No. 22-10645-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NAVY SEAL 1, et al.,

Plaintiffs–Appellees,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF DEFENSE, et al.,

Defendants–Appellants.

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

ANSWER BRIEF OF PLAINTIFFS–APPELLEES

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No. 19-14387

NAVY SEAL 1, et al. v. SECRETARY OF THE UNITED STATES DEPARTMENT OF DEFENSE, et al.

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

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

Avallone, Zachary A.

Boynton, Brian M.

Carmichael, Andrew E.

Carroll, Sarah

Clark, Sarah J.

Coppolino, Anthony J.

Dover, Marleigh D.

Enlow, Courtney D.

Gannam, Roger K.

Haas, Alexander K.

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Harrington, Sarah E.

Liberty Counsel, Inc.

Macik, Thomas More

Mast, Jr., Richard L.

Merryday, Hon. Steven D.

Mihet, Horatio G.

Porcelli, Hon. Anthony E.

Powell, Amy E.

Ross, Casen B.

Scarborough, Charles W.

Schmid, Daniel Joseph

Staver, Mathew D.

Sturgill Jr., Lowell V.

Wilson, Hon. Thomas G.

(Pseudonymous Plaintiffs–Appellees begin on next page.)

No. 19-14387

NAVY SEAL 1, et al. v. SECRETARY OF THE UNITED STATES DEPARTMENT OF DEFENSE, et al.

Pseudonymous Plaintiffs–Appellees

[redacted] LIEUTENANT, USCG

[redacted] CADET, USAF

[redacted] SENIOR CHIEF PETTY OFFICER, USN

[redacted] NAVY CHIEF WARRANT OFFICER, USN

[redacted] LCDR PILOT, USCG

[redacted] PILOT, USCG

[redacted] SECOND LIEUTENANT, USMC

[redacted] CHAPLAIN, USN

[redacted] CAPTAIN 2, USMC

[redacted] RESERVE LIEUTENANT COLONEL, USMC

[redacted] NAVY EOD OFFICER, USN

[redacted] TECHNICAL SERGEANT, USAF

[redacted] NAVY COMMANDER SURFACE WARFARE OFFICER, USN

[redacted] MAJOR, USMC

[redacted] LIEUTENANT COLONEL 2, USMC

[redacted] RESERVE LIEUTENANT COLONEL 1, USAF

[redacted] CHIEF WARRANT OFFICER 3, USMC

[redacted] MASTER SERGEANT SERE SPECIALIST, USAF

[redacted] NAVY SEAL 1, USN

[redacted] LANCE CORPORAL 2, USMC

[redacted] CAPTAIN 3, USMC

No. 19-14387

NAVY SEAL 1, et al. v. SECRETARY OF THE UNITED STATES DEPARTMENT OF DEFENSE, et al.

[redacted]
NAVY SEAL 2, USN

[redacted]
CHAPLAIN, USAFA

[redacted]
CAPTAIN, USMC

[redacted]
FIRST LIEUTENANT, USMC

[redacted]
LANCE CORPORAL 1, USMC

[redacted]
ARMY RANGER, USA

[redacted]
NATIONAL GUARDSMAN, VAARNG

[redacted]
RESERVE LIEUTENANT COLONEL 2, USAF

[redacted]
LIEUTENANT COLONEL 1, USMC

[redacted]
COLONEL, FINANCIAL MANAGEMENT OFFICER, USMC

[redacted]
COLONEL, USAF

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

/s/ Daniel J. Schmid
Daniel J. Schmid
Attorney for Plaintiffs–Appellees

PLAINTIFFS–APPELLEES' STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs–Appellees respectfully request that this Court permit oral argument in the instant appeal because it would assist the Court in understanding and adjudicating the critically important constitutional and statutory issues upon which the district court relied in issuing its well-reasoned preliminary injunction against Defendants–Appellants' unconstitutional and unlawful discrimination against Plaintiffs' cherished religious free exercise rights.

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INTRODUCTION

As the Supreme Court has long affirmed, the heroes of the United States Armed Forces do not shed their constitutional rights when they take the oath. Indeed, "[t]his Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." *Chappell v. Wallace*, 462 U.S. 296, 304 (1983). Moreover, while servicemembers certainly have duties and responsibilities "without counterpart in civilian life," *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975), the Constitution still provides them with the same blanket of constitutional protection that their dedicated service and sacrifice provide to the average civilian. Indeed, "[i]t is a basic tenet of our legal system that a government agency is not at liberty to ignore its own laws and that agency action in contravention of applicable statutes and regulations is unlawful. The military departments enjoy no immunity from this proscription." *Dilley v. Alexander*, 603 F.2d 914, 920 (D.C. Cir. 1979) (citation omitted). For without question, when critical constitutional rights are at issue, "the Supreme Court [has] heard numerous constitutional challenges to military policies." *Singh v. Carter*, 168 F. Supp. 3d 216, 225 (D.D.C. 2016) (cleaned up).

"Times of crisis take the truest measure of our commitment to constitutional values. Constitutional rights are only as strong as our willingness to reaffirm them when they seem most costly to bear." *Hartness v. Bush*, 919 F.2d 170, 181 (D.C.

Cir. 1990) (Edwards, J., dissenting). Our willingness to reaffirm our staunch commitment to our fundamental freedoms is imperative to the very survival of the American experiment. Plaintiffs–Appellants Navy Commander Surface Warfare Officer and Marine Lieutenant Colonel 2 have demonstrated their staunch commitment, and it is time that we honor ours. For, "[i]f the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 483 (1934) (Sutherland, J., dissenting).

The DOD[1] "provides a religious accommodation process, but by all accounts, it is theatre." *U.S. Navy SEALS 1-26 v. Biden*, 2022 WL 34443, at *1 (N.D. Tex. Jan. 3, 2022) And, that theatrical performance violates the First Amendment and RFRA. Despite the DOD's protestations to the contrary, "[t]here is no military exclusion from our Constitution." *Id.* The district court's preliminary injunction should be upheld.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1) Whether the district court correctly held that the DOD's vaccine mandate and concomitant refusal to accommodate sincerely held religious beliefs violated the Religious Freedom Restoration Act ("RFRA").

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[1] "DOD" refers collectively to Defendants–Appellants unless otherwise indicated.

(2) Whether the district court correctly enjoined the DOD's vaccine mandate, as a violation of RFRA, for impermissibly relying on broadly asserted and generalized interests in mandating vaccination for Navy Commander and Lieutenant Colonel 2.

(3) Whether the DOD's policy of refusing to provide accommodations of sincerely held religious beliefs while exempting thousands of servicemembers from the vaccine mandate for nonreligious reasons demonstrates that the mandate is not the least restrictive means of advancing any relevant governmental interest.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND.

A. The DOD Vaccine Mandate and Sham Religious Accommodation Process.

1. The DOD Vaccine Mandate.

On August 24, 2021, U.S. Department of Defense Secretary Lloyd Austin issued a "Memorandum for Senior Pentagon Leadership, Commanders of the Combatant Commands, and Defense Agency and DOD Field Activity Directors" mandating that all military servicemembers receive the COVID-19 vaccine. (A855, ¶80 (hereinafter "Vaccine Mandate").) The Secretary stated: "I have determined that mandatory vaccination against coronavirus disease 2019 (COVID-19) is necessary to protect the Force and defend the American people." (A855, ¶81.) The Secretary "direct[ed] the Secretaries of the Military Departments to immediately begin full

vaccination of all members of the Armed Forces under DOD authority on active duty or in the Ready Reserve, who are not fully vaccinated against COVID-19." (A855, ¶82.) The Secretary's mandate states that servicemembers are only required to receive "COVID-19 vaccines that receive full licensure from the Food and Drug Administration." (A855, ¶83.)

2. Religious accommodation process in Navy and Marine Corps.

a. Navy process.

Under Navy regulations and administrative guidance governing a servicemember's religious accommodation request (RAR), the servicemember must first submit to an interview by a Navy chaplain for a recommendation on the sincerity of the servicemember's religious beliefs. (A964.) Then the servicemember submits the RAR to his or her commanding officer (CO). (A964.) The CO then has seven days to prepare an endorsement stating (1) whether the religious accommodation would negatively affect military readiness, health, and safety, (2) the number of servicemembers who have received similar accommodation, and (3) a determination that denial ("if" recommended) furthers a compelling government interest and that no less restrictive alternatives exist. (A964.) Upon the CO's endorsement, the Chief of Naval Personnel must resolve the RAR within sixty days. (A964.)

If the Chief of Naval Personnel denies the initial RAR, the servicemember may appeal to the Chief of Naval Operations. (A964.) If the Chief of Naval Operations (or his delegate) denies the appeal, the Navy orders the servicemember to accept a COVID-19 vaccine within five days. (A964.) Any servicemember who does not must be "processed for administrative separation" under the Navy's Covid Consolidated Disposition Authority, which contains different requirements for officers and enlisted personnel. (A964.) An officer who declines vaccination is processed for separation for alleged "Misconduct, Moral or Professional Dereliction, and Substandard Performance." (A965.) A non-probationary officer is thereafter entitled to a Board of Inquiry hearing where senior officers recommend retention or separation. (A965.)

b. Marine Corps process.

