No. 22-5234

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

JASKIRAT SINGH, AEKASH SINGH, MILAAP SINGH CHAHAL,
Plaintiffs-Appellants,

v.

DAVID H. BERGER, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Columbia
Honorable Richard J. Leon
(1:22-cv-01004-RJL)

REPLY IN SUPPORT OF EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL OR, IN THE ALTERNATIVE, TO EXPEDITE APPEAL

AMANDEEP S. SIDHU
WINSTON & STRAWN LLP
1901 L St., NW
Washington, DC 20036
(202) 282-5828

AMRITH KAUR AAKRE
GISELLE KLAPPER
THE SIKH COALITION
50 Broad St., Suite 504
New York, NY 10004
(847) 786-5839

BRIAN W. SONG
MATTHEW K. COWHERD
BAKER & HOSTETLER LLP
45 Rockefeller Plaza
New York, NY 10111
(212) 589-4200

ERIC S. BAXTER
Counsel of Record
DANIEL H. BLOMBERG
DIANA VERM THOMSON
DANIEL D. BENSON
LAURA WOLK
THE BECKET FUND FOR RELIGIOUS LIBERTY
1919 Pennsylvania Ave. NW
Suite 400
Washington, DC 20006
(202) 955-0095
ebaxter@becketlaw.org

Counsel for Plaintiffs-Appellants

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INTRODUCTION

Unless this Court intervenes, the government will exclude an entire group of Americans from serving as Marines because of their religious appearance. Observant Sikhs, among others, will be forever ineligible. A single declaration is the sole evidence the government musters to justify such sweeping exclusion. Beyond mere say-so, that declaration fails to show that accommodating Plaintiffs would threaten national security. If the government can prevail on such evidence, the RFRA and the Constitution are toothless.

Looking past what the Marine Corps *says*, what it *does* refutes its claim that "strict uniformity" is essential. It concedes that medical beards are permitted during recruit training (at least after Day 1), that women never have to shave their heads (whether "train[ed] separately" or not), and that anyone can have a tattoo (essentially anywhere). The Marine Corps is somehow unconcerned with these deviations because recruits still "achiev[e] cohesion through shared experience," "tattoos are prevalent and not readily removed," and the Marine Corps has a distinct interest in pursuing "diversity and inclusion." These exceptions to "stripping" each recruit of "individuality" do not harm national security—but apparently accommodating three Sikhs does.

The government ignores the countless other "regimented practices" Plaintiffs would submit to with every other recruit. Plaintiffs too could "achiev[e] cohesion" through abandoning "the pronoun 'I'"; following

"tightly circumscribed" (but religiously compliant) grooming standards; and submitting to the physical and psychological demands of recruit training. It beggars belief that shaving (men) on Day 1 is *the* indispensable element of Marine formation.

The government also fails to explain how every other branch of the military—including the Naval Academy, which commissions Marine Corps officers, Dkt. 35-1 ¶ 34—manages to accommodate Sikhs without compromising national security. The Marine Corps says its "entire" force is "expeditionary," but then contradicts itself by allowing the Naval-Academy loophole and other exceptions. It also never explains how all other branches (and militaries worldwide) maintain expeditionary forces *and* accommodate Sikhs. And after the Army asserted the *exact same interests* to exclude Sikhs years ago, courts held it to its burden of proof and found it wanting—not least because studies of Sikhs who actually served showed no adverse impact on discipline, *esprit de corps*, or mission accomplishment. Everyone gains when the military reflects the America it serves.

The government is left to complain—after dragging its feet for *years*—that Plaintiffs took seventeen business days to file their (timely) motion. But that cannot save it from the obvious result dictated by the facts, the law established by Congress, and Marine Corps regulations.

Nor can the government complain that the schedule is now too rushed. The issues are legal and were fully briefed below and again here, leaving

no reason to delay a ruling. The motion should be granted, or in the alternative, merged with expedited merits proceedings. Plaintiffs cannot wait another year to start their careers. By law, they should not have to.

ARGUMENT

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

Compelling Government Interest. Contrary to its claim of across-the-board compliance with "strict uniform and grooming requirements," Opp.10, the Marine Corps allows broad exceptions for tattoos, women's hairstyles, and men with skin conditions. Mot.6-7. But it claims that letting Plaintiffs wear neatly tied beards and turbans in accordance with their faith—just as allowed in other branches and militaries worldwide—crosses the line. This "system of exceptions" fatally "undermines" any "contention that [the Marine Corps'] … policies can brook no departures." *Fulton v. Philadelphia*, 141 S.Ct. 1868, 1882 (2021).

