

No. 22-10077 consolidated with No. 22-10534

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States of
America; LLOYD AUSTIN, Secretary, U.S. Department of Defense, individually and
in his official capacity as United States Secretary of Defense; UNITED STATES
DEPARTMENT OF DEFENSE; CARLOS DEL TORO, individually and in his official
capacity as United States Secretary of the Navy,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Texas, Fort Worth Division
No. 4:21-cv-01236

**BRIEF OF AMICUS CURIAE LT. GEN. (RET.) WILLIAM G. "JERRY"
BOYKIN IN SUPPORT OF PLAINTIFFS-APPELLEES**

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SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

U.S. Navy SEALs 1-26, No. 22-10077

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Alabama Center for Law and Liberty – Firm representing *Amicus Curiae*
2. Boykin, William G., Lt. Gen. (ret.) – *Amicus Curiae*
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IDENTITY AND INTEREST OF *AMICUS CURIAE*¹

Amicus Curiae Lt. Gen. (ret.) William G. “Jerry” Boykin (“General Boykin”) is the Executive Vice President for the Family Research Council, a nonprofit organization based in Washington, D.C., dedicated to creating a culture in which human life is valued, families flourish, and religious liberty thrives. During his career in the Army, General Boykin was one of the original members of the United States Army’s Delta Force. He eventually became the Delta Force’s commander. Later in his career, General Boykin commanded all of the Army’s Green Berets and the Special Warfare Center and School. General Boykin spent 36 years in the Army, the last four of which were serving as the Deputy Undersecretary of Defense for Intelligence in the George W. Bush administration. General Boykin is also a devout Christian and an ordained minister.²

Having served in and commanded the special forces in the Army for many years, General Boykin appreciates both the need for military readiness and the need to protect religious freedom where possible. Should this Court believe that Plaintiffs-Appellees are entitled to prevail but are concerned about hindering the military,

¹ All parties have consented to the filing of this brief. Rule 29, Fed. R. App. P. Counsel for a party did not author this brief in whole or in part, and no such counsel or party made any monetary contribution to fund the preparation or submission of this brief. No person or entity other than *Amicus Curiae* and their counsel made a monetary contribution to fund the preparation or submission of this brief.

² *Jerry Boykin, Executive Vice President, Family Research Council*, <https://www.frc.org/biography/william-boykin> (last visited Aug. 28, 2022).

General Boykin wrote the argument section of the attached brief to inform the Court that it is possible to accommodate the SEALs without compromising the special forces and that failing to accommodate them may harm the military more than it helps. For that reason, *Amicus Curiae* believes that this Court will find the brief useful. General Boykin wrote the argument section of this brief himself. Counsel have added citations and have made only light edits when necessary.

SUMMARY OF THE ARGUMENT

General Boykin served in the United States Army for thirty-six years, rising to the rank of lieutenant-general (three-star general) and spending most of his career in the special forces. General Boykin was one of the founding members of the Army's Delta Force and eventually became its commander. He was in a command position during many special-operation missions, including the Iran Rescue Mission, Grenada, Panama, and Somalia.

Having been so highly involved in the Army's special forces, General Boykin has seen the importance of letting our warriors hold fast to their religious, moral, and ethical convictions, because it is relevant to the job they do as our Nation's elite warriors. Being placed in highly dangerous and sensitive situations, our special-forces warriors (like the Army's Delta Force and the Navy SEALs) could make situations even more dangerous than they already are if ethics and morality were not important to them. Furthermore, General Boykin has seen the effect of religion on

our special-forces operators, as it produces the will to stay in the fight when times get hard.

In this case, the Plaintiffs, like many other Americans, have religious and moral objections as to the COVID-19 vaccines. Many objections center on their connection with aborted fetal cells. Others have to do with the highly experimental nature of these vaccines, which raises religious and ethical questions for many who believe they have a religious duty to take reasonable care of their bodies. These particular vaccines were developed much faster than regular vaccines, calling their safety into question.

Taking all of the foregoing into consideration, as a former special-forces commander, General Boykin believes the SEALs and the other Plaintiffs should be accommodated. COVID-19 poses a fairly low health threat to men like the SEALs who are younger and need to be in extraordinarily good health in order to qualify. Additionally, the current vaccines were designed against the original Wuhan strain and Delta strain but is not proving to be effective against the current strains. Subjecting the SEALs to discipline or discharge for their religious objections to the vaccines will leave our military less ready to combat the threats posed by America's enemies around the world. Consequently, even though he was subjected to many vaccines during his time in the military, General Boykin believes that in this case, it is not worth discharging the SEALs for objecting to the COVID-19 vaccines.

