

**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

**DEFENDANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL
AND FOR IMMEDIATE ADMINISTRATIVE STAY**

Defendants respectfully request a stay pending appeal of this Court's February 18, 2022, Preliminary Injunction and Order ("Order") ECF No. 111, which granted Plaintiffs' motion for a preliminary injunction. The Court's Order prevents the Navy and Marine Corps from removing an officer from — and requires the Marine Corps to place an officer in — commanding officer billets who the military has deemed unfit for command. Moreover, the Order prohibits the military from requiring these service members to receive the COVID-19 vaccine at all, even as a condition of deployment and assignment to command an operational unit. The Order is an extraordinary intrusion upon the inner workings of the military that presents a direct and imminent threat to national security during a global military crisis, and it indefinitely sidelines a Navy warship. Because a stay of the Court's Order is of the utmost urgency, Defendants also seek an immediate administrative stay of that Order while the Court

considers Defendants' stay motion, and to allow the Eleventh Circuit time to consider an emergency stay motion if this Court does not issue one.

Defendants respectfully request a ruling on the administrative stay by the end of the day March 2, 2022. After that date, if relief has not been granted, Defendants will seek relief from the U.S. Court of Appeals for the Eleventh Circuit.

ARGUMENT

The factors governing a request for a stay pending appeal are “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). “[W]here the government is the party opposing the preliminary injunction, its interest and harm merge with the public interest.” *Swain v. Junior*, 958 F.3d 1081, 1091 (11th Cir. 2020).

While “[l]ikelihood of success [is] a prerequisite in the usual case[. . .] it is not an invariable requirement.” *Ruiz v. Estelle*, 666 F.2d 854, 857 (5th Cir. 1982). Rather, a motion can still be “granted upon a lesser showing of a substantial case on the merits when the balance of the equities . . . weighs heavily in favor of granting the stay.” *LabMD, Inc. v. Fed. Trade Comm’n*, 678 F. App’x 816, 819 (11th Cir. 2016); *see also Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1232 (11th Cir. 2005) (“Where the ‘balance of the equities weighs heavily in favor of granting the [injunction],’ the movant need only show a ‘substantial case on the merits.’”). Moreover, 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).

I. The Preliminary Injunction Exceeds the Court’s Authority.

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. Sec’y of Air Force*, 866 F.2d 1508, 1511, (D.C. Cir. 1989) (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)). It is “difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process,” *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 constitutionally entrusted to the military and political branches. *See, e.g., Orloff v. Willoughby*, 345 U.S. 83, 93–94 (1953); *Speigner v. Alexander*, 248 F.3d 1292, 1298 (11th Cir. 2001) (“To dictate to the military which officers should be considered competent would be to interfere in just the way that *Feres* and its progeny preclude.”); *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.”). For that reason, courts routinely find challenges to military assignment decisions to be non-justiciable even when they involve a constitutional challenge. *See, e.g., Harkness v. Sec’y of Navy*, 858 F.3d 437, 443–45 (6th Cir. 2017) (collecting cases). Here, the Court’s order enjoins any “enforcement” of the vaccine mandate with respect to these two individuals and any related adverse action. By ordering that these two Plaintiffs be kept in command (in the case of Navy Commander) or be placed in command (in the case of Lieutenant Colonel 2), the Court improperly took control of the Navy’s and the Marine Corps’ command assignments, stepping beyond its constitutional limits and improperly stepping into the role of those officers entrusted to run the military.

Moreover, this Court’s Order 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, and is therefore contrary to longstanding principles of comity for coordinate judicial systems. *See Schlesinger v. Councilman*, 420 U.S. 738, 756-57 (1975); *see also* Ex. 1 (Email from Plaintiffs’ Counsel) (threatening contempt motion if any disciplinary action is taken with respect to misconduct identified at the hearing).

II. Defendants Are Likely To Prevail On The Merits Of Their Appeal and, at the Least, Present a Substantial Case on the Merits.

The Court need not determine that its prior decision was in error in order to grant a stay of its preliminary injunction pending appeal. While Defendants respectfully submit that they are also likely to prevail on the merits of their appeal, the

Court need only determine that Defendants have, at a minimum, presented a substantial question on the merits. *See Schiavo*, 403 F.3d at 1232. In addition to its jurisdictional arguments, Defendants have presented a substantial case on the merits in response to Plaintiffs' claims under RFRA and the First Amendment.

