United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

October 13, 2022

Mr. Ryan Baasch
Office of the Attorney General of Texas
Office of the Solicitor General
P.O. Box 12548 (MC-059)
Austin, TX 78711-2548

No. 22-40399 Abbott v. Biden
USDC No. 6:22-CV-3

Dear Mr. Baasch,

You must submit **7 paper copies** of the Appellant's reply brief required by 5th Cir. R. 31.1 within **5 days** of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1. Gray front covers are required. Back covers are also required and may be any color.

Failure to timely provide the appropriate number of copies may result in disciplinary action.

Sincerely,

LYLE W. CAYCE, Clerk

Dantrell Johnson

By: _____
Dantrell L. Johnson, Deputy Clerk
504-310-7689

cc:
Ms. Sarah Jane Clark
Mr. James Garland Gillingham
Mr. Christopher D. Hilton
Mr. Leif A. Olson
Mr. Casen Ross
Ms. Abby Christine Wright

No. 22-40399

In the United States Court of Appeals for the Fifth Circuit

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS,

Plaintiff-Appellant,

v.

JOSEPH R. BIDEN, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; DEPARTMENT OF DEFENSE; LLOYD AUSTIN, SECRETARY, U.S. DEPARTMENT OF DEFENSE; DEPARTMENT OF THE AIR FORCE; FRANK KENDALL, III, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE AIR FORCE; DEPARTMENT OF THE ARMY; CHRISTINE WORMUTH, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE ARMY,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Texas, Tyler Division

REPLY BRIEF FOR APPELLANT

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

JUDD E. STONE II
Solicitor General

RYAN S. BAASCH
Assistant Solicitor General
Ryan.Baasch@oag.texas.gov

Counsel for Plaintiff-Appellant
Governor Greg Abbott

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes:

Other Authorities:

INTRODUCTION

Multiple key features of this litigation are not in dispute. There is no dispute that Defendants[1] cannot constitutionally "govern" the State National Guards, except when the President has federalized the Guardsmen by calling them into federal service. U.S. Const. art. I, § 8, cl. 16. There is also no dispute that Defendants' COVID Vaccine Orders apply to non-federalized Guardsmen. And there is no dispute that Defendants will impose "consequences" on non-federalized Guardsmen who fail to comply with the Orders. Appellee Br. at 25. The core dispute is whether Defendants' imposition of those "consequences" exceeds their limited constitutional powers over non-federalized militia, including the State National Guards. Governor Abbott explained in his opening brief that the Orders do exceed those limits because they amount to unconstitutional "governing" of the non-federalized Guard, in violation of the Constitution's commitment of the "governing" power over non-federalized militia to the States.

Defendants argue that their power to "provide" for "disciplining" non-federalized militia, U.S. Const. art. I, § 8, cl. 16, provides authority for the COVID Vaccine Orders. But "disciplining," especially in the military context, was understood at the Founding to mean the act of instructing or teaching—*not* punishing. Defendants' theory of the "disciplining" power also makes no sense in context. The Constitution says the States have "Authority of training the Militia according to the discipline

[1] This brief adopts the naming conventions used in Governor Abbott's opening brief.

prescribed by Congress." *Id.* No one "trains" another "according to" a punishment. But it makes perfect sense to "train" another "according to" a set of instructions. Defendants also notably fail to explain what meaning "governing" has if their broad interpretation of the "disciplining" power prevails. That is why Governor Abbott's interpretation of the "disciplining" power must be correct. And the Founding-era dictionaries and contemporary usage of the term "discipline" confirm that it is. *See infra* at 5-7.

History is also against Defendants. "Nothing can be more certain" than that the Founders did not empower the federal government to punish non-federalized militia. 3 *Debates in the Several State Conventions of the Adoption of the Federal Constitution* 424 (Jonathan Elliot, ed., 2d ed. 1836) (statement of James Madison); *see also infra* at 11-13. Defendants remarkably assert that history "sheds no light" on modern practice because the Founding era had no National Guard. Appellee Br. at 37. But "the national guard *is* the militia, in modern-day form." *Lipscomb v. FLRA*, 333 F.3d 611, 613 (5th Cir. 2003) (emphasis added). Defendants never grapple with this critical fact.

