IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIMRATPAL SINGH, Plaintiff, v. ASHTON B. CARTER, *et al*., Defendants.	Civil Action No. 1:16-cv-00399-BAH **REPLY MEMORANDUM IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING ORDER**

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INTRODUCTION

Defendants' retaliation against Captain Singh for seeking a religious accommodation is astounding and easily justifies the emergency relief he is seeking. Defendants' most recent disclosures confirm the extraordinary nature of the testing imposed on Captain Singh, despite the fact that tens of thousands of soldiers have received analogous accommodations with no testing at all. Four and a half months after Captain Singh advised the Army of his need for an accommodation, and nearly three months after the Army granted him a temporary accommodation, on Friday, February 26, around 8:00 PM, he received orders to report on Tuesday morning for three days of testing at the Army's Aberdeen Proving Grounds. Singh Decl. ¶ 10. Today, Defendants disclosed that the testing was going to cost the military $32,925. *See* 03/01/2016 Notice, Exhibit 1, at 3 [Dkt. 13(1)].

The suspicion of Captain Singh underlying Defendants' testing requirements is palpable. While Defendants have attempted to explain away their suggestion that he should have "a more senior escort . . . to travel with him and observe the training," their alternative still required his commander to at least "provide him very clear written/counseling instructions as to . . . his requirements to comply with the experts"—hardly a level of trust warranted for a decorated Army Ranger with an exemplary ten-year record and reputation. And it's notable that the lawyers were overseeing the testing. *See* Singh Decl. ¶ 10, attachment to Ex. 1.

Without a temporary restraining order against any further non-standard testing, Captain Singh will be deprived of his constitutional and statutory right to continue serving in the military without being discriminated against because of his faith.

REBUTTAL OF DEFENDANTS' MISSTATEMENTS OF FACT AND LAW

Defendants' elusive response to the application for temporary restraining order—both in their brief and at oral argument—muddles the law and the facts. But reality is not so easily brushed

aside. The Religious Freedom Restoration Act (RFRA) and Defendants' own regulations prohibit the government from imposing a substantial burden on an individual's sincere religious exercise, unless the government demonstrates a compelling interest that cannot be met by less restrictive means. While RFRA has always applied to the military, in January 2014, Defendants expressly incorporated RFRA's standards into their own regulations, promising that "[r]equests for religious accommodation *will* be resolved in a timely manner and *will* be approved," so long as they do not "adversely affect mission accomplishment." Dep't of Def. Instruction 1300.17(4)(e) (emphasis in original).

At oral argument, Defendants conceded that denying Captain Singh an accommodation would impose a substantial burden on his sincere religious belief. Thus, it is their burden to show a compelling government reason for denying the accommodation. Their reliance at oral argument on the Supreme Court's recent and unanimous decision in *Holt v. Hobbs*, 135 S. Ct. 853 (2015), is too clever by half. In *Holt*, an Arkansas prisoner sought the right to wear a beard in accordance with his Islamic faith. He presented evidence that medical beards were allowed and that "the vast majority" of other prison systems allowed beards, "either for any reason or for religious reasons." *Id*. at 866. When Arkansas responded with concerns that its prison system was "different," that more prisoners would demand beards for religious reasons than for medical reasons, and the religious beards would increase the flow of contraband, the Court demurred, refusing to rely on unfounded, exaggerated, and speculative concerns. *See Holt*, 135 S. Ct. at 866 (officials' "mere say-so" could not suffice).

Certainly, the Court would not have countenanced singling out the plaintiff prisoner, and subjecting him to extraordinary testing, while continuing to allow other prisoners with religious or medical beards continue without scrutiny. At minimum, the Court emphasized that it was

Arkansas' burden to show with *existing* evidence, why the plaintiff's situation was different from the other accommodations granted—even by other prison systems.

Defendants likewise are not operating in a vacuum. They did not and cannot deny that observant Sikhs have been serving in the military for decades without ever having been subjected to the rigorous testing being imposed on Captain Singh. Khalsa Decl. ¶¶ 4, 22-25; Lamba Decl. ¶¶ 20-23; Kalsi Decl. ¶¶ 12-16. Tens of thousands of soldiers wear beards for medical reasons. Special forces soldiers often wear beards and long hair when deployed abroad to the front lines, where they are most at risk of exposure to dangerous chemical agents. *See, e.g.*, Kalsi Decl. ¶ 14. None of those soldiers are tested like Captain Singh is being required to be tested—and perhaps obviously so, considering the $30,000 cost per soldier. Women soldiers similarly are allowed to wear their hair longer than men, but are never subjected to the additional helmet testing imposed on Captain Singh.

