

# **Born-Again RFRA: Will the Military Backslide on its Religious Conversion?**

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## ABSTRACT

*This Article details the importance of religious freedom in the United States and its armed forces, as well as the unfortunate history of non-accommodation that has plagued the Department of Defense (DoD) until recent years. It reviews the jurisprudence surrounding military service member free-exercise claims before and after the landmark Religious Freedom Restoration Act (RFRA) of 1993, and it analyzes how courts have addressed those claims within the military. It proposes an analysis for handling religious accommodation claims under RFRA in the military, and examines a series of hypotheticals that demonstrate the issues the DoD must confront and accommodate if it is to value its members' religious liberty.*

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## TABLE OF CONTENTS

ABSTRACT.....	435
TABLE OF CONTENTS.....	436
I. INTRODUCTION: A TALE OF TWO SIKHS.....	437
II. RELIGIOUS LIBERTY: A FREEDOM WORTH FIGHTING FOR.....	439
<i>A. Religion in the Colonial Militia and at the Founding</i> .....	440
<i>B. Religion and the Armed Forces in a Growing, Diverse Nation</i> .....	442
III. IN THE BEGINNING: PRE-RFRA FREE-EXERCISE CASES.....	446
<i>A. Pre-RFRA Supreme Court Precedent in Civilian Cases</i> .....	446
<i>B. Pre-RFRA Military Treatment of Religious Liberty</i> .....	449
IV. THE PASSAGE AND INTERPRETATION OF RFRA.....	453
<i>A. RFRA's Birth and Initial Setback</i> .....	453
<i>B. RFRA's Interpretation and Evolution</i> .....	455
1. The Meaning of "Religion" Under RFRA.....	456
2. Substantial Burdens in RFRA Cases.....	459
3. The Application of Strict Scrutiny Under RFRA.....	460
V. RFRA'S APPLICATION WITHIN THE U.S. ARMED FORCES.....	462
<i>A. The DoD's Long, Unpardonable Delay in Embracing RFRA</i> .....	463
1. The DoD's Willful Ignorance of RFRA.....	463
2. The DoD's Long-Overdue Embrace of RFRA.....	466
<i>B. The Mixed Judicial Response to RFRA in Military Cases</i> .....	468
1. Early Judicial Consideration of RFRA.....	468
2. Judicial Difficulties in Applying RFRA to Military Policies ...	470
VI. LOSING MY RELIGION: WILL THE MILITARY BACKSLIDE ON ITS RFRA CONVERSION?.....	474
<i>A. Analyzing a RFRA Military Claim Today</i> .....	474
<i>B. Applying RFRA to Real-World Military Scenarios</i> .....	477
1. Uniform and Appearance Regulations.....	478
2. Religious Expression in the Military Workplace.....	480
3. Religious Issues Related to LGBTQ+ Rights.....	484
4. Religious Issues Related to Health and Medicine.....	488
VII. CONCLUSION.....	491

## I. INTRODUCTION: A TALE OF TWO SIKHS

When Ronald Sherwood enlisted in the United States (“U.S.”) Navy in 1969, in the midst of a raging war in Vietnam, he probably hadn’t expected his career to end in disgrace, convicted of criminal charges due to his religious beliefs.<sup>1</sup> He served four years honorably until, during Thanksgiving break, he had a religious conversion and became a Sikh.<sup>2</sup> That decision would change the trajectory of his military service.

Sikhism – a monotheistic religion founded in India during the fifteenth century – centers on “service, egalitarianism, and engagement in daily life,” with Sikhs finding “markers” of their identity in “the Five Ks”: “kesh (uncut hair which is typically covered by a turban), kanga (wooden comb), kachha (specially-designed underwear), kara (steel bracelet), and kirpan (strapped sword).”<sup>3</sup> After his religious conversion, Sherwood took the vows of the Sikh faith, including a vow where he promised that he would not “alter his human form from the way the Creator has created it, thereby not removing or permitting to be removed, any hair from the body, and ... wearing the unshorn hair on top of the head in a Rishi knot and covered with a cotton cloth known as a turban.”<sup>4</sup>

Unfortunately, when Sherwood reported back to military duty, his new religious practices directly conflicted with military uniform regulations, which precluded the wearing of turbans.<sup>5</sup> Unwilling to grant an accommodation, the Navy brought criminal charges against Sherwood at a court-martial. It convicted him of disobeying military regulations and then discharged him from the service.<sup>6</sup> Sherwood later sued the Secretary of the Department of Defense (“DoD”), seeking damages and a declaration that the regulations were unconstitutional as applied to him.<sup>7</sup> In rejecting his claim, an appellate court found that safety requirements for Navy personnel constituted a compelling governmental interest and that the Navy had used the least restrictive means in furthering that interest.<sup>8</sup>

Jumping ahead 35 years, Simratpal Singh – another young Sikh wishing to serve in the military – faced a nearly identical dilemma to the

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<sup>1</sup> See *Sherwood v. Brown*, 619 F.2d 47 (9th Cir. 1980).

<sup>2</sup> *Id.* at 48.

<sup>3</sup> Jasmine K. Singh, “*Everything I’m Not Made Me Everything I Am*”: *The Racialization of Sikhs in the United States*, 14 *ASIAN PAC. AM. L.J.* 54, 55–56 (2009) (explaining the origin and faith of Sikhism).

<sup>4</sup> *Sherwood*, 619 F.2d at 48.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* (“Whether aboard a ship or aircraft extreme conditions of confinement make safety the touchstone of combat readiness and efficiency. . . . The accomplishment of an entire naval mission may be impaired by the failure of a single individual to perform his assigned task.”).

one Sherwood confronted.<sup>9</sup> Singh accepted an appointment to the United States Military Academy at West Point in 2006,<sup>10</sup> but Army policy prohibited long hair and beards. “[B]elieving he had no other option,” but feeling “shame and disappointment in himself,” Singh “succumbed under pressure and made the difficult decision to remove his turban, cut his hair, and shave his beard” so that he could serve in the Army.<sup>11</sup> He graduated from West Point with honors and served as an Army Ranger, receiving several medals, including a Bronze Star for his service in Afghanistan, and attaining the rank of Captain – all the while not maintaining the articles of his faith.<sup>12</sup> In 2015, after meeting Sikh soldiers who had received accommodations for their faith, Singh told his commander that he would begin wearing a turban, unshorn hair, and a beard despite the fact that this conflicted with uniform regulations.<sup>13</sup> While the Army considered how to handle Singh’s situation, it granted him a series of temporary religious accommodations.<sup>14</sup>

Eventually, Singh sued the Army in federal court and obtained a temporary restraining order allowing him to maintain the articles of his faith despite the uniform regulations.<sup>15</sup> The district court judge agreed that the Army “unquestionably has a compelling interest in ensuring the health and safety of military personnel,” but found that it had failed to use the “least restrictive means” to further that interest, partly because it had “granted permanent religious accommodations in the past to other Sikh soldiers [who had] . . . served with merit on active duty deployments.”<sup>16</sup> Singh’s case eventually settled, and he continued to serve, while the DoD modified its regulations to accommodate the needs of Sikh and other religious military members.<sup>17</sup>

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<sup>9</sup> See *Singh v. Carter*, 168 F. Supp. 3d 216, 220 (D.D.C. 2016).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* Ironically, the Army had previously categorically exempted Sikhs from its uniform and appearance regulations from 1958 until 1981, when it changed its policy because of requests for exemptions from other groups, and due to concerns about the fitting of gas masks over beards. See *Khalsa v. Weinberger*, 779 F.2d 1393, 1395 (9th Cir.), *aff’d*, 787 F.2d 1288 (9th Cir. 1985) (declining to review a Sikh’s challenge to Army appearance regulations preventing his enlistment due to judicial deference to military policies).

<sup>12</sup> See *Singh*, 168 F. Supp. 3d at 220.

<sup>13</sup> See *id.* at 220–21.

<sup>14</sup> See *id.* at 221.

<sup>15</sup> See *id.* at 222.

<sup>16</sup> *Id.* at 230–31.

<sup>17</sup> See Corey Dickstein, *Army Grants Religious Exemptions For Beards, Turbans, And Hijabs*, STARS & STRIPES, (Jan. 8, 2017, 5:21 PM), <https://taskandpurpose.com/news/army-grants-religious-exemptions-beards-turbans-hijabs/> []; see, e.g., DOD INSTRUCTION 1300.17, *Religious Liberty in the Military Services*, (Sept. 1, 2020) (expanding discretion to grant uniform accommodations).

Religious servicemembers like Sherwood and Singh have always been present in the armed forces, providing valuable aid in the military's primary mission to fight and win wars.<sup>18</sup> So why the difference in treatment and outcome in these two cases, one litigated in the 1970s and the other in the 2000s? One major reason is the impact of the Religious Freedom Restoration Act ("RFRA"),<sup>19</sup> passed in 1993 but only recently finding its footing in the DoD's regulations. One might say the military has been "born again" into the RFRA world Congress created in the 1990s.<sup>20</sup> But will this conversion last?

This Article details the history of religious liberty cases in the U.S. Armed Forces, both before and after RFRA's passage and eventual acceptance by the DoD, and it poses a series of contemporary hypotheticals to test whether the military's newfound RFRA conversion will persevere. Part II recounts the importance of religion to the founding generation and to servicemembers over the centuries. Part III sets out the trajectory of religious liberty cases prior to the passage of RFRA, as well as the military's reluctance to accommodate religious free exercise in its policies. Part IV discusses the birth of RFRA in 1993, and its evolution over the past 25 years. Part V traces the military's failure to embrace RFRA within military regulations until 2014, and the judicial avoidance of the Act in military cases. Finally, Part VI proposes a series of hypotheticals – derived from the headlines and dealing with religion in the workplace, LGBTQ+ issues, and the Covid-19 pandemic – that are testing the resolve of the DoD to tolerate the religious beliefs of its members in the midst of a rapidly shifting cultural landscape. This Article concludes, however, that the DoD can and should respect the religious beliefs and practices of military members, as RFRA requires, while staying true to recent social change.

## II. RELIGIOUS LIBERTY: A FREEDOM WORTH FIGHTING FOR

Religion and religious liberty have always served an essential role in society and culture, making them necessary ingredients for good

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<sup>18</sup> See Dickstein, *supra* note 17 ("Sikhs fought in the Army during both World Wars, the Korean War and in Vietnam[.]"); see generally Rajdeep Singh Jolly, *The Application of the Religious Freedom Restoration Act to Appearance Regulations That Presumptively Prohibit Observant Sikh Lawyers from Joining the U.S. Army Judge Advocate General Corps*, 11 CHAP. L. REV. 155 (2007) (discussing the Sikh uniform issue in depth under RFRA).

<sup>19</sup> Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb–2000bb-4) *invalidated by* City of Borne v. Flores, 521 U.S. 507 (1997).

<sup>20</sup> See John 3:3–5 (stating that only those who are "born again" may enter God's kingdom).

democratic government and a strong military.<sup>21</sup> As Founding Father John Adams predicted, the U.S. Constitution would only be successful if it governed “a moral and religious people.”<sup>22</sup> The same can be said of a successful armed forces, where integrity, service, and honor are required to avert the worst atrocities of warfare.<sup>23</sup> Part II of this Article briefly addresses the historic importance of religion at the founding of the nation and in the lives of military members.

### *A. Religion in the Colonial Militia and at the Founding*

Perhaps no individual had a greater influence in shaping the U.S. military than George Washington, its first Commander-in-Chief.<sup>24</sup> Even while serving as a young colonel during the French and Indian War (1753–63), he recognized the importance of religious practice within the armed forces, repeatedly requesting chaplains for his troops to preserve “[c]ommon decency ... in a camp.”<sup>25</sup> When his superiors refused his requests, Washington periodically performed those religious duties himself: reading the Scriptures, offering prayers, and conducting funeral services.<sup>26</sup>

In the lead-up to American Revolution, Colonial leaders understood that human rights and civil freedoms had developed in Western Civilization largely due to religious principles.<sup>27</sup> They recognized that

<sup>21</sup> Leon Miller, *Religion's Role in Creating National Unity*, 26 INT'L J. ON WORLD PEACE 91, 96 (2009) (discussing the view that “the cornerstone of liberty is religious freedom.”).

<sup>22</sup> Letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (Oct. 11, 1798).

<sup>23</sup> See Sandra Gibson, *The Code of Honor; Know it; Embrace it*, U.S. ARMY (Mar. 8, 2013), [https://www.army.mil/article/98038/the\\_code\\_of\\_honor\\_know\\_it\\_embrace\\_it](https://www.army.mil/article/98038/the_code_of_honor_know_it_embrace_it) [<https://perma.cc/BM3Q-4PVD>].

<sup>24</sup> See Brian Logan Beirne, *George vs. George vs. George: Commander-in-Chief Power*, 26 YALE L. & POL'Y REV. 265, 267–69 (2007).

<sup>25</sup> GEORGE WASHINGTON, THE WRITINGS OF GEORGE WASHINGTON Vol. II 178 (John C. Fitzpatrick, ed.) (1931). Washington made at least six pleas for chaplains during his military tenure. *Id.* at Vol. I 498, 505, 510; Vol. II 33, 56, 178.

<sup>26</sup> See, e.g., JARED SPARKS, THE WRITINGS OF GEORGE WASHINGTON Vol. II 54 (1834); E. C. M'GUIRE, THE RELIGIOUS OPINIONS AND CHARACTER OF WASHINGTON 136 (1836); WASHINGTON IRVING, LIFE OF GEORGE WASHINGTON Vol. I 128–129, 201 (1855); C. M. KIRKLAND, MEMOIRS OF WASHINGTON 155 (1857); J. T. HEADLEY, THE ILLUSTRATED LIFE OF WASHINGTON 60 (1859).

<sup>27</sup> See JHH Weiler, *Freedom of Religion and Freedom From Religion: The European Model*, 65 ME. L. REV. 759, 767 (2013) (noting that human rights “do not only derive from the Enlightenment, Neo-Kantianism, and the French Revolution,” but that they also have “always drawn” from religious sources); see Aaron R. Petty, *Religion, Conscience, and Belief in the European Court of Human Rights*, 48 GEO.

religion deals with universal values to which humanity has always attained in seeking relationship with a “divine or transcendent authority.”<sup>28</sup> Indeed, this understanding was an underlying premise in the revolutionary mind, as seen in the Declaration of Independence’s famous statement that, “[a]ll men are created equal and endowed by their Creator with certain inalienable rights.”<sup>29</sup>

During the American Revolution, those involved with the defense of a new nation also understood the importance of religion.<sup>30</sup> After the Battles of Lexington, Concord, and Bunker Hill, Congress established the Continental Army, recommending “all officers and soldiers diligently to attend Divine Service.”<sup>31</sup> Congress similarly instructed its fledgling navy that “commanders of the ships of the Thirteen United Colonies are to take care that Divine Service be performed twice a day on board, and a sermon be preached on Sundays.”<sup>32</sup>

With independence achieved, the Constitution’s framers included a key religious protection in the founding document: that “no religious test shall ever be required as a qualification to any office or public trust under the United States.”<sup>33</sup> This provision prevented bigotry against minority (mostly Christian) religions in filling public offices.<sup>34</sup> Later, when the first Congress debated the Bill of Rights, it rejected the notion that it should broadly protect all conscience rights, opting instead to single out religious belief for “preferential treatment.”<sup>35</sup> The First Amendment’s final draft

WASH. INT’L L. REV. 807, 816–17 (2016) (recounting Christianity’s role in developing human rights in Europe).

<sup>28</sup> Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 218 (1991); see also MIRCEA ELIADE, *THE SACRED AND THE PROFANE* (1957) (discussing the universal aspects of the divine throughout human history); Thomas C. Berg, *Can State-Sponsored Religious Symbols Promote Religious Liberty?*, 52 J. CATH. LEGAL STUD. 23, 30 (2013) (“A transcendent source means that the rights apply to everyone, even those who seem most alien, and that society must take the utmost care when it treads close to these rights.”).

<sup>29</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>30</sup> James P. Byrd, *Was the American Revolution a holy war?*, WASH. POST (July 5, 2013), [https://www.washingtonpost.com/opinions/was-the-american-revolution-a-holy-war/2013/07/05/039fb5b8-e25f-11e2-aef3-339619eab080\\_story.html](https://www.washingtonpost.com/opinions/was-the-american-revolution-a-holy-war/2013/07/05/039fb5b8-e25f-11e2-aef3-339619eab080_story.html) [https://perma.cc/KH2Q-KY5B].

<sup>31</sup> UNITED STATE CONTINENTAL CONGRESS, ET. AL., JOURNALS OF THE CONTINENTAL CONGRESS Vol. II 112 (1904).

<sup>32</sup> *Id.* at Vol. III, 378.

<sup>33</sup> U.S. CONST. art. VI, cl. 3.

<sup>34</sup> Daniel L. Dreisbach, *The Constitution’s Forgotten Religion Clause: Reflections on the Article VI Religious Test*, 38 J. CHURCH & STATE 261, 262 (1996).

<sup>35</sup> See *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400 (1993) (Scalia, J., concurring); see also Eduardo Peñalver, *The Concept of Religion*, 107 YALE L.J. 791, 802–03 (1997) (citing “compelling” evidence that the

protected religion as the nation's "first freedom," declaring in the Religion Clauses that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>36</sup> The first part of that sentence is known as the "Establishment Clause," while the second part is known as the "Free Exercise Clause."<sup>37</sup>

*B. Religion and the Armed Forces in a Growing, Diverse Nation*

"Those who adopted our Constitution ... believed that the public virtues inculcated by religion are a public good."<sup>38</sup> This can be seen through actions taken by the first Congress, such as its passage of legislation recognizing that "religion, morality and knowledge" were "necessary to good government and the happiness of mankind."<sup>39</sup> That same Congress also saw the benefit of acknowledging religion in public institutions, passing a law that provided for the payment of legislative chaplains, which the Supreme Court recognized as constitutional.<sup>40</sup> Since that time, Presidents and Congresses of all parties have acknowledged the importance of religion in public life,<sup>41</sup> including in the armed forces. In

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Framers rejected a version of the Religion Clauses that would have covered secular conscience rights); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1481–82 (1990) (same).

<sup>36</sup> U.S. CONST. amend. I.

<sup>37</sup> Administrative Office of the U.S. Courts on behalf of the Federal Judiciary, *First Amendment and Religion*, UNITED STATES CTS. (last visited Feb. 7, 2022), <https://www.uscourts.gov/educational-resources/educational-activities/first-amendment-and-religion> [<https://perma.cc/6JVP-RCHL>].

