IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

AIR FORCE OFFICER, Plaintiff, v. **LLOYD AUSTIN**, in his official capacity as Secretary of Defense, *et al*. Defendants.	No. 5:22-cv-00009-TES

NOTICE OF SUPPLEMENTAL AUTHORITY

Defendants respectfully notify the Court of the attached order by the Supreme Court in *Dunn v. Austin*, 596 U.S. ---, No. 21A599 (Apr. 18, 2022) (attached as Ex. 1), denying a preliminary injunction pending appeal in that case. Defendants provide this update because their pending motion to stay cites to the Supreme Court's proceedings in *Dunn*. *See* Defs.' Mot. to Stay District Court Proceedings Pending Appeal, at 3, ECF No. 74. Defendants also provide this notice because Plaintiff Air Force Officer and her proposed co-Plaintiffs filed an amicus brief in support of applicant Dunn at the Supreme Court. Mot. for Leave to File Br. and Br. for *Amici Curiae*, *Dunn v. Austin*, No. 21A599, Doc. 1 (U.S. Apr. 18, 2022) (attached as Ex. 2).

Jonathan Dunn, a member of the Air Force Reserve, challenged the Air Force's COVID-19 vaccination requirements under the Religious Freedom Restoration Act and the First Amendment. Compl., *Dunn v. Austin, et al.*, No. 2:22-cv-288, ECF No. 1 (E.D.

Cal.). Dunn moved for a temporary restraining order and preliminary injunction similar to the preliminary injunction at issue here, ECF No. 4, which the district court denied, ECF No. 16. Dunn then appealed to the Ninth Circuit and moved for an injunction pending appeal. March 9, 2022, Emer. Mot. for Inj., *Dunn v. Austin, et al.*, 22-15286 (9th Cir.). While the Ninth Circuit temporarily granted Dunn interim relief, the Court of Appeals ultimately denied Dunn's request for an injunction pending appeal. Order, *Dunn v. Austin, et al.*, 22-15286 (April 1, 2022 9th Cir.).

Dunn then applied for the same emergency relief from the Supreme Court. App. For Inj. Pending Appeal, *Dunn v. Austin*, No. 21A599, Doc. 1 (U.S. Apr. 18, 2022) (attached as Ex. 3). Numerous parties filed amici briefs in support of Applicant Dunn, including the Plaintiff in this case (Air Force Officer) and the proposed Plaintiffs (Air Force NCO, Air Force Special Agent, and Air Force Engineer). *See* Ex. 2. Defendants opposed Dunn's application, relying on many of the same arguments that they have advanced in this case in opposition to preliminary injunctive relief. Defs.' Resp. to App., *Dunn v. Austin*, No. 21A599, Doc. 7 (U.S. Apr. 15, 2022) (attached as Ex. 4).

Dunn's application for emergency relief was presented to Justice Kagan, who referred it to the Court. Ex. 1. The Court denied Dunn's request without comment. *Id.* Justices Thomas, Alito, and Gorsuch noted that they would have granted the application for an injunction pending appeal, but provided no further explanation. *Id.*

Dated: April 18, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2022, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, and that that document is now available for viewing and downloading from the CM/ECF system. I further certify that the foregoing document is being served this day on all counsel of record, via Notices of Electronic Filing generated by CM/ECF.

/s/ Zachary A. Avallone
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Exhibit 1

(ORDER LIST: 596 U.S.)

MONDAY, APRIL 18, 2022

ORDER IN PENDING CASE

21A599 DUNN, JONATHAN V. AUSTIN, SEC. OF DEFENSE, ET AL.

The application for an injunction pending appeal presented to Justice Kagan and by her referred to the Court is denied.

Justice Thomas, Justice Alito, and Justice Gorsuch would grant the application for an injunction pending appeal.

Exhibit 2

No. 21A599

IN THE

Supreme Court of the United States

JONATHAN DUNN,

Applicant,

v.

LLOYD J. AUSTIN III, SECRETARY OF DEFENSE, *et al.*,

Respondents.

ON EMERGENCY APPLICATION FOR INJUNCTION PENDING APPEAL TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR *AMICI CURIAE* AIR FORCE OFFICER, AIR FORCE NCO, AIR FORCE SPECIAL AGENT, AND AIR FORCE ENGINEER IN SUPPORT OF APPLICANT

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF APPLICANT

Amici curiae Air Force Officer, Air Force NCO, Air Force Special Agent, and Air Force Engineer, respectfully move for leave to file a brief explaining why this Court should grant applicant Lt. Col. Jonathan Dunn's Emergency Application for Injunction Pending Appeal and Certiorari, or, in the Alternative, for Certiorari before Judgment. *Amici* have promptly notified counsel of record for both parties that they intended to submit the attached brief. *Amici* submit this motion for leave pursuant to this Court's Rule 37.2(b) only out of an abundance of caution, as counsel for respondent "takes no position" regarding this filing, though they consented to the filing of an *amici curiae* brief below, and Lt. Col. Dunn has consented to the filing of this brief.

Like Applicant Lt. Col. Dunn, *amici* are fellow Air Force service members who have all been denied religious accommodations to the Air Force's COVID-19 vaccine mandate. The experience of all four *amici* reveals that the Air Force's religious-accommodation process to its COVID-19 vaccine mandate is illusory and pure theater. Despite their varying circumstances, all four *amici* were ultimately denied religious accommodations via nearly identical rote letters from the Air Force Surgeon General, relying on generalized interests that made no attempt to explain why thousands of exemptions have been granted to the mandate for

secular reasons but essentially none have been granted for religious reasons.

Amicus Air Force Officer has already obtained a preliminary injunction against the Air Force's rote denial of her religious accommodation request, and respectfully submits that the District Court's analysis of her circumstances is especially illuminating. *See Air Force Officer v. Austin*, No. 5:22-CV-00009-TES, 2022 WL 468799 (M.D. Ga. Feb. 15, 2022). Indeed, Air Force Officer is a decorated and longtime reservist, is naturally immune, has never been deployed, works in a purely administrative position, with demonstrated ability to effectively work remotely, socially distance, test, and mask—and yet was still rotely denied a religious accommodation based on the same alleged interests that apply to, for example, an active-duty Navy Seal (yet which interests somehow do not apply to the thousands of Air Force service members with medical and administrative exemptions).

Amici's experience will thus aid this Court's understanding of the sincerity and legitimacy (or lack thereof) underlying the denial of their fellow Air Force service member Lt. Col. Dunn's request for religious accommodation from the Air Force's COVID-19 vaccine mandate. Additionally, *amici*'s experience confirms that the Air Force is inflicting per se irreparable harms on these and other similarly situated service members by, among other things, threatening to withhold their military pay, benefits, advancement opportunities, etc., *as a*

means of pressuring them to forgo their sincerely held religious beliefs about COVID vaccination. This combination of across-the-board denials of religious but not secular accommodations to the Air Force's COVID-19 vaccine mandate, and the infliction of ongoing irreparable harm on Air Force service members who have made the "wrong" kind of accommodation request, cries out for intervention and resolution by this Court. Accordingly, the motion to file the brief of *amici curiae* should be granted.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

Four Air Force service member *amici*—"Air Force Officer," "Air Force NCO," "Air Force Special Agent," and "Air Force Engineer"—support Plaintiff Lt. Col. Dunn's pursuit of injunctive relief against the military's COVID-19 vaccine mandates.

Amici ("the Four Airmen") are named plaintiffs or proposed named plaintiffs in a putative class action pending in the United States District Court for the Middle District of Georgia, *Air Force Officer v. Austin*, No. 5:22-cv-00009-TES. Like Lt. Col. Dunn, the Four Airmen received final denials of their requests for religious accommodation regarding the military's COVID-19 vaccine mandates.

Originally, one of the Four Airmen, Air Force Officer, brought a case seeking, *inter alia*, an injunction against enforcement of the military's

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[1] No counsel for any party authored this brief in whole or in part. No person or entity, other than the *amici* and their counsel, Thomas More Society, has contributed monetarily to the brief's preparation or submission. Additionally, *amici* timely notified counsel for both parties of their intent to file this brief. Applicant consents, but Respondents' position is not clear, as Respondents' counsel's reply to *amici*'s request for Respondent's position was as follows: "The government takes no position." Accordingly, out of an abundance of caution, *amici* have submitted a motion for leave to file this brief.

COVID-19 vaccine mandates. On February 15, 2022, the court granted a preliminary injunction in her favor against the military defendants. *Air Force Officer v. Austin*, No. 5:22-CV-00009-TES, 2022 WL 468799 (M.D. Ga. Feb. 15, 2022). The court "easily f[ound] that the Air Force's process to protect religious rights is both illusory and insincere." *Id.* at *10. The "religious accommodation process… proved to be nothing more than a quixotic quest." *Id.* at *1.

The Four Airmen recently sought leave to file a Second Amended Complaint adding Air Force NCO, Air Force Special Agent, and Air Force Engineer as plaintiffs, and alternatively these three airmen sought to intervene, alleging claims on behalf of themselves and a putative class of all Air Force service members who submitted a request for religious accommodation and already received or will receive a final denial.[2]

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[2] The Four Airmen are proceeding or seeking to proceed under pseudonyms in *Air Force Officer*. In an order issued separately from but on the same day as the preliminary injunction, the court granted Air Force Officer leave to proceed anonymously, recognizing a social climate, both on the national and local levels, that is hostile to those who decline a COVID-19 vaccine for any reason, and that religion is a quintessentially private matter. *Air Force Officer v. Austin*, No. 5:22-CV-00009-TES, 2022 WL 468030, at *2 (M.D. Ga. Feb. 15, 2022). A motion to proceed anonymously with

As the Middle District of Georgia concluded in *Air Force Officer*, the process for requesting a religious accommodation regarding the military's COVID-19 vaccine mandates is "illusory and insincere." The military's denial of the religious accommodation requests of the Four Airmen, Lt. Col. Dunn, and thousands of other similarly situated airmen unlawfully abridges their religious freedom under the Religious Freedom Restoration Act (RFRA) and the First Amendment of the U.S. Constitution.

Amici submit that this brief will assist the Court in more fully understanding the military's essentially uniform practice of denying religious accommodations and the need for emergency relief.

SUMMARY OF ARGUMENT

This brief focuses on two issues: the sham religious accommodation request process and the irreparable harm caused by the military's denial of religious accommodation requests.

As the court found in *Air Force Officer*, the Air Force's religious accommodation process is illusory and insincere. The Air Force's formulaic

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respect to the three new plaintiffs, on the same grounds, is currently pending.

final denial letters are indicative of this sham process. The Air Force has not approved any or essentially any of the thousands of religious accommodation requests, while it has approved thousands of non-religious accommodation requests and grants a blanket exemption that may last indefinitely for participants in "COVID-19 clinical trials." Like the court in *Air Force Officer*, several other courts have held that the Air Force's accommodation request process or other military branches' similar process is illusory and insincere.

The Air Force's denial of religious accommodation requests causes irreparable harm because it imposes "spiritual rather than pecuniary" harms on their ability to exercise their respective religious beliefs. *Ramirez v. Collier*, No. 21-5592, 2022 WL 867311, at *12 (U.S. March 24, 2022). Indeed, this Court and lower courts have long recognized that threatening to withhold (or actually withholding) pecuniary benefits in order to pressure one to forgo a particular religious belief or practice is a quintessential "substantial burden" on religious exercise that constitutes irreparable harm under both the First Amendment and the Religious Freedom Restoration Act. The Air Force has done exactly that here in denying the religious accommodation requests submitted by Applicant Lt. Col. Dunn and the four *amici*—and those of many other similarly situated religious service members. In doing so, the Air Force also irreparably deprives them of the incommensurable ability to patriotically serve their country.

ARGUMENT

A. The Air Force's religious accommodation request process is "illusory and insincere."

The Air Force's religious accommodation process is "illusory and insincere," "nothing more than a quixotic quest" for service members seeking a reasonable and lawful accommodation. *Air Force Officer*, 2022 WL 468799, at *1, *10. This is true for all service members, regardless of the role or capacity in which they serve. For example, Air Force Officer is a reserve officer and has never been deployed. Air Force NCO is a non-commissioned officer and has been deployed four times. Air Force Special Agent works in the Air Force Office of Special Investigations, and in his current position there are virtually no physical interactions. Air Force Engineer is an active-duty officer and licensed civil engineer. All Four Airmen have natural immunity to COVID-19. To varying degrees, all Four Airmen have worked remotely and can work remotely.

Despite the dissimilarities in their circumstances, these Four Airmen received essentially identical letters finally denying them accommodations on the basis of religious belief. This is a clear indicator of a sham process. *See* Exhibit A hereto (the Four Airmen's final denial letters). While none of the letters disputes the sincerity or reasonableness of the service member's religious objection, the letters otherwise

reflect no real consideration of Plaintiffs' particular circumstances. *Id.* Each letter incants the same generic and self-evidently false statement of Air Force Surgeon General Robert I. Miller: "I have carefully reviewed your request for religious accommodation," then recites substantially all of the same canned generalizations, word-for-word (*e.g.*, "Your health status as a non-immunized individual in this dynamic environment, and aggregated with other non-immunized individuals in steady state operations, would place health and safety, unit cohesion, and readiness at risk. Foregoing the above immunization requirement would have a real adverse impact on military readiness and public health and safety."). *Id.* The letters even include the same identical copy of Surgeon General Miller's handwritten signature. *Id.* In this case, the final denial letter Lt. Col. Dunn received is no different.

The Four Airmen and Lt. Col. Dunn are just five of the 7,500+ service members who unsuccessfully sought religious accommodation, and the Air Force treats them all the same—brazenly violating RFRA's requirement that the Air Force demonstrate a compelling interest in applying its mandate "to the person," 42 U.S.C. § 2000bb-1(b)(1). The Air Force has not approved any or essentially any of these requests. The Air Force posts its exemption statistics on its public website, https://www.af.mil/News/Article-Display/Article/2959594/daf-covid-19-statistics-

march-2022/ ("Air Force Statistics"), showing the thousands of unapproved requests for religious accommodation. The Air Force claims to have "approved" a small number of requests for religious accommodation, but those requests were "approved" because the service members were already slated for separation. *See Navy Seal 1 v. Austin*, No. 8:31-cv-2429-SDM-TGW, 2022 WL 534459, at *19 (M.D. Fla. Feb. 18, 2022); *Poffenbarger v. Kendall*, No. 3:22-CV-1, 2022 WL 594810, at *13 n.6 (S.D. Ohio Feb. 28, 2022). Regardless, as the District Court for the Southern District of Ohio recently found, "of the thousands of religious exemptions the Air Force has adjudicated, the Air Force has only approved a shameful number of 23 religious exemptions." *Doster v. Kendall*, No. 1:22-CV-84, 2022 WL 982299, at *4 (S.D. Ohio Mar. 31, 2022).[3]

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[3] Meanwhile, the Air Force has granted thousands of non-religious—medical and/or administrative—accommodation requests. *See* Air Force Statistics. And the military provides a blanket exemption for *all* "COVID-19 clinical trial[]" participants, as expressly stated in the Department of Defense's August 24, 2021 military-wide COVID-19 vaccine mandate order. Such clinical trials presumably involve COVID-19 studies other than vaccination, with some participants taking a placebo in any event (*Navy Seals 1-26 v. Biden*, No. 4:21-cv-01236-O, 2022 WL 34443, at *11 (N.D. Tex. Jan. 3, 2022), and could last indefinitely. *See* August 24 Order ("Service members who are actively participating in COVID-19 clinical trials are exempted from

As the District Court for the Middle District of Georgia "easily found" in *Air Force Officer*, the Air Force's religious accommodation request process is "illusory and insincere":

> [T]he Air Force has rejected 99.76% of all religious accommodation requests, and until about two weeks ago, it had rejected every single one it 'carefully consider[ed].' ... With such a marked record disfavoring religious accommodation requests, the Court easily finds that the Air Force's process to protect religious rights is both illusory and insincere.

Air Force Officer, 2022 WL 468799, at *10.

Several other courts have likewise held that the Air Force's religious accommodation request process or other military branches' similar process is a sham. *See*, *e.g.*, *Poffenbarger*, 2022 WL 594810, at *13 ("The current evidence appears to support

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mandatory vaccination against COVID-19 until the trial is complete...."). This favoritism shows that the Air Force lacks a compelling interest, and fails the least-restrictive-means test, in categorically denying service members' requests for religious accommodation. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542-46 (1993) (no compelling interest where law burdening religious exercise is substantially underinclusive as to its purposes).

Poffenbarger's assertion that the **Air Force is systematically denying religious exemptions**.") (emphasis added); *Doster*, 2022 WL 982299, at *13 (the **broad formulaic claims** of 'stemming the spread of COVID-19' and promoting military readiness and national security **ring hollow**.... The only difference between the over 2,500 Airmen who have otherwise received exemptions and the 18 Plaintiffs before this Court is solely the type of exemption they requested. It appears to the Court that **the Air Force has freely granted medical and administrative exemptions while denying almost all religious exemption requests**.") (emphasis added); *U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336, 352 (5th Cir. 2022) (discussing the Navy's "**pattern of disregard for RFRA rights** rather than individualized consideration of Plaintiffs' requests") (emphasis added); *Navy Seals 1-26 v. Austin*, 2022 WL 34443, at *1 (N.D. Tex. Jan. 3, 2022) ("The Navy provides a religious accommodation process, but **by all accounts, it is theater**. The Navy has not granted a religious exemption to any vaccine in recent memory. It merely rubber stamps each denial.") (emphasis added); *Navy Seal 1 v. Austin*, No. 8:21-CV-2429-SDM-TGW, 2022 WL 710321, at *7 (M.D. Fla. Mar. 2, 2022) (discussing aspects of the "**deeply entrenched failure of the**

[military] defendants to respond effectively to the requirements of RFRA") (emphasis added).[4]

The uniform denial of religious accommodation requests by the military constitutes a gross disregard for fundamental religious-liberty rights that is visiting irreparable harm upon thousands of our nation's service members. This Court should enter the injunction pending appeal in order to preserve the status quo ante and to allow time to address this important question of federal law.

B. The military's denial of religious accommodation requests in violation of RFRA and the First Amendment causes irreparable harm.

Violations of military service members' RFRA and First Amendment rights cause them "spiritual rather than pecuniary," and thereby

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[4] With the military facing such rebukes, the Inspector General of the Department of Defense recently announced an investigation into "whether the Military Departments are processing exemption requests for the Coronavirus Disease–2019 vaccination and taking disciplinary actions for active duty Service members in accordance with Federal and DoD guidance." *See* February 28, 2022 Memorandum from the Office of the Inspector General, https://media.defense.gov/2022/Mar/01/2002947117/-1/-1/1/D2022-D000AW-0081.000.PDF.

irreparable, harms. *Ramirez v. Collier*, No. 21-5592, 2022 WL 867311, at *12 (March 24, 2022); *accord Air Force Officer*, No. 5:22-CV-0009-TES, 2022 WL 468799, at *12.[5]

The fact that the military's COVID-19 vaccine mandate causes *some* compensable injuries, like cutting off military pay, does not mean it imposes *no* irreparable harm. The contrary argument would be absurd, since it would mean that anyone who suffers compensable harms *as a result of a RFRA violation* could *never* suffer irreparable harm and obtain a corresponding injunction. *Cf. All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) ("It would prove too much" to say plaintiffs have not suffered irreparable harm because they can "view, experience, and utilize other areas of the forest" that are not irreparably fire-damaged, as that would mean "a plaintiff can *never* suffer irreparable injury resulting from environmental harm in a

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[5] It goes without saying that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). This analysis focuses on irreparable harm under RFRA.

forest area as long as there are other areas of the forest that are not harmed") (emphasis added).

The military's imposition of compensable harms, such as loss of pay and retirement benefits, on service members for seeking religious exemptions from the vaccine mandate accentuates the reality that where, as here, service members' compensation, careers, and very livelihoods are threatened by a *government* actor like the military because of their *religious* beliefs and practices, the resulting "pressure . . . to forego th[ose] [beliefs and] practice[s] is unmistakable"—and thus irreparably harmful. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

In *Air Force Officer*, this substantial pressure came in the form of ceasing Air Force Officer's military pay, denying her the right to apply for a permanent change of station, denying her at least one Temporary Duty Assignment, and denying her the right to any military orders of any kind, together with the prospect of final separation. *See Air Force Officer*, 2022 WL 468799, at *4. The military told those requesting a religious accommodation that the mere act of requesting an accommodation "may have an adverse impact on… deployability, assignment, and/or international travel." *Air Force Officer*, No. 5:22-CV-0009-TES, Doc. 2-11. Such "pressure on an adherent to modify his [or her] behavior and to violate his [or her] beliefs" is a quintessential "substantial burden" on religion *and thus a non-compensable spiritual harm*. *Kaemmerling v. Lappin*, 553 F.3d 669, 678

(D.C. Cir. 2008) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)); *see also Singh v. McHugh*, 185 F. Supp. 3d 201, 217 (D.D.C. 2016) (holding that a finial denial of religious exemption request is a "substantial burden" under RFRA).

Indeed, the Fifth Circuit recently recognized that vaccine mandates which "substantially burden" an individual's free exercise of religion per se cause "irreparable harm." *BST Holdings, L.L.C. v. Occupational Safety & Health Admin. United States Dep't of Lab.*, 17 F.4th 604, 618 (5th Cir. 2021).

It thus comes as no surprise that this Court has *twice* affirmed Circuit decisions holding that violations of RFRA necessarily cause irreparable harm. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 704, 736 (2014), *affirming Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1146 (10th Cir. 2013) (holding that "by analogy to First Amendment cases . . . establishing a likely RFRA violation satisfies the irreparable harm factor"); *and Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2006), *affirming O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 342 F.3d 1170, 1187 (10th Cir. 2003) (noting "a plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA").

Indeed, most Circuits, too, have held that RFRA violations constitute irreparable harm. *See Joy v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) ("Courts have persuasively found that irreparable

harm accompanies a substantial burden on an individual's rights to the free exercise of religion under RFRA."); *Merced v. Kasson*, 577 F.3d 578, 595 (5th Cir. 2009); *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 615-16 (6th Cir. 2020); *Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013); *Annex Med., Inc. v. Sebelius*, No. 13-1118, 2013 WL 1276025, at *3 (8th Cir. Feb. 1, 2013) (unpublished); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1146 (10th Cir. 2013); *Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 756 F.3d 1339, 1340 (11th Cir. 2014).

This Court has deemed the same to be true for violations of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1—the "sister statute" of RFRA. *See Holt v. Hobbs*, 574 U.S 352, 356 (2015). As this Court noted in *Holt*, RLUIPA was enacted in response to this Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), which held that Congress lacked the power to apply RFRA to the states and their subdivisions (including state prisons) under its Fourteenth Amendment Section 5 powers. *Holt*, 574 U.S. at 357. As a result, Congress enacted RLUIPA pursuant to its Spending and Commerce Clause powers, *id.*, and Section 3 of that Act "allows prisoners to seek religious accommodations pursuant to the same standard as set forth in RFRA," *id.* at 358.

Thus, in *Holt*, this Court granted an injunction pending appeal against the Arkansas

Department of Correction's refusal to let a Muslim prisoner grow a half-inch beard in accord with his religious faith, before ultimately holding that RLUIPA required that he be given such permission permanently. *See Holt*, 574 U.S. at 360; *see also Am. Trucking Assocs., Inc. v. Gray*, 483 U.S. 1306, 1308 (1987) (noting that injunction pending resolution of petition for writ of certiorari requires showing "there is a likelihood that irreparable injury will result if relief is not granted").

And just last month, in *Ramirez*, this Court held that failure to accommodate the petitioner inmate's religious faith by allowing his pastor to touch him and pray over him in the execution chamber, within due limits, would render him "unable to engage in protected religious exercise in the final moments of his life." *Ramirez*, 2022 WL 867311, at *12. This Court rightly observed that "[c]ompensation . . . would not remedy this harm, *which is spiritual rather than pecuniary*." *Id.* (emphasis added).

Nearly every Circuit has likewise recognized (either explicitly or implicitly) that violations of RLUIPA cause or can cause irreparable harm. *See Fortress Bible Church v. Feiner*, 694 F.3d 208, 220, 225 (2d Cir. 2012); *Washington v. Klem*, 497 F.3d 272, 286 (3d Cir. 2007); *Lovelace v. Lee*, 472 F.3d 174, 206 (4th Cir. 2006) (Wilkinson, J., concurring); *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 295 (5th Cir. 2012); *River of Life Kingdom Ministries v. Vill. of Hazel Crest, Ill.*, 611 F.3d 367, 391-92 (7th Cir. 2010) (Sykes, J.,

dissenting); *Native Am. Council of Tribes v. Weber*, 750 F.3d 742, 754 (8th Cir. 2014); *Warsoldier v. Woodford*, 418 F.3d 989, 1001-02 (9th Cir. 2005); *Ray v. Commissioner, Alabama Dep't of Corrections*, 915 F.3d 689 (11th Cir. 2019). This logic extends directly to violations of RFRA as the "sister" statute of RLUIPA.

For this reason, in recent months lower courts have had no trouble holding that the military's reflexive application of the COVID-19 vaccine mandate to service members seeking religious accommodations unquestionably inflicts irreparable harm. *See, e.g.*, *Air Force Officer*, 2022 WL 468799, at *12; *Navy Seal 1*, 2022 WL 534459, at *19; *Poffenbarger*, 2022 WL 594810, at *18; *Navy Seals 1-26 v. Austin*, No. 4:21-cv-01236-O, 2022 WL 1025144, at *13 (N.D. Tex. Mar. 28, 2022); *Doster*, 2022 WL 982299, at *15.