In their brief and at oral argument, Defendants ignored or distorted these facts. They argued that the recent "sea change in biology" arising in the context of football concussions warrants closer scrutiny of helmet efficacy. Yet they admitted that their current standard helmet has been in use since 2004. They argued that a 2009 mask study showed that beards created problems with protective masks, but the study only required seven days of beard growth. Moreover, at least three accommodations for observant Sikh soldiers were granted after 2009. Baxter Decl. Exs. D-F. Defendants argued that those soldiers are no longer in the military, but all three continue to serve in the Active Reserves or in the Individual Ready Reserves. *See, e.g.*, Lamba Decl. ¶ 3; Kalsi Decl. ¶ 2. Defendants had no legitimate explanation for why Captain Singh's beard cannot be accommodated the same as other beards worn for religious or medical reasons.

Even with respect to Captain Singh's own history, Defendants' counsel were woefully unaware of the reality of his situation. He has already served for nearly three months with his articles of faith intact, clearly demonstrating that denying him a "permanent" accommodation is not the least restrictive means of accommodating his religious beliefs. Moreover, he has already passed standard protective mask testing, most recently yesterday. Singh Decl. ¶¶ 13-17. Defense counsel even contended yesterday that the heightened testing being imposed on Captain Singh, was never scheduled for this Tuesday as Captain Singh alleged. But that assertion is clearly belied by an email sent to Captain Singh showing that counsel was in fact involved with the scheduling. Singh Decl. ¶ 10, Exhibit 1 (attachment).

But beyond all this, perhaps most disturbing was Defendants' response to the Court's pointed question at oral argument about "what happens next" if Captain Singh were to fail the testing at some level, "No Sikh soldiers?" Shockingly, Defendants' counsel responded passively: "That is a policy decision." No, that is not a policy decision. It's outrageous. Observant Sikhs serve in the militaries of the United Kingdom, Canada, India, and Australia, and also as United Nations Peacekeepers. Canada's current Secretary of Defense is an observant Sikh who served in Afghanistan alongside American forces with his articles of faith fully intact. Observant Sikhs have served honorably and nobly in the United States military since World War I until the beard rules were tightened, almost entirely cutting Sikhs out of the military with only a handful of recent exceptions. Defendants' extraordinary and discriminatory retaliation against Captain Singh for requesting his own accommodation is now one more step in the wrong direction. Failing to require Defendants to comply with their clear obligations under RFRA and their own regulations sends a message to minority religious believers serving in our nation's military that they are not worthy to be there unless they are willing to sacrifice their religious convictions at the whim of bureaucrats.

If the government has compelling reasons why that must sometimes happen, it can always make its case. But Defendants have not and cannot do so here. For all these reasons, and as more fully set forth below, this Court should grant Captain Singh's application for temporary restraining order without further delay.

ARGUMENT

I. Captain Singh is likely to succeed on the merits of his RFRA, Free Exercise, and Equal Protection claims.

In our opening memorandum, we demonstrated that Captain Singh is likely to succeed on the merits of three of his claims—the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, (RFRA) the Free Exercise Clause, and the Equal Protection Clause. Mem. 23-36; 37-38; 38-40.

In response, the Army does not argue that Captain Singh should lose this TRO on the merits of his claims. Indeed, it conceded in court that denying Captain Singh a religious accommodation is a substantial burden on his religion, and that it has no evidence to show that denying that accommodation would be the least restrictive means of meeting a compelling interest. *See Holt*, 135 S. Ct. 853. The Army also conceded that its sole reason for subjecting Captain Singh to sustained, rigorous, and unprecedented tests is to determine whether or not to provide Captain Singh with an accommodation. Opp. Mem. 3. This type of retaliatory discrimination is clearly a violation of RFRA, and the First and Fifth Amendments of the United States Constitution, and thus should be enjoined.

