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.

EMERGENCY MOTION UNDER CIRCUIT RULE 27.3 FOR A PARTIAL STAY PENDING APPEAL

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INTRODUCTION AND SUMMARY

The district court has usurped the Navy's authority to decide which service members should deploy on special operations missions, what precautions must be taken to reduce the risk that a service member will become ill and compromise such a mission, who is fit to train Navy special operations forces, and how best to maintain good order and discipline among the small group of service members who train for and execute some of the military's most hazardous and sensitive tasks. The court lacked jurisdiction to second-guess the Navy's judgments that service members who are not vaccinated against COVID-19 should not be deployed or assigned other duties, and wrongly disregarded the government's declarations and other evidence substantiating those judgments.

Because there is no basis for the court's extraordinary intrusion into core military affairs, the preliminary injunction should be partially stayed pending appeal. During this appeal, the Navy will not initiate involuntary separation or disciplinary proceedings against plaintiffs for refusing to be vaccinated against COVID-19, but this Court should stay the injunction insofar as it precludes the Navy from considering plaintiffs' vaccination status in making deployment, assignment, and other operational decisions.

Plaintiffs are 35 service members in the Naval Special Warfare community—Navy SEALs, Special Warfare Combatant-Craft Crewmen, Explosive Ordnance Disposal personnel, and Navy Divers—who are charged with handling some of the

U.S. military's most challenging and high-stakes missions. In light of the intense demands placed on this elite fighting community, the Navy has imposed an array of medical requirements designed to ensure their maximum readiness to serve, including requirements that they be vaccinated against numerous illnesses. In 2021, the Navy added COVID-19 vaccination to those requirements after concluding that it was necessary to ensure "force readiness and mission execution." ALNAV 062/21, ROA.1662, ¶ 2.

The district court concluded that applying the COVID-19 vaccination requirement to plaintiffs likely violates the Religious Freedom Restoration Act (RFRA) and the First Amendment. The court also took the extraordinary step of barring military commanders from even *considering* plaintiffs' vaccination status in deciding whether to deploy them and in making other duty assignments. In doing so, the court supplanted military leaders' professional expertise with the court's own views, overriding the military's judgment that deploying unvaccinated service members creates intolerable risks of mission failure and illness.

The harms flowing from the district court's order are significant and ongoing. Indeed, plaintiffs have already asked the court to hold the Navy in contempt for allegedly failing to promptly assign them to new duty stations or send them to training and other programs. The Vice Chief of Naval Operations—the second-highest uniformed officer in the Navy—has explained that the district court's interference with deployment and assignment decisions "cause[s] direct and immediate impact to

mission execution." Add. 96, ¶ 2. Plaintiffs' decisions to remain unvaccinated elevate the risk that they or other service members will become seriously ill from COVID-19, potentially requiring their units to abandon missions, risking the lives of other personnel who must conduct a medical evacuation, and threatening "mission failure in contingencies and crises that cause harm to national security." Add. 102, 107, 109-10, ¶¶ 11, 16, 19-22. Those harms far outweigh plaintiffs' asserted injuries, particularly because the Navy will not discharge or discipline plaintiffs while this appeal is pending.

The government's appeal is also likely to succeed on the merits. First, plaintiffs' challenges to military deployment decisions and duty assignments are nonjusticiable under *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), because they require the court to review internal military affairs. Second, the Navy's COVID-19 vaccination requirement is fully consistent with RFRA and the First Amendment. The Navy has an extraordinarily compelling interest in requiring that service members generally—and these plaintiffs in particular—be vaccinated against COVID-19, both (1) to reduce the risk that they become seriously ill and jeopardize the success of critical missions and (2) to protect the health of their fellow service members. The district court erred in concluding that the Navy treats secular requests for vaccine exemptions more favorably than religious ones: any service member who does not obtain a required vaccine, for any reason, is medically disqualified from special operations duty absent a medical waiver.

In denying the government's motion for a partial stay pending appeal, the district court exacerbated the key errors that beset its preliminary injunction order. For example, the court expressly overruled the judgment of military commanders that unvaccinated SEALs pose an unacceptable risk to mission success, stating that it was "unconvinced that thirty-five unvaccinated Plaintiffs present an intolerably high risk to their vaccinated peers." Add. 128. And the court confirmed that the preliminary injunction prohibits the military from considering plaintiffs' unvaccinated status when it makes deployment and other assignment decisions. *See* Add. 124 (stating that the Navy may not "block[]" an unvaccinated plaintiff "from the training program he would otherwise attend"). That sort of interference with core military affairs is unprecedented, and this Court should immediately grant a partial stay of the preliminary injunction.

