No. 22-10645

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

REPLY BRIEF FOR APPELLANTS

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AMENDED CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, counsel for defendants-appellants certify that the following persons have an interest in the outcome of this appeal.

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Air Force NCO*

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American Constitutional Rights Union*

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Counsel for defendants-appellants further certifies that no publicly traded company or corporation has an interest in the outcome of the case or appeal.

Dated: July 1, 2022

/s/ Sarah J. Clark
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INTRODUCTION AND SUMMARY

The district court abused its discretion in preliminarily enjoining the Navy and the Marine Corps from taking any adverse action against plaintiffs because of their refusal to be vaccinated against COVID-19.[1] Plaintiffs have failed to show that they are likely to succeed on the merits of their Religious Freedom Restoration Act (RFRA) and Free Exercise Clause claims, that they will be irreparably harmed absent an injunction, or that the equities tilt in their favor.

As an initial matter, the district court lacked the authority to bar the Navy and the Marine Corps from considering plaintiffs' vaccination status in making deployment, assignment, and other operational decisions. Those particular matters are constitutionally committed to the Executive Branch, as this Court has already recognized in staying the preliminary injunction to the extent that it interferes with the military's authority in those respects, consistent with the Supreme Court's stay in a similar case, *see Austin v. U.S. Navy SEALs 1-26*, 142 S. Ct. 1301 (2022). Plaintiffs offer no response to this point, except to inaccurately accuse the military of arguing that their claims are completely beyond judicial review. At a minimum, therefore, the Court should vacate the injunction to the same extent that it has already stayed it, "insofar as

[1] For purposes of this brief, references to "plaintiffs" are to the two plaintiffs whose claims are at issue in this appeal: Navy Commander and Lieutenant Colonel 2.

it precludes the Navy from considering the plaintiffs' vaccination status in making deployment, assignment, and other operational decisions." Stay Order 3.

Plaintiffs also have failed to show a likelihood of success on the broader substance of their RFRA and Free Exercise Clause claims. The Navy and the Marine Corps have a compelling interest in ensuring that these plaintiffs remain fit for duty and in protecting them against illness that could jeopardize missions and military readiness. Vaccination is the least restrictive means of protecting those compelling interests. Those conclusions are supported by sworn declarations of numerous high-ranking military officials, and plaintiffs have identified no valid basis to second-guess those judgments. As those declarations explain, plaintiffs' command duties do not allow for social distancing or teleworking; vaccinating plaintiffs would more effectively serve the military's interests than other measures like masking and testing plaintiffs; and plaintiffs would be unable to deploy worldwide if unvaccinated (in part because some countries require vaccination against COVID-19 for entry).

Unable to rebut these key points, plaintiffs fall back on the district court's reasoning, but they offer no meaningful response to the opening brief's explanation of the defects in that reasoning. For example, medical exceptions—which are usually temporary and are only provided when necessary to protect service members' health and safety—are not comparable to the religious exceptions that plaintiffs request. Plaintiffs' requested exceptions would be permanent and (in the military's expert judgment) would impair plaintiffs' health and fitness for duty. That plaintiffs were able

to complete missions before COVID-19 vaccines were available should not bar the military from advancing its compelling interest in military readiness with newly available vaccines.

Plaintiffs also failed to show that the balance of equities favors preliminary relief. The Navy's and Marine Corps' interest in fielding a healthy and effective fighting force—especially with respect to these plaintiffs, one in command of a Navy warship at the time of his exception request and the other slated to command a Marine Corps combat logistics battalion—outweighs any interests plaintiffs may have in avoiding discipline or other consequences from their refusal to be vaccinated during the pendency of this litigation, especially since plaintiffs could obtain full relief on their employment-related claims even if they were ultimately separated from the military.

ARGUMENT

I. The Preliminary Injunction Should Be Vacated Because Plaintiffs Failed to Demonstrate a Likelihood of Success on the Merits.