<sup>38</sup> *Lamb's Chapel*, 508 U.S. at 400 (Scalia, J., concurring). *But see* *McCreary Cty. v. Am. C.L. Union of Ky.*, 545 U.S. 844, 878–79 (2005) (disputing Scalia's position).

<sup>39</sup> *See* Act of Aug. 7, 1787, 1 Stat. 50 (1789) ("An Act to provide for the Government of the Territory Northwest of the river Ohio") (reenacting the Northwest Ordinance of 1787, which contained the quoted language in its text).

<sup>40</sup> *See* JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES OF AMERICA 67 (1820); Act of Sept. 22, 1789, 1 Stat. 70 (1789) ("An Act for allowing compensation to the Members of the Senate and House of Representatives of the United States, and to the Officers of both Houses"); *see also* *Marsh v. Chambers*, 463 U.S. 783, 792–93 (1983) (citing the first Congress's appointment of legislative chaplains as a valid, constitutional historical practice, while upholding the practice of legislative prayer in Nebraska).

<sup>41</sup> *See* *Van Orden v. Perry*, 545 U.S. 677, 692 (2005) (Scalia, J., concurring); *see also* *McCreary Cty.*, 545 U.S. at 885–912 (Scalia, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 91–114 (1985) (Rehnquist, J., dissenting); *see, e.g., Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (holding that a city's inclusion of a nativity scene in its Christmas display did not violate the establishment clause, "notwithstanding the religious significance" of the nativity scene). *See generally* *Zorach v. Clauson*, 343



one remarkable decision from 1892, the Supreme Court catalogued the “Christian” foundations of the nation from Colonial days to the present, declaring that every state had demonstrated “a profound reverence for religion, and an assumption that its influence in all human affairs is essential to the well-being of the community.”<sup>42</sup>

A similar notion impacted how religion was integrated into the U.S. Armed Forces from the very beginning. America’s second Commander-in-Chief, John Adams – known as the “Father of the American Navy” – instructed his Secretary of the Navy on the importance of a Navy chaplaincy: “I know not whether the commanders of our ships have given much attention to this subject [chaplains], but in my humble opinion, we shall be very unskillful politicians as well as bad Christians and unwise men if we neglect this important office in our infant navy.”<sup>43</sup> Congress responded favorably to President Adams’ desire by establishing and providing for naval chaplains, and re-issuing the naval regulations it had established during the Revolutionary War, requiring Divine Services twice each day aboard all naval vessels, and a sermon each Sunday.<sup>44</sup> This continued the longstanding acceptance of organized (Christian) religion in military life, acknowledging the importance for service members to freely participate in religious exercise.<sup>45</sup> Indeed, in every branch of the military, the chaplaincy has continued unabated to the present day, and has been found to be constitutional as an accommodation for military members to exercise their religion.<sup>46</sup>

Unfortunately, as with the rest of U.S. society, members of minority religions living in a “Christian nation” did not find full acceptance in the U.S. Armed Forces until recently. For instance, during the Civil War, over 3,000 chaplains served in both the Union and Confederate armies, yet the

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U.S. 306, 312–14 (1952) (detailing the for religion’s accepted role in official government actions).

<sup>42</sup> Holy Trinity Church v. United States, 143 U.S. 457, 469 (1892).

<sup>43</sup> JOHN ADAMS, THE WORKS OF JOHN ADAMS Vol. VIII, 661–62 (Charles Francis Adams, ed.) (1853) (quoting a letter to Benjamin Stoddert, the Secretary of the Navy, on July 3, 1799).

<sup>44</sup> Act of Apr. 23, 1800, 2 Stat. 45 (1800) (“An Act for the better government of the navy of the United States”).

<sup>45</sup> See generally Ronit Y. Stahl, *How the US military embraced America’s religious diversity*, MILITARY TIMES (Nov. 12, 2019), <https://www.militarytimes.com/news/your-navy/2019/11/12/how-the-us-military-embraced-americas-religious-diversity/> [https://perma.cc/TM2X-4V43] (“The Continental Congress . . . authorized military chaplains to minister to soldiers in 1775 . . . [t]he armed forces have employed clergy ever since . . . [and they are now] fully integrated into the military’s organizational structure.”).

<sup>46</sup> See, e.g., *Katcoff v. Marsh*, 755 F.2d 223, 237 (2d Cir. 1985) (upholding the chaplaincy). See generally Ira C. Lupu & Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, 110 W. VA. L. REV. 89 (2007) (analyzing chaplaincy as an accommodation).

Chaplain Corps was dominated overwhelmingly by Methodists.<sup>47</sup> The Union Army originally required that its chaplains be from a Christian denomination, although in 1862 it finally allowed rabbis to serve Jewish military members.<sup>48</sup> Later, when the United States entered World War I in 1917, the military chaplaincy was once again entirely Christian in composition until Congress passed a law expanding its composition, naming eligible religions for the chaplaincy to include Jews, Mormons, Christian Scientists, the Eastern Orthodox and the Salvation Army.<sup>49</sup> Since that time, the chaplaincy has continued to grow and diversify.

Today, chaplains of many diverse religions can be found in the military, including Muslims, Hindus, and Buddhists.<sup>50</sup> They “care for all Service members, including those who claim no religious faith, facilitate the religious requirements of personnel of all faiths, provide faith-specific ministries, and advise the command.”<sup>51</sup> They not only serve the spiritual needs of members, but also distinguish themselves in warfare.<sup>52</sup> The best known modern example may be the “grunt padre,” Father Vincent Capodanno, a Navy chaplain awarded the Congressional Medal of Honor after he was killed in action in Vietnam as he “moved about the battlefield administering last rites to the dying and giving medical aid to the wounded ... [and] provided encouragement by voice and example to the valiant marines.”<sup>53</sup> One of only nine chaplains to receive the Medal of Honor, Father Capodanno had a Navy frigate named in his honor,<sup>54</sup> and the Roman

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<sup>47</sup> Rachel Williams, *Civil War Chaplains*, NAT’L MUSEUM OF CIVIL WAR MED. (Feb. 5, 2017), <https://www.civilwarmed.org/chaplains/> [<https://perma.cc/DR9Z-VPVP>].

<sup>48</sup> *See id.*

<sup>49</sup> *See, e.g.*, Jim Dao, *Atheists Seek Chaplain Role in the Military*, N.Y. TIMES (Apr. 27, 2011), [https://www.nytimes.com/2011/04/27/us/27atheists.html?pagewanted=all&\\_r=1&](https://www.nytimes.com/2011/04/27/us/27atheists.html?pagewanted=all&_r=1&) [<https://perma.cc/3LKQ-YLKA>] (discussing the diversity of the modern chaplain corps).

<sup>50</sup> *See generally* RONIT Y. STAHL, ENLISTING FAITH: HOW THE MILITARY CHAPLAINCY SHAPED RELIGION AND STATE IN MODERN AMERICA (2017) (detailing the “processes through which the military struggled with, encouraged, and regulated religious pluralism over the twentieth century”); *see also* Stahl, *supra* note 45.

<sup>51</sup> OPNAV INSTRUCTION 1730.7D, *Religious Ministry Within the Department of the Navy*, para. 5(e)(3) (Aug. 8, 2008).

<sup>52</sup> *Id.*

<sup>53</sup> *Stories of Sacrifice*, CONG. MEDAL OF HONOR SOC’Y, <https://www.cmohs.org/recipients/vincent-r-capodanno> [<https://perma.cc/7XUP-79T4>] (last visited Mar. 3, 2022). Father Capodanno’s recommendation for a Bronze Star for service while he was still alive included the detail that he “encouraged the men of all faiths to do more for their God, our Country, their corps and themselves.” ANN BALL, *FACES OF HOLINESS II*, 255 (2001).

<sup>54</sup> Katie Lange, *Medal of Honor Monday: Navy Lt. Vincent Capodanno*, DEP’T OF DEF. (Apr. 1, 2019),

Catholic Church has opened up a cause for his potential canonization as a saint.<sup>55</sup>

The importance of religion to service members was again illustrated in the World War II era. In the build-up to the war, President Franklin D. Roosevelt vowed to “never fail to provide for the spiritual needs of our officers and men.”<sup>56</sup> During the war, Roosevelt directed (at government expense) the printing and distribution of the Bible to troops, along with his exhortation, “I take pleasure in commending the reading of the Bible to all who serve in the Armed Forces of the United States.”<sup>57</sup> In a major survey following the war, the Army discovered that soldiers most frequently identified prayer as their strongest source of support during combat.<sup>58</sup> And in 1950, as post-World War II America slid into Cold War with the Soviet Union, President Harry S. Truman convened a commission that focused on chaplains and spiritual faith in the military.<sup>59</sup> The commission found that the West’s “idea of a moral law[,] which is based on religious convictions and teachings,” gave “democratic faith a very large measure of its strength” compared to those totalitarian regimes that rejected the moral law and stifled religion.<sup>60</sup>

The preceding anecdotes merely sample the hundreds of historical examples illustrating that the practice of religion within the armed forces is an important right, and that the religious liberty of service members is worth preserving. Even in the modern military, which is more religiously

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<https://www.defense.gov/Explore/Features/story/Article/1798399/medal-of-honor-monday-navy-1t-vincent-capodanno/> [<https://perma.cc/NV26-AYYV>].

<sup>55</sup> *Progress on Cause for Canonization*, FATHER CAPODANNO GUILD (May 23, 2017), <https://www.capodannoguild.org/progress-cause-canonization/> [<https://perma.cc/3WEU-PXAC>].

<sup>56</sup> Franklin D. Roosevelt, *Fireside Chat*, THE AM. PRESIDENCY PROJECT (Oct. 12, 1942), <https://www.presidency.ucsb.edu/documents/fireside-chat-4> [<https://perma.cc/9FC5-X9A5>].

<sup>57</sup> CLIFFORD M. DRURY, *THE HISTORY OF THE CHAPLAIN CORPS: UNITED STATES NAVY 9* (1948).

<sup>58</sup> See SAMUEL A. STOUFFER ET AL., *STUDIES IN SOCIAL PSYCHOLOGY IN WORLD WAR II* Vol II, 136 (1949) (discussing the survey results by the Army’s Information and Education Division).

<sup>59</sup> Hans Zeiger, *Why Does the US Military Have Chaplains?*, PEPPERDINE SCH. PUB. POL’Y, <https://publicpolicy.pepperdine.edu/academics/research/policy-review/2009v2/why-does-us-military-have-chaplains.htm> [<https://perma.cc/9QPZ-9FHT>].

<sup>60</sup> THE MILITARY CHAPLAINCY: A REPORT TO THE PRESIDENT BY THE PRESIDENT’S COMMITTEE ON RELIGION AND WELFARE IN THE ARMED FORCES 1–2 (Oct. 1, 1950) (“A program of adequate religious opportunities for service personnel provides an essential way for strengthening their fundamental beliefs in democracy and, therefore, strengthening their effectiveness as an instrument of our democratic form of government.”).

diverse than ever,<sup>61</sup> religious liberty is still cherished by most service members.<sup>62</sup> Unfortunately – as the following sections demonstrate – the right of religious liberty is an ideal that has not always been realized by civilian and military leadership or vindicated in the courts. To the contrary, the modern history of religious accommodation in the U.S. Armed Forces has largely been one of military leaders reluctantly following the lead of Congress in response to decisions by the Supreme Court that have been viewed as devaluing the importance of religious freedom.

### III. IN THE BEGINNING: PRE-RFRA FREE-EXERCISE CASES

Prior to passage of the Religious Freedom Restoration Act (“RFRA”) in 1993, the U.S. Supreme Court and lower federal courts – including military courts – applied differing standards in religious-liberty cases, often curtailing the free exercise of religion in favor of public safety or military efficiency. Part III of this Article first discusses the varied tests the Supreme Court erected in cases involving the Free Exercise Clause, which eventually led Congress to adopt a single standard under RFRA. It then examines how the military addressed religious liberty during the pre-RFRA period.

#### A. Pre-RFRA Supreme Court Precedent in Civilian Cases

The Supreme Court has consistently interpreted the Free Exercise Clause as a “tightly closed” door “against any government regulation of religious beliefs,”<sup>63</sup> which receive absolute protection under the Constitution. Religious exercise and actions, however, have been subject to the whim of inconsistent judicial standards.<sup>64</sup> For instance, the Court’s prevailing view for many years was that “Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.”<sup>65</sup>

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<sup>61</sup> In 2009, the DoD conducted a Religious Identification and Practices Survey (RIPS), which revealed that 65.84% of military members claim some type of Christian identity and 25.5% claim no religious affiliation, with the remaining 9% reporting a variety of non-Christian faiths. See *Issue Paper #22, Religious Diversity in the U.S. Military*, MILITARY LEADERSHIP DIVERSITY COMMISSION 3 (2010).

<sup>62</sup> The RIPS also found that a substantial majority of those surveyed claimed that religion was either “important” or “very important” in their lives. *Id.* at 4.

<sup>63</sup> *Sherbert v. Verner*, 374 U.S. 398, 402 (1963) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)).

<sup>64</sup> *Reynolds v. United States*, 98 U.S. 145, 165 (1879).

<sup>65</sup> *Id.* at 164; see also *Davis v. Beason*, 133 U.S. 333, 341–42 (1890) (upholding laws against bigamy and polygamy, and distinguishing religion from the “form of worship of a particular sect,” finding that it would “shock the moral judgment of the community” to accept polygamy as “a tenet of religion”).

Yet in 1943, the Court struck down a law requiring recitation of the Pledge of Allegiance each school day because it unconstitutionally infringed upon the free exercise of religion by members of the Jehovah's Witnesses.<sup>66</sup> The deciding factors in free-exercise cases often have been the directness of a law's burden on religious practice and its neutrality toward religion.<sup>67</sup>

In the 1961 case of *Braunfeld v. Brown*,<sup>68</sup> the Supreme Court considered a challenge to state "blue laws," which required businesses to remain closed on Sundays even though this disproportionately impacted businesses run by Orthodox Jews, who typically observe Saturday as their sabbath.<sup>69</sup> In upholding such laws with an "indirect" impact on religion, the Court set a relatively low bar for the government, finding that a "general law" passed "to advance the State's secular goals" (such as mandating a single day where families could spend time away from the rigors of commerce), would be "valid despite [the law's] indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden."<sup>70</sup> Thus, the State could justify actions that indirectly burdened religious exercise if it could merely demonstrate a secular purpose and that no alternative, non-burdensome means could accomplish that purpose.

Just two years later, the Supreme Court signaled a paradigm shift in its landmark decision in *Sherbert v. Verner*,<sup>71</sup> involving a member of the Seventh-Day Adventist church – which also observes a Saturday sabbath – who was denied unemployment benefits after she was terminated from her job because her beliefs prevented her from working on Saturdays.<sup>72</sup> Finding a violation of the Free Exercise Clause, the Court applied a more exacting standard than the one used in *Braunfeld*.<sup>73</sup> After *Sherbert*, if a claimant could prove that a state action placed a substantial burden on her ability to act on her sincere religious beliefs, then the government was required to satisfy "strict scrutiny" in the courts by showing that it was acting in furtherance of a compelling governmental interest and had used the least restrictive or burdensome means to achieve that interest.<sup>74</sup>

For nearly three decades after *Sherbert*, courts often applied strict scrutiny in free-exercise cases, such as in *Wisconsin v. Yoder*,<sup>75</sup> where the

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<sup>66</sup> See generally *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943).

<sup>67</sup> *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993).

<sup>68</sup> *Braunfeld v. Brown*, 366 U.S. 599 (1961).

<sup>69</sup> *Id.* at 601.

<sup>70</sup> *Id.* at 607.

<sup>71</sup> See *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>72</sup> See *id.* at 403–04.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (rejecting the government's argument that the Free Exercise Clause only protected religious belief, not actions such as going to school).

Supreme Court granted Amish families a religious accommodation from state compulsory school requirements because of the law's substantial burden on their religious practices and unique way of life.<sup>76</sup> During the 1980's, however, the Supreme Court began moving away from the *Sherbert* standard in some free-exercise cases.<sup>77</sup>

Finally, in 1990, the Court overhauled its jurisprudence altogether in another landmark unemployment case, *Employment Division v. Smith*.<sup>78</sup> There, the Court limited *Sherbert's* reach in a case where members of the Native American Church in Oregon were fired from their jobs and denied state unemployment benefits for misconduct due to their illegal ingestion of the hallucinogenic drug, peyote, which is commonly used sacramentally by some Native American tribes.<sup>79</sup> The Oregon law that prohibited the use of peyote and other controlled substances did not target drugs that are used sacramentally, and it applied equally to everyone within the state.<sup>80</sup> The Court expressed concern that applying *Sherbert's* strict scrutiny test to such neutral laws of general applicability "would be courting anarchy ... [and] would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."<sup>81</sup> Instead, the Court affirmed the convictions and held that neutral laws of general applicability that incidentally burdened religion would be analyzed under the rational basis test in the future.<sup>82</sup> While this holding did not detract from the Court's precedent in *Braunfeld*, it significantly undermined the *Sherbert* and *Yoder* precedents.<sup>83</sup>

*Smith* received swift and severe criticism from both sides of the political spectrum.<sup>84</sup> As discussed in Part IV, the case directly led

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<sup>76</sup> *Id.* at 236.

<sup>77</sup> *See, e.g.*, *United States v. Lee*, 455 U.S. 252, 259 (1982) (upholding social security taxes, stating that "some religious practices yield to the common good" in "an organized society that guarantees religious freedom to a great variety of faiths"); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (refusing to apply strict scrutiny to free-exercise cases in the armed forces because of the unique nature of military service); *Bowen v. Roy*, 476 U.S. 693, 702 (1986) (upholding social security numbers, stating that "claims of religious conviction do not automatically entitle a person to" relief because "not all burdens on religion are unconstitutional").

<sup>78</sup> *Emp. Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990).

<sup>79</sup> *Id.* at 878.

<sup>80</sup> *See id.*; OR. REV. STAT. § 475.922(4) (1987).

<sup>81</sup> *Smith*, 494 U.S. at 888–89 (listing in jeopardy compulsory military service laws, tax laws, child neglect laws, drug laws, minimum wage laws, child labor laws, "animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races").

<sup>82</sup> *See id.* at 878.

<sup>83</sup> *Id.* at 893–903 (O'Connor, J., concurring in the judgment) (criticizing the Majority's interpretation of these precedents)

<sup>84</sup> *See infra* Section IV.A.

Congress to pass RFRA in an attempt to restore strict scrutiny as the applicable legal test in religious-exercise cases.

