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

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

v.

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

On Appeal from the United States District Court
for the District of Columbia
No. 1:22-cv-01004-RJL
Hon. Richard J. Leon

## BRIEF OF THE MUSLIM PUBLIC AFFAIRS COUNCIL AND AMERICAN ISLAMIC CONGRESS AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici. All parties, interveners, and amici appearing before the district court and in this Court are listed in the Brief of Plaintiffs-Appellants.

B. Rulings under review. References to the rulings at issue appear in the Brief for Plaintiffs-Appellants.

C. Related cases. Aside from the related cases listed in the Brief for Plaintiffs-Appellants, amici are unaware of any related cases.

## CORPORATE DISCLOSURE STATEMENT

Amici American Islamic Congress and Muslim Public Affairs Council do not have a parent corporation and do not issue stock. *See* Fed. R. App. P. 26.1; D.C. Cir. R. 26.1. Both amici are Section 501(c)(3) certified nonprofit organizations that advocate for Muslim Americans and seek to foster tolerance, understanding, and dialogue.

## SEPARATE BRIEFING STATEMENT

Under D.C. Circuit Rule 29(d), counsel certifies that separate briefing is necessary because this appeal presents issues of exceptional importance and amici offer the perspective of a minority religious group whose members are affected by the Marine Corps' uniform and grooming policies. As organizations that advocate for the interests of Muslim Americans and minority religious groups more generally, amici are well suited to provide insight on the harmful effects of the Marine Corps' policies and the need to scrutinize the government's argument that national security prohibits granting religious accommodations.

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## INTEREST OF AMICI CURIAE[1]

As associations that advocate for the interests of Muslim Americans, amici promote government policies that treat Muslims and other religious minorities with equality, dignity, and respect.

The Muslim Public Affairs Council is a nonprofit public affairs organization. Since 1988, it has sought to improve policies affecting American Muslims. The Council aims to strengthen American pluralism by engaging with our government, media, and communities and highlighting how American Muslims' vital contributions enrich America.

The American Islamic Congress was founded to provide a voice for American Muslims after September 11. It seeks to facilitate understanding, fight intolerance, and promote coexistence, human rights, and religious liberty. By bridging the sectarian, ethnic, cultural, and political divisions within Islamic communities, the American Islamic Congress seeks to strengthen American society.

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[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting this brief; and no person other than amici, their members, or their counsel contributed money intended to fund preparing or submitting this brief. All parties consent to the filing of this brief.

Amici submit this brief to share the perspective of a minority religious group. In other litigation (*Di Liscia v. Austin*, D.D.C. case no. 21-cv-01047), Muslims and other religious minorities secured religious beard accommodations from the Navy. Even so, the Marine Corps is still holding out, without justifying why the Marines' interests differ from other branches of the Armed Forces or why similar accommodations could not be granted here. As amici explain, the Marine Corps' grooming and uniform policy violates fundamental rights of Muslims and other religious minorities, undercuts the Corps' own pluralistic values, and in the end only weakens our national security.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Although this appeal seeks relief for three Sikh plaintiffs, the Marine Corps policy under review harms countless more. By banning head garb and requiring all nonexempt recruits to shave, the policy forces Sikhs, Muslims, and those of other minority faiths to an impossible choice between military service and religious duty. In so doing, the policy not only discriminates against religious minorities but deprives the Marine Corps of diverse and much-needed recruits—contrary to both the law and the public interest.

## ARGUMENT

### I. The Marine Corps' grooming and uniform policy excludes Muslims and other religious minorities, undermining both the military's and the public's interests.

This appeal seeks preliminary injunctive relief for three Sikh would-be recruits, but the policy under review reaches much further. By prohibiting religious headgear, beards, and unshorn hair, the Marines' policy excludes not only Sikhs but Muslims, Native Americans, and Jews (among others) with similar beliefs. For thousands of devout members of these faiths, joining the Marine Corps without violating deeply held beliefs is impossible.