STATEMENT

A. Medical Requirements for Military Service Members

The military has implemented numerous vaccination requirements to maintain the readiness of the force. *See* ROA.1658-59. Ten vaccines are currently required for all DoD service members, and eight others are required when certain risk factors are present. *See* BUMEDINST 6230.15B, tbl. D-1, ROA.1650.

The Naval Special Warfare community consists of Navy SEALs and Naval Special Warfare combat support personnel. Add. 8-9, ¶ 3. Special Warfare service members conduct some of the military's most critical and sensitive missions, including

special reconnaissance, counterterrorism, counterinsurgency, countering weapons of mass destruction, and hostage rescue and recovery. Add. 8-9, 15, ¶¶ 3, 14. These missions often occur in diplomatically sensitive or hostile environments, and they may necessitate clandestine action. Add. 15, ¶ 14. Special Warfare service members routinely engage in "high-risk operations," and they do so in small units that operate in close proximity. Add. 2-3, ¶¶ 4, 5; *see* Add. 103-04, ¶ 13 (noting that units "can be as small as a squad of four").

In light of the intense demands of Special Warfare service, the Navy disqualifies service members from special operations duty if they have any condition "which may be exacerbated by [special operations] duty, impair the ability to safely and effectively work in the [special operations] environment," "increase potential for medical evacuation," or "caus[e] a significant potential for disruption of operations." MANMED art. 15-105(4)(a), ROA.1810; *see* MANMED art. 15-105(4)(b), ROA.1810 (disqualifying individuals with, for example, certain forms of sleep apnea, chronic conditions that require frequent dental care, and severe allergies). Service members who have not received required vaccines for religious or personal reasons are disqualified under this provision absent a medical waiver. MANMED art. 15-105(4)(n)(9), ROA.1816. Service members who are unvaccinated for medical or other secular reasons are likewise disqualified absent a medical waiver. *See* Add. 118-19, ¶ 7.

B. The Military and COVID-19

COVID-19 has taken a severe toll on the military. As of early January 2022, 261,504 service members had contracted COVID-19, resulting in 2,320 hospitalizations and 82 deaths. Add. 102-03, ¶ 11. More than 97% of the service members who died and approximately 87% of the active-duty service members who have been hospitalized were unvaccinated. *Id.* In addition, many "otherwise healthy Service members have developed 'long-haul' COVID-19, potentially impacting their ability to perform their missions." Add. 48-49, ¶ 9; *see also* Add. 2-3, 4-5, ¶¶ 4, 7-8 (noting that multiple members of the Special Warfare community have experienced long COVID, which may prevent them from engaging in certain "high-risk operations" including "parachuting," "high-speed boat and unconventional vehicle operation," and "weapons operation").

On August 24, 2021, after FDA announced the approval of the Pfizer-BioNTech COVID-19 vaccine, the Secretary of Defense directed the Secretaries of the Military Departments to immediately ensure that all service members were fully vaccinated. *See* ROA.1591-92. Shortly thereafter, the Navy issued guidance for implementing the Secretary's directive. ALNAV 062/21, ROA.1662. Upon determining that COVID-19 "adversely impacts [the Navy's] force readiness and mission execution," the Secretary of the Navy directed active-duty service members to be fully vaccinated by November 28, 2021. *Id.* ¶¶ 2, 4. As with other vaccination requirements, there is a process to seek religious exemptions, and service members'

medical providers can provide medical exemptions. *See* NAVADMIN 190/21, ROA.1666. Service members may appeal the denial of a religious exemption request. Add. 24-28. A service member who refuses vaccination without an approved exemption may be subject to discipline, but adverse action will not be taken against a service member while his religious exemption request remains pending. *See, e.g.*, ALNAV 062/21, ¶ 5, ROA.1662; NAVADMIN 225/21, ¶ 3.c., ROA.1671. On October 13, 2021, the Navy issued NAVADMIN 225/21, designating the Chief of Naval Personnel to initiate separation procedures for sailors who refuse COVID-19 vaccination and do not have a pending religious exemption request or medical exemption recommendation. ROA.1671-72, ¶ 5. The same policy designated the Vice Chief of Naval Operations to initiate court-martial and non-judicial punishment for sailors refusing the COVID-19 vaccination without an exemption. *Id.*