Defendants resort to claiming that the "consequences" they impose on non-compliant Guardsmen are permissible in any event, because they do not constitute "punishment." This linguistic nitpicking gets Defendants nowhere, though, because whatever the right technical characterization, Defendants' "consequences" go well beyond what the Founders intended. Anti-Federalists feared that the federal government would engage in all kinds of coercive actions against States' militiamen

to subvert the militia as an institution. To achieve ratification, the Federalists assured them that this could not happen, principally because of how they structured the Organizing Clause, U.S. Const. art. I, § 8, cl. 16. And then the Founding generation lived up to this promise by imposing federal consequences on only a *federalized* militia's failure to obey orders. Defendants contend that things should be different in the modern era because now the federal government funds the State National Guards. But the Founders knew the federal government could "provide for . . . arming . . .the Militia" in this way, and yet they reserved—in the very same sentence of constitutional text—the "governing" power to the States except when the militia is called into federal service. U.S. Const. art. I, § 8, cl. 16. Defendants cannot bootstrap themselves into impermissible "governing" through the simple expedient of funding.

The COVID Vaccine Orders are also arbitrary and capricious. Defendants never explained why voluntary vaccination was insufficient to advance their aims, particularly given that there are apparently more voluntarily vaccinated National Guardsmen now than have ever been needed for any federal activation of the Guard. Defendants also never explained how it is consistent with their objective of Guard readiness to discharge unvaccinated Guardsmen, but to nevertheless allow them to remain in the "unorganized" State militias, where Defendants concede they need not be vaccinated. The Constitution does not differentiate between the National Guard and the Texas State Guard—they are both parts of the militia, ostensibly both subject to federalization. U.S. Const. art. I, § 8, cl. 15. So how does it benefit Defendants to

push Guardsmen into those units, where there is no vaccination requirement? Defendants have no answer. And their only attempt to square these circles was through post-litigation affidavits that cannot be used to save arbitrary and capricious administrative action. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971).

The equities also favor Governor Abbott. Defendants' Orders have resulted, and will continue to result, in his losing valuable Guardsmen. And the public interest favors allowing these individuals to make their own health decisions.

ARGUMENT

I. Defendants' COVID Vaccine Orders Threaten to Unconstitutionally Punish Non-Federalized Guardsmen.

A. Defendants are constitutionally unable to punish non-federalized militia members who ignore federal orders.

Governor Abbott explained in his opening brief that the Constitution's Organizing Clause, U.S. Const. art. I, § 8, cl. 16, does not empower the federal government to punish non-federalized militia members, including National Guardsmen. That is clear as a textual matter because none of the federal government's Organizing Clause powers was understood at the Founding to confer power to punish non-federalized militia. It is likewise clear because the federal government may exercise that clause's "governing" power—which does include the power to punish—only when the militia is federalized. Original practice confirms all of this because the Founders never deigned to punish non-federalized militia, even as they established punishment for *federalized* militia. And the Founders' intent makes the point unmistakable: "The

idea of Congress inflicting severe and ignominious punishments upon the militia in times of peace was [regarded as] absurd." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1202 (1833). That was because Congress could not "punish" the militia "when not in the actual service of the government." 3 *Debates*, *supra*, at 407. Of this, "[n]othing can be more certain." *Id.* at 424 (Madison).

Defendants' responses all fail.

1. Defendants contend that their power to "disciplin[e]" non-federalized militia, U.S. Const. art. I, § 8, cl. 16, includes the power not only to promulgate rules, but also to administer "consequences for failure to conform to" those rules. Appellee Br. at 31-32. That is wrong in multiple critical respects. Defendants understandably seize (at 31-32) on certain dictionary definitions providing that, *in addition* to meaning "instruction" or "teaching"—as Governor Abbott has explained—the word "discipline" can also refer to punishment. But Defendants do not explain how this alternative definition makes any sense *in context*. For example, Defendants have no answer to the fact that the Organizing Clause provides that States shall "train[] the militia according to the discipline prescribed by Congress." U.S. Const. art. I, § 8, cl. 16. That makes good sense if "discipline" refers to teaching or instruction, as Governor Abbott contends. But it makes no sense if "discipline" refers to punishment, as Defendants prefer. No one "trains" another "according to" a punishment. *See* Appellant Br. at 18 & n.8.

Defendants' use of their preferred dictionary definitions also fails because when those dictionaries specifically referred to military matters, they ordinarily adopted

the definition that refers to teaching and instruction. *See, e.g.*, *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) ("specific" ordinarily controls over the "general"). "The most authoritative dictionary of that era was Noah Webster's" post-founding dictionary. *Vogt v. City of Hays*, 844 F.3d 1235, 1242 (10th Cir. 2017). And Webster's dictionary defined "military discipline[] [to] include[] instruction in manual exercise, evolutions and subordination." 1 Noah Webster, *An American Dictionary of the English Language* 580 (1828).[2] Webster also equated discipline with instruction when he defined the militia as "[t]he body of soldiers in a state enrolled for discipline." 2 Noah Webster, *An American Dictionary of the English Language* 128 (1828).[3] It is implausible that Webster, in the Constitution's immediate aftermath, would have defined "discipline" in this context in a way that deviated from the Constitution's usage. Moreover, pre-Founding dictionaries that addressed military discipline defined "discipline" similarly. *See, e.g.*, Thomas Dyche & William Pardon, *A New General English Dictionary* 229 (3d ed. 1740) ("order or management observed in an army"). And as a matter of contemporary usage in that era the word "discipline" commonly referred to proper military instruction. Certain Anti-Federalists, for example, desired that "the militia shall always be kept . . . disciplined" in order to guard against federal tyranny. *United States v. Emerson*, 270 F.3d

[2] https://archive.org/details/americandictiona01websrich/page/580/mode/2up?view=theater.