Many Muslim women, for example, wear a headscarf, or "hijab." *See EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 770 (2015) (upholding a religious discrimination claim brought by a Muslim woman who, "consistent with her understanding of her religion's requirements," wore a headscarf). More than just a religious obligation, the hijab for them represents a Muslim woman's submission to Allah and her connection with the faith. *Why hijab is important in Islam*, Arab News (Nov. 23, 2012), https://perma.cc/Y7YH-WN4R. With the Marine Corps'

uniform policy in place, however, these women cannot join the Corps while keeping that sacred practice.

As courts have recognized, growing a beard is also a religious command for many Muslim men. In its landmark *Holt v. Hobbs* decision, the Supreme Court protected a Muslim prison inmate's right to grow a short beard, holding that prison officials' security concerns did not justify forcing him to "engage in conduct that seriously violate[d] [his] religious beliefs." 574 U.S. 352, 361 (2015) (citation omitted). In another case, the Third Circuit ruled for two Muslim police officers disciplined for refusing to shave their beards. *Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999). Writing for the court, then-Judge Alito credited an imam's affidavit explaining his belief that failing to grow a beard is a "major sin"—as serious "as eating pork." *Id.* at 360. Just as with Muslim women who wear the hijab, these men cannot go through boot camp without violating a religious command.

Sikhs and Muslims are not alone in these beliefs. Many Native Americans, for example, believe "hair is a gift from the Creator," "to be cut only when someone close to them dies." *Hamilton v. Schriro*, 74 F.3d

1545, 1547–48 (8th Cir. 1996). To some, "hair symbolizes and embodies the knowledge a person acquires during a lifetime" and cutting it not only costs them their "wisdom and strength" but can prevent them from "join[ing] [their] ancestors in the afterlife." *Warsoldier v. Woodford*, 418 F.3d 989, 991–92 (9th Cir. 2005).

In Judaism, wearing religious headgear like a yarmulke shows a "silent devotion akin to prayer" and reverence for God. *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986). Growing a beard is also an "established religious tradition among members of the Jewish faith." *Geller v. Sec'y of Def.*, 423 F. Supp. 16, 17 (D.D.C. 1976).

All told, the Marines' policy excludes a host of would-be recruits with a wide range of sincere religious beliefs. And worse, the policy particularly "disadvantage[es] those religious groups whose beliefs . . . are outside of the 'mainstream,'" *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 197 (2012) (Thomas, J., concurring)—violating one of the First Amendment's "clearest command[s]." *Larson v. Valente*, 456 U.S. 228, 244 (1982). For these disfavored minority recruits, the message is clear: To serve, they must shed their religious identity and violate their faith.

Treating religious minorities this way clashes with RFRA, which Congress enacted to protect "religious minorities too small to be heard in the legislature"—or in the Marine Corps—by enshrining a broad religious freedom principle. *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary*, 102d Cong. 77 (1992) (statement of Douglas Laycock).

Forcing religious minorities to make the impossible choice between duty to their country and duty to their God causes immense—and irreparable—harm. Violating plaintiffs' religious freedom, whether for days or months, "unquestionably constitutes irreparable injury." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)). And "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017) (alteration in original) (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)).

Here, the Marines' policy actively violates plaintiffs' religious freedom not only by withholding the privilege of military service on a

discriminatory basis but by forcing them to choose between military service and their core beliefs. The resulting crisis of conscience forced on would-be recruits is irreparable precisely because it is "spiritual rather than pecuniary." *Ramirez v. Collier*, 142 S. Ct. 1264, 1282 (2022). Indeed, the "pressure on [plaintiffs]" to forgo their religious practice "is unmistakable." *Sherbert*, 374 U.S. at 404. They must "choose between following the precepts of [their] religion and forfeiting [military service], on the one hand, and abandoning one of the precepts of [their] religion in order to accept work, on the other hand." *Id.* At bottom, it is "the same kind of burden" as a fine on religious practice. *Id.* No earthly compensation could remedy the harm inflicted by that burden. And so long as the Marines' policy remains, Plaintiffs and other devout people of faith will continue to bear that harm.

