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.

REPLY TO PLAINTIFFS' RESPONSE TO EMERGENCY MOTION UNDER CIRCUIT RULE 27.3 FOR A PARTIAL STAY PENDING APPEAL

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INTRODUCTION AND SUMMARY

Plaintiffs contend that the district court's preliminary injunction "is not attempting to run the Navy" because it merely prevents the Navy from taking plaintiffs' unvaccinated status into account in making deployment, assignment, and other duty decisions. Opp'n 2. But the injunction's admitted "mere[]" effects, *id.*, are exactly the problem, as the injunction undeniably countermands the Navy's military and operational judgments.

As our motion for a partial stay explained, the Vice Chief of Naval Operations—the second-highest uniformed officer in the Navy—has determined that the preliminary injunction "cause[s] direct and immediate impact to mission execution." Stay Mot. 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." Stay Mot. Add. 107, ¶ 16; *see also id.* at 102, 109-10, ¶¶ 11, 19-22. Those harms far outweigh plaintiffs' asserted injuries pending resolution of this appeal, particularly because, even if the motion is granted, the Navy will remain enjoined from discharging or disciplining plaintiffs while the appeal is pending. Plaintiffs' assertion of claims under the Religious Freedom Restoration Act (RFRA) provides no license for a civilian

court to override the judgment of military commanders that deploying unvaccinated service members creates an intolerable risk of mission failure and illness.

ARGUMENT

I. Plaintiffs' Contentions That The Navy Is Not Complying With The Injunction And Waited Too Long To Seek Relief Are Incorrect And Provide No Basis To Deny A Stay.

Plaintiffs' leading argument for denying the request for a partial stay pending appeal is that the Navy has "unclean hands" because it is not complying with the preliminary injunction. *See* Opp'n 8. But that argument rests on an incorrect and as-yet undetermined factual premise. The Navy has opposed plaintiffs' district-court motion to show cause why it is not violating the injunction, and the district court has not yet ruled on that motion. At a minimum, this Court should not deny the military's request for a partial stay pending appeal based on an as-yet undecided show cause motion. To do so would be flatly at odds with the principle that the military is entitled to a presumption of good faith. *See*, *e.g.*, *Dodson v. U.S. Gov't, Dep't of the Army*, 988 F.2d 1199, 1204 (Fed. Cir. 1993).

Plaintiffs also suggest (Opp'n 1) that the Navy waited too long before appealing the preliminary injunction and seeking a stay pending appeal, but the Navy moved as quickly as possible given the need to prepare and submit declarations from high-level Department of Defense officials explaining the serious harms flowing from the preliminary injunction. In requesting a ruling on its motion by March 2, 2022, the Navy sought to give the Court a reasonable period of time to consider the motion. A

ruling by that date is necessary because many plaintiffs are in deployable units and others might still deploy on short notice. Plaintiffs' counterfactual assertion that they "are not deployed with short notice," Opp'n 2-3, disregards the expert judgment of military commanders, as well as "the dynamic nature of military operations and special operations in particular." ROA.2768, ¶ 9.

II. Equitable Factors Overwhelmingly Favor A Partial Stay Pending Appeal.

As explained in our stay motion (at 11-15), the preliminary injunction irreparably damages the Navy and the public by requiring the Navy to disregard plaintiffs' unvaccinated status when making deployment, assignment, and other operational duty decisions. 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." Stay Mot. Add. 107, ¶ 16.

Naval Special Warfare (NSW) units carry out some of the U.S. military's most challenging and high-stakes missions, *see* Stay Mot. 4-5, and unvaccinated service members are at substantially higher risk of experiencing severe COVID-19 symptoms that disable them from their duties, *see* Stay Mot. Add. 102-03, 109, ¶¶ 11, 19. Because they "routinely" undertake missions 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." Stay Mot. Add. 110, ¶ 21; *see also* Stay Mot. 12-15 (identifying other mission risks presented by unvaccinated NSW service members, including that instructors at NSW Advanced Training Command may spread the virus to students, with whom they are in close contact).