ARGUMENT³

My name is William G. (Jerry) Boykin, and I am executive vice-president of the Family Research Council (FRC) in Washington, D.C. I write as a retired member of the armed forces with over three decades of service to the nation.⁴ I believe there are aspects of my career and life experiences that may allow me to provide this Court with insights as to how someone who has commanded from the rank of lieutenant to lieutenant-general in the U.S. Army – including special operations forces – would assess whether an application for service accommodation, religious is in this case, should be granted.

In this instance, I will explain why the religious accommodation requests as requested by the Navy SEALs should be granted. I will argue that religious accommodations are not detrimental to the good order and discipline of an effective military fighting force. In fact, the maintenance and support of the warrior spirit of our combatants can be a more powerful vaccine than those administered by shots in the arm. Thus, this court should grant the SEALs' accommodation the requests regarding the COVID-19 vaccination program.

³ General Boykin wrote the argument section of this brief himself. Counsel made only light edits and added citations.

⁴ General Boykin wrote an autobiography detailing his career. William G. Boykin, *Never Surrender: A Soldier's Journey to the Crossroads of Faith and Freedom* (2008).

I. Relevant Career and Personal Experiences

I served for a total of thirty-six years before retiring from the United States Army as a Lieutenant General. My tenure in the Army included commands in both conventional and Special Operations Forces, but the majority of my career was spent in Special Operations. My early assignments in conventional units included the 2nd Armored Division, the 101st Airborne Division, and as a company commander in the 24th Infantry Division (Mechanized).

After moving to Special Operations, I successfully served in assignments which included positions as: a Platoon Leader and then the Company Executive Officer in 1st Battalion (Ranger) 75th Infantry, Fort Stewart, Georgia; Branch Chief at the Florida Ranger School, Eglin AFB, Florida; and Director for Operations at the Joint Special Operations Command, Fort Bragg, North Carolina. Additionally, I served a total of thirteen years in the Army's Special Forces Operational Detachment – Delta (aka, the “Delta Force”), as a Detachment Commander, Staff Officer, Squadron Commander (twice), the Deputy Commander, and finally, as the Commander.

Finally, in 1998, I was assigned to Fort Bragg, North Carolina as the Commanding General, United States Army Special Forces Command (Green Berets). From 2000 to 2003, I served as the Commanding General, United States Army John F. Kennedy Special Warfare Center, Fort Bragg, North Carolina.

I participated in numerous operations; some of which include the Iranian Hostage Rescue Mission,⁵ Grenada,⁶ Panama,⁷ and with Task Force Ranger in Mogadishu, Somalia, including the events described in the movie, “Black Hawk Down.”⁸ The Purple Heart was awarded to me for a limb-threatening arm wound delivered from a Cuban .50 caliber machine gunner while our unit was engaged in combat in the Grenada rescue operation.

Finally, I earned the Master Parachutist Badge, the Ranger Tab, and the Special Forces Tab. There are many skills involved in conventional and special forces operations that require repetitive practice and the honing of one’s physical and mental capabilities. For example, I successfully (not always without serious injury) parachuted from planes and helicopters over 600 times. My highest jump was made from an altitude of 26,000 feet.

⁵ See generally Laura Lambert, *Operation Eagle Claw*, Encyclopedia Britannica, <https://www.britannica.com/event/Operation-Eagle-Claw> (last visited Aug. 28, 2022).

⁶ See generally Ronald H. Cole, *Operation Urgent Fury*, Office of the Chairman of the Joint Chiefs of Staff (1997), https://www.jcs.mil/Portals/36/Documents/History/Monographs/Urgent_Fury.pdf.

⁷ See generally *Armed Forces Expeditions: Panama Campaign*, U.S. Army Center of Military History, https://history.army.mil/html/reference/army_flag/panama.html (last visited Aug. 28, 2022).

⁸ *Black Hawk Down* (Columbia Pictures 2001).

II. Religious and Ethical Dimensions of Military Effectiveness

Before the Iran Rescue mission (Operation Eagle Claw), I led a group of 100+ mission participants in a prayer before the operation began. It was extremely memorable to me. We were assembled in an Egyptian aircraft hangar seeking God's blessing and protection. There was no chaplain in the Delta Force, so I was asked to lead the prayer.

