers, "to grow beards for medical reasons." *Id.* at 95 (noting that the Army has authorized "at least 49,690 permanent 'shaving profiles' and at least 57,616 temporary ones."). Though the standard exception allows the beards to be grown to 1/8 of an inch, they can be grown longer if medically necessary. *Id.* The Army permits beard exceptions because, according to the Army's Technical Bulletin, "[t]he existence of a beard does not prevent performance of most military duties" and "authorizing the growth of a beard should not ordinarily require . . . a change or limitation in the performance of military duties." Dep't of the Army, Pseudofolliculitis of the Beard and Acne Keloidalis Nuchae, Technical Bulletin Med. 287 § 2-6(*c*)(1) (Dec. 10, 2014),

[1] That Britain's Royal Navy also permits male personnel to wear beards and moustaches, trimmed or tied up according to health and safety standards, suggests less restrictive means here. *See* "Policy and Appearance," Royal Navy § 3818(d) (Feb. 2019), https://perma.cc/CA2L-K8UK. "British naval greatness depends" upon many things, though clean-shaven male personnel seem not to be one of them. *Manella, Pujals & Co. v. Barry*, 7 U.S. (3 Cranch) 415, 434 (1806).

https://perma.cc/L54Q-VZ73. While a commander can order a beard be shaved for operational reasons, the Army did not "claim[] or show[] that even one of the more than 100,000 soldiers who have been permitted to grow a beard since 2007—including many who have served in deployed environments—has been ordered to shave it for any reason." *Singh*, 109 F. Supp. 3d at 96.

The Air Force has similarly liberalized its beard policy, especially in seeking to accommodate the religious beliefs of service members. *See* Secretary of the Air Force, Dress and Personal Appearance of Air Force Personnel, Instruction 36-2903, ¶ 3.1 (Feb. 7, 2020), https://perma.cc/ND7B-4BNY ("Beards are not authorized unless for medical reasons . . . or as authorized pursuant to a request for a religious accommodation."); *see also id.* Attachment 9 (offering "Sample Turban, Uncut Beard and Hair Approval Memorandum" templates for commanding officers).

Decisions involving police and firefighters confirm that forcing EMN3 Di Liscia to shave is not the least restrictive means of furthering any government interest. For instance, in *Fraternal Order of Police*, 170 F.3d at 365, the Third Circuit struck down a police department's "no beard" policy that allowed for medical but not religious exemptions. As then-Judge Alito explained, "the medical exemption raises concern because it indicates that the Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not." *Id.* at 366. Then, applying heightened scrutiny, the court struck down the department's policy, emphasizing that "[w]e are at a loss to understand why religious exemptions threaten important city interests but medical exemptions do not." *Id.* at 367; *see also Potter v. District of Columbia*, 558 F.3d 542, 547 (D.C. Cir. 2009) (affirming summary judgment in favor of the plaintiffs—Muslim firefighters—because the District of Columbia did not "profe[r] evidence" to "establis[h] a genuine issue as to

whether its clean-shaven requirement is narrowly tailored to further the interest of protecting firefighters").

In sum, the shave order is not the least restrictive means of promoting any compelling government interest, Defendants' order cannot satisfy RFRA, and EMN3 Di Liscia is likely to succeed on the merits of his RFRA claim.

II. EMN3 Di Liscia is likely to succeed on his Free Exercise Clause claim.

EMN3 Di Liscia is also likely to prevail on his Free Exercise claim. Government action that burdens religious exercise is subject to strict scrutiny under the Free Exercise Clause if it is "not neutral or not of general application." *Lukumi*, 508 U.S. at 546. And actions are neither neutral nor generally applicable "whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, No. 20A151, 2021 WL 1328507, *1 (Apr. 9, 2021). And "[c]omparability is concerned with the risks various activities pose" to the "asserted government interests that justifies the [action] at issue." *Id.*

In *Lukumi*, the Supreme Court unanimously struck down an "extreme" example of government action as not neutral or generally applicable. *Lukumi* involved four municipal ordinances that restricted the killing of animals. When challenged, the city argued that the ordinances were neutral because they were written "in secular terms, without referring to religious practices." *Id.* at 534. The Supreme Court emphasized that when determining whether a law is neutral and generally applicable, "[f]acial neutrality is not determinative." *Id.* at 534. The Court explained that because the ordinances applied to "Santeria adherents but almost no others," they prohibited Santeria sacrifice "even when it does not threaten the city's interest in the public health," and "selective[ly]" "impose[d] burdens only on conduct motivated by religious belief," they were not neutral or generally applicable. *Id.* at 536, 538-39, 543.

Like the City's treatment of Santeria worship, the Navy's treatment of EMN3 Di Liscia has not been neutral or generally applicable. As discussed, beard exemptions are routinely granted for morale and medical reasons, thus treating "comparable secular activit[ies] more favorably than religious exercise." *Tandon*, 2021 WL 1328507, *1. By discriminatorily refusing to grant EMN3 Di Liscia an accommodation to practice his faith, the Navy has impermissibly "'impose[d] special disabilities on the basis of . . . [his] religious status,'" *Lukumi*, 508 U.S. at 533 (quoting *Smith*, 494 U.S. at 877). In light of the clearly different treatment that EMN3 Di Liscia has received, the Navy's conduct should be evaluated under strict scrutiny for a violation of the Free Exercise Clause. As explained above, the Navy's regulations as enforced against EMN3 Di Liscia are not the least restrictive means of upholding a compelling government interest.