A Marine requesting a religious accommodation must complete a religious exemption form and then submit to a chaplain interview to determine whether the Marine's religious beliefs are sincerely held. (A965.) The chaplain then submits the RAR to the Marine's commander to be routed to the Deputy Commandant, Manpower and Reserve Affairs, who in turn reviews the application and consults with a staff judge advocate and the Religious Accommodation Board. (A966.) The Religious Accommodation Board, consisting of three voting members, a recorder, a legal advisor, and a chaplain advisor, reviews the RAR, writes an assessment, and

makes the recommendation to grant or deny. (A966.) The Deputy Commandant then must resolve each RAR and articulate the rationale for each decision within 60 days. (A966.) The Deputy Commandant may deny an RAR only if there are no less restrictive alternatives to further a compelling government interest. (A966.)

The Deputy Commandant provides written notice to the requesting Marine, outlining the decision and providing any guidance, conditions, or limitations placed on an approved RAR. (A966.) If denied, the Marine may appeal to the Commandant of the Marine Corps. (A966.) If the Commandant denies the appeal, the Marine is given an order to receive the COVID-19 vaccine within five days. (A966.) If the Marine does not comply, the Marine is classified as refusing the vaccine and is reported for administrative separation. (A967.)

3. The DOD religious accommodation sham.

The district court ordered the DOD to submit data on the number of RARs, approvals, and denials. (R.19.[2]) On February 4, 2022, the Navy's data showed 4,095 RARs submitted, none granted, and 3,728 denied, with 1,303 denials appealed. (A965.) The Navy had denied 81 appeals and granted none. (A965.)

The February 4 Marine Corps data showed 3,539 RARs submitted, none granted, and 3,458 denied, with 1,272 appeals. (A967.) The Marine Corps had

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[2] References to parts of the record not contained in Appellants' Appendix are by "R.[district court document number]."

denied 119 appeals and granted 3. (A967.) The 3 granted accommodations, however, were for Marines who had already begun the process of retirement, terminal leave, or other separation. (A1001; A802, ¶17.)

Based on this data and subsequent filings detailing the 25 most recent appeal denials at the time (A1000), the district court found that the Navy and Marine submissions "reveal[] a process of 'rubber stamp' adjudication by form letter" (A1000), and "strongly illustrate[] that the military fails to afford an applicant an actual 'case-by-case assessment' as required by RFRA." (A1002.)

B. Navy Commander's and Lieutenant Colonel 2's Sincerely Held Religious Objections to the COVID-19 Vaccines.

1. Navy Commander's sincerely held religious beliefs and accommodation request.

On September 13, 2021, Navy Commander submitted his RAR. (A418, ¶8.) He testified below that he is a practicing Christian and believes his body is a temple. (R.112, Tr., at 26.) He believes he should honor and respect his temple "as if God indwells in [his] body" which, he explained, "pertains to the things that I eat . . . to what I watch . . . to the things that I listen to." (*Id.*) He sincerely believes he is "a steward of [his] body" and that he is to "differentiate between the clean and the unclean." (*Id.*) Navy Commander believes it is his "duty to safeguard [his] body and not defile it, as [he is] committed to honoring [his] God, to glorify Him and His purposes." (*Id.*; *see also* A862, ¶106 ("Plaintiffs have sincerely held religious beliefs

that their bodies are temples of the Holy Spirit, and that to inject medical products that have any connection whatsoever to aborted fetal cell lines would be defiling the temple of the Holy Spirit.").) Navy Commander practices his sincerely held religious beliefs in all areas of his life. (R.112, Tr., at 27-28; *see also* A856, ¶85–A865, ¶115.)

Specifically pertaining to his RAR, Navy Commander testified:

> When I read about these vaccines, it is my understanding, regardless of whether they were developed or produced or used ingredients of fetal cell tissues, to me that is abhorrent to take innocent life and use them. While I don't fully understand the mRNA aspect of it and whether or not it messes with your DNA or the effects to your body, to me all that stuff together is idol worship as it pertains to taking what—you know, God created me to be holy and defile it with a manmade object, separate from what God created me to be, and I have a problem with reconciling that.
>
> So my religious objection is that I cannot knowingly put something in my body that I think is a toxin or will defile me, in an effort to honor my God and practice my faith.

(R.112, Tr., at 27; *see also* A862, ¶105 ("105. Because all three of the currently available COVID-19 vaccines are developed and produced from, tested with, researched on, or otherwise connected with the aborted fetal cell lines HEK-293 and PER.C6, Plaintiffs' sincerely held religious beliefs compel them to abstain from obtaining or injecting any of these products into their body . . . .").)

Navy Commander articulated his sincerely held religious beliefs to the Navy Chaplain responsible for interviewing him for his RAR, and the Chaplain determined that Navy Commander's religious beliefs were sincere. The Navy denied his RAR

on October 22, 2021. (A418, ¶9.) Like all Navy RAR denials, Navy Commander's denial letter was "identical to the denial letter received by the sixteen sailors under his command on the guided missile destroyer." (A969.) As a reviewing authority himself for the RARs of his destroyer crew, he had endorsed all of his crew's RARs and "affirmed the ability to accommodate each sailor's request." (A969.)

Navy Commander submitted his appeal on November 3, 2021 (A418, ¶10), which was denied on January 28, 2022. (A423, ¶23.) The rubber-stamp denial of his appeal notes that his religious convictions are sincerely held and that coercing his vaccination would be a substantial burden on those beliefs. (A970.) Nevertheless, the Navy stated there was no less restrictive alternative to mandatory vaccination because "the other preventative measures, which for the last two years Navy Commander has required of sailors under his command, are not 100 percent effective." (A970.) Navy Commander was ordered to present himself for COVID-19 vaccination on February 3, 2022, or face immediate consequences, including removal from command of his vessel. (A423, ¶¶24-25.)

2. Lieutenant Colonel 2's sincerely held religious beliefs and accommodation request.

On September 7, 2021, Lieutenant Colonel 2 submitted her RAR. (A972.) She lives her life according to her sincerely and deeply held religious convictions, testifying, "I am a believer in Christ, and I am a follower of Christ. . . . I like to live out my life according to the Word of God, and I hope that I demonstrate that every

day . . . .” (A972; R.112, Tr., at 160-161.) Lieutenant Colonel 2’s sincerely held religious beliefs preclude her from accepting any substance connected in any way with aborted fetal cells. (A818-819.) She testified, “for me, it would be sin and it would defile my body, because my body is, in fact, a temple of Christ.” (R.112, Tr., at 157; *see also* A862, ¶105.) As the district court found, “Lieutenant Colonel 2 harbors a sincere religious belief that her body is temple of God and that the compulsory introduction of a foreign substance into the body violates the word of God.” (A972.)

Lieutenant Colonel 2’s religious beliefs against the sin of abortion are deeply felt due to a traumatic personal experience:

> [I]n 1995, active duty LIEUTENANT COLONEL 2 became pregnant after being raped. The anger and humiliation of the sexual assault led her to have an abortion which made her even more ashamed. In fact, after her abortion, LIEUTENANT COLONEL 2 felt like a murderer, and punished herself because she felt unworthy. This behavior only stopped after her husband caught her punishing herself, and helped her realize that God had truly forgiven her for the abortion.

(A819.) The district court found, “This experience caused Lieutenant Colonel 2 to develop a profound religious opposition to abortion and to any vaccine developed with cell lines derived from fetal cells.” (A972.)

Lieutenant Colonel 2’s objections to the COVID-19 vaccines are also informed by her deeply held religious convictions that the mRNA technology is unclean. She testified:

> [I]t's not just aborted fetal cell lines that's the issue. It's the messenger RNA is another issue for me, and that's because I don't believe that this messenger RNA is clean, and that was something that the Spirit rose up in me and was like, that's unclean. It's almost like in the Bible where it says don't eat pork. I don't eat pork, because it's unclean, so I can't do messenger RNA, because based on what I believe, it is also unclean. And that doesn't mean that you can't eat pork, I'm not going to suggest that, or that you can't get a vaccine, that's up to you. But for me, I cannot.

(R.112, Tr., at 181.)

Lieutenant Colonel 2 conveyed her sincerely held religious objections in her RAR. (R.112, Tr., at 160.) On October 13, 2021, the Deputy Commandant denied Lieutenant Colonel 2's request for a religious accommodation, which she timely appealed on November 3, 2021. (A972.) On January 26, 2022, the Assistant Commandant of the Marine Corps denied Lieutenant Colonel 2's appeal and ordered her to begin a COVID-19 vaccination series by February 2, 2022. (A972-973.)

In the appeal denial letter, the Marine Corps stated that compelling Lieutenant Colonel 2 to receive a COVID-19 vaccine would impose no substantial burden on her because "fetal stem cells are neither used in the manufacture of the Pfizer COVID-19 vaccine nor are they present in the vaccine itself." (A443.) As the district court observed, however, the appeal denial said "says nothing about the development of the vaccine or the religious concepts of, for example, accepting a personal benefit from evil, assisting someone in profiting from evil, cooperating in evil, appropriation of evil, de-sensitization to evil, moral contamination by intimacy with evil,

ratification of evil, complicity with evil, or other considerations undoubtedly familiar to a theologian and likely familiar to a thoughtful religious lay person." (A972-973.) But the appeal denial stated that, even if mandatory vaccination were a substantial burden on Lieutenant Colonel 2's religious beliefs, there were no less restrictive alternatives to achieve the government's compelling interest in the "health and safety of the force." (A444.) And, "in conclusory fashion, without citation of sources and without analyzing the specific demands of Lieutenant Colonel 2's particular assignment," the appeal denial stated that less restrictive options that have been deployed for the last two years were insufficient. (A973.)