This Court should adopt the same reasoning in Applicant Dunn's case.

Finally, application of the military's COVID-19 vaccine mandate to service members who cannot comply for religious reasons also deprives them—in the most meaningful way imaginable—of the opportunity to continue serving their country in uniform out of a sense of patriotism and piety. *See, e.g.*, Will Atkins, "A veteran's perspective of

patriotism on this Independence Day," Military Times, July 4, 2021.[6] No sum can compensate for that loss, which is no less than the permanent and superimposed inability to "g[i]ve the last full measure of devotion." *See* Abraham Lincoln, The Gettysburg Address, Gettysburg, Pennsylvania, Nov. 19, 1863.[7]

This patriotic harm, like the above-described "spiritual" harms, is plainly non-compensable and also irreparable. And it is a direct result of the military's refusal to make *any* real room for religious accommodations regarding its vaccine mandates, notwithstanding the contrary and clear demands of the Constitution and laws the military is sworn to defend.

CONCLUSION

For all the foregoing reasons, the injunction pending appeal should be reinstated.

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[6] https://www.militarytimes.com/opinion/commentary/2021/07/04/a-veterans-perspective-of-patriotism-on-this-independence-day/.

[7] https://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm.

Respectfully submitted,

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EXHIBIT A

Exhibit A

Air Force Officer Final Denial:

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON DC

Exhibit 14

MEMORANDUM FOR [redacted]

FROM: HQ USAF/SG
1780 Air Force Pentagon
Washington, DC 20330-1780

SUBJECT: Decision on Religious Accommodation Appeal

Your final appeal is denied. In accordance with Department of the Air Force Instruction (DAFI) 52-201, *Religious Freedom in the Department of the Air Force*, paragraph 3.2, I have carefully reviewed your request for religious accommodation, specifically for an exemption from the COVID-19 immunization.

The Department of the Air Force has a compelling government interest in requiring you to comply with the COVID-19 immunization requirement because preventing the spread of disease among the force is vital to mission accomplishment. Specifically, in light of your circumstances, your present duty assignment requires intermittent to frequent contact with others and is not fully achievable via telework or with adequate distancing. We must be able to leverage our forces on short notice as evidenced by recent worldwide events. Your health status as a non-immunized individual in this dynamic environment, and aggregated with other non-immunized individuals in steady state operations, would place health and safety, unit cohesion, and readiness at risk. Foregoing the above immunization requirement would have a real adverse impact on military readiness and public health and safety. There are no less restrictive means available in your circumstance as effective as receiving the above immunization in furthering these compelling government interests.

A copy of this decision memorandum will be placed in your automated personnel records. Please contact your unit leadership for questions or concerns.

Robert I. Miller

ROBERT I. MILLER
Lieutenant General, USAF, MC, SFS
Surgeon General

Air Force NCO Final Denial:

 EXHIBIT 4

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON DC

DEC 27 2021

MEMORANDUM FOR [redacted]

FROM: HQ USAF[redacted]
1780 Air Force Pentagon
Washington, DC 20330-1780

SUBJECT: Decision on Religious Accommodation Appeal

Your final appeal is denied. In accordance with Department of the Air Force Instruction (DAFI) 52-201, *Religious Freedom in the Department of the Air Force*, paragraph 3.2, I have carefully reviewed your request for religious accommodation, specifically for an exemption from the COVID-19 immunization.

The Department of the Air Force has a compelling government interest in requiring you to comply with the COVID-19 immunization requirement because preventing the spread of disease among the force is vital to mission accomplishment. Specifically, in light of your circumstances, your present duty assignment as a [redacted] requires intermittent to frequent contact with others and is not fully achievable via telework or with adequate distancing. Additionally, your duties may require travel for [redacted] conferences, and other engagements which increases your exposure to other personnel. We must be able to leverage our forces on short notice as evidenced by recent worldwide events. Your health status as a non-immunized individual in this dynamic environment, and aggregated with other non-immunized individuals in steady state operations, would place health and safety, unit cohesion, and readiness at risk. Foregoing the above immunization requirement would have a real adverse impact on military readiness and public health and safety. There are no less restrictive means available in your circumstance as effective as receiving the above immunization in furthering these compelling government interests.

A copy of this decision memorandum will be placed in your automated personnel records. Please contact your unit leadership for questions or concerns.

Robert I. Miller

ROBERT I. MILLER
Lieutenant General, USAF, MC, SFS
Surgeon General

Air Force Special Agent Final Denial:

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON DC

EXHIBIT 4

FEB 10 2022

MEMORANDUM FOR [redacted]

FROM: HQ USAF/SG
1780 Air Force Pentagon
Washington, DC 20330-1780

SUBJECT: Decision on Religious Accommodation Appeal

Your final appeal is denied. In accordance with Department of the Air Force Instruction (DAFI) 52-201, *Religious Freedom in the Department of the Air Force*, paragraph 3.2, I have carefully reviewed your request for religious accommodation, specifically for an exemption from the COVID-19 immunization.

The Department of the Air Force has a compelling government interest in requiring you to comply with the COVID-19 immunization requirement because preventing the spread of disease among the force is vital to mission accomplishment. Specifically, in light of your circumstances, your present duty assignment requires intermittent to frequent contact with others and is not fully achievable via telework or with adequate distancing. In addition, your required in-person meeting attendance includes prolonged, intermittent contact with multiple individuals. We must be able to leverage our forces on short notice as evidenced by recent worldwide events. Your health status as a non-immunized individual in this dynamic environment, and aggregated with other non-immunized individuals in steady state operations, would place health and safety, unit cohesion, and readiness at risk. Foregoing the above immunization requirement would have a real adverse impact on military readiness and public health and safety. There are no less restrictive means available in your circumstance as effective as receiving the above immunization in furthering these compelling government interests.

A copy of this decision memorandum will be placed in your automated personnel records. Please contact your unit leadership for questions or concerns.

Robert I. Miller

ROBERT I. MILLER
Lieutenant General, USAF, MC, SFS
Surgeon General

Air Force Engineer Final Denial:

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON DC

JAN 2 1 2022

EXHIBIT 4

MEMORANDUM FOR [redacted]

FROM: HQ USAF/SG
1780 Air Force Pentagon
Washington, DC 20330-1780

SUBJECT: Decision on Religious Accommodation Appeal

Your final appeal is denied. In accordance with Department of the Air Force Instruction (DAFI) 52-201, *Religious Freedom in the Department of the Air Force*, paragraph 3.2, I have carefully reviewed your request for religious accommodation, specifically for an exemption from the COVID-19 immunization.

The Department of the Air Force has a compelling government interest in requiring you to comply with the COVID-19 immunization requirement because preventing the spread of disease among the force is vital to mission accomplishment. Specifically, in light of your circumstances, your present duty assignment as the [redacted] requires frequent contact with others and is not fully achievable via telework or with adequate distancing. Your leadership role was also taken into consideration. While some of these duties may be completed remotely, institutionalizing remote completion of those duties permanently would be detrimental to readiness, good order and discipline, and unit cohesion. In addition, your unit has high-risk personnel that have an elevated potential for severe illness or death, if they were infected. We must be able to leverage our forces on short notice as evidenced by recent worldwide events. Your health status as a non-immunized individual in this dynamic environment, and aggregated with other non-immunized individuals in steady state operations, would place health and safety, unit cohesion, and readiness at risk. Foregoing the above immunization requirement would have a real adverse impact on military readiness and public health and safety. There are no less restrictive means available in your circumstance as effective as receiving the above immunization in furthering these compelling government interests.

A copy of this decision memorandum will be placed in your automated personnel records. Please contact your unit leadership for questions or concerns.

Robert Miller

ROBERT I. MILLER
Lieutenant General, USAF, MC, SFS
Surgeon General

SUPREME COURT OF THE UNITED STATES
No. 21A599

----------X

LT. COL. JONATHAN DUNN,

Petitioner,

v.

LLOYD J. AUSTIN, III, IN HIS OFFICIAL CAPACITY AS UNITED STATES SECRETARY OF DEFENSE; FRANK KENDALL, IN HIS OFFICIAL CAPACITY AS UNITED STATES SECRETARY OF THE AIR FORCE; COL. GREGORY HAYNES, IN HIS OFFICIAL CAPACITY; MAJOR GEN. JEFFREY PENNINGTON, IN HIS OFFICIAL CAPACITY; UNITED STATES DEPARTMENT OF DEFENSE,

Respondents.

----------X

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the Motion for Leave to File Brief contains 509 words, and the Brief for *Amici Curiae* contains 3,520 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 14th day of April, 2022.

Mariana Braylovskiy

Sworn to and subscribed before me this 14th day of April, 2022.

MARYNA SAPYELKINA
Notary Public State of New York
No. 01SA6177490
Qualified in Kings County
Commission Expires Nov. 13, 2022
#312489

AFFIDAVIT OF SERVICE

SUPREME COURT OF THE UNITED STATES

No. 21A599

----------X

LT. COL. JONATHAN DUNN,

Petitioner,

v.

LLOYD J. AUSTIN, III, IN HIS OFFICIAL CAPACITY AS UNITED STATES SECRETARY OF DEFENSE; FRANK KENDALL, IN HIS OFFICIAL CAPACITY AS UNITED STATES SECRETARY OF THE AIR FORCE; COL. GREGORY HAYNES, IN HIS OFFICIAL CAPACITY; MAJOR GEN. JEFFREY PENNINGTON, IN HIS OFFICIAL CAPACITY; UNITED STATES DEPARTMENT OF DEFENSE,

Respondents.

----------X

STATE OF NEW YORK)

COUNTY OF NEW YORK)

I, Mariana Braylovskiy, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by Counsel of Record for *Amici Curiae* – Air Force Officer, Air Force NCO, Air Force Special Agent, and Air Force Engineer.

That on the 14th day of April, 2022, I served the within *Motion for Leave to File Brief and Brief for Amici Curiae Air Force Officer, Air Force NCO, Air Force Special Agent, and Air Force Engineer in Support of Applicant* in the above-captioned matter upon:

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by sending three copies of same, addressed to each individual respectively, and enclosed in a properly addressed wrapper, through the United States Postal Service, by Express Mail, postage prepaid. An electronic version was also served by email to each individual.

That on the same date as above, I sent to this Court forty copies and 1 un-bound copy of the within *Motion for Leave to File Brief and Brief for Amici Curiae Air Force Officer, Air Force NCO, Air Force Special Agent, and Air Force Engineer in Support of Applicant* through the United States Postal Service by Express Mail, postage prepaid. In addition, the brief has been submitted through the Court's electronic filing system.

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 14th day of April, 2022.

Mariana Braylovskiy

Sworn to and subscribed before me this 14th day of April, 2022.

MARYNA SAPYELKINA
Notary Public State of New York
No. 01SA6177490
Qualified in Kings County
Commission Expires Nov. 13, 2022

#312489

Exhibit 3

No. 21A_____

In the Supreme Court of the United States

LT. COL. JONATHAN DUNN, *Applicant*,

v.

LLOYD J. AUSTIN, III, in his official capacity as United States Secretary of Defense; FRANK KENDALL, in his official capacity as United States Secretary of the Air Force; COL. GREGORY HAYNES, in his official capacity; MAJ. GEN. JEFFREY PENNINGTON, in his official capacity; UNITED STATES DEPARTMENT OF DEFENSE, *Respondents*.

TO THE HONORABLE ELENA KAGAN,
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES
AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT

EMERGENCY APPLICATION FOR INJUNCTION PENDING APPEAL AND CERTIORARI OR, IN THE ALTERNATIVE, FOR CERTIORARI BEFORE JUDGMENT

RELIEF REQUESTED BEFORE APRIL 26, 2022

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Counsel for Applicant Lt. Col. Jonathan Dunn

QUESTION PRESENTED

Applicant, a lieutenant colonel in the Air Force Reserve, has served since 2003, with more than a decade on active duty. He contracted COVID-19 in summer 2021 and acquired natural immunity to the disease. Shortly afterward, the Air Force instituted a COVID-19 vaccine mandate. 98% of all airmen have now been vaccinated; more than 2000 airmen are subject to medical and administrative exemptions. Applicant has sincere religious objections to the COVID-19 vaccine. Respondents nonetheless denied his request for a religious exemption to the vaccine mandate, and the district court denied a preliminary injunction and an injunction pending appeal. While the motion for a preliminary injunction was pending, respondents removed applicant from his command; he does not seek reinstatement to that post, but seeks only protection against further punishment, including a discharge, because of his religious beliefs. After entering interim relief, the United States Court of Appeals for the Ninth Circuit denied an injunction pending appeal in a one-page order over a dissent by Judge Bade.

The question presented is whether the Religious Freedom Restoration Act (RFRA) and the Free Exercise Clause of the First Amendment allow military authorities to permit secular exceptions to challenged conduct while categorically denying all religious accommodations based on a broad asserted interest rather than an individualized assessment of the efficacy of less restrictive measures to serve the interest as properly defined in terms of the particular claimant.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption.

RELATED PROCEEDINGS

Applicant's interlocutory appeal is pending in the United States Court of Appeals for the Ninth Circuit, *Dunn* v. *Austin*, No. 22-15286. That court denied an injunction pending appeal on April 1, 2022.

Applicant's action for injunctive relief and damages is pending in the United States District Court for the Eastern District of California, *Dunn* v. *Austin*, No. 22-cv-288-JAM-KJN.

DECISIONS BELOW

The order of the court of appeals is unreported and is attached as App. 1a. The order of the district court denying an injunction pending appeal is unreported and is attached as App. 2a. The order of the district court denying a preliminary injunction is unreported and is attached as App. 3a. The transcript of the hearing at which the district court stated its reasons denying a preliminary injunction is attached as App. 4a-53a.

JURISDICTION

Applicant has a pending appeal in the United States Court of Appeals for the Ninth Circuit, which has jurisdiction under 28 U.S.C. § 1292(a)(1). The court of appeals denied an injunction pending appeal on April 1, 2022. This Court has jurisdiction over this request for interim injunctive relief under the All Writs Act, 28 U.S.C. § 1651(a). The Court will have jurisdiction over applicant's petition for certiorari under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]

42 U.S.C. § 2000bb-1

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

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INTRODUCTION

Is the military immune from the accommodation requirements of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*., and the Free Exercise Clause, as a practical matter, when COVID-19 vaccination mandates are involved? This case will give the lower courts and, ultimately, this Court an opportunity to answer that important question.

Applicant Lt. Col. Jonathan Dunn repeatedly put his life on the line to defend his country, flying combat missions over hostile territory during three deployments to Afghanistan. Yet after nearly two decades of faithful service as a pilot, trainer, and commander—and although he has already recovered from a COVID-19 infection—respondents relieved him of his command because of his religious objections to the vaccine. They now seek to reprimand him and send him to the Individual Ready Reserve ("IRR"), where he could not serve in any unit or be eligible for training opportunities.

Applicant does not ask this Court (and did not ask the courts below) to reinstate his command, and the relief sought here would not prevent the Air Force from "considering" his "vaccination status in making deployment, assignment, and other operational decisions." *Austin* v. *U.S. Navy Seals 1–26*, 595 U.S. __, No. 21A477, slip op. 1 (Mar. 25, 2022). The Navy's administrative response to the recent order by the district court in *Austin* granting class-wide preliminary injunctive relief shows the feasibility of compliance with an injunction within the limits this Court prescribed there. And such an injunction would provide applicant meaningful relief. But although applicant's case involves a single officer with natural immunity, rather than

dozens of members of special warfare units, a divided Ninth Circuit panel denied the narrow relief that the Fifth Circuit left in place in *U.S. Navy Seals 1–26* v. *Biden*, 27 F.4th 336 (5th Cir. 2022), and that this Court left in place in *Austin*.

Applicant does not challenge respondents' authority to mandate the COVID-19 vaccine. Nor does he challenge their ability to "consider[his] vaccination status in making deployment, assignment, and other operational decisions." *Austin*, slip op. 1. He seeks only to enjoin respondents from inflicting punishments that deprive him of his First Amendment freedoms and irreparably harm his career, including by categorically precluding him from serving in *any* unit, even where a potential commander may not object to his unvaccinated status.

Applicant should have been granted a preliminary injunction in the district court and an injunction pending appeal in the court of appeals. Now, only a writ of injunction from this Court can prevent respondents from taking further and irreparable actions to destroy his career because of his religious beliefs.

STATEMENT OF THE CASE

A. Factual Background

1. Applicant's service record

Applicant is a Lieutenant Colonel in the United States Air Force Reserve Command who was commissioned in 2003. 3 C.A.E.R. 366-367.[1] In addition to one combat tour flying the B-1B strategic bomber and two combat tours flying MC-12W reconnaissance aircraft in missions over Afghanistan, he has served as an instructor

[1] Citations to the Excerpts of Record below (C.A. ECF 20–3) are listed as [vol] C.A.E.R. [page]. Citations to the Ninth Circuit's docket are listed as C.A. ECF [document number].

in the T-6 primary trainer and as an evaluator for the MC-12W Tactical Intelligence Surveillance and Reconnaissance aircraft. *Id.* at 367. Applicant left active duty for the Air Force Reserve in 2014, where he has participated in numerous real-world joint planning operations and combatant command-level exercises. *Ibid.* He took command of the 452d Contingency Response Squadron on August 21, 2021, and—as of now—is on track to qualify for a military pension in just over 12 months. *Ibid.*

Applicant earned 100% on his Air Force Physical Fitness Test in November 2021 and has no preexisting medical conditions associated with adverse outcomes from COVID-19. *Ibid.* Indeed, he already had the disease without complications. He tested positive for COVID-19 in summer 2021, experiencing symptoms typical of the Delta variant—fever, headache, loss of taste and smell—which lasted for a few days and did not require any treatment. *Id.* at 367-368. Since then, a COVID-19 antigen test confirmed the presence of antibodies. *Id.* at 368.

2. Respondents' policies and vaccine mandate

Consistent with RFRA and the First Amendment, respondents' policies and regulations require individualized assessment of religious accommodation requests, placing the burden on the government to demonstrate that a denial furthers a compelling interest and uses the least restrictive means to do so. See 3 C.A.E.R. 430-466, 480-481, 497-505. In particular, the "Air Force will approve an individual request for accommodation unless the request would have a real (not theoretical) adverse impact on military readiness, unit cohesion, good order, discipline, or public health and safety." *Id.* at 502. "Using the least restrictive means necessary may

include partial approval, approval with specified conditions, or other means that are less burdensome on the member's religious beliefs." *Id.* at 432.

On August 24, 2021, respondent Austin ordered vaccination of all active-duty and reserve service members against COVID-19. 3 C.A.E.R. 399-400. Under that order, service members who have contracted and recovered from COVID-19 must be vaccinated, but service members participating in a COVID-19 clinical trial are exempted. *Id.* at 399. Respondent Kendall then required airmen in the Ready Reserve to "be fully vaccinated by 2 December 2021." *Id.* at 424. He later directed that a "service member will have five (5) calendar days from notice of denial [of an appeal] to begin the COVID-19 vaccination regimen." *Id.* at 471.

3. Applicant's request for a religious exemption and respondents' response

Although applicant has received many vaccines, he has a religious objection to receiving the COVID-19 vaccine. 3 C.A.E.R. 368. Because government leaders have described the vaccine as a moral obligation and have relegated the unvaccinated to lower social status with reduced civil rights, he believes this particular vaccine has taken on a "symbolic" and "sacramental quality." *Ibid.* That makes COVID-19 vaccination a religious ritual required as a condition of participating fully in civil society—like ancient Roman laws requiring sacrifices to Caesar, or Nebuchadnezzar's "edict requiring worship of the golden statue" (see *Daniel* 3:1-30). 3 C.A.E.R. 368. Cf. *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 628-629 (1943) (Jehovah's Witnesses viewed the Pledge of Allegiance as a form of idolatry). As in the past,

today's government officials threaten severe punishments for those who refuse to participate. 3 C.A.E.R. 368

After much prayer, applicant concluded that he "cannot participate in such a religious ritual"—and thus cannot take the vaccine—because, as a Christian, he "must render worship to God only." *Ibid.* On September 11, 2021, applicant notified his commanding officer that he intended to seek a religious exemption. *Id.* at 368-369. The base's chaplain interviewed applicant and concluded that his exemption request was "an individual expression of his sincerely-held beliefs founded on a matter of religious conviction, conscience, and moral principle." *Id.* at 372.

Applicant's formal request for a religious exemption nonetheless was denied on November 16, 2021, *id.* at 381, as was his appeal to the Surgeon General of the Air Force on February 8, 2022. 2 C.A.E.R. 73; 3 C.A.E.R. 389. After the appeal was denied, applicant was ordered to indicate within five days whether he would "(1) receive the COVID-19 vaccine; (2) submit a retirement request, if eligible; or (3) refuse the COVID-19 vaccine in writing." 2 C.A.E.R. 75, 245. He responded: "NUTS!" *Id.* at 91; 3 C.A.E.R. 393.

Applicant discussed his situation with his commander, respondent Haynes. 3 C.A.E.R. 369-370. But Haynes made clear that there would be no relief from punishment. *Id.* at 369-370, 391.

The day after applicant filed this action—and four hours after he moved for a TRO—respondent Haynes relieved applicant from command by telephone. 2 C.A.E.R. 76. Haynes's formal memorandum relieving applicant "for cause" did not describe the basis for the decision. *Id.* at 81. In a declaration below, Haynes stated that he

relieved applicant from command because he lost confidence based on applicant's "conduct and lack of judgment following the denial of his religious accommodation request appeal," specifically by responding, "NUTS!," to the five-day notice and by seeking to obtain a document related to his accommodation request from a junior officer rather than through a FOIA request. *Id.* at 251-252.

As respondent Haynes knew, "NUTS!" echoed Brig. Gen. McAuliffe's famous answer to the Germans demanding that the 101st Airborne surrender at the Battle of the Bulge. *Ibid.* Applicant intended his response to demonstrate resolve, not disrespect. *Id.* at 75-76. He believed it was an appropriate response because he did not believe that any of the three options provided in his five-day notice was tenable. *Id.* at 75. Taking the vaccine would violate his religious beliefs; he is ineligible to retire and desires to continue serving his country; and putting in writing his decision to violate an order would instantly doom his career. *Id.* at 75-76. Applicant hoped his succinct reply would communicate to respondents Pennington and Haynes—both well versed in military history—that the Air Force's ultimatum was unlawful and that they should defend his religious rights. *Ibid.* And the document applicant sought from the 452d Operations Group Executive Officer did not require a FOIA request; applicant asked only for a signed copy of his own religious accommodation request because he could not locate a signed version in his files. *Id.* at 74-75, 83-84.

B. Procedural History

Seeking to protect his federal constitutional and statutory rights, applicant filed this action in the Eastern District of California on February 14, 2022. The district court had jurisdiction under 28 U.S.C. § 1331.

In a February 22 hearing, the district court denied applicant's motion for a preliminary injunction. "[G]iv[ing] great deference to the professional judgment of military authorities," the district court concluded that, "[i]f the military can eliminate almost all risk through this policy," respondents had a compelling interest in refusing a religious exemption to applicant. App. 39a-40a. The court believed that, because applicant is unvaccinated, he is "not medically ready to deploy to certain areas of the world," which raised "a possibility that this could impact both military readiness and the need to adequately deploy." App. 40a.

The district court also concluded that "the government is likely to show that the vaccination is the least restrictive means of achieving a compelling interest." App. 45a. The court "agree[d] with the government that . . . there is a lack of consensus" on whether "natural immunity is effective." App. 42a-43a. The court also found "that it's not always feasible to get the testing done . . . within the time period required" for deployment. App. 43a. As a result, the court held that applicant was not likely to succeed on his RFRA claim. App. 45a.

The district court considered the mandate a neutral law of general applicability, and thus did not apply strict scrutiny to applicant's Free Exercise claim. App. 45a-47a. The court also concluded that the refusal to provide a religious exemption would survive strict scrutiny. App. 47a-48a.

The district court believed that, because applicant might recover backpay, the threatened career harm and disciplinary actions, including discharge, did not amount to irreparable harm. App. 49a. The court again deferred to "military authorities" on the balance of hardships and public interest. App. 49a-50a.

After noticing his appeal to the United States Court of Appeals for the Ninth Circuit and receiving the hearing transcript, applicant moved the district court for a preliminary injunction pending appeal on March 4. The district court denied that motion on March 8, for the reasons stated at the February 22 hearing. App. 2a.

On March 9, applicant moved the court of appeals for an injunction pending appeal, also seeking immediate interim relief. See C.A. ECF 11-1. That court entered interim relief on March 11, C.A. ECF 12, but on April 1 denied the motion for an injunction and vacated the interim relief. App. 1a. Judge Bade dissented. *Ibid.* She would have granted the injunction pending appeal and, in the alternative, would have left the interim relief in place to allow applicant to seek relief from this Court. *Ibid.*

SUMMARY OF ARGUMENT

This case warrants a writ of injunction under the All Writs Act, 28 U.S.C. § 1651(a), to foreclose further irreparable harm while applicant's case is adjudicated. The injunction pending appeal sought here complies with the limits this Court established in *Austin*. Applicant has been removed from command, but he does not seek judicially ordered reinstatement. Nor does applicant seek an order that would prevent the Air Force from "considering" his "vaccination status in making deployment, assignment, and other operational decisions." *Austin*, slip op. 1. Applicant wants only the opportunity to serve that is accorded the thousands of airmen who hold medical or administrative exemptions from the COVID-19 vaccine (and other vaccines). And the Navy's reaction to the injunction entered by the district court in *Austin* makes clear that the military can both suspend the imposition of

adverse consequences for refusing the vaccine, and reassign any servicemember whose unvaccinated status may present an impediment to operations.

