

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

U.S. NAVY SEALs 1-26;)	
)	
U.S. NAVY SPECIAL WARFARE)	
COMBATANT CRAFT CREWMAN 1-5;)	
)	
U.S. NAVY EXPLOSIVE ORDNANCE)	Civil Action No. 4:21-cv-01236-O
DISPOSAL TECHNICIAN 1; and)	
)	
U.S. NAVY DIVERS 1-3,)	
)	
Plaintiffs,)	
)	
v.)	
)	
JOSEPH R. BIDEN, JR., in his official)	
capacity as President of the United States of)	
America; LLOYD J. AUSTIN, III,)	
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.)	

**MOTION OF THE AMERICA FIRST POLICY INSTITUTE
FOR LEAVE TO FILE BRIEF *AMICUS CURIAE***

In accordance with Local Rule 7.2(b), the America First Policy Institute (“AFPI”) respectfully moves for leave to appear as *amicus curiae* for the purpose of filing the attached brief supporting Plaintiffs.

As explained in the attached brief, AFPI “is a 501(c)(3) non-profit, non-partisan research institute. AFPI exists to conduct research and develop policies that put the American people first. Our guiding principles are liberty, free enterprise, national greatness, American military

superiority, foreign-policy engagement in the American interest, and the primacy of American workers, families, and communities in all we do.” AFPI, *About*, <https://americafirstpolicy.com/about/> (last visited Nov. 21, 2021).

AFPI consists of many former senior leaders of the United States government. Lieutenant General Keith Kellogg, United States Army (Retired), serves as AFPI’s Co-Chairman of the Center for American Security and previously served as the National Security Advisor to former Vice President Mike Pence and Chief of Staff and Executive Secretary of the National Security Council. The Honorable John Ratcliffe serves as Co-Chairman of the Center for American Security and previously served as the sixth Director of National Intelligence. Dr. Jacob Olidort is Director of the Center for American Security and recently served in the Office of the Vice President.

Amicus seeks to bring this experience and expertise to bear in assisting this Court in resolving the question before it of whether religious servicemembers should be forced to violate their deeply-held religious beliefs or face punitive or involuntary administrative separation. In particular, *amicus* seeks to illuminate the negative effects on American national security of a ruling against Plaintiffs.

In accordance with Local Rules 7.1(a) and 7.1(c), *amicus* certifies that it has been able to confer with attorneys for Plaintiffs but has not been able to confer with attorneys for Defendants regarding the relief requested in this motion, as a docket search shows that attorneys for Defendants have not yet made an appearance in this matter. Plaintiffs consent to the filing of this brief.

Respectfully submitted this 22nd day of November, 2021.

/s/ Jessica Hart Steinmann

Pamela Jo Bondi
Florida Bar Number 0886440*
Jessica Hart Steinmann
Texas Bar Number 24067647
James Baehr
Louisiana Bar Number 35431*
Joshua J. Campbell
Georgia Bar Number 720007*
Rachel Jag
Missouri Bar Number 70674*
1635 Rogers Road
Fort Worth, TX 76107
(571) 348-1802
jsteinmann@americafirstpolicy.com
jbaehr@americafirstpolicy.com
jcampbell@americafirstpolicy.com
rjag@americafirstpolicy.com
Attorneys for Amicus Curiae

** Application to be Admitted/Admitted Pro
Hac Vice Forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2021, this Motion of the America First Policy Institute for Leave to File Brief *Amicus Curiae* was filed through the Electronic Court Filing system and will be sent electronically to all parties as identified in the Notice of Electronic Filing.

/s/ Jessica Hart Steinmann

Pamela Jo Bondi
Florida Bar Number 0886440*
Jessica Hart Steinmann
Texas Bar Number 24067647
James Baehr
Louisiana Bar Number 35431*
Joshua J. Campbell
Georgia Bar Number 720007*
Rachel Jag
Missouri Bar Number 70674*
1635 Rogers Road
Fort Worth, TX 76107
(571) 348-1802
jsteinmann@americafirstpolicy.com
jbaehr@americafirstpolicy.com
jcampbell@americafirstpolicy.com
rjag@americafirstpolicy.com
Attorneys for Amicus Curiae

** Application to be Admitted/Admitted Pro Hac Vice Forthcoming*

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....ii

INTEREST OF THE AMICUS.....1

INTRODUCTION.....2

ARGUMENT.....3

 I. Military budget cuts and misplaced priorities are already harming military readiness.....3

 II. This mandate creates lifelong harm to religious servicemembers by forcing them to accept the “moral injury” of violating their conscience or face the consequences of a negative discharge.....10

 III. The COVID Mandate Order is arbitrary, capricious, and not in accordance with law because it violates the Immunization Program that it is required to follow...13