### *B. Pre-RFRA Military Treatment of Religious Liberty*

The Supreme Court has consistently noted that the Free Exercise Clause embraces the freedom both to believe and to act, but while the former is absolute, the latter is not.<sup>85</sup> This principle has been especially true within the armed forces, particularly after World War II, as America's armed forces grew more religiously diverse.<sup>86</sup> Inevitably, conflicts arose between a greater variety of religious tenets and the demands of military service.<sup>87</sup> Although military courts frequently applied legal tests that were analogous to the tests applied in civilian cases, they also acknowledged that the unique nature of military service sometimes yielded different results than in the civilian world.<sup>88</sup>

For instance, in the 1954 case of *United States v. Morgan*,<sup>89</sup> a member of the Jehovah's Witnesses faith refused to obey his commander's order to salute the flag and other superiors due to his religious belief that a salute constituted idolatry.<sup>90</sup> The airman was criminally tried and convicted at court-martial for willfully disobeying the lawful commands of his superior officer.<sup>91</sup> On appeal, the United States Air Force Board of Review – predecessor to the current Air Force Court of Criminal Appeals – summarily rejected Morgan's free-exercise claim despite the Supreme Court's recognition only a few years earlier that it was unconstitutional to force a Jehovah's Witnesses member to salute the flag and recite the Pledge of Allegiance in school.<sup>92</sup> The Air Force court distinguished the Supreme Court precedent due to the unique nature of military service.<sup>93</sup> In a similar case three years later, the Air Force court again upheld the court-martial conviction of a member of the Jehovah's Witnesses faith for failing to salute.<sup>94</sup> The court noted that the member had voluntarily enlisted in the service, thereby subjecting himself to military regulations, as well as

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<sup>85</sup> *Id.* at 894 (O'Connor, J., Brennan, J., Marshall, J., and Blackmun, J., concurring).

<sup>86</sup> Kevin L. Walters, *Beyond the Battle: Religions and American Troops in World War II* (2013) (Ph.D. dissertation, University of Kentucky) (on file with History at UKnowledge, University of Kentucky).

<sup>87</sup> *See, e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940).

<sup>88</sup> Walters, *supra* note 86.

<sup>89</sup> *United States v. Morgan*, 17 C.M.R. 584 (A.F.B.R. 1954).

<sup>90</sup> *Id.* at 586.

<sup>91</sup> *See id.*

<sup>92</sup> *Id.* at 587; *see West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943).

<sup>93</sup> *See Morgan*, 17 C.M.R. at 587 (“It follows, of course, that those subject to military discipline are under many duties and may not claim many freedoms that we hold inviolable as those in civilian life.”).

<sup>94</sup> *United States v. Cupp*, 24 C.M.R. 565, 575 (A.F.B.R. 1957).

that the regulations were “not intended to interfere with religious liberties” (i.e., they were neutral toward religion).<sup>95</sup>

With no relief coming from the courts, the following three decades saw no notable military free-exercise cases. Indeed, the notion that the military had a free hand to limit the rights of servicemembers under the First Amendment was buttressed by the Supreme Court’s 1974 decision, *Parker v Levy*,<sup>96</sup> which upheld the court-martial conviction of an Army doctor who refused to follow orders due to his conscientious objection to the Vietnam War.<sup>97</sup> In that case, the Court acknowledged that “members of the military are not excluded from the protection granted by the First Amendment”; however, it cited the “different character of the military community and . . . mission” that required “the fundamental necessity for obedience[] and . . . imposition of discipline,” making it “permissible within the military that which would be constitutionally impermissible outside it.”<sup>98</sup> In the wake of *Parker*, the military services continued to handle religious-accommodation requests through their own internal policies.<sup>99</sup>

In the 1980’s, a new wave of military free-exercise litigation arose, this time in federal civilian courts.<sup>100</sup> An early key decision – already discussed in the introduction to this Article – involved Ronald Sherwood’s conversion to Sikhism and his prosecution for refusing to cut his hair and remove his turban.<sup>101</sup> In his post-service challenge to his discharge, the Ninth Circuit applied *Sherbert*-style strict scrutiny to the military’s uniform regulations, yet it upheld the Navy’s actions, finding that the military had used the least restrictive means to further its compelling interest in the safety of its personnel.<sup>102</sup> The court noted that “extreme” military conditions “make safety the touchstone of combat readiness and efficiency,” and that a Sikh’s inability to wear a helmet “poses serious

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<sup>95</sup> *Id.* at 571–72.

<sup>96</sup> *Parker v. Levy*, 417 U.S. 733 (1974).

<sup>97</sup> *Id.* at 736.

<sup>98</sup> *Id.* at 758.

<sup>99</sup> Not all these policies were detrimental to religious liberty. For instance, the Army crafted a policy in 1958 that categorically exempted Sikhs from uniform and appearance regulations, until it reversed that policy in 1981. *See Khalsa v. Weinberger*, 779 F.2d 1393, 1395 (9th Cir. 1985), *aff’d*, 787 F.2d 1288 (9th Cir. 1985).

<sup>100</sup> Bill Kenworthy, *Military Speech*, FREEDOM F. INST. (Feb. 2010), <https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/personal-public-expression-overview/military-speech/> [https://perma.cc/S746-YHK4].

<sup>101</sup> *Sherwood v. Brown*, 619 F.2d 47 (9th Cir. 1980); *see also Khalsa*, 779 F.2d at 1395 (declining review of a Sikh’s challenge to Army appearance regulations due to judicial deference).

<sup>102</sup> *Sherman*, 619 F.2d at 48.



safety problems both for the unprotected sailor and for the crew that depends on him.”<sup>103</sup>

Two years after Sherwood’s case, the Air Force took an even harder line in *Bitterman v. Secretary of Defense*,<sup>104</sup> where an Orthodox Jewish airman brought an as-applied challenge to the constitutionality of an Air Force uniform regulation. Conceding that wearing a yarmulke would not interfere with Bitterman’s duties as an air traffic controller, the Air Force argued instead that its regulations furthered two compelling interests: (1) “the effective functioning and maintenance of the Air Force,” and (2) “motivation, image, morale, discipline, and *esprit de corps*.”<sup>105</sup> The district court agreed and gave the military remarkable deference, finding that the regulations were the least restrictive means to further a compelling interest in “maintaining an efficient Air Force.”<sup>106</sup> Even more extraordinary, the court opined that Bitterman’s desire to wear a yarmulke was not a religious requirement, but merely a “preference.”<sup>107</sup> This notable finding contradicted the usual judicial practice of avoiding questions about the centrality of a particular religious practice or exercise to a religious system of belief.<sup>108</sup>

This new wave of military free-exercise cases prompted Congress to commission a joint service study on religious matters as part of the DoD Authorization Act of 1985.<sup>109</sup> Incredibly, this was the first time the DoD had made a thorough examination of the types of conflicts “that religious practices can pose for service members, the military interests at stake when these conflicts arise, and possible accommodations.”<sup>110</sup> The report found four areas of recurring religious conflict: diet, health, dress and appearance, and “time off to observe worship, sabbath, or holy days.”<sup>111</sup> The study advised against mandating the accommodation of religion

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<sup>103</sup> *Id.*

<sup>104</sup> *Bitterman v. Sec’y of Def.*, 553 F. Supp. 719, 720 (D.C. 1982).

<sup>105</sup> *Id.* at 724.

<sup>106</sup> *Id.* at 724–25.

<sup>107</sup> *Id.* at 726 (citing 1 GERISON, APPEL, *THE CONCISE CODE OF JEWISH LAW* 34, n.3 (1977) (permitting Jews to not wear yarmulkes, “especially where one’s livelihood is involved”)).

<sup>108</sup> *See, e.g.*, *Emp. Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 887 (1990) (“Judging the centrality of different religious practices is akin to the unacceptable business of evaluating the relative merits of differing religious claims.”); *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989) (“It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith.”); *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) (“[I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment.”).

<sup>109</sup> Major Thomas R. Folk, *Religion and the Military: Recent Developments*, *THE ARMY LAWYER* (DA PAM 27-50-156) 6, 7 (Dec. 1985) (discussing the background of the newly released DoD report and regulations).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* (quoting DoD DIRECTIVE 1300.17 (Mar. 1985)).

because the “nature of the military requires servicemembers to subordinate individual desires or beliefs to military mission and discipline.”<sup>112</sup> Still, those findings led military leaders to adopt DoD Directive 1300.17, which – though advisory in nature to avoid undermining military discipline with legally enforceable rights – for the first time provided military religious-accommodation guidance.<sup>113</sup>

In 1986, the Supreme Court finally took up a military free-exercise case, *Goldman v. Weinberger*,<sup>114</sup> revisiting the issue of whether a Jewish servicemember was entitled to a free-exercise accommodation to wear a yarmulke while on duty.<sup>115</sup> Presaging its holding in *Smith* four years later, the Court ruled that the First Amendment rights of an Orthodox Jew and ordained rabbi who served in the Air Force were not violated by being prohibited from wearing a yarmulke while indoors and on duty.<sup>116</sup> The decision resolved the confusion in the lower courts over whether strict scrutiny should be applied in military free-exercise cases.<sup>117</sup> Noting once again that “the military is . . . a specialized society separate from civilian society,” and that judicial review of military actions must be “far more deferential than constitutional review of similar laws or regulations designed for civilian society,”<sup>118</sup> the Court applied a much more government-friendly standard than strict scrutiny, holding that the regulation at issue reasonably and even-handedly regulated attire in a manner that accomplished the military’s need for uniformity and discipline.<sup>119</sup>

In the wake of *Goldman*, Congress took action – not for the last time – to correct a perceived injustice by the Supreme Court, dictating by statute that “a member of the armed forces may wear an item of religious apparel while wearing the uniform of the member’s armed force,” and directing the DoD to prescribe regulations consistent with the law.<sup>120</sup> Complying, the military revised DoDD 1300.17 in February 1988, affirming that “a Jewish yarmulke may be worn with the uniform . . . as long as it does not interfere with the proper wearing, functioning, or appearance” of required headgear.<sup>121</sup> The regulation announced the “policy that requests for

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<sup>112</sup> *Id.* (quoting U.S. Dep’t of Def., Joint Service Study (May 20, 1985)).

<sup>113</sup> *Id.* (quoting DoD DIRECTIVE 1300.17 (Mar. 1985)).

<sup>114</sup> *Goldman v. Weinberger*, 475 U.S. 503 (1986).

<sup>115</sup> *Id.* at 504.

<sup>116</sup> *Id.* at 509–10.

<sup>117</sup> See *Goldman v. Sec’y of Def.*, 530 F. Supp 12 (D.C. 1981); *Goldman v. Sec’y of Def.*, 734 F.2d 1531, 1535–36 (D.C. Cir. 1984) (disagreeing over the proper level of judicial scrutiny).

<sup>118</sup> *Weinberger*, 475 U.S. at 506–07.

<sup>119</sup> See *id.* at 510.

<sup>120</sup> See Pub.L. 100-180, Dec. 4, 1987, 101 Stat. 1086 (codified at 10 U.S.C. § 774(a), (b)); see also Dwight H. Sullivan, *The Congressional Response to Goldman v. Weinberger*, 121 MIL. L. REV. 125 (1988).

<sup>121</sup> DoD DIRECTIVE 1300.17, para. 3.2.7.3 (Feb. 3, 1988) (now superseded).

accommodation of religious practices should be approved by commanders when accommodation will not have an adverse impact on military readiness, unit cohesion, standards, or discipline.”<sup>122</sup> But it also set out five factors for commanders considering a religious accommodation: (1) “[t]he importance of military requirements in terms of individual and unit readiness, health and safety, discipline, morale, and cohesion”; (2) [t]he religious importance of the accommodation to the requester”; (3) “[t]he cumulative impact of repeated accommodations of a similar nature”; (4) “[a]lternative means available to meet the requested accommodation”; and, (5) “[p]revious treatment of the same or similar requests.”<sup>123</sup> Finally, it specified that, in appropriate cases, commanders could take administrative actions against those seeking accommodations, including “assignment, reassignment, reclassification, or separation.”<sup>124</sup>

But even as the military reluctantly revised its regulations in response to statutory requirements, the Supreme Court considered *Smith*, which would strip strict scrutiny review from most free-exercise cases in the nation.<sup>125</sup> Soon, Congress would again need to use whatever powers it possessed to protect religious liberty.<sup>126</sup>

#### IV. THE PASSAGE AND INTERPRETATION OF RFRA

For those seeking to “re-birth” the Free Exercise Clause in the watery wake of the Supreme Court’s controversial decisions in *Goldman* and *Smith*, the spirit of politics would be their salvation with passage of RFRA.<sup>127</sup> Part IV of this Article first addresses the near-unanimous support for RFRA in 1993, followed by the Act’s first serious setback at the Supreme Court in 1997. It then examines how the courts have interpreted the scope and reach of RFRA, separately examining each aspect of a RFRA claim.

##### A. RFRA’s Birth and Initial Setback

In the wake of *Smith*, a miraculously bi-partisan coalition of politicians and organizations – many with historically conflicting agendas – rallied to reinstitute the *Sherbert* standard in free-exercise cases.<sup>128</sup>

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<sup>122</sup> *Id.* at para. 3.1.

<sup>123</sup> *Id.* at para. 4.1.1–4.1.5.

<sup>124</sup> *Id.* at para. 4.3.

<sup>125</sup> *See* Emp. Div., Dep’t of Human Res. v. *Smith*, 494 U.S. 872, 873 (1990).

<sup>126</sup> *See* Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb–2000bb-4) *invalidated by* City of Borne v. Flores, 521 U.S. 507 (1997).

<sup>127</sup> *Id.*

<sup>128</sup> For example, the American Civil Liberties Union, Traditional Values Coalition, Christian Legal Society, and the American Jewish Congress all expressed

Congressman Chuck Schumer, a Democrat from New York, introduced the Religious Freedom Restoration Act of 1993,<sup>129</sup> which was met with such universal acclaim that it unanimously passed the House of Representatives and missed unanimous passage in the Senate by only three votes before President William J. Clinton signed it into law.<sup>130</sup>

The chief aim of RFRA was to restore strict scrutiny as the legal framework for analyzing free-exercise claims under the First Amendment,<sup>131</sup> and by the Act's own terms, it achieved that goal (and much more). Under RFRA, when the government imposes a substantial burden on sincere religious exercise, it must demonstrate that its actions constitute the least restrictive means of furthering a compelling state interest.<sup>132</sup> The Act demands a particularized inquiry; the balancing test must be "satisfied through application of the challenged law 'to the person' – the particular claimant whose sincere exercise of religion is being substantially burdened."<sup>133</sup>

As originally written, RFRA applied at both the federal and state levels, restoring strict scrutiny as the applicable legal test across the nation.<sup>134</sup> Almost immediately, however, its constitutionality was challenged on federalism grounds as an overreach of Congress's remedial authority under Section 5 of the Fourteenth Amendment.<sup>135</sup> In 1997, the Supreme Court agreed with that position in *City of Boerne v. Flores*,<sup>136</sup> holding that "Congress had overstepped its Section 5 authority because '[t]he stringent test RFRA demands' 'far exceed[ed] any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*.'"<sup>137</sup> This holding negated the application of the Act to the states; nearly half of the states have gone on to pass their own state-level versions of RFRA in the wake of *City of Boerne*.<sup>138</sup>

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support for RFRA. See DAVID M. ACKERMAN, CONG. RSCH. SERV., 97-795A, THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993 20–22 (1998).

<sup>129</sup> Pub. L. No. 103-141, *invalidated by* *City of Borne v. Flores*, 521 U.S. 507 (1997).

<sup>130</sup> *All Information (Except Text) for H.R. 1308 – Religious Freedom Restoration Act of 1993*, CONGRESS.GOV, <https://www.congress.gov/bill/103rd-congress/house-bill/1308/all-info> [<https://perma.cc/4NP5-DYJV>] (last visited Feb. 6, 2022).

<sup>131</sup> See ACKERMAN, *supra* note 128, at 20–22.

<sup>132</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 692 (2014).

<sup>133</sup> *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 430–31 (2006) (quoting § 2000bb–1(b)).

<sup>134</sup> See 42 U.S.C. §§ 2000bb–2000bb-4.

<sup>135</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997).

<sup>136</sup> *Id.* at 511.

<sup>137</sup> *Burwell*, 573 U.S. at 695 (discussing *City of Boerne*'s holding).

<sup>138</sup> See ALA. CONST. art. I, § 3.01; ARIZ. REV. STAT. ANN. § 41-1493.01 (1999); ARK. CODE ANN. §§ 16-123-401–16-123-407 (2015); CONN. GEN. STAT. § 52-571b (1993); FLA. STAT. §§ 761.01–761.061 (1998); IDAHO CODE § 73-402 (2000); 775 ILL. COMP. STAT. 35/1–99 (1998); IND. CODE § 34-13-9 (2015); KAN. STAT. ANN. §

The Court later found that Congress had acted within its proper authority in passing the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”), which (like RFRA) applied strict scrutiny to free-exercise cases arising in both federal and state prisons.<sup>139</sup> The Court also made it clear that RFRA did not pose constitutional concerns as applied to purely federal acts (such as those actions taken by authorities within the U.S. Armed Forces).<sup>140</sup> In short, despite the concerns raised in *Smith* about strict scrutiny, the Supreme Court began to faithfully interpret and apply RFRA in the way Congress intended.<sup>141</sup>

### *B. RFRA’s Interpretation and Evolution*

The Supreme Court has discussed or directly applied RFRA in several cases in the new millennium, expounding on the broad protections for religious liberty contained in the Act.<sup>142</sup> The Court has explained that Congress amended RFRA to provide “even broader protection for religious liberty than was available” under pre-*Smith* decisions like *Sherbert* and *Yoder*,<sup>143</sup> and that RFRA protects religion “far beyond what this Court has held is constitutionally required.”<sup>144</sup> As the cases have evolved at both the Supreme Court and in lower courts, questions about RFRA have arisen in three primary areas: the definition of religion under the Act, the substantial burden required to trigger strict scrutiny, and the mechanics of applying RFRA’s strict scrutiny when it *is* triggered.<sup>145</sup>

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446.350 (2013); KY. REV. STAT. ANN. § 446.350 (West 2013); LA. STAT. ANN. §§ 13:5231–5242 (2010); MISS. CODE ANN. § 11-61-1 (2014); MO. REV. STAT. § 1.302 (2003); N.M. STAT. ANN. §§ 28-22-1–5 (2000); OKLA. STAT. tit. 51, §§ 251–258 (2000); 71 PA. CONS. STAT. §§ 2401–2408 (2002); R.I. GEN. LAWS §§ 42-80.1-1–4 (1993); S.C. CODE ANN. §§ 1-32-10–60 (1999); TENN. CODE ANN. § 4-1-407 (2018); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001–.012 (West 1999); VA. CODE ANN. § 57-2.02 (2022).