[3] https://archive.org/details/americandictiona02websrich/page/128/mode/2up.

203, 250 n.58 (5th Cir. 2001) (Garwood, J.). And Joseph Story explained that uniform "discipline" would enable the militia to "acquire" "that degree of proficiency in military functions, which is essential to their usefulness." Joseph Story, *Commentaries on the Constitution of the United States* § 1199 (1833). These usages self-evidently make no sense if "discipline" refers to punishment.

Defendants also wrongly contend (at 32) that Governor Abbott's argument that Defendants lack power to punish non-federalized militia "cannot be squared with" his concession that Defendants "may lawfully prescribe readiness requirements for" non-federalized militia. Defendants confuse requirements, on the one hand, with punishment for violating those requirements, on the other. Governor Abbott recognizes that Defendants can prescribe readiness requirements under their power to "provide" for "disciplining" the militia. U.S. Const. art. I, § 8, cl. 16. And Governor Abbott stipulates that COVID vaccination is a "readiness requirement." But the Organizing Clause directs *the States*—not the federal government—to apply that discipline to non-federalized militia. U.S. Const. art. I, § 8, cl. 16 ("States" have "Authority of training the Militia according to the discipline prescribed by Congress"). So the States can incorporate federal "readiness requirements" into their militia discipline, and can enforce those requirements in their discretion. But Defendants have no authority to step in and coerce non-federalized militiamen when a State declines to enforce to Defendants' liking. Defendants can accomplish that feat only if they validly federalize the militia—for that is when they unlock the power of "governing" the militia. *Id.*; *see also* Act of February 28, 1795, ch. 36, § 4, 1 Stat. 424 ("[T]he

militia employed *in the service of the United States*, shall be subject to the same rules and articles of war, as the troops of the United States." (emphasis added).

2. Defendants' historical argument is even more flawed than their textual one. Defendants do not contest Governor Abbott's claim that the Founders overwhelmingly rejected in word and in deed a federal power to punish non-federalized militia. Appellant Br. at 20-22. That is critical because "historical practice" informs any "separation-of-powers" analysis. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 23 (2015). Defendants remarkably assert (at 33-34) that the history is meaningless because the Founders did not have a National Guard and were referring only to "unorganized militia." But "the national guard *is* the militia, in modern-day form." *FLRA*, 333 F.3d at 613 (emphasis added); *accord Maryland ex rel. Levin v. United States*, 381 U.S. 41, 46 (1965), *vacated on other grounds,* 382 U.S. 159 (1965) ("The National Guard is the modern Militia reserved to the States."). The militia's division between "unorganized" and "organized" (the National Guard) is a 20th century, statutory invention. *See* 10 U.S.C. § 246 (dividing the "classes of the militia" into the "organized militia" and "the unorganized militia"). That artificial division does not change the fact that the National Guard is still part of the militia, and still operates pursuant to the Constitution's militia clauses.[4]

[4] Notably, when Congress first organized the militia into "organized" and "unorganized" components, it provided that the President may issue "orders" "as he may think proper" as to federalized militia only. Act of Jan. 21, 1903, ch. 196, 32 Stat. 775, § 4.

3. Defendants' preferred constitutional interpretation also contains a glaring omission: They offer no explanation of what the "governing" power includes. As Governor Abbott has explained, it is the governing power—and only the governing power—that provides power to punish the militia. Appellant Br. at 18-19. Defendants' position is evidently that punishment can be doled out without the governing power (which, as noted, Defendants can exercise only when they federalize the militia). But the governing power must confer *something* unique. *See, e.g.*, *Wright v. United States*, 302 U.S. 583, 588 (1938) ("Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood."); *Holmes v. Jennison*, 39 U.S. 540, 570-71 (1840) (same).

