No. 22-10077

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-Appellants.

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

OPPOSITION TO MOTION FOR PARTIAL STAY PENDING APPEAL

Kelly J. Shackleford
Jeffrey C. Mateer
Hiram S. Sasser, III
David J. Hacker
Michael D. Berry
Justin Butterfield
Jordan E. Pratt
Danielle A. Runyan
Holly M. Randall
FIRST LIBERTY INSTITUTE
2001 W. Plano Pkwy., Ste. 1600
Plano, Texas 75075
Tel: (972) 941-4444

Heather Gebelin Hacker
Andrew B. Stephens
HACKER STEPHENS LLP
108 Wild Basin Road South
Suite 250
Austin, Texas 78746
(512) 399-3022 (phone)
heather@hackerstephens.com

Counsel for Plaintiffs-Appellees

CERTIFICATE OF INTERESTED PERSONS

No. 22-10077
U.S. NAVY SEALS 1-26, ET AL.,
Plaintiffs-Appellees,

v.

BIDEN, ET AL.,
Defendants-Appellants.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 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.

Plaintiffs-Appellees	**Former or present counsel**
• 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	Hacker Stephens LLP • Heather Gebelin Hacker • Andrew B. Stephens First Liberty Institute • Kelly J. Shackleford • Jeffrey C. Mateer • Hiram S. Sasser III • David J. Hacker • Michael D. Berry • Justin Butterfield • Jordan E. Pratt • Roger Byron • Danielle A. Runyan • Holly M. Randall

Defendants-Appellants	**Former or present counsel**
• Joseph R. Biden, Jr. • Lloyd Austin • U.S. Department of Defense • Carlos Del Toro	U.S. Department of Justice • Brian M. Boynton • Alexander K. Haas • Anthony J. Coppolino • Andrew E. Carmichael • Amy E. Powell • Stuart J. Robinson • Zachary Avallone • Courtney D. Enlow • Liam Holland • Reginald Skinner • Daniel Luecke • Sarah W. Carroll • Marleigh D. Dover • Casen Ross • Charles W. Scarborough • Lowell V. Sturgill, Jr.

/s/ Heather Gebelin Hacker
HEATHER GEBELIN HACKER
Counsel for Plaintiffs-Appellees

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INTRODUCTION

Plaintiffs—thirty-five Navy SEALs and members of the Naval Special Warfare (NSW) community—are some of the most devoted servicemembers in the military. But they are also devoted to their faith. When Plaintiffs requested accommodation of their sincere religious beliefs against COVID-19 vaccination, the Department of Defense and the United States Navy[1] responded by engaging in coercive tactics designed to persuade Plaintiffs to violate their beliefs. And evidence has revealed that the Navy has no valid accommodation process, only a rubber-stamped denial for each request in violation of clear legal precedent. The district court's preliminary injunction rightfully halts the ongoing violation of Plaintiffs' rights while this lawsuit proceeds. Yet the Navy now asks this Court to allow it to continue this unlawful conduct.

This is not an emergency. The preliminary injunction was entered on January 3, 2022. ROA.2419. The Navy does not explain why it needs relief by March 2, 2022, an arbitrarily chosen date. Fifth Cir. R. 27.3. It waited weeks before filing this appeal, ROA.2508-09,[2] and even longer before asking the district court for a stay, ROA.2545-48. But the Navy already granted itself a stay because it has not been complying with the injunction. It has even blocked one Plaintiff from receiving medical treatment for a traumatic brain injury sustained during his service, persisting even

[1] Defendants-Appellants are referred to collectively as "the Navy." President Biden was dismissed from the case. ROA.2399.

[2] Plaintiffs rely on the record and do not submit separate exhibits duplicative of the record.

after the district court called that conduct "egregious." ROA.2408, 2662-63, 2674-76, 2978-79, 3005-07. Because the Navy is not complying with the injunction, it cannot show irreparable injury.

