

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.*,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR., in his official
capacity as President of the United States,
et al.,

Defendants.

Civil Action 21-1136-F

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

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Emily Eslinger & Michael Paradis, Lawfare,
Federalism and Coronavirus Vaccination Mandates for Military Personnel (Dec. 9, 2021),
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Military Times, *Military COVID-19 Deaths on Upswing as Vaccination Deadlines Pass*
(Dec. 15, 2021),
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Office of Mgmt. & Budget, Update on Implementation of COVID-19 Vaccination Requirement for Federal Employees (Dec. 9, 2021), https://perma.cc/V7DR-5NC6	31
Pandemic Response Accountability Committee, Top Challenges Facing Federal Agencies (June 2020), https://perma.cc/9D8L-J5MN	3
Stanley Lemon et al., <i>Protecting Our Forces: Improving Vaccine Acquisition and Availability in the US Military</i> , National Academies Press (2002), https://perma.cc/E545-TQ9G	2

INTRODUCTION

This is a case brought by the State of Oklahoma and sixteen pseudonymous members of the Oklahoma Air National Guard (“OKANG”) who seek to challenge federal requirements that they receive a COVID-19 vaccination. Plaintiffs’ request for extraordinary preliminary relief fails on numerous grounds.

As an initial matter, Plaintiffs fail to challenge the vaccine requirements that apply to the National Guard. OKANG members are subject to military vaccine requirements, issued under the President’s unambiguous authority to “prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard.” 32 U.S.C. § 110. But instead of challenging the military order issued pursuant to that authority, Plaintiffs challenge Executive Order 14043 (“EO 14043”), which applies to civilian federal employees. *See* Requiring Coronavirus Disease 2019 Vaccination for Federal Employees, EO 14043, 86 Fed. Reg. 50,989 (Sept. 14, 2021); *see generally* ECF No. 1 (“Compl.”); ECF No. 9 (“Mot.”). Plaintiffs’ motion should be rejected on this basis alone—Plaintiffs’ failure to challenge the applicable requirements or even address the proper statutory authority negates every ground they raise for preliminary injunctive relief.

At most, Plaintiffs allege that two members of the OKANG are dual-status technicians under 32 U.S.C. § 709(b), who are simultaneously members of the National Guard and federal civilian employees for certain purposes. *See* Compl. ¶ 36; *see also* OKANG Member 4 Decl. ¶ 5, ECF No. 32; OKANG Member 13 Decl. ¶ 4, ECF No. 31. Yet these two individuals have not sought the Court’s leave to proceed pseudonymously, so they are not parties to this action under clear Tenth Circuit precedent, and Defendants are unable to discern anything

about their employment status. And because these individuals are unquestionably also subject to the military vaccination order, an injunction against the civilian requirement would bring them no redress. Nor does Oklahoma have standing: a state lacks *parens patriae* standing to sue the federal government, and the injuries Oklahoma claims are purely conjectural.

Even if Plaintiffs could show standing, emergency relief would still be improper because no Plaintiff is facing irreparable injury: National Guard members and civilian federal employees can generally pursue reinstatement with potential back pay if wrongfully discharged, and Oklahoma fails to show that EO 14043 will cause the state to suffer any irreparable injury.

Finally, Plaintiffs cannot show any likelihood of success on the merits. The President has authority under Article II to oversee both the National Guard and the federal workforce. Congress has provided further authority by statute. The EO that Plaintiffs challenge is not subject to arbitrary-and-capricious review under the APA, and if it were, it would easily satisfy that lenient standard. Plaintiffs' various constitutional claims are meritless for the reasons stated more fully below. Finally, the requested injunction would undermine important public interests in public health, military readiness, and the efficiency of the civil service.

The Court should therefore deny Plaintiffs' request for emergency injunctive relief.¹

¹ For the reasons explained herein—including Plaintiffs' failure to challenge the military vaccination requirement that applies to the National Guard—Defendants respectfully submit that Plaintiffs' motion can and should be denied without a hearing. Most importantly, live testimony is unnecessary because the legal issues are dispositive. Moreover, Plaintiffs have already submitted their direct testimony through declarations, Defendants are not seeking to present any additional live testimony, and Defendants do not believe that cross-examination is necessary (though they reserve the right to cross-examine any witnesses who are permitted to present live testimony). Defendants further note that, if a hearing is held, they intend to object to any testimony from pseudonymous Plaintiffs because these individuals have neither sought nor been granted leave to proceed pseudonymously, and Defendants are unable to prepare an effective cross-examination of these individuals without knowing their identities.

BACKGROUND

The United States is in the midst of the most serious public health crisis it has faced in at least a century. Over 120,000 new COVID-19 infections are being reported in the United States every day. *See* CDC COVID Data Tracker Weekly Review (updated Dec. 17, 2021), <https://perma.cc/QNV6-6HVZ>. Eighty service members have died from COVID-19 complications. *Military Times, Military COVID-19 Deaths on Upswing as Vaccination Deadlines Pass* (Dec. 15, 2021), <https://perma.cc/T438-3TK5>. None were fully vaccinated. *Id.*

I. Department Of Defense COVID-19 Vaccination Directive

The U.S. military instituted its first immunization program in 1777, when General Washington directed the inoculation of the Continental Army for smallpox. Stanley Lemon et al., *Protecting Our Forces: Improving Vaccine Acquisition and Availability in the US Military*, National Academies Press (2002), <https://perma.cc/E545-TQ9G>. For generations, the military has implemented a variety of inoculation measures to maintain military readiness by reducing infectious disease morbidity and mortality within the force. *See* Cong. Rsch. Serv., *Defense Health Primer: Military Vaccinations* (updated Aug. 6, 2021), <https://perma.cc/BMW3-HGJW>. Nine vaccines are currently required for all service members, including the annual flu shot. *See* AR 40-562, <https://perma.cc/MB96-5JK3>; *see also* Decl. of S. Bradley, Ex. B, ¶ 5. .

On August 9, 2021, the Secretary of Defense announced that he would add the COVID-19 vaccine to the list of required vaccines by the earlier of mid-September or upon approval by the Food and Drug Administration (“FDA”). *See* Aug. 9, 2021 SecDef Memo, <https://perma.cc/6PFX-Q64G>. After FDA approved the Pfizer COVID-19 vaccine, Secretary Austin directed the Secretaries of the Military Departments to immediately vaccinate

all members of the armed forces, including the National Guard, under Department of Defense (“DoD”) authority. *See* Aug. 24, 2021 SecDef Memo, ECF No. 26-2.²

On November 2, 2021, Oklahoma wrote a letter to the Secretary of Defense asking him to reconsider the vaccine requirement for Oklahoma’s National Guard. Nov. 2, 2021 Ltr., <https://perma.cc/76G4-74Z5>. The Secretary of Defense responded on November 29, 2021, explaining the importance of the vaccine requirement and noting that the President has authority under 32 U.S.C. § 110 to regulate the non-Federalized National Guard. Nov. 29, 2021 Ltr., ECF No. 36-1.

On November 30, 2021, the Secretary of Defense issued supplemental guidance to members of the National Guard on Title 32 duty as opposed to active duty under Title 10. Nov. 30, 2021 SecDef Memo, ECF No. 26-3; *see also* Decl. of Col. K. Mulcahy, Ex. A ¶ 12. The memo explained that no DoD “funding may be allocated for payment of duties performed under title 32 for members of the National Guard who do not comply with [DoD] COVID-19 vaccine requirements.” Nov. 30, 2021 SecDef Memo. The Secretary of the Air Force followed with specific regulatory guidance applicable to members of the Air National Guard serving under Title 32. *See* Secretary of the Air Force Memo, Supplemental Coronavirus Disease 2019 Vaccination Policy (Dec. 7, 2021), ECF No. 36-2.

² The DoD mandate has been subject to extensive litigation, and every request to enjoin it has failed. *See Navy Seal 1 v. Biden*, --- F. Supp. 3d ---, 2021 WL 5448970 (M.D. Fla. Nov. 22, 2021); *Doe #1–14 v. Austin*, --- F. Supp. 3d ---, 2021 WL 5816632 (N.D. Fla. Nov. 12, 2021); *Church v. Biden*, No. 21-cv-2815, 2021 WL 5179215 (D.D.C. Nov. 8, 2021); *Stone v. Austin*, No. 21-cv-4822, 2021 WL 4443733 (E.D.N.Y. Sept. 28, 2021); *Robert v. Austin*, 21-cv-2228, ECF No. 12 (D. Colo. Sept. 1, 2021).

II. Organization And Regulation Of The National Guard

The National Guard both (1) is a part of the official state militia and (2) includes reserve members of the national military.³ The Oklahoma National Guard includes employees and military members serving in different roles.

- Active Duty. Under Title 10, active duty National Guard members serve under the direct control of a federal official. They are subject to the active duty COVID-19 vaccination compliance deadlines set by each Service (Nov. 2, 2021 for Air Force; Dec. 15, 2021 for Army), and are not subject to EO 14043. *See, e.g.*, 10 U.S.C. §§ 12301, 12302.
- Title 32 Drill Status Guardsmen (“DSG”). Most members of the National Guard are DSGs. Ex. A ¶ 4. These individuals train pursuant to Title 32 at least one weekend a month and two weeks a year. *Id.* Title 32 training is conducted by the State, but DSGs must comply with federal rules, including military vaccination requirements. *See* 32 U.S.C. §§ 110, 501; U.S. Const., art. I., sec. 8, cl. 15-16. DSGs are not subject to EO 14043. Ex. A ¶ 4.
- Title 32 Active Guard and Reserve (“AGR”). AGR members are full-time, uniformed service members serving under Title 32 under the direction of a State official. Ex. A ¶ 5. AGRs must comply with Title 32 regulations set by the President and Secretaries, and continued service in the AGR requires the consent of the applicable service Secretary. 32 U.S.C. § 328. AGRs are not subject to EO 14043, but they are required to adhere to military vaccination requirements. Ex. A ¶ 5.
- Military Technicians (Dual-Status). Some National Guard members are “dual-status,” meaning they work for the National Guard as full-time civilian employees but are also required to maintain National Guard Membership. *See* 32 U.S.C. § 709(b), (f). Dual-status technicians are subject to the military vaccination requirement in their capacity as members of the National Guard. Ex. A ¶ 6.
- Title 5 Civilians. These civilians are non-uniformed, civilian staff of the state National Guard (*e.g.*, accountants) and are federal employees as defined by 5 U.S.C. § 2105. They are therefore subject to EO 14043. Ex. A ¶ 7.

³ *See* Emily Eslinger & Michael Paradis, Lawfare, *Federalism and Coronavirus Vaccination Mandates for Military Personnel* (Dec. 9, 2021), <https://perma.cc/6KY5-5H4X>.

The National Guard Bureau (“NGB”) has issued guidance that the civilian vaccination requirement “only applies to National Guard Title 5 Civilian Employees.” Ex. A ¶ 10; Oct. 8, 2021 NGB Memo, Ex. A, Att. A. The civilian vaccination guidance “does not apply to Title 32 Military Technicians, Active Guard and Reserve personnel or M-Day / Drill Status Guardsmen” who must “comply with applicable DoD COVID-19 vaccine policies.” Ex. A ¶¶ 10–11; *see also* Nov. 10, 2021 NGB Memo, Ex. A, Att. B (“This guidance is not applicable to individuals employed under Title 32. . . . Those individuals will be subject to vaccination requirements outlined by their respective service components.”).

III. Executive Order 14043

EO 14043 reflects the President’s determination that COVID-19 threatens “[t]he health and safety of the Federal workforce, and the health and safety of members of the public with whom they interact, [which] are foundational to the efficiency of the civil service.” EO 14043 § 1. “[I]n light of public health guidance,” EO 14043 instructs each federal agency to “implement, to the extent consistent with applicable law, a program to require COVID-19 vaccination for all of its federal employees, with exceptions only as required by law.” *Id.* §§ 1, 2. It also directs the Safer Federal Workforce Task Force (“Task Force”) to “issue guidance . . . on agency implementation of this requirement.” *Id.* § 2. EO 14043 applies to federal “employees” as defined by 5 U.S.C. § 2105, *see* EO 14043 § 3(b), which would not include members of the National Guard unless they separately held a federal civilian position.

Task Force guidance recognizes that federal employees may be eligible for exceptions based on a medical condition or religious objection, and advises that federal employees who have not requested or received an exception should be fully vaccinated no later than

November 22, 2021. It further advises that an employee who requests an exception should not be disciplined while the request is pending. *See generally* Task Force, Frequently Asked Questions (“Task Force FAQs”), Vaccinations, <https://perma.cc/B2YZ-76PT>.⁴

IV. This Lawsuit

Plaintiffs filed a complaint on December 2, 2021, *see* Compl., and they filed an emergency motion the following day, *see* Mot. Plaintiffs seek an order enjoining Defendants from “enforcing, implementing, or giving any effect, in the State of Oklahoma, to EO 14043, the consequent [Task Force] guidance, or agency action,” and from “withholding federal funding from the Oklahoma National Guard or its members or depriving them of any of their usual rights and privileges.” Mot. at 25.

LEGAL STANDARD

“[A] preliminary injunction is an extraordinary remedy,” so “the movant’s right to relief must be clear and unequivocal.” *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1154 (10th Cir. 2001) (citation omitted). The moving party must show (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in its favor; and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

⁴ EO 14043 has been subject to extensive litigation, and every request to enjoin it has failed. *See Donovan v. Vance*, No. 21-cv-5148, ECF No. 58 (E.D. Wa. Dec. 17, 2021); *McCray v. Biden*, No. 21-cv-2882, ECF No. 11 (D.D.C. Dec. 7, 2021); *Rodden v. Fauci*, No. 21-cv-317, 2021 WL 5545234 (S.D. Tex. Nov. 27, 2021); *Rydie v. Biden*, No. 21-cv-2696, 2021 WL 5416545 (D. Md. Nov. 19, 2021), *appeal pending*, No. 21-2359 (4th Cir.); *Brnovich v. Biden*, No. 21-cv-01568, ECF No. 64 (D. Ariz. Nov. 10, 2021); *Altschuld v. Raimondo*, No. 21-cv-2779, ECF No. 23 (D.D.C. Nov. 8, 2021); *Church*, 2021 WL 5179215; *Smith v. Biden*, No. 21-cv-19457, 2021 WL 5195688 (D.N.J. Nov. 8, 2021), *appeal pending*, No. 21-3091 (3d Cir.); *Foley v. Biden*, No. 21-cv-01098, ECF No. 18 (N.D. Tex. Oct. 6, 2021).

ARGUMENT

I. Plaintiffs Fail To Challenge The Order Governing The National Guard, Which Is Unquestionably Lawful.

Plaintiffs challenge the President’s vaccination requirements for federal employees in EO 14043, issued pursuant to his authority under Title 5. Yet the vaccination requirements for members of the National Guard are issued pursuant to Titles 10 and 32 and have required members of the National Guard to be vaccinated against various diseases for decades. *See, e.g.*, DoD Instruction (“DoDI”) 6205.02 §§ 1.2(c), 2.12(b); AR 40-562, §§ 3–2(b), 4–7(b), <https://perma.cc/ZU4H-CBA3>. The Secretary of Defense simply added another vaccination to the long list of vaccines already required.

Plaintiffs nowhere challenge the military’s authority to require vaccinations pursuant to the correct statutory authorities. While the Mancino Declaration alludes to new legal challenges to the military vaccination requirement, *see* ECF No. 27, Plaintiffs obviously cannot add new legal claims to their complaint through declaration. *See Blevins v. Werholtz*, No. 09-3033-SAC, 2009 WL 539913, at *6 (D. Kan. Mar. 4, 2009) (claims must be added by amending complaint).⁵ The current motion is thus based on a complaint that fails to challenge the federal vaccination requirements applicable to the military members of the National Guard.

In any event, a challenge the military’s vaccination requirement for National Guard members pursuant to Titles 10 and 32 would fail. Those requirements are unquestionably lawful, and the novel arguments raised in the Mancino Declaration are inconsistent with the text of the Constitution and contrary to centuries of statutory and legal precedent.

⁵ Defendants submit Ex. A to provide some historical, factual, and regulatory background to put the assertions from the Mancino Declaration in proper context.

The Constitution explicitly tasks Congress with “organizing, arming, and disciplining, the Militia and [with] governing such Part of them as may be employed in the Service of the United States.” U.S. Const., art. I, § 8, cl. 15-16. The States may appoint militia officers and conduct training, provided the training conforms with federal regulations. *Id.* In Federalist No. 29, Alexander Hamilton described the States’ role as limited to “the appointment of the officers” and “training the militia according to the discipline prescribed by Congress” because “[i]f a well-regulated militia be the most natural defense of a free country, it ought certainly to be under the regulation and at the disposal of that body which is constituted the guardian of the national security”—*i.e.*, the federal government. Likewise, the Supreme Court has long recognized the States’ subordinate role to Congress in military affairs. *See, e.g., Houston v. Moore*, 18 U.S. (5 Wheat) 1, 16 (1820) (“Congress has power to provide for organizing, arming, and disciplining them; and this power being unlimited, except in the two particulars of officering and training them, according to the discipline to be prescribed by Congress, it may be exercised to any extent that may be deemed necessary by Congress.”). Oklahoma law also recognizes the supremacy of the federal government over the Oklahoma National Guard. While the Governor is authorized under State law to act as commander-in-chief of National Guard members “in the service of the state” (in Title 32 status), all orders of the Governor are “subject to the laws of the United States and regulations prescribed by the President of the United States.” 44 Okla. Stat. Ann. tit. 44, § 23.

Moreover, Congress has unambiguously delegated the authority to regulate the National Guard to federal officials. “The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard.” 32 U.S.C. § 110.

The Secretaries of the Army and Air Force likewise have authority to “prescribe such regulations as the Secretary considers necessary to carry out provisions of law relating to the reserve components,” which include the National Guard. 10 U.S.C. § 10202(a). And each Service Secretary is “[s]ubject to the authority, direction, and control of the Secretary of Defense.” *Id.* §§ 7013(b)(9), 9013(b)(9), 113(b). Congress further tasked the National Guard Bureau with “[i]ssuing directives, regulations, and publications consistent with approved policies of the Army and Air Force.” 10 U.S.C. § 10503(11).

These prescribed regulations set the conditions that must be met by all members of the National Guard to meet the readiness standards of the Army Reserve or Air Force Reserve (of which National Guard members are a part). 10 U.S.C. § 12641(a). The regulations currently require a service member to receive nine immunizations, in addition to the COVID-19 vaccination, to be deemed medically qualified for military service. *See* AR 40-562, (“Reserve component Servicemembers receive the same immunizations as active duty personnel”); Ex. B, ¶ 5. “If a [member of the] Reserve fails to comply with the standards and qualifications prescribed under subsection (a), he shall—(1) if qualified, be transferred to an inactive reserve status; (2) if qualified, be retired without pay; or (3) have his appointment or enlistment terminated.” 10 U.S.C. § 12641(b). Thus, members of the reserve components, including members of the Air National Guard, must comply with federal readiness standards (regardless of duty status) or risk disqualification and termination of their status as a reservist. *See, e.g.*, DoDI 6205.02 § 1.2(c); 32 U.S.C. §§ 301,323.

Moreover, service in the Active Guard or reserve duty may only be performed with the consent of the Secretary of the Army or Air Force. 32 U.S.C. § 328. And the Secretary of the

Air Force has withdrawn consent for Air National Guard members who have not complied with the Air Force's current medical readiness requirements. The federal government is not required to pay for reserve training that does not meet federal regulations. *See* 32 U.S.C. § 108; Nov. 30, 2021 Memo, ECF No. 26-3 (“No Department of Defense funding may be allocated for payment of duties performed under title 32 for members of the National Guard who do not comply with Department of Defense COVID-19 vaccination requirements.”).

The law is thus clear: Congress and those federal officers using the authority delegated from Congress set the standards for service in the United States military, including service in the National Guard. The State of Oklahoma is of course free to establish a separate state defense force under the exclusive control of the state. *See* 32 U.S.C. § 109. But as far as the *National* Guard is concerned, the State of Oklahoma cannot allow service members to defy the lawful orders and rules of federal military authorities.

II. Plaintiffs’ Challenge To EO 14043 Fails On Threshold Grounds.

Instead of challenging the military vaccine requirements governing the OKANG, Plaintiffs challenge EO 14043. That challenge fails on numerous threshold grounds.

A. Plaintiffs Lack Standing.

Plaintiffs bear the burden of proving the “irreducible constitutional minimum of standing,” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 84, 102 (1998)—*i.e.*, (1) “an injury in fact that is concrete, particularized, and actual or imminent; (2) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief.” *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). Neither the unnamed individual Plaintiffs nor Oklahoma can carry that burden here.

1. The Individual Plaintiffs Lack Standing.

a) The Court Lacks Jurisdiction Over The Anonymous Individual Plaintiffs.

At the threshold, the Plaintiffs proceeding under pseudonyms have failed to comply with the Rules of Civil Procedure, which “make no provision of suits by persons using fictitious names or for anonymous plaintiffs.” *Nat’l Commodity & Barter Ass’n v. Gibbs*, 886 F.2d 1240, 1245 (10th Cir. 1989); *see* Fed. R. Civ. P 10(a). Although there may be “exceptional circumstances warranting some form of anonymity in judicial proceedings,” *Femedeer v. Haun*, 227 F.3d 1244, 1246 (10th Cir. 2000), the burden is on the party seeking anonymity to “first petition the district court for permission to do so,” *W.N.J. v. Yocom*, 257 F.3d 1171, 1172 (10th Cir. 2001). Plaintiffs have not done so here, and the Court thus “lack[s] jurisdiction over the unnamed parties, as a case has not been commenced with respect to them.” *Id.* (citation omitted). These non-parties cannot carry Plaintiffs’ burden of demonstrating standing or irreparable harm. *See KeyView Labs, Inc. v. Barger*, No. 20-cv-2131, 2020 WL 8224618, at *6 (M.D. Fla. Dec. 22, 2020) (anonymous declaration could not meet the “high burden” for obtaining a preliminary injunction and collecting cases rejecting anonymous declarations).⁶

b) No Individual Plaintiff Has Standing To Challenge EO 14043.

Even putting the anonymity issue aside, the individual Plaintiffs lack standing to challenge EO 14043. Fourteen of the anonymous Plaintiffs allege only that they are members of the OKANG, which is not, standing alone, federal civilian employment subject to the

⁶ Multiple courts have denied requests to proceed under pseudonym in cases challenging EO 14043. *See Doe v. Raimondo*, No. 21-mc-127 (D.D.C. Oct. 14, 2021), ECF No. 1; *Rydie v. Biden*, No. 21-cv-2696 (D. Md. Nov. 18, 2021), ECF No. 24; *Brnovich v. Biden*, No. 2:21-cv-1568 (D. Ariz. Dec. 15, 2021), ECF No. 122.

Executive Order. Some of these individuals assert that they “have been informed by [DoD] that Exec. Order No. 14043 . . . applies to” them, *e.g.*, OKANG Member 9 Decl. ¶ 4, ECF No. 30, but such “anonymous double hearsay” is “problematic,” “unreliable and of little persuasive value,” *Advance Am. v. FDIC*, No. 14-593, 2017 WL 2672741, at *8 (D.D.C. Feb. 23, 2017). And, in any event, what matters for purposes of jurisdiction is the actual requirement at issue, not what someone claims to have been told.

Two of the Plaintiffs—OKANG Members 4 and 13—allege that they are also dual-status civilian federal employees with DoD. *See* OKANG Member 4 Decl. ¶ 5; OKANG Member 13 Decl. ¶ 4. But National Guard Bureau guidance directs each state’s National Guard to apply only the “applicable DoD COVID-19 vaccine policies”—not civilian requirements—to dual-status, Title 32 Military Technicians. *See* Ex. A ¶¶ 10–11, Att. A & B. Based on these anonymous Plaintiffs’ allegations, it is impossible to discern whether they are subject to EO 14043. Therefore, they have not carried their burden to establish standing.

Even if these individuals were parties and were subject to EO 14043, none has provided any evidence demonstrating that EO 14043 is likely to cause him any imminent, concrete injury sufficient to satisfy Article III. Federal employees may request exceptions from EO 14043; they are not subject to discipline while a request is pending; and the ultimate discipline any federal employee might face is uncertain given the procedural protections to which most federal employees are entitled under federal law. Any claims that purport to challenge EO 14043 are thus unripe because they depend on “contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Trump v. New York*, 141 S. Ct. 530, 535 (2020) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)); *see also Church*, 2021

WL 5179215, at *8-10; *Rodden*, 2021 WL 5545234, at *3; *McCray v. Biden*, No. 21-2882, 2021 WL 5823801, at *8-9 (D.D.C. Dec. 7, 2021).

c) Plaintiffs Have Not Exhausted Available Remedies.

Plaintiffs do not challenge the military vaccination requirement applicable to the National Guard, and thus cannot seek any injunctive relief as to that requirement. But if they were to challenge the military requirement, the Court would still lack jurisdiction. A plaintiff challenging a military decision or regulation must exhaust *all* available military remedies before bringing a lawsuit. *See Noyd v. McNamara*, 378 F.2d 538, 539–40 (10th Cir. 1967) (per curiam) (“Although appellant has exhausted his administrative remedies as that term is concerned with Air Force regulations, he has not exhausted the military process and has not been denied, nor can we anticipate that he will be denied, a full consideration of his constitutional rights within the complete scope of that process”).

A claim challenging a potential National Guard discharge is not ripe if there has been no final decision. *See Vaughan v. Ky. Army Nat’l Guard*, No. 12-cv-35, 2013 WL 211075, at *6 (E.D. Ky. Jan. 18, 2013) (“Nor has Vaughan’s federal recognition been finally withdrawn. A claim is not justiciable where it hinges on hypothetical future events.”); *Diraffael v. Cal. Mil. Dep’t*, No. 10-cv-7240, 2011 WL 13274364, at *3 (C.D. Cal. Mar. 21, 2011) (suit “premature” where “discharge proceedings are still underway”). Here, that means a plaintiff must seek any applicable exemptions, pursue all appeals, and then if those are denied, must still wait until the military concludes any adverse action, and pursue all available appeals of adverse action. Decl. of Col. C. Nichols, Ex. C ¶¶ 4–23. There is no evidence that any of the individual Plaintiffs has done so.

2. Oklahoma Lacks Standing.

The State of Oklahoma also lacks standing to challenge EO 14043. As an initial matter, Oklahoma cannot establish standing under *Massachusetts v. EPA*, 549 U.S. 497 (2007). *See* Mot. at 5. The “unique circumstances” on which that decision was based—the state’s “interests in ensuring the protection of the land and air within its domain, and its ‘well-founded desire to preserve its sovereign territory’”—are not present here. *See Ctr. for Biological Diversity v. U.S. Dep’t of Interior*, 563 F.3d 466, 476 (D.C. Cir. 2009). Moreover, the Supreme Court clearly did “not eliminate the state petitioner’s obligation to establish a concrete injury.” *Wyoming v. U.S. Dep’t of Interior*, 674 F.3d 1220, 1238 (10th Cir. 2012). Oklahoma posits three theories (but no facts or evidence) to support its standing here. None demonstrates the requisite “concrete and particularized injury.” *TransUnion*, 141 S. Ct. at 2203.

Oklahoma’s primary theory is that it has standing “under the *parens patriae* doctrine.” Mot. at 5. But a state “does not have standing as a *parens patriae* to bring an action on behalf of its citizens against the federal government because the federal government is presumed to represent the State’s citizens.” *Wyoming ex rel. Sullivan v. Lujan*, 969 F.2d 877, 883 (10th Cir. 1992); *see also Wyoming*, 674 F.3d 1220 (similar); *Florida v. U.S. Dep’t of Health & Human Servs.*, --- F.4th ---, 2021 WL 5768796, at *16 (11th Cir. Dec. 6, 2021) (rejecting state *parens patriae* standing in a challenge to federal vaccination requirement).

Nor is Oklahoma otherwise entitled to assert the rights of federal employees not before the court. *See, e.g., Hollingsworth v. Perry*, 570 U.S. 693, 708 (2013) (describing rule against third-party standing). In some limited circumstances, courts have made exceptions to the rule against third-party standing, but typically only where “a close relationship exists between the

litigant and the third party” and where “‘some genuine obstacle’ to the third party asserting his own rights” exists. *The Wilderness Soc’y v. Kane Cnty.*, 632 F.3d 1162, 1172 (10th Cir. 2011) (citation omitted). Oklahoma has not even attempted to demonstrate a “close relationship” with any third-party federal employee, and there are no obstacles to such employees asserting their own rights—as many have endeavored to do in challenges to EO 14043.

Oklahoma further argues that it has standing “when it has suffered an economic injury or is forced to deploy its resources.” Mot. at 5. Yet it presents no evidence that EO 14043 has caused it any economic injury. Its claim that “State tax dollars” would be lost if hypothetical federal employees, through a speculative chain of events, were to “lose [their] federal employment,” Compl. ¶ 91, is insufficient. Because Oklahoma has presented “no evidence that specific loss of tax revenues have occurred, and its assertions of future lost tax revenues are merely speculative,” it cannot establish standing on this basis. *Wyoming*, 674 F.3d at 1235; *see also Utah v. Babbitt*, 137 F.3d 1193, 1212 (10th Cir. 1998).

To the extent Oklahoma complains about the potential loss of federal National Guard funding for National Guard members serving under Title 32, Oklahoma fails to show that any significant portion of its Guard members are at risk of noncompliance with EO 14043, which does not apply to Title 32 service. Even if Oklahoma made such a showing, the question of whether the President should withhold funds is nonjusticiable. *See Schroder v. Bush*, 263 F.3d 1169, 1174 (10th Cir. 2001). The Constitution unambiguously commits decisions about funding and regulation of the National Guard to the political branches. *See* U.S. Const., art. I, § 8, cl. 15-16. Congress authorized the President, in his sole discretion, to bar states “from receiving money or any other aid benefit or privilege” if a state fails to comply with “a

regulation prescribed” under Title 32. *See* 32 U.S.C. § 108. There are no judicially manageable standards for reviewing the President’s funding decisions.

Oklahoma has similarly failed to demonstrate any “sovereign” injury. Mot. at 5. Its alleged injury is that EO 14043 “contravenes Oklahoma’s law and public policy” and deprives the state of “the law enforcement support it needs to protect itself and its citizens.” Compl. ¶¶ 88-91. But Oklahoma does not identify any state “law [or] public policy” that the Executive Order “contravenes,” *id.*, much less show that the EO 14043 interferes with the state’s ability to “create and enforce a legal code,” Mot. at 5 (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982)); *cf. Utah Div. of Consumer Prot. v. Stevens*, 398 F. Supp. 3d 1139, 1143-44 (D. Utah 2019) (noting that state may have standing to vindicate its sovereign interests where “a federal court holds that a state law is unconstitutional” or in cases involving “the maintenance and recognition of borders”). As discussed in Part I, above, any argument that Oklahoma has the authority to supersede the President’s regulation of the National Guard is legally meritless and ignores Oklahoma’s own state laws, which provide that all orders of the Governor concerning the National Guard are “subject to the laws of the United States and regulations prescribed by the President of the United States.” 44 Okla. Stat. tit. 44, § 23. And in any event, “it is black-letter law that the federal government does not ‘invade’ areas of state sovereignty ‘simply because it exercises its authority in a way that . . . ‘displaces the States’ exercise of their police powers.’” *Florida*, 2021 WL 5768796, at *15 (alterations omitted) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 291 (1981)).

Moreover, Oklahoma’s claim that EO 14043 will adversely affect state law enforcement is pure speculation. Again assuming that the EO concerning federal civilian employment were

even applicable here, Oklahoma submits no facts demonstrating that the speculative chain of events on which it relies—*i.e.*, that the executive order will cause the state to lose law enforcement officers and suffer a measurable harm to public safety. Each outcome in that causal chain is speculative and unsupported, and the theory of injury relies on “the independent action of some third party not before the court,” which makes Oklahoma’s standing burden “substantially more difficult.” *Habecker v. Town of Estes Park*, 518 F.3d 1217, 1225 (10th Cir. 2008) (citations omitted). In any case, Oklahoma fails to explain its counterintuitive conjecture that the hypothetical loss of certain *federal* employees based in the state interferes with the state’s *own* law enforcement function.

