

No. 22-10645

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

TIME-SENSITIVE MOTION FOR STAY PENDING APPEAL

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**CERTIFICATE OF INTERESTED PERSONS AND
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INTRODUCTION AND SUMMARY

The district court has issued a preliminary injunction requiring the U.S. Navy and the Marine Corps to keep or place two senior officers in command of combat units after the military has lost confidence in their ability to command. By countermanding the Navy's military judgment in that way, the court has sidelined a \$1.8 billion warship and substantially interfered with the deployment of roughly 300 Marines. The court has also usurped the military's authority to decide which service members are fit for command, what precautions must be taken to reduce the risk that service members will compromise military readiness, and how best to maintain good order and discipline. Because there is no basis for the district court's extraordinary intrusion into core military affairs, the preliminary injunction should be stayed pending appeal. Allowing the preliminary injunction to remain in effect during the appeal will do irreparable damage to national security and military readiness during a global crisis. Given the grave and ongoing harm caused by the preliminary injunction, defendants request an immediate administrative stay, or a stay as soon as possible.

The preliminary injunction covers two officers, proceeding under pseudonyms: a Commander Surface Warfare Officer in the Navy (Navy Commander) who is currently the commanding officer of a guided-missile destroyer and its crew of over 300 sailors, and a Lieutenant Colonel in the Marine Corps (Lieutenant Colonel) who had been selected to command a forward-deploying battalion of over 300 Marines embarked within the confined spaces of an amphibious ship for six to ten months and

on-call for rapid crisis response. Both individuals' duties require them to be ready to deploy around the world at any time. But both individuals have refused to be vaccinated against COVID-19 even after their requests for religious exception were denied. The Navy and Marine Corps have concluded that neither can effectively or safely hold command positions under those circumstances. The Navy and Marine Corps have further concluded that, for these plaintiffs, vaccination against COVID-19 is the least-restrictive means of advancing compelling interests in military readiness and in the health and discipline of the force. The district court's preliminary injunction prevents the military from acting on these determinations—or even taking the intermediate step of preventing the plaintiffs from occupying command posts while unvaccinated—overriding the military's professional judgment that keeping plaintiffs in command creates an intolerable threat to military readiness and to good order and discipline.

The harms flowing from the district court's order are immediate, grave, and ongoing. The Navy has concluded that it cannot deploy Navy Commander's \$1.8 billion guided-missile destroyer while he remains in command, taking one of the Navy's most versatile warships out of commission during an international crisis. And the Marine Corps must continue to usher Lieutenant Colonel through the rigorous process required for her to assume command of a deploying unit, even though she would not be permitted to enter some of the countries to which her unit may be deployed. As long as the preliminary injunction is in effect, the Marine Corps cannot assign another officer to fill this command role.

Moreover, the military's appeal is likely to succeed on the merits. First, challenges to military-assignment decisions are not reviewable in civilian courts, so plaintiffs' claims are not justiciable insofar as they challenge their assignments. Second, the Navy and Marine Corps' application of their COVID-19 vaccination requirements is fully consistent with the Religious Freedom Restoration Act (RFRA) and the First Amendment. The military has a compelling interest in maintaining military readiness, including by ensuring that all of its service members are healthy and ready to deploy at a moment's notice. This interest is vital to the national security of the United States, and requiring that these plaintiffs be vaccinated is the least-restrictive means of vindicating it. As long as these plaintiffs remain unvaccinated, they cannot deploy worldwide, severely hampering their ability to carry out their missions. Moreover, plaintiffs remain at greater risk of serious illness and pose a greater risk of spreading COVID-19 to the hundreds of men and women under their command, further jeopardizing their ability to perform core military functions.

The military has made an expert judgment that, for these plaintiffs, vaccination is by far the best way to avoid these harms. The district court erred in rejecting that judgment and ignoring the military's individualized determinations that these plaintiffs cannot safely and effectively serve in command positions while they refuse to obey the lawful order to become vaccinated against COVID-19.

STATEMENT

A. The Military and COVID-19

COVID-19 has taken a severe toll on the military. As of late January 2022, 355,099 service members had contracted COVID-19, resulting in 92 deaths. A224 (Dkt. 74-5 ¶ 3).¹ Only 3% of those deaths were from individuals with any level of vaccination. A224, A230 (Dkt. 74-5 ¶¶ 3, 18). Moreover, of all active-duty personnel hospitalized with COVID-19 from December 2020 to January 2022, only 0.012% were vaccinated. A230 (Dkt. 74-5 ¶ 18).

On August 24, 2021, once the Pfizer COVID-19 vaccine received full approval, the Secretary of Defense directed the Secretaries of the military departments to immediately ensure that all service members were fully vaccinated against COVID-19. A71 (Dkt. 1-4). Shortly thereafter, the Secretary of the Navy directed active-duty service members in the U.S. Navy and the Marine Corps to be fully vaccinated by November 28, 2021. A73 (Dkt. 23-8).

The COVID-19 vaccination requirement joined the military's nine existing vaccination requirements used to maintain the readiness of its force, along with eight other vaccines required in specific situations. As with other vaccination requirements, a service member's doctor can provide or recommend a medical exception to the COVID-19 vaccination requirement. A77-78 (Dkt. 23-18 ¶ 5); A122-26 (Dkt. 23-19

¹ Citations to A__ are to the addendum to this motion.

¶¶ 6-11). In addition, a service member can seek a religious exception and may administratively appeal the denial of a religious exception request. A84-86 (Dkt. 23-18 ¶ 14); A126 (Dkt. 23-19 ¶ 12). If a service member refuses vaccination without an approved exception or a pending administrative appeal, he or she is required to be processed for administrative separation. A86-87 (Dkt. 23-18 ¶ 15); A130-31 (Dkt. 23-19 ¶ 15).

B. Prior Proceedings

In October 2021, a group of military service members filed this lawsuit on behalf of a putative class, challenging the Department of Defense and Navy COVID-19 vaccination requirement under RFRA and the First Amendment. Dkt. 1. Plaintiffs first sought a temporary restraining order (TRO) and preliminary injunction barring enforcement of the COVID-19 vaccination requirement as to all United States military service members. Dkt. 2. The district court declined, but permitted plaintiffs to move for individualized relief in exigent circumstances. Dkt. 9; Dkt. 40.

On February 1, 2022, plaintiffs sought a TRO as to two officers—Navy Commander and Lieutenant Colonel. Dkt. 60. Plaintiffs alleged that Navy Commander faced imminent removal from command and Lieutenant Colonel faced rescission of her command selection because they had been denied a religious exception to the COVID-19 vaccine requirement. The court granted a TRO, barring the military “from diminishing or altering in any manner and for any reason the current status of Navy Commander and [Lieutenant Colonel]” through February 11. Dkt. 67 at 10. The district

court held a preliminary injunction hearing, and, on February 11, extended the TRO through February 18. Dkt. 85.

On February 18, the district court issued a preliminary injunction, enjoining the defendants “from enforcing against Navy Commander and [Lieutenant Colonel] any order or regulation requiring COVID-19 vaccination” and “from any adverse or retaliatory action against Navy Commander or [Lieutenant Colonel] as a result of, arising from, or in conjunction with Navy Commander’s or [Lieutenant Colonel’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.” A49-50 (Dkt. 111 at 47-48).

The district court first concluded that plaintiffs’ claims were justiciable because RFRA “expressly creates a remedy in district court” and “includes no administrative exhaustion requirement.” A32 (Dkt. 111 at 30).

The district court next concluded that plaintiffs’ RFRA claims were likely to succeed on the merits, reasoning that the military had failed to establish that requiring plaintiffs to be vaccinated was the least-restrictive means to achieve a compelling government interest. The district court believed the Navy and Marine Corps’ analysis of the relevant interests was insufficiently individualized, concluding that the Navy and Marine Corps had failed to establish that plaintiffs could not use other COVID-19

mitigation measures or continue “under altered conditions including remote work and isolation protocol” and “under altered duties.” A43 (Dkt. 111 at 41).²

The district court went on to conclude that plaintiffs would suffer irreparable harm absent a preliminary injunction, as they would be forced to choose between “follow[ing] a direct order contrary to a sincerely held religious belief or . . . fac[ing] immediate processing for separation or other punishment.” A47 (Dkt. 111 at 45).

Finally, the district court determined that the balance of the equities and the public interest weighed in favor of a preliminary injunction. According to the district court, “the public has no interest in tolerating even a minimal infringement on Free Exercise,” which RFRA protects. A47 (Dkt. 111 at 45). Moreover, the district court suggested, “to the extent a ‘substantial disruption’ results from the defendants’ systemic failure to assess a religious exemption request ‘to the person,’ the ‘harm’ suffered by defendants results only from the defendants’ own failure to comply with RFRA.” A48 (Dkt. 111 at 46). Declaring that plaintiffs had “ably discharged their duties” throughout the pandemic despite being unvaccinated, the district court asserted that it saw no “meaningful increment of harm to national defense likely to result because [plaintiffs] continue to serve unvaccinated but in accord with other, proven, rigorous, and successful safety protocols.” A48-49 (Dkt. 111 at 46-47).

² The court did not separately analyze plaintiffs’ First Amendment claims on the logic that RFRA provides greater protection for a service member than the First Amendment. A31 (Dkt. 111 at 29).

Defendants filed a notice of appeal on February 25 and on February 28 asked the district court to grant an administrative stay and to stay its order pending appeal. Dkt. 115; Dkt. 118. Defendants asked for a ruling on its administrative stay request by March 2, explaining that, if denied, they would seek relief in this Court. Dkt. 118 at 2. The district court denied defendants' administrative stay request on March 2 and set a hearing on defendants' stay motion. Dkt. 122.

ARGUMENT

In determining whether to grant a stay pending appeal, this Court considers (1) likelihood of success on appeal; (2) whether the applicant will suffer irreparable injury; (3) the balance of hardships to other parties interested in the proceeding; and (4) the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009); *Hand v. Scott*, 888 F.3d 1206, 1207 (11th Cir. 2018). In cases involving the government, the harm to the government and the public interest merge. *Nken*, 556 U.S. at 435. Moreover, where “the balance of the equities . . . weighs heavily in favor of granting the stay,” a stay may be “granted upon a lesser showing of a substantial case on the merits.” *LabMD, Inc. v. Federal Trade Comm’n*, 678 F. App’x 816, 819 (11th Cir. 2016) (quoting *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986)); see also *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1232 (11th Cir. 2005). Here, every factor strongly favors staying the preliminary injunction pending appeal.

I. Equitable factors overwhelmingly favor a stay.

A. By requiring the military to keep Navy Commander in command and allow Lieutenant Colonel to assume command, despite their refusal to comply with the military's COVID-19 vaccination requirement, the preliminary injunction irreparably damages the military and the public interest.

The Supreme Court has repeatedly emphasized that professional military commanders are best situated to decide what is necessary for military readiness, explaining that “it is difficult to conceive of an area of governmental activity in which the courts have less competence.” *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *see also Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953) (“[J]udges are not given the task of running the Army. . . . The military constitutes a specialized community governed by a separate discipline from that of the civilian.”). Here, however, the district court has directly countermanded military commanders’ professional judgment that plaintiffs cannot safely and effectively hold command roles. The loss of discretion vested under the Constitution and federal law to determine assignment and resource decisions is *per se* irreparable harm. *See Swain v. Junior*, 958 F.3d 1081, 1090 (11th Cir. 2020).

1. The preliminary injunction creates an unacceptable risk to military readiness and national security. While Navy Commander and Lieutenant Colonel are unvaccinated, they place themselves and their units at higher risk of illness, hospitalization, and death and thus create a greater risk of mission failure. *See* A156 (Dkt. 66-4 ¶ 2); A233-34 (Dkt. 74-10 ¶ 5); A196-208 (Dkt. 74-4 ¶¶ 14-30). As Admiral

William Lescher—the second-highest commissioned officer in the Navy—explains, restricting the Navy’s ability to reassign unvaccinated personnel “to mitigate COVID-19 related risks to units preparing to deploy, or that are deployed, will cause direct and immediate impact to mission execution,” as well as to “[t]he hea[l]th, readiness, and mission execution of broader conventional Navy units.” A156 (Dkt. 66-4 ¶ 2). Admiral Daryl Caudle, who commands the United States Fleet Forces Command, likewise explains that serious illness from COVID-19 threatens the Navy’s “mission if unvaccinated Sailors remain in deployable units.” A286-87 (Dkt. 118-3 ¶ 16) (emphasis omitted). Based on experience with past outbreaks, “fully vaccinated units withstand COVID outbreaks with significantly less impact to the mission.” A283-87 (Dkt. 118-3 ¶¶ 14-16).

The Navy has determined that Navy Commander’s unvaccinated status poses an unacceptable risk to the Navy’s ability to carry out its mission and to the health and safety of his crew; accordingly, the Navy will not deploy the destroyer under his command. Navy Commander’s “vaccination status creates a risk that the most critical member of the command, i.e., the commander, may suffer adverse health effects due to COVID-19,” and it also “creates a risk to his Sailors, all of which ultimately translate into operational risks for the ship.” A317 (Dkt. 118-6 ¶¶ 15-16); *see also* A294 (Dkt. 118-4 ¶ 7) (describing risks posed by unvaccinated personnel, including medical evacuation, issues with foreign country requirements, and mission failure); A249-51 (Dkt. 74-12 ¶¶ 12-13) (describing additional risks Navy Commander poses to the destroyer, its crew,

and its mission and explaining that the Navy is unwilling to deploy the destroyer with a commander “who could compromise the health and effectiveness of the ship”). The risks of an unvaccinated commander “reverberate throughout the force” because “complex operational plans are impacted when ships are unavailable to deploy as planned or when a ship is taken off mission for reasons such as a COVID-19 outbreak.” A317 (Dkt. 118-6 ¶ 16). Vaccination status also affects “pre-deployment quarantine requirements” and “port entry requirements,” A317 (Dkt. 118-6 ¶ 16)—indeed, because of foreign country vaccination requirements, the presence of a single unvaccinated crew member could keep a ship from entering port. And in the event of a COVID-19 outbreak, “the unavailability of a vessel can have negative implications at the strategic level by removing U.S. naval presence from key areas.” A317 (Dkt. 118-6 ¶ 16).

Similarly, the Marine Corps has determined that Lieutenant Colonel’s unvaccinated status poses an unacceptable risk to her prospective command and to the Marine Corps’ mission. *See* A335-37 (Dkt. 118-7 ¶¶ 9-11); A302-05 (Dkt. 118-5 ¶¶ 10-11); A241-42 (Dkt. 74-11 ¶¶ 8-9). “[I]t is imperative that a [logistics battalion] commander be worldwide deployable and ready to lead Marines at all times.” A333-34 (Dkt. 118-7 ¶ 6). The “fundamental goal” of the Marine Corps “is the maintenance of a force that is ready, responsive, and capable of fighting whenever and wherever called upon,” which requires the Corps “to maintain a high degree of readiness to deploy responsively, engage quickly, and sustain itself in combat for whatever period is required.” A238-39 (Dkt. 74-11 ¶ 4). Marine Expeditionary Units in particular are

organized and equipped to be “capable of responding rapidly to a broad range of crises and conflict situations.” A337 (Dkt. 118-7 ¶ 12). Lieutenant Colonel cannot meet those standards and would not be able to effectively deploy as the commanding officer of the combat logistics battalion of the Marine Expeditionary Unit to which she is assigned. A333-37 (Dkt. 118-7 ¶¶ 6, 9-13); A240-43 (Dkt. 74-11 ¶¶ 7-10).

While Lieutenant Colonel is unvaccinated, she is at increased risk of infection, severe illness, and death. If Lieutenant Colonel were to fall “seriously ill before or during the deployment,” for example, it would “necessitat[e] a change of command at an inopportune moment” and compromise the effectiveness of the unit. A336 (Dkt. 118-7 ¶ 10). In addition, she would be unable to disembark with her battalion at certain ports due to foreign countries’ vaccination requirements, undermining her battalion’s ability to complete its mission, her the unit’s operations, and the Marines’ operations more broadly. A335-36 (Dkt. 118-7 ¶¶ 9-10); A241-43 (Dkt. 74-11 ¶¶ 9-10); A303-05 (Dkt. 118-5 ¶ 11). Despite these risks, the district court’s order prevents the Navy from giving that command position to a vaccinated Marine and reassigning Lieutenant Colonel. Although Lieutenant Colonel is not expected to take command of the unit until fall 2022, it is necessary to select, train and prepare a battalion commander now, as battalion commanders must be selected many months in advance to permit time for adequate training and preparation. A333-34 (Dkt. 118-7 ¶¶ 5, 7).

2. The preliminary injunction also undermines military good order and discipline and causes irreparable harm to the military’s effectiveness by forcing the military to

keep or to place persons in command positions despite the military’s determination that they are unfit. The military’s mission demands a culture of obedience to lawful orders. A283-85, A287-88 (Dkt. 118-3 ¶¶ 14, 17). As the Supreme Court has explained, “[t]he inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection.” *Chappell v. Wallace*, 462 U.S. 296, 300 (1983); *accord* A283-85 (Dkt. 118-3 ¶ 14) (explaining that military success depends on a culture of compliance with orders). A contrary culture “ultimately degrades mission effectiveness and the ability of the strike group to perform its mission in the interest of U.S. national security.” A316-17 (Dkt. 118-6 ¶ 14).

The preliminary injunction allows two officers who have refused to obey military orders—issued after careful deliberation from senior military authorities—to continue to serve in assignments over the Navy and Marine Corps’ objection. Preventing the military from removing Navy Commander from command “creates a manifest good order and discipline concern because it shields Navy Commander from the responsibility and accountability upon which his command authority rests, and leaves him in charge of enforcing policies from which he is immunized.” A317-18 (Dkt. 118-6 ¶ 17); A249, 252 (Dkt. 74-12 ¶¶ 11, 15). The same is true for Lieutenant Colonel. Notably, her inability to disembark with her unit “is antithetical to her ability to command.” A337 (Dkt. 118-7 ¶ 13). And no military can successfully function where courts allow service members to define the terms of their own military service, including

which orders they will choose to follow. Given that Lieutenant Colonel will herself be tasked with enforcing the vaccination requirement, her own unvaccinated status will undermine her authority as a commanding officer, both on that issue and more broadly. A337-38 (Dkt. 118-7 ¶ 14); A240, A242-43 (Dkt. 74-11 ¶¶ 7, 10).

With respect to Navy Commander, the Navy has lost confidence in his ability to lead and will not deploy the warship with him in command. A316-18 (Dkt. 118-6 ¶¶ 14, 17); A246 (Dkt. 74-12 ¶ 6). Not only has Navy Commander disobeyed an order that he is expected to enforce, A315-17 (Dkt. 118-6 ¶¶ 13-14); A252 (Dkt. 74-12 ¶ 15), he has compromised his trustworthiness by misleading his commanding officer about a recent leave request. A265-70 (Dkt. 81-1 ¶¶ 8-18); A271-72 (Dkt. 83-1). He also exposed dozens of his crew to COVID-19 in December 2021, failing to test himself for the virus or quarantine after experiencing symptoms. A263-65 (Dkt. 81-1 ¶¶ 4-7). The Navy has determined that it cannot, in its judgment, leave Navy Commander in his role given these breaches of trust with his commanding officer and with his subordinates. As a result, the preliminary injunction effectively takes the \$1.8 billion guided-missile destroyer that he currently commands out of commission, with obvious and grave consequences. A317-18 (Dkt. 118-6 ¶ 17); A246 (Dkt. 74-12 ¶ 6). The preliminary injunction thus poses a serious and ongoing threat to Navy operations and national security.

B. Plaintiffs cannot show that they are likely to suffer irreparable harm if the injunction is stayed. Staying the preliminary injunction will result in plaintiffs being

reassigned to non-command roles. If the military initiates separation proceedings against either plaintiff, those proceedings would take place over many months, during which time plaintiffs would not have to undergo vaccination and would have further opportunity to argue that they should be retained in their respective services. In any event, reassignment—and even separation—are not irreparable harms, as a service member could always be reinstated and provided back pay if the member prevails. *See Hartikka v. United States*, 754 F.2d 1516, 1518 (9th Cir. 1985); *Chilcott v. Orr*, 747 F.2d 29, 34 (1st Cir. 1984); *see also Guitard v. U.S. Sec’y of the Navy*, 967 F.2d 737, 742 (2d Cir. 1992).

The district court reasoned that, absent an injunction, plaintiffs would face “substantial pressure” to violate their sincerely held religious beliefs. A46-47 (Dkt. 111 at 44-45). But that does not constitute irreparable injury. As this Court and the Supreme Court have repeatedly explained, employment-related harms, including those alleged by plaintiffs here, do not constitute irreparable injury, absent a “genuinely extraordinary situation.” *Sampson v. Murray*, 415 U.S. 61, 92 n.68 (1974); *see also Northeast Fla. Chapter of Ass’n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990). The district court’s suggestion that irreparable harm exists whenever there is religious pressure in the workplace, *see* A46 (Dkt. 111 at 44), is irreconcilable with the high bar set by *Sampson* and this Court’s precedent.

II. The military is likely to succeed on the merits of its appeal.

A stay is also warranted because the military is likely to succeed on the merits of its appeal, both because the district court’s preliminary injunction exceeded the court’s authority and because plaintiffs’ claims lack merit.

A. The preliminary injunction exceeds the district court’s authority.

The district court’s decision contravenes precedent of this Court and the Supreme Court holding that civilian courts may not review challenges to military assignment decisions—especially with respect to decisions concerning plaintiffs’ fitness for command—even if they involve a constitutional challenge.

The “Constitution vests ‘[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force’ exclusively in the legislative and executive branches,” *Kreis v. Secretary of the Air Force*, 866 F.2d 1508, 1511, (D.C. Cir. 1989) (quoting *Gilligan*, 413 U.S. at 10). Accordingly, courts have consistently held that decisions as to who is placed in command of our troops are beyond the judiciary’s competence and are constitutionally entrusted to the military and political branches. *See, e.g., Orloff*, 345 U.S. at 93-94; *accord Speigner v. Alexander*, 248 F.3d 1292, 1298 (11th Cir. 2001); *see also Antonellis v. United States*, 723 F.3d 1328, 1336 (Fed. Cir. 2013) (“Courts are in no position to determine the ‘best qualified Officer’ or the ‘best match’ for a particular billet.”); *Bryant v. Gates*, 532 F.3d 888, 899 (D.C. Cir. 2008) (Kavanaugh, J., concurring) (“[T]he Supreme Court has indicated” that “military decisions and assessments of morale, discipline, and unit cohesion . . . are well beyond

the competence of judges.”). Consistent with this precedent, courts routinely find challenges to military assignment decisions to be non-justiciable. *See, e.g., Harkness v. Secretary of the Navy*, 858 F.3d 437, 443-45 (6th Cir. 2017) (collecting cases).

It is difficult to conceive of an order that would interfere more directly with core military prerogatives than the injunction here: the district court has directly ordered the Navy and Marine Corps to keep or place plaintiffs in command positions notwithstanding military leaders’ assessment that neither is fit for command. In so doing, the district court stepped beyond its constitutional limits and into a role reserved for military leaders and the political branches.

B. Plaintiffs’ claims lack merit.

Even assuming plaintiffs’ claims were justiciable, the district court erred in concluding that the Navy’s COVID-19 vaccination requirement likely violates RFRA. The military is likely to prevail on the merits of plaintiffs’ RFRA and First Amendment claims and, at a minimum, has presented a substantial question for purposes of appeal. *See Schiavo*, 403 F.3d at 1232.

The military has a compelling interest in mitigating the impact of COVID-19 on its missions, units, and personnel; vaccination of Navy Commander and Lieutenant Colonel is the least-restrictive means to advance that interest. Senior military leaders, exercising their professional judgment, have determined that COVID-19 vaccination is necessary for Navy Commander and Lieutenant Colonel to carry out their duties safely and effectively. Both may be required to deploy on short notice, and immunizations

play an essential role in ensuring that they are ready to do so. Not only are unvaccinated service members at heightened risk of contracting and spreading COVID-19, the consequences of infection in even one deployed service member are severe. *See, e.g.*, A301-03 (Dkt. 118-5 ¶¶ 8, 10); A293-95 (Dkt. 118-4 ¶¶ 6-8); *see also supra* 9-14. Indeed, one unvaccinated service member can derail an entire mission—for that reason, the district court’s reference to the military’s vaccination rates does not overcome the harm of unvaccinated individuals, particularly commanding officers. *See* A12 (Dkt. 111 at 10).³

Admiral Michael M. Gilday, the highest-ranking uniformed officer in the Navy and a member of the Joint Chiefs of Staff, personally assessed and denied Navy Commander’s appeal. A290-91, A295-96 (Dkt. 118-4 ¶¶ 1-2, 9). In doing so, Admiral Gilday considered “the service member’s initial request and appeal, all enclosed matters submitted by the service member, [the] command endorsement, and the requester’s specific duties” in light of the Navy’s compelling interests in military readiness, unit cohesion, good order and discipline, and health and safety. A291 (Dkt. 118-4 ¶ 2). General Eric M. Smith—the second-highest ranking uniformed officer in the Marine Corps—likewise personally assessed and denied Lieutenant Colonel’s appeal based on her specific circumstances, including her likely need to travel to countries that require

³ The district court relied on plaintiffs’ testimony that they had conducted successful missions during the pandemic despite being unvaccinated. *See* A12 (Dkt. 111 at 10). But the military does not need to establish that all of its missions would fail without vaccination—it must show that vaccination is the least-restrictive method of vindicating its compelling interest in mission success and in military readiness. Defendants have done so.

COVID-19 vaccination as a condition of entry. A298-99, A303-05 (Dkt. 118-5 ¶¶ 2, 11). These assessments necessarily involved a weighing of the value of plaintiffs’ experience against the military’s interest in their vaccination. Contrary to the district court’s suggestion, A41-43 (Dkt. 111 at 39-40), plaintiffs’ relative seniority *enhances* the military’s interest in their vaccination, as the consequences for military readiness if plaintiffs were to get seriously ill or be barred from entering a country on a deployment would be even more severe than for lower-ranking service members.

The military is also likely to prevail on its argument that, for Navy Commander and Lieutenant Colonel, vaccination is the least-restrictive means of ensuring military readiness. Plaintiffs cannot carry out their duties effectively and safely if they are not vaccinated. Not only is vaccination superior to measures like masking, social distancing, and teleworking—some of which are unavailable on a destroyer or in a forward-deploying unit aboard an amphibious ship (both of which have many confined, unventilated spaces)—vaccination is the only way to ensure that plaintiffs can enter a country with a COVID-19 vaccination requirement while deployed. *See* A274-75 (Dkt. 118-3 ¶ 2); *see generally* A155 (Dkt. 66-4); A232 (Dkt. 74-9); A185 (Dkt. 74-4).

The district court erred in supplanting the military’s reasonable, expert evaluation of the evidence regarding the necessity of COVID-19 vaccination. *See Rostker v. Goldberg*, 453 U.S. 57, 68 (1981). The district court imposed its own judgments about the “comparative effectiveness” of vaccines vis-à-vis “natural immunity” in maintaining a ready military force, A39 n.10 (Dkt. 111 at 37 n.10), discounted the effect of vaccine

refusal on good order and discipline in the military, A45 (Dkt. 111 at 43), and ignored the declarations addressing the military's particularized compelling interest in vaccinating Navy Commander and Lieutenant Colonel. In substituting its own evaluation for the military's, the district court far exceeded its authority. *Cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2421-22 (2018) (declining in matters of national security to “substitute” the Court’s own “predictive judgments,” or its own “evaluation of the underlying facts,” for those of the President). The Navy and Marine Corps have determined that vaccination is the most effective means of mitigating the risk to their missions, units, and personnel from COVID-19. The assessment of such operational risks is within the military’s purview, not the judiciary’s.⁴

In particular, the district court misconstrued the record in concluding that the military failed to conduct a case-by-case assessment of plaintiffs’ religious exception requests. A46 (Dkt. 111 at 44). Although the court noted similarities between the appeal denial letters in the record, A39-46 (Dkt. 111 at 37-44), many of the Navy’s reasons for requiring vaccination are generally applicable—for example, the fact that unvaccinated service members cannot deploy worldwide. The court also ignored that each letter contains individualized analysis and ignored the voluminous record materials filed

⁴ The Fifth Circuit made a similar error in denying the military’s request for a stay pending appeal in *U.S. Navy Seals 1-26 v. Biden*, No. 22-10077, 2022 WL 594375 (5th Cir. Feb. 28, 2022) (per curiam), wrongly rejecting the Navy’s assessment that certain members of the Navy special warfare community must be vaccinated to effectively carry out their duties, *see id.* at *11-12.

under seal that further elaborate on why there are no less restrictive means for promoting defendants' compelling interests with respect to Navy Commander and Lieutenant Colonel based on their roles, their responsibilities, and the requirements for deployment. *See, e.g.*, Dkts. 81, 87, 90, 103.

CONCLUSION

The district court's preliminary injunction should be stayed pending appeal. Defendants respectfully request that the Court immediately issue an administrative stay while it considers this stay motion or issue a stay as soon as is practicable, given the grave and ongoing harm to military readiness posed by the preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,184 words. This brief also complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Sarah J. Clark
SARAH J. CLARK

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system. Plaintiffs' counsel was also notified of this motion by email.

/s/ Sarah J. Clark
SARAH J. CLARK

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**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA**

NAVY SEAL # 1, et al.,

Plaintiffs,

v.

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

Defendants.

Case No. 8:21-cv-02429-SDM-TGW

NOTICE OF APPEAL

PLEASE TAKE NOTICE that all Defendants hereby appeal to the United States Court of Appeals for the Eleventh Circuit from this Court's Preliminary Injunction and Order, ECF No. 111, granting Plaintiffs' motion for preliminary relief, ECF No. 60.

Dated: February 25, 2022

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CERTIFICATE OF SERVICE

On February 25, 2022, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Middle District of Florida, using the electronic case filing system of the Court. I hereby 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
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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

NAVY SEAL 1, et al.,

Plaintiffs,

v.

CASE NO. 8:21-cv-2429-SDM-TGW

LLOYD AUSTIN, et al.,

Defendants.

_____ /

PRELIMINARY INJUNCTION AND ORDER

Here is the short version: Expressly applicable to each branch of the federal government, the Religious Freedom Restoration Act (RFRA) commands the military to grant to a service member harboring a sincerely held religious objection to COVID-19 vaccination a religious exemption from the vaccination (1) unless a compelling governmental interest requires the vaccination and (2) unless a good faith evaluation, directed specifically to the singular circumstances of the service member — that is, directed “to the person” requesting the exemption — demonstrates that no less restrictive means is available to the military reasonably to protect the compelling governmental interest. Under the command of RFRA, the military bears the burden of showing both the existence of a compelling governmental interest and the absence of a less restrictive means of reasonably protecting that interest. In the instance of Navy Commander and Lieutenant Colonel 2, the Navy and the Marine Corps have failed manifestly to offer the statutorily required demonstration that no less restrictive

means is available, and each of the two service members is entitled to preliminary injunctive relief that (1) permits them, pending a final determination on a complete record, to continue to serve without the vaccination and (2) forbids any punitive or retaliatory measure against either by the military pending a final judgment in this action. The long version follows.

BACKGROUND

Harboring a sincere religious objection to COVID-19 vaccination and denied a religious exemption, Navy Commander Surface Warfare Officer and Lieutenant Colonel 2 (each appearing pseudonymously) move (Doc. 60) for injunctive relief against the military. The defendants oppose (Docs. 23 and 74) the motion. Two orders (Docs. 67 and 85) preserve the status quo for Navy Commander and Lieutenant Colonel 2 pending resolution of a motion for preliminary injunction on behalf of Navy Commander, Lieutenant Colonel 2, the service members appearing in this action, and a putative class comprising service members in each branch of the military.

I. PROCEDURAL POSTURE

On October 15, 2021, several service members in each branch of the military sued on behalf of a putative class and promptly moved to preliminarily enjoin and to temporarily restrain military directives and executive orders requiring COVID-19 vaccination.¹ An October 18, 2021 scheduling order (Doc. 9) states that the plaintiffs

¹ The original complaint includes as plaintiffs federal employees, federal contractors, and the employees of federal contractors, but a February 12, 2022 order (Doc. 89) severs the non-service members.

may move in an exigent circumstance for relief on behalf of an individual member of the putative class.

After a hearing on the motion for a preliminary injunction, a November 22, 2021 order (Doc. 40) defers resolution of the service members' claims under RFRA and the First Amendment because each service-member plaintiff remained temporarily exempt from the COVID-19 vaccination requirement pending resolution of a request for a religious exemption and the resolution of any appeal.² The order (Doc. 40) requires, among other things, that the defendants submit every fourteen days beginning January 7, 2022, a notice containing information about, among other things, the number of requests for religious and other exemptions and the number of requests denied after appeal (this reporting requirement was terminated recently). According to the February 4, 2022 notice (Doc. 73), the Navy has denied 81 appeals and granted none, the Marine Corps has denied 119 appeals and granted 3, and the Air Force has denied 443 appeals and granted 1 appeal (and granted 8 initial requests).

On January 20, 2022, the plaintiffs moved (Doc. 49) to amend the complaint to remove President Biden as a defendant, to add as a defendant the head of each branch of the military, to add claims under the APA, and to add plaintiffs. On January 21, 2022, the plaintiffs submitted (Doc. 51) a supplemental memorandum in support of a preliminary injunction on behalf of the putative class of service members.

² The order (Doc. 40) denies the motion on the service members' "informed consent" claim under 10 U.S.C. § 1107a.

On February 1, 2022, the plaintiffs moved (Doc. 60) for emergency injunctive relief on behalf of Navy Commander and Lieutenant Colonel 2, each denied a religious exemption after a final appeal and each ordered to accept COVID-19 vaccination within five days. A February 2, 2022 order (Doc. 67) schedules for February 10, 2022, a hearing on further preliminary relief resulting from the emergency motion and enjoins through February 11, 2022, the military's diminishing or altering the current status of these two service members. At the February 10, 2022 hearing, the service members testified, and the defendants filed (Doc. S-91) additional items from the administrative record. To permit review of the administrative record; to preserve the status quo; to permit a reasonable time to evaluate the issues presented during the February 10, 2022 hearing; and for other good cause shown, a February 11, 2022 order (Doc. 85) extends the February 2, 2022 order's injunctive relief through February 18, 2022. Also, a February 13, 2022 order (Doc. 90) requires the defendants to submit for each of the Navy, Marines, and Air Force (1) each letter or memorandum granting a religious exemption (whether granted initially or after appeal), (2) the twenty-five most recent denials after appeal and the underlying denial of the initial request, (3) for each grant or denial the service member's initial request and the service member's written submission beginning the appeal, and (4) anything else the defendants elect to submit in an effort to meet their statutory burden of proof.

II. THE RECORD

On August 23, 2021, the FDA licensed Pfizer's COVID-19 vaccine. The next day, the Secretary of the Department of Defense directed each branch to require of

every service member “full vaccination” against COVID-19. (Doc. 1-4 at 1) The secretary’s memorandum states that “the Military Departments should use existing policies and procedures to manage mandatory vaccination of [s]ervice members to the extent practicable” and that the vaccination requirement “will be subject to any identified contraindications and any administrative or other exemptions established in Military Department policy.” (Doc. 1-4 at 1)

A. Religious exemptions in the Navy and the Marine Corps

Each branch of the military has promulgated a process for a service member to request a religious, medical, or administrative exemption from COVID-19 vaccination. In general, each branch temporarily exempts a service member from the COVID-19 vaccination requirement pending resolution of a request and of any appeal. If the appeal results in denial, each branch requires the service member — within only five days — to decide the life-altering question whether to accept COVID-19 vaccination or face discharge for disobeying an order. Specifically, if the service member fails to accept COVID-19 vaccination within the allotted five days, the branch considers the service member in violation of a lawful order and the commander reports the service member for discharge or other punishment based on the charge of misconduct, moral or professional dereliction, and substandard performance. (Of course, the typical service member cannot as a practical matter obtain judicial relief on only five days’ notice.)

1. Religious exemption in the Navy

Under BUPERINST 1730.11A, a sailor requesting a religious exemption from COVID-19 vaccination must interview with a Navy chaplain, who decides whether to recommend the service member's religious objection as sincere. (Doc. 23-18 ¶ 14) Next, the sailor submits an exemption request to the service member's commander. (Doc. 23-18 ¶ 14) Within seven days after receiving an exemption request, the commander must prepare in accord with MILSPERMAN 1730-020 an endorsement identifying "(1) the negative effect (if any) of the requested accommodation on the unit's military readiness, health, or safety; (2) the number of service members in the command that have been granted a similar exemption; and (3) when recommending a denial, a determination that the denial furthers a compelling government interest and there is no less restrictive means of accommodating the request." (Doc. 23-18 ¶ 14.b) After receiving the commander's endorsement, the Chief of Naval Personnel resolves the request within sixty days. (Doc. 23-18 ¶ 14.b)

If the request is denied, the sailor can appeal to the Chief of Naval Operations. (Doc. 23-18 ¶ 14.b) Under NAVADMIN 256/21, if the Chief of Naval Operations (or other adjudicating authority) denies the appeal, the sailor must accept COVID-19 vaccination within five days. (Doc. 23-18 ¶ 15) Under NAVADMIN 225, if the sailor fails to accept COVID-19 vaccination within five days, the sailor is "refusing the vaccine" and must "be processed for administrative separation" under the Navy's Covid Consolidated Disposition Authority. (Doc. 23-18 ¶ 15) Under NAVADMIN 225/21, an officer refusing the vaccine "is processed for separation on the bases of

Misconduct, Moral or Professional Dereliction, and substandard Performance.” A non-probationary officer refusing the vaccine is entitled to a Board of Inquiry hearing, during which three or more senior officers recommend retention or separation. (Doc. 23-18 ¶ 17.b)

In the February 4, 2022 notice (Doc. 73), the Navy reports receiving 4,095 requests for a religious exemption from COVID-19 vaccination. (Doc. 73-3 at 3) The Navy has denied 3,728 initial requests — 93% of all pending requests — and granted no initial request. Of these 3,728 denials, 1,303 sailors have appealed. The Navy has denied 81 appeals and granted none. The Navy has reportedly separated 240 sailors who requested a religious exemption from COVID-19 vaccination.

Although the defendants report an inability to quantify the number of requests for, or denials of, a temporary or permanent medical exemption (Doc. 34-2 at 3–4), the Navy reports 252 active temporary medical exemptions, which require renewal every thirty days (Doc. 34-2 at 4), and 11 permanent medical exemptions. (Doc. 73-2 at 3) The number of active temporary medical exemptions has fallen since November 10, 2021, when the Navy reported 698 active temporary medical exemptions. (Doc. 34-2 at 4)

2. Religious exemption in the Marine Corps

Under Marine Corps Order 1730.9, a Marine requesting a religious exemption from COVID-19 vaccination must complete a religious exemption form, NAVMC 10274 AA. (Doc. 23-19 Ex. A ¶ 4.a) Next, the Marine interviews with a chaplain, “who assesses whether the [applicant’s] beliefs appear sincerely held.” (Doc. 23-19

¶ 12.a) The chaplain routes the assessment to the applicant's commander, who routes the application through the chain of command to the Deputy Commandant, Manpower and Reserve Affairs. (Doc. 23-19 ¶ 12.a)

The Deputy Commandant reviews the application and consults with a staff judge advocate and the Religious Accommodation Board. (Doc. 23-19 ¶ 12.c) Under Marine Corps Order 1730.9, the Religious Accommodation Board, comprising at least three voting members and a recorder, a legal advisor, and a chaplain advisor, reviews each request for a religious exemption, writes an assessment of the request, and recommends granting, granting-in-part, or denying the request. Marine Corps Order 1730.9 requires the Deputy Commandant to resolve each request "on a case-by-case basis" and to "articulate the factual basis underlying their decision." Under the regulations, the reviewing authority can deny the request only if "there is no lesser restrictive means to furthering" a "compelling government interest." (Doc. 23-19 ¶ 12.a-b)

The Deputy Commandant resolves the request within sixty days. (Doc. 23-19 Ex. A ¶ 4.b) The Marine receives written notice of the decision and, if applicable, "any conditions or limitations placed on the approval to meet the compelling governmental interest in mission accomplishment." (Doc. 23-19 Ex. A ¶ 4.b.4) If the request is denied, the Marine can appeal to the Commandant of the Marine Corps, who issues a final decision. (Doc. 23-19 Ex. A ¶ 4.c)

If the Commandant denies the appeal (or if the Marine declines to appeal), the Marine receives an order to begin COVID-19 vaccination within five days. Under

MARADMIN 612/21, if the Marine fails to timely begin COVID-19 vaccination, the Marine has “refused the vaccine” and is reported for administrative separation based on misconduct, moral or professional dereliction, and substandard Performance.

As of February 3, 2022, the Marine Corps reports receiving 3,539 initial requests for a religious exemption. (Doc. 73-4 at 3) The Marine Corps has denied 3,458 initial requests — 98% of all pending requests — and granted none. In 1,272 denials, the requestor appealed. The Marine Corps has adjudicated 122 appeals and granted 3 exemptions on appeal.

Like the Navy, the Marine Corps has begun the administrative separation of a Marine who, after denial of the appeal, fails to accept COVID-19 vaccination. As of February 3, 2022, the Marine Corps has reportedly separated two Marines who were denied a religious exemption to COVID-19 vaccination and has reportedly initiated the separation of seven more Marines who were denied a religious exemption to COVID-19 vaccination.

The Marine Corps, like the Navy, reports an inability to present the number of requests for, or denials of, a temporary or permanent medical exemption from a vaccine. (Doc. 47-4 at 2) The Marine Corps reports 232 active temporary and 21 active permanent medical exemptions from COVID-19 vaccination. (Doc. 73-4 at 3) The number of active temporary medical exemptions has decreased since January 7, 2022, when the Marine Corps reported 419 active temporary medical exemptions. (Doc. 47-4 at 6)

B. Findings of fact from the evidentiary hearing

The following findings of fact result from my assessment of Navy Commander and Lieutenant Colonel 2's credibility during an evidentiary hearing and from my review of the declarations, exhibits, and other items in the record.

1. Navy Commander

Navy Commander serves as the commanding officer of a guided missile destroyer. (Doc. 60-1 ¶ 2) Navy Commander joined the Navy in 2004 and has served for more than seventeen years. (Doc. 60-1 ¶ 4) Over the course of those 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, while adhering to COVID-19 safety protocols, including masking, sanitizing, physical distancing, COVID-19 testing, and quarantining. (Doc. 60-1 ¶¶ 12-13) More than 93% of the sailors under his command have completed a COVID-19 vaccination series. (Doc. 60-1 ¶ 15) In sum, his present regime has proven successful including while "underway" on the oceans of the world.

On September 13, 2021, Navy Commander submitted a “Religious Accommodation Request.” (Doc. 60-1 ¶ 8) A devout Christian, Navy Commander harbors a sincere belief, which during his testimony he convincingly articulated with scriptural citations, that acceptance of the vaccine introduces an unclean substance into his body, which he understands is a gift from God and a temple of the Holy Spirit. Navy Commander abhors the use of fetal cell tissue in the development of the vaccines and believes that production of the available vaccines was and is achieved by immoral means. As required by his faith, Navy Commander refuses to accept any COVID-19 vaccine.

On October 22, 2021, the Chief of Naval Personnel denied Navy Commander’s Religious Accommodation Request. Navy Commander appealed on November 3, 2021. (Doc. 60-1 ¶¶ 9, 10) Navy Commander testifies — consistent with the balance of the record in this action — that the denial letter “is identical to the denial letter received” by the sixteen sailors under his command on the guided missile destroyer. (Doc. 60-1 ¶ 19) Although Navy Commander endorsed the exemption request of each sailor under his command and affirmed the ability on the destroyer he commands to accommodate each sailor’s request, the reviewing authority deemed Navy Commander’s endorsement insufficient for each member of his crew. (Doc. 60-1 ¶ 22)

On January 28, 2022, the Chief of Naval Operations, the Navy’s final appellate authority for religious exemptions, denied Navy Commander’s appeal. (Doc. 60-1 at 8–9) The appellate denial letter assumes that Navy Commander’s

“religious beliefs are sincere and would be substantially burdened.” (Doc. 60-1 at 8) However, the letter states that “[a] waiver of immunizations would have a predictable and detrimental effect on the readiness of you and the Sailors who serve alongside you” and that the other preventative measures, which for the last two years Navy Commander has required of sailors under his command, “are not 100 percent effective and must be implemented in conjunction with immunization to reduce the risk of mission failure.” (Doc. 60-1 at 8) 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. (Doc. 60-1 at 9) 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.’” (Doc. 60-1 ¶¶ 24–25)³

³ Within minutes of the conclusion of the February 10, 2022 hearing on Navy Commander’s and Lieutenant Colonel 2’s motion for injunctive relief, counsel for the defendants announced the essentially simultaneous filing of, among other things, the affidavit (Doc. 81-1) of Navy Commander’s commanding officer and the affidavit (Doc. 83-1) of the Executive Officer serving immediately under Navy Commander on the destroyer. Although introduced after the close of evidence, the affidavits purport to contradict a part of Navy Commander’s testimony that is unrelated to his request for, and the Navy’s denial of, a religious exemption from the COVID-19 vaccination requirement. The plaintiffs object to consideration of the declaration.

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 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.

2. Lieutenant Colonel 2

Lieutenant Colonel 2 serves as a logistics officer at Marine Forces Special Operations Command at Camp Lejeune, North Carolina. (Doc. 60-2 ¶ 2) In 1997, Lieutenant Colonel 2 enlisted in the Marine Corps. (Doc. 60-2 ¶ 3) 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. (Doc. 60-2 ¶ 6) Since the beginning of COVID-19, Lieutenant Colonel 2 has completed eight temporary duty assignments, which required travel across the United States. (Doc. 60-2 ¶ 19) 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 2022.⁴ 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.

⁴ After objecting to COVID-19 vaccination, Lieutenant Colonel 2's transfer to Bahrain was delayed.

On September 7, 2021, Lieutenant Colonel 2 requested a religious exemption from COVID-19 vaccination. (Doc. 60-2 ¶ 8; Doc. 60-2 at 13) A devout follower of Christ, Lieutenant Colonel 2 testified that she and her husband live their lives according to the word of God. Lieutenant Colonel 2 harbors a sincere religious belief that her body is temple of God and that the compulsory introduction of a foreign substance into the body violates the word of God. Also, before joining the military, Lieutenant Colonel 2 received an abortion after she became pregnant because of a rape. (Doc. 60-2 ¶ 18) This experience caused Lieutenant Colonel 2 to develop a profound religious opposition to abortion and to any vaccine developed with cell lines derived from fetal cells. (Doc. 60-2 ¶ 18)

On October 13, 2021, the Deputy Commandant, Manpower & Reserve Affairs denied Lieutenant Colonel 2's request for a religious exemption. (Doc. 60-2 ¶ 10) On November 3, 2021, Lieutenant Colonel 2 appealed, which on January 26, 2022, the Assistant Commandant of the Marine Corps denied. (Doc. 60-2 at 7) In the appellate denial letter (Doc. 66-3), the Assistant Commandant determines — without explanation or citation of sources — that the COVID-19 vaccination requirement “does not substantially burden” Lieutenant Colonel 2's religious belief because “fetal stem cells are neither used in the manufacture of the Pfizer COVID-19 vaccine nor are they present in the vaccine itself.” (Doc. 66-3 at 3) (The Assistant Commandant says nothing about the development of the vaccine or the religious concepts of, for example, accepting a personal benefit from evil, assisting someone in profiting from evil, cooperating in evil, appropriation of evil, de-sensitization to evil, moral

contamination by intimacy with evil, ratification of evil, complicity with evil, or other considerations undoubtedly familiar to a theologian and likely familiar to a thoughtful religious lay person.)

Further, “assuming that COVID-19 vaccination substantially burdens” Lieutenant Colonel 2’s religious exercise, the Assistant Commandant concludes that “the government’s compelling interests in military readiness and in the health and safety of the force” justify denying Lieutenant Colonel 2’s request. (Doc. 66-3 at 3) Again, in conclusory fashion, without citation of sources and without analyzing the specific demands of Lieutenant Colonel 2’s particular assignment, the Assistant Commandant states that “[w]hile masking, social distancing, hygiene, teleworking, and other similar measures, individually or in combination, have been shown to help slow the spread of the virus, they are simply not as effective as vaccination.” (Doc. 66-3 at 4) The Assistant Commandant finds that these lesser-restrictive measures “are often incompatible with the demands of military life, where Marines and Sailors must live, work, realistically train, and, if necessary fight in close quarters.” (Doc. 66-3 at 4) (The Assistant Commandant’s use of “often” exemplifies the difference between an insufficient global dismissal and the required evaluation directed “to the person.”)

On January 26, 2022, the commanding officer directed Lieutenant Colonel 2 to begin a vaccination series not later than February 2, 2022. (Doc. 60-2 at 7) 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. (Doc. 60-2 ¶ 13) Further, placement on the Officer Disciplinary Notebook begins the “Board of Inquiry Process,” that is, the process of administrative separation from the Marines. (Doc. 60-2 ¶ 14)

DISCUSSION⁵

This action questions the effect of RFRA’s resurrection of the Free Exercise Clause, the “prohibiting” clause of the First Amendment.⁶ The meaning of the Free Exercise Clause, which understandably leaves “Free Exercise” undefined, has confused, confounded, and vexed studious and well-meaning citizens and, especially, beleaguered jurists for many decades. (For a vivid example, see *McGowan v. Maryland*, 366 U.S. 420 (1961) (separate opinions appear at 366 U.S. 459, 561, 583, 599, and 617).

Thomas Jefferson in his often-remarked letter (his “wall of separation” letter) to the Danbury Baptists in 1802 seems confidently to declare that “the legitimate

⁵ The following observations in a substantially similar form appear in an earlier order (Doc. 40) and appear here because understanding the provenance of RFRA informs a faithful application of Congress’s command.

⁶ The First Amendment, a spare but dense forty-five words, preserves against legislative intrusion by Congress an array of rights irreplaceable to the civil and peaceful preservation of a constitutional republic. After the central prohibition “Congress shall make no law,” the First Amendment deploys three participles to identify the laws the amendment forbids. The three participles—respective, prohibiting, and abridging—are not identical and not synonymous but suggest a hierarchical ordering. Akin to the encompassing but amorphous phrase “relating to,” “respecting” connotes the proscription of any law touching the pertinent rights. A more focused and more targeted phrase, “prohibiting” connotes a bar against any law that disallows, proscribes, or precludes the pertinent rights. “Abridging” connotes a bar of any law that compacts, constricts, confines, or otherwise impedes the pertinent rights. But the Supreme Court seldom, if ever, mentions the presence of these three distinct terms and attributes little, if any, importance to the apparent hierarchy of protections embedded in the First Amendment.

powers of government reach actions only, and not opinions” and that a person “has no natural rights in opposition to his social duties.” James Madison, often but not always in agreement with Jefferson, held that the constitutional meaning of “religion” extends to “the means of discharging” religious faith. And, among others, William Penn held that “liberty of conscience,” which during the time of the Founders meant religious liberty, included “not only a mere liberty of the mind, in believing or disbelieving . . . but the exercise of ourselves in a visible way of worship.” Of course, the statements and the writings of this or that person, however prominent in the politics of the founding years or of another time, might influence — but cannot in isolation resolve — the meaning of a founding document (or any other document) that was drafted by one or more persons, first approved by a larger group of persons, and finally approved after further and more encompassing deliberation, for example, in the several states. Although famously inconstant and sometimes even self-contradictory on the subject, the Supreme Court’s interpretation governs the content and effect of the First Amendment (the Supreme Court’s exclusive power to interpret the Constitution is one of the rare doctrines on which the Supreme Court is tirelessly constant).

Remarkably, from 1789 to 1878 the Supreme Court had no occasion to expound the meaning of the Free Exercise Clause (perhaps the meaning was agreed and accepted, and the lawmakers, mindful of the Constitution and the tradition of deference to religious beliefs and tolerance of religious difference, prudentially chose tolerance and diversity over aggression and enforced homogeneity). But a territorial

legislature's response to polygamy among the Mormons resulted in *Reynolds v. United States*, 98 U.S. 145 (1878), in which Chief Justice Waite for a unanimous court evaluated whether at Reynolds's trial the judge should have instructed the jury that if Reynolds, a Mormon criminally charged under the law of the Territory of Utah with bigamy, was married simultaneously to two women "in pursuance of and in conformity with what he believed at the time to be a religious duty, th[en] the verdict must be not guilty." 98 U.S. at 161.

Reynolds sounds strongly the theme that bigamy "has always been odious among the northern and western nations of Europe," in England and Wales was punishable by death, and was at all times in the states of the United States "an offence against society." Fortified by a recitation of some pertinent history, by a survey of the states, and by the force of public opinion, *Reynolds* finds that by force of the Free Exercise Clause:

Congress was deprived of all legislative powers over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.

. . .

Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.

98 U.S. at 145. *Reynolds* reaches a Jeffersonian result, entirely consistent with his assurances to the Danbury Baptists, a small and uneasy assembly at the time, that "the legislative powers of the government reach action only, and not opinions."

After *Reynolds*, the Free Exercise Clause received little attention in the Supreme Court until *Cantwell v. Connecticut*, 310 U.S. 296 (1940), discovered that the Fourteenth Amendment had incorporated the Free Exercise Clause and subjected the state's law to the First Amendment's admonition that "Congress shall make no law." With the addition of challenges to state laws affecting religion, the frequency of Supreme Court decisions on the Free Exercise Clause accelerated. In *Cantwell*, three Jehovah's Witnesses were convicted of soliciting house-to-house for contributions to the church without first procuring a permit from "the secretary of the public welfare council of the state." Soliciting for a religious contribution in Connecticut was fine, but soliciting without a permit from the public welfare secretary was, according to Connecticut, an illegal incitement of a breach of the peace.

Cantwell finds that the public-welfare secretary's capacity to accomplish the "censorship of religion" by an exercise of governmental permitting discretion imposed a "prior restraint" — a "denial of liberty protected by the First Amendment" as incorporated into the Fourteenth Amendment and applied to Connecticut. Although casually mingling concepts of freedom of religion with concepts of freedom of speech (and perhaps freedom of assembly), *Cantwell* resolves:

[T]o condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.

310 U.S. at 307.

Legal developments from the fraternal disagreement between Jefferson and Madison to the present dispute are too lengthy to detail precisely. But a distinct and troublesome thread of tension between religion and legislation appears, and the main decisions are worth briefly recalling. For example, the availability of the Fourteenth Amendment to support a claim against a state law yielded *Sherbert v. Verner*, 374 U.S. 398 (1963), in which a Seventh-Day Adventist lost her job when she declined to work on Saturday, the Sabbath Day of her faith. The state denied her application for unemployment compensation because she “failed without good cause . . . to accept available suitable work,” which her employer offered if she would work on Saturday, which she would not. *Sherbert*, 374 U.S. at 401.

Explicitly confirming a distinction between regulation to “compel affirmation of a repugnant belief” and “regulation of certain overt acts prompted by religious beliefs or principles,” *Sherbert* addresses “whether the disqualification for benefits imposes any burden on the free exercise of appellant’s religion.” *Sherbert*, 374 U.S. at 402–03. Acknowledging that the disqualification required by the unemployment compensation law “derives solely from the practice of her religion” and that the law applies “pressure upon her to forego that practice,” *Sherbert* equates the effect of the law to a monetary penalty for “Saturday worship” and invalidates the law as a violation of the Free Exercise Clause because the law “penalizes the free exercise of her constitutional liberties” by inducing her to avoid the penalty by violating a “cardinal principle of her religious faith.” *Sherbert*, 374 U.S. at 404–06. *Sherbert* considers

whether a “compelling state interest” might counterbalance the identified infringement of religious liberty and concludes:

It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, “[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.

Sherbert, 374 U.S. at 406 (citing *Thomas v. Collins*, 323 U.S. 516, 530 (1945)). *Sherbert* was a much more Madisonian result.

Similarly, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), invalidates the state’s law requiring compulsory school attendance for those under sixteen. Yoder and other Amish declined on religious grounds to send their children to school after the eighth grade. Writing for the court, Chief Justice Burger finds the state’s interest in education (“a high responsibility”) is “not totally free from a balancing process when it impinges . . . the Free Exercise Clause . . . and the traditional interests of parents with respect to the religious upbringing of their children.” *Yoder*, 406 U.S. at 213–14. After an extensive review of the provenance and practice of Amish beliefs and after finding the beliefs sincere, enduring, and elemental to the Amish faith, the Chief Justice observes that — for the Amish — limiting a child’s education to the eighth grade, to “the three Rs,” “is not merely a matter of personal preference, but one of deep religious conviction.” *Yoder*, 406 U.S. at 216. As a result, the Chief Justice finds “a very real threat of undermining the Amish community and religious practice as they exist today” and concludes:

The impact of the compulsory-attendance law on respondents’ practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under

threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs.

Yoder, 406 U.S. at 218.

Yoder balances two strong but, in *Yoder*'s circumstance, competing and irresolvable interests — universal education and Free Exercise. Because examination identified only a marginal harm to the state's interest if Free Exercise rights were preserved, *Yoder* prevailed. *Yoder* is avowedly an example of the court's "recognizing the need for a sensible and realistic application of the Religion Clauses." *Yoder*, 406 U.S. at 221. The extended discussion in *Yoder* includes this summary:

The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. We can accept it as settled, therefore, that, however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests.

Yoder, 406 U.S. at 215. *Sherbert* and *Yoder* governed for a several years.

Somewhat similar to this dispute is *Goldman v. Weinberger*, 475 U.S. 503 (1986), in which the Air Force enforced a dress regulation that prohibited the wearing of a non-regulation attire, including a yarmulke worn by an Air Force psychologist who was an Orthodox Jew, an ordained rabbi, and a PhD in psychology; who was practicing in a clinic at March Air Force Base in California; and whose sincerely held religious belief required his wearing a yarmulke.

Although the rabbi argued for the application of *Sherbert* and *Yoder*, then-Justice Rehnquist in his opinion for the court cited the military's "specialized society separate from civilian society" and the military's "respect for duty and a discipline

without counterpart in civilian life” and determined to apply a standard (unstated) “far more deferential” than for a challenge by a civilian to a similar restriction “for civilian society.” *Goldman*, 475 U.S. at 506–07. *Goldman* offers assurances that the consequences of military discipline “do not, of course, render entirely nugatory in the military context the guarantees of the First Amendment” and that:

[W]hen evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.

Goldman, 475 U.S. at 507.

Remarking the claimed need for a “sense of hierarchical unity,” advanced in the military “by tending to eliminate outward individual distinctions except for those of rank,” Justice Rehnquist identifies regulations providing that only “authorized headgear” is worn outdoors and that, except for on-duty law enforcement and in “designated living quarters,” no headgear is worn indoors. *Goldman*, 475 U.S. at 508–09. Without a lucid expression of the applicable standard of scrutiny and an explanation of how the result in *Goldman* follows reasonably from the facts of *Goldman*, the opinion leaves the reader mystified about how a mere yarmulke, worn under a regulation Air Force cap outdoors on the base and in the confines of a psychologist’s consulting rooms and clinic on the base, erodes “hierarchical unity”; how the yarmulke was even noticed (except perhaps in retaliation by Goldman’s litigation adversary, who filed the complaint); and how this prospective erosion of military discipline, hierarchy, or the like — not specified, not quantified, and not even exemplified

— outweighed a constitutionally fundamental right guaranteed by the Free Exercise Clause. The *Goldman* dissenters complained tellingly that the military’s “lack of any reasoned basis for prohibiting yarmulkes” was “striking” and that the majority seemed to forsake the more demanding inquiry featured in *Sherbert* and *Yoder*. *Goldman*, 475 U.S. at 520 (Brennan, J., dissenting).

Soon after *Goldman* came *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), in which Justice Scalia, writing for the majority, determines that Oregon — without unconstitutionally contravening the Free Exercise rights of church members — can criminalize consumption of the hallucinogen peyote, although members of the Native American Church use peyote in religious rites. While surveying the precedent in which a state law of general application competes with the Free Exercise Clause, Justice Scalia first attempts to confine the precedent to instances raising “not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional freedoms, such as freedom of speech and of the press,” *Smith*, 494 U.S. at 881, and next attempts to confine the balance of the precedent to instances involving unemployment compensation. Further minimizing *Sherbert* and *Yoder*, Justice Scalia cites instances, including *Goldman*, that evade *Sherbert*. In a decisive dismissal of *Sherbert*, Justice Scalia mentions his view of the limitations that *Sherbert* would encounter “even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field.” *Smith*, 494 U.S. at 884.

In precisely describing (or, at least, in trying to precisely describe) the controlling distinction, Justice Scalia in *Smith* distinguishes between (1) a circumstance in which “the state has in place a system of individual exemptions,” in which case “the state may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason” and (2) a circumstance in which a state adopts “an across-the-board criminal prohibition on a particular form of conduct.” 494 U.S. at 884. Justice Scalia’s coda to *Smith* presents both his recognition that several states had enacted statutory exemptions from the criminal law to permit sacramental use of peyote and his reconciliation of those exemptions to *Smith*:

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process.

. . .

But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

Smith, 494 U.S. at 890.

A search for a general rule emerging from *Smith* reveals this paragraph, written by Justice O’Connor in a concurrence, which recapitulates *Smith*’s formal retirement of *Sherbert*:

The Court today extracts from our long history of free exercise precedents the single categorical rule that “if prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.” [citation omitted] Indeed, the Court holds that where the law is a generally applicable criminal prohibition, our usual free exercise jurisprudence does not even apply. [citation omitted] To reach this sweeping result, however, the Court must not only give a strained reading of the First Amendment but must also disregard our consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct.

Smith, 494 U.S. at 892 (O’Connor, J., concurring).

Smith left much uncertainty about the breadth and vigor of the Free Exercise Clause, an uncertainty fortified by an assay of the Supreme Court’s decisions, to and including *Smith*, which reveals a variety of distinctions, each offering utility in the facts of a particular case and used by the Supreme Court to resolve challenges to governmental intrusion on Free Exercise: whether the governmental action affects belief or conduct; if conduct is affected, whether the conduct is active or passive; whether the governmental action affects a religious practice that is otherwise legal or otherwise illegal; whether application or enforcement of the law is mandatory, strictly or loosely guided, or discretionary; whether governmental action enforces a law that is generally applicable or aimed toward religious activity; whether the governmental action is generally applicable or permits exceptions; if exceptions are permitted, whether the exceptions are religious, secular, or both; if exceptions are permitted, whether the exceptions favor religious activity to an extent that affronts the Establishment Clause; whether the law affects a religious belief or a conviction of secular moral conscience; whether an affected belief is sincere and, if so, whether the

affected belief or conviction is implausible, irrational, or bizarre (but not whether the belief is true or untrue); whether the belief or conviction amounts to principled opposition to a category of morally offensive events or is limited to ad hoc opposition to a particular event (such as the difference between opposition to all wars and opposition to a particular war); whether the law affects only the government's conduct of its own internal affairs; and whether the law affects only Free Exercise or also affects other constitutional rights; and sundry other distinctions from time to time deployed by the Supreme Court "as meet and convenient."

Perceiving unhappily the result in *Smith* and the shifting grounds for the Supreme Court's other Free Exercise Clause decisions, Congress enacted RFRA, which emphatically rejects *Smith* and explicitly restores *Sherbert* and *Yoder*. In RFRA's statement of purpose section, 42 U.S.C. § 2000bb, Congress states that RFRA serves "(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where Free Exercise is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government."

For a unanimous court in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006), the Chief Justice confirms the congressional rejection of *Smith* in favor of *Sherbert* and *Yoder* and outlines more expressly the statutory purpose:

[T]he Federal Government may not, as a statutory matter, substantially burden a person's exercise of religion, "even if the burden results from a rule of general applicability." [42 U.S.C.] § 2000bb-1(a). The only exception recognized by the statute requires the Government to satisfy the compelling interest test—to "demonstrat[e] that application of the burden to the person— (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." [42 U.S.C.] § 2000bb-1(b). A person whose religious practices are burdened in violation of RFRA "may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief." [42 U.S.C.] § 2000bb-1(c).

O Centro, 546 U.S. at 424.

Further, the Chief Justice in his unanimous opinion details that, assuming a plaintiff presents prima facie evidence of a substantial burden on a sincerely held religious exercise, the government bears the burden to prove that the law in question furthers a compelling governmental interest by the least restrictive means available.

Confirming the reasoning in *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004), and summarizing, the Chief Justice explains:

RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person"—the particular claimant whose sincere exercise of religion is being substantially burdened.

O Centro, 546 U.S. at 430.

Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014), conceives RFRA's statutory protection for religious liberty as more comprehensive and more accessible than the constitutional protection, at least if the federal government is the alleged infringer. Specifically, *Hobby Lobby* confirms that "RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader

protection for religious liberty than was available under those decisions.” *Hobby Lobby*, 573 U.S. at 695 n.3; *Holt v. Hobbs*, 574 U.S. 352, 859–60 (2015) (finding that RFRA “provide[s] greater protection for religious exercise than is available under the First Amendment.”)

The service members in Count II challenge the military’s vaccination requirement under the First Amendment and in Count III challenge the military’s vaccination requirement under RFRA. Because for a service member RFRA “provides greater protection . . . than is available under the First Amendment,” the RFRA claim demands primary consideration (after all, if a service member’s RFRA claim fails, the service member’s First Amendment claim necessarily fails).

I. JUSTICIABILITY

RFRA secures for a service member a claim against the military for violation of Free Exercise. Article I, Section 8, Clause 14 of the Constitution vests Congress with the plenary authority “[t]o make Rules for the Government and Regulation of the land and naval Forces[.]” By enacting RFRA, Congress exercised this plenary authority to guarantee the “broad protection for religious liberty.” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014). To ensure comprehensive protection of Free Exercise, Congress under 42 U.S.C. § 2000bb-2(1) extends RFRA to govern any substantial burden imposed by a “branch, department, agency, instrumentality, and

official (or other person acting under color of law) of the United States.” No exemption, whether express or implied, relieves the military of RFRA’s command.⁷

Further, RFRA expressly creates a remedy in district court. Entitled “Judicial Relief,” 42 U.S.C. § 2000bb-1(c), affords “[a] person whose religious exercise has been burdened in violation of this section” to “assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.” RFRA includes no administrative exhaustion requirement and imposes no jurisdictional threshold. No exemption, whether or express or implied, insulates the military from review in the district court.

Explaining RFRA’s application to the military, *Singh v. McHugh*, 185 F. Supp. 3d 201, 217–18 (D.D.C. 2016) persuasively observes:

RFRA applies to the “government,” which is defined to include a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States.” 42 U.S.C. § 2000bb–2(1). So, on its face, the statute plainly applies to the U.S. Army. And defendants acknowledge that Congress specifically intended RFRA to apply to the military. Hr’g Tr. at 35; see also S. Rep. No. 103–111, at 12 (1993) (“Under

⁷ “[C]ourts must — at least initially —indulge the optimistic presumption that the military will afford its members the protections vouchsafed by the Constitution, by the statutes, and by its own regulations.” *Hodges v. Callaway*, 499 F.2d 417, 424 (5th Cir. 1984). But that deference “does not justify the abdication of the responsibility, conferred by Congress, to apply [a statute’s] rigorous standard.” *Holt v. Hobbs*, 574 U.S. 352, 364 (2015). *Holt* charges that the Religious Land Use and Institutionalized Persons Act—RFRA’s “sister statute”—“does not permit such unquestioning deference” to a decision by a prison official even if that decision affects health, safety, good order, and discipline. *Holt*, 574 U.S. at 364. The defendants cite no authority—governing or persuasive—to suggest that a military personnel decision allegedly violative of RFRA enjoys immunity from judicial review. To the contrary, determining whether a government official’s action contravenes a statutory directive is singularly within the expertise of a district court. See *Holt*, 574 U.S. at 866 (emphasizing that RLUIPA “demands much more” than deferring to an officials “mere say-so that they could not accommodate petitioner’s request”); *Harmon v. Brucker*, 355 U.S. 579, 582 (1958); *Emory v. Sec’y of Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987); *Dilley v. Alexander*, 603 F.2d 914, 920 (D.C. Cir. 1979) (“It is the duty of the federal courts to inquire whether an action of a military agency conforms to the law[.]”); *Singh v. McHugh*, 185 F. Supp. 3d 201, 218–22 (D.D.C. 2016); *Heap v. Carter*, 112 F. Supp. 402 (E.D. Va. 2015).

the unitary standard set forth in [RFRA], courts will review the free exercise claims of military personnel under the compelling governmental interest test.”); H.R. Rep. No. 103–88 (1993) (“Pursuant to the Religious Freedom Restoration Act, the courts must review the claims of prisoners and military personnel under the compelling governmental interest test.”).

A service member can sue in a district court to enjoin a military department or military official from violating the service member’s civil right to Free Exercise.⁸ Although RFRA imposes no requirement of administrative exhaustion and both this record and other decisions explain the likely futility within the military of a religious exemption, *Air Force Officer v. Austin*, 5:22-cv-0009-TES (M.D. Ga. Feb. 15, 2022), and *U.S. Navy SEALs 1–26 v. Biden*, --- F. Supp. 3d ---, 2022 WL 34443 (N.D. Tex. Jan. 3, 2022), Navy Commander and Lieutenant Colonel 2 have nonetheless exhausted the mechanisms available within the military.

II. PRELIMINARY INJUNCTION

A preliminary injunction issues only if the movant shows (1) a substantial likelihood of success on the merits, (2) a substantial likelihood of irreparable injury absent an injunction, (3) an imbalance of equities favoring the movant, and (4) an

⁸ According to *Speigner v. Alexander*, 248 F.3d 1292, 1295 n.5 (11th Cir. 2001), the test in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), no longer determines justiciability in actions by service members against the military for a claim “based on an injury incident to service.” See also *Doe v. Garrett*, 903 F.2d 1455, 1463 n.15 (11th Cir. 1990) (“[I]t appears well established that *Mindes* need not be applied before reaching the merits of a statutory claim against the military.”). But see *Stinson v. Hornsby*, 821 F.2d 1537, 1540 (11th Cir. 1987) (remanding case against the military to district court to apply *Mindes* factors). In the alternative that the *Mindes* factors govern justiciability, I find the *Mindes* test thoroughly and convincingly satisfied for the reasons stated in *Air Force Officer v. Austin*, 5:22-cv-00009-TES (M.D. Ga. Feb. 15, 2022) and *U.S. Navy SEALs 1–26 v. Biden*, --- F. Supp. 3d ---, 2022 WL 34443 (N.D. Tex. Jan. 3, 2022).

unlikelihood of the injunction's materially injuring the public interest. *Siegel v. Le-Pore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc).

A. Substantial likelihood of success

As explained earlier, to prevail on a claim under RFRA, the plaintiff must show that the challenged government action substantially burdens a sincere religious belief. If the plaintiff establishes a substantial burden and sincerity, the government must demonstrate "that application of the burden to the person" both "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that interest."

1. A substantial burden on a sincere religious belief

A substantial burden exists if the challenged action "prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief," *Davila v. Gladden*, 777 F.3d 1198, 1204 (11th Cir. 2015) (quoting *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014)), or if the action "truly pressures the [plaintiff] to significantly modify his religious behavior," *Christian Missionary All. Found., Inc. v. Burwell*, No. 2:14-cv-580, 2015 WL 437631, at *5 (M.D. Fla. 2015) (quoting *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004)). Governmental action coercing a direct violation of a religious belief imposes a substantial burden. *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (finding the existence of a substantial burden "inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs."); *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069–70 (9th Cir. 2008) (defining

“substantial burden” to mean a person “coerced to act contrary to their religious beliefs by threat of civil or criminal sanctions”).

Judged under the governing legal standard, both Navy Commander and Lieutenant Colonel 2 suffer a substantial burden on a sincere religious belief. Navy Commander refuses vaccination to remain true to his faith, which requires the preservation of his body as a temple of the Holy Spirit. Similarly situated and believing that each COVID-19 vaccination is “religiously unclean according to [Lieutenant Colonel 2’s] personal faith,” Lieutenant Colonel 2 refuses vaccination. (Doc. 60-2 at 9) Lieutenant Colonel 2 voices a sincere objection to “any substance . . . connected with [] aborted fetal cell lines.” In practicing her religious belief, Lieutenant Colonel 2 finds her opposition to abortion irreconcilable with accepting any COVID-19 vaccine.

On January 28, 2022, Navy Commander received notice that the Chief of Naval Operations disapproved Navy Commander’s appeal. (Doc. 60-1 at 8) The notice of denial ordered Navy Commander to receive a vaccine within five calendar days. (Doc. 66-2 at 2) On January 26, 2022, Lieutenant Colonel 2 received the denial of her appeal, accompanied with an order to vaccinate within five business days. (Doc. 60-2 at 3) The fact of, and the consequences of, disobeying a direct order doubtlessly pressure Navy Commander and Lieutenant Colonel 2 to alter their religious practice. Because the COVID-19 vaccination requirement “puts [Navy Commander and Lieutenant Colonel 2] to this choice,” the requirement to vaccinate substantially burdens religious exercise. *Holt v. Hobbs*, 574 U.S. 352, 361 (2015).

2. The defendants fail to discharge RFRA's burden.

If a plaintiff demonstrates that the government's action substantially burdens the person's Free Exercise, the government must "demonstrate" under 42 U.S.C. § 2000bb-1(b), that is, the government must bear the burden of going forward with the evidence and satisfying the burden of persuasion, that application of the burden to the person (1) is in furtherance of a compelling governmental interest and (2) is the least restrictive means of furthering that compelling governmental interest. RFRA's focus on "the burden to the person" demands more than dismissive, encompassing, and inflexible generalizations about the government's interest and about the absence of a less restrictive alternative. *Davila*, 777 F.3d at 1206 ("[B]roadly formulated interests" and "generalized statement[s]" will not suffice). Instead, the government must proffer "specific and reliable evidence" (not formulaic commands, policies, and conclusions) demonstrating that the marginal benefit flowing from a specific denial — discounted by any detriment as a consequence of dismissing highly trained, successful, and patriotic service members — furthers a compelling governmental interest. The government must discharge both of RFRA's burdens "through application of the challenged law 'to the person' — the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006); see also *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 727–28 (emphasizing that a court must "'loo[k] beyond broadly formulated interests' and to 'scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants'" (alterations in original) (quoting *O Centro*, 546 U.S.

at 431). In sum, a district court must not defer to an official’s “mere say-so that [the official] could not accommodate” a request. *Holt*, 574 U.S. at 369. RFRA demands a “more focused” inquiry and requires scrutiny of the “‘marginal interest in enforcing’ the challenged government action in that particular context.” *Holt*, 574 U.S. at 363 (citing *Hobby Lobby*, 573 U.S. at 726–27); *U.S. Navy Seals 1-26 v. Biden*, --- F. Supp. 3d ---, 2022 WL 34443, at *10 (N.D. Tex. Jan. 3, 2022) (“The defendants must provide more than a broadly formulated interest in ‘national security.’ They must articulate a compelling interest in vaccinating the thirty-five religious servicemembers currently before the Court.”).⁹

Further, the government’s burden at the preliminary injunction stage tracks the government’s burden at trial. *O Centro*, 546 U.S. at 429. RFRA “squarely” places the burden on the government to demonstrate a compelling interest achieved through the least restrictive means. *O Centro*, 546 at 429–30 (citing *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666 (2004) (affirming the grant of a preliminary injunction because the government failed to satisfy the burden of proof)). Accordingly, the plaintiffs “must be deemed likely to prevail unless the Government has shown that [the plaintiffs’] proposed less restrictive alternatives are less effective” than the burden imposed by the government. *Ashcroft*, 542 U.S. at 666. Showing

⁹ Accordingly, RFRA likely exceeds the pre-*Smith* protection of Free Exercise. *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997) (holding that RFRA “imposes in every case a least restrictive means requirement—a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify”); *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 475 (5th Cir. 2014) (holding that RFRA’s requiring the least-restrictive means “is a severe form of the ‘narrowly tailored’ test.”)

that the challenged action has “some effect” on achieving a governmental interest is insufficient. *Ashcroft*, 542 U.S. at 666; *O Centro*, 546 U.S. at 418 (“The point remains that the burdens at the preliminary injunction stage [of a RFRA action] track the burdens at trial.”).

- a. The denial of Navy Commander’s and Lieutenant Colonel 2’s request for a religious exemption.

The Navy denies Navy Commander’s appeal “due to the Navy’s compelling governmental interest in preventing spread of diseases to support mission accomplishment, including military readiness, unit cohesion, good order and discipline, and health and safety, at the individual, unit, and organizational levels.” (Doc. 60-1 at 8) The denial letter asserts that granting Navy Commander’s appeal “will have a direct and foreseeable negative impact on the compelling government interest in military readiness and health of the force.” In support of this assertion, the letter states that COVID-19 vaccination “reduces the risk to the individual for disease-related performance impairment and [] reduces the risk to the unit for disease outbreaks” and states that “non-pharmacologic measures [of mitigating COVID-19] . . . are not 100 percent effective and must be implemented in conjunction with immunization.” (The denial letter fails, as the denial letter must fail, to identify any “100 percent” effective method to defeat COVID-19.) Except for noting that Navy Commander is “a Surface Warfare Officer commanding an operational warship[,]” the letter fails to explain how the denial of Navy Commander’s religious accommodation satisfies the requirements of RFRA.

The Marine Corps denies Lieutenant Colonel 2's appeal because of "the government's compelling interests in military readiness and in the health and safety of the force." Citing the increased transmission and severity of the Delta variant among unvaccinated people, the letter states that "an exemption from the COVID-19 vaccination poses a significant risk to military readiness[] and the health and safety of the force," particularly because Lieutenant Colonel 2 "work[s] primarily indoors" and because Lieutenant Colonel 2 is "currently attached to a deployable unit." Further, the letter asserts — again reaching disputed medical conclusions without evaluation or citation of medical or legal authority — that "natural immunity" and mitigation measures other than vaccination "are simply not as effective as vaccination" and that "[t]he demands of military life" render ineffective these less restrictive means of protecting the health and safety of the force.¹⁰

¹⁰ The comparative effectiveness—and the quantification of that comparative effectiveness—for several combinations of vaccines, for natural immunity resulting from an earlier infection, and for several combinations of vaccines plus natural immunity remains, especially as to the current Omicron variant, remain under careful study and constant "evolution." For example, the CDC Morbidity and Mortality Weekly Report for January 28, 2022, finds in the summary that "[b]y early October [2021], persons who survived a previous infection had lower case rates than persons who were vaccinated alone." The report later finds:

[A]fter emergence of the Delta variant and over the course of time, incidence increased sharply in this group, but only slightly among both vaccinated and unvaccinated persons with previously diagnosed COVID-19. Across the entire study period, persons with vaccine- and infection-derived immunity had much lower rates of hospitalization compared with those in unvaccinated persons. These results suggest that vaccination protects against COVID-19 and related hospitalization and that surviving a previous infection protects against a reinfection. Importantly, infection-derived protection was greater after the highly transmissible Delta variant became predominant, coinciding with early declining of vaccine-induced immunity in many persons. Similar data accounting for booster doses and as new variants, including Omicron, circulate will need to be assessed.

(continued...)

Thus, each letter predicates Navy Commander's and Lieutenant Colonel 2's denial on a broadly articulated interest in "the health and safety of the force" and on the assertion that broadly articulated "demands of military life" render ineffective any less restrictive means that either service member identified to mitigate COVID-19. RFRA demands more.

b. The defendants discharge neither of RFRA's burdens.

Identifying only the broadly articulated governmental interests and broadly articulated demands of military life, neither denial letter engages in any individualized assessment of Navy Commander's or Lieutenant Colonel 2's request. As the November 22, 2021 order (Doc. 40 at 32) explains:

To accomplish the consideration required by RFRA, the military certainly must consider, perhaps above all else, not whether COVID adversely affects the force (or course it does) but 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

The understanding and epidemiology of COVID-19 has shifted substantially over time with the emergence and circulation of new SARS-CoV-2 variants, introduction of vaccines, and changing immunity as a result. Similar to the early period of this study, two previous U.S. studies found more protection from vaccination than from previous infection during periods before Delta predominance (3,7). As was observed in the present study after July, recent international studies have also demonstrated increased protection in persons with previous infection, with or without vaccination, relative to vaccination alone.

Tomás M. León, et al., Ctrs. for Disease Control & Prevention, *COVID-19 Cases and Hospitalizations by COVID-19 Vaccination Status and Previous COVID-19 Diagnosis—California and New York, May–November 2021*, 71 MMWR 125, 130 (Jan. 28, 2022), <https://www.cdc.gov/mmwr/volumes/71/wr/pdfs/mm7104e1-H.pdf> (internal citations and footnotes omitted).

of the successors' acquiring similar experience and the deficit in fitness and readiness experienced in the interim.

These factors might not present the best evaluation available or the only evaluation available or the most complete evaluation available, but these and other individualized factors seem pertinent and in all events seem better than dismissive generalization and recitation of policies and aspirations. Regardless, the Navy and the Marine Corps fail to "demonstrate" the individualized "to the person" analysis required when reviewing Navy Commander's or Lieutenant Colonel 2's request for a religious exemption. The defendants' justifications for denying a religious accommodation to Navy Commander and Lieutenant Colonel 2 are elementally inadequate under RFRA.

- i.* The defendants rely on a generalized assessment of the compelling interest.

To justify the denial of Navy Commander's and Lieutenant Colonel 2's request for a religious exemption, the Navy and Marine Corps assert that each denial supports the military's compelling interest in "military readiness and health of the force." But *Davila*, 777 F.3d at 1206, explains that "[military] officials cannot simply utter the magic words ['military readiness and health of the force'] and as a result receive unlimited deference from those of us charged with resolving the dispute." The denial of these two religious exemptions removes from the service (1) a surface warfare officer with seventeen years of experience, with several deployments, and with specialized training on nuclear engineering and whom the Navy entrusted to command a destroyer with 320 personnel and (2) a Marine with twenty-four years

(eighteen of which as an officer) of experience in field operations and legislative affairs, in whom the Corps has invested substantial time and money (including a master's degree from the Command and Staff College at the Marine Corps University), and whom the Corps selected to lead a combat logistics battalion. Absent record material demonstrating that the military considered both the marginal increase, if any, in the risk of contagion incurred by granting the requested exemption and the marginal detrimental effect, if any, on military readiness and the health of the force flowing from the specific denial of Navy Commander's and Lieutenant Colonel 2's request for religious exemption from COVID-19 vaccination, the government fails to demonstrate that either denial results from an individualized "to the person" evaluation required by RFRA. In other words, the government has not shown that the stated interest cannot be reasonably preserved without subjecting Navy Commander and Lieutenant Colonel 2 to vaccination contrary to a sincerely held religious belief protected by RFRA or, given a refusal to vaccinate, separating each from service.

- ii.* The defendants rely on a generalized assessment of a less restrictive means.

In each application, Navy Commander and Lieutenant Colonel 2 identify several alternative measures to mitigate the spread of COVID-19. For example, each applicant demonstrates the natural presence of COVID-19 antibodies following an infection. These antibodies, each applicant argues, provide similar if not equal (or better, according to the recent CDC report cited above) protection against infection with, and serious symptoms from, COVID-19. Further, each applicant describes the

COVID-19 mitigation protocol — masking, social distancing, and isolation — that the Navy and the Marine Corps successfully implemented for more than a year before the development of vaccines and have continued to implement in conjunction with vaccines.

In response, the Navy and Marine Corps assert that the proposed alternatives “are less effective than vaccination” and “must be implemented in conjunction with immunization.” As with a compelling governmental interest, however, the defendants cannot rely on “magic words.” The defendants must demonstrate, with specific and reliable evidence, that the proposed alternative measures are insufficient to further — to an extent reasonably similar to vaccination — the military’s compelling governmental interest.

Also, the military fails to consider other alternatives, such as altering the applicant’s practice in a manner that might further the military’s compelling interest without burdening the plaintiff’s religious exercise. For more than a year before the COVID-19 vaccination requirement, Navy Commander and Lieutenant Colonel 2 performed their duties under altered conditions including remote work and isolation protocol. Further, after the defendants initiated the vaccination requirement, both plaintiffs have continued to work under an administrative exemption and under altered duties.

In sum, the defendants fail to articulate why Navy Commander’s and Lieutenant Colonel 2’s sincerely held religious practice must yield to the requirement to accept COVID-19 vaccination. The administrative record documenting the denial of

both Navy Commander's and Lieutenant Colonel 2's request for religious exemption fails to evidence the required "to the person" evaluation of whether a less restrictive means is available to further the compelling governmental interest. Accordingly, on this record, Navy Commander and Lieutenant Colonel 2 enjoy a substantial likelihood of success on the merits.

In accord with a February 13, 2022 order (Doc. 90), the Navy, the Marine Corps, and the Air Force submit (Docs. S-106, S-108, and S-109) the twenty-five most recent letters denying an appeal and submit every letter granting a religious exemption. The submission reveals a process of "rubber stamp" adjudication by form letter, a process incompatible with RFRA's command to assess each request "to the person."

Although the form letter varies slightly by branch, each form letter contains the same general recitation of the military's "compelling interest in . . . mission accomplishment, military readiness, unit cohesion, good order, and discipline, and . . . health and safety." (Doc. S-106) For example, each denial letter authored by the Navy announces that granting the exemption request "will have a direct and foreseeable negative impact on the compelling governmental interest in military readiness and health of the force," which each letter invariable supports with the conclusion:

Vaccination of Navy personnel can impact both individual and unit mission accomplishment. It reduces the risk to the individual for disease-related performance impairment, and it reduces the risk to the unit for disease outbreaks of contagious diseases such as COVID-19.

(Doc. S-106) Next, each form denial letter identifies certain general characteristics of military life (such as the need to interact in close proximity) and of the specific applicant (most notably whether the applicant is attached to a deployable unit) that render impossible the continued implementation of COVID-19 mitigation measures. Finally, each letter asserts generally that no lesser restrictive means exists because other COVID-19 mitigation efforts, such as masking and social distancing, “are not 100 percent effective,” a statement equally true of vaccination.¹¹ (Doc. S-106)

The letters granting an exemption yield nothing more. For example, in the Marine Corps, each grant letter contains the same boilerplate discussion of the Marine Corps’ compelling interest in military readiness and the health and safety of the force and of the insufficiency of “masking, social distancing, hygiene, teleworking, and other similar measures.” But each grant concludes:

However, in your case, because you [either have begun terminal leave, are currently participating in a Skill Bridge Program, or otherwise will have no interaction with Marines before leaving the Corps] I find the compelling interest of the government and the likelihood of your vaccination status impacting readiness, and the health of the force, remote. Therefore, I approve your request until the date of the end of your active duty service

¹¹ For example, Department of Defense data discussed at the hearing and available on the department’s website show that between November 24, 2021, and December 22, 2021, the month during which vaccines became mandatory, the “military total of new COVID-19 cases rose by 7,515 cases but between December 22, 2021 and February 9, 2022, after vaccination was mandatory and after each branch reported greater than 90% vaccination rates, cases rose by 114,292 cases. *Coronavirus: DOD Response*, U.S. Dept. of Def., <https://www.defense.gov/Spotlights/Coronavirus-DOD-Response/> (data as of Nov. 24, 2021, Dec. 22, 2021, and Feb. 9, 2022); see Oren Lieberman, *US military has vaccinated more than 97% of service members*, CNN Politics, Dec. 16, 2021, <https://www.cnn.com/2021/12/16/politics/military-vaccine-numbers/index.html>.

obligation, which is [the day on which the applicant's service ends].

(Doc. S-109-1) Thus, each grant letter differs only by the description of the applicant's future service and by the day upon which the applicant's service ends.

As the defendants note, the fact that all "decision memoranda [are] simple form letters" does not automatically justify granting each request for a religious exemption. A blanket or categorical grant no more satisfies RFRA's individualized assessment than does a blanket or categorical denial. Although only a sample of the hundreds of denial letters issued by the military, the documents considered in conjunction with the administrative record supporting Navy Commander's and Lieutenant Colonel 2's denial, strongly illustrates that the military fails to afford an applicant an actual "case-by-case assessment" as required by RFRA.

B. Irreparable harm

"The loss of First Amendment freedoms, even for minimal periods of time unquestionably constitutes irreparable injury." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020); *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012) ("This principle applies with equal force to the violation of RLUIPA rights because RLUIPA enforces First Amendment freedoms[.]"). As *Air Force Officer v. Austin*, 5:22-cv-0009-TES (M.D. Ga. Feb. 15, 2022), and *U.S. Navy SEALs 1-26 v. Biden*, --- F. Supp. 3d ---, 2022 WL 34443, at *1 (N.D. Tex. Jan. 3, 2022) correctly recognize, the "substantial pressure" on a religiously objecting service member to obey the COVID-19 vaccination order and violate a sincerely held

religious belief constitutes an irreparable injury redressable by a preliminary injunction. *See also BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021). Requiring a service member either to follow a direct order contrary to a sincerely held religious belief or to face immediate processing for separation or other punishment undoubtedly causes irreparable harm. *Sambrano v. United Airlines, Inc.*, 19 F.4th 839, 842 (5th Cir. 2021) (Ho, J., dissenting) (“To hypothesize that the earthly reward of monetary damages could compensate for these profound challenges of faith is to misunderstand the entire nature of religious conviction at its most foundational level.”)

C. Balance of the equities and the public interest

Because Navy Commander and Lieutenant Colonel 2 request preliminary relief against officials of the federal government, the analysis on the balance of equities and the analysis on the public interest merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). As the plaintiffs correctly argue, the public has no interest in tolerating even a minimal infringement on Free Exercise. *See Hobby Lobby*, 723 F.3d at 1147; *Beckwith Elec. Co. v. Sebelius*, 960 F. Supp. 2d 1328, 1350 (M.D. Fla. 2013). “The vindication or constitutional rights and the enforcement of a federal statute serve the public interest almost by definition.” *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1167 (N.D. Fla. 2012).

In opposition, the defendants claim that preliminary relief “would encourage other members to attempt to bypass the military’s process and ask courts to enter similar injunctive relief, which ‘in the aggregate present the possibility of substantial disruption and diversion of military resources[.]’” (Doc. 74 at 36) (citing *Parrish v.*

Brownlee, 335 F. Supp. 2d 661, 669 (E.D.N.C. 2004)). But no injury to the public results from recognizing a person’s constitutional or statutory right or from “encouraging” a person to vindicate that right in federal court, especially when the statute creating the right expressly authorizes such judicial vindication. Further, to the extent a “substantial disruption” results from the defendants’ systemic failure to assess a religious exemption request “to the person,” the “harm” suffered by defendants results only from the defendants’ own failure to comply with RFRA. By enacting RFRA, Congress guaranteed each service member “appropriate relief” from an infringement on the service member’s Free Exercise. To say the least, an attempted evasion of judicial review strongly disserves the public interest. *See* 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2947 (3d ed. Apr. 2021 update) (“Although the fundamental fairness of preventing irreparable harm to a party is an important factor on a preliminary-injunction application, the most compelling reason in favor of entering a Rule 65(a) order is the need to prevent the judicial process from being rendered futile by defendant’s action or refusal to act.”).

For the past two years, Navy Commander and Lieutenant Colonel 2 ably discharged their duties. Each served at the onset of the pandemic and successfully during peak jeopardy in the pandemic and before any vaccination against COVID-19 existed, each served during the height of the Delta variant surge, and each served (with the benefit of a temporary exemption from the vaccination requirement) during the Omicron variant. Nothing in the record establishes — on balance — that

preliminary injunctive relief for these officers harms the public interest. Extending the status quo protects the fundamental right to Free Exercise and ensures judicial review of allegedly wrongful government action. The record fails to demonstrate any meaningful increment of harm to national defense likely to result because Navy Commander and Lieutenant Colonel 2's continue to serve unvaccinated but in accord with other, proven, rigorous, and successful safety protocols.

CONCLUSION

The record in this civil rights action reveals a substantial likelihood that the Navy and the Marine Corps has failed to discharge RFRA's burden of demonstrating the required RFRA evaluation individualized "to the person" of Navy Commander and "to the person" of Lieutenant Colonel 2, each of whom harbor a sincere religious belief substantially burdened by the military's COVID-19 vaccination requirement. The motion (Doc. 60) for preliminary injunctive relief by Navy Commander and Lieutenant Colonel 2 is **GRANTED**, and the defendants are **PRELIMINARILY ENJOINED** (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.

ORDERED in Tampa, Florida, on February 18, 2022.



STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

NAVY SEAL 1, et al.,

Plaintiffs,

v.

CASE NO. 8:21-cv-2429-SDM-TGW

LLOYD AUSTIN, et al.,

Defendants.

_____ /

ORDER

The defendants move (Doc. 118) on an emergency basis (1) for a stay pending appeal from a February 18, 2022 preliminary injunction (Doc. 111) and (2) for an “immediate administrative stay” pending resolution of the motion (Doc. 118) to stay.

The preliminary injunction order enjoins the 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.

(Doc. 111 at 47–48)

The defendants contend that, among other things, the preliminary injunction “allows two officers who have refused a lawful order to continue to serve in

assignments over the Navy's objection." (Doc. 118 at 15) The defendants report that "the Navy has lost confidence in [Navy Commander's] ability to lead" because Navy Commander "disobeyed an order that he is also expected to enforce" and because Navy Commander "further compromised his trustworthiness" by allegedly "misleading his commander regarding taking leave out of the area," by allegedly making misleading statements about communications with his Executive Officer," and by allegedly "expos[ing] dozens of his crew to COVID-19 when he decided not to test himself after experiencing symptoms." (Doc. 118 at 15–16)

In other words, the defendants contend that the sudden eagerness to remove Navy Commander from command of a destroyer results from "other neutral factors," *U.S. Navy Seals 1–26 v. Biden*, No. 22-10077, 2022 WL 594375 at *12 (5th Cir. Feb. 28, 2022), and not from a retaliatory animus toward Navy Commander's legally protected pursuit of the relief that Congress through RFRA secures in federal court for every service member. Presented at the preliminary injunction hearing with declarations endeavoring to establish Navy Commander's untrustworthiness (and consequently his unsuitability for command), the preliminary injunction order (Doc. 111) states:

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.

(Doc. 111 at 12 n.3) Accordingly, 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.¹

A Necessary Preface About RFRA

In Article I, Section 8, the Constitution empowers (but does not compel) the Congress to “raise and support” the armed forces of the United States and “to make rules for the government and regulation of the . . . forces.” These constitutional clauses were informed preeminently by the unfortunate English experience, fresh in the minds of the Constitution’s authors, with James II and his royal army, which was raised without the consent of Parliament, which led to the Glorious Revolution of 1688, and which ended with the Bill of Rights of 1689, which stated that “raising or keeping a standing army within the kingdom in time of peace, unless it be with the consent of Parliament, is against the law.”

Fortunately, Congress raised and has maintained the armed forces (at some times more generously than at others) throughout the ensuing years, and these forces have preserved and defended the Constitution of the United States by defeating

¹ The defendants contend that Lieutenant Colonel 2, among other things, allegedly cannot reliably enforce the vaccination order against subordinates, convene administrative separation proceedings for service members refusing COVID-19 vaccination, or deploy worldwide in foreign countries requiring that foreign service members accept COVID-19 vaccination. (Doc. 118 at 17)

aggression and tyranny whenever and wherever necessary; under whatever circumstance, no matter how brutal and merciless; and at whatever cost proved necessary (for one historic example, read the riveting and unforgettable *With the Old Breed* by E. B. Sledge).

A signal feature of the Constitution that the armed forces have vigilantly preserved and defended is the Free Exercise Clause of the First Amendment. One of the “rules for the government and regulation of the . . . forces” that the Congress has enacted and that the President (who is, of course, also the Commander-in-Chief of the armed forces) has signed into law is the Religious Freedom Restoration Act of 1993, Public Law 103-141, which creates for the free exercise of religion a renewed protection against impingement by the government, including the armed forces. RFRA was a bi-partisan enactment (although in 1993 the President, the Speaker of the House, and the Majority Leader in the Senate were Democrats). Specifically, two months after then-Representative Chuck Schumer (and more than one-hundred other representatives, both Republicans and Democrats) introduced RFRA, H.R. 1308, 103d Cong. (1993), the House of Representatives passed the bill by a two-thirds voice vote. 139 Cong. Rec. 9,687 (1993). The Senate amended the bill and passed the amended version by a vote of 97 yeas to 3 nays. 139 Cong. Rec. 26,416. After unanimously consenting to the Senate’s amendment, 139 Cong. Rec. 27,241, the House presented RFRA to President Clinton on November 5, 1993. 139 Cong. Rec. 32,215. President Clinton promptly signed RFRA.

The statutorily stated purpose of RFRA is “to restore the compelling interest test . . . in all cases where free exercise of religion is substantially burdened and to provide a claim or defense to persons whose religious exercise is substantially burdened by government.” To enable those, including service members, whose free exercise rights are improperly restricted to pursue RFRA’s statutory remedy, RFRA amends 42 U.S.C. § 1988, the Civil Rights Attorney’s Fees Awards Act of 1976, Public Law 94–559, to allow in a RFRA action an award to the prevailing party, other than the United States, of a reasonable attorney’s fee and costs, including expert witness fees.

RFRA includes specific and unequivocal commands to the government, defined to include every “branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States.” Obviously, RFRA includes everyone from the President to a park ranger, from the Chief Justice of the United States to a probation officer, from the Speaker of the House to a member’s district office staffer, from the Chairman of the Joint Chiefs of Staff to a military recruiter — even if they don’t like it and even if they don’t agree with it. The Free Exercise Clause and RFRA are the law of the land.

Among RFRA’s express and explicit findings are that the government “should not substantially burden religious exercise without a compelling justification” and that the “compelling interest test” that RFRA restores is a “workable test” that demands “striking a sensible balance between religious liberty and competing prior governmental interests.” With the notions of a “workable test” and a “sensible balance”

featured conspicuously, the statute proscribes any substantial burden on Free Exercise unless the government “demonstrates” (a statutorily defined term) that the substantial burden (1) “is in furtherance of a compelling governmental interest” and (2) “is the least restrictive means of furthering that compelling governmental interest.” Explaining that the government must meet a “burden of proof,” RFRA defines “demonstrates” as “meets the burdens of going forward with the evidence and of persuasion.” That burden is the same for preliminary or permanent injunctive relief.

The unanimous decision in *Gonzalez v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211 (2006), authored by the Chief Justice, exemplifies the proper method for applying RFRA. In *O Centro*, a Christian “religious sect” used a “sacramental tea,” *hoasca*, containing dimethyltryptamine, a Schedule 1 controlled substance under the Controlled Substances Act, 21 U.S.C. §§ 801–971, which imposes on the hallucinogen in *hoasca* “an outright ban on all importation and use, except pursuant to strictly regulated research projects.” The religious sect sued in the district court under RFRA for preliminary and permanent injunctive relief against both the government’s seizure of shipments of *hoasca* and the government’s threatened prosecution for continued use of *hoasca*. In sum, a statute containing a prohibition against the acquisition and use of a dangerous controlled substance and providing for the necessary enforcement mechanism, including prosecution — a statute fundamental to the well-being and security of the United States — conflicted directly with the sacramental observations, using *hoasca*, of the sectarian plaintiffs, who relied on RFRA to resolve the conflict.

After finding the evidence introduced at the preliminary injunction hearing to stand “in equipoise,” the district court determined that the government failed to satisfy RFRA’s statutory burden of “demonstrating” that seizure and prosecution were the “least restrictive means” to preserve the compelling governmental interests expressed in the Controlled Substances Act and issued a preliminary injunction against the government. The Tenth Circuit affirmed, and the Supreme Court granted certiorari.

After confirming that the lower courts properly assigned the burden of proof to the government in accord with RFRA, the Chief Justice explained a fundamental flaw in the government’s approach:

RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government’s categorical approach. RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law “to the person” — the particular claimant whose sincere exercise of religion is being substantially burdened.

126 S. Ct. at 1220. Similarly, responding to the government’s argument that granting an exception to the Controlled Substances Act was not within the proper domain of the judiciary, the Chief Justice responded authoritatively:

RFRA, however, plainly contemplates that *courts* would recognize exceptions — that is how the law works. See 42 U.S.C. § 2000bb–1(c) (“A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.”). . . . RFRA makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress.

126 S. Ct. at 1222. (Supreme Court’s emphasis). The message from *O Centro* and later decisions is unmistakable.

Despite the unmistakable message of the Free Exercise Clause, RFRA, and *O Centro*, the defendants argue as if none of the three exists (or, at least, as if none of the three affects the command discretion of the armed forces). The defendants begin their present motion by declaring, “The Supreme Court has made clear: ‘Judges are not given the task of running the Army,’” a quote from *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953), a dispute resolved forty years before enactment of RFRA. Although certainly not “given the task of running the Army,” the courts in the narrow instance of RFRA are given the task of ensuring that those who are given the task of running the Army (and the armed forces in general and every other component of the federal government) conform their actions to the governing law, to RFRA, to which the admirals and the generals and commandants are unquestionably subordinate — just like the President, the Speaker of the House, the Chief Justice, and every other person in the federal government. This order and this action will proceed accordingly.

Discussion

The defendants move (Doc. 118) for a stay pending appeal and for an “immediate administrative stay.” The defendants announce menacingly in the opening sentences of the motion, filed at 6:27 p.m. EST on February 28, 2022, that “by the end of the day March 2, 2022 . . . if relief has not been granted, Defendants will seek relief from the U.S. Court of Appeals for the Eleventh Circuit.” The opening sentences of the motion, along with much of the remainder of the motion, attempt to evoke the

frightening prospect of a dire national emergency resulting from allegedly reckless and unlawful overreaching by the district judge, an exigency sufficient to warrant depriving the plaintiffs of a fair opportunity to respond to the motion, depriving the district court of a fair opportunity to consider and resolve the motion, and finally and effectively depriving the two immediately affected service-member plaintiffs of a right explicitly secured by RFRA.

A review of the defendants' motion reveals that the defendants persistently and resolutely cling to the belief that their accustomed and unfettered command discretion need not yield — on the narrow and specific question of the free exercise of religion — to the statutory command of RFRA or to an order under RFRA from a district court (actually, at this moment, orders from several district courts and a circuit court of appeals), the forum selected by Congress and enacted in RFRA to resolve a dispute under RFRA (in other words, Congress and the President, not the district court, chose the district court as the proper forum for service members to assert the RFRA claim asserted in this action).

In the motion, filed in response to the preliminary injunction granted to one Navy officer and one Marine officer, the defendants first feature a series of alarums, including the specter of “a direct and imminent threat to the national security” and “an indefinitely sideline[d]” Navy warship,” which putatively create a circumstance of “utmost urgency,” the severity of which compels the defendants to demand an immediate ruling from the district court, failing which the defendants promise an emergency motion in the court of appeals. In contrast, this order prescribes an accelerated

but reasonable time for the plaintiffs to respond and schedules a hearing at which the parties can offer evidence, including live testimony, and both legal and factual argument on the merits of the defendants' motion. Also, because the defendants, if dissatisfied with the stated schedule, promise to move in the court of appeals, this order responds in general terms (all that time permits) to the defendants' characterization of the preliminary relief granted to Navy Commander and Lieutenant Colonel 2.

The first heading of the defendants' motion suggests that the preliminary injunction "exceeds the court's authority"; mentions that the executive branch and the legislative branch, not the court, properly direct "the composition, training, equipping, and control" of the armed forces; insists that "who is placed in command" is "beyond the judiciary's competence"; and recalls that "challenges to military assignment decisions" are "routinely" found non-justiciable. Although those claims are largely correct, none takes cognizance of RFRA; none mentions the narrow and specific instruction in RFRA to the district court to provide an "appropriate remedy" for violation of RFRA by any component of the federal government, including the military. The defendants argue as if RFRA does not exist or has no application to the military or is a matter subject to the command discretion of the military. Stated plainly: Yes, the Congress and the President, not the courts, govern the military. But the Congress and the President in governing the military and by enacting RFRA have established — for the narrow category of free exercise of religion — an action and a remedy in the district court, have specified and placed the burden of proof on the military, and have allowed for an "appropriate remedy" to ensure a service

member's right to free exercise. That is not a fairly contestable proposition, and the military must acquiesce to the command of the Congress and the President in that respect.

Further the preliminary injunction includes no instructions to the military about composing, training, equipping, or otherwise controlling the military or about assigning, promoting, or demoting anyone. On the contrary and in accord with RFRA, the preliminary injunction — as an “appropriate remedy” pending a final order — merely preserves the status quo, that is, preserves for Navy Commander and Lieutenant Colonel 2 the assignments granted by the military, not by the court. The preliminary injunction preserves the state of affairs established by the military before Navy Commander and Lieutenant Colonel 2 sought under RFRA a religious exemption from vaccination. As an interim “appropriate remedy,” the preliminary injunction prevents an adverse action by the military against Navy Commander and Lieutenant Colonel 2 based on their resort to the court in an effort to acquit their statutory rights under RFRA.

If the military has a non-retaliatory reason for some adverse action against Navy Commander and Lieutenant Colonel 2, the military can move for a modification of the injunction, which is always an option for a party subject to a preliminary, or even a permanent, injunction. In this instance, Navy Commander and Lieutenant Colonel 2 testified most credibly in person at the hearing. Before the hearing, the Navy submitted affidavits that claim the Navy has “lost confidence” in Navy Commander. This peculiarly subjective determination of “lost confidence,” arriving

suddenly after seventeen stellar years of service by Navy Commander and after, to say the least, tense exchanges with his superior officer about vaccination and about his RFRA claim does not warrant immediate deference but, rather, demands a closer examination, which is readily and reasonably promptly available. Surely the free exercise rights restored by RFRA are not subject to evisceration or circumnavigation by a notion as subjective and illusory — and, according to the defendants, unreviewable by the judiciary — as a sudden “loss of confidence” by a superior officer who sends a declaration to the court. The same reasoning applies to Lieutenant Colonel 2 and any non-retaliatory basis the military might have with respect to her assignments.

The defendants conclude the first heading with the startling accusation that the preliminary injunction “is broad enough to prevent the military from imposing discipline or convening a court martial with respect to either plaintiff, even for potential violations of the Uniform Code of Military Justice.” This novel formulation is wholly unwarranted, except that admittedly the preliminary injunction likely prohibits, because RFRA prohibits, the military’s disciplining or court martialing either plaintiff in retaliation for their requesting a religious exemption under RFRA.

This odd inclusion in the defendants’ argument of the prospect of a court martial for the plaintiffs perhaps originates in the defendants’ frequently repeated idea that the plaintiffs are subject to discipline and separation because they have “disobeyed a lawful order” to accept vaccination. Admittedly, the order to accept vaccination is lawful. But, owing to RFRA, the order to accept vaccination is a lawful order with respect to which the plaintiffs, based on the present record, are likely

entitled to an exemption. In other words, what we have here is a failure to communicate. The military sees the plaintiffs' request for a lawful exemption from a lawful order as a refusal to obey a lawful order and as a basis for discipline. But, although the matter remains momentarily unresolved, the plaintiffs might enjoy — likely enjoy — a lawful exemption from compliance with a lawful order. Thus far, the defendants seem to comprehend, or at least to acknowledge, only half — the “lawful order” half — of the governing legal reality and seem studiously and purposefully to ignore the other half, the religious exemption half, ensured by RFRA.

The second portion of the defendants' motion advances the “judicial overstepping” claim. In particular, the second portion claims that two footnotes in the preliminary injunction (Doc. 111 at 37, n.10 and at 43, n. 11) somehow “discount[] the effect of refusers on good order and discipline in the military” and “by second-guessing the scientific and military evidence that vaccination is the most effective means to protect the health and safety of the force.” (The term “refusers” is a tellingly offensive term that the defendants must employ no further in this court. A RFRA claimant is not a “refuser,” not an outcast subject to shunning.)

First, the footnote on page 37 of the preliminary injunction order notes — with a lengthy quote from, and citation to, a January 28, 2022 CDC publication — that the matter of natural immunity and vaccination in several combinations “remain under careful study and constant evolution,” which is not surprising, is not news, and is not an adjudication or a “second guessing” of any kind. The footnote on page 43 of the order notes then-current Department of Defense data that shows a

remarkable surge in COVID-19 (Omicron) cases in the military immediately after the vaccination deadline and despite about a 97% vaccination rate among service members. The footnote draws no conclusion from the Department of Defense's data, adjudicates nothing, and second-guesses nothing.

Second, no dispute exists in the action (not even the plaintiffs suggest otherwise) that the military must combat COVID-19 (and other diseases) and that vaccination helps maximize the health and safety of the force. Of course it does. And in excess of 99% of the armed forces is fully vaccinated today. Neither this action nor the plaintiffs' claims nor the preliminary injunction raises any question about that. The defendants might prefer to argue that question, but the plaintiffs and the court address only the question presented in this RFRA claim. The plaintiffs concede that the military has a compelling governmental interest in the "health and safety of the force" and consequently in vaccinating the force. The question presented in this action and presented by the explicit language of RFRA is whether 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." RFRA establishes that explicit test and places the burden of proof on the government.

Proving the obvious, that vaccination is best for "the force" and necessary for "the force," fails to satisfy the "to the person" test required by RFRA. The military designs to avoid the "to the person" test, but the statute is unflinching.

Earlier orders discuss — without any limitations and for suggestive, not directional, purposes — what sort of evidence might gravitate favorably for the defendants. For example, reason suggests that the defendants might show why the Navy cannot — in the facts of his actual performance — accommodate Navy Commander’s service on his surface missile destroyer now, when 99% of the force is vaccinated and the relatively weak and transient Omicron variant is dominant, even though Navy Commander served in the same command on the same destroyer, including on a 300-day mission with his 320-member crew, entirely without vaccination during the many months of the height of the pandemic and without any unmanageable consequence. Navy Commander’s unrebutted testimony about the feasibility of that accommodation was compelling (history is difficult to rebut). Perhaps the defendants have a good response — directed “to the person” of Navy Commander — but, because they fail to acknowledge the correct issue (or, at least, the correct focus of the issue), the defendants’ presentation was largely unresponsive to the issue governing the preliminary injunction.

Also, as stated in a November 22, 2021 order (Doc. 40), the defendants might consider offering evidence probative of:

not whether COVID adversely affects the force (or course it does) but 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.

To illustrate the deeply entrenched failure of the defendants to respond effectively to the requirements of RFRA, Part A of Section III (Doc. 118 at 10–14) of the defendants’ motion offers a graphic exemplar. The defendants 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 grater risk of mission failure.” To support this dramatic and broad claim, the defendants cite declarations submitted by Lescher, Yun, and Rans. A definitive review of the probative value of these declarations and others requires a hearing and an opportunity for cross-examination. And a detailed discussion of these declarations is beyond the scope of, and the time available for, this order. But the affidavits fail, consistent with the balance of the defendants’ presentation, to focus on the assignment, duty, and performance of Navy Commander and Lieutenant Colonel 2. Further, for the most part, the declarations contain generalizations and conclusions about “the force” as a whole or aggregated portions of the whole force. The declarations fail, at a minimum, to disaggregate by age, by medical characteristics (for example, BMI, diabetes, high blood pressure, etc.), by assignment, and the like. The declarations evidence mostly historical data from the 2020 and 2021 pre-Omicron, pre-vaccine phase of the pandemic. In sum, the declarations, both bulky and full of numbers, say little or nothing about, for example, the marginal risk, if any, that Navy Commander, who is triumphantly fit and slim and strong, who is robustly

healthy, who is young, who has already caught and recovered from COVID-19 with only trivial symptoms, who has commanded the same destroyer “underway” on a 300-day mission with a 320-sailor crew, and who has designed and implemented successfully an anti-COVID protocol customized to the needs of his vessel cannot serve — consistent with his sincerely held religious beliefs — without vaccination as a reasonable accommodation that both preserves the compelling governmental interest and reasonably accommodates the free exercise of religion. That is the question, as to Navy Commander, the defendants scrupulously avoid. But that is the question that RFRA burdens the defendants to answer. They have not.

As well stated in *U.S. Navy Seals 1–26 v. Biden*, No. 22-10077, 2022 WL 594375 at *9–10 (5th Cir. Feb. 28, 2022), in denying a stay in a strikingly similar circumstance:

The Navy has been extraordinarily successful in vaccinating service members, as at least 99.4% of whom are vaccinated. But that general interest is nevertheless insufficient under RFRA. The Navy must instead “scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants.” *O Centro*, 546 U.S. at 431, 126 S. Ct. at 1220. “The question, then, is not whether [the Navy has] a compelling interest in enforcing its [vaccination] policies generally, but whether it has such an interest in denying an exception to [each Plaintiff].” *Fulton*, 141 S. Ct. at 1881. And RFRA “demands much more[]” than deferring to “officials’ mere say-so that they could not accommodate [a plaintiff’s religious accommodation] request.” *Holt*, 574 U.S. at 369, 135 S. Ct. at 866 (RLUIPA context). That is because “only the gravest abuses, endangering paramount interests, give occasion for permissible limitation[]” on the free exercise of religion. *Sherbert v. Verner*, 374 U.S. 398, 406, 83 S. Ct. 1790, 1795, 10 L.Ed.2d 965 (1963).

(Because the defendants in this action assert in the Fifth Circuit action many arguments and theories rejected by the Fifth Circuit, the quoted opinion is immensely instructive and endorsed entirely.)

Time will not permit further comment about the defendants' motion for a stay. However, a comment on the progress of the action is required. The complaint (Doc. 1) and a motion (Doc. 2) for injunctive relief were filed on October 15, 2021. The defendants responded (Doc. 23) to the motion on November 3, 2021. The first hearing on the motion occurred on November 15, 2021. A November 22, 2021 order (Doc. 40) denied the motion for a temporary restraining order and denied the motion for a preliminary injunction as to the civilian plaintiffs, some defendants, and some counts but deferred ruling on the preliminary injunction as to the First Amendment and RFRA counts pending. Also, the order directed certain reporting by the defendants and permitted another hearing, which occurred on February 10, 2022, after additional briefing and supplemental material. Navy Commander and Lieutenant Colonel 2 were the only witnesses testifying at the hearing.

The amended complaint (Doc. 75) had arrived on February 7, 2022. Later, an order (Doc. 89) severed misjoined parties and opened separate actions (assigned to the same district and magistrate judge) in an effort to manage this abundance of parties and claims more effectively. The order (Doc. 111) granting preliminary relief was entered on February 18, 2022.

In sum, this difficult and unprecedented action, along with similar actions pending in this court and elsewhere, presents not only a somewhat novel legal problem

(the application of RFRA to the armed forces) but a daunting management problem (hundreds or more of disappointed RFRA applicants asserting claims in different districts in different circuits, some including class allegations, as in this action, and some not, and some with plaintiffs serving on one branch or two branches of the armed forces and this action, with plaintiffs in each branch of the service). To further illustrate the management problem, at 1:56 p.m. today, during the hurried composition of this order, the plaintiffs filed another motion (Doc. 121) for preliminary relief on behalf of another plaintiff who is ordered to receive vaccination and offered only two days to either accept vaccination or face discipline. The military, despite several adverse orders, continues on the path determined months ago. A more organized and encompassing approach must attach soon.

In finalizing a plan, the district judge must consider the full array of options available for conditional and final class certification, along with an array of other formidable issues. Mindful of these and other considerations and mindful both of the public interest and the interest of the litigants (not necessarily divergent in many or most respects), this action has proceeded expeditiously but carefully (with simultaneous mediation underway before the magistrate judge). Unless ordered otherwise, the district judge will continue to proceed apace to resolve the organizational, legal, and remedial complexities (assuming some successful claims) in accord with governing law.

Conclusion

The motion for an “immediate administrative stay” is **DENIED**. Not later than **MARCH 8, 2022**, (1) the plaintiffs must respond to the motion (Doc. 118) to stay and (2) the parties must submit a witness and exhibit list. An evidentiary hearing on the motion to stay is scheduled for **MARCH 10, 2022, at 10:00 A.M.** in Courtroom 15A, United States Courthouse, 801 N. Florida Avenue, Tampa, Florida, 33602.

ORDERED in Tampa, Florida, on March 2, 2022.



STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE



SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

AUG 24 2021

MEMORANDUM FOR SENIOR PENTAGON LEADERSHIP
COMMANDERS OF THE COMBATANT COMMANDS
DEFENSE AGENCY AND DOD FIELD ACTIVITY DIRECTORS

SUBJECT: Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members

To defend this Nation, we need a healthy and ready force. After careful consultation with medical experts and military leadership, and with the support of the President, I have determined that mandatory vaccination against coronavirus disease 2019 (COVID-19) is necessary to protect the Force and defend the American people.

Mandatory vaccinations are familiar to all of our Service members, and mission-critical inoculation is almost as old as the U.S. military itself. Our administration of safe, effective COVID-19 vaccines has produced admirable results to date, and I know the Department of Defense will come together to finish the job, with urgency, professionalism, and compassion.

I therefore direct the Secretaries of the Military Departments to immediately begin full vaccination of all members of the Armed Forces under DoD authority on active duty or in the Ready Reserve, including the National Guard, who are not fully vaccinated against COVID-19.

Service members 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. Those with previous COVID-19 infection are not considered fully vaccinated.

Mandatory vaccination against COVID-19 will only use COVID-19 vaccines that receive full licensure from the Food and Drug Administration (FDA), in accordance with FDA-approved labeling and guidance. Service members voluntarily immunized with a COVID-19 vaccine under FDA Emergency Use Authorization or World Health Organization Emergency Use Listing in accordance with applicable dose requirements prior to, or after, the establishment of this policy are considered fully vaccinated. Service members who are actively participating in COVID-19 clinical trials are exempted from mandatory vaccination against COVID-19 until the trial is complete in order to avoid invalidating such clinical trial results.

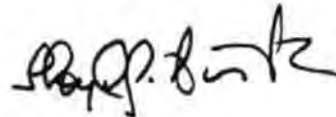
Mandatory vaccination requirements will be implemented consistent with DoD Instruction 6205.02, "DoD Immunization Program," July 23, 2019. The Military Departments should use existing policies and procedures to manage mandatory vaccination of Service members to the extent practicable. Mandatory vaccination of Service members will be subject to any identified contraindications and any administrative or other exemptions established in Military Department policy. The Military Departments may promulgate appropriate guidance to carry out the requirements set out above. The Under Secretary of Defense for Personnel and



Readiness may provide additional guidance to implement and comply with FDA requirements or Centers for Disease Control and Prevention recommendations.

The Secretaries of the Military Departments should impose ambitious timelines for implementation. Military Departments will report regularly on vaccination completion using established systems for other mandatory vaccine reporting.

Our vaccination of the Force will save lives. Thank you for your focus on this critical mission.

A handwritten signature in black ink, appearing to read "Robert P. Bunker". The signature is stylized with a large, looped 'R' and a distinct 'B'.

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SUBJ/2021-2022 DEPARTMENT OF NAVY MANDATORY COVID-19 VACCINATION POLICY//

REF/A/DOC/SECDEF/24AUG21//

AMPN/REF A IS THE OFFICE OF THE SECRETARY OF DEFENSE MEMO MANDATING

CORONAVIRUS

DISEASE 2019 VACCINATION FOR DEPARTMENT OF DEFENSE SERVICE MEMBERS//

RMKS/1. Protecting the health of the force and warfighting readiness is of paramount importance. I thank and applaud all of you who have become fully vaccinated. Your action helps to ensure the health and safety of you, your family, your shipmates, and your mission.

2. Coronavirus disease 2019 (COVID-19) adversely impacts Department of the Navy (DON) force readiness and mission execution. Disease models indicate that Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2), the virus that causes COVID-19, will continue to spread throughout 2021.

3. Vaccination is the most effective tool we have to prevent widespread manifestation of COVID-19 in our force. Within the last year, millions of Americans have received approved COVID-19 vaccines in response to this emergency. One of the approved vaccines has received full licensure from the Food and Drug Administration (FDA). This licensure approval provides additional confidence and comfort in the safety of the most effective tool we have in our arsenal against this threat. Considering this threat to the health and readiness of Service Members, vaccination against COVID-19 using a vaccine that has received full licensure from the FDA is now a mandatory requirement in accordance with reference (a). Additional implementation guidance will be issued via Navy and Marine Corps administrative message.

4. As the faithful maritime protectors of our country in peacetime and war, each of us must take ownership of our readiness to preserve and protect the force, and ensure the success of our mission. Effective immediately, all DON active duty Service Members, who are not already vaccinated or exempted, are required to be fully vaccinated within 90 days and all Reserve Component Service Members are required to be fully vaccinated within 120 days of this issuance with an FDA approved vaccination against COVID-19. Service Members voluntarily immunized with a COVID-19 vaccine under FDA Emergency Use Authorization or World Health Organization Emergency Use Listing in accordance with applicable dose requirements prior to, or after, the establishment of this policy are considered fully vaccinated. Service Members who are actively participating in COVID-19 clinical trials are exempted from mandatory vaccination against COVID-19 until the trial is complete in order to avoid invalidating such clinical trial results.

5. The order to obtain full vaccination is a lawful order, and failure to comply is punishable as a violation of a lawful order under Article 92, Uniform Code of Military Justice, and may result in punitive or adverse administrative action or both. The Chief of Naval Operations and Commandant of the Marine Corps have authority to exercise the full range of administrative and disciplinary actions to hold non-exempt Service Members appropriately accountable. This may include, but is not limited to, removal of qualification for advancement, promotions, reenlistment, or continuation, consistent with existing regulations, or otherwise considering vaccination status in personnel actions as appropriate.

6. Additional guidance will be provided with regard to reporting requirements of vaccination numbers on a weekly basis to Assistant Secretary of the Navy (Manpower & Reserve Affairs).

7. Released by the Honorable Carlos Del Toro Secretary of the Navy.//

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CLASSIFICATION: UNCLASSIFIED//

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA**

NAVY SEAL #1, at al.

Plaintiffs,

v.

**Joseph R. Biden, Jr., in his official capacity as
President of the United States, et al.**

Defendants.

Case No. 8:21-cv-02429-SDM-TGW

DECLARATION OF WILLIAM MERZ

I, William Merz, hereby state and declare as follows:

1. I am a Vice Admiral in the United States Navy, currently serving as the Deputy Chief of Naval Operations, Operations, Plans and Strategy (OPNAV N3/N5), located in Arlington, Virginia at the Pentagon. I make this declaration in my official capacity, based upon my personal knowledge and upon information that has been provided to me in the course of my official duties.

2. I have been assigned to my current position since August 6, 2021. Prior to my current assignment, I served as Commander, U.S. SEVENTH Fleet, the Deputy Chief of Naval Operations for Warfighting Requirements, the Director, Undersea Warfare Division, and Commander, Naval Mine & Anti-Submarine Warfare Command. I graduated from the U.S. Naval Academy in 1986, and earned master's degrees from Catholic University and the Naval War College. As part of my duties currently, I am responsible for serving as the principal advisor to the Chief of Naval Operations (CNO) on operational matters, strategy, policy, and plans;

international politico-military matters; and the current operational status of naval forces. As part of my responsibility for the current operational status of naval forces, CNO delegated responsibility to me for the Navy's COVID-19 policies. Those responsibilities include tracking the number of COVID-19 cases across the Navy, implementing Secretary of the Navy COVID-19 plans and policies, planning for and ensuring the appropriate initial distribution of COVID-19 vaccines, coordination across the Navy and with the other services on COVID-19 plans and policy, and providing input to the Secretary of the Navy on proposed COVID-19 plans and policy.

3. On August 24, 2021, the Secretary of Defense directed the Secretaries of the Military Departments to immediately begin full vaccination of all members of the Armed Forces under DoD authority on active duty or in the Ready Reserve. The Secretary of the Navy directed implementation of SECDEF's COVID-19 vaccination mandate¹ via a Department-wide administrative message (ALNAV) on August 30, 2021. The ALNAV applies to both Services within the Department of the Navy (DON), the United States Navy and the United States Marine Corps. The ALNAV requires all active duty DON Service members, who are not already vaccinated, exempted, or currently seeking an exemption, to be fully vaccinated with an FDA-approved COVID-19 vaccine within 90 days, and all Reserve Component personnel to be fully vaccinated within 120 days. ALNAV 062/21 ¶ 4. Active duty Sailors and Marines must therefore become fully vaccinated by November 28, 2021, and Reserve Component Sailors and Marines must become fully vaccinated² by December 28, 2021. The requirement to obtain full vaccination constitutes a lawful order under Article 92 of the Uniform Code of Military Justice

¹ SECDEF Memo, "Memorandum for Senior Pentagon Leadership, Commanders of the Combatant Commands, Defense Agency, and DoD Field Activity Directors," (August 24, 2021).

² Although refusal to receive the vaccine may subject a member to adverse administrative or disciplinary action, the vaccine will not be forcibly administered to any member who refuses.

(UCMJ), and failure to comply may result in punitive or adverse administrative action, or both. ALNAV 062/21 ¶ 5.

4. The United States Navy issued service-specific guidance via a separate administrative message (“NAVADMIN”) on September 1, 2021. NAVADMIN 190/21 outlines Navy policy concerning the mandatory vaccination of Navy service members, vaccination administration and reporting requirements, and general guidance related to logistics and distribution of vaccines. The policy reiterates that COVID-19 vaccination “is mandatory for all DoD service members who are not medically or administratively exempt” under existing Navy policy. NAVADMIN 190/21 ¶ 2, 3.a. Refusal to be fully vaccinated against COVID-19 without an approved or pending exemption constitutes a failure to obey a lawful order and is punishable under Article 92, UCMJ. Ordinarily, any officer with authority to convene courts-martial or administer nonjudicial punishment under Article 15 of the UCMJ may dispose of alleged violations of the UCMJ. Manual for Courts-Martial (“MCM”), Part II, Rules for Court Martial, 401. However, authority to initiate courts-martial, non-judicial punishment, or administrative separation processing for failure to become fully vaccinated is withheld to a designated COVID Consolidated Disposition Authority (CCDA). NAVADMIN 190/21 ¶ 3.c., 3.e.(5). Withholding this authority from Service members’ commanders precludes administrative separation or disciplinary action without elevated review and direction by the CCDA. On October 13, 2021, the Chief of Naval Personnel (CNP) was designated as the CCDA. NAVADMIN 225/21 ¶ 1.

5. NAVADMIN 190/21 ¶ 3.d. provides that service members may seek two types of exemptions, medical and administrative. Medical exemptions are governed by Army Regulation (AR) 40-562, which is a consolidated Military Services regulation implemented by the Navy and Marine Corps via Bureau of Medicine (BUMED) Instruction 6230.15B (hereinafter

BUMEDINST 6230.15B). Medical personnel are responsible for reviewing and granting medical exemptions, whereas non-medical personnel (sometimes with the assistance of advising medical personnel) are responsible for reviewing and granting administrative exemptions.

BUMEDINST 6230.15B, 2-6.

6. The policy provides the following with respect to medical exemptions:

a. Medical exemptions. A medical exemption includes any medical contraindication relevant to a specific vaccine or other medication. Health care providers will determine a medical exemption based on the health of the vaccine candidate and the nature of the immunization under consideration. Medical exemptions may be temporary (up to 365 days) or permanent. Standard exemption codes appear in appendix C.

(1) *General examples* of medical exemptions include the following—

(a) Underlying health condition of the vaccine candidate (for example, based on immune competence, pharmacologic or radiation therapy, pregnancy and/or previous adverse response to immunization).

(b) *Evidence of immunity* based on serologic tests, documented infection, or similar circumstances.

(c) An individual's clinical case is not readily definable. In such cases, consult appropriate medical specialists, including specialists in immunization health care.

AR 40-562, 2-6a.(1), (emphasis added).

As the policy reflects, these are just examples of situations when health care providers may determine a medical exemption is warranted, but each exemption request is an individual determination based on the health of the individual and the disease at issue. Additionally, there are some diseases for which serologic or other tests may be used to identify pre-existing immunity.³

³ The AR states, "*Screening for immunity. For some vaccine-preventable diseases, serologic or other tests can be used to identify pre-existing immunity from prior infections or immunizations that may eliminate unnecessary immunizations.*" AR 40-562, 2-1.g (emphasis added).

7. Service members who seek a medical exemption first submit their request to Navy medical providers who follow BUMED policy when processing those requests. A Navy medical provider is defined as any uniformed, Navy-employed civilian, or contract-licensed independent medical practitioner whose scope of practice encompasses immunization healthcare delivery, and Independent Duty Corpsmen. BUMEDNOTE 6300, ¶ 7.b. Navy medical providers have the authority to grant temporary medical exemptions for pregnancy or other temporary medical contraindications. BUMED Notice 6150 (Sept. 21, 2021). For requests for permanent exemptions, Navy medical providers have authority to disapprove temporary or permanent medical exemption requests that do not meet clinical contraindications for the COVID-19 vaccine. BUMEDNOTE 6300, ¶ 6.c. Service members who are actively participating in COVID-19 clinical trials are exempt from mandatory vaccination until the trial is complete. NAVADMIN 190/21 ¶ 3.d.(2).