As an initial matter, Defendants have presented a substantial case that the Court erred in substituting its "own evaluation of evidence for a reasonable evaluation" by the military regarding the necessity of full COVID-19 vaccination among service members. *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981). The Court overstepped its expertise by, for example, ruling on the "comparative effectiveness" of vaccines *vis-à-vis* so-called natural immunity in maintaining a ready military force, *Order*, at 37 n.10, by discounting the effect of refusers on good order and discipline in the military, *id.* at 43, by not addressing the specific declarations regarding the compelling interest in vaccinating these officers, ECF. Nos. 74-11, 74-12, 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, *see, e.g.*, ECF Nos. 66-4 through 66-7; ECF Nos. 74-3 through 74-9. *See, e.g., 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); *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 9 (2008). The Services have determined that vaccination is the most effective means of mitigating the risk to their missions, units, and personnel from COVID-19, and even if the Court views this risk is "marginal," the assessment

of such operational risks is the specific purview of the military and not the judiciary. *Goldman*, 475 U.S. at 512 (Stevens, J. concurring) (“Because professionals in the military service attach great importance to that plausible interest, it is one that we must recognize as legitimate and rational even though personal experience or admiration for the performance of the ‘rag-tag band of soldiers’ that won us our freedom in the Revolutionary War might persuade us that the Government has exaggerated the importance of that interest.”).

Moreover, Defendants are likely to prevail on their (easily substantial) argument that the military has a compelling interest in mitigating the impact of COVID-19 on its missions, units, and personnel, and that vaccination of these particular service members is the least restrictive means to advance that interest. For example, the Court’s conclusion that the record “strongly illustrates that the military fails to afford an applicant an actual ‘case-by-case’ assessment as required by RFRA,” Order at 44, is contradicted by substantial arguments presented by Defendants. The Court’s findings rely on similarities between the final letters received by Navy Commander and Lieutenant Colonel 2 and other similarly situated individuals, Order at 37–44, and ignores the fact that there are substantial concerns about unvaccinated individuals that apply broadly, such as their inability to deploy worldwide, and the increased danger from COVID-19 on board ships. The Court also failed to consider the individual-specific analysis in the letters, as well as the voluminous records filed under seal that provide additional descriptions of each individual’s role, their responsibilities, the requirements for deployment, and the specific descriptions of how less restrictive

means are not available for those particular individuals, including because of the requirements of foreign countries. *See* ECF Nos. 81, 87, 90, and 103.

The Court's conclusion also runs contrary to declarations provided by the two high-ranking military officers who decided Navy Commander's and Lieutenant Colonel 2's appeals. Admiral Michael M. Gilday, the highest-ranking uniformed officer in the Navy and a member of the Joint Chiefs of Staff, personally decided to deny Navy Commander's appeal. Ex. 3, Gilday Decl. ¶¶ 1-2, 10; ECF No. 66-2. He explained that he "carefully review[s] 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." *Id.* ¶ 2; *see* ECF No. 66-2. General Eric M. Smith, the second-highest ranking uniformed officer in the Marine Corps, explained that he "personally consider[s] every appeal" including the requester's submissions, "the command endorsements, the recommendation of the Religious Accommodation Review Board (RARB), the input of the Director [of] Health Services, . . . and the nature of the requester's current duties, living conditions, deployment status and a variety of other information specific to the individual requester." Ex. 4, Smith Decl. ¶ 2; *id.* ¶ 11 (explaining consideration of details specific to Lieutenant Colonel 2, including requirements of foreign countries that would apply to her); ECF No. 66-3.

The Court may disagree with the readiness conclusions of these declarants, but senior military leaders, exercising their professional military judgment, have determined that "[i]mmunizations 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,” especially when deployed. Smith Decl. ¶ 8; *id.* ¶ 10 (explaining that every Marine must be deployable). For the Navy, “[s]pecific 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.” Gilday Decl. ¶¶ 6-8. As explained above, the reasons for requiring vaccination are compelling—unvaccinated service members are at heightened risk of contracting and spreading COVID-19, and the consequences of infection in even one deployed service member are severe. *See supra* 5-7; *see also* Gilday Decl. ¶ 7.¹ At the very least, the military has clearly substantial arguments in support of its position on the merits, warranting a stay pending appeal.

