No. 21A599

In the Supreme Court of the United States

LT. COL. JONATHAN DUNN,

Applicant,

v.

LLOYD J. AUSTIN, III, IN HIS OFFICIAL CAPACITY AS SECRETARY OF DEFENSE, ET AL.,

Respondents.

To the Honorable Elena Kagan, Associate Justice of the United States Supreme Court and Circuit Justice for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF APPLICANT AND AN INJUNCTION PENDING APPEAL

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The Becket Fund for Religious Liberty respectfully moves for leave to file a brief *amicus curiae* in support of Applicant's Emergency Application for an Injunction Pending Appeal, without 10 days' advance notice to the parties of *Amicus*'s intent to file as ordinarily required.

In light of the expedited nature of the application, it was not feasible to give 10 days' notice, but *Amicus* did notify the parties of this motion before filing. Counsel for Applicant consents to this motion. Counsel for Respondents responded to the notice and request for consent by stating "Please refer your request to the SCT."

The Becket Fund for Religious Liberty is a non-profit, nonpartisan law firm dedicated to protecting the free exercise of all religious traditions. Becket has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits around the country. Becket has also represented numerous prevailing religious parties in this Court. See, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171 (2012); *Burwell* v. *Hobby Lobby Stores*, 573 U.S. 682 (2014); *Holt* v. *Hobbs*, 574 U.S. 352 (2015); *Zubik* v. *Burwell*, 578 U.S. 403 (2016); *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S.Ct. 2049 (2020); *Little Sisters of the Poor* v. *Pennsylvania*, 140 S.Ct. 2367 (2020).

Becket has also litigated cases before this and other courts concerning the intersection of COVID-related restrictions and the free exercise of religion. See, *e.g.*, *Agudath Israel of Am.* v. *Cuomo*, 141 S.Ct. 889 (2020); *Lebovits* v. *Cuomo*, No.20-cv-1284 (N.D.N.Y. filed Oct. 16, 2020) (challenge to restrictions on Jewish girls' school located in Far Rockaway, Queens); *Roman Catholic Archbishop of Wash.* v. *Bowser*, No.20-cv-3625, 2021 WL 1146399 (D.D.C. Mar. 25, 2021) (enjoining restrictions on worship attendance); see also *Dr. A.* v. *Hochul*, No.21-1143 (pending petition for certiorari over New York's healthcare vaccination mandate); *Doe* v. *San Diego Unified Sch. Dist.*, 142 S.Ct. 1099 (2022) (denying as moot request for emergency relief over public high school vaccination mandate).

Amicus has also represented numerous Sikh, Muslim, Jewish, Catholic, and Protestant servicemembers in a variety of circumstances where branches of the military have sought to suppress their religious teaching, worship, dress, and articles of faith. *Amicus* offers this brief to situate the present Application within the broader context of these other military RFRA cases. They demonstrate that, just as Congress intended when it made RFRA applicable to the military, RFRA works in the military context without jeopardizing military readiness or mission. Here, far from meeting the RFRA standard, the Air Force asserts general interests to broadly restrict constitutional rights without engaging in the careful, individualized balancing that strict scrutiny requires. Requiring the Air Force to undergo the thorough RFRA analysis prescribed by Congress—which sensibly weighs the rights of servicemembers against potential national security interests—is the way to strike the right balance. The amicus brief includes relevant material not fully brought to the attention of the Court by the parties. See Sup. Ct. R. 37.1.

For the foregoing reasons, proposed *Amicus* respectfully requests that the Court grant this unopposed motion to file the attached proposed *amicus* brief and accept it in the format and at the time submitted.

Respectfully submitted.

/s/ Eric Baxter
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APRIL 2022

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INTEREST OF THE *AMICUS CURIAE*[1]

The Becket Fund for Religious Liberty is a non-profit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. Becket has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country. Becket has also represented numerous religious prevailing parties in this Court.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel made a monetary contribution to fund the brief's preparation or submission. This brief has been submitted with an unopposed motion for leave to file it.

INTRODUCTION AND SUMMARY OF ARGUMENT

Some religious objection cases are difficult, because the relevant legislature has not provided for religious exemptions or because the executive argues that any religious or secular exemptions at all would threaten important public health or national security interests. This is not such a case.

Here, Congress expressly directed the military not to burden the sincere religious exercise of men and women in uniform except where necessary for compelling reasons. It should be unsurprising that Congress set forth such a rule: Congress is expressly authorized by Article I to "make rules for the government and regulation" of the military, and it has provided accommodations to religious people in military service since the Revolution.