C. Navy Commander's and Lieutenant Colonel 2's Dedicated, Exemplary, and Uninterrupted Service and Execution of Duties During COVID-19.

1. Navy Commander's 18 years of exemplary service and mission completion during COVID-19.

Navy Commander joined the Navy after completing university in 2004 and has been serving his country honorably for nearly 18 years. (A968.) After completing several tours of duty and graduating from nuclear power school, Navy Commander was given command of a surface warfare vessel, a guided missile destroyer, with a crew of 320. (A968; R.112, Tr., at 22-23.) Because of his highly specialized training, "few service members are as qualified as Navy Commander to direct a surface vessel." (A968.) In fact, as Navy Commander testified,

> I'm a surface warfare officer. Given my nuclear skill set—there's only a small number of all the ships in the Navy that are nuclear powered, and that would be our national assets, the aircraft carriers, we have about 12 of them, and about 10 percent of my community, in the surface warfare community, are qualified to be able to operate those on the aircraft carriers.

(R.112, Tr., at 24.)

Navy Commander has deployed across the globe, on multiple occasions, in defense of the Nation. (A417, ¶5.) He has deployed to the Western Pacific, Persian Gulf, Red Sea, Mediterranean Sea, Black Sea, Atlantic Ocean, Caribbean, Eastern Pacific, and several other locations on multiple missions in support and defense of the Nation's interests. (A417, ¶5.) Navy Commander's deployment and mission assignments did not cease when COVID-19 arose, and he continued to complete all mission assignments. (A418-A420, ¶¶12-13.)

As Navy Commander testified, from the first confirmed case of COVID-19 in the United States on January 20, 2020 until December 11, 2020, when the first EUA vaccine was issued, he completed the following mission assignments: (a) From January 2020 to August 2020, Navy Commander's ship deployed to FIFTH and SIXTH FLEET areas of operation in support of OPERATION SENTINEL; (b) In September 2020, his guided missile destroyer and those under his command completed a weapons offload at a Naval Weapons Station; (c) From October 2020 to November 2020, his command conducted national tasking for SECOND FLEET in the Western Atlantic in support of out-of-area deployers; and (d) From January

2021 to March 2021, his command executed a 60-day surge deployment to FOURTH FLEET in support of counter-illicit trafficking operations. (A418-A419, ¶12.) Additionally, from January 2020 to March 2021, Navy Commander commanded his guided missile destroyer underway for 300+ days over a 15-month period. (A419-A420, ¶13.)

Throughout the periods of deployment and mission assignments, Navy Commander's guided missile destroyer successfully executed health protection protocols to limit COVID-19 exposure, including masking, sanitization of the ship's spaces and door handles, social distancing where practicable, restriction of movement protocols for traveling sailors or those experiencing symptoms, and a quarantine/isolation protocol for underway operations. (A419-A20, ¶13.) He testified:

> For almost a year, my command continued to execute mission requirements during the height of the COVID-19 pandemic without the benefit of a vaccine. The force health protection protocols we executed have proven successful and are a less restrictive means of furthering the government's compelling interest without infringing upon any service member's religious freedoms.

(A420, ¶14.) The district court found:

> From January 2020 to March 2021, from the onset of COVID-19, through the height of the pandemic, and without a vaccine (and certainly before the FDA fully authorized a COVID-19 vaccine), Navy Commander conducted successful operations, including a voyage exceeding 300 days, while adhering to COVID-19 safety protocols, including masking, sanitizing, physical distancing, COVID-19 testing, and quarantining. More than 93% of the sailors under his command

> have completed a COVID-19 vaccination series. In sum, his present regime has proven successful including while "underway" on the oceans of the world.

(A968 (citations omitted).)

Navy Commander also testified below that he was fully capable of providing requested religious accommodations to those under his command without endangering military readiness, mission success, or operational capacity. Navy Commander endorsed 16 RARs from his crew that the Chaplain determined were based on sincerely held beliefs. (R.112, Tr., at 30.) As he testified,

> From my perspective, I feel that those sincerely held beliefs are something that we can mitigate onboard my ship in terms of mission readiness, unit cohesion, good order and discipline. . . . And because I think that I can, you know, mitigate and protect those sincerely held beliefs with religious accommodations, I positively endorsed 16 of those requests, and I had a negative endorsement for the one that the chaplain said was not sincerely held.

(R.112, Tr., at 30.)

Navy Commander further testified, "I say that all in the context that our ability to execute and operate in a COVID environment has not stopped. We adapt, we overcome, we execute. **At no point in this process have I not been able to do or execute the mission because of COVID**." (R.112, Tr., at 36 (emphasis added).) Navy Commander also has had COVID-19 and "demonstrates the natural presence of COVID-19 antibodies." (A998.)

2. Lieutenant Colonel 2's 25 years of exemplary service and mission completion during COVID-19.

Lieutenant Colonel 2 enlisted in the Marine Corps in 1997 and has served honorably since. (A971.) Though she began as a reservist, she transferred to active duty following the events of September 11, 2001. (A971.) An African American woman, Lieutenant Colonel 2 graduated at the top of her class in recruit training in 1998, and graduated at the top of her class in Marine Combat Training. (R.112, Tr., at 151.) She also graduated at the top of her class from the unit diary clerk's course. (*Id.*) She graduated Officer Candidates School, attended The Basic School, obtained further schooling to become a logistics officer and logistics trainer, and received training in special operations. (R.112, Tr., at 151-152.) Lieutenant Colonel 2 is also a ground safety officer and has an environmental operations military occupational specialty. (R.112, Tr., at 152.) Her other career highlights include serving as a Congressional Fellow for the Defense Department and as a legislative assistant for the Marine Forces Integration Office. (R.112, Tr., at 152.)

The Marine Corps selected Lieutenant Colonel 2 to attend Command and Staff College and to participate in the advanced studies program, which is a specialized program limited to 10 selectees. (R.112, Tr., at 153.) After completing her master's degree in that program, the Marines selected Lieutenant Colonel 2 to command a logistics company, and then to serve as the executive officer of a maintenance battalion with 1,400 people under her command. (R.112, Tr., at 153.) After she

completed that assignment, the Marines assigned her to Marine Corps Forces Special Operations Command, where she is currently stationed. (*Id.*) Lieutenant Colonel 2 has completed several tours of duty, including in Iraq and Afghanistan, and various assignment tours in multiple parts of Asia. (A428, ¶7.) In January 2021, the Marines assigned Lieutenant Colonel 2 to transfer to Bahrain for the Marine Corps' naval integration program during the summer of 2022, and in August 2021, the Marines selected her to command a combat logistics battalion stationed at Camp Lejeune. (A971.) While Lieutenant Colonel 2 is eligible for retirement, she believes that she has a duty to fulfill the assignment of battalion command that requires her service for many more years. (A432, ¶23.)

Since the beginning of COVID-19, Lieutenant Colonel 2 has completed eight temporary duty assignments, which required her to travel throughout the United States. (A971.) Lieutenant Colonel 2's vaccination status did not prevent her from continuing to execute the mission of the Marine Corps throughout the COVID-19 pandemic, and the DOD authorized and paid for her travel throughout the United States during the COVID-19 pandemic to complete her assignments. (A431, ¶19.) Lieutenant Colonel 2 even worked while infected with COVID-19 at the request of her superior officers, including onsite in her unit office, in order to complete a critical mission assignment. (R.112, Tr., at 164.) While working on that assignment, Lieutenant Colonel 2's direct command visited her at her office, knowing she was

positive for COVID-19, and simply maintained physical distance while Lieutenant Colonel 2 wore a mask and kept her work area disinfected. (R.112, Tr., at 164-65.) And, like Navy Commander, Lieutenant Colonel's 2's infection left her with natural immunity. (A998.)

Lieutenant Colonel 2's unit never refused or was unable to deploy Marines due to COVID-19 and performed its mission successfully with health and safety protocols in place. (R.112, Tr., at 163.) She testified, "we just had to execute COVID protocols in order to execute that mission. . . . And we pride ourselves on being able to complete the mission." (R.112, Tr., at 163.) Employing standard COVID-19 protocols that existed from the start of the pandemic, the Marine Corps "executed the mission like normal." (R.112, Tr., at 166.)

II. PROCEDURAL HISTORY AND DISPOSITIONS BELOW.

On October 15, 2021, Plaintiffs filed their Verified Class Action Complaint for Preliminary and Permanent Injunctive Relief and Declaratory Relief. (A39.) The same day, Plaintiffs moved for a temporary restraining order and preliminary injunction (A161), seeking to enjoin Defendants from enforcing their Vaccine Mandate against servicemember with sincerely held religious objections to the vaccine. On October 18, 2021, the district court entered an order deferring the temporary restraining order and preliminary injunction pending a response from Defendants and invited Plaintiffs to seek emergency relief for servicemembers who

faced serious and irreparable injury while the motion remained under advisement. (A190.) The district court also scheduled a hearing for November 15, 2021. (A190.) After conducting the all-day hearing on November 15, the district court entered an order deferring the preliminary injunction pending further information and filings from Defendants. (A387.) That order required Defendants to provide, by January 7, 2022, and every two weeks thereafter, the number of RARs, grants, denials, appeals, and appeal adjudications. (A387-A388.)