The military has also presented a compelling case that there are no less restrictive means available to protect the force, because measures like masking, social distancing, and teleworking are unavailable or ineffective or need to be layered with vaccination to achieve mitigation in the context of deployable units. There is copious evidence in the record that vaccination is most effective means of protecting the health

¹ The Court relied in part on individual Plaintiffs’ testimony that they personally had previously conducted some successful missions during the pandemic. *See, e.g.*, Order, at 10. Plaintiffs’ assessment of military readiness is, of course, “quite beside the point.” *See Goldman*, 475 U.S. at 509 (dismissing “expert testimony” from military official); *Rostker*, 453 U.S. at 63 (similar); *Trump*, 138 S. Ct. at 2421-22 (giving no weight to the views of former military officials). But even if Plaintiffs’ testimony had some relevance, the Government does not need to prove a 100% failure rate of all missions in the face of COVID-19. Defendants have submitted copious evidence that maintaining both these particular Plaintiffs and unvaccinated service members in general undermines military readiness. And Plaintiffs’ own testimony supports a conclusion that COVID-19 adversely impacted Plaintiffs’ military missions. *See* Ex. 5, Decl. of Vice Admiral Daniel Dwyer ¶ 15 n.5 (explaining that types of COVID response measures described by Navy Commander in his testimony affect the Navy broadly).

and safety of service members in general, and these individuals in particular (and thus, the readiness of the force). *See generally* Declaration of Admiral William Lescher, ECF No. 66-4; Declaration of Joon Yun, ECF No. 74-9; Declaration of Col. Tonya Rans, ECF No. 74-4. Admiral Daryl Caudle, Commander of the United States Fleet Force Command and third-ranking admiral in the Navy, further explains that “[i]n 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.” Ex. 1, Decl. of Adm. Daryl Caudle ¶ 2.² And the Navy and Marine Corps made a particularized finding based on the individual records and working situation of these particular Plaintiffs that no less restrictive means are available. *See* ECF Nos. 66-2, 66-3, 66-11, 74-11, 74-12; Gilday Decl. ¶¶ 2, 9; Smith Decl. ¶¶ 10-11.

Accordingly, Defendants have presented a detailed and substantial case that Plaintiffs’ claims are unlikely to succeed on the merits.

III. An Order Enjoining the Navy and Marines from Making Assignment And Reassignment Decisions Would Inflict Irreparable Damage On The Navy And The Public Interest, and the Balance of Interests Favors a Stay.

The Court’s preliminary injunction will cause irreparable harm to the military and the public in at least two ways: first, it will keep unvaccinated individuals in places where they and their units are at risk and thus degrade the overall readiness of the

² This declaration was prepared in connection with other litigation and is submitted here because it addresses many of the considerations for granting a stay pending appeal in this case as well.

units; and it will undermine good order and discipline. *See generally* Ex. 5, Declaration of Vice Admiral Daniel Dwyer; Ex. 6, Declaration of Lieutenant General William Journey. In contrast, staying the order will result in Plaintiffs being reassigned to non-command roles. If the military initiates separation proceedings against Plaintiffs, those proceedings will take place over many months, during which time Plaintiffs will not have to undergo vaccination and will have further opportunity to make their case for being retained in their respective Services. The threat to military readiness and national security outweighs the impact on these Plaintiffs of additional military proceedings, while an appeal is pending in this matter. *See, e.g., Councilman*, 420 U.S. at 758.

A. The Order Creates an Unacceptable Risk to the Force.

The Order causes irreparable harm because these unvaccinated individuals place themselves and their units at higher risk of illness, hospitalization and death, and thus create a greater risk of mission failure. *See* Lescher Decl. ¶¶ 2, 11-13; Declaration of Joon Yun ¶ 5, ECF No. 74-10; Rans Decl. ¶¶ 14-30, ECF No. 74-4. As Admiral Lescher explained, “[u]nvaccinated 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.” Lescher Decl. ¶ 2. The Navy’s highest leaders have therefore made the judgment that “[f]ully vaccinated naval forces are required to ensure readiness to carry out Navy missions throughout the world and, if required, to engage in combat operations.” *Id.*; *see id.* ¶ 11. And in particular, “[r]estriction 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,” as well as to “[t]he health, readiness, and mission execution of broader conventional Navy units and personnel who support these personnel.” *Id.* ¶ 2. Admiral Caudle concurs, explaining that “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,” and “fully vaccinated units withstand COVID outbreaks with significantly less impact to the mission.” Caudle Decl. ¶¶ 14-16.