CONCLUSION.....16

TABLE OF AUTHORITIES

Cases

Doe v. Rumsfeld, 341 F. Supp. 2d 1 (D.D.C. 2004).....12

NRDC, Inc. v. Pritzker, 828 F.3d 1125, 1132 (9th Cir. 2016).....13

United States v. Moore, 58 M.J. 466, 469 (C.A.A.F. 2003).....13

United States v. Womack, 29 M.J. 88, 90 (C.M.A. 1989).....13

United States v. Wartsbaugh, 21 U.S.C.M.A. 535 (1972).....13

United States v. Wysong, 9 U.S.C.M.A. 249 (1958).....13

Statutes

5 U.S.C. § 706(2)(A).....13

Title 10, United States Code, Section 892; Manual for Courts-Martial IV-28 (2019 Edition)
[https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20\(Final\)%20\(20190108\).pdf?ver=2019-01-11-115724-610](https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20(Final)%20(20190108).pdf?ver=2019-01-11-115724-610).....11

Department of Defense Orders or Directives

Department of Defense Instruction 6205.02, *DoD Immunization Program* (July 23, 2019)..14, 15

Memorandum for Senior Pentagon Leadership, *Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members* (August 24, 2021).....14

Other Resources

AFPI, *About*, <https://americafirstpolicy.com/about/>.....2

Alex Horton, *Air Force is first to face troops’ rejection of vaccine mandate as thousands avoid shots*, WASH. POST, Oct. 28, 2021, available at <https://www.washingtonpost.com/national-security/2021/10/28/vaccine-mandate-air-force/>.....8

Alberto Nardelli, *U.S. Warns Europe that Russia May be Planning Ukraine Invasion*, BLOOMBERG, Nov. 11, 2021, available at <https://www.bloomberg.com/news/articles/2021-11-11/u-s-warns-europe-that-russian-troops-may-plan-ukraine-invasion>.....7

ALNAV, Department of Navy Mandatory COVID-19 Vaccination Policy, Aug. 21, 2021, <https://www.mynavyhr.navy.mil/Portals/55/Messages/ALNAV/ALN2021/ALN21062.txt>.....8

Center for Strategic and Budgetary Assessments, *Military Personnel* (Aug. 15, 2017), <https://csbaonline.org/reports/military-personnel>.....3

Congressional Research Service, *Veterans’ Benefits: The Impact of Military Discharges on Basic Eligibility* 7 (Mar. 6, 2015), <https://sgp.fas.org/crs/misc/R43928.pdf>.....12

Department of Defense, *Military and Security Developments Involving the People’s Republic of China* (Sept. 1, 2020) <https://media.defense.gov/2020/Sep/01/2002488689/-1/-1/2020-DOD-CHINA-MILITARY-POWER-REPORT-FINAL.PDF>.....6

Department of Veterans Affairs, *Address Moral Injury to Reduce Veteran Suicide Risk* (2021) available at https://www.mentalhealth.va.gov/MENTALHEALTH/suicide_prevention/docs/FSTP-Address-Moral-Injury-to-Reduce-Veteran-Suicide-Risk-4-2021.pdf.....10, 11

Final Report to the National Institute of Justice, *Criminal Stigma, Race, Gender, and Employment: An Expanded Assessment of the Consequences of Imprisonment for Employment*, https://thecrimereport.s3.amazonaws.com/2/fb/e/2362/criminal_stigma_race_crime_and_unemployment.pdf.....12

Government Accountability Office, *Military Personnel: Personnel and Cost Data Associated with Implementing DOD’s Homosexual Conduct Policy* (Jan. 2011), <https://www.gao.gov/assets/gao-11-170.pdf>.....9

Heritage Foundation, *2022 Annual Index of U.S. Military Strength* 9 (Oct. 20, 2021) https://thf_media.s3.amazonaws.com/2021/2022_Military_Index/2022_IndexOfUSMilitaryStrength_WEB.pdf.....4, 5, 6, 7

Javon Price, *Warfighting and Military Readiness after the Post 9/11 Wars* 5 (Oct. 12, 2021) <https://americafirstpolicy.com/assets/uploads/files/warfighting-and-military-readiness-after-the-post-9-11-wars.pdf>.....4, 6

Lieutenant General Keith Kellogg, United States Army (Retired), and Dr. Jacob Olidort, *American Security Report: Placing Americans First in America’s Foreign Affairs* (May 26, 2021), <https://americafirstpolicy.com/docs/Center-for-American-Security.pdf>.....3, 10, 16

Marc Kaufman, *U.S. Barred from Forcing Troops to Get Anthrax Shots*, Oct. 28, 2004, THE WASH. POST, <https://www.washingtonpost.com/wp-dyn/articles/A3691-2004Oct27.html>.....12

Memorandum for Senior Pentagon Leadership 1 (August 24, 2021).....13, 14, 15

Niall McCarthy, *The Cost of Training U.S. Air Force Fighter Pilots* (Apr. 9, 2019), available at <https://www.forbes.com/sites/niallmccarthy/2019/04/09/the-cost-of-training-u-s-air-force-fighter-pilots-infographic/?sh=7cf9ecaf7973>.....4

Press Release, *Heritage Foundation Releases 2022 Index of U.S. Military Strength* (Oct. 20, 2021)) <https://www.heritage.org/press/heritage-foundation-releases-2022-index-us-military-strength>5

The New England Journal of Medicine, *Myocarditis after Covid-19 Vaccination in a Large Health Care Organization*, pg. 1, Background, October 6, 2021.....15