On February 1, 2022, while the preliminary injunction motion was still under advisement, Plaintiffs filed an Emergency Motion for Temporary Restraining Order Pending Decision on Motion for Preliminary Injunction on behalf of Plaintiffs Navy Commander and Lieutenant Colonel 2, who faced immediate harm without injunctive relief. (A410-A411.) On February 2, 2022, the district court issued a temporary restraining order for Navy Commander and Lieutenant Colonel 2, enjoining Defendants from taking adverse action against them pending a hearing scheduled for February 10, 2022. (A476-A485.) At the all-day evidentiary hearing Navy Commander and Lieutenant Colonel 2 testified in person, while Defendants did not call any witnesses. (A962; A1116-A1117.) The district court found the two Plaintiffs credible and entered a preliminary injunction on February 18, 2022, enjoining Defendants from enforcing the Vaccine Mandate against Navy Commander and Lieutenant Colonel 2 and from taking any adverse action against

them for requesting a religious accommodation from such mandate. (A1005-A1006.)

On February 25, 2022, Defendants appealed to this Court. (A1007.) On February 28, 2022, Defendant requested that district court issue an immediate administrative stay of the preliminary injunction and issue a stay pending appeal. (A1009.) On March 2, 2022, the district court denied the request for an immediate administrative stay and scheduled an evidentiary hearing for March 10, 2022. (A1112.) At the all-day evidentiary hearing, Navy Commander testified in person, and Lieutenant Colonel 2 attended in person but did not testify. (A1119-A1120.) Plaintiffs also presented the testimony of U.S. Army Lt. Colonel Dr. Pete Chambers, one of only six Green Beret Flight Surgeons in the world; U.S. Army Lt. Colonel Dr. Teresa Long, also a Flight Surgeon, who also holds an MPH with special training in epidemiology and the Defense Medical Epidemiology Database (DMED); and Colonel (Ret) Dr. Stewart Tankersley, who retired from the U.S. Army as a Flight Surgeon. Although the district court had urged Defendants to bring lives witnesses (A1107-A1109), Defendants did not. (A1117; A1119-A1120.) The district court issued its order denying the stay pending appeal on March 11, 2022. (A1119-A1120.)

In discussing the scope of its preliminary injunction, the district court noted its order "includes no instructions to the military about composing, training,

equipping, or otherwise controlling the military" (A1103), but rather "preserves for Navy Commander and Lieutenant Colonel 2 the assignments granted by the military, not by the court." (A1103.) The court noted its preliminary injunction merely "prevents an adverse action by the military against Navy Commander and Lieutenant Colonel 2," but permitted the military—for any nonretaliatory reason—to take action against the movants should it exist. (A1103.) Additionally, the court explained, "The operative language of the preliminary injunction is direct and specific. Pending resolution of the pending RFRA claims, the preliminary injunction narrowly and specifically protects Navy Commander and Lieutenant Colonel 2" from enforcement of the Vaccine Mandate and from any adverse action that is retaliatory. (A1114.) The court concluded, "Any interpretation to the contrary is wrong . . . ." (A1114.)

On March 3, 2022, Defendants moved for a stay of the preliminary injunction in this Court, which the Court granted in part on March 30, 2022.

STANDARD OF REVIEW

On appeal to this Court, a district court's preliminary injunction "is reviewed for an abuse of discretion." *S.E.C. v. Unique Fin. Concepts, Inc.*, 196 F.3d 1195, 1198 (11th Cir. 1999). "Legal determinations underlying the grant of an injunction are reviewed *de novo*, and factual determinations are reviewed for clear error." *United States v. Alabama*, 691 F.3d 1269, 1281 (11th Cir. 2012). Where, as here, an

appellant challenges the preliminary injunction on the basis of the district court's jurisdiction, Plaintiffs "need only establish a reasonable probability of ultimate success upon the question of jurisdiction when the action is tried on the merits." *S.E.C.,* 196 F.3d at 1109 (cleaned up).

SUMMARY OF THE ARGUMENT

The district court correctly held that the DOD is subject to the demands of the Religious Freedom Restoration Act (RFRA) and the First Amendment to accommodate the sincerely held religious beliefs of military servicemembers. RFRA plainly and textually grants the district court jurisdiction to hear challenges to military policies and regulations and imposes upon the federal government and its agencies, including the DOD and the military branches, the requirement to justify a substantial burden on religious beliefs by proving, "to the person," that the burden is the least restrictive means of advancing a compelling government interest. The DOD has failed on both counts.

ARGUMENT

I. THE PRELIMINARY INJUNCTION SHOULD BE AFFIRMED BECAUSE THE DISTRICT COURT HAD JURISDICTION TO ENJOIN THE DOD'S UNLAWFUL DISCRIMINATION AGAINST RELIGION.

A. The DOD Claims Boundless Discretion in Willful Disregard of RFRA's Jurisdictional Grant.

To avoid any review of its unlawful, unconstitutional actions, the DOD persists in the futile argument that no court has authority to review its decisions. (DOD Br. 21-25.) RFRA provides Article III courts with the authority (and mandate) to review the decisions of every agency of the federal government, including the DOD and the military branches, and RFRA vests the district court with authority to enter appropriate relief against the DOD for violations of RFRA. To be sure, the DOD admits (albeit in a different section) that "RFRA applies to the military." (DOD Br. 42.)

1. RFRA's protections apply to the DOD.

As the district court recognized, "[d]espite the unmistakable message of the Free Exercise Clause, RFRA, and [*Gonzalez v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418 (2006)], the defendants continue to argue as if none of the three exists (or, at least, as if none of the three affects the command discretion of the armed forces)." (A1100.) The plain text of RFRA states, "Government shall

not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . ." 42 U.S.C. § 2000bb-1(a).

RFRA also states that "the term 'government' includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity." 42 U.S.C. § 2000bb-2(1); *see also Tanzin v. Tanvir*, 141 S. Ct. 486 (2020) (holding RFRA's definition of "government" includes "all government officials"). And, as Congress' explicit findings make clear, the "purpose" of RFRA is "to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1).

"Congress rendered justiciable Plaintiffs' claims under RFRA, which . . . sets the standards binding every department of the United States to recognize and accommodate sincerely held religious beliefs." *U.S. Navy SEALS 1-26 v. Biden*, 27 F.4th 336, 346 (5th Cir. 2022). RFRA "**undoubtedly applies in the military context**." *Id.* (emphasis added) (quoting *United States v. Sterling*, 75 M.J. 407, 410 (C.A.A.F. 2016)). Against this unequivocal text of RFRA, the DOD presses its inapposite contention that courts are not given the task of running the Army. (DOD Br. 22.) But, "as Justice Frankfurter used to observe, a half-truth is often a whole lie." *Union P. R. Co. v. State Tax Comm'n*, 716 F. Supp. 543, 560 (D. Utah 1988). The district court held:

> Although not given the task of running the Army, the courts in the narrow instance of RFRA are given the task of ensuring that those who

> are given the task of running the Army (and the armed forces in general and every other component of the federal government) conform their actions to the governing law, to RFRA, to which the admirals and the generals and commandants are unquestionably subordinate – just like the President, the Speaker of the House, the Chief Justice, and every other person in the federal government.

(A1097.)

> Moreover,
>
> RFRA includes specific and unequivocal commands to the government, defined to include every branch, department, agency, instrumentality, and official . . . of the United States. Obviously, RFRA includes everyone from the President to a park ranger, from the Chief Justice of the United States to a probation officer, from the Speaker of the House to a member's district office staffer, from the Chairman of the Joint Chiefs of Staff to a military recruiter – even if they don't like and even if they don't agree with it. The Free Exercise Clause and RFRA are the law of the land.

(A1097.) *See also Singh v. McHugh*, 185 F. Supp. 3d 201, 218 (D.D.C. 2016) ("on its face, the statute plainly applies to the U.S. Army. Defendants acknowledge that **Congress specifically intended RFRA to apply to the military**." (emphasis added)); *Singh v. Carter*, 168 F. Supp. 3d 216, 226 (2016) ("Congress nowhere inserted any exception for the U.S. Armed Forces from RFRA's application or any exhaustion requirement"); *Rigdon v. Perry*, 962 F. Supp. 150 (D.D.C. 1997) (applying RFRA against a military regulation restricting the speech of certain military chaplains).

2. RFRA vests the district court with jurisdiction to enter an appropriate remedy against the DOD.

The text of RFRA plainly permits the district court to provide an appropriate remedy for violations of an individual's sincerely held religious beliefs. 42 U.S.C. §2000bb-1(c) ("A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.") (*See also* A988.) Despite its application to the military, the DOD nevertheless contends that an injunction against its vaccine mandate is beyond the authority of the district court and thus not an appropriate remedy. (DOD Br. 42.) This is incorrect.

As the district court recognized,

> Yes, Congress and the President, not the Courts, govern the military. But the Congress and the president in governing the military and by enacting RFRA have established – for the narrow category of free exercise of religion – an action and a remedy in the district court, have specified and placed the burden of proof on the military, and have allowed for an appropriate remedy to ensure a service member's right to free exercise. That is not a fairly contestable proposition, and the military must acquiesce to the command of the Congress and the President in that respect.