Accordingly, the Navy has determined that having an unvaccinated commander of a destroyer poses an unacceptable risk to the mission. *See* ECF Nos. 66-2; Dwyer Decl. ¶¶ 15-16 (describing risks Commander poses to destroyer, including potential for incapacitation of Commander, potential need for medical evacuations, quarantine requirements); Gilday Decl. ¶ 7 (describing risks posed by unvaccinated personnel in general, including dangers of mission failure, medical evacuation, and the sensitivity of foreign host country requirements); 1st Brandon Decl. ¶¶ 12-13 (describing risks Commander poses to a destroyer).³ Admiral Dwyer elaborates that the risks of an unvaccinated Commander “reverberate throughout the force” because

³ These declarations emphasize that COVID-19 is particularly likely to spread aboard a destroyer in light of close quarters and congregate living situations. *See, e.g.*, Gilday Decl. ¶¶ 7-8; 1st Brandon Decl. ¶ 12. In case a visual aid is helpful, this url includes a photo of sleeping berths in a guided missile destroyer: <https://www.dvidshub.net/image/5285051/us-sailor-checks-deck-berthing-during-gg-drill-aboard-uss-spruance>.

“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.” Dwyer Decl. ¶ 16. Vaccination status also affects “pre-deployment quarantine requirements” and “port entry requirements,” and in the event of an outbreak, “the unavailability of a vessel can have negative implications at the strategic level by removing U.S. naval presence from key areas.” *Id.*

Similarly, the Marine Corps has determined that Lieutenant Colonel 2 poses an unacceptable risk to her unit. *See* ECF No. 66-3; Journey Decl. ¶¶ 9-11; Smith Decl. ¶¶ 10-11 (describing how concerns about unvaccinated Marines in general apply to Lieutenant Colonel 2); Thompson Decl. ¶¶ 8-9 (describing risks an unvaccinated battalion commander will pose to the Marine unit). As explained by Lieutenant General Journey, “it is imperative that a CLB commander be worldwide deployable and ready to lead Marines at all times.” Journey Decl. ¶ 6; *see also* Tr. 190:24 –191:4; 191:19 –22 (agreeing that Marines deploy into inhospitable environments).

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.” Decl. of Col. Eric N. Thompson ¶ 4, ECF No. 74-11. As a result, “every Marine is a rifleman,” Smith Decl. ¶ 10, and Marine Expeditionary Units in particular are organized and equipped to be “capable of responding rapidly to a broad range of crises and conflict situations.” Journey Decl. ¶ 12. As an unvaccinated officer whose

exemption request was denied, Lieutenant Colonel 2 cannot meet those standards and should be unable to deploy with the Combat Logistics Battalion of the Marine Expeditionary Unit to which she is assigned. Journey Decl. ¶¶ 6, 9-13; Thompson Decl. ¶¶ 7-10. She is at increased risk of infection, severe illness and death, and she would be unable to disembark with her battalion in many countries, which would undermine operations. Journey Decl. ¶¶ 9-10.⁴ For example, if she were to fall “seriously ill before or during the deployment,” the loss of a battalion commander would “necessitat[e] a change of command at an inopportune moment” and compromise the effectiveness of the unit. *Id.* ¶ 10. For another example, the commands within the MEU are often tasked for disaggregated or independent operations, and her unit would be unable to do so and would hinder the effectiveness of the unit. *Id.* ¶ 9; Thompson Decl. ¶¶ 9-10 (explaining need for commander to disembark); Smith Decl. ¶ 11; Tr. 191:23-25 (agreeing that commander needs to deploy). The record reflects that a battalion commander needs to deploy with her unit, but Lieutenant Colonel 2’s deployment and effectiveness will be limited by COVID-19 mitigation measures imposed by foreign countries, as well as by DoD, to protect the force.⁵

⁴ Even when not deployed, she is regularly interacting with “at least 20, 30 people a day.” Tr. 188:1–6, and being unvaccinated poses an increased risk to herself and to those around her. *See supra* pp. 5-7; ECF No. 74-11; Smith Decl. ¶¶ 8, 11; Journey Decl. ¶ 10.