A. Defendants concede that Captain Singh has made his case on the merits of his claims.

By failing to address the merits of Captain Singh's claims on the temporary restraining order, the government has waived any argument that Captain Singh is unlikely to succeed on the merits of his claims. *See Center for Auto Safety v. U.S. Dep't of Treasury*, No. CV 11-1048 (BAH), 2015 WL 5726348, at *17 n.9 (D.D.C. Sept. 30, 2015) (quoting *Hopkins v. Women's Div., Gen. Bd. of*

Glob. Ministries, 284 F. Supp. 2d 15, 25 (D.D.C. 2003)) (alterations in original) ("It is well understood in this Circuit that when a [party] files an opposition to a dispositive motion and addresses only certain arguments raised by [the opposing party], a court may treat those arguments that the [party] failed to address as conceded."). *See* Opp. Mem. 6-7 (arguing that this Court lacks jurisdiction). At the hearing, counsel for the government agreed explicitly that denying Captain Singh an accommodation and requiring him to shave his beard or turban would substantially burden his religious beliefs. Counsel seemingly argued that because the testing the Army proposes does not do either of those things, it does not, in itself, impose a substantial burden on Captain Singh's beliefs in violation of RFRA. But using unprecedented tests as a pretext to discriminate against a religious believer solely because of his religious beliefs is in itself a substantial burden on his religious exercise. "[T]he substantial burden provision protects against non-discriminatory, as well as discriminatory, conduct that imposes a substantial burden on religion." *Bethel World Outreach Ministries v. Montgomery Cty. Council*, 706 F.3d 548, 557 (4th Cir. 2013) (Holding potential discrimination against church imposed a substantial burden under the Religious Land Use and Institutionalized Persons Act, an analog to RFRA). By subjecting Captain Singh to testing it has not imposed on any other soldier, the Army is discriminating against him in violation of RFRA. The government cannot separate its decision to conduct this testing with its decision whether to accommodate his religious beliefs. "A substantial burden exists when government action puts 'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Singh v. McHugh*, 109 F. Supp. 3d 72, 87 (D.D.C. 2015). By subjecting Captain Singh to this testing, they are forcing him to choose between pursuing his religious beliefs and pursuing a normal career in the Army that any other soldier could expect, a classic violation of RFRA that this Court can enjoin today. This discrimination likewise violates the Equal Protection Clause of

the Fifth Amendment, and the Free Exercise Clause of the First Amendment, a premise the government has not disputed.

B. Defendants fail to prove their only available affirmative defense of strict scrutiny for all three claims.

Defendants' only arguments on the substance of Captain Singh's claims go to their strict scrutiny defense. Opp. Mem. at 8-9. The government claims that it has a "valid military purpose" for subjecting Captain Singh to this unique testing, an argument that addresses not RFRA strict scrutiny but the lower standard of deference the military is entitled to in some constitutional contexts. *In re Navy Chaplaincy*, 697 F.3d 1171, 1179 (D.C. Cir. 2012), *aff'd*, 738 F.3d 425 (D.C. Cir), *cert. denied*, 135 S. Ct. 86 (2014). That deference is due only to a court's consideration of "harm that would result to military interests," *Id.*, in a constitutional challenge. In court yesterday, however, the Government conceded that RFRA strict scrutiny applies in this situation. RFRA "'makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress.'" *Singh v. McHugh*, 109 F. Supp. 3d at 91 (quoting *Holt*, 135 S. Ct. at 864).

1. Defendants make no effort to prove that they have a compelling interest in subjecting Captain Singh to discriminatory testing.

Rather than an "interest in the highest order" required by RFRA, *see Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433 (2006), Defendants claim they have a "valid military purpose" for discriminating against Captain Singh. But at the hearing yesterday, the government acknowledged that RFRA "does not permit . . . unquestioning deference," to "valid" government interests. *Singh v. McHugh*, 109 F. Supp. 3d at 91 (citing *Holt*, 135 S. Ct. at 858). The only interest Defendants offer for imposing rigorous, sustained, unprecedented testing on Captain Singh *before* they can grant him an accommodation is that they believe it is "possible that Plaintiff's accommodation may affect his health and safety." But that is no affirmative

evidence that Captain Singh's safety is at risk, and no reason to treat Captain Singh differently from the other soldiers that have already received an accommodation.

