No. 22-10645-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NAVY SEAL 1, et al.,

Plaintiffs–Appellees,

v.

PRESIDENT OF THE UNITED STATES, et al.,

Defendants–Appellants.

On Appeal from the United States District Court
for the Middle District of Florida
In Case No. 8:21-cv-02429-SDM-TGW before the Honorable Steven D. Merryday

PLAINTIFFS–APPELLEES' RESPONSE IN OPPOSITION TO DEFENDANTS–APPELLANTS' TIME-SENSITIVE MOTION FOR STAY PENDING APPEAL

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PLAINTIFFS–APPELLEES'
CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Plaintiffs–Appellees hereby certify that the following individuals and entities are known to have an interest in the outcome of this case (pseudonymous Plaintiffs–Appellees are listed separately at the end for purposes of redaction and sealed filing):

Avallone, Zachary A.

Boynton, Brian M.

Carmichael, Andrew E.

Carroll, Sarah

Clark, Sarah J.

Coppolino, Anthony J.

Dover, Marleigh D.

Enlow, Courtney D.

Gannam, Roger K.

Haas, Alexander K.

Handberg, Roger B.

Harrington, Sarah E.

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Macik, Thomas More

Mast, Jr., Richard L.

Merryday, Hon. Steven D.

Mihet, Horatio G.

Porcelli, Hon. Anthony E.

Powell, Amy E.

Ross, Casen B.

Scarborough, Charles W.

Schmid, Daniel Joseph

Staver, Mathew D.

Sturgill Jr., Lowell V.

Wilson, Hon. Thomas G.

(Pseudonymous Plaintiffs–Appellees begin on next page.)

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Pseudonymous Plaintiffs–Appellees

[redacted]
LIEUTENANT, USCG

[redacted]
CADET, USAF

[redacted]
SENIOR CHIEF PETTY OFFICER, USN

[redacted]
NAVY CHIEF WARRANT OFFICER, USN

[redacted]
LCDR PILOT, USCG

[redacted]
PILOT, USCG

[redacted]
SECOND LIEUTENANT, USMC

[redacted]
CHAPLAIN, USN

[redacted]
CAPTAIN 2, USMC

[redacted]
RESERVE LIEUTENANT COLONEL, USMC

[redacted]
NAVY EOD OFFICER, USN

[redacted]
TECHNICAL SERGEANT, USAF

[redacted]
NAVY COMMANDER SURFACE WARFARE OFFICER, USN

[redacted]
MAJOR, USMC

[redacted]
LIEUTENANT COLONEL 2, USMC

[redacted]
RESERVE LIEUTENANT COLONEL 1, USAF

[redacted]
CHIEF WARRANT OFFICER 3, USMC

[redacted]
MASTER SERGEANT SERE SPECIALIST, USAF

[redacted]
NAVY SEAL 1, USN

[redacted]
LANCE CORPORAL 2, USMC

[redacted]
CAPTAIN 3, USMC

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NAVY SEAL 2, USN

[redacted]
CAPTAIN, USMC

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[redacted]
LANCE CORPORAL 1, USMC

[redacted]
NATIONAL GUARDSMAN, VAARNG

[redacted]
LIEUTENANT COLONEL 1, USMC

[redacted]
COLONEL, USAF

[redacted]
CHAPLAIN, USAFA

[redacted]
FIRST LIEUTENANT, USMC

[redacted]
ARMY RANGER, USA

[redacted]
RESERVE LIEUTENANT COLONEL 2, USAF

[redacted]
COLONEL, FINANCIAL MANAGEMENT OFFICER, USMC

No publicly traded company or corporation has an interest in the outcome of this case.

/s/ Roger K. Gannam
Roger K. Gannam
Attorney for Plaintiffs–Appellees

PLAINTIFFS–APPELLEES' RESPONSE IN OPPOSITION TO DEFENDANTS–APPELLANTS' TIME-SENSITIVE MOTION FOR STAY PENDING APPEAL

Plaintiffs–Appellees respond in opposition to Defendants–Appellants' Time-Sensitive Motion for Stay Pending Appeal (the "Stay Motion"), which seeks a stay of the district court's Preliminary Injunction and Order (R111[1], the "PI Order") prohibiting Defendants from retaliating or taking other adverse action against two Plaintiffs whose final religious accommodation (RA) appeals were denied and who were ordered to receive a COVID-19 vaccine within days or be subject to discipline for disobeying an order. The Court should deny the Stay Motion because Defendants cannot satisfy the requirements for obtaining a stay. The PI Order should remain in full force and effect as the product of the district court's careful and deliberate management of this case, considering the overwhelming evidence of Defendants' fault and irreparable harm to the two Plaintiffs, navigating Defendants' shifting positions, and applying the appropriate measure of judicial intervention in unlawful military conduct based on well-settled authorities.