Thomas Gnau, *Air Force Secretary: Vaccine Refusers Could be Prosecuted*, JOURNAL NEWS, Oct. 21, 2021, <https://www.journal-news.com/local/air-force-secretary-vaccine-refusers-could-be-prosecuted/ZHNIJJE44FC4DFVJU7RARYFKPM/>.....9

Todd South, *Troops who refused anthrax vaccine paid a high price*, MILITARY TIMES, Jun. 17, 2021, <https://www.militarytimes.com/news/pentagon-congress/2021/06/17/troops-who-refused-anthrax-vaccine-paid-a-high-price/>.....10, 12, 13

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

U.S. NAVY SEALs 1-26;)
)
U.S. NAVY SPECIAL WARFARE)
COMBATANT CRAFT CREWMAN 1-5;)
)
U.S. NAVY EXPLOSIVE ORDNANCE) Civil Action No. 4:21-cv-01236-O
DISPOSAL TECHNICIAN 1; and)
)
U.S. NAVY DIVERS 1-3,)
)
Plaintiffs,)
)
v.)
)
JOSEPH R. BIDEN, JR., in his official)
capacity as President of the United States of)
America; LLOYD J. AUSTIN, III,)
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.)

**BRIEF *AMICUS CURIAE* OF THE AMERICA FIRST
POLICY INSTITUTE IN SUPPORT OF PLAINTIFFS**

INTEREST OF THE *AMICUS*

The America First Policy Institute (“AFPI”) “is a 501(c)(3) non-profit, non-partisan research institute. AFPI exists to conduct research and develop policies that put the American people first. Our guiding principles are liberty, free enterprise, national greatness, American military superiority, foreign-policy engagement in the American interest, and the primacy of

American workers, families, and communities in all we do.” AFPI, *About*, <https://americafirstpolicy.com/about/> (last visited Nov. 21, 2021).

AFPI consists of many former senior leaders of the United States government. Lieutenant General Keith Kellogg, United States Army (Retired), serves as AFPI’s Co-Chairman of the Center for American Security and previously served as the National Security Advisor to former Vice President Mike Pence and Chief of Staff and Executive Secretary of the National Security Council. The Honorable John Ratcliffe serves as Co-Chairman of the Center for American Security and previously served as the sixth Director of National Intelligence. Dr. Jacob Olidort is Director of the Center for American Security and recently served in the Office of the Vice President.

Amicus seeks to bring this experience and expertise to bear in assisting this Court in resolving the question before it of whether religious servicemembers should be forced to violate their deeply held religious beliefs or face punitive or involuntary administrative separation. In particular, *amicus* seeks to illuminate the negative effects on American national security of a ruling against Plaintiffs.

INTRODUCTION

Forcing religious servicemembers to either violate their conscience or be negatively discharged undermines U.S. national security by directly causing an immediate, significant loss of American military strength for an order that illegally and unnecessarily undermines military readiness. A ruling against Plaintiffs will result in long-term devastating effects on the morale, recruitment, and retention of our all-volunteer force. As Plaintiffs capably explain in their Complaint, this action is unwarranted by both text and precedent. As outlined below, it is equally inappropriate from a national security policy perspective.

ARGUMENT

AFPI's Center for American Security is dedicated to the expansion of "America's Unrivaled Military Strength." Lieutenant General Keith Kellogg, United States Army (Retired), and Dr. Jacob Olidort, *American Security Report: Placing Americans First in America's Foreign Affairs* (May 26, 2021), <https://americafirstpolicy.com/docs/Center-for-American-Security.pdf> (hereinafter *American Security Report*). AFPI emphasizes a world at "peace through a robust and reinvigorated military that prioritizes the lives of American servicemen and women, their families, and the American taxpayer over the foreign policy establishment." *Id.* at 10.

I. Military budget cuts and misplaced priorities are already harming military readiness.

American military strength is in part achieved through appropriate funding of the United States military. While in office, AFPI's senior leadership pressed for such funding, and the Trump administration increased "real (inflation-adjusted) federal government expenditures on national defense . . . by over \$100 billion, or roughly 14 percent" after years of "precipitous decline." *Id.* at 9. The highest military expenditures historically come from military and civilian personnel costs. Center for Strategic and Budgetary Assessments, *Military Personnel* (Aug. 15, 2017), <https://csbaonline.org/reports/military-personnel> ("Overall, the pay and benefits of military personnel and civilian employees accounts 42 percent of the total DoD budget request.").

Maintaining strong national security requires expending resources in recruiting and training the best servicemembers in the world. Highly trained personnel in elite units, such as the Navy SEALs before the Court today, cost substantially more to train. Equipping and training

Navy SEALs has been estimated to cost as much as \$1 million per SEAL. Dkt. 1. Fighter pilot training can cost upwards of \$10 million for some aircraft:



Niall McCarthy, *The Cost of Training U.S. Air Force Fighter Pilots*, FORBES, Apr. 9, 2019, available at <https://www.forbes.com/sites/niallmccarthy/2019/04/09/the-cost-of-training-u-s-air-force-fighter-pilots-infographic/?sh=7cf9ecaf7973>.