On November 15, 2021, the Chief of Naval Personnel issued NAVADMIN 256/21, which states that the "least favorable characterization of service for Navy service members" who are discharged for "refusing the vaccine, without extenuating circumstances, will be GENERAL (under honorable conditions)." ROA.1677, ¶ 2.a. "Navy service members who are not vaccinated, regardless of exemption status, may be temporarily reassigned . . . based on operational readiness and mission requirements." *Id.*

After the DoD and Navy vaccine directives were issued, the Commander of the Special Warfare community issued Trident Order #12 to provide a consolidated

reference to relevant policies and implement specific compliance timelines. *See* ROA.1685-86; Add. 9-11, ¶¶ 5-8.

C. Prior Proceedings

1. Thirty-five pseudonymous members of the Special Warfare community filed this lawsuit challenging the DoD COVID-19 vaccine directive and Navy policies implementing the DoD directive under RFRA, the First Amendment, and the Administrative Procedure Act. ROA.48-67.

Plaintiffs moved for a preliminary injunction, relying only on their RFRA and First Amendment claims. On January 3, 2022, the district court granted plaintiffs' motion, enjoining defendants from applying to plaintiffs MANMED art. 15-105(4)(n)(9), which provides that service members who refuse to receive required vaccines based on personal or religious beliefs are disqualified from special operations duty. *See* Add. 94 (also enjoining application of NAVADMIN 225/21; Trident Order #12; and NAVADMIN 256/21). The court also enjoined defendants "from taking any adverse action against Plaintiffs on the basis of Plaintiffs' requests for religious accommodation." *Id.*

The court concluded that plaintiffs' claims are justiciable under *Mindes v. Seaman*, 453 F.2d 197, 201 (5th Cir. 1971), notwithstanding their failure to exhaust intramilitary remedies, and even though plaintiffs seek review of core military decisions regarding their fitness for deployment and other assignments. The court determined that plaintiffs' claims under RFRA and the First Amendment are likely to

succeed because "the Navy cannot demonstrate a compelling interest in vaccinating" plaintiffs, Add. 87, ignoring military commanders' declarations explaining why it is vital that each and every service member, including plaintiffs, be vaccinated. Finally, based on the court's mistaken belief that service members who receive medical (as opposed to religious) exemptions from the COVID-19 vaccination requirement are not disqualified from special operations duty, the court found that the Navy discriminates against service members who have requested religious accommodations. Add. 88.

The district court also concluded that the equities favored plaintiffs. Although the court recognized that plaintiffs' alleged workplace harms are compensable and therefore "do not, by themselves, rise to the level of irreparable injury," the court reasoned that those harms "are inextricably intertwined with Plaintiffs' loss of constitutional rights." Add. 92. The court dismissed the countervailing harms to the military and the public from a preliminary injunction, reasoning that most members of the Navy have been vaccinated, that "[h]ospitalizations are rising at a much slower rate than COVID-19 cases," and that "treatments are becoming more effective and widely available." Add. 94.

2. The government filed a notice of appeal on January 21 and asked the district court to partially stay its order pending appeal on January 24. On February 13, the district court denied the government's motion for partial stay. Add. 121-30. The court declared that the preliminary injunction does not improperly disregard military

fitness-for-duty judgments because the injunction does not "require the Navy to place a particular SEAL in a particular training program." Add. 124. The court made clear, however, that its order prohibits the Navy from "blocking" a plaintiff "from the training program he would otherwise attend" if he were vaccinated. *Id.* The court concluded that the preliminary injunction does not irreparably harm the Navy because it disagreed with the judgment of military commanders "that thirty-five unvaccinated Plaintiffs present an intolerably high risk to their vaccinated peers." Add. 128.

On January 31, plaintiffs filed a motion to show cause why the Navy is not in contempt of the court's preliminary injunction. The Navy filed a response to that motion on February 7, ROA.2860-76. The motion remains pending.