(A1102-03.)

B. The District Court Had Separate and Independent Jurisdiction Under the First Amendment to Enter a Preliminary Injunction.

The district court also had jurisdiction under the First Amendment to adjudicate Plaintiffs' free exercise claims. (A911-914, ¶¶240-257.) As the Supreme

Court has held, "we have not required that all of those subject to overbroad regulations risk prosecution to test their rights." *Dombrowski v. Pfister* 380 U.S. 479, 486 (1965). This Court, too, has held: "We will not force a plaintiff to choose between intentionally violating a law to gain access to judicial review and foregoing what he or she believes to be constitutionally protected activity in order to avoid criminal prosecution." *White's Place, Inc. v. Glover*, 222 F.3d 1327, 1329 (11th Cir. 2000). Put simply, "one does not have to await the consummation of threatened injury to obtain preventative relief. If the injury is certainly impending, that is enough." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)); *see also Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."); *ACLU v. The Florida Bar*, 999 F.3d 1486, 1492 (11th Cir. 1993) ("When a plaintiff has stated that he intends to engage in a specific course of conduct 'arguably affected with a constitutional interest,' however, he does not have to expose himself to enforcement to be able to challenge the law." (quoting *Babbitt*, 442 U.S. at 298)).

"If the rule were otherwise, the contours of regulation would have to be hammered out case by case—and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of the regulation." *Dombrowski*, 380 U.S.

at 486. The First Amendment—"of transcendent value to all society, and not merely those exercising their rights—might be the loser." *Id.*

The Government has no answer to the above. Ignoring the First Amendment precedent, the DOD's only response is to suggest that only the military may determine "how best to maintain good order and discipline." (DOD Br. 2, 22.) But the district court has jurisdiction to entertain Plaintiffs' First Amendment claims. As the Middle District of Georgia noted,

> Generals don't make good judges—especially when it comes to nuanced constitutional issues. It's that simple. Whether Defendants' COVID-19 Vaccination requirement can withstand strict scrutiny doesn't require military expertise or discretion. . . . Such an issue is a purely legal matter well within the confines of what the Constitution permits of the judicial branch and its duly-appointed judges.

Air Force Officer v. Austin, No. 5:22-cv-9-TES, 2022 WL 468799, at *8 (M.D. Ga. Feb. 15, 2022). Indeed, "resolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum." *Navy SEALS 1-26*, 27 F.4th at 348 (quoting *Downen v. Warner*, 481 F.2d 642, 643 (9th Cir. 1973)). Thus, "[t]he constitutional underpinnings and merit of Plaintiffs' claims weigh in favor of judicial review." *Id.* The DOD's efforts to escape judicial scrutiny of its unconstitutional actions must fail. The district court had separate and independent jurisdiction—and an unflagging duty—to review Plaintiffs' First Amendment claims.

II. THE DISTRICT COURT'S PRELIMINARY INJUNCTION SHOULD BE AFFIRMED BECAUSE NAVY COMMANDER AND LIEUTENANT COLONEL 2 DEMONSTRATED A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR RFRA AND FREE EXERCISE CLAIMS.

A. The DOD's Vaccine Mandate and Sham Religious Accommodation Process Is Subject to Strict Scrutiny Under RFRA Because it Imposes a Substantial Burden on the Sincerely Held Religious Beliefs of Navy Commander and Lieutenant Colonel 2.

RFRA requires the federal government to provide accommodations from the Vaccine Mandate for those with sincerely held religious beliefs against the COVID-19 vaccines. Congress enacted RFRA "to provide **very broad** protection for religious liberty," going "far beyond what [the Supreme Court] has held is constitutionally required" under the First Amendment. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693, 706 (2014) (emphasis added). The Supreme Court has called RFRA a "super statute." *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020). RFRA prohibits the government from placing a "substantial burden on a person's exercise of religion even if the burden results from a rule of general applicability." *Hobby Lobby*, 573 U.S. at 695. Under RFRA, when the government substantially burdens a person's exercise of religion, "that person is entitled to an exemption from the rule unless the Government '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.'" *Id.* (quoting 42 U.S.C. § 2000bb-1(b) (emphasis added).

1. Plaintiffs have sincere religious objections to the COVID-19 vaccines.

Under RFRA, the definition of the "exercise of religion" includes "'any exercise of religion, **whether or not compelled by, or central to, a system of religious belief**.'" *Hobby Lobby*, 573 U.S. at 696 (emphasis added) (quoting 42 U.S.C. § 2000cc-5(7)(A)). And, under RFRA, the only relevant inquiry is whether Plaintiffs have articulated a sincerely held religious belief that compels them to abstain from a particular action—acceptance of a COVID-19 vaccine that violates their religious convictions. Both Navy Commander and Lieutenant Colonel 2 have plainly satisfied this inquiry.

In determining whether a belief is sincerely held, the Supreme Court has made clear that the protections under the Free Exercise Clause, which are more limited than under RFRA, are "'not limited to beliefs which are shared by all of the members of a religious sect.'" *Holt v. Hobbs*, 574 U.S. 356, 362 (2015). Courts cannot sit in judgment of whether a person's "religious beliefs are mistaken or insubstantial." *Hobby Lobby*, 573 U.S. at 725. Nor are courts to determine "'the plausibility of a religious claim.'" *Id.* at 724 (quoting *Emp't Div., Dept. of Human Res. of Or. v. Smith*, 494 U.S. 872, 887 (1990)). Rather, the "narrow function" of a court (and the DOD) "'is to determine' whether the line drawn [between conduct that is and is not permitted under one's religion] reflects an **honest conviction**.'" *Id.* (emphasis added) (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.,* 450 U.S. 707, 716

(1981)). "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez v. Comm'r,* 490 U.S. 680, 699 (1989).

Here, Navy Commander and Lieutenant Colonel 2 have articulated sincerely held religious objections to the COVID-19 vaccine. (A991 ("Navy Commander refuses vaccination to remain true to his faith, which requires the preservation of his body as the temple of the Holy Spirit. Similarly situated and believing that each COVID-19 vaccination is religiously unclean according to Lieutenant Colonel 2's personal faith, Lieutenant Colonel 2 refuses vaccination [and] voices a sincere objection to any substance connected with aborted fetal cell lines." (cleaned up)); *see also* Statement of the Case, *supra*, § I.B.) The DOD has accepted the sincerity of both Plaintiffs' beliefs. This is not an issue before the Court.

2. The DOD's Vaccine Mandate imposes a substantial burden on Plaintiffs' religious exercise.

The DOD also does not contest, and therefore concedes, that the Vaccine Mandate imposes a substantial burden on Plaintiffs' religious exercise. (DOD Br. 25.) *See Navy SEALS 1-26*, 27 F.4th at 350 ("The Navy does not even dispute that its COVID-19 vaccination requirements substantially burden each Plaintiffs' free exercise of religion.")

There is no question that the DOD's refusal to provide religious accommodations to Navy Commander and Lieutenant Colonel 2 imposes a

substantial burden on their religious exercise. "[T]he question that RFRA presents [is] whether the [vaccine] mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with their religious beliefs." *Hobby Lobby*, 573 U.S. at 724. Notably, the substantial burden inquiry does not address the "very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable)." *Id.* This Court has held that a substantial burden under RFRA is caused whenever the government's action "places more than an inconvenience on religious exercise," and "significantly hampers one's religious practice." *Davila v. Gladden*, 777 F.3d 1198, 1205 (11th Cir. 2015). As in *Hobby Lobby*, Plaintiffs here "believe that [accepting] the [product] demanded by the [vaccine mandate] is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to [accept] the [vaccine]." 573 U.S. at 724. Plaintiffs' "belief implicated a difficult and important question of religion and moral philosophy, namely the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of [benefitting from] the immoral act by another." *Id.* (emphasis added).

As the district court correctly noted, "[a] substantial burden exists if the challenged action 'prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief . . . or if the action truly pressures the plaintiff to significantly modify his religious behavior." (A990 (quoting *Davilla*, 777 F.3d at

1204; *Christian Missionary All. Found, Inc. v. Burwell*, No. 2:14-cv-580, 2015 WL 437631, at *5 (M.D. Fla. 2015)).) Forcing Navy Commander and Lieutenant Colonel 2 to choose between compliance with a mandate that violates their most sincere religious convictions and their sacrificial and honorable service to this Nation is unquestionably a substantial burden. Defendants' position of "take a jab or take a hike" is the very definition of a substantial burden on Plaintiffs' sincerely held religious beliefs. As the district court held, "[t]he fact of, and the consequences of, disobeying a direct order doubtlessly pressure Navy Commander and Lieutenant Colonel 2 to alter their religious practice." (A991.) The DOD "puts Navy Commander and Lieutenant Colonel 2 to this choice:" vaccinate or separate. (A991.) That choice is a substantial burden.

B. The DOD's Vaccine Mandate and Sham Religious Accommodation Process Is Subject to Strict Scrutiny Under the First Amendment Because It Is neither Neutral nor Generally Applicable.