Unfortunately, the investments necessary to maintain future American strength in both personnel and procurement are not being made. When accounting for inflation, “[t]he FY22 budget request for the Pentagon totals at \$715 billion . . . [and] marks a reduction from the previous year’s budget.” Javon Price, *Warfighting and Military Readiness after the Post 9/11 Wars* 5 (Oct. 12, 2021) <https://americafirstpolicy.com/assets/uploads/files/warfighting-and-military-readiness-after-the-post-9-11-wars.pdf> (hereinafter *Post 9/11 Military Readiness*). The Heritage Foundation’s Center for National Defense recently released its 2022 Annual Index of U.S. Military Strength, a comprehensive, statistical assessment of U.S. military capability, capacity, and readiness, and found that, “As currently postured, the U.S. military continues to be only marginally able to meet the demands of defending America’s vital national interests” and is

trending in the wrong direction. Heritage Foundation, *2022 Annual Index of U.S. Military Strength* 9 (Oct. 20, 2021), https://thf_media.s3.amazonaws.com/2021/2022_Military_Index/2022_IndexOfUSMilitaryStrength_WEB.pdf (hereinafter “Index”).

The Index notes declines in the capabilities of both the Navy and the Air Force. “[T]he Navy is rated ‘marginal’ on a downward slope to ‘weak’ in readiness.” *Id.* at 17. The Air Force is downgraded to “weak” from a prior “marginal” assessment in the year prior: “The service also lost ground in readiness compared with the preceding year. A score of ‘weak’ in this area is the result of *a shortage of pilots* and flying time that implies a lack of effort or focused intent given the general reduction in operational deployments[.]” *Id.* at 19 (emphasis added). All the services are undermanned to meet the goal of addressing two simultaneous global conflicts: “the services have also normalized reductions in the size and number of military units, and the forces remain well below the level needed to meet the two-[contingency] benchmark.” *Id.* at 21.

While our Nation’s strength recedes, our adversaries’ capabilities quickly advance. “America’s key adversaries – China, Russia, Iran, and North Korea – are actively making clear advances in their military capabilities, with China reportedly launching a new hypersonic missile just this past week.” *Id.* Press Release, *Heritage Foundation Releases 2022 Index of U.S. Military Strength* (Oct. 20, 2021) <https://www.heritage.org/press/heritage-foundation-releases-2022-index-us-military-strength>. National security experts from across the foreign policy spectrum have raised alarms concerning the speed and strength of China’s military transformation. The Department of Defense’s annual congressional report on Chinese military power describes the dramatic improvements China has made in just the past twenty years:

[I]t is likely that Beijing will seek to develop a military by mid-century that is equal to—or in some cases superior to—the U.S. military, or that of any other

great power that the PRC views as a threat. As this year's report details, the PRC has marshalled the resources, technology, and political will over the past two decades to strengthen and modernize the PLA in nearly every respect. Indeed, as this report shows, China is already ahead of the United States in certain areas such as

- Shipbuilding: The PRC has the largest navy in the world . . .
- Land-based conventional ballistic and cruise missiles . . .
- Integrated air defense systems . . .

Department of Defense, *Military and Security Developments Involving the People's Republic of China* (Sept. 1, 2020), <https://media.defense.gov/2020/Sep/01/2002488689/-1/-1/1/2020-DOD-CHINA-MILITARY-POWER-REPORT-FINAL.PDF>. Should conflict occur, the services most needed to address the Chinese threat are those facing the most pressing budget shortfalls.

There is little doubt that the U.S. Navy, alongside the U.S. Air Force, will be the primary services if the United States is looking to deter future Chinese aggression and protect U.S. interests in the Indo-Pacific. Yet, given the budget proposed by the Pentagon . . . it is clear that the current rhetoric does not match its budget priorities. This disconnect is further proof that the DoD has not made the intellectual pivot necessary to address the growing concern in the Far East.

Post 9/11 Military Readiness at 5.

In the European theater, Russia continues to project power beyond its borders.

In Europe, Russia uses its energy position, along with espionage, cyberattacks, and information warfare, to exploit vulnerabilities with the goal of dividing the transatlantic alliance and undermining faith in government and societal institutions. Overall, Russia possesses significant conventional and nuclear capabilities and remains the principal threat to European security. Its aggressive stance in a number of theaters, including the Balkans, Georgia, Syria, and Ukraine, continues both to encourage destabilization and to threaten U.S. interests.

Index at 235.

MAP 10

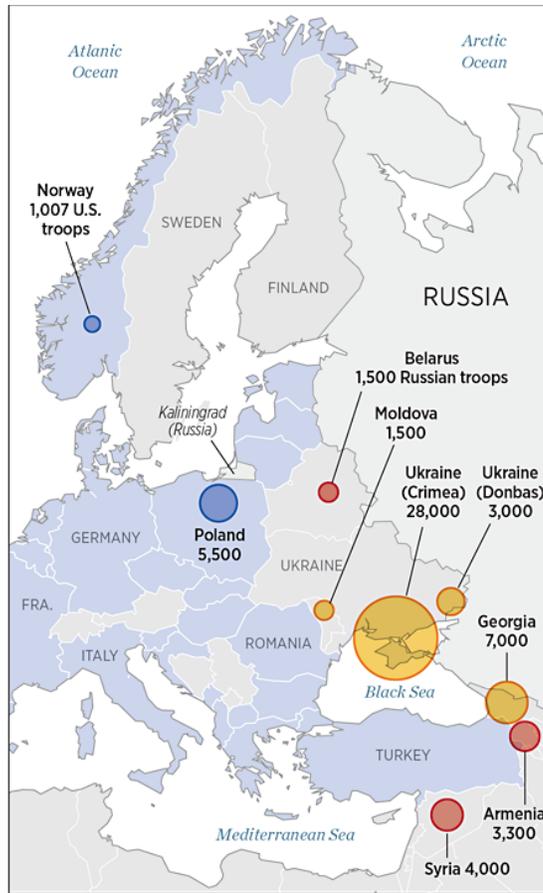
U.S. Troops Vastly Outnumbered by Russian Troops Outside Russia's Borders