Moreover, the Air Force itself admits it *can* provide religious accommodations, claiming that it allows for religious exemptions to the very mandate at issue here. And while several federal courts have now deemed that offer of religious accommodation illusory, there is no dispute that the military has granted thousands of vaccine exemptions for medical, administrative, and experimental reasons.

Nor does this case concern the kind of emergency combat deployment decisions at issue in *Austin* v. *U.S. Navy SEALS 1-26*, 142 S.Ct. 1301 (2022). Here, Applicant is a member of the Reserves and does not ask courts to interfere with the "assignment and deployment of all Special Warfare personnel." *Id.* at 1301 (Kavanaugh, J., concurring). Rather, Applicant—a decorated wing commander who has already recovered from COVID—seeks only to avoid being fired or punished for refusing the vaccine on religious grounds.

Thus the sole issue in this case is the precise one the Solicitor General did not dare to challenge in *SEALS*: punishment and termination. The Solicitor General was wise not to challenge that part of the injunction in *SEALS*, nor to claim that Article II

generally trumps Article I as to Congress's power to make rules to govern the military. This Court should not hesitate to provide Applicant with the same protection the Solicitor General did not challenge in *SEALS*.

The Air Force would only be able to avoid that result if it could satisfy the standard imposed by Congress: strict scrutiny, "to the person." And while the Air Force employs the all-too-frequent litigation tactic of claiming that almost every burden the military places on religious exercise is compelling, a brief look at the history of military RFRA cases demonstrates that such defenses are usually unfounded.

As that history shows, whether it is religious beards and attire for Sikhs, Jews, and Muslims, or homilies for Catholics, the reflex of some military defendants is to claim that their actions are justified by compelling interests in national security and mission accomplishment. But the military often cannot back those assertions up, and often fails to explain why it could grant secular exemptions but not religious ones. Lived experience also shows that the sky has not fallen since such claims were subjected to RFRA, and the military has frequently demonstrated that it can obey Congress's rules without compromising readiness.

The Court should be wary of yet another attempt to undermine RFRA's balancing test, particularly in light of the Air Force's doubtful religious "accommodation" scheme. Indeed, the understanding of RFRA offered by the Air Force would, if adopted by this Court, immediately put in jeopardy the ability of servicemembers of religious minority faiths to continue serving the Nation. Congress set the standard for religious accommodation in both contexts, and the Air Force should be required to meet that standard. Those who have faithfully served our country are entitled to the protections promised by Congress.

ARGUMENT

I. Congress requires the Air Force to satisfy strict scrutiny before substantially burdening sincere religious exercise.

Article I, Section 8 of the Constitution gives Congress the power to make rules governing the armed forces. Congress exercised this power when it enacted RFRA. *Burwell* v. *Hobby Lobby Stores*, 573 U.S. 682, 695 (2014) ("As applied to a federal agency, RFRA is based on the enumerated power that supports the particular agency's work."). By its text, RFRA applies to "all Federal law, and the implementation of that law," from every "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." 42 U.S.C. 2000bb-2(1), 2000bb-3(a); *City of Boerne* v. *Flores*, 521 U.S. 507, 516 (1997) (noting "the Act's universal coverage" of Federal law). Accordingly, RFRA's "very broad protection for religious liberty," *Hobby Lobby*, 573 U.S. at 693, extends to servicemembers such as the Applicant.

That protection was no accident. The House and Senate Reports specifically rejected "carv[ing] out an exception to the compelling interest test for military regulations that burden religious practice." S. Rep. No.103-111, at 11 (1993). Rather, RFRA requires courts to review the claims of both "prisoners and military personnel under the compelling governmental interest test." H.R. Rep. No.103-88, at 8 (1993); accord S. Rep. No.103-111, at 12. Congress still explained that "the expertise and authority of military * * * officials" would be considered, H.R. Rep. No.103-88, but only within the strict-scrutiny standard, a "workable test for striking sensible balances," 42 U.S.C. 2000bb(a)(5), which Congress was "confident" would not "adversely impair the ability of the U.S. military to maintain good order, discipline, and security." S. Rep. No.103-111, at 12.

Congress deliberately rejected a "deferential approach" that simply asked whether a "regulation reasonably satisfied" the military's interests, S. Rep. No.103-111, at 11-

12. Instead, it set a standard where "[s]eemingly reasonable regulations based upon speculation * * * cannot stand." H.R. Rep. No.103-88. Both the Senate and House reports noted that, in *Goldman* v. *Weinberger*, 475 U.S. 503 (1986), the military had sought and received broad deference under the Free Exercise Clause, and that RFRA was meant to avoid that result. H.R. Rep. No.103-88; S. Rep. No.103-111.