Defendants' only attempt to explain away the superfluity their textual argument creates is to say that "[w]hen the federal government is 'governing' the . . . National Guard [it] is under the exclusive control of the federal government in ways that the non-federalized National Guard is not." Appellee Br. at 33. That is obvious question-begging. If, as Defendants assert, the federal government has full power to enact *and* enforce rules for non-federalized militia, it is not apparent what unique power springs to life when the militia is federalized and the federal government enjoys the additional "governing" power. U.S. Const. art. I, § 8, cl. 16.[5]

[5] Defendants may argue that the "governing" power includes the power to command the militia in combat. But the "Commander in Chief" clause already provides that power as to federalized militia. *See* U.S. Const. art. I, § 2, cl. 1 (President is Commander in Chief of "Militia of the several States, when called into the actual Service of the United States").

4. Defendants ultimately assert (at 27) that they should prevail because this case implicates their "wide-ranging authority over national defense and military matters." But they get no deference in this separation-of-powers dispute. *See, e.g.*, *Morrison v. Olson*, 487 U.S. 654, 704-05 (1988) (Scalia, J., dissenting) ("[W]here the issue pertains to separation of powers, and the political branches are (as here) in disagreement, neither can be presumed correct."). Deference to military decisions applies in cases where the judiciary is asked to second-guess "civilian control of the Legislative and Executive Branches." *Gilligan v. Morgan*, 413 U.S. 1, 3, 10 (1973) (challengers "sought injunctive relief against the Governor to restrain him in the future from prematurely ordering National Guard troops to duty in civil disorders"). The idea is that courts are not "competent or empowered to sit as a super-executive authority to review" the political branches' military decisions. *Simmons v. United States*, 406 F.2d 456, 459 (5th Cir. 1969) (challenger claimed "compulsory service can be justified only by extreme necessity" and not in "peacetime"). But this is a case about *which* political branch—the States or the federal government—controls. In any event, were the Court to defer to the proper Commander-in-Chief in this case about non-federalized Guardsmen, Governor Abbott would necessarily win. *See Holdiness v. Stroud*, 808 F.2d 417, 421 (5th Cir. 1987) ("Governor[s] remain[] in charge" of non-federalized Guard).[6]

[6] Defendants misleadingly contend that the Organizing Clause "reserved to the States just two powers" Appellee Br. at 28 (alterations omitted). But the States, as independent sovereigns, retained *all* powers not expressly given to the federal government. *See* U.S. Const. amend. X; *Houston v. Moore*, 18 U.S. 1, 50 (1820) (Story,

B. Defendants' COVID Vaccine Orders threaten to punish non-federalized militia members in multiple ways.

Governor Abbott has also explained how Defendants' COVID Vaccine Orders threaten to inflict prohibited punishment on non-federalized militia members. Appellant Br. at 23-27. Defendants have threatened to court-martial and discharge non-federalized Guardsmen who disobey the COVID Vaccine Orders, to restrict their participation in State-led training, and to dock their pay. These are all classic examples of punishment under any common sense understanding of the term, and they also closely mirror the punishments that the Founding generation reserved solely for *federalized* militia. Appellant Br. at 23.

1. All of Defendants' arguments (at 34-38) why these actions do not amount to "punishment" fail. But it is instructive first to understand what Defendants' COVID Vaccine Orders—whether technically labeled "punishment," or something else—represent, and why that is anathema to the Constitution's structure.

At bottom, Defendants' COVID Vaccine Orders are the manifestation of a supposed federal power to treat the States' militias much like how Defendants treat the

---

J., dissenting) ("In all . . . respects [not explicitly covered by the Constitution], the militia are subject to the control and government of the State authorities."). Defendants correctly note (at 31 n.3) that Justice Story's opinion in *Houston v. Moore* was technically a dissent, not a concurrence. But Governor Abbott's opening brief cited Justice Story's opinion for points that no Justice disputed. Indeed, "on many subjects discussed [in *Moore*] the judges all agreed." *Dunne v. People*, 94 Ill. 120, 128 (1879). The "difference between the judges" on the militia was, as with many other parts of the opinion, "not as to the principle . . . but as to its application to the case before them." *Suydam v. Broadnax*, 39 U.S. 67, 69 (1840) (discussing *Moore*).

army. *See, e.g.*, Appellee Br. at 7-9 (explaining that Defendants' National Guard regulations mirror those applied to the army). The COVID Vaccine Orders do that by forcing state militia members to incur unwanted medical treatment under the guise of "readiness requirements," Appellee Br. at 25, related to "physical fitness," Appellee Br. at 7. Like the vaccination mandate, any requirement can be dressed up as a "readiness requirement" that, if challenged, Defendants would presumably defend with a claim to extreme military deference. Appellee Br. at 27 (claiming entitlement to "greater deference" than the federal government is due in any "other area"). And Defendants are concededly backing up their mandate with "consequences for failure to conform." Appellee Br. at 31.