In any event, the strength and readiness of the entire Navy does not rest on the shoulders of the thirty-five Plaintiffs. The Navy has been successfully running its operations since the beginning of the COVID-19 pandemic regardless of the vaccination status of the thirty-five Plaintiffs. The Navy also waited nearly a year after vaccines were available to demand vaccination. As this Court recently held, there is no "purported 'emergency' [when] the entire globe has now endured [the pandemic] for nearly two years," and the Navy "spent nearly [eleven] months responding." *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 611 (5th Cir. 2021). The Navy openly admits that Omicron has had "really no operational impact," and that over 99% of the Navy is vaccinated. ROA.2396, 2729. Plaintiffs' religious-accommodation (RA) requests also have no operational impact, yet those requests were the trigger for the Navy's retaliatory and coercive conduct, not Plaintiffs' vaccination status. Plaintiffs were previously deployed, promoted, trained, and trained others, all despite being unvaccinated. And some are *still* doing so. The district court is not attempting to run the Navy, as the Navy claims. The preliminary injunction merely requires the Navy to treat Plaintiffs as they were treated before their RA requests became an issue—in other words, it preserves the status quo. *See Sambrano v. United Airlines*, No. 21-11159, 2022 WL 486610, at *4 (5th Cir. Feb. 17, 2022) (per curiam).

By contrast, Plaintiffs stand to incur further harm if the Court grants the stay. The district court found that the Navy's religious-accommodation process is "by all

accounts … theater" and the Navy "merely rubber stamps each denial." ROA.2394. The Navy has never contested this. Thus, the Navy is violating the Religious Freedom Restoration Act (RFRA) by imposing a vaccination mandate without a legitimate accommodation process demonstrating the government's high burden is met for each person's circumstances. *See McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 475 (5th Cir. 2014). And as this Court just held in *Sambrano*, Plaintiffs are suffering irreparable harm because they are being coerced into violating their sincere religious beliefs against the COVID-19 vaccination, 2022 WL 486610, at *8, which is a substantial burden on their religious-liberty rights, *see Holt v. Hobbs*, 574 U.S. 352, 361 (2015). If this Court were to grant the partial stay rather than preserve the status quo, the Navy will not hesitate in punishing Plaintiffs as much as possible, short of court martial or separation. This Court should not permit the Navy to violate Plaintiffs' fundamental rights by granting the partial stay.

BACKGROUND

I. Factual background

a. Plaintiffs' positions and training

Plaintiffs are U.S. Navy SEALs, Navy Special Warfare Combatant Craft Crewmen (SWCCs), a Navy Explosive Ordnance Disposal Technician (EOD), and Navy Divers who object to receiving a COVID-19 vaccination based on their sincerely held religious beliefs. ROA.32-33. Plaintiffs are each assigned to NSW Command units. ROA.34. Many Plaintiffs are assigned to training commands; others are assigned to active SEAL Teams. *See* Mot. at 14, ROA.2740, 2993. Except for a few SEALs in a

certain group (which no Plaintiff is in), SEALs are not deployed with short notice. ROA.2740-41, 2994. Their commands operate on a predictable, cyclical basis. ROA.2741, 2994. That allows each SEAL Team to obtain training and qualifications required for specific missions, which is facilitated by the training commands. *Id.* Many Plaintiffs hold highly specialized qualifications that enable them to perform their special operations missions and train other SEALs. ROA.39. Plaintiffs' sincerely held religious beliefs forbid them from receiving the COVID-19 vaccine for various reasons rooted in their Christian faith. ROA.40-42, 1124-1275, 2396-97.

b. Defendants' vaccination policies

On July 29, 2021, in addition to announcing vaccination mandates for federal employees and contractors, the President announced that he directed the Department of Defense (DoD) to require military servicemembers to receive a COVID-19 vaccination. ROA.523-35. About a month later, Secretary of Defense Lloyd Austin directed DoD to vaccinate all active-duty and reserve servicemembers. ROA.399-400. Six days later, Secretary of the Navy Carlos Del Toro directed Navy active-duty and reserves personnel to become vaccinated within 90 and 120 days, respectively. ROA.402-03.