In *Goldman*, an Orthodox Jewish rabbi serving in the Air Force as a clinical psychologist sought an accommodation from a ban on indoor headgear so that he could wear his yarmulke. Goldman had worn a yarmulke for years without incident—first as a Navy chaplain and then as an Air Force psychologist. U.S.Br., No.84-1097, 1985 WL 669077, at *2-4 (Nov. 27, 1985) And courts acknowledged that the Air Force's rule was "necessarily arbitrary." *Id.* at *10. Yet the Air Force argued that the burden on Goldman's religious exercise was justified because, in its "considered, professional judgment," banning the yarmulke was "essential to the accomplishment of the Air Force's mission." *Id.* at *5, 17. Making an exception for religious exercise, it claimed, would hurt "teamwork, * * * pride and motivation, and undermine discipline and morale." *Id.* at *5 (cleaned up). In response, this Court declined to apply strict scrutiny and instead adopted "far more deferential" review that accepted the Air Force's "considered professional judgment" as sufficient to reject Goldman's claims. *Goldman*, 475 U.S. at 507-508.

Congress promptly disagreed, legislating the following year that "a member of the armed forces may wear an item of religious apparel while wearing the uniform of the member's armed force." 10 U.S.C. 774(a) (enacted Dec. 4, 1987). Later, in passing RFRA, Congress further "ma[de] clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress," *Gonzales* v. *O Centro*, 546 U.S. 418, 433 (2006) and not under *Goldman*'s deferential analysis. S. Rep. No.103-111, at 12; H.R. Rep. No.103-88; see also DoDI 1300.17 (acknowledging and following RFRA test for evaluating religious accommodations).

Under RFRA's standard, it is "not enough" for military officials to ask courts to "simply defer to their determination" or to accept the government's "speculation" about future cases. *Ramirez* v. *Collier*, 142 S.Ct. 1264 (2022). Rather, the military must "*prove* that denying [an] exemption is the least restrictive means of furthering a compelling government interest." *Holt* v. *Hobbs*, 574 U.S. 352, 364 (2015) (emphasis added). Under this standard, the Air Force can place substantial burdens on religion only if it is necessary to "advance[] 'interests of the highest order'"; "so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton* v. *City of Philadelphia*, 141 S.Ct. 1868, 1881 (2021). And while Air Force officials "are experts in running" their branch of the armed forces, and "courts should respect that expertise," that judicial "respect does not justify the abdication of the responsibility, conferred by Congress, to apply [RFRA's] rigorous standard." *Holt*, 574 U.S. at 364.

II. Congress's application of RFRA to the military was necessary and has proven workable.

This case is far from the first time the military has had to comply with RFRA. As in prisons, experience shows that RFRA works in the military as it should—significantly protecting the religious exercise of America's servicemembers without hindering weighty interests in military readiness and mission accomplishment.

It also shows the necessity of Congress's decision to task the courts with ensuring that servicemembers serving their country are not unnecessarily required to abandon their sincerely held religious beliefs. The military has frequently refused to grant religious accommodations based on allegedly compelling interests in uniformity, mission accomplishment, combat readiness, and the safety of religious claimants. And it has often reverted to the broad-deference standard from *Goldman* despite its having been forcefully rejected by Congress. See, *e.g.*, *Singh* v. *McHugh*, 185 F.Supp.3d 201,

221 (D.D.C. 2016) (noting the Army's heavy reliance on the "long line of cases predating RFRA that describe the nature of the deference they contend is due here," "point[ing] in particular to *Goldman*"); *id.* at n.14 (quoting the Army's briefing arguing that "RFRA was never intended to, and did not in fact, alter the standard of review applied by the Supreme Court * * * to cases involving the military" and that "Congress did not displace *Goldman* deference with RFRA"). The Air Force did much the same below, urging the court of appeals to apply *Goldman* to "give great deference to the professional judgment of military authorities." C.A.Br.11 (quoting *Goldman*, 475 U.S. at 507); accord *id.* at 2, 8, 16, 18 (calling for great deference).

But when required to meet the standards of RFRA, the military has often been unable to show that it cannot accommodate religious beliefs without compromising compelling interests. Indeed, when prodded by courts and RFRA, it has generally demonstrated a laudable ability to accommodate diverse religious beliefs.

A. The experience of Sikhs and other religious minorities in the military illustrates the importance of enforcing RFRA.

The experience of servicemembers from minority faith groups provides instructive examples of why the *Goldman* deference standard is insufficient to protect fundamental religious rights, while the RFRA standard protects religious differences without compromising core military interests.