ARGUMENT

In determining whether to grant a stay, this Court considers "(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." *Nken v. Holder*, 556 U.S. 418, 426 (2009). In cases involving the government, the harm to the government and the public interest merge. *Id.* at 435. Every factor strongly favors partially staying the preliminary injunction pending appeal.

I. Equitable Factors Overwhelmingly Favor A Stay.

A. By requiring the Navy to disregard plaintiffs' unvaccinated status in making deployment, assignment, and other operational decisions, the preliminary injunction irreparably damages the Navy and the public.

The Supreme Court has repeatedly emphasized that professional military commanders are best situated to decide what is necessary for military readiness, explaining that "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). Here, however, the district court has directly countermanded military commanders' professional judgment that service members are not qualified and fit for special operations duty unless they are vaccinated against COVID-19. As the Navy's second-highest uniformed officer explains, the preliminary injunction "will degrade" the "mission readiness" of special operations forces, "break down good order and discipline," "unnecessarily limit the Navy's ability to conduct daily operations and operational missions," and risk "mission failure in contingencies and crises that cause harm to national security." Add. 107, ¶ 16; *see also* ALNAV 062/21, ROA.1662, ¶¶ 2, 3 (finding by the Secretary of the Navy that COVID-19 "adversely impacts" "force readiness and mission execution").

Forcing the Navy to deploy plaintiffs while they are unvaccinated threatens the success of critical missions and needlessly endangers the health and safety of other service members. Unvaccinated service members are at substantially higher risk of

experiencing severe COVID-19 symptoms that disable them from their duties. Add. 102-03, 109, ¶¶ 11, 19. Naval Special Warfare units carry out some of the U.S. military's most challenging and high-stakes missions. *See, e.g.*, 157 Cong. Rec. H2926-29 (daily ed. May 2, 2011) (discussing a SEAL team's killing of Osama bin Laden). And because they "routinely" do so in units of as few as four, the loss of even one service member would "degrade the effectiveness of [the] unit[] and may compromise the mission." Add. 110, ¶ 21. The Navy thus reasonably determined that it must deploy only service members who are at the least risk of becoming severely ill, leaving their units shorthanded and potentially unable to complete missions.

Deploying unvaccinated service members also jeopardizes missions because "Navy ships have limited health care facilities." Add. 109-10, ¶ 20. If a service member became seriously ill from COVID-19—a significantly greater risk for unvaccinated service members—his ship would likely be required to abandon its mission and "pull into port" to obtain care. *Id.*

Deploying plaintiffs who are unvaccinated also elevates the risk that the Navy must conduct a dangerous medical evacuation. Even if a service member's ship pulled into port to obtain medical care, adequate care might be unavailable because Special Warfare "forces often deploy in countries with little or no healthcare support structure and in remote areas where healthcare is scarce." Add. 109-10, ¶ 20. Conducting a medical evacuation of a seriously ill service member would increase mission risks; threaten the lives of other service members who must extract the ill

service member from an area that might be hostile, remote, or diplomatically sensitive; and redirect personnel from core military objectives. Add. 109-10, ¶¶ 20, 21. Medical evacuations also "often require one or more members from the service member's unit to accompany the evacuated service member," leaving the unvaccinated service member's small unit further depleted. Add. 110, ¶ 21. Accordingly, the Navy considers "[a]ny condition . . . which may . . . increase potential for medical evacuation . . . disqualifying" for special operations duty, MANMED art. 15-105-(4)(a), ROA.1810—a judgment that the district court directly countermanded with respect to COVID-19 vaccination.

The injunction also jeopardizes the health of other service members within the Special Warfare community and among the Navy's conventional forces. *See* Add. 109, 110-11, ¶¶ 19, 22; *see also, e.g.,* Add. 8-9, 15-16, ¶¶ 3, 14, 15. Members of the special operations force often "work in close quarters where social distancing is not possible"; for example, they may "travel for an extended duration" on vehicles "that are less than six feet across" and that "have limited ventilation." Add. 100, ¶ 8; *see* Add. 103, ¶ 12. The heightened risk that one unvaccinated service member will contract COVID-19 necessarily heightens the risk that others in his unit will contract COVID-19. Add. 107-08, ¶ 17. Special Warfare "personnel also routinely interact with the greater Navy population, on ships and aircraft, and in dining facilities and office environments across the globe," so the health risks imposed by the injunction

extend far beyond plaintiffs' units and far beyond the Special Warfare community. Add. 104-05, ¶ 14; *see* Add. 110-11, ¶ 22.