[1] Pursuant to 11th Cir. R. 28-5, references to documents in the district court record will be by "R[district court document number] at [page number]."

SUMMARY OF PROCEEDINGS BELOW

A. Classwide Preliminary Injunction Proceedings.

Plaintiffs are United States Armed Forces service members who commenced this putative class action on October 15, 2021 (R1), to challenge the Department of Defense COVID-19 vaccine mandate (R1-4) requiring them to receive a vaccine that violates their sincerely held religious beliefs without providing them any meaningful way to obtain a religious accommodation (RA).[2] (R105 at 4.) Plaintiffs moved for a classwide temporary restraining order (TRO) and preliminary injunction against enforcement of the vaccine mandate under RFRA and the First Amendment, among other grounds. (R2 at 8–25.)

The district court deferred ruling on the TRO and set a preliminary injunction hearing for November 15, but invited Plaintiffs to "move on behalf of any individual member of the alleged class who satisfies the requirements for temporary injunctive relief . . . whose circumstances are for some singular reason markedly more acute than other members of the putative class." (R9 at 4.) In advance of the hearing, the district court ordered Defendants to file verified statements on each military branch's

[2] Plaintiffs originally commenced this putative class action along with other plaintiffs who were civilian federal employees and contractors. (R1.) The district court ordered severance of the action into three actions—one for Plaintiffs as military service members, retaining the original case number, one for civilian federal employees (M.D. Fla. No. 8:21-cv-00364-SDM-TGW), and one for civilian federal contractors (M.D. Fla. No. 8:21-cv-00365-SDM-TGW). (R83.)

RA procedures, including requests, grants, and denials. (R19.) Defendants filed the requested information (R34, R34-1 to R34-6), which was in addition to the various policies and declarations they filed in opposition to Plaintiffs' preliminary injunction motion (R23, R23-1 to R23-26).

The hearing proceeded on the evidence filed of record. (R38.) The court entered an order following the hearing (R40), observing, "the available interim data lends tentative credence" to the fact that "the regulations are subject to an undisclosed policy of 'deny them all'" (R40 at 26), and concluding it "quite plausible that each branch's procedure for requesting a religious exemption is a ruse that will result inevitably in the undifferentiated (and therefore unlawful under RFRA) denial of each service member's request." (R40 at 33.) The court, however, deferred ruling on preliminary injunctive relief. (R40 at 33–34.) Having concluded that free exercise rights are violated "the first moment an objecting service member must act contrary to a religious belief [—] when the exemption is finally denied and the member must choose to immediately receive the injection or immediately defy a direct order," and thus, that "'ripeness' can occur no later than the moment the member must irreparably receive the injection or irreparably defy an order upon the final denial of an RA appeal and issuance of a final order to get the shot" (R40 at 30), the court directed Defendants to provide, every 14 days beginning January 7, 2022, updated

data on the number of military RA requests, approvals, and denials, including *final* denials ripening service members' RFRA claims. (R40 at 33–35.)

Defendants filed their first installment on January 7 (R47), showing 21,243 RA requests among all military branches, with none granted to save objecting servicemembers from the choice between vaccination against conscience or involuntary separation,[3] but with over 5,135 temporary and permanent medical exemptions granted.[4] (R47, R47-1 to R47-8.) Because Defendants' updated data confirmed that "the actual and governing policy-in-fact—perhaps emanating from an implicit understanding common to and extending throughout each branch of the military and throughout the layers of reviewing officers and boards—demands the indiscriminate and undifferentiated denial of each request for a religious exemption" (R40 at 23), Plaintiffs filed a supplemental memorandum in support of a classwide preliminary injunction on January 21 (R51). What looked like a ruse to the district

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[3] The two granted RA requests were for service members already slated for separation. (R51 at 4 & n.2.)