8. For either a temporary or permanent medical exemption request, medical providers evaluate the patient for medical contraindications based on documented medical history and/or clinical evaluation, and an assessment of the benefits and risks to the patient. BUMEDNOTE 6300 of September 3, 2021, *Clinical Consultation Guidance for COVID 19 Vaccine Permanent Exemption* (published September 3, 2021). Additionally, medical providers are encouraged to request expert consultation by an immunizations specialist, when necessary. Medical contraindications for the COVID-19 vaccine include:

- (a) Anaphylaxis from a previous COVID-19 vaccine or COVID-19 vaccine ingredient;
- (b) Myocarditis or pericarditis after COVID-19 vaccine administration or infection;

(c) Temporary association of Stevens-Johnson Syndrome or Guillain-Barré Syndrome that cannot be attributed to another underlying cause within 6 weeks of COVID-19 vaccine administration or infection;

(d) Thrombosis with Thrombocytopenia Syndrome (TTS) after COVID-19 vaccine administration;

(e) Persistent clinical symptoms lasting 4 or more weeks following a COVID-19 infection that cannot be attributed to another underlying cause after evaluation and focused workup ("Long COVID"). *Id.*

In the *Clinical Consultation Guidance*, providers are also encouraged to consult CDC guidance.⁴

9. In addition to the procedures in BUMEDINST 6230.15B, authority to approve a permanent medical exemption for COVID-19 vaccination is the first Navy Medical Department Flag Officer⁵ in the medical provider's chain of command. NAVADMIN 190/21 ¶ 3.d. BUMEDNOTE 6300 outlines the process for Navy medical providers recommending approval for a permanent medical exemption for COVID 19 vaccination. Where a provider recommends such an exemption, the provider drafts an initial permanent exemption letter and routes the letter

⁴ An example of CDC clinical considerations includes:

If you were treated for COVID-19 with monoclonal antibodies or convalescent plasma, you should wait 90 days before getting a COVID-19 vaccine. Talk to your doctor if you are unsure what treatments you received or if you have more questions about getting a COVID-19 vaccine.

If you or your child has a history of multisystem inflammatory syndrome in adults or children (MIS-A or MIS-C), consider delaying vaccination until you or your child have recovered from being sick and for 90 days after the date of diagnosis of MIS-A or MIS-C. Learn more about the clinical considerations for people with a history of multisystem MIS-C or MIS-A.

See <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/faq.html>

⁵ "Flag Officers" comprise the highest ranks in the military. Officer ranks range from O-1 to O-10, with flag officers occupying the ranks between O-7 to O-10. In the Navy, a flag officer is any officer serving in the rank of Rear Admiral (Lower Half) or higher.

to the appropriate flag officer as well as the member's commanding officer. BUMED Notice 6300, ¶ 6.c. A temporary medical exemption is granted pending the approval or disapproval decision of a permanent medical exemption.⁶ BUMED Notice 6300, ¶ 7.b. If the permanent medical exemption is approved, a formal letter of approval is forwarded to the initial recommending Navy provider. BUMED Notice 6300, ¶ 7.j. Vaccinations and vaccine exemptions are entered into the member's Electronic Health Record (EHR), or the Medical Readiness Reporting System (MRRS) where entry in the EHR is impracticable. BUMED Note 6150, ¶ 5.b. During the pendency of a temporary exemption or once a permanent exemption is approved, a member will not be subject to disciplinary action.

10. The Navy Reserves is comprised of several categories of Reservist, including: (1) Ready Reserve; (2) Standby Reserve, consisting of the Standby Reserve-Active (USNR-S1) and Standby Reserve-Inactive (USNR-S2); or (3) Retired Reserve (USNR-Retired). *See* Bureau of Personnel Instruction (hereinafter BUPERSINST) 1001.39F, Ch. 1, ¶ 101. A Reservist's administrative requirements, entitlements, pay, or benefits eligibility is dependent on the status of the Reservist. *See generally Id.*, Figure 1-2. Navy Reservists are required to meet physical qualifications for retention in the Reserve, and all members of the Navy and Marine Corps Reserve annually complete a periodic health assessment. *Id.*, Ch. 2 ¶ 201; U.S. Navy Manual of the Medical Department, Ch. 15, Art. 15-23(2) (hereinafter "MANMED"). Drilling Reservists have additional requirements with respect to notifying the chain of command of any physical or dental problem that may delay or preclude their performance of drills, Annual Training (AT), or mobilization eligibility, including their vaccination status. BUPERSINST 1001.39F, Ch. 2, ¶ 201. Unlike active duty Service members, Reservists are not automatically covered under

⁶ No disciplinary or administrative action will be initiated while a permanent medical exemption request is pending.

TRICARE, the military's health care program, unless called to active duty for greater than 30 days. Reservists do have the option to obtain health insurance through TRICARE Reserve Select, a low-cost premium-based version of TRICARE. *See* TRICARE Reserve Select, <https://tricare.mil/TRS>, (last visited Oct. 28, 2021).

11. For the annual physical evaluation, the Reservist's unit Medical Department Representative (MDR) reviews the Service member's periodic health assessment to evaluate all new or materially changed medical conditions. MANMED 15-23(3). The MDR is encouraged to obtain additional information from reservists via outpatient medical records or other sources as appropriate to develop as complete an understanding as possible of the condition(s). *Id.* If a potentially disqualifying physical condition is discovered, such as the lack of a required vaccination, the supporting commanding officer will place the member in a Medical Retention Review (MRR) status. In this status, the medical officer or MDR will recommend that either the member be allowed or denied the opportunity to remain in a drill status. BUPERSINST 1001.39F, Ch. 2 ¶ 203.2. The commanding officer has the option to retain the member in the unit with or without drill authorization or reassignment of the member to a temporary unit in an authorized absence status. *Id.*, ¶ 203.2.a.

12. Like active duty Service members, Reservists are subject to immunization requirements as outlined in BUMEDINST 6230.15B, but must be in a duty status to receive required immunizations. *See* BUMEDINST 6230.15B ¶ 3-2.a.-b. Reservists recalled to active duty are subject to screening requirements for activation, which includes an assessment of the member's medical condition, including the need for requirement vaccinations. *Id.* Ch. 21 ¶ 2105; Figure 21-1. Reservists may seek a medical exemption for a vaccination from a DoD medical provider. In the event a non-DoD provider recommends a vaccine contraindication, the

Reservist must request assistance from a Navy medical provider in order to request a permanent medical exemption. BUMED Notice 6300, ¶ 7.f.-g. If a Reservist is not exempted from the vaccination requirement and is determined to be physically disqualified, that Reservist may be subject to discharge or retirement. *Id.* Ch. 2 ¶ 203.2.f.

13. Medical rationale for disapproval based on serology: Serological test results that shows the presence of antibodies from a prior COVID-19 infection, standing alone, will not be a basis for a permanent medical exemption. Serologic testing, as a means to determine immunity, has not been scientifically validated and evidence suggests that prior infection does not prevent later infection.⁷ Although AR 40-562 indicates that serology screening tests for immunity may be warranted, it applies to diseases or conditions where it has been established that serologic tests are able to determine one's immunological status.⁸ AR 40-562 contemplates that serologic or other tests might be appropriate to determine immunity for some diseases, but not all vaccine-preventable diseases. AR 40-562 ¶ 2-1.g. In contrast to a disease such as varicella ("chicken pox"), where prior infection usually provides "immunity for life" and a second occurrence is uncommon, prior COVID-19 infection does not provide similar immunity. *See* CDC, "Chicken Pox for Healthcare Professionals, available at <https://www.cdc.gov/chickenpox/hcp/index.html>; Alyson M. Cavanaugh, et al., *Reduced Risk of Reinfection with SARS-CoV-2 After COVID-19 Vaccination*, Morbidity and Mortality Weekly Report, Vol. 70, No. 32 (Aug. 13, 2021).

⁷ One study found the following: "[A]mong Kentucky residents who were previously infected with SARS-CoV-2 in 2020, those who were unvaccinated against COVID-19 had significantly higher likelihood of reinfection during May and June 2021. This finding supports the CDC recommendation that all eligible persons be offered COVID-19 vaccination, regardless of previous SARS-CoV-2 infection status." Further, the authors noted limited available evidence to determine the extent and duration of immunity from natural infection, and cited the emergence of new variants might affect infection-acquired immunity. Alyson M. Cavanaugh, et al., *Reduced Risk of Reinfection with SARS-CoV-2 After COVID-19 Vaccination*, Morbidity and Mortality Weekly Report, Vol. 70, No. 32 (Aug. 13, 2021), available at <https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7032e1-H.pdf>.

⁸ "g. Screening for immunity. For some vaccine-preventable diseases, serologic or other tests can be used to identify pre-existing immunity from prior infections or immunizations that may eliminate unnecessary immunizations." AR 40-562, 2-1.g (emphasis added).

14. Administrative exemptions may be granted for various reasons, including pending separation or retirement, permanent change of station, emergency leave, and religious accommodation. BUMEDINST ¶ 6230.15B, 2-6.b. Navy policy concerning requests for the accommodation of religious practices generally, including immunizations, is outlined in BUPERSINST 1730.11A(attached as Exhibit A to this declaration) , while specific guidance related to immunization exemptions for religious beliefs is found in the Naval Military Personnel Manual (MILPERSMAN), Article 1730-020 (attached as Exhibit B to this declaration).

a. An active duty or reserve service member⁹ seeking an exemption of immunization for religious reasons must submit the request in accordance with BUPERSINST 1730.11A, ¶ 5.e. The requirements include: (1) a written request via his or her commander stating the waiver sought; and (2) an interview with a Navy Chaplain, who assesses whether the requestor's beliefs appear sincerely held for recommendation to the commander. BUPERSINST 1730.11A, ¶ 5.e. Templates for the member's request and Chaplain's assessment and recommendation are found in enclosures (1) through (3) of the instruction. The Service member must also include a NAVPERS 1070/613, "Administrative Remarks" form (commonly known as a "Page 13"), which documents the member has been advised of potential health, travel, and administrative consequences of their immunization waiver request. MILPERSMAN 1730-020 ¶ 4.c.

b. The approval authority for requests for immunization exemptions is the Deputy Chief of Naval Operations (Manpower, Personnel, Training and Education)

⁹ "This instruction applies to all active and reserve members of the Navy, including applicants for entry into the Navy and Navy Reserve, as well as midshipmen at the U.S. Naval Academy (USNA) and in the Naval Reserve Officers Training Corps (NROTC), and officers and officer candidates in Navy officer accession program." BUPERSINST 1730.11A ¶ 3.a

(hereinafter CNO N1)¹⁰. BUPERSINST 1730.11A, ¶ 5.a.(4) Commanders routing requests to CNO N1 must forward the matter within 7 days from the date of the member's request in accordance with BUPERSINST 1730.11A, ¶ 5.c. The commander's endorsement must include information as required under MILPERSMAN 1730-020 ¶ 5, including: (1) the negative effect (if any) of the requested accommodation on the unit's military readiness, health, or safety; (2) the number of service members in the command that have been granted a similar exemption; and (3) when recommending denial, a determination that the denial furthers a compelling government interest and there is no less restrictive means of accommodating the request. MILPERSMAN 1730-020 ¶ 5. a.-b. Commanders are required to ensure the applicant receives counseling related to the potential health and travel impacts they may incur as a consequence of their waiver, and the possibility that their waiver may be revoked in the event they are at imminent risk of disease. MILPERSMAN 1730-020 ¶ 6.¹¹ Action on a service member's written request for accommodation must be in a timely manner, generally no later than 60 days from receipt by the Office of the Secretary concerned.¹² DoD Instruction 1300.17, ¶ 3.2.c., Table 1. A member may appeal CNO N1 decisions to the Chief of Naval Operations (CNO). BUPERSINST 1730.11A, ¶ 5.f. Template letters for approvals and approval recommendations are found in enclosure (4) of the instruction.

¹⁰ CNO N1 is identified by the alternate designation of CNP (Chief of Naval Personnel) in MILPERSMAN 1730-020). CNO N1 and CNP are interchangeable acronyms and refer to the same position and official.

¹¹ The authority to revoke approved religious accommodation exemptions has been withheld per NAVADMIN 225/21 ¶ 7.g.

¹² No disciplinary or administrative action will be initiated while a request for an exemption for religious accommodations is pending.

c. Requests for religious accommodation are evaluated using criteria outlined in paragraph 5 of the instruction. Specifically, each request is evaluated on a case-by-case basis considering the following factors:

- (1) applicable operational or regional policies,
- (2) importance of the military policy, practice or duty in terms of mission accomplishment, including military readiness, unit cohesion, good order, discipline, health, or safety,
- (3) importance of the practice to the requestor,
- (4) cumulative impact of repeated accommodations of a similar nature and
- (5) alternate means to fulfill the request.

d. Commanders will not deny or recommend denial of a religious accommodation unless the denial or partial denial furthers a compelling governmental interest and is the least restrictive means of furthering that compelling government interest. Factors for commanders to consider include (but are not limited to) whether approving the accommodation would pose a health or safety hazard, or otherwise impair mission accomplishment, good order, discipline, morale or unit cohesion. BUPERSINST 1730.11A ¶ 5.a.(2).

15. NAVADMIN 225/21 provides guidance for disposition of offenses involving Navy service members who are not fully vaccinated as required by NAVADMIN 190/21. Navy Service members refusing the COVID-19 vaccine, absent a pending or approved exemption, are required to be processed for administrative separation.¹³ NAVADMIN 225 ¶ 2. A Navy Service member is considered to be “refusing the vaccine, if: (1) the individual has received a lawful order to be fully vaccinated, (2) is not or will not be fully vaccinated by the date required, and (3)

¹³ Although processing for separation is required, this does not automatically result in a member actually being separated. Members processed for separation may ultimately be retained in the service.

does not have a pending or approved exemption request.” NAVADMIN 225/21 ¶ 3.c. The policy designates CNP as the CCDA to ensure fair and consistent administrative processing across the service. NAVADMIN 225/21 ¶ 5.b. For disciplinary matters, authority to initiate disciplinary proceedings, either non-judicial punishment or court-martial, is withheld to the Vice Chief of Naval Operations. *Id.*

16. Prior to the initiation of administrative or disciplinary action, Navy service members are formally advised of the order to be fully vaccinated using a NAVPERS 1070/613, “Administrative Remarks” form (commonly known as a “Page 13”). NAVADMIN 225/21 ¶ 7.e.(1). A Page 13 is not a punitive action, but is a manner to document formal counseling of a Navy Service member. The inclusion of this Page 13, by itself, is not considered to be an adverse matter and will not affect a member’s career. The Page 13 provides guidance to the Navy service member and serves to document that the member has been advised of his or her acknowledgement of the lawful order to be vaccinated against COVID-19. It also provides the service member with an opportunity to notify his or her commander of the member’s intent to seek a medical or religious exemption.

17. Officer administrative separation is initiated by a formal report of misconduct to Navy Personnel Command (NAVPERS), as required by MILPERSMAN 1611-010, and governed by the procedures in SECNAV Instruction 1920.6D (hereinafter SECNAVINST 1920.6D). The CCDA serves as the “show cause authority” under SECNAVINST 1920.6D, and requires mandatory show cause proceedings for all officers who refuse the vaccine. Specifically, officers are processed for separation on the bases of Misconduct, Moral or Professional Dereliction, and Substandard Performance. NAVADMIN 225/21 ¶ 7.a. Officers are processed

with the least favorable characterization of service¹⁴ as General (Under Honorable Conditions), unless inclusion of another basis for separation warrants a characterization of Other Than Honorable. *Id.*

a. The specific procedures involved with processing an officer for misconduct are outlined in SECNAVINST 1920.6D, Enclosure (6), “Policy Governing Involuntary Separation for Cause or Parenthood”, and Enclosure (7), “Guidelines on Separations for Cause”. The applicable procedures may vary in certain respects depending on the officer’s type of appointment, years of service, and record of performance, amongst other factors.

b. Probationary officers may be processed without a Board of Inquiry (BOI) when the show cause authority determines that an Honorable, or General (under honorable conditions) characterization of service is appropriate. SECNAVINST 1920.6D, Encl (2), ¶ 25; Encl (7), ¶ 3.a. Non-probationary officers must be processed using BOI procedures, which entails a formal administrative hearing over which a panel of no fewer than three senior officers preside in order to make findings with respect to the bases for separation, and recommendations with respect to retention or separation, and character of service. *Id.*, Encl (7) ¶ 4; Encl (11).

18. Administrative separation of enlisted service members is processed under MILPERSMAN 1910-142, “Commission of a Serious Offense.” NAVADMIN 225/21 ¶ 7.b. A “serious offense” is one that would warrant a punitive discharge in accordance with the Manual

¹⁴ A characterization of service is assigned to a Service member upon separation from the military and generally reflects the quality of an individual’s military service. The highest characterization of service is Honorable, followed by General (Under Honorable Conditions), Other Than Honorable, Bad-Conduct, and Dishonorable. Officers may be awarded a Dismissal, which is akin to a Dishonorable discharge. The first three types of characterization may be awarded using administrative procedures, whereas Bad Conduct and Dishonorable discharges, as well as an officer’s Dismissal, are considered “punitive discharges.” These types of discharges may only be awarded by a court-martial sentence and imposed after appellate review is complete.

for Courts-Martial (MCM), which includes violations of Article 92, UCMJ. MILPERSMAN 1910-142 ¶ 2.a. The CCDA directs processing with the least favorable characterization of General (under honorable conditions), unless inclusion of another basis for separation warrants other than honorable. NAVADMIN 225/21 ¶ 7.b.

a. Similar to officer administrative separation processing, the applicable procedures may vary in certain respects depending on the service member's specific community (*e.g.*, nuclear-trained Sailors), their years of service, and record of performance, amongst other factors. Processing of enlisted Navy service members is initiated using a NAVPERS form 1910/31, "Administrative Separation Processing Notice," and those service members may be processed using either notification procedures or administrative board procedures under MILPERSMAN 1910-402.

b. Notification procedures are appropriate where the least favorable characterization is General (under honorable conditions). *Id.* ¶ 1.a. For Navy service members with fewer years of service, notification procedures permit an opportunity to consult with counsel and submit matters for consideration to the separation authority. The CCDA serves as the separation authority for cases involving vaccine refusal, unless a higher separation authority is required by MILPERSMAN 1910-704. NAVADMIN 225/21 ¶ 7.b. Navy service members with more than 6 years of service may elect an administrative separation board, which is a formal administrative hearing similar to a BOI except with regards to the composition of board membership and post-hearing administrative processing. *See generally* MILPERSMAN 1910-010 through 1910-710.

19. Timelines to complete administrative processing vary depending on whether the Navy service member is an officer or enlisted Sailor, the efficiency of administrative processing

within any given command or unit, and what specific procedures apply to the member's case. For cases involving a Navy service member's vaccine refusal and no other misconduct or basis for separation, the following timelines offer a rough estimate for administrative separation processing:

a. For officers, it generally takes between 6 to 12 months from the time the officer is notified to show cause to the officer's approved separation. It takes approximately 86 days from notification of officer misconduct to NAVPERS before the officer is notified to show cause. The officer ("respondent") normally has 10 working days to respond to the notice, and an extension of time may be granted for good cause. The commanding officer must forward the case to the Secretary of the Navy via NAVPERS and the Chief of Naval Personnel (CNP). Review of the case at each level of review takes approximately 50 to 75 days. In cases where a BOI is required, it typically takes another 120 days to complete all phases of the BOI process. The respondent is afforded a minimum 30 days' notice prior to the board convenes, and may request a continuance not to exceed 30 days for good cause. After review is completed and the officer's separation is approved, the decision is communicated to the command via naval message. The officer is generally required to complete separation requirements within 60 days of the approved separation notice.

b. Administrative separation of enlisted service members often takes several months, although the range of processing timelines varies more so than with officer processing. Following the notice of administrative separation, the service member generally has two working days to consult with counsel. For probationary service members, the individual may elect to submit matters to the separation authority and is

given a reasonable time to do so, typically 5 working days. The commander must then route the case file to the CCDA for action as the separation authority. The approved separation is then forwarded to the command to complete separation processing requirements locally. Where a service member is entitled to, and thereafter elects an administrative separation board, the command must request qualified counsel be assigned to the member. The command and the member's counsel then coordinate to set a date for the administrative hearing. There is no required timeline, but generally the board should occur within 30 days of defense counsel appointment. Following the board, the command must generate a record of the board's proceedings and forward the case file to the CCDA using a formal letter format, which typically takes between 5-10 working days. Where a higher separation authority is required by MILPERSMAN 1910-704, such as for members with greater than 18 years of service or who are pending a Physical Evaluation Board (PEB), the review timelines inherent to officer administrative separation processing apply.

20. While NAVADMIN 225/21 withholds authority to initiate disciplinary either non-judicial punishment or courts-martial for cases involving vaccine refusal, commanders generally possess a wide array of administrative and disciplinary options with which to dispose of service members' offenses under the UCMJ. Subject to the limits of the commander's authority, the commander's administrative corrective measures include formal or informal counseling, non-punitive letters of caution or censure,¹⁵ withholding of privileges, and extra-military instruction, as governed by the relevant service policy. Disciplinary options include non-judicial punishment

¹⁵ Non-punitive letters of caution or censure are matters between the issuing authority and the counseled member and do not become part of the member's official service record. Manual of the Judge Advocate General (JAGMAN) 105 ¶b.(2).

under Part V of the MCM, disposition of the charges by court-martial where the commander has the authority to do so, or forwarding of charges for trial by court-martial where the commander does not.

a. Nonjudicial punishment is a forum generally reserved for minor offenses, or those offenses which the maximum sentence would not include a Dishonorable Discharge or confinement for greater than one year if tried by a general court-martial. MCM, Part V ¶ 1.e. Punishments are limited by the rank and position of the cognizant commander, as well as the rank of the person accused of misconduct. *Id.* ¶ 2, 5. Punishments and service limitations are outlined in MCM Part V and the Manual of the Judge Advocate General (JAGMAN), but commonly include some combination of the following: admonishment or reprimand, extra duties, restriction, reduction in rank, or forfeiture of pay. MCM, Part V ¶ 5; JAGMAN, 0111. Commanders are encouraged to permit the accused to speak with counsel subject to the immediate availability of counsel, the delay involved, and operational commitments or military exigencies. JAGMAN 0108 ¶ a.(1). Service members not attached to a vessel have the right to refuse non-judicial punishment and request trial by court-martial. MCM, Part V ¶ 3; JAGMAN 0108 ¶ a. Following imposition of non-judicial punishment, the service member has five working days to submit an appeal, and may request additional time for good cause. MCM, Part V ¶ 7. The member's appeal is forwarded, along with the commander's endorsement, to the cognizant general court-martial convening authority for action. MCM, Part V ¶ 7; JAGMAN, 0117.

b. More serious offenses under the UCMJ may be subject to trial by court-martial. There are three types of courts-martial: summary court-martial, special court-martial, and general court-martial. Depending on the rank and position of the commander, he or she may

or may not be authorized to convene certain types of courts-martial. UCMJ, 10 U.S.C. § 821-24. Further, the nature of the proceedings and punishments available are limited depending on the forum and rank of the accused. *See* UCMJ, 10 U.S.C. Chapter 47, Subchapters IV, VIII. The most severe punishments, such as the death penalty, a Dishonorable Discharge, Dismissal, or extended periods of confinement, are only available at general courts-martial, and certain offenses are only permitted to be tried by general courts-martial. *Id.* Summary courts-martial are less formal than either special or general courts-martial, which are equivalent in formality and procedure to civilian criminal courts; however, each court-martial forum is governed by the procedures outlined in the MCM, Part II, Rules for Court Martial. Special courts-martial and general courts-martial, in particular, have substantial legal and procedural requirements with respect to pre-trial, trial, and post-trial judicial proceedings.¹⁶ The adjudication of trials by court-martial generally take months before the court is convened, and may take several months, depending on the matters involved in the case and the court's docket, prior to the trial date. Upon conclusion of the trial, the member may appeal the findings or sentence as provided in Chapter XI and XII of the MCM.

21. The administrative and disciplinary options available to commanders are the same for both active duty and reserve component Service members; however, the application of such options with respect to Reservists is subject to unique jurisdictional and practical considerations. A member of a Reserve Component on active duty or inactive-duty training is subject to the UCMJ and they may be ordered to active duty for disciplinary proceedings. UCMJ Art. 2, 10 U.S.C. §802; JAGMAN, 0107. Punishments awarded at non-judicial punishment are limited to

¹⁶ Relevant to a charge of violation of Article 92 (disobeying a lawful order) for refusal to receive the COVID-19 vaccination, an accused member could choose to raise all available affirmative defenses, including the lawfulness of the order, at court-martial.

the duration of the Service member's period of active duty or inactive-duty training. *Id.*, 0112. Special procedures apply to recall members of the reserve component to activity duty for purposes of a court-martial, and such members may be retained on active duty to serve a punishment of confinement or restraint on liberty. *Id.*, 0123. Administrative separation procedures are largely the same as those used with active duty Service members, with minor variations related to composition of the board and post-board administrative processing. *See, e.g.*, SECNAVINST 1920.6D, Encl. 11, ¶ 3.b., and MILPERSMAN 1910-704 (requiring a Reservist member on officer and enlisted administrative separation boards).

22. Discharged service members may seek a review of his or her discharge through the cognizant Discharge Review Board (DRB). 10 U.S.C. § 1553. The DRB is empowered to change and issue a new discharge on grounds of equity or propriety. 32 C.F.R. § 70.9. 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.* Discharged service members may also seek an upgraded discharge from the appropriate Board for Correction of Military Records (BCMR), which is the Board for Correction of Naval Records (BCNR) for the Navy and Marine Corps personnel. 10 U.S.C. § 1552. The BCNR has 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. The BCNR may correct any military record when it is necessary to correct an error or remove an injustice. *Id.* The BCNR's action may result in a member being reinstated in the Navy. If a Service member is unable to obtain relief through the appropriate DRB or BCMR, the service member may elect to

challenge the agency's decision and administrative proceedings in federal court under applicable federal law.

23. In summary, the Navy is providing its personnel opportunities to seek medical and religious exemptions from the requirement to be vaccinated. For those Sailors who do not wish to pursue an exemption or have their exemption requests denied after full adjudication including appeals and still refuse to be immunized, the Navy's interest in good order and discipline is best served by adjudicating each refusal on a case-by-case basis. Each Sailor will be afforded all due process to which he or she is entitled while fully exhausting intra-service administrative and disciplinary processes that result in a final agency action.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 3rd day of November, 2021.



W. R. MERZ

Merz Declaration - Exhibit A



DEPARTMENT OF THE NAVY
CHIEF OF NAVAL PERSONNEL
701 SOUTH COURTHOUSE ROAD
ARLINGTON VA 22204-2472

BUPERSINST 1730.11A
N13
16 Mar 2020

BUPERS INSTRUCTION 1730.11A

From: Chief of Naval Personnel

Subj: STANDARDS AND PROCEDURES GOVERNING THE ACCOMMODATION OF
RELIGIOUS PRACTICES

Ref: (a) DoD Instruction 1300.17 of 10 February 2009
(b) SECNAVINST 1730.8B
(c) NAVPERS 15665I
(d) BUMEDINST 6230.15B

Encl: (1) Sample Request for Waiver of Policy to Accommodate a Religious Practice
(Template)
(2) Chaplain Interview Checklist (Template)
(3) Chaplain Memorandum for the Record (Template)
(4) Religious Accommodation Approval or Endorsement (Template)

1. Purpose. To provide policy, guidance, procedures and responsibilities for the accommodation of practices in support of sincerely held religious beliefs for Sailors and prospective accessions, per references (a) and (b). Reference (c) provides the Navy's manner of wear policy for the most commonly requested waivers of uniform and grooming standards in support of religious practices, as delineated in paragraph 5.

a. This revision updates policy, guidance and procedures for the accommodation of practices in support of sincerely held religious beliefs.

b. This is a complete revision and should be reviewed in its entirety.

2. Cancellation. BUPERSINST 1730.11.

3. Scope and Applicability

a. This instruction applies to all active and reserve members of the Navy, including applicants for entry into the Navy and Navy Reserve, as well as midshipmen at the U.S. Naval Academy (USNA) and in the Naval Reserve Officers Training Corps (NROTC), and officers and officer candidates in Navy officer accession programs. Nothing in this instruction precludes disciplinary or administrative action for conduct that is proscribed by the Uniform Code of Military Justice or supporting policies.

b. **Conscientious Objectors.** Conscientious objections are not covered under this instruction. See DoD Instruction 1300.06 (Conscientious Objector) of 12 July 2017.

c. **Peyote Use.** Peyote use is not covered under this instruction. See Assistant Secretary of Defense for Force Management Policy Memorandum of 25 April 1997, *Sacramental Use of Peyote by Native American Service Members*.

3. **Background.** This policy complies with references (a) and (b) and supports the Navy's culture of diversity, tolerance and inclusion. In line with section 2000bb-1 of Title 42, United States Code, requests for religious accommodation from a military policy, practice or duty that substantially burdens a Sailor's exercise of religion may be denied only when the military policy, practice or duty furthers a compelling government interest and is the least restrictive means available of furthering that compelling government interest. Religious liberty is more than freedom to worship. It includes the freedom to integrate one's religion into every aspect of one's life. When the policies or procedures of the Navy conflict with a Sailor's religious practices, the Navy works to support the Sailor's religious practices to the broadest extent possible within the bounds of military readiness, unit cohesion, good order, discipline, health and safety. Many religious practices such as (but not limited to) religious observances and dietary practices do not need a request for waiver of policy and can be accommodated at the command level.

4. **Roles and Responsibilities**

a. **Sailors.** Sailors seeking accommodation of a religious practice that requires a waiver of Navy policy ("requestors") must submit a request in writing to their commander, consistent with enclosure (1). Prospective accessions seeking accommodation of a religious practice that requires a waiver of Navy policy ("requestors") should use the accession source chain of command, consistent with subparagraph 5b, enclosure (1) and Table 2.

(1) A requestor must comply with the applicable policy, practice, direction or duty from which he or she is requesting a religious accommodation until the request is adjudicated. Additionally, commanders and commanding officers ("commanders") may temporarily modify or suspend a religious accommodation, consistent with subparagraph 5g.

(2) A requestor with an approved religious accommodation must inform his or her chain of command of the approved accommodation upon checking in to a new command or changing duties. A requestor must retain a copy of the approved accommodation and be able to produce it within five working days.

b. **Chaplains.** Command chaplains are responsible for advising and assisting commands with religious accommodation policy execution. In line with SECNAVINST 1730.7E, chaplains, assisted by Religious Program Specialists, provide for and facilitate religious requirements of Sailors and authorized users and advise commanders on command religious program matters throughout the Department of the Navy (DON).

(1) A Navy chaplain will conduct an administrative interview for each religious accommodation request that requires a waiver of policy. Local chaplains should be used if available. Chaplains may use any means available to ensure the interview takes place promptly, such as telephone or video conference. The chaplain should use enclosure (2) during the interview and must produce a memorandum for the record consistent with enclosure (3).

(2) The chaplain will inform the Sailor or prospective accession that the interview is for the purpose of preparing a memorandum for the record and advising the command, and that the content of the interview is not privileged or confidential as defined in SECNAVINST 1730.9A and the Manual for Courts-Martial Military Rule of Evidence 503.

c. Commanders and Commanding Officers (CO). Commanders must process requests according to the timelines, routing and criteria set forth in this instruction.

(1) When forwarding a request for adjudication or appeal, commanders will use enclosure (4).

(2) Commanders must obtain the advice of a judge advocate and a chaplain prior to acting on a request that involves a waiver of Navy policy.

(3) Commanders will include a religious needs assessment upon check-in to the command in line with OPNAVINST 1730.1E to include identification of Sailors who may need previously-approved religious accommodation waivers reviewed.

d. Deputy Chief of Naval Operations (Manpower, Personnel, Training and Education) (CNO N1). CNO N1 is responsible for overseeing this religious accommodation policy and will review and act on religious accommodation requests that require waiver of Department of Navy (DON) policy and are routed to CNO N1 for approval as indicated in Tables 1 and 2.

5. Policy. In accordance with Article 0820 of United States Navy Regulations, 1990, commanders will provide maximum opportunity for the free exercise of religion by members of the naval service.

a. Standards-Based Approach. The Navy has a compelling governmental interest in mission accomplishment at the individual, unit and organizational levels, including such necessary elements of mission accomplishment as military readiness, unit cohesion, good order, discipline, health and safety. The military is a specialized community within the United States, governed by a discipline separate from the rest of society. All Navy personnel must expeditiously review and act on requests for religious accommodations. Many religious practices do not require an exception to Navy policy and can be accommodated at the command level. The term "religious practice" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(1) Each request for religious accommodation must be reviewed on a case-by-case basis, giving consideration to the full range of facts and circumstances relevant to the specific request. Requests to accommodate religious practices should not be approved or denied simply because similar requests were approved or denied. The following factors should be considered:

- (a) applicable operational or regional policies,
- (b) importance of the military policy, practice or duty in terms of mission accomplishment, including military readiness, unit cohesion, good order, discipline, health, or safety,
- (c) importance of the practice to the requestor,
- (d) cumulative impact of repeated accommodations of a similar nature and
- (e) alternate means to fulfill the request.

(2) To comply with the intent of section 2000bb-1 of Title 42, U.S. Code, commanders and their staffs should remain objective in considering requests to accommodate religious practices. Commanders will not deny or recommend denial of a religious accommodation unless the denial or partial denial furthers a compelling governmental interest and is the least restrictive means of furthering that compelling government interest. It is essential that commanders articulate the factual basis underlying any compelling government interest and that they articulate why a recommended denial or partial denial is the least restrictive means available to the commander to protect the compelling government interest over the individual request. Factors to consider include (but are not limited to) whether approving the accommodation would:

- (a) pose a health or safety hazard (such as flammable materials or loose clothing that could become caught in a piece of equipment),
- (b) interfere with the wear or proper function of special or protective clothing or equipment (such as a respirator, protective helmet or communication gear) or
- (c) otherwise impair mission accomplishment, good order, discipline, morale or unit cohesion.

(3) Sometimes it is necessary for commanders to recommend an alternative manner by which the religious requirement may be met. For example, there may be options and resources not known to the member at the time of his or her request that might be known to the commander. Those alternatives should be discussed and offered to the member to determine if they might satisfy some or all of the member's religious requirement. Where appropriate, the chaplain memorandum may discuss alternative means available to address the requested accommodation.

(4) Religious practices and corresponding approval authorities are listed in Table 1. Many religious practices, such as (but not limited to) religious observances and dietary practices do not need a request for waiver of policy and can be accommodated at the command level. Other religious accommodations may be approved by the first O-6 in the chain of command, whether the requestor's CO or Immediate Superior in Command (ISIC). Per reference (a), exceptions to Table 1 are not permitted without CNO N1 approval.

Type of Religious Practice	Authority
Religious observances per subparagraph 5d(1)	CO
Dietary practices per subparagraph 5d(2)	CO
Neat, conservative head covering in line with subparagraph 5d(4)(a), which requires waiver of uniform regulation provisions in reference (c)	Approvals authorized at O-6 CO/ISIC level. O-6 CO/ISIC send recommendation for disapproval directly to CNO N1
Unshorn hair on men in line with subparagraph 5d(4)(b), which requires waiver of uniform regulation provisions in reference (c)	O6 CO/ISIC send recommendation directly to CNO N1
Beard, which requires waiver of requirement for male Sailors to be clean shaven found in reference (c), in line with subparagraph 5d(4)(c)	O6 CO/ISIC send recommendation directly to CNO N1
Uniform, grooming or religious apparel waivers not authorized at the CO or O-6 CO/ISIC level in line with reference (c)	O-6 CO/ISIC send recommendation directly to CNO N1
Immunizations per subparagraph 5d(3)	O-6 CO/ISIC send recommendation directly to CNO N1
All other types of religious practices that require a waiver of Navy policy to support	O-6 CO/ISIC send recommendation directly to CNO N1

Table 1. Authorities and Religious Practices

Note 1: Pre-accession authority examples are listed below in subparagraph 5b.

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b. Accessions

(1) Navy accession sources, Navy Recruiting Command, Naval Service Training Command, USNA and U.S. Navy Bureau of Medicine and Surgery (BUMED), are the designated chains of command for pre-accession requests in line with Table 2. Accession source headquarters are responsible for ensuring active and reserve enlisted and officer accessions are informed of uniform and grooming standards and policies, as well as procedures for seeking religious accommodations. Accession source headquarters must document this opportunity in writing and ensure all accession requests for religious accommodation are adjudicated prior to entering service. The following language should be used to document the applicant understanding of the Navy's religious accommodation policy:

"I understand that Department of the Navy policy is to accommodate religious practices whenever possible, unless doing so would have an adverse impact on mission accomplishment, including military readiness, unit cohesion, good order, discipline or health and safety.

I understand accommodation of my religious practices cannot be guaranteed at all times. I understand that determination of military necessity rests entirely with my Navy chain of command, and that I will be expected to comply with the Navy's policy, practice or duty from which I am requesting accommodation unless and until approved by the designated authority.

I do NOT desire to request support for specific religious practices at this time

(Applicant Signature)

I DO desire to request support for the following religious practice(s):

(Type of Request)

(Applicant Signature)

Applicants requesting religious accommodation may not enlist or commission until they receive a final response in writing. Accession commands must immediately process the request in line with BUPERSINST 1730.11A (Standards and Procedures Governing the Accommodation of Religious Practices).

(Typed or Printed Name and Signature of Witnessing Recruiting Representative)"

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(2) Additionally, prospective accessions must be given the opportunity to route a religious accommodation request prior to departure for a Military Entrance Processing Station. Many pre-accession religious practices such as (but not limited to) religious observances and dietary practices do not need a request for waiver of policy and can be accommodated at the command level. Certain requests for religious accommodation may be approved by local commanders as listed in Table 2, below. Per reference (a), exceptions to this table are not permitted without CNO N1 approval.

Type of Religious Practice	Process	Notes
Religious observances	Route to RTC/OTCN CO for approval	RTC/OTCN CO send recommendation for disapproval directly to CNO N1
Dietary practices	Route to RTC/OTCN CO for approval	RTC/OTCN CO send recommendation for disapproval directly to CNO N1
Religious head covering during RTC/OTCN	RTC/OTCN CO may approve religious head covering during religious ceremonies/services only	If religious head covering during religious ceremonies/services only is not acceptable by applicant, then send to CNO N1
Unshorn hair on men in line with subparagraph 5d(4)(b), which requires waiver of uniform regulation provisions in reference (c)	RTC/OTCN CO send recommendation directly to CNO N1	
Any request for beards during RTC/OTCN	RTC/OTCN CO send recommendation directly to CNO N1	
Uniform, grooming or religious apparel accommodation that do not require waiver of DON policy	Route to RTC/OTCN CO for approval	Disapproval recommendations must be routed to CNO N1
Immunizations	RTC/OTCN CO may approve use of any available alternative vaccinations	If no alternative vaccines are available, then send recommendation directly to CNO N1
All other requests that require a waiver of Navy policy	Route to CNO N1	

Table 2. Authorities and Religious Practices for Pre-Accession and Recruit Training

c. Timelines. For waivers of policy requiring adjudication at the commander or O-6 CO/ISIC level, final review and written notification to the requestor will be completed no later than 7 days from the date the requestor submitted the request to his or her immediate commander. Extensions for good cause may be granted by the Director, Military Personnel, Plans and Policy (OPNAV N13). Examples of good cause for an extension include operational necessity or lack of immediate access to a judge advocate or chaplain. All religious accommodation cases forwarded from an O-6 CO/ISIC or RTC/OTCN to CNO N1 for adjudication must be forwarded within 7 days from the date the requestor submitted the request to his/her immediate commander, and will be expeditiously adjudicated in line with references (a) and (b). To ensure timely and consistent adjudication of all requests, active and reserve Sailors will not submit a request for a religious accommodation that would require a waiver of Navy policy if they are expected to execute permanent change of station orders within 90 days. Written notification should be given to the requestor within 5 days upon any decision, modification, suspension or revocation of a waiver of policy.

d. Religious Practice Type

(1) Observances of Worship and Holy Days. Worship practices, holy days and Sabbath or similar religious observance requests will be accommodated except by necessity, consistent with mission accomplishment, U.S. Navy Regulations, and Navy Military Personnel Manual (MILPERSMAN) article 1731-010. These requests do not normally require a waiver of policy.

(2) Dietary Practices. Commanders should support religious dietary observances to the fullest extent possible. Commanders normally support religious dietary observances through a standard core menu that supports many religious dietary requirements or by issuing Meals Ready to Eat, Religious. In certain circumstances, commanders may consider other alternative solutions.

(3) Immunizations. The Navy requires immunizations for all Sailors, based on its compelling interest in mission accomplishment, including military readiness, unit cohesion, good order, discipline, health and safety. Local commanders should make a reasonable effort to acquire alternative vaccinations, when available, that meet both religious needs of Sailors and the Navy's immunization requirements as determined by BUMED. Refer to MILPERSMAN 1730-020 as needed. Medical waivers of immunization requirements not associated with religious belief will continue to be adjudicated by the health care provider as addressed in reference (d).

(4) Uniform and Grooming. Pursuant to subparagraph 5a above, to determine whether a religious accommodation might interfere with the accomplishment of the unit or individual mission(s), a commander should consider such factors as the safe and effective operation of weapons, work center equipment and machinery, as well as wear of protective clothing or equipment. Commanders should also state in the endorsement or approval how the religious accommodation may need to be modified in operational, non-operational or training environments.

(a) Head Coverings. As delineated in Table 1, religious accommodations for Sailors on all duty types to wear neat and conservative religious head coverings such as (but not limited to) a hijab, turban, kufi, kippah or yarmulke may be authorized at the O-6 CO/ISIC level based upon the operational environment and in line with reference (c). Except in the case of safety or protective headgear required by a Sailor's duties, position or assignment, Sailors granted a religious accommodation for head coverings are not required to wear military headgear in addition to their religious head covering if such military headgear would violate their sincerely held religious beliefs.

(b) Unshorn/Long Hair. As delineated in Table 1, waivers of Navy policy for male Sailors on all duty types to wear unshorn/long hair must be sent to CNO N1 for decision.

(c) Beards. As delineated in Table 1, waivers of Navy policy for Sailors on all duty types to wear a beard must be sent to CNO N1 for decision. Approved unshorn beards must be worn in a neat and conservative manner. When a Sailor is authorized to wear a beard of greater than 2 inches in length, the beard must be rolled, tied and/or otherwise groomed to achieve a length not to exceed 2 inches when measured from the bottom of the chin.

(5) Deoxyribonucleic Acid (DNA) Specimen Sampling. Waiver requests from participation in DNA specimen collection should be forwarded to CNO N1 for final adjudication. BUMED will be consulted prior to final adjudication.

(6) Other Religious Accommodation Requests. All other religious accommodation requests requiring a policy waiver not specified under this section will be routed to CNO N1 via OPNAV N13 for adjudication.

e. Routing. For those requests that require a waiver of policy:

(1) A requestor seeking a waiver of Navy policy must submit a request in writing through his or her commander using the template at enclosure (1). The requestor must state the waiver sought and may elaborate on the sincerely-held religious beliefs or circumstances motivating the request.

(2) Every requestor seeking religious accommodation requiring a waiver of Navy policy must interview with a Navy chaplain. The chaplain will assess whether the requestor's religious beliefs appear sincerely-held, and will forward an evaluation to the commander using the templates provided in enclosures (2) and (3).

(3) Commanders will take appropriate action on requests to stay within the timelines in subparagraph 5(c). Requests forwarded by a commander to the O-6 CO/ISIC or to CNO N1 must include enclosures (1) through (4). There are no additional requirements.

(4) A copy of all waivers of uniform or grooming policy authorized at the O-6 CO/ISIC level must be forwarded via e-mail to OPNAV N13 for record keeping purposes at

ALTN_Navy_Religious_Accommodations@navy.mil. Requests forwarded from the O-6 CO/ISIC level to CNO N1 for adjudication must also be sent to that email address. Forwarding waiver requests to OPNAV N13 via mail is highly discouraged and can potentially delay a decision for a Sailor.

(5) For commands that do not have regular Navy/Marine Corps Intranet email accounts (e.g., overseas, sea duty or joint commands), email OPNAV N13 at ALTN_Navy_Religious_Accommodations@navy.mil first before sending attachments.

(6) If the request contains Personally Identifiable Information (PII), the request must be labelled and encrypted appropriately.

(7) A requestor who reports directly to another U.S. military service must route religious accommodation requests to the authority specified in the policies of that military service. Sailors assigned to a Joint command will route requests to their respective Navy Element Commander for approval or recommendation to CNO N1 as delineated in Table 1. In all circumstances Sailors will adhere to the provisions set forth in subparagraph 4a.

(8) Questions from commands and requesters concerning religious accommodation requests may be referred to ALTN_Navy_Religious_Accommodations@navy.mil.

f. Appeals

(1) Appeals of command-level adjudication will be forwarded to the commander's O-6 CO/ISIC for adjudication. Appeals of O-6 CO/ISIC level adjudication will be forwarded to CNO N1 for adjudication within 15 days from the date the requestor submits the appeal. Appeals of CNO N1 adjudication will be forwarded to the Chief of Naval Operations (CNO) for final adjudication, unless other direction is provided in reference (a) or (b).

(2) When a religious accommodation request is denied, the requestor may renew the request upon a change in physical, operational or geographical environment, or at any time in which there is a change to pertinent policy.

g. Approval Duration, Withdrawal and Suspension. Religious accommodations are subject to review, suspension or revocation, in whole or in part, any time there is a change in the circumstances upon which the initial religious accommodation was based (e.g., new duty assignment, temporary duty or other material change in circumstances). However, an approved religious accommodation remains in effect until the commander or future commander notifies the Sailor or candidate in writing that a compelling government interest requires suspension or revocation of the accommodation. The written notification must include the nature of the changed circumstances and specify the reason for the revocation and the length of the suspension.

(1) The authority to temporarily suspend a previously approved religious accommodation resides with the Sailor's CO, while the authority to permanently revoke a previously approved religious accommodation remains with CNO N1. A commander may suspend or initiate revocation of an approved religious accommodation only upon a determination that a compelling government interest requires such suspension or revocation and that no less restrictive means of furthering that compelling government interest are available. The decision to suspend or initiate revocation of an approved religious accommodation must be informed by the factors enumerated in this instruction.

(2) A commander may require immediate compliance with suspension of a religious accommodation only if necessary due to an imminent threat to health or safety. In any case in which there is no imminent threat, the Sailor or candidate must be given five business days to submit an appeal using the process described in subparagraph 5f(1). The religious accommodation will remain in effect until the appeal process is completed. When necessary, a Sailor may be assigned to temporary additional duty orders to protect him or her from circumstances that are incompatible with the religious accommodation while the appeal is being adjudicated.

(3) When there is a change in military duties or requirements, a commander may suspend a previously approved religious accommodation if the suspension furthers a compelling government interest and is the least restrictive means available to further that interest. For example, a Sailor with a grooming waiver authorizing him to wear a beard may be required to shave the beard to deploy to an area in which there is a high risk that the Sailor will have to don a gasmask. When the conditions that required the suspension are no longer present, the Sailor may resume the religious practice per the original waiver. There is no requirement for a Sailor to resubmit a request for a religious accommodation that has been suspended.

6. Records Management

a. Records created as a result of this instruction, regardless of format or media, must be maintained and dispositioned for the standard subject identification codes (SSIC) 1000 through 13000 series per the records disposition schedules located on the Department of the Navy/Assistant for Administration (DON/AA), Directives and Records Management Division (DRMD) portal page at <https://portal.secnav.navy.mil/orgs/DUSNM/DONAA/DRM/Records-and-Information-Management/Approved%20Record%20Schedules/Forms/AllItems.aspx>.

b. For questions concerning the management of records related to this instruction or the records disposition schedules, please contact your local records manager or the DON/AA DRMD program office.

7. Review and Effective Date. Per OPNAVINST 5215.17A, OPNAV N13 will review this instruction annually on the anniversary of its issuance date to ensure applicability, currency and consistency with Federal, Department of Defense, SECNAV and Navy policy and statutory authority using OPNAV 5215/40 Review of Instruction. This instruction will be in effect for 5 years unless revised or cancelled in the interim, and will be reissued by the 5-year anniversary

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date if it is still required, unless it meets one of the exceptions in OPNAVINST 5215.17A, paragraph 9. Otherwise, if the instruction is no longer required, it will be processed for cancellation following the guidance in OPNAV Manual 5215.1 of May 2016.



JOHN B. NOWELL, JR.
Deputy Chief of Naval Operations
(Manpower, Personnel, Training,
and Education)

Releasability and distribution:

This instruction is cleared for public release and is available electronically only via BUPERS/NAVPERSCOM Web site, <https://www.public.navy.mil/bupers-npc/reference/Pages/default.aspx>

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SAMPLE REQUEST FOR WAIVER OF POLICY TO ACCOMMODATE A RELIGIOUS
PRACTICE (TEMPLATE)

(Date)

From: Rate or rank, as applicable, full name, branch and type of service as applicable

To: Appropriate authority per Table 1 or Table 2 (i.e., O-6 CO/ISIC or CNO N1)

Via: Appropriate authority per Table 1 or Table 2 (i.e., CO, O-6 CO/ISIC)

Subj: REQUEST FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

Ref: (a) DoD Instruction 1300.17 of 10 February 2009

(b) SECNAVINST 1730.8

(c) BUPERSINST 1730.11

(d) Other references as needed

Encl: (1) Photograph or graphic (as needed to show the neat and conservative color, manner of wear, etc.)

(2) Optional enclosures (e.g., religious leader endorsement or research in applicable area)

1. Pursuant to references (a) through (c), I hereby request religious accommodation from Navy policy (use reference as needed) to ____ (describe the specific practice(s)) ____ due to my religious belief that ____ (paraphrase religious basis of the request) ____.

2. My request is based on my religious belief that ____ (provide a detailed explanation here as desired) ____ and reference enclosure (1) or (2) as needed/desired.

3. (Required statement) I certify that I understand that any approved or partially approved waiver may not be appropriate for future duty to which I may be assigned, including operational, non-operational or training command(s), and may be suspended or withdrawn in accordance with reference (c).

(Signature)

Enclosure (1)

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CHAPLAIN INTERVIEW CHECKLIST TEMPLATE

Requestor:			Interview Date:
Name:			Chaplain Interviewer:
Phone:			Phone:
Email:			E-mail:
Command:			Chaplain's Command:
Interview Preliminaries			
Yes	No	N/A	
			Chaplain reviewed policy and doctrine on religious accommodation and the policy for which the requestor is seeking accommodation.
			Applicant was notified that the interview is not confidential and will be used to advise the command.
			Chaplain explained to the applicant that confidential support can be received from another chaplain.
			Applicant has been granted a waiver for this practice previously.
			Applicant's Page 2 (NAVPERS 1070/602) reflects the belief cited in the application.
Type of Waiver Requested			
Yes	No	N/A	
			Uniform standards
			Grooming standards
			Immunization requirements
			DNA sampling
			Other (Please describe):
Interview			
Yes	No	N/A	
			Requestor's religious beliefs seemed honestly and sincerely held using one or more of the following factors:
			1. Requestor was credible (consistently keeps tenets, practices, etc.).
			2. Requestor's demeanor and pattern of conduct are consistent with the request.
			3. Requestor participates in activities associated with the belief(s).
			4. Other persons supporting the claim are credible.
			5. Request is supported by letter(s) of verification or endorsement from an organization espousing the beliefs which are the basis for the claim.
			Alternate means of accommodating the practice were explored in the interview.
Process Checklist			
Yes	No	N/A	
			Chaplain has prepared a memorandum documenting the interview.
			Chaplain reviewed memorandum with applicant and provided a copy.
			Chaplain submitted the memorandum and this document to the commanding officer via chain of command.
			Chaplain referred applicant to command to process request.

Enclosure (2)

A110

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CHAPLAIN MEMORANDUM FOR THE RECORD (TEMPLATE)

From: [Chaplain's rank and name], CHC, USN
To: [Commanding Officer of requestor]

Subj: REQUEST FOR A WAIVER OF POLICY TO ACCOMMODATE PRACTICE
BASED ON RELIGIOUS BELIEF ICO [REQUESTOR'S RANK, NAME]

Ref: (a) SECNAVINST 1730.8
(b) SECNAVINST 1730.9

1. (Requestor's rank and name) has submitted a request for accommodation of a religious practice per reference (a). Per BUPERSINST 1730.11A, I interviewed the requestor on (date). I explained that this interview would not be a confidential communication as defined by reference (b) and informed the requestor that referral for confidential chaplain support was available.
2. Nature of the request. (Provide a narrative summary of the request for religious accommodation and whether or not the requestor has previously had this or any other related request approved or denied)
3. Basis. (Identify the religious beliefs on which the accommodation request is based and provide a professional and objective opinion regarding the religious importance of the request to the member. Include the requestor's religion as listed on NAVPERS 1070/602 (Page 2).
4. Alternate Means. (Indicate alternate means of meeting the request)
5. Sincerity. (Assess the sincerity of the requestor. The memorandum should focus on the sincerity of the member's personal religious beliefs, including the information provided during the interview.)
6. My contact information is (telephone number and e-mail address).

[Signature]

Copy to:
(Rank and name of requestor)

Enclosure (3)
A111

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RELIGIOUS ACCOMMODATION APPROVAL OR ENDORSEMENT (TEMPLATE)

(Date)

From: Appropriate authority per Table 1 or Table 2

To: Appropriate authority per Table 1 or Table 2

Via: As applicable with appropriate authority per Table 1 or Table 2

Subj: APPROVAL (or) APPROVAL/DISAPPROVAL RECOMMENDATION ICO (INSERT
NAME HERE) RELIGIOUS ACCOMMODATION

Ref: (a) DoD Instruction 1300.17

(b) SECNAVINST 1730.8

(c) BUPERSINST 1730.11A

(d) Other references as needed including regional or operational policy

Encl: (1) Sailor/accession request of DD MMM YY

(2) Chaplain Memorandum and Interview Checklist

(3) Other enclosures as needed (e.g., operational or regional policy)

1. Per references (a) through (c)/(d), I am approving this request or I am forwarding this request recommending approval/disapproval in full or in part during the following environments (as applicable to the command):

a. Operational recommendation:

b. Non-operational recommendation:

c. Training environment recommendation:

2. The following information was considered or is provided for consideration as applicable (articulate the factual basis underlying any compelling government interest and why the denial or partial denial is the least restrictive means available to protect the compelling government interest over the individual request):

a. The importance of the military policy, practice or duty from which religious accommodation is sought in terms of mission accomplishment, including:

(1) Military readiness:

(2) Unit cohesion:

(3) Good order and discipline:

(4) Health and safety:

Enclosure (4)
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- b. The religious importance of the practice to the requestor.
 - c. The cumulative impact of repeated accommodations of religious practices of a similar nature.
 - d. Alternate means available to accommodate the practice in whole or in part.
3. Other pertinent issues or information associated with this request.
4. My point of contact (POC) for this matter is _____ (insert POC here) who can be reached at _____ (insert e-mail and telephone number here).
5. This approval/recommendation will be emailed to OPNAV N131 for review/decision within the timelines in reference (c). Otherwise, Commander should provide the timeline/waiver of timeline here as applicable.

(Signature)

Copy to:
OPNAV N131
Operational Commander(s),
Requestor, etc.

Merz Declaration - Exhibit B

MILPERSMAN 1730-020**IMMUNIZATION EXEMPTIONS FOR RELIGIOUS BELIEFS**

Responsible Office	OPNAV (N131)	Phone:	DSN COM	664-5015 (703) 604-5015
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MyNavy Career Center	Phone: Toll Free E-mail: MyNavy Portal:	1-833-330-MNCC (6622) askmncc@navy.mil https://my.navy.mil/
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References	(a) DoD Instruction 1300.17 of 10 February 2009 (b) BUPERSINST 1730.11A (c) BUMEDINST 6230.15B (d) SECNAVINST 1730.9A (e) SECNAVINST 1920.6D
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1. **Policy**. The Navy requires immunizations for all Sailors, based on its compelling interest in the health and safety of the military workforce. Pursuant to references (a) and (b), religious exemptions of immunization requirements will include the justification and endorsements in paragraphs 4 and 5 of this article prior to routing to the Chief of Naval Personnel (CHNAVPERS) for decision. Non-religious medical waivers of immunization requirements will be adjudicated by the health care provider as addressed in reference (c).

2. **Authority**. Authority to grant medical waivers of immunization requirements is vested at the Bureau of Medicine and Surgery (BUMED). Authority to grant religious exemptions of immunization requirements is vested with CHNAVPERS.

3. **Application Procedure**. Service members requesting religious exemption of immunization requirements will forward their requests to CHNAVPERS via their commanding officers (CO) or immediate superiors in command. Submission guidance for commands is provided in reference (b).

4. **Contents of Service Member's Request**. The request will include the following information:

- a. Full name and grade,

b. Immunization(s) exemption requested and the reason why the exemption is needed, and

c. The following signed [NAVPERS 1070/613](#) Administrative Remarks, using the following format:

"I request a waiver of the (state the type) immunization. I hereby state that my request is based upon (religious objection to immunization or other reasons specifically described). I acknowledge having received the following counseling:

1. Failure to obtain immunization poses additional risk to my health upon exposure to disease.

2. In the event of foreign travel, I may be detained during travel across foreign borders due to international health regulations.

3. If granted, a waiver may be revoked by my commanding officer if I am at imminent risk of disease or due to international health regulations.

4. If my job duties change, I may need to route a new request.

5. If I am at my permanent change of station while my waiver is in effect, I may need to route a new request if my job duties change, my geographic region exposes me to the aforementioned disease, or other factors exist that could put me at imminent risk of disease.

Service Member's Signature

Witnessed:

5. **Content of Commander's Endorsement.** In line with reference (b), COs must endorse every request for religious accommodation through waiver of immunization requirements. The content of the endorsement must include:

a. An endorsement from a military chaplain in line with reference (d),

b. A recommendation to approve or disapprove the request,

c. Relevant information concerning the applicable operational or regional policies,

d. Negative effect (if any) on mission accomplishment (i.e., military readiness, unit cohesion, good order, discipline, health, and safety),

e. The number of Service members in the command that have been granted a similar exemption for non-religious purposes, and

f. When recommending denial of the request, a determination that the denial furthers a compelling governmental interest (such as those identified in subparagraph 5d above), and that there is no less restrictive means of accommodating the request, such as an available alternative vaccination that meets both the religious need and the Navy's immunization requirements as determined by BUMED.

6. **Applicant Counseling.** COs will ensure applicants are counseled concerning the following, in line with subparagraph 4c above:

a. The additional risk to health on exposure to disease against which the applicant will not be protected by a military physician who informs Service member of diseases concerned, and benefits and risks of vaccine;

b. The possibility that the applicant may be detained during travel across international borders due to international health regulations; and

c. The possibility that individuals granted such exemptions may have their waivers revoked if they are at imminent risk of disease (e.g., exposure to anthrax, measles, cholera, etc.) or due to international health regulations.

7. **Revocation of Waiver by CO.** COs may, without prior approval, revoke a Service member's authorized immunization waiver in the event of imminent risk of disease due to exposure or as a result of international health regulations incident to foreign travel. If a Service member's immunization waiver is revoked, such action must be reported to CHNAVPERS and BUMED Public Health and Safety Division (M44) by message as soon as possible.

8. **Administrative and Disciplinary Actions**

a. In line with reference (a), Service members submitting requests for religious accommodations will comply with the

policy, practice, or duty from which they are requesting accommodation, unless or until the request is approved.

b. Service members whose waivers have been disapproved, or those who refuse to take immunizations without approved waivers, may be subject to administrative and or disciplinary actions, as deemed appropriate by COs, for violation of a lawful order.

c. Actions include:

(1) Formal counseling and warning recorded on [NAVPERS 1070/613](#),

(2) Nonjudicial punishment,

(3) Court-martial, or

(4) Processing for administrative separation.

d. See [MILPERSMAN 1910-120](#), [1910-142](#), [1910-164](#), and [1910-402](#) for guidance on enlisted separations. See reference (d) for officer separations.

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA**

NAVY SEAL #1, et al.

Plaintiffs,

v.

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

Defendants.

Case No. 8:21-cv-02429-SDM-TGW

DECLARATION OF DAVID J. FURNESS

I, David J. Furness, hereby state and declare as follows:

1. I am a Lieutenant General in the United States Marine Corps, currently serving as the Deputy Commandant for Plans, Policies, and Operations, Headquarters Marine Corps, located in Washington, D.C. I make this declaration in my official capacity, based upon my personal knowledge and upon information that has been provided to me in the course of my official duties.

2. I have been assigned to my current position since August 2021. Prior to my current assignment, I served as the Assistant Deputy Commandant for Plans, Policies and Operations from August 2020 to August 2021. My Marine Corps career began in 1987 when I was commissioned as a Second Lieutenant on 16 May after graduating from the Virginia Military Institute. Throughout my career I have served in a variety of command and staff billets in both the operating forces and supporting establishment.

(a) As a Lieutenant I served as a rifle platoon command and an 81mm mortar platoon commander in the Second Marine Division with 3d Battalion, 4th Marines and 2d Battalion, 8th Marines. As a Captain and Major I served in the 1st Marine Division as the Commanding Officer of Company K, and the Operations Officer of the 3rd Battalion, 7th Marines. As a Lieutenant Colonel I again served in the 1st Marine Division as the G3 Plans Officer, Deputy G-3, Commanding Officer of 1st Battalion, 1st Marines, and then as the Executive Officer of the 1st Marine Regiment. As a Colonel I commanded the 1st Marine Regiment. As a General Officer I commanded Combined Joint Task Force-Horn of Africa, and the 2d Marine Division.

(b) In the Supporting Establishment I have served on the staff of The Basic School as a Staff Platoon Commander and as a Tactics Instructor for both the Basic Officer and Infantry Officer Course, as Commanding Officer of Recruiting Station Sacramento, California, as the Director, Marine Corps Legislative Liaison Office, United States House of Representatives, as the Director of Expeditionary Warfare School, as the Legislative Assistant to the Commandant of the Marine Corps, and as the Assistant Deputy Commandant for Plans, Policy and Operations, Headquarters, United States Marine Corps.

(c) My professional military education includes The Basic School, the Infantry Officer Course, the U.S. Army Infantry Officer Advanced Course, the Marine Corps Command and Staff College, the School of Advanced Warfighting, and the National War College. I earned Masters Degrees from both the Marine Corps Command and Staff College and the National War College.

(d) I participated in contingency operations in the Republic of Panama, and in the following named operations: Operation Provide Comfort, Operation Unified Assistance, Operation Iraqi Freedom, and Operation Enduring Freedom.

(e) As part of my duties currently, I am responsible for coordinating the development and execution of Marine Corps plans and policies related to the structure, deployment, and employment of Marine Corps forces in general. I am also the Operations Deputy for the Commandant on all Joint Chiefs of Staff matters. In this capacity I serve as the focal point for the interface between the Marine Corps and the other joint and combined activities of the Joint Chiefs of Staff and the unified Commanders-in-Chief, and various allied other foreign defense agencies.

3. On August 24, 2021, the Secretary of Defense directed the Secretaries of the Military Departments to immediately begin full vaccination of all members of the Armed Forces under DoD authority on active duty or in the Ready Reserve. The Secretary of the Navy directed implementation of SECDEF's COVID-19 vaccination mandate¹ via a Department-wide administrative message (ALNAV) on August 30, 2021. The ALNAV applies to both Services within the Department of the Navy (DON), the United States Navy and the United States Marine Corps. The ALNAV requires all active duty DON Service members, who are not already vaccinated, exempted, or currently seeking an exemption, to be fully vaccinated with an FDA-approved COVID-19 vaccine within 90 days, and all Reserve Component personnel to be fully vaccinated within 120 days. ALNAV 062/21 ¶ 4.

4. Active duty Sailors and Marines must therefore become fully vaccinated by November 28, 2021, and Reserve Component Sailors and Marines must become fully vaccinated² by December 28, 2021. The requirement to obtain full vaccination constitutes a lawful order under

¹ SECDEF Memo, "Memorandum for Senior Pentagon Leadership, Commanders of the Combatant Commands, Defense Agency, and DoD Field Activity Directors." (August 24, 2021).

² Although refusal to receive the vaccine may subject a member to adverse administrative or disciplinary action, the vaccine will not be forcibly administered to any member who refuses.

Article 92 of the Uniform Code of Military Justice (UCMJ), and failure to comply may result in punitive or adverse administrative action, or both. ALNAV 062/21 ¶ 5.