3. Plaintiffs Fail To Adequately Allege That The Relief They Seek Can Redress Their Injuries.

Plaintiffs lack standing for the additional reason that an order against the Defendants sued here would not redress their alleged injuries. To begin with, neither declaratory nor injunctive relief is proper against the President in his official capacity. Rather, “[w]ith regard to the President, courts do not have jurisdiction to enjoin him and have never submitted the President to declaratory relief.” *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) (citations omitted); *see also Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992); *Willis v. U.S. Dep’t of Health & Human Servs.*, 38 F. Supp. 3d 1274, 1277 (W.D. Okla. 2014) (“Longstanding legal authority establishes that the judiciary does not possess the power to issue an injunction against the President or Congress.”). Multiple courts have thus rejected requests for declaratory or injunctive relief against EO 14043 itself. *See Rydie*, 2021 WL 5416545, at *3; *Foley*, No. 21-cv-1098, ECF No. 18; *Navy Seal 1 v. Biden*, No. 21-cv-2429, 2021 WL 5448970, at *2 (M.D. Fla. Nov. 22, 2021); *McCray*, 2021 WL 5823801, at *5-8.

Nor can Plaintiffs obtain relief by asserting claims against the Task Force, the White House COVID-19 Response Team, and their members. The federal employee vaccination requirement flows from EO 14043 and implementing actions by each federal agency, not from the nonbinding guidance issued by the Task Force and the Response Team. Relief against these Defendants therefore cannot redress Plaintiffs' asserted injuries. *See Rodden*, 2021 WL 5545234, at *2-3 (so holding, in challenge to EO 14043).

Finally, an order enjoining DoD, Secretary Austin, the various service branches, and the heads of those branches from implementing EO 14043 could not provide Plaintiffs relief, even as to any Plaintiffs to whom EO 14043 might separately apply. The two unnamed OKANG members who allege that they are dual-status technicians are unquestionably subject (like all of the individual Plaintiffs) to the separate military vaccination requirement for members of the National Guard, which are not challenged here. *See* OKANG Member 13 Decl. ¶ 6 (providing "deadline for receiving this vaccination regiment as a Guard member"); OKANG Member 4 Decl. ¶ 7 (same). Indeed, civilian employment as a dual-status technician is contingent upon being a military member of the National Guard. *See* 32 U.S.C. § 709(b)(2). Setting aside that the National Guard Bureau has directed each state's National Guard not to require dual-status technicians to comply with civilian vaccine requirements, even if the Court enjoined Secretary Austin from enforcing EO 14043, these Plaintiffs would receive no relief because the military mandate would still apply to them, and they would need to comply with the military mandate to maintain their civilian employment. *See, e.g., KH Outdoor, LLC v. Clay Cnty.*, 482 F.3d 1299, 1303 (11th Cir. 2007) (no redressability where plaintiff also "failed to meet the requirements of other statutes and regulations not challenged").

III. Plaintiffs Fail To Establish Irreparable Injury.

To satisfy their burden of proving irreparable harm, Plaintiffs must demonstrate irreparable harm that is *likely*, not merely possible. *Winter*, 555 U.S. at 20. The harm shown “must be both certain and great,” not “merely serious or substantial.” *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001) (citations omitted). The showing also must be “clear and unequivocal.” *Colorado v. EPA*, 989 F.3d 874, 886 (10th Cir. 2021). Plaintiffs have not carried their burden here.

Oklahoma argues that it will suffer imminent irreparable harm because EO 14043 places the state “at risk of having her laws and public policy preferences usurped by this vaccine mandate” and because the Executive Order will cause OKANG members to quit, which will allegedly jeopardize Oklahomans’ safety and security and cause economic injury. Mot. at 6. But all of this is speculative, and Oklahoma fails to identify any law or public policy contravened by the Executive Order. *See supra* Part I.A.2. Nor does Oklahoma “clear[ly] and unequivocal[ly]” show, *see Colorado*, 989 F.3d at 886, that EO 14043 will prompt a single service member to quit. Because Oklahoma has alleged only speculative harms, it has failed to carry its burden. *See Pierce*, 253 F.3d at 1250; *see also Florida*, 2021 WL 5768796, at *16 (holding that state’s claims that vaccination requirements would cause staffing shortages were wholly “speculative” and “conclusory” and did not establish irreparable harm).

Oklahoma also asks this court to “preliminarily enjoin Defendants from withholding federal funding from the Oklahoma National Guard.” Mot. at 25. Plaintiffs have not even challenged the regulations that apply to the National Guard, but even if they had, “[e]conomic loss usually does not, in and of itself, constitute irreparable harm.” *Port City Props. v. Union Pac.*

R. Co., 518 F.3d 1186, 1190 (10th Cir. 2008) (citation omitted).

The service member Plaintiffs likewise will not suffer irreparable harm in the absence of an injunction. To be sure, a National Guard member who refuses vaccination may be subject to a range of administrative and disciplinary actions. *See* Ex. C, ¶¶ 4–23. But those administrative and disciplinary actions, including separation, are not irreparable injuries because service members could later be reinstated and provided back pay if they prevailed on their claims. *See, e.g., Guitard v. U.S. Sec’y of Navy*, 967 F.2d 737, 742 (2d Cir. 1992); *Guerra v. Scruggs*, 942 F.2d 270, 274 (4th Cir. 1991); *Hartikka v. United States*, 754 F.2d 1516, 1518 (9th Cir. 1985); *Chilcott v. Orr*, 747 F.2d 29, 34 (1st Cir. 1984); *McCurdy v. Zuckert*, 359 F.2d 491, 494 (5th Cir. 1966); *Shaw v. Austin*, --- F. Supp. 3d ---, 2021 WL 1840397, at *10 (D.D.C. May 7, 2021); *Reinhard v. Johnson*, 209 F. Supp. 3d 207, 220 (D.D.C. 2016) (military separation not irreparable harm); *Bors v. Allen*, 607 F. Supp. 2d 204, 211 (D.D.C. 2009); *Farris v. Rice*, 453 F. Supp. 2d 76, 79 (D.D.C. 2006) (“cases are legion holding that loss of employment does not constitute irreparable injury”); *Wilburn v. Dalton*, 832 F. Supp. 943, 948 (E.D. Pa. 1993); *Dowds v. Bush*, 792 F. Supp. 1289, 1291 (D.D.C. 1992) (“where the claim is for unlawful exclusion from the military or improper denial of promotion, the delay can be compensated by awarding backpay, seniority, etc. . . . [and] the damages suffered are not irreparable.”).

Indeed, the Supreme Court has long held that, absent a “genuinely extraordinary situation,” the loss of employment is not an irreparable harm. *Sampson v. Murray*, 415 U.S. 61, 92 n.68 (1974). This is so at least in part because loss of employment is usually compensable by monetary damages. *See id.* at 90. And irreparable injury occurs only when the “court would be unable to grant an effective monetary remedy . . . because such damages would be

inadequate or difficult to ascertain.” *Dominion Video Satellite*, 269 F.3d at 1156; *see also Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1267 (10th Cir. 2005) (“[S]imple economic loss” does not constitute irreparable harm). That is not the case here. Even if the individual Plaintiffs were certain to be terminated for their refusal to be vaccinated—and they are not⁷—any financial consequences of termination would not be irreparable. *See Sampson*, 415 U.S. at 92 n.68; *see also Franks v. Nimmo*, 683 F.2d 1290, 1294 (10th Cir. 1982).⁸

The service members’ second asserted harm—violation of “their rights to individual autonomy and bodily integrity” and “against forced medical intervention,” Mot. at 6—also fails. Given that the service members chose not to seek a preliminary injunction on their substantive-due-process claim, they cannot meet their burden of showing irreparable harm in relation to that claim. *See Schrier*, 427 F.3d at 1267. In any event, no one is at risk of being forcibly vaccinated: if the individual Plaintiffs are right on the merits of their claims, they can decline vaccination and seek remedies for any adverse employment consequences at the conclusion of litigation. *See e.g., Smith*, 2021 WL 5195688, at *8 (“Plaintiffs are undeniably being presented with a difficult choice—comply with the vaccine mandate or risk losing their employment. They are, however, presented with a choice”); *Klaassen v. Trs. of Ind. Univ.*, ---

⁷ As discussed in Part I.A.I(b), any civilian employee subject to EO 14043 may request a religious or medical exception and, per the Task Force Guidance, should not be subject to any discipline while any such request is pending (or if it is granted). The DoD mandate likewise provides religious and medical exemptions, and suspends vaccination requirements while those requests are pending. Aug. 24, 2021 SecDef Memo; Ex. C, ¶¶ 4–7. Consequently, Plaintiffs’ allegations “call into question the ‘imminence’ of the harm” they allegedly face. *Church*, 2021 WL 5179215, at *14.

⁸ As many federal courts have held, a federal employee’s choice between complying with a COVID-19 vaccination mandate and suffering job-related consequences is not irreparable harm. *See Rydie*, 2021 WL 5416545, at *5; *Altschuld*, ECF No. 23, at 8; *Church*, 2021 WL 5179215, at *13–15; *Smith*, 2021 WL 5195688, at *8–9.

F. Supp. 3d ---, 2021 WL 3073926, at *25 (N.D. Ind. July 18, 2021) (similar), *denying mot. for inj. pending appeal*, 7 F.4th 592 (7th Cir. 2021) (Easterbrook, J.), *emergency application for relief denied*, No. 21A15 (Barrett, J., in chambers) (Aug. 12, 2021); *Bridges v. Hous. Methodist Hosp.*, --- F. Supp. 3d ---, 2021 WL 2399994, at *2 (S.D. Tex. June 12, 2021) (similar), *appeal filed*, No. 21-20311 (5th Cir. June 14, 2021).

Finally, Plaintiffs’ delay in seeking relief further confirms the absence of any irreparable injury. Plaintiffs waited eleven weeks from the issuance of EO 14043 to file suit, and “[a]s a general proposition, delay in seeking preliminary relief cuts against finding irreparable injury.” *Kan. Health Care Ass’n v. Kan. Dep’t of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543–44 (10th Cir. 1994) (citation omitted); *see also GTE Corp. v. Williams*, 731 F.2d 676, 678 (10th Cir. 1984).

IV. Plaintiffs Are Unlikely To Succeed On The Merits Of Their Challenge To EO 14043.

Even if the Court had jurisdiction to review Plaintiffs’ challenge to EO 14043, their claims would fail on the merits.

A. EO 14043 Is A Valid Exercise Of The President’s Constitutional And Statutory Authority.

Counts I, II, and III are asserted directly under the federal civil service statutes: Plaintiffs allege that EO 14043 is not authorized by 5 U.S.C. § 3301 (Count I); 5 U.S.C. § 3302 (Count II); or 5 U.S.C. § 7301 (Count III). Those assertions fail both for lack of a cause of action and on the merits.

1. The Civil Service Statutes Do Not Create A Private Right Of Action.

“[E]ven where a statute is phrased in . . . explicit rights-creating terms,” a plaintiff still must show that Congress has created “not just a private *right* but also a private *remedy*.” *Gonzaga*

Univ. v. Doe, 536 U.S. 273, 284 (2002) (citation omitted)). “Absent Congressional intent to create both a right and a remedy in favor of a plaintiff, a cause of action does not exist, . . . no matter how desirable that might be as a policy matter.” *Cuba Soil & Water Conservation Dist. v. Lewis*, 527 F.3d 1061, 1064 (10th Cir. 2008) (quotation omitted). None of the statutes that Plaintiffs invoke creates a private right of action: they are silent about a “private remedy,” and they are not “phrased” in “rights-creating terms.” *Gonzaga*, 536 U.S. at 284; *see also id.* at 287 (statute must reflect “congressional intent to create new rights”). Instead, these statutes speak exclusively to the authority of the *President* to issue rules. *Cf. id.* at 287 (statute did not create individual rights because its “provisions speak only to the Secretary of Education”).

To the contrary, Congress has spoken clearly as to how federal employees must allege violations of their rights in the workplace: through the Civil Service Reform Act (“CSRA”). Under the CSRA, “adverse actions,” including removals and suspensions of more than fourteen days, *see* 5 U.S.C. § 7512, can generally only be appealed directly to the Merit Systems Protection Board (“MSPB”), with judicial review in the Federal Circuit. *Id.* §§ 7513(d), 7703(b)(1).⁹ This scheme provides the exclusive and preemptive means for federal employees to challenge workplace decisions and conditions. *See, e.g., Elgin v. Dep’t of Treasury*, 567 U.S. 1, 11-12 (2012) (“Given the painstaking detail with which the CSRA sets out the method for covered employees to obtain review of adverse employment actions, it is fairly discernible that

⁹ Corrective action for a less severe “personnel action” may generally be sought from any agency administrative or negotiated grievance rights, through Equal Employment Opportunity Commission complaints if an EEO protected basis is alleged, or from the Office of Special Counsel (“OSC”) if the applicant or employee alleges a prohibited reason for the action. 5 U.S.C. §§ 1214(a)(3), 2302.

Congress intended to deny such employees an additional avenue of review in district court.”); *United States v. Fausto*, 484 U.S. 439, 455 (1988); *Steele v. United States*, 19 F.3d 531, 532-33 (10th Cir. 1994); *Petrini v. Howard*, 918 F.2d 1482, 1483–85 (10th Cir. 1990).¹⁰

2. EO 14043 Falls Within The President’s Constitutional And Statutory Authority.

In any event, EO 14043 is a valid exercise of the President’s authority. At the outset, Plaintiffs’ assumption that the President required explicit congressional authorization to set terms of employment in the Executive Branch is wrong. The President is the head of the Executive Branch, and, “[u]nder our Constitution, the ‘executive power’—all of it—is ‘vested in a President,’ who must ‘take Care that the Laws be faithfully executed.’” *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020) (quoting U.S. Const. art. II, § 1, cl. 1 & § 3). And “if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.” *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492 (2010) (quoting 1 Annals of Cong. 463 (1789)). Thus, as another court explained in rejecting a challenge to EO 14043, “The President derives his authority to regulate the federal workforce from the Constitution, not from Congress’s enactments.” *Rydie*, 2021 WL 5416545, at *3. And nothing in the text of the statutes on which Plaintiffs rely purports to limit the President’s Article II authority, for each is phrased to *grant* authority. *See* 5 U.S.C. §§ 3301 (“The President may”); 3302 (same); 7301 (same); *see also*

¹⁰ Dual-status technicians as defined in 32 U.S.C. § 709(f) may not appeal to the MSPB termination from federal employment that results from separation from the National Guard. *See Dyer v. Dep’t of the Air Force*, 971 F.3d 1377 (Fed. Cir. 2020). Yet the Supreme Court has been clear that the CSRA precludes district court review not only for federal employees to whom Congress has given MSPB appeal rights, but also for those to whom such rights are denied. *See Fausto*, 484 U.S. at 488.

Clarry v. United States, 85 F.3d 1041, 1047 (2d Cir. 1996) (“The President has broad authority pursuant to 5 U.S.C. §§ 3301 and 7301 to regulate employment matters”).

Far from limiting the President’s authority, Congress has “endorsed his action here,” *Rydie*, 2021 WL 5416545, at *3. *First*, Plaintiff’s contention that the vaccination requirement is not tied to the “efficiency of th[e] service” under 5 U.S.C. § 3301 is wrong. Plaintiffs claim that efficiency “does not concern matters such as public-health mandates,” Mot. at 8, but the President specifically found that “[t]he health and safety of the Federal workforce, and the health and safety of members of the public with whom they interact, are foundational to the efficiency of the civil service.” EO 14043 § 1. Nor can Plaintiffs dispute that COVID-19 has caused serious disruptions to the operations of employers, including the federal government. *See infra* Part V. In light of “the obvious intent of Congress to confer broad discretion upon the President,” this Court must “restrict [itself] to the limited scope of judicial review which follows.” *Am. Fed. of Gov’t Emps. v. Hoffman*, 543 F.2d 930, 938 (D.C. Cir. 1976); *see also, e.g., Giesler v. Merit Sys. Prot. Bd. of the U.S.*, 686 F.2d 844, 849 (10th Cir. 1982). There is no basis for this Court to second-guess the President’s finding that requiring federal civilian employees to be vaccinated would serve the efficiency of the civil service. *See also, e.g., Rydie*, 2021 WL 5416545, at *5 (EO 14043 serves “[t]he effective administration of the federal government”)

Second, Plaintiffs’ suggestion that 5 U.S.C. § 3302 “concerns only selection procedures for the competitive service,” Mot. at 10, is also wrong. The text of the statute authorizes “rules governing the competitive service,” 5 U.S.C. § 3302, and there is no warrant for this Court to read into the statute language that is not there. *See United States v. Nichols*, 184 F.3d 1169, 1171 (10th Cir. 1999) (“[W]here a statute is clear on its face, we give its words literal effect.”).

Third, Congress has confirmed the President’s authority to “prescribe regulations for the conduct of employees in the executive branch.” 5 U.S.C. § 7301. Plaintiffs suggest that “conduct” is limited to “behavior and activity” as opposed to “status,” but the act of becoming vaccinated plainly is conduct that the President may require—just as the act of taking illegal drugs is conduct that the President may prohibit (as Plaintiffs concede). *See* Mot. at 13 (discussing Executive Order 12564).¹¹

3. The Major Questions Doctrine Does Not Apply.

Plaintiffs’ invocation of the so-called major questions doctrine misses the mark. The cases Plaintiffs invoke limit the deference that agencies receive under *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), on the theory that Congress does not silently give unelected agency heads power to regulate on questions of major significance. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132, 147 (2000); *see also In re MCP No. 165*, --- F. 4th ---, 2021 WL 5989357 (6th Cir. Dec. 17, 2021) (vacating stay of OSHA ETS: “The seldom-used major questions doctrine . . . has been described as an exception to *Chevron* deference.”). But that doctrine does not apply here for many reasons, including that EO 14043 is presidential authority, not agency authority, the government is not seeking *Chevron* deference, and the constitutional and statutory provisions here speak in unmistakable terms.

Most fundamentally, the terms of employment that the government sets for its own workforce is not a question of “vast economic and political significance”; the government is not seeking to ban evictions across the United States, *see Ala. Ass’n of Realtors v. Dep’t of Health*

¹¹ Further, these Title 5 sections are irrelevant to the military mandate, which was issued pursuant to other constitutional and statutory authority not challenged by Plaintiffs.

Human Servs., 141 S. Ct. 2485 (2021), regulate billions of dollars of carbon emissions, *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014), or regulate the entire tobacco industry, *see Brown & Williamson*, 529 U.S. 120. Plaintiffs offer no evidence that the federal employee mandate has had any meaningful economic impact, nor does the “unprecedented politicization” surrounding COVID-19 limit the President’s existing authority, especially since “mandatory vaccinations for the public at large have long been held valid,” and so “there was no reason for Congress to be more specific” in confirming the President’s authority to require vaccination as a term of federal employment. *Florida*, 2021 WL 5768796, at *12; *see also In re MCP No. 165*, 2021 WL 5989357, at *7 (“The ETS is not a novel expansion of OSHA’s power; it is an existing application of authority to a novel and dangerous worldwide pandemic.”).

B. Plaintiffs’ APA Claim Fails.

In Count IV, Plaintiffs purport to challenge the federal employee vaccination requirement under the APA. *See* Compl. ¶¶ 145-162; Mot. at 14-17. This claim also fails.

1. The CSRA Precludes Jurisdiction Over Plaintiffs’ APA claim.

As noted above, *see supra* Part IV.A.1, Congress has provided an exclusive mechanism for challenging federal employment actions: the CSRA, which precludes “an additional avenue of review in district court.” *Elgin*, 567 U.S. at 11-12. That preclusion extends to suits under the APA. *See Tompkins v. U.S. Dep’t of Veterans Affs.*, 16 F.4th 733, 741-42 (10th Cir. 2021). Thus, even if the federal employee vaccination requirement were applicable in this case, Plaintiffs could not bring an employment dispute in this Court. *See Rydie*, 2021 WL 5416545, at *2; *see also Tompkins*, 16 F.4th at 743 (an employee “cannot utilize the APA to obtain the very review he is denied by” a comprehensive federal employment scheme).

2. Plaintiffs Do Not Challenge Reviewable Agency Action.

Even if the CSRA did not preclude Plaintiffs' APA claim, a plaintiff invoking the APA must challenge action taken by an "agency." *See* 5 U.S.C. §§ 701(b)(1), 702, 704. Plaintiffs' APA claim is directed solely at the actions of the President and the Task Force. *See, e.g.,* Compl. ¶¶ 148, 151. But neither is an "agency" for purposes of the APA. The Supreme Court has squarely held that the President "is not an agency" subject to APA review. *See Franklin*, 505 U.S. at 796. The Task Force is also not an agency: it is an advisory body created by executive order, and its guidance is not binding on the public, nor even on any federal agency. "[U]ltimate authority to set objectives, determine policy, and establish programs rests elsewhere" *Armstrong v. Exec. Off. of the President*, 90 F.3d 553, 564 (D.C. Cir. 1996) (National Security Council not an agency). Thus, it does not wield substantial authority independently of the President and so cannot be an agency subject to APA review. *See Rodden*, 2021 WL 5545234, at *3; *see also CREW v. Off. of Admin.*, 566 F.3d 219, 222 (D.C. Cir. 2009).

In all events, Plaintiffs do not challenge *final* agency action. Final agency action (1) "must mark the consummation of [an] agency's decisionmaking process" and (2) must determine legal "rights or obligations" or have other "legal consequences." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citations omitted). Yet there remain myriad steps before any federal employee may face a "final" decision from an employer. *See Rodden*, 2021 WL 5545234, at *3. And neither EO 14043 nor the Task Force Guidance bears on regulatory guidance applicable to the Army National Guard and Air National Guard. In the absence of any final agency action, Plaintiffs' APA claim cannot succeed.

3. Plaintiffs' APA Claim Fails On The Merits.

Even if the Court were to consider the merits of Plaintiffs' APA claim, it should find that Plaintiffs are unlikely to prevail. As set forth above, *see supra* Section IV.A, EO 14043 was issued pursuant to ample statutory and constitutional authority. The Court should likewise reject Plaintiffs' arbitrary-and-capricious challenge. "[T]he arbitrary-and-capricious standard is very deferential to the agency," *Hays Med. Ctr. v. Azar*, 956 F.3d 1247, 1264 (10th Cir. 2020) (citation omitted), and courts must "presume that an agency action is valid unless the party challenging the action proves otherwise." *Id.*¹²

Plaintiffs complain that the Task Force failed to account for "costs to the States," Mot. at 14, Plaintiffs' own legal challenges, and Oklahoma's sovereignty, laws, and reliance interests, *see id.* at 16. But none of these considerations are implicated in EO 14043 or the Task Force guidance, which only apply to the conduct of federal employees and do not require any action by state governments. And while Plaintiffs fault the Task Force for failing to offer exemptions for federal employees with natural immunity or remote work environments, *see* Mot. at 16, it was the *President* who determined that federal employees would be required to be vaccinated against COVID-19, with only legally required exceptions. In any event, the Task Force and

¹² Had Plaintiffs challenged the DoD vaccination requirement, their APA claim would be subject to an even higher bar. *See Rostker v. Goldberg*, 453 U.S. 57, 66 (1981). Indeed, judicial review of military decisions under the APA is limited to whether the military followed proper law, regulation, and procedure. *See Hill v. Dep't of Air Force*, 844 F.2d 1407, 1408 (10th Cir. 1988) (agreeing "that 1) courts are not permitted to second-guess the merits or wisdom of military or national security decisions [and] 2) the only proper basis for review of a military or national security decision is to determine whether pertinent procedural regulations were followed"). Because the DOD vaccination requirement comports with applicable law, *see supra* Part I, any APA claim against it would fail as well.

the President explicitly relied on the CDC’s determination that vaccination is the best way to slow the spread of COVID-19. *See* EO 14043 § 1; Task Force FAQs.¹³ That judgment clearly involves “technical or scientific matters within the agency’s area of expertise” that are entitled to “especially strong” judicial deference. *Hays*, 956 F.3d at 1264 (citation omitted).

In a different vein, Plaintiffs contend that the Task Force failed to consider certain impacts on the federal workforce, including the problems of disparate vaccination deadlines across the entire federal government and of a “mass exodus” of unvaccinated employees. *See* Mot. at 16. But the Task Force recommended a single deadline for civilian employees: November 22, 2021. And it recognized that the “[u]nique operational needs of agencies and the circumstances affecting a particular employee may warrant departure” from the standard guidelines, and that those needs should be balanced against the need for “consistency across government.” Task Force FAQs. Moreover, managing the federal workforce is the federal government’s concern, not the concern of state governments. And in any case, Plaintiffs ignore the fact the federal employee vaccination requirement has been highly successful: the overwhelming majority of federal employees have complied with the requirement. *See* Office of Mgmt. & Budget, Update on Implementation of COVID-19 Vaccination Requirement for Federal Employees (Dec. 9, 2021), <https://perma.cc/V7DR-5NC6>.

Finally, Plaintiffs argue that the Task Force failed to explain its departure from prior practice in the Executive Branch. *See* Compl. ¶ 156; Mot. at 15. But EO 14043 simply imposes

¹³ CDC public health experts—after conducting an extensive review and issuing a comprehensive brief on the issue—continue to recommend vaccination for individuals who have recovered from a SARS-CoV-2 infection. *See* CDC, *Science Brief: SARS-CoV-2 Infection-induced and Vaccine-induced Immunity* (updated Oct. 29, 2021), <https://perma.cc/CMT3-XU8X>.

a new condition of federal employment—it does not constitute a reversal of any “prior policy” position. *Cf. FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009). In any event, the President and the Task Force clearly considered the vaccination requirement to be necessary to supporting the health and safety of the federal workforce, and that judgment was well supported by scientific agency assessments and the government’s recent experience during the pandemic. This Court should reject Plaintiffs’ invitation to second-guess the President’s decisions about how best to run the Executive Branch

C. Plaintiffs’ Tenth Amendment Claim Fails.

The Court should reject Oklahoma’s suggestion that EO 14043 violates the Tenth Amendment or generalized “federalism provisions.” Mot. at 17. It is black-letter law that powers specifically delegated to the federal government by the Constitution “are not powers that the Constitution ‘reserved to the States.’” *United States v Comstock*, 560 U.S. 126, 144 (2010) (citation omitted); *accord, e.g., Hodel*, 452 U.S. at 291; *Okla. ex rel. Okla. Dep’t of Pub. Safety v. United States*, 161 F.3d 1266, 1272 (10th Cir. 1998). So long as federal action is authorized by the Constitution, “the Tenth Amendment gives way.” *United States v. Hatch*, 722 F.3d 1193, 1202 (10th Cir. 2013). As explained above, EO 14043 is a valid exercise of the President’s authority to set the terms and conditions of employment in the federal workforce that he oversees. That authority is “clearly conferred in the Constitution,” *Rydie*, 2021 WL 5416545, at *3, and “endorsed” by several statutory provisions granting the President power to oversee the federal civil service, *see id.*, none of which Oklahoma asserts is unconstitutional.¹⁴

¹⁴ Although Plaintiffs fail to challenge the National Guard vaccination regulations, those too are plainly consistent with the Tenth Amendment because they are valid exercises of Constitutional authority. *See* Part I.

Oklahoma contends that the states’ retention of authority over public health renders vaccination requirements “not a matter of federal concern.” Mot. at 18. But that contention is wrong because “[t]he federal government’s exercise of its enumerated powers does not infringe on powers reserved to the states under the Tenth Amendment.” *Rydie*, 2021 WL 5416545, at *3 (citing *Hodel*, 452 U.S. at 291–92; U.S. Const. art. VI, cl. 2); *see also NASA v. Nelson*, 562 U.S. 134, 148 (2011) (the federal government “has a much freer hand” when acting as “manager of its ‘internal operation’” than “‘when it brings its sovereign power to bear on citizens at large’” (citation omitted)). That settles the Tenth Amendment question here. Because EO 14043 is a constitutional exercise of federal authority, the Court “necessarily must also conclude that the [Plaintiffs’] efforts to invoke abstract principles of federalism through the Tenth Amendment fail.” *Town of Johnston v. FHFA*, 765 F.3d 80, 86 (1st Cir. 2014).¹⁵

Oklahoma’s contention that the Supreme Court’s decision in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) is “outcome-determinative,” Mot. at 18, is “meritless, in addition to being inconsistent with Plaintiffs’ federalism argument.” *Rydie*, 2021 WL 5416545, at *3. This case does not present a situation where the President has acted outside his congressionally delegated authority.¹⁶

¹⁵ The Tenth Amendment may also impose a bar to federal action that unlawfully “commandeer[rs] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.” *Kelley v. United States*, 69 F.3d 1503, 1509 (10th Cir. 1995) (citation omitted). EO 14043, which merely sets conditions for continued federal employment, plainly does not do this. Because the President has not regulated “the States as States,” there is “no Tenth Amendment impediment.” *Hodel*, 452 U.S. at 286.

¹⁶ Oklahoma’s argument that EO 14043 “exceeds the federal government’s Commerce Clause authority,” Mot. at 19-20, is both wrong and irrelevant in light of the President’s constitutional and statutory authority to issue the Executive Order. *See, e.g., Rydie*, 2021 WL 5416545, at *3.

D. Plaintiffs’ Nondelegation Claim Fails.

Plaintiffs’ nondelegation claim is equally infirm. “In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 471, 472 (2001). Yet this is not a case in which Congress has “delegate[d] away its own powers” and “lawmaking functions.” Mot. at 20. Rather, the President has authority under Article II to set internal employment policy for the Executive Branch, and the statutes that Plaintiffs invoke do not delegate the President legislative authority that would otherwise belong to Congress. *See Serv. Emps. Int’l Union Local 200 United v. Trump*, 419 F. Supp. 3d 612, 620–21 (W.D.N.Y. 2019) (executive order was “not an impermissible exercise of legislative power, but a function of the President’s role as head of the executive branch and his associated broad statutory authority to regulate executive branch employment policies”), *aff’d*, 975 F.3d 150 (2d Cir. 2020).

Even if this case involved a delegation of legislative power, the claim would still fail. Congress may lawfully delegate decision-making authority so long as it “clearly delineates [1] the general policy, [2] the public agency which is to apply it, and [3] the boundaries of this delegated authority.” *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989) (citation omitted). This standard is so deferential that the Supreme Court has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.” *Whitman*, 531 U.S. at 474–75 (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)). In fact, the Supreme Court has struck down congressional delegations only twice—both in 1935—and then only because “Congress had failed to articulate *any* policy or standard” to confine discretion. *Gundy v. United States*, 139 S. Ct. 2116,

2129 (2019) (plurality op.). Over the last eighty years, the Court “has countenanced as intelligible seemingly vague principles in statutory text.” *In re Nat’l Sec. Agency Telecomms. Recs. Litig.*, 671 F.3d 881, 896 (9th Cir. 2011) (citing multiple cases); *see also, e.g., Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (upholding delegation to determine what constituted a “safe” place of employment); *Gundy*, 139 S. Ct. at 2129 (noting that the Supreme Court has, on multiple occasions, “approved delegations to various agencies to regulate in the ‘public interest’”). Here, the statutes relied upon are narrow in scope—dealing with the President’s authority to set employment policy for the executive branch—and make clear that regulations must be tied to things like “the efficiency of [the] service,” 5 U.S.C. § 3301(1), and “good administration,” *id.* § 3302. Plaintiffs’ nondelegation challenge fails.¹⁷

E. Plaintiffs’ Fourth Amendment Claim Fails.

Plaintiffs allege that requiring employees to be vaccinated violates the Fourth Amendment, Compl. ¶¶ 259–272, which “protects citizens from unreasonable searches and seizures by government actors,” *United States v. Smythe*, 84 F.3d 1240, 1242 (10th Cir. 1996). To begin, Oklahoma cannot assert the Fourth Amendment rights of third parties. *See supra* Part I.A.2; *see also United States v. Poe*, 556 F.3d 1113, 1121 (10th Cir. 2009). And in any event, the challenged vaccination requirement is not a “search” or “seizure.” An “invasion of privacy[] is not alone a search unless it is done *to obtain information.*” *United States v. Jones*, 565

¹⁷ Even if Plaintiffs had challenged the military vaccine regulation that actually applies to the National Guard, their non-delegation argument would fail. Congress has directed the President to “prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard,” 32 U.S.C. § 110, which is more than sufficient to pass constitutional muster.