Defendants' obey or else paradigm may befit the federal government's relationship with its army, but it is antithetical to the Founders' vision for how the federal government could treat the States' militias. It is well understood that the Founders cherished the militia and distrusted professional armies. *Perpich v. Dep't of Defense*, 496 U.S. 334, 340 n.5 (1990) (recounting Edmund Randolph's assertion that "there was not a member in the federal Convention, who did not feel indignation at the idea of a standing Army" (cleaned up)); *United States v. Miller*, 307 U.S. 174, 179 (1939) (same). That was in large measure because of how the federal government could treat one versus the other, and how it affected a man's loyalties to his neighbors. The "essential difference between" the two was that the militia-man retained loyalties to his community that "predominate[d]" over his role as a fighter, whereas the army man's identity as a soldier "predominate[d] over every other character." *Id.* at 179. The Founders thought that army soldiers "had sold themselves into virtual bondage

to the government." Akhil Amar, *The Bill of Rights as a Constitution*, 100 Yale L. J. 1131, 1169 (1991). "Full-time service . . . weakened their ties" to society. *Id.* And the fact that the federal government could back up army discipline with punishment "increased the[] [army's] servility" to the federal government. *Id.* That servility made the army dangerous, in the Founders' views, because if commandeered by a tyrant it would "pose[] an intolerable threat to individual liberty and to the sovereignty of the separate States." *Perpich*, 496 U.S. at 340; *Emerson*, 270 F.3d at 238-39 (same).

The Founders valued the militia precisely because it would *not* be servile to the federal government. The Founders nevertheless "feared that the [federal] government" would try to subvert the militia to establish the army's primacy. *Emerson*, 270 F.3d at 237. The most obvious way would be to "tak[e] away the people's arms." *District of Columbia v. Heller*, 554 U.S. 570, 598 (2008). So the Founders forbade that action in the Second Amendment. The Founders also knew the federal government could try to subvert the militia in less obvious ways, such as by "making militia service so unpleasant that the people" would see no difference between it and the army, or by "declaring a large number of people" to be "ineligible" to serve in the militia. *Emerson*, 270 F.3d at 238, 247. George Mason, for example, feared that the federal government could "render useless the Militia" or "harass [them], by such rigid Regulations, and intollerable Burdens." *Id.* at 237 n.40 (describing Mason's expression of his fears to Jefferson). But the Founders guarded against these schemes as well by committing the "governing" power to the States except in the limited instance when the militia is federalized. U.S. Const. art. I, § 8, cl. 16; *see also* Appellant Br. at 21 (explaining how the Founders assured Mason that this clause assuaged his fears).

Defendants' argument that they can functionally treat the militia the same as the army is a telling, but devastating, admission. Defendants' COVID Vaccine Orders would override the Founders' careful balance and bring Mason's fears to life. It is one thing to, as the federal government has long done, prescribe mandatory medical interventions for army members and to anticipate that the States would adopt those same interventions for their militias. Appellee Br. at 8. It is quite another for the federal government to countermand objecting Governors, to step into the Governors' shoes without actually federalizing their militiamen, and to penalize non-compliant State militia members. But that is exactly what Defendants contend they may do.[7]

2. It does not matter whether the repercussions for failure to vaccinate are characterized as "punishment" or, as the Defendants would have it (at 35), merely the "consequence" of a failure to meet a requirement. They penalize non-compliance all the same—something Defendants cannot do to non-federalized militia. And all of Defendants' arguments as to why the penalties are lawful are wrong.

Court-Martial: A court martial is obviously a form of punishment; indeed, it is the form of punishment the Founders most explicitly feared. Appellant Br. at 24.

[7] Defendants suggest (at 23) that Texas statutes regarding the National Guard require compliance with federal law. Those statutes, however, do not provide that the federal government may punish non-federalized Guardsmen. In addition, to the extent Defendants are suggesting that Governor Abbott has violated state law, they overlook that under the Texas Constitution Governor Abbott is "Commander-in-Chief of the military forces of the State, except when they are called into actual service of the United States." Tex. Const. art. IV, § 7. And Defendants do not argue (nor could they) that state law somehow legitimizes the unlawful COVID Vaccine Orders.

Defendants say (at 35) they have not yet court-martialed anyone, and that the COVID Vaccine Orders "do not threaten that as a potential consequence." But Defendants' own declarant explained the consequences for failure to vaccinate, and expressly stated in that explanation that "Congress has . . . provided a means for courts-martial of National Guard service members who are not in Federal service." ROA.425.[8] Defendants fall back (at 35) on the argument that, if they convene a court-martial, "any consequences imposed" as a result "would be imposed by the state through its own court-martial regime and as provided by state law." But they make this assertion based on a misreading of 32 U.S.C. § 326. There, Congress provided that "[p]unishments" in the federal court-martial "shall be *as provided by the laws* of the respective States." 32 U.S.C. § 326 (emphasis added). In other words, the federal court-martial would impose a penalty that the State itself makes available in its own proceedings. The federal court-martial would not, as Defendants claim, kick the punishment phase to the States altogether.