5. The USMC issued service-specific guidance via a separate administrative message (“MARADMIN”) on September 1, 2021. MARADMIN 462/21 outlines Marine Corps policy concerning the mandatory vaccination of USMC service members, vaccination administration and reporting requirements, and general guidance related to logistics and distribution of vaccines. The policy reiterates that all Marine Corps active and reserve personnel must become fully vaccinated against COVID-19, unless medically or administratively exempt. MARADMIN 462/21 ¶ 3.a.-3.b. The requirement to become fully vaccinated is a lawful order, punishable under Article 92 of the Uniform Code of Military Justice (UCMJ). *Id.* ¶ 3.1.; 10 U.S.C. § 892. Ordinarily, any officer with authority to convene courts-martial or administer nonjudicial punishment under Article 15 of the UCMJ may dispose of alleged violations of the UCMJ. Manual for Courts-Martial (“MCM”), Part II, Rules for Court Martial, 401. The authority to dispose of offenses arising from COVID-19 vaccine refusals is withheld to the general court-martial convening authority, although the special court-martial convening authority may issue administrative counseling. MARADMIN 462/21 ¶ 3.1. Withholding this authority from lower ranking commanding officers and commanders precludes administrative separation or disciplinary action without elevated review and direction of a general officer.³

6. MARADMIN 462/21 ¶ 3.j & 3.k provides that service members may seek two types of exemptions, medical and administrative. Medical exemptions to vaccination are governed by Army Regulation (AR) 40-562, which is a consolidated Military Services regulation

³ “General officers” comprise the highest ranks in the military. Officer ranks range from O-1 to O-10, with general officers occupying the ranks between O-7 to O-10. In the Marine Corps, a general officer is any officer serving in the rank of Brigadier General or higher.

applicable to the Navy and Marine Corps via Bureau of Medicine Instruction 6230.15B (hereinafter BUMEDINST 6230.15B). Granting medical exemptions is a medical function, whereas granting administrative exemptions is a non-medical function. BUMEDINST 6230.15B, 2-6.

7. The policy provides the following with respect to medical exemptions:

a. Medical exemptions. A medical exemption includes any medical contraindication relevant to a specific vaccine or other medication. Health care providers will determine a medical exemption based on the health of the vaccine candidate and the nature of the immunization under consideration. Medical exemptions may be temporary (up to 365 days) or permanent. Standard exemption codes appear in appendix C.

(1) *General examples* of medical exemptions include the following—

(a) Underlying health condition of the vaccine candidate (for example, based on immune competence, pharmacologic or radiation therapy, pregnancy and/or previous adverse response to immunization).

(b) *Evidence of immunity* based on serologic tests, documented infection, or similar circumstances.

(c) An individual's clinical case is not readily definable. In such cases, consult appropriate medical specialists, including specialists in immunization health care.

AR 40-562, ¶ 2-6a.(1) (emphasis added).

As the policy reflects, these are just examples of situations when health care providers may determine a medical exemption is warranted but each exemption request is an individual determination based on the health of the individual and the disease at issue. Additionally, there are *some*, but not all, diseases in which serologic or other tests may be used to identify pre-existing immunity.⁴

⁴ The AR states, "*Screening for immunity*. For *some* vaccine-preventable diseases, serologic or other tests can be used to identify pre-existing immunity from prior infections or immunizations that may eliminate unnecessary immunizations." AR 40-562, 2-1.g (emphasis added).

8. MARADMIN 462/21 ¶ 3.j. provides specific guidance related to processing medical exemptions. The policy requires the electronic documentation of vaccination or vaccine exemption, if applicable, in the Medical Readiness Reporting System (MRRS) and the Service member's Electronic Health Record (EHR). MARADMIN 462/21 ¶ 3.h.2. Permanent medical exemptions are granted only where the service member has a medical contraindication to the COVID-19 vaccine and must be approved by the first Command Surgeon, in the grade of O-5 or above, in the Service member's chain of command. MARADMIN 462/21 ¶ 3.j. Temporary medical exemptions may be granted when there is a temporary medical reason to postpone vaccination, and such exemptions may be approved by a licensed DoD healthcare provider. *Id.*

9. On October 7, 2021, MARADMIN 533/21 was issued to provide additional guidance related to the documentation of medical exemptions. Permanent medical exemptions are assessed, granted, and documented as required by MARADMIN 462/21 and MARADMIN 533/21 ¶ 2.c.2. All administrative exemptions are required to be documented in the Medical Readiness Reporting System (MRRS) not later than October 24, 2021, for active duty service members, and November 24, 2021, for reserve component personnel. MARADMIN 533/21 ¶ 2.c. Members with pending exemption requests are granted temporary medical exemptions pending the approval or denial of their request.⁵ MARADMIN 533/21 ¶ 2.c.4.

10. For either a temporary or permanent medical exemption request, medical providers evaluate the patient for medical contraindications based on documented medical history and/or clinical evaluation, and an assessment of the benefits and risks to the patient. BUMEDNOTE 6300 of September 3, 2021, *Clinical Consultation Guidance for COVID 19 Vaccine Permanent Exemption* (published September 3, 2021). Additionally, medical providers

⁵ No disciplinary or administrative action will be initiated with a permanent medical exemption request is pending.

are encouraged to request expert consultation by an immunizations specialist, when necessary.

Medical contraindications for the COVID-19 vaccine include:

- (a) Anaphylaxis from a previous COVID-19 vaccine or COVID-19 vaccine ingredient;
- (b) Myocarditis or pericarditis after COVID-19 vaccine administration or infection;
- (c) Temporary association of Stevens-Johnson Syndrome or Guillain-Barré Syndrome that cannot be attributed to another underlying cause within 6 weeks of COVID-19 vaccine administration or infection;
- (d) Thrombosis with Thrombocytopenia Syndrome (TTS) after COVID-19 vaccine administration;
- (e) Persistent clinical symptoms lasting 4 or more weeks following a COVID-19 infection that cannot be attributed to another underlying cause after evaluation and focused workup ("Long COVID"). *Id.*

In the *Clinical Consultation Guidance*, providers are also encouraged to consult CDC guidance.⁶

11. If a patient does not present with contraindications for COVID-19 vaccination, or does not otherwise present a clinical case requiring specialized assessment under BUMEDINST

⁶ An example of CDC clinical considerations includes:

If you were treated for COVID-19 with monoclonal antibodies or convalescent plasma, you should wait 90 days before getting a COVID-19 vaccine. Talk to your doctor if you are unsure what treatments you received or if you have more questions about getting a COVID-19 vaccine.

If you or your child has a history of multisystem inflammatory syndrome in adults or children (MIS-A or MIS-C), consider delaying vaccination until you or your child have recovered from being sick and for 90 days after the date of diagnosis of MIS-A or MIS-C. Learn more about the clinical considerations for people with a history of multisystem MIS-C or MIS-A.

<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/faq.html>

6230.15B, paragraph 2-6a.(1)(c), the patient does not qualify for a permanent medical exemption.

12. In contrast to medical exemptions, granting administrative exemptions is a non-medical function handled by separate procedures. Administrative exemptions may be granted for reasons such as pending separation or retirement, permanent change of station, emergency leave, and religious accommodation. BUMEDINST 6230.15B, ¶ 2-6.b. Marine Corps policy concerning requests for the accommodation of religious practices generally, including immunizations, is outlined in Marine Corps Order (MCO) 1730.9 (attached as Exhibit A to this declaration). A service member seeking an exemption from immunization for religious reasons must submit the request, using Navy Marine Corps (NAVMC) 10274 Administrative Action (AA) Form (attached as Exhibit B to this declaration), in accordance with MCO 1730.9, paragraphs 4.a.(2) and 4.a.(3).

a. The requirements for a request include: (1) the nature of the accommodation requested, (2) the duration of the request, (3) the religious or sincerely held spiritual basis for the request, and (4) the faith group or belief system identified with the request. MCO 1730.9 ¶ 4.a.(3). Service members must complete an interview with the cognizant command chaplain, who assesses whether the requestor's beliefs appear sincerely held for recommendation to the commander. *Id.*, encls. (1) and (2). Requests for the accommodation or religious practices for medical requirements are forwarded, via the general court-martial convening authority, to the Deputy Commandant, Manpower and Reserve Affairs (DC M&RA)⁷ for action as the adjudication authority. *Id.* ¶ 4.b.

⁷ "Requests for the accommodation of religious practices that require the waiver of Department of Navy and Marine Corps Orders and regulations will be submitted to DC M&RA via the first GCMCA. This type of request includes requests for grooming, religious apparel, and medical requirements. Prior to an Adjudication Authority determination, the authority must consult with their staff judge advocate." *Id.* ¶ 4.b.

Requests for waiver of immunization requirements must be forwarded to DC M&RA within 30 days of receipt of the request. *Id.* ¶ 4.b.(2). DC M&RA review and final determination must be made within 60 days of receipt of the request.⁸ *Id.*

b. If a policy, practice, or duty substantially burdens a Marine's exercise of religion then the request can only be denied if the military policy, practice, or duty is in furtherance of a compelling governmental interest, and there is no lesser restrictive means to furthering that compelling interest. *Id.* ¶ 3.a. The policy states that the Marine Corps, not the Marine requesting the accommodation, carries the burden of proof in establishing that the policy, practice or duty furthers a compelling governmental interest and there are no lesser restrictive means to further that interest. *Id.* ¶ 3.a.(2).

c. MCO 1730.9 directs the adjudication authority to consider every request on a case-by-case basis. However, adjudication authorities may consider the "individual and the cumulative effects of granting similar religious accommodation requests on the necessary elements of mission accomplishment;" *Id.* ¶ 4(b)(2). MCO 1730.9 lists specific considerations to be considered when a member requests a religious accommodation seeking exemption from vaccination requirements.⁹ The DC M&RA also considers the recommendation of the Religious Accommodation Board.¹⁰ Further, the adjudication

⁸ No disciplinary or administrative action will be initiated while a request for an exemption for religious accommodations is pending.

⁹ "The Marine Corps requires immunizations for all Marines, based upon our compelling interest in military readiness and the health and safety of the Total Force. Immunizations are an important component of individual and unit medical readiness. Marines may be called upon to operate in environments and under conditions that increase their exposure and susceptibility to illness, particularly in deployed environments and when Marines are required to be in close proximity to each other such as recruit training and embarked on ships, aircraft, and military vehicles. Mission accomplishment may require that Marines be immunized to protect against disease due to increased exposure potential, or to conform with international health regulations incident to foreign travel or unit deployment." *Id.*, ¶ 3.f.(1).

¹⁰ The Religious Accommodation Review Board (RARB) consists of a minimum of three voting members and non-voting advisors, to include a recorder, a legal advisor, a chaplain advisor, and other personnel as determined by the Board President. *Id.*, Encl. 3, ¶ 1. The RARB provides written recommendations as to the merits of each

authority may consider any adverse health and safety impacts of the request in rendering its decision. *Id.*, ¶ 4.b.(3)(b). For any medical-related accommodation request, paragraph 4(e)(6) requires the Director, Health Services provide a medical advisory. If the request for religious accommodation for immunization is disapproved, the service member has the right to request an appeal to the Commandant of the Marine Corps (CMC).¹¹ *Id.*, ¶ 4(c)(1).

13. Enforcement Generally: USMC commanders are required to issue appropriate orders to ensure Service members under their command are fully vaccinated. MARADMIN 462/21 ¶ 3.1. In the event a service member does not qualify for an exemption and refuses the order to become vaccinated, the member's refusal is documented in MRRS and the general court-martial convening authority may initiate disciplinary or adverse administrative action. MARADMIN 533/21 ¶ 2.c.4.

14. Disciplinary options generally: While MARADMIN 462/21 elevates disposition authority for cases involving vaccine refusal to the general court-martial convening authority, commanders generally possess a wide array of administrative and disciplinary options with which to dispose of Service members' offenses under the UCMJ. Subject to the limits of the commander's authority, the commander's administrative corrective measures include formal or

religious accommodation request and whether the DC M&RA should approve or deny, in whole or in part, each request. The Board may also recommend an accommodation request be temporarily or partially denied. *Id.*, Encl. 3, ¶ 2.

¹¹ "The appellate authority for religious accommodation requests that can be approved consistent with Department of Navy and Marine Corps Orders and regulations is the first Marine Corps GCMCA The Appellate Authority for religious accommodation requests that require waiver of Department of Navy and Marine Corps Orders or regulations is the Commandant of the Marine Corps (CMC). The Assistant Commandant of the Marine Corps or the Director of the Marine Corps Staff may take action on behalf of the CMC. Decisions by an Appellate Authority are final. A Service member who desires to appeal DC M&RA's decision will submit the appeal in standard naval letter addressed to CMC within 10 business days of receiving the determination. The appeal should provide substantive information as to why the Service member or applicant believes the decision was unjust. The appeal will be sent to CMC(MPO) at MPO@usmc.mil." *Id.*, ¶ 4.c.(1).

informal counseling, non-punitive letters of caution or censure,¹² withholding of privileges, and extra-military instruction, as governed by the relevant service policy. Disciplinary options include non-judicial punishment under Part V of the MCM, disposition of the charges by court-martial where the commander has the authority to do so, or forwarding of charges for trial by court-martial where the commander does not.

a. Nonjudicial punishment is a forum generally reserved for minor offenses, or those offenses which the maximum sentence would not include a Dishonorable Discharge or confinement for greater than one year if tried by a general court-martial. MCM, Part V ¶ 1.e. Punishments are limited by the rank and position of the cognizant commander, as well as the rank of the person accused of misconduct. *Id.* ¶ 2, 5. Punishments and service limitations are outlined in MCM Part V and the Manual of the Judge Advocate General (JAGMAN), but commonly include some combination of the following: admonishment or reprimand, extra duties, restriction, reduction in rank, or forfeiture of pay. MCM, Part V ¶ 5; JAGMAN, 0111. Commanders are encouraged to permit the accused to speak with counsel subject to the immediate availability of counsel, the delay involved, and operational commitments or military exigencies. JAGMAN 0108 ¶ a.(1). Service members not attached to a vessel have the right to refuse non-judicial punishment and request trial by court-martial. MCM, Part V ¶ 3; JAGMAN 0108 ¶ a. Following imposition of non-judicial punishment, the service member has five working days to submit an appeal, and may request additional time for good cause. MCM, Part V ¶ 7. The member's appeal is forwarded, along with the commander's endorsement, to the cognizant general court-martial convening authority for action. MCM, Part V ¶ 7; JAGMAN, 0117.

¹² Non-punitive letters of caution or censure are matters between the issuing authority and the counseled member and do not become part of the member's official service record. Manual of the Judge Advocate General (JAGMAN) 105 ¶b.(2).

b. More serious offenses under the UCMJ may be subject to trial by court-martial. There are three types of courts-martial: summary court-martial, special court-martial, and general court-martial. Depending on the rank and position of the commander, he or she may or may not be authorized to convene certain types of courts-martial. UCMJ, 10 U.S.C. § 821-24. Further, the nature of the proceedings and punishments available are limited depending on the forum and rank of the accused. *See* UCMJ, 10 U.S.C. Chapter 47, Subchapters IV, VIII. The most severe punishments, such as the death penalty, a Dishonorable Discharge, Dismissal, or extended periods of confinement, are only available at general courts-martial, and certain offenses are only permitted to be tried by general courts-martial. *Id.* Summary courts-martial are less formal than either special or general courts-martial, which are equivalent in formality and procedure to civilian criminal courts; however, each court-martial forum is governed by the procedures outlined in the MCM, Part II, Rules for Court Martial. Special courts-martial and general courts-martial, in particular, have substantial legal and procedural requirements with respect to pre-trial, trial, and post-trial judicial proceedings.¹³ The adjudication of trials by court-martial generally take months before the court is convened, and may take several months, depending on the matters involved in the case and the court's docket, prior to the trial date. Upon conclusion of the trial, the member may appeal the findings or sentence as provided in Chapter XI and XII of the MCM.

15. Administrative Separations Generally: Adverse administrative action includes administrative separation from the service. Administrative separation procedures may vary in certain respects depending on the Service member's status (officer or enlisted), years of service,

¹³ Relevant to a charge of violation of Article 92 (disobeying a lawful order) for refusal to receive the COVID-19 vaccination, an accused member could choose to raise all available affirmative defenses, including the lawfulness of the order, at court-martial.

and record of performance, among other factors. Administrative separations for officers are processed in accordance with SECNAV Instruction 1920.6D (hereinafter SECNAVINST 1920.6D) and Chapter 4 of MCO 1900.16, Separation and Retirement Manual (hereinafter MARCORSEPMAN), while enlisted administrative separations are processed pursuant to MARCORSEPMAN, Chapter 6. “Marines refusing the COVID-19 vaccination, absent an approved administrative or medical exemption, religious accommodation, or pending appeal shall be processed¹⁴ for administrative separation.” MARADMIN 612/21 ¶ 3.a.

16. Adverse incidents involving officers require notification to the CMC, Military Personnel Policy Branch. MARCORSEPMAN ¶ 4101. The CMC shall initiate administrative separation processing when the officer’s performance or conduct is such that administrative separation is appropriate. *Id.* Reasons for separation are outlined in SECNAVINST 1920.6D, and include reasons such as Misconduct, Moral or Professional Dereliction, and Substandard Performance. The specific procedures involved with processing an officer for misconduct are outlined in SECNAVINST 1920.6D, Enclosure (6), “Policy Governing Involuntary Separation for Cause or Parenthood”, and Enclosure (7), “Guidelines on Separations for Cause”.

17. The applicable procedures may vary in certain respects depending on the officer’s type of appointment, years of service, and record of performance, among other factors. Probationary officers may be processed without a Board of Inquiry (BOI) when the show cause authority determines that an Honorable, or General (under honorable conditions) characterization of service is appropriate. SECNAVINST 1920.6D, Encl (2), ¶ 25; Encl (7), ¶ 3.a. Non-probationary officers must be processed using BOI procedures, which entails a formal administrative hearing over which a panel of no fewer than three senior officers preside in order

¹⁴ Although processing for separation is required, this does not automatically result in a member actually being separated. Members processed for separation may ultimately be retained in the service.

to make findings with respect to the bases for separation, and recommendations with respect to retention or separation, and character of service. *Id.*, Encl (7) ¶ 4; Encl (11).

18. Separation processing should be completed 30 calendar days from the date a command notifies an officer of the commencement of separation processing in cases where no BOI is required. SECNAVINST 1920.6D ¶ 9b. In cases where a BOI is required, the processing goal is 90 calendar days from the date a command notified an officer of the commencement of separation processing. *Id.* at ¶ 9c. Every effort is made to adhere to these time goals but the failure to process an administrative separation within the prescribed time goals will not constituted a bar to separation or characterization. *Id.* at ¶ 9.

19. Enlisted Marines may be separated for the convenience of the government for reasons including refusal of medical treatment, including refusal of inoculation, if the refusal interferes with duty. MARCORSEPMAN ¶ 6203.7.e. Alternatively, Marines may be separated by reason of misconduct for offenses which would warrant a punitive discharge under the UCMJ, which includes violations of Article 92 of the UCMJ. MARCORSEPMAN ¶ 6210.6. Marines with fewer than six years of service may be processed using notification procedures under MARCORSEPMAN 6303, unless characterization of service¹⁵ of Other Than Honorable is warranted. Administrative board procedures under MARCORSEPMAN paragraph 6304 are used in instances where an Other Than Honorable characterization is warranted, or for Marines with greater than six years of service, if they elect an administrative board.

¹⁵ A characterization of service is assigned to a Service member upon separation from the military and generally reflects the quality of an individual's military service. The highest characterization of service is Honorable, followed by General (Under Honorable Conditions), Other Than Honorable, Bad-Conduct, and Dishonorable. Officers may be awarded a Dismissal, which is akin to a Dishonorable discharge. The first three types of characterization may be awarded using administrative procedures, whereas Bad Conduct and Dishonorable discharges, as well as an officer's Dismissal, are considered "punitive discharges." These types of discharges may only be awarded by a court-martial sentence and imposed after appellate review is complete.

20. Notification procedures afford the Marine with notice of the adverse administrative action and an opportunity to submit written matters for consideration, whereas administrative board procedures require a formal administrative hearing. The MARCORSEPMAN processing time goal where a board is not required is 15 working days after the Marine received notification of separation. MARCORSEPMAN ¶ 6102. If a board is required, action should be completed within 50 working days after the Marine received notification of separation. *Id.*

21. MARADMIN 462/21 permits the special court-martial convening authority to issue administrative counseling pursuant to paragraph 6105 of the MARCORSEPMAN, which provides the following for involuntary separations by reason of misconduct:

“In cases involving unsatisfactory performance, pattern of misconduct, minor disciplinary infractions, or other bases requiring counseling under paragraph 6105, separation processing may not be initiated until the Marine is counseled concerning deficiencies and afforded a reasonable opportunity to overcome those deficiencies.”

MARCORSEPMAN ¶ 6105.3. The duration of time that affords the Marine a “reasonable opportunity” is determined by the commanding officer on a case-by-case basis, and the commanding officer must sign the formal counseling document (commonly known as a “Page 11”). *Id.* The MARCORSEPMAN provides standard language to include to advise the Marine of potential disciplinary or adverse administrative action, to include administrative separation, and advises the member of his or her right to provide a rebuttal to be filed with the counseling. *Id.*

22. Discharged service members may seek a review of his or her discharge through the cognizant Discharge Review Board (DRB). 10 U.S.C. § 1553. The DRB is empowered to change and issue a new discharge on grounds of equity or propriety. 32 C.F.R. § 70.9. 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.* Discharged service members may also seek an upgraded discharge from the appropriate Board for Correction of Military Records (BCMR), which is the Board for Correction of Naval Records (BCNR) for the Navy and Marine Corps personnel. 10 U.S.C. § 1552. The BCNR has 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. The BCNR may correct any military record when it is necessary to correct an error or remove an injustice. *Id.* The BCNR's action may result in a member being reinstated in the Marine Corps. If a Service member is unable to obtain relief through the appropriate DRB or BCMR, the service member may elect to challenge the agency's decision and administrative proceedings in federal court under applicable federal law.

23. In summary, the Marine Corps is providing its personnel opportunities to seek medical and religious exemptions from the requirement to be vaccinated. For those Marines who do not wish to pursue an exemption or have their exemption requests denied after full adjudication including appeals and still refuse to be immunized, the Marine Corps' interest in good order and discipline is best served by adjudicating each refusal on a case-by-case basis. Each Marine will be afforded all due process to which he or she is entitled while fully exhausting intra-service administrative and disciplinary processes that result in a final agency action.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 3rd day of November, 2021.



DAVID J. FURNESS

Furness Declaration - Exhibit A



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3000 MARINE CORPS PENTAGON
WASHINGTON DC 20350-3000

MCO 1730.9
M&RA (MPO)
12 July 2021

MARINE CORPS ORDER 1730.9

From: Commandant of the Marine Corps
To: Distribution List

Subj: ACCOMMODATION OF RELIGIOUS PRACTICES IN THE MARINE CORPS

Ref: (a) Free Exercise Clause of the First Amendment to the Constitution of the United States
(b) The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb, *et seq.*
(c) 10 U.S. Code §774
(d) DoDI 1300.17, Religious Liberty in the Military Services
(e) SECNAVINST 1730.8B CH-1, Accommodation of Religious Practices
(f) MCRP 6-11D, Sustaining the Transformation (28 Jun 99)
(g) MCTP 6-10A CH 1, Sustaining the Transformation (4 Apr 18)
(h) MCWP 6-11, Leading Marines (formerly FMFM 1-0)
(i) MCO 1020.34H, Marine Corps Uniform Regulations

Encl: (1) Chaplain Interview Checklist Template
(2) Chaplain Memorandum for the Record Template
(3) Religious Accommodation Review Board

1. Situation. Pursuant to reference (a), Service members have a right to observe the tenets of their religion or to observe no religion at all, as provided in this Order. Reference (b) prohibits the federal government from substantially burdening a person's exercise of religion unless the government can demonstrate the burden to the person is: (1) in furtherance of a compelling government interest; and (2) the least restrictive means of furthering that compelling government interest. This Order implements Marine Corps policy for religious accommodation requests in accordance with references (d) and (e).

2. Mission. As required by references (a) - (d), the Marine Corps will accommodate individual expressions of sincerely held beliefs (conscience, moral principles, or religious beliefs) which do not have an adverse impact on a compelling government interest. Religious accommodation includes excusing a service member from an otherwise applicable military policy, practice, or duty. In accordance with reference (d), if such a military policy, practice, or duty substantially burdens a service member's exercise of religion, the accommodation request can only be denied if the cognizant Adjudication Authority determines the following: (1) the military policy, practice, or duty is in furtherance of a compelling government interest; and (2) the military policy, practice, or duty is the least restrictive means of furthering that compelling governmental interest.

DISTRIBUTION STATEMENT A: Approved for public release; distribution is unlimited.

MCO 1730.9
12 JUL 2021

3. Execution

a. Commander's Intent

(1) Per references (b) through (d), Marine Corps Adjudication Authorities will accommodate practices of a Marine based on a sincerely held religious belief when such requests do not adversely affect a Marine or unit's mission accomplishment capabilities. Accommodation includes excusing a Marine from an otherwise applicable military policy, practice, or duty. In accordance with reference (d), if such military policy, practice, or duty substantially burdens a Marine's exercise of religion then a request for accommodation can only be denied if:

(a) The military policy, practice, or duty is in furtherance of a compelling governmental interest; and

(b) The denial is the least restrictive means of furthering that compelling interest.

(2) In applying the standard of paragraphs 3.a.(1)(a) and 3.a.(1)(b), the burden of proof is placed upon the Marine Corps, not the individual requesting the exemption.

(3) Commanders making final determinations on requests will consider, with appropriate annotation on the determination, the elements of mission accomplishment that form the basis of the compelling governmental interest.

(4) Commanders must remain objective in considering requests to accommodate religious practices. Each request for religious accommodation must be reviewed on a case-by-case basis, giving consideration to the full range of facts and circumstances relevant to the specific request. It is essential that commanders articulate the factual basis underlying their decision.

b. Compelling Governmental Interest The United States Marine Corps has a compelling governmental interest in mission accomplishment at the individual, unit, and organizational levels. The necessary elements of mission accomplishment include: (1) military readiness; (2) unit cohesion; (3) good order and discipline; and (4) health and safety. Adjudication Authorities must pay particular attention to how religious accommodation request determinations will impact the unit's ability to accomplish the mission. In making their decision, the matters to be considered by a commander include, but are not limited to, the following:

(1) The Marine Corps has a compelling interest in instilling in each Marine an identity as part of a team. Almost everything the Marine Corps does, it does as a team. It trains as a team, fights as a team, wins as a team. This identity is in the very nature of a "Corps." To be effective, every member of the team must commit to accepting a role and a willingness to sacrifice individually to carry out that role in support of the team. To defend our nation, some Marines have been, and will be called upon to make the ultimate sacrifice. A commitment of this magnitude runs counter to humanity's most primal survival instincts, but the mission of the Corps requires it. The very nature of being a Marine means possessing more than a willingness to go into harm's way—it requires the strength of character to move forward in environments that will cost Marine lives. To do this, Marines must have more than courage. They must have the highest level of

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discipline and a unique trust in those with whom they serve. They must know at an instinctual level that their fellow Marines are as committed to stepping forward in those dangerous environments to execute the mission. This discipline is forged through Marine training and culture, instilled as an ethos at the very beginning of a recruit's journey to becoming a Marine, and carried with them into those dangerous and difficult environments for which the Corps was created.

(2) The Marine way of life includes the use of certain tools to instill and maintain that team mindset. One such tool is the uniform. For the Marine, uniformity is a reminder for the individual that they have joined a storied team with a warrior culture. An individual joins the Corps and through the transformation to Marine, joins a team that relies on individual sacrifice and performance in the context of executing the Corps' mission. As a practical matter, this means that everyone desiring to be a Marine often must be willing to give up something to accept uniformity and what it means. This common sacrifice contributes to the forging of unit cohesion.

(3) Importantly, the uniform is a representation of commitment to other Marines. It does not supersede an individual Marine's personal beliefs or values. No Marine will be asked to change their personal beliefs, including religious beliefs, which are protected by the United States Constitution. The Corps has an obligation to try to find ways to facilitate each Marine's commitment to their faith as well as to each other. To facilitate that obligation, the Corps has created a process enabling each Marine to request a waiver of its regulations to allow the display or facilitation of articles of faith. That process is outlined herein.

c. Pre-accession Requests and Delayed Entry Program. During the screening process, the recruiter will explain to the applicant the Marine Corps' uniform and grooming policies and the religious accommodation policy. An applicant will acknowledge an understanding of these policies, in writing, and inform the recruiter if they maintain religious beliefs that would require an accommodation of the uniform and/or grooming policies. The recruiter will explain the conditions and considerations taken by commands and individuals when an accommodation has been requested as described in sections 3.c, 3.d, 3.e, and 3.f of this Order. An applicant must be determined by the Recruiting Station to be a qualified applicant for accession before a request for religious accommodation will be considered. The applicant will acknowledge, in writing, an understanding of these policies. Once a decision on the accommodation request is made, the applicant may accept the decision and then be contracted and enter the delayed entry program or direct ship. While in the delayed entry program, the recruiter reinforces the requirements to be a Marine, and begins to instill the sense of team over self. The qualified applicant begins to gain an understanding of what it means to be a Marine and begins transforming underlying assumptions of being a Marine into service beliefs of being a Marine. This transformation, as identified in references (f) and (g), begins as the qualified applicant prepares for recruit training.

d. Entry Level Training (ELT). Of particular importance is the recruit training phase which begins the ELT continuum. During recruit training, the recruit is transformed from a civilian into a United States Marine. Recruit training instills the understanding of, and ability to, put the needs of the unit over an individual Marine's needs. Uniformity plays an integral role in the Transformation. As the Marine proceeds through the ELT continuum, the

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Marine is increasingly introduced to working with military equipment, and the associated necessary health and safety precautions.

e. Unit Assignment

(1) Fleet and Deployable units. Marines assigned to Fleet and deployable units face the possibility of protecting the interest of the United States in the full range of conflict at any time. Unit readiness, safety and security are essential in ensuring Marine units are ready to respond to crisis. Marines assigned to these units are involved in many inherently dangerous activities to include combat operations. Personal protective equipment is required. Some accommodations may not be suitable during such assignments and previously approved accommodations are subject to review. During combat deployments, the needs of the unit are greater than the needs of the individual.

(2) Non-deployable units. Marines assigned to non-deployable units are typically involved in fewer inherently dangerous activities and have less reliance on personal protective equipment and therefore, health and safety considerations are weighed against some accommodations. However, the need for uniformity in public-facing ceremonial duties is high. Marines who perform ceremonial duties must be mindful that they represent the entirety of the Corps to the general public and to each specific audience for whom ceremonies are performed. When performing public-facing ceremonial roles, Marines must signal that the Corps is neutral on matters of religion. This is an important representational role, one that inspires others to join the Corps and that communicates to national leaders and others that the Corps is achieving its goal of creating a cohesive group of warriors capable of defending the nation's interests.

f. Other Considerations

(1) The Marine Corps requires immunizations for all Marines, based upon our compelling interest in military readiness and the health and safety of the Total Force. Immunizations are an important component of individual and unit medical readiness. Marines may be called upon to operate in environments and under conditions that increase their exposure and susceptibility to illness, particularly in deployed environments and when Marines are required to be in close proximity to each other such as recruit training and embarked on ships, aircraft, and military vehicles. Mission accomplishment may require that Marines be immunized to protect against disease due to increased exposure potential, or to conform with international health regulations incident to foreign travel or unit deployment.

(2) The Marine Corps generally accommodates religious dietary observances by adopting a standard core menu that supports many religious dietary requirements at military dining facilities, ashore and afloat, as well as by issuing meals, ready-to-eat (MREs) and meals, religious, ready-to-eat (MRE-R) in field environments. However, forward deployed dining facilities may not be able to provide for all dietary practices and MRE or MRE-Rs cannot always be guaranteed. When military dining facilities, MREs or MRE-Rs cannot meet a Marine's religious dietary observances during training events, commanders may authorize Marines to provide their own supplemental food rations to the extent that health, safety or mission readiness of the unit is not compromised.

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(3) The Marine Corps generally accommodates religious observance requests by permitting Marines time off for worship and similar religious observance practices, consistent with mission accomplishment. Time off for religious observances can routinely be addressed by modifying duty schedules, or by granting leave or liberty when the time required for religious observance would interfere with the performance of normal duties. However, a Marine must also be prepared to perform alternative duty or duty hours for the benefit of the team. Marines must also recognize that time for religious observances may not always be readily available in a forward-deployed or operational environment.

4. Concept of Operations

a. Accommodation Requests

(1) Qualified Applicant Requests. Qualified applicants will be briefed on the requirements of references (d) and (e) and this Order and screened on their willingness to comply with reference (i) if accessed into the Marine Corps. Qualified applicants may submit a pre-accession request for religious accommodations in accordance with this Order. Qualified applicants requesting an accommodation will be interviewed by a chaplain, per enclosures (1) and (2). A decision concerning the request must be made prior to participation in the commissioning program, warrant officer program, enlistment, reenlistment, enrollment in a Military Service Academy or a Senior Reserve Officers' Training program, or award of such scholarship or benefit. Pre-accession requests for religious accommodations will be forwarded through the chain of command to the Commanding General, Marine Corps Recruiting Command (CG, MCRC), for further coordination with the Deputy Commandant, Manpower and Reserve Affairs (DC M&RA). Qualified applicants who submit such requests may not be accepted for enlistment before DC M&RA makes a determination on their requests.

(2) Service Members. Service member religious accommodation requests will be submitted using the NAVMC 10274 AA form. Requests requiring DC M&RA decision will be forwarded, via the chain of command, to include the first Marine Corps General Court-Martial Convening Authority (GCMCA) in the chain of command. Service members submitting a religious accommodation request must continue to comply with the policy, practice, or duty from which an accommodation has been requested until informed that the request has been approved by the appropriate authority unless exceptional circumstances exist. The cognizant Appellate Authority may determine whether a particular circumstance qualifies as an exceptional circumstance. For the purposes of this Order, a cadet or midshipman enrolled at a Military Service Academy or in a Reserve Officers' Training Corps are considered service members.

(3) Minimum requirements. Religious accommodation requests will include the nature of the accommodation requested, duration of the request, the religious or sincerely held spiritual basis for the request, and the faith group or belief system identified with the request. Requesters are encouraged, but not required, to propose viable alternatives that could balance the Marine Corps and Marine's interests appropriately (e.g., limiting a request to the wear of certain religious attire in an indoor setting or identifying an alternative immunization). If applicable, the request must also include a photo or description of any head covering, religious affiliated item, grooming standard, and/or personal appearance for which the requester is requesting accommodation. For Service member requests, an

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interview from the cognizant command chaplain is required. See enclosures (1) and (2).

b. Adjudication Authority. Religious accommodation requests that can be approved/denied consistent with Department of Defense, Department of Navy, and Marine Corps Orders and regulations will be reviewed and acted upon by a Marine Corps special court-martials convening authority (SPCMCA). This type of request includes requests for dietary practices and time off for religious observances. Requests for the accommodation of religious practices that require the waiver of Department of Navy and Marine Corps Orders and regulations will be submitted to DC M&RA via the first GCMCA. This type of request includes requests for grooming, religious apparel, and medical requirements. Prior to an Adjudication Authority determination, the authority must consult with their staff judge advocate.

(1) Review and Action Timelines

(a) Review and Action Timelines. Adjudication Authority review and final determinations for requests that can be approved consistent with existing orders, regulations, and policies must be made within 30 business days of receipt of a request that meets the minimum requirements under this Order. However, Adjudication Authority review and a final determination for requests originating from outside the United States or for Reserve Component Service members not on active duty must be made within 60 days of receiving a request that meets the minimum requirements under this Order. Exceptions to these timelines may be granted only in exceptional circumstances.

(b) Requests that require the waiver of otherwise applicable orders, regulations, and policies, must be forwarded to DC M&RA within 30 days of receipt of a request that meets the minimum requirements under this Order. Requests originating from outside the United States or for Reserve Component service members not on active duty must be forwarded to the DC M&RA within 60 days of receipt of a request that meets the minimum requirements under this Order. DC M&RA review and final determinations for these requests must be made within 60 days of receipt of a request. In addition, the individual requesting the accommodation must be informed of the final determination within five business days of final action.

(c) All pre-accession qualified applicant requests will be submitted to DC M&RA for final determination. The request must be received by DC M&RA within 30 days from submission to recruiter.

(d) Per reference (d) to establish controls for compliance, commands will inform DC M&RA when a request for accommodation is received.

(2) Standard of Review. The Marine Corps will approve an individual request for accommodation unless such approval erodes a compelling government interest. The factors detailed above shall be considered. Adjudication Authorities must demonstrate that their determinations consider whether the request is based on a sincerely held religious belief and whether there is a less restrictive alternative means of meeting the compelling government interest while providing for a religious accommodation. Adjudication Authorities must consider every request on a case-by-case basis. However, Adjudication Authorities may consider: (1) the individual and the cumulative effects of granting similar religious accommodation requests on the necessary elements of mission accomplishment; and (2) whether any existing exemptions available for other individuals or entities could be expanded to include the

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requester in whole or in part. Pursuant to reference (d), Adjudication Authorities must ensure, to the greatest extent practical, the consistent application of the policies and procedures prescribed by this Order. This should include a consistent application of prior accommodation decisions.

(3) In making their decision, the matters to be considered and annotated by an adjudication authority include, but are not limited to, the following:

(a) The unit's readiness and potential impacts of the request. This includes consideration of the overall mission of the unit and of the particular position the service member occupies.

(b) Any adverse health and safety impacts of the request. This includes potential interference with the proper functioning of special or protective military equipment (for example a respirator, gas mask, protective helmet or communication gear).

(c) Whether or not accommodations of similar nature have been granted in the past within the unit and the cumulative impact of repeated similar accommodations. Note, requests to accommodate religious practices should not be approved or denied simply because similar requests were approved or denied in the past.

(d) Least restrictive alternate means to fulfil the request that support the Service member in the exercise of their religious beliefs and practices.

(4) Adjudication Authority Notice of Resolution

(a) A qualified applicant or service member will be informed of the approval or disapproval of their request for accommodation in accordance with the review and action timelines in this Order.

(b) A religious accommodation request may be granted in whole or in part. The qualified applicant or service member will be informed in writing of any conditions or limitations placed on the approval to meet the compelling governmental interest in mission accomplishment. For example, conditions related to deployment, health and safety issues relative to particular assignments or types of assignments, or training events or ceremonial occasions that require a service member to conform to military standards to protect health and safety, or maintain good order and discipline.

(c) A qualified applicant or service member whose request is granted in whole or in part will be informed, in writing, of the specific elements of that approval.

c. Administrative Appeal Process. An appeal must be requested in writing within five business days of receipt of final decision by the adjudication authority. An appeal must be forwarded via the chain of command, through the first Marine Corps GCMCA in the chain of command, for appellate decision.

(1) Appellate Authority. The appellate authority for religious accommodation requests that can be approved consistent with Department of Navy and Marine Corps Orders and regulations is the first Marine Corps GCMCA.

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The Appellate Authority for religious accommodation requests that require waiver of Department of Navy and Marine Corps Orders or regulations is the Commandant of the Marine Corps (CMC). The Assistant Commandant of the Marine Corps or the Director of the Marine Corps Staff may take action on behalf of the CMC. Decisions by an Appellate Authority are final. A Service member who desires to appeal DC M&RA's decision will submit the appeal in standard naval letter addressed to CMC within 10 business days of receiving the determination. The appeal should provide substantive information as to why the Service member or applicant believes the decision was unjust. The appeal will be sent to CMC(MPO) at MPO@usmc.mil.

d. Duration and Proposals to Rescind. In accordance with reference (d), an approved religious accommodation request will remain in effect during follow-on duties, assignments, or locations, and for the duration of a service member's military career, including after promotions, reenlistment or commissioning, unless and until rescinded in accordance with the requirements of this Order. As detailed above, the Adjudication Authority may place conditions or limitations on the request, for example those related to deployment, health and safety issues relative to particular assignments or types of assignments, or training events or ceremonial occasions.

(1) Rescissions and modifications. An approved accommodation may be subject to review and rescission, in whole or in part, at any time, based upon a determination that the circumstances and conditions under which the grant of accommodation was approved have changed (e.g., deployment, new duties, or other material change in circumstances). The standard for repealing a previously granted accommodation is the same as the standard for denying an accommodation request. Proposals to review, rescind, or modify an approved accommodation will, at a minimum, originate from the cognizant SPCMCA and will state the basis on which the proposed review, rescission or modification of the religious accommodation has been submitted. When such a proposal is initiated, the service member will be afforded the following:

(a) A written summary of the nature of the materially changed circumstances that require such review and repeal;

(b) No fewer than 10 business days to review and comment on the proposed rescission of the accommodation;

(c) An opportunity to review and comment on any endorsements of the proposal from the chain of command;

(d) Subject to security classification requirements, the opportunity to review and comment on any documents or attachments to the proposal or subsequent endorsements.

(2) Exigent Circumstances

(a) Previously approved requests may be revoked due to exigent circumstances in furtherance of a compelling government interest and due to operational necessity, when time is of the essence, and no less restrictive means of religious accommodation are available. Exigent circumstances may include instances in which a competent military authority has identified a specific and concrete threat to the health and safety (such as toxic chemical, biological, radiological, nuclear agents that may merit a heightened protective posture). During exigent circumstances, the cognizant GCMCA, after consultation with their staff judge advocate, must notify a

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service member of the need to suspend a religious accommodation, the basis for the suspension, the date the suspension will go into effect, and the service member's right to appeal. The cognizant GCMCA shall inform DC M&RA of any actions to suspend a religious accommodation due to exigent circumstances within three business days. Service members will have five business days to submit their appeal to DC M&RA. A Service member may temporarily self-suspend an approved accommodation without surrendering the approval.

(b) Imminent Threat Exigent Circumstances. During exigent circumstances involving an imminent threat to individual, unit, or organizational health and safety, the GCMCA may shorten or eliminate the notification and appeal process until such time as the imminent threat to health and safety no longer exists. The cognizant GCMCA shall inform DC M&RA of any actions to suspend a religious accommodation due to imminent and exigent circumstances within three business days.

e. Subordinate Element Tasks

(1) Deputy Commandant for Manpower and Reserve Affairs (DC M&RA)

(a) Establish a non-statutory Religious Accommodation Review Board ("Board") to consider religious accommodation requests requiring DC M&RA determination (see enclosure (3)).

(b) In accordance with references (d) and (e), the DC M&RA is delegated the authority to act on religious accommodation requests that require waiver of Department of Navy and Marine Corps issuances, directives, and regulations.

(2) Commanding General, Training and Education Command (CG TECOM)

(a) Ensure the training curriculum for commanding officers and sergeants major include appropriate education and training on this Order.

(b) Provide subject matter expertise on the Transformation Process during the ELT training continuum.

(3) Commanding General, Marine Corps Recruiting Command (CG MCRC)

(a) Ensure qualified applicants are screened on their willingness to comply with reference (i), if inducted into the Marine Corps. Qualified applicants may submit a pre-accession request for religious accommodation in accordance with this order.

(b) Qualified applicants who submit such requests may not be accepted for enlistment before DC M&RA makes a determination on their requests. Pre-accession requests for religious accommodations will be forwarded through the chain of command to the CG MCRC, for further coordination with the DC M&RA.

(c) Ensure Service members in the Ready Reserve submit their request for religious accommodation through Marine Corps Individual Reserve Supporting Activity chain of command before joining them through Prior Service Recruiting.

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(d) Ensure recruiters are provided appropriate education and training on this Order.

(4) Chaplain of the Marine Corps

(a) Provide a chaplain advisor to support the Religious Accommodation Review Board, who assess the interviewing chaplain's advisement to the command concerning the sincerity and the nature (i.e., conscience, moral principles, or religious beliefs) of the held beliefs.

(b) Ensure chaplains complete enclosures (1) and (2) for all accommodation requests.

(c) Ensure chaplains assigned to the Marine Corps are provided appropriate education and training on this Order.

(5) Staff Judge Advocate to the Commandant of the Marine Corps (SJA to the CMC)

(a) Provide a legal advisor to support the Religious Accommodation Review Board.

(b) Ensure staff judge advocates assigned to the Marine Corps commands are provided appropriate education and training on this Order.

(6) Director, Health Services (HS). Provide a medical advisory for any medical related accommodation request.

f. Coordinating Instructions

(1) DC M&RA will make determinations on requests for grooming, religious apparel, and medical practices (including, but not limited to, immunizations and deoxyribonucleic acid (DNA) specimen samples).

(2) Commanding officers will make determination on dietary requests and requests for time off for religious observances in accordance with the guidance in this Order.

(3) Service members requesting an accommodation within the context of this Order will be interviewed by a chaplain. The chaplain will conduct an interview of the Marine and record it with the templates found in enclosures (1) and (2). The interviewing chaplain shall assess the sincerity and the nature (i.e., conscience, moral principles, or religious beliefs) of the held belief.

(4) Nothing in this Order precludes disciplinary or administrative action for conduct by a service member that is prohibited by Chapter 47 of Title 10, U.S. Code, also known as the "Uniform Code of Military Justice."

(5) An expression of sincerely held beliefs may not be used as the basis of any adverse personnel action, discrimination, or denial of promotion, schooling, training, or assignment.

g. Definitions

(1) Business Days. Any day except any Saturday, any Sunday, any day which is a federal legal holiday, or a day in which the Office of Personnel

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Management designates the federal offices in the Washington D.C. area as closed.

(2) Exceptional Circumstances. An incident that is out of the ordinary, unavoidable, or unexpected where time is of the essence and the incident requires immediate and mandatory intervention. For example, a showing of exceptional circumstance may include the exercise of certain religious practices for a medical emergency or funeral rite.

(3) Qualified Applicant. A Marine Corps applicant who has been found to be mentally, morally, and physically qualified for accession in to the Marine Corps. This term includes applicants applying for a commissioning program, warrant officer program, enlistment, reenlistment, or enrollment in a military service academy or Reserve Officers' Training Corps program (including military service academy preparatory schools).

(4) Service Member. For the purposes of this Order, this term means a member of the Marine Corps. Additionally, this term means members of the Navy who are serving with Marine Corps units and authorized to wear the Marine Corps uniform.

5. Administration and Logistics

a. Records Management. Records created as a result of this directive shall be managed according to National Archives and Records Administration (NARA)-approved dispositions per SECNAV M-5210.1 CH-1 to ensure proper maintenance, use, accessibility and preservation, regardless of format or medium. Records disposition schedules are located on the Department of the Navy/Assistant for Administration (DON/AA), Directives and Records Management Division (DRMD) portal page at: <https://portal.secnav.navy.mil/orgs/DUSNM/DONAA/DRM/Records-and-Information-Management/Approved%20Record%20Schedules/Forms/AllItems.aspx>. Refer to MCO 5210.11F for Marine Corps records management policy and procedures.

b. Privacy Act. Any misuse or unauthorized disclosure of Personally Identifiable Information (PII) may result in both civil and criminal penalties. The Department of the Navy (DON) recognizes that the privacy of an individual is a personal and fundamental right that shall be respected and protected. The DON's need to collect, use, maintain, or disseminate PII about individuals for purposes of discharging its statutory responsibilities shall be balanced against the individuals' right to be protected against unwarranted invasion of privacy. All collection, use, maintenance, or dissemination of PII shall be in accordance with the Privacy Act of 1974, as amended (5 U.S.C. 552a) and implemented per SECNAVINST 5211.5F.

c. Recommendations. Recommendations for the content of this Order may be sent to Manpower and Reserve Affairs (M&RA), Manpower Military Policy (MPO) branch.

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6. Command and Signal

- a. Command. This Order is applicable to the Total Force.
- b. Signal. This Order effective date signed.

A handwritten signature in black ink, appearing to read "D. H. Berger", is written over the printed name.

David H. Berger
Commandant of the Marine Corps

Distribution: PCN 10202400600

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12 JUL 2021CHAPLAIN INTERVIEW CHECKLIST TEMPLATE

Requester:			Interview Date:		
Name:			Chaplain Interviewer:		
Phone:			Phone:		
Email:			E-mail:		
Command:			Chaplain's Command:		
Interview Preliminaries					
Yes	No	N/A			
			Chaplain reviewed policy and doctrine on religious accommodation and the policy for which the requestor is seeking accommodation.		
			Requester was notified that the interview is not confidential and will be used to advise the command.		
			Chaplain explained to the requester that confidential support can be received from another chaplain.		
			Requester has been granted a waiver for this practice previously.		
Type of Waiver Requested					
Yes	No	N/A			
			Uniform standards		
			Grooming standards		
			Immunization requirements		
			DNA sampling		
			Other (Please describe):		
Interview					
Yes	No	N/A			
			Requester's beliefs (conscience, moral principles, or religious beliefs) seemed honestly and sincerely held using one or more of the following factors:		
			1. Requester was credible (consistently keeps tenets, practices, etc.).		
			2. Requester's demeanor and pattern of conduct are consistent with the request.		
			3. Requester participates in activities associated with the belief(s).		
			4. Other persons supporting the claim are credible.		
			5. Request is supported by letter(s) of verification or endorsement from an organization espousing the beliefs which are the basis for the claim.		
			Alternate means of accommodating the practice were explored in the interview.		
Process Checklist					
Yes	No	N/A			
			Chaplain has prepared a memorandum documenting the interview.		
			Chaplain reviewed memorandum with requester and provided a copy.		
			Chaplain submitted the memorandum and this document to the commanding officer via chain of command.		
			Chaplain referred requester to command to process request.		

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12 JUL 2021CHAPLAIN MEMORANDUM FOR THE RECORD TEMPLATE

Date

From: [Chaplain's rank and name], CHC, USN

To: [Commanding Officer of requester]

Subj: REQUEST FOR A WAIVER OF POLICY TO ACCOMMODATE
PRACTICE BASED ON RELIGIOUS BELIEF ICO [REQUESTER'S
RANK, NAME]Ref: (a) DoDI 1300.17
(b) SECNAVINST 1730.8B

1. (Requester's rank and name) has submitted a request for accommodation of a religious practice. Per MCO 1730.9, I interviewed the requester on (date). I explained that this interview would not be a confidential communication as defined by reference (b) and informed the requestor that referral for confidential chaplain support was available.

2. Nature of the request. (Provide a narrative summary of the request for religious accommodation and whether or not the requestor has previously had this or any other related request approved or denied). The narrative summary should also identify the beliefs are derived from a matter of conscience, rooted in moral principles, or religious beliefs.

3. Basis. (Identify the religious beliefs on which the accommodation request is based and provide a professional and objective opinion regarding the religious importance of the request to the member.

4. Alternate Means. (Indicate alternate means of meeting the request).

5. Sincerity. (Assess the sincerity of the requester. The memorandum should focus on the sincerity of the member's personal religious beliefs, including the information provided during the interview).

6. My contact information is (telephone number and e-mail address).

[Signature]

Copy to:
(Rank and name of requester)

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RELIGIOUS ACCOMMODATION REVIEW BOARD

1. The Religious Accommodation Review Board will use existing M&RA board structure and will consist of a minimum of three voting members assigned by DC M&RA. The Board will be supported by non-voting advisors, to include a recorder, a legal advisor, a chaplain advisor, and other personnel as determined by the Board President.
2. The Board will make written recommendations as to the merits of each religious accommodation request and whether the DC M&RA should approve or deny, in whole or in part, each request. The Board may also recommend an accommodation request be temporarily or partially denied. For example, the Board may recommend a particular accommodation request be denied for a short period of time during ELT (e.g., during recruit training), for safety reasons (i.e., within 25 feet of an operating aircraft), or during combat operations (i.e., to ensure the proper wear or function of special or protective clothing or equipment).
3. For each accommodation request where the Board recommends an accommodation be temporarily approved or denied, the Board is encouraged to make a recommendation on what conditions could affect the modification or revocation of an accommodation.
4. The Board is encouraged to make specific recommendations that will allow consistent accommodation decision for Marines serving in similar MOSs, geographical locations, and duty assignment.

Furness Declaration - Exhibit B

ADMINISTRATIVE ACTION (5216)**NAVMC 10274 (REV. 3-93) (EF)**

Previous editions will be used

SN: 0109-LF-063-3200 U/I: PADS OF 100

1. ACTION NO.

2. SSIC/FILE NO.

3. DATE

4. FROM (Grade, Name, SSN, MOS, or CO, Pers. O., etc.)

5. ORGANIZATION AND STATION (Complete address)

6. VIA (As required)

7.

8. NATURE OF ACTION/SUBJECT

TO:

9. COPY TO (As required)

10. REFERENCE OR AUTHORITY (if applicable)

11. ENCLOSURES (if any)

12. SUPPLEMENTAL INFORMATION (Reduce to minimum wording - type name of originator and sign 3 lines below text)

13. PROCESSING ACTION. (Complete processing action in item 12 or on reverse. Endorse by rubber stamp where practicable.)

NAVMC 10274 (REV. 3-93) (EF) BACK

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

**U.S. NAVY SEALs 1-26;
U.S. NAVY SPECIAL WARFARE
COMBATANT CRAFT CREWMEN 1-5;
U.S. NAVY EXPLOSIVE ORDNANCE
DISPOSAL TECHNICIAN 1; and
U.S. NAVY DIVERS 1-3,**

Plaintiffs,

v.

LLOYD J. AUSTIN, III,
individually and in his official capacity as
United States Secretary of Defense; **UNITED
STATES DEPARTMENT OF DEFENSE;**
CARLOS DEL TORO, individually and in
his official capacity as United States
Secretary of the Navy,

Defendants.

Case No. 4:21-CV-01236-O

DECLARATION OF WILLIAM K. LESCHER

I, William K. Lescher, hereby state and declare as follows:

1. I am an admiral¹ in the United States Navy, currently serving as the Vice Chief of Naval Operations (VCNO), located in Arlington, Virginia at the Pentagon. The position of VCNO is appointed by the President, with the advice and consent of the Senate, and is the second highest uniformed Officer in the Navy. I have served in this position since May 29, 2020. I make this declaration in support of the Government's motion for a stay of this Court's preliminary injunction pending appeal. The statements made in this declaration are based on my

¹ The rank of "admiral" is the highest military rank in the Navy. The term "admirals" is also frequently referred to as "flag officers." Flag officers include the ranks of rear admiral (lower half), rear admiral (upper half), vice admiral and admiral. Flag officers comprise the most senior levels of uniformed leadership in the Navy.

personal knowledge, my military judgment and experience, and on information that has been provided to me in the course of my official duties.

Preliminary Statement

2. I have reviewed the preliminary injunction order issued by this Court on January 3, 2022. I believe the Court's injunction will cause immediate harm to the Navy, and in particular to the operations of Naval Special Warfare (NSW) and Special Operations Forces (SOF), and to the national security of the United States. Operationally, in 2021, the Navy executed more than 30,000 steaming days and one million flying hours to protect America, deter conflict and keep the sea lanes open and free. The Court's injunction directly impacts the Navy's ability to carry out its responsibilities to protect and maintain the health and safety of our Force, in particular our ability to halt the spread of COVID-19 through a mandatory vaccination requirement. Unvaccinated or partially vaccinated service members are at higher risk to contract COVID-19, and to develop severe symptoms requiring hospitalizations that remove them from their units and impact mission execution. Vaccination against COVID-19 has proven to be essential in keeping Navy units on mission by mitigating the impact of COVID-19. Fully vaccinated naval forces are required to ensure readiness to carry out Navy missions throughout the world and, if required, to engage in combat operations. Restriction of the Navy's ability to reassign unvaccinated personnel in order to mitigate COVID-19 related risks to units preparing to deploy, or that are deployed, will cause direct and immediate impact to mission execution. Further, the harm caused by this injunction is not limited to 35 unvaccinated Plaintiffs. The health, readiness, and mission execution of broader conventional Navy units and personnel who support these personnel are threatened as well.

Naval Background and Experience

3. As the Vice Chief of Naval Operations,² I work in coordination with the Chief of Naval Operations (CNO), the senior admiral in the U.S. Navy,³ in the execution of his statutory duties and responsibilities as they pertain to the employment of the Navy. Those duties include recruiting, organizing, supplying, equipping, training, servicing, mobilizing, demobilizing, administering, and maintaining the Navy, as will assist in the execution of any power, duty, or function of the Secretary of the Navy or the Chief of Naval Operations. Additionally, the CNO delegated several specific responsibilities to me. I oversee programs and policies that impact Sailors and their families, including health affairs, and monitor and enact policies that promote good order and discipline in the Navy.

4. I have served in the United States Navy for nearly 42 years. A 1980 graduate of the United States Naval Academy, my experience includes command of the Vipers of Helicopter Anti-Submarine Light (HSL) Squadron-48, the Airwolves of HSL-40 and the Maritime Strike Wing Atlantic. As Commanding Officer, HSL-48, my responsibilities included training, preparing, and executing Seahawk helicopter detachment deployments on Navy ships deploying worldwide. As Commanding Officer, HSL-40, I was responsible for the training, evaluation, and maintenance of the Seahawk helicopter squadron that trains all East Coast Seahawk pilots in employment of this weapon system. As Commander, Maritime Strike Wing Atlantic, I was responsible for the material readiness and training of eight Helicopter Maritime Strike (HSM)

² “The [VCNO] has such authority and duties with respect to the Department of the Navy as the Chief of Naval Operations, with the approval of the Secretary of the Navy, may delegate to or prescribe for him. Orders issued by the [VCNO] in performing such duties have the same effect as those issued by the Chief of Naval Operations.” 10 U.S.C. § 8035(c).

³ The CNO is the senior uniformed officer in the United States Navy. *See* 10 U.S.C. § 8033(b) (“The Chief of Naval Operations, while so serving, has the grade of admiral without vacating his permanent grade. In the performance of his duties within the Department of the Navy, the Chief of Naval Operations takes precedence above all other officers of the naval service.”).

squadrons, the Weapons School, Fleet Replacement Squadron, and a total of 42 detachments deploying on Atlantic Fleet aircraft carriers and air capable ships, encompassing 68 aircraft and 1,900 personnel. Between command of the Vipers and Airwolves, I was the executive officer of Mine Countermeasures Command and Control Ship USS Inchon (MCS 12), a 20,000 ton vessel with a crew of 700. As the second in command, I was responsible for the supervision, training and development of the crew and the daily execution of the command mission, which included training and preparing the crew for deployment, maintaining and improving operational readiness and material condition of the ship. As a flag officer, I commanded Expeditionary Strike Group 5 (ESG-5) and Task Forces 51/59 (CTF 51/59) in Bahrain, leading multiple Amphibious Ready Groups, Marine Expeditionary Units and the afloat forward staging base USS Ponce (AFSB(I)-15) in execution of theater security events, combat operations, and emergent national taskings spanning the Middle East/Central Command region. My responsibilities as ESG-5 and CTF 51/59 included multiple events working with NSW forces embarked on my ships and interoperability exercises with partner countries. I also served as Joint Staff deputy director for resources and acquisition, deputy assistant Secretary of the Navy for budget, and Deputy Chief of Naval Operations for integration of capabilities and resources.

Specific Functions of the United States Navy

5. The United States Navy and Marine Corps comprise the Nation's principal maritime forces. Their missions are to provide globally deployable forces in order to "secure the Nation from direct attack; secure strategic access and retain global freedom of action; strengthen existing and emerging alliances and partnerships; establish favorable security conditions; deter aggression and violence by state, non-state, and individual actors and, should deterrence fail, prosecute the full range of military operations in support of U.S. national interests." *See*

Department of Defense Directive (DoDD) 5100.01, Change 1, 09/17/2020, Encl. 6, ¶ 5.a. –b (attached hereto). Effective execution of all of these discrete functions is vital to the national security of the United States, and is accomplished by providing fully trained and qualified naval forces to joint commanders⁴ to deter aggression and, if required, engage in combat operations and win decisively.

Naval Special Warfare (NSW) and Special Operations Forces (SOF)

6. Naval Special Warfare (NSW) and Special Operations Forces (SOF) are composed of Navy SEALs⁵ and Special Warfare Combatant-Craft Crewmen (SWCC). The NSW team is a multipurpose combat force organized and trained to conduct a variety of special operations missions in all environments. Navy SEALs conduct clandestine missions infiltrating their objective areas by fixed and rotary-wing aircraft, Navy surface ships, combatant craft, submarines and ground mobility vehicles. Service members designated as Navy SEALs consist of officers and enlisted members who have been designated pursuant to Navy and NSW policies. SWCC focus on infiltration and exfiltration of SEALs and other SOF to include from other Services, and they provide dedicated rapid mobility in maritime environments, as well as the ability to deliver combat craft via parachute drop. SWCC operate and maintain state-of-the-art surface craft to conduct special operations.

7. In addition to SEALs and SWCC, combat support (CS) and combat service support (CSS) personnel are assigned to NSW units to support the mission. CS/CSS personnel

⁴ Joint commanders are the combatant vested with authority and responsibility for military operations within their area of responsibility. The Navy and other branches of the Armed Forces provide forces to the combatant commanders to execute those responsibilities and functions. The combatant commanders exercise authority, direction and control over the commands and forces assigned to them and employ those forces to accomplish missions assigned to the combatant commander. Department of Defense Directive (DoDD) 5100.01, Change 1, 09/17/2020, Encl. 1, ¶1.a through d.

⁵ The term "SEAL" refers to "Sea, Air, Land."

include officers and enlisted service members identified in Plaintiffs' complaint (i.e., Explosive Ordnance Disposal (EOD) personnel and Navy Divers), in addition to other officers and enlisted service members performing a variety of military functions (e.g., chaplains, medical personnel, mobile communications teams, tactical cryptologic support, etc.). Navy EOD personnel perform missions neutralizing explosive weapons, including various weapons of mass destruction. Their duties include detonating or demolishing hazardous munitions, neutralizing various ordnance, including sea mines, torpedoes or depth charges, performing parachute or helicopter insertion operations, and clearing waterways of mines in support of our military operations. Navy Divers perform a variety of military functions, including wreckage salvage operations and underwater repairs, harbor and waterway clearance operations, assisting in construction and demolition projects, executing search and rescue missions, performing deep submergence operations, and serving as technical experts for diving operations for numerous military special operations units.

8. Service members in the NSW force are responsible for performing special operations. Special operations require unique tactics, techniques, procedures and equipment. They are often conducted in hostile, austere or diplomatically sensitive environments, and are characterized by one or more of the following: time-sensitivity, clandestine nature, low visibility, working with or through host-nation forces, greater requirements for regional orientation and cultural expertise, and a higher degree of risk. These missions often require members of the NSW force to work in close quarters where social distancing is not possible. Small NSW teams may travel for an extended duration on boats, submersibles, helicopters, aircraft, or other vehicles that are less than six feet across, and/or which have limited ventilation. Service members may be in such close quarters while traveling that they must sit shoulder-to-shoulder.

Additionally, members may be required to operate in subsea environments and may have to share diving rebreather devices and inhale one another's exhalation.

Mandatory Vaccination Requirements in Response to COVID-19 Pandemic

9. On August 24, 2021, the Secretary of Defense directed the Secretaries of the Military Departments to immediately begin full vaccination of all members of the Armed Forces on active duty or in the Ready Reserve. The Secretary of Defense determined that mandatory COVID-19 vaccinations are necessary to protect the health and military readiness of the force. The Secretary of the Navy directed implementation of Secretary of Defense's COVID-19 vaccination mandate⁶ via a Department-wide administrative message (ALNAV) on August 30, 2021. The ALNAV applies to both Services within the Department of the Navy (DON), the United States Navy and the United States Marine Corps. The ALNAV required all active duty DON Service members, who were not already vaccinated, exempted, or currently seeking an exemption, to be fully vaccinated with an FDA-approved COVID-19 vaccine within 90 days of the ALNAV, and all Reserve Component personnel to be fully vaccinated within 120 days. ALNAV 062/21 ¶ 4. Active duty Sailors and Marines were required to become fully vaccinated⁷ by November 28, 2021, and Reserve Component Sailors and Marines by December 28, 2021. The requirement to obtain full vaccination constitutes a lawful order under Article 92 of the Uniform Code of Military Justice (UCMJ), and failure to comply may result in punitive or adverse administrative action, or both. ALNAV 062/21 ¶ 5.

⁶ Secretary of Defense Memorandum, "Memorandum for Senior Pentagon Leadership, Commanders of the Combatant Commands, Defense Agency, and DoD Field Activity Directors," (August 24, 2021).

⁷ Although refusal to receive the vaccine may subject a member to adverse administrative or disciplinary action, the vaccine will not be forcibly administered to any member who refuses.

10. The United States Navy issued service-specific guidance via a separate administrative message (“NAVADMIN”) on September 1, 2021. NAVADMIN 190/21 outlines Navy policy concerning the mandatory vaccination of Navy service members, vaccination administration and reporting requirements, and general guidance related to logistics and distribution of vaccines. The policy reiterates that COVID-19 vaccination “is mandatory for all DoD service members who are not medically or administratively exempt” under existing Navy policy. NAVADMIN 190/21 ¶ 2, 3.a. Refusal to become fully vaccinated against COVID-19 without an approved or pending exemption constitutes a failure to obey a lawful order and is punishable under Article 92, UCMJ.