A. The Preliminary Injunction Exceeds the District Court's Authority.

As the opening brief demonstrated (at 21-25), the district court usurped an authority reserved to the Executive Branch to the extent it enjoined the military from considering plaintiffs' vaccination status in making deployment, assignment, and other operational decisions. Challenges to military assignment and discipline decisions—especially decisions concerning service members' fitness for command—are not justiciable in civilian courts. *See, e.g.*, *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *Orloff v.*

Willoughby, 345 U.S. 83, 93-94 (1953); *see also Harkness v. Sec'y of the Navy*, 858 F.3d 437, 443 (6th Cir. 2017) (collecting cases).

This Court was accordingly correct to stay the preliminary injunction pending appeal, "insofar as it precludes the Navy from considering the plaintiffs' vaccination status in making deployment, assignment, and other operational decisions." Stay Order 3. The stay is consistent with the Supreme Court's stay pending appeal in *Austin v. U.S. Navy SEALS 1-26*, 142 S. Ct. 1301 (2022), and with Justice Kavanaugh's concurring opinion in that case, which admonished the district court there for "insert[ing] itself into the Navy's chain of command" and "overriding military commanders' professional military judgments," *id.* at 1302 (Kavanaugh, J., concurring). At a minimum, therefore, the Court should vacate the preliminary injunction to the extent it is currently stayed.

Plaintiffs fail to grapple with this controlling authority, instead misstating the military's position on this issue. Contrary to plaintiffs' suggestion (at 23), the Navy and the Marine Corps are not arguing that courts entirely lack authority to review plaintiffs' RFRA claims. As the Supreme Court's recent stay order confirms, however, courts lack authority to order a particular form of relief on those claims—for example, an injunction precluding the military from considering plaintiffs' vaccination status in making deployment, assignment, and other operational decisions. Thus, the preliminary injunction here must at least be vacated to the extent it constrains the military's discretion with respect to these issues.

Plaintiffs similarly offer no substantive response to the government's showing that the preliminary injunction is 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, 318-19 (1999) (quotation marks omitted), as it infringes on areas uniquely within the military's authority and expertise, including professional military judgments about operational needs and assignments. Principles of equity jurisdiction also constrain the available relief on plaintiffs' First Amendment claims, *see Armstrong v. Exceptional Child Ctr., Inc.,* 575 U.S. 320, 327-28 (2015). And the cases plaintiffs cite regarding pre-enforcement First Amendment challenges (at 27-28) provide no support for the extraordinary proposition that civilian courts have authority to second-guess the operational judgments of the Nation's military leaders.

B. Plaintiffs Failed to Demonstrate a Substantial Likelihood of Success on the Merits of Their Claims.

The preliminary injunction should be vacated in full, moreover, because plaintiffs' RFRA and First Amendment claims are unlikely to succeed on the merits. The military has a compelling interest in mitigating the effect of COVID-19 on its missions, units, and personnel, and therefore in taking measures to reduce the risk that plaintiffs could become seriously ill and unable to perform their command responsibilities. Requiring plaintiffs to be vaccinated against COVID-19 is the least restrictive means to mitigate those risks.

1. Plaintiffs' RFRA Claims Lack Merit.

a. Requiring Plaintiffs to Be Vaccinated Against COVID-19 Furthers Compelling Military Interests.

The record demonstrates that the military has a compelling interest in protecting the readiness and health of its forces, and therefore in preventing COVID-19 from impairing that readiness and health. Unvaccinated service members are at heightened risk of contracting and spreading COVID-19 and of suffering severe health consequences if they do contract the virus. *See* Opening Br. 27. And even one service member becoming seriously ill from COVID-19—especially a service member entrusted with command responsibilities—could derail a mission and endanger other service members. *See id.* at 28-30. As Admiral William K. Lescher explained, vaccination is an essential component of maximizing the chances of mission success—to "order[] unvaccinated personnel into an environment in which they endanger their lives, the lives of others and compromise accomplishment of essential missions" would be akin to sending a ship into combat without adequate weapons or other tools. A453-54 (Dkt. 66-4, at 9-10, ¶ 11); *see also* Opening Br. 30-31; *accord* A1048-49 (Dkt. 118-4, at 6-7, ¶ 8) (declaration from Admiral Gilday, the highest-ranking uniformed officer in the Navy, explaining why vaccination is required for Sailors to deploy); A1055-57 (Dkt. 118-5, at 6-8, ¶¶ 8, 10) (similar, declaration from General Smith, the second-highest-ranking uniformed officer in the Marine Corps).