Applicant satisfies the standards for injunctive relief in this Court. To begin, he is likely to succeed on the merits on an issue of substantial importance that has divided the courts of appeals, and on which this Court is likely to grant certiorari. Although the Fifth Circuit recognized that relief under RFRA and the Free Exercise Clause is available to a member of the military in applicant's situation (albeit approving overbroad relief), see *U.S. Navy Seals 1–26* v. *Biden*, 27 F.4th 336 (5th Cir. 2022), stayed in part, *Austin*, *supra*, No. 21A477, a divided Ninth Circuit denied *all* relief in this case—even though applicant here is naturally immune and sought relief that is consistent with the limits this Court set in *Austin*.

The Air Force's denial of a religious exemption is subject to strict scrutiny under RFRA because respondents' vaccine mandate substantially and undisputedly burdens applicant's religious exercise. Strict scrutiny also applies under the Free Exercise Clause because the mandate's exemptions render it not generally applicable. Respondents thus bear the burden to show that forcing applicant to get vaccinated is the least restrictive means of serving a compelling government interest.

The district court gave respondents the near-total deference they sought—not only to the Air Force's general interest in military health and readiness, but to respondents' specific decision to deny applicant a religious exemption. Deference so broad would make RFRA a dead letter as applied to the military. Just as a demand for deference is "not enough" to prevail under RFRA's "sister statute," the Religious

Liberty and Institutionalized Persons Act (RLUIPA), *Ramirez* v. *Collier*, 595 U.S. __, No. 21-5592, slip op. 9, 14-15 (Mar. 24, 2022), it is not enough here.

Nor may a RFRA defendant frame its compelling interest at a high level of generality. Instead, the analysis must focus on the particular exemption sought by the particular individual—here, a young, healthy officer who has already recovered from COVID-19. Thousands of secular exemptions show that respondents have no compelling interest in vaccinating one additional officer. Further undercutting respondents' asserted interest in slowing the spread of COVID-19 is growing evidence that the vaccines do not prevent infection or transmission. Yet applicant's natural immunity puts him at minimal risk of illness or transmitting the disease to others.

Nor is forcing applicant either to be vaccinated or leave the Air Force the least restrictive means of furthering respondents' interest. Given the overwhelming data showing that natural immunity is at least on par with vaccine-induced immunity, respondents could allow him to provide an antibody test confirming his natural immunity. Respondents could also allow him to use the protocols that permitted the military to function before vaccines: regular testing, careful hygiene, and continually improving therapeutics. In combination, these alternatives would promote military health and readiness at least as effectively as forced vaccination.

The violation of applicant's religious freedom itself constitutes irreparable harm. In addition, no legal remedies can compensate him for the reputational and career harms he faces. Only prompt action by this Court can forestall those harms, some of which have only begun, but will be completed well before the Ninth Circuit can hear argument, let alone decide applicant's appeal.

Finally, the public interest and balance of hardships tip sharply toward maintaining the status quo. It is always in the public interest to vindicate First Amendment rights. And respondents will not be harmed by an immediate injunction because applicant no longer serves in a unit subject to rapid deployment. Indeed, moving applicant to the IRR will deprive the Nation of the services of a dedicated officer with specialized training.

Applicant served without vaccination for two years after COVID-19 struck the United States. That service should continue while he proves his strong case for a permanent injunction. A writ of injunction pending appeal from this Court or, in the alternative, a writ of certiorari before judgment is therefore warranted.

ARGUMENT

An injunction "pending appellate review" is warranted when the applicant shows that his claims "are likely to prevail, that denying . . . relief would lead to irreparable injury, and that granting relief would not harm the public interest." *Roman Cath. Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 66 (2020) (per curiam) (citing *Winter* v. *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). The otherwise separate balance-of-equities factor merges with the public interest when the government is a defendant. See *Nken* v. *Holder*, 556 U.S. 418, 435 (2009).

A. This Case Presents An Appropriate Vehicle For Further Review By This Court.

Applicant is likely not only to succeed on the merits of his claims but, if necessary, to obtain further review by this Court. A conflict between the circuits is developing on a question where national uniformity is critical.

Applicant here is similarly situated to the plaintiffs in *U.S. Navy Seals* v.

Austin, whose challenge to the Navy's meaningfully identical practice the Fifth Circuit found sufficiently strong to warrant leaving the district court's injunction in place. See 27 F.4th at 349-353. Applicant's case, if anything, is both simpler and stronger. He is one servicemember, rather than 35, and he has natural immunity to COVID-19, which not all the *Seals* plaintiffs have. See *U.S. Navy Seals 1-26* v. *Biden*, __ F. Supp. 3d __, 2022 WL 34443, at *10 (N.D. Tex. Jan. 3, 2022), stay denied, 27 F.4th 336 (5th Cir. Feb. 28, 2022), partial stay granted, *Austin*, *supra*. The Navy has granted far fewer secular exemptions than the Air Force, for a force of nearly the same size. Compare 27 F.4th at 341-342 with pp. 16, 24, *infra*. And applicant is not in a special warfare unit, let alone trying to stay in one. In addition to the likely conflict with *Seals*, the district court in the present case relied on the Ninth Circuit's decision in *Doe* v. *San Diego Unified School District*, 19 F.4th 1173, 1176 (9th Cir. 2021), *reh'g en banc denied,* 22 F.4th 1099 (9th Cir. 2022). As explained below (and in Judge Bumatay's dissent from denial of rehearing en banc, 22 F.4th at 1100-1108), *Doe* conflicts with this Court's Free Exercise precedents.

This Court's review on the merits is likely. And applicant is likely to prevail.

B. Applicant Is Likely To Succeed On The Merits.

1. Applicant is likely to succeed on his RFRA claim

The Government has "concede[d] that" RFRA "applies to the military." *Austin*, dis. op. 4. Respondents' own regulations recognize as much, using the same statutory standards that govern all other federal government conduct. See 3 C.A.E.R. 477-481. Under RFRA, the federal Government may substantially burden "*a person's* exercise of religion" only if it "demonstrates that application of the burden *to the person*—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Burwell* v. *Hobby Lobby*

Stores, Inc., 573 U.S. 682, 705 (2014) (quoting and adding emphasis to 42 U.S.C. § 2000bb-1(a), (b)).

a. Substantial burden is undisputed.

Respondents have not disputed that forced COVID-19 vaccination would substantially burden applicant's religious exercise. 3 C.A.E.R. 373 (chaplain); *id.* at 381 (appeal). Respondents have "[f]orced [him] to choose between violating [his] religious beliefs and the punishment" they have "threatened." *Austin*, dis. op. 3; see *U.S. Navy Seals*, 27 F.4th at 350.

b. Forced vaccination of applicant serves no compelling government interest.

Because RFRA applies and the vaccine would substantially burden applicant's religious beliefs, respondents bear the burden to demonstrate that forcing *him* to be vaccinated furthers a compelling governmental interest using the least restrictive means available. 42 U.S.C. §§ 2000bb-1(b), -2(3). Respondents must go beyond establishing a *general* interest in vaccinating military personnel. They instead must "demonstrate that the compelling interest test is satisfied through application of the . . . law to the . . . particular claimant whose sincere exercise of religion is being substantially burdened." *Burwell,* 573 U.S. at 726. (cleaned up) (quoting *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-431 (2006)).

i. Respondents' arguments are not entitled to uncritical deference.

Respondents persuaded the district court to defer to their judgment "concerning the relative importance of a particular military interest." App. 39a. But RFRA concededly applies to the military, and its text brooks no exceptions. In

addition, Congress indicated that the "courts must review the claims of prisoners and military personnel under the compelling governmental interest test." H.R. Rep. No. 103-88, at 8 (1993); see also S. Rep. No. 103-111, at 12 (1993) (courts "will review the free exercise claims of military personnel under the compelling governmental interest test"). The legislative history notes that the military has a compelling interest in "good order, discipline, and security," and might still receive deference "in effectuating those interests." S. Rep. 103-111, at 12. But "legislative history can never defeat unambiguous statutory text" like RFRA's. *Bostock* v. *Clayton Cnty.*, 140 S. Ct. 1731, 1750 (2020). And this Court has made clear that "RFRA operates as a kind of super statute, displacing the normal operation of other federal laws," *id.* at 1754, which necessarily includes judge-made principles of deference. While some deference to the military's assessments of its own interests is inevitable, see *Austin*, conc. op. 2, "[d]eference, though broad, has its limits." *South Bay United Pentecostal Church* v. *Newsom*, 141 S. Ct. 716, 717 (2021) (Roberts, C.J., concurring).

RFRA's legislative history equated the amount of deference due the military with that due prison authorities. See S. Rep. 103-111, at 9-12; see also H.R. Rep. 103-88, at 8. And, when applying RLUIPA, RFRA's "sister statute," *Ramirez*, slip op. 9, which "mirrors RFRA" in the prison context, this Court in *Holt v. Hobbs* unanimously rejected a similar request for "a degree of deference . . . tantamount to unquestioning acceptance." 574 U.S. 352, 357, 364 (2015). The Court declined to "import[]" deferential reasoning from other contexts because the governing statute, here RFRA, provides "greater protection" for free exercise rights. *Id.* at 361. Instead, the Court applied strict scrutiny and held that the prison's failure to provide a religious

accommodation to the claimant in that case violated the statute. *Id.* at 367-370. *Holt* provides the proper framework for resolving RFRA claims against the military. *E.g.*, *U.S. Navy Seals*, 27 F.4th at 350-352.

Under *Holt* and *Ramirez*, respondents' mere request that Court "defer to their determination" "is not enough" to carry their burden here. *Ramirez*, slip. op. 14-15. In any event, as explained below, there is no reason to believe respondents made a reasoned "determination" as to applicant himself, as RFRA requires.

ii. As indicated by their denying 99.3% of religious accommodation requests, respondents' identified interests are too broad and generic to satisfy RFRA.

Any analysis of respondents' interests must "start[] with a heavy presumption against a . . . law that infringes the constitutional or statutory right in question." *Ramirez*, conc. op. 3 (Kavanaugh, J.). To determine whether respondents have carried their burden, the Court must "look beyond broadly formulated interests," *Burwell*, 573 U.S. at 726 (cleaned up), such as a general interest in having a vaccinated military. Yet that was the justification offered for denying his request, 3 C.A.E.R. 381 ("All immunizations . . . are an important element of mission accomplishment[.]"), and his appeal, *id.* at 389 ("[P]reventing the spread of disease among the force is vital to mission accomplishment.").

To prevail under the statutory requirement to show a compelling interest in "application of the burden *to the person*," *Burwell*, 573 U.S. at 705 (emphasis in original), respondents must articulate a compelling interest in vaccinating a healthy 40-year-old (1) whose prior bout with COVID-19 gave him natural immunity, (2) in

an active duty Force that is more than 98% vaccinated (with the total Force at 96.6%) (3) where roughly 2300 medical and administrative exemptions have been granted as opposed to 35 religious accommodations (all to airmen near separation from the Force), and (4) more than 90,000 airmen have recovered from COVID-19, out of a total active and Reserve force of nearly 400,000. See Sec'y of the Air Force Pub. Affs., *DAF COVID-19 Statistics – Apr. 5 2022* (Apr. 5, 2022), https://tinyurl.com/2z8cfuay ("*DAF COVID-19 Statistics*"). And that asserted interest must withstand scrutiny even though (5) respondents admit that the required vaccines do not prevent either infection or transmission, 2 C.A.E.R. 116, and (6) the dominant strain of COVID-19 produces mild cold-like symptoms in the vast majority of healthy individuals. Put simply, respondents must show that accommodating applicant's "religious-based refusal to take a COVID-19 vaccine" is "going to halt a nearly fully vaccinated Air Force's mission to provide a ready national defense." *Air Force Officer* v. *Austin*, __ F. Supp. 3d ___, 2022 WL 468799, at *12 (M.D. Ga. Feb. 15, 2022).

Respondents cannot carry their burden under the necessary "case-specific consideration of the particular circumstances and claims." *Ramirez*, slip op. 21. Although respondents have maintained that applicant was denied an accommodation based on his particular job duties, the record does not support that claim. As other courts have recognized, "the Air Force is systematically denying religious exemptions," *Poffenbarger* v. *Kendall*, __ F. Supp. 3d __, 2022 WL 594810, at *13 (S.D. Ohio Feb. 28, 2022), using an "illusory and insincere" process, *ibid.* (quoting *Air Force Officer*, 2022 WL 468799, at *10), and (as the 100:1 grant ratio indicates) "there has been a double standard between" secular "and religious accommodation requests,"

ibid. In short, the Air Force's system, like the Navy's, is "largely 'theater' designed to result in the denial of almost all requests" *Austin*, dis. op. 2 (quoting *U.S. Navy Seals 1-26* v. *Biden*, 2022 WL 34443, at *1).

The Air Force's public statistics confirm that it systematically disfavors religious accommodations. Only 32 of 4866 requests for religious exemption have been granted, and only 3 of 1,505 appeals have succeeded. *DAF COVID-19 Statistics*, *supra*. That is a 99.3% rejection rate with an affirmance rate of 99.8% on appeal. And the Air Force respondents effectively conceded in another case that the few religious exemptions "were only given to members who were at the end of their terms of service with the military." *Poffenbarger*, 2022 WL 594810, at *13 n.6. That is, the Air Force has granted *no* exemptions to service members who want to continue serving without being vaccinated. At best, this is rubber-stamp adjudication, not the kind of individualized assessment that RFRA requires.

Further undercutting respondents' efforts to root their denial of an accommodation (and later adverse actions) in applicant's particular circumstances, they have not shown that any members of applicant's former unit are especially susceptible to COVID-19, or even unvaccinated. See 2 C.A.E.R. 311 (noting Air Force policy to "mitigate[]" risk from secular exemptions "by maximizing the number of people around the service member that are vaccinated"). Respondents cannot explain how—although applicant's presence did not impede military operations when no airmen were vaccinated and fewer had natural immunity—grave impairment would now result to a force with a 98% vaccination rate and natural immunity rate of 20% or better. And respondents admit that all unvaccinated airmen, regardless of their

current post, will be placed on Individual Ready Reserve where they cannot command any unit. App. 34a; 2 C.A.E.R. 108; 3 C.A.E.R. 329, 335. Accordingly, both the denial of applicant's exemption request and relief from command were inevitable the moment he refused to take the vaccine.

For good reason, a district court rejected the Navy's use of a supposed "loss of confidence" to justify its "sudden eagerness to remove . . . from command" an officer who had declined vaccination on religious grounds, after "tense exchanges with his superior officer about vaccination and about his RFRA claim." *Navy Seal 1* v. *Austin*, __ F. Supp. 3d __, 2022 WL 710321, at *1, *5 (M.D. Fla. Mar. 2, 2022). There, as here, respondents' actions reflect "retaliatory animus toward" applicant's "legally protected pursuit" of RFRA relief, *id.* at *1, not the individualized analysis that RFRA requires.

iii. Respondents did not and cannot tie any legitimate compelling interest to the "particular claimant" here.

Moreover, as the district court observed, the exemption denial appeared to be a form letter, App. 21a-22a, further demonstrating that respondents did not individually assess applicant's request. Respondents reinforced that impression at the hearing. When asked about applicant's natural immunity to COVID-19, respondents admitted they did not know "what variant plaintiff had," "how many antibodies he has," "what level of antibodies is even necessary to give someone immunity," or "what his level of protection might be against a reinfection." App. 27a.

Yet any consideration of applicant as a "particular claimant," *Burwell*, 573 U.S. at 726, would have to take into account his "physical characteristics," *Austin*, dis. op. 6, including his natural immunity. Nothing in the record suggests that respondents

undertook RFRA's "more focused inquiry," *Burwell*, 573 U.S. at 726 (cleaned up), into whether they had a compelling interest in vaccinating airmen who have recovered from COVID-19, let alone applicant himself. The record evidence shows that they do not. Although available vaccines provide some protection against serious illness and death, respondents cannot claim a compelling interest in vaccinating applicant for his own sake because his natural immunity provides equivalent protection.

For the special purpose of litigating their COVID-19 vaccine policy, respondents shut their eyes to the existence and protections of natural immunity. But the Third Circuit has recognized that a person "[p]rotected by natural immunity" cannot show that "continued exposure to COVID-19 still puts him at imminent risk of serious physical injury." *Garrett* v. *Murphy*, 17 F.4th 419, 433 (3d Cir. 2021) (citing multiple studies). Indeed, "[t]here is no scientific dispute that natural immunity exposes the human body to the entire virus and not just the spike protein used by the COVID-19 vaccines to mitigate symptoms[.]" *Halgren* v. *City of Naperville*, __ F. Supp. 3d __, 2021 WL 5998583, at *29 (N.D. Ill. Dec. 19, 2021). The whole point of vaccines is to "trigger the same biological mechanism of natural immunity." *Ibid.*

But when COVID-19 is involved, basic science and common knowledge fall by the wayside—as do respondents' contrary policies toward natural immunity and other vaccines. For example, one directive in their general vaccine policy requires responsible officers to "[e]nsure patients are evaluated for preexisting immunity, screened for administrative and medical exemptions, and/or evaluated for the need for medical exemptions to immunizations or chemoprophylaxis medications," 2 C.A.E.R. 171 ¶ 1–4(c)(4). The same document identifies as a basis for an exemption

"[e]vidence of immunity based on serologic tests, documented infection, or similar circumstances." *Id*. at 176 ¶ 2–6(a)(1)(*b*). The military even has a code for exemptions based on medical immunity—"MI," for "Medical, immune"—exemptions that can be "[i]ndefinite," and that can be based on evidence including a "serologic antibody test" like the one that confirmed applicant's natural immunity. *Id.* at 198, Table C–1. See also *id.* at 176 ¶ 2–6(a) (noting that medical exemptions can be permanent).

Respondents claim that the data regarding immunity are inconclusive, but inconclusive data cannot carry a burden that respondents bear. And the data in fact weigh heavily the other way. As Drs. Jayanta Bhattacharya (Stanford) and Martin Kulldorff (Harvard) have explained, "[m]ultiple extensive, peer-reviewed studies" now "overwhelmingly conclude that natural immunity provides equivalent or greater protection against severe infection than immunity generated by mRNA vaccines (Pfizer and Moderna)." 3 C.A.E.R. 533; see also *id.* at 532-536 & nn. 11-21; see also Brief of Drs. Jay Bhattacharya and R. Scott French as *Amici Curiae* in Support of Petitioners at 20-21, *Dr. A.* v. *Hochul*, No. 21-1143 (filed Mar. 17, 2022) ("[T]he clear weight of scientific evidence confirm[s] that natural immunity is at least as good as, if not superior to, vaccine-based immunity."); see also *id.* at 21-27 (collecting studies). A peer-reviewed "pooled analysis of clinical studies" published on the NIH's website similarly reported that "[a]ll of the included studies found at least statistical equivalence between the protection of full vaccination and natural immunity; and three studies found superiority of natural immunity."[2] Moreover, a CDC analysis of

[2] Mahesh B. Shenai, Ralph Rahme, and Hooman Noorchashm, *Equivalency of Protection From Natural Immunity in COVID-19 Recovered Versus Fully Vaccinated Persons: A Systematic Review and Pooled Analysis*, NCBI (Oct. 28, 2021), https://tinyurl.com/2p838c7a ; see also 3 C.A.E.R. 532-535 (collecting studies).

"recent international studies" concluded that, as early as October 2021, previous infection conferred "increased protection" compared "to vaccination alone," while also protecting "against severe outcomes in the event of reinfection."[3]

In the court of appeals (C.A. ECF 13, at 16), respondents deleted the last three words from the CDC's FAQ regarding vaccination for those with natural immunity: "People who already had COVID-19 and do not get vaccinated after their recovery are more likely to get COVID-19 again than those who get vaccinated *after their recovery*."[4] The deletion changed the meaning of the sentence to suggest that natural immunity is not sufficient. As those last three words make clear, however, the CDC claims only that there is some slight increase in protection for those *with natural immunity* who also vaccinate over those with natural immunity alone—not, as respondents have suggested, that the vaccinated have greater resistance to disease than those with natural immunity, which is the pertinent issue here.[5]

In any event, the only supporting data offered in the quoted FAQ section is a study published in August 2021,[6] long before the recent CDC studies concluding that natural immunity provides better protection than vaccination.[7]

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[3] Tomás M. León, et al., *COVID-19 Cases and Hospitalizations by COVID-19 Vaccination Status and Previous COVID-19 Diagnosis—California and New York, May-November 2021*, CDC (Jan. 28, 2022), https://tinyurl.com/2786wzun.

[4] CDC, *Frequently Asked Questions about COVID-19 Vaccination* (updated Apr. 7, 2022), https://go.usa.gov/xzUSk (emphasis added).

[5] Those who already had COVID-19 but nonetheless receive the COVID-19 vaccine are also at greater risk of side effects. 3 C.A.E.R. 554-555.

[6] CDC, *Frequently Asked Questions, supra* note 4 (data obtained by clicking the hyperlink on the words "more likely to get COVID-19 again" in the text under the question "If I already had COVID-19 and recovered, do I still need to get a COVID-19 vaccine?").

[7] *See* Tomás León, *supra* note 3, https://tinyurl.com/2786wzun; *Navy Seal 1* v. *Austin*, __ F. Supp. 3d __, 2022 WL 534459, at *16 n.10 (M.D. Fla. Feb. 18, 2022) (citing León study).

Tellingly, neither respondents nor the CDC documents they cite have suggested any differential in serious (or even symptomatic) COVID-19 illness between persons with natural immunity and persons who are vaccinated, much less between those with natural immunity who are vaccinated and those with natural immunity who are not. With a mismatch between their assertions and their support, respondents cannot carry their burden here.

iv. The military's track record refutes any compelling interest in a 100% vaccinated force.

Nor have respondents established a compelling interest in a 100% vaccinated force. Applicant has ably discharged his duties throughout the two years of the pandemic, including the 18 months before respondents imposed a vaccine mandate. His service has continued through a parade of variants, including the variant from which he recovered. Clearly, he can serve his country without being vaccinated.

In addition, COVID-19 does not present a significant risk to the Air Force's ability to operate. Although the Air Force has recorded 92,924 COVID-19 cases over the past two years, only 53 resulted in hospitalization, with 15 deaths. *DAF COVID-19 Statistics*, *supra*. As a point of comparison, more than 100 airmen committed suicide in 2019 alone. See Stephen Losey, *Air Force deaths by suicide spiked by one-third in 2019*, A.F. Times (Jan. 31, 2020), https://tinyurl.com/5n646fvv. With few isolated exceptions, military operations have been uninterrupted. See *U.S. Navy Seals*, 2022 WL 34443, at *10.

Respondents have suggested that not all airmen are young and healthy, yet their own statistics show that, among airmen, well under one COVID-19 case in a

thousand has required hospitalization—including cases before vaccines were available. *DAF COVID-19 Statistics*, *supra*. Compared even to civilian Air Force employees, airmen's overall resistance to serious COVID-19 is striking: airmen are hospitalized less than half as often, and their death rate (16 thousandths of one percent) is less than one-*thirtieth* the death rate for civilian employees. *Ibid.* See also 2 C.A.E.R. 267 (showing analogous comparative rates throughout military).

With 98% of the Air Force now vaccinated, it is extremely unlikely that applicant would be in sustained close contact with an unvaccinated airman, let alone one who also lacked natural immunity. And it is still less likely that applicant or any member of his unit who happened to suffer a breakthrough infection would become seriously ill or require hospitalization.

In addition, it is now clear that vaccinated individuals can both contract and transmit COVID-19. See *BST Holdings, LLC* v. *OSHA*, 17 F.4th 604, 616 n.19 (5th Cir. 2021).[8] Respondents have no compelling interest in forcing 100% vaccination to prevent transmission of COVID-19 when the vaccines do not work for that purpose.

[8] See also CDC, *Omicron Variant: What You Need to Know* (updated Mar. 29, 2022), https://tinyurl.com/44udfzw5 ("[A]nyone with Omicron infection, regardless of vaccination status or whether or not they have symptoms, can spread the virus to others."); Eric Sykes, *CDC Director: Covid vaccines can't prevent transmission anymore*, MSN (Jan. 10, 2022), https://tinyurl.com/uu3h9bs4; Shirley Collie, et al., *Effectiveness of BNT162b2 Vaccine against Omicron Variant in South Africa*, New Eng. J. Med. (Feb. 3, 2022), https://tinyurl.com/jkuc988f (reporting that "omicron was shown to escape antibody neutralization by the BNT162b2 messenger RNA vaccine (Pfizer-BioNTech)," but that "during the proxy omicron period, we saw a maintenance of effectiveness of the BNT 162b2 vaccine (albeit at a reduced level) against hospital admission for COVID-19 . . . as compared with the rate associated with the delta variant earlier in the year"); Elie Dolgin, *Omicron thwarts some of the world's most-used COVID vaccines*, Nature (Jan. 13, 2022), https://tinyurl.com/2p9h4z9f .

v. The underinclusiveness of respondents' vaccine mandate further demonstrates that their interest here is not compelling.