The COVID-19 Pandemic Threat to Naval Forces

11. The judgment of each of the Military Services is that vaccines are the most effective tool the Armed Forces have to keep our personnel safe, fully mission capable and prepared to execute the Commander-in-Chief’s orders to protect vital United States’ national interests. As of January 5, 2022, 261,504 members of the Armed Forces have contracted the COVID-19 virus, resulting in 2,320 hospitalizations and 82 deaths. Eighty of 82 members who have died were unvaccinated. Of all active duty personnel who were required to be hospitalized because of COVID-19, 0.8% received a booster shot prior to hospitalization. Separately, there have only been six active duty personnel who have received a booster and had a breakthrough COVID-19 infection that required hospitalization. Among the active duty force, 12% of those required to be hospitalized have received a primary COVID-19 vaccine without the booster. Among Reserve and National Guard service members, 97% of those hospitalized with COVID were unvaccinated or partially vaccinated; 3% of hospitalized members received primary vaccination but no booster shot; 0.2% hospitalized members had received a booster shot.

Sending ships into combat without maximizing the crew's odds of success, such as would be the case with ship deficiencies in ordnance, radar, working weapons or the means to reliably accomplish the mission, is dereliction of duty. The same applies to ordering unvaccinated personnel into an environment in which they endanger their lives, the lives of others and compromise accomplishment of essential missions.

12. The environment in which Navy personnel operate -- in close quarters for extended periods of time -- make them particularly susceptible to contagious respiratory diseases such as COVID-19 and renders mitigation measures such as social distancing unrealistic. In mid-March 2020, the aircraft carrier USS THEODORE ROOSEVELT (CVN 71) was deployed to the Western Pacific Ocean, a vital geo-political center of gravity encompassing several of the world's largest militaries and five nations allied with the U.S. through mutual defense treaties. The leadership of USS THEODORE ROOSEVELT began to see several COVID-19 cases among the crew. By April 1, 2020, USS THEODORE ROOSEVELT had been pulled off mission and into Guam with approximately 1,000 crew removed from the ship, with a reduced crew remaining to maintain the nuclear reactor and other essential systems. By April 20, 2020, 4,069 Sailors had been removed from the ship out of a crew of approximately 4,800. The ship was unavailable for 51 days to maintain presence in a strategically important area which includes the world's busiest sea lanes, creating a national security vulnerability in an area vital to our national interests. When USS THEODORE ROOSEVELT finally got underway on May 21, 2020, approximately 1,800 Sailors remained in Guam. Tragically, one Sailor succumbed to the COVID-19 virus and died.

13. Even with approximately 97% of the Navy vaccinated, the COVID-19 virus can degrade units and impact mission. Last month, USS MILWAUKEE (LCS 5), with a 100%

vaccinated 100-person crew, remained in port one week beyond its schedule because several members tested positive for COVID-19. Because the full crew was vaccinated, infected personnel were asymptomatic or had mild symptoms and the impact to mission accomplishment was substantially mitigated compared to the USS THEODORE ROOSEVELT's experience of more than 4,000 crew removed from the ship and a 51-day loss of mission. Given the hospitalizations and death statistics cited above, the MILWAUKEE's minor deployment delay would likely have been far worse with unvaccinated personnel. The MILWAUKEE is one example of a Navy manning model where each individual crew member has a high level of responsibility with little redundancy. The medical staff of the MILWAUKEE consists of only two Navy Hospital Corpsman, comparable to an Emergency Medical Technician in the civilian setting. There is little ability on ship to care for a service member with severe COVID symptoms. If a service member were to develop severe symptoms on this type of ship, it would require a return to port or an emergency medical evacuation by helicopter. Helicopter medical evacuation is not always viable due to the location of the ship and the limited range of helicopters. At the deployable unit level, NSW, EOD, and diver personnel operate in units that can be as small as a squad of four personnel. Medical evacuations in these small units can be even less practical and significantly more damaging than the loss of an equal number of crew on a ship the size of the MILWAUKEE.

14. The types of missions conducted by SEALs, SWCC, EOD and divers cannot be conducted remotely. A SEAL assigned to perform a counterterrorism mission in a foreign country cannot perform that task from home; a SWCC cannot drive a combatant craft and transport SEALs in a telework status; an explosive ordnance disposal technician—whose job it is to disarm and dispose of explosives—cannot perform that task remotely. Similarly, the arduous

training necessary to prepare NSW personnel for these missions cannot be performed remotely. It is not possible for a Navy Diver to remotely prepare compressed air and oxygen tanks for personnel to complete their training dives. A safety diver must be physically present during a high-risk training evolution that may require rescue divers or oxygen technicians. In particular, Navy Divers assigned to NSW must be able to operate a diving recompression chamber – a small confined space where the Navy Diver must be in the chamber to assist with the personnel casualty – which cannot be done remotely. SEAL trainers cannot oversee dangerous swim or survival training from a physically distanced location. NSW personnel also routinely interact with the greater Navy population, on ships and aircraft, and in dining facilities and office environments across the globe. They are required to deploy with no-notice. NSW, EOD and diver training and operations necessitate our service members interact in close-quarters, confined spaces, and under conditions where telework, social distancing, and mask-wearing are not reliable mitigation options.

Immediate Harm to Readiness and Mission Accomplishment

15. The preliminary injunction forbids the Navy from applying MANMED § 15-105(3)(n)(9), NAVADMIN 225/21, NAVADMIN 256/21 and Trident Order #12. Order 26, ECF No. 66. MANMED § 15-105(3)(n)(9) states that personnel who choose not to receive required vaccinations will be disqualified from special operations duty. NAVADMIN 225/21 provides guidance for disposition of offenses involving Navy service members who are not fully vaccinated by the required deadlines. Navy Service members who refuse the COVID-19 vaccine, absent a pending or approved exemption, are required to be processed for administrative separation.⁸ NAVADMIN 225/21 ¶ 2. A Navy Service member is considered to be “refusing the

⁸ Although processing for separation is required, this does not automatically result in a member actually being separated. Members processed for separation may ultimately be retained in the service.

vaccine, if: (1) the individual has received a lawful order to be fully vaccinated, (2) is not or will not be fully vaccinated by the date required, and (3) does not have a pending or approved exemption request.” *Id.* ¶ 3.c. The policy designates the Chief of Navy Personnel, a 3-star admiral, as the COVID-19 Consolidated Disposition Authority to ensure fair and consistent administrative processing across the service. *Id.* at ¶ 5.b. For disciplinary matters, authority to initiate disciplinary proceedings, either non-judicial punishment or court-martial, is withheld to the Vice Chief of Naval Operations. *Id.* NAVADMIN 256/21 provides additional guidance on administrative separation processing for those refusing the vaccine, as well as guidance on other applicable administrative actions. These other applicable administrative actions include: cancellation of government travel for training or other official purposes; temporary reassignment within the local area for unvaccinated personnel (with or without a medical exemption or religious accommodation); adverse fitness reports and evaluations; prohibition on executing permanent change of station orders; potential termination of special duty and incentive pays; potential recoupment of unearned bonuses; termination of and potential reimbursement for Navy-funded education and training; promotion and advancement delays; and removal of additional qualification designations or Navy Enlisted Classifications.⁹ *See* NAVADMIN 256/21 ¶¶ 4.b.through 13. Trident Order # 12, which is directed to the NSW force, does not create any new requirements or adverse administrative actions. It consolidates and restates previously promulgated Navy implementing guidance.

16. The preliminary injunction forbids the Navy from “[t]aking any adverse

⁹ Navy Enlisted Classifications define the work performed by Navy enlisted members and the requirements to perform specific “ratings” (i.e., occupations). *See generally*, MANUAL OF NAVY ENLISTED MANPOWER AND PERSONNEL CLASSIFICATIONS AND OCCUPATIONAL STANDARDS, VOL II NAVY ENLISTED CLASSIFICATIONS (NAVPERS 18068F), April 21, 2021 (supplementing the enlisted rating structure in identifying personnel and billets [i.e., jobs] and skills, knowledge, aptitude, or qualifications that must be documented to identify both people and billets for management purposes).

action against Plaintiffs on the basis of Plaintiffs' requests for religious accommodation." Order 26, ECF No. 66. The order specifically references actions that Plaintiffs allege are being taken against them while they await a decision on their religious accommodation requests, actions such as restrictions on travel, access to non-work activities, unpleasant assignments, and being relieved of leadership duties. Order 26, ECF No. 66. This aspect of the order is intrusive and harmful to Navy operations, including deployment decisions. In the Navy, "adverse action" refers to an action that is punitive or the action itself has a direct adverse impact on one's career such as a court martial or discharge. The Court's order, however, indicates that routine personnel actions, such as assignment, official travel and specific duties, are adverse decisions. Contrary to the Court's apparent understanding, temporarily reassigning personnel to other units because they are unvaccinated, regardless of the reason they are unvaccinated (e.g., medical exemption, religious accommodation, or pending exemption request) is not an adverse action but a step to protect the health of the whole unit and maintain mission readiness. The Court's injunction appears to require the Navy to leave unvaccinated NSW, EOD, and diver personnel in their units, performing their same duties and deploying on missions regardless of the known risk to personnel and mission. Such an injunction will degrade NSW, EOD, and diver mission readiness, breakdown good order and discipline within the NSW force, unnecessarily limit the Navy's ability to conduct daily operations and operational missions, and could clearly result in mission failure in contingencies and crises that cause harm to national security.

17. NSW personnel must be fully medically ready and at peak fitness given that their training and missions are physically demanding and arduous. It is vital that all members of the NSW force be medically fit to perform daily operations and to train or deploy on short notice. Regardless of their current assignment, all naval forces, NSW in particular, must be ready to

respond to contingencies and crises around the world. All NSW personnel are expected to meet this requirement, whether in a training status, on instructional duty, or at a headquarters, as the mission of NSW is to be ready to provide maritime SOF to conduct full spectrum operations to support national objectives. The Navy could easily require Navy Special Warfare Command to mobilize personnel outside from any unit, regardless of the planned deployment cycles of a unit or the currently assigned duties of NSW personnel to respond to the full range of contingencies and crises. Medical conditions or illness create risk, both medical and operational, not only for the service member afflicted, but for other members of the unit. As a result, unvaccinated personnel in a unit degrade the force health protection conditions in the unit, placing personnel in the unit at risk and degrading the unit's ability to safely conduct operations, regardless of the scope of the operation. The following publicly available mission event illustrates how rapidly a NSW unit can go from steady state in the United States to deploying forward on a mission of the highest difficulty, requiring peak medical, physical and mental readiness. This example illustrates the rapid manner in which a contingency or crisis could unfold, and although more than a decade old, is used due to the unclassified classification of my declaration.

18. On April 8, 2009, armed Somali pirates boarded the U.S.-flagged container ship, *Maersk Alabama* in the Indian Ocean, taking the crew, composed of U.S. citizens, hostage and making ransom demands. USS BAINBRIDGE (DDG-96) was the first ship of the international counter-piracy task force to respond. BAINBRIDGE's commanding officer realized he needed additional capabilities beyond what he had available on the ship. In response, on short notice, a SEAL team flew 8,000 miles from the United States to USS BAINBRIDGE and were recovered onboard. By the evening of April 12, 2009, the situation escalated and SEALs on BAINBRIDGE eliminated the threat to the remaining hostage, *Maersk Alabama* Captain

Phillips, who was subsequently rescued. This is but one example, using a well-publicized mission, that illustrates how an unvaccinated member would put himself, his teammates, the conventional forces and the mission at great risk. While NSW personnel may be assigned to various units with various mission-sets, all naval forces must be ready to respond to global contingencies and crises on short notice.

19. If this type of crisis or contingency occurred today, with the Court's preliminary injunction in place, the Navy could be required to deploy a SEAL team with one or more unvaccinated members, risking a COVID-19 outbreak within that unit or on the host Navy destroyer. Destroyer crews, and others embarked aboard, sleep in confined shared berthing spaces, are in close proximity in passageways, and eat meals in a communal galley. An unvaccinated service member is not only more likely to contract COVID-19, but to experience significant disease symptoms, impact the mission and spread the disease to others.

20. Navy ships have limited health care facilities. A Sailor experiencing severe COVID symptoms would require the ship to pull into port instead of executing its mission. NSW forces often deploy in countries with little or no healthcare support structure and in remote areas where healthcare is scarce. This is why there has been a long-standing requirement for all members of the NSW force to be fully medically ready to deploy. A small number of SOF medical personnel provide limited medical support and patient movement; therefore, any encumbrance placed on that limited capability unnecessarily puts the mission and the force at risk. While some SEALs are trained to perform emergency, life-saving procedures in remote and hostile environments, those personnel are not physicians or nurses. Unlike doctors and nurses, formal civilian medical licenses are not required for them. They do not generally have the capability, capacity or training to use a ventilator. Additionally, they do not have access to this

equipment in the types of austere environments in which the NSW units operate. If a deployed team member contracts COVID-19, there is a strong possibility that the necessary equipment or treatment would not be readily available. Further, if medical evacuation is necessary for a member of the unit, this creates additional risk not only to the mission, but places those service members executing medical evacuation at a risk of harm to themselves such as when the member requires transport from a hostile, remote or diplomatically sensitive areas.

21. Redirecting these assets and their crew to perform preventable evacuations results in a degradation of the Navy's ability to accomplish its primary missions and incurs collateral impacts. Medical evacuations often require one or more member from the service member's unit to accompany the evacuated service member. The loss of even one member can degrade the effectiveness of small NSW units and may compromise the mission. This is similarly the case for SWCC personnel, who routinely operate with a crew of as little as four personnel on a combatant craft. Every member of a SEAL team is vital.

22. Unvaccinated NSW personnel put conventional Navy forces at risk as well. Navy SEALs are one of the most versatile elements of the SOF across all branches of the military services, in part, because the Navy can deliver them to their mission locations through a variety of conventional means (*e.g.*, fixed-wing aircraft, helicopters, surface ships and submarines). All of these means of delivery are confined spaces in which social distancing is impractical. Because NSW personnel rely on conventional Navy forces to support their missions, any unvaccinated NSW personnel will put the crew of those conventional forces at unnecessary risk as well. The Navy must balance the risk to unvaccinated individuals and vaccinated personnel alike. That risk calculation led to the mandatory vaccination mandate and associated personnel policies pertaining to the COVID-19 pandemic. It is imperative for the entire force, including

every member of NSW, to be vaccinated and ready to deploy and execute assigned missions on short notice.

23. The capabilities NSW personnel provide include crisis response, support to forward presence operations, support to conventional Naval forces at sea and in training, support to Law Enforcement agencies and clandestine insertion operations. EOD personnel provide critical safety and response to units using live ordnance; Navy divers, EOD and SEALs support underwater surveys and route clearances. SEALs conduct insertions and extractions by sea, air or land; they capture high-value enemy personnel and terrorists around the world, carry out small-unit direct-action missions against military targets and perform underwater reconnaissance and strategic sabotage. SEALs, SWCC, EOD and divers frequently deploy to foreign countries to train partners and allies and participate in exercises. Reducing the Navy's ability to apply long-standing, proven medical readiness principles to this small, elite community will clearly negatively impact the NSW force's ability to conduct their operations and could have significant negative effects to the NSW force's ability to respond to large-scale contingencies or crises. This would damage the national security interests of the United States and our foreign allies and partners.

24. These concerns apply if the injunction requires the Navy to maintain these 35 Plaintiffs in their current status while an appeal is pending. Of the 35 Plaintiffs, 18 are assigned to nine different parent commands and may deploy anywhere in the world in the immediate future to perform the type of missions described. 15 Plaintiffs are assigned to the NSW Center or a NSW Center subordinate command, with 14 of them assigned to NSW Advanced Training

Command (ATC);¹⁰ some as instructors who necessarily have close contact with ATC students in courses to prepare them for NSW operations and some as students attending an advanced training course before returning to their current or prospective assignment. Two Plaintiffs are currently assigned to non-NSW training commands. Because the court's order prohibits them from being temporarily reassigned, the 14 unvaccinated personnel at NSW ATC have close contact with fellow instructors and students. These students then circulate among the larger NSW community as soon as their courses at ATC end. Simply put, close quarters contact during training creates the opportunity to contract COVID-19 from the unvaccinated instructors at ATC detachments. The unvaccinated instructors can spread COVID-19 to dozens of candidates in training, and qualified SEALs, SWCCs, and other personnel, including fellow instructors, at NSW ATC training courses who will promptly return to their primary units or interact with additional training classes.

25. In summary, the Navy's judgment is that COVID-19 vaccines are a critical defense against COVID-19 and mitigate risk both to our force and to our mission. This judgment takes into account the environments our service members operate in, the operations the Navy conducts, and the absence of other effective COVID-19 mitigation measures in the environments in which we operate. The COVID-19 virus has had a proven substantial impact on Navy unit readiness. The Court's order, which bars implementation of the vaccine requirement and requires the Navy to keep service members it has determined are not medically fit for deployment in a ready to deploy status, will undermine military readiness through the spread of disease and cause

¹⁰ ATC's mission is to provide standardized and accredited individual training and education for qualified NSW and support personnel, U.S. SOF (i.e., from other Services), partner nation SOF and other personnel, as required for NSW Operations. There are several ATC detachments. The largest detachment in Coronado, California provides a course of instruction to candidates (i.e., those seeking to obtain their SEAL or SWCC designation). It also provides training to those already designated as SEALs, SWCC or combat support personnel. Other ATC detachments provide training in specialized areas to NSW personnel, other SOF and partner nation SOF.

significant harm to military operations by allowing unvaccinated service members to remain in an unvaccinated status.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 19th day of January, 2022.



W. K. LESCHER

ENCLOSURE 6

FUNCTIONS OF THE MILITARY DEPARTMENTS

1. COMMON MILITARY DEPARTMENT FUNCTIONS. For purposes other than the operational direction of the Combatant Commands, the chain of command runs from the President to the Secretary of Defense to the Secretaries of the Military Departments and, as prescribed by the Secretaries, to the commanders of Military Service forces.

a. Subject to the authority, direction, and control of the Secretary of Defense, the Secretaries of the Military Departments are responsible for, and have the authority necessary to conduct, all affairs of their respective Departments, including:

- (1) Recruiting.
- (2) Organizing.
- (3) Supplying.
- (4) Equipping (including research and development).
- (5) Training.
- (6) Servicing.
- (7) Mobilizing.
- (8) Demobilizing.
- (9) Administering (including the morale and welfare of personnel).
- (10) Maintaining.
- (11) Construction, outfitting, and repairs of military equipment.
- (12) Construction, maintenance, and repair of buildings, structures, and utilities as well as the acquisition, management, and disposal of real property and natural resources.

b. Subject to the authority, direction, and control of the Secretary of Defense, the Secretaries of the Military Departments are also responsible to the Secretary of Defense for ensuring that their respective Departments:

- (1) Operate effectively, efficiently, and responsively.

(2) Formulate policies and programs that are fully consistent with national security objectives and policies established by the President and the Secretary of Defense.

(3) Implement, in a timely and effective manner, policy, program, and budget decisions and instructions of the President or Secretary of Defense.

(4) Present and justify positions on the plans, programs, and policies of the Department of Defense.

(5) Prepare, submit, and justify budgets before Congress, in coordination with other USG departments and agencies, as applicable; and administer the funds made available for maintaining, equipping, and training the forces of their respective departments, including those assigned to the Combatant Commands. Among other things, budget submissions shall be informed by the recommendations of the Military Service Chiefs, Commanders of the Combatant Commands, and of Military Service component commanders of forces assigned to the Combatant Commands.

(6) Establish and maintain reserves of manpower, equipment, and supplies for the effective prosecution of the range of military operations and submit, in coordination with the other Military Departments, mobilization information to the Joint Chiefs of Staff.

(7) Develop integrated mobilization plans for the expansion of peacetime components to meet the needs of war.

(8) Perform Military Department functions necessary to fulfill the current and future operational requirements of the Combatant Commands, including the recruitment, organization, training, and equipping of interoperable forces.

(9) Provide forces to enhance military engagement, conduct security cooperation, build the security capacity of partner states, and deter adversaries to prevent conflict. These actions shall be coordinated with the other Military Departments, Combatant Commands, USG departments and agencies, and international partners, as required.

(10) Provide forces, military missions, and detachments for service in foreign countries as may be required to support the national interests of the United States, and provide, as directed, assistance in training, equipping, and advising the military forces of foreign nations.

(11) Coordinate with the other Military Departments and all of the other DoD Components to provide for more effective, efficient, and economical administration; eliminate duplication; and assist other DoD Components in the accomplishment of their respective functions by providing personnel, intelligence, training, facilities, equipment, supplies, and services, as may be required.

(12) Develop, garrison, supply, equip, and maintain bases and other installations, including lines of communication, and provide administrative and logistical support for all assigned forces and bases, unless otherwise directed by the Secretary of Defense.

(13) Provide, as directed, administrative and logistical support to the headquarters of the Combatant Commands, to include direct support of the development and acquisition of the command and control systems of such headquarters.

(14) Supervise and control Military Department intelligence activities, including the collection, production, and dissemination of military and military-related foreign intelligence and counterintelligence as required for execution of Military Department responsibilities.

(15) Afford the Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict; the Commander, USSOCOM; the PCA; and the Commander, USCYBERCOM, an opportunity to coordinate on Military Department and Military Service personnel management policy and plans as they relate to accessions, assignments, compensation, promotions, professional development, readiness, retention, sustainment, and training of all SOF (for USSOCOM) and all cyber operations forces (for USCYBERCOM) personnel. This coordination shall not interfere with the title 10 authorities of the Military Departments or Military Services.

(16) Engage in such other activities as are prescribed by law, the President, or the Secretary of Defense.

2. COMMON MILITARY SERVICE FUNCTIONS. The Army, the Navy, the Air Force, the Marine Corps, and the Space Force, and the Coast Guard, when transferred to the Department of the Navy in accordance with sections 2, 3, and 145 of Reference (h), to include the Active and Reserve Components of each, under their respective Secretaries, shall provide conventional, strategic, and SOF to conduct the range of operations as defined by the President and the Secretary of Defense. Further, they shall perform the following common functions:

a. Develop concepts, doctrine, tactics, techniques, and procedures, and organize, train, equip, and provide land, naval, air, space, and cyberspace forces, in coordination with the other Military Services, Combatant Commands, USG departments and agencies, and international partners, as required, that enable joint force commanders to conduct decisive operations across the spectrum of conflict in order to achieve the desired end state.

b. Determine Military Service force requirements and make recommendations concerning force requirements to support national security objectives and strategy and to meet the operational requirements of the Combatant Commands.

c. Recommend to the Joint Chiefs of Staff the assignment and deployment of forces to the Combatant Commands established by the President through the Secretary of Defense.

d. Monitor and assess Military Service operational readiness and capabilities of forces for assignment to the Combatant Commands and plan for the use of the intrinsic capabilities of the other Military Services, USSOCOM, and USCYBERCOM that may be made available.

e. Develop doctrine, tactics, techniques, and procedures for employment by Military Service forces and:

- (1) Assist the Chairman of the Joint Chiefs of Staff in the development of joint doctrine.
 - (2) Coordinate with the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the other Military Services, USG departments and agencies, partner security forces, and non-governmental organizations, in the development of the doctrine, tactics, techniques, and procedures necessary for participation in and/or command of joint, interagency, and multinational operations.
 - (3) Coordinate with the Commanders, USSOCOM and USCYBERCOM, in the development of the doctrine, tactics, techniques, and procedures employed by Military Service forces when related to special operations and cyber operations, respectively.
- f. Provide for training for joint operations and joint exercises in support of Combatant Command operational requirements, including the development of Military Service joint training requirements, policies, procedures, and publications.
 - g. Provide logistical support for Military Service and all forces assigned to joint commands, including procurement, distribution, supply, equipment, and maintenance, unless otherwise directed by the Secretary of Defense.
 - h. Organize, train, and equip forces to contribute unique service capabilities to the joint force commander to conduct the following functions across all domains, including land, maritime, air, space, and cyberspace:
 - (1) Intelligence, surveillance, reconnaissance, and information operations, to include electronic warfare and MISO in order to provide situational awareness and enable decision superiority across the range of military operations.
 - (2) Offensive and defensive cyberspace operations to achieve cyberspace superiority in coordination with the other Military Services, Combatant Commands, and USG departments and agencies.
 - (3) Special and cyber operations in coordination with USSOCOM, USCYBERCOM, and other Combatant Commands, the Military Services, and other DoD Components.
 - (4) Personnel recovery operations in coordination with USSOCOM and other Combatant Commands, the Military Services, and other DoD Components.
 - (5) Counter weapons of mass destruction.
 - (6) Building partnership capacity/security force assistance operations.
 - (7) Forcible entry operations.
 - (8) Missile Defense.

(9) Other functions as assigned, such as Presidential support and antiterrorism.

i. Organize, train, and equip forces to conduct support to civil authorities in the United States and abroad, to include support for disaster relief, consequence management, mass migration, disease eradication, law enforcement, counter-narcotics, critical infrastructure protection, and response to terrorist attack, in coordination with the other Military Services, Combatant Commands, National Guard, and USG departments and agencies.

j. Operate organic land vehicles, aircraft, cyber assets, spacecraft or space systems, and ships or craft.

k. Conduct operational testing and evaluation.

l. Provide command and control.

m. Provide force protection.

n. Consult and coordinate with the other Military Services on all matters of joint concern.

3. INDIVIDUAL MILITARY DEPARTMENT FUNCTIONS. The forces developed and trained to perform the primary functions set forth in sections 4 through 6 of this enclosure shall be employed to support and supplement the other Military Service, USSOCOM, and USCYBERCOM forces in carrying out their primary functions, wherever and whenever such participation shall result in increased effectiveness and shall contribute to the accomplishment of overall military objectives.

4. FUNCTIONS OF THE DEPARTMENT OF THE ARMY

a. The Department of the Army includes land combat, and service forces, and such aviation, water transport, and space and cyberspace forces as may be organic therein, and shall be organized, trained, and equipped primarily for prompt and sustained combat incident to operations on land, and to support the other Military Services and joint forces. The Army is responsible for the preparation of land forces necessary for the effective prosecution of war and military operations short of war, except as otherwise assigned. The Army is the Nation's principal land force and promotes national values and interests by conducting military engagement and security cooperation; deterring aggression and violence; and should deterrence fail, compelling enemy behavioral change or compliance. The Army shall contribute forces through a rotational, cyclical readiness model that provides a predictable and sustainable supply of modular forces to the Combatant Commands, and a surge capacity for unexpected contingencies.

b. The Functions of the Army. In addition to the common military service functions listed in paragraphs 2.a. through 2.n. of this enclosure, the Army, within the Department of the Army, shall develop concepts, doctrine, tactics, techniques, and procedures, and organize, train, equip,

and provide forces with expeditionary and campaign qualities to perform the following specific functions:

- (1) Conduct prompt and sustained combined arms combat operations on land in all environments and types of terrain, including complex urban environments, in order to defeat enemy ground forces, and seize, occupy, and defend land areas.
- (2) Conduct air and missile defense to support joint campaigns and assist in achieving air superiority.
- (3) Conduct airborne and air assault, and amphibious operations. The Army has primary responsibility for the development of airborne doctrine, tactics, techniques, and equipment.
- (4) Conduct CAO.
- (5) Conduct riverine operations.
- (6) Occupy territories abroad and provide for the initial establishment of a military government pending transfer of this responsibility to other authority.
- (7) Interdict enemy sea, space, air power, and communications through operations on or from the land.
- (8) Provide logistics to joint operations and campaigns, including joint over-the-shore and intra-theater transport of time-sensitive, mission-critical personnel and materiel.
- (9) Provide support for space operations to enhance joint campaigns, in coordination with the other Military Services, Combatant Commands, and USG departments and agencies.
- (10) Conduct authorized civil works programs, to include projects for improvement of navigation, flood control, beach erosion control, and other water resource developments in the United States, its territories, and its possessions, and conduct other civil activities prescribed by law.
- (11) Provide intra-theater aeromedical evacuation.
- (12) Conduct reconnaissance, surveillance, and target acquisition.
- (13) Operate land lines of communication.

5. FUNCTIONS OF THE DEPARTMENT OF THE NAVY

a. The Department of the Navy is composed of naval, land, air, space, and cyberspace forces, both combat and support, not otherwise assigned, to include those organic forces and capabilities necessary to operate, and support the Navy and Marine Corps, the other Military Services, and joint forces. The Navy and Marine Corps comprise the Nation's principal maritime force. They

employ the global reach, persistent presence through forward-stationed and rotationally-based forces, and operational flexibility to secure the Nation from direct attack; secure strategic access and retain global freedom of action; strengthen existing and emerging alliances and partnerships; establish favorable security conditions; deter aggression and violence by state, non-state, and individual actors and, should deterrence fail, prosecute the full range of military operations in support of U.S. national interests.

b. The Functions of the Navy. In addition to the common military service functions listed in paragraphs 2.a. through 2.n. of this enclosure, the Navy, within the Department of the Navy, shall develop concepts, doctrine, tactics, techniques, and procedures and organize, train, equip, and provide forces to perform the following specific functions:

(1) Conduct offensive and defensive operations associated with the maritime domain including achieving and maintaining sea control, to include subsurface, surface, land, air, space, and cyberspace.

(2) Provide power projection through sea-based global strike, to include nuclear and conventional capabilities; interdiction and interception capabilities; maritime and/or littoral fires, to include naval surface fires; and close air support for ground forces.

(3) Conduct ballistic missile defense.

(4) Conduct ocean, hydro, and river survey and reconstruction.

(5) Conduct riverine operations.

(6) Establish, maintain, and defend sea bases in support of naval, amphibious, land, air, or other joint operations as directed.

(7) Provide naval expeditionary logistics to enhance the deployment, sustainment, and redeployment of naval forces and other forces operating within the maritime domain, to include joint sea bases, and provide sea transport for the Armed Forces other than that which is organic to the individual Military Services, USSOCOM, and USCYBERCOM.

(8) Provide support for joint space operations to enhance naval operations, in coordination with the other Military Services, Combatant Commands, and USG departments and agencies.

(9) Conduct nuclear operations in support of strategic deterrence, to include providing and maintaining nuclear surety and capabilities.

c. The Functions of the Marine Corps. In addition to the common military service functions listed in paragraphs 2.a. through 2.n. of this enclosure, and pursuant to section 8063 of Reference (e), the Marine Corps, within the Department of the Navy, shall develop concepts, doctrine, tactics, techniques, and procedures and organize, train, equip, and provide forces, normally

employed as combined arms air ground task forces, to serve as an expeditionary force-in-readiness, and perform the following specific functions:

- (1) Seize and defend advanced naval bases or lodgments to facilitate subsequent joint operations.
- (2) Provide close air support for ground forces.
- (3) Conduct land and air operations essential to the prosecution of a naval campaign or as directed.
- (4) Conduct complex expeditionary operations in the urban littorals and other challenging environments.
- (5) Conduct amphibious operations, including engagement, crisis response, and power projection operations to assure access. The Marine Corps has primary responsibility for the development of amphibious doctrine, tactics, techniques, and equipment.
- (6) Conduct security and stability operations and assist with the initial establishment of a military government pending transfer of this responsibility to other authority.
- (7) Provide security detachments and units for service on armed vessels of the Navy, provide protection of naval property at naval stations and bases, provide security at designated U.S. embassies and consulates, and perform other such duties as the President or the Secretary of Defense may direct. These additional duties may not detract from or interfere with the operations for which the Marine Corps is primarily organized.

d. The Functions of the Coast Guard. The Coast Guard is a unique Military Service residing within the Department of Homeland Security while simultaneously providing direct support to the Department of Defense under its inherent authorities under References (e) and (h). In addressing the Coast Guard when it is not operating in the [Department of the] Navy, this issuance is descriptive in nature and does not purport to be either directive or regulatory. As directed by the President, and in accordance with Memorandum of Agreement between the Department of Defense and Department of Homeland Security on the use of Coast Guard Capabilities and Resources in Support of the National Military Strategy (Reference (ab)), the Department of the Navy shall coordinate with the Department of Homeland Security regarding Coast Guard military functions in time of limited war or defense contingency, without transfer of Coast Guard authority to the Secretary of the Navy. As directed, the Department of the Navy will provide intelligence, logistical support, and specialized units to the Coast Guard, including designated ships and aircraft, for overseas deployment required by naval component commanders, maritime search and rescue, integrated port security, and coastal defense of the United States. The Coast Guard shall maintain a state of readiness to function as a specialized Military Service in the Department of the Navy in time of war or national emergency. If specified in a declaration of war by Congress or if directed by the President, the Coast Guard shall operate as a Military Service in the Department of the Navy, and shall continue to do so

until the President transfers the Coast Guard back to the Department of Homeland Security by Executive order pursuant to section 3 of Reference (h).

(1) The Coast Guard shall develop concepts, doctrine, tactics, techniques, and procedures and organize, train, equip, and provide forces to perform the following specific functions when providing direct or cooperative support to the Department of Defense:

- (a) Conduct coastal sea control and maritime and air interception and interdiction operations.
- (b) Conduct maritime homeland security and counterterrorism operations.
- (c) Provide for port operations, security, and defense.
- (d) Provide maritime operational threat response.
- (e) Conduct counter-illicit trafficking operations.
- (f) Conduct military environmental response operations.
- (g) Conduct theater security cooperation operations.
- (h) Conduct search and rescue operations.
- (i) Conduct ice operations.
- (j) Provide for marine safety, including aids to navigation.

(2) The Coast Guard will coordinate with the Department of Defense, including the Department, of the Navy to provide specialized Coast Guard units, or obtain Navy units, including designated ships and aircraft, for deployment as requested by Military Service component or joint commanders.

6. FUNCTIONS OF THE DEPARTMENT OF THE AIR FORCE

a. The Department of the Air Force is composed of air, space, and cyberspace forces, both combat and support, not otherwise assigned. The Air Force and Space Force are the Nation's principal air and space forces, and are responsible for the preparation of forces necessary for the effective prosecution of war. The Department of the Air Force shall organize, train, equip, and provide air, space, and cyberspace forces for the conduct of prompt and sustained combat operations, military engagement, and security cooperation in defense of the Nation, and to support the other Military Services and joint forces. The Air Force and Space Force will provide the Nation with global vigilance, global reach, and global power in the form of in-place, forward-based, and expeditionary forces possessing the capacity to deter aggression and violence by state, non-state, and individual actors to prevent conflict, and, should deterrence fail, prosecute the full range of military operations in support of U.S. national interests.

b. The Functions of the Air Force. In addition to the common military service functions listed in paragraphs 2.a. through 2.n. of this enclosure, the Air Force, within the Department of the Air Force, shall develop concepts, doctrine, tactics, techniques, and procedures and organize, train, equip, and provide forces to perform the following specific functions:

(1) Conduct nuclear operations in support of strategic deterrence, to include providing and maintaining nuclear surety and capabilities.

(2) Conduct offensive and defensive operations, to include appropriate air and missile defense, to gain and maintain air superiority, and air supremacy as required, to enable, the conduct of operations by U.S. and allied land, sea, air, space, and special operations forces.

(3) Conduct global precision attack, to include strategic attack, interdiction, close air support, and prompt global strike.

(4) Provide timely, global integrated intelligence, surveillance, and reconnaissance capability and capacity from forward deployed locations and globally distributed centers to support world-wide operations.

(5) Provide rapid global mobility to employ and sustain organic air and space forces and other Military Service and USSOCOM forces, as directed, to include airlift forces for airborne operations, air logistical support, tanker forces for in-flight refueling, and assets for aeromedical evacuation.

(6) Provide agile combat support to enhance the air and space campaign and the deployment, employment, sustainment, and redeployment of air and space forces and other forces operating within the air and space domains, to include joint air and space bases, and for the Armed Forces other than which is organic to the individual Military Services and USSOCOM in coordination with the other Military Services, Combatant Commands, and USG departments and agencies.

(7) Conduct global personnel recovery operations including theater-wide combat and civil search and rescue, in coordination with the other Military Services, USJFCOM, USSOCOM, and DoD Components.

(8) Conduct global integrated command and control for air and space operations.

c. The Functions of the Space Force. In addition to the common military service functions listed in Paragraphs 2.a. through 2.n. of this enclosure, the Space Force, within the Department of the Air Force, shall develop concepts, doctrine, tactics, techniques, and procedures and organize, train, equip, and provide forces to perform the following specific functions:

(1) Provide freedom of operation for the United States in, from, and to space.

(2) Provide prompt and sustained space operations.

- (3) Protect the interests of the United States in space.
- (4) Deter aggression in, from, and to space.
- (5) Conduct space operations.

7. DEPARTMENT OF THE ARMY AND DEPARTMENT OF THE AIR FORCE: THE NGB.

The NGB is a joint activity of the Department of Defense. The NGB performs certain Military Service-specific functions and unique functions on matters involving non-federalized National Guard forces as set forth in Reference (i).

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA**

NAVY SEAL #1, et al.,

Plaintiffs,

V.

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

Defendants.

Civil Action No. 8:21-cv-02429-SDM-TGW

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

¹ <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html>, last accessed January 24, 2022.

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, nausea, vomiting, diarrhea, 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 January 19, 2022, CDC reports that over 68 million individuals in the U.S. have been diagnosed with COVID-19 disease, over 4 million have been hospitalized, and over 856,000 have died (approximately 1 in 500 in the total U.S. population of 330 million).⁴ Per the CDC, the elderly and those with underlying medical conditions such as cardiovascular disease, diabetes, chronic respiratory disease, obesity, pregnancy,

² <https://www.cdc.gov/coronavirus/2019-ncov/faq.html>, last accessed January 24, 2022.

³ <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>, last accessed January 24, 2022.

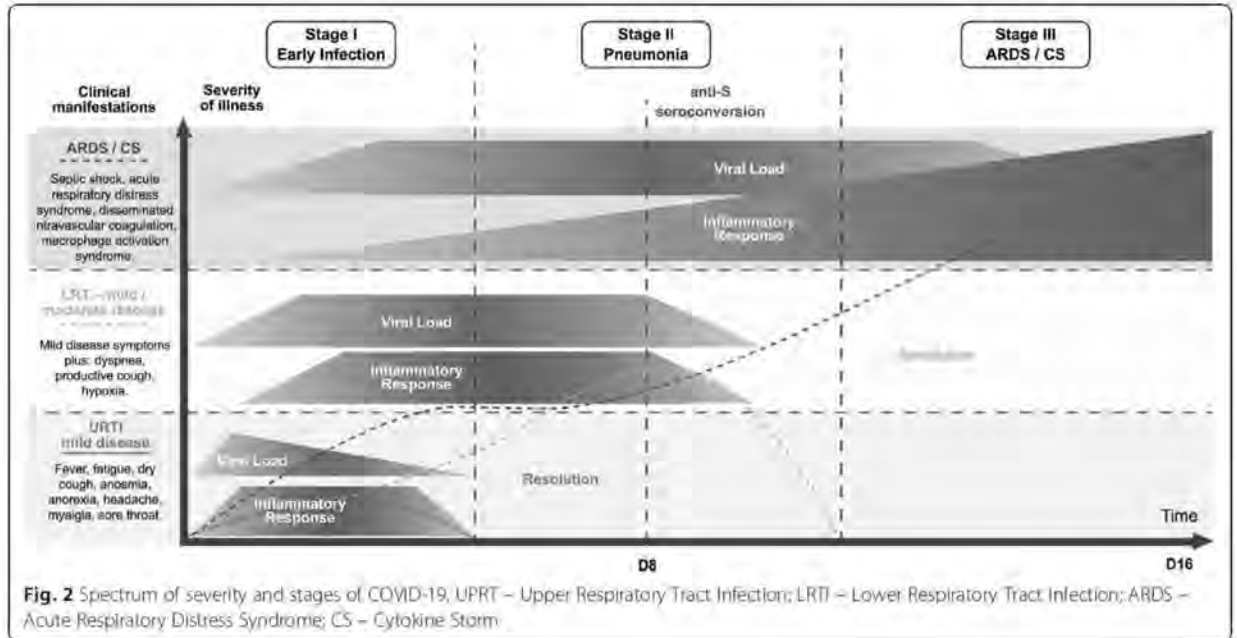
⁴ <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html>, last accessed January 24, 2022.

immunocompromising conditions, or cancer are more likely to develop serious illness.⁵ However, it is a misguided assumption that those who are otherwise healthy will not develop severe, or even fatal, disease. During the acute infectious stage, the virus causes inflammatory cell death, resulting in the release of pro-inflammatory cytokines (proteins which are important in cell signaling). Pro-inflammatory cytokines can cause inflammatory cell death within multiple organs. Cell death releases cellular and viral fragments, which results in production and release of more inflammatory cytokines.⁶ Disease progression can be curtailed by controlling the inflammatory process through immune system clearing of the virus. However, as depicted in the figure below, if the immune system is overwhelmed, either by viral immune evasive mechanisms or by an impaired host response, the pro-inflammatory cytokine process may continue unabated, causing increasingly severe disease such as acute respiratory distress syndrome and cytokine storm. Recognition of the viral and hyperinflammatory phases informs treatment strategies for those with COVID-19 disease, including, but not limited to vaccines, anti-SARS-CoV-2 monoclonal antibodies, and effective pooled antibodies (convalescent plasma) for prevention/mitigation and antivirals for treatment in the viral phase, and targeted immunobiologics and systemic steroids for those in the hyper-inflammatory phase.⁷

⁵ <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>, last accessed January 24, 2022.

⁶ Bordallo B, et al. Severe COVID-19: What Have We Learned With the Immunopathogenesis? *Adv Rheumatol* (2020) 60(1):50. doi: 10.1186/s42358-020-00151-7.

⁷ <https://www.covid19treatmentguidelines.nih.gov/management/clinical-management/>, last accessed January 29, 2022.



8. Treatment for COVID-19 disease, even in the outpatient environment, is not without risks. The strongest recommendation for pre-exposure to COVID-19 disease remains vaccination, with highest level of evidence demonstrated through robust randomized control trials.⁸ Although anti-SARS-CoV-2 monoclonal antibody combinations may be prescribed in the outpatient setting, the indication and level of evidence in use differs when considering pre-exposure prophylaxis, post-exposure prophylaxis, or treatment. Additionally, effectiveness of monoclonal antibodies is impacted by the variant in the infected person. Currently, only one SARS-CoV-2 monoclonal antibody is anticipated to be effective against the omicron variant (sotrovimab), resulting in inadequate supply to meet demand nationwide. What this means to DoD is that even if otherwise healthy service members develop COVID-19 disease, an individual's immune system response may not be able to adequately manage the virus, resulting in a hyperinflammatory state, with variable outcomes, depending on the individual's medical history and immune response. Of the

⁸ <https://www.covid19treatmentguidelines.nih.gov/management/clinical-management/> last accessed January 29, 2022.

treatments currently available, only sotrovimab is anticipated to be a clinically effective mAb against omicron. Of the outpatient antiviral medications, only one comes with a strong recommendation, based on randomized trials. Just as it is acknowledged that there are potential adverse events to COVID-19 vaccines, it should also be understood that there are risks to treatment of COVID-19 disease, even in the outpatient setting. A non-exhaustive list includes cardiovascular events, liver toxicity, and drug interactions. Further, some treatment must be administered shortly after diagnosis – within a matter of days – in order to be effective.⁹

9. Although most people with COVID-19 are 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.¹⁰ Another study comparing outcomes in patients referred to outpatient rehabilitation clinics after COVID-19 reported poorer general, mental, and physical health and functioning

⁹ <https://www.covid19treatmentguidelines.nih.gov/management/clinical-management/> last accessed January 29, 2022.

¹⁰ 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>.

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.¹¹ A study assessing clinical patterns and recovery time from COVID-19 illness in 147 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.¹²

COVID-19 Impacts on the Force

10. 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

¹¹ 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>.

¹² 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.

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 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.

11. Between February 2020 and December 2021, there were 234,563 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 28,351 cases identified, followed by the second highest peak in December 2021 with 25,102 cases identified (see “Figure” below). Other

peaks occurred in August 2021 with 22,072 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 and October 2021. The percentage of hospitalized cases decreased to 1.1% in November 2021 and 0.3% in December 2021, but this trend should be interpreted with caution due to data lags. In total, 31 active duty service members have died from COVID-19 as of the end of December 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 31 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. No active duty service member deaths have yet been reported for December 2021.

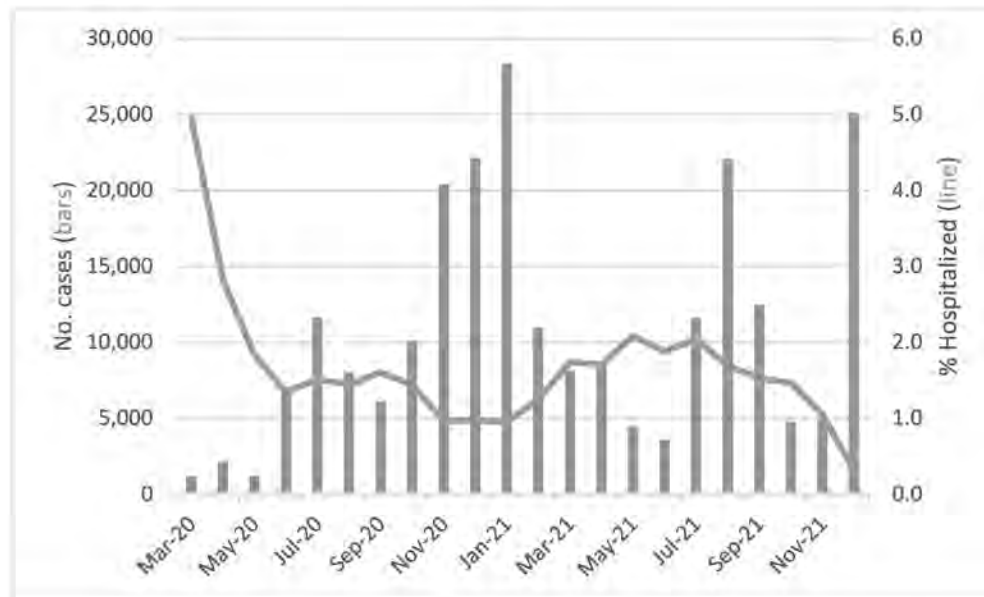
Table. COVID-19 cases, hospitalizations, and deaths among active duty service members, February 2020 - December 2021

	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	6,790	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	10,048	144	1.4	1
Nov-20	20,422	197	1.0	0
Dec-20	22,119	215	1.0	2
Jan-21	28,351	269	0.9	2
Feb-21	10,981	137	1.2	5
Mar-21	8,136	141	1.7	0
Apr-21	8,575	146	1.7	1
May-21	4,420	92	2.1	0
Jun-21	3,569	67	1.9	0
Jul-21	11,585	236	2.0	1
Aug-21	22,072	372	1.7	5
Sep-21	12,438	190	1.5	6
Oct-21	4,786	70	1.5	6
*Nov-21	4,944	52	1.1	1
*Dec-21	25,102	76	0.3	0

*Hospitalization and death 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 – December 2021



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

12. 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.¹³ As depicted below, data through January 19, 2022 demonstrated that of the 490,202 COVID-19 cases within the DoD 5,817 individuals were hospitalized and 660 have died, including 90 military service members (service members include Active Duty, Reserves, and National Guard personnel). In both the civilian sector and in the

¹³ <https://www.defense.gov/Spotlights/Coronavirus-DOD-Response/>, last accessed January 24, 2022.

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	320,601	2,413	280,609	90
Civilian	92,022	2,182	72,588	401
Dependent	47,868	516	43,408	34
Contractor	29,711	706	25,559	135
Total	490,202	5,817	422,164	660

13. 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. Throughout the pandemic, the National Guard has been called on extensively to provide medical support to the civilian population. Over the last few months, DoD has increasingly been deploying military doctors, nurses, paramedics and other personnel to U.S hospitals to assist in preventing the country's medical system from collapsing from demand.

Vaccine Impacts

14. 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

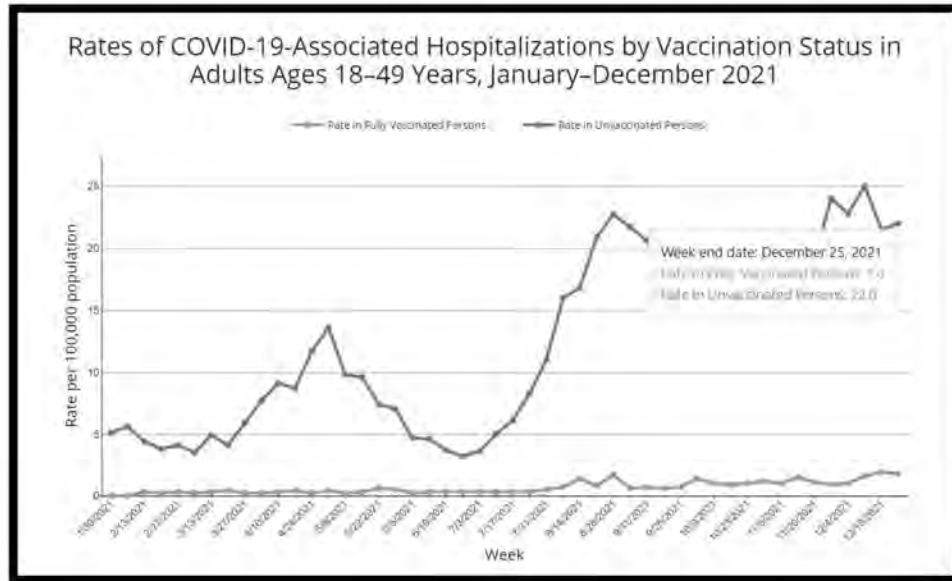
who may not be able to receive a vaccine or do not mount an adequate antibody response). Disease prevention through immunization also mitigates the need for pharmacologic treatment (antibiotics for sepsis, etc.), reducing the risk of drug-resistant pathogen development.

15. A key component of primary health care, the U.S. Food and Drug Administration (FDA) provides regulatory allowance for immunizations and 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.

16. According to the CDC, over 529 million doses of COVID-19 vaccine have been given in the United States from December 14, 2020, through January 18, 2022.¹⁴ 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 COVID-19 associated hospitalizations in unvaccinated adults ages 18-49 years was over 12 times higher than fully vaccinated adults aged 18-49 years for the week ending December 25, 2021.¹⁵

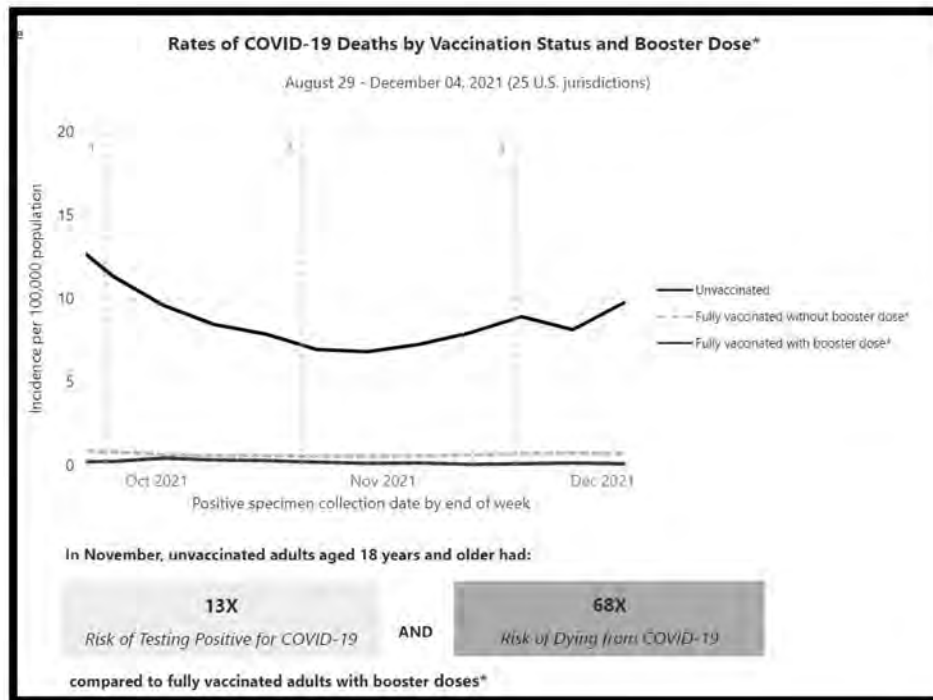
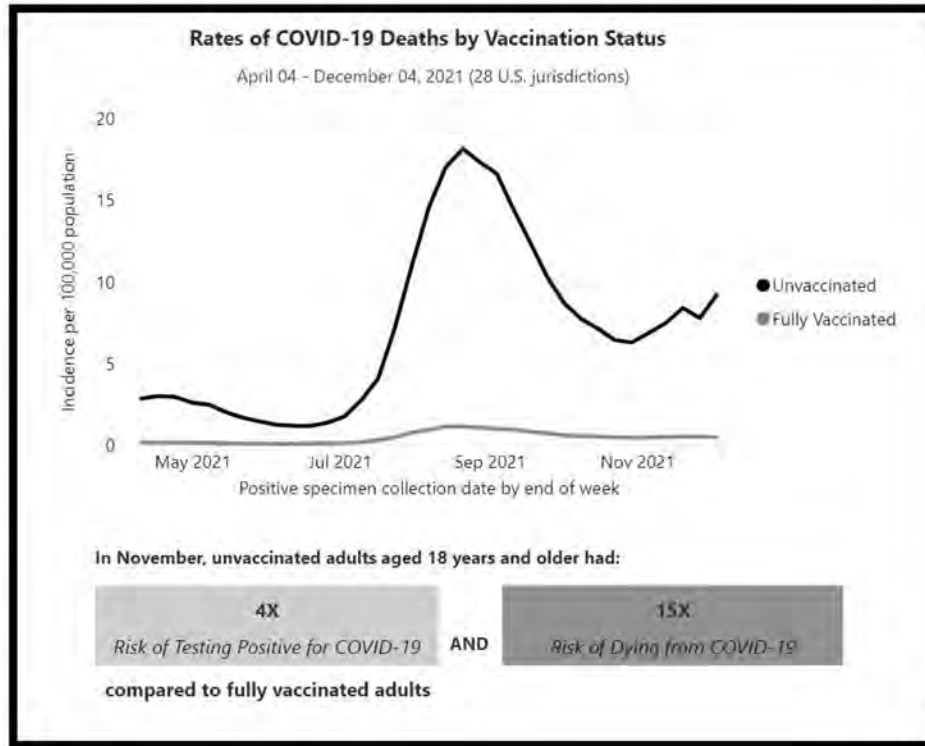
¹⁴ <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/safety-of-vaccines.html>, last accessed January 24, 2022.

¹⁵ <https://covid.cdc.gov/covid-data-tracker/#covidnet-hospitalizations-vaccination>, last accessed January 24, 2022.



Also, according to CDC data, deaths by vaccination status in November 2021, demonstrated that unvaccinated persons 18 years of age and older had a 4 times greater risk of testing positive for COVID-19 and a 15 times greater risk of dying from COVID-19 compared to fully vaccinated individuals, and unvaccinated persons 18 years of age and older had a 13 times greater risk of testing positive for COVID-19 and 68 times greater risk of dying from COVID-19 compared to fully vaccinated adults with a booster dose.¹⁶

¹⁶ <https://covid.cdc.gov/covid-data-tracker/#rates-by-vaccine-status>, last accessed January 24, 2022.



17. As of January 19, 2022, DoD immunization sites have administered over 6.71 million doses of COVID-19 vaccine. Vaccine adverse events that are temporally associated with vaccine administration are centrally captured by CDC and FDA's Vaccine Adverse Event Reporting System (VAERS) through passive surveillance, meaning that information is voluntarily reported by health care providers and the public. VAERS is not designed to determine whether a vaccine caused a health issue of concern, but it is useful for detecting unexpected patterns of adverse event reporting that might indicate a possible safety problem with a vaccine. As of January 14, 2022, a total of 7,927 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. It must be stressed that a VAERS submission to the CDC does not mean that the vaccine of concern caused or contributed to the medical issue reported.

18. The DoD has received hundreds of thousands of Pfizer-BioNTech BLA-manufactured, EUA-labeled COVID-19 vaccine doses and continues to use 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.”¹⁷ 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 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.”¹⁸ As described below, lab tests for serology also state

¹⁷ <https://www.cdc.gov/healthyschools/bam/diseases/vaccine-basics.htm>, accessed January 24, 2022.

¹⁸ <https://www.fda.gov/consumers/consumer-updates/coronavirus-disease-2019-testing-basics>, accessed January 24, 2022.

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 for those who are moderately or severely immunocompromised, 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 COVID-19 vaccines can be given safely to people with evidence of a prior SARS-CoV-2 infection.”¹⁹

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

¹⁹ 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 January 24, 2022.

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.”²⁰

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 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. In other words, re-infection is possible. Multiple serotypes of a 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.

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 January 24, 2022.

24. “Herd immunity” is an epidemiologic concept that explains how a community may be protected from an infectious disease that is human-to-human transmitted.²¹⁻²² Herd immunity can be achieved through vaccination or through natural infection, if enough individuals 1) survive the disease and 2) mount a life-long immune response. Safe and effective vaccines are unequivocally considered the safer approach to a vaccine-preventable disease as compared to the unpredictable response that an individual may have to exposure to disease, as described above. When a large proportion of a community is immune, vulnerable members of the community are indirectly protected because their chance of infection exposure is very low. Herd immunity does not eliminate risk, but the phenomenon means that population risk is greatly reduced. Herd immunity is only possible when humans are the only source of infection transmission, when immunity can be clearly established to prevent lifelong infection and transmission, and when an adequate proportion of the population can safely develop immunity to protect all others. Measles (rubeola virus infection) is a classic example of the successful application of the concept of herd immunity. It is important to recognize that there is no disease where a vaccination program would cease once a certain level of immunity is reached, unless the disease is considered eradicated (i.e. smallpox in humans). Children continue to receive routine immunizations for diseases that we have not seen in this country for many years (i.e., polio) or rarely see (i.e. epiglottitis from *Haemophilus influenza*) so the vaccine preventable disease does not resurge. The Department of Defense vaccine program follows these same principles.

²¹ Desai AN, Majumder MS. What Is Herd Immunity? *JAMA*. 2020;324(20):2113.
doi:10.1001/jama.2020.20895

²² McDermott A. Core Concept: Herd immunity is an important-and often misunderstood-public health phenomenon. *Proc Natl Acad Sci U S A*. 2021;118(21):e2107692118.
doi:10.1073/pnas.2107692118

25. The percentage of the population needing to be immune to drive herd immunity varies from disease to disease. Generally, the more contagious a disease is, the greater proportion of the population needs to be immune to stop its spread. For example, with regards to the highly contagious measles disease, approximately 95% immunity within a population is needed to interrupt the chain of transmission. When the immunity levels of a population falls, local outbreaks can, and have, occurred. In 2019, 1,282 individual cases of measles were confirmed in 31 states, the highest level since 1992. The majority of those cases were among those who were not vaccinated.^{23,24}

26. This herd immunity threshold – the level above which the spread of disease will decline – is currently unknown for COVID-19. As described above, in order to interpret an antibody response as it pertains to immunity, a correlate of protection (i.e. what antibody number do I need to be considered immune?) must be determined and validated. No FDA antibody test has validated a correlate of protection at this time. Nonetheless, it is generally agreed that the more severe the COVID-19 disease is in an individual, the more antibodies a survivor would produce and therefore likely would have a higher degree of protection and possibly be protected longer than those asymptomatic or with mild symptoms.

27. Those who receive the COVID-19 vaccine contribute to the information available from studying the outcomes from 529 million doses administered in the US and over the 9.93 billion doses administered globally. Responses to vaccination are more consistent and there is minimal risk compared to the complications and treatments needed to treat the disease. Although

²³ <https://www.cdc.gov/measles/cases-outbreaks.html>, accessed 25 January 2022

²⁴ <https://www.cdc.gov/mmwr/volumes/68/wr/pdfs/mm6840e2-H.pdf>, accessed 25 January 2022

breakthrough infections do occur depending on the circulating variant and the longer the interval from vaccination, vaccines (especially when a booster is also received) remain highly effective in preventing hospitalizations and death.

28. Given the data available from the global scientific community and considering the risks and benefits realized from a history of infection versus a history of vaccination and an unequivocal need for a healthy force, the Department of Defense determined, after considering the available evidence from FDA guidance and CDC recommendations, that vaccination would provide the minimal risk to service members while maintaining a necessary state of readiness.

29. 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.²⁵ 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%).

²⁵ <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/vaccine-induced-immunity.html>, accessed January 24, 2022.

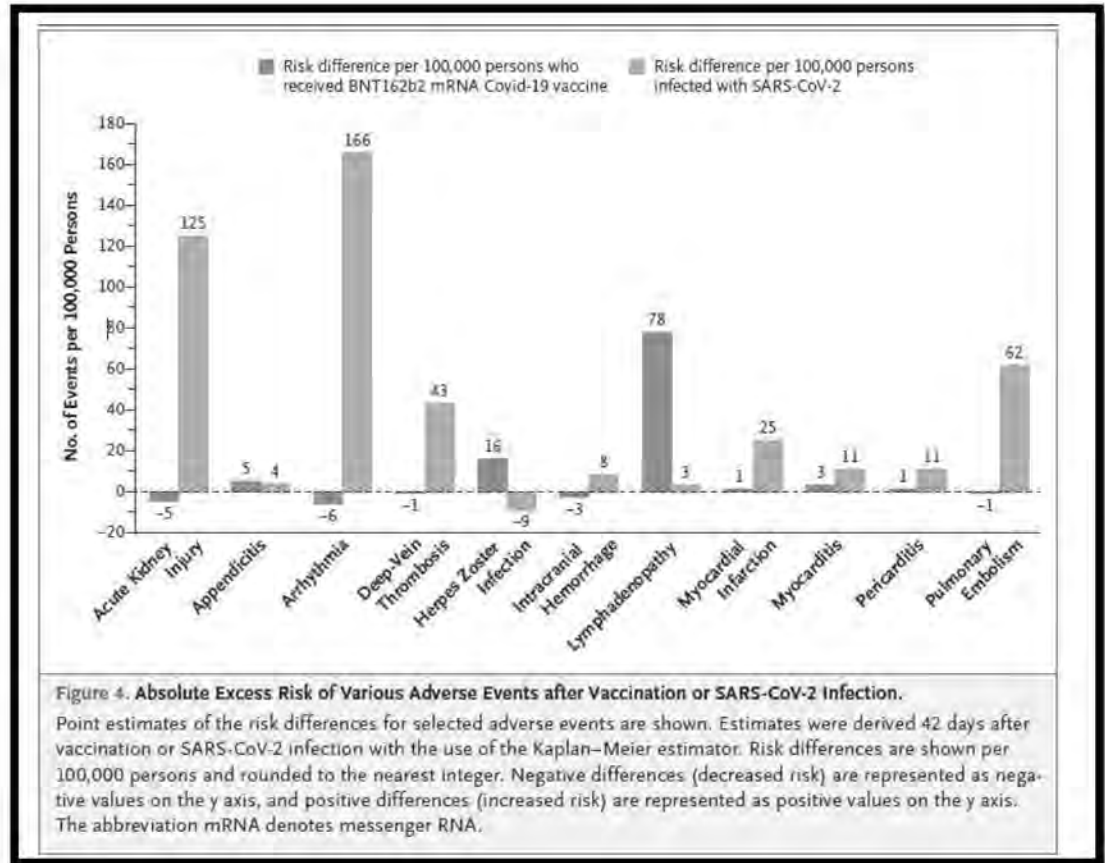
- Multiple studies have shown that antibody titers correlate with protection at a population level, but protective titers at the individual level remain unknown.
- Whereas there is a wide range in antibody titers in response to infection with SARS-CoV-2, completion of a primary vaccine series, especially 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.

30. 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 individuals²⁶. These findings have not been reproduced in a peer-reviewed or prospective publication. However, an observational study,²⁷ 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.

²⁶ <https://www.medrxiv.org/content/10.1101/2021.08.24.21262415v1>, last accessed January 24, 2022.

²⁷ 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

31. On November 26, 2021, the World Health Organization (WHO) designated the Omicron variant (Pango lineage B.1.1.529), first identified in November 2021 in Botswana and South Africa, 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.²⁸ 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,

²⁸ [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 January 24, 2022.