U.S. troops in Norway and Poland number less than 7,000—far fewer than the 48,300 Russian troops that are, for all intents and purposes, permanently stationed outside its borders on NATO's perimeter.

- NATO nations
- U.S. troops in NATO nations adjacent to Russia
- Russian troops
- Russian troops in occupied territories

SOURCES: International Institute for Strategic Studies, *The Military Balance 2021: The Annual Assessment of Global Military Capabilities and Defence Economics* (London: Routledge, 2021); U.S. Department of Defense, Defense Manpower Data Center; and Heritage Foundation research.

heritage.org



Index at 241. Recent reports state that the United States is warning European allies of a potential Russian invasion of Ukraine. Alberto Nardelli, *U.S. Warns Europe that Russia May be Planning Ukraine Invasion*, BLOOMBERG, Nov. 11, 2021, available at <https://www.bloomberg.com/news/articles/2021-11-11/u-s-warns-europe-that-russian-troops-may-plan-ukraine-invasion>.

Facing these growing global challenges, the Department of Defense should be doing all it can to maintain its fighting strength. Instead, it is threatening to expel highly trained and effective personnel by forcing them to violate their deeply held religious belief or practice with a hasty order that is both overbroad and violates the standing vaccine implementation order, as discussed, *infra*.

Initial reports indicate the disastrous effect this policy will have across the services. *The Washington Post* reported on October 28, 2021, that

Up to 12,000 Air Force personnel have rejected federal orders to get fully vaccinated against the coronavirus despite the Pentagon mandate, and officials say it is too late for them to do so by the Tuesday deadline, posing the first major test for military leaders whose August directive has been met with defiance among a segment of the force.

Alex Horton, *Air Force is First to Face Troops' Rejection of Vaccine Mandate as Thousands Avoid Shots*, WASH. POST, Oct. 28, 2021, available at <https://www.washingtonpost.com/national-security/2021/10/28/vaccine-mandate-air-force/>. This segment composes approximately 3% of the 324,000 active-duty airmen. *Id.* Deadlines for the other services will shortly follow: an ALNAV message from the Secretary of the Navy gave active sailors and Marines 90 days to comply with mandatory vaccination, or until November 19, 2021. ALNAV, Department of Navy Mandatory COVID-19 Vaccination Policy, Aug. 21, 2021, <https://www.mynavyhr.navy.mil/Portals/55/Messages/ALNAV/ALN2021/ALN21062.txt>.

Reservists have an additional 30 days. *Id.*

Instead of broadly accepting religious exemption requests, the services are refusing them. “The Army, the largest military service, has granted just one permanent medical exemption and no religious exemptions for the coronavirus vaccine, officials said. The Navy has not granted any religious exemptions for any medical vaccine — for the coronavirus or otherwise — in the past seven years.” *Id.* Even *The Washington Post* quotes a nationally recognized expert, Katherine Kuzminski with the Center for a New American Security, who concedes that this policy will affect readiness: “A wave of dismissals could jolt the Air Force personnel system and cause significant challenges within units that must be ready to respond to crises at a moment’s notice,

especially if some vital jobs — like pilots or aircraft maintainers — are overrepresented among those who could face expulsion.” *Id.*

The monetary costs of training replacement personnel to replace those forced out due to this policy will run into the hundreds of millions of dollars. In 2011, the United States Government Accountability Office (“GAO”) published a comprehensive report analyzing the costs associated with separating 3,664 trained servicemembers in the context of the Department of Defense’s since revoked homosexual conduct policy and found the costs to be substantial.

According to GAO’s analysis of Defense Manpower Data Center data, 3,664 servicemembers were separated under DOD’s homosexual conduct policy from fiscal years 2004 through 2009. . . Using available DOD cost data, GAO calculated that it cost DOD about \$193.3 million (\$52,800 per separation) in constant fiscal year 2009 dollars to separate and replace the 3,664 servicemembers separated under the homosexual conduct policy. This \$193.3 million comprises \$185.6 million in replacement costs and \$7.7 million in administrative costs. The cost to recruit and train replacements amounted to about \$185.6 million.

Government Accountability Office, *Military Personnel: Personnel and Cost Data Associated with Implementing DOD’s Homosexual Conduct Policy* (Jan. 2011), <https://www.gao.gov/assets/gao-11-170.pdf>. The numbers being reported for religious servicemembers unwilling to receive the vaccine are far many multiples greater than those lost to this prior policy, ultimately and will costing far more.