⁵ Although Lieutenant Colonel 2’s unit is not expected to deploy until the fall of 2022, it is necessary to select, train and prepare a battalion commander now. Battalion commanders are selected months ahead of any deployment to permit time for adequate training and preparation. Journey Decl. ¶¶ 5, 7.

Senior military officers have thus determined that these particular unvaccinated service members pose an unacceptable risk and degrade the readiness of their units. Even if the Court ultimately disagrees, it should not enjoin the exercise of that quintessential military judgment as a preliminary matter.

B. The Order Undermines Good Order and Discipline.

The Court's order will also undermine military good order and discipline and cause irreparable harm to the military's effectiveness (and potentially, our nation's security) by forcing the military to keep or to place persons who the military finds unfit to lead in command positions. *Speigner*, 248 F.3d at 1297 (“[C]ourts should not interfere with military discipline and management.”) (quoting *Meister v. Texas Adjutant Gen. Dep’t*, 233 F.3d 332 (5th Cir. 2002)). As Admiral Caudle explained, the life and death work of the military demands obedience to lawful orders. Caudle Decl. ¶¶ 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). “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.” Caudle Decl. ¶ 14. Admiral Dwyer confirms that insubordination like that here “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.” Dwyer Decl. ¶ 14.

The Order allows two officers who have refused a lawful order to continue to serve in assignments over the Navy's objection. As explained by Admiral Dwyer, "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." Dwyer Decl ¶ 17; 1st Brandon Decl. ¶¶ 11, 15 (explaining that the lack of uniformity and disparate treatment necessitated by" the Order "significantly corrodes good order and discipline beyond this officer's destroyer").

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. Dwyer Decl. ¶¶ 14, 17; First Decl. of Frank Brandon ¶ 6, ECF No. 74-12. The record shows that he disobeyed an order that he is also expected to enforce, Dwyer Decl. ¶¶ 13-14; 1st Brandon Decl. ¶ 15, and that he further compromised his trustworthiness by misleading his commander regarding taking leave out of the area, Second Decl. of Frank Brandon, ECF No. 81-1, ¶¶ 8-18, and by making misleading statements about communications with his Executive Officer, Executive Officer Decl. ECF No. 83-1. This conduct occurred after he had already disregarded Navy regulations and, as a result, exposed dozens of his crew to COVID-19 when he decided not to test himself after experiencing symptoms, 2d Brandon Decl. ¶¶ 4-7; ECF No. 81-2 (Letter of

Instruction).⁶ Even if the Court found him credible despite these lapses in judgment, Navy Commander cannot lead a crew and command a warship, particularly given the breach of the relationships with both his commanding officer and his subordinates.

As explained by Admiral Dwyer, the Commander of the Second Fleet, “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” and “it appears Plaintiff Navy Commander may be precisely such a concern—one who would disregard simple orders pertaining to risk mitigation on travel, while still expected to enforce the order as it pertains to his 320 sailors.” Dwyer Decl. ¶ 14. By forcing the Navy to keep in place a commander of a destroyer who has lost the trust of his superior officers and the Navy at large, this Order effectively places a multi-billion dollar guided missile destroyer out of commission. *Id.* ¶ 17; 1st Brandon Decl. ¶¶ 6; 2d Brandon Decl. For example, if it becomes necessary to deploy an East Coast-based surface ship in response to global events in Ukraine (or elsewhere), the Navy will not deploy the Commander’s vessel. In this way, the Court’s order will have a wide-ranging impact on Navy operations and national security.

⁶ Navy Commander’s insistence on the witness stand that “loss of voice” is not a symptom of COVID-19 and that his throat was not at all sore despite his inability to speak is implausible, but these excuses are also rather beside the point. *See* Tr. 68-73, 108-29. In the face of possible symptoms, he came into work, interacted with dozens of crew members and chose not to get tested until ordered, and in doing so, he objectively made the wrong decision and exposed others to COVID-19. He continued to fail to meet expectations by failing to inform his commanding officer he was going on leave out of town, failing to inform his executive officer, and failing to submit a mitigation plan until confronted on the evening he left. *See* Brandon Decls., ECF Nos. 74-12, 81-1; Executive Officer Declaration, ECF No. 83-1.