i. Plaintiffs argue (at 37-38) that the military cannot rely on "generalized interests"—like "ensuring [servicemembers] are healthy and ready to deploy worldwide"—to show that it has a compelling interest in plaintiffs' vaccination. But the military has demonstrated, through extensive and specific declarations, that these compelling interests apply with particularity to each of the plaintiffs, both as service members and as officers with command responsibilities. *See* Opening Br. 26-34. For example, Lieutenant Colonel 2 was selected to command a unit "that will be deploying" and that provides "rapid crisis response," but "she cannot effectively lead Marines when she herself cannot deploy with them" freely around the world. A552-53 (Dkt. 74-11, at 6-8, ¶¶ 8-10) (explaining that plaintiff's "unvaccinated status jeopardizes the health and welfare of personnel in her unit and prevents her from being world-wide deployable, which is a necessary component of her command position"). And Navy Commander commanded a $1.8 billion guided-missile destroyer and its crew of over 300 sailors—as his own commanding officer explained, Navy Commander's decision not to be vaccinated risked having a grave effect on "the ability of the ship to execute its assigned missions." A557, A560-62 (Dkt. 74-12, at 4, 7-9, ¶¶ 6, 12-13). Thus, unlike in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), the Navy is not relying on "generalized interests" here. On the contrary, the record amply shows why the military has determined that these plaintiffs need to be vaccinated against COVID-19 and why they cannot be exempted from that requirement without impairing the

government's compelling interests in ensuring their health and the effectiveness of their military missions. *See* Opening Br. 11-12, 28-35.

Plaintiffs suggest (at 38) that the military lacks a compelling interest in their vaccination because they have many years of experience and have, according to plaintiffs (at 39), successfully completed missions during the pandemic. Those arguments are unpersuasive.[2] If anything, plaintiffs' relative seniority enhances the need for their vaccination. Were either to become seriously ill or be barred from entering a country on a deployment because of a COVID-19 vaccination requirement, the consequences for military readiness would be even more severe than if they held a lower rank, as they would not be able to fulfill their command responsibilities and could not be easily replaced at the last minute. *See* Opening Br. 29-30.

ii. Plaintiffs further suggest (at 42) that the military lacks a compelling interest in their vaccination because the military "allow[s] unvaccinated servicemembers [with medical exceptions] to continue unabated in their same positions." As the opening brief explained (at 7, 41), however, medical exceptions and religious exceptions are different in kind in at least two respects. First, the overwhelming majority of medical exceptions

[2] Plaintiffs additionally contend (at 40-41) that, because they had COVID-19 in the past, the military lacks a compelling interest in their being vaccinated. This argument is incorrect on its own terms, but is properly analyzed under whether the vaccination requirement is the least restrictive means to further the military's compelling interests, discussed *infra* pp. 10-11, 15.

are temporary and last only as long as the medical condition at issue (often pregnancy). *See* A539 (Dkt. 74-8, at 4, ¶ 6). Religious exceptions, by contrast, are permanent.

Second, medical and religious exceptions serve categorically different purposes. Unlike religious exceptions, medical exceptions facilitate service members' health and therefore their fitness for duty—the same interest underlying the military's COVID-19 vaccination requirement—and the military can and does consider the condition necessitating the medical exception in making decisions as to that service member's training, assignments, and ability to continue on in service. *See* A541-42 (Dkt. 74-8, at 6-7, ¶ 11). Put simply, medical exceptions promote the health of the force, whereas religious exceptions undermine it. *See* Opening Br. 41; *see also Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1179 (9th Cir. 2021) (concluding that a 30-day vaccination exception did not "undermine [a school district's] asserted interests in student health and safety the way a religious exemption would"). Moreover, service members with a medical exceptions are subject to the same restrictions as service members with a religious exceptions, including restrictions on deployment, entering certain foreign countries, frequent COVID-19 testing or extended quarantine, and travel—as well as other restrictions based on the condition occasioning the medical exceptions. *E.g.*, A545-47 (Dkt. 74-10, at 4-6, ¶¶ 6, 8); *see also Roth v. Austin*, No. 8:22-cv-3038, 2022 WL 1568830, at *20 (D. Neb. May 18, 2022) ("[S]ervice members with medical, administrative, or religious exemptions to the COVID-19 vaccination mandate do not operate within the Air Force as if they were vaccinated.").