<sup>139</sup> See *Cutter v. Wilkinson*, 544 U.S. 709, 713–14 (2005) (upholding a facial challenge against RLUIPA, 42 U.S.C. § 2000cc-1 (2000)).

<sup>140</sup> See *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 430–31 (2006) (discussing RFRA).

<sup>141</sup> See *Cutter*, 544 U.S. at 713–14.

<sup>142</sup> See, e.g., *Burwell*, 573 U.S. at 696.

<sup>143</sup> *Id.* at 695 n.3. The Court explained this expansion by noting that RLUIPA amended RFRA’s definition of “exercise of religion” in a manner that “deleted the prior reference to the First Amendment” in “an obvious effort to effect a complete separation from First Amendment case law.” *Id.* at 695–96, 714.

<sup>144</sup> *Id.* at 706.

<sup>145</sup> See discussion *infra* Sections B.1, B.2, B.3.

## 1. The Meaning of “Religion” Under RFRA

Although not explicitly set forth in the Act, to qualify for protection under RFRA (or RLUIPA), a religious belief must be “sincere.”<sup>146</sup> This is because an insincere “belief” is no religious belief at all. The Supreme Court has explained that, in passing those two laws, Congress believed “that the federal courts were up to the job” of “spotting” and “dealing with insincere . . . claims” in religion cases.<sup>147</sup> Thus, insincere religious beliefs are not protected by RFRA.<sup>148</sup> The Court has also stated, however, that it would be inappropriate for the government to judge the *reasonableness* or *plausibility* of a sincerely held religious belief.<sup>149</sup> A court’s “narrow function” is to determine whether the asserted belief reflects “an honest conviction” by the person asserting it.<sup>150</sup> But exactly what beliefs qualify as “religious” under RFRA?

Neither RFRA nor the Constitution define the scope of “religion,” leaving it to the courts to sort out. Courts and legal scholars have struggled to define the parameters of “religion” in the Constitution’s requirement that Congress neither establish a religion nor infringe on its free exercise.<sup>151</sup> The Framers of the First Amendment viewed religion as purely theistic in nature,<sup>152</sup> encompassing Christianity and other faiths that recognized the existence of a God. The Supreme Court has sent mixed signals on the issue. At one point, the Court unanimously used theistic terms in adopting a definition of religion as “reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.”<sup>153</sup> Beginning in

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<sup>146</sup> See *Burwell*, 573 U.S. at 718. *But c.f.* Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb–2000bb-4) *invalidated by* *City of Borne v. Flores*, 521 U.S. 507 (1997).

<sup>147</sup> *Burwell*, 573 U.S. at 718.

<sup>148</sup> See *id.*

<sup>149</sup> See *id.* at 724–25 (citing *Emp. Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990)); *Hernandez v. Comm’r*, 490 U.S. 680 (1989); *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707 (1981); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440 (1969)).

<sup>150</sup> *Id.* at 725 (quoting *Thomas*, 450 U.S. at 716).

<sup>151</sup> See Antony Barone Kolenc, *Not “For God and Country”: Atheist Military Chaplains and the Free Exercise Clause*, 48 U.S.F. L. REV. 395 (2014) (discussing the meaning of “religion” in the First Amendment).

<sup>152</sup> See Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 338 (1996) (agreeing the Framers viewed “religion” as theistic); Peñalver, *supra* note 35, at 803 (noting “religion” encompassed theistic beliefs for Framers); Micah Schwartzman, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1405 (2012) (“There is little, if any, evidence that the Framers, ratifiers, or ordinary members of the public understood the meaning of religion to encompass nontheistic views.”).

<sup>153</sup> *Davis v. Beason*, 133 U.S. 333, 342 (1890) (discussing the Mormon church and polygamy); see also *United States v. Macintosh*, 283 U.S. 605, 625 (1931) (“We

the mid-twentieth century, however, the Court began to use the term “religion” to include a wide variety of faiths, including non-theistic ones and even secular humanism.<sup>154</sup> Yet the Court has still maintained as a core principle that the First Amendment’s scope of religious belief requires some quality to distinguish it from purely secular beliefs and philosophies, which are not covered by the Religion Clauses.<sup>155</sup>

As the twentieth century progressed, courts and legal scholars developed more sophisticated approaches to define the meaning of religion. One accepted approach uses a multi-factor test that identifies “instances to which the concept [of religion] indisputably applies” and then compares “in more doubtful instances how close the analogy is between these and the indisputable instances.”<sup>156</sup> Alternatively, a useful single-factor test – the “Higher Reality” approach – posits that the most essential aspect of religion is “faith in something beyond the mundane observable world – faith that some higher or deeper reality exists than that which can be established by ordinary existence or scientific observation.”<sup>157</sup> This latter approach seems to fit better with the Framers’ view of religion, which also centered around the concept of a Creator.<sup>158</sup>

While the meaning of “religion” under the First Amendment is an important question, RFRA is no longer tied to the Supreme Court’s free-exercise cases interpreting that amendment.<sup>159</sup> Although the Act originally made reference to the “exercise of religion under the First Amendment” in its definitions section, when Congress passed RLUIPA it sought “to effect a complete separation [of RFRA] from First Amendment case law” by “delet[ing] the reference to the First Amendment [in RFRA] and defin[ing] the ‘exercise of religion’ to include ‘any exercise of religion, whether or

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are a Christian people, according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God.”).

<sup>154</sup> See, e.g., *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961) (noting that “[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others”); see also *United States v. Seeger*, 380 U.S. 163, 165 (1964); *Welsh v. United States*, 398 U.S. 333 (1970) (interpreting the definition of religion in the Universal Military Training and Service Act “to exclude essentially political, sociological, or philosophical views”); *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985) (noting the Court had “unambiguously concluded that the ... First Amendment embraces the right to select any religious faith or none at all”).

<sup>155</sup> See *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (“A way of life ... may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief....”).

<sup>156</sup> Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 763 (1984).

<sup>157</sup> *Id.* at 805.

<sup>158</sup> Peñalver, *supra* note 35, at 803.

<sup>159</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 696 (2014) (citing § 2000cc-5(7)(A)).

not compelled by, or central to, a system of religious belief.”<sup>160</sup> Still, many considerations that go into defining religion under the First Amendment also apply to identifying RFRA’s scope of religion.<sup>161</sup>

For instance, in *United States v. Meyers*, the U.S. Court of Appeals for the Tenth Circuit explained that a party asserting a RFRA claim must identify state actions that “(1) substantially burden, (2) a religious belief rather than a philosophy or way of life, (3) which belief is sincerely held.”<sup>162</sup> In *Meyers* – a pre-RLUIPA case – a criminal defendant accused of crimes involving marijuana raised a RFRA defense, testifying “that he is the founder and Reverend of the Church of Marijuana and that it is his sincere belief that his religion commands him to use, possess, grow and distribute marijuana for the good of mankind and the planet earth.”<sup>163</sup> The lower courts rejected his claim, finding that it was sincerely held but that it did not qualify as “religion” under RFRA.<sup>164</sup> The courts used a multi-factor approach to define religion, considering such factors as whether the proposed marijuana religion included “comprehensive beliefs” containing “ultimate ideas,” “metaphysical beliefs,” or a “moral or ethical system,” and whether it had the “accoutrements of religion” (such as a divine founder, “important writings,” “gathering places,” “keepers of knowledge,” “ceremonies and rituals,” “structure or organization,” “holidays,” “diet or fasting,” “appearance and clothing,” and a way to propagate its beliefs).<sup>165</sup> The Tenth Circuit found that “Meyers’ beliefs more accurately espouse a philosophy and/or way of life rather than a ‘religion.’”<sup>166</sup>

Even after RFRA’s changes under RLUIPA, courts continue to use similar multi-factor tests to determine whether certain beliefs are “religious” under the Act.<sup>167</sup> This is so because Congress still has not defined the scope of the term “religion.”

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<sup>160</sup> *Id.*

<sup>161</sup> *See, e.g., United States v. Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 1479.

<sup>164</sup> *Id.* at 1483–84.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 1484. Notably, *Meyers* is a pre-RLUIPA case that references the Supreme Court’s First Amendment case law; however, the Tenth Circuit has not repudiated this approach even after RLUIPA’s redefinition. *See generally id.*

<sup>167</sup> *See, e.g., Hale v. Fed. Bureau of Prisons*, 759 Fed. Appx. 741, 746 (2019). In *Hale*, the Tenth Circuit rejected a claim by a prisoner who identified himself as “a minister in The Church of the Creator,” which has the “overriding mission” of the “permanent prevention of the cultural, genetic, and biological genocide of the White Race worldwide and thus the achievement of White racial immortality.” *Id.* at 743. In rejecting the belief system as a “religion,” the court noted, for example, that, “[i]nstead of addressing existential, teleological, or cosmological matters, Creativity presents only a singular concern of racial dominance, framed in terms of social, political, and ideological struggles.” *Id.* at 747.



## 2. Substantial Burdens in RFRA Cases

By its terms, RFRA prohibits the federal government (including military authorities) from placing a “substantial burden” on religious exercise without a compelling justification.<sup>168</sup> Early on, this language led some courts to opine that RFRA would only protect religious exercise that was “central” to the religion’s belief system.<sup>169</sup> In 2000, however, Congress remedied that ambiguity by amending the Act and removing any potential requirement for centrality.<sup>170</sup> RFRA now defines “religious exercise” to include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”<sup>171</sup> The Supreme Court has acknowledged this revised definition.<sup>172</sup>

Unfortunately, RFRA also does not define what constitutes a “substantial burden” to a person’s ability to engage in religious exercise.<sup>173</sup> Nor has the Supreme Court provided specific guidance on what makes a burden more or less substantial,<sup>174</sup> although the Court has held that forcing a person to choose between religious exercise and “serious disciplinary action” constitutes a substantial burden,<sup>175</sup> as does forcing a person to choose between acting in accordance with religious beliefs and paying “an enormous sum of money” as a fine.<sup>176</sup>

Some courts apply a common-sense approach to understanding the meaning of “substantial,” giving the term its “ordinary” or “natural” meaning.<sup>177</sup> The Tenth Circuit has given more guidance in this area by establishing a test to determine when a burden on religion becomes substantial enough to trigger RFRA strict scrutiny. This test – essentially

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<sup>168</sup> Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb–2000bb-4) *invalidated by* City of Borne v. Flores, 521 U.S. 507 (1997).

<sup>169</sup> See *Adkins v. Kaspar*, 393 F.3d 559, 567 n.34 (5th Cir. 2004).

<sup>170</sup> 42 U.S.C. § 2000bb-2(4) (2000) (“As used in this chapter . . . the term ‘exercise of religion’ means religious exercise, as defined in section 2000cc-5 of this title.”).

<sup>171</sup> 42 U.S.C. § 2000cc-5(7)(a).

<sup>172</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 696 (2014) (citing § 2000cc–5(7)(A)).

<sup>173</sup> See *United States v. Sterling*, 75 M.J. 407, 417 (C.A.A.F. 2016).

<sup>174</sup> In *Burwell*, Justice Ruth Bader Ginsburg argued that the modifier (“substantially”) was meant to “carry weight” because it was inserted into the bill “pursuant to a clarifying amendment offered by Senators Kennedy and Hatch,” and that Kennedy had stated the law “does not require the Government to justify every action that has some effect on religious exercise.” 573 U.S. at 758 (Ginsburg, J., dissenting).

<sup>175</sup> *Holt v. Hobbs*, 574 U.S. 352, 361 (2015).

<sup>176</sup> *Burwell*, 573 U.S. at 726.

<sup>177</sup> *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1226 (11th Cir. 2004).

adopted by the DoD today<sup>178</sup> – occurs when the government, “at the very least”:

(1) requires the plaintiff to participate in an activity prohibited by a sincerely held religious belief, (2) prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief, or (3) places considerable pressure on the plaintiff to violate a sincerely held religious belief—for example, by presenting an illusory or Hobson’s choice where the only realistically possible course of action available to the plaintiff trenches on sincere religious exercise.<sup>179</sup>

Additionally, some courts go beyond the subjective explanation given by the religious person, further inquiring “objectively” whether the government “actually ‘puts’ the religious adherent to the ‘choice’ of incurring a ‘serious’ penalty or ‘engaging in conduct that seriously violates his religious beliefs.’”<sup>180</sup>

### 3. The Application of Strict Scrutiny Under RFRA

Under RFRA, government actions that substantially burden religious exercise are subject to an exacting kind of judicial scrutiny.<sup>181</sup> As it turns out, RFRA scrutiny is perhaps even more demanding than the strict level of scrutiny previously set forth by the Supreme Court in *Sherbert*, which RFRA sought to restore.<sup>182</sup> Not only might it be difficult for government authorities to articulate interests that are sufficiently compelling, but they might not be able to demonstrate that they have taken the least restrictive means to further those interests.

As an initial point, once a person claiming protection from RFRA has shown that the challenged government action would substantially burden a sincere religious exercise, the government bears the burden of demonstrating that its interests are sufficiently compelling.<sup>183</sup> This requires, as RFRA itself states, that the government show “that application

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<sup>178</sup> See DOD INSTRUCTION 1300.17, *Religious Liberty in the Military Services*, para. G.2 (Sept. 1, 2020) (adopting the Tenth Circuit’s definition for the DoD when defining “substantial burden”).

<sup>179</sup> *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014).

<sup>180</sup> *Eternal Word Television Network, Inc. v. Sec’y of U.S. Dep’t of Health & Human Servs.*, 818 F.3d 1122, 1144 (11th Cir. 2016) (quoting *Holt*, 574 U.S. at 361).

<sup>181</sup> See Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb–2000bb-4) *invalidated by City of Borne v. Flores*, 521 U.S. 507 (1997).

<sup>182</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014) (opining that RFRA protects religion “far beyond what this Court has held is constitutionally required”).

<sup>183</sup> See *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 429 (2006) (discussing the burden in RFRA cases).

of the [substantial] burden to the person ... is in furtherance of a compelling governmental interest.”<sup>184</sup> In interpreting the Act’s language, the Supreme Court has emphasized that the compelling-interest inquiry is “focused” and not “categorical” in its approach, and that the government must demonstrate that its compelling interest can only be satisfied by applying the challenged law to the “particular claimant” whose exercise is being substantially burdened.<sup>185</sup>

For example, while discussing the first prong of strict scrutiny in *O Centro Espírita*, the Supreme Court rejected a categorical argument by the government against a member of a sect with a religious exercise that involved consuming a hallucinogenic tea prohibited by the Controlled Substances Act (“CSA”).<sup>186</sup> The government argued that it had “a compelling interest in the uniform application of the [CSA] such that no exception . . . could be made to accommodate the sect’s sincere religious practice.”<sup>187</sup> Not persuaded, the Court cited the fact that the government had previously granted an exception to the CSA for religious use of peyote by “hundreds of thousands of Native Americans practicing their faith.”<sup>188</sup> Thus, the government’s argument failed on the first prong of strict scrutiny because it could not establish that there was a compelling interest in applying the CSA to the particular tea-drinking religious claimants in the case.<sup>189</sup>

The least-restrictive-means analysis under RFRA may be even more difficult to satisfy than the compelling-interest inquiry. As the Supreme Court explained, “[t]he least-restrictive-means standard is exceptionally demanding,” requiring that the government show “that it lacks other means of achieving its desired goal without imposing a substantial burden.”<sup>190</sup> Further, “if a less restrictive means is available for the Government to achieve its goals, the Government must use it.”<sup>191</sup> This test is exceedingly difficult for the government to satisfy.

For instance, in *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court struck down the oft-maligned contraceptive coverage mandate

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<sup>184</sup> Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb–2000bb-4) *invalidated by* City of Borne v. Flores, 521 U.S. 507 (1997).

<sup>185</sup> *Gonzales*, 546 U.S. at 430–31 (citing 42 U.S.C. § 2000bb–1(b) and noting that “RFRA expressly adopted the compelling interest test ‘as set forth in *Sherbert* ... and ... *Yoder*,” where the “Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants”).

<sup>186</sup> *Id.* at 423.

<sup>187</sup> *Id.* at 423.

<sup>188</sup> *Id.* at 433.

<sup>189</sup> *See id.* at 439.

<sup>190</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014).

<sup>191</sup> *Holt v. Hobbs*, 574 U.S. 352, 364–65 (2015) (quoting *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 815 (2000)).

contained in the Affordable Care Act of 2010.<sup>192</sup> The Court assumed *arguendo* that the government had a compelling interest in ensuring women cost-free access to contraceptives, but it concluded the mandate was not the least restrictive means of furthering that interest under RFRA because the government had failed to demonstrate that it had no other means at its disposal of achieving its stated goal.<sup>193</sup> A year later, in *Holt v. Hobbs*, the Supreme Court applied RLUIPA – which mandates the same kind of strict scrutiny as RFRA – to a state prison policy that prohibited inmates from growing beards.<sup>194</sup> The Court invalidated the policy in part because applying it to a particular Muslim inmate without accommodation was not the least restrictive means of satisfying the prison’s safety concerns – an ostensibly compelling interest.<sup>195</sup> These prison concerns are the same types of concerns Congress considered for the military, also.<sup>196</sup>

#### V. RFRA’S APPLICATION WITHIN THE U.S. ARMED FORCES

As this Article discussed in Parts I to III, the history of accommodation of religious exercise in the military has been mixed, even while servicemembers have cherished their faith and chaplains have ministered to their spiritual needs. Typically, military leaders have focused more on unit efficiency and uniformity than individual religious liberty, adjusting DoD policies only after Congress forced their hand.<sup>197</sup>

After RFRA’s passage and success at the federal level, as discussed in Part IV, one would think the Act would have had a major impact on the U.S. Armed Forces, especially in light of the Supreme Court’s concern in *Smith* that applying strict scrutiny to neutral military service laws “would be courting anarchy ... [and] would open the prospect of constitutionally required religious exemptions ... of almost every conceivable kind.”<sup>198</sup> In fact, the opposite occurred.<sup>199</sup> Part V first traces the military’s forced, overly delayed embrace of RFRA from its passage in 1993 until 2020, when the DoD’s regulations finally recognized the full spirit and letter of

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<sup>192</sup> *Burwell*, 573 U.S. at 736.

<sup>193</sup> *Id.* at 728–29.

<sup>194</sup> *See Holt*, 574 U.S. at 364–65.

<sup>195</sup> *Id.* *But see* *Adams v. Comm’r*, 170 F.3d 173, 178 (3d Cir. 1999) (rejecting taxpayer RFRA claim opposing military funding because implementing the tax system in a uniform, mandatory way was the least restrictive means of furthering the government’s compelling interest in collecting taxes).

<sup>196</sup> *See* H.R. REP. NO. 103-88, at 8 (1993) (likening military interests to institutional prison interests).