An order requiring the Navy to include plaintiffs in training commands while unvaccinated likewise inflicts serious harms: 14 plaintiffs are assigned to Naval Special Warfare Advanced Training Command, some as instructors who necessarily have close contact with students preparing for Special Warfare operations and some as students. Add. 111-12, ¶ 24. "[U]nvaccinated instructors can spread COVID-19 to dozens of candidates in training," as well as to other instructors, all of whom can further spread the virus when returning to their primary units after training. *Id.*

Although the district court declared itself "unconvinced" that these risks are "intolerabl[e]," Add. 128, a civilian court is neither equipped nor authorized to second-guess the judgment of military commanders about what risks are acceptable. The district court is neither a public-health expert nor an official that the Constitution entrusts with these decisions, and the court exceeded its authority by substituting its own views about acceptable risks for the expert judgments of military commanders.

B. Plaintiffs cannot show that they are "likely to suffer irreparable harm" if the injunction is partially stayed. *Daniels Health Scis., LLC v. Vascular Health Scis., LLC*, 710 F.3d 579, 585 (5th Cir. 2013). Plaintiffs must show that they have "no adequate remedy at law," *Janvey v. Alguire*, 647 F.3d 585, 600 (5th Cir. 2011), and the availability of "adequate compensatory or other corrective relief . . . weighs heavily against a claim of irreparable harm," *Sampson v. Murray*, 415 U.S. 61, 90 (1974). The standard is

particularly demanding in the military context. *See, e.g.*, *Pitcher v. Laird*, 415 F.2d 743, 745 (5th Cir. 1969).

As noted, the Navy will not discharge or discipline plaintiffs based on their vaccination status during this appeal. And the district court properly recognized that other injuries plaintiffs alleged—such as being "declared nondeployable" and being deprived of "promotions and travel," Add. 83—would "not, by themselves, rise to the level of irreparable injury." Add. 92. As the court explained, plaintiffs could be awarded "backpay, retroactively promoted, or reimbursed for lost benefits like medical insurance and the GI Bill." *Id.*; *see also* 10 U.S.C. § 1552 (authorizing military departments to "correct any military record" to remove "an error" or "correct an injustice"); Add. 41-42, ¶ 22 (describing remedies available through intramilitary processes).

The district court's apparent view that irreparable harm exists anytime an employment claim is "intertwined" with a constitutional claim is irreconcilable with the Supreme Court's admonition that employment-related harms do not constitute irreparable injury absent a "genuinely extraordinary situation." *Sampson*, 415 U.S. at 92 n.68. "[I]rreparable harm must be proven separately and convincingly," regardless of "the strength and nature of the underlying claim." *White v. Carlucci*, 862 F.2d 1209, 1212 (5th Cir. 1989) (no irreparable harm, despite claim of race-based discrimination); *see also Sampson*, 415 U.S. at 90-92. None of plaintiffs' allegations satisfy that demanding standard.

II. The Government Is Likely To Prevail On The Merits.

A partial stay is also warranted because the Navy is likely to succeed on the merits of its appeal: plaintiffs' RFRA and First Amendment claims are nonjusticiable and lack merit.

A. Plaintiffs' Claims Are Nonjusticiable.

This Court has long recognized that "interference by civilian courts with military authority" raises serious concerns about "judicial competency" and "separation of powers." *Bynum v. FMC Corp.*, 770 F.2d 556, 562-63 (5th Cir. 1985). By prohibiting the Navy from considering plaintiffs' unvaccinated status in making deployment, assignment, and other operational decisions, the preliminary injunction raises all these concerns and exceeds the district court's jurisdiction.

This Court weighs four factors to determine whether review of internal military matters is appropriate: (1) the nature and strength of the plaintiff's challenge, (2) his potential injury 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. *See Mindes v. Seaman*, 453 F.2d 197, 201-02 (5th Cir. 1971). All four factors demonstrate that plaintiffs cannot obtain civilian review of their duty assignments, deployment, and medical fitness for duty.