After that mission it became clear that meeting the spiritual needs of our men in uniform is crucial to their performance and well-being. I advocated before and after that mission that a Delta chaplain was needed. And, after a time, the Army did assign a chaplain to the Delta Force.

In those decades of service, many under my command made expressions of faith declaring Jesus Christ to be their Lord and Savior. Some have made use of chaplains that were available to them along with other religious resources that were at their disposal. These experiences helped raise my awareness of the religious and spiritual needs of members of the armed services over time. Additionally, my interactions with soldiers formed a key part in my decision to become an ordained minister upon retirement from the US Army.⁹

⁹ I was ordained by Morningstar Ministries of Fort Mill, South Carolina.

The U.S. Navy, like the Army, is an institution that must embrace and develop the whole person who serves within its ranks. Members of the armed services are American citizens who serve for their fellow Americans. These are human beings made in the image of God with bodies, minds, and souls. Navy SEALs are selected because they have many distinctive qualifications of body, mind, and soul, including high ethical standards. It should be self-explanatory that this is highly desirable from the Navy's perspective since these men often serve in highly sensitive and dangerous areas around the globe where a lack of judgement or moral character could create an international incident and a loss of life.

Why does this matter to a military unit's fighting effectiveness? Here we return to the spiritual component of the human being. We expect our soldiers and sailor to "stay in the fight" and to "stand" in the face of overwhelming adversity. But what gives that warrior the ability to stand and fight? Certainly, loyalty to and camaraderie with those with whom one serves is a key component. But, that sort of courage also comes when we allow the human spirit to flourish and seek ultimate meaning in their personal beliefs and love of country. A country and a military that suppresses deeply held moral beliefs and compels blind obedience will not produce the great war-fighters needed by a democratic republic.

III. The COVID-19 Vaccines

Various ethical objections have been lodged against these novel biological products, the mRNA vaccines, now mandated by the Department of Defense Covid-19 vaccination program. These are new technologies that raise moral, religious, and ethical concerns. There are also concerns about the abbreviated approval process that produced the vaccines – hence the use of the term, “Operation Warp Speed.”

For example, one set of ethical concerns lies in the use of aborted fetal stem cells for the development, testing, or manufacture of these vaccines.¹⁰ Each vaccine has defined characteristics in this regard. The question for those with these concerns lies in where a person differentiates the ethical boundaries for the use of such stem cells.¹¹ One may disagree with the line-drawing being done by these Navy SEALs, but one cannot deny that fetal stem cell implications exist for these new “biologic” agents – the mRNA vaccines. We are all exploring the moral and ethical implications of these new technologies together. Raising these objections does not make that person a “flat-Earther,” selfish, or unfit for military service.

As I noted above, the term “Operation Warp Speed” was used by the Trump Administration for a reason. The period for safety and effectiveness testing that

¹⁰ See, e.g., *Dr. A. v. Hochul*, 142 S. Ct. 552, 553 (2021) (Gorsuch, J., dissenting); *U.S. Navy SEALs 1-26 v. Biden*, 27 F. 4th 336, 342 n.4 (5th Cir. 2022); *Creger v. United Launch Alliance, LLC*, 571 F. Supp. 3d 1256, 1261 (N.D. Ala. 2021).

¹¹ See *Thomas v. Review Bd. of Ind.*, 450 U.S. 707, 715 (1981) (“Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one.”).

might have taken ten years was reduced to something like a half-year.¹² Again, there is a religious concern here regarding what these men are being forced to inject into their bodies. No one can be certain now what the injections are composed of, and there are certain substances that are objectional based on deeply held religious beliefs. Furthermore, while some people have been afflicted by serious illness and death after contracting COVID-19, those with the health, physical fitness, and youth of the Navy SEALs have only a tiny chance of death or serious illness.¹³

In August 2022, the Covid-19 virus being transmitted will be Omicron variants,¹⁴ which are highly effective at infecting and being transmitted by those who are vaccinated. Personally, I know about the leakiness of these vaccines because I have been vaccinated and boosted and still contracted Covid-19. The vaccines appear to have a diminished capability to prevent Omicron-variant transmission – the most important reason for having a vaccine mandate.

¹² See *Typical Timeline*, Johns Hopkins University & Medicine, <https://coronavirus.jhu.edu/vaccines/timeline#:~:text=A%20typical%20vaccine%20development%20timeline,vaccine%20doses%20for%20widespread%20distribution> (last visited Aug. 28, 2022) (noting that the typical timeline for a vaccine development is 5-10 years).