Observant Sikhs, for example, wear highly visible articles of faith. *Singh* v. *Carter*, 168 F.Supp.3d 216, 220 (2016) (Howell, J.). As a symbol of respect for the perfection of God's creation, they maintain *kesh*, or unshorn hair (covered by a turban) and unshorn beards, *ibid.*

For most of the United States' military history, facial hair, religious or otherwise, was not an issue, as General Burnside's sideburns attest. But in 1981, ostensibly to tighten military discipline, new uniform and grooming regulations required all soldiers to be clean shaven with tight haircuts. Observant Sikhs already serving were

grandfathered in, with no restrictions placed on their service. But for the next thirty years, new Sikh recruits were forced to cut their hair and shave—a sin for Sikhs comparable to committing adultery—or be barred from entering military service altogether.

Over the last decade, observant Sikhs have been returning to service in the U.S. military. Their experience seeking religious accommodations, and the experience of other religious minorities with comparable beliefs, reveals a telling pattern. The military is often quick to claim that religious accommodations will threaten compelling interests in uniformity, safety, and national security. But when compelled to analyze requests more carefully under RFRA standards, the military has found ways to accommodate religion without compromising its mission.

1. The Army

In 2013, the Army granted three accommodations. Corporal Simran Preet S. Lamba, Major Tejdeep S. Rattan, and Major Kamaljeet S. Kalsi, pictured below, were admitted specifically for their language and medical skills.

But the Army did not make similar exceptions for other Sikhs. Captain Simratpal Singh was one such soldier. His request for a religious accommodation was denied when he matriculated at West Point. *Carter*, 168 F.Supp.3d at 220. He believed that

his request might be successful until he was abruptly sent to the West Point barber and told to shave or return home. *Ibid.* Captain Singh made the heart-wrenching choice to remove his turban, cut his hair, and have his beard shorn for the first time so that he could serve his country. After graduating from West Point and Ranger School, and over a decade of service including a deployment to Afghanistan (where he was awarded the Bronze Star), he attended a Vaisakhi celebration at the Pentagon where he met the three accommodated Sikh soldiers and resolved to seek an accommodation that would allow him to fully observe his faith while pursuing his Army career. See *ibid.*

The Army wavered. Captain Singh was initially granted a temporary accommodation, which was extended one month at a time for several months as the Army claimed concerns about the fit of his helmet and gas mask. But then, in late February 2016, Captain Singh was told that he would be sent "under escort" to the Aberdeen Proving Grounds to undergo a battery of tests regarding the fit of his helmet and gas mask. *Carter*, 168 F.Supp.3d at 222. At that point, Captain Singh brought a RFRA lawsuit seeking a fairer procedure not targeted solely at him because of his faith. *Ibid.*

The U.S. District Court for the District of Columbia quickly granted a preliminary injunction over the Army's objection that the court should give "great deference" to the Army's interests in "health and safety," and its accompanying warning that an injunction would "substantially harm the Army" and "have far-reaching effects." Opp. to TRO at 8, 10-11, *Carter, supra* (No.16-00399). The court noted the Army did not require testing—let along individualized testing—for "Special Forces soldiers deployed in war zones with 'relaxed grooming standards.'" *Carter*, 168 F.Supp.2d at 230. The same was true for "thousands of service members" granted medical exceptions for beards "without any specialized gas mask testing." *Ibid.* "Not even soldiers subject to the Army's 'Hard to Fit' protocol [were] subject to the level of specialized testing

ordered" for Captain Singh. *Ibid*. That protocol required certain soldiers "merely to perform five exercises" to find a mask that would work. *Ibid*. Captain Singh, the court noted, after several months of beard growth, had "just this week * * * passed the standard gas mask test" routinely administered to soldiers. *Id*. at 219. Thus, "[s]ingling [him] out for specialized testing due only to his Sikh articles of faith" was "unfair and discriminatory" and had "a clear tendency to pressure [him] * * * to conform behavior and [forgo] religious precepts." *Ibid*. Captain Singh is pictured below in the uniform the Army ultimately approved that accommodates his religious beliefs.