2021, it has rapidly spread throughout the United States.²⁹ Those infected with the Omicron variant in South Africa were initially reported in the media as not having severe outcomes and therefore concluding that this would be a “mild” variant. In attempt to address that misconception, on January 6, 2022, Dr. Tedros Adhanom Ghebreyesus, the WHO Director-General, stated that “while Omicron does appear to be less severe compared to Delta, especially in those vaccinated, it does not mean it should be categorized as ‘mild’. Hospitals are becoming overcrowded and understaffed, which further results in preventable deaths from not only COVID-19 but other diseases and injuries where patients cannot receive timely care. First-generation vaccines may not stop all infections and transmission but they remain highly effective in reducing hospitalization and death from this virus.”³⁰

32. The Omicron variant has approximately 32 mutations on the spike (S) protein with approximately 15 of the 32 occurring within the receptor binding domain (RBD). The RBD is what the virus uses to bind to our cells and initiate viral infection process. Antibodies produced from previous infection or vaccination, as well as the monoclonal antibodies (mAb) given to treat those infected, target the RBD. The degree to which antibodies bind or “neutralize” the virus, determines the degree of resultant illness – the better antibodies bind, the less likely a person will become ill. This is why any mutation on the S protein RBD would cause concerns about the efficacy of existing vaccines, antibodies produced from previous infection, and the mAb given to treat people in preventing Omicron infection. One study, using an artificial intelligence (AI)

²⁹ <https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html>, last accessed January 24, 2022.

³⁰ <https://twitter.com/WHO/status/1479167003109859328>, posted January 6, 2022.

model, revealed that “Omicron may be over 10 times more contagious than the original virus or about 2.8 times as infectious as the Delta variant.”³¹

33. Multiple investigators turned their attention to assessing the effectiveness of antibodies following COVID-19 disease and current vaccines against Omicron. One study assessed the neutralization of 9 monoclonal antibodies (mAb), sera from 34 COVID-19 vaccine (Pfizer or Astra Zeneca) primary series recipients who had not previously been infected, sera from 20 recipients who had received a Pfizer-BioNTech booster dose, and sera from 40 convalescent sera (blood serum obtained from individuals who had a history of infection) donors, 22 of whom had also been vaccinated.³² The better the neutralization, the better the protection a person. Omicron was totally or partially resistant to neutralization by all mAbs tested. Sera from those vaccinated, sampled 5 months after being fully vaccinated, had limited inhibition of Omicron. Blood sera from those with a history of COVID-19 disease demonstrated no or low neutralizing activity against Omicron. Those who received a booster dose did generate an anti-Omicron neutralizing response, though lower than what has been seen against the Delta variant. A second study³³ also demonstrated that those who had a history of infection and were fully vaccinated (whether disease then vaccinated or vaccinated then disease (i.e., a breakthrough infection) were better able to neutralize the Omicron variant as compared to those who had only a history of disease or had a history of being fully vaccinated. An additional small study investigated the neutralizing

³¹ Chen J, et al. Omicron Variant (B.1.1.529): Infectivity, Vaccine Breakthrough, and Antibody Resistance J. Chem. Inf. Model. 2022, 62, 2, 412-422 <https://doi.org/10.1021/acs.jcim.1c01451>.

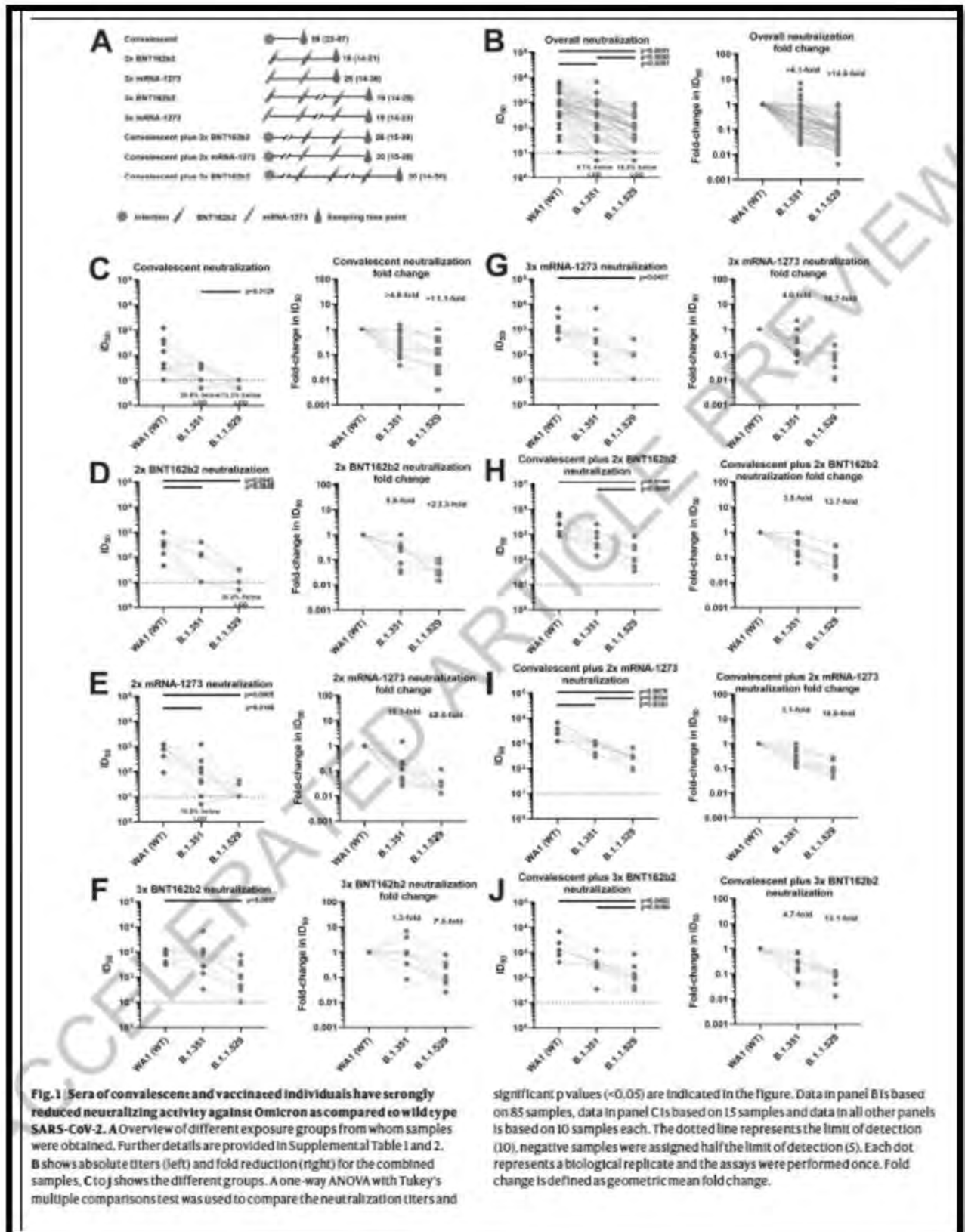
³² Planas, D. et al. Considerable escape of SARS-CoV-2 Omicron to antibody neutralization. *Nature* <https://doi.org/10.1038/s41586-021-04389-z> (2021).

³³ Rossler A., et al SARS-CoV-2 Omicron Variant Neutralization in Serum from Vaccinated and Convalescent Persons NEJM, published January 12, 2022 doi:10.1056/NEJMc2199236.

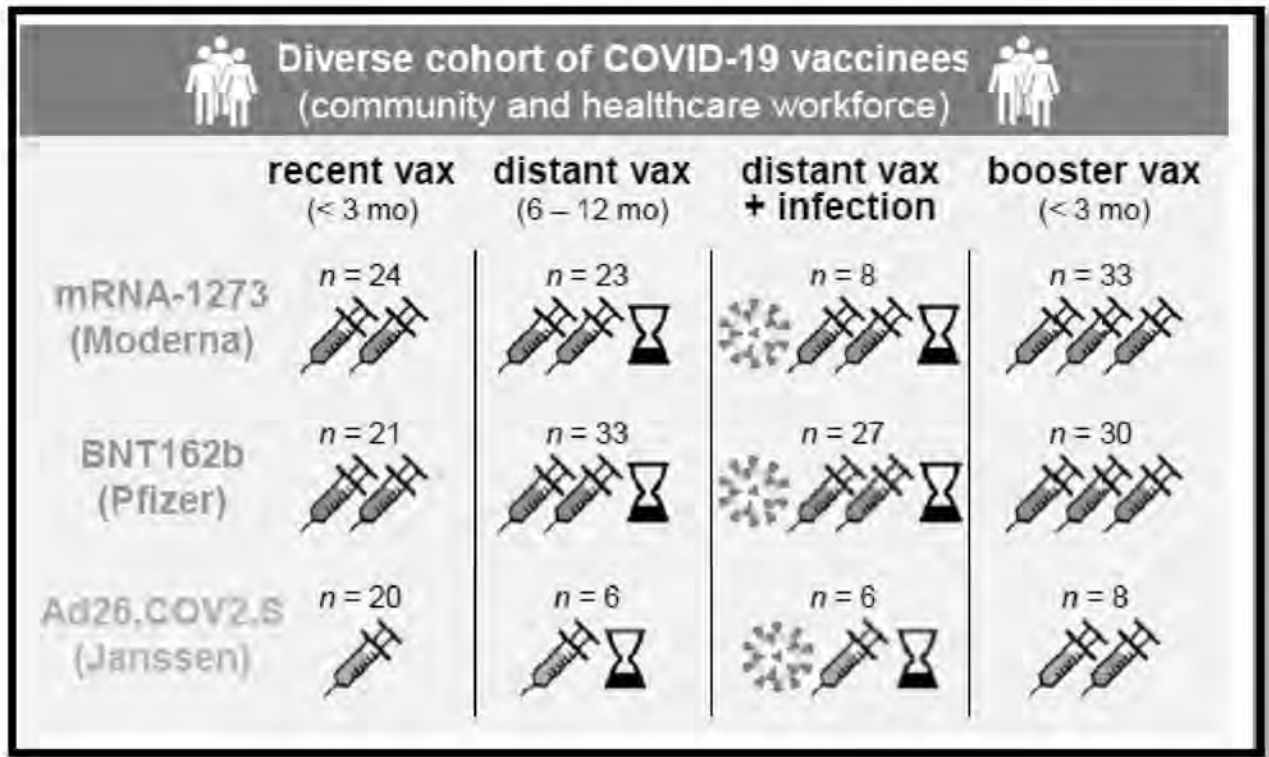
activity of sera from convalescent (history of disease), mRNA double vaccinated (BNT162b2 = Pfizer-BioNTech; mRNA-1273 = Moderna), mRNA boosted, convalescent double vaccinated, and convalescent boosted individuals against the original SARS-CoV-2 strain, Beta variant (B.1.351), and Omicron (B.1.1.529) variant in a laboratory (in vitro) setting.³⁴ In the figures depicted below, Figures 1c–1j provide the results of different combinations of sera studied. What would be interpreted as the “best” combination to work against the Omicron variant is the highest level of red dots on the y-axis seen with the B.1.1.529 on the x-axis. For example, Figure 1c shows the results of those individuals with a history of COVID-19 disease. In an oversimplified interpretation, Figure 1c shows that those with a history of COVID-19 disease had no measurable neutralizing activity for Omicron. In Figures 1d and 1e, (2 doses of either Pfizer-BioNTech or Moderna), there is some neutralization against Omicron. Those who received a booster (Figure 1f and 1g) had higher levels of neutralization against Omicron compared to the two-dose primary series. Those who had a history of disease and were then vaccinated with a two-dose primary series or a two-dose primary series and a booster (Figures 1h–1j) had better Omicron neutralization. In summary, the study found that neutralizing activity against Omicron “is most impacted in unvaccinated, convalescent individuals and in naïve individuals who acquired immunity through two mRNA COVID-19 vaccine doses” and that “boosted individuals had, at least within the short time after the booster dose, significant protection against symptomatic disease in the range of 75%.”³⁵

³⁴ Carreno, J.M. et al. Activity of convalescent and vaccine serum against SARS-CoV-2 Omicron. *Nature* <https://doi.org/10.1038/s41586-022-04399-5> (2021).

³⁵ *Id.* at 2.

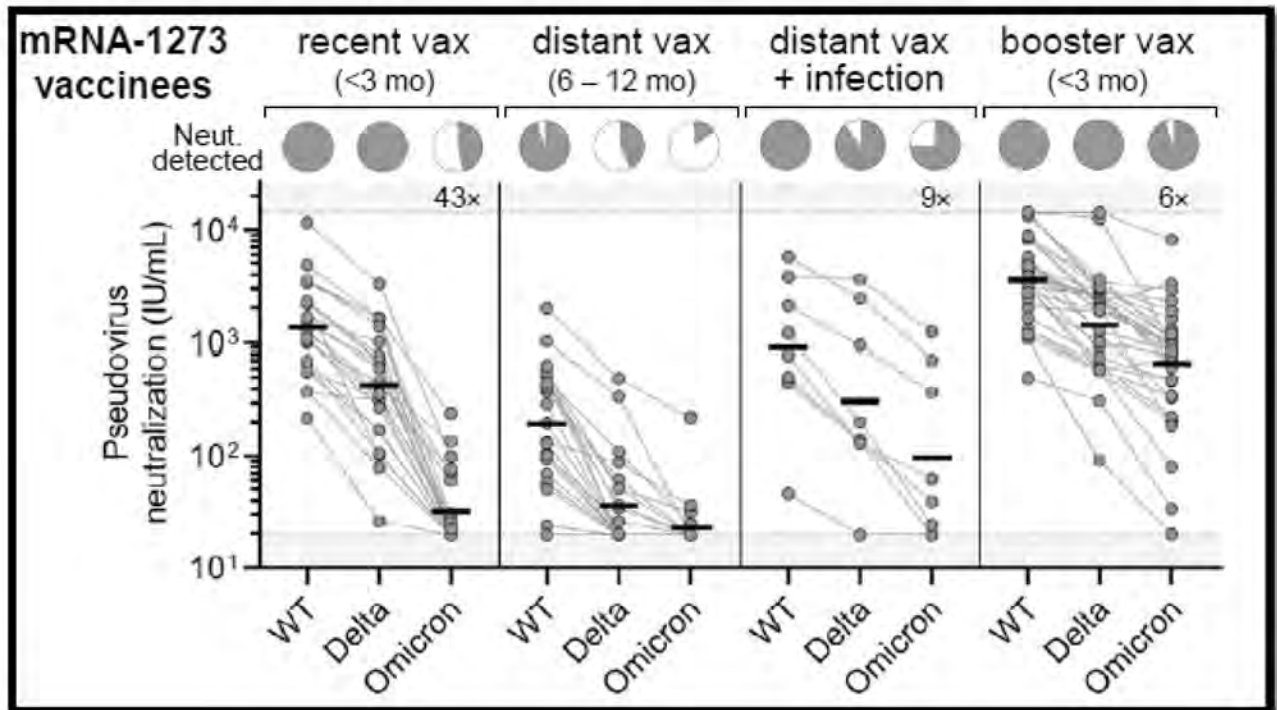


34. An additional study³⁶ assessed the neutralizing potency of sera from 88 mRNA-1273 (Moderna), 111 BNT162b (Pfizer-BioNTech), and 40 Ad26.COV2.S (Janssen) vaccine recipients against wild-type, Delta, and Omicron COVID-19 variants, based on recent vaccination, distant vaccination (6-12 months), history of infection and distant vaccination, and recent booster vaccination, as depicted below.

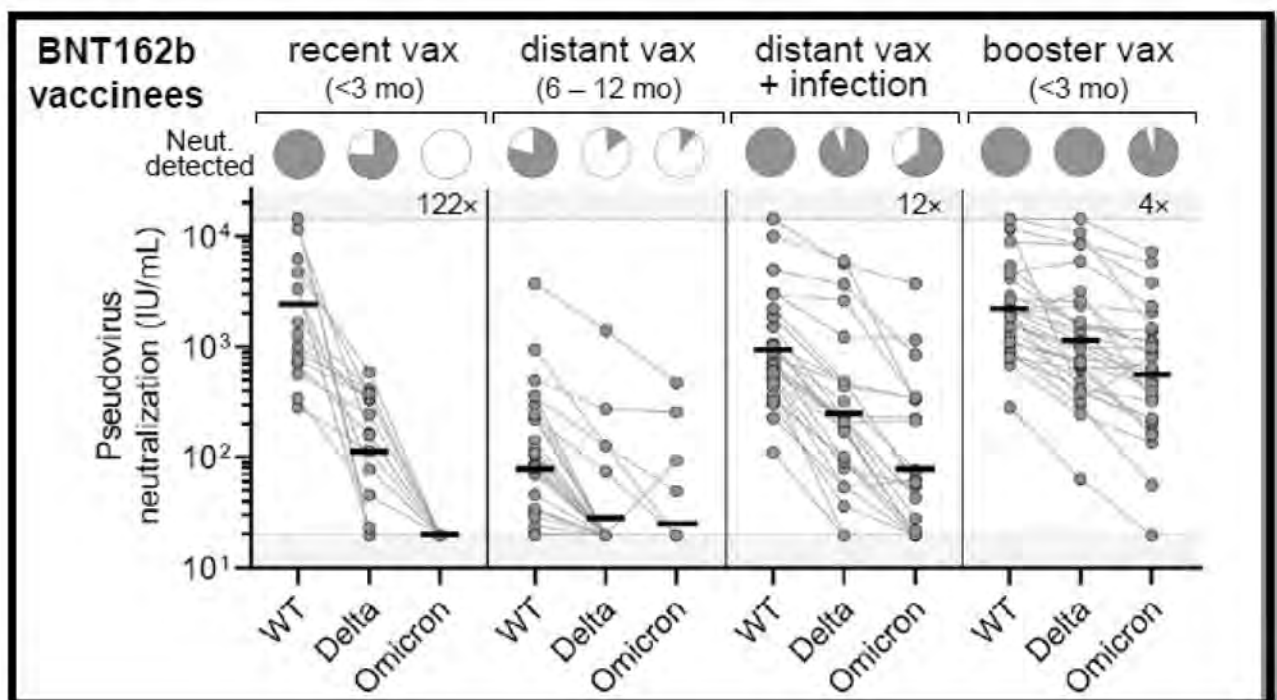


35. Against the Omicron variant, recent (< 3 months) vaccine recipients exhibited a 43-fold lower neutralization than the wild type (WT). Those with a history of vaccination and infection had a 9-fold decrease in neutralization than WT, whereas those who received a booster dose less than 3 months ago had a 6-fold decrease in neutralization compared to WT.

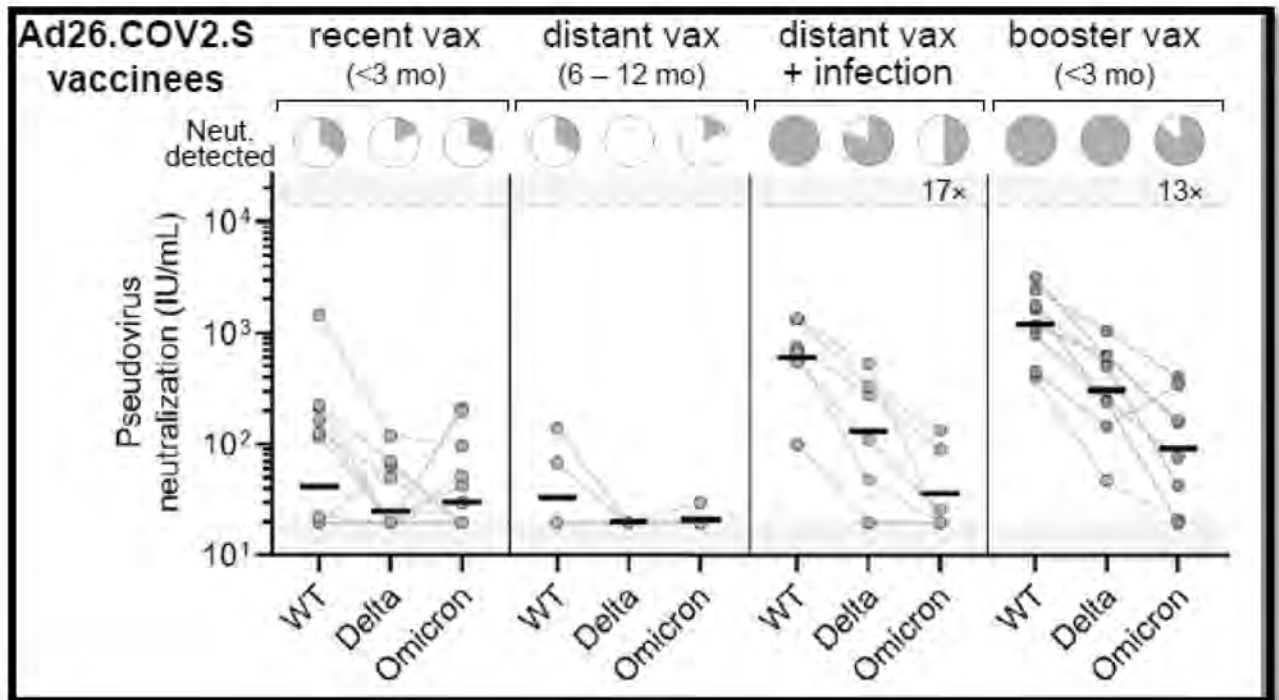
³⁶ Garcia-Beltran WF, et al mRNA-based COVID-19 vaccine boosters induce neutralizing immunity against SARS-CoV-2 Omicron variant. Cell 185, 1-10, accessed January 29, 2022.



36. Similar results were seen in Pfizer-BioNTech recipients, with the best protection against Omicron seen in those who recently received a booster dose.



37. Of the three vaccines, Janssen recipients had the least neutralization against the Omicron variant, with those who recently received a booster dose demonstrating a 13-fold decrease in neutralization as compared to the WT.



38. In contrast to the above studies, the CDC recently published a study examining the impact of primary COVID-19 vaccination and previous SARS-CoV-2 infection on COVID-19 incidence and hospitalization rates from California and New York.³⁷ The findings demonstrated that prior to Delta variant, being vaccinated with or without a history of COVID-19 resulted in lower incidence of laboratory-confirmed COVID-19 disease and hospitalizations as compared to those who were unvaccinated with a history of disease. However, after the Delta variant became dominant, those with a history of COVID-19 disease, with or without a history of vaccination, had

³⁷ Leon TM, Dorabawila V., Nelso L, et al. COVID-19 Cases and Hospitalizations by COVID-19 Vaccination Status and Previous COVID-19 Diagnosis – California and New York, May–November 2021. MMWR Morb Mortal. Wkly Rep 2022;71:125-131. DOI: <http://dx.doi.org/10.15585/mmwr.mm7104e1>.

a lower incidence of laboratory-confirmed COVID-19 disease than those who were vaccinated without a history of COVID-19. Excluded in the study was discussion of severity of COVID-19 disease and outcomes of those who had disease (complications, etc). CDC concludes with reminding readers that more than 130,000 California and New York residents died from COVID-19 through November 30, 2021, and that “vaccination remains the safest and primary strategy to prevent SARS-CoV-2 infections, associated complications, and onward transmission.”

39. Clinical data of DoD breakthrough rates and hospitalizations as of January 20, 2022, taking into account the prior 6 weeks (where 78.8% of all breakthrough cases were seen) revealed the following results: Of the 1,578,364 active duty fully vaccinated individuals without a booster dose, 116,513 (7.38%) had a breakthrough infection. The hospitalization rate in active duty after full vaccination without a booster was 12 per 100,000 active duty service members. Of those active duty service members who were unvaccinated, the hospitalization rate was 782 per 100,000. Those who were unvaccinated had a higher percentage of critical and severe disease.

40. In summary, unvaccinated persons without a history of disease are most vulnerable to COVID-19 disease. Vaccination was highly effective against the initial SARS-CoV-2 strain it was developed to protect against. The longer the interval from vaccination, the increased risk for disease. Vaccination and a history of disease was shown to be less protective than vaccination and booster dose against both the Delta and Omicron variants. Clinically, breakthrough infections during the time of Omicron dominance have been increasingly seen in those fully vaccinated; however, the hospitalization rate during Omicron dominance in the unvaccinated active duty population was 65 times higher than the hospitalization rate in those fully vaccinated without a booster. CDC states “primary COVID-19 vaccination, additional doses, and booster doses are recommended by CDC’s Advisory Committee on Immunization Practices to ensure that all eligible

persons are up to date with COVID-19 vaccine, which proves the most robust protection against initial infection, severe illness, hospitalization, long-term sequelae, and death.”³⁸

Risks from COVID-19 Vaccination

41. Risks from immunization, including COVID-19 vaccines are rare. CDC provides routine updates on specific adverse events temporally associated with COVID-19 vaccines.³⁹ CDC updates as of January 18, 2022, include the following:

- A. **Anaphylaxis after COVID-19 vaccination is rare** and has occurred in approximately 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 January 13, 2022, more than 17.8 million doses of the J&J/Janssen COVID-19 Vaccine have been given 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 30-49 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-Barré 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

³⁸ Leon TM, Dorabawila V., Nelso L, et al. COVID-19 Cases and Hospitalizations by COVID-19 Vaccination Status and Previous COVID-19 Diagnosis – California and New York, May-November 2021. MMWR Morb Mortal. Wkly Rep 2022;71:125-131. DOI: <http://dx.doi.org/10.15585/mmwr.mm7104e1>.

³⁹ <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/adverse-events.html>, last accessed January 24, 2022.

muscle weakness and sometimes paralysis. Most people fully recover from GBS, but some have permanent nerve damage. After more than 17.8 million J&J/Janssen COVID-19 Vaccine doses administered, there have been around 301 preliminary reports of GBS identified in VAERS as of January 13, 2022. 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 January 13, 2022, VAERS has received 2,103 reports of myocarditis or pericarditis among people ages 30 years and younger 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 1,213 reports of myocarditis or pericarditis.

E. Reports of death after COVID-19 vaccination are rare. More than 529 million doses of COVID-19 vaccines were administered in the United States from December 14, 2020, through January 18, 2022. During this time, VAERS received 11,468 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. Continued monitoring has identified additional deaths for a total of 9 deaths causally associated with J&J COVID-19 vaccination.

42. 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.⁴⁰

⁴⁰ <https://www.who.int/news/item/27-10-2021-gacvs-statement-myocarditis-pericarditis-covid-19-mrna-vaccines-updated>, last accessed January 24, 2022.

COVID-19 Antibody Tests

43. 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. Last updated December 3, 2021, the FDA's EUA Authorized Serology Test Performances⁴¹ 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."⁴²
- 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."⁴³
- 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 XXX test may not mean that an individual's current or past symptoms were due to COVID-19 infection."⁴⁴

⁴¹ <https://www.fda.gov/medical-devices/coronavirus-disease-2019-covid-19-emergency-use-authorizations-medical-devices/eua-authorized-serology-test-performance>, last accessed January 24, 2022.

⁴² <https://www.fda.gov/media/146369/download>, last accessed January 24, 2022.

⁴³ <https://www.fda.gov/media/138627/download>, last accessed January 24, 2022.

⁴⁴ <https://www.fda.gov/media/137542/download>, last accessed January 24, 2022.

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 February 4, 2022, in Falls Church, Virginia

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

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA**

NAVY SEAL #1, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 8:21-cv-02429-SDM-TGW
)	
JOSEPH R. BIDEN, JR., in his official)	
capacity as President of the United States,)	
et al.,)	
)	
Defendants.)	
)	

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 January 27, 2022, there have been 355,099 cases of Coronavirus Disease 2019 (COVID-19) in service members across the Department of Defense (DoD) which have led to 92 deaths (three of which had some level of vaccinations: two were partially vaccinated, while one had received the single-dose Johnson and Johnson vaccine and was one day short of the booster eligibility window of at least two months after the primary J&J dose). There have been no deaths among active duty personnel since the vaccination deadlines when approximately 98% of active duty personnel are at least partially vaccinated.

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.

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

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>.

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. In December of 2021, the President announced plans to send an additional 1,000 military medical personnel to U.S. hospitals to join the roughly 240 personnel already deployed to seven states. Since this announcement, the DoD has already sent over 400 personnel, made an additional nearly 500 available as of 15 January, and is preparing to send 500 more. 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 many 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. According to the Director of the National Institute of Allergy and Infectious Diseases (NIAID), Dr. Anthony Fauci, the latest statistics for the U.S. population show that an unvaccinated person has a 10-times greater chance of getting infected, a 17-times greater chance of getting hospitalized, and a 20-times chance of dying compared to a vaccinated person.² Rates of COVID-19 cases between October and November of 2021 were lowest among fully vaccinated persons with a booster dose compared to those with just the primary series, and much lower than rates among unvaccinated persons (25.0, 87.7, and 347.8 per 100,000 population, respectively). In December of 2021, when Omicron was circulating widely, the same pattern holds (148.6, 254.8, and 725.6 per 100,000 population, for boosted, primary series only, and unvaccinated, respectively).

17. Although COVID-19 vaccine effectiveness (VE) has decreased in terms of preventing infections with the emergence of the new variants and with the waning of vaccine-induced immunity, protection against hospitalization and death has remained high. The CDC published a study on January 19, 2022 that showed VE in terms of preventing hospitalization during the period when Omicron has been the dominant variant was 81% following the initial 2-shot series and 90% in those who were up to date with the recommended booster dose, compared to only 57% in those who were not up to date (meaning beyond the recommended time for booster dose eligibility without receiving a booster dose). In November of 2021, the CDC found that unvaccinated individuals were 4-times more likely to test positive and 15-time more likely to die

² 20 January 2022 Blue Star Families forum. Panel Speakers: Dr. Anthony Fauci, NIAID; LTG Ronald Place, Defense Health Agency; and Maj Gen Paul Friedrichs, Joint Staff Surgeon.

than a fully vaccinated individual. In December of 2021, unvaccinated individuals were 16 times more likely to be hospitalized with COVID-19. For hospitalized adults, the CDC found that unvaccinated people with a previous COVID-19 diagnosis were more than 5 times more likely to get re-infected than fully vaccinated people with no prior history of SARS-CoV-2 infection. This demonstrates that COVID-19 vaccines are effective reducing the risk of becoming infected but, more importantly, are highly effective at preventing hospitalizations and deaths and highlights the importance of being up to date with your COVID-19 vaccine.

18. DoD specific data is equally compelling in terms of demonstrating the value of vaccinations. Between July and November of 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. In December 2021 unvaccinated adults were 16-times more likely to be hospitalized than vaccinated adults. Furthermore, unvaccinated adults over 50 years of age were 44 times more likely to be hospitalized than individuals who were vaccinated and received a booster dose. Of all active duty personnel hospitalized with COVID-19 since December of 2020 thru this month, only 0.012% were vaccinated. This amounts to 13 active duty personnel with boosters and breakthrough infections requiring hospitalization – an extremely rare occurrence. And as mentioned previously, of the 92 deaths among uniformed service members, only one had completed a primary series of a COVID-19 vaccine (the J&J vaccine) and had not yet received a booster dose. It is also worth noting that there have been no COVID-19 related deaths among active duty personnel since the vaccination deadlines have passed.

19. While some have pointed to the increase in the number of breakthrough cases in general, and with the Delta and Omicron variants in particular, as a reason to question the effectiveness of the vaccines, it is important to keep in mind that as vaccination rates increase among service members, vaccinated service members will make up a larger percentage of the

population available to become infected. In other words, vaccinated personnel are disproportionately represented in the pool of individuals exposed to the virus that causes COVID-19. Taken to the extreme, if *every* service member were vaccinated, only vaccinated service members *could* have infections. 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.

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

Executed on February 4, 2022 in Washington, DC.

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Date: 2022.02.04 08:58:17 -05'00'
Scott Stanley, PhD
Major, United States Army
Joint Staff Force Health Protection Officer
Office of the Joint Staff Surgeon

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

NAVY SEAL #1, *et al.*

Plaintiffs,

v.

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

Defendants.

Case No. 8:21-cv-02429-SDM-TGW

DECLARATION OF JOON YUN

I, Captain Joon Yun, United States Navy, hereby state and declare as follows:

1. I am a Captain in the United States Navy, currently serving as CTF-80 Surgeon, located in U. S. Fleet Forces Headquarter, Norfolk, Virginia. I make this declaration in my official capacity, based upon my personal knowledge and upon information that has been provided to me in the course of my official duties.

2. As the Fleet Chief Medical Officer, I am primarily responsible for overseeing quality healthcare delivery within the Fleet and supervision of the credentialing and privileging process. I make this declaration in my official capacity, based upon my personal knowledge and upon information that has been provided to me in the course of my official duties.

3. I have been assigned to my current position since July 30, 2021. Prior to my current assignment, I served as the Chief Medical Informatics Officer at Naval Medical Forces Atlantic, Director of Medical Services at Naval Medical Center Portsmouth, Director of Medical Services at U. S. Naval Hospital Okinawa and as the Navy Specialty Leader for the Pulmonary

and Critical Care Community. I am board certified in Pulmonary Medicine, Critical Care Medicine and Internal Medicine and serves as an Assistant Professor of Medicine at the Uniformed Services University of Health Sciences.

4. I have reviewed the temporary restraining order (TRO) issued in the above captioned case on February 2, 2022. The order states, “the military faces a trivial, if any, prospect of material injury as a result of permitting the service members continued service under the same terms and conditions and with the same privileges and emoluments as currently prevail, especially because the military permits a large group of unvaccinated persons to serve without adverse consequence.” ECF No. 67 at 9. This is statement is incorrect.

5. I first explain why there is far more than a “trivial” prospect of material injury by permitting Plaintiff to remain in command of a destroyer at sea. The judgment of the Military Services is that vaccines are the most effective and readily available tool the Armed Forces has to keep Sailors safe, fully mission capable and prepared to execute the Commander-in-Chief’s orders to protect vital United States’ national interests. As of January 5, 2022, 261,504 members of the Armed Forces have contracted the COVID-19 virus, resulting in 2,320 hospitalizations and 82 deaths. Eighty of 82 members who have died were unvaccinated. Of all active duty personnel hospitalized with COVID-19, 0.8% had received a booster shot. This amounts to six active duty personnel with boosters and breakthrough infections requiring hospitalization – an extremely rare occurrence. Among the active duty force, 12% of hospitalizations received a full course of vaccination without the booster shot. Hospitalizations among unvaccinated or partially vaccinated active duty personnel is 79%. Among non-active duty personnel (e.g., Reserve officers and enlisted), the statistical breakdown is even more stark: 0.2% with boosters hospitalized, 3% with primary vaccinations but no booster hospitalized and 97% unvaccinated or

partially vaccinated hospitalized. Furthermore, DoD has seen increasingly convincing data supporting that people are more likely to have “Long COVID”¹ after a COVID infection if they are unvaccinated, compared to those who are vaccinated and have a breakthrough infection. If Plaintiff were deployed and became seriously ill with the COVID-19 virus, the destroyer has limited medical capabilities to treat him. Depending on the location of the ship, a medical evacuation via helicopter may not be possible or extremely difficult, complex and lengthy. Additionally, Plaintiff sets the wrong example for anyone else in the crew of over 300 who does not wish to be vaccinated.

6. Second, the TRO is premised on an incorrect assumption that there are a large group of unvaccinated personnel who continue to serve without “adverse consequence.” The TRO, as well as and the Court’s previous order of November 23, 2021, ECF No. 40 at 24, incorrectly accepts Plaintiffs’ contention that personnel with pending or approved medical exemptions are given preferable treatment and status as compared to those with pending or approved religious accommodations. Medical exemptions only pertain to the requirement to receive the COVID-19 vaccination. A service member with a medical exemption is still subject to restrictions and/or limitations related to the fact that they are unvaccinated (e.g., deployment

¹ The CDC describes “long COVID” as the following:

Post-COVID conditions are a wide range of new, returning, or ongoing health problems people can experience **four or more weeks** after first being infected with the virus that causes COVID-19. Even people who did not have COVID-19 symptoms in the days or weeks after they were infected can have post-COVID conditions. These conditions can present as different types and combinations of health problems for different lengths of time.

These post-COVID conditions may also be known as long COVID, long-haul COVID, post-acute COVID-19, long-term effects of COVID, or chronic COVID.

Available at: <https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects/index.html>.

eligibility, foreign country entry restrictions, frequent COVID-19 testing or extended quarantine requirements, restrictions from all non-mission essential travel, etc.). Therefore, receipt of a medical exemption is not a “golden ticket” that permits the recipient to continue to freely perform any and all duties without consequences. That member will likely be reassigned and non-deployable just as any other unvaccinated person with or without a pending religious accommodation. Moreover, receiving any type of exemption from the vaccine requirement may require an additional medical waiver in order to deploy overseas, go on sea duty, or engage in other special duties or assignments.

7. A medical waiver to the physical standards is a separate determination that would come after a medical exemption or administrative exemption, such as religious accommodation, for the COVID-19 vaccine. Accordingly, if a service member receives an exemption to the COVID-19 vaccine for any reason they would have to engage in this subsequent process to be cleared for full duty by the Navy. That is, a service member who receives an exemption from the COVID-19 vaccination requirement, whether for religious or secular reasons, may not be medically qualified for certain duties unless he or she obtains separate medical clearance. Moreover, the service member may also need a separate medical waiver from the Combatant Command² to enter that commander’s geographic area of responsibility. Different Combatant Commands may have specific requirements for vaccination based on the endemic biomedical threats that naturally exist in their geographic area as well as any biowarfare threats from adversaries. An unvaccinated member who deploys to a geographic region where there is an

² Since the passage of the Goldwater-Nicholas Department of Defense Reorganization Act of 1986, combatant commanders are vested with vast authorities and responsibilities for military operations within their area of responsibility. The Navy and other branches of the Armed Forces provide forces to the combatant commanders to execute those responsibilities and functions. The combatant commanders exercise authority, direction and control over the commands and forces assigned to them and employ those forces to accomplish missions assigned to the combatant commander. Department of Defense Directive (DoDD) 5100.01, Change 1, 09/17/2020, Encl. 1, ¶1.a through d.

endemic infectious disease would put not only his health at risk, but also the health of any other service member. Thus, a determination that a member is not deployable takes into account the risk to other personnel, the risk to mission as well as the unvaccinated member. These deployment determinations do not take into account whether a member is unvaccinated for secular or religious reasons; all unvaccinated service members are treated the same for purposes of determining whether they should receive a medical waiver that would render them fit for certain types of duty.

8. Receiving a medical exemption for the COVID-19 vaccine does not automatically render a service member deployable; he or she must undergo the process described in the prior paragraph. Indeed, many of the common reasons that a service member may receive a medical exemption from an immunization requirement may also make the service member not medically qualified and non-deployable. For example, BUMEDINST 6230.15B ¶ 2.6 lists immune competence, pharmacologic or radiation therapy, pregnancy and/or previous adverse response to immunization as common reasons for a medical exemption from an immunization.³ The first three conditions would almost certainly lead to a finding of unsuitability for deployment and an inability for the service member to get underway on Navy vessels.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 4th day of February, 2022.


JOON YUN

³ BUMEDINST 6230.15B ¶ 2.6 also lists evidence of immunity based on serologic tests, documented infection, or similar circumstances as a possible basis for a medical exemption for an immunization. However, pursuant to DoD policy a prior COVID-19 infection, by itself, is not grounds for a medical exemption to the COVID-19 vaccination requirement.

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA**

NAVY SEAL #1, et al.

Plaintiffs,

v.

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

Defendants.

Case No. 8:21-cv-02429-SDM-TGW

DECLARATION OF ERIC N. THOMPSON

[WITH REGARD TO PLAINTIFF LIEUTENANT COLONEL #2]

I, Colonel Eric N. Thompson, United States Marine Corps, hereby state and declare as follows:

1. I am a Colonel in the United States Marine Corps, currently serving as the Chief of Staff, Marine Forces Special Operations Command, located in Camp Lejeune, NC. I make this declaration in my official capacity, based upon my personal knowledge and upon information that has been provided to me in the course of my official duties.

2. I have been assigned to my current position since June 2021. Prior to my current assignment, I served as Commanding Officer, Marine Raider Support Group (2019-2021).

3. My Platoon Commander tours were with 2nd Battalion, 4th Marines (1997-1999), 1st Force Reconnaissance Company (1999-2002), and Marine Corps Special Operations Detachment 1 (2003-2005). I served as Company Commander, Operations Officer, and Executive Officer with 1st Battalion, 3d Marines (2005-2008), and Battalion Commander, 3d Reconnaissance Battalion (2012-2014). My professional military education includes Infantry

Officers Course, Expeditionary Warfare School, a Master of Arts Degree in Military Studies from Marine Corps Command and Staff College, the Massachusetts Institute of Technology Security Studies Program in Cambridge, and Joint Professional Military Education Phase 2 at Joint Forces Staff College. I am also a Marine Combat Diver, Military Freefall Parachutist, and a graduate of U.S. Army Ranger School and Marine Corps Basic Reconnaissance Course.

4. “The fundamental goal of the Marine Corps is the maintenance of a force that is ready, responsive and capable of fighting whenever and wherever called upon.” Marine Corps Manual § 1005 ¶ 1. In order to achieve this goal, one of many objectives is “[t]o maintain a high degree of readiness to deploy responsively, engage quickly, and sustain itself in combat for whatever period is required.” *Id.* at ¶ 2.b. Plaintiff has been selected for battalion command with the prospective authority, responsibility and accountability for mission accomplishment and the readiness, health and welfare of more than 300 Marines. Plaintiff had her leadership’s full trust and confidence in her ability to command and recognizes her, and every Marine’s, right to seek accommodation of their religious beliefs. That trust and confidence significantly diminished, however, once Plaintiff refused to obey a lawful order following the denial of her religious accommodation appeal. After the denial of her appeal, she received an order to be vaccinated by February 2, 2022. At this point, she has failed to obey that lawful order. The Marine Corps cannot accomplish its mission, functions, and service to the Nation if its commanding officers do not obey the same orders they are demanded to enforce among the Marines under their charge. Adherence to orders cannot be taught during a crisis or on the battlefield. For a Marine Corps unit to successfully accomplish its mission, compliance with military orders must be instinctive with little time for debate or reflection. This is imperative in combat, but conduct in combat invariably reflects the training that precedes combat. It is the commanding officer’s

responsibility to create a culture where immediate obedience to orders and military procedures is habit for when such conditions arise. A commanding officer who cannot adhere to military orders themselves has forever lost the ability to instill a culture of good order and discipline in their Marines. This is why a Marine is ineligible for command once that officer is suspended from duty or under investigation or arrested for allegations of misconduct. In that circumstance, “[the] officer is deprived of all authority to give orders or exact obedience from junior personnel or to perform any other duties that go with the exercise of command.” *Id.* at ¶3.c. In this regard, the temporary restraining order (TRO) issued on February 2, 2022 intrudes upon nearly 250 years of Marine Corps and U.S. military leadership by keeping an insubordinate officer in a position to assume command and lead Marines.

5. In accordance with the Marine Corps Manual, “[t]he responsibility of the commanders for their commands is *absolute* except to the extent that the commander is relieved of responsibility by competent authority or by regulations.” *Id.* at 2.a (emphasis added). With this awesome responsibility also comes accountability. Every commanding officer is accountable to a superior officer within the chain of command, up to and including the Commander-in-Chief, who is accountable to the American people. The TRO gives Plaintiff the absolute responsibility and authority for her command and Marines but without any accountability since this officer is not subject to any accountability under the TRO. The truly breathtaking aspect of the TRO is that it forces the Marine Corps to place an insubordinate officer in command and allows her to lead Marines and then prohibits the Marine Corps from holding the Plaintiff to account if she fails to meet the exacting standards demanded of all officers entrusted with command. This is anathema to the Constitution that every Marine Corps officer swears to defend.

6. Marine Corps policy and COVID vaccination implementing guidance balances the safety, health, and readiness of the Force with the ability of members to seek medical exemptions and religious accommodations to the vaccination requirement while — to the maximum extent possible — maintaining their current assignments and responsibilities. Specific to those in command or selected for command, such as Plaintiff, officers are allowed to remain in command while unvaccinated with proper mitigation measures while their accommodation or exemption requests are pending. If an officer has exhausted his or her exemption processes and is ultimately denied an exemption, he or she faces a choice: get vaccinated or do not assume command:

Marines who have refused the vaccine may not serve in a command assignment (e.g., Commanding Officers, Inspector-Instructors, Senior Enlisted Advisors, or Officers-in-Charge) without an approved administrative or medical exemption, religious accommodation, or pending appeal. Commanders will relieve for cause unvaccinated Marines without an approved administrative or medical exemption, religious accommodation, or pending appeal currently serving in command assignments. Unvaccinated Marines without a pending or approved exemption or accommodation request or appeal will not assume a command assignment.

MARADMIN 612/21 ¶ 3.g.

7. The scope of the order, which forces the Marine Corps to allow Plaintiff to assume command with no ability to hold her to account will irreparably harm good order and discipline in the unit and will ripple across the Marine Corps. More than 300 Marines will be expected to follow Plaintiff's orders or face discipline and adverse administrative action. If other Marine Corps personnel learn that plaintiff has refused to comply with a lawful order, Plaintiff's ability to effectively command Marines will be seriously undermined. In addition, some junior personnel will see an example that some lawful orders need not be followed. In either case, the result will be harm to good order and discipline and the effectiveness of the force.

8. “A Marine who has not been fully vaccinated is not considered worldwide deployable and shall be assigned or reassigned, locally, to billets which account for health risks to the unvaccinated Marine and those working in proximity to the Marine.” *Id.* at 3.c. Plaintiff’s prospective command is currently slated to deploy as part of a Marine Expeditionary Unit (MEU), which will mean that her unit could travel anywhere in the world. The MEU is the standard forward-deployed Marine expeditionary organization. Forward-deployed MEUs are maintained in the Mediterranean Sea, the western Pacific, and the Indian Ocean or Arabian Gulf region. The MEU can be thought of as a self-contained operating force capable of missions of limited scope and duration. The MEU’s mission is to provide the President, Secretary of Defense, and Combatant Commanders with a forward-deployed, sea-based, rapid crisis response capability to execute a full range of military operations. It is organized, trained, and equipped as a self-sustaining, general-purpose expeditionary unit that possesses the capability to conduct a range of military operations in support of various contingency requirements. Embarked aboard the ships of a Navy amphibious ready group, a deployed MEU provides operational commanders with a quick, sea-based reaction force for a wide variety of situations. In many cases, the MEU embarked on amphibious warfare ships may be the first US force at the scene of a crisis and can conduct enabling actions for larger follow-on forces. It can provide a visible and credible presence in many potential trouble spots and can demonstrate the willingness of the United States to protect its interests overseas.

9. Travel to other countries will be a requirement for personnel assigned to the MEU. That is to say, Plaintiff and members of her unit could be required to enter several foreign countries during the duration of Plaintiff’s assignment to command. The TRO directs the Department of Defense and the Marine Corps to maintain the status quo, but the TRO will not

supersede another country's sovereignty to control who is allowed to enter their country. For example, key partner nations such as Israel,¹ and Kuwait,² which has American military facilities, require those who enter their country to be vaccinated, and other nations have varying testing requirements and quarantine periods for unvaccinated personnel. By remaining unvaccinated yet court-ordered to remain eligible for command in the TRO, Plaintiff will face a situation in which she cannot travel to countries she may be required to visit in her capacity as the commanding officer. Therefore, Plaintiff has requested and the TRO has enabled a situation in which Plaintiff's ability to command, and to travel to U.S. or foreign facilities in key partner nations, and to engage foreign partners is seriously impaired and will result in diminished unit effectiveness and mission accomplishment.

10. The military makes demands on its personnel — and its commanding officers in particular — that have no counterpart in civilian life. The TRO does not recognize these inescapable demands of the military establishment and the overriding requirements for good order and discipline that are necessary for the Marine Corps to fight and win the Nation's wars. The business of the Marine Corps is conducted in the deserts, jungles, mountains, and shores of dangerous places, not from board rooms, cubicles, and home offices. For centuries, the Marine Corps has successfully accomplished its missions by adhering to its Core Values of Honor, Courage, and Commitment. Plaintiff is selected for command of a unit that will be deploying; she cannot effectively lead Marines when she herself cannot deploy with them. Her unvaccinated status jeopardizes the health and welfare of personnel in her unit and prevents her from being world-wide deployable, which is a necessary component of her command position. Moreover, if allowed to assume command while in defiance of a lawful order, she will erode the

¹ <https://corona.health.gov.il/en/abroad/arriving-foreign-nationals/>

² [COVID-19 Information - U.S. Embassy in Kuwait \(usembassy.gov\)](https://usembassy.gov/covid-19-information-us-embassy-in-kuwait/)

good order and discipline of her unit and degrade the unit's ability to successfully accomplish its assigned missions.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 4th day of February, 2022.

A handwritten signature in black ink, appearing to read 'Eric N. Thompson', with a stylized, flowing script.

ERIC N. THOMPSON

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA**

NAVY SEAL #1, et al.

Plaintiffs,

v.

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

Defendants.

Case No. 8:21-cv-02429-SDM-TGW

DECLARATION OF FRANK BRANDON

[WITH REGARD TO PLAINTIFF NAVY COMMANDER]

I, Captain Frank Brandon, United States Navy, hereby state and declare as follows:

1. I am a Captain in the United States Navy, currently serving as Commodore of Destroyer Squadron TWO SIX, located in Norfolk, Virginia. I make this declaration in my official capacity, based upon my personal knowledge and upon information that has been provided to me in the course of my official duties.

2. I have been assigned to my current position since June 2021. Prior to my current assignment, I served as the Deputy Commodore of Destroyer Squadron TWO SIX from June of 2020 to June of 2021.

3. Select Navy tours include the following: Operations Officer onboard the USS LASSEN (DDG-82) transitioning the ship to the Forward Deployed Naval Forces - Yokosuka, Japan; Main Propulsion Assistant onboard the USS ENTERPRISE (CVN 65) deploying to the Arabian Gulf in support of Operations IRAQI FREEDOM and ENDURING FREEDOM

(OIF/OEF); Executive Officer onboard the USS MITSCHER (DDG-57); Commanding Officer onboard the USS MITSCHER executing a 5th Fleet Ballistic Missile Defense Deployment; and Reactor Officer onboard the USS EISENHOWER (CVN-69).

4. I have lost trust and confidence in Plaintiff, and I have determined that he should be removed immediately from his position as commander of a guided-missile destroyer. To be clear, I have not lost trust and confidence in Plaintiff because of his religious beliefs. Rather, once his religious accommodation appeal was denied, he was issued an order giving him five days to receive the COVID-19 vaccine, but he refused to do so. Therefore, Plaintiff is in violation of a lawful order. In the military, adherence to a lawful order is the most fundamental principle on which good order, discipline, and the success of military forces rests. Adherence to orders cannot be taught during a crisis or on the battlefield. Rather, a commanding officer is instilled with the responsibility to create a culture of immediate compliance to orders and military procedures that are reflexive for when such conditions arise. A commanding officer who cannot adhere to military orders has forever lost the ability to instill a culture of good order and discipline in their crew. This will inevitably lead to the breakdown of basic principles of training, safety and seamanship and could have tragic consequences at any moment but especially when the vessel is underway at sea.

5. I have reviewed the temporary restraining order (TRO), ECF No. 67, issued on February 2, 2022. Enjoining Navy leadership from relieving Plaintiff of his command of a destroyer creates a dangerous situation. *See* ECF 67 at 10. Specifically, the Navy is forced to leave an insubordinate officer with poor judgment and a lack of concern for the health and welfare of his crew of over 300 sailors in charge of a nearly 10,000-ton warship—armed with missiles, torpedoes, a mounted naval artillery gun, and other powerful ordnance—that could be

called to respond to a national security crisis. Under Navy regulations, “[t]he responsibility of the commanding officer for his or her command is absolute, except when and to the extent to which, he or she has been relieved therefrom by competent authority.” With this awesome responsibility also comes accountability. Every commanding officer is accountable to a superior officer within the chain of command, up to and including the Commander-in-Chief, who is accountable to the American people. Navy Regulations 0802 ¶ 1. Because the Court has ordered that the Plaintiff cannot be removed from command, this result would give the Plaintiff the absolute responsibility and authority over his ship and crew but without any accountability to the chain of command. Providing Plaintiff with this authority and responsibility with no accountability is contrary to every principle of leadership in the 246-year history of the United States Navy and is anathema to the Constitution that every Naval Officer swears to defend.

6. In addition, this destroyer cannot deploy with the Plaintiff as the commanding officer. The TRO has rendered the Plaintiff’s destroyer a non-worldwide deployable unit. The Plaintiff’s unvaccinated status limits the destroyer’s worldwide deployability—at this point in the ship’s readiness cycle, she could be soon called upon to support military operations. The requirement to remove the plaintiff from command just prior to combat operations creates risk to the military mission, endangers the crew, and diminishes our national security. For example, vaccination for COVID-19 is required prior to deployment to the U.S. Central Command Area of Responsibility. Given current world events, sidelining a 1.8 billion dollar destroyer significantly reduces the capacity and readiness of my Destroyer Squadron to support national security objectives.

7. Navy policy and COVID-19 vaccination implementing guidance balances the safety, health and readiness of the Force with the ability of service members to seek medical

exemptions and religious accommodations to the vaccination requirement while—to the maximum extent possible—maintaining their current assignments and responsibilities. Specific to those in command, such as Plaintiff, commanding officers may be allowed to remain in command while unvaccinated with proper mitigation measures while their accommodation or exemption requests are pending. If a commanding officer has exhausted his or her exemption processes and is ultimately denied an exemption, he or she faces a choice: get vaccinated or be relieved of command:

An unvaccinated senior leader without a pending or approved exemption calls into question the Navy's trust and confidence regarding their ability to ensure unit readiness or to maintain good order and discipline. These senior leaders must begin vaccination immediately. This constitutes a lawful order. The immediate superior in command (ISIC), commander, or commanding officer, as applicable, will notify in writing senior leaders refusing the vaccine that they have five (5) calendar days to initiate corrective action. If the senior leader does not begin a vaccination series or request an exemption within that five-day period, the ISIC, commander, or commanding officer will relieve the senior leader and initiate detachment for cause (DFC) [proceedings].

NAVADMIN 225/21 ¶ 6.a.

Plaintiff's religious accommodation appeal was denied, he was ordered to take the vaccine within five days, and he was about to be relieved from command before the TRO was issued. Plaintiff, now in violation of a lawful order, remains in command. The Plaintiff has issued the same or similar orders to members of his crew and has enforced the Navy's disposition guidance on members of his crew for refusing the vaccine—notwithstanding his refusal to obey the same order. The first member of his crew will be separated from the Navy on February 8, 2022 for refusing to get vaccinated.

8. Pursuant to Navy regulations, “[t]he commanding officer and his or her subordinates shall exercise leadership through personal example, moral responsibility and judicious attention to the welfare of persons under their control or supervision. Such leadership

shall be exercised in order to achieve a positive, dominant influence on the performance of persons in the Department of the Navy.” Navy Regulations 0802 ¶ 4. The breadth of the TRO, which would arguably leave this officer in command with no accountability, will likely lead to a breakdown of good order and discipline on this ship. This authority without accountability could lead to tragic results. The TRO sets the conditions for over 300 personnel on this destroyer to not follow Plaintiff’s orders because of his personal example. If Sailors disagree with an order issued by this commanding officer, the example they have from this Plaintiff is to refuse the order and, if needed, judicially challenge the order or assignment the commanding officer has issued.¹ A Navy warship cannot function under these conditions.

9. Men and women charged with the responsibility of command at sea understand that being at sea is fraught with hazards in normal operations. For example, in a span of approximately two months in 2017, two destroyers, USS FITZGERALD and USS JOHN S. MCCAIN, were involved in horrific collisions during routine transits resulting in the loss of 17 Sailors. The Navy determined that these incidents were, in part, based on a failure of leadership. Specifically the commands failed to create a culture that prioritized training, qualifications, and the flawless execution of the basics of seamanship. Because Plaintiff now refuses orders himself, I have lost confidence in his ability to create such a culture in his own command. To mitigate this risk, I have already placed extra supervision onboard the destroyer to ensure the safe handling and operations of this warship at sea.

10. In addition, the Court’s order prohibits the Navy from removing the Plaintiff from his command “for any reason.” On its literal terms, the order appears to mean that even if the

¹ The Navy waterfront is watching. Restricting my authority to enforce the orders from my Navy superiors sets a precedent across the Navy waterfront, and encourages Sailors to challenge the orders they are given when those Sailors disagree with the order.

Plaintiff were to cause a catastrophic event resulting in the loss of life or a tactical blunder with strategic consequences, such as a reckless maneuver in proximity to a hostile military aircraft or vessel, the Court's order appears to foreclose the Navy from removing Plaintiff from command or taking any other action against Plaintiff. Similarly, if Plaintiff issues a clearly unlawful order that endangers his entire crew, again, the Court's order seems to require that he be kept in place. For example, the Court's order purports to require the Navy to keep this officer in command even if he was responsible for a horrific accident similar to those that occurred on the USS FITZGERALD and USS JOHN S. MCCAIN. Even assuming the Plaintiff were to carry out his military duties without incident, the Court's order still would require the Navy to maintain in place a commanding officer who has lost the confidence of his superiors by defying a lawful order critical to ensuring the continued readiness of world-wide deployable Navy.

11. The TRO will also result in decreased morale and a breakdown of discipline within the unit and likely other units as well. The order creates a bifurcated system for leading, assigning, disciplining, and employing Navy personnel. The lack of uniformity and disparate treatment necessitated by the TRO significantly corrodes good order and discipline beyond this officer's destroyer.

12. As the commanding officer of a guided-missile destroyer, Plaintiff commands a crew of more than 300 Sailors aboard a 510-foot long ship. Generally, the Arleigh Burke Class Guided Missile Destroyers are warships that provide multi-mission offensive and defensive capabilities. These modern warfighting platforms cost approximately \$1.8 billion to build. Destroyers can operate independently or as part of Carrier Strike Groups, Surface Action Groups, and Expeditionary Strike Groups. Guided-missile destroyers are multi-mission surface combatants capable of conducting Anti-Air Warfare, Anti-Submarine Warfare, and Anti-Surface

Warfare. The destroyer's armament has greatly expanded the role of the ship in strike warfare utilizing the MK-41 Vertical Launching System. The class's armament includes Standard Missile; Vertical Launch ASROC missiles; Tomahawk; six MK-46 torpedoes (from two triple tube mounts); Close In Weapon System, 5-in. MK 45 Gun, and Evolved Sea Sparrow Missile (ESSM). Aircraft include two LAMPS MK III MH-60 B/R helicopters with Penguin/Hellfire missiles and MK 46/MK 50 torpedoes. Because a destroyer can fill several mission sets and deploy independently, it is one of the most dynamic and versatile assets within the Navy.² Readiness to deploy is paramount. Onboard, the crew of the ship and others, who may include helicopter air crews or embarked special operations forces, sleep in confined berthing spaces, are in close proximity in passageways, and eat meals in a communal galley. There is no ability to social distance on a destroyer. There is no ability on a destroyer to provide appropriate care for a service member with severe COVID-19 symptoms. Accordingly, if a service member were to develop severe symptoms on a destroyer, it would require the ship to return to port (and abandon its present mission) or arrange for an emergency medical evacuation using a helicopter. Often a medical evacuation may not be a viable option due to the ship's location and the limited range of the ship's helicopter. Even where a medical evacuation is an option, it may involve the long-term loss of the ship's helicopter and members of the ship's crew to accompany the sick service member. Such a loss would have an adverse impact on employment of the ship and the ability of the ship to execute its assigned missions. Because of the risks to unvaccinated personnel, the crew, and the mission, unvaccinated personnel cannot be assigned to operational units.³

² For instance, the Commander of U.S. Central Command, Gen McKenzie, stated the following regarding destroyers in his 2021 posture statement: "As Iran's ballistic missile force is the most formidable in the region, USCENTCOM's missile defense assets incorporate Patriots, Sentinel and Avenger systems, and *Navy cruisers/destroyers* to form a layered defense, augmented by Theater High-Altitude Air Defense when ordered."

³ "[A]ll operational Navy units are assumed to be 100 percent vaccinated. Unvaccinated uniformed personnel should only include those with an approved waiver, those awaiting waiver disposition, or those processing for separation." NAVADMIN 077/22 ¶5.b.1. "Operational" units refer to the Navy's warfighting units, like a guided-missile destroyer,

NAVADMIN 007/22.

13. The destroyer that Plaintiff currently commands is in her “basic phase.” The “basic phase” means the ship is in training in preparation for future deployment, conducting measures such as live-fire events, helicopter operations, handling of munitions and ordnance, small-craft boarding team evolutions, and others, to prepare for future deployment certification. In other words, the ship is preparing for deployment. This preparation involves qualifications and certification events that require the ship to be underway (at sea) for several short periods of time. Units that have completed the basic phase may be tasked with independent contingency operations as directed by the President and Secretary of Defense, in addition performing homeland security, humanitarian assistance (HA) and disaster relief (DR), or other specific, focused operations. It should also be noted that this ship is homeported on the east coast. Geopolitical events and national security crises are unpredictable but some are foreseeable. This ship could be called into foreseeable contingency operations in very short order. If this occurs, the Navy would have to deploy a destroyer with a commander for whom I have lost confidence in his ability to follow orders, faithfully execute his duties as assigned, and who could compromise the health and effectiveness of the ship. The Navy’s discretion to choose commanders of its destroyers for deployments is paramount for national security.

14. In addition to refusing to obey a lawful order, after exhausting the religious accommodation process, on February 1, 2022, Plaintiff then submitted a “new” request in an effort to remain in an indefinite “exemption request pending” status to avoid adverse administrative action and accountability. Plaintiff’s religious accommodation appeal was denied

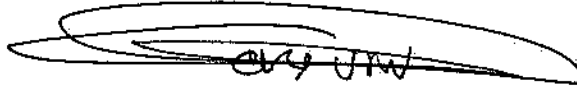
which are required to be worldwide deployable at all times to ensure our national security. The assumption is that, to ensure mission readiness, unvaccinated personnel will only remain assigned to these types of units temporarily until such time as they are vaccinated, reassigned, or separated.

on January 23, 2022. Plaintiff's "new" religious accommodation request seeks the identical accommodation that was the subject of his appeal. However, Plaintiff contends that there are significant changes in the physical environment by referencing the number of personnel vaccinated, infections with the Omicron variant, and the fact that he was inconvenienced during the holiday period when his executive officer became infected with COVID-19, requiring Plaintiff to be aboard the ship—of which his responsibility for is "absolute"—for more than he would have preferred.⁴ In response, the Chief of Navy Personnel, the adjudication authority for religious accommodation requests, denied the renewed request, finding that there was no significant change in the environment and no change in the compelling government interest in Plaintiff being vaccinated. Exhibit B. In the short time since his religious accommodation appeal was denied and through his actions and words, Plaintiff has demonstrated that he will remain personally unvaccinated to the detriment of the readiness of his crew and unit.

15. In conclusion, the COVID-19 vaccine is the best defense the military has against a virus which can significantly degrade the health and welfare of service members and compromise the mission. The Court's order barring the implementation of this lawful order, and requiring the Navy to leave an insubordinate officer in command, has undermined the good order and discipline onboard this destroyer. As long as this order remains in place, this TRO will continue to severely undermine the military readiness of this destroyer. Due to its overall impact on good order and discipline it is also likely to affect the military readiness of other ships and the Navy. Finally, sidelining a 1.8 billion dollar destroyer is an unnecessary risk to national security.

⁴ "Of note, my holiday stand down was limited/non-existent because my XO (fully vaccinated) contracted COVID-19 and remained away from his duties to execute required ROM [restriction of movement] protocols." Exhibit A at 2.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 4th day of February, 2022.

A handwritten signature in black ink, appearing to read "Frank Brandon", enclosed within a large, loopy oval shape.

Frank Brandon

Exhibit A

1 Feb 22

From: [REDACTED] USN
 To: Deputy Chief of Naval Operations (Manpower, Personnel, Training and Education) (N1)
 Via: Commander, Destroyer Squadron TWO SIX
 Subj: REQUEST FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

Ref: (a) DOD Instruction 1300.17
 (b) SECNAVINST 1730.8
 (c) BUPERSINST 1730.11A

Encl: (1) APPEAL OF RELIGIOUS ACCOMMODATION FOR IMMUNIZATION REQUIREMENT, dated 23 January 2022
 (2) APPEAL OF DISAPPROVED REQUEST FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE IN CONSIDERATION OF COMMANDER [REDACTED]
 (3) Email from CDR [REDACTED] to ISIC requesting missing information from RA disapproval, dated 29 December 2021
 (4) Email from CDR [REDACTED] to OPNAV requesting missing information from RA disapproval, dated 04 January 2022
 (5) Email from ISIC providing the missing documentation, dated 24 January
 (6) REQUEST FOR RELIGIOUS ACCOMMODATION THROUGH WAIVER OF IMMUNIZATION REQUIREMENTS ICO CDR [REDACTED] USN, dated 13 October 2021 (BUMED letter)
 (7) <https://www.washingtonpost.com/national-security/2022/01/03/uss-milwaukee-covid-outbreak/>
 (8) <https://news.usni.org/2022/01/04/uss-milwaukee-back-in-sea-after-covid-19-outbreak>
 (9) <https://www.medrxiv.org/content/10.1101/2021.08.24.21262415v1>
 (10) [https://www.thelancet.com/journals/lanpe/article/PIIS2666-7762\(21\)00258-1/fulltext](https://www.thelancet.com/journals/lanpe/article/PIIS2666-7762(21)00258-1/fulltext)
 (11) <https://www.news-medical.net/news/20210608/No-point-vaccinating-those-who-280999ve-had-COVID-19-Findings-of-Cleveland-Clinic-study.aspx>
 (12) <https://www.nih.gov/news-events/nih-research-matters/lasting-immunity-found-after-recovery-covid-19>

1. Per references (a) and (b), the Department of the Navy (DON) recognizes that religion can be as integral to a person's identity as one's race or sex. To that extent, DON promotes a culture of diversity, tolerance, and excellence by **making every effort** to accommodate religious practices **absent a compelling operational reason** to the contrary. Religious medical practices include traditional objections to receiving immunizations. It is DON policy to accommodate the traditional observances of the religious faith practiced by individual members when these doctrines or observances **will not** have an adverse impact on military readiness, individual or unit readiness, unit cohesion, health, safety, discipline, or mission accomplishment. Immunizations requirements may be waived when requested by the member based on religious objection.