Discharge: Discharge is also plainly a form of punishment. Defendants respond (at 35-36) with the tautology that discharge is not a "punishment" because it is just a mere "consequence of a failure to meet a requirement." The Founders plainly thought it was a punishment—that is why they imposed it on disobedient *federalized* militiamen. *See* Appellant Br. at 23. And, "punishment" or not, it is plainly an action

[8] Governor Abbott's trial counsel misspoke at the preliminary-injunction hearing when he said that courts-martial were not on the table. Defendants' attempt (at 35) to seize on that misstatement cannot override what their declarant admitted.

that can hollow out the militia, and the federal government was barred from hollowing out the militia *at least* while it is in State control. *See Emerson*, 270 F.3d at 238, 247.

It is no answer to say, as Defendants do (at 36), that a discharged member "may still serve in a state defense force like the Texas State Guard." Defendants' unstated premise is apparently that they cannot discharge members of the Texas *State* Guard and so Governor Abbott's control of the militia is not materially harmed by discharge of members in the Texas *National* Guard. But that argument is in the nature of a confession because Defendants' constitutional powers do not change according to which part of the militia they are seeking to regulate. The Constitution controls the federal government's treatment of "*the* Militia," full stop. U.S. Const. art. I, § 8, cl.16 (emphasis added). If Defendants lack constitutional power to discharge Texas State Guard members, then necessarily they lack power to discharge non-federalized members of the Texas National Guard. They are both indisputably part of the "militia." *See Levin*, 381 U.S. at 46.

Furthermore, Defendants are doubly barred from discharging State *officers* because the Constitution explicitly makes officer selection the States' exclusive prerogative. U.S. Const. art. I, § 8, cl. 16 (States have sole authority over "Appointment of the Officers"); *cf.* Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 211 & n.171 (1940). Governor Abbott identified this point in his opening brief, *see* Appellant Br. at 25, but Defendants offered no response. Instead, they appear to have conceded that their Orders do in fact target State officers.

See, e.g., Appellee Br. at 12 (describing Defendants' process for "remov[ing] a service member" and explaining that such process applies to "members *and* officers" (emphasis added)).

Title 32 Training: Defendants also punish non-federalized Guardsmen when they deny them the ability to participate in state-run Title 32 training. *See, e.g.*, ROA.419 ("Title 32 is conducted by states."). Defendants respond (at 36) that excluding unvaccinated militia from these trainings "is merely the enforcement of conditions on the receipt of federal funds." This reveals the heart of Defendants' argument, but also its Achilles Heel. Defendants' position distilled to its simplest form is that, once a State accepts federal militia funding, it must also accept federal militia governing. But that is not how the Constitution works. The Constitution explicitly gives Congress power to fund non-federalized State militias, including by empowering Congress to "provide" for "arming" the militia. U.S. Const. art. I, § 8, cl. 16. But the very same sentence of the Constitution explicitly *reserves* the power of "governing" to the States, except when the militia is federalized. *Id.* Defendants' theory introduces a loophole into the constitutional text, whereby once the federal government arms the militia it also unlocks the power to govern the militia. Defendants' preferred reading of the Organizing Clause would read something like this:

> The Congress shall have Power—
>
> > To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, [*or such Part as Congress has armed*]; reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress

U.S. Const. art. I, § 8, cl.16 (emphasized alterations reflecting the upshot of Defendants' reading). But that is not what the Constitution says. Defendants' contention that they can control what they fund may have purchase in a variety of other contexts, but it does not in a case, like this one, where "other constitutional provisions . . . provide an independent bar to the conditional grant of federal funds." *South Dakota v. Dole*, 483 U.S. 203, 208 (1987); *see also Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 269-70 (1985).

Withholding Pay: Defendants' withholding of pay from non-federalized Guardsmen as a penalty for their refusal to vaccinate is also prohibited punishment, as demonstrated by the Founding-era understanding and practice. *See supra* at 11-13; Appellant Br. at 23, 26. Defendants retreat (at 37) to their argument that Founding-era understanding and practice "shed[] no light" because "there were no non-federalized militiamen receiving pay at that time." But that is a meaningless distinction because "the national guard *is* the militia, in modern-day form." *FLRA*, 333 F.3d at 613 (emphasis added). Just as Defendants cannot bootstrap themselves into a power to govern the militia by arming it, *see supra* at 16-18, they likewise cannot bootstrap themselves into a power to govern the militia by organizing it. *Cf.* U.S. Const. art. I, § 8, cl.16 (Congress has power to "provide" for "organizing" non-federalized militia).