Plaintiffs' assertion (at 42) that service members with medical exceptions "continue unabated in their same positions" is thus inaccurate; and plaintiffs are wrong to say (at 50) that "the purported risk to 'military readiness' is identical from a medically exempt servicemember and a religiously exempt servicemember." The fact that the Navy has granted more medical than religious exceptions thus does not reflect religious discrimination or disfavor, *see* Resp. Br. 49, but rather reflects compelling military interests in a healthy force. *See Short v. Berger*, No. CV 22-1151-DMG, 2022 WL 1051852, at *8 (C.D. Cal. Mar. 3, 2022) ("To the extent the [military] accommodates medical exemptions but not religious ones, that is . . . simply a reflection of what is feasible while still maintaining the government's interest.").

b. Requiring Plaintiffs to Be Vaccinated Against COVID-19 Is the Least Restrictive Means of Furthering Compelling Military Interests.

As the Navy and the Marine Corps have determined, requiring plaintiffs to be vaccinated is the least restrictive means of ensuring military readiness and furthering the military's compelling interests. The military's determinations to that effect were the result of specific and particularized assessments that necessarily involved weighing plaintiffs' experience and circumstances against the military's interests in their vaccination. *See* Opening Br. 32-34. Plaintiffs simply cannot carry out their command duties effectively and safely if they are not vaccinated—and plaintiffs have identified no other, less restrictive alternative that would maintain the military's compelling interest in ensuring the fitness and readiness of the force. Plaintiffs instead seem to suggest that

the military should rely on other COVID-19 mitigation measures and on "natural immunity" (at 18)—but plaintiffs fail to support that suggestion with any meaningful evidence. And, in any event, the Court should defer to the military's determination to rely on the consensus in the scientific and public health communities that vaccination is the most effective way to mitigate the effects of COVID-19.

i. Plaintiffs argue (at 51) that vaccination is not the least restrictive means for plaintiffs because, "despite not being vaccinated," plaintiffs have "performed all mission assignments and executed duties flawlessly," in spite of COVID-19.[3] Even assuming that self-interested claim is accurate, it misses the point. For purposes of plaintiffs' RFRA claims, the question is instead whether—now that safe and effective vaccines are available—other mitigation measures are as effective as vaccines in furthering the military's compelling interests. The military has determined that plaintiffs' vaccination is the most effective way of furthering those interests.

As the opening brief (at 37) explained, missions conducted before vaccines were available were, in fact, constrained, *see, e.g.*, A529-33 (Dkt. 74-5, at 3-7, ¶¶ 5-13) (noting that the military enacted a "60-day stop movement order for all DoD uniformed and civilian personnel . . . overseas," providing examples of specific training exercises that were curtailed, and describing the devastating effects of the COVID-19 outbreak on

[3] Plaintiffs also argue (at 39-40) that the military lacks a compelling interest in their vaccination because they have completed missions during the pandemic without vaccines. That argument fails for the same reasons.

the U.S.S. Theodore Roosevelt); *see also* A454-55 (Dkt. 66-4, at 10-11, ¶¶ 12-13) (contrasting the outbreak on the U.S.S. Theodore Roosevelt, before vaccines were available, with the minimal outbreak on the U.S.S. Milwaukee, after vaccines were available); A1039 (Dkt. 118-3, at 14, ¶ 14) (describing COVID-19's effects on the military).

In any event, past good fortune is no guarantee of future success. Moreover, even assuming plaintiffs successfully completed missions before COVID-19 vaccines were developed or approved, that does not mean that the Navy lacks a compelling interest in using newly developed and approved vaccines to mitigate the effects of COVID-19. *See Roth*, 2022 WL 1568830, at *28 ("The [military] simply was not required to continue to 'muddle through' with less effective means once superior means of furthering its compelling interest, in the form of FDA-approved vaccines, were available."); *Short*, 2022 WL 105182, at *9 (noting that "merely because the military has found ways to perform its duties despite the risks of COVID-19 does not mean it must endure these risks indefinitely when there are effective means of mitigating them").