The third and fourth factors of the *Mindes* analysis strongly disfavor review—the extent of the district court's incursion on internal military affairs is extraordinary. In requiring the Navy to deploy and assign plaintiffs without regard for their

vaccination status, the court effectively inserted itself into the Navy's chain of command, overriding military commanders' expert judgments about operational needs and requirements, including service members' fitness to deploy and carry out other duties. As this Court, the Supreme Court, and other courts of appeals have repeatedly emphasized, "decisions as to the composition, training, . . . and control of a military force are essentially professional military judgments." *Miller v. United States*, 42 F.3d 297, 303 (5th Cir. 1995) (alteration in original); *see also Chappell v. Wallace,* 462 U.S. 296, 301 (1983) (warning against suits that "tamper with the established relationship between enlisted military personnel and their superior officers "); *Harkness v. Secretary of the Navy*, 858 F.3d 437, 444-45 (6th Cir. 2017) ("Duty assignments lie at the heart of military expertise and discretion," and "[s]ubjecting every such assignment to judicial review would have a deleterious effect on the military's performance."). Indeed, in *Mindes* itself, this Court cautioned that "[c]ourts should defer to the superior knowledge and experience of professionals in matters [that] directly relate[] to specific military functions." 453 F.2d at 201-02.

The district court sought to downplay its intrusion on core military affairs, asserting that its injunction would not interfere with military discretion because "[w]hether denying religious accommodations violates the First Amendment is a distinct legal question" that "requires neither 'military expertise or discretion.'" Add. 83-84 (quoting *Mindes*, 453 F.2d at 201). But plaintiffs are challenging the Navy's determination that COVID-19 vaccination is necessary to field an effective Special

Warfare fighting force, Add. 84, 124, and assignment, deployment, and fitness for duty decisions quintessentially implicate military expertise and discretion. The court's requirement that the Navy deploy and assign particular service members to special-operations duty based on the court's own views about the risks posed by COVID-19 is improper and unprecedented.

The first and second *Mindes* factors also disfavor review. As explained *infra* pp. 19-22, plaintiffs' claims are likely to fail on the merits. The claims' constitutional nature does not render them reviewable. *See, e.g.*, *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953) (declining to review a constitutional claim because review would be "disruptive" "to affairs peculiarly within the jurisdiction of the military authorities"); *Harkness*, 858 F.3d 437 at 443-45 (First Amendment claim nonjusticiable). And as explained above, plaintiffs' claimed harms are not irreparable. *See supra* pp. 14-15.

Review is also barred under *Mindes* because plaintiffs did not exhaust "available intraservice corrective measures" before presenting their claims. 453 F.2d at 201. *See* Add. 20, ¶ 4. The district court waived the exhaustion requirement, reasoning that exhaustion would be futile because plaintiffs' religious accommodation requests will likely be denied. *See* Add. 77-81. But this Court has required exhaustion even where it viewed military relief as unlikely, explaining that exhaustion provides "a definitive interpretation of the [challenged policy] and an explication of the relevant facts from the highest administrative body in the [military's] own appellate system." *Von Hoffburg v. Alexander*, 615 F.2d 633, 639 (5th Cir. 1980). Exhaustion here would, for example,

permit the Navy to compile a record on matters directly relevant to the validity of individual plaintiffs' claims, such as the sincerity of each service member's religious beliefs. *See* BUPERSINST 1730.11A, ¶ 5.e(2), ROA.1918 (requiring that military chaplains evaluate whether each "requestor's religious beliefs appear sincerely-held"). The district court therefore erred in exercising jurisdiction.

B. Plaintiffs' First Amendment And RFRA Claims Lack Merit.

Even assuming plaintiffs' claims are justiciable, the district court plainly erred in concluding that the Navy's COVID-19 vaccination requirement violates RFRA and the First Amendment.

1. Under RFRA, the government "may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. As the district court recognized (Add. 87), "[s]temming the spread of COVID-19 is unquestionably a compelling interest." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020). The Navy also has a compelling interest in maximizing the effectiveness of Special Warfare operations and assigning duties only to the fittest service members who are at the least risk of being disabled by illness, particularly in those elite fighting units. As explained, illness in even one team member can devastate a mission, particularly given the small units and remote locations in which special operations forces typically operate. The Navy's Medical Manual thus provides

that service members are disqualified from special operations duty for "[a]ny condition or combination of conditions" which may "impair the ability to safely and effectively work in the [special operations] environment" or have "significant potential" to disrupt operations. MANMED art. 15-105-(4)(a), ROA.1810; *see* MANMED art. 15-105-(4)(b)-(n), ROA.1810-16 (disqualifying conditions). Military commanders have determined that unvaccinated service members are at significantly higher risk of becoming severely ill from COVID-19 and are therefore medically unqualified to deploy.