In addition, Governor Abbott explained that Defendants' withholding of pay from individual Guardsmen violates the U.S. Code because Defendants are specifically empowered by Congress only to withhold money from "the National Guard of

[a] *State*" for failure to comply with regulations, not from the Guardsmen themselves. 32 U.S.C. § 108.[9] Defendants argue in response (at 37) that Governor Abbott has failed to "explain why withholding federal funds from individual National Guard members constitutes 'punishment,' but withholding federal funds from an entire unit or state" does not. The distinction is obvious. The State has power to punish individual Guardsmen, and it can decide to pass along the financial burden to each Guardsman in the form of reduced pay. Or the State can absorb the burden. But that is the State's choice.

3. Defendants ultimately claim (at 38) that Governor Abbott cannot win because "it would mean that the federal government would be required to pay the salaries of National Guard members who do not meet [federal] readiness requirements." But that is not true—the federal government is not required to dispense funding at all. If the federal government concludes it is somehow consistent with federal objectives, it can cut the flow of dollars altogether. What Defendants cannot do is condition an individual Guardsman's receipt of pay on compliance with federal

[9] Defendants suggest (at 26) that the statutory reference to "a State" in 32 U.S.C. § 108 may sweep in not just each sovereign State, but also Guardsmen themselves as "constituent members" of that State. Only two provisions in Title 32 (which codifies the National Guard) appear to define "State," and each defines it to mean "each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States." 32 U.S.C. §§ 112(h), 901. Granted, those sections do not purport to control Section 108, but this is how Congress routinely defines the term "State." It is highly implausible that Congress could have meant for the term in Section 108 to take on a highly unusual meaning and sweep in individuals without explicitly saying so.

rules. That would constitute prohibited "governing" of non-federalized Guardsmen.

Defendants also claim (at 38) that Governor Abbott's theory requires them "to maintain [unvaccinated members] in the National Guard despite their refusal to" vaccinate. That is true, but also completely unremarkable. "[A]ll located decisions on the state and federal-militia relationship hold that National Guardsmen of the several states are employees of the state except when in the actual service of the United States." *Storer Broad. Co. v. United States*, 251 F.2d 268, 269 (5th Cir. 1958) (per curiam). Governor Abbott—not Defendants—governs the non-federalized Texas National Guard, and Governor Abbott decides the membership of that force. *See also Ass'n of Civilian Technicians, Inc. v. United States*, 603 F.3d 989, 992-93 (D.C. Cir. 2010).

II. Defendants' COVID Vaccine Orders Are Arbitrary and Capricious.

Governor Abbott also explained that the COVID Vaccine Orders are arbitrary and capricious. Defendants had a duty to "reasonably explain[]," *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021), how the Orders advance Defendants' stated interest in a "healthy and ready force" for federal activation. ROA.264. But the Orders contain almost no reasoning at all. And, notably, Defendants did not address two facially irrational components of the Orders. *First,* there are already more than enough voluntarily vaccinated Guardsmen for even the largest plausible federal activation; so why the need to coerce more Guardsmen into vaccination? *See* Appellant Br. at 32. And *second*, Defendants suggest that non-compliant Texas National Guardsmen could join the Texas *State* Guard, where the vaccine mandate does not

apply, and where Defendants' interest in "health and readiness" necessarily cannot be advanced. Appellant Br. at 33. It is not apparent how Defendants can square this circle—the Constitution gives the federal government the same power to federalize the militia no matter which "part" it is federalizing, U.S. Const. art. I, § 8, cl. 15, so if vaccination is somehow necessary to federalization, how is that interest rationally advanced by telling Guardsmen to join a militia force that Defendants will not try to vaccinate? Given the inconsistencies and lack of explanation, there is a strong indication that Defendants' "health and readiness" explanation is pretextual, and that the COVID Vaccine Orders are a part of the President's legal "work-around" to just vaccinate as many people as he can through administrative brute force. Appellant Br. at 33-34.

Defendants' response primarily relies (at 41-44) on litigation affidavits to ostensibly show that the Orders are reasonably explained and that Governor Abbott's arguments were accounted for. *See* Appellee Br. at 43 (citing ROA.440, the post-decisional litigation affidavit of Colonel Steve L. Bradley). But it is hornbook administrative law that such "post hoc" "litigation affidavits" are an "inadequate basis for review" in an administrative-law challenge. *Volpe*, 401 U.S. at 419. Instead, Defendants' action must rise or fall based on the administrative record as it existed *when they promulgated the Orders*. *See Luminant Generation Co. v. EPA*, 675 F.3d 917, 925 (5th Cir. 2012) ("We must disregard any *post hoc* rationalizations of the [agency's] action and evaluate it solely on the basis of the agency's stated rationale at the time of its decision.").