A255

Subj: REQUEST FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

2. Per enclosure (1), I received denial of my Religious Accommodation (RA) appeal request from the CNO dated 23 Jan 2022. I am submitting a new RA request per reference (c) which states as follows:

5f(2) When a religious accommodation request is denied, the requestor may renew the request upon change in physical, operational or geographical environment, or at any time in which there is a change to pertinent policy.

Since my original request for RA submitted 13 September 2021 and appeal submitted 3 November 2021, my physical environment has changed significantly as follows:

1. About 300 sailors at my command have become vaccinated or natural infected and recovered from the COVID-19 virus;
2. I contracted the COVID-19 virus on 10 November 2021 with mild symptoms associated with the Omicron variant and have natural immunity that I did not have previously;
3. Over 160 Sailors have contracted the COVID-19 virus despite being fully vaccinated. Of note, my holiday stand down was limited/non-existent because my XO (fully vaccinated) contracted COVID-19 and remained away from his duties to execute required ROM protocols.
4. Over 5500 COVID-19 positive reports on surface ships under USFFC have demonstrated the primary COVID-19 infections are in vaccinated sailors, clearly indicating current COVID-19 vaccinations do not prevent contraction or spread of the COVID-19 virus;
5. The Omicron variant (as opposed to the original virus and subsequent variants), though more transmissible, has significantly lower instances leading to hospitalization and almost non-existent instances of death directly relating to COVID-19 infection; and
6. [REDACTED] is increasing its operational status with fewer and fewer days ashore, naturally limiting myself and crew to additional, outside COVID-19 virus exposure.

3. Additionally, after I submitted my RA appeal in November 2021 per enclosure (2), I was made aware by my PERSREP JAG that I had not received all of the information utilized by N1 to deny my Sep 2021 RA request. Specifically, in consult with my JAG, I had the right to view documents and/or recommendations made by other agencies and individuals which should have been provided along with the CNP denial letter dated 22 Oct 2021, contained in enclosure (2). I requested this information from my ISIC on 29 Dec 2021 (see enclosure (3)) and formally requested this information from OPNAV N1 via email on 04 Jan 2022, see enclosure (4). In my email request, I asked the following information to be provided:

a. Reference (h) of CNP's denial letter: BUMED ltr 6320 Ser M44/21UM40540 of 13 Oct 21 which CNP states in paragraph 5 he relied upon in making his determination.

b. Any documents, notes, or additional material submitted to CNP for evaluation and consideration of my 13 September 2021 request for religious accommodation.

After receiving some of the requested documentation from N1 on 24 Jan 2022 via email from my ISIC (see enclosure (5)), it was clear that **I had not had the opportunity to fully address the issues I would have raised in my appeal had I been provided the original denial's supporting documents.**

Subj: REQUEST FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

4. Upon reading the BUMED letter dated 13 Oct 2021, see enclosure (6), I would like to proactively address some of the information that is contained therein as follows:

- a. Per para 2, vaccines required for individual medical readiness have met the safety requirements of the FDA. Of note, vaccines that are required for individual medical readiness have been approved by the FDA. The only COVID-19 vaccines that are currently approved by the FDA are "COMIRNATY" by BioNTech Manufacturing GmbH (Mainz, Germany) and "SPIKEVAX" by Moderna, neither of which are available in the United States presently as stated in the 31 Jan 2022 letter to ModernaTX, Inc. which states:

"Although SPIKEVAX (COVID-19 Vaccine, mRNA) and Comirnaty (COVID-19 Vaccine, mRNA) are approved to prevent COVID-19 in certain individuals, within the scope of the Moderna COVID-19 Vaccine authorization, there is not sufficient approved vaccine available for distribution to this population in its entirety at the time of reissuance of this EUA."

- b. Currently, all other COVID-19 vaccinations that are available to servicemembers are only authorized by the FDA for Emergency Use Authorization (EUA) only. Per 21 USC Sec. 360bbb-3, vaccinations under EUA are voluntary, unless waived by POTUS per 10 USC Sec. 1107a, DoDI 1300.17 and DoDI 6200.02.

- c. The BUMED letter states that vaccinations have demonstrated effectiveness in disease prevention. That statement may apply to other vaccinations; however, it does not apply to any of the current COVID-19 vaccines available. The efficacy of the current COVID-19 vaccinations is based on reducing symptoms if exposed and preventing severe illness or death. None of the COVID-19 vaccinations prevent contracting the predominant Omicron variant virus, or transmission of the virus as evidenced by world wide reports and current Navy COVID-19 virus positivity tracking data.

- d. Per para 3, the letter states that active duty personnel will be up to date on routine vaccinations. COVID-19 is not a routine vaccination.

- e. Per para 4, the BUMED letter states that a waiver of immunization requirements would have a **detrimental** effects on readiness of myself and my fellow service members. The letter does not explain **how** this is detrimental. The letter continues to state that primary prevention of disease is through immunization. It is still common knowledge that COVID-19 vaccination does not prevent the contraction or spread of COVID-19. Studies have shown natural immunity is an effective guard against contraction, spread and symptoms that would cause hospitalization or death, see enclosures (9) through (12).

- f. The BUMED letter further cites the case of USS THEODORE ROOSEVELT that had a COVID outbreak in March 2021 as an example of how an outbreak of COVID can degrade the individual unit readiness. This case is used by BUMED to "highlight the importance of vaccination to both individual and unit force health protection. A similar outbreak happened to the USS MILWAULKEE (LCS 5) in December 2021 with a crew that was 100% vaccinated, see enclosures (7) and (8). One third of the crew tested positive for COVID. This ship had just deployed, and had

Subj: REQUEST FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

to be isolated inport, removing the unit from executing its mission capabilities for about two weeks. This demonstrates that unit and mission readiness could be negatively impacted **regardless** of COVID vaccination status.

g. Per para 5, the BUMED letter states that unvaccinated individuals remain at risk for developing COVID-19 and propagating new variants that impact the force. This statement is inaccurate in that both vaccinated and unvaccinated individuals can develop COVID-19. Also, studies show that vaccinated individuals are just as likely to transmit COVID and propagate variants, see enclosure (9). Specifically, researchers found that “those who were fully vaccinated with the Pfizer-BioNTech Covid-19 vaccine had a 13.06-fold increased risk of developing COVID-19 from the delta variant than those who had previously contracted and recovered from a COVID-19. The study also found that those who previously contracted and recovered from COVID-19 had increased protection against reinfection from a single dose of Pfizer’s COVID-19 vaccine compared to those who had had a prior infection and remained unvaccinated. Researchers calculated the 13-fold increased risk of infection based on just 238 infections among about 16,000 vaccinated people—accounting for less than 1.5% of that group—versus 19 reinfections among roughly 16,000 study participants who had been previously infected.” According to the CDC website, “High viral loads suggest an increased risk of transmission and raised concern that, unlike with other variants, vaccinated people infected with Delta can transmit the virus,” CDC Director Rochelle Walensky said in a statement. “This finding is concerning and was a pivotal discovery leading to CDC’s updated mask recommendation. The masking recommendation was updated to ensure the vaccinated public would not unknowingly transmit virus to others, including their unvaccinated or immunocompromised loved ones.” **The BUMED letter is not up to date with the CDC** comments on vaccinated individuals being susceptible to transmitting COVID. Therefore, it should not be used against unvaccinated personnel who are no different.

h. Per para 6, the BUMED letter states that vaccination remains the most effective means to prevent COVID-19. However, studies show that vaccination does not prevent one from contracting or spreading COVID. The letter does state that efficacy was tied to **preventing symptomatic** COVID. This matches up with my previous statement; it should be restated that the efficacy is NOT tied to preventing the contraction or transmission of COVID. Additionally, the BUMED letter refers to the FDA approved vaccine. The FDA has only approved two of the five COVID-19 vaccine products, COMIRNATY on 23 Aug 2021 and SPIKEVAX on 31 Jan 2022. Of note, the other three COVID vaccine products (Pfizer-BioNTech, Moderna, and Johnson&Johnson remain under EUA). This statement by BUMED implies that the FDA approved vaccine is and has been available to servicemembers. Based upon my personal attempts to locate an FDA licensed vaccine at my local MTFs, I have been unsuccessful to locate any.

i. Per para 7, the BUMED letter states that my religious objects must be balanced against the medical risk to me and my unit. Subsequent to my original RA request and RA denial appeal, I have already contracted COVID-19 and have natural immunity to the virus. I am not at risk for severe illness. All personnel (vaccinated or unvaccinated) are susceptible to COVID transmission; vaccination status does not prevent that fact. Per enclosure (10), there is increasing evidence that vaccinated individuals are more likely to transmit COVID than unvaccinated individuals. Regardless, it has already been shown that mission accomplishment can still be done despite vaccination status. And we already know that complete vaccination can still be impacted by COVID, which could affect unit readiness. Not receiving the vaccine has no measurable effect to

Subj: REQUEST FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

the opinion that BUMED states in their letter, and should not be held against service members that have a sincerely held belief or religious objection.

5. Per reference (c), when a religious accommodations is denied, the request or may renew the request upon a change in physical, operational or geographical environment. Physical environment includes your work environment on the ship, on the job. Since my initial RA request of 13 Sep 2021, and the subsequent appeal on 03 Nov 2021, I contracted & recovered from COVID-19 (with a positive test dated 10 Nov 2021). Natural immunity reduces the risk of additional covid infection and effects, see enclosures (9) through (12). Lasting immunity is found up to 8 months post COVID infection. It can be concluded that "This study demonstrated that natural immunity confers longer lasting and stronger protection against infection, symptomatic disease and hospitalization caused by the Delta variant of SARS-CoV-2, compared to the BNT162b2 two-dose vaccine-induced immunity."

6. The Religious Freedom Restoration Act of 1993 (RFRA) states the Government may substantially burden an individual's exercise of religion only if it demonstrates that the application of the burden to the person is: (1) in furtherance of a compelling governmental interest, and (2) is the least restrictive means of furthering that interest. The burden rests with the government to demonstrate both factors in their entirety, not the individual requesting the exemption per DoDI 1300.17, September 1, 2020. All requests for accommodation of religious practices are to be assessed on a case-by-case basis. My original RA request, subsequent appeal, and this change to RA request demonstrate facts that the government's vaccination mandate is NOT the least restrictive means to further the interest of mission accomplishment and unit readiness. The original disapproval from CNP and subsequent Appeal disapproval from CNO **do not** explain how vaccination outweighs my sincerely held beliefs to accomplish the mission and promote good order and discipline, nor do they explain how this would detrimentally affect me and my unit's readiness. Using the information provided, I have demonstrated how the COVID-19 vaccination is not the least restrictive means available to preserve military readiness, mission accomplishment and the health and safety of military service members. Natural immunity also confers the same benefits and offers better protection. The government must show it cannot accommodate the religious adherent while achieving its interest through a viable alternative, which is available.

7. Unit cohesion and good order and discipline are not affected by my vaccination status at the command. The medical status of individuals is a private matter that is not disclosed to the command at large. All military members may wear a mask for personal protection even if fully vaccinated in light of personal health protection. It is well-established that even individuals who have been fully vaccinated against COVID-19 may still contract and spread the virus. Individuals who chose to receive a COVID-19 vaccination did so to protect their individual health and have put their confidence in the efficacy and effectiveness of the vaccine to protect them from contracting the virus or reducing the effects of the virus if contracted. The vaccination status of co-workers is not an issue within our command.

8. On 3 Jan 2022, Judge Reed O'Connor issued a preliminary injunction for plaintiffs in U.S. NAVY SEALS 1-26, et al, v. JOSEPH R. BIDEN, JR., et al. Plaintiffs had submitted RA requests but were not provided the legal review required in evaluating their submissions. The Court noted that the Navy utilized a "six-phase, fifty step process" that at Phase 1 the administrator is instructed to update a prepared disapproval template with the requestor's name and rank. Based upon the

Subj: REQUEST FOR WAIVER OF POLICY IN SUPPORT OF RELIGIOUS PRACTICE

boilerplate rejection template, it appears the RA review process is pre-determined and sidesteps an individualized review process as required by law. The Judge called the Navy RA review process "theater" and that it "merely rubber stamps each denial." Based upon the documents presented to the Court and the Judge's acknowledgement of the blanket denial process of all RA requests, I am submitting a new RA request for an individualized case-by-case review as required under the law.

9. As I discussed in my initial religious accommodation request, I believe that my natural God-given immunity, in conjunction with my healthy diet/lifestyle, is better than the artificial immunity created by the COVID-19 vaccine. Studies support the conclusion that natural immunity derived from prior COVID-19 infection confers longer lasting and stronger protection against infection, symptomatic disease, and hospitalization caused by the Delta variant of SARS-CoV-2 compared to the Pfizer two-dose vaccine induced immunity. In comparison, vaccines had over 13-fold increased risk of breakthrough infection with the Delta variant compared to those individuals previously infected. Proof of recovery from a prior COVID-19 infection is a less restrictive means of furtherance of a compelling government interest as opposed to an additional unnecessary and less effective vaccination that substantially burdens my religious freedoms. Other mitigations still remain in place, such as: mask wear, social distancing, frequent sanitization, weekly testing, etc.

10. As stated in my previous request, I cannot do something that I know to be wrong for my body. Being mandated to take the COVID-19 vaccine would negatively impact my spiritual, mental, and emotional readiness, and cause significant anguish due to my sincerely held beliefs. I have served honorably for nearly 18 years. I can continue in my capacity with current mitigations that is backed by research, science, and opinions of leading medical experts.

11. In closing, the Founders envisioned a nation where religious people are free to practice their faith without fear of discrimination or retaliation by the federal government. For that reason, the Constitution enshrines and protects the fundamental right to religious liberty as Americans' first freedom. Federal law protects this freedom without undue interference by the federal government. James Madison said the free exercise of religion is "in its nature an unalienable right because the duty owed to one's creator is precedent both in order of time and in degree of obligation to the claims of Civil Society." Except in the narrowest circumstances, no one should be forced to choose between living out his or her faith and complying with the law.

12. Based upon the above supplement to my appeal request and enclosures in support, I respectfully request another review of my religious accommodation request and appeal. As stated by Judge O'Connor:

"The COVID-19 pandemic provides the government no license to abrogate those [religious] freedoms. There is no COVID-19 exception to the First Amendment. There is no military exclusion from our Constitution.

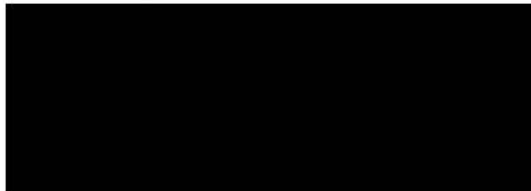


Exhibit B



DEPARTMENT OF THE NAVY
OFFICE OF THE CHIEF OF NAVAL OPERATIONS
2000 NAVY PENTAGON
WASHINGTON DC 20350-2000

1730
Ser N1/117995
2 Feb 22

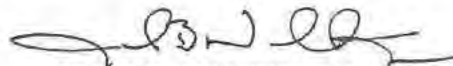
From: Deputy Chief of Naval Operations (Manpower, Personnel, Training and Education) (N1)
To: [REDACTED] USN
Via: Commander, Destroyer Squadron TWO SIX

Subj: REQUEST FOR RELIGIOUS ACCOMMODATION THROUGH WAIVER OF
IMMUNIZATION REQUIREMENTS

Ref: (a) [REDACTED] USN ltr of 1 Feb 22 w/ends
(b) BUPERSINST 1730.11A
(c) DCNO/N1 RA Response ltr of 22 Oct 21
(d) CNO Appeal RAI Response ltr of 23 Jan 22

1. Your request at reference (a) is denied. Contrary to your assertion, there have been no substantive changes to the physical environment since your original request and appeal. The compelling government interest in ensuring mission accomplishment, to include military readiness, unit cohesion, good order and discipline, health and safety, on both individual and unit levels remains the same.

2. As provided in reference (b), members are afforded the opportunity to renew requests when the physical, operational, or geographical environment in which they work or operate has changed. In your case, the environment has not materially changed. Specifically, and as already noted in references (c) and (d), you remain a Surface Warfare Officer commanding an operational warship, where you live and work in close proximity with your shipmates. Further, a waiver of the COVID-19 immunization would continue to have a predictable and detrimental effect on your readiness and the readiness of the Sailors who serve alongside you in both operational and non-operational environments. Granting your request would still have a direct and foreseeable negative impact on the compelling government interests of military readiness and health of the force. Finally, while no vaccine is completely effective, vaccines reduce disease incidence and disease severity.


JOHN B. NOWELL, JR

Copy to:
OPNAV (N131, N0975)
BUMED

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA**

NAVY SEAL #1, et al.

Plaintiffs,

v.

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

Defendants.

Case No. 8:21-cv-02429-SDM-TGW

DECLARATION OF FRANK BRANDON

[WITH REGARD TO PLAINTIFF NAVY COMMANDER]

I, Captain Frank Brandon, United States Navy, hereby state and declare as follows:

1. I am a Captain in the United States Navy, currently serving as Commodore of Destroyer Squadron TWO SIX, located in Norfolk, Virginia. I make this declaration in my official capacity, based upon my personal knowledge and upon information that has been provided to me in the course of my official duties.

2. I have been assigned to my current position since June 2021. Prior to my current assignment, I served as the Deputy Commodore of Destroyer Squadron TWO SIX from June of 2020 to June of 2021.

3. I am the immediate superior officer in command (ISIC) to Plaintiff Navy Commander.

4. In early November 2021, I embarked on Plaintiff Navy Commander's ship. The ship was scheduled to get underway the following day. In order to get underway, I and my staff needed to attend a navigation brief and certify the navigation team.

5. Once onboard, I chatted with Plaintiff Navy Commander in his cabin. I noticed that his voice was softer than usual. We departed the cabin for the mess decks and attended the navigation brief. Roughly 50-60 personnel were present for the navigation brief, in shoulder-to-shoulder proximity with one another. The Commanding Officer of the ship typically makes comments to close out the brief. I could hardly hear Plaintiff Navy Commander's voice, though I was sitting just across from him. His voice was not just muffled by the mask he was wearing, it was distinctly quiet. He could barely speak. I asked to speak with him privately following the brief.

6. After the brief, I spoke with Plaintiff Navy Commander again in his cabin. I asked him why he seemed to struggle to speak. He told me that he had gone for a run and it was the cold air. I asked him if he had a sore throat. He replied that he did, but that it was improving. I immediately ordered that he be tested for COVID-19. Plaintiff Navy Commander tested positive for COVID-19. I learned later that he had discussed that morning with his Independent Duty Corpsman the need to get tested for COVID-19. USFFC/NAVNORTH EXORD 20-032.011 clearly states: "Personnel exhibiting influenza or COVID like symptoms in the past 48 hours, have had known close contact with COVID positive personnel in the last 14 days and/or have traveled without a completed risk assessment within the past 10 days should avoid entering the workplace until consultation with a supervisor and medical personnel." I discussed with Plaintiff Navy Commander that the Commanding Officer needs to set the example for his crew. If there was any question on the need to get tested, then he should have

taken the test to remove any doubt and protect his crew from the spread of COVID-19. In this case, he should have contacted the IDC prior to reporting to the workplace removing the risk to his crew altogether.

7. Following the incident, on December 3rd, 2021, I issued Plaintiff Navy Commander a Letter of Instruction (LOI). An LOI is an administrative measure intended to document deficiencies and prescribe corrective action. In the letter, I explained that Plaintiff Navy Commander reported to work on November 9th and 10th while experiencing symptoms of COVID-19, when he should not have done so. I advised that per USFFC/NAVNORTH EXORD 20-032.011 and CDC guidelines, he should have tested for COVID-19 as soon as he began experiencing symptoms. I further advised that by reporting to work for at least two days while experiencing COVID-19 symptoms put his crew at unnecessary risk. Finally, I told him that I expected him to adhere strictly to COVID-19 protocols and mitigation measures in the future. Exhibit 1 to this declaration is a copy of that LOI.

8. As Plaintiff Navy Commander's ISIC, I am his leave approval authority. As a practical matter, I have delegated the authority to sign the leave requests by direction to the executive officer (XO) of the ship after my verbal approval with the Plaintiff Navy Commander. There is a special trust and confidence that the Plaintiff Navy Commander will be forthright with his intentions for his leave, so that I can properly assess the operational impact to his ship while he is absent. During the COVID-19 pandemic, in accordance with USFFC/NAVNORTH EXORD 20-032.009, there is an additional requirement to conduct a risk assessment of his travel while on leave. One of the critical assessments that has to be made is the availability of a Commanding Officer in the event of an emergency. For example if Commanding Officer is on leave in the local area in the event of a major fire, emergency weather sortie or emergent

operational tasking, I could cancel their leave and order them to return to the ship. I need to understand the availability of my Commanding Officers at all times, they are critical to the security of our nation. This is what we refer to as the “burden of Command,” and if a Commanding Officer is not readily available then I have to be aware of that in order to ensure my ships meet any and all operational requirements when tasked.

9. On 3 February, Plaintiff Navy Commander discussed with me his desire to take some leave in the near future to spend with his family. I strongly supported that leave, expressing my understanding that Plaintiff Navy Commander was under an extraordinary amount of stress and that the time off would be a worthwhile opportunity to reconnect with his family. Following verbal discussions with myself and my Deputy Commodore (DCDRE), Plaintiff Navy Commander sent me an e-mail on Monday, February 7th at roughly 1000 (10 a.m.). He stated that he intended to take leave this week. The email did not disclose that he would be traveling out of area. Exhibit 2.

10. In the evening on Monday, February 7th, I called Plaintiff Navy Commander to discuss his ongoing ship inspections and to verify that he was staying local for his leave. To my recollection, he stated that he was going to spend some time with his family and that he would be available. Even though I asked him directly if he was leaving the local area, he did not tell me that he was flying to [REDACTED]

[REDACTED]

12. I learned on 8 February, from the Navy's litigation team that Plaintiff Navy Commander was traveling to [REDACTED] in order to testify in this litigation. But for the Navy's participation in preparing for the lawsuit, I might not have known that Plaintiff Navy Commander was traveling out of area. Also on February 8th, the day his leave started, he submitted his formal leave paperwork to the Executive Officer for approval signature by direction with a leave address in [REDACTED]. This was the first time his Executive Officer became aware the Plaintiff Navy Commander was traveling outside the local area.

13. Regardless of the current public health crisis and the dramatic effect it has had on military operations, I consider Plaintiff Navy Commander's failure to notify me that he was traveling out of area to be an egregious breach of trust. Plaintiff Navy Commander has served in the military for roughly seventeen years. He should understand the responsibility of Command and that his ISIC needs to be notified, if he plans to travel of the local area. Even when on leave, the Navy expects all Sailors to inform their chain of command of their location, if it were to change during their leave. Based on that fact, and the three opportunities Plaintiff Navy Commander had to notify me that he was traveling out of area, I believe that Plaintiff Navy Commander intentionally misled me. This is cause alone for removal of Command. If I cannot trust the Commanding Officer of a guided-missile destroyer to honestly apprise me of his whereabouts, I cannot trust him with command of the ship or her crew.

14. As it happens, the current public health crisis has placed limitations on the movements of sailors, both for official and unofficial travel. In most cases, travel by unvaccinated servicemembers requires restriction of movement upon their return. In order to protect the force, United States Fleet Forces Command has implemented a risk assessment

matrix that must be completed and approved prior to *any* travel.¹ Contrary to Navy policies, Plaintiff Navy Commander did not complete the required risk assessment worksheet prior to beginning his leave.

15. Upon learning that he would be traveling out of area, I contacted Plaintiff Navy Commander on the evening of 8 February (after he started his leave at 1600, i.e. 4 p.m.) with the Deputy Commodore listening over speaker phone. When asked why he did not tell me he was leaving the local area during our conversation the night before, Plaintiff Navy Commander stated that he did tell me and also stated he told me he would be unavailable. I then asked him if he understood the requirements that I have as a Commander when approving his leave as it pertains to COVID mitigation policy. He acknowledged that I was required to do a risk assessment of his travel prior to approving his leave. I asked Plaintiff Navy Commander why he had failed to complete the required notifications and travel risk assessment, Plaintiff Navy Commander only responded that he failed to do so. I then conducted the risk assessment over the phone. Given the area of travel, the mode of travel and his activities, Plaintiff Navy Commander will require a 5 day restriction of movement (quarantine period) before he can return to work, assuming he remains symptom free. I reiterated that he had already received an LOI outlining that he needed to maintain strict adherence to the COVID policy direction and that his actions as a Commanding Officer needed to be beyond reproach.

¹ The DOD Force Protection Guidance (Supplement 20, Revision 1), provides that “for Service members” a risk assessment is required before all travel. For unofficial travel (i.e., leave), servicemembers will comply with the component-specific guidance for screening, ROM and testing (Exhibit 4). The Navy implemented that guidance via NAVADMIN 073/21, which provides that commanders will conduct a risk assessment when approving leave travel and comply with Echelon 2 (United States Fleet Forces Command) delegation of authority. (Exhibit 5). United States Fleet Forces Command, implemented that guidance in FRAGO 20-032.009. That order requires that commanders and supervisors use a risk assessment worksheet for all travel requests. “This Risk Assessment Management Worksheet is meant to provide a repeatable, risk-based assessment framework that Commanders and Supervisors can use in their decision making process.” (Exhibits 6 and 7).

16. Plaintiff Navy Commander provided a written risk assessment thirty minutes after this phone conversation and after his leave period had already begun. Exhibit 8. He was clearly aware of the requirement and had the worksheet readily available to him, but failed to complete and submit the assessment before he began his leave.

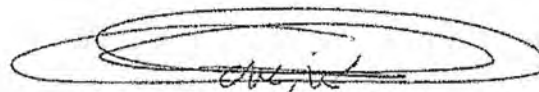
17. Additionally, the operational impact of losing a Commanding Officer from a ship for over a week during the basic phase is significant and a very rare occurrence across the waterfront. The significance can be mitigated by proper planning and coordination with me and my staff to ensure the ship is properly supported during his absence. In this case, the Executive Officer found out Plaintiff Navy Commander was leaving the area only hours before he departed on leave. In discussions the day before he started leave, Plaintiff Navy Commander told his Executive Officer that he would be gone for two and a half days returning to the ship on Friday afternoon to be available to support ship operations. Plaintiff Navy Commander never discussed the COVID risk assessment required with the Executive Officer and the ship had no plan to be without the Commanding Officer for over a week due to ROM requirements. Even after my discussion with the Plaintiff Navy Commander and determining the ROM requirements, he did not contact his Executive Officer to inform him that he would need to stay away from the ship for an extended period of time, much less provide his Commander's intentions to mitigate his absence until after I had already spoken with his executive officer the next morning. This is negligent behavior by Plaintiff Navy Commander in performance of his duties as a Commanding Officer.

18. In sum, I believe Plaintiff Navy Commander intentionally deceived me when it came to his leave request. Despite multiple opportunities and direct questions about his intention for leave, he never stated he was going to travel on a commercial aircraft out of the state of

Virginia. I believe, he clearly understood that he was required to do so. I do not understand why he would have done this, as I have been very clear that I would approve his leave in any event—even for the purposes of attending this hearing. If I had not intervened after learning about his travel plans, I believe that the Plaintiff Navy Commander intended to *again* risk the welfare of his crew and ship by reporting back to work without adhering to the COVID ROM policies of the Navy.

19. In light of the foregoing, I do not trust Plaintiff Navy Commander with the lives of our Sailors. In my professional judgment, I cannot leave him in Command of a Navy warship, regardless of his vaccination status or religious exemption request. Plaintiff Commanding Officer put his crew at risk due to his personal actions and failed to comply with the Navy's COVID-19 policies. He was intentionally evasive about whether he was going to remain in the local area, despite being asked a direct question by me about his leave. I am responsible for the well-being of my Squadron, including welfare of my ships and the health of my sailors. My loss of confidence in Plaintiff Navy Commander is not based on his vaccination status or his denied request for a religious exemption. It is based on the fact that I cannot trust his judgment, I cannot trust him to look after the welfare of his sailors, and I cannot trust him to be honest with me. In my judgment, allowing him to remain in command of Navy warship would be reckless.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 9th day of February, 2022.



FRANK BRANDON

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

NAVY SEAL #1, *et al.*

Plaintiffs,

v.

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

Defendants.

Case No. 8:21-cv-02429-SDM-TGW

DECLARATION OF [REDACTED]

[WITH REGARD TO PLAINTIFF NAVY COMMANDER]


I, Commander [REDACTED], United States Navy, hereby state and declare as follows:

1. I am a Commander in the United States Navy, currently serving as the Executive Officer of the destroyer of which the Plaintiff Navy Commander is currently the Commanding Officer, located in Norfolk, Virginia. I make this declaration in my official capacity, based upon my personal knowledge and upon information that has been provided to me in the course of my official duties.

2. I am the second highest ranking officer on the destroyer. I report directly to Plaintiff Navy Commander.

3. On Thursday, February 3, 2022, Plaintiff Navy Commander first mentioned to me that he intended to take leave the following week. At that time, Plaintiff Navy Commander did not mention that he was leaving the local area on leave. On Monday, February 7, 2022, Plaintiff Navy Commander did not tell me he was leaving the local area on leave. Plaintiff Navy

Commander submitted his electronic leave request at some point on Monday, February 7, 2022. I reviewed the electronic leave request midday on Tuesday, February 8, 2022. This was the first time I became aware that Plaintiff Navy Commander was leaving the local area to travel to

 Travel outside the local area requires submission of COVID risk mitigation plan. I was not aware if the Plaintiff Navy Commander had completed a COVID risk mitigation plan.

4. Today I asked all the Department Heads, who are other officers supervising personnel responsible for different functions on the ship, when they became aware that Plaintiff Navy Commander was leaving the local area on leave. The Combat Systems Officer became aware that Plaintiff was leaving the local area on midday Tuesday, February 8, 2022 when Plaintiff Navy Commander asked him for a COVID mitigation worksheet. No other Department Heads were aware that Plaintiff was leaving the local area before midday on Tuesday, February 8, 2022, shortly before the time Plaintiff Navy Commander commenced his leave period.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 10th day of February, 2022.



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

U.S. NAVY SEALs 1-26;
U.S. NAVY SPECIAL WARFARE
COMBATANT CRAFT CREWMEN 1-5;
U.S. NAVY EXPLOSIVE ORDNANCE
DISPOSAL TECHNICIAN 1; and
U.S. NAVY DIVERS 1-3,

Plaintiffs,

Case No. 4:21-CV-01236-O

v.

LLOYD J. AUSTIN, III, in his official capacity as
United States Secretary of Defense; UNITED
STATES DEPARTMENT OF DEFENSE;
CARLOS DEL TORO, in his official capacity as
United States Secretary of the Navy,
Defendants.

DECLARATION OF DARYL CAUDLE

I, Daryl L. Caudle, hereby state and declare as follows:

1. I am an admiral¹ in the United States Navy, currently serving as the Commander, United States Fleet Forces Command (USFFC), located in Norfolk, Virginia. Commander, USFFC is appointed by the President, by and with the advice and consent of the Senate. I have served in this position since December 7, 2021. I make this declaration in support of the Government's motion in opposition to Plaintiffs' motion for a preliminary injunction for putative class members in this lawsuit.² The statements made in this declaration are based upon my personal knowledge, my military judgment and experience, and upon information that has been provided to me in the course of my official duties.

¹ The rank of "admiral" is the highest military rank in the Navy. The term "admirals" is also frequently referred to as "flag officers." Flag officers include the ranks of rear admiral (lower half), rear admiral (upper half), vice admiral and admiral. Flag officers comprise the most senior levels of uniformed leadership in the Navy.

² ECF 104, filed Feb. 7, 2022.

Preliminary Statement

2. I have reviewed the preliminary injunction order issued by this Court on January 3, 2022, Admiral Lescher's declaration previously filed in this case and the motion for a preliminary injunction for putative class members filed on February 7, 2022. I agree with Admiral Lescher's assessment regarding the importance of a fully vaccinated force to blunt the impact of the COVID-19 virus in the fleet and the significant harm that would come from allowing a subset of the force to remain unvaccinated, putting themselves, their fellow service members, and the mission at unacceptable risk. As Admiral Lescher stated, unvaccinated or partially vaccinated service members are at higher risk to contract COVID-19, and to develop severe symptoms requiring hospitalizations that remove them from their units and impact mission execution. The medical data clearly shows that vaccination against COVID-19 is essential to keeping Navy units on mission by mitigating the impact of COVID-19. Plaintiffs now seek to expand the current injunction, which is already causing risk to military operational readiness, from 35 personnel to potentially 2,500 to 4,000 personnel across various ranks, occupational specialties, and unit assignments. Accordingly, the harm to military readiness and interference in the Navy's ability to fight and win the nation's wars would be exponentially greater if this Court were to grant Plaintiffs' pending motion for a class-wide preliminary injunction. At this time, 88 ships are underway and tens of thousands of personnel are deployed to deter conflict and, if required, win conflicts decisively. In the confined and enclosed working environments in which Navy personnel perform their duties, the COVID-19 vaccination *in addition to* other mitigation measures is the best way to keep the Navy underway and deployed and prevent the COVID-19 virus from interfering with mission accomplishment. Having fully vaccinated Navy forces is essential to ensure maximum health and readiness of forces to carry

out the Navy's mission throughout the world and, if required, engage in combat operations. Having thousands of unvaccinated personnel assigned across the Fleet, especially within operational units, degrades the effectiveness of the units and seriously endangers the Navy's ability to fully accomplish assigned missions.

Navy Background and Experience

3. The Chief of Naval Operations (CNO)³ delegates to USFFC authorities and responsibilities under Title 10, U.S. Code, to train, certify and provide combat-ready Navy forces to combatant commanders that are capable of conducting prompt, sustained naval, joint and combined operations in support of U.S. national interests. USFFC is the budget submitting office with financial management authority and responsibility for assigned forces, shore activities, military and civilian personnel, infrastructure, and budget. CNO delegates to USFFC the authority to generate and communicate Navy global force management solutions to the Joint Staff concerning general purpose forces and ad hoc forces, whether assigned, unassigned, allocated, or service retained. The Secretary of the Navy designates USFFC as U.S. Naval Forces Northern Command (NAVNORTH), the Navy Component to U.S. Northern Command (USNORTHCOM).⁴ USNORTHCOM designates NAVNORTH as the standing Joint Force Maritime Component Commander (JFMCC). NAVNORTH and JFMCC exercise operational

³ The CNO is the most senior uniformed officer in the United States Navy.

⁴ USNORTHCOM is one of many geographical and functional combatant commands. The combatant commanders exercise authority, direction and control over the commands and forces assigned to them and employ those forces to accomplish missions assigned to the combatant commander. Department of Defense Directive (DoDD) 5100.01, Change 1, 09/17/2020, Encl. 1, ¶1.a through d. USNORTHCOM is the combatant commander defends the homeland; deters, detects, and defeats threats to the United States; conducts security cooperation activities with allies and partners and supports civil authorities. USNORTHCOM's AOR includes air, land and sea approaches and encompasses the continental United States, Alaska, Canada, Mexico and the surrounding water out to approximately 500 nautical miles. It also includes the Gulf of Mexico, the Straits of Florida, and portions of the Caribbean region to include The Bahamas, Puerto Rico, and the U.S. Virgin Islands.

control over allocated forces as delegated by USNORTHCOM. CNO delegates USFFC authority to deploy and attach to USNORTHCOM service-retained Navy forces for execution of maritime homeland defense, maritime homeland security, and defense support to civil authority's operations. Commander, U.S. Strategic Command (USSTRATCOM)⁵ designates USFFC as U.S. Naval Forces Strategic Command (NAVSTRAT) and USSTRATCOM JFMCC. As directed, NAVSTRAT and USSTRATCOM JFMCC coordinate and synchronize operations with combatant commanders and other USSTRATCOM components.

4. I have served in the United States Navy for over 37 years. I graduated from North Carolina State University (magna cum laude) with a degree in chemical engineering in 1985 and served in several assignments throughout my career. I hold advanced degrees from the Naval Postgraduate School, Master of Science (distinction) in Physics; from Old Dominion University, Master of Science in Engineering Management; and the School of Advanced Studies, University of Phoenix, Doctor of Management in Organizational Leadership with a specialization in Information Systems and Technology. As a flag officer, I most recently served as Commander, Submarine Force Atlantic; Commander, Task Force (CTF) 114, CTF 88, and CTF 46; and Commander, Allied Submarine Command. My other flag assignments include Deputy Chief for Security Cooperation, Office of the Defense Representative, Pakistan; Deputy Commander, Joint Functional Component Command-Global Strike; Deputy Commander, U.S. 6th Fleet; Director of Operations, U.S. Naval Forces Europe-Africa; Commander, Submarine Group Eight;

⁵ The mission of USSTRATCOM is to deter strategic attack and employ forces, as directed, to guarantee the security of our Nation and our Allies. The command enables Joint Force operations and is the combatant command responsible for strategic deterrence, nuclear operations, nuclear command, control, and communications (NC3) enterprise operations, joint electromagnetic spectrum operations, global strike, missile defense, analysis and targeting, and missile threat assessment.

Commander, Submarine Force, U.S. Pacific Fleet; and Vice Director for Strategy, Plans, and Policy on the Joint Staff (J-5) in Washington, D.C.

Major Components and Functions of the Navy

5. The United States is a maritime nation, and the U.S. Navy protects America at sea. The Navy defends freedom, preserves economic prosperity, and keeps the sea lanes open and free. America's maritime forces preserve peace, deter aggression and, when directed by the President and Secretary of Defense, engage in combat operations and win decisively. The Navy projects power above, on, and below the surface of the world's oceans, which cover 70% of the surface of the Earth. Our nation is engaged in strategic competition with The People's Republic of China and Russia, and we, along with our partners and allies, face grave threats from rogue nations and non-state actors. To defend American interests around the globe, the Navy must be in a constant state of readiness to execute the missions the President directs. As of February 10, 2022, the Navy is composed of approximately 350,000 active duty personnel, approximately 3,700 operational aircraft, and 296 deployable ships, 88 of which are currently underway at sea.

6. Whether they serve at sea, overseas, or ashore, every Sailor is important to mission accomplishment and must be available to perform their duties globally when called upon. Because the stakes in war can be so high - both for the success and survival of individual units at sea and for the success of the mission - it is imperative that all Sailors are medically and physically ready to execute their duties and responsibilities without fail, even while exposed to extreme danger, emotional stress and harsh environments. The loss of personnel due to illness, disease, injury, or bad health diminishes military effectiveness. The Navy's medical standards are therefore designed to minimize the odds that any given Sailor will be unable to perform his or her duties because of illness, disease, or injury. These standards are particularly vital in the

deployed or at sea environments where a Sailor may not have access to robust medical care and may require medical evacuation. Those who seek to enter military service must be free of contagious diseases; free of medical conditions or physical defects that could require treatment, hospitalization, or eventual separation from service for medical unfitness; medically capable of satisfactorily completing required training; medically adaptable to the military environment; and medically capable of performing duties without aggravation of existing physical defects or medical conditions.⁶ Further, each service member must receive (or show that they have previously received) nine vaccinations—now ten with the inclusion of the COVID-19 vaccination—upon entry into Navy service.⁷ Because COVID-19 presents a severe risk to the mission of Navy units, and the COVID-19 vaccination is the most effective means of mitigating that risk, the Navy requires every person assigned to operational units to be vaccinated against COVID-19. Any request to waive this requirement or any other medical standard introduces potential additional risk to the mission. Accordingly, such a waiver request requires a case by case military operational risk assessment regardless of the basis of the waiver request. As explained in detail below, Plaintiffs' requested injunction would take that risk assessment away from the military, exposing the Navy's mission, units, and personnel to unacceptable and unmanaged risk.

7. Surface Operations. The surface fleet is composed of 296 ships consisting of aircraft carriers, amphibious assault ships, cruisers, destroyers, littoral combat ships, minesweepers, and patrol craft. The objective of surface operations is to achieve and sustain sea control at the time and place of the Nation's choosing to protect the homeland from afar; build and maintain global security; project the national power of the United States; and win decisively.

⁶ See DOD Instruction 6130.03, Vol 1 ¶1.2.c.

⁷ AR 40-562/BUMEDINST 6230.15B/AFI 48-110_IP/CG COMDTINST M6230.4G, Appx D.

It is essential to security and prosperity that the Navy maintain the ability to maneuver globally on the seas and to prevent others from using the sea against the interests of the United States, our allies and partners, or any other nation. Additionally, sea control is the pre-requisite to achieving the objectives of all domain⁸ access, deterrence, power projection, and maritime security.

8. Personnel on surface ships work in close proximity in confined spaces almost exclusively in the interior of the ship with no exterior ventilation. While masking and frequent cleaning assist in mitigating the spread of the COVID-19 virus, Sailors sleep in confined berthing often stacked three “racks” (beds) high with as many as 60 enlisted personnel sharing these quarters. These are ideal conditions for the spread of a respiratory virus, as evidenced by the COVID-19 outbreak on USS THEODORE ROOSEVELT (CVN 71).⁹ Personnel cannot distance themselves from other personnel in berthing or in confined workspaces. Sailors who operate surface ships cannot telework. While aircraft carriers (11 total) and large amphibious assault ships (nine total) have over a dozen medical personnel and advanced equipment, including ICU beds, to treat injuries sustained in combat, some personnel have experienced such severe COVID-19 symptoms that they have had to be evacuated from even aircraft carriers. The remaining ships in the Fleet have much more limited medical capabilities and personnel. Those ships may have one or possibly two independent duty Navy Hospital Corpsman (HM), who are enlisted personnel with specialized medical training. HMs are well trained but are not physicians

⁸ Domains are distinct operating areas that cross political and geographic boundaries. Simply put, they are areas in which military forces operate and, if necessary, fight. The five commonly accepted domains of warfare are land, maritime, air, space and cyberspace.

⁹ By April 1, 2020, USS THEODORE ROOSEVELT (CVN 71) had approximately 1,000 crew removed from the ship with a small skeleton crew remaining to maintain the nuclear reactor and other essential systems. At this time, this ship was off mission in port in Guam. By April 20, 2020, 4,069 Sailors had been removed from the ship out of a crew of approximately 4,800. The ship was unavailable for 51 days to partner with allies, maintain presence in the maritime commons, which include the world’s busiest sea lanes, and, if required, engage in combat operations, creating a national security vulnerability in an area vital to the United States’ national interests. The extended absence and unavailability of the aircraft carrier could likely have emboldened potential adversaries and set the conditions for instability in an area essential to global commerce.

or nurses and the ships to which they are assigned as independent duty HMs lack sophisticated medical equipment. Unlike doctors and nurses, formal civilian medical licenses and formal medical education are not required for HMs. They do not generally have the capability, capacity, or training to intubate a patient or use a ventilator. Personnel with severe COVID-19 symptoms would need to be medically evacuated from these ships. Prior to the availability of the vaccine and requirement for deployable units to be fully vaccinated, ships with unvaccinated personnel needed to remain within 72-hours of higher-level medical care, placing an undesirable restraint on where they could transit.

9. Undersea Operations. All U.S. Navy submarines are nuclear-powered, as only nuclear propulsion allows for the combination of persistent stealth, long duration, high-speed, and sustained underwater movement that makes modern nuclear submarines vital to a modern blue-water navy. Today's submarine force, consisting of 71 submarines, is the most capable force in the history of the U.S. Navy and the world. Our existing fleet of ballistic submarines currently carries 54 percent of our nation's nuclear deterrent arsenal, and their replacements under development and eventual construction will carry an even greater percentage of strategic warheads. The U.S. Navy operates three types of submarines: ballistic missile submarines, guided missile submarines, and attack submarines. U.S. Navy (nuclear) ballistic missile submarines carry the most survivable leg of the U.S. strategic triad; the other legs are the land-based U.S. strategic missile force and the air-based U.S. strategic bomber force. These submarines have only one mission: to carry and, if called upon, launch the Trident D5 strategic missile. The primary missions of attack and guided missile submarines in the U.S. Navy are peacetime engagement, surveillance and intelligence, special operations, precision strikes, and control of the seas. To these, attack submarines also add support to the battlegroup operations

mission. Attack and guided missile submarines have several tactical missions, including sinking ships and adversary submarines, launching cruise missiles, gathering intelligence, and supporting special operations missions.

10. Submarines can remain submerged for extended periods of time and the primary limitation for the duration of a submerged patrol is the amount of food on the submarine. Submarines have limited medical capabilities similar to small surface ships. Berthing is even more confined than on surface ships, making the spread of a respiratory disease highly likely. Space is so limited and confined that frequently the most junior Sailors on the boat are required to “hot rack” (i.e., crew members take turns sleeping in the same rack). Like smaller surface ships, submarines have one independent duty Navy HM. If a member of the crew were to become seriously ill with the COVID-19 virus, the submarine would be required to evacuate the ill crew member, requiring it to navigate to a location suitable for evacuation and forcing it to rise to the surface of the ocean. This would very likely result in the compromise, disruption, or even termination of critical missions for which the avoidance of detection is vital. Additionally, depending on where the submarine is located, the rapid evacuation of an ill crew member may be nearly impossible, jeopardizing the crew member’s safety.

11. Air operations. There are ground-based Navy aviation units for larger patrol aircraft and other platforms, but projecting air power from the sea is the core function of naval aviation. The Navy has approximately 3,700 operational aircraft. Many surface ships have rotary wing aircraft (i.e., helicopters) onboard. There are 11 aircraft carriers in the Fleet, and each aircraft carrier has a carrier air wing (CVW) made up of nine squadrons of fixed wing and rotary wing aircraft with a combined total of more than 70 aircraft when the carrier is at full strength. Each CVW is composed of approximately 1,500 personnel. The personnel in the

CVW live and work in the same conditions as the other 3,000 personnel assigned to the carrier. They live in confined spaces and almost always share berthing, eat meals together in close quarters, and participate in frequent briefings or meetings in small spaces referred to as “ready rooms.” If members of the squadron succumb to illness, the squadron’s readiness is diminished. If aviators fall ill and cannot operate their aircraft, the aircraft carrier cannot serve its purpose to project air power from the sea. Without the CVW, the aircraft carrier goes from being the centerpiece of a multi-vessel strike group from which to project force and take the fight to the adversary, to being a vulnerability that must be protected by other assets.

12. Naval Special Warfare. Admiral Lescher’s declaration provides extensive background on the training and operating environments in which Navy special operations personnel perform their duties and the associated risks from being unvaccinated.

13. Cyber and other functions. The Navy performs a variety of other missions and support functions through its vast array of shore installations and organizations. While it would take considerable time to explain the myriad functions and missions ashore, cyberspace operations represents one particular function of increasing strategic importance and an example of vital work frequently performed outside of ships, submarines, and aircraft. Every operational plan and every mission across the Navy builds from the assumption that we will be able to assure that the bandwidth and data that our forces require will be accessible and trustworthy. Since its establishment on January 29, 2010, U.S. Fleet Cyber Command/U.S. TENTH Fleet has grown into an operational force composed of more than 14,000 Sailors and civilians organized into 28 active commands, 40 Cyber Mission Force units, and 27 reserve commands around the globe. U.S. Fleet Cyber Command is responsible for Navy information network operations, offensive and defensive cyberspace operations, space operations, and signals intelligence. As such, U.S.

Fleet Cyber Command serves as the Navy component command to U.S. Cyber Command, the Navy space component to U.S. Space Command, and the Navy's Service Cryptologic Component Commander under the National Security Agency/Central Security Service. U.S. TENTH Fleet is the operational arm of Fleet Cyber Command and executes its mission through a task force structure similar to other warfare commanders. Personnel assigned to cyber units almost exclusively perform their work in a secured compartmentalized information facility (SCIF). These are enclosed, windowless spaces in which the most highly classified work of the U.S. government is performed. Personnel assigned to these units cannot do their jobs remotely in a telework environment. The confined nature of a SCIF creates a significant risk for the spread of a highly contagious respiratory virus. Having unvaccinated personnel in such an environment creates significant risk for the unvaccinated person and potentially others, in addition to the critical mission performed by our cyberspace operators.

The Necessity of Vaccinations in Response to COVID-19 Pandemic

14. The Supreme Court has acknowledged that the life and death work of the military demands a level of obedience without counterpart in civilian life.¹⁰ The Uniform Code of Military Justice, a commander's principal tool to enforce that obedience, states that orders are inferred to be lawful and are "disobeyed at the peril of the subordinate." Moreover, "the dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order."

But the Navy has made room for personal religious values to be considered, when time permits, by establishing a process for those with religious objections to the COVID-19 vaccine to request an exemption from the requirement to take the vaccine. Each exemption request is

¹⁰ Parker v. Levy, 417 U.S. 733, 758-59 (1974).

reviewed and a determination is made based upon the merits of that case. If initially denied an exemption, a Sailor may appeal the decision. If the appeal is denied, the Sailor must comply with the order to take the vaccine.

In the Navy, we champion self-sufficiency and the ability to operate effectively with limited external guidance. This is known as “mission command” and is an operational imperative for our Navy to be ready to deploy worldwide at a moment’s notice to execute the commander’s intent without persistent supervision or additional orders. Trust is the cornerstone of mission command and a commander cannot trust those who choose to disobey lawful orders. Although we train Sailors to be thoughtful and inquisitive, compliance with lawful orders must be instinctive and expeditious.

In the deadly business of protecting our national security, we cannot have a Sailor who disobeys a lawful order to receive a vaccine because they harbor a personal objection any more than we can have a Sailor who disobeys the technical manual for operating a nuclear reactor because he or she believes they know better. Our success, our national security, and the safety of our people depends on instinctive compliance with orders, and unless an order is “patently illegal,” the Sailor should robustly follow the order.

The judgment of the Military Services is that the direction to take the vaccine is a lawful order and are the most effective and readily available tool the Armed Forces has to keep Sailors safe, fully mission capable, and prepared to execute the Commander-in-Chief’s orders to protect vital United States’ national interests.¹¹ Simply put, the less people who are vaccinated, the less ready the Navy is to deter aggression and, if required, fight and win in combat. As of February 16, 2022, there have been 17 deaths among uniformed personnel - 16 were unvaccinated and one

¹¹ Memorandum for the Joint Force from General Mark A. Milley, Chariman of the Joint Cheifs of Staff, CM-0141-21 (Aug. 9, 2021).

was partially vaccinated. There have been 84,924 Navy uniformed personnel infected with the COVID-19 virus. There have been 623 hospitalizations - 546 unvaccinated, 32 partially vaccinated, 44 fully vaccinated, and one fully vaccinated with a booster shot. Readiness is not just measured by deaths and hospitalizations. Taking the 84,924 cases of infection multiplied by the previous 14 days¹² of restriction of movement (i.e., a period in which the member is isolated and unavailable to perform normal duties), the result is a rough estimate of 1,188,936 lost days in the Navy since the inception of the COVID-19 pandemic. In addition to the irreplaceable loss of 17 Sailors, the lost opportunities resulting from this massive loss of time and readiness cannot be replaced.

Harm to Readiness if Preliminary Injunction Issued

15. A preliminary injunction requiring unvaccinated members be assigned to deployable units or critical shore assignments will create an unacceptable risk to personnel. It is well-established and understood that commanders have absolute responsibility to maintain a safe working environment, protect Sailors, and soundly assess and balance risk. Commanders are given the authority to ensure that Sailors are safe. If commanders fail in this responsibility or exercise poor judgment in balancing risk, they will be subject to the absolute accountability of being relieved of command and perhaps other more severe consequences. In following the direction and guidance of the Secretary of Defense, the Navy determined that there is a compelling interest in ensuring Sailors remain healthy and ready to fight. The survival rate of

¹² Recent CDC guidance issued several weeks ago has lowered the isolation period to as little as five days, but noting that fully vaccinated, boosted and asymptomatic persons *exposed* to a COVID positive person do not need to isolate for five days, but do need to wear a mask for up to 10 days. On the other hand, unvaccinated or non-boosted persons *exposed* to a COVID positive person need to isolate for five days regardless if they have no symptoms. [CDC Updates and Shortens Recommended Isolation and Quarantine Period for General Population | CDC Online Newsroom | CDC](#)

vaccinated people is significantly higher than unvaccinated people.¹³ The Department of Defense and Navy have determined that COVID-19 is a risk that can be best managed by vaccination *in addition to* other mitigation measures and *is* the least intrusive means to maintain maximum readiness while creating the lowest risk the Navy is willing to accept to the force. Having 4,000 unvaccinated Sailors deployed across the Fleet will create an unacceptable risk to readiness and could result in unnecessary deaths.

16. A preliminary injunction will result in irreparable harm to readiness and mission accomplishment by prohibiting several necessary actions to ensure the health and readiness of naval forces. Plaintiffs ask the Court to maintain the status quo, which effectively is a request for the Court to order the Navy to leave unvaccinated personnel in their units, performing their same duties and deploying regardless of the substantial risk to personnel and mission that will result. By obliging the Plaintiffs' request, an injunction would seriously degrade the military readiness, and unnecessarily limit the Navy's ability to respond to the most challenging crises, and may result in the failure of critical military missions and irreparable harm to our national security. Contrary to the Court's and Plaintiffs' understanding, serious illness resulting from the COVID-19 virus remains a threat *to the unvaccinated and, therefore, the mission if unvaccinated Sailors remain in deployable units*. For example, the USS MILWAUKEE (LCS-5) outbreak during deployment in late 2021 and early 2022 demonstrated the risk COVID-19 still poses *and* the success of the vaccine. Approximately, one-third (i.e., about 30 of a crew of approximately 100) of the 100% vaccinated crew tested positive in January 2022, but all positive personnel

¹³ "During October–November [2021], unvaccinated persons had 13.9 and 53.2 times the risks for infection and COVID-19–associated death, respectively, compared with fully vaccinated persons who received booster doses, and 4.0 and 12.7 times the risks compared with fully vaccinated persons without booster doses." Available at [COVID-19 Incidence and Death Rates Among Unvaccinated and Fully Vaccinated Adults with and Without Booster Doses During Periods of Delta and Omicron Variant Emergence — 25 U.S. Jurisdictions, April 4–December 25, 2021 | MMWR \(cdc.gov\)](#)

experienced mild symptoms or were asymptomatic. While the ship remained in port for 14 days due to the outbreak, had they been at sea, they would have been able to continue normal operations. Contrast that situation to the one on USS THEODORE ROOSEVELT (CVN 71) before the vaccine existed, or even the early days of vaccine availability when USS PHILIPPINE SEA (CG-58) had 20 Sailors of a crew of approximately 330 test positive, yet spent an entire month in port in Bahrain - off mission in the strategically important Arabian Gulf and adjacent areas - due to the outbreak. Bottom line: fully vaccinated units withstand COVID outbreaks with significantly less impact to the mission. The Court's order of January 3, 2022, takes the position that the incremental impact of adding one unvaccinated member, then another, then another and so on will have a minimal impact on the unit and operations. This is incorrect and dangerous logic. With each unvaccinated member added to a unit, the risk to personnel and risk to mission increases exponentially and unacceptably in the professional judgment and experience of the Military Services.

17. A preliminary injunction would essentially prohibit discipline, adverse administrative action, and non-adverse, routine personnel actions and, therefore, irreparably harm good order and discipline in the Navy. Such an order creates two different sets of rules applied to Plaintiffs and non-Plaintiffs. If issued, the order will set the conditions for Plaintiff Sailors to judicially challenge every order or assignment a commander directs. Irrespective of the nature of the government interest or how compelling it is, Sailors will be invited to challenge a commander's professional military judgment, whether it concerns training, assignment of duties, or other everyday orders essential to the Navy's mission that they might find to be objectionable. The Navy's protection of its people and preservation of our national security demands a force that complies with the lawful orders of superiors, and Navy leadership must be

empowered to equitably enforce strict adherence with those orders. A preliminary injunction will result in decreased morale and a breakdown of discipline across the organization and the Navy. The order would create a bifurcated system for leading, assigning, disciplining, and employing Sailors in a unit. The lack of uniformity and disparate treatment necessitated by the order would significantly corrode good order and discipline to the point in which unit effectiveness would very likely suffer.

Conclusion

18. The professional military judgment of United States Navy military and civilian leadership is that the working conditions and operations that Navy personnel are engaging in or need to be immediately prepared to engage in require a fully protected and medically ready force. The least constrictive manner to accomplish this compelling and vital imperative is the COVID-19 vaccine *in addition to* other mitigation measures. The vaccine is to be viewed as the same as any other protective equipment that Sailors need to accomplish the mission safely and return home. Extending the preliminary injunction to potentially 4,000 personnel and requiring the Navy to deploy unvaccinated service members who are not medically fit for deployment will severely undermine military readiness through the spread of disease and cause irreparable harm to military operations by allowing unvaccinated service members to remain in their current status. Furthermore, having 4,000 unvaccinated personnel who refuse the lawful order to be vaccinated in such units will further undermine mission accomplishment by subverting good order and discipline.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 23rd day of February, 2022.



D. L. CAUDLE

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA**

NAVY SEAL #1, et al.

Plaintiffs,

v.

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

Defendants.

Case No. 8:21-cv-02429-SDM-TGW

DECLARATION OF ADMIRAL MICHAEL M. GILDAY

I, Michael M. Gilday, hereby state and declare as follows:

1. I am an admiral¹ in the United States Navy, currently serving as the 32nd Chief of Naval Operations (CNO). My place of duty is located in Arlington, Virginia at the Pentagon. The position of CNO is appointed by the President, by and with the advice and consent of the Senate, and is the highest-ranking uniformed officer in the Navy and a member of the Joint Chiefs of Staff.² I have served in this position since August 22, 2019. I make this declaration in support of the Government's motion for a stay of this Court's preliminary injunction pending appeal. The statements made in this declaration are based upon my personal knowledge, my military judgment and experience, and upon information that has been provided to me in the course of my official duties.

¹ The rank of "admiral" is the highest military rank in the Navy. The term "admirals" is also frequently referred to as "flag officers." Flag officers include the ranks of rear admiral (lower half), rear admiral (upper half), vice admiral and admiral. Flag officers comprise the most senior levels of uniformed leadership in the Navy.

² The CNO is the senior uniformed officer in the United States Navy. *See* 10 U.S.C. § 8033(b) ("The Chief of Naval Operations, while so serving, has the grade of admiral without vacating his permanent grade. In the performance of his duties within the Department of the Navy, the Chief of Naval Operations takes precedence above all other officers of the naval service.").

Preliminary Statement

2. I have reviewed the preliminary injunction order issued by the Court on February 18, 2022. I am the designated official that decides all Navy service member appeals of the denial of religious accommodation (RA) requests that require waiver of Department of Navy policy, to include exemption from the requirement to be inoculated with the COVID-19 vaccine. I carefully review each appeal, to include the service member's initial request and appeal, all enclosed matters submitted by the service member, command endorsement, and the requester's specific duties. In considering these matters, I assume the requester's religious belief is sincere and would be substantially burdened by being required to be inoculated with the COVID-19 vaccine. I then determine whether there are less restrictive means to satisfy the compelling government interest in preventing the spread of diseases to support mission accomplishment, including military readiness, unit cohesion, good order and discipline, and health and safety, at the individual, unit, and organizational level. COVID-19 in particular has taken the lives of Sailors, jeopardized the health and safety of Sailors and their families, and impeded mission accomplishment. I deeply respect every Sailor who raised his or her right hand to wear the uniform of our Nation, and I owe them individual, case-by-case consideration of each of their appeals. To do otherwise would run counter to the sacred duty Navy leaders have to every Sailor under their charge.

Navy Background and Experience

3. As CNO, I execute statutory duties and responsibilities as they pertain to the employment of the Navy. Those duties include recruiting, organizing, supplying, equipping, training, servicing, mobilizing, demobilizing, administering, and maintaining of the Navy, as

well as assisting in the execution of any power, duty, or function of the Secretary of the Navy.

As the Service Chief for the United States Navy, I serve as a member of the Joint Chiefs of Staff.³

4. I have served in the United States Navy for 37 years. I graduated from the United States Naval Academy in 1985 and served in several assignments throughout my career. Some of my prior assignments included command of destroyers USS Higgins (DDG 76) and USS Benfold (DDG 65) and subsequent command of Destroyer Squadron 7, serving as sea combat commander for the Ronald Reagan Carrier Strike Group. Joint assignments include executive assistant to the Chairman of the Joint Chiefs of Staff and naval aide to the President. As a flag officer, I served as commander, Carrier Strike Group 8 embarked aboard USS Dwight D. Eisenhower (CVN 69), and as commander, U.S. Fleet Cyber Command and U.S. 10th Fleet. As a flag officer, I also served in joint positions as director of operations for NATO's Joint Force Command Lisbon; as chief of staff for Naval Striking and Support Forces NATO; as director of operations, J3, for U.S. Cyber Command; and as director of operations, J3, for the Joint Staff. Prior to my current assignment as CNO, I recently served as director, Joint Staff. I hold master's degrees from the Harvard Kennedy School and the National War College.

Consideration of RA Appeals

5. RA appeals are evaluated by me on a case-by-case basis using criteria outlined in BUPERSINST 1730.11A. Because the Navy requires immunization for all Sailors, RA requests

³ See 10 U.S.C. §151(a) (Joint Chiefs of Staff (JCS) is headed by the Chairman of the JCS (CJCS) and composed of the Vice Chairman, the Chief of Staff of the Army, the Chief of Naval Operations, the Chief of Staff of the Air Force, the Commandant of the Marine Corps, the Chief of the National Guard Bureau and the Chief of Space Operations). The CJCS is the principal military adviser to the President, the National Security Council, the Homeland Security Council, and the Secretary of Defense and in carrying out his functions, duties and responsibilities, the CJCS shall consult with and seek the advice of the other members of the JCS and the commanders of the unified and specified combatant commands, as necessary. *Id.* at §151(b)-(c).

for exemptions from the requirement to be inoculated with the COVID-19 vaccine are initially acted on by the Chief of Naval Personnel (CNP) as the deciding official. I am the appeal authority in the event that CNP denies the initial RA request. In my review, I assume the requester's religious belief to be sincere, and that the requirement to be inoculated with the COVID-19 vaccine would substantially burden the requester's exercise of his or her religion. I do not deny the requester's appeal unless denial furthers a compelling governmental interest and is the least restrictive means of furthering that compelling government interest. BUPERSINST 1730.11A ¶ 5.a.(2) Factors considered include (but are not limited to) whether there are less restrictive means, whether approving the accommodation would pose a health or safety hazard, or otherwise impair mission accomplishment, good order, discipline, morale or unit cohesion. *Id.*

6. If the requirement substantially burdens a requester's exercise of his or her religion, the Navy must establish that the substantial burden is required in furtherance of a compelling Navy interest and is the least restrictive means of accomplishing that interest. I consider whether the government's compelling interest applies to the particular requester and whether there are less restrictive means to achieve the Navy's compelling government interest. This is also a case-by-case review that is particularized to circumstances applicable to the individual requester. Specific duty assignments and the requirement for Sailors to be immediately available to deploy in the event of military exigencies will result in less restrictive means not being feasible in many circumstances. A religious accommodation will be approved if it does not adversely impact the Navy's compelling government interest in preventing the spread of diseases to support mission accomplishment, including military readiness, unit

cohesion, good order and discipline, or health and safety, at the individual, unit, and organizational levels.

7. The Court's conclusion that the Navy's assessment of the compelling interest is generalized and not specific to the requester is incorrect because there are several common denominators that apply across broad sections of the Navy, particularly to those in deployable units. For example, communicable diseases can interfere with the Navy's mission accomplishment at the individual, unit, and organizational levels, decrease the overall health of the force, degrade military readiness, and place additional strain on already limited medical resources. Spread of communicable diseases among Sailors who live and work in confined quarters aboard ships or in austere deployed environments can cause mission failure if one or more personnel become too sick to perform their jobs. Logistical challenges inherent in moving personnel to and from deployed ships and other deployed environments make it difficult, if not impossible, to quickly evacuate sick personnel and replace them with healthy personnel. Navy ships have limited medical and long-term placement capabilities. Accordingly, if a service member becomes severely ill onboard a ship, the ship may have to abandon its mission and transit to a location that offers more adequate treatment. The spread of communicable diseases from U.S. Navy personnel to foreign or host-nation personnel would have a detrimental impact on U.S. foreign relations, especially if the disease was viewed as preventable.