<sup>197</sup> *See* discussion *supra* Parts I–III.

<sup>198</sup> *Emp. Div., Dep’t of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 888–89 (1990) (worrying that applying strict scrutiny would put “military service laws” in jeopardy).

<sup>199</sup> *See* discussion *infra* Parts V.A, V.B.

the Act. It then discusses the generally weak response in courts that considered RFRA claims in military cases.

### A. *The DoD's Long, Unpardonable Delay in Embracing RFRA*

With RFRA's passage, the DoD faced another opportunity to adjust military policy to the will of Congress, as it reluctantly did in the 1980's.<sup>200</sup> That change, however, was inexcusably slow in coming.<sup>201</sup> For decades after 1993, the military operated as though RFRA either did not exist or did not change how commanders must address religious-liberty issues among its ever-diversifying pool of recruits.<sup>202</sup>

#### 1. The DoD's Willful Ignorance of RFRA

For twenty years after RFRA's passage, the DoD largely ignored the Act, despite official positions acknowledging its constitutionality.<sup>203</sup> Although RFRA's text does not explicitly mention the military, there is no doubt it applies fully to the acts of military leaders and commanders, as the Court of Appeals for the Armed Forces ("CAAF") recognized in 2016.<sup>204</sup> RFRA leaves no wiggle room, applying to actions by the "government," which it defines as any "branch, department, agency, instrumentality, official (or other person acting under color of law) of the United States."<sup>205</sup> Further, its legislative history expressly contemplated military application.<sup>206</sup> The House Judiciary Committee's report on the Act stated that, "[p]ursuant to the Religious Freedom Restoration Act, the courts must review the claims of ... military personnel under the compelling governmental interest test."<sup>207</sup> Similarly, the Senate Judiciary Committee's report stated that, "[u]nder the unitary standard set forth in the act, courts will review the free-exercise claims of military personnel under the compelling governmental interest test."<sup>208</sup> As early as 1997, a

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<sup>200</sup> See *infra* notes 120–26 and accompanying text.

<sup>201</sup> See *infra* Part V.A.1.

<sup>202</sup> See *infra* Part V.A.1.

<sup>203</sup> See *infra* n. 203–221 and accompanying text.

<sup>204</sup> See *United States v. Sterling*, 75 M.J. 407, 410 (C.A.A.F. 2016) ("RFRA[] ... applies in the military context.").

<sup>205</sup> 42 U.S.C. §§ 2000bb-2 (2000).

<sup>206</sup> H.R. REP. NO. 103-88 (1993).

<sup>207</sup> *Id.*

<sup>208</sup> S. REP. NO. 103-111, at 12 (1993). *But see* Jeffrey Lakin, *Atheists in Foxholes: Examining the Current State of Religious Freedom in the United States Military*, 9 FIRST AMEND. L. REV. 713, 729–30 (2011) (arguing RFRA's legislative history is mixed because the House Committee did not "necessarily" believe RFRA would undermine military authority, and the Senate Committee "intend[ed] and expect[ed]" the "significant deference" that "the courts have always extended to military authorities" to "continue under" RFRA).

United States district court found that RFRA applied to military orders and regulations.<sup>209</sup>

The fact that RFRA's passage was a non-event to DoD leaders is illustrated by the Act's absence in any regulations and legal analysis in military circles. For instance, in a lengthy 1998 article written by an Army judge advocate in *The Army Lawyer* – an article purporting to provide “a legal framework for judge advocates to use to ensure that their commands neither improperly restrict the free exercise of religion, nor unconstitutionally establish religion”<sup>210</sup> – RFRA was nowhere discussed or applied, receiving a single mention in a footnote that erroneously suggested the Supreme Court had “held that the RFRA was unconstitutional because it exceeded Congress’ legislative powers.”<sup>211</sup> The article relied instead on outdated DoD and Army religious-accommodation regulations that had not been modified since 1988 or 1993 (pre-RFRA), concluding that “religious accommodation issues are leadership issues rather than legal ones” because the regulations “are settled” that a commander has “great latitude to make a decision” and should “accommodate religious practice unless the mission requires otherwise.”<sup>212</sup>

Three years later, an article about RFRA written by a judge advocate in an official publication by the Office of the Air Force Judge Advocate General summed up the RFRA situation in military legal circles as of March 2001:

Although the act was passed in 1993, there is an absence of guidance within the department incorporating the compelling interest test. In fact, as recently as February 2001, guidance available was to follow a 1988 DOD Directive ... which uses a rational basis test even though the directive itself is hopelessly outdated. What regulatory guidance there is does not incorporate the test mandated by Congress in 1993.<sup>213</sup>

The article referenced guidance from the Air Force JAG Corps that had been “recently changed” to reflect the RFRA test (although not in any formal regulation), and it noted that the position of the Departments of Justice and the Air Force had been that RFRA was constitutional.<sup>214</sup>

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<sup>209</sup> See *Rigdon v. Perry*, 962 F. Supp. 150, 160–61 (D.D.C. 1997).

<sup>210</sup> Major Michael J. Benjamin, *Justice, Justice Shall You Pursue: Legal Analysis of Religion Issues in the Army*, ARMY LAW., Nov. 1998, at 18.

<sup>211</sup> *Id.* at 2 n.4 (citing *City of Boerne v. Flores*, 521 U.S. 507 (1997) (finding RFRA unconstitutional as applied to the states, *not* that it was unconstitutional as applied to the federal government)).

<sup>212</sup> *Id.* at 8–13.

<sup>213</sup> Major Calvin Anderson, *The Religious Freedom Restoration Act*, 28 NO. 1 THE REPORTER 10, 10 (2001).

<sup>214</sup> *Id.* (citing ACCOMMODATION OF RELIGIOUS PRACTICES, AIR FORCE GENERAL LAW DIVISION (AF/JAG), (Mar. 5, 2001)).

Despite this official determination, the military had not yet incorporated the Act's mandates into its guidance to commanders and legal advisors.<sup>215</sup> Remarkably, although the article had stated that legal advisors should consider the possibility of applying RFRA to religious accommodation requests, it concluded, "Absent more specific regulatory guidance, commanders should continue to apply existing [outdated] regulations to religious accommodation requests."<sup>216</sup>

In fact, it was not until 2009 that the DoD canceled its 1988 guidance and replaced it with an updated regulation.<sup>217</sup> Incredibly, the new instruction completely ignored RFRA and failed to even hint at incorporating the compelling-interest or least-restrictive-means standards required by RFRA.<sup>218</sup> Instead, the instruction merely reissued the same 1988 DoD policy that "requests for accommodation of religious practices should be approved by commanders when accommodation will not have an adverse impact on mission accomplishment, military readiness, unit cohesion, standards, or discipline."<sup>219</sup> In dealing with accommodations for "religious apparel," the guidance limited that definition to "[a]rticles of clothing worn as part of the doctrinal or traditional observance of the religious faith," explicitly excluding from the definition "[h]air and grooming practices required or observed by religious groups."<sup>220</sup> It also reissued the same five factors for commanders to consider for religious accommodations that had been included in the 1988 regulation, as well as the guidance that administrative actions could be taken against those requesting accommodations where the requests were "not in the best interest of the unit, and continued tension between the unit's requirements and the individual's religious beliefs is apparent."<sup>221</sup>

Thus, despite the discussion in the 2001 Air Force JAG article, military leaders in 2009 seemed to believe that RFRA did not apply to the military. With DoD displaying this untenable position by regulation, the stage was set for further congressional action.

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<sup>215</sup> *See id.*

<sup>216</sup> *Id.* at 12.

<sup>217</sup> *See* DoD INSTRUCTION 1300.17, *Accommodation of Religious Practices Within the Military Services* (Feb. 10, 2009) (now superseded).

<sup>218</sup> *See generally id.*

<sup>219</sup> *Id.* at para. 4.

<sup>220</sup> *Id.* at para. 3(b).

<sup>221</sup> *Id.* at *Enclosure*.

## 2. The DoD's Long-Overdue Embrace of RFRA

In 2014, military leadership would once again be prompted to recognize religious liberties through congressional intervention.<sup>222</sup> In the National Defense Authorization Acts for 2013 and 2014, Congress directed the DoD to issue regulations enhancing protections for the religious exercise of conscience by servicemembers and chaplains.<sup>223</sup> While complying with this direction, on January 22, 2014 – over twenty years after the passage of RFRA – the DoD finally incorporated the Act into official regulatory guidance.<sup>224</sup> One of the amendments to the DoD regulation appropriately defined the “exercise of religion” to include “any religious practice(s), whether or not compelled by, or central to, a system of religious belief.”<sup>225</sup> The changes also included as part of religious exercise the “grooming and appearance practices, include hair, required or observed by religious groups,” even including “religious body art” and piercings.<sup>226</sup>

Significantly, the 2014 change incorporated RFRA’s “substantial burden” requirement, defining the burden as “significantly interfering with the exercise of religion as opposed to minimally interfering with the exercise of religion.”<sup>227</sup> It restated RFRA’s requirement that a religious-accommodation request “from a military policy, practice, or duty that substantially burdens a Service member’s exercise of religion may be denied only when the military policy, practice, or duty: (a) Furthers a compelling governmental interest [; and] (b) Is the least restrictive means of furthering that compelling governmental interest.”<sup>228</sup> While the regulation did not define what constituted the “least restrictive means,” it did define a “compelling governmental interest” as “a military requirement that is essential to accomplishment of the military mission.”<sup>229</sup> It went on to declare that the DoD had a compelling interest “in mission accomplishment, including ... military readiness, unit cohesion, good order, discipline, health, and safety, on both the individual and unit levels. An essential part of unit cohesion is establishing and maintaining uniform

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<sup>222</sup> See DOD INSTRUCTION 1300.17, *Accommodation of Religious Practices Within the Military Services* (Feb. 10, 2009) (Incorporating Change 1, Effective January 22, 2014) (now superseded).

<sup>223</sup> See § 533, National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239; § 532, National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66.

<sup>224</sup> See DOD INSTRUCTION 1300.17, *Accommodation of Religious Practices Within the Military Services* (Feb. 10, 2009) (Incorporating Change 1, Effective January 22, 2014) (now superseded).

<sup>225</sup> *Id.* at para. 3(f).

<sup>226</sup> *Id.* at para. 3(c), (d).

<sup>227</sup> *Id.* at para. 3(e).

<sup>228</sup> *Id.* at para. 4(e)(1).

<sup>229</sup> *Id.* at para. 3(g).



military grooming and appearance standards.”<sup>230</sup> The regulation gave additional in-depth guidance on how commanders should process accommodation requests, mostly restating the prior 1988 guidance (with some modification), and still leaving open the possibility that a member requesting an accommodation could be administratively reassigned, reclassified, or separated from the service.<sup>231</sup>

On September 1, 2020, the DoD canceled its 2009/2014 instruction and reissued a newly revised and reorganized instruction that mostly repeated the prior guidance from 2014, with some substantive changes.<sup>232</sup> Five changes are worthy of particular note. First, the new instruction clarified that in religious accommodation requests, “the burden of proof is placed upon the DoD Component, not the individual requesting the exemption.”<sup>233</sup> Second, it required that accommodation requests “be reviewed and acted on as soon as practicable, and no later than the timelines provided in Table 1,” placing strict 30–60 day deadlines on decisions.<sup>234</sup> Third, an added factor attempted to address the least-restrictive-means analysis, stating that decisionmakers should consider “[a]lternate means available to address the requested accommodation. The means that is least restrictive to the requestor’s religious practice and that does not impede a compelling governmental interest will be determinative.”<sup>235</sup> Fourth, it stated that granted accommodations “will remain in effect during follow-on duties, assignments, or locations, and for the duration of a Service member’s military career, including after promotions, reenlistment or commissioning, unless and until rescinded in accordance with the requirements of this issuance.”<sup>236</sup> Fifth, it provided a specific explanation of what constitutes a “substantial burden,” defining that as an act that “[r]equires participation in an activity prohibited by a sincerely held religious belief; [p]revents participation in conduct motivated by a sincerely held religious belief; or [p]laces substantial pressure on a Service member to engage in conduct contrary to a sincerely held religious belief.”<sup>237</sup>

With these 2020 changes to the DoD’s regulations, the military had finally embraced the full import of the spirit and letter of RFRA.

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<sup>230</sup> *Id.* at para. 4(c).

<sup>231</sup> *See id.* at para. 4, *Enclosure*.

<sup>232</sup> *See* DoD INSTRUCTION 1300.17, *Religious Liberty in the Military Services* (Sept. 1, 2020).

<sup>233</sup> *Id.* at para. 1.2(e).

<sup>234</sup> *Id.* at para. 3.2(c).

<sup>235</sup> *Id.* at para. 3.2(d).

<sup>236</sup> *Id.* at para. 3.2(g).

<sup>237</sup> *Id.* at para. G.2 (definitions). This definition seems largely taken from the Tenth Circuit’s decision *Yellowbear* decision. *See Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014). This three-pronged approach seems a reasonable and prudent way to capture the RFRA burden, even for military members.

### B. *The Mixed Judicial Response to RFRA in Military Cases*

Military leaders were not the only ones struggling to determine whether, when, and how to apply RFRA to cases involving military members or policies. From the mid-1990's to the present, both federal courts and military courts have stumbled in analyzing and applying the Act, even as the Supreme Court has interpreted it broadly.

#### 1. Early Judicial Consideration of RFRA

The judicial application of RFRA in the military context got off to a rough start in 1995 in *Hartmann v. Stone*,<sup>238</sup> one of the first cases to address the Act. There, the Sixth Circuit considered the validity of an Army regulation that prohibited private, civilian daycare providers on Army bases from engaging in religious activities while providing family childcare.<sup>239</sup> The court appropriately applied strict scrutiny and struck the regulation down as invalid, but it did so by deciding the case under the First Amendment, stumbling badly in its quest *not* to apply RFRA. The court started its analysis from a solid premise, finding that the Army's policy was not "neutral and generally applicable" – it specifically targeted religion – and that the regulation would thus receive strict scrutiny even under the Supreme Court's free-exercise analysis in *Smith*.<sup>240</sup> Then the court took a wrong turn. Because it had the *ability* to apply strict scrutiny under the First Amendment, the court erroneously believed it *must* resolve the case "as we would any other case involving laws or regulations that are not neutrally and generally applicable, and, as such, we need not address RFRA."<sup>241</sup>

This misguided desire to avoid RFRA turned constitutional analysis on its head. Under the doctrine of "constitutional avoidance," courts are supposed to avoid constitutional decisions if a statutory remedy (such as RFRA) will suffice.<sup>242</sup> As Justice Felix Frankfurter explained over 75 years ago, "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not pass on questions of constitutionality . . . unless such adjudication is unavoidable."<sup>243</sup> The Supreme Court demonstrated this principle in the *Hobby Lobby* case in the context of RFRA, concluding, "[t]he contraceptive mandate . . . violates RFRA. Our decision on that statutory question makes it unnecessary to reach the First Amendment claim raised

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<sup>238</sup> 68 F.3d 973 (6th Cir. 1995).

<sup>239</sup> *Id.* at 978–79.

<sup>240</sup> *Id.* at 978 ("A rule that uniformly bans all religious practice is not neutral.") (citing *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872 (1990)).

<sup>241</sup> *Id.*

<sup>242</sup> *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944).

<sup>243</sup> *Id.* at 105.

by [the litigants].”<sup>244</sup> The Sixth Circuit’s upside-down analysis in *Hartmann* has led at least one other court into error, causing it to misunderstand the case to stand for the improper proposition that RFRA “applies only to government actions that are ‘neutral and generally applicable.’”<sup>245</sup> Not so. RFRA’s application does not turn on the religious neutrality of a government action, but rather on its *effect* causing a substantial burden to religious exercise.<sup>246</sup>

Two years after *Hartmann*, a United States district court demonstrated the proper way to apply RFRA in a case involving the military.<sup>247</sup> In *Rigdon v. Perry*,<sup>248</sup> two Air Force chaplains – a Roman Catholic priest and a Jewish rabbi – sued the DoD after military guidance prohibited them from encouraging their military chapel congregants from contacting Congress to support legislation ending the partial-birth abortion procedure, which was morally abhorrent to the faith of the two chaplains.<sup>249</sup> Applying RFRA, the court held that the restriction placed a substantial burden on the military chaplains’ free-exercise rights, which included their right to “‘advance their religious beliefs’” during their sermons, with the court analogizing that practice to other forms of religious exercise, such as a church’s program to feed the needy or wearing a crucifix around one’s neck.<sup>250</sup> The court agreed that the DoD had compelling interests in “a politically-disinterested military, good order and discipline, and the protection of service members’ rights to participate in the political process.”<sup>251</sup> The court found, however, that the DoD had “not shown how these interests are in any way furthered by the restriction on the speech of military chaplains. ... It is difficult to understand why the defendants have singled out for proscription a seemingly innocuous request to congregants to write to Congress.”<sup>252</sup> The court concluded that the DoD’s compelling interests were “outweighed by the military chaplains’ right to autonomy in determining the religious content of their sermons.”<sup>253</sup>

Other federal courts have since applied RFRA to cases involving service members, finding potential rights violations when the military

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<sup>244</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736 (2014).

<sup>245</sup> *Larsen v. U.S. Navy*, 346 F. Supp. 2d 122, 137 (D.D.C. 2004) (“In *Hartmann v. Stone*, the court held that the RFRA is inapplicable if a regulation is not neutral and generally applicable.”). On appeal, the D.C. Circuit criticized the judge’s dismissal of the RFRA claim based on this “questionable theory advocated by neither party.” *See Larsen v. U.S. Navy*, 525 F.3d 1, 3 (D.C. Cir. 2008).

<sup>246</sup> *See* 42 U.S.C. §§ 2000bb–2000bb-4

<sup>247</sup> *See generally* *Rigdon v. Perry*, 962 F. Supp. 150 (D.D.C. 1997).

<sup>248</sup> *Id.*

<sup>249</sup> *See id.* at 152.

<sup>250</sup> *Id.* at 161.