In October 2021, the Chief of Naval Operations issued Navy Administrative Message (NAVADMIN) 225/21, which threatens religious objectors not only with the loss of their careers, but also with potentially crippling debt. ROA.414-18. NAVADMIN 225/21 states that "Navy service members refusing the COVID-19 vaccination, absent a pending or approved exemption, shall be processed for administrative separation." ROA.161; *see also* ROA.417-18. It also provides that the Navy

"may seek recoupment of applicable bonuses, special and incentive pays, and the cost of training and education for service members refusing the vaccine." ROA.415. For the SEALs, this means that the Navy is threatening to force each of them to pay back over $1 million. ROA.39. NAVADMIN 225/21 also authorizes temporary reassignment of "Navy service members who refuse the COVID-19 vaccine, regardless of exemption status, based on operational readiness or mission requirements." ROA.416-17. It also mandates that "[c]ommands shall not allow those refusing the vaccine to promote/advance, reenlist, or execute orders, with the exception of separation orders, until the CCDA has completed disposition of their case." ROA.417.

In November 2021, the Navy issued NAVADMIN 256/21, ROA.1676-83, which states that "Navy service members whose COVID-19 vaccination exemption request is denied are required to receive the COVID-19 vaccine … within 5 days of being notified of the denial." ROA.1677. It also authorizes adverse performance evaluations, denial of promotion or advancement, loss and required repayment of Navy-funded education, and possible loss of eligibility for some VA benefits such as the GI Bill, including the transfer of GI Bill benefits to dependents. ROA.1676-83.

c. Defendants' discriminatory actions

On their face, the Navy's policies require individualized assessment of religious-accommodation requests, and the regulations place the burden on the military to demonstrate a compelling justification for denials. *See* ROA.420-38, 440-48, 450-66, 468-71. But as to the vaccine mandate, the individualized assessments and compelling demonstration the policies require are a farce. The Navy uses a six-phase, fifty-step process in adjudicating RA requests. ROA.2355-78, 2397. The process begins,

however, by instructing an administrator to use a prepared disapproval template containing the same rationale, despite the differing circumstances of each servicemember submitting a request. ROA.2377-78, 2397. Plaintiffs have received nearly identical denials. *See, e.g.*, ROA.3302-03 (sealed) (SEAL 3); ROA.3349-50 (sealed) (SEAL 2); ROA.3359-60 (sealed) (EOD 1).[3] Notably, this is despite SEAL 2 and SEAL 3's commanding officer, who is in charge of all SEAL training on the East and West coasts, recommending approval. ROA.3285-86, 3346-47 (sealed).

d. Harm to Plaintiffs

Even if the Navy's promised religious-accommodation process were not a farce with a predetermined outcome, it has provided Plaintiffs no relief. Each Plaintiff submitted an RA request, some as early as August 2021, but none have been approved. ROA.2397, 2856. Even submission of an RA request resulted in coercive and punitive action against Plaintiffs. *See* ROA.1131-32, 1136, 1144-45, 1158-59, 1173, 1176, 1181, 1185, 1189-90, 1199, 1202-04, 1208, 1215-16, 1224-25, 1232, 1237, 1242, 1255, 1260, 1263, 2146, 2175, 2181, 2184, 2190, 2193, 2196, 2199, 2205-06, 2209, 2217-18, 2221, 2224, 2228, 2239, 2242, 2247-48, 2254-55, 2674-75, 2678-79, 2685-87, 2695, 2697, 2700-01, 3005-07, 3009-10, 3012-14, 3038, 3040-42, 3044-45, 3048-50. Because of the Navy's coercive and heavy-handed policies, many Plaintiffs have suffered adverse psychological effects, causing some to seek treatment. ROA.2149, 2153, 2162, 2169, 2193, 2213, 2217, 2228, 2235, 2239, 2242-43, 2248.

[3] These documents were discussed in the testimony of SEAL 2, SEAL 3, and EOD 1 at the preliminary-injunction hearing. The hearing transcript was still under review when the record was provided to this Court. *See* ROA.29, 3051.

II. Procedural history

Plaintiffs sued on November 9, 2021, asserting claims under the Free Exercise Clause, RFRA, and other provisions of federal law. ROA.32-80. Plaintiffs moved for a preliminary injunction based on their religious-liberty claims on November 24. ROA.201-46. Plaintiffs also moved for a protective order to permit them to proceed by pseudonym and have used pseudonyms through the preliminary-injunction proceedings, though Plaintiffs' identities were disclosed to the Navy under an agreed protective order. ROA.1316-25, 1517-20. The district court held a preliminary-injunction hearing on December 20, ROA.25, and granted the preliminary injunction on January 3, 2022. ROA.2419. The Navy filed a notice of interlocutory appeal on January 21 and filed a motion for partial stay of the injunction pending appeal in the district court on January 24. ROA.2508-09, 2545-48. Plaintiffs filed a motion for order to show cause as to why the Navy should not be held in contempt on January 31. ROA.2650-69. That motion is fully briefed as of February 13. ROA.2974-86. The district court denied the Navy's motion for partial stay on February 13. ROA.2964-73.