The compelling interest test rejects "mere invocation[s]" of important government interests. *O Centro*, 546 at 432. Defendants' argument that their interest in this harmful testing is necessary, or even valid, is exposed "when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993). The Army does not do this kind of "health and safety" testing for other soldiers using the same equipment Captain Singh would be using, nor has it done this kind of testing for other Sikh soldiers who continue to serve in the military. Kalsi Decl. ¶¶13, 16; Lamba Decl. ¶¶ 21-22; Khalsa Decl. ¶ 25.

2. Defendants make no effort to satisfy strict scrutiny's least restrictive means requirement.

Defendants make no argument that they cannot meet their supposed interest in Captain Singh's health and safety in a less restrictive way than subjecting him to discriminatory testing. They refuse to consider the truly less restrictive means of treating him the same way that they have treated other servicemen who have received Sikh accommodations, namely, by granting them permanent or "indefinite" accommodations that leave open the option for rescission if truly compelling circumstances arise. *See, e.g.*, Baxter Decl., Exs. D-F. The same standard applies to soldiers with medical beards. They can only be forced to shave when real tactical circumstances actually require it. Mem. at 15. The Army has in no way shown that it must keep Captain Singh in limbo without granting an indefinite accommodation in order to meet supposed health and safety standards.

The Army further stood the RFRA standard on its head by arguing at the TRO hearing that the *Holt* standard expounded upon in *Singh v. McHugh* allows them to collect "information" by conducting this discriminatory testing on Captain Singh. *Holt*, 135 S. Ct. 853 involved a prisoner

who requested an exemption from prison grooming standards to grow a 1/2 inch beard in accordance with his religious beliefs. *Id.* at 859. The prison argued that allowing him to grow his beard would interfere with the prison's interest in security by allowing him the possibility of secluding contraband in his beard, or by escaping and allowing him to change his appearance. *Id.* at 861. But it could produce no examples of when beards had created any kind of security or identity concern for that prison, or in the dozens of other prisons who allow short beards. The Supreme Court held that the government failed to "offer persuasive reasons why it believes that it must take a different course" from the other prisons that allowed beards. *Id.* at 866. The government is arguing here that, in the absence of any examples of health and safety concerns of the many Sikhs who have served with their articles of faith intact in the U.S. Army, it should be allowed to *create* an example of a health and safety concern by "testing" Captain Singh. The government bears the burden of providing evidence that it has least restrictive means. It should not be allowed to discriminate against Captain Singh after he has asked for an accommodation in order to seek out that evidence.

II. This Court has jurisdiction to consider Captain Singh's claims and Defendants' assertions of valid military purpose.

A. This Court has jurisdiction over Captain Singh's claims

Defendants argue that this Court lacks jurisdiction to consider Captain Singh's statutory and constitutional civil rights claims. *See* Opp. Mem. 6. Defendants' position is that Captain Singh must first submit to discriminatory testing before he can seek relief from that testing, and that he must personally participate in the Army's development of a reason for denying him permanent accommodation before he can contest the Army's continued refusal to provide him permanent accommodation. That is not the law.

It is a long-standing and oft-repeated principle that the deference courts pay to the military in some areas is "wholly inappropriate" for "cases in which a violation of the Constitution, statutes, or regulations is alleged." *Larsen v. U.S. Navy*, 346 F. Supp. 2d 122, 128 (D.D.C. 2004) (quoting *Dilley v. Alexander*, 603 F.2d 914, 920 (D.C. Cir. 1979)). Courts are "well within [their] authority to adjudicate" claims that the Army is subjecting service members to "allegedly unconstitutional . . . practice[s]." *Id.* (citing *Emory v. Secretary of the Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987) and *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) ("this Court has never held . . . that personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service.")).

Thus, for instance, while courts may not order "the promotion of officers," they may ensure that "the armed forces have not trenched upon constitutionally guaranteed rights through the promotion and selection process." *Emory*, 819 F.2d at 294 ("The military has not been excepted from constitutional provisions that protect the rights of individuals"). In fact, it is "precisely the role of courts to determine whether those rights have been violated." *Heap v. Carter*, 112 F. Supp. 3d 402, 414 (E.D. Va. 2015) (quoting *Emory*, 819 F.2d at 294). Ruling otherwise would contravene "a basic tenet of our legal system that a government agency is not at liberty to ignore its own laws." *Dilley*, 603 F.2d at 920.