Dave Philipps, *Sikh Captain Says Keeping Beard and Turban Lets Him Serve U.S. and Faith,* N.Y. Times, Apr. 1, 2016, https://perma.cc/YGW4-5DFW

In a similar situation, another federal court ruled for an individual barred from the Army ROTC because of his Sikh articles of faith. *McHugh*, 185 F.Supp.3d at 201. In that case, the Army "contend[ed] that the heightened deference owed to military judgment require[d]" ruling in its favor. *Id.* at 221. According to the Army, an accommodation would "undermine the common Army identity," "adversely impact efforts to develop cohesive teams," "weaken 'good order, discipline, the credibility of the officer corps, cohesion, and morale,'" and "undermine the overall readiness of the Army." *Id.* at 212. But the court concluded that the "degree of deference" necessary to "credit defendants' assertion that denying a religious accommodation * * * advances the

Army's asserted compelling interests" was "'tantamount to unquestioned acceptance.'" *Id.* at 230 (quoting *Holt*, 135 S.Ct. at 864). The Army "tolerate[d] so many idiosyncratic deviations from its grooming regulations" that it could not credibly contend a religious beard exemption would hinder its ability "to perform effectively." *Id.* at 226 (cleaned up). The court found that over 100,000 beard exemptions had been granted for medical reasons, and over 200,000 tattoo exemptions had been granted from uniformity regulations. *Id.* at 207-209 (noting accommodated tattoos such as "a vampire Mickey Mouse and a Star Wars caricature"). And the Army conceded "there are some masks that are capable of providing protection to individuals who wear beards"; they just were "'not standard Army issue.'" *Id.* at 213.

The court relied heavily on investigations into the three Sikhs accommodated in 2013, noting that each of them had "earned commendations and outstanding reviews," without "any of the negative consequences that [the Army] predict[ed] would flow from granting a similar exception" to the plaintiff. *McHugh*, 185 F.Supp.3d at 228-229. The court emphasized that, while for some soldiers, "failure to follow the Army's standards might signal a rebellious streak or reflect a lack of impulse control or discipline," the Army had failed "to grapple with the fact that any deviation from the rules" for religious reasons flowed "from a very different source." *Id.* at 227.

The court acknowledged "the doctrine that cautions judges to afford substantial deference to the judgment of military commanders" in certain matters. *McHugh*, 185 F.Supp.3d at 204. But that was subject to the "congressional determination—enshrined in RFRA—to tip the scale in favor of individual religious rights." *Ibid.* And applying RFRA's balancing test, the Court could find no threat to the Army's alleged interests from allowing the plaintiff to enroll in the ROTC with his articles of faith.

After losses in *McHugh* and *Carter*, in early 2017 the Army issued a new policy on religious garb and grooming to align more closely to the RFRA standard. That policy (as updated in 2018) broadly protects religious exercise while still respecting military

interests. It sets forth general principles for reviewing religious accommodation requests to promote uniform treatment throughout the Army. Army Directive 2018-19. It provides that a religious accommodation "will not affect a Soldier's assignment of [Military Occupational Specialty] or branch," except in narrow circumstances involving bearded soldiers in "positions requiring compliance with biological, chemical, or nuclear surety requirements." *Id.* ¶ 5. Accommodated soldiers generally cannot be forced to shave absent an actual "threat of exposures to toxic CBRN agents" that would require "all Soldiers to be clean-shaven." *Ibid*. Yet other procedures were included to preserve military discretion in unanticipated circumstances, although with countervailing protections for affected soldiers. *Id*. ¶ 6. There are now believed to be over 100 Sikh soldiers serving in the Army with their articles of faith intact.

2. The United States Military Academy at West Point

Unfortunately, however, the new regulations did not end the military's hesitancy toward religious accommodations. The Army admitted two observant Sikhs to West Point but told them they would have to remove their turbans and shave when donning the Army's "Long Gray Line" ceremonial uniform, strictly for purposes of maintaining uniformity. But West Point corrected course almost immediately after another RFRA lawsuit was filed, showing there was no compelling interest in eradicating such minor deviations from uniformity in ceremonial dress as a religious turban and beard. See Notice of Voluntary Dismissal, *Chahal* v. *Seamands*, No.17-cv-12656 (E.D. Mich., Aug. 24, 2017), ECF.13, https://perma.cc/7P6J-8MM6. Three Sikh cadets have now graduated from West Point with their articles of faith intact,[2] and Captain Singh currently teaches there.

[2] See, *e.g.*, Annie Karni, *Latest Crop of West Point Graduates Includes First Observant Sikh Cadet*, N.Y. Times, June 12, 2020, https://perma.cc/YE5E-LCF2.

3. The Air Force

The Air Force eventually followed the Army's new procedures, and in 2020, adopted its own policy allowing turbans and beards as long as "the bulk of an Airman's beard [does] not impair the ability to operate an assigned weapon, military equipment, or machinery." Air Force Instr. 36-2903, Attachment 8.1.3.2. Since implementation, we are aware of no instances of problems with military readiness or safety involving beards or turbans on accommodated Sikh servicemembers.

4. The Navy and Marine Corps

The Navy and the Marine Corps chose not to follow the Army's new procedures, but rather its earlier pattern of denying religious accommodations until faced with a RFRA challenge.