"[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). In fact, "the regulations cannot be viewed as neutral because they single out [religion] for especially harsh treatment." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020). "When a state so obviously targets religion for differential treatment, our job

becomes much clearer." *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 717 (Gorsuch, J.). Here, the DOD's Vaccine Mandate has plainly treated religiously motivated exemption requests with much less favor than the medically motivated. (A913, ¶¶250-251; A487 (noting that the Navy has granted 252 temporary and 11 permanent medical exemptions); A489 (noting that the Marine Corps has granted 232 temporary and 21 permanent medical exemptions).) *See also Navy SEALS 1-26*, 27 F.4th at 352 (noting that the DOD has granted numerous medical exemptions from the COVID-19 vaccine mandate).

In *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, Justice (then-Judge) Alito wrote that "[b]ecause the Department makes exemptions from its [no beards] policy for secular reasons and has not offered any substantial justification for refusing to provide similar treatment for officers who are required to wear beards for religious reasons, we conclude that the Department's policy violates the First Amendment." 170 F.3d 359, 360 (3d Cir. 1999). And, by creating a system of individualized exemptions from the Vaccine Mandate while excluding in practice all religious accommodations from the same mandate, the DOD violates the First Amendment:

> We also reject the argument that, because the medical exemption is not an "individualized exemption," the *Smith* /*Lukumi* rule does not apply. While the Supreme Court did speak in terms of "individualized exemptions" in *Smith* and *Lukumi,* it is clear from those decisions that the Court's concern was the prospect of the government's deciding that secular motivations are more important than religious motivations. If

> anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection.

Id. at 365 (cleaned up). "Therefore, we conclude that the Department's decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*." *Id*.

The DOD is not permitted to make value judgments about whether requests for religious accommodation should be treated less favorably than nonreligious requests.

> [T]he medical exemption raises concern because it indicates that the Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not. As discussed above, when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny**.**

Id. at 366. Like the Third Circuit in *Fraternal Order of Police*, this Court should "conclude that the Department's policy cannot survive any degree of heightened scrutiny and thus cannot be sustained**.**" *Id.* at 367.

C. The DOD Failed to Satisfy Its RFRA Strict Scrutiny Burden to Demonstrate "to the Person" That the Vaccine Mandate Is the Least Restrictive Means of Advancing a Compelling Government Interest.

Because the DOD's Vaccine Mandate is neither neutral nor generally applicable, and because it constitutes a substantial burden on Plaintiffs' religious beliefs under RFRA, it must satisfy strict scrutiny and must be narrowly tailored to serve a compelling interest. *Catholic Diocese*, 141 S. Ct. at 67. "That standard is not watered down; it really means what it says," *Tandon*, 141 S. Ct. at 1298, and is "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 US. 507, 534 (1997), which is rarely passed. *See Burson v. Freeman*, 504 U.S. 191, 200 (1992) ("[W]e readily acknowledge that a law rarely survives such scrutiny . . . .").

1. The DOD bears the burden of proof under strict scrutiny, even at the preliminary injunction stage.

As the district court acknowledged (A993), the DOD bears the burden of demonstrating that its Vaccine Mandate satisfied strict scrutiny. This is not disputed. The DOD cannot show the mandate is the least restrictive means of protecting a compelling interest, especially when focused "to the person" under RFRA. Indeed, "the burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006).

2. RFRA requires the DOD to discharge its strict scrutiny burden by particularized application "to the person" rather than by broadly articulated, general assertions.

Under RFRA, both the compelling interest and the least restrictive means must be satisfied "to the person," which the DOD cannot do.

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

O Centro, 546 U.S. at 430-31 (quoting 42 U.S.C. § 2000bb-1(b)); *see also Hobby Lobby*, 573 U.S. at 727-28 (the court must "look beyond broadly formulated interests and scrutinize the asserted harm of granting specific exemptions to particular religious claimants" (cleaned up)). The district court's conclusion as to this application of the strict scrutiny test was correct. (A992.) The DOD fails that test.

3. The DOD's Vaccine Mandate is not supported by a compelling interest to the person.

Despite RFRA's textual requirement that the DOD satisfy strict scrutiny *to the person*, it resorts to continued reliance on generalized interests, magic words, mere say-so, and other insufficiently tailored interests. For that reason alone, the DOD's mandate fails strict scrutiny.

a. The DOD cannot rely on "magic words" and mere *ipse dixit* to discharge its burden to show a compelling interest *to the person*.

As the Supreme Court has recognized, under RFRA, "broadly articulated interests" and "categorical approach[es]" are insufficient to satisfy the compelling interest test. *O Centro*, 546 U.S. at 431. Throughout the entirety of the proceedings below, and again here, the DOD relies solely on the allegedly compelling interest of "stemming the spread of COVID-19," "maintaining a fighting force," "ensuring [servicemembers] are healthy and ready to deploy worldwide," and general health and military readiness (DOD Br. 26-32.) As the district court noted, the DOD "identif[ies] only the broadly articulated governmental interests and broadly articulated demands of military life" when denying Navy Commander and Lieutenant Colonel 2's requested religious accommodations. (A996.) But, as this Court has held, the DOD "cannot simply utter the magic words and as a result receive unlimited deference from those of us charged with resolving the dispute." (A997 (quoting *Davilla*, 777 F.3d at 1206).)

Here, the DOD's sham accommodation process removes from service Navy Commander (with 18 years of experience) and Lieutenant Colonel 2 (with 25 years of service), based on broadly articulated claims that military readiness would suffer absent mandating these two servicemembers be vaccinated against COVID-19. (DOD Br. 26-32.) As the district court noted, the DOD's determination was made

"[a]bsent record material" and thus fails to show "that the stated interest cannot be reasonably preserved without subjecting Navy Commander and Lieutenant Colonel 2 to vaccination contrary to a sincerely held religious belief." (A998.)

The DOD's position is actually worse than a mere failure to consider the actual impact on military readiness. As the testimony before the district court demonstrates, both Navy Commander and Lieutenant Colonel 2, despite not being vaccinated, successfully completed mission assignments throughout the COVID-19 pandemic without any impact on military readiness. As Navy Commander testified, throughout the periods of deployment and mission assignments, he commanded his guided missile destroyer successfully and executed health protection protocols to limit COVID-19 exposure, including masking, sanitization of the ship's spaces and door handles, social distancing where practicable, restriction of movement protocols for traveling sailors or those experiencing symptoms, and a quarantine/isolation protocol for underway operations. (A419, ¶13.) He testified:

> For almost a year, my command continued to execute mission requirements during the height of the COVID-19 pandemic without the benefit of a vaccine. The force health protection protocols we executed have proven successful and are a less restrictive means of furthering the government's compelling interest without infringing upon any service member's religious freedoms.

(A420, ¶14.)

And the district court found:

> From January 2020 to March 2021, from the onset of COVID-19, through the height of the pandemic, and without a vaccine (and certainly before the FDA fully authorized a COVID-19 vaccine), Navy Commander conducted successful operations, including a voyage exceeding 300 days, while adhering to COVID-19 safety protocols, including masking, sanitizing, physical distancing, COVID-19 testing, and quarantining. More than 93% of the sailors under his command have completed a COVID-19 vaccination series. In sum, his present regime has proven successful including while 'underway' on the oceans of the world.

(A968.)

Simply put, as Navy Commander testified, "I say all this in the context that our ability to execute and operate in a COVID environment has not stopped. We adapt, we overcome, we execute. **At no point in this process have I not been able to do or execute the mission because of COVID**." (R.112, Tr., at 36 (emphasis added).) Indeed, as the district court explained, "Navy Commander's unrebutted testimony about the feasibility of that accommodation was compelling (history is difficult to rebut)." (A1107.) And, the DOD resorts only to generalized interests again instead of showing why an accommodation cannot be made for Navy Commander,

> who is triumphantly fit and slim and strong, who is robustly healthy, who is young, who has already caught and recovered from COVID-19 with only trivial symptoms, who have commanded the same destroyer 'underway' on a 300-day mission with a 320-sailor crew, and who has designed and implemented successfully an anti-COVID protocol customized to the needs of his vessel.

(A1109.)

Lieutenant Colonel 2's exceptional service also demonstrates that the DOD's "magic words" fail the test, as she, too, completed mission assignments in the absence of the vaccine. Since the beginning of COVID-19, Lieutenant Colonel 2 has completed eight temporary duty assignments, which has required her to travel throughout the United States. (A971.) Lieutenant Colonel 2's vaccination status did not prevent her from continuing to execute the mission of the Marine Corps throughout the COVID-19 pandemic, and the Defense Department authorized and paid for her travel throughout the United States during the COVID-19 pandemic to complete various assignments. (A431, ¶19.) As Lieutenant Colonel 2 testified, her unit has never refused to deploy Marines due to COVID-19, deployed like normal, and performed successfully with COVID protocols in place. (R.112, Tr., at 163.) Simply put, "we just had to execute COVID protocols in order to execute that mission . . . And we pride ourselves on being able to complete the mission." (R.112, Tr., at 163.). Lieutenant Colonel 2 also "demonstrate[d] the natural presence of COVID-19 antibodies following an infection," which "provides similar if not equal . . . protection against infection." (A9998.)

Simply put, as the Fifth Circuit recognized, "Plaintiffs successfully deployed overseas before and after the vaccine became available," *Navy SEALS 1-26*, 27 F.4th at 352, and that demonstrates that the DOD's asserted interest is not only not compelling—it is not even accurate. Indeed, "the marginal interest in vaccinating

each Plaintiff appears to be negligible; consequently, Defendants lack a sufficiently compelling interest to vaccinate Plaintiffs." *Id.*

b. The DOD's discriminatory treatment of nonreligious, medical exemptions undermines any assertion of a compelling interest.