<sup>251</sup> *Id.* at 162.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

failed to provide requested accommodations, but also recognizing that RFRA's reach has its limits.<sup>254</sup> The most notable case in this area was discussed in the introduction to this Article, when a United States district court granted Captain Simratpal Singh's temporary restraining order against the Army under RFRA, allowing him to maintain his Sikh articles of faith to wear a beard and turban despite uniform and appearance regulations.<sup>255</sup> In another case, several Sikh soldiers in a similar situation were denied a preliminary injunction because, during the pendency of the litigation, the Army already had given them religious accommodations that essentially provided all of their requested relief.<sup>256</sup>

## 2. Judicial Difficulties in Applying RFRA to Military Policies

Military courts rarely have interpreted RFRA in the context of a criminal court-martial conviction. The Army Court of Criminal Appeals decided the most significant case in this area, *United States v. Webster*,<sup>257</sup> involving a combat engineer who converted to Islam and refused to deploy with his unit to Iraq in support of combat operations.<sup>258</sup> Webster pleaded guilty to willfully disobeying an order to prepare for deployment and for missing his unit's deployment to Iraq,<sup>259</sup> but on appeal he raised RFRA in an attempt to overturn his pleas, arguing that the "irreconcilable choice that the Army forced upon [him] constituted the prohibited 'substantial burden' upon his free exercise of religion."<sup>260</sup> The Army countered that it "did not substantially burden [Webster's] free exercise of religion because he 'could have deployed to Iraq in a non-combatant role, but he [chose] not to accept this offer' and 'any miniscule burden on [his] free exercise of religion was in the furtherance of . . . a compelling governmental interest.'"<sup>261</sup>

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<sup>254</sup> See, e.g., *Rasul v. Myers*, 563 F.3d 527, 533 (D.C. Cir. 2009) (finding that "the term 'person' as used in RFRA should be read consistently with similar language in constitutional provisions, as interpreted by the Supreme Court at the time Congress enacted RFRA," and holding that "four British nationals who brought an action alleging that they were illegally detained and mistreated at the United States Naval Base at Guantanamo Bay, Cuba, from 2002 until their release in 2004" could not bring a claim under RFRA because they are "nonresident aliens"—a class of persons that is "not among the 'person[s]' protected by" RFRA).

<sup>255</sup> See *Singh v. Carter*, 168 F. Supp. 3d 216 (D.D.C. 2016); *Singh v. McHugh*, 185 F. Supp. 3d 201 (D.D.C. 2016) (granting Sikh's RFRA claim against the Army); see also *supra* notes 9–17 and accompanying text.

<sup>256</sup> See *Singh v. McConville*, 187 F. Supp. 3d 152, 163 (D.D.C. 2016) (denying injunction).

<sup>257</sup> *United States v. Webster*, 65 M.J. 936 (A. Ct. Crim. App. 2008).

<sup>258</sup> See *id.*

<sup>259</sup> *Id.* at 938.

<sup>260</sup> *Id.* at 944, 946.

<sup>261</sup> *Id.* at 946–47.

Avoiding the substantial burden issue, the Army court assumed *arguendo* that a substantial burden had occurred, and it applied RFRA strict scrutiny to Webster's claim.<sup>262</sup> In doing so, the court cited the Supreme Court's decision in *Goldman* and applied a deferential stance toward "the professional judgment of military authorities concerning the relative importance of a particular military interest."<sup>263</sup> The court agreed that the Army had a "compelling interest in requiring soldiers to deploy with their units," and it concluded the Army had used the least restrictive means to further that interest:

Although the Army required appellant to deploy with his unit, the Army made numerous allowances for him. The Army afforded him the opportunity to request relief as a conscientious objector. The Army gave him the right to request reasonable accommodation of his religious practices. Finally, although apparently not required to do so by any regulation, appellant's commander generously allowed appellant to deploy with his unit in a non-combatant role.<sup>264</sup>

The court rejected Webster's claim, holding that he "had no legal right or privilege under the First Amendment to refuse obedience to the order[s]" under the circumstances.<sup>265</sup> This case illustrates that applying RFRA's strict scrutiny to military decisions can be done without necessarily "courting anarchy," as the Supreme Court feared in *Smith*.<sup>266</sup>

Not all courts have fared as well in applying RFRA in the military context.<sup>267</sup> Part of the interpretive problem has been with courts incorrectly narrowing the definition of "religious exercise" under RFRA to avoid triggering its protections.<sup>268</sup> That was the case in *United States v. Sterling*,<sup>269</sup> where the Navy-Marine Corps Court of Criminal Appeals reviewed a court-martial conviction for a Marine's failure to remove a Bible verse – "No weapon formed against me shall prosper" – from her shared military workplace desk after receiving an order to do so.<sup>270</sup> The case is clouded by the fact that Sterling "did not inform the person who ordered her to remove the signs that they had had any religious significance to [her], the words in context could easily be seen as combative in tone, and the record reflects that their religious connotation

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<sup>262</sup> *Id.* at 946–48.

<sup>263</sup> *Id.* at 947 (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)).

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 948.

<sup>266</sup> *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 888–89 (1990).

<sup>267</sup> *See United States v. Sterling*, 75 M.J. 407 (C.A.A.F. 2016).

<sup>268</sup> *Id.* at 413.

<sup>269</sup> *United States v. Sterling*, 2015 WL 832587, at \*1 (N-M. Ct. Crim. App. Feb. 26, 2015), *aff'd on other grounds*, 75 M.J. 407 (C.A.A.F. 2016).

<sup>270</sup> *Id.* at \*1.

was neither revealed nor raised until mid-trial.”<sup>271</sup> Notably, that was partly due to the fact that Sterling represented herself *pro se* at her court-martial.<sup>272</sup>

On Sterling’s first level of appeal, the Navy court wrongly held that RFRA did not apply to her conduct because the posting of Bible verses on a workplace computer did not constitute a religious exercise.<sup>273</sup> On the second level of appeal, however, the CAAF found that the Navy court had “erred in defining ‘religious exercise’ for purposes of RFRA.”<sup>274</sup> The CAAF reasoned that the Navy court’s definition was “too narrow” because RFRA’s scope includes “‘not only belief and profession but the performance of (or abstention from) physical acts’ that are ‘engaged in for religious reasons.’”<sup>275</sup>

Other courts also have made potential errors in this regard.<sup>276</sup> Most notably, in *Wilson v. James*,<sup>277</sup> the D.C. Circuit Court of Appeals affirmed the denial of a servicemember’s RFRA claim.<sup>278</sup> The conduct in the case took place in 2012, after the military’s “Don’t Ask, Don’t Tell” policy regarding homosexual conduct had been repealed, but while same-sex marriage was still unrecognized under federal law.<sup>279</sup> *Wilson*, a Mormon

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<sup>271</sup> *Sterling*, 75 M.J. at 410; see also Lisa Mathews, *Religious Freedom in the Military as viewed through the Sterling case*, MASON VETERANS & SERVICEMEMBERS LEGAL CLINIC, (Nov. 22, 2016), <https://mvets.law.gmu.edu/2016/11/22/religious-freedom-in-the-military-as-viewed-through-the-sterling-case> [https://perma.cc/6MNZ-QTFR] (discussing the facts).

<sup>272</sup> *Sterling*, 75 M.J. at 413.

<sup>273</sup> *Id.* at 415.

<sup>274</sup> *Id.* at 410. CAAF affirmed Sterling’s conviction on other grounds because Sterling had “failed to identify the sincerely held religious belief that made placing the signs important to her exercise of religion or how the removal of the signs substantially burdened her exercise of religion in some other way.” *Id.*

<sup>275</sup> *Id.* at 415 (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 710 (2014)). A dissenting judge expressed concern that CAAF’s decision could be read as requiring religious believers to either ask the government’s permission before engaging in religious exercise or “to inform the government of the religious nature of their conduct at the time they engage in it.” *Id.* at 421–22 (Ohlson, J., dissenting).

<sup>276</sup> See, e.g., *Heap v. Carter*, 112 F. Supp. 3d 402, 422 (E.D. Va. 2015) (denying the RFRA claim of a Humanist applicant denied entry into the Navy chaplaincy by making the questionable finding that he had not shown a substantial burden on his religious exercise because he had “not demonstrated that being a Navy chaplain is part of the core belief system of Humanism”).

<sup>277</sup> *Wilson v. James*, No. 15-5338, 2016 WL 3043746 (D.C. Cir. May 17, 2016) (“Appellant has failed to show this letter of reprimand substantially burdened any religious action or practice so as to violate his rights under the Constitution or [RFRA].”).

<sup>278</sup> See *id.*

<sup>279</sup> *Wilson v. James*, 139 F. Supp. 3d 410, 418 (D.D.C. 2015), *aff’d*, No. 15-5338, 2016 WL 3043746 (D.C. Cir. May 17, 2016); see also *Obergefell v. Hodges*, 576 U.S. 644 (2015) (striking down state laws prohibiting same-sex marriage as violative of the Equal Protection and Due Process clauses of the Fourteenth Amendment).

non-commissioned officer in the Utah Air National Guard, “was reprimanded for sending a personal email to a senior officer outside his chain of command, using a Utah Air National Guard computer and his government email account under the Guard’s signature block, in violation of rules and regulations and in disobedience of a prior order.”<sup>280</sup> Mistakenly believing that he was emailing a military chaplain at West Point, Wilson wrote to protest “homosexuality weddings at military institutions” after reading a report of a same-sex marriage that took place at a military chapel at West Point.<sup>281</sup> His email stated, “Our base chapels are a place of worship and this [is] a mockery to God and our military core values. . . . I hope sir that you will take appropriate action so this does not happen again.”<sup>282</sup> For this he was reprimanded.<sup>283</sup>

Wilson claimed this reprimand violated RFRA because it “substantially burdened a religious belief, i.e., that same-sex marriage is a sin.”<sup>284</sup> Remarkably, the court held that “[a] substantial burden on one’s religious beliefs – as distinct from such a burden on one’s exercise of religious beliefs – does not violate RFRA.”<sup>285</sup> The court stated, “Nothing prevented [Wilson] from continuing to maintain his beliefs about same-sex marriage and homosexuality, just as he had before the [reprimand], without repercussion.”<sup>286</sup> The court admitted that the reprimand “likely chilled [his] speech regarding his religious beliefs, . . . [b]ut nowhere does [he] assert that [his religious] doctrine requires him to publicly voice his dissent about homosexuality or same-sex marriage.”<sup>287</sup> The court further stated, “[E]ven if [his] speech about same-sex marriage could be considered a religious exercise under RFRA, . . . a neutral regulation that places a limit on where someone may engage in religiously motivated expression does not . . . constitute a ‘substantial burden’ on religious exercise.”<sup>288</sup>

In light of the neutral regulations governing the use of government computers and email systems, it may be true that Wilson did not plead sufficient facts to establish the substantial burden required under RFRA. Still, it is impossible to square the court’s statement that burdening religious *belief* is insufficient to trigger a RFRA claim, especially

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<sup>280</sup> *Wilson*, 2016 WL 304746 at \*1.

<sup>281</sup> *Wilson*, 139 F. Supp. 3d at 418.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 420.

<sup>284</sup> *Id.* at 424.

<sup>285</sup> *Id.* (citing *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) (stating that “[r]eligious exercise necessarily involves an action or practice” and the government’s collection and storage of the plaintiff’s DNA did not “pressure [him] to modify his own behavior in any way that would violate his beliefs”)).

<sup>286</sup> *Id.* at 425.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* (citing *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001)).

considering the Supreme Court's statement in *Hobby Lobby* (echoed by CAAF in *Sterling*) that "the 'exercise of religion' involves 'not only belief and profession but the performance of (or abstention from) physical acts' that are 'engaged in for religious reasons.'"<sup>289</sup> Nor would the court's statement comport with current guidance within DoD Instruction 1300.17, which recognizes as part of "religious practice" actions that constitute "individual expressions of religious beliefs, whether or not compelled by, or central to, the religion concerned."<sup>290</sup> Wilson's email to a chaplain's office expressing his religious beliefs about morality, motivated by his faith, would surely fit this definition.<sup>291</sup>

## VI. LOSING MY RELIGION: WILL THE MILITARY BACKSLIDE ON ITS RFRA CONVERSION?

After nearly 30 years under RFRA, the DoD's regulations have finally embraced the principles enshrined in the Act's words.<sup>292</sup> Yet new challenges presented by seismic shifts in cultural practices and by novel issues arising during the Covid-19 pandemic have already challenged whether the military is serious about applying RFRA's rigors. Part VI will first provide some comments on how the military should analyze a RFRA claim in light of the precedent and regulations discussed earlier. It will then examine a series of real-world hypotheticals and suggest how a faithful application of RFRA might unfold today.

### A. Analyzing a RFRA Military Claim Today

The most recent version of DoDI 1300.17 sets out detailed guidance and a coherent process for requesting religious accommodations in the military, along with strict time guidelines for acting on those requests.<sup>293</sup> That guidance mostly seems to comport with the spirit of RFRA, considering the unique nature of military service.<sup>294</sup> Notably, "the burden

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<sup>289</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 710 (2014).

<sup>290</sup> DoD INSTRUCTION 1300.17, *Religious Liberty in the Military Services*, para. G.2 (Sept. 1, 2020).

<sup>291</sup> *Wilson*, 139 F. Supp. 3d at 418.

<sup>292</sup> DoD INSTRUCTION 1300.17, *Religious Liberty in the Military Services*, para. G.2 (Sept. 1, 2020).

<sup>293</sup> *See generally id.*; *see also supra* notes 222–237 and accompanying text (discussing the DoD guidance).

<sup>294</sup> *See* DoD INSTRUCTION 1300.17, *Religious Liberty in the Military Services*, para. 1.2(e) (Sept. 1, 2020) (stating that, if a "military policy, practice or duty substantially burdens a Service member's exercise of religion, accommodation can only be denied if: (1) [t]he military policy, practice, or duty is in furtherance of a compelling governmental interest[; and] (2) [i]t is the least restrictive means of furthering that compelling governmental interest"). The religious practice can be "[a]n



of proof is placed upon the DoD Component, not the individual requesting the exemption.<sup>295</sup> In addition, the CAAF has set out a succinct statement of the law explaining the burdens in a RFRA case in the trial setting:

[The servicemember] must show by a preponderance of the evidence that the government action (1) substantially burdens (2) a religious belief (3) that the [member] sincerely holds.<sup>296</sup> If a claimant establishes a *prima facie* case, the burden shifts to the government to show that its actions were “the least restrictive means of furthering a compelling governmental interest.”<sup>297</sup>

In light of this guidance, it should be clear that an older military case may present outdated, bad law that military leaders cannot rely upon.<sup>298</sup> For instance, contrary to *Bitterman v. Secretary of Defense*, RFRA does not require that a claimed religious practice be a religious “requirement,” rather than a mere “preference.”<sup>299</sup> Not only do RFRA and military regulations establish that religious exercise is protected by the Act “whether or not compelled by, or central to, the religion concerned,”<sup>300</sup> but also it would be inappropriate for courts to wade into ecclesiastical matters involving internal religious doctrines and practices to determine what is “central” or “required” or “preferred” in one’s faith.<sup>301</sup> Further, recent DoD guidance defining whether a religious practice is “substantially burdened” provides a helpful test that can clarify what has often been a difficult inquiry in the past.<sup>302</sup> It should not be forgotten, however, that a substantial burden may occur even where the government prevents

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action, behavior, or course of conduct constituting individual expressions of religious beliefs....” *Id.* at para. G.2.

<sup>295</sup> *Id.* at para. 1.2(e).

<sup>296</sup> *United States v. Sterling*, 75 M.J. 407, 415–16 (C.A.A.F. 2016) (citing *Holt v. Hobbs*, 574 U.S. 352 (2015)); *United States v. Zimmerman*, 514 F.3d 851, 853 (9th Cir. 2007); *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001)).

<sup>297</sup> *Sterling*, 75 M.J. at 416 (citing *United States v. Quaintance*, 608 F.3d 717, 719–20 (10th Cir. 2010)).

<sup>298</sup> *See Bitterman v. Secretary of Defense*, 553 F. Supp. 719, 726 (D.D.C. 1982).

<sup>299</sup> *Id.*

<sup>300</sup> DoD INSTRUCTION 1300.17, *Religious Liberty in the Military Services*, para. G.2 (Sept. 1, 2020).

<sup>301</sup> *See, e.g., Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (“It is well established . . . that courts should refrain from trolling through a person’s or institution’s religious beliefs.”).

<sup>302</sup> *See* DoD INSTRUCTION 1300.17, *Religious Liberty in the Military Services*, para. G.2 (Sept. 1, 2020) (defining a “substantial burden” is an act by the government that “[r]equires participation in an activity prohibited by a sincerely held religious belief; [p]revents participation in conduct motivated by a sincerely held religious belief; or [p]laces substantial pressure on a Service member to engage in conduct contrary to a sincerely held religious belief”) (adopting the Tenth Circuit’s test in *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014)).

“conduct” as simple as an “individual expression[] of religious beliefs.”<sup>303</sup> And once it is established that the government has placed a substantial burden on a sincerely held religious belief or practice by a servicemember, the exacting demands of strict scrutiny come into play.<sup>304</sup>

First and foremost, the military interest underlying the government action must be compelling – not only to the military’s “broadly formulated interests” in uniformity and efficiency, but also at a granular level: the military’s interest must be so compelling that an exemption cannot be granted to the “particular religious claimants” making the request.<sup>305</sup> While it is appropriate to consider the factors set out in DoDI 1300.17 in this regard,<sup>306</sup> military leaders must apply those factors through a particularized analysis of the interest “to the person.”<sup>307</sup> In other words, the military cannot satisfy the compelling interest test merely by asserting a need for good order and discipline, or relying on abstract, generalized interests.<sup>308</sup> This is well-illustrated in *O Centro Espírita*, where the government’s grant of exceptions to the use of a Schedule I drug by Native Americans demonstrated that the allegedly compelling interest in uniformly enforcing Schedule I drug laws was not so compelling that an exception could not be made for the particular claimants in the case<sup>309</sup> – a concept that will recur in military situations when analyzing prior exceptions granted to various rules, regulations, or policies.

When considering the military’s asserted compelling interest in a RFRA case, courts should consider the unique nature of military life, which traditionally demands some restriction of individual liberty and autonomy.<sup>310</sup> In the context of RFRA, however, Congress has already considered the important interests in unique institutions such as prisons

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<sup>303</sup> *Id.* at para. 1.2.

<sup>304</sup> *See id.* at G2.

<sup>305</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 710 (2014) (quoting *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 431 (2006)).

<sup>306</sup> DOD INSTRUCTION 1300.17, *Religious Liberty in the Military Services*, para. 3.2(d), 3.3(d) (Sept. 1, 2020) (outlining factors for consideration).

<sup>307</sup> *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 430–31 (2006).

<sup>308</sup> *See id.* at 419.

<sup>309</sup> *Id.* at 433.