Like the district court, plaintiffs turn a blind eye to these declarations by high-ranking Navy officials detailing the harms flowing from the injunction's prohibition on taking into account plaintiffs' unvaccinated status in making deployment and other assignment decisions. Instead, plaintiffs offer their own views about the Navy's operational needs, arguing that COVID-19 vaccination is unnecessary for this elite group of Navy warriors because plaintiffs successfully deployed overseas in the past while unvaccinated. *See* Opp'n 14. But past success is no guarantee that an unvaccinated NSW service member will not contract the virus on a future assignment and derail a special-operations mission in precisely the ways high-level military commanders have identified. Plaintiffs also quote a military official as stating that the Omicron variant of COVID-19 has had "really no operational impact." Opp'n 2 (quoting ROA.2729). But that official explained that the Omicron variant has had minimal operational impact *because* all operational Navy units are currently 100 percent vaccinated—by virtue of the fact that service members "who have a waiver or are seeking a COVID-19 vaccine exemption are transferred to a shore tour to ensure sailors in operational units are fully vaccinated." ROA.2731, 2749.

The adverse effects on the military and the public interest substantially outweigh any harms these plaintiffs may suffer from the partial stay pending appeal we have requested. The district court properly recognized that being "declared nondeployable" and deprived of "promotions and travel," Stay Mot. Add. 83, would "not, by themselves, rise to the level of irreparable injury," *id.* at 92, because plaintiffs could be awarded "backpay, retroactively promoted, or reimbursed for lost benefits like medical insurance and the GI Bill." *Id.* Relying on this Court's unpublished, per curiam disposition in *Sambrano v. United Airlines*, No. 21-11159, 2022 WL 486610, at *8 (5th Cir. Feb. 17, 2022), plaintiffs argue that an asserted substantial burden on the free exercise of religion is per se irreparable harm, *see* Opp'n 3, but *Sambrano* is not precedent and the panel in that case was sharply divided on this question, in any event. The Supreme Court and this Court have repeatedly held that employment-related harm typically is not irreparable. *See Sampson v. Murray*, 415 U.S. 61, 92 n.68 (1974); *see also White v. Carlucci*, 862 F.2d 1209, 1212 (5th Cir. 1989) (no irreparable harm despite claim of race-based discrimination). Plaintiffs' asserted irreparable harm is also in significant tension with the fact that, "when 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). Plaintiffs cite cases only involving "civilian society," which have limited relevance when applied to the military. *Id.*; *see* Opp'n 13, 19.

Contrary to plaintiffs' contention, *see* Opp'n 1-2, the Navy did not deny SEAL 26 permission to travel for medical treatment. *See* ROA.2874. And plaintiffs' contention that the Navy "is threatening to force plaintiffs to pay back over $1 million" in bonuses, special and incentive pays, and training costs lacks any foundation. Opp'n 5. The Navy has issued no such threats and has no policy authorizing recoupment of training costs. *See* Stay Mot. Add. 13, ¶ 11.

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

As explained in our stay motion (at 16-22), 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.

Under *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), the Navy's decisions concerning deployments, assignments, and other operational duties are not subject to judicial review. "[D]ecisions 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) (second alteration in original) (quoting *Chappell v. Wallace*, 462 U.S. 296, 302 (1983)); *see also 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."). By requiring the Navy to deploy and assign plaintiffs despite their unvaccinated status, the district court disregarded

these principles and effectively inserted itself into the Navy's chain of command, overriding military commanders' expert judgments about plaintiffs' fitness to deploy and carry out other duties.

Plaintiffs contend that allowing them to continue doing their jobs without being vaccinated will not threaten the Navy's "performance of vital duties," Opp'n 13 (quoting *Mindes*, 453 F.3d at 201). But these NSW members carry out duties that are especially vital to national security, and the Navy has determined that allowing them to do so while unvaccinated would present unacceptable mission risks. Plaintiffs likewise wrongly contend that the preliminary injunction does not interfere with the military's mission because plaintiffs "are not asking the Court to promote [p]laintiffs who had not already earned it or command it to deploy specific [p]laintiffs for specific missions." Opp'n 14. But plaintiffs do not dispute that the preliminary injunction does require the Navy to deploy plaintiffs for specific missions when the Navy has previously assigned a plaintiff to a particular SEAL team and that team would deploy in the normal course. *See* Opp'n 15. In so doing, the district court has overridden the Navy's military judgment because the Navy has determined that plaintiffs' failure to be vaccinated for COVID-19 renders them unfit for those assignments. The fact that plaintiffs currently hold those positions does not lessen the extent to which the preliminary injunction interferes with *that* judgment.