Similarly, plaintiffs' "exemplary and uninterrupted service" (Resp. Br. 51) does not lessen the risk that they would be unable to perform their critical duties if infected with the virus in the future. The Court should reject plaintiffs' suggestion that the military must simply tolerate the added risks posed by deploying unvaccinated high-ranking officers.

ii. Plaintiffs also contend (at 44) that the COVID-19 vaccines are "neither safe nor effective."[4] That argument does not advance plaintiffs' claims. Guided by medical professionals and by the Centers for Disease Control and Prevention (CDC), *see, e.g.*, A245-47 (Dkt. 23-15, at 12-14, ¶¶ 19-20), the military has determined that vaccination is the most effective way to ensure its service members will be protected against the virus and prepared to defend the country. That judgment is, at the very least, reasonable and entitled to deference. *See Creaghan v. Austin*, No. 22-cv-981, 2022 WL 1500544, at *10 (D.D.C. May 12, 2022) (concluding, based on "the military's scientific and medical conclusion" that vaccination against COVID-19 is the least restrictive means of furthering the military's compelling interest, "which rest[s] on the great weight of scientific authority" (alteration in original) (quoting *Navy SEAL 1 v. Austin*, No. 22-cv-688, 2022 WL 1294486, at *11 (D.D.C. Apr. 29, 2022))); *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981) (explaining that "judgments concerning military operations and needs . . . unquestionably" require deference (citation omitted)); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 35 (2010).

Plaintiffs assert (at 44) that "the COVID-19 vaccines are not effective in preventing transmission of the virus." That assertion is not supported by the record, and in any event does not speak to the efficacy of vaccines in preventing adverse effects

[4] This argument purports to call into question the military's compelling interests, but again is more properly focused on whether the vaccination requirement is the least restrictive means of advancing those interests.

once the virus has been contracted. "Evidence continues to show that the incidence of SARS-CoV-2 infection, hospitalization, and death is higher in unvaccinated than vaccinated persons." A242-43 (Dkt. 23-15, at 9-10, ¶¶ 13-15) (providing a number of statistical summaries); A244 (Dkt. 23-15, at 11, ¶ 16); A447 (Dkt. 66-4, at 3, ¶ 2); *see also* A544-45 (Dkt. 74-10, at 3-4, ¶ 5 & n.1); *see also* Opening Br. 30-32. As the Secretary of the Navy found, "[v]accination is the most effective tool we have to prevent widespread manifestation of COVID-19 in [the] force." A214 (Dkt. 23-8, at 2); *see also* A453-54 (Dkt. 66-4, at 9-10, ¶ 11). Plaintiffs provide no reason to supplant the scientific consensus as to the efficacy of vaccines as compared to other COVID-19 mitigation methods or the military's reasonable reliance on that consensus.

Plaintiffs' argument that the vaccines are not safe (at 46-48) is similarly faulty. Relying on junk science that contradicts the great weight of medical authority and the expert judgment of the FDA, plaintiffs posit that COVID-19 vaccines are "highly inflammatory," have led "to 'an increase in cancers,'" and have "caused strokes" and "a significant increase in myocarditis in the military." Resp. Br. 47-48 (first two quotations quoting Dkt. 149 (Tr. 220-27)). As the military's declarations explain, however, adverse effects from COVID-19 vaccines are rare, A249 (Dkt. 23-15, at ¶ 26), and easily outweighed by the vaccines' benefits. *See Navy SEAL 1*, 2022 WL 1294486, at *11 (explaining that the plaintiff's vaccine safety concerns were "outside the scientific mainstream" and did not support rejecting "the military's scientific and medical conclusions, which rest on the great weight of scientific authority"). Again, plaintiffs

invite the Court to substitute plaintiffs' own (mistaken) assessment of vaccine safety for the military's reasonable reliance on the judgment of expert public health agencies, like the CDC, that have determined that vaccination against COVID-19 greatly reduces the risks of infection and significantly reduces the chances of hospitalization or death in the event of infection. That invitation should be rejected.