U.S. 400, 408 n.5 (2012) (emphasis added); *accord id.* at 407; *Gaytan v. New Mexico*, No. 19-cv-0778, 2021 WL 1634383, at *4 (D.N.M. Apr. 27, 2021). Plaintiffs’ own authorities—which involve the collection of biological samples *to be analyzed for evidence of drug or alcohol use*—acknowledge this distinction. *See Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 606, 616–18 (1989); *Schmerber v. California*, 384 U.S. 757, 767–772 (1966).¹⁸ By contrast, vaccination is not obtaining information or otherwise “‘searching’ [an employee] for something within the meaning of the Fourth Amendment.” *See Doe v. Bd. of Educ. of City of Chi.*, --- F. Supp. 3d ---, 2020 WL 1445638, at *8 (N.D. Ill. Mar. 24, 2020). Moreover, as discussed below, no one is compelled to be vaccinated.

Nor does EO 14043 effect a “seizure,” because “freedom of movement” is not being terminated or restrained by receiving a vaccine as a condition of employment. *Morris v. Noe*, 672 F.3d 1185, 1192 (10th Cir. 2012); *accord Brendlin v. California*, 551 U.S. 249, 254 (2007). The Fourth Amendment’s seizure analysis is not implicated where “an individual chooses [to] voluntarily . . . cooperate.” *United States v. Easley*, 911 F.3d 1074, 1079 (10th Cir. 2018). An individual who chooses to be vaccinated to start or continue employment is not being coerced into receiving a vaccination. *Smith*, 2021 WL 5195688, at *8; *see also Easley*, 911 F.3d at 1079.¹⁹

Ultimately, while Plaintiffs have tried to plead their personal privacy claim under the

¹⁸ Plaintiffs also claim that the court in *B.A.B., Jr. v. Board of Education of the City of St. Louis*, 698 F.3d 1037 (8th Cir. 2012), treated “[f]orcible vaccinations” as “searches and seizures” under the Fourth Amendment. Mot. at 20–21. But nothing in *B.A.B.* supports this assertion.

¹⁹ Because Plaintiffs cannot show a Fourth Amendment violation, their argument invoking the unconstitutional-conditions doctrine fails *a fortiori*. *See Reedy v. Werholtz*, 660 F.3d 1270, 1277 (10th Cir. 2011) (explaining that “if no constitutional rights have been jeopardized, no claim for unconstitutional conditions can be sustained”); *see also Planned Parenthood of Ind., Inc. v. Comm’r of Ind. State Dep’t of Health*, 699 F.3d 962, 986 (7th Cir. 2012).

Fourth Amendment, courts have routinely rejected similar arguments asserted as a matter of substantive due process. *See, e.g., Smith*, 2021 WL 5195688, at *8; *Klaassen*, 2021 WL 3073926, at *25; *Norris v. Stanley*, --- F. Supp. 3d ---, 2021 WL 4738827, at *2 (W.D. Mich. Oct. 8, 2021), *appeal filed*, No. 21-1705 (6th Cir. Nov. 5, 2021). This Court should likewise reject Plaintiffs' Fourth Amendment claim.

F. Plaintiffs' Take Care Clause And Separation Of Powers Claim Fails.

Finally, there is no merit to Oklahoma's claim that "the President is also violating the separation of powers and the Take Care Clause." Mot. at 24; *see* Compl. ¶¶ 296–312. This claim collapses into Plaintiffs' argument that EO 14043 exceeds the President's statutory authority. The Supreme Court has rejected similar attempts to dress up statutory arguments in constitutional garb, holding that "claims simply alleging that the President has exceeded his statutory authority are not 'constitutional' claims." *Dalton v. Spector*, 511 U.S. 462, 473 (1994). In addition, the Supreme Court has held that "the duty of the President in the exercise of the power to see that the laws are faithfully executed" "is purely executive and political," and not subject to judicial direction. *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 499 (1866). To the government's knowledge, no court has *ever* found a violation of the Take Care Clause. In any event, as shown above, EO 14043 falls comfortably within the President's constitutional and statutory authority to regulate the federal civil service. *See supra* Part IV.A. Thus, Count XI is exceedingly unlikely to succeed.

V. The Equities And Public Interest Weigh Against Injunctive Relief.

The third and fourth requirements for issuance of a preliminary injunction "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). These

factors tilt decisively against granting a preliminary injunction here. Enjoining EO 14043 would harm the public interest in slowing the spread of COVID-19 among millions of federal employees and the members of the public with whom they interact. In recognition of the Government’s “compelling interest” in “[s]temming the spread of COVID-19,” *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020), numerous courts reviewing EO 14043 and other “executive action designed to slow the spread of COVID-19” have concluded that “[t]he public interest in protecting human life—particularly in the face of a global and unpredictable pandemic—would not be served by” an injunction. *Tigges v. Northam*, 473 F. Supp. 3d 559, 573–74 (E.D. Va. 2020); *see also, e.g., Rydie*, 2021 WL 5416545, at *5–6; *Altschuld*, ECF No. 23, at 11; *Church*, 2021 WL 5179215, at *18–19; *Smith*, 2021 WL 5195688, at *9.

An injunction against EO 14043 would also hamper “[t]he effective administration of the federal government, in which Defendants and the public have a deep and abiding interest.” *Rydie*, 2021 WL 5416545, at *5. The COVID-19 pandemic has interfered with numerous aspects of the government’s work by, *e.g.*, forcing office closures; hampering employees’ access to paper-based records; limiting official travel; and causing staffing shortages. *See generally* Pandemic Response Accountability Committee, Top Challenges Facing Federal Agencies (June 2020), <https://perma.cc/9D8L-J5MN>. Thus, enjoining EO 14043 would harm the public interest by interfering with the government’s resumption of normal, pre-pandemic operations.

Although Plaintiffs fail to challenge the military’s vaccination requirements, any injunction of those regulations would seriously and adversely impact the national security of the United States. After consulting with “medical experts and military leadership,” the Secretary of Defense “determined that mandatory vaccination against [COVID-19] is

necessary to protect the Force and defend the American people.” Aug. 24, 2021 SecDef Memo, <https://perma.cc/YZ9F-NNU2>; *see also* Dec. 7, 2021 SecAF Memo, <https://perma.cc/72K5-SN8E>. The Court must “give great deference” to these leaders’ “professional military judgments.” *See Winter*, 555 U.S. at 24–25 (citation omitted); *see also Church*, 2021 WL 5179215, at *18 (similar).

These professional military judgments are supported by evidence showing COVID-19’s harmful impact on the military. *See* Decl. of Maj. S. Stanley, Ex. D, ¶¶ 3–13 (detailing such impacts);²⁰ Decl. of Col. T. Rans, Ex. E, ¶¶ 9–12; *accord Church*, 2021 WL 5179215, at *18 (DoD vaccination requirement is “supported by a lengthy record replete with data demonstrating the necessity of a general vaccine mandate”); *Military COVID-19 Deaths*, <https://perma.cc/T438-3TK5> (80 service members have died and none were fully vaccinated). *Id.* Vaccinations have promoted military readiness by reducing the risk of infections, hospitalizations, and deaths of service members, reducing the number of service members required to quarantine, and permitting a return to higher levels of occupancy in DoD facilities and in-person trainings. Ex. D ¶ 14; *see also* Ex. E ¶¶ 13–25. Vaccinations also permit service members to engage in joint training exercises with other countries that have vaccination requirements. Ex. D ¶ 14. Vaccinations are also required now to ensure troops

²⁰ COVID-19 has “impacted exercises, deployments, redeployments, and other global force management activities,” Ex. D ¶ 6 (including rendering one of the Navy’s eleven aircraft carriers non-operational because of an outbreak, *id.* ¶ 8); caused the cancellation of “19 major training events, many of which involved preparedness and readiness training with our foreign partners,” *id.* ¶ 9; and “required significant operational oversight” by the most senior military leaders, *id.* ¶ 4. In addition, because health care providers have had to care for COVID-19 patients, certain service members have not been able to “address non-emergency conditions and undergo routine medical and health assessments that are required under military directives to maintain medical readiness.” *Id.* ¶¶ 12–13.

can respond and deploy quickly. Ex. B ¶ 9. For all these reasons, enjoining the vaccination directive would significantly harm national security.

The requested injunction would also impinge upon the military’s authority to handle matters of good order and discipline without interference from the Judiciary. *Chappell v. Wallace*, 462 U.S. 296, 300–01 (1983); *Bois v. Marsh*, 801 F.2d 462, 467-68 (D.C. Cir. 1986). The National Guard has specific processes that must be followed prior any discipline or adverse employment action, *see* Ex. C ¶¶ 10–23. An injunction prohibiting the military from initiating or completing those processes “would be a disruptive force as to affairs peculiarly within the jurisdiction of the military authorities.” *Orloff v. Willoughby*, 345 U.S. 83, 95 (1953); *cf. White v. Carlucci*, 862 F.2d 1209, 1212 (5th Cir. 1989) (stating that *Sampson* “explicitly mandates that courts must consider the disruptive effect on the administrative process of the federal government of granting preliminary injunctions in government-employment-related cases”). This, too, would be contrary to the public interest. *See Chilcott*, 747 F.2d at 33 (noting the “strong judicial policy against interfering with the internal affairs of the armed forces”); *see also Reinhard*, 209 F. Supp. 3d at 221; *Guerra*, 942 F.2d at 275; *Shaw*, 2021 WL 1840397, at *10.

CONCLUSION

The court should deny Plaintiffs’ motion.²¹

Dated: December 22, 2021

Respectfully submitted,

BRIAN M. BOYNTON

²¹ Plaintiffs seek only an injunction within Oklahoma. *See* Mot. at 25. If the Court were to enter any relief, there would be no basis for the Court to award broader relief than Plaintiffs are seeking. *See, e.g., Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring) (nationwide injunctions “take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch.”).

Acting Assistant Attorney General

ANTHONY J. COPPOLINO
Deputy Director

CHRISTOPHER R. HALL
CARLOTTA P. WELLS
Assistant Directors

/s/ Zachary A. Avallone

STEVEN A. MYERS
ANDREW E. CARMICHAEL
Senior Trial Counsels
ZACHARY A. AVALLONE (DC Bar No. 1023361)
JOSEPH J. DEMOTT
COURTNEY D. ENLOW
CODY T. KNAPP
R. CHARLIE MERRITT
KENZIE K. OVERING
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
Tel: (202) 514-2705
E-mail: zachary.a.avallone@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

On December 22, 2021 I electronically submitted this document to the clerk of court for the U.S. District Court for the Western District of Oklahoma using the electronic case filing system of the Court. I certify that I have served all parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Zachary A. Avallone
ZACHARY A. AVALLONE
Trial Attorney
U.S. Department of Justice

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,
et al.,

Plaintiffs,

v.

JOSEPH R. BIDEN, *et al.*,

Defendants.

Civil Action No.:CIV-21-1136-JD

DECLARATION OF COL KEVIN A. MULCAHY

I, Kevin A. Mulcahy, hereby state and declare as follows:

1. I am the Deputy Director of Manpower and Personnel of the National Guard Bureau at the Pentagon in Arlington, Virginia. As the Deputy Director, NGB-J1, I serve as a principal advisor to the Chief of the National Guard Bureau and other senior National Guard Bureau leaders on Army National Guard and Air National Guard personnel policy matters that are included within the functions of the National Guard Bureau as prescribed by Congress in 10 U.S.C. § 10503 and the Secretary of Defense in Department of Defense Directive 5105.77, *The National Guard Bureau*, October 15, 2015 (with change 1, October 10, 2017). I have also served in the Illinois State National Guard as a title 32 Human Resource Officer, and various other senior roles within the NGB-J1 and the state NG.

2. I make this declaration in my official capacity as the National Guard Bureau Deputy Director for Manpower and Personnel based upon my personal knowledge and upon information that has been provided to me in the course of my official duties.

Overview of National Guard Statutes

3. The duties and responsibilities of guard members differs depending on the title of the United States Code applicable to their role.

4. Most members of the National Guard are Drill Status Guardsmen, who are required to attend Title 32 training one weekend a month and two weeks a year. *See* 32 U.S.C. § 502(a). Title 32 training is conducted by states, but subject to regulation by Congress and the federal military. *See* 32 U.S.C. § 501 (“The training of the National Guard of the several states . . . shall be conducted in conformity with this title.”). Drill Status Guardsmen are not subject to the vaccine requirements in Executive Order 14043, but are required to comply with vaccination requirements prescribed by the Secretaries of the Army or Air Force before attending Title 32 training. For Drill Status Guardsmen in the Air National Guard, the deadline is December 31, 2021.

5. Members in the Title 32 Active Guard and Reserve (AGR) are full-time, uniformed service members serving at the state level but paid by federal funds. Title 32 allows the Governor, with the consent of the Secretaries of the Army or Air Force, to allow members of the National Guard to work full-time under the control of the state, subject to Title 32 regulations. *See* 32 U.S.C. §§ 328, 502(f). Federal consent may be withdrawn at any time and for any reason. *See* 32 U.S.C. § 328. AGRs are not subject to the vaccine requirements in Executive Order 14043, but are required to comply with military vaccination requirements as prescribed by the

Secretaries of the Army or Air Force. For AGRs serving in the Air National Guard, the deadline is December 31, 2021.

6. Military technicians (dual status) are full-time civilian employees whose employment is conditioned on maintaining their military position in the National Guard. *See* 5 U.S.C. 3101 and 32 U.S.C. 709(b). Because they are required to maintain a military position as a condition of employment and are governed by two different titles of the United States Code, they are sometimes referred to as “dual-status technicians.” These roles include organizing, administering, recruiting, and training the Reserve components. Dual-status technicians are also members of the National Guard, so they are required to comply with military vaccine requirements as a matter of fitness for duty in the Reserve components. *See* 32 U.S.C. §709(f)(4) and (j)(2). For dual-status Air National Guardsmen, they must comply with applicable military vaccination requirements by December 31, 2021 before they can participate in any Title 32 training or other Title 32 activities.

7. The National Guard in each state may also have full-time civilians who serve pursuant to Title 5. These individuals are subject to EO 14043, and were required to comply with those vaccination requirements by November 22, 2021. Title 5 employees are not subject to the military’s vaccine requirements for active duty, reserve forces, and National Guard, unless they are also incidentally members of the National Guard or Reserve.

8. Members of the National Guard serving under Title 10 are on active duty and are subject to the same rules and regulations as active duty military. For the Oklahoma National Guard, this would include the United States Fiscal and Property Officer.

COVID-19 Vaccine Requirements For Guard Members

9. On August 24, 2021, the Secretary of Defense issued a memorandum directing the Secretaries of the Military Departments to immediately begin full immunization of all members of the Armed Forces against COVID-19, including members of the Army National Guard and Air National Guard. Memorandum from Secretary of Defense to Service Secretaries, subject: Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members, August 24, 2021.

10. On October 8, 2021, in my capacity as Deputy Director, Manpower and Personnel National Guard Bureau, I have first-hand knowledge that a memorandum was sent to the adjutants general and the commanding general of the District of Columbia titled “Implementation Guidance for Mandatory Coronavirus Disease 2019 Vaccination of National Guard Title 5 Employees.” A true copy of that is attached to this declaration as Exhibit A. That memo provided “implementation guidance to the National Guards of the States, Territories, and the District of Columbia” required by Presidential EO 14043.” The memo made clear that the “guidance applies to National Guard Title 5 Civilian Employees” but “does not apply to Title 32 Military Technicians, Active Guard and Reserve personnel or M-Day / Drill Status Guardsmen” who “will comply with applicable DoD COVID-19 vaccine policies.” NGB-J1 is the Office of Primary Responsibility (OPR) for issuing technician and title 5 civilian employee guidance to the 54 NGs.

11. On November 10, 2021, in my capacity as Deputy Director, Manpower and Personnel National Guard Bureau, I have first-hand knowledge that NGB-J1 sent a memorandum to the adjutants general and the commanding general of the District of Columbia titled “National Guard Implementation Guidance for Force Health Protection (Supplement 23) Revision 2 – Mandatory Coronavirus Disease 2019 Vaccination Attestation, Screening Testing and Verification.” A true

copy of that is attached to this declaration as Exhibit B. That memo explained that the civilian vaccine requirements pursuant to EO 14043 were “not applicable to Title 32 dual status military technicians who will follow directives and procedures issued by their respective service components and supplemented by the Army National Guard and Air National Guard.” It further explains that the civilian guidance “is not applicable to individuals employed under Title 32 United Code 709” and that “[t]hose individuals will be subject to vaccination requirements outlined by their respective service components and supplemented by policy implemented under the authority of their respective Adjutant General or Commanding General.” The memo also included attachments that specifically referred to EO 14043. *See* Attachment 3 DD Form 3175 “Civilian Employee Certificate of Vaccination”; Attachment 6 DD Form 3176 “Request for a Medical Exemption or Delay to the COVID-19 Vaccination Requirement”; Attachment 6 DD Form 3177 “Request for a Religious Exemption to the COVID-19 Vaccination Requirement”; and Attachment 11 Sample Memoranda.

12. On November 30, 2021, the Secretary of Defense issued a memorandum specifically mandating the immunization of non-federalized members of the National Guard (i.e., those not serving on active duty in a Title 10 military status), and directing the Secretaries of the Army and Air Force to “establish, as appropriate, policies and implementation guidance to address the failure to maintain this military medical requirement by members of the non-federalized National Guard who remain unvaccinated” Memorandum from Secretary of Defense to Service Secretaries, subject: Coronavirus Disease 2019 Vaccination for Members of the National Guard and the Ready Reserve, November 30, 2021.

13. The Department of the Army and Department of the Air Force followed with specific regulatory guidance applicable to the non-federalized members of the Army National Guard and

Air National Guard. Memorandum from Secretary of the Air Force to Commanders of Major Commands, Field Commands, Direct Reporting Units and Field Operating Agencies, subject “Supplemental Coronavirus Disease 2019 Vaccination Policy, December 7, 2021” Secretary of the Air Force (SecAF) Memo, Dec. 7, 2021, and Army Fragmentary Order 11 to HQDA Exord 225-21 Covid-19 Steady State Operations.

14. The Dec. 7, 2021 SecAF Memo explained that COVID-19 vaccination requirements apply to “Air National Guard performing any duty or training under both Title 10 and Title 32 of the United States Code.” The Secretary directed commanders to “take appropriate administrative and disciplinary actions consistent with federal law and Department of the Air Force (DAF) policy in addressing service members who refuse to obey a lawful order to receive the COVID-19 vaccine and do not have a pending separation or retirement, or medical, religious or administrative exemption.” *Id.* “[U]nvaccinated regular Airmen or Guardians with a request for medical, religious, or administrative exemption will be temporarily exempt from the COVID-19 vaccination requirement while their exemption request is under review.” *Id.*

15. Attachment 2 to the Dec. 7, 2021 SecAF Memo explains that pursuant to 32 U.S.C. § 328, “the Secretary of the Air Force hereby withdraws consent for members not fully vaccinated to be placed on or to continue on previously issued Title 32 Active Guard and Reserve (AGR) orders.” Dec. 7, 2021 SecAF Memo, Att. 2, ¶ 2. Since consent of the Secretary is required for any unit or member to serve under Title 32, the withdrawal of consent means that unvaccinated members without a pending exemption are not allowed to participate in training or any other Title 32 activities (even those Title 32 activities are generally directed by state officials, like the governor).

16. The Secretary of the Air Force also explained that Air National Guard members “that have not initiated a vaccination regimen by 31 December 2021” and do not have a pending exemption request, “may not participate in drills, training, or other duty conducted Title 10 or Title 32.” Dec. 7, 2021 SecAF Memo, Att. 2, ¶ 5.

17. Army Fragmentary Order 11 at paragraph 3.D.21., requires compliance with the Secretary of Defense Memorandum “Coronavirus Disease 2019 Vaccination for Members of the National Guard and Ready Reserve,” dated 30 November 2021.

Federal Authority Over National Guard

18. The National Guard was established by our Constitution. The Militia Clauses of the U.S. Constitution give Congress authority “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,” and “[t]o provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.” U.S. CONST., art. I., sec. 8, cl. 15-16.

19. Accordingly, Congress regulates the organized militia of the several States, today referred to as the National Guard. In 1903, Congress passed the Militia Act, better known as the Dick Act. As set forth in section 1 of the Dick Act, “the militia shall consist of every able-bodied male citizen of the respective States, Territories, and the District of Columbia, and every able-bodied male of foreign birth who has declared his intention to become a citizen, who is more than eighteen and less than forty-five years of age, and shall be divided into two classes—the organized militia, to be known as the National Guard of the State, Territory, or District of Columbia, or by such other designations as may be given them by the laws of the respective

States or Territories, and the remainder to be known as the Reserve Militia.” Militia Act of 1903, 32 Stat. 775 (January 21, 1903).

20. Under this legislation, the organized militia of the States (or National Guard) was required to conform to Regular Army organization. “The organization, armament, and discipline of the organized militia in the several States and Territories and in the District of Columbia shall be the same as that which is now or may hereafter be prescribed for the Regular and Volunteer Armies of the United States, within five years from the date of the approval of this Act.” The act also required National Guard units to attend 24 drills and five annual training days a year, and, for the first time, provided for pay for annual training. In return for the increased federal funding, the militia was subject to inspection by Regular Army officers, and had to meet certain standards. Later legislation in 1908, 1916, 1920, and 1933 would further expand upon and delineate Congress’ clear intent to regulate the militia of the several States. The National Defense Act of 1916 was one of the most significant of these later acts because it transformed the militia from individual state forces into a Reserve Component of the U.S. Army. It also made the term “National Guard” mandatory. The act stated that all organized militia units would have to be federally recognized, and that the qualifications for officers would be set by the War Department. It also increased the number of annual training days and yearly drill, and it authorized pay for drills.

21. These laws and others were later codified into predominantly titles 32 and 10 of the U.S. Code, which set forth numerous statutes authorizing federal officials to prescribe military regulations and policies that govern the militia, to include the Army and Air National Guard. The primary title 32 authority for the federal regulation of the National Guard is 32 U.S.C. § 110,

which provides, “The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard.”

22. The Secretary of Defense serves as the principal assistant to the President on military matters and, consistent with his authorities under 10 U.S.C. § 113(b), he may assist the President in carrying out the responsibilities of 32 U.S.C. § 110 with respect to the National Guard. The Under Secretary of Defense for Personnel and Readiness assists the Secretary of Defense in carrying out the Secretary’s responsibilities and, under 10 U.S.C. § 138, he “shall perform such duties and exercise such powers as the Secretary of Defense may prescribe in the areas of military readiness, total force management, [and] . . . National Guard and reserve components . . . affairs.” 10 U.S.C. § 136(b).

23. The Chief, National Guard Bureau is charged with carrying out the National Guard Bureau’s statutory function of “[p]rescribing training discipline and training requirements for the . . . Air National Guard” and with “[i]ssuing directives, regulations, and publications consistent with approved policies of the . . . Air Force.” See 10 U.S.C. §§ 10502, 10503; *see also* Department of Defense Directive 5105.77, *The National Guard Bureau*, October 15, 2015 (with change 1, October 10, 2017). Such approved policies of the Air Force are prescribed by the Secretary of the Air Force according to 10 U.S.C. §§ 9013 and 10202.

24. Congress has further authorized the Secretary of the Air Force to prescribe regulations relating to the reserve components under his or her jurisdiction. “Subject to standards, policies, and procedures prescribed by the Secretary of Defense, the Secretary of each military department shall prescribe such regulations as the Secretary considers necessary to carry out provisions of law relating to the reserve components under the Secretary’s jurisdiction.” 10 U.S.C. § 10202(a).

25. National Guard units and members are subject to these federal military regulations when they are engaged in federal training functions and other authorized duty under title 32, U.S. Code, even though they are subject to state command authority at these times. As a general rule, federal training is conducted pursuant to 32 U.S.C. § 502(a) for members of the National Guard performing drills or annual training, and federal training is conducted pursuant to 32 U.S.C. § 502(f) for members of the National Guard performing full-time National Guard duty, to include Active Guard and Reserve duty. All such training under 32 U.S.C. § 502 is regulated by the Secretaries of the Army and Air Force. “The discipline, including training, of the Army National Guard shall conform to that of the Army. The discipline, including training, of the Air National Guard shall conform to that of the Air Force.” 32 U.S.C. § 501(a). “The training of the National Guard shall be conducted by the several States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, and the Virgin Islands in conformity with this title.” 32 U.S.C. § 501(b).

26. In addition to the Militia Clauses of the U.S. Constitution, Congress also has the broader authority “[t]o raise and support Armies[,]” of which the Air National Guard of the United States is an element, as a reserve component of the U.S. armed forces. *See* 10 U.S.C. § 10101. As a reserve component of the U.S. armed forces, units and members of the Air National Guard of the United States must maintain the standard of readiness that is prescribed by federal officials who exercise training and readiness oversight over the reserve components pursuant to federal law.

27. Since 1933, all members of the National Guard have simultaneously enlisted or received commissions in the National Guard of the United States. With the creation of the Air Force in 1947, members of the Air National Guard accordingly are simultaneously members of the “Air National Guard of the United States,” which is a reserve component of the U.S. Air Force. *See*

10 U.S.C. § 10101; *Perpich v. Dep’t of Def.*, 496 U.S. 334, 345 (1990) (commenting that the 1933 amendments created “two overlapping but distinct organizations”). These federal reserve components consist of all federally-recognized members and units of a state’s National Guard, 10 U.S.C. §§ 10105, 10111, and their fundamental purpose “is to provide trained units and qualified persons available for active duty in the armed forces, in time of war or national emergency, and at such other times as the national security may require.” 10 U.S.C. § 10102.

28. As specified in 10 U.S.C. § 12641, members of the reserve components—to include members of the Air National Guard—must comply with and maintain the readiness standards established by the Secretaries of the Army and Air Force, regardless of their duty status, so that they are “Always Ready, Always There” to respond to these vital national security requirements: “§ 12641. Standards and procedures: Secretary to prescribe[:] (a) The Secretary concerned shall, by regulation, prescribe—(1) standards and qualifications for the retention and promotion of members of the reserve components under his jurisdiction; and (2) equitable procedures for the periodic determination of the compliance of each such Reserve with those standards and qualification. (b) If a Reserve fails to comply with the standards and qualifications prescribed under subsection (a), he shall—(1) if qualified, be transferred to an inactive reserve status; (2) if qualified, be retired without pay; or (3) have his appointment or enlistment terminated.”

29. Congress intended the Air National Guard to be “an integral part of the first line of defenses of the United States,” and that the “strength and organization of the . . . Air National Guard . . . be maintained and assured at all times.” 32 U.S.C. § 102. Further, pursuant to 32 U.S.C. § 501, “[t]he discipline, including training, of the . . . Air National Guard shall conform to that of the Air Force.”

30. Because members of the Air National Guard are also members of the Air National Guard of the United States, they may be involuntarily ordered to active duty with minimal notice when necessary to augment the active components of the armed forces. When so ordered to active duty, “each member of the . . . Air National Guard of the United States who is ordered to active duty is relieved from duty in the National Guard of his State, or of the Commonwealth of Puerto Rico, Guam, or the Virgin Islands or the District of Columbia, as the case may be, from the effective date of his order to active duty until he is relieved from that duty.” 32 U.S.C. § 325(a). Statutory examples of these involuntary active duty authorities include, but are not limited to, involuntary active duty under 10 U.S.C. §§ 12301(a), 12302, 12304, 12304a, and 12304b. See generally Department of Defense Instruction 1215.06, *Uniform Reserve, Training, and Retirement Categories for the Reserve Components*, March 11, 2014 (with change 1, May 19, 2015). The Department of Defense further requires the Secretary of the Air Force to “[e]stablish necessary criteria and procedures to ensure . . . [t]rained and qualified [reserve component] units and individuals are available for [active duty] throughout the entire spectrum of [Department of Defense] requirements, including war and national emergency, contingency operations, homeland defense, defense support of civil authorities, and other national security requirements.” Department of Defense Instruction 1215.06, encl. 2, para. 5b.

**Role of the States Under Title 32 Limited to Selection of Officers and
Conducting Training as Prescribed by Congress**

31. Congressional power to regulate the National Guard, in particular, through the Militia Clauses “is unlimited, except in the two particulars of officering and training them, according to the discipline to be prescribed by Congress...” *Houston v. Moore*, 18 U.S. 1, 16 (1820).

32. The governor may order the National Guard AGR to full-time duty under Title 32 only with the consent of the Secretaries of the Army or the Air Force. See 32 U.S.C. §§ 328, 502(f).

Federal consent may be withdrawn by the Secretaries of the Army or Air Force at any time and for any reason. *See* 32 U.S.C. § 328.

33. While the governor acts as the commander-in-chief the National Guard while members are in Title 32 status, members are also required to comply with all federal regulations issued pursuant to Title 32. *See* 32 U.S.C. § 110; 32 U.S.C. § 501; 10 U.S.C. § 12641.

34. States' constitutions and statutes recognize that any state-specific order must comply with applicable federal regulations. *See, e.g.*, WASH. CONST., art. X, § 2 (“The legislature shall provide by law for organizing and disciplining the militia in such manner as it may deem expedient, not incompatible with the Constitution and laws of the United States.”).

35. In Oklahoma, state statutory law recognizes the Governor as Commander in Chief and authorizes the Governor, as Commander in Chief of the Oklahoma National Guard, to “perform such other acts in keeping with the laws of the Commander in Chief, subject to the laws of the United States and regulations prescribed by the President of the United States.” 44 OKLA. STAT. § 23; *see also* 44 OKLA. STAT. § 49 (“Application of Army customs – Regulations and usage. All matters relating to the organization, commissioning and discharging of officers, enlisting and discharge of enlisted men, discipline, and government of the National Guard, not otherwise provided in this code shall be decided by customs, regulations, and usage of the United States Army or the United States Air Force or National Guard regulations.”).

Enforcement of Federal Regulations

36. Congress has provided various means for the federal government to enforce compliance with federal military regulations.

37. In accordance with 32 U.S.C. § 105, federal inspections may be ordered to ensure National Guard units and members meet federal standards and to determine eligibility for the issuance of military property and federal recognition.

38. The federal military has the power to administratively remove a service member from the National Guard if that member fails to comply with federal regulatory standards (withdrawal of federal recognition for officers, or administrative discharge for enlisted). *See* 32 U.S.C. § 323; *see also* 32 U.S.C. §§ 322, 324.

39. In addition, if a state's National Guard fails to comply with a regulatory requirement prescribed according to Title 32, Congress has authorized the President to withhold federal funds from the state under authority of 32 U.S.C. § 108. As stated in *Charles v. Rice*, "States that fail to comply with federal regulations risk forfeiture of federal funds allocated to organize, equip, and arm state Guards." 28 F.3d 1312, 1315 (1st Cir. 1994); *see also Walker v. United States*, 40 Fed. Cl. 666, 668 (Ct. Cl. 1998).

40. Congress has also provided a means for courts-martial of National Guard service members who are not in Federal service. Pursuant to 32 U.S.C. § 326, "[i]n the National Guard not in Federal service, there are general, special, and summary courts-martial constituted like similar courts of the Army and the Air Force. They have the jurisdiction and powers, except as to punishments, and shall follow the forms and procedures, provided for those courts." Section 327 of title 32 of the U.S. Code enumerates the specific convening authorities for such courts-martial.