III. EMN3 Di Liscia is likely to succeed on his Equal Protection claim.

EMN3 Di Liscia is also likely to succeed on his Equal Protection claim under the Due Process Clause of the Fifth Amendment.[2] "Strict scrutiny . . . is warranted if the restriction 'jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic.'" *Banner v. United States*, 428 F.3d 303, 307 (D.C. Cir. 2005) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)); *see also City of Cleburne v. Cleburne Living Ctr.* 473 U.S. 432, 440 (1985). The Navy's actions here both jeopardize the exercise of a fundamental right— EMN3 Di Liscia's religious exercise—and categorizes him on the basis of an inherently suspect characteristic—his religion.

Engaging in religious expression is the exercise of a fundamental right, both because it is religious exercise and because it is expression. *See, e.g., Johnson v. Robison*, 415 U.S. 361, 375

[2] The principles of the Equal Protection Clause apply with equal force to the federal government through the Due Process Clause of the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497 (1954).

n.14 (1974) ("Unquestionably, the free exercise of religion is a fundamental constitutional right."); *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951) (Equal Protection Clause barred the Government from suppressing Jehovah's Witnesses from engaging in religious expression); *see also Harbin-Bey v. Rutter*, 420 F.3d 571, 576 (6th Cir. 2005) (both speech and religious freedom are fundamental rights for Equal Protection purposes); *Srail v. Village of Lisle*, 588 F.3d 940, 943 (7th Cir. 2009) ("Fundamental rights include freedom of speech and religion."). Here, Di Liscia seeks to exercise both his rights of expression and to religious exercise. That is one of the two triggers for strict scrutiny.

The other trigger is the application of a suspect classification. The Navy's singling out of EMN3 Di Liscia due to his religion also categorizes him on the basis of an inherently suspect class—religion. Discrimination on the basis of religious adherence "not only lacks a rational connection with any permissible legislative purpose, but is also inherently suspect. Such invidious discrimination violates the equal protection of the laws guaranteed by the Due Process Clause." *King's Garden, Inc. v. F.C.C.*, 498 F.2d 51, 57 (D.C. Cir. 1974) (citing *Bolling*, 347 U.S. 497). *See also United States v. Batchelder*, 442 U.S. 114, 125 n.9 (1979) ("The Equal Protection Clause prohibits selective enforcement 'based on an unjustifiable standard such as race, religion, or other arbitrary classification'" (citation omitted)).

Here, as noted above, the Navy has discriminated on the basis of EMN3 Di Liscia's religion by refusing to extend to him the same kinds of exemptions from the grooming requirements that it extends to other Sailors who can pay for morale no-shave "chits" or who receive accommodations during medical treatment regimens, including those of indeterminate length.

For the reasons discussed in Sections I.C and I.D above, the Navy cannot defend its regulations under strict scrutiny. EMN3 Di Liscia is likely to succeed on his claims.

IV. The remaining factors all weigh in favor of granting temporary injunctive relief and preliminary injunctive relief.

EMN3 Di Liscia's likelihood of succeeding on the merits of his RFRA claim is sufficient to justify a preliminary injunction on his behalf. *See Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016) ("In First Amendment cases, the likelihood of success will often be the determinative factor" (citations omitted)); *Roman Cath. Archbishop of Wash. v. Bowser*, No. 20-cv-03625, 2021 WL 1146399, at *18 (D.D.C. Mar. 25, 2021) (RFRA protects First Amendment interests). The remaining relevant factors, however, also all support this outcome.

A. EMN3 Di Liscia will suffer irreparable harm absent injunctive relief.

Defendants are discriminating against EMN3 Di Liscia because of his religious beliefs and pressuring him to violate his faith. That is clearly irreparable harm. If that were not enough, in the context of constitutional and civil rights, the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Diocese of Brooklyn*, 141 S. Ct. at 67 (quoting *Elrod v. Burns*, 427 U.S. 347, 373); *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (noting this principle has been "long established"). *See also Rigdon*, 962 F. Supp. 150 (violation of First Amendment religious expression rights constituted irreparable injury); *Simms v. District of Columbia.*, 872 F. Supp. 2d 90, 104 (D.D.C. 2012) (violation of Fifth Amendment rights constitutes irreparable harm); *Bowser*, 2021 WL 1146399, at *18 (finding "the same is true of rights afforded under the RFRA"); *cf. Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 303 (D.C. Cir. 2006) ("[W]here a movant alleges a violation of the Establishment Clause, this is sufficient, without more, to satisfy the irreparable harm prong for purposes of the preliminary injunction determination."). Because EMN3 Di Liscia has

demonstrated that his constitutional and civil rights are being violated, he has automatically demonstrated irreparable harm under *Mills*.