[4] Possibly hundreds or thousands more temporary medical exemptions have been granted, but each of the branches is only able to report the number of active medical exemptions at a given time, and is unable to report a total number over a period of time. (*See, e.g.*, R47 at 2; R47-2 at 7; R47-3 at ECF 7 n.2; R47-4 at ECF 6 n.2; R47-5 at ECF 6 n.6; R47-8 at 2.)

court in its deferral order (R40 at 33) was proved a ruse by Defendants' data submission.[5]

B. Preliminary Injunction Proceedings and Order for Plaintiffs Navy Commander and Lieutenant Colonel 2.

On February 1, Plaintiffs filed an emergency TRO motion for Plaintiffs Navy Commander Surface Warfare Officer ("Navy Commander") and Marine Lieutenant Colonel 2 ("Lieutenant Colonel 2") pending the court's ruling on classwide preliminary injunctive relief (R60). Each Plaintiff had received a final RA appeal denial and faced an order to be vaccinated within five days. (R60-1 at 7; R60-2 at 3; R112 at 24:25–25:10, 153:22–155:10.)

After ordering a response by Defendants (R62; R66), the district court entered an order on February 2 granting the TRO and setting an evidentiary hearing for February 10. (R67 at 8–10.) The TRO enjoined Defendants "from diminishing or altering in any manner and for any reason the current status of Navy Commander and Lieutenant Colonel 2, including their assignment, privileges, rank, or the like," such that "Navy Commander and Lieutenant Colonel 2 must remain 'as is' throughout the duration of this injunctive relief." (R67 at 10.)

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[5] Defendants filed a total of three data updates pursuant to the deferral order (R40), and an additional update at the district court's direction (R47, R47-1 to R47-8; R52, R52-1 to R52-6; R73, R73-1 to R73-6; R76 (errata to R73); R103, R103-1 to R103-3), showing 25,088 total RA requests, and the granting of only 20—all to service members already slated for separation.

At the February 10 hearing, Navy Commander and Lieutenant Colonel 2 appeared in person and testified in support of their motion, while Defendants relied on declarations. (R84.) After the hearing, on February 13, the district court ordered Defendants to produce a final batch of updated RA data, to include all RA grants and the last 25 RA appeal denials for each of the Navy, Marines, and Air Force. (R90 at 1–2.) On February 17, Defendants complied. (R103, R103-1 to R103-3.)

On February 18, the court entered its PI Order (R111), enjoining Defendants

> (1) from enforcing against Navy Commander and Lieutenant Colonel 2 any order or regulation requiring COVID-19 vaccination and (2) from any adverse or retaliatory action against Navy Commander or Lieutenant Colonel 2 as a result of, arising from, or in conjunction with Navy Commander's or Lieutenant Colonel 2's requesting a religious exemption, appealing the denial of a request for a religious exemption, requesting reconsideration of the denial of a religious exemption, or pursuing this action or any other action for relief under RFRA or the First Amendment.

(R111 at 47–48.) Regarding Navy Commander, the district court found, *inter alia*:

> Navy Commander serves as the commanding officer of a guided missile destroyer. . . . Over the course of . . . seventeen years, the Navy entrusted Navy Commander with increasing levels of responsibility. After completing several tours of duty and graduating nuclear power school, Navy Commander commands a surface warfare vessel with a crew of 320. Because of the required nuclear education and experience, few service members are as qualified as Navy Commander to direct a surface vessel. From January 2020 to March 2021, from the onset of COVID-19, through the height of the pandemic, and without a vaccine (and certainly before the FDA fully

> authorized a COVID-19 vaccine), Navy Commander conducted successful operations, including a voyage exceeding 300 days,[6] while adhering to COVID-19 safety protocols, including masking, sanitizing, physical distancing, COVID-19 testing, and quarantining. More than 93% of the sailors under his command have completed a COVID-19 vaccination series. In sum, his present regime has proven successful including while "underway" on the oceans of the world.
>
> * * *
>
> On January 28, 2022, the Chief of Naval Operations, the Navy's final appellate authority for religious exemptions, denied Navy Commander's appeal. . . . The appellate denial letter orders Navy Commander to begin a COVID-19 vaccination series at a Navy immunization clinic not later than February 3, 2022. Also, another order directed Navy Commander to meet with a squadron commander the evening of February 3, 2022, at which time Navy Commander "fully expect[ed]" — absent preliminary injunctive relief — "to be relieved as a commander of the ship, due to a 'loss of confidence.'"