¹³ Out of 441,138 cases of COVID-19 in the military, only 95 servicemembers have died. *Coronavirus: DOD Response*, United States Department of Defense, <https://www.defense.gov/Spotlights/Coronavirus-DOD-Response> (last visited Aug. 28, 2022).

¹⁴ See *Variants of the Virus*, Centers for Disease Control and Prevention (last updated Aug. 11, 2022), https://www.cdc.gov/coronavirus/2019-ncov/variants/index.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fvariants%2Fomicron-variant.html.

I would be remiss in not taking note of the many tens of thousands of serious adverse events (including deaths) that have been reported to the United States government through its Vaccine Adverse Events Reporting System (VAERS).¹⁵ Historically, reporting systems like VAERS are known to undercount adverse events because these are voluntary reporting systems meant to pick up large signals of drug or vaccine injury.¹⁶ The COVID-19 vaccine injury totals would probably be much lower had the vaccines been evaluated in the normal ten-year approval and testing process.

IV. Balancing the Costs and Benefits of This Vaccine Mandate

Having served for decades in the military, I took many required vaccines. So, I do not oppose military vaccination, and I understand why vaccines are needed and their importance. On balance, however, I do not believe the Department of Defense's decision to mandate these novel COVID-19 vaccines deserves the level of deference and respect that prior vaccine mandates have received.

¹⁵ See generally *Vaccine Adverse Event Reporting System*, United States Department of Health and Human Services, <https://vaers.hhs.gov> (last visited Aug. 28, 2022). According to this system, there have been at least 28,000 deaths, 1 million injuries (with 160,000 hospitalizations), 32,000 life-threatening injuries, and 53,000 people reporting permanent disabilities. See *VAERS Summary for COVID-19 Vaccines Through 6/3/2022*, VAERS Analysis, <https://vaersanalysis.info/2022/06/10/vaers-summary-for-covid-19-vaccines-through-6-3-2022> (last viewed June 16, 2022).

¹⁶ See Ross Lazarus, *Electronic Support for Public Health—Vaccine Adverse Event Reporting System* at 6, Harvard Pilgrim Health Care, Inc., available at <https://www.rickjaffeesq.com/wp-content/uploads/2021/02/r18hs017045-lazarus-final-report-20116.pdf> (last viewed June 16, 2022).

Here are the most important reasons for my decision. *First*, while Covid-19 is a complex disease, men of the age and physical fitness of these Navy SEALs will clear the virus and be highly unlikely to have lasting effects from it. The seriousness of the disease is not proportionate to the punishment being exacted. *Second*, the decision-making of our government in bringing these vaccines to market was unprecedented in its brevity and safety testing. Safety problems only emerge over time – that is why earlier vaccine assessment programs would often require a decade to complete. This process seemed panicked, rushed, and political. *Third*, the vaccines, designed to combat the original Wuhan variant of the virus, appear to have a vastly reduced impact on fighting current COVID-19 variants.¹⁷ This will only worsen as time goes by. *Finally*, the vaccine mandate ignores the terrible impact it will have on the fighting spirit and morale of men and woman who are forced to submit to a medical treatment for which they may have ethical and moral, and religious objections. On balance, the costs of this vaccine mandate to the United States exceed its benefits. These Navy SEALs should not be disciplined or separated from military services. Their religious accommodations should be granted. This is

¹⁷ It is worth noting that being vaccinated and boosted did not protect President Biden, Dr. Anthony Fauci, and Pfizer CEO Albert Bourla from catching the current strain of COVID-19. As Dr. Robert Malone, who was highly involved in the development of mRNA technology explained recently, the biotech companies are rolling out new vaccines based on old COVID-19 strains. See *The Lies My Government Told Me*, 1819 News: The Podcast (Aug. 24, 2022, at about the 40-minute mark).

a dangerous world with conflict imminently possible with Russia, Iran, and China. America needs these fighters far too much to force these professionals out of the service.

CONCLUSION

For these reasons, *Amicus Curiae* respectfully requests that the orders of the trial court granting a preliminary injunction and the class-wide injunction be affirmed.

Respectfully submitted August 29, 2022,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed via the Court's ECF filing system, and therefore service will be effectuated by the Court's electronic notification system upon all counsel or parties of record.

Dated August 29, 2022.

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Rule 29(a)(5), Fed. R. App. P., because, excluding the parts of the document exempted by Rule 32(f), Fed. R. App. P., and 5th Cir. R. 32.3, this document contains 2,922 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it was prepared using Microsoft Word in 14-point Times New Roman.

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