<sup>310</sup> *See Goldman v. Weinberger*, 475 U.S. 507 (1986) (“[T]o accomplish its mission the military must foster instinctive obedience, unity, commitment, and *esprit de corps*. The essence of military service is the subordination of the desires and interests of the individual to the needs of the service.”); *Parker v. Levy*, 417 U.S. 758 (1974) (“The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.”); *United States v. Priest*, 45 C.M.R. 338, 344 (C.M.A. 1972) (“In the armed forces some restrictions exist for reasons that have no counterpart in the civilian community.”).

and the military, and it has “placed a thumb on the scale in favor of protecting religious exercise” despite those special situations.<sup>311</sup> Further, as the Supreme Court has explained, “Congress enacted RFRA in order to provide greater protection for religious exercise than is available under the First Amendment.”<sup>312</sup> This fact lessens the weight of some of the pre-RFRA Supreme Court cases discussing traditional military deference. For good or ill, the days of an unyielding military uniformity that breaks down individuality and replaces it with unit cohesion are over. The unique religious practices of service members can now make them stand out – many have and continue to stand out as performers – as individuals within their units.

Even if an asserted military interest is compelling enough to enforce against the particular claimants making a RFRA accommodation request, the second prong of strict scrutiny must also be satisfied.<sup>313</sup> In the words of DoDI 1300.17, there must be no “[a]lternate means available to address the requested accommodation,” and “[t]he means that is least restrictive to the requestor’s religious practice and that does not impede a compelling governmental interest will be determinative.”<sup>314</sup> Although satisfying the least-restrictive-means standard is “exceptionally demanding,” it is not impossible to meet.<sup>315</sup>

With the above analysis in mind, it is now possible to examine several real-world scenarios that will put the DoD’s newfound embrace of RFRA to the test.

### *B. Applying RFRA to Real-World Military Scenarios*

The final section of this Article suggests hypotheticals in four areas that the military services have been struggling to address or might expect to address in the foreseeable future. While each scenario cannot be definitively resolved due to the individualized nature of each RFRA case, this section will provide some comments and discussion on areas of legal analysis for each scenario.

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<sup>311</sup> *Singh v. McHugh*, 185 F. Supp. 3d 201, 222 (D.D.C. 2016) (discussing why traditional deference to the military is not as great in RFRA cases as under the First Amendment).

<sup>312</sup> *Holt v. Hobbs*, 574 U.S. 352, 357 (2015) (setting aside prison appearance requirement for beard).

<sup>313</sup> *See id.* at 353.

<sup>314</sup> DOD INSTRUCTION 1300.17, *Religious Liberty in the Military Services*, para. 3.2(d) (Sept. 1, 2020).

<sup>315</sup> *See, e.g., Sherwood v. Brown*, 619 F.2d 47, 47–48 (9th Cir. 1980) (finding that a Navy uniform regulation was the least restrictive means of furthering the military interest in preventing wear of a turban because the evidence presented showed that Sikhs could not wear helmets and that the “[a]bsence of a helmet poses serious safety problems for both the unprotected sailor and for the crew that depends on him”).

## 1. Uniform and Appearance Regulations

Throughout this Article, several examples have illustrated the military's longstanding unwillingness to accommodate the religious practices of minority religions with regard to dress and appearance while on duty.<sup>316</sup> But in the past decade, it seems that the uniform-and-appearance-accommodation wars within the military have been fully waged and won by the individual religious members seeking those accommodations.<sup>317</sup> While this high-profile issue was boiling over as recently as five years ago, a series of embarrassing judicial setbacks in RFRA cases brought by Sikhs has led to new policies that have blown the accommodation door wide open.<sup>318</sup> Under revised uniform and appearance policies, beards, turbans, dreadlocks, and hijabs are now accommodated regularly, with some commanders even granting accommodations to wear beards for Norse Heathen and Pagan members.<sup>319</sup>

With the opening of this door, it is hard to envision sincere religious uniform-and-appearance requests that could be denied by military leaders in the future. Perhaps the rigors of actual combat or the need to wear specialized equipment (e.g., hazardous materials suits, flight helmets, or underwater breathing apparatuses) might justify some denials under limited conditions. With the recent dramatic changes to appearance and grooming standards, however, the military would have difficulty claiming that prior rationales supporting uniform regulations – uniformity, discipline, *esprit de corps*, and efficiency – still constitute a compelling interest.<sup>320</sup> If a Sikh can wear a turban instead of a helmet, and a Muslim can cover her hair with a hijab while in uniform, and a Norse Heathen can wear a beard instead of shaving, then under what rationale would a commander legitimately deny similar requests from other religious members?

Envision the following situation. A female Muslim Army servicemember requests an accommodation to wear a more intensive

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<sup>316</sup> See discussion *supra* Sections I, III.B.

<sup>317</sup> See *supra* Part VI.A.

<sup>318</sup> See, e.g., *Singh v. Carter*, 168 F. Supp. 3d 216, 218 (D.D.C. 2016); *Singh v. McHugh*, 185 F. Supp. 3d 201, 204 (D.D.C. 2016); *Singh v. McConville*, 187 F. Supp. 3d 152, 163 (D.D.C. 2016).

<sup>319</sup> See Stephen Losey, *Air Force officially OKs beards, turbans, hijabs for religious reasons*, AIR FORCE TIMES (Feb. 11, 2020), <https://www.airforcetimes.com/news/your-air-force/2020/02/11/air-force-officially-oks-beards-turbans-hijabs-for-religious-reasons/> [https://perma.cc/47Y6-R9Y7] (“[T]wo airmen who follow the Norse Heathen, or pagan, faiths have been granted permission to wear a beard.”); see also Dickstein, *supra* note 17.

<sup>320</sup> See generally *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006) (explaining that the exemption of peyote for Native Americans undermined any compelling interest to uniformly enforce the Controlled Substances Act).

body-covering over her uniform, such as a one-piece veil that covers her entire face and body (i.e., a “burqa”) or a veil that covers her face but leaves the area around her eyes open (a “niqab”). Does RFRA require the Army to grant either of these accommodations? Both requests could easily be established as sincerely held religious beliefs, since they are common religious garb throughout Islam. Nor would it be difficult for the servicemember to establish that rules preventing the wear of such garb would “substantially burden” her religious practice, thus triggering strict scrutiny.

If the Army were to resist such an intense change to its uniform-and-appearance rules, it might be able to muster stronger compelling interests to prohibit a burqa than it was able to conjure with regard to turbans or hijabs, perhaps based on safety concerns (e.g., danger of a loose-fitting veil near machinery) or movement concerns (e.g., unable to perform physical-fitness requirements). But would the Army be willing to assert the same dubious interests that some European nations have used to entirely ban burqas in public, such as worries about security and personal identification, or perhaps to avoid “gender oppression?” In *S.A.S. v. France*,<sup>321</sup> the European Court of Human Rights rejected some of those asserted interests as invalid, but the court did uphold France’s ban of the burqa based on its asserted interests in furthering “social communication,” a “principle of interaction between individuals” that was “essential for” pluralism.<sup>322</sup>

Still, even if some of those asserted interests could be considered “compelling” (when tailored to the particular claimant), the least-restrictive-means analysis would pose further challenges to the Army’s outright denial of an accommodation request. Depending on the asserted compelling interests, there would likely be occasions when those interests would not be furthered by prohibiting the wear of a burqa, leaving open the possibility of a limited accommodation that would be less restrictive than a full ban. For instance, many positions in the military are performed in work environments without hazardous conditions (e.g., personnel, headquarters positions, the JAG Corps). And even though military members must deploy and engage in physical-fitness events, that does not justify a complete ban on the requested body-covering. A one-size-fits-all approach is not the least restrictive way to accommodate such a request. In short, if the Army is serious about respecting RFRA, it will need to accept the possibility that a limited accommodation might be warranted in some circumstances.

As an aside, if accommodating the burqa is too “extreme” for the Army, surely the wearing of a niqab would now be accommodated, due to

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<sup>321</sup> 43835/11 Eur. Ct. H.R. (2014), available at <https://hudoc.echr.coe.int/eng?i=001-145466> [<https://perma.cc/7ZMG-93A3>].

<sup>322</sup> *Id.* at para. 153.

the Army's current acceptance of hijabs combined with the long-term mask requirements being mandated against military members during the Covid-19 pandemic.<sup>323</sup> If the face can be partly covered for medical reasons for the entire Army, then what possible interest could justify preventing a single claimant from covering her face for religious reasons? After Covid-19, it will be substantially more difficult for the military to assert a plausible compelling interest against a particular servicemember wearing a niqab, which covers a woman's face to a similar degree as the Covid masks already integrated into everyday military life.

## 2. Religious Expression in the Military Workplace

Although the Establishment Clause prevents the government from turning the military workplace into a religious environment, RFRA prevents the military from excluding individual religious expression from that same workplace.<sup>324</sup> This has been another longstanding issue because well-meaning supervisors, wishing to avoid any appearance of established religion, are sometimes overzealous in their crusade to expel religion from the workplace.<sup>325</sup> They are especially sensitive when a military member speaks about religion on a military installation, especially if the speech is considered a form of "proselytizing."<sup>326</sup>

For instance, in 2016, an Air Force commander wrongly directed his subordinates to physically remove a retired, 33-year senior enlisted member who was giving a speech as an invited guest at a private flag-folding ceremony that was to be performed at another member's retirement ceremony from the military.<sup>327</sup> The commander believed that the speech would violate Air Force policy because it referenced "God" several times.<sup>328</sup> Only after a lawsuit was brought did the Air Force modify its policy, making it clear that such future speeches would be

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<sup>323</sup> Josie Fischels, *The Pentagon Will Require Masks To Be Worn Indoors Even By Those Who Are Vaccinated*, NPR (July 28, 2021, 6:01 PM), <https://www.npr.org/sections/coronavirus-live-updates/2021/07/28/1021925844/the-pentagon-masks-indoors-even-vaccinated-cdc-covid> [<https://perma.cc/E85W-TGZ5>].

<sup>324</sup> See, e.g., *United States v. Sterling*, 75 M.J. 407, 417 (C.A.A.F. 2016).

<sup>325</sup> See Lisa Mathews, *Religious Freedom in the Military as viewed through the Sterling case*, M-VETS (Nov. 22, 2016), [https://mvets.law.gmu.edu/2016/11/22/religious-freedom-in-the-military-as-viewed-through-the-sterling-case/#\\_ednref25](https://mvets.law.gmu.edu/2016/11/22/religious-freedom-in-the-military-as-viewed-through-the-sterling-case/#_ednref25) [<https://perma.cc/5C8D-FWZG>].

<sup>326</sup> See Bob Smietana, *Troops inclined to proselytize may face court martial*, USA TODAY (May 2, 2013, 12:30 PM), <https://www.usatoday.com/story/news/nation/2013/05/02/military-ban-proselytizing/2129189/> [<https://perma.cc/AP3B-6FYK>].

<sup>327</sup> See *Oscar Rodriguez, Jr. Case*, FIRST LIBERTY, <https://firstliberty.org/cases/oscar-rodriguez/> [<https://perma.cc/LPE2-2MK5>] (last visited Feb. 4, 2022).

<sup>328</sup> *Id.*

permissible.<sup>329</sup> Surprisingly, some commanders have even targeted the religious speech of chaplains performing spiritual counseling of servicemembers behind closed doors.<sup>330</sup> As one example, in 2014, the Navy threatened (but later relented) to take a potentially career-ending action against one of its highly decorated, 19-year Christian chaplains who “took a strong stance in counseling sessions on subjects like sex outside marriage and homosexuality.”<sup>331</sup>

For years, military legal advisors have recognized the problem with singling out religious speech for exclusion in the workplace. As one Air Force scholar noted:

If some personal conversations are permitted in the workplace during duty hours (e.g., pertaining to sports or social events), leaders cannot place religion off-limits. The same is true regarding religious displays in the barracks: if personal nonreligious items are permitted to be displayed in rooms, religious items must be permitted to the same extent. Otherwise, the discrimination against religious speech would be content-based and would almost certainly not survive scrutiny by the courts or by military investigators looking into a complaint.<sup>332</sup>

This is good advice only made stronger by the DoD’s recent embrace of RFRA.

These religious-expression issues also touch upon the right to free speech, even though courts generally afford less protection to the speech of service members, and some speech is unprotected by the First Amendment, such as “fighting words,” “obscenity,” and “dangerous speech.”<sup>333</sup> For military members, there may be additional restrictions on speech that is contemptuous, prejudicial to good order and discipline, or

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<sup>329</sup> See *Rodriguez v. U.S. Dep’t of the Air Force*, 387 F. Supp. 3d 130, 132–33 (D.D.C. 2019), *appeal dismissed*, No. 19-5216, 2021 WL 1045489 (D.C. Cir. Feb. 18, 2021) (dismissing a RFRA claim for lack of personal jurisdiction, but noting that the Air Force had already changed its policy to allow private speeches that referenced religion at future flag-folding ceremonies).

<sup>330</sup> See, e.g., *Chaplain Modder Case*, FIRST LIBERTY, <https://firstliberty.org/cases/chaplainmodder/> [<https://perma.cc/VCK6-TC2F>] (last visited Feb. 4, 2022).

<sup>331</sup> Paul Strand, *Military Chaplains Orders: Follow Policy, Not Scripture*, CBN (June 10, 2015), <https://www1.cbn.com/cbnnews/us/2015/June/War-on-Chaplains-Demise-of-the-US-Military> [<https://perma.cc/W2UM-FFBW>]; see also *Chaplain Modder Case*, *supra* note 330.

<sup>332</sup> David E. Fitzkee, *Religious Speech in the Military: Freedoms and Limitations*, 41 US ARMY WAR COLL. Q.: PARAMETERS 59, 60 (2011).

<sup>333</sup> *United States v. Wilcox*, 66 M.J. 442, 446–48 (C.A.A.F. 2008) (“[S]ervicemembers enjoy some measure of the right to free speech granted by the First Amendment.”).

of a nature to discredit the armed services.<sup>334</sup> But otherwise-protected military speech may only be prohibited when the government makes a “direct and palpable connection between the speech and the military mission or military environment.”<sup>335</sup>

Envision the following situation. An Air Force servicemember is also a devout member of the Church of Jesus Christ of Latter Day Saints, often referred to as “LDS” or “Mormon.” As a member of an Air Force Security Forces unit, he and his fellow airmen perform their duties safeguarding a building that contains high-value space-launch assets. During the course of a typical shift, they have the chance to speak together in the guard shack as they keep an eye on an entrance gate, in between perimeter sweeps. Often, the members discuss the latest sports events, news around local community, movies, musical groups, and ambitions for school. In accordance with his religion, the member believes it is his religious obligation to spread his faith to others. On several occasions, he shares his LDS faith with fellow unit members during their shifts. One of the other guards complains to their commander that this amounts to “proselytizing on duty,” and the member’s supervisor directs him to stop making his fellow members feel “uncomfortable” at work by talking about religion. Does RFRA require the Air Force to allow this member to continue speaking about his faith on duty?

To begin, the military might make the dubious argument from the *Wilson* case, referenced earlier, that RFRA does not apply to this situation because expressing one’s religious beliefs is not a form of religious exercise (plus, RFRA allows burdens on belief but not practice).<sup>336</sup> While that argument should never have been accepted by the district court in *Wilson*, after the newest revision of DoDI 1300.17, the claim is untenable because the regulation itself admits that “religious practice” includes acts that constitute “individual expressions of religious beliefs, whether or not compelled by, or central to, the religion concerned.”<sup>337</sup> Here, the member will be able to establish that preaching his faith is part of his religious practice as an LDS member, and that preventing him from doing so impacts his religious exercise.

The Air Force might argue next that preventing a member from speaking about his faith at work is not a “substantial burden” because it is

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<sup>334</sup> 10 U.S.C. § 934. Importantly, courts “must be sensitive to protection from ‘the principle of free thought—not free thought for those who agree with us but freedom for the thought we hate.’” *United States v. Priest*, 21 C.M.A. 564, 570 (C.M.A. 1972) (citing *United States v. Schwimmer*, 279 U.S. 644, 654–55 (1929)).

<sup>335</sup> *Wilcox*, 66 M.J. at 448.

<sup>336</sup> See *Wilson v. James*, No. 15-5338, 2016 WL 3043746 at \*1 (D.C. Cir. May 17, 2016) (upholding the district court’s questionable dismissal of a RFRA claim for lack of demonstrating a substantial burden).

<sup>337</sup> DOD INSTRUCTION 1300.17, *Religious Liberty in the Military Services*, para. G.2 (Sept. 1, 2020).



a *de minimis* interference with that exercise (i.e., there are other times the member can talk about religion “off-duty”). Applying the broad definition of a “substantial burden” adopted by the DoD in its regulations, the member might prevail against this line of attack by showing that a prohibition on his religious speech at work “[p]revents [his] participation in conduct motivated by a sincerely held religious belief.”<sup>338</sup> Again, the Air Force might counter that he can participate off-duty, and thus this is still a *de minimis* burden; however, that argument is unlikely to prevail. When the Air Force accepts workplace speech about sports and music and school, it is opening up the workplace to discussion about life in general. To tell a person whose faith encourages them to share their beliefs in everyday life situations that they may not do so, even though everyone around them is discussing such matters, is more than a *de minimis* burden because it forces the member to divorce his faith from his everyday life in a way that is untrue to his religious identity. Not only that, under the free-speech line of First Amendment cases, such a content-based exclusion of religious speech in the workplace would trigger strict scrutiny for other reasons.<sup>339</sup>

Faced with overcoming strict scrutiny, the Air Force would no doubt assert that it had a compelling interest in preventing members from “proselytizing” in the workplace because “proselytizing can affect the listener’s morale and ability to do his job and thus interfere with mission accomplishment and unit effectiveness.”<sup>340</sup> For the Air Force to prevail using this interest, it must show more than generalities and platitudes, because RFRA requires that the compelling interest be demonstrated with this particular religious claimant’s conduct. That a military commander subjectively believes or deems religious speech to be contrary to mission accomplishment is insufficient. If the speech is to be prohibited, there must be a “direct and palpable” connection to the claimant’s speech.<sup>341</sup>

Further, in the parlance of free-speech cases, “the Free Speech Clause does not require a speaker to cease speaking a message just because others do not like hearing it.”<sup>342</sup> For instance, conversations about sports teams or happenings in the community often lead to animated conversations between individuals, perhaps even conflict as one person boasts about his favorite team. Why would it be permissible to have that kind of discomfort in the workplace, but not the kind that stems from a religious conversation? Here, the compelling-interest inquiry will be fact-intensive. Depending

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<sup>338</sup> *Id.*

<sup>339</sup> See Fitzkee, *supra* note 332, at 60 (discussing First Amendment rules for content-based restrictions).

<sup>340</sup> Major (ret.) David E. Fitzkee & Captain Linell A. Letendre, *Religion in the Military: Navigating the Channel Between the Religion Clauses*, 59 A.F. L. REV. 1, 35–36 (2007).

<sup>341</sup> *United States v. Wilcox*, 66 M.J. 442, 449 (C.A.A.F. 2008).