ARGUMENT

"A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citations omitted). The Court considers four factors when deciding whether to stay a preliminary injunction pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be

irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016) (citation omitted). "Also, the maintenance of the status quo is an important consideration in granting a stay." *Id.* (citation omitted). "The proponent of a stay bears the burden of establishing its need." *Clinton v. Jones*, 520 U.S. 681, 708 (1997). Here, the Navy fails to carry its burden.

I. The Navy's Non-Compliance with the Preliminary Injunction Is Sufficient Reason to Deny the Stay.

As mentioned above, the Navy already granted itself the stay it now seeks because it is flouting the preliminary injunction. ROA.2658-74, 2974-3050. Thus, the Navy seeks equitable relief, yet comes to the Court with unclean hands. Granting relief would violate traditional principles of equity. *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945). As this Court recently held in another case in which the federal government asked for a stay pending appeal, "inequitable conduct is 'sufficient to deny' DHS's request for an equitable stay pending appeal." *State v. Biden*, 10 F.4th 538, 559 (5th Cir. 2021) (citation omitted). Courts have also denied stays pending appeal where "compl[iance] with the Court's injunctive orders" was an issue in the litigation, and where, as here, a motion for contempt is pending. *See Fed. Trade Comm'n ex rel. Yost v. Educare Ctr. Servs., Inc.*, No. EP-19-CV-196-KC, 2020 WL 4334117, at *6 (W.D. Tex. Apr. 3, 2020); *see also* ROA.2650-704, 2974-3050. The Court should not reward the Navy's noncompliance by granting equitable relief.

II. Plaintiffs' Claims Are Justiciable.

The Navy argues that Plaintiffs' claims are not justiciable for two main reasons: It contends that the preliminary injunction improperly interferes with "core military affairs," Mot. at 17, and Plaintiffs did not "exhaust available intraservice corrective measures before presenting their claims," which bars their suit. Mot. at 18. Neither contention is correct.

A. Holding that Plaintiffs' RFRA claim is non-justiciable would frustrate Congress's clear purpose in requiring the military to comply with RFRA.

"Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014). RFRA commands that, with a narrow exception, "[g]overnment shall not substantially burden a person's exercise of religion," and it directly provides that "[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense *in a judicial proceeding* and obtain appropriate relief against a government." 42 U.S.C. § 2000bb-1(a), (c) (emphasis added). "RFRA provides both broad protection of the free exercise right and a broad right of action for judicial relief," even against the military. *Singh v. Carter*, 168 F. Supp. 3d 216, 226 (D.D.C. 2016); *see also* 42 U.S.C. § 2000bb-2. The Navy does not contest that RFRA applies. *See* ROA.2411. If the Court were to apply a judge-made abstention doctrine to entirely avoid adjudicating Plaintiffs' RFRA claim, it would frustrate Congress's purpose in creating it. And as the Supreme Court has recognized, "we have been particularly reluctant to abstain in cases involving facial challenges based

on the First Amendment." *City of Houston v. Hill*, 482 U.S. 451, 467 (1987) (*Pullman* abstention).

The D.C. Circuit has explained that the logic underlying non-justiciability in some military cases is "wholly inappropriate, however, when a case presents an issue that is amenable to judicial resolution," recognizing that "courts have shown no hesitation to review cases in which a violation of the Constitution, statutes, or regulations is alleged." *Dilley v. Alexander*, 603 F.2d 914, 920 (D.C. Cir. 1979); *see id.* ("It is a basic tenet of our legal system that a government agency is not at liberty to ignore its own laws and that agency action in contravention of applicable statutes and regulations is unlawful. The military departments enjoy no immunity from this proscription." (citations omitted)). Even if military operations require some deference from courts, "resolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board." *Adair v. England,* 183 F. Supp. 2d 31, 55 (D.D.C. 2002) (citation omitted). Indeed, "the Supreme Court … [has] heard numerous [constitutional] challenges to military policies." *Brannum v. Lake*, 311 F.3d 1127, 1130 (D.C. Cir. 2002).