41. Finally, Department of Defense policy prohibits state National Guards from issuing regulations on National Guard matters that are inconsistent with federal military regulations issued by the Department of Defense, Departments of the Army and the Air Force, or the

National Guard Bureau. For example, Department of Defense Directive 5105.83, *National Guard Joint Force Headquarters - State (NG JFHQs-State)*, provides: “The NG JFHQs-State may issue State regulations on NG matters pertaining to their respective States consistent with State and U.S. laws and DoD, CJCS, Departments of the Army and the Air Force, and NGB policies, regulations, instructions, and directives.”

Military Processes Available For Individual Members Who Are Discharged

42. Certain members of the National Guard discharged for failure to comply with the regulations of the Departments of the Army or the Air Force may seek a review of his or her discharge through the cognizant Army or Air Force Discharge Review Board (DRB). *See* 10 U.S.C. § 1553; Department of Defense Instruction 1332.28, *Discharge Review Board (DRB) Procedures and Standards*. The DRB is empowered to change and issue a new discharge on grounds of equity or propriety. DRBs may consider factors such as the applicant's service history, awards and decorations, letters of commendation or reprimand, wounds received in action, acts of merit, length of service, convictions by court-martial or civilian convictions, non-judicial punishments, records of unauthorized absence, or records relating to the member's discharge. *Id.*

43. Discharged service members may also seek review from the appropriate Board for Correction of Military Records (BCMR), which is the Army Board for Correction of Military Records for Army National Guard personnel and Air Force Board for Correction of Military Records of Air National Guard personnel. 10 U.S.C. § 1552; Air Force Instruction 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*; Army Regulation 15-185, *Army Board for Correction of Military Records*. These BCMRs have broad authority—more extensive authority than DRBs—to upgrade discharges, void discharges, alter reenlistment codes, and

remove otherwise inaccurate or adverse documents from a service member's record. Congress authorized the BCMRs to correct any federal military record when it is necessary to correct an error or remove an injustice. *Id.* If a service member is unable to obtain relief through the appropriate DRB or BCMR, then the service member may elect to challenge the agency's decision and administrative proceedings in federal court under applicable federal law.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 22nd day of December 2021.

MULCAHY.KEVIN.AL
AN.1087832518
KEVIN A. MULCAHY
Colonel, USAF
Deputy Director, Manpower and Personnel
National Guard Bureau

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MULCAHY
DECLARATION
Attachment A



NATIONAL GUARD BUREAU

111 SOUTH GEORGE MASON DRIVE
ARLINGTON, VA 22204-1373

08 OCT 21

**MEMORANDUM FOR THE ADJUTANTS GENERAL AND THE COMMANDING
GENERAL OF THE DISTRICT OF COLUMBIA**

**SUBJECT: Implementation Guidance for Mandatory Coronavirus Disease 2019
Vaccination of National Guard Title 5 Employees**

- References:
- (a) Deputy Secretary of Defense Memorandum, "Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Civilian Employees, 1 October 2021
 - (b) Secretary of Defense Memorandum, "Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members, 24 August 2021.
 - (c) Executive Order 14043, "Requiring Coronavirus Disease 2019 Vaccination for Federal Employees," September 9, 2021
 - (d) Safer Federal Workforce Task Force COVID-19 Workplace Safety: Agency Model Safety Principles, 13 September 2021

1. This memorandum provides implementation guidance to the National Guards of the States, Territories, and the District of Columbia regarding the new Department of Defense mandatory Coronavirus Disease 2019 (COVID-19) vaccination requirements (reference (a)) for all DoD Civilian Employees.

2. On September 9, 2021, the President of the United States directed mandatory COVID-19 vaccination for all Federal employees in order to ensure the health and safety of the Federal workforce and members of the public with whom they interact, subject to exceptions as required by law. The following guidance applies to National Guard Title 5 Civilian Employees located in the States, Territories, and in the District of Columbia. This guidance does not apply to Title 32 Military Technicians, Active Guard and Reserve personnel or M-Day / Drill Status Guardsmen. These personnel will comply with applicable DoD COVID-19 vaccine policies.

3. Per Presidential EO 14043 "*Requiring Coronavirus Disease 2019 Vaccination for Federal Employees*," dated 9 Sep 2021 (reference (c)) and Deputy Secretary of Defense Memorandum, "*Mandatory Coronavirus Disease 2019 Vaccination of DoD Civilian Employees*," dated 1 Oct 201, all National Guard Title 5 Civilian Employees must be fully vaccinated by November 22, 2021. Employees are considered fully vaccinated two weeks after completing the second dose of a two-dose COVID-19 vaccine or two weeks after receiving a single dose of a one-dose COVID-19 vaccine. Those who are not currently fully vaccinated must meet the following deadlines in order to comply with the Presidential EO and the DoD requirements to be fully vaccinated by November 22, 2021:

- a. October 11: first dose deadline (if receiving the Moderna vaccine)

b. October 18: first dose deadline (if receiving the Comirnaty/Pfizer-BioNTech vaccine)

c. November 8: second dose deadline (if receiving the Moderna and Comirnaty/Pfizer-BioNTech vaccines)

d. November 8: first (only) dose deadline (if receiving the Johnson & Johnson/Janssen vaccine).

4. Vaccines must be either fully licensed or authorized for emergency use by the U.S. Food and Drug Administration (e.g., Comirnaty/Pfizer-BioNTech, Moderna, Johnson & Johnson/Janssen); listed for emergency use on the World Health Organization Emergency Use Listing (e.g., AstraZeneca/Oxford); or an approved clinical trial vaccine for which vaccine efficacy has been independently confirmed (e.g., Novavax). Those with previous COVID-19 infection(s) are not considered fully vaccinated on that basis.

5. National Guard Title 5 Civilian employees are eligible to receive the COVID-19 vaccine at any DoD vaccination site, including military medical treatment facilities. They may also opt to receive the COVID-19 vaccine at locations other than DoD vaccination sites, to include retail stores, private medical practices, and/or local and state public health department sites. Employees, including those who have already received COVID-19 vaccines, must be prepared to provide a copy of their COVID-19 vaccine record in order to meet forthcoming procedures for DoD COVID-19 vaccination verification requirements.

5. All new National Guard Title 5 civilian employees must be fully vaccinated by their entry on duty (start) date or November 22, 2021, whichever is later.

6. This guidance is provided under an emergency use authority and will be implemented immediately upon publication, however it is highly recommend State Human Resource Offices (HROs) satisfy applicable labor relations obligations under chapter 71 of title 5, U.S.C., prior to or soon after implementation and when implementing workplace safety plans.

7. Please ensure widest dissemination to applicable Title 5 National Guard Civilian Employees. Additional guidance, including procedures for processing vaccination exemption requests, will be forthcoming from the Under Secretary of Defense for Personnel and Readiness (USD(P&R)).

8. This memorandum and other COVID-19 guidance memoranda are centrally located at: <https://www.defense.gov/Explore/Spotlight/Coronavirus/Latest-DOD-Guidance/>. J1 point of contact is Mr. Nancy C. Zbyszinski, NGB-J1-Vice at 703-601-7991 or nancy.c.zbyszinski.civ@army.mil.



ERIC K. LITTLE
Major General, USA
Director, Manpower and Personnel
National Guard Bureau

Attachments:
As Stated

MULCAHY
DECLARATION
EXHIBIT B



NATIONAL GUARD BUREAU

111 SOUTH GEORGE MASON DRIVE
ARLINGTON, VA 22204-1373

10 NOV 2021

**MEMORANDUM FOR THE ADJUTANTS GENERAL AND THE COMMANDING
GENERAL OF THE DISTRICT OF COLUMBIA**

**SUBJECT: National Guard Implementation Guidance for Force Health Protection
(Supplement 23) Revision 2 - Mandatory Coronavirus Disease 2019 Vaccination
Attestation, Screening Testing and Verification**

1. This memorandum rescinds and replaces National Guard Implementation Guidance for Force Health Protection (Supplement 23) Revision 1 - Mandatory Coronavirus Disease 2019 Vaccination Attestation, Screening Testing and Verification for National Guard Title 5 Employees, and provides updated implementation guidance regarding DoD Force Health Protection (FHP) Guidance (Supplement #23), Revision 2. The guidance includes DoD mandatory Coronavirus Disease 2019 (COVID-19) vaccination attestation, vaccination verification requirements, exemption process, and enforcement for Title 5 National Guard employees. Civilian vaccine attestation, verification requirement guidance, exemption process, and enforcement is not applicable to Title 32 dual status military technicians who will follow directives and procedures issued by their respective service components and supplemented by the Army National Guard and the Air National Guard. OUSD(P&R) FHP (Supplement #23) Revision 2 guidance is very broad in its approach and provides amplifying guidance on workplace safety including vaccination requirements, screening testing requirements for purposes of physical access to DoD facilities, and testing supply information. Not all guidance applies to all National Guard personnel.
2. This guidance is not applicable to individuals employed under Title 32 United States Code 709. Those individuals will be subject to vaccination requirements outlined by their respective service components and supplemented by policy implemented under the authority of their respective Adjutant General or Commanding General.
3. Procedures for screening and Testing of T5 NG Employees, Contractors, and visitors can be found in Attachment 7, COVID-19 Screening Testing Requirements (Applicable to Title 5 NG Employees, DoD Contractors, and all visitors to DoD facilities to include Military Service Members (Title 32 Military Technicians, M-Day, and Drill Status Guardsmen).
4. Title 5 National Guard employees are required to be fully vaccinated by 22 November 2021, subject to exemptions as required by law. This mandate also includes Title 5 National Guard employees who are engaged in full-time telework or remote work. Additional information about the requirements for Title 5 National Guard employees can be found in Attachment 1, COVID-19 Vaccination Requirements and Documentation for Title 5 National Guard Employees.

5. Title 5 National Guard employees may request an exemption on the basis of a disability (which includes medical conditions) or a sincerely held religious belief, practice or observance. Exemptions will be granted in limited circumstances and only where legally required. Generally, such requests should be submitted in writing. Employees may use Attachment 5, DD Form 3176- "Request for a Medical Exemption or Delay to the COVID-19 Vaccination Requirement" or Attachment 6, DD Form 3177- "Request for a Religious Exemption or Delay to the COVID-19 Vaccination Requirement" to submit their request.
6. Title 5 National Guard employees who refuse to be vaccinated, or to provide proof of vaccination, are subject to disciplinary measures, up to and including removal from Federal service, unless the employee has received an exemption or an exemption request is pending. Please see Attachment 1 for further guidance.
7. The States will need to ensure they are complying with any required I&I that is laid out in your CBA but are advised to implement as soon as possible. We do acknowledge and understand that compliance with the CBA may result in a short delay in implementation as it relates to exemption requests and enforcement.
8. Reporting Requirement. J1 in coordination with the G1 and A1 will provide all reporting requirements to the State HROs.
9. Frequently asked questions are being collected and answers are being updated on a continual basis at: <https://gko.portal.ng.mil/joint/J1/D06>. Additional Department of Defense COVID-19 guidance is centrally located at: <https://www.defense.gov/Explore/Spotlight/Coronavirus/Latest-DOD-Guidance/>. J1 point of contact for this memorandum is Nancy C. Zbyszinski, NGB-J1-Vice at 703-601-7991 or nancy.c.zbyszinski.civ@army.mil.



ERIC K. LITTLE
Major General, USA
Director, Manpower and Personnel
National Guard Bureau

Attachments:

1. Attachment 1: COVID-19 Vaccination Requirements and Documentation for Title 5 National Guard Employees (Applicable to Title 5 National Guard Employees only)
2. Attachment 2: Requirements for DoD Contractor Personnel, Official Onsite Visitors, and Others Seeking Access to Facilities
3. Attachment 3: Draft DD Form 3175 – "Civilian Employee Certification of Vaccination" (Applicable to Title 5 National Guard Employees only)
4. Attachment 4: DD Form 3150 – "Contractor and Visitor Certification of Vaccination" (Applicable to Contractors for vaccine certification and for all visitors to DoD facilities)

5. Attachment 5: DD Form 3176 – “Request for a Medical Exemption or Delay to the COVID-19 Vaccination Requirement”
6. Attachment 6: DD Form 3177 – “Request for a Religious Exemption or Delay to the COVID-19 Vaccination Requirement”
7. Attachment 7: COVID-19 Screening Testing Requirements
8. Attachment 8: Requirements for Obtaining Self-Collection Kits and Self-Tests
9. Attachment 9: Privacy Requirements (Applicable to all personnel who may store and retain DD Form 3175, DD Form 3150, and proof of vaccination)
10. Attachment 10: Timelines to Be Considered Fully Vaccinated (Applicable to Title 5 NG Employees and Informational Purposes Only for T32 Military Technicians, Title 32 AGR, and ANG/ARNG Drill Status Guardsmen)
11. Attachment 11: Sample Memoranda
 - a. Figure 1: “Sample 5 day counseling memorandum”
 - b. Figure 2: “Sample exemption decision approval memorandum”
 - c. Figure 3: “Sample exemption decision temporary approval memorandum”
 - d. Figure 4: “Sample exemption decision disapproval memorandum”
12. Attachment 12: References

ATTACHMENT 1

COVID-19 Vaccination Requirements and Documentation for Title 5 NG Employees

1. Vaccination Requirement

a. T5 NG Employees who are not currently fully vaccinated must meet or have met the following deadlines, if using vaccines that are fully licensed or authorized for emergency use by the FDA, in order to be fully vaccinated by November 22, 2021:

(1) October 11: first dose deadline (if receiving the Moderna vaccine);

(2) October 18: first dose deadline (if receiving the Pfizer-BioNTech/COMIRNATY vaccine);

(5) November 8: second dose deadline (if receiving the Moderna and PfizerBioNTech/COMIRNATY vaccines);

(4) November 8: first (only) dose deadline (if receiving the Johnson & Johnson/Janssen vaccine); and

(5) If T5 NG Employees use an authorized vaccine other than those listed above, they are responsible for being fully vaccinated by November 22, 2021.

b. T5 NG Employees who are not fully vaccinated must comply with all DoD requirements for individuals who are not fully vaccinated, including those requirements related to masking, physical distancing, and travel. Regular COVID-19 testing is not required prior to November 22, 2021. On or after November 22, 2021, weekly COVID-19 testing is required for those T5 NG Employees who are not fully vaccinated, including those who have medical or religious exemptions. T5 NG Employees who telework or work remotely on a full-time basis are not subject to weekly testing, but must provide a negative result from a test performed within the prior 72 hours for entry into a DoD facility.

c. T5 NG Employees are eligible to receive the COVID-19 vaccine at any DoD vaccination site, including military medical treatment facilities. They may also opt to receive the COVID-19 vaccine at locations other than DoD vaccination sites, such as retail stores, private medical practices, and/or local and State public health department sites.

d. New T5 NG Employees must be fully vaccinated by their entry on duty (start) date or November 22, 2021, whichever is later.

(1) The Vice Chief of the National Guard Bureau may approve temporary exemptions in writing for up to 60 days after a T5 NG Employee's start date for urgent, mission-critical hiring needs in circumstances in which a T5 NG Employee could not have been fully vaccinated between the time the job opportunity announcement closes and the T5 NG Employee's start date. States will forward requests for these temporary exemptions through NGB-J1-TCP.

(2) States must address the COVID-19 vaccination requirement in job opportunity announcements and tentative and final offer letters. For hiring actions currently

underway, States must issue revised tentative and final offer letters.

e. T5 NG Employees are authorized official duty time to receive vaccination doses. For T5 NG Employees who are unable to receive a COVID-19 vaccination within their duty hours, regular overtime rules are applicable.

f. T5 NG Employees are authorized administrative leave for purposes of taking a family member to get a vaccination and for themselves to recover from vaccination. T5 NG Employees who experience an adverse reaction to a COVID-19 vaccination should be granted no more than 2 workdays of administrative leave for recovery associated with a single COVID-19 vaccination dose. T5 NG Employees should use the time and attendance code for "physical fitness" to record administrative leave for COVID-19 vaccination recovery time that prevents the employee from working or for taking a family member to be vaccinated for COVID-19. The type hour code is "LN" and the environmental/hazard/other code is "PF". Non-appropriated fund employers should code administrative leave related to COVID-19 in a way that can be easily reported.

2. Verification of Vaccination

a. T5 NG Employees who have received a dose of a one-dose vaccine, or both doses of a two-dose vaccine, must provide proof of vaccination to their supervisors. For purposes of the vaccination data submission and verification requirements, "supervisor" includes authorized human resources officials. Proof of vaccination may be submitted in hard copy or in an electronic format, and the proof may be a photocopy or photograph of the vaccination record, if it legibly displays the data points to be verified by supervisors. T5 NG Employees who are not fully vaccinated must provide proof of vaccination to their supervisors upon receipt of each required dose. Acceptable proof includes:

(1) A copy of the record of immunization from a health care provider or pharmacy;

(2) A copy of the COVID-19 Vaccination Record Card (CDC Form MLS 319813_r, published on September 3, 2020);

(3) A copy of medical records documenting the vaccination;

(4) A copy of immunization records from a public health or State immunization information system; or

(5) A copy of any other official documentation containing the data points required to be verified by the supervisor.

b. In addition to providing proof of vaccination to their supervisors, T5 NG Employees also will complete Section A of DD Form 3175 (Attachment 3). T5 NG Employees with access to milConnect (<https://milconnect.dmdc.osd.mil/>) will complete the DD Form 3175 via milConnect; otherwise use of a hard copy2 is acceptable. T5 NG Employees who complete the DD Form 3175 via milConnect do not need to email or otherwise transmit a copy of the form to their supervisors. T5 NG Employees using a hard copy will provide the hard copy to their supervisor. T5 NG

Employees are required to complete the DD Form 3175 even if they already completed the DD Form 3150 (Attachment 4).

c. Upon receiving proof of vaccination, a T5 NG Employee's supervisor will verify that the proof of vaccination provided contains the following data points:

(1) Type of vaccine administered;

(2) Number of doses received;

(3) Date(s) of administration; and

(4) Name of the health care professional(s) or clinic site(s) administering the vaccine(s).

d. In addition to verifying that a T5 NG Employee's proof of vaccination includes the required data points, supervisors also will complete Section B of DD Form 3175 beginning on or about November 7, 2021 (or when activation of the form is completed for supervisor use). Supervisors with access to milConnect (<https://milconnect.dmdc.osd.mil/>) will complete the DD Form 3175 via milConnect using the T5 NG Employee's Employee Identification Number; otherwise use of a hard copy is acceptable.

e. State's medical record keeping practices must ensure all privacy requirements contained in Attachment 9 are followed. States may choose to centrally maintain the proof of vaccination and DD form 3175 in their HRO offices or they may allow supervisors to locally maintain copies. Supervisors will retain T5 NG Employees' proof of vaccination and DD Form 3175 (for those T5 NG Employees not using milConnect) in accordance with their State's recordkeeping requirements for T5 NG Employee medical records and the privacy requirements contained in Attachment 9. Supervisors should not ask for copies of the DD Form 3175 from those employees who used milConnect to complete the form. Supervisors who receive completed copies of the DD Form 3175 from T5 NG Employees who completed the DD Form 3175 using milConnect shall not maintain the copy.

f. T5 NG Employees may not be required to use their own personal equipment for the purpose of submitting proof of vaccination or DD Form 3175. T5 NG Employees who submit proof of vaccination or the DD Form 3175 in an electronic format are encouraged to use encrypted email or password protected files with DoD SAFE file transfer (<https://safe.apps.mil/>).

3. Enforcement of T5 NG Employee COVID-19 Vaccination Requirement:

a. T5 NG Employees who refuse to be vaccinated, or to provide proof of vaccination, are subject to disciplinary measures, up to and including removal from Federal service, unless the T5 NG Employee has received an exemption or the T5 NG Employee's timely request for an exemption is pending a decision. The National Guard will generally follow the recommended enforcement procedures, subject to CNGB Instruction 1400.25 Vol 752 and bargaining agreements.

b. Progressive enforcement actions include, but are not limited, to:

(1) A 5 calendar-day period of counseling and education;

(2) A short suspension without pay, generally 14 calendar days or less, with an appropriate notice period. Senior Executive Service members may only be suspended for more than 14 calendar days;

(3) Removal from Federal service for failing to follow a direct order.

c. During the notice periods preceding adverse employment actions, T5 NG Employees generally should not be placed on administrative leave. States should require T5 NG Employees to continue to telework or report to the worksite and follow all mitigation measures applicable to not fully vaccinated T5 NG Employees when reporting to the worksite.

d. States will designate officials, at the appropriate organizational level, to handle the disciplinary process to promote consistent application of disciplinary measures. Such officials will decide each case with due regard to the facts and circumstances of that case. States may begin enforcement action as soon as November 22, 2021, for T5 NG Employees who are not fully vaccinated and who do not have an exemption request approved or a timely request pending decision.

e. Supervisors should contact their servicing human resources and legal offices to discuss options available to address individual situations regarding enforcement of this requirement.

f. States are encouraged to identify an occupational health office, medical office, or other resource with which a T5 NG Employee may consult during the period of counseling and education.

4. Exemptions to T5 NG Employee COVID-19 Vaccination Requirement:

a. T5 NG Employees may request an exemption on the basis of a medical condition or circumstance or a sincerely held religious belief, practice or observance. Because all T5 NG Employees must now be vaccinated against COVID-19 as a condition of employment, exemptions will be granted in limited circumstances and only where legally required. The information collected must be handled in accordance with the privacy requirements in Attachment 9.

b. Decision Authority. It is recommended that TAGs designate, in writing, one original deciding official to adjudicate all exemption requests for T5 employees. States should establish an approval process that preserves the ability for TAGs to consider the final appeal. In establishing exemption processes, States will ensure that the management official designated to make decisions concerning requests for exemption from the COVID-19 vaccination requirement make such decisions in coordination with the organization's servicing legal office and are at an appropriate level within the organization to consider the impact, if any, of the volume of requests and to promote similar cases being handled in a consistent manner. Such officials will decide each case with due regard to the facts and circumstances of that case.

c. Employee Notice. States will inform T5 NG Employees how to make a request for

an exemption and notify them that requests must be submitted no later than November 19, 2021, absent extenuating circumstances, to be considered timely.

d. **Employee Requests.** To make a request for exemption from vaccination, T5 NG Employees must provide an official statement which describes the medical or religious reason the employee objects to vaccination against COVID-19. Generally, such requests will be submitted in writing. T5 NG Employees may use DD Form 3176 (Attachment 5) or DD Form 3177 (Attachment 6) to submit their request. T5 NG Employees who make oral requests may be provided a sample written request format and/or be interviewed to develop the basis for the request. While the use of the DD Form 3176 and DD Form 3177 is optional for DoD civilian employees, when T5 NG Employees make a request, they must provide the following information in writing to fairly consider the exemption request.

(1) Medical Exemption.

(a) A description of the medical condition or circumstance that is the basis for the request for a medical exemption from the COVID-19 vaccination requirement;

(b) An explanation of why the medical condition or circumstance prevents the employee from being safely vaccinated against COVID-19;

(c) If it is a temporary medical condition or circumstance, a statement concerning when it will no longer be a medical necessity to delay vaccination against COVID-19; and

(d) Any additional information, to include medical documentation that addresses the employee's particular medical condition or circumstance, which may be helpful in resolving the employee's request for a medical exemption from the COVID-19 vaccination requirement.

(e) If the employee is not submitting their exemption request via DD Form 3176, they must provide a copy of a written and endorsed medical statement from a medical provider detailing how the individual's condition and medical circumstances are such that COVID-19 vaccination is not considered safe.

(2) Religious Exemption.

(a) A description of the religious belief, practice, or observance that is the basis for the request for a religious exemption from the COVID-19 vaccination requirement;

(b) A description of when and how the T5 NG Employee came to hold the religious belief or observe the religious practice;

(c) A description of how the T5 NG Employee has demonstrated the religious belief or observed the religious practice in the past;

(d) An explanation of how the COVID-19 vaccine conflicts with the religious belief, practice, or observance;

(e) A statement concerning whether the T5 NG Employee has previously raised an objection to a vaccination, medical treatment, or medicine based on a religious belief or practice. If so, a description of the circumstances, timing, and resolution of the matter; and

(f) Any additional information that may be helpful in resolving the T5 NG Employee's request for a religious exemption from the COVID-19 vaccination requirement.

(g) Recommended Advisory Team considerations for Religious Exemptions: Is the request based on the expression of a sincerely held religious belief? If it is based on a sincerely held belief, the relevant expression can include any religious practice, whether or not compelled by, or central to, an organized system of religious belief. Does the requirement to receive the vaccine substantially burden the expression of that belief?

e. Minimum Requirements for Exemption Procedures. States will ensure that exemption procedures require the following measures.

(1) Development of a written factual record that includes the following:

(a) The basis for the claim;

(b) The nature of the T5 NG Employee's job responsibilities; and

(c) The reasonably foreseeable effects on the agency's operations, including protecting other agency employees and the public from COVID-19, if the civilian employee remains unvaccinated.

(2) Designation of the T5 NG Employee's supervisor for completing Section B of the T5 NG Employee's DD Form 3175, as the proper recipient for a T5 NG Employee's request for exemption. For purposes of exemption request procedures, "supervisor" includes authorized human resources officials. Upon receipt, the supervisor will update the DD Form 3175 to indicate a request for exemption determination is pending and forward the request to the office supporting the designated decision maker.

(3) A process for the decision maker to obtain any reasonably necessary additional information (for example, medical documentation, an interview of the DoD civilian employee, or a supervisor statement) and to consult with, as appropriate, subject matter experts within DoD such as occupational health personnel, public health personnel, equal employment opportunity advisors, chaplains, and human resources personnel.

(a) Recommend that States initiate an Advisory Team to assist in exemption determination. Advisory Teams should be a diverse group which may include both military and civilian personnel.

(b) Although states should coordinate developing their exemption process with their Labor Relations Specialist, State Equal Employment Manager, and their Judge Advocate General, utilizing these individuals to run the process or make decisions in the process is discouraged as doing so may create a conflict of interest

when these individuals are called upon to defend the States' actions.

(c) States must seek guidance from qualified religious personnel such as chaplains to review claims for religious exemption for a determination as to whether the claim constitutes a sincerely held religious belief.

(d) States must seek guidance from qualified medical personnel to review claims for medical exemption for a determination as to whether the claimant has a bona fide medical condition.

(4) A written determination, including the reason(s) for that determination, by the decision maker. In cases where the exemption is temporary or denied, the determination must specify a date by which the T5 NG Employee must be fully vaccinated against COVID-19. In specifying that date, T5 NG Employees must be given a minimum period of 14 days to receive their first (or only) dose of a COVID-19 vaccine.

(5) Provision of the written determination to the T5 NG Employee's supervisor, who, in turn, provides the T5 NG Employee with a copy of the written determination, updates the DD Form 3175, and informs the T5 NG Employee of next steps.

(6) Unless exemption decision is appealed to TAG, decision authority's determination is the final agency decision.

f. Appeals.

(1) IAW with reference j, TAG will be the final decision authority on all appeal requests.

(2) Employees who disagree with the decision provided by the designated deciding official may appeal that decision by providing notice directly to TAG through an individual or individuals within the state's Human Resources Office designated for receiving and processing such appeals. If no appeal is received within 7 calendar days of the decision being issued, the decision is considered final.

(3) Appeals must contain the following information.

(a) Employees original request for exemption and all official communication received by the employee from the state regarding that appeal.

(b) An explanation as to why the appellant feels that the state either did not properly follow the established appeals process or why they feel the deciding official did not consider pertinent information included in the exemption request.

(c) Although the employee is free to introduce new information not included in the original exemption request, this new information will only be considered in rare circumstances and normally when it could not have been reasonably known to the appellant when filing the original appeal.

(4) Upon receipt of a TAG appeal, the identified individual receiving appeal will promptly review the contents of the appeal for completeness.

(a) If the appeal contains all the required information, the appeal will be

forwarded to TAG for consideration and decision on the appeal.

(b) If the appeal is missing critical information, the appeal will be returned to the appellant with instructions as to what was missing and allow the appellant an opportunity to resubmit.

(c) In no case will the individual receiving the appeal make personal judgments as to the merits of the appeal. They will only ensure the completeness of the appeal and process it accordingly.

(5) TAG decisions are the final agency decision.

g. Additional Guidance.

(1) Requests for medical exemption will be treated as medical records to be maintained separately from other personnel files. Both medical and religious exemption requests will be maintained in accordance with the privacy requirements at Attachment 9.

(2) A T5 NG Employee's failure to submit a timely request for exemption is not a basis to deny a request but may be relevant in evaluating the request.

(3) Discipline for failure to meet the COVID-19 vaccination requirement will not be initiated against a T5 NG Employee while a timely request for a medical or religious exemption from the COVID-19 vaccination requirement is pending determination. If a T5 NG Employee submits a request after discipline is initiated, disciplinary measures may be held in abeyance where appropriate.

(4) T5 NG Employees who are not fully vaccinated but who have a pending request for exemption from vaccination are required to comply with any mitigation measures that are applicable to all T5 NG Employees in the worksite who are not fully vaccinated (for example, screening testing (Attachment 7), masking, and physical distancing). Requests for reasonable accommodation related to those mitigation measures may be analyzed separately from requests for exemption from vaccination.

(5) A T5 NG Employee who receives an exemption from the vaccination requirement may, because of the exemption, be unable to perform the duties and responsibilities of the position without a change in working conditions. Such matters will be referred to the reasonable accommodation process.

(6) Requests for exemption from candidates for employment will be handled consistent with the provisions in this attachment, except for those in paragraph 4, sub paragraph c.

ATTACHMENT 2

Requirements for DoD Contractor Personnel, Official Onsite Visitors, and Others Seeking Access to Facilities

1. DoD Contractor Personnel

a. For DoD contractor personnel, the DoD civilian vaccination deadline of November 22, 2021, does not apply. Vaccination requirements for DoD contractor personnel will be in accordance with reference (i), as implemented by reference (j), as directed under Executive Order 14042.

b. DoD contractor personnel will complete the DD Form 3150, "Contractor and Visitor Certification of Vaccination" (Attachment 4), maintain a current completed DD Form 3150, and show it to authorized DoD personnel upon request. Failure to complete the DD Form 3150 may result in denying DoD contractor personnel access to the DoD facility to which access is sought.

c. DoD contractor personnel who are not fully vaccinated against COVID-19 because they are not performing under a covered contract that requires COVID-19 vaccination, due to a legally required accommodation, or who decline to attest to their COVID-19 vaccination status will be subject to COVID-19 screening testing at least weekly as set forth in this guidance (Attachment 7). DoD contractor personnel who refuse required screening testing will be denied access to DoD facilities. d. In accordance with applicable contracts, DoD contractor personnel may be offered, but are not required to receive, COVID-19 vaccines at their DoD worksites.

2. Official Onsite Visitors

a. Official onsite visitors will complete DD Form 3150, "Contractor and Visitor Certification of Vaccination"³ (Attachment 4); and maintain a current completed DD Form 3150 and show it to authorized DoD personnel, upon request. Failure to complete the DD Form 3150 may result in denial of an official onsite visitor's access to the DoD facility to which access is sought.

b. Official visitors who are not fully vaccinated against COVID-19, or who decline to volunteer their COVID-19 vaccination status, must show an electronic or paper copy of negative results from an FDA-authorized or approved COVID-19 test administered no earlier than 72 hours prior to their visit. If an official visitor is unable to show a negative COVID-19 test result, the visitor may be provided onsite self-testing, if available, or will be denied access to the DoD facilities to which access is sought. Service members who are not on active duty at the time of their official visit are subject to the requirements in this paragraph.