In any event, the government "does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 803 n.9 (2011). And respondents' willingness to grant medical and administrative exemptions confirms that they have no compelling interest in achieving 100 percent vaccination. See 3 C.A.E.R. 509. As of April 5, the Air Force had in effect 1045 medical exemptions and 1275 administrative exemptions. *DAF COVID-19 Statistics*, *supra*. Such underinclusiveness shows that "the interest given in justification of the restriction is not compelling." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 546-547 (1993); see *Holt*, 574 U.S. at 367.

Respondents have contended that the medical exemptions further their interest in military readiness because those with adverse reactions to the vaccines would be rendered undeployable if forced to take the vaccine. But that argument is a red herring: The Air Force Respondents admitted in *Poffenbarger* that medical exemptions are "overwhelmingly pregnancy"-related, not based on medical contraindications to the vaccine. Transcript, *Poffenbarger v. Kendall*, No. 3:22-cv-00001, ECF 33, at 67:2-5 (S.D. Ohio Feb. 22, 2022); see also 2 C.A.E.R. 106 (acknowledging that pregnancy is a basis for a medical exemption). If unvaccinated airmen with contraindications are deployable, and unvaccinated pregnant service members can serve for nine months, without harming a compelling interest, applicant can serve.

vi. Applicant can perform his duties without receiving the vaccine.

Respondents also tried to justify their denial on the ground that applicant needs to be able to deploy quickly. 2 C.A.E.R. 113-114; see App. 19a-20a. Respondents mooted that justification by removing applicant from command.[9] Moreover, to justify the denial, respondents have relied on sustained speculation through a series of unlikely events: that applicant might be deployed on short notice, might become infected with COVID-19 just before or during deployment, possibly resulting in severe illness, possibly without antivirals or other treatments on hand, possibly making him unable to perform his duties, and possibly infecting enough other (98% vaccinated) airmen to require emergency evacuation of sick airmen, thereby rendering his unit unable to achieve its mission. See 2 C.A.E.R. 114-115.

But it is not "enough for the Government to posit that sending" applicant "on such a mission *might* produce such consequences," *Austin*, dis op. 6 (emphasis in original), and each event is unlikelier than the last. First, applicant's natural immunity makes it unlikely that he will become infected with COVID-19 at all, see 3 C.A.E.R. 532-35, let alone at a critical time for deployment. Second, given his youth and health, any new infection is much less likely to disable him. *Ibid.* Third, oral antivirals—which can be taken without access to medical facilities—should be available to a deployed unit, especially because vaccinated airmen can contract COVID-19. See *Seals*, 2022 WL 34443, at *10.[10] Fourth, applicant's immunity and

[9] Since applicant is no longer assigned to the 452d Contingency Response Squadron—and is not asking this Court to reinstate him—he no longer needs to be available for immediate deployment.

[10] See FDA, *Coronavirus (COVID-19) Update: FDA Authorizes First Oral Antiviral for Treatment of COVID-19* (Dec. 22, 2021), https://tinyurl.com/25r3p7n2; FDA, *Coronavirus (COVID-19)*

the Air Force's 98% vaccination rate make infection of other members of his unit unlikely. Fifth, it is still less likely that a vaccinated or naturally immune member of his unit would experience more than mild symptoms, much less require hospitalization or evacuation. And sixth, the military's track record before the vaccine mandate makes it far-fetched that the unit would fail to complete its mission. This compound "conjecture" and "speculation" cannot carry respondents' burden. *Ramirez*, slip op. 15 (citing *Fulton* v. *Philadelphia*, 141 S. Ct. 1868, 1882 (2021)).

Indeed, thousands of asymptomatic service members have deployed and served domestically over the past two years. See *Seals*, 37 F.4th at 351-352. And that was before the Air Force achieved its 98% vaccination rate. The Navy treats unvaccinated persons with medical exemptions as "deployable," *Austin*, dis. op. 9, and thousands of exempt Air Force members are carrying out their duties unvaccinated. Not every deployed service member who tests positive but is asymptomatic—or has the mild symptoms characteristic of infection in those with natural immunity or vaccination—would have to be recalled stateside to quarantine.

Moreover, respondents' stated fear (App. 19a-20a) that applicant would pose a grave risk to his team suggests that they do not believe that the required vaccinations are effective in preventing transmission. That further indicates that less restrictive measures in combination sufficiently serve respondents' asserted interests.

Further, while respondents maintain that applicant could not be deployed to countries that require vaccination but reject natural immunity, those restrictions are

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Update: FDA Authorizes Additional Oral Antiviral for Treatment of COVID-19 in Certain Adults (Dec. 23, 2021), https://tinyurl.com/j6badvmz.

becoming less common as time goes on and case counts subside.[11] In addition, any such restrictions would be subject to a Status of Forces Agreement; those agreements are negotiated and renegotiated as conditions change. See generally U.S. Dep't of State, Int'l Sec. Advisory Bd., *Report on Status of Forces Agreements* (Jan. 16, 2015), https://tinyurl.com/2ptcs32m. Those agreements cover a variety of criminal, civil and regulatory requirements such as "special entry and exit arrangements," "driving and other licenses," and "applicability of local labor and environmental laws." *Id.* at 20. The United States could and should ensure religious protections for the service members it deploys. *Id.* at 8 ("The United States has leverage in SOFA negotiations, and should be prepared to use it."). The speculation that applicant would be deployed to a country where his rights could not be protected at most would provide a reason to assign him to a different unit, not to drum him out of the Air Force.

Respondents also have contended that applicant must be vaccinated to prevent an "outbreak at March Air Force Base." 2 C.A.E.R. 115. This speculation underscores respondents' lack of confidence in the mandated vaccines to prevent infection or minimize symptoms for the 98% of airmen who are vaccinated. Moreover, the risk of getting infected off base, where reservists spend the vast majority of their time, far exceeds any risk they face from applicant on base. See 3 C.A.E.R. 355-356; see also *Seals*, 37 F.4th at 351 n.19.

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[11] See Elise Schoening & Lizzie Wilcox, *The Latest Updates on International Gathering and Travel Restrictions*, Northstar Meetings Grp. (Apr. 4, 2022), https://tinyurl.com/472h2ud7 (showing countries such as Switzerland, Israel, Japan, Vietnam, and many others easing travel restrictions).

In short, looking beyond respondents' "broadly formulated interests" to their "marginal interest" in vaccinating *applicant* despite his natural immunity, the claimed interest is not compelling. *Burwell*, 573 U.S. at 726-727.

c. Forcing applicant to take the vaccine is not the least restrictive means of advancing respondents' claimed interest.

In any event, respondents' interest in further protecting (and protecting others from) a young airman with natural immunity can be furthered by less restrictive means. And respondents "bear the burden of showing that mandatory vaccination is the least restrictive means of furthering the interest it asserts in light of the present nature of the pandemic, what is known about the spread of the virus and the effectiveness of the vaccines, prevalent practices, and the physical characteristics of" the applicant. *Austin*, dis. op. 6; see *Ramirez*, slip op. 17-18.

One less restrictive alternative is to treat applicant and others with acquired natural immunity the same as the fully vaccinated. Air Force regulations recognize that "evidence of immunity (for example, by serologic antibody test)" and "documented previous infection" can provide a basis for a medical exemption to other vaccines. 3 C.A.E.R. 570. But respondents have departed from those principles here, *id.* at 399-400, 424, contending instead that accepting proof of prior immunity does not sufficiently further their interests. See 2 C.A.E.R. 119.

Though respondents claim they cannot quantify how much protection natural immunity affords, they likewise cannot quantify the incremental protection, if any, afforded by the vaccine. That failure strongly suggests that the less restrictive means of relying on natural immunity, protective conduct measures, and antiviral

treatments would sufficiently serve respondents' interest, just as treatments adequately serve the government's interest in reducing the severity of other diseases. Because even "the European Union (among other authorities) considers proof of recovery from infection as the functional equivalent to vaccination," *Halgren*, 2021 WL 5998583, at *30, respondents' "rejection of natural immunity as an alternative is puzzling," *Louisiana* v. *Becerra*, __ F. Supp. 3d __, 2021 WL 5609846, at *13 (W.D. La. Nov. 30, 2021).

Moreover, other "precautions that suffice for" those with medical exemptions—such as testing, masking, and social distancing—"suffice for religious exercise too." *Tandon* v. *Newsom*, 141 S. Ct. 1294, 1297 (2021). Assuming the vaccine impedes transmission, distancing and testing—measures the military implemented effectively for the first eighteen months of the pandemic—would sufficiently reduce transmission to vaccinated colleagues. The Navy even now allows testing for those in its ranks that are unvaccinated.[12] Indeed, because the vaccine has proven ineffective in preventing transmission, respondents have no interest in insisting upon vaccination for that purpose.[13] For that reason, the less restrictive alternatives that respondents used for the first eighteen months are sufficiently effective at stopping the spread of COVID-19 where religious exercise or natural immunity is at issue.

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[12] U.S. Navy, *NAVADMIN 07/22, U.S. Navy COVID-19 Standardized Operational Guidance 5.0*, https://tinyurl.com/2f4a2ceu ("Unvaccinated personnel"—which the Navy explains earlier are those "with an approved waiver" and "those awaiting waiver disposition"—"shall follow the testing requirements.").

[13] CDC, *Omicron Variant: What You Need to Know* (updated Mar. 29, 2022), https://tinyurl.com/44udfzw5 ("CDC expects that anyone with Omicron infection, regardless of vaccination status . . . can spread the virus to others."); *ibid.* ("[B]reakthrough infections in people who are vaccinated can occur.").

Less restrictive measures—such as requiring a negative test before reporting for duty—are especially appropriate for a reservist like applicant who is on base one weekend a month and two weeks a year unless deployed. Respondents do not dispute that testing could eliminate any risk that applicant might infect others on base, but contend that "[t]esting prior to deployment is not an effective alternative to vaccination." 2 C.A.E.R. 121. Yet rapid antigen tests are effective for that purpose.[14]

Nor would a positive test necessarily render applicant unable to accompany any unit he might join; millions of asymptomatic people have continued to work throughout the pandemic. Unless applicant were severely ill, he could perform his duties with a few added precautions, such as wearing an N95 mask and face shield when indoors and social distancing when possible.[15] Respondent's own witness testified that masks could extend the time needed in close contact to transmit an effective dose of the virus up to six hours. See 3 C.A.E.R. 347-348. Improving COVID-19 treatments further reduce the risk.[16]

The question is not whether any mitigation measure is sufficient when considered alone, but whether less restrictive measures in combination sufficiently further the government's asserted interests in health and readiness. The Air Force's track record during the pandemic shows that they do.

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[14] See FDA, *Coronavirus (COVID-19) Update: FDA Authorizes Additional OTC Home Test to Increase Access to Rapid Testing for Consumers* (Oct. 4, 2021), https://tinyurl.com/mr3v5d7c.

[15] See CDC, *Types of Masks and Respirators—Summary of Recent Changes* (updated Jan. 28, 2022), https://tinyurl.com/re3kh6h7 ("Masks and respirators are effective at reducing transmission of SARS-CoV-2 . . . when worn consistently and correctly").

[16] FDA, *Coronavirus (COVID-19) Update: FDA Authorizes New Monocolonal Antibody for Treatment of COVID-19 that Retains Activity Against Omicron Variant* (Feb 11, 2022), https://tinyurl.com/y9fmn5v7; U.S. Dep't of Health & Human Servs., *Possible Treatment Options for COVID-19*, https://tinyurl.com/39weytea; FDA, *Know Your Treatment Options for COVID-19*, https://tinyurl.com/2p9bx9kj.

Under strict scrutiny, the curtailment of protected rights "must be actually necessary to the solution." *Brown*, 564 U.S. at 799. Otherwise the curtailment cannot satisfy RFRA's "exceptionally demanding" least-restrictive-means standard. *Burwell,* 573 U.S. at 728-732 (citing 42 U.S.C. § 2000bb-1(b)(1)). Respondents' imposition of their vaccine mandate on applicant "in these circumstances doesn't just fail the least restrictive means test, it borders on the irrational." *Does 1-3 v. Mills*, 142 S. Ct. 17, 22 (2021) (Gorsuch, J., dissenting from denial of application for injunctive relief).

2. Applicant's First Amendment Free Exercise claim is also likely to succeed.

Respondents' vaccine mandates also trigger strict scrutiny under the Free Exercise Clause because they are not neutral and generally applicable. See *Employment Division* v. *Smith*, 494 U.S. 872, 879 (1990).

First, the mandates provide "a mechanism for individualized exemptions" that "invites the government to consider the particular reasons for a person's conduct." *Fulton*, 141 S. Ct. at 1877 (cleaned up). "[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason." *Ibid.* (cleaned up).

Second, respondents have granted thousands of medical exemptions (mostly due to pregnancy), 3 C.A.E.R. 509, yet allow unvaccinated pregnant women and others to serve. Thus, respondents "prohibit[] religious conduct" (abstaining from a vaccine due to religious convictions) "while permitting secular conduct" (abstaining

for medical or administrative reasons) "that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877; see 3 C.A.E.R. 399-400, 424.[17]

Third, the mandates treat "comparable secular activity"—not receiving the vaccine for medical or administrative reasons—more favorably than not receiving it for religious reasons. *Tandon*, 141 S. Ct. at 1296. "Comparability is concerned with the risks various activities pose, not the reasons why" people engage in them. *Ibid.* "[P]recautions that suffice for" those with medical exemptions—such as testing, masking, social distancing—"suffice for religious exercise too." *Id.* at 1297.

Moreover, the district court departed from this Court's precedents in concluding (App. 46a-47a) that *Doe* v. *San Diego Unified School District*, 19 F.4th 1173, 1176 (9th Cir. 2021), reh'g en banc denied, 22 F.4th 1099 (9th Cir. 2022), precludes strict scrutiny. In that case, the Ninth Circuit held that a school district's COVID-19 vaccination requirement was generally applicable even though the district exempted students with medical contraindications but not religious objectors, was generally applicable. *Id.* at 1176. Yet a person who is unvaccinated for medical reasons is as likely to spread COVID-19 as one who is unvaccinated for religious reasons. As Judge Bumatay explained for seven judges, this Court's precedents show that such mandates are not generally applicable. See 22 F.4th at 1100-1108 (Bumatay, J., dissenting from denial of rehearing en banc). See also *Does 1–3* v. *Mills*, 142 S. Ct. at 20 (Gorsuch, J., dissenting). When persons unvaccinated for religious

[17] It is no answer to say that medical exemptions are temporary because the risk posed by a person while medically exempt from vaccination is no different from the risk posed by a person with a religious exemption. "Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied." *Tandon*, 141 S. Ct. at 1297. "Otherwise, precautions that suffice for other activities suffice for religious exercise too." *Ibid.*

reasons cannot serve at all, but those not vaccinated for secular reasons may remain at their posts, there is no neutrality under *Tandon* or *Roman Catholic Diocese*.

Accordingly, strict scrutiny applies, and respondents cannot carry their burden for the constitutional claim any more than for the statutory one.

C. Applicant Will Be Irreparably Harmed If Relief Is Denied.

1. Applicant is irreparably harmed by the loss of his protected religious freedom.

Respondents' denial of an exemption, and the continuing and threatened discipline that have followed, have irreparably harmed applicant. As this Court has previously held, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable harm." *Roman Cath. Diocese*, 141 S. Ct. at 67 (quoting *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) (plurality op.)). The loss of statutory religious freedoms is equally irreparable. See *Ramirez*, slip op. 18.

Respondents contended below that *Sampson* v. *Murray*, 415 U.S. 61 (1974), imposes a higher-than-usual standard of irreparable harm in the military context. But *Sampson* merely responded to the court of appeals' suggestion that a district court could issue an injunction without a finding "that there was actually irreparable injury." *Id.* at 88. *Winter* has since made clear that a showing of actual irreparable harm is necessary in every case.

The harm from the denial of accommodation here is actual, and no less real because it "is spiritual rather than pecuniary." *Ramirez*, slip op. 19. And it is exacerbated by respondents' active coercion to force applicant to abandon either his military career or his religious convictions. If applicant "acquiesces to [the vaccine]

mandate despite his faith," he won't "lose any pay. But he will have to wrestle with self-doubt—questioning whether he has lived up to the calling of his faith." *Sambrano* v. *United Airlines, Inc.*, 19 F.4th 839, 842 (5th Cir. 2021) (Ho, J., dissenting)). On the other hand, if he continues to follow his faith and refuse the vaccine, he must also "wrestle with self-doubt" as his distinguished military career is sidetracked and soon ended. *Ibid.*

2. Applicant's military career and reputation face continuing irreparable harm.

In addition, the harm to applicant's career and reputation from discharge, placement on the IRR, or other discipline if this Court does not act would be irreversible. 3 C.A.E.R. 366. Respondents indicated that they intend to place applicant on "no points/no pay" status, which will prevent him from participating in military service while he is processed to the IRR. 2 C.A.E.R. 108-111. And while this appeal was pending, they carried out that threat. C.A. ECF 14-2. The process was paused while the court of appeals' interim relief was in effect, but that relief has been vacated. Without relief from this Court, applicant will likely be processed to the IRR within weeks—yet briefing in the Ninth Circuit is not set to finish until May 12, with argument and decision unlikely for weeks, if not months, after that.

Even if applicant is later reinstated, time on IRR would inflict harm beyond the loss of income because he is up for promotion in October; any gap in service would severely undermine his chances for advancement even if he is reinstated before his review board. See 2 C.A.E.R. 77-78; C.A. ECF 14-2, at 1-2. "No points/no pay" status also keeps him from Temporary Duty Assignments (TDY), irretrievably depriving

him of valuable experience. 2 C.A.E.R. 78. Training and drill exercises build rapport between applicant and his fellow servicemen, prepare him for more advanced roles within the Air Force, and ready him for future combat. No amount of backpay, reinstatement, or other legal remedy can provide a retroactive substitute. That loss of training opportunities constitutes additional irreparable harm. Respondents' further contemplated actions (C.A.ECF 14-2, at 1-2) will further and irreparably damage his reputation and career.

D. The Balance Of Equities And Public Interest Favor An Injunction.

Both the balance of the equities and the public interest—which merge here, *Nken*, 556 U.S. at 435—strongly support relief. There is always a public interest in enforcing constitutional protections: "[E]ven in a pandemic, the Constitution cannot be put away and forgotten." *Roman Cath. Diocese*, 141 S. Ct. at 68. Moreover, the district court failed to consider the public interest in retaining a former squadron commander with 18 years' experience. The Air Force faces at most a trivial prospect of injury from permitting applicant's continued service, especially while it permits thousands of unvaccinated airmen to serve under medical exemptions. Any broader public interest in maximum vaccination rates has diminished given COVID's retreat across the world and the dominance of the milder Omicron variant. See CDC, *COVID Data Tracker*, https://tinyurl.com/2p8unxsm.

What is more, respondents' hardships are largely speculative—and thus cannot weigh in the balance. *See Winter*, 555 U.S. at 27. They have advanced no example where an unvaccinated airman caused greater disruption based on COVID-19 than his or her vaccinated colleagues, cf. *U.S. Navy Seals*, 27 F.4th at 349 n.17

(recounting December 2021 sidelining of USS Milwaukee "despite having a fully vaccinated crew")—let alone an example where one refusing vaccination for religious reasons has caused greater harm than one serving under a medical exemption, or where an unvaccinated airman who has natural immunity has caused greater harm than his vaccinated comrades. Just as the plaintiffs in *Winter* failed because they could not identify a "documented episode of harm to a marine mammal," 555 U.S. at 33, respondents here rely on speculation and a plea for the near-total deference they received below on this point.

In contrast, applicant has served without vaccination and without incident through two years of the pandemic. He now has natural immunity, and the Air Force is now 98% vaccinated—and many of the 7,000 or so unvaccinated airmen are likely among the more than 90,000 who have recovered from COVID-19 and thus have natural immunity to further infection. See *DAF COVID-19 Statistics*, *supra*. Thus, the risk of infection among other service members is both speculative and minuscule.

Respondents ultimately seek deference to what they characterize as a justified response to applicant's violation of a "lawful order." C.A. ECF 13, at 1, 20. But the order applicant resisted—the vaccine requirement forced upon him—is not lawful because it violates his rights under RFRA and the First Amendment. If that legal conclusion is correct, respondents' claimed harm is no harm at all.

E. The Injunction Sought Here Accords With *Austin* Yet Provides Applicant Meaningful Relief.

The relief applicant seeks here falls within the limits set in this Court's order in *Austin*. Applicant has already been removed from command and does not seek an

order from this Court directing reinstatement or any other "deployment, assignment, [or] other operational decision." *Austin*, slip op. 1. He seeks only an order that would forestall further retaliation for his religious beliefs, including further efforts to process him into the IRR or (the next step) to separate him from the Air Force.

The Navy's response to the injunction recently entered by the *Austin* district court after this Court's order shows that compliance with an injunction within the bounds set by *Austin* is practicable. The district court entered a class-wide preliminary injunction that it immediately stayed "insofar as it precludes the Navy from considering respondents' vaccination status in making deployment, assignment, and other operational decisions." *U.S. Navy Seals 1–26* v. *Austin*, __ F. Supp. 3d __, 2022 WL 1025144, at *1 (N.D. Tex. Mar. 28, 2022) (quoting *Austin*, slip op. 1).

In response, the Navy issued an administrative order that "suspends separation processing and adverse administrative consequences of COVID-19 vaccine refusal for Navy service members who submitted requests for religious accommodation from the COVID-19 vaccine requirement." C.A. ECF 29–3 ¶ 2.[18] See also *id.* ¶ 4. The order notes that, in accordance with *Austin*, "the Navy may continue to consider the unvaccinated status of Navy service members when making deployment, assignment, and other operational decisions." *Id.* ¶ 2; see also *id.* ¶ 5. That limit is satisfied because "Navy service members who are not vaccinated, regardless of exemption status, may be temporarily or permanently reassigned based

[18] Attaching U.S. Navy, *NAVADMIN 083/22, Interim Guidance Regarding Members Requesting Religious Accommodation From COVID-19 Vaccination Requirements*, https://tinyurl.com/2tkmcfn7.

on mission requirements [in accordance with] previous guidance . . . regarding the assignment of unvaccinated personnel to operational or deployable units[.]" *Id.* ¶ 5.

In suspending "[a]ll adverse administrative consequences of refusing the vaccine, . . . including involuntary administrative separation," *id.* ¶ 4, the Navy stopped in-process involuntary separations in their tracks and ordered that affected "members are directed to remain on active duty, pending additional guidance." *Id.* ¶ 4(a). Applying less restrictive means of preventing COVID-19 transmission, the order notes that "[a]ll unvaccinated Navy service members remain subject to screening testing against COVID-19, where required." *Id.* ¶ 6.

The relief that the Navy recognizes as compliant with *Austin* would provide applicant adequate relief against the Air Force here. He does not seek court-ordered reinstatement to his recent command or court-ordered assignment to any other post. Instead, he seeks suspension of any punishment, including involuntary assignment to the IRR, which is a discharge in all but name. Assignment to the IRR prevents the service member from drawing a salary, incurring points toward retirement, reporting for duty, or being attached to a unit. C.A. ECF 11-1, at 23-24; C.A. ECF 14-1, at 11-12. The requested injunction barring respondents from preventing or delaying permanent change of station would not preclude them from taking his vaccine status into account. The injunction would only bar them from categorically denying applicant the opportunity to apply for a new position within the Air Force or applying to attend training.

The difference matters. If not placed on the IRR, applicant can seek attachment to a unit that is willing to hire him. Since he was removed from his former

command, he has been seeking and believes he has found an appropriate unit. The requested injunction pending appeal would allow him to serve in a unit where rapid deployment is not expected and the commander sees a benefit to applicant's service despite his vaccination status. Only if this Court enters an injunction will applicant be able both to live his religious beliefs and serve his country—as the First Amendment and RFRA require.

CONCLUSION

A writ of injunction pending appeal should therefore issue restraining and enjoining respondents:

1. From enforcing, attempting to enforce, or threatening to enforce the COVID-19 vaccine mandate against applicant or otherwise requiring him to receive the COVID-19 vaccine, and

2. From taking any further adverse action against applicant based on his refusal to take the COVID-19 vaccine, including but not limited to imposing non-punitive disciplinary measures, denying training or temporary duty assignment opportunities available to other unvaccinated service members, preventing or delaying Permanent Change of Station, or discharging him from the Air Force.

3. To restore the *status quo* as it existed when applicant filed his notice of appeal by requiring respondents to restore his status immediately before he was relegated to no points/no pay.

The injunction should remain in place until this Court resolves any petition for a writ of certiorari with respect to the Ninth Circuit's decision. Alternatively, this

Court should issue the requested injunction and grant certiorari before judgment to decide the important issues presented by the application.

April 11, 2022

Respectfully submitted,

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Attorneys for Applicant

No. 21A_____

In the Supreme Court of the United States

LT. COL. JONATHAN DUNN, *Applicant*,

v.