(R111 at 10–12 (citations omitted).) Because of the TRO that preceded the PI Order, Navy Commander's commanding officer, Captain Frank Brandon, was unable to remove Navy Commander from his command on February 3. (R112 at 61:9–18, 133:7–13.) But Captain Brandon warned him, "that train is coming, and the next

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[6] Navy Commander testified that he commanded his ship underway for over 300 total days of the approximately 400-day period from January 2000 to March 2021, not for one 300-day voyage. (R112 at 30:15–112:10.)

time that I see you, I will relieve you of your command. This is per Navy policy. Do you understand?" (R112 at 133:10–12.)

Regarding Lieutenant Colonel 2, the district court found, *inter alia*:

> Lieutenant Colonel 2 serves as a logistics officer at Marine Forces Special Operations Command at Camp Lejeune, North Carolina. In 1997, Lieutenant Colonel 2 enlisted in the Marine Corps. Originally a reservist, Lieutenant Colonel 2 voluntarily transferred to active duty after the attacks of September 11, 2001. In 2003, Lieutenant Colonel 2 completed officer candidate school and basic school. After becoming an officer, Lieutenant Colonel 2 performed several duties for the Marine Corps, which duties included serving as a congressional fellow for the Department of Defense and as a legislative assistant for the Marine Forces Integration Office. Lieutenant Colonel 2 was selected in a class of ten service members to receive a master's degree from the Command and Staff College at the University of the Marine Corps.
>
> Currently, Lieutenant Colonel 2 serves as a Logistics Officer and a Diversity and Inclusion Officer. Since the beginning of COVID-19, Lieutenant Colonel 2 has completed eight temporary duty assignments, which required travel across the United States. In January 2021, Lieutenant Colonel 2 received orders to transfer to Bahrain to serve in the Marine Corps' "naval integration program" during the summer of 2022. In August 2021, Lieutenant Colonel 2 was selected to command a combat logistics battalion stationed at Camp Lejeune. She was scheduled to assume command in the fall of 2022.
>
> . . . .
>
> On October 13, 2021, the Deputy Commandant, Manpower & Reserve Affairs denied Lieutenant Colonel 2's request for a religious exemption. On November 3, 2021, Lieutenant Colonel 2 appealed, which on January

> 26, 2022, the Assistant Commandant of the Marine Corps denied. . . .
>
> . . . .
>
> On January 26, 2022, the commanding officer directed Lieutenant Colonel 2 to begin a vaccination series not later than February 2, 2022. If Lieutenant Colonel 2 failed to timely begin the vaccination series, "the process will immediately begin to place [Lieutenant Colonel 2] on the Officer Disciplinary Notebook," which strips Lieutenant Colonel 2 of her scheduled command and her eligibility for deployment, promotion, schooling, and other career progression, including retirement. Further, placement on the Officer Disciplinary Notebook begins the "Board of Inquiry Process," that is, the process of administrative separation from the Marines.

(R111 at 13–16 (citations omitted) (omitting footnote: "After objecting to COVID-19 vaccination, Lieutenant Colonel 2's transfer to Bahrain was delayed.").)

C. Defendants' Attempts to Stay the PI Order.

Defendants first moved the district court for a stay of the PI Order pending appeal, filing an "emergency" stay motion on February 28 (R118)—10 days after the PI Order and 3 days after their notice of appeal to this Court (R115). Defendants complained that the PI Order prevents them from removing Navy Commander and Lieutenant Colonel 2 for refusing their orders to be vaccinated. (R118 at 1; R122 at 1–2.) The district court promptly entered an order on March 2, setting an evidentiary hearing for March 10. (R122.) Questioning Defendants' insistence that their desire to remove Navy Commander and Lieutenant Colonel 2 from their respective

commands was "not from a retaliatory animus," given the evidence adduced at the preliminary injunction hearing, the court explained that "the defendants' proffered basis to stay the injunction to permit the re-assignment of Navy Commander and Lieutenant Colonel 2 (despite the likely unlawful denial of their religious exemptions) warrants a prompt evidentiary hearing." (R122 at 2–3.) And given Defendants' utter failure to carry their evidentiary burden at the prior hearing, the district court detailed the categories of evidence Defendants should consider bringing to the upcoming hearing. First, because the court was "[p]resented at the preliminary injunction hearing with declarations endeavoring to establish Navy Commander's untrustworthiness (and consequently his unsuitability for command)," the court reminded Defendants of its rejection of the declarations and its reasoning:

> Because I heard the testimony of Navy Commander and carefully observed his demeanor and listened attentively to the content of his testimony, I fully credit his testimony, even the parts inconsistent with the un-cross-examined, last-minute affidavits. A determination of the credibility of the statements in the [defendants'] affidavits must await live testimony and further exploration (these two witnesses are at the disposal of, and under the command of, the defendants, who neither offered their live testimony nor notified the plaintiffs of the fact of, or the content of, their affidavits). Cross-examination is necessary in this circumstance to permit assessment of, among other things, the extent to which "command influence" might have affected the presence or content of the affidavits.

(R122 at 2–3 (quoting R111 at 12 n.3).)

Second, the court suggested Defendants should consider offering evidence on

> whether the readiness and fitness of the force is more adversely affected (1) by granting exemptions and accommodations to a stated number of sincere objectors or (2) by punishing, separating, and discharging that same stated number of skilled and experienced personnel, notwithstanding the time, energy, and money expended to train those service members and necessarily spent again to locate, recruit, and train a successor, including the cost of the successors' acquiring similar experience and the deficit in fitness and readiness experienced in the interim.

(R122 at 15–16 (quoting R40 at 32–33).)

Third, the district court suggested that Defendants subject their primary medical declarants ("Lescher, Yun, and Rans") to "a hearing and an opportunity for cross-examination" to support Defendants' "dramatic and broad claim" that "'the preliminary injunction causes irreparable harm because these unvaccinated individuals place themselves and their units at higher risk of illness, hospitalization and death, and this creates a gr[e]ater risk of mission failure.'" (R122 at 16 (quoting R118 at 10).)

But, despite the district court's second chance and explicit direction to overcome their evidentiary failures, Defendants declined to offer *any* evidence at the evidentiary hearing on *their* stay motion, opting instead to go through the motions in the district court and bring their deficient record to this Court. (R128 at 1–2.) Plaintiffs, however, took Defendants' stay motion and the district court's hearing

seriously, and brought Navy Commander and three military physicians to testify in person.[7] (R134 at 1–2.)

Navy Commander testified primarily to expose Defendants' blatant misrepresentation to the district court (and this Court) that the PI Order "indefinitely sidelines" Navy Commander's destroyer and "effectively places [his] multi-billion dollar guided missile destroyer out of commission." (R118 at 1, 16; *see also* Stay Mot. 1, 2 (same).) As Navy Commander testified, he was *out at sea commanding his ship* on the very days Defendants filed their stay motions in the district court and this Court claiming the ship was "sideline[d]" and "out of commission." (R136-1 at 7:13–8:20, 17:13–20, 33:15–21.) Moreover, Navy Commander was commanding his ship with excellence, on the same deployment certification cycle set for his ship prior to entry of the PI Order. (R136-1 at 8:21–12:19.) Indeed, under his command, Navy Commander's ship completed its most recent certification mission on the first try, which is unusual, and a day early. (R136-1 at 9:17–10:21.) His ship's high performance and success, as recognized by a superior officer observing onboard,

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[7] Lt. Col. Peter Chambers (D.O.), TXARNG, Lt. Col. Theresa Long (M.D.), USA, and Col. Stewart H. Tankersley (M.D.), USA (Ret.), all took the stand to testify on the lack of necessity, safety, and efficacy of the available COVID-19 vaccines. (R134, R135.) Lt. Col. Chambers now suffers from demyelination disease after taking the Moderna shot, and all three testified that the shots are causing injuries and are not effective in preventing transmission, and that there are less restrictive means than universal vaccination to prevent and treat COVID-19. The transcript of their testimony is not yet available.

allowed Navy Commander to testify confidently that his vaccination status has had no impact on his ship's readiness or the good order and discipline of his crew. (R136-1 at 11:9–11, 14:10–14, 23:24–26:7.)