Where, as here, First Amendment and RFRA free exercise rights are at issue, "the government must shoulder a correspondingly heavier burden and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights." *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2472 (2018). The DOD "must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994); *see also Edenfield v. Fane*, 507 U.S. 761, 770 (1993). This is so because "[d]eference to [the government] cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Commc'ns, Inc. v. Maine*, 435 U.S. 829, 843 (1978).

Defendants' allowing unvaccinated servicemembers to continue unabated in their same positions when motivated by nonreligious medical or other reasons while claiming Navy Commander and Lieutenant Colonel 2 would put the military at risk undermines any claim that the DOD's interest is compelling. If any unvaccinated servicemembers pose a risk to the DOD's purported interest because they are

unvaccinated, then Defendants cannot assert the risk is greater if the reason they are unvaccinated is based on sincere religious beliefs as opposed to nonreligious reasons. As the Fifth Circuit recognized, the DOD's

> alleged compelling interest is further undermined by other salient facts. It has granted temporary medical exemptions to 17 Special Warfare members, yet no reason is given for differentiating those service members from Plaintiffs. That renders the vaccine requirements underinclusive. . . . And underinclusiveness is often regarded as a telltale sign that the government's interest in enacting a liberty-restraining pronouncement is not in fact compelling.

Navy SEALS 1-26, 27 F.4th at 352 (cleaned up). *See also Air Force Officer*, 2022 WL 468799, at *10 (noting that the DOD's asserted "compelling interest as to Plaintiff . . . completely ignores that there are at least 3,300 exempt Air Force members carrying out their respective duties similarly unvaccinated").

Defendants' mandate "cannot be regarded as protecting an interest of the highest order . . . **when it leaves appreciable damage to that supposedly vital interest unprohibited**." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (emphasis added) (cleaned up). Where, as here, the DOD permits exceptions, the Supreme Court has recognized that such exceptions "can raise doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular [individual]." *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 448 (2015) (cleaned up). "Where a regulation already provides an exception from the law for a particular group, the government will have a higher burden in showing

that the law . . . furthers a compelling interest." *McAllen Grave Brethren Church v. Salazar*, 764 F.3d 465, 472 (5th Cir. 2014) (emphasis added). The DOD has not and cannot satisfy that higher burden.

c. The record evidence before the District Court demonstrates that the COVID-19 vaccine is neither safe nor effective, which eviscerates the DOD's feigned compelling interest in mandating it.

i. The record evidence below demonstrates that the COVID-19 vaccine does not prevent transmission of COVID-19.

The DOD also claims a generalized compelling interest (without evidence) that "vaccination is the most effective tool we have for preventing widespread manifestation of COVID-19 in the force." (DOD Br. 30.) This is contradicted by the record evidence in this case, and therefore cannot serve as a compelling interest, and certainly has no bearing "to the person" of either Plaintiff. The district court was presented with significant evidence that the COVID-19 vaccines are not effective in preventing transmission of the virus. As Lt. Colonel Dr. Peter Chambers testified, the currently available vaccines are not effective at preventing the spread of COVID-19. (R.149, Tr., at 149 ("Q: Are they effective in preventing transmission, particularly Omnicron, or any other –[?] A: There are research controlled trials that are out that show that these shots don't last as long as they – as natural immunity does, by far outweighs – natural immunity outweighs the shots."); *see also* R.149, Tr., at 188 (noting that Israel, "one of the most vaccinated nations in the world, now

on their fourth booster," is still "the highest nation in the world per capita for COVID infection"); *id.* (Q: "what does this chart tell you? A: It's the wrong strategy, sir."); *id.* at 190 ("[W]hatever strategy they're implementing, the vaccine is not working. In fact, these—all these charts could be very indicative of a state in which the vaccine itself is causing worse outcomes in patients who are vaccinated"); *id.* at 90 (noting that the infection rate for the vaccinated in his unit represented 82-86 percent of positivity rate, whereas the unvaccinated personnel only represented 15 percent).)

The testimony of Dr. Chambers that the vaccines are not preventing infection or transmission was also supported by the Declaration of world-renowned expert, Dr. Peter McCullough, and the in-person testimony of Flight Surgeons Lt. Colonel Dr. Teresa Long and Colonel (Ret) Dr. Stewart Tankersley.

The district court, too, recognized that the evidence suggests the vaccines are not effective at preventing the spread of COVID-19. (A996-997.) And, as the court in *Air Force Officer* reasoned,

> Does a COVID-19 vaccine really provide more sufficient protection? This is especially curious given the number of people who have been and continue to be infected after becoming fully vaccinated and receiving a booster—including the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, and the Commandant of the Marine Corps. Simply put, Defendants have failed to explain why having Plaintiff—a single member of a nearly fully vaccinated Air Force—submit to a COVID-19 vaccine is the least restrictive means to achieve its compelling governmental interest in maintaining a healthy force.

2022 WL 468799, at *10 (quoting Air Force Magazine, *Joint Chiefs' Milley and Berger Test Positive for COVID-19*, https://www.airforcemag.com/joint-chiefs-milley-and-berger-test-positive-for-covid-19/).

Simply put, the evidence before the district court eviscerates the DOD's contention that "vaccination is the most effective tool we have to prevent widespread infection." (DOD Br. 30.)

ii. The record evidence below demonstrates that the COVID-19 vaccine is causing significant injuries to military servicemembers and is thus not safe.

The district court was also presented with testimony from physicians detailing the COVID-19 vaccines' poor safety records, which further undermines the DOD's alleged compelling interest. Dr. Chambers testified that the vaccines are not safe. (R.149, Tr., at 111 ("Q: In your experience, based upon not only your research military-wide throughout the DOD with the DMED, but also beginning from the very first FDA document pre-EUA, and the material that was released last week, is this—are these vaccines safe for the men and women of the military? A: These are not safe for the men and women of the military, not based on this data that we received or the soldiers that I've seen in the hospital. Not at all, sir.").) And Dr. Chambers well knows the safety problems with the COVID-19 vaccines because he was vaccinated with a Moderna regimen, and it caused demyelination, which is a neurological deficit that is concomitant with multiple sclerosis. (R.149, Tr., at 76.)

Dr. Theresa Long testified that the vaccine is causing a significant increase in myocarditis in the military and has caused strokes in military servicemembers, and that she was "watching people get absolutely destroyed, and I am watching senior leaders at the highest level have complete indifference to that risk." (R.149, Tr., at 153-156.) Dr. Long also testified that, not only is the vaccine not safe, but

> the vaccine actually has the opposite effect. It actually makes you more vulnerable to bad outcomes from getting the—in a sense, your immune system does worse by being vaccinated than it would it you just experienced the infection by natural immunity. It was one of the problems identified very early on and concerns by such people as Dr. Robert Malone, inventor of messenger RNA, that this vaccine-induced enhancement could be a problem.

(R.149, Tr., at 190.)

The undisputed record below also demonstrates that the DOD was aware of the enhanced risk of myocarditis in the military. (A894, ¶184 (noting the "higher than expected rates of heart inflammation following receipt pf COVID-19 vaccines" among servicemembers); *id.* (noting the American Medical Association's findings that numerous military members "presented with acute onset of marked chest pain within 4 days after receipt of an mRNA vaccine.").) Dr. Peter McCullough likewise testified that even the CDC's studies and reports noted the risk of "cardiovascular, neurological, hematologic, and immune system" complications because of the vaccines. (A899, ¶196.)

Dr. Tankersley, an expert in treating COVID-19 patients, also testified that the mRNA vaccines the DOD mandates leads to "an increase in cancers," and "is highly inflammatory." (R.149, Tr., at 220-227.) Simply put, and contrary to the DOD's assertions, the vaccine mandate is not supported by a compelling interest because the vaccines are not sufficiently safe or effective.

4. The DOD Vaccine Mandate is not the least restrictive means.

"As the Government bears the burden of proof on the ultimate question of . . . constitutionality, [Navy Commander and Lieutenant Colonel 2] must be deemed likely to prevail unless the Government has shown that [their] proposed less restrictive alternatives are less effective than [the mandate]." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). Under that standard, "[n]arrow tailoring requires the government to demonstrate that a policy is the 'least restrictive means' of achieving its objectives." *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 633 (2d Cir. 2020) (quoting *Thomas*, 450 U.S. at 718).

To meet this burden, the DOD must show it "seriously undertook to address the problem with less intrusive tools readily available to it," meaning that it "considered different methods that other jurisdictions have found effective." *McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014). And the DOD must "show either that **substantially less-restrictive alternatives were tried and failed**, or that the alternatives were closely examined and ruled out for good reason," *Bruni v. City of*

Pittsburgh, 824 F.3d 353, 370 (3d Cir. 2016) (emphasis added), and that "imposing lesser burdens on religious liberty 'would fail to achieve the government's interest, not simply that the chosen route was easier.'" *Agudath Israel*, 983 F.3d at 633 (quoting *McCullen*, 134 S. Ct. at 495). The DOD fails that test.

a. Because the DOD permits nonreligious exemptions, it must show why religious accommodation requests are treated less favorably.