LLOYD J. AUSTIN, III, in his official capacity as United States Secretary of Defense;
FRANK KENDALL, in his official capacity as United States Secretary of the Air Force;
COL. GREGORY HAYNES, in his official capacity;
MAJ. GEN. JEFFREY PENNINGTON, in his official capacity;
UNITED STATES DEPARTMENT OF DEFENSE, *Respondents*.

TO THE HONORABLE ELENA KAGAN,
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES
AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT

APPENDIX TO EMERGENCY APPLICATION FOR INJUNCTION PENDING APPEAL AND CERTIORARI OR, IN THE ALTERNATIVE, FOR CERTIORARI BEFORE JUDGMENT

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Minute Order Denying Motion for Preliminary Injunction,
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Transcript of Preliminary Injunction Hearing,
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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JONATHAN DUNN, Lieutenant Colonel, Plaintiff-Appellant, v. LLOYD J. AUSTIN III, US Secretary of Defense; et al., Defendants-Appellees.	No. 22-15286 D.C. No. 2:22-cv-00288-JAM-KJN Eastern District of California, Sacramento ORDER

Before: TASHIMA, FRIEDLAND, and BADE, Circuit Judges.

Order by Judges TASHIMA and FRIEDLAND; Dissent by Judge BADE.

Appellant's opposed emergency motion for an injunction pending appeal (Docket Entry No. 11) is denied. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Appellant's request to extend the grant of interim relief, set forth in the reply brief in support of the motion, is denied. The interim stay granted in the March 11, 2022 order is terminated.

The existing briefing schedule remains in effect.

BADE, Circuit Judge, dissenting:

I would grant the emergency motion for an injunction pending appeal and, in the absence of an injunction, I would extend interim relief to allow Appellant to seek emergency relief from the Supreme Court.

MKS/MOATT

From: caed_cmecf_helpdesk@caed.uscourts.gov
Subject: Activity in Case 2:22-cv-00288-JAM-KJN Dunn v. Austin et al Minute Order.
Date: March 8, 2022 at 11:32 AM
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Eastern District of California - Live System

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Case Name: Dunn v. Austin et al
Case Number: 2:22-cv-00288-JAM-KJN
Filer:
Document Number: 25(No document attached)

Docket Text:
MINUTE ORDER issued by Courtroom Deputy G. Michel for District Judge John A. Mendez on 3/8/2022: On March 4, 2022, Plaintiff filed a Motion for Preliminary Injunction Pending Appeal. See ECF No. [24]. Having reviewed Plaintiff's arguments, the Court DENIES the instant Motion for the same reasons stated at the hearing denying the Motion for Preliminary Injunction. IT IS SO ORDERED. [TEXT ONLY ENTRY] (Michel, G.)

2:22-cv-00288-JAM-KJN Notice has been electronically mailed to:

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Case Name: Dunn v. Austin et al
Case Number: 2:22-cv-00288-JAM-KJN
Filer:
Document Number: 16(No document attached)

Docket Text:
MINUTES for proceedings held via video conference before District Judge John A. Mendez: MOTION HEARING held on 2/22/2022. T. Molloy appeared via video for Plaintiff. C. Enlow appeared via video for Defendants. Plaintiff present via video. The Court DENIED Plaintiff's [4] Motion for Temporary Restraining Order converted to a Motion for Preliminary Injunction. Court Reporter: J. Coulthard. [TEXT ONLY ENTRY] (Michel, G.)

2:22-cv-00288-JAM-KJN Notice has been electronically mailed to:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
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JONATHAN DUNN, Plaintiff, v. LLOYD J. AUSTIN, III, ET AL., Defendants.	Docket No. 22-CV-288 Sacramento, California February 22, 2022 1:32 p.m. Re: Preliminary injunction

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN A. MENDEZ
UNITED STATES DISTRICT JUDGE

APPEARANCES (via Zoom):

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ASSISTANT U.S. ATTORNEY
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Proceedings reported via mechanical steno - transcript produced via computer-aided transcription

SACRAMENTO, CALIFORNIA, TUESDAY, FEBRUARY 22, 2022

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(In open court via Zoom.)

THE CLERK: Calling civil case 22-0288, Dunn v. Austin, et al.

THE COURT: Good afternoon. And Counsel, if you would, state your appearances for the record, please.

MR. MOLLOY: Good afternoon, Your Honor. This is Thomas Molloy for plaintiff.

THE COURT: Okay. If you could get a little closer to your mic. I had a hard time hearing you, Mr. Molloy.

MR. MOLLOY: Good afternoon, Your Honor. This is Thomas Molloy for plaintiff.

THE COURT: Much better.

MS. ENLOW: Good afternoon, Your Honor; Courtney Enlow for the government.

THE COURT: Good afternoon. This began last week as a motion filed on behalf of Mr. Dunn, who I understand is also observing the hearing this afternoon, so welcome to the plaintiff.

As a temporary restraining order, the Court asked that the parties fully brief, as much as possible in a week's time, the issues raised by the TRO, again, on an expedited basis. And to the lawyers' credit, they were able to submit full briefs and supporting documentation within a week's time, so,

first, my compliments to the lawyers who probably didn't get much sleep this week. These are wonderful briefs, excellent briefs. It's an incredibly interesting issue, obviously, going on around the country at this time, including our court. And I always appreciate excellent lawyering and definitely had it in this case.

It makes our job harder, in some ways, because the arguments are so well formed and thought out, but it also makes our job easier when we have good lawyers on both sides, so thank you for that.

I've converted the TRO into a motion for preliminary injunction. I know, Mr. Molloy, you raised the issue that there may be further action taken against your client tomorrow, but I don't think that really significantly changes the issues as to whether injunctive relief should be granted either in the form of a restraining order or a preliminary injunction.

Let me take up first -- and, again, because the briefs are so well written, I don't have a lot of questions. And the way I conduct hearings normally is simply to raise questions and then I am prepared to rule today on the motion. I know that both parties want some type of indication from the Court.

And as a further preface, as much as I would love to issue a written order, that's not going to be possible. We're extremely burdened in the Eastern District. I'm not sure if the two of you are aware of how bad our court is, in terms of

the caseload that each judge carries. We're one judge down. We've been one judge down or two judges down for the past years. We only have six judges, four in Sacramento and two in Fresno. We only have three in Sacramento right now. We've had a caseload -- I've been on the bench almost 15 years -- anywhere from 900 to 1,200 cases. And as much as I would like to issue a written opinion along the lines of the opinions that the lawyers have sent me in this case, it's just not feasible. I've got a lengthy criminal sentencing hearing on Friday; I start a trial on Monday. And I have, as I said, I think roughly 975 other matters that I get to handle right now. So the transcript is going to serve as the Court's decision and the discussions that we have and; in that vein, if there's anything you want to add that isn't already briefed -- I will cut you off if I think it's been thoroughly briefed and I understand the arguments, but if you want to add something for purposes of the record, please do so.

Ms. Enlow, let me start with you. I didn't necessarily see this in your opposition, but the case raises a question as to whether the plaintiff's belief in this case is, in fact, religious, that -- the test being obviously that in these cases the belief has to be religious, and it has to be sincerely held. But I'm focusing more on the: Is this really a religious belief or is this a political issue disguised as a religious belief? And so I'm wondering if, in fact, the

defendants are challenging the plaintiff with respect to that argument.

MS. ENLOW: We didn't raise it in the brief, Your Honor, because the compelling interests and the less restrictive means are so compelling for the government, but, going forward, we reserve the right to challenge it. It is questionable. He says that it's a religious ritual to take the vaccine.

Col. Poel's declaration clearly says that taking the vaccine -- putting the vaccine on the list of nine other vaccines was based on scientific principles alone.

Lt. Col. Dunn also said he developed this belief mid-September. Of course, that was three weeks after Secretary Austin ordered everyone to get vaccinated, so it's a little unclear why he didn't just go ahead and get vaccinated when he was ordered to do so.

So while we didn't challenge it in the preliminary injunction stage, we certainly intend to pursue that going forward.

THE COURT: Do you think it's a basis for me for denying injunctive relief at this stage, or do you think he's adequately demonstrated to the Court that this really is a religious-based belief?

MS. ENLOW: Your Honor, since we haven't briefed it or put more evidence in the record on that, I would move to

compelling interest on least restrictive means to base Your Honor's judgment on.

THE COURT: Okay. Mr. Molloy, my question is, it's clear from Lt. Col. Dunn's declaration that this is the only vaccine to which he objects. Isn't that inconsistent with his argument and his position that this is clearly grounded in religion?

Let me also expand that question. I'll let you respond. My concern is when I read paragraph 11 of his initial affidavit, not the second affidavit, that's the paragraph that explains to the Court how this is grounded in a sincerely-held religious belief.

There's a lot of reference to politics and political officials and government officials and decisions by government officials and very little discussion about the religious grounding of his belief. And so it raised questions such as: Is Lt. Col. Dunn worried about the health effects of the vaccine?

Does he disbelieve scientifically-accepted views that the vaccine is harmless to most people?

Does he believe that the COVID-19 vaccine may do more harm than good?

Is his moral belief that being vaccinated would be a sin an isolated moral teaching rather than a comprehensive system of beliefs about fundamental or ultimate matters?

And if he's going to be consistent, shouldn't he ask for a religious accommodation with respect to all vaccines in order for the Court to find that he has raised a protected religious belief in this case?

Those are my concerns when I read his affidavit. Go ahead.

MR. MOLLOY: Thank you, Your Honor. The first thing I would say in answer to your first question is no. I think that the fact that Lt. Col. Dunn objects only to this vaccine, not the others, actually strengthens his argument that it is a religious objection here.

He's not a general antivaxxer. He's not opposed to general health, you know, burdens that might come from vaccines.

He really is opposed to what he takes to be a religious ritual and government religious ritual.

And, as a Christian, there's ample evidence for this throughout the Old Testament. So King Nebuchadnezzar, Shadrak, Mishach, and Abednego refused to bow the knee to government orders that conflicted with their religious orders or with their religious conscience.

So there's ample Old Testament, religious, Christian support for refusing even a highly intertwined and politically charged -- in fact, oftentimes, the most politically charged get to the crux of religious objections even more sharply

because, as a Christian, one must worship, bow down, serve only God alone and not the government.

THE COURT: How do we go from a political mandate to this becomes a -- it almost sounds like you're arguing it's the establishment of a religion by the government, that President Biden's directive and the Department of Defense's directive that all military personnel need to be vaccinated is, in effect, the establishment of a religion, which would violate his beliefs that he can only worship one God and taking the vaccine would be a sin. Explain that to me again.

MR. MOLLOY: Yes, Your Honor. So, first, I would just reiterate, as Counsel Enlow said, they did not challenge the sincerity, they did not challenge that it's a religious belief and, in fact, all of the language by Lt. Col. Dunn is about it being a sin, that it violates his religion, so just want to reiterate that.

In terms of the substance of it, though, Lt. Col. Dunn has -- the chaplain agreed, everyone in his chain of command. No one doubts his sincerity. No one doubts that it's a sincere religious belief, that it's substantive and that's it's a sin.

What Lt. Col. Dunn has explained --

THE COURT: I'm sorry to interrupt. I want to make the record clear. This isn't a question about his sincerity. It really focuses on is this a religious-based objection or is it a political objection, that it doesn't fit the traditional

religious-based objections.

And there are other cases, obviously, out there where certain individuals who are Catholic have opposed this vaccine or some other vaccines on the basis that it may violate what they believe are tenets of the Catholic Church. That's not really this case. It's somewhat different.

And I'm really trying to understand the religious underpinning to his objection. His affidavit is a bit general, and I'm trying to -- and again, I also agree with both of you that it wasn't fully briefed and it's not the primary issue, but when I read briefs and get involved in cases like this, curious questions like this come up and it may be an issue down the road, so I wanted to give both of you an opportunity to address it at this point.

MR. MOLLOY: Thank you, Your Honor.

And I admit, political and religious questions often are intermixed, and that has not prevented the Supreme Court -- for instance, the Pledge of Allegiance cases, objecting to those on religious bases. The Pledge of Allegiance is a highly political act, and it gets really to the core of one's role in society, one's allegiance to the government. So it's not surprising that very politically charged questions would also present really thorny questions of religious conscientious objection. And that has not prevented the Court from protecting religious objectors --

COURT REPORTER: I'm sorry, Counsel, I'm having a hard time understanding you.

THE COURT: Yeah, I am too. You're breaking up. I don't know if you want to lean in more or -- when you lean back a little, we're having a hard time hearing you.

And run it by me again how you believe his objection to only this vaccine actually strengthens the argument that it's based -- it's religious based.

MR. MOLLOY: Yes, Your Honor. So just to repeat what I had previously said, in case it was unclear, is, the Court routinely looks at issues that are highly politically charged. And I brought up the case of Pledge of Allegiance cases, which really get at one's role in society.

And it's not surprising that such politically charged questions will also present thorny issues for religious objectives. In fact, that can almost guarantee it because highly politically charged questions can raise the specter of idolatry and serving only one God.

In terms of Your Honor's second question in terms of general antivax, I think what that demonstrates is Lt. Col. Dunn is not trying to hide a health objection, is not trying to hide a general objection to vaccines in religious language.

He very clearly feels that this vaccine and all of the governmental messaging around it, all of the required and implied symbolic acts surrounding it present religious

questions.

He has taken more vaccines than pretty much any civilian, but this particular vaccine, like Nebuchadnezzar, like Shadrak, Mishach, Abednego, like Daniel, they felt that they could not bow the knee that required that amount of unthinking loyalty when it would result in personal --

THE COURT: Why can you bow the knee to a flu vaccine but not to a COVID-19 vaccine if his objection isn't to the health effects or that the vaccine is harmless, that the vaccine actually does more good than harm? Explain that difference. I'm using the flu vaccine as the example, but how does that make it clear that this really is a religious-based objection?

MR. MOLLOY: Well, Your Honor, I think what that gets to is the surrounding messaging, symbolism, surrounding acts, that's what makes something particularly religious.

The government messaging, the government compulsion, the government demonizing of citizens who refuse to get the vaccine, none of that was present with the flu vaccine. None of that --

THE COURT: We lost him.

Mr. Molloy, you froze. You froze for a second. Mr. Molloy, stop. You froze. Your connection is awful and we're losing you, so I'm not sure what's going on. We don't hear you at all, so find a spot where we can hear you.

MR. MOLLOY: My apologies, Your Honor. Is this better?

THE COURT: Much better.

Okay. You were explaining to me -- I raised the flu vaccine versus the COVID-19 vaccine issue, and you were explaining to me how that doesn't -- shouldn't cause concern for the Court.

MR. MOLLOY: Yes, Your Honor. So I believe Your Honor's question gets to the context surrounding required acts and the symbolic meaning of those required acts.

So as Lt. Col. Dunn stated in his affidavit, it really was the general -- the symbolic gesture that he takes this vaccine to require him to partake in the governmental messaging about how all of the problems surrounding the corona virus endemic, all of the not taking the vaccine makes one an immoral person. All of that surrounding messaging goes into requiring him to take the COVID-19 vaccine where none of that was present with the general flu vaccine. And so the fact that he does not object to run-of-the-mill flu vaccines I think really strengthens the fact that this is a real religious objection that Lt. Col. Dunn --

THE COURT: We lost you.

Ms. Enlow, are you still there? Ms. Enlow?

Is she muted?

Ms. Enlow? Oh, I love this. Ms. Enlow?

Okay. I'm going to take a break. You set this up again.

THE CLERK: Okay.

(Recess at 1:51 p.m. to 2:11 p.m.)

THE COURT: Mr. Molloy and Ms. Enlow, we're back. We apologize for the Zoom issues. I think I was almost done with the first issue I had raised.

And, Ms. Enlow, I just wanted to give you an opportunity if you wanted to add anything just on this issue, which, again, wasn't really briefed but was just something that I've been thinking about.

MS. ENLOW: No, Your Honor.

THE COURT: Or Mr. Molloy -- Mr. Molloy, I know you got cut off. Anything further you wanted to add?

MR. MOLLOY: Oh, yes, sir. Just wanted to -- the waiver point, again, the government has not briefed it and for good reason, Your Honor. *Hobby Lobby*, binding precedent, makes clear that federal courts shouldn't inquire into the reasonableness of a religious belief. They can inquire into the sincerity of a religious belief, of course, but *Hobby Lobby* specifically says, I quote, "Federal courts have no business addressing whether the religious belief asserted in a RFRA case is reasonable."

And I think no one doubted the sincerity. The chaplain's letter did not doubt sincerity. And the substance

of Lt. Col. Dunn's religious exemption, it's in Exhibit 2 of his first affidavit, really kind of in depth --

THE COURT: And so the record is clear, I'm not questioning the reasonableness. I'm simply questioning whether this is a religiously-held belief or not or whether it's a politically-based objection. And that, so the record is clear, was the reason for my questions.

Let's turn to the issues that were briefed, the two primary issues, among others and that is -- and this goes, obviously, to likelihood of success on the merits in terms of granting injunctive relief, whether there's a compelling governmental interest, the policy that's been adopted by the military and then the second part of that, and I think the guts of this case is whether this is narrowly tailored.

Again, the law that both sides agree is applicable here is that because this COVID-19 mandate, the policy adopted by the military, does burden plaintiff's free exercise of religion, the burden shifts to the government to show that the application of the burden to plaintiff specifically furthers the compelling governmental interest; and second, is the least restrictive means of furthering that compelling governmental interest.

Ms. Enlow, there were a number of arguments raised in response to your arguments with respect to compelling -- the compelling interest issue, the plaintiff arguing that the

Air Force does not have a compelling interest in vaccinating Lt. Col. Dunn; arguments such as this action does not challenge the mandate itself or the military's authority to require vaccinations, it challenges the denial of a religious exemption to a single officer. Defendants cannot justify that decision by invoking a broadly formulated interest in favor of vaccines.

They go on to argue -- he goes on to argue, "Other than the real possibility of a deployment, each step in defendant's parade of horribles is implausible."

And he goes on to argue that "It's unlikely that Lt. Col. Dunn will be infected because he has robust natural immunity. It's unlikely that any new infection would have any adverse effects on his health. In addition to his existing immunity, he's an extremely healthy 40-year-old, and such individuals are rarely sickened or hospitalized."

Third, "Although advanced treatments should almost certainly be unnecessary, there's no reason that oral antivirals, which can be taken at home, would not be available to a deployed unit."

Fourth, that it's speculation that he might infect other members of a unit.

And then fifth, his assertion that his unit might fail to complete its mission should one or more members of the unit become infected is a thoughtless insult to the dedication and determination of the airmen in that unit.

I know there's a lot there, there's several pages of argument, but I wanted to give you an opportunity to respond to anything raised in the reply brief on this compelling interest issue.

MS. ENLOW: Thank you, Your Honor. This comes down to what level of risk does the military have to accept when they deploy people abroad. This is not a generalized concern that's just spread across the entire military. This is -- the Air Force conducted an individualized assessment for Lt. Col. Dunn and concluded that given his position in leadership, given his position as a leader of a worldwide, rapidly deployable unit, they get orders to go, and in 72 hours you could be flying across the world, set up an airfield in an austere location with no medical services available. Given all of these factors, the Air Force concluded that he need to be vaccinated in order to further the Air Force's compelling interest in satisfying its mission.

And these airfields are used to support combat operations, to support humanitarian aid, to support aid to countries that are dealing with natural disasters. And if the airfield is not set up within the four-hour time frame that they're supposed to set up the airfield, then that risk not only of this particular unit not reaching its goal, not achieving its mission, but also has these trickle down effects. And these trickle down effects can be very serious depending on

why the Air Force needed that airfield right then right there.

So the idea that this is some kind of broad generalized assessment is false. They conducted the individualized assessment required under RFRA.

Now, he presents this -- the string of "mights" that you referenced earlier, Your Honor. That -- the string of mights could happen. That's the point. They could absolutely happen. The Air Force, the military itself has a lot of experience with people getting sick on the battlefield and has determined, based on its experience with that, based on the science of the vaccines, that the way to minimize any kind of risk of outbreak, any kind of risk of serious illness, risk that somebody would have to get airlifted out of there, thus taking away medical services from people that might get wounded in combat, the Air Force doesn't want to take that risk. It shouldn't have to take that risk.

The point of the Reserves is to deploy. That is his job, to be ready to deploy. And he is not medically ready.

The Air Force has -- the secretary of the Air Force, secretary of defense have both determined that these individuals who are deploying need to be medically ready to go, and especially for his unit that's going to deploy and within 72 hours he has to be ready. The Air Force does not have to accept the risk that he might get seriously ill and have to be medevaced out.

His assertions that there's treatments and it will be fine because he's healthy, well, we've seen numerous reports, I'm sure the Court's aware, of pure healthy people without any kind of underlying conditions die from COVID. It's just reality. They get hospitalized.

And the fact that he's saying, "Oh, well, there could be treatments there," well, these are not areas where there's necessarily going to be a hospital. There may not be anything there. It might be a dirt strip. So the idea that there's going to be these treatments available for him, that's just based on nothing. It's entirely speculative.

THE COURT: One of the issues raised in other cases, and in particular the case out of Florida, was -- I don't want to call it a "criticism," but an observation by the Court that they were bothered by the general nature of the letters, almost a form letter rejecting these religious accommodation requests, that, as Mr. Molloy points out, the number of these requests that have been granted is minimal.

And then when you look further into what do the letters say, you can see they've been written by a lawyer, not by someone who's in the military, because they use all the right buzz words.

And that concerned the judge in Florida because the statute makes it clear that it's got to be an individualized-based decision. What is it about this member of

the military that makes it compelling that he be vaccinated?

And so it raises a question in my mind. There's a review process that I understand that each person goes through, several levels, it looks like. So even though the letter seemed to be almost a form letter, explain to me what went on in these reviews of his request for a religious accommodation. And do you think that satisfies the concern that was raised by the judge in Florida?

MS. ENLOW: It absolutely does, Your Honor. Thank you.

Major Streett's declaration lays this out in a lot of detail, but as a -- to kind of succinctly say it, once a member submits the religious accommodation request, his chain of command gives endorsements whether they agree or disagree with the request. They have no authority to grant or deny. It's just whether they agree or disagree.

The member meets with a chaplain. The member meets with a medical health provider to talk about the risk to not getting vaccinated and what would happen if he doesn't get vaccinated, like you can't go and deploy, for example.

And then this packet goes up to a higher level commander. The Air Force is a little more decentralized than the other services in that they have commanders of what they called "Maj Com" or the things like that. The Air Force reserve commander is what looked at his initial packet.

THE COURT: Does each --

Sorry to interrupt.

Does each person who's reviewing this religious accommodation request, do they provide sort of a written memorandum as to whether they endorse or not endorse?

The reason I ask is if this case proceeds and Mr. Molloy asks for discovery, would there be, in effect, this package of written endorsement or no endorsement for both Mr. Molloy and the Court to look at, in terms of the level of discussion and what was reviewed with the plaintiff?

MS. ENLOW: So, yes, it is written down.

THE COURT: Okay.

MS. ENLOW: The chain of command's recommendations are written. I believe the chaplain writes a memo. There's at least documentation about the medical review. And then there is a --

THE COURT: Are there psychologists involved at all?

MS. ENLOW: That's a really good question. I don't think so.

THE COURT: Okay.

MS. ENLOW: I believe it's just a medical, immunization specialty or just a general health specialty.

And so then after the Air Force Reserve command -- commander makes a decision on the initial review, if there's an appeal, like there was here, then the packet goes -- the

appeal -- the appeal and then the packet all go up to the Air Force surgeon general for another independent review.

And the Air Force surgeon general is advised by a religious resolution team. It's a multidisciplinary team. It consists of chaplains, JAGs, medical professionals, and they each also review the packet and they provide their assessment.

And so when the Air Force surgeon general is getting -- what you see with this letter at the end, that is based on his assessment, you know, informed by his team that's informing him as well. So it is an individualized assessment.

The fact that the letter does not spell out every single, you know, command duty or things that like that that he has, that does not mean that it wasn't an individualized assessment.

THE COURT: Okay.

MS. ENLOW: And the Court and for that, unfortunately, is not engaging with that declaration for Major Streett or with -- you know, with the facts that they are individualized.

THE COURT: Okay. Mr. Molloy, do you want to respond at all? I know your reply brief covers this, but go ahead.

MR. MOLLOY: Yes, Your Honor. I would just say this long, individualized process of review has resulted in all -- no exemptions for any airmen up until just a couple of weeks ago, so I don't think that that really supports the idea that the military, behind these boilerplate letters, is giving real

close scrutiny to an individual airman, their risks, their missions, because it's resulted in the exact same thing, exact same boilerplate letter every single time.

Second, I wanted to address -- I think it's telling Ms. Enrow used the word it "might" result in these impairments to the mission. I think that is correct. This could theoretically happen. But the Air Force regulations are clear that it has to have a real, not merely theoretical adverse impact. And it's clear that that's not the case here where only 28 airmen have been hospitalized in the entire period of the pandemic, only 6 have died. So I do think this qualifies as a theoretical, not a real impact.

THE COURT: Your client, if he was called up today to go to New Zealand or Australia, couldn't do it. They wouldn't allow him in the country.

Why shouldn't I be concerned about that? And there -- I guess there's other countries. I know the government raised that in their opposition, but that's concerning to me. If I'm issuing orders and I'm in the military and I say to your client, to the Lieutenant Colonel, "Hop on the next plane, you're going to be in New Zealand," and he says, "Oh, I can't go there, I'm not vaccinated," how is that of benefit to the military?