iii. Nor does the fact that plaintiffs have previously contracted COVID-19 advance their claims, as vaccination remains the least restrictive means of furthering the military's compelling interest in preventing COVID-19 from impairing the health and readiness of its forces. The military has determined, based on public health guidance from the CDC, that past infection is not as effective as vaccination in protecting its service members, and the record supports that determination. *See* A159 (Dkt. 1-4, at 1); A246-49 (Dkt. 23-15, at 13-16, ¶¶ 20-25) (describing the military's reliance on recommendations from the CDC); A270 (Dkt. 23-18, at 10, ¶ 13) (explaining that tests for immunity to COVID-19 based on prior infection have "not been scientifically validated and evidence suggests that prior infection does not prevent later infection"). Plaintiffs' personal belief that past infection "provides similar if not equal . . . protection against infection" in the future, Resp. Br. 41 (alteration in original) (quoting A998 (Dkt. 111, at 40)), cannot replace the expert judgment of military leaders and health authorities.

2. Plaintiffs' Free Exercise Claims Lack Merit.

Plaintiffs argue (at 33) that the military's COVID-19 vaccination requirement and exception process is not neutral or generally applicable, and is therefore subject to strict scrutiny under the Free Exercise Clause. Strict scrutiny under the Free Exercise Clause involves the same compelling interest and least restrictive means test as RFRA. Because the Navy satisfies that test for the reasons explained in Part I.B.1, *see supra* pp. 6-15, the Court need not independently address that argument. If the Court were to reach the issue, however, it should conclude that the Navy's COVID-19 vaccination requirement is neutral and generally applicable, and thus subject only to rational-basis review under the Free Exercise Clause—which the requirement easily satisfies.

To begin, the Navy and Marine Corps' COVID-19 vaccination requirements are facially neutral toward religion: they require all non-exempted active-duty Navy and Marine Corps service members to be fully vaccinated, not just service members who hold particular religious views. A264 (Dkt. 23-18, at 4, ¶ 4); A309 (Dkt. 23-19, at 5, ¶ 5); A545-47 (Dkt. 74-10, at 4-6, ¶¶ 6-7); *cf. San Diego Unified Sch. Dist.*, 19 F.4th at 1177; *Kane v. De Blasio*, 19 F.4th 152, 164 (2d Cir. 2021) (per curiam).

Plaintiffs assert that the military has "target[ed] religion for differential treatment," Resp. Br. 33-34 (quoting *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 717 (2021) (Statement of Gorsuch, J.)), because it has granted more medical exceptions than religious exceptions, *id.* at 34. But, for the reasons described above, medical exceptions are different in kind from religious exceptions both in terms of the

purposes they serve and the effect they have on the health of the force. *See supra* pp. 8-10. The fact that the military has granted more medical exceptions than religious exceptions is accordingly not evidence of religious discrimination.

Plaintiffs' reliance (at 34-35) on *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), which held that a local police department violated the Free Exercise Clause by refusing to grant a religious exception from its no-beard policy for police officers, is misplaced. In that case, the police department allowed no religious exceptions, allowed medical exceptions, and failed to offer any justification for the differing treatment of religious and secular exception requests. *See id.* at 170 F.3d at 360. Here, by contrast, the military has granted religious exceptions to its COVID-19 vaccination requirement, *see* A961,[5] and medical exceptions serve the Navy's compelling interest in securing a healthy fighting force, while religious exceptions do not. No such interests were implicated in *Fraternal Order of Police*, where the police department's no-beard rule was based on an "interest in fostering uniform appearance." 170 F.3d at 366; *cf. Goldman v. Weinberger*, 475 U.S. 503, 509 (1986) (First Amendment does not require the military to make an exception to its uniform requirements for

[5] The number of religious exceptions has increased over time as exception requests have been adjudicated. *E.g.*, U.S. Navy, *U.S. Navy COVID-19 Updates*, https://www.navy.mil/us-navy-covid-19-updates (reflecting, as of June 22, 2022, 43 religious exceptions, 258 temporary medical exceptions, and 15 permanent medical exceptions granted in the Navy).

religious apparel, given the considered professional judgment of military officials as to the importance of uniformity).