8. The effectiveness of mitigation measures is extremely limited on ships, where Sailors must live, work, eat, and sleep in close proximity to other Sailors. Ships typically have limited space to quarantine Sailors from the rest of the crew, if such facilities exist at all. Almost all enlisted berthing compartments feature three-foot by six-foot bunks ("racks") that are generally stacked three high with narrow passages between rows. Enlisted berthing

compartments have as few as 12 and as many 210 personnel sleeping in the same space. Health protection measures are more feasible ashore, but the effectiveness is highly dependent on the type of work a Sailor does and the configuration of their workspace. Commands across the Navy Service were obligated to adopt telework policies, where feasible.⁴ Finally, Sailors' assignments typically alternate between sea duty and shore duty; however, every Sailor must be deployable. Being unvaccinated will almost certainly result in a Sailor not being deployable. Sailors who are not deployable are subject to a medical discharge.⁵ Sailors assigned to shore duty or the Navy Reserve need to be ready to deploy at a moment's notice.

Conclusion

9. The unavoidable and irrefutable fact that several common denominators exist across large sections of the Navy does not result in there being a lack of case-by-case review of each request and the application of the compelling government interest to the circumstances of the individual requester. Particular to this officer's request, lesser restrictive means will not achieve the compelling government interest. The Navy is committed to accommodating every Sailor's practice of his or her religious beliefs which do not have an adverse effect on military readiness, unit cohesion, good order and discipline, or health and safety. The Navy is also committed to protecting vital national interests, such as maintaining the advantage over long-term competitors, China and Russia, and their rapidly modernizing militaries built to challenge the international order that has benefited so many for so long. The Navy is committed to defend our Nation and interests around the globe by flawlessly executing our timeless roles of sea

⁴ Telework is not an option for many Sailors, including those performing work using classified networks, those who work with specialized equipment, or for any work, training, or maintenance on military assets (e.g. ships, aircraft, submarines).

⁵ See OPNAVINST 1300.20, Deployability Assessment and Assignment Program (requiring administrative separation processing or referral to the Disability Evaluation System for any Sailor who is undeployable for 12 months or longer).

control and power projection. I am committed to accommodating every Sailor's religious practices to the extent the individual's specific request does not undermine the compelling government interests in order to accomplish these vital functions the American people expect and demand of their Navy.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 28th day of February, 2022.


M. M. GILDAY

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA**

NAVY SEAL #1, et al.

Plaintiffs,

v.

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

Defendants.

Case No. 8:21-cv-02429-SDM-TGW

DECLARATION OF GENERAL ERIC M. SMITH

I, Eric M. Smith, hereby state and declare as follows:

1. I am a General¹ in the United States Marine Corps, currently serving as the 36th Assistant Commandant of the Marine Corps (ACMC). My place of duty is located in Arlington, Virginia at the Pentagon. The position of ACMC is appointed by the President, by and with the advice and consent of the Senate, and is the second highest ranking uniformed officer in the Marine Corps. I have served in this position since October 8, 2021. I make this declaration in support of the Government's motion for a stay of this Court's preliminary injunction pending appeal. The statements made in this declaration are based upon my personal knowledge, my military judgment and experience, and upon information that has been provided to me in the course of my official duties.

¹ The rank of "General" is the highest military rank in the Marine Corps. The term "Generals" is also frequently referred to as "General Officers." General Officers include the ranks of Brigadier General, Major General, Lieutenant General and General. General Officers comprise the most senior levels of uniformed leadership in the Marine Corps.

Preliminary Statement

2. I have reviewed the preliminary injunction order issued by the Court on February 18, 2022. I am the designated official that considers and decides all Marine Corps appeals of the denial of religious accommodation (RA) requests that seek exemption from the requirement to receive the COVID-19 vaccine. The Court's conclusion that the Marine Corps' consideration and decisions on RA requests and my determinations on appeals are made in "bad faith"² is wrong and also ignores the demanding requirements and missions the Marine Corps performs across the globe on short notice. I personally consider every appeal including all enclosed matters submitted by the requester, the command endorsements, the recommendation of the Religious Accommodation Review Board (RARB), the input of the Director, Health Services, Headquarters, U.S. Marine Corps and the nature of the requester's current duties, living conditions, deployment status and a variety of other information specific to the individual requester. I review each religious accommodation request and the available information on a case-by-case basis. When I review a Marine's request, unless there is evidence to the contrary, I assume that the individuals request is sincere. Then, I determine whether the required action or policy substantially burdens the requestor's practice of their faith, whether there is a compelling government interest in requiring the appellant to be vaccinated, and whether the requirement is the least restrictive means to satisfy a compelling government interest. I have granted religious accommodation appeals when the compelling government interest in vaccination is not as great or there are less restrictive means to satisfy the compelling government interest. Marines unselfishly and heroically put themselves in harm's way to protect national interests and defend values that Americans hold dear, including the free exercise of religion. I and every Marine

² ECF No. 111 at 1.

Corps leader are committed to ensuring that every Marine can exercise his or her constitutional rights to the maximum extent possible consistent with the demands and requirements of the Service. Any conclusion that my review and adjudication of these requests and appeals is a “sham” process is wholly incorrect. Furthermore, the Court’s implication that I am not familiar with concepts such as “complicity with evil”³ that are “likely familiar to a thoughtful religious lay person” is completely unfounded.

Military Background and Experience

3. As the ACMC, I am the second highest ranking officer in the United States Marine Corps and I serve as the second-in-command for the Commandant of the Marine Corps (CMC). In the event the CMC is absent or unable to perform his duties, I assume the duties and responsibilities of the CMC and, with the approval from the Secretary of the Navy, may be delegated or prescribed to me. Orders issued by me as the Assistant Commandant while performing such duties have the same weight as those issued by the CMC.

4. I have served in the Marine Corps for 35 years, commissioning in 1987. I have served in several assignments throughout my career and commanded at every level, including Weapons Company, 2d Battalion, 2d Marine Regiment during Operation Assured Response in Monrovia, Liberia; 1st Battalion, 5th Marine Regiment during Operation Iraqi Freedom; and 8th Marine Regiment/ Regimental Combat Team 8 during Operation Enduring Freedom. I also served in Caracas, Venezuela as part of the U.S. Military Group. As a General Officer, I commanded U.S. Marine Corps Forces Southern Command, 1st Marine Division, III Marine Expeditionary Force, and Marine Corps Combat Development Command. My staff assignments as a General Officer include serving as the Director of Capability Development Directorate,

³ *Id.* at 14-15.

Combat Development and Integration; Senior Military Assistant to both the Deputy Secretary of Defense and Secretary of Defense; and Deputy Commandant for Combat Development and Integration.

Consideration of RA Requests and Appeals

5. All requests for religious accommodation are reviewed on a case-by-case basis. Requests for the accommodation of religious practices implicating medical procedures, such as exemption from vaccines, are adjudicated by the Deputy Commandant, Manpower and Reserve Affairs (DC M&RA). If the request for religious accommodation for immunization is disapproved, the service member has the right to request an appeal to the CMC.⁴ In reviewing the request, the DC M&RA also considers the recommendation of a RARB.⁵ The RARB reviews the religious accommodation request with all endorsements and enclosures and provides written recommendations as to the merits of each religious accommodation request and whether the DC M&RA should approve or deny, in whole or in part, each request. For any medical-related accommodation request, the Director, Health Services, Headquarters, U.S. Marine Corps provides a medical advisory opinion.

6. Each request and appeal for religious accommodation is reviewed on a case-by-case basis, giving consideration to the full range of facts and circumstances relevant to the specific request. The Marine Corps will approve an individual request or appeal unless such approval unavoidably erodes a compelling government interest. The adjudication authority is required to demonstrate that its determination considers whether the request is based on a sincerely held religious belief and whether there is a less restrictive alternative means of meeting

⁴ I or the Director of the Marine Corps Staff may take action on behalf of the CMC.

⁵ The Religious Accommodation Review Board (RARB) consists of a minimum of three voting members and non-voting advisors, to include a recorder, a legal advisor, a chaplain advisor, and other personnel as determined by the Board President.

a compelling government interest. For requests for waivers from immunization requirements, Secretary of the Navy Instruction 1730.8B ¶ 8a. provides that “[t]he religious objection of the service member must be balanced against the medical risk to the member and the military unit, and military requirements such as alert status, deployment potential, and availability of the member for reassignment to units requiring full medical readiness.”

7. If DC (M&RA) or I determine there is a sincerely held religious belief, and the policy, practice, or duty (in these cases vaccination) substantially burdens a Marine’s exercise of religion, then the request can only be denied if the military policy, practice, or duty is in furtherance of a compelling governmental interest, and there is no lesser restrictive means to furthering that compelling interest. This is also a case-by-case determination. Some sincerely held beliefs may not be substantially burdened if the requester has demonstrated acquiescence to the purported burden in other portions of their life (e.g., receiving other vaccinations or using other products tested using fetal cell lines), and the requester has not stated a sincere religious basis for the difference. Additionally, if the requester’s sincerely held religious belief concerns objections to the mRNA vaccines, the requestor’s belief may not be substantially burdened by receiving a different type of vaccine, depending on the nature of the requester’s sincere religious beliefs. Generally speaking, absent evidence to the contrary, I assume the belief is sincere and I make an assessment regarding whether vaccination substantially burdens that belief based on the requestor’s description of the belief.

8. The Marine Corps has a compelling governmental interest in mission accomplishment at the individual, unit, and organizational levels. The necessary elements of mission accomplishment include: (1) military readiness; (2) unit cohesion; (3) good order and discipline; and (4) health and safety. The Marine Corps requires immunizations for all Marines,

based upon the service's compelling interest in military readiness and the health and safety of active duty and reserve Marines. Immunizations are a vital component of individual and unit medical readiness, as Marines operate in environments and under conditions that increase their exposure and susceptibility to illness. This is particularly acute in deployed environments or in circumstances when Marines are required to be in close proximity to each other, such as recruit training or when embarked on ships, aircraft, and military vehicles. Mission accomplishment may necessitate that Marines be immunized to protect against disease due to increased exposure potential, or to conform with international health regulations incident to foreign travel or unit deployment, or to comply with the requirements of those countries that host our Marines.

9. Even though vaccinations are vital to medical readiness, DC (M&RA) and I still consider, on a case-by-case basis, whether there is a compelling interest as applied to the individual requester and whether there are less restrictive means to achieve the Marine Corps' compelling government interest including mission accomplishment at the individual, unit, and organizational levels. This is also based on a case-by-case review that is highly dependent on the particular facts applicable to the requester. If I do not have enough information to complete a case-by-case analysis, then my staff will ask the requestor or the requestor's command for more information in order to adjudicate a request or an appeal (Exhibit A). Religious accommodations will be approved if a less restrictive means is available that does not adversely impact the Marine Corps' compelling government interest in preventing the spread of communicable diseases to support mission accomplishment, including military readiness, unit cohesion, good order and discipline, or health and safety.

10. DC (M&RA) and I consider a variety of unique factors specific to the requester in determining if less restrictive means are available. Some of the considerations may include

where the requestor lives (e.g., in military barracks where bathrooms and messing facilities are often shared with other Marines), where the requestor works (e.g., confined indoor space, outdoors, if telework is feasible), the nature of the requestor's unit (e.g., is it deployable, living conditions if deployed, embarkation on a vessel if deployed), the nature of required military training (e.g., will the requestor be required to train in close proximity with United States service members or foreign partners and allies), and the nature of the requestor's primary and collateral duties, among other factors. While considering these factors and others as may be applicable, the approval and appellate authorities will also consider if mitigation measures (e.g., social distancing, additional sanitation, masking, self-quarantining, periodic testing, etc.) will be effective without undermining the Marine Corps' compelling interest in mission accomplishment at the individual, unit, and organizational levels. These mitigation measures and similar ones are often incompatible with the demands of military life, where Marines and Sailors must live, work, realistically train, and, if necessary, fight in close quarters. Because the Marine Corps is the smallest of the Services, and is America's force in readiness, every Marine must be deployable and ready to fight tonight. If a Marine is not deployable, we will make every effort to assist in making the Marine deployable. Where a Marine is unable to deploy for an indefinite period, they will be discharged. Readiness is our number one concern each day, and we take seriously that every Marine is a rifleman. That is why *every* Marine undergoes combat training and *every* Marine officer undergoes training to be a rifle platoon commander.

Conclusion

11. The fact that few requests and appeals have been approved is not due to a lack of case-by-case review of each request or the lack of an individualized application of the compelling government interest to the circumstances of the requestor. Nor is it evidence that this

process is a ““rubber stamp”” adjudication by form letter.”⁶ Where an accommodation does not undermine the mission of the Marine Corps, the Marine Corps will accommodate Marines’ religious beliefs. For example, the Marine Corps has facilitated the ability to observe the Sabbath or holy days and provides kosher or halal meals to Marines who make those requests. We also recently granted a Sikh Marine the ability to deviate from our uniform and grooming standards in certain circumstances in order to observe the tenants of his faith. The fact that few of the requests or appeals for exemption to the vaccine have been approved is a reflection of the extraordinarily compelling government interest in total force readiness, and the health and safety of our Marines. In the case of the Marine Lieutenant Colonel, who is the subject of the Court’s order, I considered several specific facts and circumstances unique to her. She is currently assigned to a deployable unit, was slated to deploy overseas but her orders had to be canceled because of her unvaccinated status, and she is currently slated to take command of a deployable unit that will be embarked on a ship in confined quarters and where mitigation measures are virtually impossible to enforce. She will very likely need to travel to countries that require a COVID-19 vaccination as a condition of entry or where there are requirements for significant delays to entry because of quarantine requirements for unvaccinated persons. Marines remain forward deployed and forward engaged in the Pacific, South America, Africa, Europe and the Middle East. As a relevant and in high-demand instrument of national power, Marines respond to crises around the world, and until six months ago Marines have remained engaged in continual combat operations in Afghanistan. The relatively few exemptions to the COVID-19 vaccine requirement is not proof of the Marine Corps’ lack of *commitment* to Marines’ free exercise of their religions. On the contrary, the few exemptions to the vaccine are a direct reflection of the

⁶ ECF No. 111 at 42.

Marine Corps' *commitment* to the daunting and unrelenting demands the Nation requires of us, as the most flexible, versatile, and adaptable Service, to execute any mission immediately anywhere in the world.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 28th day of February, 2022.

A handwritten signature in black ink, appearing to read 'E M Smith', with a stylized flourish at the end.

E. M. SMITH

Exhibit A to General Smith's Declaration

RELIGIOUS ACCOMMODATION APPEAL - APPLICANT INFORMATION FORM

SECTION A – APPLICANT PERSONNEL DATA

1. NAME OF APPLICANT (LAST, FIRST, MI)	2. PAYGRADE/RANK SELECT RANK	3. DoD ID NUMBER
4. CURRENT BILLET	5. MOS	6. SERVICE COMPONENT SELECT SERVICE
7. UNIT OR ORGANIZATION	8. GENERAL COURT-MARTIAL CONVENING AUTHORITY UNIT/ORGANIZATION	

SECTION B – ADDITIONAL INFORMATION

9. Did the chain of command endorse the appeal?	<input type="radio"/> Yes	<input type="radio"/> No
10. Does the applicant reside on a military installation or in military housing?	<input type="radio"/> Yes	<input type="radio"/> No
11. Does the applicant reside in the barracks?	<input type="radio"/> Yes	<input type="radio"/> No
12. If they reside in the barracks, does the applicant have a roommate? <input type="radio"/> N/A	<input type="radio"/> Yes	<input type="radio"/> No
13. Does the applicant share a bathroom with others?	<input type="radio"/> Yes	<input type="radio"/> No
14. Whether on base or off, please describe applicant's living arrangements.		
15. Does the applicant work primarily indoors?	<input type="radio"/> Yes	<input type="radio"/> No
16. Can the applicant perform primary duties remotely?	<input type="radio"/> Yes	<input type="radio"/> No
17. Does the applicant work in close proximity to others?	<input type="radio"/> Yes	<input type="radio"/> No
18. Describe the applicant's current billet, primary duties, and working conditions.		

CUI/PRE-DECISIONAL

19. Is the applicant attached to a deployable unit?	<input type="radio"/> Yes	<input type="radio"/> No
20. Is the applicant scheduled to deploy?	<input type="radio"/> Yes	<input type="radio"/> No
21. Please describe the nature of the deployment, the applicant's primary duties on the deployment, and what their living arrangements will be. <input type="checkbox"/> N/A		
22. Will the applicant be required to serve on ship?	<input type="radio"/> Yes	<input type="radio"/> No
23. Please describe the applicant's berthing and primary responsibilities while serving on ship. <input type="checkbox"/> N/A		
24. Will the applicant be required to participate in exercises or other unit training events that require them to be in close proximity to others?	<input type="radio"/> Yes	<input type="radio"/> No
25. Please describe the applicant's primary duties and billeting for these exercises and training events. <input type="checkbox"/> N/A		
26. Does the applicant expect to PCS/PCA in the next 18 months?	<input type="radio"/> Yes	<input type="radio"/> No
27. If the applicant expects to PCS/PCA in the next 18 months, when is their anticipated date of departure?	<input type="text"/>	<input type="checkbox"/> N/A
28. If the applicant expects to PCS/PCA in the next 18 months, what is their future billet and duty responsibilities? <input type="checkbox"/> N/A		
29. Is the applicant required to stand duty?	<input type="radio"/> Yes	<input type="radio"/> No
30. Does standing duty place the applicant in close proximity to others?	<input type="radio"/> Yes	<input type="radio"/> No
31. Please describe how often the applicant stands duty and their primary responsibilities while on duty. <input type="checkbox"/> N/A		

CUI/PRE-DECISIONAL

32. Does the applicant have collateral duties that place them in close proximity to others?	<input type="radio"/> Yes	<input type="radio"/> No
33. Describe the applicant's collateral duties. <input type="checkbox"/> N/A		
34. To your knowledge, has the applicant requested or received any previous religious accommodations?	<input type="radio"/> Yes	<input type="radio"/> No
35. If so, describe previous religious accommodations. <input type="checkbox"/> N/A		
36. Is there any additional information you would like to provide the appeal authority? <input type="checkbox"/> N/A		
37. CO, XO, or OIC Name (LAST, FIRST, MI)	38. CO, XO, or OIC Signature	
39. Date Religious Accommodation Form routed to GCMCA SJA for review:		
40. Date Religious Accommodation Form routed to JCA, JAD:		
<p><u>SUBMISSION INSTRUCTIONS:</u></p> <p>All Religious Accommodations Forms must be saved in the following format: LNAME, FI. MI. RAAPPEAL Form</p> <p>Please return this form to your SJA. SJA's, after reviewing the form, please send to the following email address: JCA@usmc.mil</p>		

CUI/PRE-DECISIONAL

A309

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA**

NAVY SEAL #1, et al.

Plaintiffs,

v.

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

Defendants.

Case No. 8:21-cv-02429-SDM-TGW

DECLARATION OF VICE ADMIRAL DANIEL DWYER

I, Vice Admiral Daniel Dwyer, United States Navy, hereby state and declare as follows:

1. I am a Vice Admiral in the United States Navy, currently serving as Commander, U.S. Second Fleet, located in Norfolk, Virginia. I make this declaration in my official capacity, based upon my personal knowledge and upon information that has been provided to me in the course of my official duties.

2. I have served in the Navy since 1988, and I have been assigned to my current position since August 2021. Operationally, I have served as a career F/A-18 pilot in a variety of strike fighter squadrons. I completed eight carrier deployments to the Western Pacific, North Atlantic, Mediterranean, and North Arabian Sea, supporting Operations Southern Watch, Iraqi Freedom, Enduring Freedom, and New Dawn, flying over 75 combat missions. I have served in command of Strike Fighter Squadron (VFA) 27; Provincial Reconstruction Team Asadabad, Kunar Province, Afghanistan; Fleet Replacement Squadron (VFA) 106, Carrier Air Wing 8, and Carrier Air Wing 17; Carrier Strike Group (CSG 9), and I was the 36th Chief of Naval Air

Training (CNATRA). Ashore, I have served as Regional Outreach, NATO Headquarters; Commander, International Security Assistance Force Kabul, Afghanistan; Director of Aviation Officer Distribution, Naval Personnel Command; Chief of Staff for Strategy, Resources and Plans for Commander, U.S. Naval Forces Europe and U.S. Naval Forces Africa and for Commander, U.S. 6th Fleet in Naples, Italy; and I served as Director of Plans and Policy for U.S. Cyber Command in Fort Meade, Maryland.

Preliminary Statement

3. I have reviewed the preliminary injunction order issued by this Court on February 18, 2022. In my opinion, the Court's injunction directly interferes with the Navy's ability to carry out its responsibilities in service to the American people and our national security. As described in more detail below, I believe the Court's injunction will cause immediate and irreparable harm to the Navy.

The COVID-19 Pandemic Threat to Naval Forces

4. The United States Navy and Marine Corps comprise the Nation's principal maritime forces. Their missions, in sum, are to train, maintain, and equip global forces in order to "secure the Nation from direct attack; secure strategic access and retain global freedom of action; strengthen existing and emerging alliances and partnerships; establish favorable security conditions; deter aggression and violence by state, non-state, and individual actors and, should deterrence fail, prosecute the full range of military operations in support of U.S. national interests." *See* Department of Defense Directive (DoDD) 5100.01, Change 1, 09/17/2020, Encl. 6, ¶ 5.a. –b (attached hereto). While the effective execution of all of these discrete functions is vital to the national security of the United States, the Navy and Marine Corps overarching

missions are to provide forces to joint commanders¹ to deter aggression and, if required, engage in combat operations and win decisively.

5. Every year, the Navy executes tens of thousands of steaming days, millions of flight hours, and untold hours on duty in order to protect America, deter conflict and keep the sea lanes open and free. These military operations are performed by hundreds of thousands of Sailors, both officers and enlisted, serving in many capacities, ranging from Sailors in the deck department of our warships, pilots and aircrew operating our aircraft, information technicians operating our networks, to doctors and corpsman staffing our hospitals and medical clinics, among many, many other jobs. Our operations are interconnected; every Sailor is vital to our mission, whether they are assigned to a shore command or on deployment at sea.

6. The environment in which Navy personnel operate at sea – in close quarters for extended periods of time in spaces without the availability of exterior ventilation (e.g., inside surface ships, submarines and aircraft) – renders our Sailors susceptible to contagious respiratory diseases such as COVID-19, and makes mitigation measures such as social distancing ineffective and unrealistic.² Even ashore, our Sailors frequently live, work, and train in close proximity to one another. To maintain our operational capacity, it is imperative to protect the health and

¹ Joint commanders are the combatant vested with authority and responsibility for military operations within their area of responsibility. The Navy and other branches of the Armed Forces provide forces to the combatant commanders to execute those responsibilities and functions. The combatant commanders exercise authority, direction and control over the commands and forces assigned to them and employ those forces to accomplish missions assigned to the combatant commander. Department of Defense Directive (DoDD) 5100.01, Change 1, 09/17/2020, Encl. 1, ¶1.a through d.

² For example, in March 2020, the aircraft carrier *USS Theodore Roosevelt* was deployed to the Western Pacific Ocean, a vital geo-political center area of operations. An outbreak of COVID-19 required the removal of approximately 1,000 crew from the ship, with a skeleton crew remaining on board to maintain the nuclear reactor and other essential systems. By April 20, 2020, over 4,000 Sailors had been removed from the ship, out of a crew of approximately 4,800. The ship was unavailable for nearly two months, and therefore unable to train with allies, maintain presence in an area including the world's busiest sea lanes, or if required, engage in combat operations. This created a national security vulnerability in an area vital to the U.S. national interests. Currently, ships under the authority of U.S. Second Fleet serve in a similarly vital area, including the eastern and northern Atlantic Ocean.

safety of our personnel. In response to the COVID-19 pandemic, this obligation includes the duty to halt the spread of COVID-19 within the forces, for which the Navy and Marine Corps have implemented a mandatory vaccination requirement. While the vaccine mandate was implemented in response to COVID-19, it is similar to vaccination requirements the Services have implemented to protect the force from a variety of other health risks.

7. Vaccination against COVID-19 has been proven to be the most effective way to keep Navy units on mission and expediently halt the spread of COVID-19 within the Force. Having fully vaccinated naval forces is essential to ensure maximum health and readiness of forces to carry out our mission throughout the world and, if required, engage in combat operations. Unvaccinated Sailors pose a risk to other personnel, and any restriction on the Navy's ability to reassign unvaccinated personnel to other units in order to mitigate COVID-19 imposes a risk to naval units, personnel, and military operations. This harm is not lessened by the fact that the vast majority of the force is vaccinated; the presence of unvaccinated members of the forces still poses a significant threat to the Navy's mission.

Good Order and Discipline

8. Good order and discipline is the bedrock principle of military affairs, and it is particularly important on naval vessels, where commanders have traditionally exercised a significant degree of independence. Moreover, the principle of good order and discipline influences all aspects of military operations and is a core attribute of military justice.³ A fundamental aspect of good order and discipline is the requirement that lawful orders issued by superior officers be obeyed by subordinates. Service members who elect to follow, or not follow,

³ Manual for Courts Martial, United States, preamble ¶ 3 ("The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.")

orders at their own discretion undermine military effectiveness, corrode the trust that their superiors place in them to accomplish the mission, and disrupt good order and discipline within their unit.

9. There is no more significant influence on a ship's good order and discipline, and therefore military effectiveness, than that of the commanding officer ("CO"). By tradition, statute, and Service regulation, the CO's responsibilities are profound:

All Commanding Officers and others in authority in the naval service are required to show in themselves a good example of virtue, honor, patriotism, and subordination; to be vigilant in inspecting the conduct of all persons who are placed under their command; to guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Navy, all persons who are guilty of them; and to take all necessary and proper measures, under the laws, regulations, and customs of the naval service, to promote and safeguard the morale, the physical well-being, and the general welfare of the officers and enlisted persons under their command or charge.

10 U.S.C. §5947. Requirement of exemplary conduct.

The responsibility of the Commanding Officer for his or her command is absolute, except when, and to the extent to which, he or she has been relieved therefrom by competent authority, or as provided otherwise in these regulations. The authority of the Commanding Officer is commensurate with his or her responsibility. While the Commanding Officer may, at his or her discretion, and when not contrary to law or regulations, delegate authority to subordinates for the execution of details, such delegation of authority shall in no way relieve the commanding officer of continued responsibility for the safety, well-being and efficiency of the entire command.

U.S. Navy Regulations (1990), ¶0802. Responsibility.

10. The CO is a defining feature of the ship and its culture. He or she sets the tone in all matters on the ship (e.g., discipline, safety, morale, technical proficiency, professionalism, etc.). Consequently, it is the CO who bears ultimate responsibility for all matters of the ship, be it the ship's operational performance, disciplinary matters, or morale generally. It is crucial that a CO be trusted by both the Sailors that serve in the command, as well as by his or her superior officers. Trust and confidence are the standards by which Navy COs are measured. *See* Chief of

Naval Operations, *The Charge of Command* (Apr. 6, 2018) (“A Commander’s competence and character lead to trust and confidence. Commanders can only feel comfortable delegating their authority — sending subordinate Commanding Officers and their teams over the horizon and into harm’s way — with the knowledge that those CO’s are both technically competent and share their values.”).

11. There is a continuous chain of command that runs from the most junior sailor onboard Plaintiff Navy Commander’s ship all the way to me. Just as it is important that Plaintiff Navy Commander entrust his subordinates, it is absolutely essential that I have trust and confidence in each echelon of command. The chain of command relies upon good order and discipline at all levels, and in the event the chain is broken, it will necessarily degrade our operational effectiveness.

Impact to Operations

12. The temporary restraining order and preliminary injunction that have been issued in this case are profoundly concerning. Simply put, the Court’s directive is an intrusion into military operations, insofar as the Navy has been ordered to refrain from taking adverse action with respect to Plaintiff Navy Commander. The Court’s order, as I understand it, is to be interpreted far more broadly than the Navy traditionally defines “adverse action,” and that the order prohibits reassigning Plaintiff Navy Commander. Thus, an unvaccinated CO must remain in command of a Navy warship and her approximately 320 officers and enlisted Sailors. This directly interferes with the Navy’s ability to regulate good order and discipline within our ranks, and more alarmingly, it has an impact on the conduct of military operations.

13. At the tactical level, the order creates a health risk to personnel on assigned to Plaintiff Navy Commander’s ship. Additionally, as he is the CO, the order creates a manifest

good order and discipline dilemma. As described above, the CO of a ship is expected to adhere to the high standard of all CO's. He or she is duty bound to maintain good order and discipline onboard the ship, as well as to safeguard the well-being of personnel onboard the ship. Finally, COs are bound to implement Navy policy as directed, to include the Navy's mandatory vaccination policy.⁴

14. It goes without saying that, just as a CO expects his or her subordinates to follow orders, the CO is similarly bound to follow the orders of a superior officer. The CO's superior officer has a reciprocal obligation to ensure that subordinate commanders are fit to command other Service members over whom they exercise authority, and that the unit is prepared to conduct operations in support of national security. It is imperative that senior commanders be able to trust their subordinate commanders will execute orders as directed. While a subordinate commander's perspective on the nature and execution of military operations is valuable, it is untenable that a subordinate commander may choose to disregard, modify, or half-heartedly execute a senior officer's orders due to his or her personal beliefs, or even due to a well-intentioned difference of professional opinion. Such insubordination is corrosive to good order and discipline, and ultimately degrades mission effectiveness and the ability of the strike group to perform its mission in the interest of U.S. national security. More alarmingly, the prospect of a subordinate commander in charge of other Service members or military assets disregarding the orders of his or her superior for personal reasons, whatever they may be, is itself a manifest national security concern. Based on the declarations of his superior officer and subordinates, it appears Plaintiff Navy Commander may be precisely such a concern—one who would disregard

⁴ See generally NAVADMIN 256/21 and 283/21. Though many responsibilities are withheld to elevated authorities (e.g., authority to separate or initiate disciplinary action), many required actions are implemented via the Service member's commanding officer (e.g., notification of exemption approvals or denials, orders to receive a COVID-19 vaccine, notification of separation processing, etc.).

simple orders pertaining to risk mitigation on travel, while still expected to enforce the order as it pertains to his 320 sailors.

15. In Plaintiff Navy Commander's case, his vaccination status creates a risk that the most critical member of the command, i.e., the commander, may suffer adverse health effects due to COVID-19. Further, his vaccination status creates a risk to his Sailors, all of which ultimately translate into operational risks for the ship.⁵ The unavailability of the CO, or perhaps other Sailors with specific functions or qualifications, can render the ship undeployable. In the event the ship is unable to go to sea as planned, this can negatively impact the training and technical proficiency of all Sailors aboard the ship.⁶

16. These risks reverberate throughout the force. At the operational level, complex operational plans are impacted when ships are unavailable to deploy as planned or when a ship is taken off mission for reasons such as a COVID-19 outbreak. Additionally, vaccination status is a key factor in determining pre-deployment quarantine requirements, as well as port entry requirements while on deployment. Finally, as seen with the COVID-19 outbreak aboard *USS Theodore Roosevelt*, the unavailability of a vessel can have negative implications at the strategic level by removing U.S. naval presence from key areas.

17. The court's order effectively requires the Navy leave a subordinate commander in command of a warship, despite his senior officer's questions relating to his fitness to discharge his duties as ordered.⁷ Under no circumstances would the Navy typically deploy a commander in

⁵ Indeed, Plaintiff Navy Commander testified as to several instances where his ship faced the adverse effects of COVID-19. *See* ECF 112 at 33-34 (describing the need to transport personnel off the ship to shore facilities by small boat, and later to a larger ship equipped with medical facilities by helicopter). These operations are not only dangerous to personnel performing them, but they necessarily divert attention away from planned operations.

⁶ Certain qualifications can only be earned while underway, therefore, Sailor may have their careers (i.e., their promotion or advancement) impacted in the event they are unable to deploy.

⁷ Notably, these concerns are not related to Plaintiff Navy Commander's request for a religious accommodation, but in fact relate to his fitness to discharge his duties. Specifically, concerns about Plaintiff Navy Commander are related to the fact that he remains unvaccinated and that he refuses to follow the lawful order to become vaccinated,

an operational capacity with whom his or her superior officers have such reservations. As described above, this particular commander's vaccination status creates a risk to the personnel aboard his ship, which creates operational risks that may impact the effectiveness of the strike group and ultimately create risks to U.S. national security. More fundamentally, however, enjoining the service from taking "any adverse action" with respect to Plaintiff Navy Commander, creates a manifest good order and discipline concern because it shields Navy Commander from the responsibility and accountability upon which his command authority rests, and leaves him in charge of enforcing policies from which he is immunized.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 25th day of February, 2022.

A handwritten signature in black ink, appearing to read 'D. W. Lowyer', with a long horizontal line extending to the right.

D. W. LOWYER
Vice Admiral, U.S. Navy
Commander, U.S. Second Fleet

see Brandon Decl. ECF 74-12, in addition to questions surrounding his professional conduct, judgment, and candor to both senior and subordinate officers. *See* Brandon Decl. ECF 81-1; Executive Officer Decl. ECF 83-1.

Dwyer Declaration

Attachment A

ENCLOSURE 6

FUNCTIONS OF THE MILITARY DEPARTMENTS

1. COMMON MILITARY DEPARTMENT FUNCTIONS. For purposes other than the operational direction of the Combatant Commands, the chain of command runs from the President to the Secretary of Defense to the Secretaries of the Military Departments and, as prescribed by the Secretaries, to the commanders of Military Service forces.

a. Subject to the authority, direction, and control of the Secretary of Defense, the Secretaries of the Military Departments are responsible for, and have the authority necessary to conduct, all affairs of their respective Departments, including:

- (1) Recruiting.
- (2) Organizing.
- (3) Supplying.
- (4) Equipping (including research and development).
- (5) Training.
- (6) Servicing.
- (7) Mobilizing.
- (8) Demobilizing.
- (9) Administering (including the morale and welfare of personnel).
- (10) Maintaining.
- (11) Construction, outfitting, and repairs of military equipment.
- (12) Construction, maintenance, and repair of buildings, structures, and utilities as well as the acquisition, management, and disposal of real property and natural resources.

b. Subject to the authority, direction, and control of the Secretary of Defense, the Secretaries of the Military Departments are also responsible to the Secretary of Defense for ensuring that their respective Departments:

- (1) Operate effectively, efficiently, and responsively.

(2) Formulate policies and programs that are fully consistent with national security objectives and policies established by the President and the Secretary of Defense.

(3) Implement, in a timely and effective manner, policy, program, and budget decisions and instructions of the President or Secretary of Defense.

(4) Present and justify positions on the plans, programs, and policies of the Department of Defense.

(5) Prepare, submit, and justify budgets before Congress, in coordination with other USG departments and agencies, as applicable; and administer the funds made available for maintaining, equipping, and training the forces of their respective departments, including those assigned to the Combatant Commands. Among other things, budget submissions shall be informed by the recommendations of the Military Service Chiefs, Commanders of the Combatant Commands, and of Military Service component commanders of forces assigned to the Combatant Commands.

(6) Establish and maintain reserves of manpower, equipment, and supplies for the effective prosecution of the range of military operations and submit, in coordination with the other Military Departments, mobilization information to the Joint Chiefs of Staff.

(7) Develop integrated mobilization plans for the expansion of peacetime components to meet the needs of war.

(8) Perform Military Department functions necessary to fulfill the current and future operational requirements of the Combatant Commands, including the recruitment, organization, training, and equipping of interoperable forces.

(9) Provide forces to enhance military engagement, conduct security cooperation, build the security capacity of partner states, and deter adversaries to prevent conflict. These actions shall be coordinated with the other Military Departments, Combatant Commands, USG departments and agencies, and international partners, as required.

(10) Provide forces, military missions, and detachments for service in foreign countries as may be required to support the national interests of the United States, and provide, as directed, assistance in training, equipping, and advising the military forces of foreign nations.

(11) Coordinate with the other Military Departments and all of the other DoD Components to provide for more effective, efficient, and economical administration; eliminate duplication; and assist other DoD Components in the accomplishment of their respective functions by providing personnel, intelligence, training, facilities, equipment, supplies, and services, as may be required.

(12) Develop, garrison, supply, equip, and maintain bases and other installations, including lines of communication, and provide administrative and logistical support for all assigned forces and bases, unless otherwise directed by the Secretary of Defense.

(13) Provide, as directed, administrative and logistical support to the headquarters of the Combatant Commands, to include direct support of the development and acquisition of the command and control systems of such headquarters.

(14) Supervise and control Military Department intelligence activities, including the collection, production, and dissemination of military and military-related foreign intelligence and counterintelligence as required for execution of Military Department responsibilities.

(15) Afford the Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict; the Commander, USSOCOM; the PCA; and the Commander, USCYBERCOM, an opportunity to coordinate on Military Department and Military Service personnel management policy and plans as they relate to accessions, assignments, compensation, promotions, professional development, readiness, retention, sustainment, and training of all SOF (for USSOCOM) and all cyber operations forces (for USCYBERCOM) personnel. This coordination shall not interfere with the title 10 authorities of the Military Departments or Military Services.

(16) Engage in such other activities as are prescribed by law, the President, or the Secretary of Defense.

2. COMMON MILITARY SERVICE FUNCTIONS. The Army, the Navy, the Air Force, the Marine Corps, and the Space Force, and the Coast Guard, when transferred to the Department of the Navy in accordance with sections 2, 3, and 145 of Reference (h), to include the Active and Reserve Components of each, under their respective Secretaries, shall provide conventional, strategic, and SOF to conduct the range of operations as defined by the President and the Secretary of Defense. Further, they shall perform the following common functions:

a. Develop concepts, doctrine, tactics, techniques, and procedures, and organize, train, equip, and provide land, naval, air, space, and cyberspace forces, in coordination with the other Military Services, Combatant Commands, USG departments and agencies, and international partners, as required, that enable joint force commanders to conduct decisive operations across the spectrum of conflict in order to achieve the desired end state.

b. Determine Military Service force requirements and make recommendations concerning force requirements to support national security objectives and strategy and to meet the operational requirements of the Combatant Commands.

c. Recommend to the Joint Chiefs of Staff the assignment and deployment of forces to the Combatant Commands established by the President through the Secretary of Defense.

d. Monitor and assess Military Service operational readiness and capabilities of forces for assignment to the Combatant Commands and plan for the use of the intrinsic capabilities of the other Military Services, USSOCOM, and USCYBERCOM that may be made available.

e. Develop doctrine, tactics, techniques, and procedures for employment by Military Service forces and:

- (1) Assist the Chairman of the Joint Chiefs of Staff in the development of joint doctrine.
- (2) Coordinate with the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the other Military Services, USG departments and agencies, partner security forces, and non-governmental organizations, in the development of the doctrine, tactics, techniques, and procedures necessary for participation in and/or command of joint, interagency, and multinational operations.
- (3) Coordinate with the Commanders, USSOCOM and USCYBERCOM, in the development of the doctrine, tactics, techniques, and procedures employed by Military Service forces when related to special operations and cyber operations, respectively.
- f. Provide for training for joint operations and joint exercises in support of Combatant Command operational requirements, including the development of Military Service joint training requirements, policies, procedures, and publications.
- g. Provide logistical support for Military Service and all forces assigned to joint commands, including procurement, distribution, supply, equipment, and maintenance, unless otherwise directed by the Secretary of Defense.
- h. Organize, train, and equip forces to contribute unique service capabilities to the joint force commander to conduct the following functions across all domains, including land, maritime, air, space, and cyberspace:
 - (1) Intelligence, surveillance, reconnaissance, and information operations, to include electronic warfare and MISO in order to provide situational awareness and enable decision superiority across the range of military operations.
 - (2) Offensive and defensive cyberspace operations to achieve cyberspace superiority in coordination with the other Military Services, Combatant Commands, and USG departments and agencies.
 - (3) Special and cyber operations in coordination with USSOCOM, USCYBERCOM, and other Combatant Commands, the Military Services, and other DoD Components.
 - (4) Personnel recovery operations in coordination with USSOCOM and other Combatant Commands, the Military Services, and other DoD Components.
 - (5) Counter weapons of mass destruction.
 - (6) Building partnership capacity/security force assistance operations.
 - (7) Forcible entry operations.
 - (8) Missile Defense.

(9) Other functions as assigned, such as Presidential support and antiterrorism.

i. Organize, train, and equip forces to conduct support to civil authorities in the United States and abroad, to include support for disaster relief, consequence management, mass migration, disease eradication, law enforcement, counter-narcotics, critical infrastructure protection, and response to terrorist attack, in coordination with the other Military Services, Combatant Commands, National Guard, and USG departments and agencies.

j. Operate organic land vehicles, aircraft, cyber assets, spacecraft or space systems, and ships or craft.

k. Conduct operational testing and evaluation.

l. Provide command and control.

m. Provide force protection.

n. Consult and coordinate with the other Military Services on all matters of joint concern.

3. INDIVIDUAL MILITARY DEPARTMENT FUNCTIONS. The forces developed and trained to perform the primary functions set forth in sections 4 through 6 of this enclosure shall be employed to support and supplement the other Military Service, USSOCOM, and USCYBERCOM forces in carrying out their primary functions, wherever and whenever such participation shall result in increased effectiveness and shall contribute to the accomplishment of overall military objectives.

4. FUNCTIONS OF THE DEPARTMENT OF THE ARMY

a. The Department of the Army includes land combat, and service forces, and such aviation, water transport, and space and cyberspace forces as may be organic therein, and shall be organized, trained, and equipped primarily for prompt and sustained combat incident to operations on land, and to support the other Military Services and joint forces. The Army is responsible for the preparation of land forces necessary for the effective prosecution of war and military operations short of war, except as otherwise assigned. The Army is the Nation's principal land force and promotes national values and interests by conducting military engagement and security cooperation; deterring aggression and violence; and should deterrence fail, compelling enemy behavioral change or compliance. The Army shall contribute forces through a rotational, cyclical readiness model that provides a predictable and sustainable supply of modular forces to the Combatant Commands, and a surge capacity for unexpected contingencies.

b. The Functions of the Army. In addition to the common military service functions listed in paragraphs 2.a. through 2.n. of this enclosure, the Army, within the Department of the Army, shall develop concepts, doctrine, tactics, techniques, and procedures, and organize, train, equip,

and provide forces with expeditionary and campaign qualities to perform the following specific functions:

- (1) Conduct prompt and sustained combined arms combat operations on land in all environments and types of terrain, including complex urban environments, in order to defeat enemy ground forces, and seize, occupy, and defend land areas.
- (2) Conduct air and missile defense to support joint campaigns and assist in achieving air superiority.
- (3) Conduct airborne and air assault, and amphibious operations. The Army has primary responsibility for the development of airborne doctrine, tactics, techniques, and equipment.
- (4) Conduct CAO.
- (5) Conduct riverine operations.
- (6) Occupy territories abroad and provide for the initial establishment of a military government pending transfer of this responsibility to other authority.
- (7) Interdict enemy sea, space, air power, and communications through operations on or from the land.
- (8) Provide logistics to joint operations and campaigns, including joint over-the-shore and intra-theater transport of time-sensitive, mission-critical personnel and materiel.
- (9) Provide support for space operations to enhance joint campaigns, in coordination with the other Military Services, Combatant Commands, and USG departments and agencies.
- (10) Conduct authorized civil works programs, to include projects for improvement of navigation, flood control, beach erosion control, and other water resource developments in the United States, its territories, and its possessions, and conduct other civil activities prescribed by law.
- (11) Provide intra-theater aeromedical evacuation.
- (12) Conduct reconnaissance, surveillance, and target acquisition.
- (13) Operate land lines of communication.

5. FUNCTIONS OF THE DEPARTMENT OF THE NAVY

a. The Department of the Navy is composed of naval, land, air, space, and cyberspace forces, both combat and support, not otherwise assigned, to include those organic forces and capabilities necessary to operate, and support the Navy and Marine Corps, the other Military Services, and joint forces. The Navy and Marine Corps comprise the Nation's principal maritime force. They

employ the global reach, persistent presence through forward-stationed and rotationally-based forces, and operational flexibility to secure the Nation from direct attack; secure strategic access and retain global freedom of action; strengthen existing and emerging alliances and partnerships; establish favorable security conditions; deter aggression and violence by state, non-state, and individual actors and, should deterrence fail, prosecute the full range of military operations in support of U.S. national interests.

b. The Functions of the Navy. In addition to the common military service functions listed in paragraphs 2.a. through 2.n. of this enclosure, the Navy, within the Department of the Navy, shall develop concepts, doctrine, tactics, techniques, and procedures and organize, train, equip, and provide forces to perform the following specific functions:

(1) Conduct offensive and defensive operations associated with the maritime domain including achieving and maintaining sea control, to include subsurface, surface, land, air, space, and cyberspace.

(2) Provide power projection through sea-based global strike, to include nuclear and conventional capabilities; interdiction and interception capabilities; maritime and/or littoral fires, to include naval surface fires; and close air support for ground forces.

(3) Conduct ballistic missile defense.

(4) Conduct ocean, hydro, and river survey and reconstruction.

(5) Conduct riverine operations.

(6) Establish, maintain, and defend sea bases in support of naval, amphibious, land, air, or other joint operations as directed.

(7) Provide naval expeditionary logistics to enhance the deployment, sustainment, and redeployment of naval forces and other forces operating within the maritime domain, to include joint sea bases, and provide sea transport for the Armed Forces other than that which is organic to the individual Military Services, USSOCOM, and USCYBERCOM.

(8) Provide support for joint space operations to enhance naval operations, in coordination with the other Military Services, Combatant Commands, and USG departments and agencies.

(9) Conduct nuclear operations in support of strategic deterrence, to include providing and maintaining nuclear surety and capabilities.

c. The Functions of the Marine Corps. In addition to the common military service functions listed in paragraphs 2.a. through 2.n. of this enclosure, and pursuant to section 8063 of Reference (e), the Marine Corps, within the Department of the Navy, shall develop concepts, doctrine, tactics, techniques, and procedures and organize, train, equip, and provide forces, normally

employed as combined arms air ground task forces, to serve as an expeditionary force-in-readiness, and perform the following specific functions:

- (1) Seize and defend advanced naval bases or lodgments to facilitate subsequent joint operations.
- (2) Provide close air support for ground forces.
- (3) Conduct land and air operations essential to the prosecution of a naval campaign or as directed.
- (4) Conduct complex expeditionary operations in the urban littorals and other challenging environments.
- (5) Conduct amphibious operations, including engagement, crisis response, and power projection operations to assure access. The Marine Corps has primary responsibility for the development of amphibious doctrine, tactics, techniques, and equipment.
- (6) Conduct security and stability operations and assist with the initial establishment of a military government pending transfer of this responsibility to other authority.
- (7) Provide security detachments and units for service on armed vessels of the Navy, provide protection of naval property at naval stations and bases, provide security at designated U.S. embassies and consulates, and perform other such duties as the President or the Secretary of Defense may direct. These additional duties may not detract from or interfere with the operations for which the Marine Corps is primarily organized.

d. The Functions of the Coast Guard. The Coast Guard is a unique Military Service residing within the Department of Homeland Security while simultaneously providing direct support to the Department of Defense under its inherent authorities under References (e) and (h). In addressing the Coast Guard when it is not operating in the [Department of the] Navy, this issuance is descriptive in nature and does not purport to be either directive or regulatory. As directed by the President, and in accordance with Memorandum of Agreement between the Department of Defense and Department of Homeland Security on the use of Coast Guard Capabilities and Resources in Support of the National Military Strategy (Reference (ab)), the Department of the Navy shall coordinate with the Department of Homeland Security regarding Coast Guard military functions in time of limited war or defense contingency, without transfer of Coast Guard authority to the Secretary of the Navy. As directed, the Department of the Navy will provide intelligence, logistical support, and specialized units to the Coast Guard, including designated ships and aircraft, for overseas deployment required by naval component commanders, maritime search and rescue, integrated port security, and coastal defense of the United States. The Coast Guard shall maintain a state of readiness to function as a specialized Military Service in the Department of the Navy in time of war or national emergency. If specified in a declaration of war by Congress or if directed by the President, the Coast Guard shall operate as a Military Service in the Department of the Navy, and shall continue to do so

until the President transfers the Coast Guard back to the Department of Homeland Security by Executive order pursuant to section 3 of Reference (h).

(1) The Coast Guard shall develop concepts, doctrine, tactics, techniques, and procedures and organize, train, equip, and provide forces to perform the following specific functions when providing direct or cooperative support to the Department of Defense:

- (a) Conduct coastal sea control and maritime and air interception and interdiction operations.
- (b) Conduct maritime homeland security and counterterrorism operations.
- (c) Provide for port operations, security, and defense.
- (d) Provide maritime operational threat response.
- (e) Conduct counter-illicit trafficking operations.
- (f) Conduct military environmental response operations.
- (g) Conduct theater security cooperation operations.
- (h) Conduct search and rescue operations.
- (i) Conduct ice operations.
- (j) Provide for marine safety, including aids to navigation.

(2) The Coast Guard will coordinate with the Department of Defense, including the Department, of the Navy to provide specialized Coast Guard units, or obtain Navy units, including designated ships and aircraft, for deployment as requested by Military Service component or joint commanders.

6. FUNCTIONS OF THE DEPARTMENT OF THE AIR FORCE

a. The Department of the Air Force is composed of air, space, and cyberspace forces, both combat and support, not otherwise assigned. The Air Force and Space Force are the Nation's principal air and space forces, and are responsible for the preparation of forces necessary for the effective prosecution of war. The Department of the Air Force shall organize, train, equip, and provide air, space, and cyberspace forces for the conduct of prompt and sustained combat operations, military engagement, and security cooperation in defense of the Nation, and to support the other Military Services and joint forces. The Air Force and Space Force will provide the Nation with global vigilance, global reach, and global power in the form of in-place, forward-based, and expeditionary forces possessing the capacity to deter aggression and violence by state, non-state, and individual actors to prevent conflict, and, should deterrence fail, prosecute the full range of military operations in support of U.S. national interests.

b. The Functions of the Air Force. In addition to the common military service functions listed in paragraphs 2.a. through 2.n. of this enclosure, the Air Force, within the Department of the Air Force, shall develop concepts, doctrine, tactics, techniques, and procedures and organize, train, equip, and provide forces to perform the following specific functions:

(1) Conduct nuclear operations in support of strategic deterrence, to include providing and maintaining nuclear surety and capabilities.

(2) Conduct offensive and defensive operations, to include appropriate air and missile defense, to gain and maintain air superiority, and air supremacy as required, to enable, the conduct of operations by U.S. and allied land, sea, air, space, and special operations forces.

(3) Conduct global precision attack, to include strategic attack, interdiction, close air support, and prompt global strike.

(4) Provide timely, global integrated intelligence, surveillance, and reconnaissance capability and capacity from forward deployed locations and globally distributed centers to support world-wide operations.

(5) Provide rapid global mobility to employ and sustain organic air and space forces and other Military Service and USSOCOM forces, as directed, to include airlift forces for airborne operations, air logistical support, tanker forces for in-flight refueling, and assets for aeromedical evacuation.

(6) Provide agile combat support to enhance the air and space campaign and the deployment, employment, sustainment, and redeployment of air and space forces and other forces operating within the air and space domains, to include joint air and space bases, and for the Armed Forces other than which is organic to the individual Military Services and USSOCOM in coordination with the other Military Services, Combatant Commands, and USG departments and agencies.

(7) Conduct global personnel recovery operations including theater-wide combat and civil search and rescue, in coordination with the other Military Services, USJFCOM, USSOCOM, and DoD Components.

(8) Conduct global integrated command and control for air and space operations.

c. The Functions of the Space Force. In addition to the common military service functions listed in Paragraphs 2.a. through 2.n. of this enclosure, the Space Force, within the Department of the Air Force, shall develop concepts, doctrine, tactics, techniques, and procedures and organize, train, equip, and provide forces to perform the following specific functions:

(1) Provide freedom of operation for the United States in, from, and to space.

(2) Provide prompt and sustained space operations.

- (3) Protect the interests of the United States in space.
- (4) Deter aggression in, from, and to space.
- (5) Conduct space operations.

7. DEPARTMENT OF THE ARMY AND DEPARTMENT OF THE AIR FORCE: THE NGB.

The NGB is a joint activity of the Department of Defense. The NGB performs certain Military Service-specific functions and unique functions on matters involving non-federalized National Guard forces as set forth in Reference (i).

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA**

NAVY SEAL #1, et al.

Plaintiffs,

v.

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

Defendants.

Case No. 8:21-cv-02429-SDM-TGW

DECLARATION OF WILLIAM M. JURNEY

I, William M. Journey, hereby state and declare as follows:

1. I am a Lieutenant General in the United States Marine Corps (USMC), currently assigned as the Commanding General, II Marine Expeditionary Force (II MEF). I make this declaration in my official capacity, based upon my personal knowledge and upon information that has been provided to me in the course of my official duties.

2. I have been assigned to my current position since July 2021. Prior to my current assignment, I served as the Commanding General, Marine Air Ground Task Force Training Command and Marine Corps Air Ground Combat Center from 2020-2021.

3. My Marine Corps career began in 1987 as an infantryman. In 1988, I was commissioned through the Enlisted Commissioning Program. From 1989-1992, I served as a Rifle Platoon Commander and Company Executive Officer in 2d Battalion, 4th Marines, participating with the 22nd Marine Expeditionary Unit (MEU) in support of Operation Sharp

Edge in the U.S. Embassy, Monrovia, Liberia, and deploying in support of Operations Desert Shield and Desert Storm.

(a) Other operational assignments I have had include Rifle Company Commander and Battalion Operations Officer with 3d Battalion, 8th Marines (1996-2000). While serving as the Operations Officer for Battalion Landing Team 3/8, I deployed with the 26th MEU which provided security to refugee camps in Albania (Joint Task Force Shining Hope) and conducted peace support operations in Kosovo (Joint Guardian). From 2004-2007, I served as the Commanding Officer of 1st Battalion, 6th Marines, deploying the battalion twice in support of Operation Iraqi Freedom to the cities of Fallujah and Ramadi. In 2011, I assumed command of 2d Marine Regiment until I deployed in 2013 to Afghanistan for duty as the Executive Officer to the Commander, International Security Assistance Force (ISAF).

(b) My service outside the Fleet Marine Forces (FMF) includes: Company Commander and Assistant Director of Drill Instructor School at Marine Corps Recruit Depot, Parris Island, South Carolina (1992-1995); Commanding Officer, Recruiting Station Baltimore, Maryland (2001-2004); and Chief of Plans, U.S. Joint Forces Command, Norfolk, Virginia (2009-2011).

(c) My General Officer assignments include: Deputy Director for Joint Training, Joint Staff J7 (2014-2016); Commanding General, Marine Corps Recruit Depot San Diego and the Western Recruiting Region (2016-2018); Commanding General, 3d Marine Division, Okinawa, Japan (2018-2020); and Commanding General, Marine Air Ground Task Force Training Command and the Marine Corps Air Ground Combat Center (2020-2021).

(d) My professional military education includes The Basic School Course, Infantry Officers Course, Amphibious Warfare School, Marine Corps Command and Staff

College, and the Naval War College. I earned master's degrees in Military Studies, and in National Security and Strategic Studies.

Preliminary Statement

4. I have reviewed the preliminary injunction order issued by this Court on February 18, 2022. The Court's broad injunction will cause immediate harm to the Marine Corps because it directly interferes with the II MEF's (one of three Marine Expeditionary Forces) ability to carry out its assigned missions, in service to the American people and our national security. As described in more detail below, the Court's injunction will cause immediate and irreparable harm to the Marine Corps.

Command Slating

5. Plaintiff Lieutenant Colonel 2 is a Lieutenant Colonel ("LtCol") on active duty in the Marine Corps and assigned to Marine Forces Special Operations Command ("MARSOC") located aboard Marine Corps Base, Camp Lejeune, North Carolina. LtCol 2 is a logistics officer and has been selected for command of a Combat Logistics Battalion (CLB). LtCol 2 is currently slated to take command in the fall of 2022. The Court's injunction, which prevents the Marine Corps from removing LtCol 2's command selection, will have immediate and irreparable effects on the training pipeline and slating process for prospective commanders.

6. It is imperative that a CLB commander be worldwide deployable and ready to lead Marines at all times. LtCol 2 is currently not worldwide deployable. A CLB primarily deploys as part of a MEU. However, CLBs can also be called upon to deploy independently outside of their normal MEU rotation. For instance, in the spring of 2021, CLB 22 deployed to Philadelphia, Pennsylvania, in support of the DOD's federal vaccine response operations separately from the MEU that it usually supports. Following the withdrawal from Afghanistan in

the summer of 2021, a CLB was deployed to Quantico, Virginia, in support of Operation Allies Welcome.

7. A Marine's selection for command happens very early in the assignment process, long before they will assume command, so they have time to meet the rigorous requirements of preparing to serve in battalion command. One of the key factors weighed by the Command Selection board is physical fitness. From the time an officer takes command of an operational unit they must be capable of deploying worldwide. In addition to being medically ready and at peak physical fitness they must attend numerous training courses. The following training is generally required before a battalion commander takes command: Cornerstone Course (two weeks in length offered 2-3 times per year); Senior Officer's Legal Course (three days in length offered several times per year); Logistics Commanders Course (three days in length offered one time per year); Amphibious Warfare Staff Planning (two weeks in length). Additionally, a CLB commander will be expected to conduct numerous ship visits and short underways on Navy ships as an exercise evaluator. When a command-screened LtCol is removed from the command slate, Headquarters Marine Corps must either identify another officer who was selected as an alternate for command or make the decision to re-slate the command during the next command screening board, which only occurs one time per year in the month of July. For these reasons, it is imperative that the Marine Corps knows as early as possible if a Marine officer selected for command will be unable or unwilling to serve in the command for which he or she was selected.

Marine Expeditionary Units

8. A MEU is a standing Marine Air-Ground Task Force (MAGTF) composed of an Aviation Combat Element (ACE), Ground Combat Element (GCE), and a Logistics Combat

Element (LCE).¹ The MEU is commanded by a Colonel. Each of the subordinate elements are commanded by a LtCol. The MEU is unique in that it deploys onboard three Navy ships of an Amphibious Ready Group (ARG). Together the ARG/MEU team is a highly mobile, versatile, and self-contained crisis response force.

9. A MEU must have a CLB commander who is able to fully participate in a deployment by disembarking the ARG. A CLB commander who is not vaccinated may not be able to enter a foreign country if there are vaccination requirements which he or she cannot meet, and thus may not be able to disembark. A CLB commander cannot be effective without leaving the ship, which is a certain requirement on deployment. For instance, the ARG/MEU is often tasked by combatant commanders to conduct disaggregated operations. Disaggregated operations require elements of the ARG/MEU to function separately and independently. One ship may conduct security cooperation exercises in Israel, while another ship is conducting counter-piracy operations off the Horn of Africa. The CLB commander rarely deploys on the same ships as the MEU CO. As a result, CLB commanders are often the senior Marine in their operating area during disaggregated operations. MEU commanders rely on CLB commanders to exercise command and control in the absence of the MEU CO. If LtCol 2 was deployed but unable to disembark because of her vaccination status, the ARG/MEU's ability to conduct effective disaggregated operations would unquestionably be hindered. The ship with the CLB commander as the senior Marine could never be tasked to operate independently of the ARG/MEU. The MEU CO would now have an additional consideration of accepting the risk of having less

¹ The Mission of a MEU is "Provide a forward-deployed, flexible sea-based MAGTF capable of conducting amphibious operations, crisis response, and limited contingency operations, to include enabling the introduction of follow-on forces and designated special operations, in order to support the theater requirements of the Geographic Combatant Commander. Marine Corps Order (MCO) 3120.13

leadership in country or jostling other senior officers to fill the position. That would be an unreasonable burden to place on any ARG/MEU team, particularly one forward deployed.

10. An additional risk of deploying an unvaccinated Marine in a command position is the increased risk that he or she would fall seriously ill before or during the deployment, necessitating a change of command at an inopportune moment in the deployment/work-up cycle. Prior to deployment a MEU undergoes an approximately 26 week Pre-deployment Training Program (PTP)². The PTP is a focused training program that incrementally builds the core Mission Essential Task capabilities of the MEU Command Element (CE) and its three Major Subordinate Elements (MSE). It also focuses on developing the critical relationship between the Marines and the Navy. The PTP has three cornerstones: (1) integration and interoperability of the ARG/MEU team as often as feasible; (2) stabilization of personnel and equipment with sufficient time to train; and (3) standardization of doctrine, organization, and training. All three of those cornerstones would be undermined by removing the CLB commander at any point during the PTP or deployment.

11. The MEU cannot meet any of its Mission Essential Tasks without the full cooperation and assistance of the ARG. A MEU would irreparably damage the working relationship with the ARG if it refused to follow the orders of a ship's Captain. As demonstrated by Admiral Lescher, Vice Chief of Naval Operations, vaccinations have proved essential in keeping personnel embarked on Naval shipping safe.³ If the Marine Corps is prevented from reassigning LtCol 2, she will have to be permitted onboard a Navy vessel which requires each

² MCO 3502.3C establishes USMC training policy and guidance for reading MEU force, and serves as the primary reference for general matters pertaining to the MEU PTP. Enclosure 5 is specific to the LCE.

³ See VCNO Declaration of 19 January 2022, in Northern District of Texas, Case No. 4:21-CV-01236-O

sailor and Marine embarked to be vaccinated. Requiring the ship's commander to embark an unvaccinated Marine undermines the commander's authority.

12. Our operating forces are the heart of the Marine Corps. The MEU comprises our forward presence, crisis response, and fighting power that the Marine Corps makes available to our combatant commanders worldwide. The MEU is specifically organized to be capable of responding rapidly to a broad range of crises and conflict situations. They are the "first on the scene" and provide a wide range of capabilities including non-combatant evacuation, clandestine recovery, maritime interdictions, tactical recovery of aircraft or personnel, humanitarian and civic actions, and other military operations. The mission of the CLB is to provide the MEU with mission-essential combat service support to ensure readiness, sustainment, and mission capability are achieved and maintained. These capabilities include an engineer platoon, explosive ordinance disposal, a landing support platoon, health services support platoon, motor transportation platoon, supply platoon, and a distribution liaison cell.

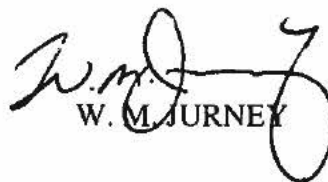
13. The Marine Corps is currently in the untenable position of having a LtCol, who will not be worldwide deployable, slated to serve as the commanding officer of a command that must be worldwide deployable. As the commanding officer of a CLB, LtCol 2 will be accountable for all that her command does or fails to do. LtCol 2 is solely responsible for ensuring the success of the CLB. Requiring this of LtCol 2, when she may not be able to deploy with her unit or enter a specific country with her unit, is antithetical to her ability to command.

14. LtCol 2 will also be responsible for setting the policies and standards within her command. LtCol 2's failure to follow the lawful policies and standards of her superiors undermines her ability to require her subordinates to follow her policies and standards. Ultimately, a commander who cannot follow lawful orders loses the moral authority to require

others to follow their own lawful orders. Further, LtCol 2 will be mandated by current regulations to convene administrative separation cases for all Covid-19 vaccine refusal cases. Her own refusal to be vaccinated undermines her ability to fairly implement that process.

15. Potential exposure to COVID-19 can have a significant impact on the operations of II MEF forces aboard Camp Lejeune and deployed worldwide. Our force must be capable of projecting offensive combat ashore while sustaining itself in combat without external assistance for a period of 60 days. Additionally, II MEF forces are capable of providing Joint Force Commanders with capabilities to conduct: Humanitarian support and natural disaster relief operations, rapid crisis response, ability to operate independent of established airfields, basing agreements, and over-flight rights, ability to train with allied forces as part of a threat engagement plan, and to provide a forward deployed and credible deterrent force (ex. A Marine Expeditionary Unit). Currently, II MEF has approximately 3,600 personnel deployed in support of Geographic Combatant Commander requirements worldwide in U.S. Northern Command, U.S. Pacific Command, and U.S. European Command. Another 2,000 are deployed across the United States conducting training to either sustain readiness or prepare for upcoming deployments. COVID-19 vaccinations ensure our ability to sustainment and rapidly deploy a ready force.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 28th day of February 2022.


W. M. JURNERY