Those principles squarely apply here. Captain Singh claims that he is being "improperly discriminated against because of his religious beliefs," *Heap*, 112 F. Supp. 3d. at 414, and merely asks for "an opportunity to be considered for [religious accommodation] without an intentionally illegal set of [decisional] criteria." *Larsen*, 346 F. Supp. 2d at 128. Those claims are "clearly within this Court's competence and jurisdiction" to determine. *Heap*, 112 F. Supp. 3d. at 414; *Larsen*, 346 F. Supp. 2d at 128; *accord Emory*, 819 F.2d at 293-94 (reversing district court decision that it

lacked jurisdiction over a claim that plaintiff was "discriminated against . . . because of his race"). Indeed, far from lacking jurisdiction, this court has a "*duty*" to "inquire whether" the Army's "action[s] . . . conform[] to the law, or [are] instead arbitrary, capricious, or contrary to the statutes . . . governing" the Army." *Dilley*, 603 F.2d at 920 (emphasis added).

The cases that Defendants cite are not to the contrary. Most of them concern "the propriety of equitable intervention in pending court-martial proceedings," claims for "retroactive promotion by judicial decree," or claims for monetary damages to compensate for tortious negligence by superior officers. *See, e.g.*, *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975) (court-martials); *Kreis v. Sec'y of Air Force*, 866 F.2d 1508, 1511 (D.C. Cir. 1989) (promotion); *United States v. Brown*, 348 U.S. 110, 112 (1954) (tort). But Captain Singh is not being court-martialed, requesting promotion, or seeking monetary compensation for a tort. He is asking to be free from the future imposition of unconstitutional religious discrimination. Courts may—indeed, must—exercise jurisdiction over such claims. *Kreis*, 866 F.2d at 1511-12; *Dilley*, 603 F.2d at 920.

And Defendants' reliance on *Doe #1 v. Rumsfeld* helps Captain Singh, not Defendants. *Rumsfeld* confirms the general rule that courts may entertain "claims for injunctive relief against the military." 297 F. Supp. 2d 119, 127 (D.D.C. 2003). And all three of the prudential factors *Rumsfeld* identifies concerning that general rule break clearly in favor of Captain Singh.

First, as Defendants admit here, "there is no pending court-martial in this case." *See* Opp. Mem. 6; *see Rumsfeld*, 297 F. Supp. 2d at 128 (noting pending court-martial as the first factor). Nor is there any prospect of one: as in *Rumsfeld*, and unlike in *New v. Cohen*, 129 F.3d 639 (D.C. Cir. 1997), Captain Singh has never disobeyed orders and has worked very hard to comply with all lawful instructions. Accordingly, Defendants concede that, having not disobeyed his orders,

Captain Singh is free to "[seek] judicial review of the military's policies" that led to the discriminatory orders. Opp. Mem. 6 (quoting *New*, 129 F.3d at 647) (alteration in original).

Second, just as in *Rumsfeld*, a ruling enjoining Defendants' discrimination "would not interfere with a supervisory-subordinate relationship on the battlefield" because his claim concerns "decision[s] made in headquarters, not . . . tactical decision[s] made in the field" and it alleges "arbitrar[y]" discrimination that "fail[s] to adhere to statutes and regulations" by which the Defendants must make their decisions in the first place. 297 F. Supp. 2d at 128.

Third, protecting Captain Singh from unconstitutional discrimination "would not affect the uniformity of military personnel to any substantial degree." Defendants have already repeatedly admitted as much to this Court via their repeated insistence that they need to engage in discriminatory testing precisely to *discover* a basis to deny Captain Singh's permanent accommodation. That damning admission came after another judge of this Court recently found that there is no evidence that extending accommodation to individuals like Captain Singh would "do greater damage to the Army's compelling interests in uniformity" any more than "100,000 soldiers who have been permitted to grow a beard since 2007" or the "nearly 200,000 soldiers with non-conforming tattoos." *Singh v. McHugh*, 109 F. Supp. 3d at 97.

B. There is no valid military purpose in continuing the unnecessary delay of Captain Singh's accommodation and subjecting him to discriminatory testing.