The government counters that tattoos are allowed only because they are "prevalent and not readily removed." Opp.16. But abandoning faith under government coercion is no light matter either: for "centuries," "men have suffered death rather than subordinate their allegiance to God to the authority of the state." *Girouard v. United States*, 328 U.S. 61, 68 (1946). And if accommodating tattoos can be justified by "diversity and inclusion," Opp.17, so can accommodating Sikhs. *Singh v. McHugh*, 185 F.Supp.3d 201, 227-28 (D.D.C. 2016) (detailing striking success of accommodated Sikhs). Favoring tattoo diversity over religious diversity is not

just underinclusive, but also illegally discriminatory. *See Fraternal Ord. of Police v. Newark*, 170 F.3d 359, 367 (3d Cir. 1999) (Alito, J.).

Indeed, the tattoo exceptions have a much larger impact on the asserted uniformity interests precisely because tattoos *are* so "prevalent." Opp.16. And while, to some, tattoos "might signal a rebellious streak or reflect a lack of impulse control or discipline," no similar claim can be made about Sikhs obeying their faith. *McHugh*, 185 F.Supp.3d at 227. Their requested accommodation "flows from a very different source," reflecting a commitment to submit to higher authorities. *Id.*

As to exceptions for female recruits, the government contends that allowing diverse hairstyles is still a "strict grooming requirement[]" with "no exceptions." Opp.16. But Sikh recruits can also submit their turbans and beards to "tightly circumscribed standards," *id.*, to keep them neat and conservative—just as they do in other branches. Army Reg. 670-1 § 3-16(b).[1] The government may think forcing women to shave their heads is asking too much, but Congress forbids it from making a value judgment not to respect Sikhs the same way.

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[1] The government claims women train "separately." Opp.16. *But see* National Defense Authorization Act for Fiscal Year 2020, H.R. 2500, 116th Cong. § 565 (2019) (requiring integrated training); *accord* Scottie Andrew, *A platoon of female Marines made history by graduating from this San Diego boot camp,* CNN (May 7, 2021), https://perma.cc/6YQJ-NELH. Even if true, it would be irrelevant to the asserted interest in "stripp[ing]" Marines "of their individuality." Opp.12.

Finally, the government distinguishes medical beards because they are "manage[d]" with "clippers or chemicals." Opp.15. But it fails to explain why only *religious* beards prevent recruits from being "psychologically transform[ed]" or harm "others in their training cycle." Opp.1, 13; *Fraternal Order*, 170 F.3d at 366-67 ("no apparent reason" why religious beards "should create any greater difficulties" than "medical exemptions"). Both types of beards actually impact the government's interest in mission accomplishment the same way: making more qualified Americans available to serve.

The government worries about the "amplified" effects of granting "similar requests." Opp.13. RFRA, however, prohibits such "slippery-slope concerns." *Gonzales v. O Centro*, 546 U.S. 418, 435-36 (2006). It is simply not "compelling" for the Marine Corps to allow medical beards, exempt women from shaved heads, and permit tattoos indiscriminately, yet still claim a need to draw the line at accommodating a religious minority. Moreover, the "amplified" effect of accommodating kosher and halal diets during recruit training has not broken the force, SECNAV 1730.8B(7); Defendants fail to show this will be different.

Nor would holding the Marine Corps to its burden force this Court to "superintend" the Marine Corps, Opp.2—any more than the district court has had to "superintend" the Army since *McHugh*, or the Supreme Court has had to "superintend" Arkansas prisons since *Holt v. Hobbs*. Ordering the government to admit three qualified recruits would simply hold the

Marine Corps to the standard established by Congress and adopted by the Marine Corps itself. Mot.6.

Least Restrictive Means. The Marine Corps fails on least-restrictive-means for the same reasons it fails on compelling interest. The inability to distinguish accommodations denied from those granted defeats any argument for excluding Plaintiffs, regardless of the interest at stake. *See* Mot.15.

Further, the Marine Corps cannot distinguish the accommodations allowed in other branches and in foreign militaries. Mot.14-15. Its only response is to repeat that it is "the country's chief expeditionary force," as if the word "expeditionary" has talismanic power to trump federal law. Opp.1, 2, 3, 8, 9, 10, 11, 14. But the Army likewise prides itself on its "combination of expeditionary capability and campaign quality."[2] So do the Navy and Air Force.[3] Yet these branches have managed to accommodate Sikhs during boot camp. The Marine Corps does not show it has studied other branches' accommodations and determined them impracticable, which independently sinks its least-restrictive-means argument. *Native Am. Couns. of Tribes v. Weber*, 750 F.3d 742, 751-52 (8th Cir. 2014)

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[2] U.S. Dep't of the Army, *ADP 3-0 Operations*, at 1-59 (July 2019), https://perma.cc/DL5K-E24D.