2. The district court concluded that "the Navy cannot demonstrate a compelling interest in vaccinating these particular Plaintiffs," reasoning that plaintiffs have little effect on overall Navy vaccination rates. Add. 88. But the strength of the government's interest does not diminish as a policy successfully reduces the problems it was designed to remedy; the interests that justified the policy in the first place remain compelling. And the government's interest cannot be viewed so myopically in any event: the Navy has received more than 3000 religious-accommodation requests, *see* Add. 19, ¶ 3, and the district court identified no basis for distinguishing "these particular Plaintiffs," Add. 87, from thousands of similarly situated service members.

Furthermore, contrary to the district court's assumption, the Navy's compelling interest is not limited to achieving "widespread vaccination" or "herd immunity" among service members generally. Add. 88. Under longstanding Navy policy, *see* *supra* pp. 4-5, the Navy's interest is instead in ensuring that each and every member of

the Special Warfare community is maximally ready to carry out their uniquely challenging and sensitive missions. As explained, an unvaccinated service member is at substantially greater risk of becoming seriously ill from COVID-19 and infecting others, and severe illness in any single plaintiff could have disastrous effects, particularly in light of the small teams and remote locations in which plaintiffs serve.

"[W]hen evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986). The district court paid no heed to this principle, overriding military commanders' judgments about the importance of deploying only vaccinated Special Warfare service members and substituting the court's own views about COVID-19's consequences for the effectiveness of the Navy's special forces. Because the Navy has a compelling interest in requiring that plaintiffs be vaccinated against COVID-19, plaintiffs' RFRA and First Amendment claims are likely to fail on appeal.[1]

3. The district court also concluded that RFRA and the First Amendment bar application of the Navy's COVID-19 vaccination requirement to plaintiffs because the court believed the Navy treats service members who are unvaccinated for

[1] The district court found it unnecessary to decide whether the COVID-19 vaccination requirement is the least restrictive means of achieving the government's compelling interests, *see* Add. 85, but the Navy has determined that other mitigation measures are unrealistic and unreliable, *see* Add. 103, 104-05, ¶¶ 12, 14.

nonreligious reasons—either for medical reasons or because they are participating in a clinical trial—more favorably. Add. 88-90. Not so. No member of the Special Warfare community has received a permanent medical exemption from the COVID-19 vaccination requirement or is participating in a clinical trial that would require him to be unvaccinated. Add. 5-6, ¶ 10; Add. 119-20, ¶ 8. If a service member were unvaccinated for such a reason, he would be deemed "not physically qualified" for special operations duty unless he obtained a medical waiver—just like a service member who received a religious accommodation. Add. 117-18, ¶ 6. Thus, contrary to the district court's view that "medically exempt, unvaccinated servicemembers are immediately deployable while unvaccinated servicemembers with religious objections are not," Add. 89-90, the Navy's "deployability determinations do not take into account whether a member is unvaccinated for secular or religious reasons," Add. 117-18, ¶ 6.

CONCLUSION

The government respectfully requests that this Court stay the injunction pending appeal insofar as it precludes defendants from taking into account plaintiffs' vaccination status in making deployment, assignment and other operational decisions.

Respectfully submitted,

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FEBRUARY 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the requirements of Federal Rule of Appellate Procedure 27(d) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 5144 words according to the count of Microsoft Word. I further certify that this emergency motion complies with the requirements of 5th Cir. R. 27.3 because it was preceded by telephone calls to the Clerk's Office and to the offices of opposing counsel on February 16, 2022, advising of the intent to file this emergency motion. I further certify that the facts supporting emergency consideration of this motion are true and complete. I further certify under 5th Cir. R. 27.4 that appellees oppose this motion and plan to file a response in opposition.

/s/ Lowell V. Sturgill Jr.
LOWELL V. STURGILL JR.
Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that, on February 16, 2022, I electronically filed the foregoing motion with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are CM/ECF users and that service will be accomplished by using the appellate CM/ECF system.

/s/ Lowell V. Sturgill Jr.
LOWELL V. STURGILL JR.
Counsel for Appellants