<sup>342</sup> Fitzkee and Letendre, *supra* note 340, at 35.

on how the member has shared his faith, there might be an argument to support this interest. Is the member abusive towards others when sharing his faith? Does he disparage others' faiths, especially using offensive or vulgar terms? Does he follow others around, despite being told to leave them alone, and yell at them about their sinful lives while they attempt to conduct their official duties? Or is the member simply sharing his personal beliefs during appropriate conversations about life? The devil is in the details.

Even if it could be established, as related to this particular claimant, that there is a compelling interest in preventing his religious speech in the workplace, the Air Force still must overcome the least-restrictive-means test.<sup>343</sup> Perhaps the compelling interest can be met simply by ordering the member to "tone down" his aggressiveness when discussing religion, if he is the abusive type. Or perhaps the real problem is that the Air Force allows its members to discuss their personal lives at work. It might be less restrictive to simply require all conversations in the workplace to be directly work-related (But who would want to live in such an environment?). At what cost would the Air Force be willing to go to exclude religious speech from the workplace?

Absent extreme misbehavior by this LDS member, it is likely that the Air Force will need to accommodate his religious practice of discussing his faith during everyday life conversations. The hypothetical might work itself out differently, however, if other coercive elements were present. For instance, if the religious member were a supervisor and his listeners were a captive audience, the coercive element would add extra weight to the Air Force interest involved, and might warrant a more restrictive means of addressing it.<sup>344</sup> If the member used threats of violence to proselytize, a different result would also be warranted, no doubt. For the everyday conversations described in this scenario, however, if the Air Force is serious about respecting RFRA, it will need to accept that religious speech in the workplace is simply part of life.

### 3. Religious Issues Related to LGBTQ+ Rights

Perhaps the most difficult and sensitive civil-rights issue of recent years has been balancing the now-recognized intimate, constitutional rights of lesbian, gay, bi-sexual, transgender, queer, and other individuals ("LGBTQ+") with venerable First Amendment (and RFRA-based) conscience rights of certain religious individuals. Some religious faiths

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<sup>343</sup> *Id.* at 23.

<sup>344</sup> *See, e.g.,* Fitzkee, *supra* note 332, at 66–67 ("Proselytizing violates the Establishment Clause if military members are misusing their official position to advance, favor, endorse, or coerce religion. This might apply to members of the chain of command proselytizing subordinates on duty or to service providers proselytizing customers while providing a service.").

hold sincere beliefs that same-sex sexual conduct is immoral, that same-sex marriage denigrates the holiness of marriage itself, and that one's God-given biological sex cannot be morally changed.<sup>345</sup> The Supreme Court referenced this clash of rights in its landmark decision legalizing same-sex marriage on constitutional grounds:

Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. . . . [T]hose who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.<sup>346</sup>

The Court's description of those holding these religious positions is respectful and compassionate, similar to the Court's recognition that "same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right."<sup>347</sup>

A crucial legal challenge going forward in society will be to find a way to affirm the rights of those "decent and honorable" religious persons who wish to abstain from approval of, or involvement with, what they believe to be morally objectionable conduct, while at the same time not "diminish[ing] the[] personhood" of those in the LGBTQ+ community who merely seek to exercise their constitutionally protected rights and freedoms.<sup>348</sup> This is no small task, and it is made more complex when it is imported into the military environment, where unit cohesion is essential and individual rights must sometimes give way.

This is a fairly recent problem in the U.S. Armed Forces, however, because for most of the nation's history, the concept of LGBTQ+ rights was entirely foreign in the military – in fact, the conduct that is today constitutionally protected was criminalized or prohibited as recently as 2011, until the repeal of the "Don't Ask, Don't Tell" policy.<sup>349</sup> With full acceptance of LGBTQ+ members into the military over the past decade – most recently in January 2021, with President Joe Biden's executive order permitting transgender servicemembers<sup>350</sup> – the pendulum has now swung

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<sup>345</sup> See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 672, 671–72 (2015).

<sup>346</sup> *Id.* at 679–80.

<sup>347</sup> *Id.* at 672.

<sup>348</sup> *Id.*

<sup>349</sup> See Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111–321.

<sup>350</sup> President Joseph R. Biden, Jr., *Executive Order on Enabling All Qualified Americans to Serve Their Country in Uniform*, WHITE HOUSE (Jan. 25, 2021),

in the other direction, with those who have moral opposition to such conduct being censored or reprimanded for expressing their religious beliefs or refusing to participate in certain actions that violate their consciences.<sup>351</sup>

For instance, in 2017, an Air Force colonel was found to have violated equal employment opportunity (“EEO”) regulations when his Christian beliefs about marriage would not permit him in good conscience to sign an honorary “certificate of spouse appreciation” for the same-sex spouse of one of his retiring military members.<sup>352</sup> As an informal accommodation, a higher-ranking officer signed the certificate instead; however, when the enlisted member filed an EEO complaint, the Air Force initially substantiated it as unlawful discrimination.<sup>353</sup> Later, the Secretary of the Air Force reversed, concluding that the colonel “had the right to exercise his sincerely held religious beliefs and did not unlawfully discriminate when he declined to sign the certificate of appreciation.”<sup>354</sup> At least one scholar has argued the Air Force had not “substantially burdened” the colonel’s religious exercise, but had only offended his “religious sensibilities” because his “signature on a certificate of appreciation for his Airman’s spouse no more ‘enabled’ or ‘facilitated’ that marriage than would the act of eating a handful of mints left over from the wedding reception.”<sup>355</sup> But the heart of that scholar’s argument – that the colonel’s belief was unreasonable because its link to same-sex marriage was attenuated – was rejected by the Supreme Court in *Hobby Lobby*.<sup>356</sup>

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<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/25/executive-order-on-enabling-all-qualified-americans-to-serve-their-country-in-uniform/> [<https://perma.cc/BG9G-6Z2C>].

<sup>351</sup> See Peter Reid, *Air Force grants appeal to Colonel who was suspended for gay marriage views*, AM. MIL. NEWS, (Apr. 4, 2018), <https://americanmilitarynews.com/2018/04/air-force-grants-appeal-to-colonel-who-was-suspended-for-gay-marriage-views/> [<https://perma.cc/44FN-LR6T>].

<sup>352</sup> *Id.*; see also *Col. Bohannon Case*, FIRST LIBERTY, <https://firstliberty.org/cases/bohannon/> [<https://perma.cc/J6KF-2QW7>] (last visited Feb. 4, 2022).

<sup>353</sup> *Col. Bohannon Case*, *supra* note 352.

<sup>354</sup> See Letter from Heather Wilson, Sec’y A.F., to Rep. Doug Lamborn (Apr. 2, 2018) (available at [https://lamborn.house.gov/sites/lamborn.house.gov/files/migrated/UploadedFiles/Col\\_Bohannon\\_Response\\_Letter\\_from\\_Air\\_Force\\_April\\_2\\_2018.pdf](https://lamborn.house.gov/sites/lamborn.house.gov/files/migrated/UploadedFiles/Col_Bohannon_Response_Letter_from_Air_Force_April_2_2018.pdf) [<https://perma.cc/9HJL-2AZ3>]).

<sup>355</sup> Thomas G. Becker, *Culture Wars: The Clash Between Religion and the Rights of Same-Sex Members in the United States Air Force*, THE REPORTER 1, 4–5 (June 2019).

<sup>356</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 723–24 (2014) (considering the dissent’s argument that “the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be

Envision the following situation. A female Navy officer who is also a surgeon is a devout Orthodox Jew who believes that a person's biological sex is a gift from God that cannot be changed because God made persons as "male" and "female." The officer is assigned to a Navy hospital that performs gender-transition surgeries for servicemembers who identify as a different gender than that of their biological sex. The officer requests a religious accommodation that would free her from any requirement to perform gender-transition surgeries on servicemembers. Does RFRA require the Navy to grant an exemption? This is not a far-fetched scenario. Though it has not yet been litigated in the military context, gender-identity RFRA cases have already arisen due to threatened penalties from the U.S. Department of Health and Human Services under the Affordable Care Act.<sup>357</sup>

Assuming this Navy officer is expressing a sincere religious belief, it seems clear that forcing her to perform gender-transition surgeries in opposition to her conscience and morals would be a "substantial burden" because it would "[r]equire [her] participation in an activity prohibited by a sincerely held religious belief" (i.e., surgically creating bodily changes in contradiction to a person's biological sex).<sup>358</sup> Failure to perform those duties could lead to criminal or administrative penalties, such as a court-martial for failing to obey a lawful order.<sup>359</sup> This would present a similar situation to the Affordable Care Act gender case, where the court found the burden to be "placing substantial pressure on Christian Plaintiffs, in the form of fines and civil liability, to perform and provide insurance coverage for gender-transition procedures."<sup>360</sup> The imposition of this burden would trigger RFRA's strict scrutiny.<sup>361</sup>

Under strict scrutiny, the Navy would likely assert a compelling interest in having military doctors perform their required duties to complete medically indicated procedures in accordance with the law and

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morally wrong (destruction of an embryo) is simply too attenuated," and rejecting that argument because it "dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with their religious beliefs) and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable)).

<sup>357</sup> See *Franciscan All., Inc. v. Becerra*, No. 7:16-CV-00108-O, 2021 WL 3492338, at \*1 (N.D. Tex. Aug. 9, 2021) (granting a permanent injunction in favor of Christian medical associations required "to perform and insure abortions and gender-transition procedures or face penalties for unlawful discrimination").

<sup>358</sup> See DOD INSTRUCTION 1300.17, *Religious Liberty in the Military Services*, para. G.2 (Sept. 1, 2020) (defining a "substantial burden").

<sup>359</sup> See 10 U.S.C. 890, Art. 90.

<sup>360</sup> *Becerra*, 2021 WL 3492338, at \*10.

<sup>361</sup> See Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb-2000bb-4) *invalidated by* *City of Borne v. Flores*, 521 U.S. 507 (1997).

the individual needs of transgendered patients. But RFRA's compelling-interest standard would require the Navy to show more than a generic desire to have military doctors perform their duties. It would need to tailor the compelling interest to this particular religious claimant and establish that granting *her* an exemption would result in the inability of the Navy to complete medically indicated gender-transition procedures. In other words, if other doctors at the Navy hospital could perform the surgery instead of the claimant, the Navy would be unable to establish a sufficiently compelling individualized government interest. Notably, in the Affordable Care Act gender case, the government was unable to state a compelling interest, instead "assert[ing] no 'harm [in] granting specific exemptions' to Christian Plaintiffs [from performing gender-identity surgeries]."<sup>362</sup>

Even if it could state a compelling interest, however, the Navy would likely lose the case under the least-restrictive-means analysis. For instance, would not a less restrictive means of handling the situation be to assign doctors without moral objections to that facility, or perhaps to have the surgery done at another hospital where doctors were available, or even at a local civilian hospital in accordance with medical agreements between the base and civilian community? It is highly unlikely that the only practicable way for the Navy to perform these surgeries would be to force this particular claimant to violate her religious beliefs upon pains of disobeying an order and facing criminal or administrative punishment.

In short, if the Navy is serious about respecting RFRA, it will need to accept that some of its religious members will not be available to complete gender-transition surgeries and other LGBTQ+-related acts that would violate their religious beliefs.

#### 4. Religious Issues Related to Health and Medicine

Perhaps the single biggest issue since March 2020 has been the global Covid-19 pandemic and the response of governments to the situation, including mask-mandates, vaccine-mandates, and the closing down of churches to minimize transmission of the virus.<sup>363</sup> The Supreme Court has weighed in on several cases, indicating that some governments have targeted religion in their responses to the pandemic.<sup>364</sup> In 2021, the Biden Administration implemented stronger measures to require that the Covid-

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<sup>362</sup> *Id.*

<sup>363</sup> See, e.g., Antony Barone Kolenc, *Religious Liberty in the Age of COVID*, UNT DALLAS COLL. OF L., ACCESSIBLE L., Spring 2021, at 2 (discussing Covid-19 issues and freedom of religion).

<sup>364</sup> *Id.*

19 vaccine be taken by as many individuals as possible, including military members, federal employees, and federal contractors.<sup>365</sup>

Envision the following situation. In 2022, a new global pandemic strikes: Covid-22. To fight the pandemic, leaders in the Marine Corps require all Marines to be vaccinated. Due to problems with managing religious exemptions during the Covid-19 vaccination debacle, the Marine Corps issues a policy that provides for no religious exemptions. A Marine enlisted member, who is a devoted Roman Catholic with a strong objection to abortion or the use of aborted fetuses for medical research, learns that none of the available vaccines for Covid-22 were tested, developed, or produced without some connection to abortion. Although the Marine Corps has said it will not provide any religious exemptions this time around, the Marine requests one anyway, citing RFRA as the basis for the request. Does RFRA require the Marine Corps to grant the vaccine exemption to this member? This scenario is not far removed from the Covid-19 situation, in light of the Biden Administration's policy to minimize religious exemptions in the military by enlisting the help of chaplains to interrogate servicemembers about their religious practices and habits before considering religious exemption requests.<sup>366</sup>

Assuming the Marine can establish a sincere religious opposition to abortion and the use of aborted fetuses in developing the vaccines, this again would seem to be a substantial burden on religious exercise because it “[r]equires participation in an activity prohibited by a sincerely held religious belief” and “[p]laces substantial pressure on a Service member to engage in conduct contrary to a sincerely held religious belief.”<sup>367</sup> If the Marine Corps attempts to avoid this by arguing that any burden is *de minimis* because the production of the vaccine is too attenuated from the issue of abortion, that argument would seem to fall under the Supreme

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<sup>365</sup> See Letter from Secretary of Defense Lloyd J. Austin, *Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members*, DEP'T OF DEF. (Aug. 24, 2021), <https://media.defense.gov/2021/Aug/25/2002838826/-1/-1/0/MEMORANDUM-FOR-MANDATORY-CORONAVIRUS-DISEASE-2019-VACCINATION-OF-DEPARTMENT-OF-DEFENSE-SERVICE-MEMBERS.PDF> [<https://perma.cc/FM26-6ATN>]; see also President Joseph R. Biden, Jr., *Executive Order on Requiring Coronavirus Disease 2019 Vaccination for Federal Employees*, WHITE HOUSE (Sept. 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-requiring-coronavirus-disease-2019-vaccination-for-federal-employees/> [<https://perma.cc/4VSS-7X3Y>].

<sup>366</sup> See, e.g., Ryan Morgan, *Coast Guard to scrutinize members requesting religious exemptions for mandatory COVID vaccine, leaked document reveals*, AM. MIL. NEWS (Sept. 24, 2021), <https://americanmilitarynews.com/2021/09/coast-guard-to-scrutinize-members-requesting-religious-exemptions-for-mandatory-covid-vaccine-leaked-document-reveals/>.

<sup>367</sup> See DOD INSTRUCTION 1300.17, *Religious Liberty in the Military Services*, para. G.2 (Sept. 1, 2020) (defining a “substantial burden”).

Court's decision in *Hobby Lobby*, which rejected a similar attenuation argument as an improper judgment as to the reasonableness of the sincere religious belief.<sup>368</sup>

Assuming that strict scrutiny would apply to this request – the absence of DoD religious exemptions would be irrelevant considering the existence of a superseding act of Congress, such as RFRA – the Marine Corps would undoubtedly cite to data indicating the need for a vaccine to slow the spread of the virus, the severe nature of the global pandemic, and any other medical data available indicating that having a Covid-22 vaccine would be critical for public health and the safety of military personnel. It is likely that this would be seen as a compelling interest in general, but RFRA would also require the Marine Corps to illustrate why the military has a compelling interest in ensuring that this particular Marine must get a vaccination. This would be a fact-specific inquiry, and it could be complicated by other data, such as whether the Marine had natural immunity to Covid-22 or had built up antibodies after surviving a bout of Covid-22, himself. In addition, if the Marine Corps were also offering medical exemptions, military leaders would need to explain why it was necessary to vaccinate this Marine when other members could work with an exemption.

Assuming the Marine Corps could establish a compelling interest to vaccinate this particular Marine, the issue would then become whether forcing the vaccination of this member is the least restrictive means of protecting his fellow Marines. For instance, would a regimen of Covid-22 testing, mask-wearing, social-distancing, isolation, and the like provide a sufficient level of safety to satisfy the compelling Marine Corps interest in the safety of those fellow Marines, or is it essential to actually vaccinate this Marine (against his conscience)? A truly searching inquiry would examine the medical and statistical evidence to determine whether the vaccination requirement is sufficiently better than the alternative means to achieve the asserted compelling interests.

In short, if the Marine Corps is serious about respecting RFRA, it may need to find alternative ways to address these health issues to accommodate the religious beliefs of its members. On the other hand, this might be one of those situations where the Marine Corps is able to survive strict scrutiny review and force the Marine to take the vaccination against his conscience.

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<sup>368</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 723–24 (2014) (rejecting the argument); see also *supra* note 355 and accompanying text (discussing the matter).



## VII. CONCLUSION

Religious service members are a critical part of the military fighting force that is tasked to fight and win wars. In the 1990's, Congress and the President decided that the protections for religious liberty under the First Amendment were not sufficiently strong in light of Supreme Court constitutional interpretations, so they enacted the Religious Freedom Restoration Act (RFRA) to remedy that problem.<sup>369</sup> Although the Act clearly applied to the U.S. Armed Forces, it took the DoD almost 30 years to finally embrace it and be “born again” into the RFRA world created in the 1990's.<sup>370</sup>

This Article has detailed the importance of religious freedom in the United States and its armed forces, as well as the unfortunate history of non-accommodation that has plagued the military until recent years. It has recounted the Supreme Court case law that led Congress to enact RFRA, and it has outlined the military's reticence in accepting RFRA as the new standard in religious accommodation claims. Setting out an analysis for handling religious accommodation claims under RFRA in the military, this Article has proposed a series of hypotheticals that demonstrate the kinds of issues the military will need to confront and accommodate if it is truly able to respect its members' religious liberty, as well as the spirit and letter of RFRA.

The only question that remains is whether the DoD will backslide to a time when it refused to accommodate religious exercise in a meaningful way, or whether it will comply with the law and support the freedom of its servicemembers. While not every issue will be easy to resolve, and some will criticize certain religious accommodations, there is no reason why religious freedom cannot be balanced with military efficiency, good order and discipline, and respect for the rights of others – even those with whom one disagrees. In sum, the DoD can and should respect the religious practices of its members, as RFRA requires, and still remain true to recent social change.

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<sup>369</sup> *Burwell*, 573 U.S. at 695.

<sup>370</sup> *Singh v. McHugh*, 185 F. Supp. 3d 201, 210 (D.D.C. 2016).