The district court denied Defendants' stay motion on March 11. (R133.) The court explained that "the preliminary injunction narrowly and specifically protects Navy Commander and Lieutenant Colonel 2 (1) from enforcement of an order to either accept vaccination or undergo discipline, including possible separation from service, and (2) from any adverse action that is retaliatory." (R133 at 2.) The Court also again found Navy Commander's and Lieutenant Colonel 2's live testimony at both the preliminary injunction and stay hearings credible, despite Defendants' persistent claims to the contrary:

> [A]t the hearing that resulted in the preliminary injunction, the plaintiffs presented the testimony of Navy Commander and Lieutenant Colonel 2. The defendants offered no live testimony and no deposition. Rather, the defendants offered a last-minute declaration from Navy Commander's executive officer aiming to establish that Navy Commander in recent days had lied to his commanding officer, that because of the alleged lies the Navy had "lost confidence" in his ability to command, and that Navy Commander's immediate removal from his command was warranted. But credibility issues about the declarations were created by the timing of the un-cross-examined declarations, by the well-known risk of command influence, and by the declarations' supplying a handy and putatively neutral reason for removing Navy Commander from his command at a critical moment amidst his effort to assert under RFRA a religious exemption from vaccination. Additionally, the

> declarations were offered to negate live, cross-examined, and credible testimony.

(R133 at 4; *cf.* Stay Mot. 14.[8])

ARGUMENT

Defendants have not satisfied the governing standard for staying a preliminary injunction pending appeal:

> (1) whether the stay applicant[s have] made a strong showing that [they are] likely to succeed on the merits; (2) whether the applicant[s] will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

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[8] The discredited declarations feign "loss of confidence" in Navy Commander based Captain Brandon's false claim in November 2021 that Navy Commander disregarded safety protocols by coming to work with COVID symptoms, and Captain Brandon's false claim in February 2022 that Navy Commander mislead him in requesting leave to attend the district court's preliminary injunction hearing. (Stay Mot. 14.) Navy Commander refuted both with testimony wholly credited by the district court. (R112 at 68:8–73:20, 106:20–111:1, 116:17–126:15, 135:18–136:5 (explaining Navy Commander came to work hoarse, which he attributed to exercising in cold weather based on past experience, and that both Navy regulations and ship's medical personnel excluded mere loss of voice as a COVID symptom); R112 at 73:22–74:10, 79:12–96:9, 113:6–114:18 (explaining navy Commander requested leave to travel to the hearing according to procedure requested by Captain Brandon and all Navy requirements and timely informed both his crew and Captain Brandon that he would be unavailable due to traveling out of area); R136-1 at 28:22–33:6 (same). Navy Commander also testified that in January 2021 Captain Brandon expressed his trust in Navy Commander's ability to command his ship. (R112 at 131:15–133:6.)

Hilton v. Braunskill, 481 U.S. 770, 776 (1987). "Considering that this test is so similar to that applied when considering a preliminary injunction, courts rarely stay a preliminary injunction pending appeal." *Dream Defs. v. DeSantis*, No. 4:21CV191-MW/MAF, 2021 WL 4099437, at *33 (N.D. Fla. Sept. 9, 2021). Neither Defendants' justiciability argument nor their patently pretextual "lost confidence" argument provide the "exceptional circumstances" necessary to justify a stay of the district court's PI Order. *See id.*

Nor can Defendants overcome their intentional failure to put on live evidence despite having two chances to do it. The district court's crediting Plaintiffs' live testimony while discrediting Defendants' conflicting declarations is due high deference by this Court:

> We accord considerable deference to the district court's credibility findings. Credibility determinations are typically the province of the fact finder because the fact finder personally observes the testimony and is thus in a better position than a reviewing court to assess the credibility of witnesses. On review, we will accept the district court's credibility determination unless it is contrary to the laws of nature, or is so inconsistent or improbable on its face that no reasonable factfinder could accept it.

United States v. Thelisma, 615 Fed. App'x 664, 665 (11th Cir. 2015) (cleaned up). Defendants cannot make a sufficient showing to upset the district court's credibility determinations.

I. PLAINTIFFS' RFRA CLAIMS ARE JUSTICIABLE.

As both the district court and the Fifth Circuit concluded, RFRA—enacted by a bipartisan Congress and signed by President Clinton in 1993—makes Plaintiffs' free exercise claims justiciable as a matter of law.[9] (R111 at 29–31; R122, at 4–11; *U.S. Navy Seals 1–26 v. Biden*, No. 22-10077, 2022 WL 594375, at *7 (5th Cir. Feb. 28, 2022) [*Navy Seals*].) Several other courts have likewise concluded military RFRA claims are justiciable. *See, e.g.*, *Poffenbarger v. Kendall*, No. 3:22-CV-1, 2022 WL 594810, at *20–21 (S.D. Ohio Feb. 28, 2022); *Air Force Officer v. Austin*, No. 5:22-CV-00009-TES, 2022 WL 468799, at *13 (M.D. Ga. Feb. 15, 2022). Thus, the Court should reject Defendants' justiciability argument. (Stay Mot. 16.)