ATTACHMENT 3

DD Form 3175 – “Civilian Employee Certification of Vaccination”

CUI (when filled in)

DoD CIVILIAN EMPLOYEE CERTIFICATION OF VACCINATION

PRIVACY ACT STATEMENT

Authority: Pursuant to 5 U.S.C. chapters 11 and 79, and in discharging the functions directed under Executive Order 14043, Requiring Coronavirus Disease 2019 Vaccination for Federal Employees (Sept. 9, 2021), DoD is authorized to collect this information. Additional authorities for the systems of records associated with this collection of information also include: E.O. 13991, Protecting the Federal Workforce and Requiring Mask-Wearing; E.O. 12196, Occupational Safety and Health Program for Federal Employees; 10 U.S.C. 113, 10 U.S.C. 136, 10 U.S.C. 7013, 10 U.S.C. 8013, 10 U.S.C. 9013, 10 U.S.C. 2672; DoD Directive 5525.21; and DoD Instruction 6200.03. Providing this information is mandatory, and DoD is authorized to impose penalties for failure to provide the information pursuant to applicable Federal personnel laws and regulations.

Principal Purpose: This information is being collected and maintained to implement Coronavirus Disease 2019 (COVID-19) workplace safety plans, and ensure the safety and protection of the DoD workforce, workplace, and other DoD facilities and environments, consistent with the above-referenced authorities, the COVID-19 Workplace Safety: Agency Model Safety Principles established by the Safer Federal Workforce Task Force, and guidance from the Centers for Disease Control and Prevention and the Occupational Safety and Health Administration.

Routine Use(s): While the information requested on this form is intended to be used primarily for internal purposes, in certain circumstances it may be necessary to disclose this information externally, for example to disclose information to: a person, organization or governmental entity as necessary and relevant to notify them of, respond to, or guard against a public health emergency, or other similar crisis, including to comply with laws governing the reporting of communicable disease or other laws concerning health and safety in the work environment; adjudicative bodies (e.g., the Merit System Protection Board), arbitrators, and hearing examiners to the extent necessary to carry out their authorized duties regarding Federal employment; contractors, grantees, experts, consultants, students, and others as necessary to perform their duties for the Federal government; or agencies, courts, and persons as necessary and relevant in the course of litigation, and as necessary and in accordance with requirements for law enforcement; or to a person authorized to act on your behalf.

A complete list of routine uses may be found in the applicable System of Records Notice (SORN) associated with the collection of this information as follows: For most Federal civilian employees: OPM/GOVT-10, Employee Medical File System Records, 75 Fed. Reg. 35099 (Jun. 21, 2010), amended 80 Fed. Reg. 74815 (Nov. 30, 2015). For Federal civilian employees not covered by OPM/GOVT-10: DPR 39 DoD, DoD Personnel Accountability and Assessment System of Records, 85 Fed. Reg. 17047 (Mar. 26, 2020) (also available at <https://dpcid.defense.gov/Portals/49/Documents/Privacy/SORNs/OSDJS/DPR-39-DoD.pdf>).

Consequences of Failure to Provide Information: Providing this information is mandatory. Unless granted an exemption, all covered Federal civilian employees are required to be vaccinated against COVID-19. Employees are required to provide documentation concerning their vaccination status to their employing DoD Component. Failure to provide this information may subject you to disciplinary action, including and up to removal from Federal service.

INSTRUCTIONS: Section A of this form should be completed by DoD civilian employees only. Service members and employees of DoD contractors should not complete this form. Section B of this form should be completed by the DoD civilian employee's supervisor (or authorized human resources official). This form should be completed by DoD civilian employees only. Service members and employees of DoD contractors should not complete this form.

SECTION A. To be completed by DoD civilian employees.

1. CIVILIAN EMPLOYEE NAME (Last, First, MI):

2. CIVILIAN EMPLOYEE DoD ID NUMBER:

3. PLEASE CHECK ALL THAT COINCIDES WITH YOUR COVID-19 VACCINATION STATUS:

☐

3.a. I am fully vaccinated.

Individuals are considered "fully vaccinated" two weeks after completing the second dose of a two-dose COVID-19 vaccine or two weeks after receiving a single dose of a one-dose vaccine. Accepted COVID-19 vaccines are those which have received a license or emergency use authorization from the U.S. Food and Drug Administration and those COVID-19 vaccines on the World Health Organization Emergency Use Listing. "Fully vaccinated" also includes circumstances in which, or the individual was a participant in a U.S. site clinical trial and has received all recommended doses.

☐

3.b. I have received one or more dose, but I am not yet considered fully vaccinated (in accordance with the definition of fully vaccinated above).

☐

3.c. I have submitted proof of vaccination to my supervisor.

Proof of vaccination includes a copy of the record of immunization from a health care provider or pharmacy, a copy of the COVID-19 Vaccination Record Card, a copy of medical records documenting the vaccination, a copy of immunization records from a public health or state immunization information system, or a copy of any other official documentation. Employees may provide a digital copy of such records, including, for example, a digital photograph, scanned image, or PDF of such a record that is clear and legible.

☐

3.d. I have not received any vaccination doses.

☐

3.e. I have submitted a request for an exemption from vaccination and a decision is still pending.

☐

3.f. I have an approved exemption from vaccination.

DD FORM 3175, DRAFT 20210927

CUI (when filled in)

Controlled by: OUSD(P&R)

Controlled by: ASD(HA)

CUI Category: HLTH: PRVCY; OPSEC

LDC: DL(DoD Only)

POC: osd.pentagon.ousd-p-r.mbx.forms@mail.mil

Page 1 of 2

CUI (when filled in)

4. EMPLOYEE VACCINE INFORMATION <i>(Employees checking block 3.a. should skip block 4 and go to block 5):</i>	
4.a. VACCINE MANUFACTURER(S) OR VACCINE PRODUCT NAME(S): <input type="checkbox"/> Pfizer-BioNTech/Cominaty <input type="checkbox"/> Moderna <input type="checkbox"/> AstraZeneca/Oxford <input type="checkbox"/> Johnson and Johnson (J&J)/Janssen <input type="checkbox"/> Novavax <input type="checkbox"/> Other U.S. Food and Drug Administration licensed or authorized, World Health Organization Emergency Use listed vaccine or U.S. site clinical trial vaccine (provide name):	4.b. DATE OF FIRST DOSE:
	4.c. DATE OF SECOND DOSE <i>(if two-dose vaccine):</i>
	4.d. DATE FULLY VACCINATED:
5. CERTIFICATION/KNOWLEDGE OF POSSIBLE ACTIONS FOR FALSE STATEMENTS	
<input type="checkbox"/> I certify that the information I have provided on this form and the proof of vaccination documentation I have submitted is true and correct. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both (18 U.S.C. 1001). I understand that making a false statement on this form could result in additional administrative action including an adverse personnel action up to and including removal from my position.	
6. CIVILIAN EMPLOYEE SIGNATURE:	7. DATE:
SECTION B. To be completed by the supervisor of the DoD civilian employee completing section A (or an authorized human resources official)	
8. SUPERVISOR PROOF OF VACCINATION REVIEW <input type="checkbox"/> 8.a Proof of vaccination not received. <input type="checkbox"/> 8.b Proof of vaccination received and under review. <input type="checkbox"/> 8.c Proof of vaccination received and reviewed.	9. STATUS OF VACCINATION - EXEMPTION REVIEW <input type="checkbox"/> 9.a Exemption request received and pending disposition. <input type="checkbox"/> 9.b Exemption request received and approved. <input type="checkbox"/> 9.c Exemption request received and denied. <input type="checkbox"/> 9.d Exception request not received.
10. SUPERVISOR / AUTHORIZED HR OFFICIAL NAME <i>(Last, First, MI):</i>	11. SUPERVISOR DoD ID NUMBER:
12. SUPERVISOR / AUTHORIZED HR OFFICIAL SIGNATURE:	13. DATE:

ATTACHMENT 4

DD Form 3150 – “Contractor Personnel and Visitor Certification of Vaccination”

CUI (when filled in)

CONTRACTOR PERSONNEL AND VISITOR CERTIFICATION OF VACCINATION		OMB No. 0704-0613 Expiration: 20220228
<p align="center">AGENCY DISCLOSURE NOTICE</p> <p>The public reporting burden for this collection of information is estimated to average 2 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Department of Defense, Washington Headquarters Services, at whs.mc-alex.esd.mbx.dd-dod-informationcollections@mail.mil. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.</p>		
<p align="center">PRIVACY ACT STATEMENT</p> <p>Authority: DoD is authorized to collect the information on this form pursuant to Executive Order (E.O.) 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors; E.O. 13991, Protecting the Federal Workforce and Requiring Mask-Wearing; and E.O. 12196, Occupational Safety and Health Program for Federal Employees; as well as 10 U.S.C. 113, 10 U.S.C. 136, 10 U.S.C. 7013, 10 U.S.C. 8013, 10 U.S.C. 9013, 10 U.S.C. 2672, 5 U.S.C. chapter 79, and DoD Instruction 6200.03.</p> <p>Principal Purpose: This information is being collected to implement Coronavirus Disease 2019 (COVID-19) workplace safety plans, including DoD's COVID-19 testing programs, and to ensure the safety and protection of the DoD workforce, workplace, and other DoD facilities and environments, consistent with the above-referenced authorities, the COVID-19 Workplace Safety: Agency Model Safety Principles established by the Safer Federal Workforce Task Force, and guidance from the Centers for Disease Control and Prevention and the Occupational Safety and Health Administration.</p> <p>Routine Use(s): While the information requested on this form is intended to be used primarily for internal purposes, in certain circumstances it may be necessary to disclose this information externally, for example to disclose information to: a person, organization, or governmental entity as necessary and relevant to notify them of, respond to, or guard against a public health emergency or other similar crisis, including to comply with laws governing the reporting of communicable disease or other laws concerning health and safety in the work environment; adjudicative or administrative bodies or officials when the records are relevant and necessary to an adjudicative or administrative proceeding; contractors, grantees, experts, consultants, students, and others as necessary to perform their duties for the Federal government; agencies, courts, and persons as necessary and relevant in the course of litigation, and as necessary and in accordance with requirements for law enforcement; or to a person authorized to act on your behalf. A complete list of routine uses may be found in the applicable System of Records Notice (SORN) associated with the collection of this information from contractor personnel and DoD visitors: DPR 39 DoD, DoD Personnel Accountability and Assessment System of Records, 85 Fed. Reg. 17047 (Mar. 26, 2020) (also available at https://dpcid.defense.gov/Portals/49/Documents/Privacy/SORNs/OSDJS/DPR-39-DoD.pdf).</p> <p>Consequences of Failure to Provide Information: Providing this information is voluntary. However, if you fail to provide this information, you will be treated as not fully vaccinated for purposes of implementing safety measures, including subject to COVID-19 screening testing and/or denied access to DoD facilities. Failure to provide such information may also hinder DoD's ability to implement COVID-19 workplace safety plans, thereby increasing the health or safety risk to DoD-affiliated personnel and DoD facilities.</p> <p>INSTRUCTIONS: This form should be completed by DoD contractor personnel and official visitors in accordance with current DoD Force Health Protection Guidance. DoD civilian employees should not complete this form.</p>		
1. NAME (Last, First, MI):		2. DoD ID NUMBER:
<p>3. PLEASE CHECK THE BOX BELOW THAT COINCIDES WITH YOUR COVID-19 VACCINATION STATUS :</p> <p><input type="checkbox"/> I am fully vaccinated. Individuals are considered "fully vaccinated" two weeks after completing the second dose of a two-dose COVID-19 vaccine or two weeks after receiving a single dose of a one-dose vaccine. Accepted COVID-19 vaccines are those which have received a license or emergency use authorization from the U.S. Food and Drug Administration and those COVID-19 vaccines on the World Health Organization Emergency Use Listing. "Fully vaccinated" also includes circumstances in which the individual was a participant in a U.S. site clinical trial and has received all recommended doses.</p> <p><input type="checkbox"/> I am not yet fully vaccinated. I received only one dose of an accepted two-dose COVID-19 vaccine, or I received my final dose of an accepted COVID-19 vaccine less than two weeks ago.</p> <p><input type="checkbox"/> I have not been vaccinated.</p> <p><input type="checkbox"/> I decline to respond.</p> <p>Individuals who choose not to complete the form will be assumed to be not fully vaccinated for purposes of application of the safety protocols. If you are not vaccinated due to medical or religious reasons, please check either "I have not been vaccinated" or "I decline to respond." Note that if you have already received one dose of a vaccine, but are not yet fully vaccinated, or if you received your final dose less than two weeks ago, then you will be treated as not fully vaccinated until you are at least two weeks past your final dose and resubmit your vaccination information.</p> <p><input type="checkbox"/> I certify that the information provided in this form is accurate and true to the best of my knowledge.</p> <p>I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both (18 U.S.C. 1001). Checking "I decline to respond" does not constitute a false statement. I understand that making a false statement on this form could result in additional administrative action including an adverse personnel action up to and including removal from my position.</p>		
4. DATE (YYYYMMDD)	5. SIGNATURE (Full Name)	

DD FORM 3150, OCT 2021

CUI (when filled in)

Controlled by: OUSD(P&R)
Controlled by: ASD(HA)
CUI Category: HLTH, PRVCY, OPSEC
LDC: DL(DoD Only)
POC: osd.pentagon.ousd-p-r.mbx.forms@mail.mil

Page 1 of 1

ATTACHMENT 5
**DD Form 3176 – “Request for a Medical Exemption or Delay to the COVID-19
Vaccination Requirement”**

CUI (when filled in)

REQUEST FOR A MEDICAL EXEMPTION OR DELAY TO THE COVID-19 VACCINATION REQUIREMENT		OMB No XXXX-XXXX Exp YYYYMMDD
<p>The public reporting burden for this collection of information is estimated to average 5 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Department of Defense, Washington Headquarters Services, at 1215 mc-alex esd mbr dd-dod-informationcollections@mail.mil. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.</p>		
PRIVACY ACT STATEMENT		
<p>Authority: DoD is authorized to collect the information on this form pursuant to 29 U.S.C. 794, Executive Order (E.O.) 14043, Requiring Coronavirus Disease 2019 Vaccination for Federal Employees, E.O. 13163, Increasing the Opportunities for Individuals with Disabilities to be Employed in the Federal Government, E.O. 13164, Requiring Federal Agencies to Establish Procedures to Facilitate the Provision of Reasonable Accommodation, 29 CFR 1614.203, Rehabilitation Act, DoD Directive 1020.1, Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of Defense, as well as 10 U.S.C. 113, 10 U.S.C. 136, 10 U.S.C. 7013, 10 U.S.C. 8013, 10 U.S.C. 2672, 5 U.S.C. chapter 79, and DoD Instruction 6200.03.</p> <p>Principal Purpose: The information on this form is being collected so that DoD may determine whether to grant your request for a medical exemption from the COVID-19 vaccination requirement for federal employees, pursuant to Executive Order 14043 and in furtherance of COVID-19 workplace safety plans. By completing and submitting this form, you are providing your consent for DoD to collect and maintain your information for purposes of the exemption determination.</p> <p>Routine Use(s): While the information requested on this form is intended to be used primarily for internal purposes, in certain circumstances it may be necessary to disclose this information externally. For example, disclosure of medical condition or history information to authorized government officials for the purpose of conducting an investigation into DoD's compliance with the Rehabilitation Act of 1973, disclosure of medical condition or history information to first aid and safety personnel in the event an employee's medical condition might require emergency treatment or special procedures, to Federal agencies/entities participating in the DoD Computer/Electronic Accommodations Program (CAP) to permit the agency to carry out its responsibilities under the program. A complete list of routine uses may be found in the applicable System of Records Notice (SORN) associated with the collection of this information: DoD 0007, Defense Reasonable Accommodations and Assistive Technology Records, 86 Fed. Reg. 38892 (July 22, 2010) (also available at https://www.govinfo.gov/content/pkg/FR-2021-07-22/pdf/2021-15601.pdf).</p> <p>Consequences of Failure to Provide Information: Providing this information is voluntary and use of this form is optional. Failure to provide the information requested on this form may impact DoD's ability to evaluate or act upon a request for a medical exemption from the COVID-19 vaccination requirement. Any intentional misrepresentation to the Federal Government may result in legal consequences, including termination or removal from Federal Service.</p>		
<p>Instructions: Part 1 is to be completed by DoD civilian employees. Part 2 is to be completed by a licensed medical provider. Provide narrative responses to each of the following questions. If additional space is needed proceed on the continuation block by annotating the Section and Line number and continue your narrative response. Signing this form constitutes a declaration that the information you provide is, to the best of your knowledge and ability, true and correct. Any intentional misrepresentation to the Federal Government may result in legal consequences, including removal from Federal Service.</p>		
PART 1. TO BE COMPLETED BY THE CIVILIAN EMPLOYEE		
1. Employee Name (Last, First, Middle Initial)	2. DoD ID Number	
3. Office Symbol	4. Date of Request (YYYYMMDD)	
5. Position	6. Supervisor	7. Phone Number
8. Please provide a description of the medical condition that is the basis for the request for a medical exemption from the COVID-19 vaccination requirement.		
9. Please provide an explanation of why the medical condition or circumstance prevents you from being safely vaccinated by the November 22, 2021, deadline. If you are seeking a delay, please explain when you will be able to be fully vaccinated.		
10. Please provide any additional information, that addresses your particular medical condition, which may be helpful in resolving your request for a medical exemption or delay from COVID-19 vaccination. If you have medical documentation (in addition to Part 2 of this Form), that addresses your particular medical condition or circumstance you may submit the documentation to your supervisor along with this form.		

DD FORM 3176, 20211019 DRAFT
PREVIOUS EDITION IS OBSOLETE

CUI (when filled in)

Controlled by: OUSD(P&R) Page 1 of 2
CUI Category: M, TM, PRIVCY, OPSEC
LDC: DL (DoD Only)
POC: dodtra.mc-alex.dtra-hq.mbr.forms@mail.mil

CUI (when filled in)

11. Continuation	
I declare to the best of my knowledge and ability that the foregoing is true and correct.	
12. Date (YYYYMMDD)	13. Signature
PART 2. COMPLETED BY EMPLOYEE'S MEDICAL PROVIDER	
14. Employee Name	
MEDICAL CERTIFICATION FOR COVID-19 VACCINE EXEMPTION OR DELAY	
<p>Dear Medical Provider:</p> <p>The Department of Defense requires its employees to be fully vaccinated against COVID-19, pursuant to Executive Order of the President of the United States. As indicated in Part 1, the individual named above is seeking a medical exemption to the requirement for COVID-19 vaccination or a delay because of a temporary condition or medical circumstance. Please complete this form to assist the Department in its review process.</p> <p>Please provide at least the following information, where applicable, and use the continuation block as needed.</p>	
<p>15. Please identify any contraindication(s) or precaution(s) for COVID-19 vaccination that are applicable to the individual, and for each contraindication or precaution, indicate:</p> <p>(a) whether it is recognized by the CDC pursuant to its guidance, and</p> <p>(b) whether it is listed in the package insert or Emergency Use Authorization fact sheet for each of the COVID-19 vaccines authorized or approved for use in the United States.</p>	
<p>16. Please provide a statement detailing how the individual's condition and medical circumstances are such that COVID-19 vaccination is not considered safe. Please explain the specific nature of the medical condition or circumstance that contraindicates immunization with a COVID-19 vaccine or might increase the risk for a serious adverse reaction.</p>	
<p>17. Please provide any other medical information that would limit the employee from receiving any COVID-19 vaccine.</p>	
<p>18. The condition described above is:</p> <p><input type="checkbox"/> Temporary</p> <p><input type="checkbox"/> Long-Term/Permanent</p>	<p>19. If the employee is seeking a delay due to a temporary medical condition or circumstance, please indicate when the employee would be able to safely receive the COVID-19 vaccination.</p>
20. Continuation	
21. Medical Provider Name/Title	
22. Date (YYYYMMDD)	23. Medical Provider Signature

DD FORM 3176, 20211019 DRAFT
PREVIOUS EDITION IS OBSOLETE

CUI (when filled in)

Page 2 of 2

ATTACHMENT 6

DD Form 3177 – “Request for a Religious Exemption to the COVID-19 Vaccination Requirement”

CUI (when filled in)

REQUEST FOR A RELIGIOUS EXEMPTION TO THE COVID-19 VACCINATION REQUIREMENT		
<p align="center">PRIVACY ACT STATEMENT</p> <p>Authority: DoD is authorized to collect the information on this form pursuant to Executive Order (E.O.) 14043, Requiring Coronavirus Disease 2019 Vaccination for Federal Employees, 42 U.S.C. Chapter 218, 10 U.S.C. 113, 10 U.S.C. 136, 10 U.S.C. 7013, 10 U.S.C. 8013, 10 U.S.C. 9013, 10 U.S.C. 2072, 5 U.S.C. chapter 79, and DoD Instruction 6200.03.</p> <p>Principal Purpose: The information on this form is being collected so that DoD may determine whether to grant your request for a religious exemption from the COVID-19 vaccination requirement for federal employees, pursuant to Executive Order 14043 and in furtherance of COVID-19 workplace safety plans. By completing and submitting this form, you are providing your consent for DoD to collect and maintain your information for purposes of the exemption determination.</p> <p>Routine Use(s): While the information requested on this form is intended to be used primarily for internal purposes, in certain circumstances it may be necessary to disclose this information externally. For example to disclose information to a person, organization, or governmental entity as necessary and relevant to notify them of, respond to, or guard against a public health emergency or other similar crisis, including to comply with laws governing the reporting of communicable disease or other laws concerning health and safety in the work environment, adjudicative or administrative bodies or officials when the records are relevant and necessary to an adjudicative or administrative proceeding, contractors, grantees, experts, consultants, students, and others as necessary to perform their duties for the Federal government, agencies, courts, and persons as necessary and relevant in the course of litigation, and as necessary and in accordance with requirements for law enforcement, or to a person authorized to act on your behalf. A complete list of routine uses may be found in the applicable System of Records Notices (SORN) associated with the collection of this information. For most DoD civilian employees requesting a religious exemption: OPM/GOVT-10, Employee Medical File System of Records, 73 Fed. Reg. 35099 (Jun. 21, 2010) (Jun. 21, 2010), amended 80 Fed. Reg. 74815 (Nov. 30, 2015) (Nov. 30, 2015). For DoD civilian employees requesting a religious exemption who are not covered by OPM/GOVT-10: DPR 39 DoD, DoD Personnel Accountability and Assessment System of Records, 85 Fed. Reg. 17047 (Mar. 28, 2020) (also available at https://dpcid.defense.gov/Portals/49/Documents/Privacy/SORNs/OSD/SDPR-39-DoD.pdf).</p> <p>Consequences of Failure to Provide Information: Providing this information is voluntary and use of this form is optional. Failure to provide the information requested on this form may impact DoD's ability to evaluate or act upon a request for a religious exemption from the COVID-19 vaccination requirement. Any intentional misrepresentation to the Federal Government may result in legal consequences, including termination or removal from Federal Service.</p> <p>Instructions: To be completed by DoD civilian employees. Provide narrative responses to each of the following questions. If additional space is needed proceed on the continuation block by annotating the Section and Line number and continue your narrative response. Signing this form constitutes a declaration that the information you provide is, to the best of your knowledge and ability, true and correct. Any intentional misrepresentation to the Federal Government may result in legal consequences, including termination or removal from Federal Service.</p>		
1. Employee Name (Last, First, Middle Initial)	2. DoD ID Number	
3. Office Symbol	4. Date of Request (YYYYMMDD)	
5. Position	6. Supervisor	7. Phone Number
8. Please describe the religious belief, practice, or observance that is the basis for your request for a religious exemption from the COVID-19 vaccination requirement.		
9. Please describe when and how you came to hold the religious belief or observe the religious practice.		
10. Please describe how you have demonstrated the religious belief or observed the religious practice in the past.		
11. Please explain how the COVID-19 vaccine conflicts with the religious belief, practice, or observance.		

DD FORM 3177, 20211019 DRAFT
PREVIOUS EDITION IS OBSOLETE

CUI (when filled in)

Controlled by OUSD/PA&T
CUI Category: M, TM, PRIVCY, OPSEC
LDC: DL (DoD Only)
POC: doctrine-rec-alex-dtro-hq.mbx.forms@mail.mil

Page 1 of 2

CUI (when filled in)

12.a Have you previously raised an objection to a vaccination, medical treatment, or medicine based on a religious belief or practice.	
<input type="checkbox"/> Yes <input type="checkbox"/> No	
12.b If Yes, please provide a description of the circumstances, timing, and resolution of the matter.	
12.c If No, please provide an explanation as to why your objection is limited to the particular COVID-19 vaccines.	
13. Please provide any additional information that may be helpful in resolving your request for a religious exemption from the COVID-19 vaccination. You may submit additional documentation in support of this request to your supervisor along with this form.	
14. Continuation	
NEEDS DD67	
I declare to the best of my knowledge and ability that the foregoing is true and correct.	
15. Date (YYYYMMDD)	16. Signature

DD FORM 3177, 20211019 DRAFT
PREVIOUS EDITION IS OBSOLETE

CUI (when filled in)

Page 2 of 2

ATTACHMENT 7
COVID-19 Screening Testing Requirements

1. COVID-19 screening testing as described below is required for:

a. **Title 5 National Guard employees** who refused to receive, who are pending an exemption, or who are exempted from COVID-19 vaccination and are entering a DoD facility¹. Those not on a DoD installation or facility will follow State guidelines.

b. **DoD contractor personnel** who attest that they are not fully vaccinated against COVID-19 or decline to attest to their COVID-19 vaccination status, using the DD Form 3150, or who are exempted from COVID-19 vaccination and are entering a DoD facility; those not on a DoD installation or facility will follow State guidelines; and

c. **Official visitors** who attest that they are not fully vaccinated against COVID-19 using the DD Form 3150 and are entering a DoD facility. Those not on a DoD installation or facility will follow State guidelines.

2. To establish COVID-19 screening testing for individuals as described in section 1 of this Attachment 7, States will:

a. Begin COVID-19 screening testing for unvaccinated individuals as described in section 1 above once the individual has surpassed their mandatory vaccination date. See Attachment 10 for National Guard military and civilian mandatory vaccination dates by status.

b. Execute the screening testing requirement with COVID-19 self-collection kits or self-tests at least weekly that can be performed primarily onsite on the installation or facility with proper supervision and documentation of testing results. If onsite COVID-19 screening testing is not feasible, as an alternative the self-testing can be performed at home or in other locations (Note: these COVID-19 self-tests do not require a health care provider's clinical care order and are, therefore, considered an over-the-counter test and do not require medical support to complete);

c. Procure and provide these COVID-19 self-tests and establish guidance for where and how these tests will be distributed and conducted and how results are to be reported.

(1) Civilian employees are responsible for providing documentation of negative

¹ For the purposes of this guidance, a military installation is a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Secretary of a Military Department or the Secretary of Defense, including any leased facility, which is located within any State, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, or Guam. In the case of an activity in a foreign country, a military installation is any area under the operational control of the Secretary of a Military Department or the Secretary of Defense, without regard to the duration of operational control.

COVID-19 test results, upon receipt, to the appropriate commander or supervisor. Civilian employees may not be required to use their own personal equipment for the purpose of documenting test results; offsite tests may not be used if there is not a means to document results using government equipment. The commander or supervisor is responsible for maintaining any COVID-19 test results provided by T5 National Guard employees in accordance with applicable law and policy, including appropriate privacy protection measures.

3. After COVID-19 screening testing procedures are established, the personnel listed in paragraph 1 of this attachment are required to have a COVID-19 screening testing with a U.S. Food and Drug Administration (FDA) authorized or approved test is required and a negative COVID-19 screening test result for entry into the DoD facility. If the COVID-19 screening test is administered offsite, the negative result must be from a test performed in the past 72 hours. If the negative result is over 72 hours old, a new test is required.

4. Civilian employees and DoD contractor personnel who have positive COVID-19 screening tests will be required to remain away from the workplace. Civilian employees, and DoD contractor personnel with positive COVID-19 screening tests, will be offered, but not required to take, confirmatory laboratory-based molecular (i.e., polymerase chain reaction) testing paid for by their Unit / Organization. Contact tracing and mitigation measures will be conducted. If the confirmatory test is negative, the individual is not COVID-19 positive and will be allowed into the workplace.

5. For civilian employees, COVID-19 screening testing is expected to take no more than 1 hour of regular duty time, per test, to complete required testing. This includes time for travel to the testing site, time to complete testing, and time to return to work. Laboratory-based confirmatory COVID-19 testing for initial positive screening test results is expected to take no more than 2 hours of duty time. Commanders and supervisors will monitor duty time usage and keep duty time used for testing within these parameters to the extent possible.

6. Refusal of COVID-19 testing by civilian employees exempted from COVID-19 vaccination:

a. States may bar such employees from their worksites on the installation or facility to protect the safety of others, including while adverse action is pending.

b. While barred from their worksites on the installation or facility, such employees may be required to telework, as appropriate.

ATTACHMENT 8
Requirements for Obtaining Self-Collection Kits and Self-Tests

1. COVID-19 self-tests must have Instructions for Use and FDA approval, 510(K) premarket clearance or have an FDA Emergency Use Authorization, and will be made available through the Defense Logistics Agency. States are responsible for funding required COVID-19 screening tests.
2. Cost reporting for the purchase of testing materials or reimbursement for member tests should be in accordance with Office of the Under Secretary of Defense (Comptroller)/Chief Financial Officer of the Department of Defense, "DoD Response to the Novel Coronavirus – Cost Reporting Guidance," April 13, 2020 (reference (j)).
3. Funding for COVID-19 testing – If self-collection kits or self-tests are not available:
 - a. Each State will establish procedures to reimburse Service members and Title 5 National Guard employees for COVID-19 screening tests that require payment for purposes of meeting the screening testing requirement (e.g., if the screening test is not available through the State and must be administered by a facility who charges for the test).
 - b. Screening test requirements for DoD contractor personnel will be forthcoming in future Under Secretary of Defense for Personnel and Readiness guidance and through the NGB Directorate of Acquisitions due to applicability of specific criteria for certain contracts only (see reference (i) Principal Director for Defense Pricing and Contracting Memorandum, "Class Deviation 2021-O0009-Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors", October 1, 2021).

ATTACHMENT 9
Privacy Requirements

1. Medical and other information collected from individuals, including vaccination information, test results, and vaccine exemption requests, will be treated in accordance with applicable laws and policies on privacy, including the Privacy Act of 1974 and DoD Instruction 5400.11, "DoD Privacy and Civil Liberties Programs," January 29, 2019, the Rehabilitation Act of 1973, as amended ("Rehabilitation Act"), and 5 CFR part 293, subpart E. While such information may be sensitive and is to be safeguarded as described above, it is not covered by the Health Insurance Portability and Accountability Act (HIPAA) and the associated HIPAA Rules.
2. Medical information obtained from T5 National Guard (NG) employees, including vaccination status, will be accessible only to those persons who have a need to access the information under the Rehabilitation Act, including immediate supervisors and authorized human resources officials who must access the information to implement the guidance in this memorandum. The Rehabilitation Act's requirements on confidentiality of medical information apply whether or not a T5 NG employee has a disability.
3. States are advised to consult their Privacy Officer and servicing legal office if there is a need to share medical information with personnel other than immediate supervisors and authorized human resources officials or individuals outside of NGB.
4. Personnel will use appropriate safeguards in handling and storing T5 NG employee medical information, including a T5 NG civilian employee's proof of vaccination, the DD Form 3175, and COVID-19 test results. Appropriate safeguards may include encrypting emails and electronic files, and role-based access to electronic storage environments where this information is maintained. In the event the information is maintained in paper form, supervisors and other authorized personnel must ensure T5 NG civilian employee medical information remains confidential and is maintained separately from other personnel files, e.g., stored in a separate, sealed envelope marked as confidential T5 NG employee medical information and maintained in locked file cabinets or a secured room. States are advised to refer to applicable internal guidance on the handling and storage of T5 NG employee medical records, and to consult their Privacy Officer as needed for further guidance.