[3] *See AFDP 3-0 Operations and Planning* 146 (Nov. 4, 2016), https://perma.cc/YHZ5-YV2C; *Naval Warfare*, Naval Doctrine Publication 1, 39 (Apr. 2020), https://perma.cc/5M7G-WAMH.

(government must show it has "actually considered and rejected the efficacy of less restrictive measures").

Changing tacks, the government argues that, regardless of narrow tailoring, this Court should simply give it "deference." Opp.9. But its cited cases, Opp.17-18, are outdated. For example, after *Goldman v. Weinberger*, 475 U.S. 503 (1986), Congress permitted religious apparel. 10 U.S.C. § 774(a). Sikh articles of faith were specifically envisioned in that legislation. *See, e.g.*, H.R Rep. No.100-446, at 638 (1987); 133 Cong. Rec. at 25250 (1987); 133 Cong. Rec. at 11851 (1987). This alone leads to a ruling in Plaintiffs' favor here.

Congress further rendered the Marine Corps' cases inapplicable by enacting RFRA, where military "expertise" could still be considered, H.R. Rep. No. 103-88 (1993), but only within the strict-scrutiny standard—a "workable test for striking sensible balances." 42 U.S.C. § 2000bb(a)(5). *Contra* the government's selective quotations, Opp.9, Congress specifically rejected "carv[ing] out an exception … for military regulations," S. Rep. No. 103-111, at 11 (1993). Thus, *Goldman* "does not govern the [RFRA] analysis" because it rejected the strict scrutiny later written into RFRA. *McHugh*, 185 F.Supp.3d at 221 n.15. In any case, courts are never

required to give "a degree of deference that is tantamount to unquestioning acceptance." *Holt v. Hobbs*, 574 U.S. 352, 364 (2015).[4]

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

Because the Marine Corps concedes multiple secular exceptions, strict scrutiny is unavoidably triggered. Mot.16. Strict scrutiny applies whenever the government permits "individualized" exemptions or "prohibits religious conduct while permitting" "*any* comparable secular activity." *Fulton*, 141 S.Ct. at 1877; *Tandon v. Newsom*, 141 S.Ct. 1294, 1296 (2021). The government does both.

For example, the Marine Corps' recently relaxed tattoo rules are meant to "remove[] all barriers to entry" and accommodate "the individual desires of Marines." Compl. Ex. B ¶1. The government insists that this categorical exemption doesn't undermine its uniformity interest because the Corps "places strict limits on [tattoos'] form, content, and placement, including that they not be on the head, neck or hands." Opp.16. But the same regulation expressly permits individualized exceptions for tattoos anywhere on the body. Compl. Ex. B ¶4a(2)(h). The mere existence of this "formal system of entirely discretionary exceptions" triggers

[4] Plaintiffs' reliance on *Navy Seals 1-26*, Opp.14, is unfounded for multiple reasons, not least because the Marine Corps already accommodates Sikhs after recruit training. *Accord Ramirez v. Collier*, 142 S.Ct. 1264, 1288 (2022) (Kavanaugh, J., concurring) ("history and [government] practice," not deference, "focus the Court's assessment" of narrow tailoring).

strict scrutiny, regardless of "whether any exceptions have been given." *Fulton*, 141 S.Ct. at 1878-79. As shown above, the Marine Corps fails that standard.

III. The remaining factors require granting injunctive relief.

Because this is a First Amendment case, Plaintiffs' likelihood of success is determinative. Mot.8. The government also failed to demonstrate that any other factors weigh in its favor.

Irreparable Harm. Violations of First Amendment and RFRA rights are "unquestionably" irreparable, even when inflicted for "minimal periods of time." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 67 (2020). Here, the standard is clearly met because Plaintiffs' "free exercise of religion" is actively being infringed. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 302-03 (D.C. Cir. 2006).