For example, a court would clearly interfere with the military by preventing the Navy from removing from duty a service member who is found unfit for duty for

other reasons, such as because he has developed PTSD and presents a threat to himself and other service members, or because he refuses to comply with commands that he deems unwise. This case is no different in kind. Plaintiffs challenge the Navy's determination that COVID-19 vaccination is necessary to field an effective Special Warfare fighting force, and assignment, deployment, and fitness for duty decisions quintessentially implicate military expertise and discretion. Moreover, we are not arguing that this Court should "entirely avoid adjudicating [p]laintiffs' RFRA claim" in this case, Opp'n 9, but rather only that military decisions regarding deployment, assignment, and other operational duties are nonreviewable under *Mindes*.

The extraordinary degree to which the preliminary injunction countermands core military judgments and intrudes on the military mission strongly outweighs any need for review of the military's deployment and assignment decisions (the first and second *Mindes* factors). As our stay motion explained, plaintiffs' claims are likely to fail on the merits, and the fact that plaintiffs have asserted constitutional claims does not render those claims reviewable. *See* Stay Mot. 18 (first citing *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953); and then citing *Harkness*, 858 F.3d at 443-45 (holding First Amendment claim nonjusticiable)).

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

1. Even assuming plaintiffs' claims are justiciable, the district court erred in concluding that the Navy's COVID-19 vaccination requirement violates RFRA and the First Amendment. As our stay motion explained, the Navy has a compelling need

to maximize the effectiveness of Special Warfare operations and assign duties only to the fittest service members who are at the least risk of being disabled by illness—and particularly those in elite fighting units. *See* Stay Mot. 19-21. Plaintiffs do not, and cannot, dispute this basic operational interest. Because illness in even one team member can devastate a mission, especially given the small units and remote locations in which special-operations forces typically operate, 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. That determination is supported by declarations from high-level military officials, and is entitled to substantial deference. *See, e.g.*, *Goldman*, 475 U.S. at 507 (citing *Chappell*, 462 U.S. at 304-05).

2. Plaintiffs argue that it "strains credulity to assert that [p]laintiffs' non-vaccination—or even the non-vaccination of the other individuals who submitted [religious accommodation] 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." Opp'n 17. But the salient point is that the preliminary injunction irreparably harms the Navy's ability to operate the particular missions or training operations to which plaintiffs might be assigned. As plaintiffs themselves note, RFRA must be applied "*to* [*p*]*laintiffs*," *id.*, and the Navy's concern is that if even one NSW member is not vaccinated against COVID-19, *that* service member could become seriously ill and threaten mission success. Severe illness in any single plaintiff could have disastrous

effects, particularly in light of the small teams and remote locations in which plaintiffs serve. *See supra* p. 9.

Plaintiffs also contend that 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." Opp'n 10 (citing ROA.2730). As our stay motion explained, however, no member of the Special Warfare community has received a permanent medical exemption from the COVID-19 vaccination requirement. Stay Mot. 22 (first citing Stay Mot. Add. 5-6, ¶ 10; and then citing Stay Mot. Add. 119-20, ¶ 8). In addition, if a service member were unvaccinated for such a reason, he would be treated exactly as a service member who received a religious accommodation: he would be "not physically qualified" for special operations duty unless he obtained a medical waiver. *Id.* (citing Stay Mot. Add. 117-18, ¶ 6). Plaintiffs fail to acknowledge or rebut this evidence, which the district court made a point of noting in declining to rely on any purported differences in how the Navy treats medical and religious exemptions as a ground for denying our stay motion. *See* Stay Mot. Add. 126.

3. Plaintiffs' assertions that the Navy "merely pretends" to have a policy to process service members' religious-accommodation requests and that the process itself is a "sham," Opp'n 15-16, are squarely contradicted by sworn declarations from high-level military officials, which explain the individualized scrutiny given to each such request. *See* Stay Mot. Add. 30-33, ¶ 14. And contrary to plaintiffs' contention

(Opp'n 6), commanders are provided with templates for recommending both for and against granting a religious-accommodation request. *See* Stay Mot. Add. 30-33, ¶ 14; ROA.1910-21.

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 reply 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 reply complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 2,569 words according to the count of Microsoft Word. I further certify that this reply 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 22, 2022, advising of the intent to file this reply. I further certify that the facts supporting emergency consideration of this reply are true and complete.

/s/ Lowell V. Sturgill Jr.
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CERTIFICATE OF SERVICE

I hereby certify that, on February 23, 2022, I electronically filed the foregoing reply 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.

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