MR. MOLLOY: Well, two things, Your Honor, I would say. First off, thankfully, we are now in a situation where

more and more countries are realizing that these draconian COVID measures are no longer required. And country after country, state after state, is -- including California, which has had some of the stricter regulations in the U.S., is realizing that these are no longer required and that COVID-19 is endemic.

Second, I would say even if all of that's true, the military is in no worse position because if they get rid of Col. Dunn or he's on inactive Ready Reserve, they're down an airman anyway. And so allowing the exemption at least allows the Air Force have a plus one to their roster, to someone that they can maybe shift around and send to a different country.

THE COURT: Okay. And then lets talk about is this narrowly tailored. Are there other alternatives out there that would allow the government to accomplish its compelling interest but not require vaccination? There wasn't -- there was some mention, I don't think, Mr. Molloy, I got the impression, we're not really talking about teleworking. I didn't really consider that. I know it was raised, but I don't think that's something that your client is either advocating or pursuing. I just wanted to make sure that that's accurate.

MR. MOLLOY: Yes, Your Honor. That is accurate.

THE COURT: Okay. There's a lot of -- not a lot, but a significant amount of argument on what I would call the "natural immunity alternative." In affidavits submitted from

other cases, as the plaintiff writes in the reply brief, "While it's true that the CDC recommends vaccination even for individuals who have previously been infected, the relevant question is not whether a vaccine might provide Lt. Col. Dunn with some level of additional protection. The question is whether natural immunity is roughly equivalent or superior to the vaccine alone."

Is that the question, Ms. Enlow? Isn't natural immunity the least restrictive alternative here; and if not, why not?

MS. ENLOW: It is not, Your Honor. Col. Rans's declaration and Col. Poel's declaration made clear that there's no scientific consensus regarding the duration of any natural immunity or the level of protection that previous infection bestows upon an individual.

It's also unclear, for example, what variant plaintiff had or how many antibodies he has, what level of antibodies is even necessary to give someone immunity, what variant he was infected with, what his level of protection might be against a reinfection.

And because the science is unclear in the face of that uncertainty, the military, in accordance with CDC guidance, has determined that not being vaccinated is an unacceptable risk to the health of service members and to mission accomplishment.

And the Air Force recognizes -- they have that

regulation AFI -- sorry. I'm now blanking on the Act -- 48110, that's it, that says that prior infections for some diseases may alleviate the need for vaccination, essentially. But that's only when there's scientific proof that a person who has measles, for example, is not going to get reinfected. We don't have that with COVID. The science is unclear.

Col. Rans's declaration also points out that the studies involving vaccines are -- there are more of them and they're of higher quality, you know, control trials, things like that, that we just don't have with these natural immunity studies yet and, therefore, the military has assessed that it is not a lesser restrictive means of accomplishing the same interests in having everyone be healthy and ready to deploy.

And again, they couldn't deploy -- even having natural immunity, you can't deploy, as Your Honor pointed out, to certain countries.

THE COURT: Mr. Molloy writes in his reply brief, talking about your opposition, "Instead of engaging with any of the evidence presented by plaintiff, defendants simply throw up their hands and claim there are too many unknowns to accept natural immunity. Of course the efficacy of the vaccines themselves is unknown, and claims about the level of protection they provide has changed dramatically over the past year. We were initially told that vaccine effectiveness was at least 97 percent at preventing symptomatic disease, severe and critical

disease and death. The CDC later admitted that vaccine efficacy wanes after just a few months.

"More recently, the CDC has admitted that vaccines are not as effective in preventing infection from the Omicron variant. Given the ever-changing guidance relating to vaccine efficacy, defendant should not be allowed to hide behind their purported ignorance regarding the benefits of natural immunity, which is, by now, well established."

MS. ENLOW: Again, I disagree that it's well established.

Based on Col. Rans's and Col. Poel's declarations, it is not. It is not. And in the face of that uncertainty, it is entirely reasonable for the military to put an approved vaccine on the list and not allow folks to rely on prior infection.

This is no different, really, from the flu vaccine. Flu vaccines' effectiveness is only -- I mean, flu -- Col. Poel said the flu vaccine was less than 50 percent some years, yet the military still requires it, and they still require it and they don't allow evidence of prior infections because the military is concerned that people are going to get sick on the battlefield and have to get airlifted out and cause harm to the mission.

THE COURT: Okay. Mr. Molloy, anything further you want to add to your brief?

MR. MOLLOY: Yes, Your Honor.

I would just say the government has the burden of proving that, so if there's any unclarity in the data, that is their burden of proof.

But the CDC even recognizes that persons who survived a previous infection had lower case rates than persons who are vaccinated alone and that the vaccine does not currently help against transmission and infection, especially of omicron, so to that point.

And then just one last thing. The only thing I wanted to press generally is that the need for an immediately -- an immediate preliminary injunction or at least a TRO taking effect ideally before the end of the day simply because Col. Haynes has already taken punitive action by removing Lt. Col. Dunn from command, he's signaled his intention to further punish him, and Lt. Col. Dunn expects further punitive action when he reports for orders tomorrow. So only the Court can prevent that, Your Honor.

THE COURT: Save that. We're going to get to irreparable injury in a second.

The other issue that's raised in this discussion regarding least restrictive measures is two others, routine testing and masking and social distancing. I know you raised those, Mr. Molloy. Honestly, I wasn't that convinced that those arguments were compelling.

I don't see that routine testing or simply having Col.

Dunn mask and social distance would be least restrictive alternatives that would carry out the compelling government interest.

I've read your reply brief. I just wanted to see if there's anything that you wanted to argue with respect to those two other arguments you raised in terms of least restrictive alternatives?

MR. MOLLOY: Yes, Your Honor. Just a simple point that even if any one of those particular measures may not be the most effective in isolation, them combined, along with the robust protections the CDC recognizes natural immunity provides is a much -- it's far less or far, yeah, less restrictive means of achieving a compelling interest.

THE COURT: Okay. The other components of injunctive relief, obviously, are likelihood of irreparable harm to the plaintiff in the absence of preliminary relief.

Mr. Molloy just spoke to that briefly as to what is likely to happen tomorrow. And, again, the argument that I see in all these cases is that there is a presumption of irreparable harm because constitutional and/or statutory rights have been infringed.

Ms. Enlow, why doesn't the discussion end there?

MS. ENLOW: Well, of course, they haven't been infringed, Your Honor. The government's brief makes clear that the military has complied with RFRA. There's no RFRA

violation. And then we didn't discuss First Amendment. Because the government wins on RFRA, we win or First Amendment as well. So that presumption goes out the window.

I also don't think the Ninth Circuit has, in particular, recognized that a RFRA violation is presumptive irreparable harm.

So then we're just left with what's going to happen to him now. And nothing that's going to happen to him is -- constitutes irreparable harm. And there's two points here. The first one is these disciplinary actions that he's talking about; he might get a letter of reprimand, there might be something negative in his file that's issued tomorrow. That is not irreparable.

There is an Air Force board for correction of military records whose job it is, whose sole purpose is to correct any error or injustice in a service member's record. So he can always petition to that board. And if the board agrees with him, he could have that removed from his record. It's like it wasn't there.

THE COURT: Okay. That reminded me of a question I wanted to ask because I think -- I got the impression from his second affidavit that one of the things that can't possibly happen is he can't be reinstated as a lieutenant colonel. Is that accurate?

MS. ENLOW: He's still a lieutenant colonel. He

hasn't lost his rank, as far as I understand.

THE COURT: Right.

MS. ENLOW: He's been removed from command. Yes. So he he's been removed from command and that is correct. That it's a nonjusticiable action.

The Court cannot and should not entertain putting someone back in command when his commander has lost confidence in his leadership and judgment. That should not happen and cannot happen.

THE COURT: So he's ineligible for promotions as well, right? No matter what, he's going to leave the military as a lieutenant colonel?

MS. ENLOW: So promotions are considered by promotion boards, and I wouldn't speculate what they would do based on the record in front of them, but he would be -- he would be -- if he still refuses to get vaccinated, he would be removed to the Individual Ready Reserve.

THE COURT: I get that. Let's assume, though, that he's successful, ultimately successful in his lawsuit here, and so he goes back to the Air Force board, he gets his military record corrected, but he can't advance any further in the Air Force. He can't -- I don't know what's after lieutenant colonel. Colonel, I would assume.

MS. ENLOW: Yes.

THE COURT: He will never become a colonel. Is that

right, Mr. Molloy? Is that accurate?

MR. MOLLOY: Yes, Your Honor. Being relieved from squadron command because of lack of faith from the commander, any type of recommendations that would come from his commander, there are just so many ways when a promotion board sees that, he's not going to be -- he's not going to be promoted. And that's definitely so if he's transferred to the inactive Ready Reserve.

THE COURT: If he's ultimately successful, does he get backpay?

MS. ENLOW: Yes, Your Honor. He can get backpay if he's ultimately successful.

THE COURT: Okay. Okay.

MS. ENLOW: He can be reinstated into the Reserves with backpay.

THE COURT: But he would be -- again, he would be reinstated as a lieutenant colonel, correct?

MS. ENLOW: Which is what he is now.

THE COURT: Okay.

MS. ENLOW: Yes.

THE COURT: But if he's reinstated, why would he not be eligible, then, at that point, for promotions? If his military record is cleared up and he's back and reinstated -- fully reinstated, why would he not be eligible for a promotion?

MS. ENLOW: So you're correct. He would be eligible

for a promotion. It's a promotion board that would consider it.

THE COURT: Okay. Mr. Molloy, do you agree with that?

MR. MOLLOY: No, Your Honor, I do not.

So the promotion board is in October. So all the materials have to be before there.

And that promotion board, what they're going to see is that Lt. Col. Dunn was removed from squadron command because his superior officer lost faith in him, did not consider him effective to be a leader of men, all of that, to submit a lawful order. And that's discounting even any "around the side" recommendation letters that have to come from the superior officers. That's -- whether he can even find any other command anywhere else in the Air Force for him to continue to gain that experience and continue to gain that -- those items on his resumé. So he's effectively been sidelined from any opportunities that would -- the promotion board would look to when considering his advancement to the rank of colonel, Your Honor.

THE COURT: Okay. I know we're speculating a little as to what could happen. And I know this puts -- in effect, it puts a big obstacle in his way. But it sounds to me as if he's not absolutely prohibited from being promoted if he actually is successful in his lawsuit and clears up his military record and is reinstated. There's nothing that says because he's now been

relieved of his command that he absolutely can no longer be promoted. Is there something? Go ahead.

MR. MOLLOY: Yes, Your Honor. He would miss that October review board, and there's no second chance for that. So if he misses that October 22 review board, it's over.

THE COURT: Why? I mean, is he retiring? Is he leaving the military? Is he --

MR. MOLLOY: Your Honor, because he'll miss all service opportunities between now and then. And so he's going to have, essentially, no military service for that October review board to review when assessing him for promotion.

THE COURT: But is there a review board every year?

MR. MOLLOY: I don't know the exact timing of every review board, Your Honor.

THE COURT: Okay. We're speculating a little. Okay. I get it.

And then the third and fourth elements of injunctive relief which get combined in these cases are balance of equities and the injunction is in the public interest. Both of you have thoroughly briefed those issues. I really don't have questions with regard to those issues.

Anything further that either counsel want to add? We'll take a short break, then I'll come back out and let you know my decision on the motion for injunctive relief.

But, Mr. Molloy, starting with you, anything further

that you want me to add?

MR. MOLLOY: Yes, Your Honor. I would just like to clarify if Lt. Col. Dunn misses that October 2022 promotion board, it is possible that in a future board he could be promoted, but all of that time of missing squadron command and missing military opportunities, that's gone forever. He is behind forever from that now.

THE COURT: Okay. Thank you for that.

Ms. Enlow, anything further?

MS. ENLOW: No, Your Honor. Thank you.

THE COURT: Okay. Give me a few minutes and then we'll come back out and discuss the Court's decision on this motion. Thank you so much for responding to my questions.

(Recess at 2:44 p.m. to 2:57 p.m.)

THE COURT: Okay. Back on the record. If you freeze up again, it's on our end, so we'll let you know. Wave your hands or something and let me know if you cannot hear me.

Okay. As I indicated, I am prepared to issue a ruling on this motion today. I know that, as I said, the parties would appreciate a ruling. I know the plaintiff would appreciate a ruling, given all that's going on, on a daily basis. Again, I wish I could issue a -- and have the time and the lack of 1,000 cases to issue a more comprehensive written ruling, but the transcript is going to have to serve as the Court's ruling.

As with all motions for preliminary injunction, you start with the legal principle that preliminary injunctions are extraordinary remedies and that courts should only issue injunctive relief if, in fact, the four elements of injunctive relief, likelihood of success on the merits, irreparable harm, balance of equities and the injunction is in the public interest have been demonstrated.

This issue, the issues raised by this lawsuit, place burdens on the government to prove to the Court, in particular as we discussed in this case that the policy in this case, the requirement of vaccinating or taking a COVID-19 vaccination is in furtherance of a compelling governmental interest and, in fact, that the government is employing the least restrictive means of furthering that compelling governmental interest.

In terms of -- and focusing just -- there are two claims here upon which the plaintiff is basing his motion, his claim under the Religious Freedom Restoration Act and then his claim -- his free exercise claim under the First Amendment. And the Court will take up both of those claims as to whether there's a basis for injunctive relief.

In terms of whether this policy is in furtherance of a compelling governmental interest, is there a likelihood of success on the merits that the Court would find that the policy is not in furtherance of a compelling governmental interest? The evidence and the arguments at this point do convince the

Court that this policy is, in fact, in furtherance of a compelling governmental interest.

As courts have said over and over again, and this Court takes to heart, the Court must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.

The government -- I'm sorry. The military has argued in this case that the mandatory vaccination policy against COVID-19 is necessary to protect the force and defend the American people, that it's necessary to ensure military readiness and it's necessary to ensure the health and safety of airmen and prevent the spread of infectious disease.

This comes down to me, to this Court, in terms of what Ms. Enlow raised, as to what is an acceptable level of risk. What level of risk is appropriate is the way that Ms. Enlow phrased it and argued it.

And, again, in this Court's view, the acceptable level of risk is a military decision that deserves great deference. And given that deference in these circumstances, it's clear to me that just on that issue of whether there is a compelling governmental interest that's been demonstrated here, that that issue comes out in favor of the military.

The plaintiff is not medically ready to deploy 100 percent, as we discussed. There are still -- even though things change from day-to-day and month to month, I can only

take this case as we sit here today. He's not medically ready to deploy to certain areas of the world where he might be required to deploy.

And it does come down, as I said, to what level of risk is appropriate. If the military can eliminate almost all risk through this policy, then there is a compelling governmental interest. And if it's going to impact, as the government has argued or possibly impact -- I don't think it's speculation that it is a possibility that this could impact both military readiness and the need to adequately deploy in a fashion that the military wants deployment to occur, that the policy is necessary.

The tougher issue is, is this the least restrictive means of furthering this compelling governmental interest?

The government argues that the practice of vaccination and ordering the COVID-19 vaccination for all members of the Air Force is, in fact, the least restrictive means in fully accomplishing what the Court has found to be a compelling governmental interest.

There were, as we discussed, at least four reasons raised by the plaintiff as to why requiring the plaintiff to be vaccinated, why it is not, in fact, the least restrictive means of furthering the government's compelling governmental interest.

The government fails to satisfy this test when there

are, in fact, other alternatives of achieving its goal without imposing a substantial burden on the plaintiff's exercise of religion.

Here, again, the Court finds that at this stage of the proceedings, obviously the case has only been in front of the Court for a week and there is a lot more evidence that would be presented over time, but as we sit here today, the Court does find that the government has met its standard of showing why the proposed alternatives are not viable options.

First, although it was briefed, it really wasn't pursued, the idea that teleworking might be a least restrictive alternative. I think both sides agree that that's not an issue that the Court needs to take up or is really being pursued. You obviously cannot telework when you're deployed.

The second is the closer issue, the tougher issue in these cases. And I wanted to also mention, as the briefs do mention, we're operating in these cases right now in an area of, in effect, first impression.

While the parties have done an excellent job of giving the Court decisions issued by district court judges from around the country facing similar issues, almost identical issues to this Court, there's no Ninth Circuit precedent, there's no Supreme Court precedent in which this statute has been applied in a military context.

Obviously these cases will be appealed and we'll start

getting some guidance, but we're operating, as I've done in many cases over the past few years, in an area where there's no case on point, there's no precedent on point. And, again, you need to look simply at instructive cases in other areas, but none of these cases are binding on this Court.

So the issue is whether the natural immunity argument raised by the plaintiff is a sufficient alternative, is a least restrictive alternative that the Air Force should follow here. And the argument that was raised is that right now there is no scientific consensus and it's not well established in the face of that uncertainty. It's not well established in terms of the data concerning natural immunity and, in the face of that uncertainty, that the Court should not and cannot accept that and find that that is, in fact, the least restrictive means of furthering the compelling government interest here.

It was several Supreme Court judges that said that judges aren't scientists. This issue involves a lot of science. I appreciate the affidavits, but affidavits aren't subject to cross-examination, they aren't subject to full-blown hearings. And while they're helpful --

I lost Mr. Molloy. Okay.

-- they don't replace full-blown hearings or a full-blown explanation of issues like this.

And absent that, I am, like many judges, reluctant to make a scientific determination. And I do agree with the

government that on this issue there is a lack of consensus, and it's not well established that a natural immunity is effective, more effective or as effective as the vaccine.

And given that uncertainty, the Air Force here has determined that the best way to minimize risk is to require vaccination. Again, there are host countries that require vaccination and given the need for the military to be able to deploy the plaintiff on short notice to any location, the natural immunity alternative isn't feasible.

The plaintiff raises another argument that routine testing would be another least restrictive means of furthering a compelling government interest. The Court finds, however, that it's not always feasible to get the testing done, especially when you have to deploy quickly, and to get testing done within the time period required.

In the event that plaintiff did, in fact, test positive, the military would be forced to scramble to find a replacement. The military shouldn't be forced to scramble in these types of situations.

Again, the Court raises the fact raised by the defendants that there are a number of host nations that require vaccination for members to enter their countries. And, again, that wasn't specifically addressed by the plaintiff in the opposition -- in the reply brief.

As another district court also explained, the speed of

transmission usually outpaces test results, making test result availability not an effective alternative measure.

And then finally, masking and social distancing is another means that was raised by the plaintiff. It's not, again, the Court finds, feasible under these circumstances and given the plaintiff's specific responsibilities and duties in his role as the -- formally as the leader of -- I think it was up to at least 40 men.

We lost Mr. Molloy again.

Mr. Molloy, can you hear me? No.

Ms. Enlow, can you hear me?

MS. ENLOW: Yes, Your Honor.

THE COURT: Okay. So it's just Mr. Molloy right now. You're in Washington, D.C., right?

MS. ENLOW: Yes, I am.

THE COURT: Okay. I think Mr. Molloy is in Texas. He's back.

Can you hear me, Mr. Molloy?

MR. MOLLOY: Yes, Your Honor, I can. Yes, Your Honor. I'm sorry.

THE COURT: Okay. All right. And so I -- my finding with respect to the preliminary injunction motion is that, in fact, the government has demonstrated that requiring the vaccination -- requiring the plaintiff to be vaccinated, the COVID-19 vaccine, is, under these circumstances, these specific

circumstances, the least restrictive means of furthering the compelling governmental interest.

And again, as I have mentioned previously, I recognize, and there's a lot of discussion in the cases that I read, that military members are not excluded from the protection of statutes or constitutional rights. That is discussed over and over again.

But these same cases also make it clear that the Court should be more deferential to the defendant's judgment on what is required to obtain maximum readiness of the military.

There's a case out of the District of Columbia, *Singh v. McHugh*, which is cited by the defendants in that case. The Court noted the need to respect military judgment while still applying RFRA's strict standard.

For those reasons, the Court does find that the government is likely to show that the vaccination is the least restrictive means of achieving a compelling interest and that the plaintiff is unlikely to succeed on the merits of the RFRA claim.

I also would find that the plaintiff has not demonstrated a likelihood of success on his free exercise claim.

The Supreme Court has held that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on

the grounds that the law prescribes conduct that his religion prescribes.

A law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance this interest.

There's a recent Ninth Circuit case and not a case involving military but involving a school district, *Doe v. San Diego Unified School District,* a 2021 Ninth Circuit case. In that case, the Ninth Circuit found that a student challenging her school district's vaccine mandate, which did not allow for a religious exception, was not likely to succeed on a free-exercise claim, as she had not raised a serious question about whether the mandate was neutral or generally applicable.

As to neutrality, the Ninth Circuit noted that the terms of the mandate did not make any reference to religion, nor had the student shown a likelihood that the mandate was implemented with the aim of suppressing religious belief rather than protecting the health and safety of students, staff and the community.

Turning to general applicability, the Court noted --

the Ninth Circuit noted that the only exempted students were those who qualified for a medical exemption, which furthered the government's interest in protecting student health and safety, and so it did not undermine the district's interest as a religious exception would and, accordingly, the mandate was subject to rational basis.

Similar to what is involved here, the terms of the Air Force mandate do not make any reference to religion, and plaintiff has not claimed and does not claim that the mandate was implemented with the aim of suppressing religious belief.

The fact that the Air Force has granted medical and administrative exemptions does not render the mandate not generally applicable. And as the Ninth Circuit recognized in the *Doe v. San Diego Unified School District* case, granting the medical exemption furthers their interest in ensuring military readiness and the health of their members as requiring a service member who is, for example, allergic to a component of the vaccine would harm their health.

Accordingly, these exemptions do not undermine the government's interests the way a religious exemption would and, thus, the government is likely to show that the mandate is generally applicable and does not violate the free exercise clause.

In the event that a court -- appellate court might believe, under the free exercise claim, that it's subject to

strict scrutiny for the same reasons that the Court has found that there's not a likelihood of success on the Religious Freedom Restoration Act, I also believe that the free exercise challenge would fail as well for the same reasons as the Court provided with respect to the Religious Freedom Restoration Act.

In terms of the likelihood of irreparable harm to the plaintiff and the other factors, given that the Court has found that there is not a likelihood of success on the merits of the two claims, the Court does not have to reach those issues, but I -- in terms of if it assists both the litigants and the appellate court, I think the irreparable harm issue is a close issue. I think it requires some further evidence.

There obviously is a number of cases, precedent, that indicates that there simply -- a court should find simply that there's a presumption of irreparable harm when a constitutional or statutory right has been infringed, but in a case where plaintiff has failed to demonstrate a sufficient likelihood of success on the merits, then a presumption wouldn't apply.

The plaintiff has argued that he is -- he's already suffered and he's likely to suffer irreversible harm to his career and reputation if he is removed from command.

I'm not sure the evidence is clear on that at this stage, as evidenced by the Court's questions on what could happen if he is ultimately successful in his lawsuit.

Military administrative and disciplinary actions,

including separation, are not, at least at this point in the Court's review of the evidence, not irreparable injuries.

It appears that the plaintiff could later be reinstated and provided backpay if he did prevail on his claim. So at this point I would find that the plaintiff, because he hasn't shown a likelihood of success, has also not met his burden on demonstrating a likelihood of irreparable harm.

And then the last factor is balance of equities in the injunction and public interest, third and fourth requirements of a preliminary injunction. Those two requirements merge when the government is involved. And in this case, again, court's are to give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.

In *Winter*, the primary Supreme Court case that set forth the requirements for issuance of a preliminary injunction, the Supreme Court, in fact, reversed the granting of a preliminary injunction on the Navy on just the balance of equities in the injunction and the public interest factors alone.

The Court in *Winters* noted the importance of plaintiff's ecological, scientific and recreational interest in marine mammals but found those interests were plainly outweighed by the Navy's need to conduct realistic training exercises to ensure that it is able to neutralize the threat

posed by enemy submarines. Again, similarly here, the public's interest in military readiness and the efficient administration of the federal government does outweigh plaintiff's claims of job-related and pecuniary loss.

Serious questions have been raised. This is not, obviously, given what's gone on around the country in other cases, a case that district courts don't need further guidance on; but, as I mentioned, at this stage a preliminary injunction, especially enjoining the military, given all that's going on in the world at this time, it would be an extraordinary remedy in this Court's mind. And it can only be granted upon a clear showing that the plaintiff is entitled to the relief that he seeks here.

Courts should be and this court in particular is reluctant to enjoin the military when military readiness is at stake. I thought the discussion in the Texas case -- no. It was Georgia, I'm sorry -- by the judge in Georgia was particularly instructive even though I disagreed with where he came out on the issue, but there's a lot of discussion in this case and other cases I've seen in which the Court talks about how important it is for judges and district courts to seriously weigh what type of anticipated interference there is with the military function; would an injunction seriously impede the military in their performance of vital duties.

The cases strongly suggest that these type of cases

militate strongly against judicial review. We are entitled to review and the plaintiff is certainly entitled to his day in court, given the serious nature of his claim and the fact that it involves both statutory and constitutional issues.

But the judge in the Georgia case, again, which went in favor of the Air Force officer, it was an Air Force officer versus Lloyd Austin, says that "Courts must consider the extent to which the exercise of military expertise or discretion is involved, and courts should defer to the superior knowledge and experience of professionals in matters such as promotions or orders directly related to specific military function." And he writes over and over again, "Judges don't make good generals." I couldn't agree with that statement more.