At the same time, replacement will become more difficult as Americans unwilling to take the COVID vaccine will be barred from serving the Nation. Recruit training is already being impacted. “Nearly 40 recruits in the Air Force training pipeline were recently forced out of the service for declining to get vaccinated, officials said. They were sent home using a discharge method to easily banish recruits who fail to meet standards before officially entering the military.” Thomas Gnau, *Air Force Secretary: Vaccine Refusers Could be Prosecuted*, JOURNAL

NEWS, Oct. 21, 2021, <https://www.journal-news.com/local/air-force-secretary-vaccine-refusers-could-be-prosecuted/ZHNIJJE44FC4DFVJU7RARYFKPM/> (hereinafter *Journal News Article*).

In 1998, the Department of Defense forced servicemembers to take a mandatory anthrax vaccine that some troops objected to on health or religious grounds. The numbers being reported for those unwilling to take the COVID vaccine today – up to 12,000 in the Air Force alone – are exponentially greater than those that declined to take the anthrax vaccine (“official Pentagon statements indicated that an estimated 350 servicemembers had refused the [anthrax] vaccine between 1998 to 2000”). Todd South, *Troops Who Refused Anthrax Vaccine Paid a High Price*, MILITARY TIMES, Jun. 17, 2021, <https://www.militarytimes.com/news/pentagon-congress/2021/06/17/troops-who-refused-anthrax-vaccine-paid-a-high-price/> (hereinafter *Military Times Article*).

II. This mandate creates lifelong harm to religious servicemembers by forcing them to accept the “moral injury” of violating their conscience or face the consequences of a negative discharge.

While the costs to the military in loss of personnel in the short term will be great, the harm this policy will have on religious servicemembers will be lifelong. AFPI recognizes the connection between our long-term treatment of servicemembers and military readiness. “A key national security priority, and central to America’s military strength, is ensuring that America’s service members are taken care of—both during and after their service—and that their government’s engagements overseas improve their future and that of their families and neighbors. The greatest strength of America’s military remains the men and women who proudly wear the uniform. Ensuring we take care of these brave men and women after their service, builds morale and attracts future talent.” *American Security Report* at 11. Yet, this COVID-19 vaccination mandate puts religious servicemembers in an impossible dilemma: commit an act

that violates their deeply held religious practice and take this vaccine, or refuse and suffer the lifelong negative consequences of court-martial or involuntary discharge.

The Department of Veterans Affairs has embraced a recognition of the effect that “moral injury” plays in the mental health of servicemembers and veterans. Department of Veterans Affairs, *Address Moral Injury to Reduce Veteran Suicide Risk* (2021) available at https://www.mentalhealth.va.gov/MENTALHEALTH/suicide_prevention/docs/FSTP-Address-Moral-Injury-to-Reduce-Veteran-Suicide-Risk-4-2021.pdf (“Moral injury stems from exposure to acts that violate one’s moral code.”) (internal citation omitted). “A study that involved a national sample of Veterans found that potential exposure to morally injurious events was associated with increased risk for suicidal ideation and behavior, as well as mental health conditions.” *Id.* (internal citation omitted). At a time when servicemember and veteran mental health challenges and suicide are at an all-time high, forcing religious servicemembers to commit an act that violates their religious beliefs or face the lifelong stigma of negative discharges will only increase the likelihood of mental health struggles.

Those that refuse to violate their deeply held religious beliefs face punitive or involuntary administrative discharge with lifelong implications. An Air Force spokesperson said, “[s]hould a service member refuse to receive the COVID-19 vaccine, commanders retain the full range of disciplinary options available to them under law and policy, some of which includes issuing administrative paperwork, imposing nonjudicial punishment, or referring court-martial charges.” *Journal News Article.*

A court-martial conviction for failure to obey an order or regulation can result in the equivalent of a civilian felony conviction. The maximum punishments outlined in the Manual for Courts-Martial indicate as much:

d. *Maximum punishment.*

(1) *Violation of or failure to obey lawful general order or regulation.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

Title 10, United States Code, Section 892; Manual for Courts-Martial IV-28 (2019 Edition)

[https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20\(Final\)%20\(20190108\).pdf?ver=2019-01-11-115724-610](https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20(Final)%20(20190108).pdf?ver=2019-01-11-115724-610).

A wide body of research shows the impact of the stigma created by such a conviction on efforts to gain later employment.

Compared to different types of stigmatized job applicants, including welfare recipients, the short-term unemployed, and those with only short-term and part-time work histories, applicants with criminal justice system involvement were seen as the least likely to be hired by employers.

Final Report to the National Institute of Justice, *Criminal Stigma, Race, Gender, and Employment: An Expanded Assessment of the Consequences of Imprisonment for Employment*,

https://thecrimereport.s3.amazonaws.com/2/fb/e/2362/criminal_stigma_race_crime_and_unemployment.pdf.

Even if handled administratively, the consequences of an involuntary administrative separation are likewise severe. Recipients of an “Other than Honorable” administrative discharge lose nearly all access to VA health care, education, or other benefits. Congressional Research Service, *Veterans’ Benefits: The Impact of Military Discharges on Basic Eligibility* 7 (Mar. 6, 2015), <https://sgp.fas.org/crs/misc/R43928.pdf>. They are not even permitted back on the military bases where they served.