II. Plaintiffs Also Failed to Show Irreparable Injury or that the Balance of Harms and the Public Interest Favor Preliminary Relief.

A. Plaintiffs Failed to Demonstrate Irreparable Injury.

The district court also erred in issuing a preliminary injunction because plaintiffs have failed to establish that they will be irreparably harmed absent injunctive relief. Plaintiffs' alleged harms are, at base, employment-related harms. But as the Supreme Court has explained, such harms do not constitute irreparable injury absent a "genuinely extraordinary situation." *Sampson v. Murray*, 415 U.S. 61, 92 n.68 (1974). *Sampson*'s "reasoning applies with as much or greater force in the case of a military discharge." *Guitard v. U.S. Sec'y of the Navy*, 967 F.2d 737, 742 (2d Cir. 1992); *see also, e.g.*, *Hartikka v. United States*, 754 F.2d 1516, 1518 (9th Cir. 1985); *Chilcott v. Orr*, 747 F.2d 29, 33 (1st Cir. 1984). Even if a service member is discharged—a process that takes many months for a senior officer—he or she could be reinstated and could receive back pay.

Plaintiffs assert (at 52) that they are at risk of irreparable constitutional injuries. But that assertion must fail where, as here, plaintiffs' constitutional claims lack merit. *See supra* pp. 16-18. Nor does irreparable harm exist wherever there is an allegation of religious pressure. *Cf. Khalsa v. Weinberger*, 779 F.2d 1393, 1399-400 (9th Cir. 1985) (holding that a plaintiff failed to demonstrate irreparable harm where the Army refused to process his enlistment application, in alleged violation of his First and Fifth

Amendment rights, because his Sikh religion precluded him from complying with Army appearance regulations).

B. The Balance of Equities and the Public Interest Weigh Against Preliminary Relief.

Plaintiffs have not demonstrated that the public interest and the balance of harms—which "merge when the Government is the opposing party," *Nken v. Holder*, 556 U.S. 418, 435 (2009)—favor preliminary relief.

The preliminary injunction risks substantially undermining our national defense—a grave harm that outweighs any interests plaintiffs might have in avoiding reassignment or other reparable, employment-related consequences during the pendency of this suit. Until this Court granted a partial stay, the preliminary injunction impaired the military's ability to effectively deploy a $1.8 billion guided-missile destroyer and the prospective deployment of a forward-deployed battalion of Marines. The preliminary injunction also undermines good order and discipline and forces the Navy and the Marines Corps to accept a level of risk of illness and mission disruption that senior military leaders have determined to be unacceptable and contrary to the national security. *E.g.*, A549-50 (Dkt. 74-11, at 3-4, ¶¶ 4-5); A558-59 (Dkt. 74-12, at 5-6, ¶¶ 8-9); A1070-71 (Dkt. 118-6, at 8-9, ¶ 14). These harms to military readiness are not in the public interest and contravene the "strong judicial policy against interfering with the internal affairs of the armed forces." *Chilcott*, 747 F.2d at 33.

Plaintiffs' only response (at 55) is that the preliminary injunction serves the public interest by definition, because it vindicates their alleged constitutional rights and enforces a federal statute. For the reasons described above, that is not correct. *See supra* pp. 6-18. But even if it were, the Court's inquiry as to the equitable factors would not end because the government has identified harms to the public that would flow from the preliminary injunction even if plaintiffs were correct on the merits. *See* Opening Br. 46-49. Plaintiffs fail to engage with those harms and provide no reason to disregard them. Instead, plaintiffs close with the bald assertion that the preliminary injunction "simply isn't going to halt" the military's "mission to provide a ready national defense." Resp. Br. 55 (quoting *Air Force Officer v. Austin*, No. 5:22-cv-9, 2022 WL 468799-TES, at *12 (M.D. Ga. Feb. 15, 2022)). But that is for the military—not for plaintiffs or the courts—to determine, and the Court should reject plaintiffs' attempt to replace the judgment of senior military leaders with their own.

CONCLUSION

The preliminary injunction should be vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,885 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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I hereby certify that on July 1, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

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