Plaintiffs challenge the Navy's vaccination mandate because it lacks a legitimate accommodation process and the Navy treats secular reasons for not being vaccinated more favorably than religious ones, as evidenced by the grant of 10 permanent medical exemptions and zero religious exemptions. ROA.2730. As the district court determined, "[w]hether the vaccine mandate passes muster under the First Amendment and RFRA requires neither 'military expertise [n]or discretion.' It is a purely legal question appropriate for review." ROA.2409 (quoting *Mindes v. Seaman*, 453

F.2d 197, 201 (5th Cir. 1971)). Thus, there is no reason for the Court to abstain, and it would conflict with Congress's intent in creating a specific right of action to provide strong protection for religious-liberty rights to do so.

B. If the justiciability test from *Mindes v. Seaman* applies, Plaintiffs' claims satisfy it.

The Navy argues that Plaintiffs' claims are not justiciable under *Mindes*, 453 F.2d 197, a case pre-dating RFRA which held that courts should abstain from adjudicating claims against the military unless certain criteria are met. The district court applied *Mindes* and found its requirements are satisfied here. ROA.2399-2410. It does not appear that this Court has ever applied *Mindes* in a RFRA case, nor in a free-exercise case. Still, even if *Mindes* applies, its requirements are met.

1. *Mindes* allows for judicial review of military decisions when two threshold requirements are satisfied: the plaintiff has (1) alleged a deprivation of a constitutional or statutory rights and (2) exhausted available intraservice corrective measures. *Id.* at 201; *Meister v. Tex. Adjutant Gen.'s Dep't.,* 233 F.3d 332, 339 (5th Cir. 2000). It is undisputed that the Plaintiffs allege a deprivation of constitutional and statutory rights, but the Navy insists that Plaintiffs must wait to sue until their final appeals are adjudicated. Mot. 18-19. But this argument is moot because at least one Plaintiff recently received his boilerplate appeal denial, and another was notified that his appeal was denied, as the Navy is aware. ROA.2856; Opp. App. 001-03. [4]

[4] The denial was received by SEAL 16 on February 11, 2022. SEAL 24 has yet to receive his denial, but his command informed him that his appeal was denied on February 11. Plaintiffs could not submit SEAL 16's denial to the district court before the

There are also recognized exceptions to the exhaustion requirement for review of internal military decisions which apply here. *Van Hoffburg v. Alexander,* 615 F.2d 633, 638 (5th Cir. 1980). Exhaustion is not required when administrative remedies would not provide adequate relief, *Hodges v. Callaway,* 499 F.2d 417, 420-21 (5th Cir. 1974), when the petitioner may suffer irreparable injury if he is compelled to pursue administrative remedies, *Rhodes v. United States,* 574 F.2d 1179, 1181 (5th Cir. 1978), when administrative appeal would be futile, *Hodges,* 499 F.2d at 420, and when the plaintiff has raised a substantial constitutional question, *see* ROA.2407 n.23 (collecting cases).

This case falls within these exceptions. Plaintiffs stand to suffer irreparable injury if they cannot sue until their final appeals are adjudicated. *See Opulent Life Church v. City of Holly Springs,* 697 F.3d 279, 295 (5th Cir. 2012). And the evidence shows that denials for all are inevitable, ROA.2377-78, 2397, making the administrative process futile. None have been approved; in the past seven years the Navy has not granted a single religious accommodation to a vaccination requirement. ROA.2730. The Navy does not dispute that Plaintiffs' requests will be denied and thus do not dispute exhaustion's futility. Finally, Plaintiffs' claims raise substantial constitutional questions. *See* Part III *infra*.

2. Because the threshold step of *Mindes* is satisfied, the next step is weighing four factors to determine whether abstention is appropriate: (1) the nature and

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record was sent. A redacted copy of SEAL 16's denial is thus included as an exhibit here.

strength of the plaintiff's challenge to the military determination; (2) the potential injury to the plaintiff if review is refused; (3) the type and degree of anticipated interference with the military function; and (4) the extent to which the exercise of military expertise or discretion is involved. *Mindes,* 453 F.2d at 201-02.