The government responds, incredibly, that there's *no* "'loss of First Amendment freedoms'" because Plaintiffs can continue to sit out while the appeal proceeds. Opp.19-20. It is hard to imagine Defendants saying that about a racially exclusionary policy; the fact that they make it to exclude Sikhs emphasizes the need for relief. Moreover, the average appeal in this Circuit takes twelve months. *U.S. Court of Appeals Summary*, https://perma.cc/3YU5-U452. Having already been on hold for years, that is time Plaintiffs do not have. Chahal in particular cannot afford to wait past December and will have to abandon joining the Ma-

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

The government further complains that Plaintiffs' motion was too slow, belying ongoing harm. Opp.23. But the government does not contest that the motion is timely. D.C. Circuit Handbook § VII(A). Nor does it explain why seventeen business days for Plaintiffs to prepare injunction papers (in the midst of other filings, a hearing in the district court, and discovery preparations) should overshadow that the same government which has injured Plaintiffs for hundreds of days is asking to continue doing so for hundreds more.

Balance of Equities and Public Interest. The government does not dispute that the public interest favors vindicating First Amendment rights and ending religious discrimination. Mot.18. Moreover, having made multiple exceptions that apparently do not impact national security, and publicly announcing its desire to remove barriers to entry, Mot.21-22, the Marine Corps cannot claim any significant harm in admitting observant Sikhs.

The government relies heavily on the district court's acceptance of its assertion that national security will be threatened by allowing three qualified Sikhs to undergo recruit training. But the district court's legal

analysis is reviewed *de novo*. *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016). And its reliance on public interest alone, without considering likelihood of success or irreparable harm, Op.10, was both wrong and an abuse of discretion. *Cruz v. McAleenan*, 931 F.3d 1186, 1193 (D.C. Cir. 2019). When faced with a First Amendment violation, a court cannot simply accept governmental assertions of public interest since "enforcement of an unconstitutional law is *always* contrary to the public interest." *Karem*, 960 F.3d at 668 (emphasis added). A law's constitutionality must be assessed.

Further, the court failed to follow Congress's required approach to determining the public interest in federal laws that substantially burden a person's sincere religious belief: whether application of the law to that person passes strict scrutiny. Mot.10. That failure is particularly glaring here, since the government's untested claims of national security quickly shrink when exposed to *any* scrutiny. Indeed, courts have *already* rejected the military's asserted interests identified here, and we now have years of evidence to show the military's predictions are baseless. *McHugh*, 85 F.Supp.3d at 227-28. Moreover, the government now essentially admits that (medical) beards for an *unlimited* number of male Marines in recruit training are permissible, so long as they are shaven on Day 1 and receive a medical accommodation thereafter. Opp.15-16. Allowing *three* Sikhs an accommodation for Day 1 will not be the straw that breaks national security's back.

IV. In the alternative, the appeal should be expedited.

If the Court is inclined to require full briefing on the merits, the appeal should be expedited. The Marines have spent two years considering Plaintiffs' accommodations, long past their statutory deadlines. Mot.3-4; Dkt. 16-1 at 12-16. And the issues are purely legal and were fully briefed below. Indeed, their substance is fully captured in this motion briefing. Thus, should the Court prefer to merge with the merits, the government will suffer no prejudice from an expedited schedule.

CONCLUSION

Plaintiffs respectfully urge the Court to grant their motion.

Respectfully submitted,

/s/Eric S. Baxter

ERIC S. BAXTER
Counsel of Record
DANIEL H. BLOMBERG
DIANA VERM THOMSON
DANIEL D. BENSON
LAURA WOLK

THE BECKET FUND FOR RELIGIOUS LIBERTY
1919 Pennsylvania Ave. NW
Suite 400
Washington, DC 20006
(202) 955-0095
ebaxter@becketlaw.org

AMANDEEP S. SIDHU
WINSTON & STRAWN LLP
1901 L St., NW
Washington, DC 20036
(202) 282-5828
asidhu@winston.com

AMRITH KAUR AAKRE
GISELLE KLAPPER
THE SIKH COALITION
50 Broad St., Suite 504
New York, NY 10004
(847) 786-5839
amrith@sikhcoalition.org
giselle@sikhcoalition.org

BRIAN W. SONG
MATTHEW K. COWHERD

BAKER & HOSTETLER LLP
45 Rockefeller Plaza
New York, NY 10111
(212) 589-4200
bsong@bakerlaw.com
mcowherd@bakerlaw.com

October 3, 2022

CERTIFICATE OF COMPLIANCE

This document complies with the requirements of Fed. R. App. P. 27(d) and Circuit Rule 27(d)(D) because it has 2,564 words.

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/s/ Eric S. Baxter
Eric S. Baxter

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I hereby certify that on October 3, 2022, the foregoing document was filed electronically with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the Court's CM/ECF system. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Eric S. Baxter
Eric S. Baxter