"The least-restrictive-means standard is exceptionally demanding." *Hobby Lobby*, 573 U.S. at 728. To satisfy that exceptional demand,

> narrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID. **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.** Otherwise, precautions that suffice for other activities suffice for religious exercise too.

Tandon, 141 S. Ct. at 1296–97 (emphasis added).

The DOD Vaccine Mandate has plainly treated religiously motivated exemption requests with much less favor than the medically motivated requests. (A913, ¶¶250-251; A487 (noting that the Navy has granted 252 temporary and 11 permanent medical exemptions); A489 (noting that the Marine Corps has granted 232 temporary and 21 permanent medical exemptions).) *See also Navy SEALS 1-26*, 27 F.4th at 352 (noting that the DOD has granted numerous medical exemptions from the COVID-19 vaccine mandate). Military regulations even require the DOD

to treat medical exemptions more favorably than religious one, at least in terms of the COVID-19 vaccines. (A868, ¶126.) Yet, the purported risk to "military readiness" is identical from a medically exempt servicemember and a religiously exempt servicemember.

> No matter whether one service member is unvaccinated for a medical reason and another unvaccinated for a religious reason, one thing remains the same for both of these service members—they're both unvaccinated. In other words, both of these service members pose a similar hazard to Defendants' compelling interest in stemming the spread of COVID-19 within the military.

Air Force Officer, 2022 WL 468799, at *11.

Permitting the medically exempt to continue in their military service unabated while threatening Navy Commander and Lieutenant Colonel 2 with life-altering consequences for following their religious beliefs is not the least restrictive means. *See Doster v. Kendall*, No. 1:22-cv-84, 2022 982299, at *14 (S.D. Ohio Mar. 31, 2022) ("Because the Air Force has willingly and freely granted administrative and medical exemptions but refuses to grant virtually all religious exemptions, this Court finds that the Air Force has not satisfied the least-restrictive-means standard."); *Poffenbarger v. Kendall*, No. 3:22-cv-1, 2022 WL 594810, at *13 (S.D. Ohio Feb. 28, 2022) (holding that because "the Air Force has granted thousands of exemptions to the COVID-19 vaccine mandate on nonreligious grounds," refusing to do so for religious reasons was not the least restrictive means).

b. The DOD failed to demonstrate why Navy Commander's and Lieutenant Colonel 2' exemplary and uninterrupted service during COVID-19 without vaccination cannot continue.

Relying again on "magic words" without any evidence to back up its assertion, the DOD contends that "Navy Commander and Lieutenant Colonel 2 cannot carry out their duties effectively and safely if they are not vaccinated." (DOD Br. 32.) Nonsense. Both Navy Commander and Lieutenant Colonel 2 have—since the beginning of COVID-19—carried out and executed every mission assigned to them without vaccination. (*See supra* Statement of Facts, Section I.B.) As Navy Commander testified, "I say all this in the context that our ability to execute and operate in a COVID environment has not stopped. We adapt, we overcome, we execute. **At no point in this process have I not been able to do or execute the mission because of COVID**." (R.112, Tr., at 36 (emphasis added).). The district court, too, found that "[f]or more than a year before the COVID-19 vaccination requirement, Navy Commander and Lieutenant Colonel 2 performed their duties under altered conditions [and] after the defendants initiated the vaccination requirement, both plaintiffs have continued to work under an administrative exemption and under altered duties." (A999.) And, despite not being vaccinated, Navy Commander and Lieutenant Colonel 2 performed all mission assignments and executed duties flawlessly. The record evidence before the district court

demonstrates that the DOD's mandate and refusal to accommodate sincerely held religious beliefs is not the least restrictive means.

III. THE DISTRICT COURT'S PRELIMINARY INJUNCTION SHOULD BE AFFIRMED BECAUSE THE DOD VACCINE MANDATE AND SHAM RELIGIOUS ACCOMMODATION PROCESS IMPOSE IRREPARABLE INJURY ON NAVY COMMANDER AND LIEUTENANT COLONEL 2.

The DOD's substantial burden on Navy Commander and Lieutenant Colonel 2's religious exercise constitutes irreparable harm as a matter of law. Plaintiffs "are irreparably harmed by the loss of free exercise rights for even minimal periods of time." *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021). "There can be no question that the challenged [mandate], if enforced, will cause irreparable harm." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020). Contrary to the DOD's assertions, Plaintiffs' constitutional injuries are presumed to be irreparable harm. *See, e.g.*, *Ne. Fla. Chap. fpf Ass'n of Gen. Contractors v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990). Indeed, "direct penalization, as opposed to incidental inhibition, of First Amendment rights constitutes irreparable injury." *Cate v. Oldham*, 707 F.2d 1176, 1188 (11th Cir. 1983). The district court was correct in concluding that "[r]equring a service member either to follow a direct order contrary to a sincerely held religious belief or face immediate processing for separation or other punishment undoubtedly causes irreparable harm." (A1003.)

Defendants contend that Plaintiffs face no irreparable harm because post-disciplinary measures can correct any injury they suffer, and they can assert their constitutional rights in removal proceedings. (DOD Br. 45.) While it is generally true that a loss of employment does not constitute irreparable harm, that ignores the seminal First Amendment questions before the Court. The DOD's false reduction, that Plaintiffs face only the loss of a job and the potential discharge of their commission rather than the loss of First Amendment rights, must be rejected. "The harm [Plaintiffs] would suffer is not only, as [Defendants] argue[], the loss of [their] job[s] *per se,* but also the penalty for exercising [their First Amendment] rights. The chilling effect of that penalty cannot be adequately redressed after the fact." *Romero Feliciano v. Torres Gaztambide*, 836 F.2d 1, 4 (1st Cir. 1987).

Moreover, the DOD's contention also attempts to impose some exhaustion requirement upon Plaintiffs prior to bringing their claims in court. A military plaintiff need not exhaust administrative remedies to bring a First Amendment or RFRA challenge to military policies. *See, e.g.*, *Adair v. England*, 183 F. Supp. 2d 31, 55 (D.D.C. 2002) (military plaintiff need not exhaust administrative remedies to bring First Amendment Free Exercise challenge to military regulations); *Singh v. Carter*, 168 F. Supp. 3d 216, 226 (D.D.C. 2016) (military plaintiff not required to exhaust administrative remedies to bring RFRA challenge to military policies substantially burdening his religious exercise). As the *Singh* court explained, "RFRA

certainly provides no textual support for the defendants' position that the plaintiff is required to exhaust administrative remedies in a court-martial proceeding before bringing his constitutional and RFRA claims in this Court." 168 F. Supp. 3d at 226; *see also Oklevueha Native Am. Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 838 (9th Cir. 2012) ("We decline, however, to read an exhaustion requirement into RFRA where the statute contains no such condition and the Supreme Court has not imposed one.").

As the Fifth Circuit held, "Plaintiffs' First Amendment freedoms are seriously infringed by the navy's vaccine requirements. . . . These infringements unquestionably constitute irreparable injuries. . . . No further showing is necessary." *Navy SEALS 1-26*, 27 F.4th at 353; *see also Air Force Officer*, 2022 WL 468799 at *12 ("Since Defendant Miller ultimately denied Plaintiff's religious accommodation and essentially infringed upon the free exercise of her religion, Plaintiff has suffered an irreparable injury."); *Doster*, 2022 WL 982299, at *16 (same); *Poffenbarger*, 2022 WL 594810 at *18 (same). Infringing Navy Commander's and Lieutenant Colonel 2's free exercise rights under the First Amendment and RFRA unquestionably imposes irreparable harm, and the district court's conclusion should be affirmed.

IV. THE DISTRICT COURT'S PRELIMINARY INJUNCTION SHOULD BE AFFIRMED BECAUSE THE BALANCE OF THE EQUITIES AND PUBLIC INTEREST COMPEL ENJOINING THE DOD'S VACCINE MANDATE AND SHAM RELIGIOUS ACCOMMODATION PROCESS.

When the government is the opposing party, the final inquiries of public interest and the balance of the equities generally merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). (*See also* A1003.) And, whether analyzed separately or together, Navy Commander and Lieutenant Colonel 2 easily satisfiy the final two requirements for injunctive relief. It is beyond cavil that "[t]he vindication of constitutional rights and the enforcement of a federal statute serve the public interest almost by definition." *League of Women Voters v. Browning*, 863 F. Supp. 2d 1156, 1167 (N.D. Fla. 2012). Indeed, "proper application of the Constitution serves the public interest because it is always in the public interest to prevent the violation of a party's constitutional rights." *Air Force Officer*, 2022 WL 468799, at *12 (quoting *Dahl v. Bd. of Trs. of W. Mich. Univ.*, 15 F.4th 728, 736 (6th Cir. 2021). Put simply: "Plaintiffs religious-based refusal to take a COVID-19 vaccine simply isn't going to halt a nearly fully vaccinated Air Force's mission to provide a ready national defense." *Id. See also Doster*, 2022 WL 982299, at *16 (same); *Poffenbarger*, 2022 WL 594810, at *18 (same).

CONCLUSION

Because the DOD Vaccine Mandate imposes a substantial burden on Plaintiffs' sincerely held religious beliefs, is not neutral or generally applicable, and cannot satisfy strict scrutiny, the preliminary injunction should be affirmed.

Respectfully submitted,

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