It is "a self-evident proposition that the Government must obey its own laws." *Dilley*, 603 F.2d at 920. By the same token, there can be no "valid military purpose" in the Army's failing to obey federal law (here, by granting Captain Singh an accommodation since there is no extant evidence that doing so would harm the Army's interests) or in contriving rushed, discriminatory testing concocted expressly to discover a basis for denying religious accommodation. *See United States v. Moore*, 58 M.J. 466, 468 (C.A.A.F. 2003) (military orders "may not conflict with the

statutory or constitutional rights of the person receiving the order"); *United States v. Spencer*, 29 M.J. 740, 743 (A.F.C.M.R. 1989) (military orders cannot be "contrary to established law or regulation"; an "order that is too broadly restrictive of a private right of an individual may be arbitrary and illegal"); *see also* Army Field Manual 6-22 § 7-17 ("leaders will not tolerate . . . unfair treatment").

III. Defendants' arguments on the remaining injunctive relief factors fail.

Defendants' arguments regarding the remaining injunctive relief factors—irreparable harm, balance of harms, and the public interest—amount to a series of straw men that Defendants set up and then pummel mercilessly. For the most part they do not respond to the arguments in Captain Singh's opening memorandum and thus concede those arguments. "It is well understood in this Circuit that when a [party] files an opposition to a dispositive motion and addresses only certain arguments raised by [the opposing party], a court may treat those arguments that the [party] failed to address as conceded." *Center for Auto Safety*, 2015 WL 5726348, at *17 n.9.

A. Captain Singh has demonstrated irreparable harm.

In our opening memorandum, we set out several different irreparable harms that will occur without injunctive relief from this Court. First, the loss of constitutional freedoms, and cognate freedoms under RFRA, constitutes irreparable harm per se under *Elrod v. Burns* and *Mills v. District of Columbia*. Mem. 41. In their paragraph-long argument concerning irreparable harm, Defendants do not mention *Elrod* or *Mills*, much less try to distinguish them and the other cases cited.

Second, being subjected to discrimination is by itself an irreparable harm. Mem. 41-42 (citing *Bonnette v. D.C. Court of Appeals*, 796 F. Supp. 2d 164 (D.D.C. 2011)). Imagine, for example, that Army officials had imposed a special gas mask-fitting test on African-Americans only—or

even singling out one African-American soldier as they have done to Captain Singh—because they are more likely to seek a medical exemption to the beard ban due to the common condition pseudofolliculitis barbae (PFB). Would the Army dare to argue that such testing causes no irreparable harm? *Cf. Bradley v. Pizzaco of Neb., Inc.*, 939 F.2d 610 (8th Cir. 1991) (failure to accommodate for PFB resulted in disparate impact on African-American males). The reason the Army sees no problem with the discriminatory testing here—and indeed does not contest that it is in fact discriminatory—is because it is unfamiliar with or unconcerned with a specific small religious minority. *See, e.g., Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir.1999) (Alito, J.) (PFB medical exemptions to police department's "no-beard" policy had to be extended to Muslim police officers also). But ignorance cannot be a defense to discrimination.

Third, there will be an inevitable and profound chilling effect on religious minorities (specifically Sikhs, but others also) if the Army is allowed to impose targeted and more onerous standards on soldiers who ask for religious accommodations in accordance with their rights under law and Army regulations. Mem. 42. At the February 29 hearing, the Army seemed unaware or at the least unconcerned that its actions might have this chilling effect on religious minorities. And its briefing says nothing on the issue.

Rather than respond to these three different articulated harms, Defendants argue instead, Opp. Mem. 9, that submitting to testing cannot impose a substantial burden on religious exercise. In the first instance, this confuses the substantial likelihood of success element of the injunctive relief standard with the irreparable harm prong. While it is true that demonstrating a substantial likelihood of success on a RFRA substantial burden claim automatically results in an irreparable harm finding, Mem. 41, the converse is not true. Even if Captain Singh could not demonstrate

substantial burden (which he can), that does not mean that he is not suffering irreparable harm. In any case, this argument simply ignores Captain Singh's Free Exercise and Equal Protection claims, which of course do not turn on the existence or not of a substantial burden.