II. DEFENDANTS ARE UNLIKLY TO SUCCEED ON THE MERITS BECAUSE THEY CANNOT CARRY THEIR RFRA BURDEN.

The evidence adduced in the district court proves that the RA policy for service members is a ruse. (*See* Summary pts. A, B, *supra*.) Defendants cannot carry their burden to justify the policy under RFRA strict scrutiny.

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[9] To the extent any aspect of the 5th Circuit's pre-1980 decision in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), applies to the justiciability of Plaintiffs' RFRA claims, the *Navy Seals* court explained why the RFRA claims are justiciable under *Mindes*. *See* 2022 WL 594375, at *7–10.

A. Defendants' medical evidence is stale and fails to identify any marginal risk of allowing a particular unvaccinated service member to perform his or her duties.

As the district court explained, it is Defendants' burden to prove that "vaccinating Navy Commander or Lieutenant Colonel 2 over their religious objection, that is, athwart the right of each to the free exercise of religion, is 'the least restrictive means of furthering that compelling governmental interest.'" (R122 at 14; R111 at 35 (citing *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429–430 (2006)).) And as the district court concluded, despite the bulk of Defendants' numerous declarations, they contain stale, generalized numbers that do not address the specifics of any Plaintiff's religious accommodation request. (R122 at 15–17.) In other words, Defendants' evidence fails to answer "the question that RFRA burdens the defendants to answer."[10] (*Id.* at 17.)

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[10] Plaintiffs concede that the government has a general compelling interest in the health and safety of the military, but not any compelling interest in universal or widespread COVID-19 vaccination. Defendants cannot carry their RFRA burden even by proving safety and efficacy of COVID-19 vaccines as a general matter (R122 at 14), and Plaintiffs do not need to prove the converse to prevail. Plaintiffs nonetheless put on evidence of the lack of necessity, safety, and efficacy of the vaccines, putting even more distance between Defendants' claimed interest and the permissibility under RFRA of achieving it with mandatory, universal vaccination. (*See* note 7, *supra*.)

Moreover, even at the general level, the military's own admissions refute any need for mandatory universal vaccination. For example, in an e-mail to the over 18,000 service members under his command, U.S. Army General James H. Dickinson, Commander of U.S. Space Command,[11] adopted the latest CDC position that, "[w]ith high levels of population immunity from both vaccinations and infections, the risk of medically significant disease, hospitalization, and death from COVID-19 has been greatly reduced." (A copy of the e-mail communication is attached hereto as Exhibit A (quoting CDC, COVID-19 Community Levels (Mar. 3, 2022), https://www.cdc.gov/coronavirus/2019-ncov/science/community-levels.html); *see also* R135-2.) Thus, without acknowledging or identifying the rapidly diminishing rate of severe illness and hospitalization from COVID-19 for all, any argument by Defendants that the unvaccinated are more likely to suffer severe illness or hospitalization lacks foundation.

Also, in January the *Navy Times* quoted Vice Admiral William Merz, Deputy Chief of Naval Operations for Operations, Plans and Strategy, disclaiming any disruption of Navy operations by the most recently prevalent Omicron variant: "'So, it's coming and going all the time, very small numbers, and really no operational impact . . . . And the teams are just very, very attuned to watching their indications

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[11] U.S. Space Command, *Gen James H. Dickinson*, https://www.spacecom.mil/Leaders/Bio/Article/2329436/gen-james-h-dickinson/ (last visited March 8, 2022).

and reacting to it.'" Diana Stancy Correll, *Omicron isn't significantly impacting Navy operations, admiral says*, Navy Times (Jan. 27, 2022) https://www.navytimes.com/news/your-navy/2022/01/27/omicron-isnt-significantly-impacting-navy-operations-admiral-says/; *see also Navy Seals*, 2022 WL 594375, at *9 (quoting same and rejecting defendants' attempt to downplay statement). In the absence of any operational impact on the Navy from COVID-19 in January, despite the ongoing service of unvaccinated sailors, Defendants cannot argue that allowing any Plaintiff to continue serving without vaccination will have an operational impact.