By excluding religious minorities, the Marine Corps ultimately harms its own interests. The Corps rightly prides itself in "reaching every corner of the country" to attract "talented men and women of every race, color, and creed." *Marine Recruiting Achieves Historic Success in Diversity Representation*, Marines, https://perma.cc/K7AV-G8D3 (last visited Oct. 10, 2022). And for good reason: Diversity in its ranks

"build[s] cohesive units able to solve complex problems in war and peace." *Id.*

Muslim service members and those of other minority faiths, for example, have played a key role in the military, serving "as cultural and linguistic translators in the U.S. and abroad." Teresa Watanabe & Duke Helfand, *A bridge between mosque and military*, L.A. Times (Nov. 12, 2009), https://perma.cc/XY57-CGNM (noting one observer's account that the "services truly value the Muslim" community and "go[ ] out on a limb to bring them into the ranks"); *see also, e.g.*, Todd South, *Marine Reserve wants more officer diversity from new enlisted program*, Marine Corps Times (Aug. 29, 2022), https://perma.cc/3Q6B-YW29 (recounting the World War II service of hundreds of Navajo warriors, known as the "Navajo Code Talkers," who served "at the front of some of the [Marine] Corps' most storied and bloody battles"); *Singh v. Carter*, 168 F. Supp. 3d 216, 235 (D.D.C. 2016) (granting Sikh service member's religious accommodation, recognizing the military's vital interest in diversity and in recruiting individuals who "possess cultural and linguistic skills"). Excluding such recruits would be a great loss.

Allowing religious practices also fosters "spiritual readiness," which prepares Marines to cope with any crisis and is "the bedrock upon which the concepts of honor, courage, and commitment are built." U.S. Marine Corps, The Commander's Handbook for Religious Ministry Support, Marine Corps Ref. Pub. 3-30D.4, at 1-1 (May 2, 2016), https://perma.cc/39UZ-SNAG. Indeed, spiritual readiness is linked not only to better psychological well-being, physical health, and a sense of meaning and purpose but to lower rates of depression, substance abuse, PTSD, and suicide—the very areas where service members suffer most. Harold G. Koenig, *"Spiritual Readiness" in the U.S. Military*, J. of Religion and Health, 2–4, 7–9 (2022), https://perma.cc/8PAY-KFRU.

In sum, by requiring Sikhs, Muslims, and other religious minorities to give up a core part of their faith and identity, the Marine Corps stifles religious expression and turns away the very recruits it most needs, all to the detriment of soldier health and mission readiness. That cannot be in the public interest.

## II. Contrary to the district court's approach, this Court should not defer to the government's bare assertion of national security.

By "consid[ering] the public interest [in national security] *alone*," the District Court allowed the government's generalized interest in national security to trump a core constitutional freedom. *Toor v. Berger*, No. CV 22-1004 (RJL), 2022 WL 3646565, at *5 (D.D.C. Aug. 24, 2022) (emphasis added). But "national-security concerns must not become a talisman used to ward off inconvenient claims." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017). Unlike the district court, this Court should scrutinize the government's assertion of national security.

Courts have long recognized the importance of upholding individual rights, even in the face of national security concerns. But they have not always been so vigilant. A prime example is the Supreme Court's lamentable decision in *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), *overruled by W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). There, the Court considered whether a school could force Jehovah's Witness children to salute the American flag against their religious beliefs. *Id.* at 592–93. Although the case involved two children in a classroom, the Court cast the case in broad national security terms. Saluting the

flag promoted a sense of unity and loyalty, the Court reasoned, and "[n]ational unity is the basis of national security"—a state interest "inferior to none." *Id.* at 595. Because it thought the stakes couldn't be higher, the Court ruled the state could force the Gobitis children to violate their faith by raising their hand to the flag. *Id.* at 595–600.