Prior vaccine refusers paid dearly to exercise their rights of conscience. Sergeant James Muhammed was a deployed Marine sergeant with dreams of becoming an officer. A devout Muslim who exhibited hesitancy towards the forced anthrax vaccination, Sergeant Muhammed

told the command he was weighing whether or not he could take the shot and needed more time. But his commander said that Muhammad had already made his decision. So, instead of deploying, receiving a commission and his flying wings, the stellar sergeant was headed for court-martial. People he trusted and respected turned their backs on him. “This decision broke a lot of relationships,” he said.

Military Times Article. Facing court-martial, Sergeant Muhammed accepted a guilty plea.

Later, U.S. District Judge Emmett Sullivan declared the mandatory anthrax vaccination of servicemembers “illegal” because the Food and Drug Administration had not followed the proper approval process for the investigational drug. *Doe v. Rumsfeld*, 341 F. Supp. 2d 1 (D.D.C. 2004); Marc Kaufman, U.S. *Barred from Forcing Troops to Get Anthrax Shots*, Oct. 28, 2004, THE WASH. POST, <https://www.washingtonpost.com/wp-dyn/articles/A3691-2004Oct27.html>. When Sergeant Muhammed learned of this, he expected the Department of Defense to reach out and fix his conviction: “‘I checked my mailbox every day waiting for a letter or phone call to come back to active duty, that they realized they made a mistake and they wanted to make it right,’ he said. ‘But that letter or phone call never came.’” *Military Times Article*. It was not until nearly two decades later in 2019 that Sergeant Muhammed’s record was restored. *Id.* Today, many thousands of servicemembers face a similar dilemma. This Court’s ruling on behalf of Plaintiffs could avoid this harm.

III. The COVID Mandate Order is arbitrary, capricious, and not in accordance with law because it violates the Immunization Program that it is required to follow.

With a declining military personnel budget, forcing servicemembers to submit to an unlawful mandate or be separated only compounds the harm to national security. To be lawful, an order must have a valid military purpose and be “clear, specific, and narrowly drawn.” *United States v. Moore*, 58 M.J. 466, 469 (C.A.A.F. 2003); *United States v. Womack*, 29 M.J. 88, 90 (C.M.A. 1989) (“The order must be worded so as to make it specific, definite, and certain, and it may not

be overly broad in scope or impose an unjust limitation on personal rights.” Citing, *United States v. Wartsbaugh*, 21 U.S.C.M.A. 535 (1972); *United States v. Wysong*, 9 U.S.C.M.A. 249 (1958) (Military order was unlawful because it was so broad and all-inclusive in scope that it unlawfully restricted the accused's freedom of speech.))

In addition, “The key provisions of the [Administrative Procedure Act] require the court to hold unlawful and set aside a final order of an agency if the order is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’ *See* 5 U.S.C. § 706(2)(A). *NRDC, Inc. v. Pritzker*, 828 F.3d 1125, 1132 (9th Cir. 2016) (internal citations omitted). *Memorandum for Senior Pentagon Leadership* 1 (August 24, 2021) (hereinafter “the COVID Mandate Order”) states that it will be implemented in accordance with Department of Defense Instruction 6205.02, entitled, “DoD Immunization Program” (hereinafter “the Immunization Program”). But the COVID Mandate Order is wholly at odds with the Immunization Program. As an initial matter, it states that those who have recovered with “previous COVID-19 infection are not considered fully vaccinated,” irrespective of the considered advice of the individual servicemember’s medical provider. The mandate makes no room for those who have already developed antibodies to COVID-19, nor has the government presented any data showing that previously or not-previously infected servicemembers remain at risk to contract the virus. Meanwhile, the Immunization Program recommends *against* unilateral vaccination. Section 3:1 of the Immunization Program, entitled, “IMMUNIZATION GUIDANCE” states that immunizations should be narrowly tailored to “customize care or respond to specific clinical situations for each individual.” No such individual analysis is being conducted here.

The Immunization Program calls for careful evaluation of the risks to different categories of servicemembers and locations, while the COVID Mandate Order ignores all distinctions. Section

3:1(h) states that immunizations are to be administered when there are “indications of an impending deployment, especially to a sensitive location.” The COVID Mandate Order makes no such location distinction – or justification for its absence – but sweeps all into an arbitrary and overbroad application. Section 3:2(4)(g)(1) directs that immunizations are for only those categorized as category 1 personnel, who are “assigned or designated to be deployed with those military personnel in a high-threat area.” For those not going into a high-threat area, the Immunization Program states that “Evacuation, rather than immunization, is the primary means of addressing the threat...” Order 6205.02, Section 3:2(4)(g)(3). Contrary to the Immunization Program, servicemembers who have no deployment orders whatsoever are being mandated to take the COVID-19 vaccine. Further, the Immunization Program states clearly that “[f]or category 2, 3, and 4 personnel to whom immunization is offered, the following additional requirements apply: (a) Receipt of immunization will be on a voluntary basis.” *Id.* at 3:2(4)(g)(4) (emphasis added). The COVID Mandate Order, however, is anything but voluntary.