ATTACHMENT 10
Timelines to be considered fully vaccinated

T5 Civilian Employees	Date 1st Shot	Date Second Shot	Enforcement date
Phizer-BioNTech COVID-19 vaccine	10/18/2021	11/8/2021	11/23/2021
Moderna COVID-19 vaccine	10/11/2021	11/8/2021	11/23/2021
Johnson & Johnson/Janssen vaccine	11/8/2021	N/A	11/23/2021

Air Active Guard and Reserve (For Informational Purposes Only)	Date 1st Shot	Date Second Shot	Enforcement date
Phizer-BioNTech COVID-19 vaccine	9/28/2021	10/19/2021	11/3/2021
Moderna COVID-19 vaccine	9/21/2021	10/19/2021	11/3/2021
Johnson & Johnson/Janssen vaccine	10/19/2021	N/A	11/3/2021

T32 ANG Drill Status Guardsmen (including T32 Technicians) (For Informational Purposes Only)	Date 1st Shot	Date Second Shot	Enforcement date
Phizer-BioNTech COVID-19 vaccine	10/28/2021	11/18/2021	12/3/2021
Moderna COVID-19 vaccine	10/21/2021	11/18/2021	12/3/2021
Johnson & Johnson/Janssen vaccine	11/18/2021	N/A	12/3/2021

Army Active Guard and Reserve (For Informational Purposes Only)	Date 1st Shot	Date Second Shot	Enforcement date
Phizer-BioNTech COVID-19 vaccine	11/10/2021	12/1/2021	12/16/2021
Moderna COVID-19 vaccine	11/3/2021	12/1/2021	12/16/2021
Johnson & Johnson/Janssen vaccine	12/1/2021	N/A	12/16/2021

T32 ARNG M-Day Soldiers (including T32 Technicians) (For Informational Purposes Only)	Date 1st Shot	Date Second Shot	Enforcement date
Phizer-BioNTech COVID-19 vaccine	5/26/2022	6/16/2022	7/1/2022
Moderna COVID-19 vaccine	5/19/2022	6/16/2022	7/1/2022
Johnson & Johnson/Janssen vaccine	6/16/2022	N/A	7/1/2022

NOTE: Information for service members is for informational purposes only. Service members will follow directives and procedures issued by their respective service components and supplemented by the Army National Guard and the Air National Guard.

ATTACHMENT 11
Sample Memoranda

1. Regular and ongoing communication with employees is a critical element of success in the implementation of the COVID 19 vaccination requirement.
2. The figures on the following pages are provided as examples for states to use in providing communications to employees who have not received the required vaccination by the required date.
3. The examples are provided for informational purposes only and are not directive in nature. They simply provide an example for states to work from.
4. States are urged to see these examples as a minimum recommendation regarding communication and should take every opportunity to engage with employees regarding this requirement in a meaningful way.
5. Examples of proposals or decision memoranda for disciplinary or adverse actions are not provided. States should follow guidance provided in Chief National Guard Bureau Instruction 1400.25 Vol 752 for processes and procedures regarding discipline. The Office of Personnel Management guidance suggests that an appropriate charge against employees for employees refusing to receive the vaccination and who have not received an exemption or have an exemption request under consideration is the charge of "refusal to obey a lawful order". States retain the right and responsibility to choose the appropriate charge and may consider alternate charges.
4. The examples included in this attachment include:
 - a. Figure 1: "Sample 5 day counseling memorandum"
 - b. Figure 2: "Sample exemption decision approval memorandum"
 - c. Figure 3: "Sample exemption decision temporary approval memorandum"
 - d. Figure 4: "Sample exemption decision disapproval memorandum"

Heading: [Name, Date, etc.]

Subject: Counseling regarding mandatory COVID 19 vaccination

1. On [DATE] you were informed that, as a federal employee, you are required to be vaccinated against the COVID 19 virus. This requirement is in accordance with Executive Order 14043 requiring all federal employees to be vaccinated unless they have received an exemption as required by law.
2. As of the date of this memorandum, you have not submitted a request for exemption to this requirement and you have not provided proof of vaccination. You may request an exemption if you have a medical condition or a sincerely held religious belief that precludes you from receiving the vaccination. If you wish to submit such a request, please do so in writing by providing, through your supervisor, a DD Form 3176, "Request for a Medical Exemption or Delay to the COVID-19 Vaccination Requirement", or a DD Form 3177, "Request for a Religious Exemption to the COVID-19 Vaccination Requirement". Employees have a right to submit such requests and have them seriously considered, however approval of such a request is not guaranteed. If you submit such a request, any disciplinary action for refusing to receive the vaccination will be held in abeyance until a decision has been rendered on the request.
3. Your receipt of this memorandum begins a 5 work-day period in which you may wish to consider complying with the requirement to get vaccinated. If you do not begin the process of vaccination by [DATE] you will be subject to disciplinary action for refusing to obey a lawful order. As noted before, if you submit a request for exemption, the discipline may be held in abeyance until a decision on the request is rendered.
4. [Use this paragraph to provide any state specific information regarding dates and times the state may be providing vaccination clinics etc.]
5. For further information regarding COVID vaccination requirements or the process for requesting an exemption please reach out to [STATE POC designated for this purpose].

[Signature block]

I, [Name _____], have received this recommendation letter this [number] day of [Month, year]. My signing below is not agreement with the content, only an acknowledgement that I have received a copy of the action.

Figure 1. Sample 5 day counseling memorandum

Heading: [Name, Date, etc.]

Subject: Agency decision regarding request for [Medical/Religious] exemption from COVID19 vaccination requirement.

1. On [DATE] you requested a [Medical/Religious] exemption from the requirement for federal employees to be vaccinated against COVID19. Although it is a general requirement for federal employees to receive this vaccination, statutory exemptions are authorized in accordance with the language provided in Executive Order 14043.
2. We are pleased to inform you that your request for exemption, received on [Date] has been approved.
3. Be advised that the provisions outlined in your exemption request are considered required elements of your employment and failure to follow them may result in disciplinary actions up to and including removal.
5. For further information regarding COVID vaccination requirements please reach out to [STATE POC designated for this purpose]. _____
[Signature block]

Figure 2. Sample exemption decision approval memorandum

Heading: [Name, Date, etc.]

Subject: Agency decision regarding request for [Medical/Religious] exemption from COVID19 vaccination requirement.

1. On [DATE] you requested a temporary [Medical/Religious] exemption from the requirement for federal employees to be vaccinated against COVID19. Although it is a general requirement for federal employees to receive this vaccination, statutory exemptions are authorized in accordance with the language provided in Executive Order 14043.

2. We are pleased to inform you that your request for temporary exemption, received on [Date] has been approved. You are temporarily approved for an exemption from the vaccination requirement until [DATE]. You will be subject [to the conditions outlined in your temporary exemption request] OR [state alternate exemption requirements]. If you fail to follow these conditions you will be subject to discipline or adverse action up to and including your removal.

3. It is crucial that you understand that this approval is only temporary and, unless an extension is granted, you will be required to begin the vaccination process immediately upon the expiration of this temporary exemption.

4. If your situation changes and you can become vaccinated earlier or if you feel you need to extend the timeline for your temporary request, please contact [State POC] for further instructions.

5. For further information regarding COVID vaccination requirements please reach out to [STATE POC designated for this purpose].

[Signature block]

Figure 3. Sample exemption decision temporary approval memorandum

Heading: [Name, Date, etc.]

Subject: Agency decision regarding request for [Medical/Religious] exemption from COVID19 vaccination requirement.

1. On [DATE] you requested a [Medical/Religious] exemption from the requirement for federal employees to be vaccinated against COVID19. Although it is a general requirement for federal employees to receive this vaccination, statutory exemptions are authorized in accordance with the language provided in Executive Order 14043.

[2. In our review of your information we have made the determined that, your claim for an exemption does not meet the standard of being a [sincerely held religious belief] OR [a medical condition precluding you from receiving the vaccination. that precludes you from receiving the vaccination.]

OR

[2. Although you have the right to request an exemption, and we have determined that you [do have a sincerely held medical belief] OR [do have a medical condition] that precludes you from receiving the vaccination, neither your requested exemption or an alternate exemption will [allow you to perform the essential functions of your job [specify the essential functions and why exemption won't allow performance]] OR [the exemption requested and any alternate exemption creates an undue hardship on the agency for [outline justification for undue hardship]].

3. As stated, your request for exemption has been disapproved. You are directed to begin receiving the vaccination at your earliest opportunity and receive and provide proof of the first dose of a two dose vaccine or the single dose vaccine not later than [DATE]. If you receive a two-dose vaccine, you are expected to receive the second dose according to the medical recommendations for that vaccine. You will be required to provide proof of each required vaccination. If you fail to promptly follow these instructions you will be subject to disciplinary actions up to and including your removal. The disciplinary process will begin not earlier than the date you are required to provide proof of first dose vaccination.

4. For further information regarding COVID vaccination requirements or the process for requesting an exemption please reach out to [STATE POC designated for this purpose].

[Signature block]

Figure 4. Sample exemption decision disapproval memorandum

ATTACHMENT 12
References

- a. National Guard Implementation Guidance for Force Health Protection (Supplement 23) Revision 1 - Mandatory Coronavirus Disease 2019 Vaccination Attestation, Screening Testing and Verification for National Guard Title 5 Employees; 26 October 2021
- b. Deputy Secretary of Defense Memorandum, "Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Civilian Employees", 1 October 2021
- c. Secretary of Defense Memorandum, "Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members", 24 August 2021
- d. Executive Order 14043, "Requiring Coronavirus Disease 2019 Vaccination for Federal Employees," September 9, 2021
- e. Safer Federal Workforce Task Force COVID-19 Workplace Safety: Agency Model Safety Principles, 13 September 2021
- f. Under Secretary of Defense for Personnel and Readiness Memorandum, "Force Health Protection Guidance (Supplement 23 Revision 2) – Department of Defense Guidance for Coronavirus Disease 2019 Vaccination Attestation, Screening Testing and Vaccination Verification, 29 October 2021
- g. National Guard Bureau Memorandum, "Implementation Guidance for Mandatory Coronavirus Disease 2019 Vaccination of National Guard Title 5 Employees, 08 October 2021
- h. Safer Federal Workforce Task Force, "*COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors*," 24 September 2021
- i. Principal Director for Defense Pricing and Contracting Memorandum, "Class Deviation 2021-O0009—Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors, October 1, 2021
- j. Chief National Guard Bureau Memorandum "Designation of the Adjutants General to Appoint, Employ, and Administer National Guard Employees", 16 February 2017

EXHIBIT B

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, et al.,

Plaintiffs,

V.

JOSEPH R. BIDEN, JR., in his official
capacity as President of the United States,
et al.,

Defendants.

Civil Action No.: CIV-21-1136-JD

DECLARATION OF STEVEN L. BRADLEY

I, Colonel Steve L. Bradley, hereby state and declare as follows:

1. I am currently employed by the U.S. Air Force as the Deputy Director of Air National Guard Medical Service at the Air National Guard Readiness Center (ANGRC), located in Joint Base Andrews, Maryland. I have held this position since June 1, 2021. I previously served as Chief, Medical Readiness Division, Air National Guard Medical Service at the Air National Guard Readiness Center located at Joint Base Andrews, Maryland for 5 years since January 19, 2016. My responsibilities include coordinating with the Air Force Surgeon General, National Guard Bureau Surgeon General, gaining Major Commands, State Adjutant Generals, State Air Surgeons, and commanders to ensure the National Guard Bureau, as the management agency, maintains a viable, operationally ready Air National Guard medical force. Our office develops and coordinates strategic Air National Guard public health policies, publications, and programs to optimize readiness and promote force health protection initiatives. Our office advocates for public health activities, provides oversight for public health programs, and promotes the public health interests and initiatives of the USAF Surgeon General. In addition, we consult with other Military

Health System healthcare providers, Public Health Emergency Officers, and Senior Leaders to detail, clarify, and apply evidence-based, public health recommendations from the Centers for Disease Control and Prevention, the United States Preventive Services Task Force, and other organizations to Department of Defense Service Member and beneficiary populations.

2. I am generally aware of the allegations set forth in the pleadings filed in this matter. This declaration is based on my personal knowledge, as well as knowledge made available to me during the routine execution of my official duties. Attached to this declaration are authentic copies of relevant military regulations, instructions, and directives, referenced throughout.

Mandatory Coronavirus Disease 2019 (COVID-19) Vaccination

3. On August 24, 2021, the Secretary of Defense issued a memorandum directing the Secretaries of the Military Departments to immediately begin full vaccination of all members of the Armed Forces under Department of Defense (DoD) authority on active duty or in the Ready Reserve, including the National Guard, who are not fully vaccinated against COVID-19 (Secretary of Defense Memorandum, “Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members,” dated August 24, 2021, hereinafter “Memorandum”). The purpose of the Memorandum is to protect the health of the force, optimize readiness, and defend the Nation. To date, there have been more than 393,671 cases of COVID-19 and more than 612 deaths associated with COVID-19 reported across the DoD. As of this time, 254,805 of those cases and 77 COVID-associated deaths have been reported among Service members. (“DoD COVID-19 Cumulative Totals,” <https://www.defense.gov/Explore/Spotlight/Coronavirus-DOD-Response/>, accessed December 6, 2021). Persons who have not been fully vaccinated against COVID-19 are at higher risk of serious illness, hospitalization, and death. They are also at increased risk of post-COVID conditions (i.e., long-COVID or long-haul COVID). Under the Secretary of Defense Memorandum Service members are considered fully vaccinated two weeks after completing the

second dose of a two-dose COVID-19 vaccine series (e.g., Moderna or Pfizer-BioNTech (COMIRNATY®) vaccines) or two weeks after receiving a single-dose COVID-19 vaccine (e.g., Johnson & Johnson/ Janssen vaccine). Those with a history of previous COVID-19 infection are not considered fully vaccinated.

4. In accordance with the Secretary of Defense Memorandum, mandatory vaccination against COVID-19 will only use vaccines that received full licensure from the U.S. Food and Drug Administration (FDA), in accordance with FDA-approved labeling and guidance. The Memorandum authorizes the Military Departments to promulgate appropriate guidance to execute the stated objectives. It further directs that mandatory vaccination requirements will be implemented consistent with DoD Instruction (DoDI) 6205.02, “DoD Immunization Program,” dated July 23, 2019. Finally, the Memorandum states that Military Departments should use existing policies and procedures to manage the mandatory vaccination of Service members to the extent practicable, and that mandatory vaccination of Service members will be subject to any identified contraindications, as well as any administrative or other exemptions established in Military Department policy.

Command Authority to Immunize Soldiers

5. The Military Vaccination Program, and associated Air Force immunization programs, which include the processes and procedures by which vaccines and vaccinations are managed, as well as those by which vaccines are administered and exemption requests are reviewed and adjudicated, are implemented in accordance with several DoD, Defense Health Agency (DHA), Multi-Service, and Army Instructions, Regulations, and other publications. In particular, Air National Guard Commanders are authorized to ensure the administration of required immunizations to Airmen pursuant to the Multi-Service Regulation (AR 40–562, BUMEDINST 6230.15B, AFI 48–110_IP, CG COMDTINST M6230.4G), “Immunizations and

Chemoprophylaxis for the Prevention of Infectious Diseases,” dated October 7, 2013 (hereinafter AFI 48-110_IP), unless Airmen are medically or administratively exempted from the immunization requirements. Nine vaccines are currently required for all service members, including the annual influenza vaccine.

6. In my years of serving as a Medical Service Corps officer, I have not experienced, nor do I have knowledge of a Commander involuntarily immunizing a service member. On September 3, 2021 the U.S. Air Force implemented the Secretary of Defense’s recent Memorandum by way of a Memorandum for Department of Air Force Commanders from the Secretary of the Air Force (SAF Memorandum, “Mandatory Coronavirus Disease 2019 Vaccination of Department of the Air Force Military Members,” dated September 3, 2021).

7. The Secretary of the Air Force ordered “unless exempted, the Ready Reserve, to include the National Guard Airmen and Guardians were to be fully vaccinated by 2 December 2021.” Additionally, the Secretary of the Air Force explained those with “previous COVID-19 infection or positive serology” were not exempt from the mandatory vaccination order.

Air Force Implementation Order for Mandatory COVID-19 Vaccination

8. Pursuant to the Secretary of the Air Force September 3, 2021 Memorandum, every Airman and Guardian who is not otherwise exempt must be fully vaccinated against COVID-19 no later than December 2, 2021. The Deputy Director of Staff also provided COVID-19 Mandatory Vaccination Implementation Guidance for Service Members, September 3, 2021. *See* <https://usaf.dps.mil/teams/COVID-19/SitePages/Home.aspx> (Hereinafter “Guidance”). The Key Messages in that guidance are at paragraph 1.3., which emphasizes that the “vaccine is safe and effective,” that the “threat from COVID-19 is real and deadly,” and that “vaccination offers a layer of protection.”

9. In the National Guard, and more so the Air National Guard, service members need

to be prepared to deploy in an emergency with little or no notice. For some deployments Airmen receive months of lead-time to prepare. However, that is not true for unplanned deployments, which can range from natural (*e.g.*, hurricanes, earthquakes, forest fires) or manmade disasters (*e.g.*, Oil Spills like Deepwater Horizon, civil unrest,). Similarly terrorist attacks (conventional, chemical, nuclear or biological) are rarely telegraphed by the responsible organization beforehand. In a crisis every minute and hour matters. Delays spent mobilizing can cost lives. Disaster deployments routinely begin hours or days after notice is received by the activating Airmen. Many of these emergency recalls of NG Airmen and Guardians are based upon an oral (VOCO, Verbal Orders of Commanding Officer) order, which is subsequently memorialized in writing as there is insufficient time to prepare written orders before deploying. Finally, even mundane unexpected Temporary Duty orders (TDYs) require short notice deployment (*i.e.* selected Airman has a medical emergency, family crisis, or similar disqualifying event), and thus necessitate last minute unplanned military personnel substitution.

10. The Secretary of the Air Force September 3, 2021 memorandum directs that the Air Force execute the mandatory COVID-19 vaccination order with two deadlines: November 2, 2021 for Active Duty Airmen and Guardians, and December 2, 2021 for Air National Guard Airmen and Guardians. Per the Guidance, specifically paragraph 3.1.3., the Air Force will conduct mandatory COVID-19 vaccination operations of unvaccinated Airmen with the FDA-approved Pfizer/Comirnaty[®] vaccine, and continue voluntary vaccination with other vaccines authorized for emergency use. Airmen are considered fully vaccinated two weeks after completion of a two-dose vaccine series or two weeks after receiving a single-dose vaccine. Per paragraph 2.8.2., Commanders will order all unvaccinated Airmen to receive the COVID-19 vaccine. Airmen requesting an exemption are not required to receive the vaccine pending the final decision on their exemption request, which is discussed in more detail below. The Guidance in paragraph 5.3.1., also

directs Commanders to exercise their discretion in handling refusal cases, which is also discussed in more detail below.

Immunization Exemptions and Procedures

11. Airmen may request exemptions from immunizations based on certain circumstances. Members may seek an administrative exemption if they are on approved terminal leave before December 2, 2021. Per AFI 48–110_IP, paragraph 2-6.a., airmen may also seek a medical exemption, which may be temporary (up to 365 days) or permanent. Per AFI 48–110_IP paragraphs 2-6.a.(1)(a)-(c), examples of medical exemptions include (1) the underlying health condition of the vaccine candidate (e.g., based on immune competence, pharmacologic or radiation therapy, pregnancy and/or previous adverse response to immunization), (2) evidence of immunity based on serologic tests, documented infection, or similar circumstances,¹ and (3) if an individual's clinical case is not readily definable.

12. Pursuant to the Guidance at attachment 2, for all medical exemptions, Airmen will be referred to a Military Medical Provider (MMP). If the MMP indicates a temporary exemption is valid, the MMP will approve it. Appropriate exemption codes indicating temporary or permanent reasons for medical exemption are to be annotated in the individual's Service-specific Immunization Tracking System. If, on the other hand, the MMP does not determine that a

¹ This second basis is not available for COVID-19. Medical exemptions are not presumptive in nature, but rather are granted on a case-by-case basis after review of an individual's circumstances and the nature of the request. A Defense Health Agency Immunization Healthcare Division Information Paper (hereinafter "Paper") entitled, "Why can't documentation of COVID-19 disease or serology results meet the mandatory requirement?" and dated October 2, 2021, notes examples of circumstances where our immune systems do not mount long-lasting immunity from natural disease, to include influenza, pertussis (whooping cough), and rotavirus, among others. For these types of diseases, re-infection with such pathogens is possible and prior infection and/or serological test results are not a basis for a medical exemption from vaccination. The Paper notes the mere presence of antibodies against a disease does not equate to immunity and that, "[t]he medical immune exemption does not apply to SARS-CoV-2 infection like it does to other infections, like measles, where there are decades (or more) of data on the durability of immunity, and the viral characteristics (i.e., long incubation time, involvement of the reticuloendothelial system) allow for a sterilizing immunity to persist." The Paper does acknowledge that "[w]ith time, there may be evidence for durable immunity to SARS-CoV-2." But for now, a medical exemption based on prior infection or serological tests is not available for COVID-19.

temporary or permanent exemption is warranted, the MMP will disapprove the request, and should the airman agree to receive it, the Service member can be administered the vaccine. If the Airman declines to be vaccinated, the Airman will be referred back to his or her Commander for further action.

13. As stated in AFI 48-110_IP, paragraph 2-6a, the approval authority for permanent medical exemptions is the MMP. For the Air National Guard, the appellate authority is the Adjutant General of the State's National Guard.

14. Airmen may also seek a religious exemption to vaccination requirements. *See* AFI 48-110_IP, paragraph 2-6.b.(3)(a). Department of the Air Force Instructions 52-201, Religious Freedom in the Department of the Air Force (hereinafter AFI 52-201), applies to members of the Air National Guard.

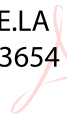
15. ANG military members seeking a religious exemption must have submitted the request no later than December 2, 2021 to be in compliance with the August 24, 2021 Secretary of Defense Directive. The process for seeking an exception, referred to in AFI 52-201 as a religious accommodation, is a lengthy process that includes multiple levels of review and recommendations from a service member's chain of command up through the National Guard Bureau (as explained below) for final decision by the U.S. Air Force's Surgeon General.

16. All members of the Air Force Reserve were required to be fully vaccinated or have submitted an exemption request by December 31, 2021. For those who have not sought an exemption or who have their exemption requests denied (after all eligible appeals) and still refuse to be immunized, the member is subject to adverse administrative action. For eligible Air Force members, the Air Force allows for voluntary retirement or separation in lieu of vaccination.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 21, 2021, at Joint Base Andrews, Maryland.

BRADLEY.STEVE.LA
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Steve L. Bradley
Colonel, U.S. Air Force
Deputy Director, Medical Services
Air National Guard Readiness Center
Joint Base Andrews, Maryland

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,

et al.,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR., in his official
capacity as President of the United States,
et al.,

Defendants.

Civil Action 21-1136-F

DECLARATION OF CHARLES NICHOLS JR

I, Colonel Charles Nichols Jr., hereby state and declare as follows:

1. I am the Deputy Director for Manpower, Personnel, Recruiting and Services for the Air National Guard Readiness Center, National Guard Bureau, Joint Base Andrews, Maryland. As Deputy Director, I serve as principal deputy and advisor to the Director in providing leadership, management, and oversight of all policy and resource management for manpower, personnel, recruiting and services for the 90 Wings and 54 States, Territories and the District.

2. I make this declaration in my official capacity as the Deputy Director for Manpower, Personnel, Recruiting and Services based upon my personal knowledge and upon information that has been provided to me in the course of my official duties.

3. On August 24, 2021, the Secretary of Defense directed the Secretaries of the Military Departments to immediately begin full immunization of all members of the Armed Forces, including ANG members, against COVID-19. On December 7, 2021, the Secretary of the Air Force issued a memo, *Supplemental Coronavirus Disease 2019 Vaccination Policy*, which outlined guidance for members of the active duty Air Force, Air Force Reserve, and Air National Guard (Attachment A). In general, the 54 Air National Guards of the States, Territories and District of Columbia follow Air Force policy and procedures with regard to requiring to immunizations, including the process for waiving required vaccines. AFI 48-110_IP, *Immunizations and Chemoprophylaxis for the Prevention of Infectious Diseases*. Per AFI 48-110, ¶ 2-6, (3), service members that request religious exemptions must comply with the provisions outlined by the service specific guidance. Department of the Air Force Instructions 52-201, *Religious Freedom in the Department of the Air Force*, applies to members of the Air National Guard.

4. ANG military members must be fully vaccinated against COVID-19, or have requested an exemption no later than 31 December 2021 to be in compliance with the 24 August 2021 Secretary of Defense Directive. By 31 December 2021, in order to be in compliance with the 7 December 2021 Secretary of the Air Force Memo, ANG members, regardless of status will be classified in the following categories:

- a. Completed or have started a vaccination regimen.
- b. Have requested or received a medical exemption.
- c. Have requested or received a religious Accommodation Request (RAR).
- d. Have requested or received an administrative exemption.
- e. Declined to be vaccinated.

5. The process for seeking a Religious Accommodation Request (RAR) exemption is a lengthy process that includes multiple levels of review and recommendations from a service member's chain of command up through the National Guard Bureau (as explained below) for final decision by the U.S. Air Force's Surgeon General.

6. AFI 52-201, ¶ 3.8.1, states the request will be considered at every level of command. For an ANG member this would include the squadron commander, wing commander, The Adjutant General Air, The state Adjutant General (TAG), the Air National Guard Readiness Center Commander, and Director, Air National Guard (DANG). See attached USAF-Post Accession Vaccination Religious Accommodation Flowcharts (Attachment B). Air National Guard and the Air National Guard Chaplain Corps estimates there will be 3,500 requests. The approval authority for religious accommodations is the DANG, as the DANG acts as the MAJCOM equivalent authority for the ANG. Should the DANG deny a member's request for religious accommodation, in accordance with AFI 51-201, Para. 3.2, the ANG member could appeal that denial to the Air Force Surgeon General (SG), who acts as the final appeal authority for all immunization exemption denials.

7. Per the 7 December 2021 SECAF Memo, unvaccinated members who request a RAR will be temporarily exempt from the COVID-19 vaccination requirement while their exemption request is under review. Excluding members with pending or approved medical, religious, or administrative exemption requests, ANG members that have not initiated a vaccination regimen by 31 December 2021 may not participate in drills, training, or other duty conducted under Title 10 or Title 32 U.S.C., and those with a remaining Military Service Obligation will be involuntarily reassigned to the Individual Ready Reserve (IRR) in accordance with 10 U.S.C. § 651 and DODI 1235.13.

8. The ANG religious accommodation request process is a lengthy administrative process. For example, I recently reviewed an adverse action involving the denial of a religious waiver request, not involving the COVID-19 vaccine, and the initial processing of the waiver request took more than 18 months. At this time, the Chaplains estimate that the ANGRC will review approximately 3,500 religious accommodation requests. Given the procedural requirements for processing the review of religious waiver applications, I would not expect that any ANG service member who submits a religious accommodation request would receive a response for many months. If a member's request were to be denied, the member could still appeal to the Air Force Surgeon General (SG).

9. If a religious accommodation request is denied by the Air Force Surgeon General on a religious waiver request, and the ANG and the member still refuses to comply with the vaccine requirement, that member is subject to adverse administrative action. Unlike the active duty and reserve components which perform duty in a Title 10 status only, Air National Guard members perform military duty primarily in a Title 32 status (federally funded, but under state command). The import of that distinction is that the Uniformed Code of Military Justice (UCMJ) which allows members of the regular and Reserve Component to be charged with criminal violations, there is no single parallel military justice system or code for members of the ANG in title 32 military status. Although states do have a state, territory or District military justice code, ANG member's being courts-martialed under the state code is a rarity. Therefore, most ANG members who refuse without being granted an exemption would face administrative, rather than criminal, adverse action. However, any adverse action would comply with ANG procedures that ensure due process for the ANG member.

10. After a final determination by the Air Force Surgeon General, if a state chooses to initiate action with non-compliance, that action must comply with Air Force Instruction, 36-2907, *Adverse Administrative Action* (hereinafter AFI 36-2907). Per AFI 36-2907 Para. 1.1, adverse administrative action should be used as part of a progressive disciplinary process. Tools that can be used in this process include Record of Individual Counseling, a Letter of Counseling, if non-compliance continues a Letter of Admonishment, and ending with a Letter of Reprimand. Most ANG members are not in an active duty status, and therefore would have 45 calendar days to respond to each letter issued to them for a total at least 135 days if commander chose to pursue more serious discipline or discharge.

11. Air Force Instruction (AFI) 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, (hereinafter AFI 36-3209) establishes procedures for administrative separation or discharge of Air National Guard members.¹ AFI 36-3209 ¶ 4.1.1. states ANG officers (not on active duty) are discharged through the withdrawal of Federal recognition (WFR) process identified in Title 32 U.S.C. § 323. All ANG officers have a board entitlement for WFR under 32 U.S.C. § 323(b). Table 2.1. of AFI 36-3209 identifies the available reasons to voluntarily and involuntarily discharge commissioned officers in the Air Reserve Component. When a commander and/or the discharge authority (which, for the ANG, is the Adjutant General (TAG) of the state) determines grounds exist to warrant initiation of separation action against an officer, the officer is issued a letter of notification of his

¹ This instruction was originally published on April 14, 2005 and is undergoing a significant revision; when the updated version is finally certified and published, many corrections will be made to the outdated references existing in the current version, which incorporates changes only as recent as September 20, 2011.

command's intent to initiate action and all required statements outlined in AFI 36-3209 ¶ 4.12.2., along with copies of all supporting documents.

12. After an officer receives notice, AFI 36-3209 ¶ 4.6. provides officers 15 days after receipt of the notification to decide whether or not to affirmatively waive their right to a board hearing and make their selections of rights. If the officer exercises his right to a board, the state then submits a request for a convening order from the convening authority. For actions involving ANG officers in the ranks of colonel and below (including the rank of Captain), the Commander, ANGRC (ANGRC/CC), is the convening authority. If and when the ANGRC/CC signs the convening order, the state can proceed with the WFR board.

13. At the WFR board, the military and the respondent submit evidence, including documents and live testimony. After parties submit their evidence, the voting members of the WFR board determine their findings and recommendations in a closed session and are charged with making clear, logical, findings of fact based on the evidence admitted at the board hearing (in addition to any live testimonies and oral arguments presented during the board), as described in AFI 36-3209 ¶ 4.15.1. and ¶ 4.17.2. The board determines (1) whether a preponderance of evidence supports each allegation included in the letter of notification, and (2) whether the findings then warrant separation or discharge. The board has the ability to consult the entire military record in determining whether or not discharge is appropriate, and if discharge is recommended, the board also recommends a characterization of service.

14. After the WFR board makes its recommendation, a report of the proceedings is prepared. AFI 36-3209 ¶ 4.18. details what must be included in the report. The board recorder prepares a summarized or verbatim report of the proceedings in cases where the board recommends an Honorable or General (Under Honorable Conditions) discharge, and all reports

include all supporting exhibits, documents, and other writings admitted/offered into evidence at the board hearing, as well as a verbatim statement of the board's findings and recommendations. The report is authenticated as required by ¶ 4.18.4., and ¶ 4.19. requires the servicing staff judge advocate to review the report for legal sufficiency after it is prepared and authenticated.

15. In all officer cases, the compiled report is reviewed through command channels up to the Secretary of the Air Force Personnel Council (SAFPC). Given the fact SAFPC holds the final authority in ANG officer cases, AFI 36-3209 ¶ 4.21. requires the report to record and include commanders in the review chain's recommendations to the higher authority. When the board recommends separation of an ANG officer, and TAG is not the final authority, AFI 36-3209 ¶ 4.22.3. requires that TAG review the case and recommend approval or disapproval of the board's recommendations.