These are difficult issues that you're asking a district court to make. And given the role of the military in protecting the American people and people around the world, I am reluctant to issue injunctive relief under these circumstances absent a clear -- a clearer or a clear showing that such injunctive relief should be granted.

That's really where I come out and where I disagree with the other cases that have been submitted, particularly by the plaintiff, where injunctive relief has been granted by the district court judge.

Hopefully I've made my decision clear, the basis for my decision. The motion for preliminary injunction is denied.

And I know that this will be pursued. Hopefully the transcript will be clear enough.

And again, I truly appreciate the lawyering in this case. I know it will continue as it moves up through the appellate courts. And given what's going on all around the country, it may end up in the Supreme Court. But thank you for contributing to the discussion and the legal issues, and we'll see where we end up. Thank you both.

Sorry, again, for the Zoom interruptions. We're going to go back to live hearings starting March 1st, so I appreciate your patience as well. Okay. Have a good afternoon.

MR. MOLLOY: Thank you, Your Honor.

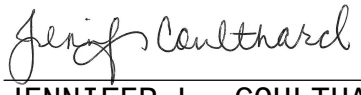
MS. ENLOW: Thank you, Your Honor.

THE COURT: Thank you.

(Concluded at 3:29 p.m.)

C E R T I F I C A T E

I certify that the foregoing is a true and correct transcript of the record of proceedings in the above-entitled matter.



JENNIFER L. COULTHARD, RMR, CRR
Official Court Reporter

February 28, 2022
DATE

No. 21A-___

In the Supreme Court of the United States

LT. COL. JONATHAN DUNN,

Applicant,

v.

LLOYD J. AUSTIN, III, IN HIS OFFICIAL CAPACITY AS UNITED STATES SECRETARY OF DEFENSE, *et al.*

CERTIFICATE OF SERVICE

Pursuant to Rule 29(5)(b), I, Donald M. Falk, a member of the Bar of this Court, hereby certify that on April 11, 2022, the Emergency Application for Injunction Pending Appeal and Certiorari Or, In the Alternative, for Certiorari Before Judgment, and the accompanying Appendix, in the above-captioned case were served by e-mail and by overnight mail on the following counsel for respondents:

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I further certify that all parties required to be served have been served.

/s/ Donald M. Falk

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Exhibit 4

No. 21A599

IN THE SUPREME COURT OF THE UNITED STATES

JONATHAN DUNN, APPLICANT

v.

LLOYD J. AUSTIN III, SECRETARY OF DEFENSE, ET AL.

RESPONSE IN OPPOSITION TO THE EMERGENCY APPLICATION FOR AN INJUNCTION PENDING APPEAL OR FOR CERTIORARI BEFORE JUDGMENT

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IN THE SUPREME COURT OF THE UNITED STATES

No. 21A599

JONATHAN DUNN, APPLICANT

v.

LLOYD J. AUSTIN III, SECRETARY OF DEFENSE, ET AL.

RESPONSE IN OPPOSITION TO THE EMERGENCY APPLICATION FOR AN INJUNCTION PENDING APPEAL OR FOR CERTIORARI BEFORE JUDGMENT

The Solicitor General, on behalf of Lloyd J. Austin, III, in his official capacity as Secretary of Defense, et al., respectfully files this response in opposition to the emergency application for an injunction pending appeal or, in the alternative, for certiorari before judgment.

Applicant is a Lieutenant Colonel in the Air Force Reserve who brought this suit under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb et seq., and the Free Exercise Clause of the First Amendment, to challenge the denial of his request for a religious exemption from the Air Force's COVID-19 vaccination requirement. Applicant does not assert that the COVID-19 vaccine itself or compulsory vaccination in general is inconsistent with his Christian faith, and indeed he has received without objection many other immunizations required by the Air Force. He instead maintains that in September 2021 -- after he was ordered

to become vaccinated against COVID-19 -- a speech by the President caused him to conclude that "the vaccine ceased to be merely a medical intervention and took on a symbolic and even sacramental quality," and that his faith forbids him from participating in what he now views as the "religious ritual" of COVID-19 vaccination. C.A. E.R. 368. When the Air Force denied his request for a religious exemption, applicant responded by sending his third-level superior -- a Major General in command of 30,000 reservists -- a one-word memorandum that simply read: "NUTS!". C.A. E.R. 245.

The district court denied applicant's motion for a preliminary injunction, as well as an injunction pending appeal. Appl. App. 2a, 37a-52a. The court of appeals similarly denied applicant's motion for an injunction pending appeal. Id. at 1a. Those decisions were correct. As the district court recognized, applicant has not established that he is likely to succeed on the merits of his claims. Even if the vaccination requirement burdens his sincere religious exercise, the Air Force has a compelling interest in requiring applicant to be as medically and physically prepared for deployment with his reserve unit as possible, particularly because his unit is designed to be deployable worldwide with just 72 hours' notice. And the Air Force has determined, as an exercise of its military judgment, that vaccination of servicemembers is an essential component of military readiness and is critical to pro-

tecting the health and safety of servicemembers. The Air Force has also concluded, after an individualized review of the particular circumstances, including applicant's military duties, that no less restrictive means exist to achieve the government's compelling interests.

Applicant also failed to establish any irreparable harm. He has already been removed from his former command -- including for reasons of poor judgment and abuse of authority, which justified the removal independent of his refusal to be vaccinated. In the lower courts, applicant sought an injunction that would have compelled the Air Force to assign and deploy him without regard to his unvaccinated status. In light of this Court's intervening order in Austin v. U.S. Navy SEALs 1-26, 142 S. Ct. 1301 (2022) (No. 21A477), petitioner now changes tack and asserts (e.g., Appl. 1-2, 11-12, 36-39) that his requested injunction would place him on equal footing with the plaintiffs in that case. But the precise contours of the injunction applicant now seeks are unclear; even in this Court, applicant suggests he would like to handpick a different unit and receive injunctive relief that would forbid the Air Force from preventing his transfer to that unit (see Appl. 38-39). In any event, it is applicant's burden to show that he faces irreparable harm, and he has not done so. Absent an injunction, he will continue to be in a "no pay/no points" status (meaning he does not participate in "drill weekends" and thus does not collect

reservist pay or accrue retirement credits for those drills), and the Air Force may initiate a process for reassigning him to the Individual Ready Reserve, which does not constitute a discharge or separation from service. His asserted injuries from those decisions, such as loss of pay or opportunities for career advancement, are quintessentially reparable because he could be reinstated and could seek backpay, retirement credits, and other remedies if he prevails. Applicant would prefer to maintain his status in the Reserve while his appeal is pending, but that preference does not justify an extraordinary grant of injunctive relief by this Court.

STATEMENT

A. The Air Force's COVID-19 Vaccination Requirement

The U.S. military has relied on mandatory immunization since 1777, when George Washington directed the inoculation of the Continental Army against smallpox. Stanley Lemon et al., Protecting Our Forces: Improving Vaccine Acquisition and Availability in the U.S. Military 11-12 (2002), go.usa.gov/xubrd. As of 2021, nine vaccines were required for all servicemembers, including an annual influenza vaccine, and eight additional vaccines were required when certain risk factors are present. C.A. E.R. 199.

In August 2021, the day after the Food and Drug Administration (FDA) granted full approval to the first COVID-19 vaccine, the Secretary of Defense announced that vaccination against COVID-19 would be added to the required list. C.A. E.R. 136. The Secretary

observed that "mission-critical inoculation is almost as old as the U.S. military itself," and that, "[t]o defend this Nation, we need a healthy and ready force." Ibid. On September 3, 2021, the Secretary of the Air Force directed commanders to ensure that servicemembers are vaccinated expeditiously, with members of the Air Force Reserve to be fully vaccinated by December 2, 2021, unless exempted from the requirement. Id. at 207.

As with other vaccines, a servicemember may seek an exemption from the Air Force's COVID-19 vaccination requirement for administrative, medical, or religious reasons. C.A. E.R. 224. Administrative exemptions are generally available only to servicemembers who are on terminal leave (i.e., taking leave until retirement or separation) or who were in the process of retiring or separating by April 1, 2022. Id. at 231, 338-339. Medical exemptions are granted by medical providers for medical reasons. Id. at 305-309, 567. Many of the conditions that might warrant a medical exemption are temporary (for example, a current COVID-19 infection or a pregnancy), and a servicemember with such a condition must receive the vaccine when the condition clears. Id. at 309-310; see id. at 220. For that reason, the Air Force grants only temporary -- not permanent -- medical exemptions from its immunization requirements, including for COVID-19. Id. at 309. And the number of medical exemptions has steadily declined as the underlying conditions have cleared. Id. at 307-308.

Under the Air Force's pre-existing religious-accommodation policy, a servicemember seeking a religious exemption must consult with his chaplain, his commander, and a military medical provider, and each commander in the chain of command makes a recommendation about whether to approve the request. C.A. E.R. 316-317, 319-321; see id. at 430-451. The decisionmaking official then conducts an individualized review "to determine (1) if there is a sincerely held religious (as opposed to moral or conscience) belief, (2) if the vaccination requirement substantially burdens the applicant's religious exercise based upon a sincerely held religious belief, and if so, (3) whether there is a compelling government interest in requiring that specific requestor to be vaccinated, and (4) whether there are less restrictive means [of] furthering that compelling government interest." Id. at 318. If the request is denied, the service member may appeal to the Air Force Surgeon General. Id. at 317. Unlike medical exemptions, religious exemptions are permanent and "remain in effect * * * for the duration of a Service member's military career," absent a change in circumstances. Id. at 439; see id. at 227.

As of April 12, 2022, out of a total force of about 500,000 Air Force servicemembers, 1013 had a temporary medical exemption from the COVID-19 vaccination requirement and 1273 had an administrative exemption. Air Force, DAF COVID-19 Statistics - Apr. 12, 2022, go.usa.gov/xuTu3. The Air Force had also granted 42

permanent religious exemptions, with several thousand requests still pending before the initial decisionmaker or on appeal. Ibid.

Servicemembers who are unvaccinated against COVID-19 -- for any reason -- generally are not considered medically ready for deployment. See Air Force Instruction 10-250, ¶ 2.1.3 (July 22, 2020), go.usa.gov/xu2xY (listing, among the "[i]ndividual medical readiness requirements," that servicemembers must "complete all required immunizations") (emphasis omitted); see also, e.g., C.A. E.R. 344 (declaration of the Chief of Public Health at the Air Force Medical Readiness Agency, explaining that vaccination is "vital to * * * maintaining mission readiness"). Servicemembers who are unvaccinated for any reason are also generally prohibited from traveling for temporary duty assignments and from attending many trainings. C.A. E.R. 250.

Servicemembers who refuse the order to be vaccinated and who lack an exemption may be subject to administrative and disciplinary action. C.A. E.R. 326-330. Air Force reservists, in particular, "will be placed in a no pay/no points status and involuntarily reassigned to the Individual Ready Reserve" (IRR). Id. at 329. "The IRR * * * is composed of former active-duty, national guard, and reserve military personnel, who, though not actively participating in the military, are still affiliated with the Reserve Component. Placing a member in a no pay/no points status means that the member will not be drilling with the member's unit and

thus will not be earning pay for that work nor credit [i.e., points] toward retirement." Id. at 335. Involuntary reassignment to the IRR is not a "discharge or separation" from the service, and "there is no policy mandating administrative separation for" members of the Reserve who refuse to be vaccinated against COVID-19. Id. at 329.

B. The Present Controversy

1. Applicant is a Lieutenant Colonel in the Air Force Reserve who was previously the Commander of the 40-member 452d Contingency Response Squadron at March Air Reserve Base in California. C.A. E.R. 238-239. Contingency Response forces are "rapidly worldwide deployable units sent to locations where air operational support is non-existent or insufficient." Id. at 239. They establish airfield operations and other basic infrastructure to support aircraft from all branches of the United States Armed Forces in combat missions and in response to humanitarian crises or natural disasters. Id. at 239-240. Applicant's unit must be ready to deploy on 72 hours' notice. Id. at 241. Once deployed, it is expected to be prepared "to begin receiving aircraft within four hours of arrival." Id. at 240. And it must "be capable of 5 days of total self-sufficiency" before "the arrival of additional supporting forces and equipment." Id. at 239. "The ability to rapidly deploy service members to establish operational airfields is critical to the Department of Defense's mission because it allows the Air Force

to establish a forward staging area for military operations that extends the reach of combat personnel and equipment from all branches of the United States armed forces and our allies." Ibid.

On October 14, 2021, applicant submitted a written request for a religious exemption from the Air Force's COVID-19 vaccination requirement. C.A. E.R. 243. Although applicant had received many prior vaccines in the Air Force without objection to those mandatory requirements, he stated that he had chosen not to become vaccinated against COVID-19 after praying on the matter; that he had contracted COVID-19 in June 2021 and had recovered without requiring medical treatment; and that the experience had "reinforced" his conviction that he is "led by the Holy Spirit in refusing the vaccine." Id. at 376.

In addition, applicant stated that he believed that being vaccinated had taken on a "quasi-religious sacramental aspect[]" when government authorities made the vaccine mandatory in some circumstances. C.A. E.R. 376. In his view, "[f]orced COVID vaccination today includes all the hallmarks of a religious act[:] a public display of submission to a higher power, presentation of our physical bodies, and a faith that suspends rational thought." Ibid. In a later affidavit, applicant confirmed that he had developed that view only after the Air Force had ordered him to be vaccinated. He stated that, "beginning on September 9, 2021, when President Biden delivered a speech blaming the unvaccinated for

the ongoing pandemic, federal, state, and local leaders have described the vaccine as a moral obligation" and a prerequisite for "participating in civil society." Id. at 368. He further stated that, "[f]rom that time onward, the vaccine ceased to be merely a medical intervention and took on a symbolic and even a sacramental quality," "akin to the ancient Roman laws requiring that sacrifices be made to Caesar." Ibid.

On November 16, 2021, the Commander of the Air Force Reserve Command denied applicant's request for a religious exemption. C.A. E.R. 244. The Commander did not "doubt the sincerity of [applicant's] beliefs" but nonetheless determined that an exemption was unwarranted in light of countervailing concerns for military readiness. Id. at 381. Applicant appealed to the Air Force Surgeon General, who denied the appeal on January 29, 2022. Id. at 389. The Surgeon General explained that he had taken into account applicant's leadership role and had determined that applicant's "present duty assignment requires intermittent to frequent contact with others and is not fully achievable via telework or with adequate distancing." Ibid. The Surgeon General also explained that the Air Force "must be able to leverage [its] forces on short notice as evidenced by recent worldwide events" and that applicant's "health status as a non-immunized individual in this dynamic environment, and aggregated with other non-immunized individuals in steady state operations, would place health and safety, unit

cohesion, and readiness at risk." Ibid.

On February 8, 2022, applicant received the Air Force Surgeon General's decision denying his appeal, and he was lawfully ordered to begin a vaccination sequence, submit a retirement request, or refuse the vaccine in writing within five days. C.A. E.R. 245. Five days later, applicant sent a memorandum to the Commander of the 4th Air Force -- a two-star general who was several steps above applicant in the chain of command -- entitled "Response to Denial of Religious Accommodation Request Appeal." Ibid. The body of the memorandum contained only one word: "NUTS!". Ibid.; see id. at 393. Applicant's direct commander described this conduct as a "highly disrespectful affront to the chain of command" that showed "a shocking lack of military decorum." Id. at 252.[1]

On February 15, 2022, applicant was removed from his command. C.A. E.R. 251. His commanding officer had by then "lost trust in [his] leadership and judgment" based on applicant's "pattern of

[1] "NUTS!" has a well-known "military historical connotation." C.A. E.R. 251-252. In 1944, during the Battle of the Bulge, General Anthony McAuliffe responded to a German message requesting American surrender with the one-word reply, "NUTS!". Ibid.; see S.L.A. Marshall, Bastogne: The First Eight Days 115-118 (reprt. 2010), go.usa.gov/xu2WX. Applicant now maintains (Appl. 6) that he meant no "disrespect" by directing at his third-level superior officer the response that General McAuliffe famously directed at the Nazis. But see Marshall, supra, at 117 (recounting that the American officer who delivered McAuliffe's message to German officers also told them, "If you don't understand what 'Nuts' means, in plain English, it is the same as 'Go to hell.'").

lack of respect for military authority." Ibid. In addition to his "NUTS!" memorandum, applicant had tried to "misuse * * * his position" of authority to obtain non-public documents about his religious-exemption request outside of the proper procedures for doing so -- after being notified of those procedures by his commander. Id. at 252. Applicant's commanding officer considered applicant's lapses in judgment serious enough to warrant his removal from command independent of his "refusal to comply with the COVID-19 vaccination order." Id. at 253.

2. On February 14, 2022, applicant brought this action in the Eastern District of California, alleging that the Air Force's denial of his request for a religious exemption violates RFRA and the First Amendment. See Compl. ¶¶ 54-84. On February 15, applicant moved for a temporary restraining order. D. Ct. Doc. 4, at 2, 10-12. Applicant asked the court to enjoin the Air Force from applying its vaccination requirement to him and from "taking any adverse action against [him] based on his refusal to take the COVID-19 vaccine, including but not limited to removing [him] from command, imposing non-punitive disciplinary measures, denying training or [temporary duty] opportunities available to vaccinated service members, or discharging [him] from the Air Force." D. Ct. Doc. 4-4, at 2 (Feb. 15, 2022). The district court treated applicant's motion as a request for a preliminary injunction and denied the motion orally at a hearing on February 22, 2022. C.A.

E.R. 575; see Appl. App. 4a-53a (hearing transcript).

The district court found that applicant had failed to establish a likelihood of success. With respect to RFRA, the court determined that the Air Force has a "compelling governmental interest" in ensuring that applicant is "medically ready to deploy," and the court deferred to the Air Force's military judgment that vaccination is "necessary * * * to ensure military readiness." Appl. App. 39a-40a. The court viewed RFRA's "least restrictive means" requirement as a "tougher issue," id. at 40a, but agreed with the government that the alternatives proposed by applicant, such as masking or routine testing, "are not viable options" in his individual circumstances, id. at 41a -- including because testing before a rapid deployment would not always be feasible, and because some nations to which applicant might be deployed require vaccination, see id. at 43a-44a. The court also declined to second-guess the Air Force's judgment, informed by medical experts, that "natural immunity" from a prior infection is not a "sufficient alternative" to being vaccinated. Id. at 42a. With respect to the First Amendment, the court found that the Air Force's vaccination requirement is a neutral and generally applicable policy and that, in any event, applicant's constitutional claim would fail for the same reasons as his RFRA claim. See id.

at 47a-48a.[2]

Turning to the other preliminary-injunction factors, the district court determined that applicant had failed to establish any irreparable harm, in part because he "could later be reinstated and provided backpay if he did prevail on his claim." Appl. App. 49a; see id. at 48a-49a. The court further found that the balance of equities weighed against granting an injunction, explaining that "the public's interest in military readiness and the efficient administration of the federal government * * * outweigh[s] [applicant's] claims of job-related and pecuniary loss." Id. at 50a.

On February 24, 2022, applicant noticed an appeal. C.A. E.R. 575. On March 4 -- two weeks after the district court's order -- applicant moved in the district court for an injunction pending appeal. Ibid. On March 8, the court denied applicant's motion "for the same reasons stated at the hearing." Appl. App. 2a.

3. On March 9, 2022, applicant filed a motion in the court of appeals for an injunction pending appeal and an immediate temporary injunction pending the disposition of his motion. See

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[2] In litigation, applicant again described his religious objection as resting on the belief that COVID-19 vaccination took on a "sacramental quality" after the President and other leaders framed becoming vaccinated as a "moral obligation." D. Ct. Doc. 4, at 18. The district court questioned whether that asserted belief, even if sincerely held, qualified as a "religious-based objection" or was instead "a political issue disguised as a religious belief." Appl. App. 7a; see id. at 7a-17a. The court did not ultimately resolve that issue.

Appellant's C.A. Inj. Mot. 1-2. A two-judge panel of the court of appeals granted applicant's request for "immediate interim relief" pending briefing on his motion. C.A. Order 1 (Mar. 11, 2022). On April 1, 2022, the court of appeals denied applicant's motion for an injunction in a brief order, citing Winter v. NRDC, 555 U.S. 7, 20 (2008), and terminated the interim relief it had previously granted. Appl. App. 1a. Judge Bade dissented. Ibid.

ARGUMENT

The application for an injunction pending further review should be denied. A temporary injunction generally requires the movant to demonstrate that his "claims are likely to prevail, that denying [him] relief would lead to irreparable injury, and that granting relief would not harm the public interest." Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020) (per curiam). Because such an injunction "grants judicial intervention that has been withheld by the lower courts," Ohio Citizens for Responsible Energy, Inc. v. NRC, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers), it "'demands a significantly higher justification' than a request for a stay," Respect Maine PAC v. McKee, 562 U.S. 996, 996 (2010) (citation omitted). Such an injunction should be granted "sparingly and only in the most critical and exigent circumstances," Wisconsin Right to Life, Inc. v. FEC, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers) (citation omitted), such as when "the legal rights at issue are 'indisputably

clear,'" ibid. (citation omitted); see Roman Catholic Diocese, 141 S. Ct. at 66 (granting injunction where "applicants ha[d] clearly established their entitlement to relief"). Applicant has not met that heavy burden here.

I. APPLICANT HAS NOT ESTABLISHED HIS ENTITLEMENT TO RELIEF

Applicant has not demonstrated a right to injunctive relief on his RFRA or First Amendment claims, much less an "indisputably clear" right to such relief. Wisconsin Right to Life, 542 U.S. at 1306 (citation omitted).

A. The Preliminary Injunction Applicant Seeks Is Not A Proper Remedy

"[J]udges are not given the task of running the Army" or the Air Force, and it is the Executive officials charged with protecting our national security and defending our borders -- not courts -- who have authority to determine servicemembers' fitness for duty and assignments. Orloff v. Willoughby, 345 U.S. 83, 93 (1953); see id. at 92-93. For that reason, "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." Department of the Navy v. Egan, 484 U.S. 518, 530 (1988). Indeed, "[j]udicial inquiry into the national-security realm raises 'concerns for the separation of powers in trenching on matters committed to the other branches.'" Ziglar v. Abbasi, 137 S. Ct. 1843, 1861 (2017) (citation omitted). "It is this power of oversight and control of military force by elected representatives and officials which un-

derlies our entire constitutional system." Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

The problems with judicial intervention in military affairs are not limited to formal separation-of-powers concerns, but include practical ones, too. "The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments." Gilligan, 413 U.S. at 10. Accordingly, "it is difficult to conceive of an area of governmental activity in which the courts have less competence." Ibid.; cf. Bryant v. Gates, 532 F.3d 888, 899 (D.C. Cir. 2008) (Kavanaugh, J., concurring) ("[M]ilitary decisions and assessments of morale, discipline, and unit cohesion * * * are well beyond the competence of judges."). In Reaves v. Ainsworth, 219 U.S. 296 (1911), for example, this Court refused to second-guess the military's determination of a servicemember's "fitness for promotion." Id. at 298. And in Orloff, the Court emphasized that it had "found no case where this Court ha[d] assumed to revise duty orders as to one lawfully in the service." 345 U.S. at 94.

This Court recently applied those principles in Austin v. U.S. Navy SEALs 1-26, 142 S. Ct. 1301 (2022) (No. 21A477), granting the government's application for a partial stay of a preliminary injunction in a case challenging the Navy's COVID-19 vaccination requirement on similar RFRA and Free Exercise grounds. The dis-

trict court in that case had granted an injunction similar to the one applicant unsuccessfully sought here, see Compl. 20-21; D. Ct. Doc. 4, at 2, but this Court granted the government's request to stay the injunction "insofar as it precludes the Navy from considering [the plaintiffs'] vaccination status in making deployment, assignment, and other operational decisions," Navy SEALs, 142 S. Ct. at 1301. Justice Kavanaugh concurred "for a simple overarching reason: Under Article II of the Constitution, the President of the United States, not any federal judge, is the Commander in Chief of the Armed Forces." Id. at 1302. Justice Kavanaugh observed that by issuing the injunction in that case, the lower court had "in effect inserted itself into the Navy's chain of command, overriding military commanders' professional military judgments." Ibid.; see Chappell v. Wallace, 462 U.S. 296, 300 (1983) (warning against suits that "tamper with the established relationship between enlisted military personnel and their superior officers").

In light of this Court's order in Navy SEALs, applicant now purports to disclaim seeking from this Court any injunctive relief that would impede the Air Force's "ability to 'consider his vaccination status in making deployment, assignment, and other operational decisions.'" Appl. 2 (brackets and citation omitted). But applicant's request for relief in the lower courts is not so limited: He has not disclaimed his request for preliminary and

permanent injunctive relief barring the Air Force from considering his unvaccinated status in assigning and deploying him. Even in this Court, moreover, applicant contradicts his disclaimer of relief governing assignments. He suggests that he would like to handpick a different unit, Appl. 38-39, and he requests a broad injunction precluding the Air Force from taking "adverse action against applicant based on his refusal to take the COVID-19 vaccine," including "preventing or delaying Permanent Change of Status," an apparent reference to his desired transfer to a new unit, Appl. 39. An injunction intruding into military decisionmaking would be neither "appropriate relief" under RFRA, 42 U.S.C. 2000bb-1(c), nor consonant with the "traditional principles of equity jurisdiction," Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 318-319 (1999) (citation omitted), that constrain the available relief on applicant's Free Exercise claim, see Armstrong v. Exceptional Child Center, Inc., 575 U.S. 320, 327-328 (2015).