The first factor favors judicial review. As the district court found, Plaintiffs' claims "are squarely in the category of claims most favorable to judicial review" and are particularly strong on the merits, as discussed below and in Part III. ROA.2406-07. The second factor favors review as well, because without it, the Plaintiffs face serious, irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). As this Court has recently held multiple times, Plaintiffs "suffered irreparable harm from being coerced into 'a choice between their job(s) and their jab(s),'" *Sambrano*, 2022 WL 486610, at *8 (quoting *BST Holdings,* 17 F.4th at 618), "or 'between their beliefs and their benefits,'" *Sambrano*, 2022 WL 486610, at *8 (quoting *Sambrano v. United Airlines, Inc.*, 19 F.4th 839, 841 (5th Cir. 2022) (Ho, J., dissenting)).

The Navy relies heavily on the third factor, arguing that the preliminary injunction is an "extraordinary intrusion into core military affairs." Mot. at 1, 16-17. But as *Mindes* acknowledges, "[i]nterference *per se* is insufficient since there will always be some interference when review is granted, but if the interference would be such as to seriously impede the military in the performance of vital duties, it militates strongly against relief." 453 F.2d at 201. Permitting Plaintiffs to continue doing their jobs, despite their vaccination status, has *demonstrably not* threatened the Navy's "performance of vital duties." *Id.*

Throughout the pandemic, multiple Plaintiffs deployed overseas, both before and after the vaccine became available, and their missions succeeded. ROA.2156, 2159, 2162, 2172, 2184, 2213, 2224, 2232, 2742-43. EOD 1 even received a Joint Service Commendation Medal for his work in conducting large scale exercises over several months in South Korea during the early part of the pandemic, with successful COVID mitigation as one of the noted achievements. ROA.2246-47, 3367 (sealed). Throughout the pandemic, Plaintiffs trained other SEALs preparing for deployments, with vaccination status being inconsequential to mission accomplishment. ROA.2149, 2153, 2162, 2165, 2169, 2178, 2181, 2184, 2187, 2205, 2213-14, 2217-18, 2227, 2242, 2247, 2993. The Navy points to *zero* examples during the last two years where one of the Plaintiffs' vaccination status—or anyone's, for that matter—compromised a NSW mission, despite claiming that vaccination is critical to mission success. In contrast, some training has been compromised because of the removal of some Plaintiffs. *See* ROA.2153, 2165, 2695. And the dangers faced by the Plaintiffs during training and deployments are far greater than the risk of COVID in a young team in peak physical condition. ROA.2995-96, 3001-03. It does not take specialized military knowledge or discretion to recognize that the Navy's claims do not align with reality.

The Navy also relies on the fourth factor, which considers "to extent to which the exercise of military expertise or discretion is involved." *Mindes,* 453 F.2d at 201-02. But Plaintiffs are not asking the Court to promote Plaintiffs who had not already earned it or command it to deploy specific Plaintiffs for specific missions. The Navy

already made the decisions to promote or train certain Plaintiffs or put them on certain SEAL Teams—the only reason it reversed course was to punish Plaintiffs for requesting an accommodation of their sincere religious beliefs, which has nothing to do with "military expertise." For instance, and as one Navy officer admitted, revoking some Plaintiffs' training was for financial, not safety, reasons. ROA.1237, 1255, 2899. Plaintiffs' RA requests do not make them more dangerous, yet they were the trigger for the Navy's retaliatory and coercive conduct, *not* vaccination status. Plaintiffs merely ask for the status quo to be preserved while the courts evaluate the legality of the Navy's farcical religious-accommodation process. Thus, the "traditional deference" cited by the Navy in applying *Mindes* to "internal military decisions" is inapplicable, because deciding this case requires "neither 'military expertise [n]or discretion.'" ROA.2409 (quoting *Mindes*, 453 F.2d at 201). The injunction simply requires the Navy to comply with the law. *See* ROA.2967. Thus, the issues at hand are "purely legal question[s] appropriate for judicial review," as the district court correctly held. ROA.2409.