Similarly, Lieutenant Colonel 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" because "a commander who cannot follow lawful orders loses the moral authority to require others to follow their own lawful orders." Journey Decl. ¶ 14. Among other problems, she will be tasked with enforcing the vaccination order and convening administrative separation processing for vaccine refusers. *Id.* Thompson Decl. ¶¶ 7, 10 (explaining that the TRO "will irreparably harm good order and discipline in the unit and will ripple across the Marine Corps"). In addition, her inability to deploy or disembark with her unit "is antithetical to her ability to command." Journey Decl. ¶ 13. 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 the deference due to the military in this area, the harms to the military and the public interest vastly outweigh Plaintiffs' employment interests and interests in evading military administrative processes.

CONCLUSION

Accordingly, for the foregoing reasons, Defendants respectfully request that this Court grant a stay of its order pending appeal, or an immediate administrative stay of that Order while the Court considers Defendants' stay motion, and to allow the Eleventh Circuit time to consider an emergency stay motion if this Court does not issue one.

Local Rule 3.01(g) Certification

Defense counsel conferred with Plaintiffs' counsel by email on February 28, 2022. Plaintiffs oppose the relief requested in this motion.

Dated: February 28, 2022

Respectfully submitted,

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ALEXANDER K. HAAS
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Table of Exhibits

Exhibit Number	Exhibit Description
1.	Email from Plaintiffs' Counsel to Amy Powell, dated Feb. 18, 2022
2.	Declaration of Admiral Daryl L. Caudle, dated Feb. 23, 2022, filed in <i>Navy Seals 1-26 v. Austin</i> , 4:21-cv-1236 (N.D. Tex.)
3.	Declaration of Admiral Michael M. Gilday
4.	Declaration of General Eric M. Smith
5.	Declaration of Vice Admiral Daniel Dwyer
6.	Declaration of Lieutenant General William M. Journey

EXHIBIT 1

From: [Horatio Mihet](#)
To: [Powell, Amy \(CIV\)](#)
Cc: [Enlow, Courtney D. \(CIV\)](#); [Avallone, Zachary A. \(CIV\)](#); [Roger Gannam](#); [Robinson, Stuart J. \(CIV\)](#); [Merritt, Robert C. \(CIV\)](#); [Daniel Schmid](#); [Richard Mast](#); [Jill M. Schmid](#)
Subject: [EXTERNAL] Navy Seal 1 v. Biden - Preliminary Injunction
Date: Friday, February 18, 2022 5:44:23 PM

Amy – we read the Preliminary Injunction entered by the Court this afternoon (dkt. 111) to prohibit any adverse action against Navy Commander for any of the things alleged by the Government in any of the affidavits filed in the proceedings thus far. Without limitation, this would include the Government’s allegations – rejected by the Court – that Navy Commander acted improperly in connection with securing leave to attend the PI hearing.

Please confirm ASAP that this is also your understanding. If the Navy takes any adverse action against him (or Lieutenant Colonel 2, for that matter), we will promptly and aggressively seek contempt sanctions against all involved.

HGM

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EXHIBIT 2

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, Chairman of the Joint Chiefs 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

EXHIBIT 3

**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

EXHIBIT 4

**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', written in a cursive style.

E. M. SMITH

Exhibit A to General Smith's Declaration

CUI/PRE-DECISIONAL

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

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

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>		

EXHIBIT 5

**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

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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.

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(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.

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(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:

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(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.

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(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,

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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

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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

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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

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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.

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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.

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- (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).

EXHIBIT 6

**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.

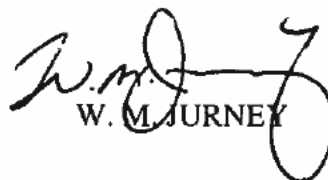
14. LtCol 2 will also be responsible for setting the policies and standards within her command. LtCol 2's failure to follow the lawful policies and standards of her superiors undermines her ability to require her subordinates to follow her policies and standards.

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