In addition, being subjected to blatantly discriminatory conditions constitutes irreparable harm. This Court faced a similar situation in *Bonnette v. D.C. Court of Appeals*, 796 F. Supp. 2d 164 (D.D.C. 2011). In that case, the disabled plaintiff sought an accommodation in taking the Multistate Bar Examination. Defendants "argue[d] that [the blind plaintiff] cannot show that she is likely to suffer irreparable harm because it is possible that she will pass the D.C. Bar Exam using either a human reader or an audio CD." *Id.* at 187. This Court rejected that argument, holding that "forcing Plaintiff to take the MBE under discriminatory conditions is itself a form of irreparable injury." *Id.*; *accord Singh*, 168 F. Supp. 3d at 233 ("[B]eing subjected to discrimination is by itself an irreparable harm.").

Under the governing regulations, EMN3 Di Liscia is fully entitled to a religious accommodation and to receive one of the myriad individualized grooming exemptions that the Navy provides to others. As in *Bonnette*, it would constitute irreparable harm to force him to choose between abandoning his religious beliefs and serving his country. And the damage to his reputation and career from being treated in a discriminatory fashion will be irreparable.

B. The balance of harms weighs in EMN3 Di Liscia's favor.

Defendants will suffer no injury from a temporary restraining order or a preliminary injunction allowing EMN3 Di Liscia to maintain his existing beard pending a final merits decision from this Court. As explained above, the Navy has allowed other Sailors to maintain similar beards without incident. Moreover, the Navy has not identified any legitimate reason why EMN3 Di Liscia must shave his beard immediately. Indeed, it has already given EMN3 Di Liscia a partial accommodation of his religious exercise and can demonstrate no harm to its interests stemming from that accommodation.

On the other hand, EMN3 Di Liscia has already demonstrated that he will suffer irreparable and severe injury if he is forced to violate his faith or is subject to military discipline. Where there is a strong likelihood of success on the merits, the balance of harms "normally favors granting preliminary injunctive relief" because "injunctions protecting First Amendment freedoms are always in the public interest." *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 590 (7th Cir. 2012).

C. The public interest favors granting an injunction.

It is undoubtedly in the public interest for the military to avoid religious discrimination and accommodate religious exercise and expression. Indeed, the Navy's own regulations emphasize that Sailors' religious practices should be supported "to the broadest extent possible." Navy Instr. 1730.11A ¶ 3 ("Religious liberty is more than freedom to worship. It includes the freedom to integrate one's religion into every aspect of one's life."). Hence this Court's recognition that there is a "vital public interest in safeguarding religious freedoms protected by the Constitution and by statutes enacted by Congress." *Bowser*, 2021 WL1146399, at *19. *See also Tyndale House Publishers v. Sebelius*, 904 F. Supp. 2d 106, 130 (D.D.C. 2012) ("[T]here is undoubtedly also a public interest in ensuring that the rights secured under . . . RFRA, are protected."); *O Centro v. Ashcroft*, 389 F.3d 973, 1010 (10th Cir. 2004) (en banc), *aff'd* 546 U.S. 418 (2006) ("[T]here is a strong public interest in the free exercise of religion."). And, on the other hand, "[e]nforcement of an unconstitutional [order] is always *contrary* to the public interest." *Pursuing Am.'s Greatness*, 831 F.3d at 511 (emphasis added).

Moreover, the Navy itself has extolled the public interest in diversity in the military. *Our Commitment to Diversity and Equality*, https://www.navy.com/who-we-are/diversity (last visited April 14, 2021) ("No matter your . . . religious beliefs, there is a place for you in the Navy" since "[w]e believe that when a diverse group of individuals come together to do a job, they can do it better because of their differences," which reflect "the rich makeup of our country."); *accord*

National Defense Authorization Act for Fiscal Year 2020, H.R. 2500, 116th Cong. § 530B (2019) ("Any personnel policy developed or implemented by the Department of Defense with respect to members of the armed forces shall ensure equality of treatment and opportunity for all persons in the armed forces, without regard to . . . religion."). Accommodating EMN3 Di Liscia advances religious diversity.

V. The Court should not require security.

EMN3 Di Liscia requests that the Court require no security. There is no prospect that Defendants would suffer damages even if it were later determined that they were wrongfully enjoined or restrained. Fed. R. Civ. P. 65(c). Thus, the relevant "sum" required to preserve Defendants' interests is zero. *Id.* In addition, "only a party seeking to change (not maintain) the status quo needs to post a bond." *Laster v. District of Columbia*, 439 F. Supp. 2d 93, 99 n.7 (D.D.C. 2006). EMN3 Di Liscia seeks only to maintain the status quo.

CONCLUSION

For all the foregoing reasons, EMN3 Edmund Di Liscia respectfully urges the Court to grant his applications for a temporary restraining order and for a preliminary injunction.

EMN3 Di Liscia also requests that the Court waive the posting of a bond.

Respectfully submitted this 15th day of April, 2021.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 15, 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.

/s/ Eric S. Baxter
Eric S. Baxter

Counsel for Plaintiff