16. In accordance with AFI 36-3209 ¶ 4.22.3. through ¶ 4.22.5., TAG ensures a copy of the board report is properly prepared, containing copies of all documentation not previously furnished to the officer (save any records withheld as a result of security or medical directives), and sent to the officer when TAG makes his recommendation on the action. The officer has 15 days after receipt of the TAG-reviewed board report to submit to NGB/A1PP (National Guard Bureau, Force Management Programs) for forwarding with the discharge package any additional evidence, brief, or argument not previously furnished that the officer or his counsel wants the final authority to consider. As all case files are submitted electronically, the officer or his counsel will submit any/all files through electronic means directly to NGB/A1PP (National Guard Bureau, Force Management Programs). The AR ANG Military Personnel Management Officer (MPMO) at Joint Force Headquarters (JFHQ) will submit the state's entire package to NGB/A1PP electronically through the Global Electronic Approval Routing System (GEARS).

17. Once all documents are obtained, an NGB/A1PP technician reviews the package to ensure everything has been processed in accordance with AFI 36-3209 and prepares it for further staffing. The package is uploaded into the NGB Task Management Tool (TMT), a web-based application utilized by NGB staff, which allows for the electronic staffing of packages. The package will be reviewed by NGB/A1PP (National Guard Bureau, Force Management Programs) leadership, then sent to NGB/A1P (National Guard Bureau, Force Management Division) leadership, and NGB/A1 (National Guard Bureau, Manpower, Personnel, Recruiting, and Services Directorate) leadership before being submitted to the National Guard Bureau Office of General Counsel (NGB/GC). An attorney within NGB/GC will perform a legal review to ensure the package is legally sufficient. The legal review is uploaded into TMT, and the package moves forward to the ANGRC/CC (Commander, Air National Guard Readiness Center) for review and coordination.

18. If the ANGRC/CC approves of the case moving forward, it is sent through TMT to the Director of Staff (DoS) within the office of the Director, Air National Guard (NGB/CF) for an overall review prior to NGB/CF signing his recommendation to the final authority. Once the NGB/CF recommendation is signed and uploaded into TMT, the task is considered “complete,” and NGB/A1PP downloads a copy of the recommendation to include in the package’s case file.

19. The package is then sent to the Office of Investigations, Inquiries, & Relief (DAF/JAJI), for a final legal review. When the DAF/JAJI legal review is complete, a member of that office uploads the legal review to Legal Transit and sends the case over to the SAFPC queue.

20. The staff supporting SAFPC reviews, prepares, and schedules the case for consideration by SAFPC. Once the SAFPC reviews the case and makes a final determination, it

prepares a final determination referred to as the “SAF instrument,” and it will include a decision on whether to approve or disapprove the recommendation to discharge the officer, and, if approved, it will include the characterization of service as indicated in AFI 36-3209 ¶ 2.28.

21. Once the SAF instrument is signed, a copy will be sent to NGB/A1PP via email. NGB/A1PP will immediately send a copy of the SAF instrument to the MPMO at JFHQ. The MPMO furnishes a copy to the appropriate member of the servicing Force Support Squadron (FSS) responsible for initiating the separation action that is ultimately sent to the Air Reserve Personnel Center (ARPC) for processing. ARPC cannot process the officer’s discharge without a copy of the SAF instrument, which is why the FSS ensures it is submitted in the electronic package sent to ARPC for execution of the discharge. AFI 36-3209 ¶ 1.4.4. and ¶ 1.5.2. address the fact ARPC is responsible for issuing discharge certificates, and the officer continues to be an officer until the discharge becomes effective.

22. The Secretary of the Air Force (SAF), in accordance with 10 U.S.C. § 1552, is authorized to correct any military record of the Department when the SAF considers it necessary to correct an error or remove an injustice as outlined in AFI 36-2603, Air Force Board for Correction of Military Records (AFBCMR). The Assistant Secretary of the Air Force for Manpower and Reserve Affairs (SAF/MR) exercises this authority on behalf of SAF, and SAF/MR has further delegated this authority to the Director of the Air Force Review Boards Agency (AFRBA). This authority is addressed in AFI 36-2603 ¶ 1.1. and ¶ 1.2. The Board is responsible for considering all applications properly brought before it and recommends correction of military records to remove an error or injustice when appropriate.

23. Current or former members of the ANG may apply to the Board for corrections of their Air Force records. AFI 36-2603 ¶ 3.3. addresses what members should do in order to

prepare the application; ¶ 3.6. clarifies the fact applying to the AFBCMR does not stay other proceedings. The Board will recommend relief only when a preponderance of evidence substantiates that the applicant was a victim of an error or injustice; with that, the Board may request the applicant furnish additional information and/or staff Air Force agencies with providing advisory opinions. AFI 36-2603 ¶ 4.2.2. details the information the agencies are required to provide in their advisory opinions; applicants are given the opportunity to review and comment on all correspondence and communications, including advisory opinions, to or from the AFRBA as indicated in ¶ 4.3. For each application, the Board sends the record of proceedings describing its recommendations to the SAF or SAF's delegee for final decision; the SAF or SAF's delegee will direct action as appropriate, and if the Board's recommendations are not accepted – the decision will be in writing and will include a brief statement of the grounds for the final decision. Chapter 7 of AFI 36-2603 details the action(s) after the final decision is made; specifically, ¶ 7.1. states the Executive Director or his/her designee will inform the applicant of the final decision, and, if any requested relief is denied, the applicant will be advised of the reconsideration procedures available. Decisions requiring corrective action (“directives”) will be sent to the appropriate designee for necessary action; these directives are final and conclusive on all officers of the government, and the corrective action(s) should be within 30 days of the date of the instrument.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 21st day of December 2021.

NICHOLS.CHARLES.W
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CHARLES W. NICHOLS, JR, Colonel, USAF
Deputy Director, Manpower, Personnel, Recruiting,
and Services
National Guard Bureau

EXHIBIT D

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, *et al.*,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR., in his
official capacity as President of the
United States,
et al.,

Defendants.

Civil Action 21-1136-F

DECLARATION OF MAJOR SCOTT STANLEY

I, Major Scott Stanley, hereby state and declare as follows:

1. I am an Army Preventive Medicine Officer. I hold a PhD in genetics and have over 10 years of experience working in novel drug and vaccine development prior to joining the Army. I am currently employed by the U.S. Army as the Joint Force Health Protection Officer. I have held this position since June of 2021. I previously served as the Medical Advisor to the Assistant Secretary of State for the Bureau of Population, Refugees, and Migration, Department of State. My responsibilities as the Joint Force Health Protection Officer include: coordinating with the Office of the Secretary of Defense, the Combatant Commands, and the Services on health service support and preventive medicine; providing expert analyses and medical recommendations impacting the Joint Force; providing Military medical advice to the Chairman of the Joint Chiefs of Staff through the Joint Staff Surgeon on all matters related to force health protection, including:

Public Health, comprehensive health surveillance and risk management, laboratory services, and veterinary services; and providing expertise across the continuum of force health protection activities including medical intelligence, health threat analysis, infectious disease prevention, industrial hygiene, chemical, biological and toxic materials and medical countermeasures.

2. I am generally aware of the allegations set forth in the pleadings filed in this matter. This declaration is based on my personal knowledge, as well as information made available to me during the routine execution of my official duties.

COVID-19 IMPACTS ON THE FORCE

3. As of December 16, 2021, there have been 259,145 cases of Coronavirus Disease 2019 (COVID-19) in service members across the Department of Defense (DoD), of which 2,315 have required hospitalizations and led to 81 deaths (80 of which occurred in unvaccinated individuals). In a preprint study looking at COVID-19 vaccine breakthrough infections, the U.S. Department of Veterans Affairs found that among 3,032,561 fully vaccinated veterans, only 0.37% had breakthrough infections and <0.1% were hospitalized (<https://www.medrxiv.org/content/10.1101/2021.09.23.21263864v1>).

4. COVID-19 impacted all elements of DoD simultaneously, and required significant operational oversight by the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, Secretaries of the Military Departments, the Under Secretaries of Defense, and all geographic and functional combatant commands (CCMD) (i.e., military commands that carry out broad missions and are composed of forces from the military departments) to execute their statutory responsibilities.

5. On March, 25, 2020, then-Secretary of Defense Mark Esper enacted a 60-day stop movement order for all DoD uniformed and civilian personnel and their sponsored family members

overseas. This measure was taken to aid in further prevention of the spread of COVID-19, to protect U.S. personnel and preserve the operational readiness of our global force.

6. Building upon previously enacted movement restrictions governing foreign travel, permanent change of station moves, temporary duty and personal leave, this stop movement order also impacted exercises, deployments, redeployments, and other global force management activities. Approximately 90,000 service members slated to deploy or redeploy within 60 days of its issuance were impacted by this stop movement order.

7. Specific examples of cancelled or curtailed training resulting from the dangers posed by the SARS-CoV-2 virus, which causes COVID-19, include the following. In March of 2020, 63 Fort Jackson recruits in a class of 940 had tested positive for the virus and caused a rescheduling of basic training activities. Also in March 2020, the United States Military Academy at West Point was on spring break when the seriousness of the pandemic came to light, forcing a pause in the academic year until a plan could be developed to bring the cadets back to campus safely. In early April 2020, Secretary Esper authorized the Secretaries of the Military Departments to pause accessions training (i.e., training for new recruits) for two weeks. In May 2020, the Defender Europe 2020 exercise was originally supposed to deploy the largest force (20,000 service members) from the United States to Europe in over 20 years, but the event was modified to about 6,000 service members to limit troop movement. Reserve and National Guard units suspended monthly battle assemblies and drill as early as March and April 2020, and moved to virtual training. For instance, the Army Reserve announced on March 18, 2020, that it was suspending monthly battle assemblies. The Navy Reserve announced about the same time the suspension of drill weekends, and then on April 16 it announced that suspension would be extended. In Korea, United States Forces Korea (the command responsible for military operations in the country) was forced

to limit travel outside of the country, and travel to and from Daegu was limited to mission-essential personnel only. In addition, the spread of the virus caused the DoD Education Activity (DoDEA) to cancel school for children in all of the schools in Daegu, and military commanders were forced to cancel all meetings, formations, and training events greater than 20 people, which severely impacted unit training which routinely requires service members to practice maneuvers and operations in large group settings.

8. Perhaps one of the more well-known examples of how the spread of COVID-19 could impact military operations, particularly among unvaccinated service members, is that of the U.S.S. Theodore Roosevelt, a nuclear-powered aircraft carrier with 4,779 personnel onboard. While conducting operations in the Pacific Ocean, the U.S.S. Theodore Roosevelt had to be diverted to the U.S. Naval Base Guam after an outbreak of SARS-CoV-2 occurred in an estimated 1,331 crew members, killing one, and resulting in the ship becoming non-operational.¹ Since the U.S. Navy only has 11 aircraft carriers in the total inventory, this event represented a significant reduction in the Navy's operational capacity. This example highlights not only the operational impact unmitigated spread of SARS-CoV-2 could have on the military's ability to carry out operations, but also the increased risk of transmission to those who must carry out their duties in close-quarters environments, such as service members who must work in close contact with others, sleep in open bays with tightly packed bunks, or must work in the confined areas of a ship where it is believed that such close, confined working environments contributed to higher exposure to the virus and a higher risk of infection.

¹ The New England Journal of Medicine, An Outbreak of Covid-19 on an Aircraft Carrier, <https://www.nejm.org/doi/full/10.1056/NEJMoa2019375>.

9. Over the past twenty months, approximately 19 major training events, many of which involved preparedness and readiness training with our foreign partners, had to be canceled as a result of COVID-19. These included major training events involving tens of thousands of personnel that focus on readiness and response to events spanning a wide range of national security and international objectives, including: responses to catastrophic natural disasters, multi-national exercises with international partners to defend against military aggression, training symposiums and exercises to enhance defenses to information infrastructures, and partner capacity training for security and stability operations.

10. Further, unvaccinated individuals were unable to participate in some international training events because some partner nations had COVID-19 vaccination requirements or additional testing and quarantine requirements for country entry that degraded training value and involvement for unvaccinated individuals. There are still countries with vaccine requirements or quarantine requirements for unvaccinated individuals which would preclude an unvaccinated individual from participating in a military-to-military engagement with partner nations.

11. The loss of these training opportunities not only inhibited the development and sustainment of intra- and international relationship development that would otherwise allow for increased cooperation and understanding, but it prevented invaluable training opportunities that allow our forces, and our foreign partners, to practice interoperability and to strengthen their abilities to plan and execute combat, humanitarian, and security operations that are vital to the preservation of national security and the protection of our foreign interests.

12. As in the civilian health care system, in the early weeks and months of the pandemic, the DoD cancelled all non-essential medical procedures and surgeries and was further limited in its ability to provide medical appointments due to access restrictions to military

treatment facilities (MTFs), the lack of available beds in the MTFs, and the burden on the military health system associated with caring for COVID-19 patients. This had the effect of reducing readiness as service members were, in some cases, unable to receive the care they needed to address non-emergency conditions and undergo routine medical and health assessments that are required under military directives to maintain medical readiness.

13. The military health system was also called on to support the COVID-19 response in the United States. In April of 2020, the Department of Defense converted the Jacob K. Javits Center in New York into an alternative care facility for more than 2,000 COVID-19 patients. The United States Naval Ship (USNS) Comfort arrived in New York Harbor on March 30, 2020, while the USNS Mercy arrived in Los Angeles on March 27, 2020, to relieve pressure on local hospital systems so they could focus on life-saving COVID-19 related care. These and other examples of DoD support to civil authorities served as a resource drain on the military health system and obviously directly exposed DoD personnel to the SARS-CoV-2virus.

14. Vaccinations for COVID-19 enabled the return to higher levels of occupancy in DoD facilities, and hold in-person training, meetings, conferences, and other events. Vaccinations also permit service members to engage in joint training exercises with other countries that have vaccine requirements. It also reduced the testing burden on the DoD since in most instances individuals who are fully vaccinated are not required to submit to COVID-19 testing.

15. On May 26, 2020, the Secretary of Defense issued conditions-based guidance that enabled the resumption of some unrestricted official DoD travel based on the White House's Opening Up America Guidelines. On April 12, 2021, the Under Secretary of Defense for Personnel and Readiness published guidance removing some travel restrictions for fully vaccinated

individuals and on September 24, 2021, the Deputy Secretary of Defense lifted travel restrictions for fully vaccinated DoD personnel.

16. Since July 2021, non-fully-vaccinated active-duty service members had a 14.6-fold increased risk of being hospitalized when compared to fully vaccinated active-duty service members. Comparing the risk of hospitalization among those who are partially vaccinated to those who are unvaccinated shows the impact of even partial vaccination. Since July 2021, unvaccinated active-duty service members had an average 6.6-fold increased risk of being hospitalized when compared to active-duty service members with at least one vaccine dose.

17. This demonstrates that COVID-19 vaccines are effective in preventing infections and hospitalizations in service members. Being fully vaccinated offers better protection than being partially vaccinated, but any vaccination decreases risk of hospitalization. Breakthrough cases are rare after full vaccination; a recent report by the Centers for Disease Control and Prevention (CDC) report found that they may occur in just 0.01% of all fully vaccinated people.²

18. Data compiled by the CDC demonstrate that unvaccinated persons had 5 times the risk of testing positive for COVID-19 and greater than 10 times the risk of being hospitalized and dying.³ More recently, in September 2021, after the Delta variant was the predominant variant in the U.S., the CDC found that unvaccinated persons had 5.8 times the risk of testing positive, 8 times the risk of

² COVID-19 Vaccine Breakthrough Infections Reported to CDC — United States, January 1–April 30, 2021. MMWR Morb Mortal Wkly Rep 2021;70:792–793. DOI: <http://dx.doi.org/10.15585/mmwr.mm7021e3>, last accessed December 9, 2021.

³ Scobie HM, Johnson AG, Suthar AB, et al. Monitoring Incidence of COVID-19 Cases, Hospitalizations, and Deaths, by Vaccination Status — 13 U.S. Jurisdictions, April 4–July 17, 2021. MMWR Morb Mortal Wkly Rep 2021;70:1284–1290. DOI: <http://dx.doi.org/10.15585/mmwr.mm7037e1>, last accessed December 9, 2021.

being hospitalized, and 14 times the risk of dying from COVID-19.⁴ While the primary goal of the COVID-19 vaccination program is to reduce severe disease and death from COVID-19, reducing transmission is also a key component to defeating this virus – each new infection provides an opportunity for the virus to explore the landscape of mutations, become more infectious, and possibly “outwit” current vaccines.

19. Accordingly, while some have pointed to the increase in the number of breakthrough cases as a reason to question the effectiveness of the vaccines, it is important to keep in mind that vaccination reduces the incidence of serious illness and death from COVID-19. Also, as vaccination rates increase among service members, vaccinated service members should make up a larger percentage of infections and hospitalized individuals. And if *every* service member were vaccinated, only vaccinated service members would have infections or be hospitalized. So it is important to view the number of breakthrough infections in this light and not as a reflection of vaccine effectiveness.

20. Given the tangible protection the vaccines afford service members against infection, serious illness, hospitalization, and death, it is clear that COVID-19 vaccines improve readiness and preserve the DoD’s ability to accomplish its mission. If an individual tests positive for COVID-19, they are required to isolate and are unavailable to perform their duties, even if they are asymptomatic or have mild symptoms. They also put their fellow service members at risk of infection and hospitalization and further degrade the readiness of their units, their service, and the DoD. Additionally, if an unvaccinated service member in a hostile area becomes seriously ill and requires a medical evaluation, it may risk the lives of other service members or may ultimately not be possible, thus endangering the member’s life and affecting the unit’s mission.

⁴ See: <https://covid.cdc.gov/covid-data-tracker/#rates-by-vaccine-status>, last accessed December 9, 2021.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 20, 2021, in Washington, DC.

STANLEY.SCOTT.E. Digitally signed by
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Date: 2021.12.20 14:58:19 -05'00'

Scott Stanley, PhD
Major, United States Army
Joint Staff Force Health Protection Officer
Office of the Joint Staff Surgeon

EXHIBIT E

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, *et al.*,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR., in his
official capacity as President of the
United States,
et al.,

Defendants.

Civil Action 21-1136-F

DECLARATION OF COLONEL TONYA RANS

I, Colonel Tonya Rans, hereby state and declare as follows:

1. I am currently employed by the U.S. Air Force as the Chief, Immunization Healthcare Division, Defense Health Agency – Public Health Directorate, located in Falls Church, Virginia. I have held the position since June 2017. I am a medical doctor and have been board certified in Allergy/Immunology since 2008 and was a board certified Pediatrician from 2001-2015.

2. In my current role, my responsibilities include directing a responsive, evidence-based, patient-centered organization promoting optimal immunization healthcare for all DoD beneficiaries and those authorized to receive immunization from DoD. This includes assisting in policy development, providing implementation guidance and education, and engaging in clinical studies and research through clinical collaboration. The Defense Health Agency-Immunization

Healthcare Division (DHA-IHD) routinely engages with the medical representatives from the military departments, U.S. Coast Guard, Joint Staff, Combatant Commands, and others to develop standardized immunization implementation guidance in accordance with published policy for consistency across DoD where possible.

3. I am aware of the allegations set forth in the pleadings filed in this matter. This declaration is based on my personal knowledge, as well as information made available to me during the routine execution of my official duties.

Coronavirus Disease 2019 (COVID-19)

4. As part of my official duties, I served as a member of the COVID-19 Vaccine Distribution Operational Planning Team (OPT), which was directed to develop and implement DoD's COVID-19 Vaccine Distribution plan. The Coronavirus Task Force (CVTF) provided overarching guidance to the OPT. The OPT provided routine and ad hoc updates on COVID-19 vaccine deliveries, administration, and adverse events to the CVTF.

5. The virus that causes COVID-19 disease is SARS-CoV-2, a ribonucleic acid (RNA) virus from the Coronavirus family. Like any RNA virus, the SARS-CoV-2 virus mutates and evolves constantly and regularly as it infects and replicates in host cells. Mutations that are beneficial to the virus (i.e., make the virus more easily spread between hosts, evade the immune system) are integrated into the viral genome, thereby increasing "survival" and replication opportunity. This has been seen with the SARS-CoV-2 "Delta" variant, which is twice as contagious as previous variants.¹ However, not all mutations are beneficial to the virus – some

¹ <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html>, last accessed December 17, 2021.

can result in virus death and therefore do not infect the host. This is part of the normal biology cycle of all viruses.

6. The latest reports from the U.S. Centers for Disease Control and Prevention (CDC) indicate that the SARS-CoV-2 virus spreads when an infected person breathes out droplets and very small particles that contain the virus.² These droplets and particles can be inhaled by other people or land on their eyes, noses, or mouth. In some circumstances, viral particles may contaminate surfaces. People who are closer than 6 feet from the infected person are most likely to get infected, especially in areas where there is poor ventilation.

7. COVID-19 disease can cause acute symptoms such as fever/chills, cough, shortness of breath, fatigue, muscle aches, headache, loss of sense of smell or taste and/or sore throat. Symptoms appear 2-14 days (usually within 4-5 days) after viral exposure.³ The infection can affect people in different ways: from asymptomatic, to limited and mild (for 2-3 days) to more severe (such as trouble breathing, chest pain, inability to think straight and inability to stay awake). Even with the availability of aggressive medical management and ventilator support in an intensive care setting for those with severe symptoms, hundreds of thousands with COVID-19 disease have died. As of December 15, 2021, CDC reports that over 50 million individuals in the U.S. have been diagnosed with COVID-19 disease, over 3.5 million have been hospitalized, and over 800,000 have died (approximately 1 in 500 in the total U.S. population of 330 million).⁴ Per the

² <https://www.cdc.gov/coronavirus/2019-ncov/faq.html>, last accessed December 17, 2021.

³ <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html>, last accessed December 17, 2021.

⁴ <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html>, last accessed December 17, 2021.

CDC, the elderly and those with underlying medical conditions like cardiovascular disease, diabetes, chronic respiratory disease, obesity, pregnancy, immunocompromising conditions, or cancer are more likely to develop serious illness.⁵

8. Although most people with COVID-19 get better within weeks of illness, some people experience post-COVID-19 conditions (aka long/long-haul COVID, Postacute Sequelae of COVID-19 (PASC), long-term effects of COVID, or chronic COVID). Post-COVID-19 conditions include a wide range of new, returning, or ongoing health problems four or more weeks after infection. Those who were asymptomatic during their COVID-19 infection may still develop post-COVID-19 conditions. One systematic review assessing short and long-term rates of long-COVID in more than 250,000 COVID-19 survivors from 57 studies with an average age of 54 years demonstrated that more than 50% of these COVID-19 survivors continued to have a broad range of symptoms six months after resolution of the acute COVID-19 infection, of which the most common were functional mobility impairments, respiratory abnormalities, and mental health disorders.⁶ Another study comparing outcomes in patients referred to outpatient rehabilitation clinics after COVID-19 reported poorer general, mental, and physical health and functioning compared with patients with no previous diagnosis of COVID-19 referred for cancer rehabilitation. Those referred for rehabilitation following COVID-19 were more likely to be male, younger, and employed.⁷ A study assessing clinical patterns and recovery time from COVID-19 illness in 147

⁵ <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>, last accessed December 17, 2021.

⁶ Groff, et al, *JAMA Network Open*, Short-term and Long-term Rates of Postacute Sequelae of SARS-CoV-2 Infection, <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2784918>.

⁷ Rogers-Brown JS, et al. CDC Morbidity and Mortality Weekly Report, Vol 70(27) 9 July 2021 <https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7027a2-H.pdf>.

international-level Paralympic and Olympic athletes showed that 86% had symptoms lasting ≤ 28 days, whereas 14% had symptoms of longer duration. In both groups, fatigue, dry cough, and headache were the predominant symptoms.⁸ As described further below, myocarditis associated with COVID-19 disease or mRNA COVID-19 vaccine is rare. However, the risk of myocarditis associated with COVID-19 disease is consistently higher than the risk of myocarditis associated mRNA COVID-19 vaccine. Hence, the risk to benefit ratio continues to be in favor of vaccination.

COVID-19 Impacts on the Force

9. Infectious diseases have been the single greatest threat to the health of those involved in military operations. As the standard military unit shrinks and becomes more mobile to rapidly respond to global threats, any decrease in personal or unit readiness can significantly decrease operational efficiency and result in military ineffectiveness. Similar to other viruses, SARS-CoV-2 virus can be easily transmitted to others prior to symptom development and therefore may infect significant numbers before being identified. DoD personnel, including service members, especially those in an operational setting (such as those working on ships, submarines, or engaged in the operation of aircraft and vehicles; those deployed to austere environments; or those engaged in routine field training and airborne exercises), work in environments where duties may limit the ability to strictly comply with mitigation measures such as wearing a face mask, avoiding crowded areas, maintaining physical distancing of at least 6 feet, increasing indoor ventilation, maintaining good hand hygiene, and quarantining if in close contact with a COVID-19 case. Therefore, upon exposure, these individuals may be at higher risk to be diagnosed with COVID-19 compared to those who can robustly maintain all recommended

⁸ Hull JH, et al. Clinical patterns, recovery time and prolonged impact of COVID-19 illness in international athletes: the UK experience. *Br J Sports Med* 2021;0:1-8. Doi 10.1136/bjsports-2021-104392.

mitigation strategies. Further, although the elderly population and those with medical conditions are more likely to have severe disease, otherwise healthy Service members have developed “long-haul” COVID-19, potentially impacting their long-term ability to perform their missions. Data presented from DoD’s COVID-19 registry has demonstrated that of 111,767 active duty service members who had COVID-19 disease between February 1, 2020 to August 12, 2021, 37,838 (33.9%) had diagnoses for conditions requiring a healthcare visit 30-180 days following their illness, the most common being joint/muscle pain (15,614 or 14%) followed by chest pain/cough (7,887 or 7.1%). In comparison, only 8.3% and 1.81%, respectively, of active duty service members had a healthcare visit for those diagnoses 30-180 days after vaccination. All diagnoses associated with “Long-COVID-19 Syndrome” were found to be more common after COVID-19 disease than after COVID-19 vaccination. Some service members have unfortunately succumbed to the disease, as described further below. Service members and federal civilian employees are the military’s most valuable asset; without a medically ready force and ready medical force, the military mission is at high risk of failure. Recommendations from evidence-based medicine must remain the core approach to medical readiness. These evidence-based recommendations will continue to be updated as our understanding of the disease, complications, and impact from vaccination continues to evolve.

10. Between February 2020 and November 2021, there were 209,133 new and repeat cases of COVID-19 among active duty service members (see “Table” below). The largest monthly peak in cases occurred in January 2021, with 28,345 cases identified (see “Figure” below). Other peaks occurred in August 2021 with 22,042 cases and in July 2020 with 11,610 cases. The percentage of cases that were hospitalized was highest at the start of the pandemic and trended downward through January 2021. The percentage of hospitalized cases then increased from

0.9% in January 2021 to 2.1% in May 2021, and decreased to 1.5% in September 2021. The percentage of hospitalized cases decreased to 0.8% in November 2021, but this trend should be interpreted with caution due to data lags. In total, 30 active duty service members have died from COVID-19 as of the end of November 2021. The number of active duty service members who died from COVID-19 remained very low throughout the first year of the pandemic, with a slight increase in the numbers of deaths occurring between December 2020 and February 2021, and a greater increase occurring between August and October 2021, coinciding with the increased spread of the Delta variant. More than one-half of the 30 deaths in active duty service members occurred between August and October 2021 (n=17). One active duty service member died from COVID-19 in November 2021.

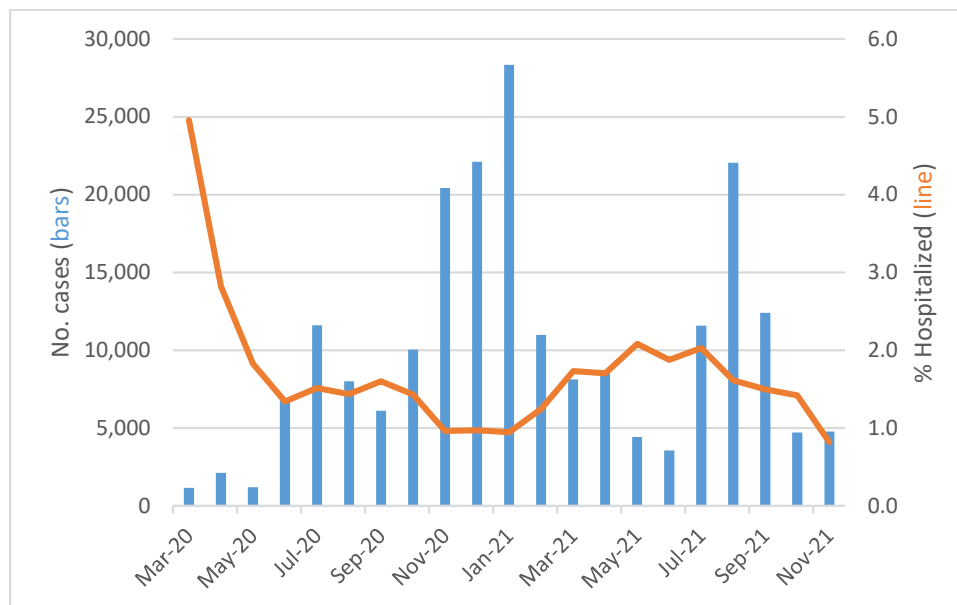
Table. COVID-19 cases, hospitalizations, and deaths among active duty service members, February 2020 - November 2021

	No. cases	No. hospitalizations	% hospitalizations	No. deaths
Feb-20	7	2	28.6	0
Mar-20	1,150	57	5.0	0
Apr-20	2,126	60	2.8	1
May-20	1,204	22	1.8	0
Jun-20	6,789	91	1.3	0
Jul-20	11,610	176	1.5	0
Aug-20	8,010	115	1.4	0
Sep-20	6,118	98	1.6	0
Oct-20	10,047	144	1.4	1
Nov-20	20,419	197	1.0	0

Dec-20	22,115	215	1.0	2
Jan-21	28,345	269	0.9	2
Feb-21	10,981	137	1.2	4
Mar-21	8,132	141	1.7	0
Apr-21	8,571	146	1.7	1
May-21	4,417	92	2.1	0
Jun-21	3,569	67	1.9	0
Jul-21	11,583	235	2.0	1
Aug-21	22,042	356	1.6	5
Sep-21	12,406	186	1.5	6
*Oct-21	4,723	67	1.4	6
*Nov-21	4,769	39	0.8	1

*Hospitalization data not complete due to data lags

Figure. COVID-19 cases among active duty service members and percentage of cases that were hospitalized, March 2020 – November 2021



Note: February 2020 is not shown due to the very small number of cases. Hospitalization data for October-November 2021 not complete due to data lags

11. The DoD has provided information on its website concerning the number of vaccinations provided by DoD, the vaccination of the force, and health impact of those who developed COVID-19 infections.⁹ As depicted below, December 15, 2021 data demonstrated that of the 400,960 COVID-19 cases within the DoD, 5,601 individuals were hospitalized and 625 have died, including 80 military service members (service members include Active Duty, Reserves, and National Guard personnel). In both the civilian sector and in the military, the overwhelming majority of individuals hospitalized or who died were not vaccinated or not fully vaccinated.

DOD COVID-19 CUMULATIVE TOTALS				
	Cases	Hospitalized	Recovered	Deaths
Military	258,800	2,315	254,471	80
Civilian	74,860	2,092	66,399	382
Dependent	42,069	504	41,058	34
Contractor	25,231	690	23,687	129
Total	400,960	5,601	385,615	625

12. The bed capacity at DoD's military medical treatment facilities (MTFs) has generally followed local civilian hospital utilization, with some MTFs having high admission rates and a need to temporarily curtail medical services. The National Guard has been called on extensively to provide medical support to the civilian population throughout the pandemic and Services have also provided "manning assist" to other DoD MTFs and civilian hospitals.

⁹ <https://www.defense.gov/Spotlights/Coronavirus-DOD-Response/>, last accessed December 17, 2021.