The Supreme Court's course correction was sharp and quick. Just three years later, the Court reversed *Gobitis*. *Barnette*, 319 U.S. at 640–42. This time the Court "appl[ied] the limitations of the Constitution," recognizing that affording "freedom to be intellectually and spiritually diverse" would hardly "disintegrate the social organization." *Id.* at 641. Far from it: The children's religious observance was "harmless to others [and] to the State." *Id.* at 642. Indeed, the Court wrote, if there is a "fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.*

As Justice Thurgood Marshall once noted, courts that "allow fundamental freedoms to be sacrificed in the name of real or perceived exigency . . . invariably come to regret it." *Skinner v. Ry. Lab. Execs.' Ass'n*,

489 U.S. 602, 635 (1989) (Marshall, J. dissenting). Today we understand that allowing the internment of Japanese Americans because of perceived military exigency "has no place in law under the Constitution." *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting). And when the Court gave "great deference to . . . military authorities" who banned a service member from wearing a yarmulke, *Goldman*, 475 U.S. at 507, Congress quickly stepped in to ensure that "member[s] of the armed forces may wear an item of religious apparel while wearing [their] uniform," 10 U.S.C. § 774.

History teaches that while national security is no doubt important, courts have an indispensable role as protectors of individual rights. They ensure those rights are not "left impoverished" by "a plea of military necessity that has neither substance nor support." *Korematsu*, 323 U.S. at 234 (Murphy, J., dissenting). Even in times of national peril, they do not allow individual freedoms to be taken away at the mere mention of national security. *See N.Y. Times Co. v. United States*, 403 U.S. 713, 718 (1971) (Black, J., concurring) (courts should not ignore the "First Amendment's emphatic command . . . in the name of 'national security'"); *Ex parte Milligan*, 71 U.S. 2, 120–21 (1866) (observing that the

Constitution was written to apply "equally in war and in peace" and to protect "all classes of men, at all times, and under all circumstances").

To be sure, the Marine Corps is right to prioritize the security of our nation. But it is precisely because that duty is so pressing that the need for judicial vigilance against unconstitutional excess is so great. *Hassan v. City of New York*, 804 F.3d 277, 306–07 (3d Cir. 2015) ("We have learned from experience that it is often where the asserted interest appears most compelling that we must be most vigilant in protecting constitutional rights."). In short, courts must scrutinize the government's asserted interests to ensure constitutional rights are not "put away and forgotten." *Roman Cath. Diocese*, 141 S. Ct. at 68.

This gatekeeping role is all the more important when it comes to religious liberty, a fundamental right protected by both the First Amendment and RFRA. In this context especially, courts must not accept broad generalizations about the government's interests but must instead determine the strength of those interests as to the "particular religious claimants" before the court. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006); *see also Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021). Nor should courts simply

"defer[ ]" to government officials' "mere say-so." *Holt*, 574 U.S. at 369. The First Amendment and RFRA demand much more.

## CONCLUSION

This Court should reverse the District Court's denial of a preliminary injunction. The government's vague unsupported assertion of national security cannot justify turning away Sikhs, Muslims, and other people of faith who desire to serve their country while remaining true to the demands of conscience. Plaintiffs should be allowed to serve with their faith intact.[2]

Respectfully submitted,

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[2] Amici thank Trey Campbell, Samantha Thorne, and Nicolas Wilson, students in the Harvard Law School Religious Freedom Clinic, for helping to prepare this brief.

## CERTIFICATE OF COMPLIANCE

This brief complies with Fed. R. App. P. 29(a)(5) because it contains 2,645 words—less than half the length allowed for Plaintiffs-Appellants' principal brief under Fed. R. App. P. 32(a)(7)B).

This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a) because it has been prepared in a proportionally spaced, 14-point Century Schoolbook font.

Dated: October 28, 2022

/s/ *Joshua C. McDaniel*
Joshua C. McDaniel

## CERTIFICATE OF SERVICE

I certify that on October 28, 2022, I served this document on all parties or their counsel of record via CM/ECF.

Dated: October 28, 2022

/s/ *Joshua C. McDaniel*
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