That leaves Defendants with only the inaccurate and the irrelevant. The inaccurate: They say (at 42) that the Secretary of Defense "reasonably rejected" voluntary vaccination "as not adequately protecting the military and the American people." Appellee Br. at 42 (citing ROA.264). But the material they cite contains no indication that the Secretary of Defense actually considered voluntary vaccination, much less explained why it was inadequate.

And the irrelevant: They say (at 43-45) that the military has long imposed vaccination requirements, including on the National Guard. But this suit is about Defendants' *enforcement* powers, and they point to no instance where they have actually punished non-federalized National Guardsmen for, say, failing to receive a flu shot. *Cf. OSG Bulk Ships v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998) ("[A]n agency's adoption of a general enforcement policy is subject to review.").

III. The Equitable Factors Favor Entering a Preliminary Injunction.

The equities also demonstrably tip in Governor Abbott's favor. Texas will not be able to recover costs from training new, replacement Guardsmen, and will additionally suffer irreparable harm from losing valuable, highly trained current members. Appellant Br. at 36-37. The public interest also favors allowing individuals to make their own decisions on how to personally manage COVID's apparently dwindling risks. *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 612 (5th Cir. 2021); *see also* Ayana Archie, *Joe Biden says the COVID-19 pandemic is over. This is what the data tells us* NPR (Sept. 19, 2022).

Defendants' response principally just quibbles with the number of Texas National Guardsmen that may stand on principle and be discharged or coerced into

quitting, as opposed to whether the loss of these Guardsmen will actually harm Texas. But the irreparable harm inquiry does not require that Texas meet some numerical threshold. It makes no legal difference that some Guardsmen have taken the vaccine since this litigation commenced. *See* Appellee Br. at 46 (observing that fewer Texas Army National Guardsmen were unvaccinated in June than in January). Governor Abbott introduced significant evidence that there are multiple, highly trained Guardsmen who will not voluntarily vaccinate. *See, e.g.*, Appellant Br. at 36-37. The loss of even one of these individuals would be irreparable. Defendants cannot seriously contend that their success coercing some Guardsmen into enduring unwanted treatment means that the prospect of the remainder facing the same fate somehow is not irreparable.

Defendants also wrongly assert (at 47) that irreparable harm is lacking because "many Texas National Guard members leave the service every year for unrelated reasons." Indeed, Guardsmen will presumably leave the Guard for unrelated reasons in similar proportions this year as they have in prior years. But the loss of Guardsmen because of the COVID Vaccine Orders will be *on top of that*, resulting in a net increase unlike what the Texas National Guard endures in a normal year. It is that delta that injures Texas and Governor Abbott.

And it is also no answer to say, as Defendants do (at 47-48), that Governor Abbott can just put unvaccinated Guardsmen in the State Active Guard. As Governor Abbott has explained, Guardsmen are trained as units, not just as individuals, and it would undermine unit cohesion and command structures to remove members from their established units and just drop them into a brand new organization. Appellant

Br. at 37. Defendants have no answer to this obvious problem either in their appellate brief or in the administrative record.

Defendants also fail to explain how they, or the public interest, are in any way harmed by a preliminary injunction. They just fall back (at 48) on their general theme that vaccination is necessary for a "healthy and ready force." But they do not dispute that there are already more than enough voluntarily vaccinated Guardsmen to answer any reasonably conceivable need for a large federal activation. *Cf.* Appellee Br. at 42 ("The fact that the military has not needed to activate a particular number of National Guard members in the past is no guarantee that that will be true in the future."). They also fail to explain why, if vaccination is truly critical, it is not a sufficient remedy for them to federalize the National Guard (even before an emergency arises) and impose the requirement then. In the meantime, while they are under Governor Abbott's control, it is not in the public interest to strip Guardsmen of their right to determine for themselves how they will manage their personal risks with COVID. *BST Holdings*, 17 F.4th at 618-19.

CONCLUSION

The Court should reverse the district court's denial of a preliminary injunction.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

JUDD E. STONE II
Solicitor General

/s/ Ryan S. Baasch
RYAN S. BAASCH
Assistant Solicitor General
Ryan.Baasch@oag.texas.gov

Counsel for Plaintiff-Appellant Governor Greg Abbott

Certificate of Service

On October 12, 2022, this document was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Ryan S. Baasch
Ryan S. Baasch

Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,472 words, excluding the parts of the motion exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Ryan S. Baasch
Ryan S. Baasch