In 2021, the Navy abruptly ordered a Jewish sailor with a religious beard to shave within twenty-four hours. *Di Liscia* v. *Austin*, No.21-cv-1047 (D.D.C. Apr. 15, 2021). This happened while everyone on-ship was enjoying a temporary "no-shave" waiver for morale reasons while deployed at sea. The Jewish sailor had previously received a temporary accommodation allowing him to grow his beard, but the Navy suddenly denied his permanent accommodation request on the grounds it would "present an unacceptable risk to the Navy's compelling interest in mission accomplishment." Complaint Ex. D at 3, *Di Liscia*, No.21-cv-1047 (D.D.C. Apr. 15, 2021), ECF.1-4, https://perma.cc/TC6R-GQAD. But after a federal court issued an administrative stay to prevent immediate implementation of the order, the Navy quickly agreed that the Jewish sailor could retain his religious beard and would not be ordered to shave it before federal judicial review of such order. Joint Status Report, ECF.10. Two Muslim sailors likewise received the same protection. *Ibid.* And a third Muslim sailor was likewise granted an accommodation to grow a religious beard during the pendency of the litigation, ECF.30, albeit only after the Navy initially argued that protecting its "compelling interest" in "the safety and readiness of a U.S. Navy warship operating

at sea" meant that there was "no le[ss] restrictive means available" than requiring him to shave, ECF.26 at 1, 12.

Like the Navy, when the Marine Corps first confronted these issues, it initially insisted accommodations were impossible, but then started retreating. Its current position is that turbans, unshorn hair, and beards can all be accommodated except during basic training and (for beards) in "combat zones." Even those restrictions are overbroad and will be subject to strict scrutiny in ongoing litigation. See Complaint, *Toor* v. *Berger*, No.22-cv-1004 (D.D.C. Apr. 11, 2022), ECF.1; see also *id.* at ECF.16-7 (declaration that Navy submarines permitted beards for morale reasons).

But the Marine Corps' conduct so far confirms the broader pattern. When confronted with a request for accommodation, the military's immediate response is to insist it cannot tolerate this exercise of religion because of asserted interests in readiness and mission accomplishment. But once forced to grapple with the RFRA standard, it inevitably finds that less restrictive means are available to accommodate individual servicemembers without threat to military readiness or mission.

The examples of accommodated Sikh, Jewish, and Muslim servicemembers in Army, Navy, and Air Force posts shows that the strict scrutiny rule imposed by Congress has been workable and even beneficial to the military. See, *e.g.*, National Defense Authorization Act for Fiscal Year 2016 § 528, Pub. L. No.114-92 (2015) (protecting religious liberty has given the military access to servicemembers "from numerous religious traditions, including Christian, Hindu, Jewish, Muslim, [and] Sikh" traditions, which "contribute[d] to the strength of the Armed Forces."). It is unsurprising that the military instinctively resorts to seeking *Goldman*-style deference whenever it is asked to grant religious accommodations. But a broadly deferential standard thwarts Congress's intent to protect the religious freedom of those who devote their lives to protecting that same freedom for others through their service in the military. When the military is compelled under the RFRA standard to look more closely at

what a religious accommodation actually requires, it regularly finds that accommodation is possible without compromising national security.

B. The experience of Sikhs, Jews, and Muslims is just one example of unjustified military resistance to religious accommodation.

Religious beards and garments are not the only religious accommodations the military has attempted to deny based on asserted compelling interests that allegedly cannot be met through any less restrictive means. But when subjected to RFRA's required scrutiny, the resistance to these claims has proven unjustified.

For instance, in 1997, DOD tried to censor religious speech by religious leaders during religious chapel services. *Rigdon* v. *Perry*, 962 F.Supp.150 (D.D.C. 1997). Specifically, DOD banned Jewish and Catholic military chaplains from instructing their congregations during chapel services that the congregants have a duty to oppose injustice and that pending legislation against partial-birth abortion gave them an opportunity to do so. *Id.* at 156. Similar to its position here, DOD claimed that this burden on internal religious speech passed RFRA's scrutiny because it "serv[ed] both the stability of our democratic political system and the ability of the military to focus on its mission of military readiness and national defense." *Id.* at 161-162. It further claimed that, allowing the speech could "severely undermine military discipline, cohesion, and readiness to the serious detriment of the National Security." *Id.* at 162 (quoting DOD's briefing). But despite these dire assertions, after the district court granted the injunction, DOD did not appeal and democracy did not fall.[3]

The military has likewise overreached on COVID-19 related measures. For example, on June 24, 2020, the Navy issued an order limiting sailors from attending off-