III. The Navy Has Not Established a Likelihood of Success on the Merits.

A. The Navy's religious-accommodation process is a sham.

For the Navy to succeed on the merits, this Court would have to hold that the Navy may substantially burden the Plaintiffs' religious beliefs even without a legitimate process for evaluating RA requests. But that would be exactly the opposite of what RFRA requires, as both the Supreme Court and this Court recognize. For that reason alone, the Navy is unlikely to succeed on the merits.

Under RFRA, to apply the COVID-19 vaccination mandate to religious objectors (thereby substantially burdening their religious beliefs), the Navy must show that the mandate is justified by a compelling interest and is the least restrictive means for achieving that interest *for each individual plaintiff*. 42 U.S.C. § 2000bb-1(b). RFRA "contemplates a 'more focused' inquiry: It 'requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened.'" *Hobby Lobby*, 573 U.S. at 726 (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006)); *accord McAllen Grace Brethren Church*, 764 F.3d at 475.

The Navy acknowledges that it must provide an opportunity for service members to request accommodation of their religious beliefs, as its policies show. But it merely pretends to have a policy that follows the law. As the district court determined, the Navy's religious-accommodation process "by all accounts … is theater" and the Navy "merely rubber stamps each denial." ROA.2394. The Navy does not dispute this factual finding. Denying every request for accommodation with boilerplate rather than an individualized assessment does not satisfy the Government's high burden under RFRA.

B. The Navy lacks a compelling interest in forcing Plaintiffs to receive a COVID-19 vaccination despite their sincere religious beliefs.

Even assuming the Navy's religious-accommodation process were not a sham, the Navy is unlikely to succeed because it fails to show that it has a compelling reason

to apply its mandate *to Plaintiffs*, as RFRA requires. "Rather than rely on 'broadly formulated interests,' courts must 'scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants.'" *Fulton v. City of Philadelphia,* 141 S. Ct. 1868, 1881 (2021) (quoting *Gonzales*, 546 U.S. at 431). "In other words, Defendants must provide more than a broadly formulated interest in 'national security.' They must articulate a compelling interest in vaccinating the thirty-five religious servicemembers currently before the Court." ROA.2412. It strains credulity to assert that Plaintiffs' non-vaccination—or even the non-vaccination of the other individuals who submitted RA requests, which amounts to 0.6% of all Navy servicemembers—will make or break the Navy's ability to operate or to combat the virus. *See BST Holdings*, 17 F.4th at 616 n.19 ("the [OSHA vaccine] Mandate cannot prevent vaccinated employees from spreading the virus in the workplace, or prevent unvaccinated employees from spreading the virus in between weekly tests"). As the district court pointed out, "vaccinated servicemembers are far more likely to encounter other unvaccinated individuals off-base among the general public than among their ranks." ROA.2971.

The Navy's argument that deployable Plaintiffs threaten operations ignores that extensive evidence shows that the Navy—and Plaintiffs in particular—continued operations successfully regardless of the vaccination of its force. *See* p. 14 *supra*. SWCC 4 participated in a major deployment during the beginning of the pandemic that required extensive training. ROA.2742-43. The mission was successful even though a vaccine was not mandated. ROA.2742. EOD 1 successfully deployed over-

seas to South Korea before a vaccine was available and earned a Joint Service Commendation Medal for "flawless execution" of large-scale operations while safely mitigating COVID-19. ROA.2246-47, 3367 (sealed).

The idea that vaccination would prevent transmission is outdated, and the Navy's current policies recognize that contending with COVID is necessary even with 100% vaccination. *See* ROA.2734-38. Navy policy permits deployment of vaccinated individuals at recognized high risk for COVID complications. ROA.2736. Restriction of movement before NSW deployments will be required regardless of unvaccinated operators. ROA.3001-02. Outside of COVID, the Navy and NSW are equipped to deal with other illnesses and injuries, which are common in deployments. ROA.2995-96, 3001-02. Even if there is a COVID-19 outbreak on a ship at sea, operations will largely continue. ROA.2734-38. The Navy does not even require service members on a ship who test positive to be retested after quarantine, as they will likely continue to test positive for 90 days. ROA.2735. Apparently, the Navy will accept *COVID-positive individuals* mingling with other servicemembers on a ship, but COVID-negative Plaintiffs are somehow an intolerable risk. That is irrational, especially since COVID outbreaks are occurring on ships that are 100% vaccinated, ROA.2729.