Exceptions to policy for the Immunization Program require that a “risk/benefit analysis must accompany the request to justify use as a general readiness measure (i.e., use beyond geographic CCDR-identified threats).” *Id.* at (a)(1), (2). No such analysis has been done for the COVID Mandate Order. The scientific data, for example, is beginning to show a linkage between higher incidents of myocarditis in males ages 16 to 29 after taking an mRNA vaccine according to a recent article in the authoritative New England Journal of Medicine. “Reports have suggested an association between the development of myocarditis and the receipt of messenger RNA (mRNA) vaccines against coronavirus disease 2019 (Covid-19), but the frequency and severity of myocarditis after vaccination have not been extensively explored.” *Myocarditis after Covid-19*

Vaccination in a Large Health Care Organization, THE NEW ENGLAND JOURNAL OF MEDICINE,¹ Oct. 6, 2021, at 1. The mandate should be stayed under this study alone because it came out a few weeks after the overbroad August mandate, imposed upon servicemembers with no meaningful comment period, nor substantive risk/benefit analysis that this study could have informed. In sum, this overbroad, arbitrary order is contrary to the standing policy outlined in the Immunization Program it purports to and must follow, lacks the sufficient risk/benefit analysis, and is not in accordance with law.

CONCLUSION

“An America First perspective demands that those designing and implementing policies on behalf of the American people ask and answer the following question: ‘How does this policy help or harm the American citizen?’” *American Security Report* at 4. Unfortunately, the policy being pursued by Defendants is both illegal and adverse to military readiness and will have grave consequences to American national security. In the short term, it will leave America weakened in the face of growing global challenges with the loss of potentially thousands of highly trained troops. In the long term, the “moral injury” or lifelong stigma of a negative discharge for religious servicemembers will diminish morale and impact recruitment and retention. This Court can prevent these severe consequences by upholding the Constitutional rights of religious servicemembers and ruling in favor of Plaintiffs.

/s/ *Jessica Hart Steinmann*

Pamela Jo Bondi
Florida Bar Number 0886440*
Jessica Hart Steinmann
Texas Bar Number 24067647

¹ Article published and studies performed by numerous doctors including, “Guy Witberg, M.D., Noam Barda, M.D., Ph.D., Sara Hoss, M.D., Ilan Richter, M.D., M.P.H., Maya Wiessman, M.D., Yaron Aviv, M.D., Tzlil Grinberg, M.D., Oren Auster, M.Sc., Noa Dagan, M.D., Ph.D., M.P.H., Ran D. Balicer, M.D., Ph.D., M.P.H., and Ran Kornowski, M.D.”

James Baehr
Louisiana Bar Number 35431*
Joshua J. Campbell
Georgia Bar Number 720007*
Rachel Jag
Missouri Bar Number 70674*
1635 Rogers Road
Fort Worth, TX 76107
(571) 348-1802
jsteinmann@americafirstpolicy.com
jbaehr@americafirstpolicy.com
jcampbell@americafirstpolicy.com
rjag@americafirstpolicy.com
Attorneys for Amicus Curiae

** Application to be Admitted/Admitted Pro
Hac Vice Forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2021, this document was filed through the Electronic Court Filing system and will be sent electronically to all parties as identified in the Notice of Electronic Filing.

/s/ Jessica Hart Steinmann

Pamela Jo Bondi
Florida Bar Number 0886440*
Jessica Hart Steinmann
Texas Bar Number 24067647
James Baehr
Louisiana Bar Number 35431*
Joshua J. Campbell
Georgia Bar Number 720007*
Rachel Jag
Missouri Bar Number 70674*
1635 Rogers Road
Fort Worth, TX 76107
(571) 348-1802
jsteinmann@americafirstpolicy.com
jbaehr@americafirstpolicy.com
jcampbell@americafirstpolicy.com
rjag@americafirstpolicy.com
Attorneys for Amicus Curiae

** Application to be Admitted/Admitted Pro Hac Vice Forthcoming*

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

U.S. NAVY SEALs 1-26;)
)
U.S. NAVY SPECIAL WARFARE)
COMBATANT CRAFT CREWMAN 1-5;)
)
U.S. NAVY EXPLOSIVE ORDNANCE) Civil Action No. 4:21-cv-01236-O
DISPOSAL TECHNICIAN 1; and)
)
U.S. NAVY DIVERS 1-3,)
)
Plaintiffs,)
)
v.)
)
JOSEPH R. BIDEN, JR., in his official)
capacity as President of the United States of)
America; LLOYD J. AUSTIN, III,)
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.)

**ORDER GRANTING MOTION OF THE AMERICA FIRST POLICY
INSTITUTE FOR LEAVE TO FILE BRIEF *AMICUS CURIAE***

The America First Policy Institute, having duly moved for leave to appear as *amicus curiae* for the purpose of filing a brief supporting Plaintiffs in this action pursuant to Local Rule 7.2(b), and having reviewed and considered the Motion of the America First Policy Institute for Leave to File Brief *Amicus Curiae*, it is hereby

ORDERED that the Motion of the America First Policy Institute for Leave to File Brief *Amicus Curiae* is **GRANTED**.

SO ORDERED, on this ____ day of _____, 2021.

The Honorable Reed O'Connor
United States District Judge