[3] A very similar situation arose in 2012 and was likewise resolved to protect religious speech without harm to military interests. See *Archbishop Broglio Calls on Faithful to Stand*, Archdiocese for the Military Services, Jan. 26, 2012, https://perma.cc/B4BY-GJD9 (text of letter); see also *Military chaplains told not to read archbishop's letter on HHS mandate*, National Catholic Reporter, Feb. 8, 2012, https://perma.cc/EY4B-XNG2 (reporting on resolution).

base activities such as "indoor religious services."[4] A Navy spokesperson explained that this order was "essential to safeguarding the health, safety and welfare of our servicemembers and ensuring the Navy's operational readiness."[5] But the order expressly did not ban using mass transit, auto repairs shops, lawn services, "essential" commercial retail services, laundromats, post offices, pet care services, or in-residence social gatherings of any size.[6] And it also did not prohibit free-speech activities such as protests or demonstrations, despite a list of the 28 other activities that were banned alongside in-person worship services. Days later, the Navy changed course, issuing a "Clarification of Guidance Related to Attendance at Religious Services," suddenly permitting sailors to attend off-base religious services where "social distancing and use of face covering" was employed.[7]

Until just this month, DOD policy did not permit servicemembers and their families to attend on-base chapels in groups larger than 50 without first obtaining special permission and confirming all attendees are either vaccinated or have received a negative COVID-19 test within 72 hours.[8] DOD asserted in this context that these restrictions were "necessary to * * * protect[] the health of all DoD personnel" and "to

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[4] See Navy Order (June 24, 2020), https://perma.cc/84SS-NMU4 (copy of order); see also Allison Bazzle, *Hampton Roads business owners and families concerned about new Navy restrictions,* 13News Now, June 26, 2020, https://perma.cc/MF7Z-F4KC (news report on order).

[5] See Richard Sisk, *Navy Ban on Sailors Worshiping Indoors at Off-Base Churches Stirs Controversy,* Military.com, July 8, 2020, https://perma.cc/YN5V-XH8U.

[6] See n.4, *supra.*

[7] See Memorandum from the Under Secretary of the Navy on Clarification of Guidance Related to Attendance at Religious Services, https://perma.cc/DX9X-3USF.

[8] See Memorandum from Deputy Secretary of Defense on Updated Coronavirus Disease 2019 Guidance (Sept. 24, 2021), https://perma.cc/26FA-GEDR; see also Memorandum from the Under Secretary of Defense on Consolidated Department of Defense Coronavirus Disease Guidance 42 (Apr. 4, 2022), https://perma.cc/9HMD-QLCQ (su-

preserve total force readiness." *Ibid.* But the policy exempts "military training and exercise events," *ibid.*, and the military also appears to have taken a more relaxed approach to the well-attended football games that its teams played in its stadiums.[9]

Given this history, this Court should be careful not to blindly defer to the military's asserted interests in a way that allows them to evade RFRA's more calibrated analysis that Congress demanded ought to apply.

III. The Air Force has not shown it is likely to meet its RFRA burden.

Respondents have failed to show they are likely to meet their burden to prove sufficient justification for substantially burdening an Applicant's religious exercise.

As an initial matter, this case is a far cry from the narrow stay that the Navy recently received. There, the Navy invoked extreme circumstances as justification, such as emergency deployments to "anywhere in the world on short notice; to complete high-risk missions under extreme conditions; and to operate in small teams and close quarters for extended periods." Appl. at 3-4, *Austin* v. *U.S. Navy SEALS 1-26*, No.21A477 (Mar. 7, 2022) (citing SEALs mission flying "8000 miles to respond to the hijacking of a U.S.-flagged ship by Somali pirates and * * * rescuing the ship's captain."). While the "extraordinarily compelling interest in maintaining strategic and operational control over the assignment and deployment of all Special Warfare personnel" may have justified a temporary stay there, *Austin* v. *U.S. Navy SEALS 1-26*, 142 S.Ct. 1301 (2022) (Kavanaugh, J., concurring), the Navy did not even attempt to argue for the broad power the Air Force claims here.

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perseding previous guidance, but still requiring meeting-size restrictions and vaccination where the Covid threat level reaches certain points and exempting training and exercise events).

[9] See *Navy-Marine Corps Memorial Stadium COVID Policies*, Navy Athletics, https://perma.cc/MWX4-EJXV (no vaccination or 72-hour testing requirement); see also *Navy Football to Play Six Home Games at Navy-Marine Corps Stadium in 2021*, Navy Athletics, Feb. 18, 2021, https://perma.cc/64B8-G2LD (2021 Navy football schedule).