The Army's argument is also wrong about the law of substantial burden. It is true that to prove a substantial burden a plaintiff need not demonstrate intentional discrimination. *See, e.g.*, *Bethel World Outreach Ministries v. Montgomery Cty. Council*, 706 F.3d 548, 557 (4th Cir. 2013) (substantial burden standard under RFRA's sister statute RLUIPA goes to both discriminatory and non-discriminatory government actions). But although intentional discrimination is not *necessary* to prove up a claim of a substantial burden on religious exercise, it is certainly *sufficient* to do so. *See id.*, *Shrum v. City of Coweta, Okla.*, 449 F.3d 1132, 1145 (10th Cir. 2006) ("Proof of hostility or discriminatory motivation may be sufficient to prove that a challenged governmental action is not neutral, but the Free Exercise Clause is not confined to actions based on animus." (citing *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993); *Axson–Flynn v. Johnson*, 356 F.3d 1277, 1294 (10th Cir. 2004)) (McConnell, J.). That Captain Singh is being subjected to a discriminatory test solely because he engages in religious exercise is a quintessential substantial burden on his religious exercise of wearing a beard and turban.

B. The balance of harms tips in Captain Singh's favor.

In our opening brief, we demonstrated that although the harms to Captain Singh are grave, the Army will suffer no harm from the temporary injunctive relief requested. Mem. 42-43. The status quo has already been in place for many months without any adverse effects, and temporary injunctive relief would simply preserve that status quo.

In their response, Defendants describe no harms they have suffered thus far from providing the existing accommodation to Captain Singh. Nor do they describe any harms they might suffer from

delaying their planned battery of tests on Captain Singh by a few days or weeks. Instead, they argue at a very high level of generality that any interference with the Army's decisions in this area would constitute harm. Opp. Mem. 9-10.

This argument proves far too much. Taken at face value, the Army's argument would prevent any injunction from ever issuing against it with respect to any claim. This de facto immunity from injunctive relief is precisely the "degree of deference that is tantamount to unquestioning acceptance" that the Supreme Court rejected most recently in *Holt*. *Holt*, 135 S. Ct. at 864.

Indeed, at the hearing Defendants contradicted their own briefing by conceding that they could delay the testing by first 48 hours, then 72 hours, and finally 96 hours. The reality of course is that the Army's deadlines are entirely self-inflicted and have nothing to do with any actual safety interest with respect to Captain Singh or his fellow soldiers. There is no impending harm to the Defendants if a temporary restraining order issues against them.

C. Injunctive relief would serve the public interest.

In our opening brief, we pointed out that holding the Army to the constitutional, statutory, and regulatory civil rights standards that bind it to accommodate religious exercise is by definition in the public interest. Mem. 43-44. In their response, Defendants argue that any harm to the Army's interests—which of course they have not shown—is automatically a harm to the public interest.[1] Opp. Mem. 9-10. This argument also proves too much. If the public interest is defined by the Army's self-definition of its own interests, then no claim for injunctive relief could ever prevail

[1] Defendants argue that the balance of harms and public interest factors "merge," Opp. Mem. 9, but cite for this proposition *Nken v. Holder*, 556 U.S. 418 (2009), which concerned the standard for stays under IIRIRA, not temporary or preliminary injunctive relief under Fed. R. Civ. P. 65. The Supreme Court's latest examination of the preliminary injunction factors in a case involving federal government defendants treats the factors separately. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008).

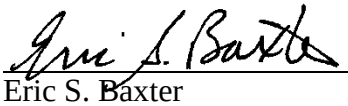
against it. It would also mean that in effect the Army is a law unto itself, bound by no stricture of constitutional or civil rights law. That this cannot be the case is proven not least by the fact that the federal courts have repeatedly awarded injunctive relief against the Army, including with respect to the precise issue now before the Court. *See*, *e.g.*, *Singh v. McHugh*, 109 F. Supp. 3d at 95; *Rigdon v. Perry*, 962 F. Supp. 150 (D.D.C. 1997).

CONCLUSION

For all the foregoing reasons and those stated in his other filings, Captain Simratpal Singh respectfully urges the Court to grant his applications for a temporary restraining order and for a preliminary injunction.

Captain Singh also requests that the Court waive the posting of a bond.

Respectfully submitted this 1st day of March, 2016.



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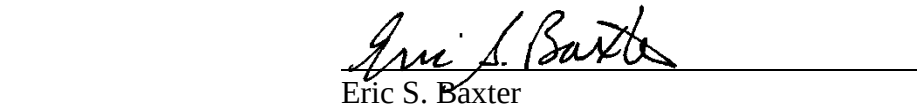
CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the Court's ECF system on March 1, 2016, and was thereby electronically served on counsel for Defendants.



Eric S. Baxter