C. Any harm to the Navy during the appeal from the preliminary injunction is outweighed by the harm to Plaintiffs and Plaintiffs' strong likelihood of success on the merits.

Because the Navy "requested a stay pending completion of appellate proceedings, the relevant question is whether the Government will be irreparably harmed

during the pendency of the appeal." *Biden*, 10 F.4th at 559. Even if the Navy "were correct that long-term compliance with the district court's injunction would cause irreparable harm," here it has presented "no reason to think that it cannot comply" while the appeal proceeds, especially since the Navy has willingly *not* been complying with the injunction. *Id.*

The Navy also cannot show that it suffers any injury by allowing the injunction to preserve the status quo with Plaintiffs. Just as the Navy was successfully able to carry out its operations throughout the pandemic, even before a vaccine was available or mandated, it will not be hindered in those operations because of the thirty-five Plaintiffs. *See* p. 14 and Part III.B *supra.* Furthermore, "any injury to [the Navy] is outweighed by [Plaintiffs'] strong likelihood of success on the merits." *Freedom From Religion Found., Inc. v. Mack*, 4 F.4th 306, 316 (5th Cir. 2021) (citing *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 243 (5th Cir. 2020)); *accord Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013). And Plaintiffs *are* suffering irreparable harm. *See Opulent Life Church*, 697 F.3d at 295.

D. The preliminary injunction preserves the status quo pending appeal, which also weighs against granting a stay.

Sometimes, a "stay pending appeal simply suspend[s] judicial alteration of the status quo, so as to allow appellate courts to bring considered judgment to the matter before them and responsibly fulfill their role in the judicial process." *Tex. All. for Retired Ams. v. Hughs*, 976 F.3d 564, 566 (5th Cir. 2020) (alteration in original) (quotation omitted). But here, the *preliminary injunction* preserves the status quo by allowing Plaintiffs to retain the same status while the legality of the of Navy's mandate

is adjudicated. Staying the injunction would disrupt that by allowing the Navy to take adverse action against Plaintiffs because of their RA requests.

If the stay is granted, the Navy will continue to harm Plaintiffs by denying them medical treatment, holding them in a temporary location for months on end, causing them to lose valuable qualifications by denying them the ability to train, removing them from earned positions they already had or were shortly about to assume, and "reassigning them" to pick lint out of Velcro, pull weeds, and give status reports about much trash they picked up around the base. *See* ROA.2658-74, 2974-3050. These actions are unrelated to safety and aim to coerce Plaintiffs into violating their religious beliefs or punish Plaintiffs for submitting an RA request. *See Sambrano*, 2022 WL 486610, at *9; *see also* ROA.2993-94 (explaining how these actions are punitive). The stay should be denied because "preservation of the status quo plainly balances the equities and does not irreparably injure" the Navy. *Mack*, 4 F.4th at 316-17.

CONCLUSION

The motion for partial stay pending appeal should be denied.

Respectfully submitted.

/s/Heather Gebelin Hacker

Kelly J. Shackleford
Jeffrey C. Mateer
Hiram S. Sasser, III
David J. Hacker
Michael D. Berry
Justin Butterfield
Jordan E. Pratt
Danielle A. Runyan
Holly M. Randall
FIRST LIBERTY INSTITUTE
2001 W. Plano Pkwy., Ste. 1600
Plano, Texas 75075
Tel: (972) 941-4444

Heather Gebelin Hacker
Andrew B. Stephens
HACKER STEPHENS LLP
108 Wild Basin Road South
Suite 250
Austin, Texas 78746
(512) 399-3022 (phone)
heather@hackerstephens.com

Counsel for Plaintiffs-Appellees

Certificate of Service

On February 21, 2022, this brief 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/ Heather Gebelin Hacker
Heather Gebelin Hacker

Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5190 words, excluding the parts exempted by Rule 27(a)(2)(B); and (2) the typeface and type style requirements of Rule 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the program used for the word count).

/s/ Heather Gebelin Hacker
Heather Gebelin Hacker