In this case, the sole question is whether anything less than punishing the Applicant and removing him from *any* role in the Air Force Reserve, regardless of deployment status, is necessary to achieve compelling military interests. It seems unlikely that the Air Force can meet that burden.

First, and most obviously, the Air Force's interest in punishing Applicant cannot be compelling because it "leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi* v. *City of Hialeah*, 508 U.S. 520, 547 (1993). The underinclusiveness here is pronounced. The Air Force's asserted interest is in preventing the spread of COVID by unvaccinated individuals. But thousands of administratively and medically exempt servicemembers threaten that interest at least as much as Applicant. Again, the question before this Court "is not whether the [Air Force] has a compelling interest in enforcing its [vaccine] policies generally, but whether it has such an interest in denying an exception to" Applicant. *Fulton*, 141 S.Ct. at 1881. And given that the Air Force tolerates thousands of unvaccinated servicemembers, its refusal to allow a single exemption for Applicant "cannot be regarded as protecting an interest of the highest order." *Lukumi*, 508 U.S. at 547 (cleaned up).

Second, the Air Force also appears to have failed the least-restrictive-means prong by "fail[ing] to engage in the sort of case-by-case analysis that [RFRA] requires" before denying an accommodation to Applicant. *Ramirez*, 142 S.Ct. at 1264. Indeed, rather than individualized consideration, the Air Force's religious accommodation scheme appears to be an intentional dead end, with federal courts warning that "the Air Force is systematically denying religious exemptions," *Poffenbarger* v. *Kendall*, No.22-cv-1, 2022 WL 594810, at *13 (S.D. Ohio Feb. 28, 2022), and "easily f[inding]" its accommodation process "both illusory and insincere," *Air Force Officer* v. *Austin*, No.22-cv-9, 2022 WL 468799, at *10 (M.D. Ga. Feb. 15, 2022); see also *Navy Seal 1* v.

Austin, No.21-cv-2429, 2022 WL 534459, at *18 (M.D. Fla. Feb. 18, 2022) (religious accommodation scheme is merely "'rubber stamp' adjudication by form letter").

The record below indicates the same is true here, with Applicant's exemption denial simply a form letter, App.21a-22a, and the Respondents' inability to answer basic questions from the district court about Applicant's specific situation that would have been necessary for evaluating whether the Air Force could accommodate him. App.27a. If the Air Force hasn't considered the facts concerning "the particular claimant" at issue here, they cannot meet their burden to "*prove*" punishing him is the least restrictive means of achieving its interests. *Holt*, 574 U.S. at 363-364 (emphasis added); *McCullen* v. *Coakley*, 573 U.S. 464, 494 (2014) (government necessarily flunked even intermediate scrutiny's narrow-tailoring test where it failed to "show[] that it considered different methods" that were "less intrusive").

Indeed, the Air Force's unusual posture here has made strict scrutiny analysis particularly straightforward. If the Air Force is granting religious accommodations, then it hard to see how they have a compelling interest in refusing to grant *any* accommodation to Applicant, a fit and naturally immune Reservist seeking only to keep his job without punishment. *Ramirez*, 142 S.Ct. at 1264 (prison's prior willingness to accommodate same religious exercise indicates no compelling reason against doing so again). And if a denial was in fact predetermined, then it is equally hard to see how the Air Force can show that the denial was truly narrowly tailored to the Applicant's individual situation. Even *Goldman* doesn't require courts to defer to a sham.

To be sure, as it has done with religious beards, the Air Force could develop *real* policies governing religious accommodations, as opposed to the rubber-stamp-denial policy apparently at issue here. Such a policy could both recognize the broad range of roles where being unvaccinated would pose no unmanageable risk to readiness or mission accomplishment, while reserving some roles where vaccination was necessary (and thus likewise unavailable to the medically exempt). Although those policies

themselves would still be subject to RFRA scrutiny, such an approach would be a less restrictive way of accomplishing the Air Force's interests. It would also comport with RFRA's purpose of requiring the government to justify restrictions on free exercise rights, while still affording latitude to the military on sensitive issues that more readily satisfy strict scrutiny.

But that's not the situation before this Court. Here, the Air Force heavily rests on deference to its expertise. RFRA requires more. Congress rejected "unquestioning deference" precisely to ensure that servicemembers are not deprived of their livelihoods, pensions, and sincerely held religious beliefs without the government first showing such deprivation is "the least restrictive means of furthering a compelling governmental interest." *Holt*, 574 U.S. at 364.

CONCLUSION

The application should be granted.

Respectfully submitted.

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APRIL 2022