B. Applicant's RFRA Claim Lacks Merit

In any event, even apart from questions about the scope of relief, applicant is not entitled to an injunction because he has not shown that he is likely to succeed on the merits of his RFRA claim. RFRA provides that the federal government "shall not substantially burden a person's exercise of religion" unless the government "demonstrates that application of the burden to the person

-- (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1(a) and (b). The application of the COVID-19 vaccination requirement to applicant satisfies those requirements.

1. A RFRA plaintiff bears the initial burden of establishing that the challenged government practice substantially burdens his sincere religious exercise. Among other things, that requires a showing that his request is "sincerely based on a religious belief and not some other motivation." Ramirez v. Collier, 142 S. Ct. 1264, 1277 (2022); see Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 429–430 (2006). Here, the district court identified substantial questions about whether applicant's stated objection to being vaccinated, even if sincere, is "a political issue disguised as a religious belief." Appl. App. 7a. The court observed, for example, that applicant's initial affidavit included "a lot of reference[s] to politics and political officials and government officials and decisions by government officials and very little discussion about the religious grounding of his belief." Id. at 9a. The court ultimately denied a preliminary injunction for other sound reasons, but the questions the court raised underscore that applicant -- at a minimum -- lacks any clear entitlement to relief.

2. Even if the vaccination requirement substantially bur-

dens applicant's sincere religious exercise, it is consistent with RFRA because the Air Force has a compelling interest in requiring servicemembers to be vaccinated against COVID-19. "Stemming the spread of COVID-19 is unquestionably a compelling interest." Roman Catholic Diocese, 141 S. Ct. at 67. It is all the more compelling in the military, given the "vital interest" of maintaining a fighting force "that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances." United States v. O'Brien, 391 U.S. 367, 381 (1968). And "when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." Goldman v. Weinberger, 475 U.S. 503, 507 (1986).

RFRA did not displace those longstanding principles. To the contrary, Congress specifically emphasized when it enacted RFRA that "[t]he courts have always recognized the compelling nature of the military's interest" in "good order, discipline, and security" and have "always extended to military authorities significant deference in effectuating those interests." S. Rep. No. 111, 103d Cong., 1st Sess. 12 (1993). Congress "intend[ed] and expect[ed] that such deference w[ould] continue under [RFRA]." Ibid.; see H.R. Rep. No. 88, 103d Cong., 1st Sess. 8 (1993).

Here, the Air Force extensively justified its military judgment that it has a compelling interest in vaccinating its servicemembers, including applicant. As Air Force Reserve Colonel Gregory P. Haynes explained, "the possibility that Airmen could get seriously ill, become hospitalized, or die from COVID-19 create[s] an unacceptable risk to personnel and substantially increase[s] the risk of mission failure, both in garrison (i.e., a non-deployed setting) and in a deployed environment." C.A. E.R. 247.

Colonel Haynes observed that "[t]he mission of the military Reserves is to be ready to deploy" when called upon, and that "[r]eadiness is essential for a unit like" the one applicant formerly commanded, "which exists to be rapidly deployable." C.A. E.R. 243. That unit is a "rapidly world-wide deployable unit[] sent to locations where air operational support is non-existent or insufficient." Id. at 239. It must be ready to deploy anywhere in the world on 72 hours' notice and be entirely self-sufficient for up to five days. Id. at 239, 245.

Once deployed, the unit applicant formerly commanded must create a fully functioning airfield within four hours, a task that could become impossible if any member of the unit -- not to mention the unit's commander -- were to fall seriously ill. C.A. E.R. 240; see also id. at 249 (explaining that airmen are deployed with "little redundancy" and that "each casualty due to illness has a significant impact"). Failure to create an airfield would "risk[]

mission failure for * * * supported aircraft" from all branches of the Armed Forces and from allied nations. Id. at 240. Applicant would also risk infecting members of his team while deployed, likewise threatening "mission failure." Id. at 249. An outbreak at March Air Force Base while applicant was not deployed would also undermine military readiness; Colonel Haynes explained that applicant's duties often required him to interact face-to-face with dozens of servicemembers, often in settings where social distancing was infeasible. Id. at 242.

Moreover, a servicemember who is unvaccinated would be barred from some of the countries to which the unit could be deployed. C.A. E.R. 246-247. And the unit's "deployments are likely to be to austere, remote locations overseas" that lack adequate medical facilities. Id. at 247. In those circumstances, a servicemember who developed severe symptoms would have to be "medically evacuated." Ibid. "Depending on the severity of the symptoms and necessary treatment, this could require an entire aircraft to be diverted from its intended mission." Ibid. And it could "further reduce the medically trained personnel available to provide medical care at the deployed location" to other airmen. Ibid.

Those individualized considerations are supported by broader interests in military readiness. As of mid-February 2022, there had been nearly 400,000 COVID-19 cases within the military, 2522 service members had been hospitalized, and 92 had died. C.A. E.R.

267; see id. at 296-300 (declaration of Major Scott Stanley, Ph.D., describing the effects of COVID-19 on the military). "[T]he overwhelming majority of individuals hospitalized or who died were not vaccinated or not fully vaccinated." Id. at 267. COVID-19 has also affected military "exercises, deployments, redeployments, and other global force management activities"; caused the cancellation of numerous "major training events, many of which involved preparedness and readiness training with our foreign partners"; and "required significant operational oversight" by the most senior military leaders. Id. at 296-298. Vaccination has permitted higher levels of occupancy in Department of Defense (DoD) facilities and in-person training. Id. at 300. All of those interests support the Air Force Surgeon General's conclusion that allowing applicant to remain unvaccinated "would have a real adverse impact on military readiness and public health and safety." Id. at 254. Indeed, the Secretary of Defense himself determined, after "consultation with medical experts and military leadership," that "mandatory vaccination against [COVID-19] is necessary to protect the Force and defend the American people," and that "vaccination of the Force will save lives." Id. at 136.

Applicant observes (Appl. 22) that he has successfully served as a reservist for the past two years without being vaccinated. Fortunately, applicant was not deployed when he contracted COVID-19 in June 2021, and he apparently did not become seriously ill.

But as noted above, others have not been so lucky; before vaccines were available, the pandemic severely disrupted the Armed Forces, causing thousands of hospitalizations and dozens of deaths. C.A. E.R. 267. In any event, past good fortune is no guarantee of future success. That vaccines were not previously available, or that the Air Force did not require them until after full FDA approval, does not mean the Air Force lacks a compelling interest in preventing COVID-19 infections among servicemembers going forward.

Applicant's reliance (Appl. 16-17, 24, 31) on the Air Force's having granted relatively few religious exemptions as compared to medical and administrative exemptions is misplaced. Applicant demands a permanent religious exemption -- as do the thousands of other Air Force servicemembers who have requested religious exemptions, C.A. E.R. 509. That is not comparable to servicemembers who receive temporary medical exemptions (e.g., for pregnancy), as they must get vaccinated after their temporary medical exemptions expire, see C.A. E.R. 301, and in the meantime are subject to the same restrictions as other unvaccinated servicemembers. Nor is it comparable to servicemembers who receive exemptions because they are on the verge of separation from the military (cf. Appl. 16). That the Air Force grants almost no permanent exemptions to servicemembers similarly situated to applicant underscores the compelling interest the military has in ensuring that our Armed Forces

are as healthy and ready to deploy as possible.

Applicant also suggests (Appl. 18-19) that his request for a religious exemption was not given individualized consideration because it was denied in what he characterizes as a form letter. But that initial denial letter expressly states that the decisionmaker "carefully consider[ed] the specific facts and circumstances of [applicant's] request," as well as the recommendations of his chain of command and a separate multidisciplinary review team. C.A. E.R. 381; see id. at 318-319. That determination is entitled to a presumption of regularity. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971). And in any event, RFRA does not require any particular administrative procedure or form of explanation for the denial of an exemption. Instead, the question in a RFRA case is whether the government has demonstrated in court that it has a compelling interest in the "application of the challenged law" to "the particular claimant[s] whose sincere exercise of religion is being substantially burdened." Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 726 (2014) (citation omitted). The government has done that here with detailed, specific declarations from senior military officers, including a sixteen-page declaration from applicant's former direct superior. C.A. E.R. 238-253. Given that showing, applicant's complaints about the process by which his exemption request was considered and the form and content of the letter initially denying

his request are beside the point.

Applicant's reliance (Appl. 22-23, 26) on the military's having persevered through the pandemic and on its generally high vaccination rate is likewise misplaced. The relevant interest here is not simply achieving herd immunity or doing the best under the circumstances. Rather, the military has an interest in reducing the risk to servicemembers and mission success to the greatest extent possible. As Justice Kavanaugh emphasized, quoting a declaration from the second-highest uniformed officer in the Navy:

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

Navy SEALs, 142 S. Ct. at 1302 (Kavanaugh, J., concurring) (citation omitted). It is no less a "dereliction of duty" with respect to airplanes, flight crews, and those responsible for establishing and operating the forward airfields on which they rely.

3. Requiring applicant to be vaccinated against COVID-19 is the least restrictive means of furthering the Air Force's compelling interests in ensuring that its servicemembers are as physically prepared as possible to execute their demanding missions and in minimizing avoidable risks to mission success. Vaccines are singularly effective at preventing COVID-19 infection and reducing the severity of illness in the event of a breakthrough infection.

As Air Force Colonel James R. Poel, Chief of Public Health at the Air Force Medical Readiness Agency, explained, "vaccines are the most effective way of mitigating the risk of spreading infectious diseases to other members, both in non-deployed and deployed environments, and preventing service members from becoming ill and dying." C.A. E.R. 342. Because vaccines "are vital to ensuring the health and safety of the force, maintaining mission readiness, and * * * protecting the individual from infectious diseases and preventing transmission," they have "long been a cornerstone of military strategy." Id. at 343-344. Vaccination is especially crucial for servicemembers like applicant, whose role "require[d] interaction with others in close quarters or travel, whether to an austere, deployed setting or for training at another location in the US." Id. at 344.[3]

No less restrictive alternatives are available. The Air Force Surgeon General found that applicant's role required "contact with others and [was] not fully achievable via telework or with adequate distancing." C.A. E.R. 254. Masking, which "is not as effective as vaccination," is likewise an inadequate alternative. Id. at

[3] Even in non-military settings, courts have held that in contexts where preventing transmission is particularly important, a uniform practice of vaccination may be the least restrictive means of furthering the government's compelling interest in preventing the spread of infectious diseases in a workforce. See, e.g., Does 1-6 v. Mills, 16 F.4th 20 (1st Cir. 2021), cert. denied, 142 S. Ct. 1112 (2022); We the Patriots USA, Inc. v. Hochul, 17 F.4th 266 (2d Cir. 2021) (per curiam), petition for cert. pending, No. 21-1143 (filed Feb. 14, 2022).

347. "Human behavior limits the effectiveness of masks when they are not worn consistently and correctly," and even when masks are "worn consistently and correctly, extended durations in close contact with an infectious person can still lead to transmission." Id. at 347-348. In addition, unlike vaccination, masks do not reduce the severity or duration of illness for people who become infected with COVID-19. Id. at 348. The Air Force accordingly concluded that "mask wear[ing] is a supplement to, but not an effective substitute for, vaccination." Ibid.

The same is true of social distancing. "[S]hort of fully isolating [a service] member from any contact with others both on the job and off -- which is not practicable" -- social distancing cannot reduce risks as effectively as vaccination. C.A. E.R. 345. And social distancing is obviously incompatible with deployment, which often requires servicemembers to sit shoulder-to-shoulder on long flights and to live, work, eat, and sleep in close quarters in tents and other temporary structures. Id. at 239-240, 249; see id. at 356 (explaining why "isolation is not practicable" in light of applicant's duties).

Testing likewise is not a viable alternative: as the district court explained, "it's not always feasible," "especially when you have to deploy quickly," and if applicant tested positive, "the military would be forced to scramble to find a replacement." Appl. App. 10a; see C.A. E.R. 245-246, 349-351. "[T]he speed of trans-

mission" can also "outpace[] test results, making test result availability not an effective alternative measure." Appl. App. 10a-11a. Applicant suggests that the Air Force use "rapid antigen tests" to obtain results more quickly, Appl. 30, but the Air Force explained that antigen tests are "less accurate" and would therefore increase the risk that applicant would "deploy while actually infectious, risking both his health and the health of his unit," C.A. E.R. 351.

In any event, testing would not permit applicant to enter countries that bar unvaccinated foreigners. "[M]any host nations require vaccination for service member[s] to enter their countries," and "[t]esting will not satisfy those requirements." C.A. E.R. 351; see ibid. (noting that "Combatant Commanders (who oversee operations for all Services in a particular area of the world)" also "require vaccination for deployment to their areas of responsibility"). Applicant states that some countries have recently relaxed their vaccination requirements, see Appl. 26-27, but various countries still require vaccination, and the mission of the unit applicant formerly commanded is to deploy anywhere in the world when a need arises, with little notice, see C.A. E.R. 241. It would obviously undermine the military's compelling interests if a member of the unit (not to mention its commander) were barred from entering the country in which a mission was to take place.

Applicant also contends that another "less restrictive al-

ternative" would be to treat him "the same as the fully vaccinated" because of his claimed "natural immunity" attributable to his June 2021 infection. Appl. 28. But relying on CDC guidance and scientific evidence, DoD has determined that there is insufficient evidence to support a conclusion that prior infection provides adequate protection against future infection. See C.A. E.R. 277. There is uncertainty about the "antibody threshold" that is needed to protect an individual against reinfection, for example, and about how long any protection from prior infection might last. See id. at 352-353. The Air Force assessed available studies and concluded that much remains "unknown about the strength, consistency, and duration of protection from prior SARS-CoV-2 infection." Id. at 353; see id. at 353-354 (describing studies). By contrast, evidence shows that "[v]accination provides a strong boost in protection for people who have recovered from COVID-19," and the Air Force has therefore concluded that "the best way to minimize the risk to service members and the Air Force mission is to require vaccination." Id. at 353-354.

Applicant and his amici cite various studies that they believe support his views about natural immunity. E.g., Appl. 20-21; Zywicki et al. Amici Br. 5-18. But the CDC has concluded, based on its ongoing assessment of new scientific evidence, that "[p]eople who already had COVID-19 and do not get vaccinated after their recovery are more likely to get COVID-19 again than those who get

vaccinated after their recovery." CDC, Frequently Asked Questions, go.usa.gov/xzUSk.[4] Applicant emphasizes (Appl. 21) that this statement compares people who remain unvaccinated after a COVID-19 infection with people who get vaccinated after an infection (rather than comparing them to vaccinated people at large). But that is precisely the point -- the CDC has concluded that post-infection vaccination provides important protection to a person in applicant's situation when compared with "natural immunity" standing alone.

In addition, natural immunity, like testing, would not enable applicant to enter countries that bar unvaccinated foreigners. Applicant asserts that the European Union sometimes accepts "proof of recovery from infection" as an alternative to vaccination. Appl. 29 (citation omitted). But applicant's June 2021 infection

[4] Amici also misread the studies they cite. To take just one example, they assert that vaccination makes people more "vulnerab[le]" to variants. Zywicki et al. Amici Br. 16. But the study they cite merely found that "antibody-resistant lineages comprised a higher percentage of cases in fully vaccinated" individuals. Venice Servellita et al., Predominance of Antibody-Resistant SARS-CoV-2 Variants in Vaccine Breakthrough Cases from the San Francisco Bay Area, California, 7 Nature Microbiology 277, 279 (Feb. 2022), www.nature.com/articles/s41564-021-01041-4.pdf. In other words, if vaccinated people become infected, they are more likely to become infected with antibody-resistant variants. But vaccinated people are far less likely to become infected in the first place: "[V]accine breakthrough infections comprised only a minority of total infections (9%, 125 out of 1,373 cases)," "consistent with previous reports showing that vaccination is effective in decreasing viral transmission." Id. at 284.

would not even qualify under the European Union's standard, which requires that "no more than 180 days have passed since the date of the first positive PCR test." European Commission, EU Digital COVID Certificate, ec.europa.eu/info/live-work-travel-eu/coronavirus-response/safe-covid-19-vaccines-europeans/eu-digital-covid-certificate_en. Applicant's observation therefore only casts further doubt on the effectiveness of his claimed immunity. See, e.g., C.A. E.R. 353 (noting questions about the duration of protection).

Applicant observes that the Air Force sometimes grants medical exemptions from other vaccination requirements when there is sufficient "evidence of immunity," including immunity resulting from prior infection. Appl. 28 (citation omitted). But as the Air Force has explained, the analysis is circumstance- and disease-specific: Long experience has shown that infection with some diseases, such as measles and chickenpox, can result in longstanding immunity, while infection with other diseases, such as influenza and whooping cough, does not. C.A. E.R. 274. Relying on FDA and CDC guidance and available scientific evidence, the Air Force has determined that a "history of COVID-19 disease" or a test showing antibodies does not constitute the "[e]vidence of immunity" that is necessary to support a medical exemption under military immunization policies. Id. at 272-273; see id. at 273 (citing "[g]rowing epidemiological evidence * * * indicat[ing] that vac-

cination following infection further increases protection from subsequent infection," including in light of "increased circulation of more infectious variants").

Applicant also makes the startling proposal that the Air Force allow him to "accompany [his] unit" even if he tests positive, suggesting that unless he becomes "severely ill, he could perform his duties with a few added precautions." Appl. 30. That proposal illustrates applicant's disregard for military readiness and the health of other servicemembers. It also underscores the extent to which he seeks to intrude on military commanders' judgment about how best to run the military: The judiciary should not compel the Air Force to assign to a unit a servicemember who is currently infected with a highly contagious virus that could render him disablingly ill, require a dangerous and disruptive medical evacuation, and infect other servicemembers.

C. Applicant's Free Exercise Claim Lacks Merit

Applicant's Free Exercise claim adds little to his RFRA claim: Because the Air Force's vaccination requirement satisfies strict scrutiny under RFRA, it necessarily complies with the most stringent standard that could apply under the Free Exercise Clause, see Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam).

That said, we respond briefly to the incorrect suggestion (Appl. 31-32) that the Air Force's vaccination requirement treats secular activity more favorably than religious exercise. As noted,

medical or administrative exemptions generally are temporary and thus not comparable to the permanent exemption that applicant seeks. See Doe v. San Diego Unified School Dist., 19 F.4th 1173, 1179 (9th Cir. 2021) (concluding that due to its "temporary duration," a 30-day exception from a COVID-19 vaccination mandate did not "undermine a school district's interests in student health and safety the way a religious exception would"). Servicemembers with temporary medical exemptions must get vaccinated as soon as the temporary condition resolves. C.A. E.R. 301. In addition, as the district court explained (Appl. App. 47a), the Air Force's goal in requiring vaccination is to ensure a maximally healthy force -- and vaccinating someone for whom a vaccine is temporarily medically contraindicated would undermine, not further, that goal. See Doe, 19 F.4th 1173, 1178; We the Patriots USA, Inc. v. Hochul, 17 F.4th 266, 285 (2d Cir. 2021), petition for cert. pending, No. 21-1143 (filed Feb. 14, 2022); Does 1-6 v. Mills, 16 F.4th 20, 30-31 (1st Cir. 2021), cert. denied, 142 S. Ct. 1112 (2022). Temporary medical exemptions are thus categorically different from the permanent religious exemption that applicant seeks.

Moreover, contrary to applicant's suggestion (Appl. 32), Air Force policy does not treat individuals who cannot be vaccinated for temporary medical reasons more favorably than individuals who cannot be vaccinated for religious reasons. As previously explained, servicemembers who are unvaccinated against COVID-19 --

for any reason -- generally are not considered medically ready for deployment. See p. 7, supra. Restrictions on travel by unvaccinated servicemembers or training opportunities likewise generally do not turn on whether a servicemember is unvaccinated for secular or religious reasons. See C.A. E.R. 250.

II. THE EQUITABLE FACTORS COUNSEL AGAINST RELIEF

Applicant has shown neither that he would suffer irreparable harm absent an injunction pending appeal, nor that an injunction would serve the public interest, which merges with the government's interest here. Nken v. Holder, 556 U.S. 418, 435 (2009); Winter v. NRDC, Inc., 555 U.S. 7, 12 (2008).

The Air Force has "no policy mandating administrative separation for" members of the Reserve who refuse to be vaccinated against COVID-19. C.A. E.R. 329. Instead, all of applicant's claimed harms flow from his no-pay/no-points status and contemplated reassignment to the IRR, which he says "prevents [him] from drawing a salary, incurring points toward retirement, reporting for duty, or being attached to a unit." Appl. 38; see C.A. E.R. 335. But those are entirely reparable harms. If applicant ultimately were to succeed on the merits of his claims, backpay is a potential remedy. See, e.g., 10 U.S.C. 1552(c)(1) (authorizing payment of "a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits"); cf. Tanzin v. Tanvir, 141 S. Ct. 486, 491 (2020). Likewise, applicant can seek to

restore his points toward retirement and even to correct his service record to avoid any adverse impact on future promotions. See, e.g., 10 U.S.C. 1552(a)(1) (authorizing military departments to "correct any military record" to "correct an error or remove an injustice"). The availability of such "adequate compensatory or other corrective relief * * * weighs heavily against a claim of irreparable harm." Sampson v. Murray, 415 U.S. 61, 90 (1974) (citation omitted). And that is especially so in the military context, where injunctive relief is a grave intrusion on the Executive Branch's supervision of the military. See pp. 16-19, supra.

Applicant also asserts (Appl. 38-39) that injunctive relief is necessary to allow him to serve with a "unit that is willing to hire him" and to pursue "training and temporary duty assignment opportunities available to other unvaccinated servicemembers." But applicant cites no authority supporting his assertion that the denial of such opportunities qualifies as irreparable harm -- and if they did, virtually any employment dispute, in the military or otherwise, would be fodder for an injunction. What is more, applicant does not explain how a unit could "hire" him consistent with Air Force policies on vaccination. Nor are training and temporary duty assignment opportunities generally available to unvaccinated servicemembers -- as applicant himself previously acknowledged. C.A. E.R. 78; see id. at 250.

Finally, denying an injunction pending appeal also would not result in any "loss of First Amendment freedoms, for even minimal periods of time," Elrod v. Burns, 427 U.S. 347, 373 (1976), because applicant would remain free to adhere to his stated religious beliefs by declining to become vaccinated while in the IRR.

On the other side of the balance, the risk to mission success and to other servicemembers weighs heavily against an injunction forcing the Air Force to disregard applicant's unvaccinated status and to allow him to be assigned to particular trainings or units. See pp. 19-34, supra. And the manner in which applicant refused to become vaccinated not only jeopardizes mission success, but also has the potential to create "a disruptive force as to affairs peculiarly within the jurisdiction of the military authorities." Orloff, 345 U.S. at 95. Applicant's commander relieved applicant from his command "based on [a] loss of faith and confidence in his ability to lead" due to his "pattern of lack of respect for military authority," including his "highly disrespectful affront to the chain of command" in sending the "NUTS!" memorandum, which "show[ed] a shocking lack of military decorum," and his misuse of his position in an effort to obtain information from a subordinate. C.A. E.R. 250-253. It is not in the public interest to absolve applicant of the consequences for that conduct.

Indeed, the judicial intrusion into military affairs that applicant seeks would harm the public interest on an even more

fundamental level, because the Constitution assigns the defense of our Nation to military leaders, not courts. See Egan, 484 U.S. at 530; Gilligan, 413 U.S. at 10. As in Navy SEALs, there is "no basis in this case for employing the judicial power in a manner that military commanders believe would impair the military of the United States as it defends the American people." 142 S. Ct. at 1302 (Kavanaugh, J., concurring).

This Court should thus simply deny the application. If, however, the Court grants any relief, it should not adopt applicant's unclear and contradictory formulation, cf. Appl. 38-39, and should make clear that nothing in its order precludes the Air Force from "considering [applicant's] vaccination status in making deployment, assignment, and other operational decisions." Navy SEALs, 142 S. Ct. at 1301.

III. CERTIORARI BEFORE JUDGMENT IS UNWARRANTED

Applicant's alternative request for certiorari before judgment also should be denied. Certiorari before judgment is warranted "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. Applicant fails to meet that "very demanding standard." Mt. Soledad Mem'l Ass'n v. Trunk, 573 U.S. 954, 955 (2014) (Alito, J., respecting the denial of a petition for a writ of certiorari before judgment).

Briefing in the Ninth Circuit already is underway on applicant's appeal from the denial of a preliminary injunction, and the court of appeals presumably will hear argument and issue a ruling with appropriate dispatch. See 9th Cir. R. 3-3. Once that court has issued its decision, this Court can then consider a petition for a writ of certiorari, if any, to review that decision. Applicant provides no sound basis -- in fact, no basis at all -- to deviate from that normal appellate practice here. Moreover, applicant did not move to further expedite appellate proceedings in the court of appeals, despite the express availability of such expedition. See 9th Cir. R. 3-3(c), 27-12, and 34-3(3) and (5). Having forgone any attempt to secure further expedition in the lower court, applicant cannot justify his request that this Court grant certiorari before judgment and short-circuit the orderly process in the court of appeals.

CONCLUSION

The application should be denied.

Respectfully submitted.

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