Vaccine Impacts

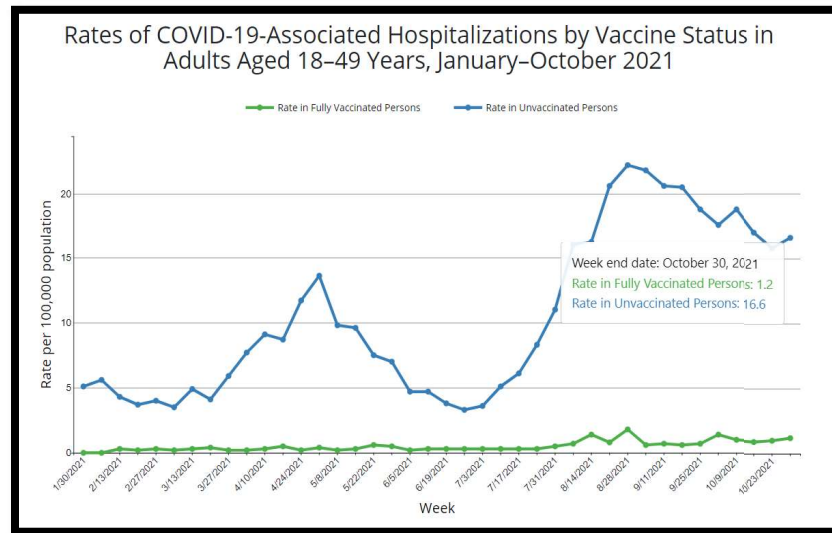
13. Immunization is a global health and development success story, saving millions of lives across the age spectrum annually from illness, chronic conditions, and potentially death. Immunizations provide benefit at both the individual and community level. First, by stimulating an active immune response, vaccinated individuals are largely protected from the disease of concern. Second, when a high proportion of individuals are immune (i.e., herd immunity) human-to-human transmission is disrupted, thereby protecting those who remain susceptible (i.e., those who may not be able to receive a vaccine or do not mount an adequate antibody response). Disease prevention through immunization also mitigates the need for pharmacologic treatment (antibiotics, etc.), reducing the risk of drug-resistant pathogen development.

14. As a key component of primary health care, the U.S. Food and Drug Administration (FDA), which provides regulatory allowance for immunizations, has licensed vaccines for over 20 different infectious diseases. The Advisory Committee on Immunization Practices (ACIP), an advisory committee of the CDC, develops recommendations on how to use vaccines to control diseases in the United States. The military also maintains awareness, surveillance, and provides guidance to DoD personnel and beneficiaries on vaccine-preventable diseases in the global setting.

15. According to the CDC, over 485 million doses of COVID-19 vaccine have been given in the United States from December 14, 2020, through December 13, 2021.¹⁰ Evidence continues to show that the incidence of SARS-CoV-2 infection, hospitalization, and death is higher in unvaccinated than vaccinated persons. Although weekly rates can vary, the cumulative rate of

¹⁰ <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/safety-of-vaccines.html>, last accessed December 17, 2021.

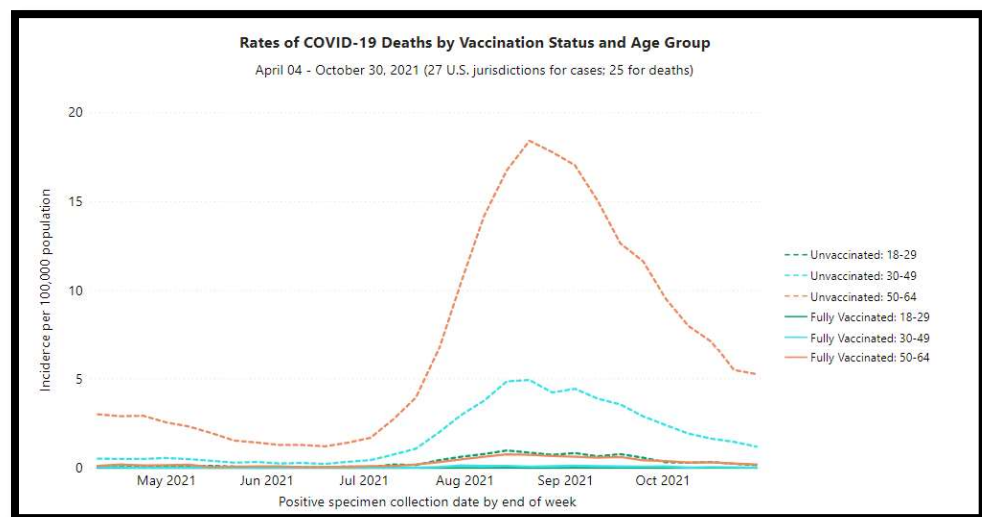
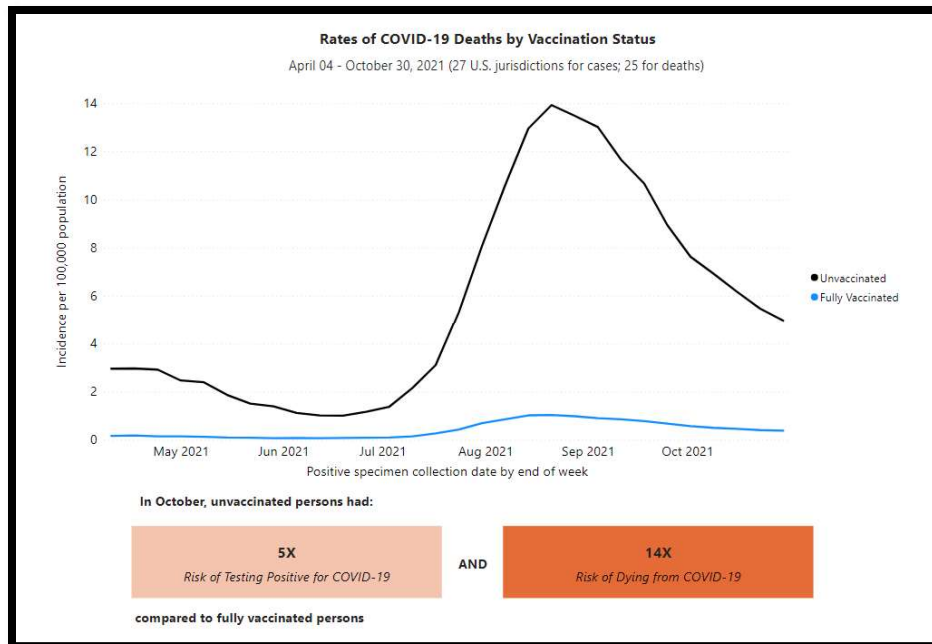
COVID-19 associated hospitalizations in unvaccinated adults ages 18-49 years was about 13 times higher than fully vaccinated adults aged 18-49 years.¹¹



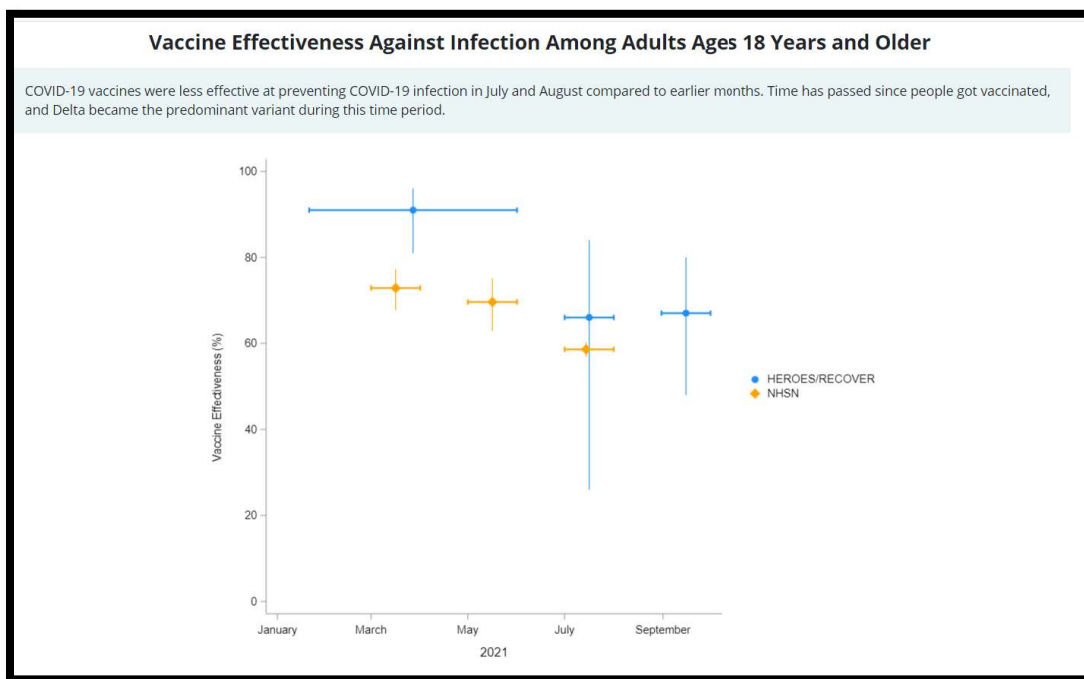
Also, according to CDC data, deaths by vaccination status from April 4, 2021-October 30, 2021 showed that unvaccinated persons had a 5 times greater risk of testing positive for COVID-19 and a 14 times greater risk of dying from COVID-19.¹²

¹¹ <https://covid.cdc.gov/covid-data-tracker/#covidnet-hospitalizations-vaccination>, last accessed December 17, 2021.

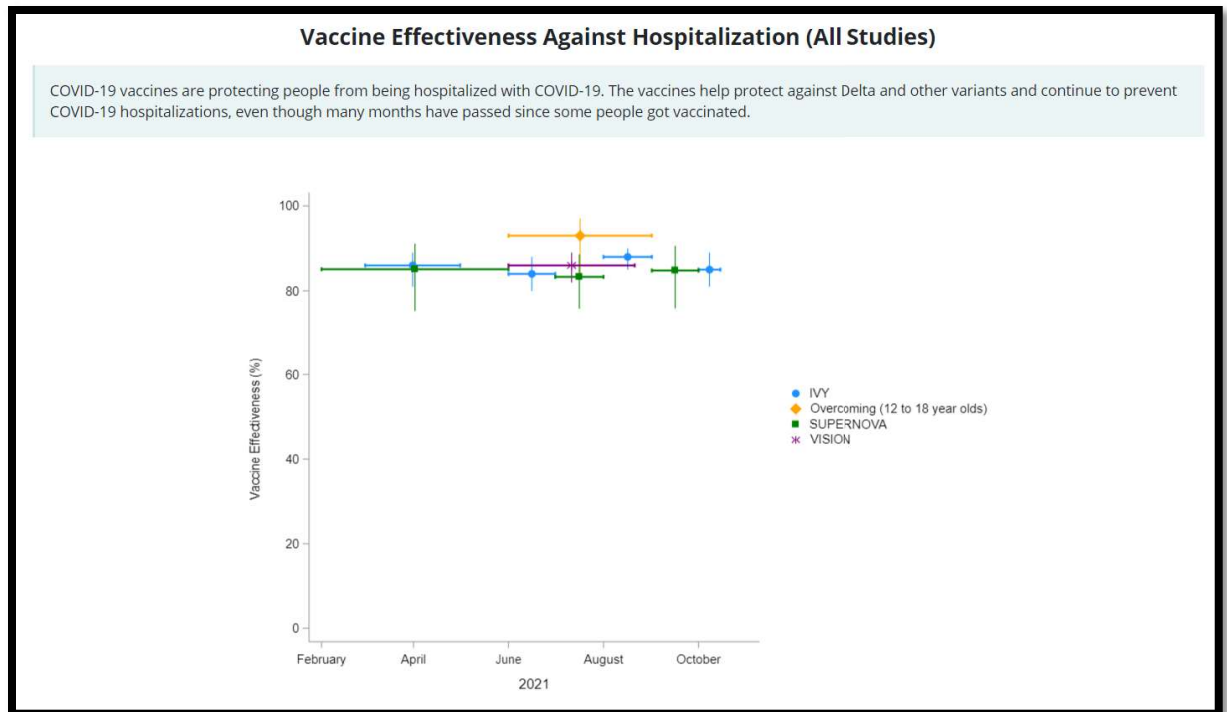
¹² <https://covid.cdc.gov/covid-data-tracker/#rates-by-vaccine-status>, last accessed December 17, 2021.



16. Although COVID-19 vaccine effectiveness against **infection** has decreased over time, this is seen more significantly in individuals 65 years of age and older. COVID-19 vaccine effectiveness against severe disease (hospitalization and death) remains high.¹³



¹³ <https://covid.cdc.gov/covid-data-tracker/#vaccine-effectiveness>, last accessed December 17, 2021.



17. As of December 17, 2021, DoD immunization sites have administered over 6.5 million doses of COVID-19 vaccine. Vaccine adverse events that are potentially related to vaccination are centrally captured through the Vaccine Adverse Event Reporting System (VAERS) through passive surveillance, meaning that information is voluntarily reported by health care providers and the public. As of December 10, 2021, a total of 7,556 unique VAERS reports (approximately 11 VAERS reports/10,000 doses administered) were submitted by DoD beneficiaries or those authorized to receive vaccine from DoD. Note that the number of VAERS reports/10,000 doses administered for DoD beneficiaries is likely to be lower, as the denominator does not take into account beneficiaries who receive vaccine in the civilian sector though DoD would still receive their VAERS report if the submitter indicated military affiliation. Additionally, individuals who had an adverse event but did not submit a VAERS would not be known and

therefore would not be counted. Of note, a VAERS submission to the CDC does not mean that the vaccine of concern caused or contributed to the medical issue reported.

18. As of December 2021, the DoD has received hundreds of thousands of BLA-manufactured, EUA-labeled vaccine doses and is using them.

19. Approach to immunizations within DoD are outlined in DoD Instruction 6205.02, “DoD Immunization Program” dated June 19, 2019, which states that it is DoD policy that all DoD personnel and other beneficiaries required or eligible to receive immunizations will be offered immunizations in accordance with recommendations from the CDC and its ACIP. Army Regulation 40-562, Navy Bureau of Medicine and Surgery Instruction 6230.15B, Air Force Instruction 48-110_IP, Coast Guard Commandants Instruction M6230.4G, “Immunizations and Chemoprophylaxis for the Prevention of Infectious Diseases,” October 7, 2013, further states the Military Service policy concerning immunizations follows the recommendations of the CDC, ACIP, and the prescribing information on the manufacturer’s package inserts, unless there is a military-relevant reason to do otherwise. This document also describes general examples of medical exemptions, which include “evidence of immunity based on serologic tests, documented infection, or similar circumstances.” Some interpret this as a diagnosis of COVID-19 disease and/or results of a COVID-19 serologic test means that a medical exemption should be granted. However, of significance is the phrase “evidence of immunity.” CDC defines immunity as “protection from an infectious disease. If you are immune to a disease, you can be exposed to it without becoming infected.”¹⁴ There are two major types of testing available for COVID-19: diagnostic tests, which assess for current infection, and antibody tests, which assess for antibody

¹⁴ <https://www.cdc.gov/healthyschools/bam/diseases/vaccine-basics.htm>, accessed December 17, 2021.

production, which is indicative of past infection and (in some tests) a history of vaccination. The FDA states, “We do not know how long antibodies stay in the body following infection with the virus that causes COVID-19. We do not know if antibodies give you protective immunity against the virus, so results from a serology test should not be used to find out if you have immunity from the virus. The FDA cautions patients against using the results from any serology test as an indication that they can stop taking steps to protect themselves and others, such as stopping social distancing or discontinuing wearing masks.”¹⁵ As described below, lab tests for serology also state that it is unclear at this time if a positive antibody result infers immunity against future COVID-19 infection. Therefore, given the scientific evidence available, a medical exemption based on the history of COVID-19 disease or serology results does not meet “evidence of immunity”. The presence of antibodies is not the same thing as being immune.

20. The CDC states that “COVID-19 vaccination is recommended for everyone aged 5 years and older, regardless of a history of symptomatic or asymptomatic SARS-CoV-2 infection. This includes people with prolonged post-COVID-19 symptoms and applies to primary series doses, additional primary doses, and booster doses. Viral testing to assess for acute SARS-CoV-2 infection or serologic testing to assess for prior infection is not recommended for the purpose of vaccine decision-making. Present data are insufficient to determine an antibody titer threshold that indicates when an individual is protected from SARS-CoV-2 infection. There is neither any FDA-authorized or FDA-approved test nor any other scientifically validated strategy that vaccination providers or the public can use to reliably determine whether a person is protected from infection. Data from multiple studies indicate that the currently approved or authorized

¹⁵ <https://www.fda.gov/consumers/consumer-updates/coronavirus-disease-2019-testing-basics>, accessed December 17, 2021.

COVID-19 vaccines can be given safely to people with evidence of a prior SARS-CoV-2 infection.”¹⁶

21. Further, CDC states “current evidence suggests that the risk of SARS-CoV-2 reinfection is low after a previous infection but may increase with time due to waning immunity. Among individuals infected with SARS-CoV-2, substantial heterogeneity exists in their immune response. (The term “heterogeneity” means that those individuals have diverse or varying immune responses which, when compared to the subsequent response of those receiving the COVID-19 vaccine, are not as reliable or consistent.) Conversely, the immune response following COVID-19 vaccination is more reliable, consistent, and predictable. A primary vaccination series decreases the risk of future infections in people with prior SARS-CoV-2 infection. Numerous immunologic studies have consistently shown that vaccination of individuals who were previously infected enhances their immune response, and growing epidemiologic evidence indicates that vaccination following infection further reduces the risk of subsequent infection, including in the setting of increased circulation of more infectious variants.”¹⁷

22. Although natural infection for some diseases, in some cases, can result in long-standing immunity (e.g., measles), there is risk of untoward outcomes from the disease itself, which can be chronic or even fatal. Examples include Pneumonia or invasive group B Strep from

¹⁶ https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-vaccines-us.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fvaccines%2Fcovid-19%2Finfo-by-product%2Fclinical-considerations.html, accessed December 17, 2021.

¹⁷ https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-vaccines-us.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fvaccines%2Fcovid-19%2Finfo-by-product%2Fclinical-considerations.html, accessed December 17, 2021.

chickenpox, meningitis or epiglottitis from *Haemophilis influenza* type B, birth defects from rubella, liver cancer from Hepatitis B, and death from measles.

23. Examples of natural infections that do not mount long-standing immunity include, in addition to COVID-19, Influenza, Respiratory Syncytial Virus, Malaria, Whooping cough, and rotavirus. Therefore, re-infection is possible. Multiple serotypes of some pathogen like influenza, pneumococcus, and possibly with the COVID-19 variants, also make determination of a protective serologic level more difficult, especially to say there is lifelong immunity.

24. In October 2021, prior to the presentation of the Omicron variant, the newest SARS-CoV2 variant of concern, CDC summarized a review of 96 peer-reviewed and preprint publications, providing an overview of current scientific evidence regarding infection-induced immunity.¹⁸ Key findings include the following:

- Available evidence shows that fully vaccinated individuals and those previously infected with SARS-CoV-2 each have a low risk of subsequent infection for at least 6 months.

Data are presently insufficient to determine an antibody titer threshold that indicates when an individual is protected from infection. At this time, there is no FDA-authorized or approved test that providers or the public can use to reliably determine whether a person is protected from infection.

- The immunity provided by vaccine and prior infection are both high but not complete (i.e., not 100%).
- Multiple studies have shown that antibody titers correlate with protection at a population level, but protective titers at the individual level remain unknown.

¹⁸ <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/vaccine-induced-immunity.html>, accessed December 17, 2021.

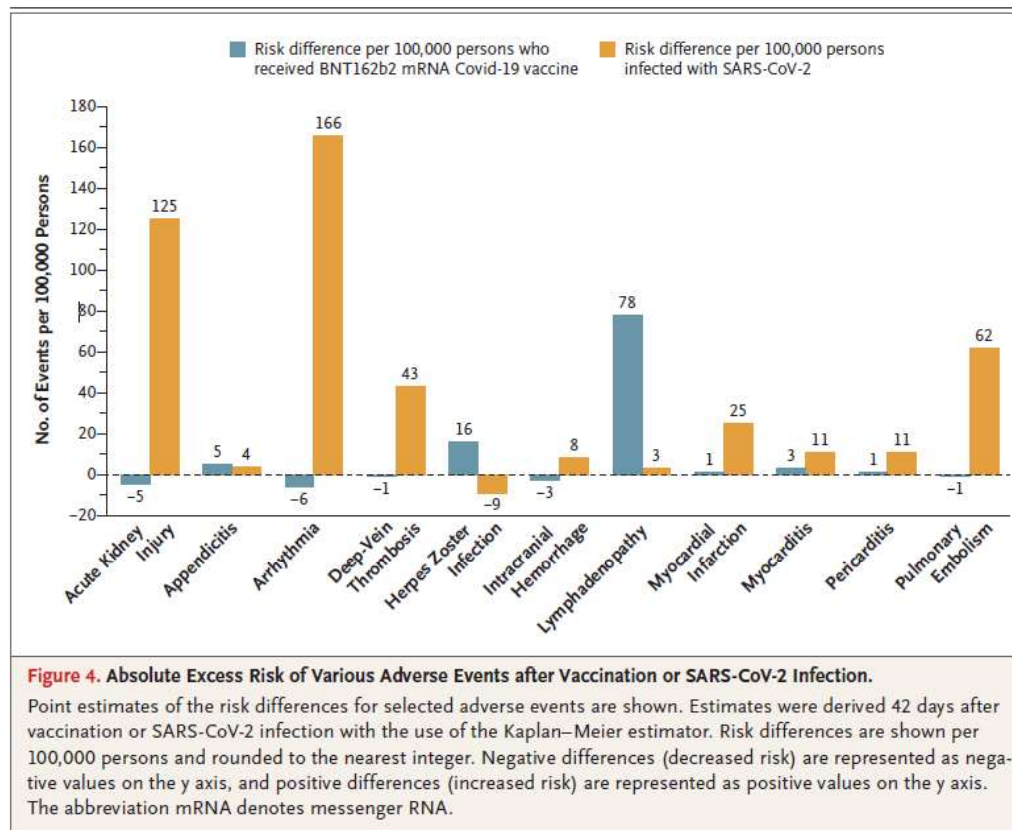
- Whereas there is a wide range in antibody titers in response to infection with SARS-CoV-2, completion of a primary vaccine series, especially with mRNA vaccines, typically leads to a more consistent and higher-titer initial antibody response.
- For certain populations, such as the elderly and immunocompromised, the levels of protection may be decreased following both vaccination and infection.
- Current evidence indicates that the level of protection may not be the same for all viral variants.
- The body of evidence for infection-induced immunity is more limited than that for vaccine-induced immunity in terms of the quality of evidence (e.g., probable bias towards symptomatic or medically-attended infections) and types of studies (e.g., observational cohort studies, mostly retrospective versus a mix of randomized controlled trials, case-control studies, and cohort studies for vaccine-induced immunity). There are insufficient data to extend the findings related to infection-induced immunity at this time to persons with very mild or asymptomatic infection or children.

25. Debate continues about whether natural immunity versus vaccine-induced immunity is more protective against breakthrough infections (a reinfection in someone who was previously infected versus an infection in a previously not infected individual who was fully immunized). A frequently cited, though not peer reviewed, retrospective study from Israel found that the rates of SARS-CoV-2 breakthrough infections in vaccinated individuals, while very low (highest rate = 1.5%) were 13 times higher than the rates of reinfection and

hospitalization in previously infected individuals¹⁹. These findings have not been reproduced in a peer-reviewed or prospective publication. However, an observational study,²⁰ also out of Israel, compared adverse events in Pfizer-BioNTech vaccinated versus unvaccinated individuals in addition to those who had a history of COVID-19 disease versus those who did not. As previously identified in multiple studies, vaccination with an mRNA vaccine like Pfizer-BioNTech was associated with an elevated risk of myocarditis compared to those unvaccinated (risk difference 2.7 events/100,000 people). However, when assessing the relative risk in those with a history of COVID-19 disease with those who did not have disease, the risk of myocarditis was substantially higher in those who had COVID-19 disease (risk difference of 11 events/100,000 persons). The risk difference is calculated as the difference between the observed risks in the two groups.

¹⁹ <https://www.medrxiv.org/content/10.1101/2021.08.24.21262415v1>, last accessed December 17, 2021.

²⁰ Barda N, et al. Safety of the BNT162b2 mRNA COVID-19 Vaccine in a Nationwide Setting N Engl J Med 2021; 385:1078-1090.



The Omicron variant

26. On November 26, 2021, the World Health Organization (WHO) designated the Omicron variant a “variant of concern”, upon recommendations of the Technical Advisory Group on SARS-CoV-2 Virus Evolution, which assesses if specific mutations and combinations of mutations alter the behavior of the virus.²¹ The United States designated Omicron as a variant of concern on November 30, 2021 and following first detection in the United States on December 1, 2021, it has rapidly spread throughout the United States.²² Very preliminary data suggests that

²¹ [https://www.who.int/news/item/26-11-2021-classification-of-omicron-\(b.1.1.529\)-sars-cov-2-variant-of-concern](https://www.who.int/news/item/26-11-2021-classification-of-omicron-(b.1.1.529)-sars-cov-2-variant-of-concern), last accessed December 17, 2021.

²² <https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html>, last accessed December 17, 2021.

the omicron variant may spread more easily than the original SARS-CoV-2 virus, and it is unknown how transmission compares to the Delta variant. Severity of disease caused by Omicron in those who are unvaccinated, had a previous history of disease, and in the unvaccinated population is unknown. Quantification of vaccine effectiveness of current FDA-approved/authorized and WHO-Emergency Use List COVID-19 vaccines is also unknown. Nonetheless, “current vaccines are expected to protect against severe illness, hospitalizations, and deaths due to infection with the Omicron variant. However, breakthrough infections in people who are fully vaccinated are likely to occur. With other variants, like Delta, vaccines have remained effective at preventing severe illness, hospitalizations, and death. The recent emergence of Omicron further emphasizes the importance of vaccination and boosters”²³.

Risks from COVID-19 Vaccination

27. Risks from immunization, including COVID-19 vaccines are rare. CDC provides routine updates on specific adverse events temporally associated with COVID-19 vaccines.²⁴ CDC updates as of December 16, 2021, include the following:

- A. **Anaphylaxis after COVID-19 vaccination is rare** and has occurred in approximately 2 to 5 people per million vaccinated in the United States.
- B. **Thrombosis with thrombocytopenia syndrome (TTS) after Johnson & Johnson’s Janssen (J&J/Janssen) COVID-19 vaccination is rare.** As of December 8, 2021, more than 16.9 million doses of the J&J/Janssen COVID-19 Vaccine have been given

²³ <https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html>, last accessed December 17, 2021.

²⁴ <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/adverse-events.html>, last accessed December 17, 2021.

in the United States. CDC and FDA identified 57 confirmed reports of people who got the J&J/Janssen COVID-19 Vaccine and later developed TTS. Women 18-49 years of age, especially, should be aware of the rare but increased risk of this adverse event. There are other COVID-19 vaccine options available for which this risk has not been seen.

- C. **Guillain-Barre Syndrome** - CDC and FDA are monitoring reports of Guillain-Barre Syndrome (GBS) in people who have received the J&J/Janssen COVID-19 Vaccine. GBS is a rare disorder where the body's immune system damages nerve cells, causing muscle weakness and sometimes paralysis. Most people fully recover from GBS, but some have permanent nerve damage. After more than 16.9 million J&J/Janssen COVID-19 Vaccine doses administered, there have been around 278 preliminary reports of GBS identified in VAERS as of December 8, 2021. These cases have largely been reported about 2 weeks after vaccination and mostly in men, many 50 years and older. CDC will continue to monitor for and evaluate reports of GBS occurring after COVID-19 vaccination and will share more information as it becomes available.
- D. **Myocarditis and pericarditis after COVID-19 vaccination are rare.** As of December 8, 2021, VAERS has received 1,908 reports of myocarditis or pericarditis among people ages 12-29 who received COVID-19 vaccines. Most cases have been reported after mRNA COVID-19 vaccination (Pfizer-BioNTech or Moderna), particularly in male adolescents and young adults. Through follow-up, including medical record reviews, CDC and FDA have confirmed 1,106 reports of myocarditis or pericarditis. CDC and its partners are investigating these reports to assess whether there is a relationship to COVID-19 vaccination.

E. **Reports of death after COVID-19 vaccination are rare.** More than 485 million doses of COVID-19 vaccines were administered in the United States from December 14, 2020, through December 13, 2021. During this time, VAERS received 10,483 reports of death (0.0022%) among people who received a COVID-19 vaccine. FDA requires healthcare providers to report any death after COVID-19 vaccination to VAERS, even if it's unclear whether the vaccine was the cause. **Reports of adverse events to VAERS following vaccination, including deaths, do not necessarily mean that a vaccine caused a health problem.** A review of available clinical information, including death certificates, autopsy, and medical records, has not established a causal link to COVID-19 vaccines. A review of reports indicates a causal relationship between the J&J/Janssen COVID-19 vaccine and TTS. On November 14, 2021, CDC scientists released a comprehensive review of reported U.S. cases through August. Continued monitoring has identified additional deaths for a total of 9 deaths causally associated with J&J COVID-19 vaccination.

28. Additionally, on October 27 2021, the COVID-19 subcommittee of the WHO Global Advisory Committee on Vaccine Safety (GACVS) provided an updated statement regarding myocarditis and pericarditis reported with COVID-19 mRNA vaccines, stating, in part: The GACVS COVID-19 subcommittee notes that myocarditis can occur following SARS-CoV-2 infection (COVID-19 disease) and that mRNA vaccines have clear benefit in preventing hospitalisation and death from COVID-19. Countries should continue to monitor reports of myocarditis and pericarditis following vaccination by age, sex, dose and vaccine brand. Countries should consider the individual and population benefits of immunization relevant to

their epidemiological and social context when developing their COVID-19 immunisation policies and programs.²⁵

COVID-19 Antibody Tests

29. As described above, testing to assess for acute SARS-CoV-2 infection or serologic testing to assess for prior infection is not recommended for the purposes of vaccine decision-making. As of December 17, 2021, the FDA's EUA Authorized Serology Test Performances²⁶ lists approximately 90 products, of which all of them had one of the following three statements about immunity interpretation:

- A. "You should not interpret the results of this test as an indication or degree of immunity or protection from reinfection."²⁷
- B. "It is unknown how long antibodies to SARS-CoV-2 will remain present in the body after infection and if they confer immunity to infection. Incorrect assumptions of immunity may lead to premature discontinuation of physical distancing requirements and increase the risk of infection for individuals, their households and the public."²⁸
- C. "It is unknown how long (IgA, IgM or IgG) antibodies to SARS-CoV-2 will remain present in the body after infection and if they confer immunity to infection. A positive result for

²⁵ <https://www.who.int/news/item/27-10-2021-gacvs-statement-myocarditis-pericarditis-covid-19-mrna-vaccines-updated>, last accessed December 17, 2021.

²⁶ <https://www.fda.gov/medical-devices/coronavirus-disease-2019-covid-19-emergency-use-authorizations-medical-devices/eua-authorized-serology-test-performance>, last accessed December 17, 2021.

²⁷ <https://www.fda.gov/media/146369/download>, last accessed December 17, 2021.

²⁸ <https://www.fda.gov/media/138627/download>, last accessed December 17, 2021.

XXX test may not mean that an individual's current or past symptoms were due to COVID-19 infection.”²⁹

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on December 20, 2021, in Falls Church, Virginia

RANS.TONYA.SUE.1081263031
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A red digital signature line is drawn over the text. To the right of the signature, the following text is displayed: "Digitally signed by RANS.TONYA.SUE.1081263031 Date: 2021.12.20 20:03:35 -05'00'".

Tonya S. Rans
Colonel, Medical Corps, U.S. Air Force
Director, Immunization Healthcare Division
Public Health Directorate
Falls Church, Virginia

²⁹ <https://www.fda.gov/media/137542/download>, last accessed December 17, 2021.