B. "Nondeployable" and "lost confidence" are code words for a blanket, pretextual policy of denying religious accommodation requests under the guise of individualized determinations.

By adopting a blanket policy of nondeployability of unvaccinated service members, the military can feign individualized denials of religious accommodation requests. (Stay Mot. 2–3, 10–12, 17–21; R133 at 3.) But Defendants have never demonstrated how the determination of who is deployable belongs to anyone other than the military. (R133 at 3; *cf.* R104 (showing, e.g., Defense Cooperation Agreement and Status of Forces Agreement provide "that U.S. forces in Kuwait be subject to U.S. rather than Kuwaiti law—a common feature of such arrangements.").) "RFRA demands much more than deferring to officials' mere say-so that they could not accommodate a plaintiff's religious accommodation request."

Navy Seals, 2022 WL 594375, at *11. (R122 at 17.) Defendants cannot carry their RFRA burden without proving why any particular Plaintiff cannot be deployed as a basis for denial of a religious accommodation.

No less pretextual but more pernicious, Defendants' now revealed blanket policy of "lost confidence" in fitness for all service members who do not comply with a final vaccination order despite the pendency of justiciable legal challenges to such orders—even despite having obtained a preliminary injunction against enforcement of such orders—cannot survive RFRA strict scrutiny requiring individualized determinations. (Stay Mot. 1, 13–14, 16–17.) The military's feigned "lost confidence" in Navy Commander and Lieutenant Colonel 2 is patently pretextual and has everything to do with their lawful and orderly attempt to obtain judicial relief from an unconstitutional and illegal mandate.[12] The military's claiming "lost confidence" in service members for no other reason than their "disobeying" a final shot order pursuant to a federal court injunction vindicating their free exercise rights amounts to a military *coup d'état* against the coequal

[12] The pretextual nature of Defendants' position is demonstrated by their shifting positions. For example, after first claiming lost confidence in Navy Commander due to his disobeying the shot order after losing his final RA appeal (a facially punitive move in violation of RFRA) (R74-12 at 2, ¶ 4), Captain Brandon disclaimed it was disobedience of the shot order and instead claimed he lost trust in Navy Commander's judgment because of the alleged November 2021 lost voice incident and the February 2022 leave incident (R83-1 at 8, ¶ 19; *see* note 8, *supra*.)

branches of the United States Government that enacted and interpreted RFRA according to their respective constitutional authorities.

III. DEFENDANTS CANNOT SATISFY THE REMAINING REQUIREMENTS FOR A STAY PENDING APPEAL.

The remaining three factors also weigh heavily against a stay. Defendants cannot show they will suffer irreparable harm without a stay because Defendants have not proved any individualized risk to military readiness posed by Navy Commander's or Lieutenant Colonel 2's continued service, apart from a generalized and pretextual "loss of confidence." Indeed, Defendants misrepresented the status of Navy Commander's ship, claiming it was out of commission when it was in fact operating as usual, and Defendants can only point to remote, speculative risks that could result from deploying Lieutenant Colonel 2.

Conversely, a stay will irreparably harm Navy Commander and Lieutenant Colonel 2. Defendants' persistent retort that there is no actual urgency for service members under final shot orders because the military's full deployment of its punitive arsenal "would take place over many months" (Stay Mot. 14–15) is disingenuous at best. Defendants make it exceedingly clear that disobeying a "lawful order" to get a COVID-19 shot is, in and of itself, a cardinal sin, making the disobedient service member *immediately* "unfit" and an "unacceptable risk" to his or her unit—even if the service member is diligently prosecuting a legal challenge of the order's authority (with some success), and even if the same service member

was fit and acceptable to serve while waiting out the military's religious accommodation review process. Even a win in court, apparently, does not remove this stain. Moreover, the constitutional injury attaches with the choice posed by the final shot order: "By pitting their consciences against their livelihoods, the vaccine requirements would crush Plaintiffs' free exercise of religion." *Navy Seals*, 2022 WL 594375, at *9.

Finally, the public interest favors keeping honorable, loyal, and excellent officers in command, and stopping the military from burdening their religious exercise where there are demonstrably effective and less restrictive means of protecting the health and safety of the military.

CONCLUSION

For all of the foregoing reasons, the Court should deny the Stay Motion.

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